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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 17 May, 2013

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT
pursuant to Article 294(6) of the Treaty on the Functioning of the European
Union concerning the position of the Council on the adoption of a Regulation
of the European Parliament and of the Council concerning customs
enforcement of intellectual property rights

Delegations will find attached the Commission document COM(2013) 282 final.

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TO THE EUROPEAN PARLIAMENT**

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**position of the Council on the adoption of a Regulation of the European Parliament and
of the Council concerning customs enforcement of intellectual property rights**

1. BACKGROUND

Date of transmission of the proposal to the European Parliament and to the Council 24/05/2011.
(document COM(2011) 0285 final – 2011/0137 COD):

Date of the position of the European Parliament, first reading: 03/07/2012.

Date of adoption of the position of the Council: 16/05/2013.

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

The proposed Regulation should replace existing Regulation No 1383/2003¹, which currently implements Section 4 (Special requirements related to border measures) of Part III (Enforcement of intellectual property Rights) of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

The proposal is an integral part of the strategic framework outlined in the Communication from the Commission on a Single Market for Intellectual Property Rights² and is in line with the Union's longstanding policy and strategy on the protection of IPR. This policy has been reflected in several Communications from the Commission, such as Europe 2020³, the Communication on a Single Market Act⁴ and the Communication on the EU Internal Security Strategy⁵.

It aims to strengthen the capability for customs to enforce IPRs at the border : it expands the range of IPR infringements covered and maintains the competence of customs

¹ Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

² Commission Communication of 24 May 2011: A Single Market for Intellectual Property Rights – COM(2011)287 final.

³ Commission Communication of 3 March 2010: "A strategy for smart, sustainable and inclusive growth – COM(2010)2020 final.

⁴ Commission Communication of 11 November 2010: 'Towards a Single Market Act - COM(2010) 608 final/2.

⁵ Commission Communication of 22 November 2010: The EU Internal Security Strategy in Action: Five steps towards a more secure Europe – COM(2010)673 final.

authorities to control all **goods under customs supervision** irrespective of their customs treatment; it ensures that **high quality information is provided to customs** to enable a good analysis and assessment of the risk of infringement of IPR; it sets out the legal basis for a **central database** for recording applications for customs action and detentions as well as exchange of information between customs authorities (COPIS).

Certain adjustments to the current procedures are also proposed to ensure that administrative burdens are kept to a minimum: it provides for the **possibility of destroying goods without legal proceedings**, based on agreement between the parties concerned; it establishes a **new procedure for small consignments** where goods may be destroyed without the involvement of the right-holders.

It ensures that the **legitimate interests of all traders are taken into account**: it harmonises the implementation of the **right to be heard** of parties to whom the detention is detrimental and **adjusts the periods** granted to each party within the procedures.

It addresses the concerns expressed by India and Brazil in the context of two WTO disputes launched in 2010 with regard to "**generic**" **medicines in transit** across the EU territory: it introduces recital 17 reminding the 2001 Doha Declaration on the TRIPS Agreement and Public Health, removes current recital 8 ("manufacturing fiction") and follows more closely TRIPS wording ("adequate evidence" of IPR infringement is needed for customs to detain goods).

3. COMMENTS ON THE POSITION OF THE COUNCIL

The position of the Council as adopted in the 1st reading fully reflects the agreement reached in the trilogue between the Council, the European Parliament and the Commission, as concluded on 19 December 2012. The main points of this agreement are as follows:

- To exclude parallel trade and overruns from the scope of the Regulation.
- To clarify that customs authority may carry out customs controls and take identification measures provided for in the customs legislation to prevent operations in breach of intellectual property laws applicable in the territory of the Union, and in order to cooperate with third countries on the enforcement of intellectual property rights.
- To set out a common procedure for all kinds of IPR infringements falling within the scope of the Regulation, without prejudice of the specific procedure for small consignments. Under such common procedure, goods may be destroyed without the need for the right-holder to initiate legal proceedings where he so requests, on condition that the declarant or holder of the goods, after being properly notified of the detention of the goods by the customs authorities, does not object to destruction.
- To establish that the procedure for small consignments only applies upon previous request from the applicant in that regard, and that the customs authorities have the possibility to require that the applicant covers the costs incurred by the application of this procedure.
- To set out the definition of small consignments in the Regulation, which empowers the Commission to adopt delegated acts in accordance with Article 290 of the Treaty

on the Functioning of the European Union in respect of amending, under certain circumstances, the non-essential elements of that definition.

- To provide, in line with TRIPS Article 69 and with a view to eliminating international trade in goods infringing intellectual property rights, with a legal basis for the swift exchange of information between customs authorities in the EU and in third countries on such trade. In order to ensure a uniform implementation of the provisions for defining the elements of the practical arrangements for the exchange of data with third countries, implementing powers are conferred on the Commission, namely to define those elements of the practical arrangements. The provisions on transfer of data to third countries are without prejudice to applicable provisions on data protection in the EU, and in particular Articles 25 and 26 of Directive 95/46/EC and Article 9 of Regulation (EC) No 45/2001.
- To rule out provisions in the Regulation harmonising the right to be heard in favour of the persons concerned by the customs detention of goods. It is considered that national laws apply for granting the right to be heard.
- To broaden and clarify the list of cases in which the right-holder may use the information that customs disclosed to him following a customs detention of goods under the Regulation.
- To include provisions in the basic act on data collection, processing, retention periods, exercise of rights and responsibilities in accordance with existing legislation on data protection.

The Commission fully supported the agreement reached in the trilogue.

4. CONCLUSION

The Commission can accept the amendments introduced by the Council to its proposal.