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From:	Presidency
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Subject:	Criminal law and protection of intellectual property rights: connections between counterfeiting and organized crime

I. Informal meeting of Justice Ministers in January 2021

At their informal meeting on 29 January 2021, the Ministers for Justice discussed the topic ‘Criminal law and protection of intellectual property rights: connections between counterfeiting and organised crime’.

The background paper for this discussion (see the Annex to 8183/21) described the framework and related issues linked to counterfeiting and organised crime, and proposed some ways forward, such as:

- including intellectual property (IP) crime, in its most serious forms, among the priorities of the European multidisciplinary platform against criminal threats (EMPACT) for the period 2022-2025¹;
- raising awareness of the serious consequences resulting from the purchase or use of counterfeit goods²; and
- approximating Member States' legislation in the field of counterfeiting, for example by criminalising the most serious forms of conduct, i.e. those associated with the activity of international criminal organisations or with high risks to health and security. This could be done by providing for and applying criminal penalties or by increasing the minimum and maximum limits of the penalty frames applicable to such forms of conduct. The aim would be to strengthen judicial cooperation, as well as to increase the effectiveness of the rules, especially with regard to the seizure and confiscation of goods and financial assets, the fight against money laundering and the recovery of assets³.

¹ Subsequently to the informal meeting of the Ministers for Justice in January 2021, IP crime and counterfeiting were included in the EMPACT for the period 2022-2025 as a sub-priority of 'Fraud, economic and financial crimes' (Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022-2025, as approved by the Council at its 3796th meeting held on 26 May 2021, 9184/21, point 7, page 9). The European Union Serious and Organised Crime Threat Assessment (EU SOCTA) 2021, prepared by Europol, identifies 'Product counterfeiting and intellectual property crime' as one of the serious and organised crime activities in the EU (see pages 78-80). SOCTA 2021 highlights that the COVID-19 pandemic has prompted a surge in the trade of illicit medical supplies. Vaccine fraud is only one of the trends in COVID-19-related crime, which also includes counterfeiting of personal protective and medical equipment (face masks, gloves, disinfectants, sanitisers, medicines, test/diagnosis kits) and of negative COVID-19 PCR test certificates (see 8244/21).

² In the context of awareness raising, counterfeiting and piracy are also referred to in the draft Council conclusions on intellectual property policy (see 8351/21, points 27-30) and in the document 'COVID-19 vaccine fraud: operational response and preparedness' (8244/21).

³ In the draft conclusions on intellectual property policy (8351/21, point 27), the Council considers that, to ensure that more effective measures can be taken against intellectual property rights (IPR) infringements, it is necessary to encourage reflections on the prevention of and fight against criminal violations of IP rights, in particular counterfeiting, and its connection with international economic and financial crime, due to the involvement of organised criminal groups, including on the possible need to conduct a stocktaking exercise on existing legal differences between the Member States' criminal law frameworks, possible criminal and prosecution gaps and legal and practical obstacles to cross-border cooperation within the EU.

As regards the issue of the **approximation of legislation in the field of counterfeiting**, in the document which was presented in preparation for the informal meeting, the Ministers of Justice were asked to reply to the following question:

‘Do you consider that an approximation of substantive criminal law through the adoption of common minimum rules such as the definition of criminal offences and applicable sanctions would be an appropriate way to make the fight against organised counterfeiting of identified products more effective, at least when the safety and health of citizens may be endangered?’

Ministers shared the view that counterfeiting and its link with organised crime is a topical matter that has become more relevant during the current COVID-19 pandemic, in particular in the area of health and medical care. They all recognised the major threat that counterfeiting represents for public health and the economy when linked to organised crime.

As regards the specific question asked, Ministers expressed differing opinions. While some favoured the idea of examining the advisability of adopting common minimum rules in order to fight counterfeiting, others expressed reservations and considered that it was necessary to first assess the implementation of the current acquis and instruments before adopting any new instruments.

Ministers were also asked a question regarding the **counterfeiting of medical products**:

‘Do you consider that efforts should be made with the aim of Member States and the European Union acceding to the Council of Europe Convention on counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME Convention)?’

A majority of the Ministers agreed that more efforts were needed to ensure that Member States ratified and implemented the MEDICRIME Convention, as it is an important substantive and procedural law instrument for judicial cooperation in criminal matters. Some Member States were, however, more cautious as regards the possible accession of the European Union to the Convention.

II. Work in the COPEN Working Party

In the light of the discussions at the informal meeting of Justice Ministers, the Presidency discussed accession to the MEDICRIME Convention and the approximation of legislation in the field of counterfeiting at the meeting of the COPEN WP on 7 May 2021, on the basis of a Presidency paper (8183/21)⁴.

– MEDICRIME Convention

So far, only six Member States have signed and ratified the MEDICRIME Convention. Eight other Member States have signed but not ratified the Convention⁵.

The European Union Strategy to tackle Organised Crime 2021-2025⁶, recently delivered by the Commission, recognises that counterfeiting is a high impact crime⁷ and more needs to be done to reinforce operational cooperation to address counterfeiting. In this Strategy, the Commission urges Member States to sign and ratify the Convention. The Commission is also committed to exploring the possibility of the European Union acceding to this instrument⁸.

At the COPEN WP meeting of 7 May, a representative of the Council of Europe provided background information on the MEDICRIME Convention, and suggested reasons why Member States that had not yet acceded to this Convention should do so (see WK 6238/21).

⁴ The outcome of proceedings is set out in WK 6317/21.

⁵ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/211/signatures>

⁶ COM(2021) 170 final.

⁷ The Strategy underlines: “counterfeit products represent 6.8 % of EU imports and are a significant source of income for organised crime groups. Medical, healthcare and sanitary products constitute a considerable and increasing share of counterfeiting, a phenomenon that has alarmingly increased with the Covid-19 pandemic. Organised crime has engaged in the production and supply of counterfeit protective equipment, test kits and pharmaceuticals, and there is a risk that organised crime groups try to exploit opportunities arising in the EU from the high demand for vaccines” - COM(2021) 170 final, p. 15.

⁸ COM(2021) 170 final, p. 17.

Subsequently, various Member States provided information on the state of play regarding the signing and ratification of the Convention. While a few Member States that have not yet acceded to the Convention indicated that they had no interest in doing so, most Member States indicated that they were either in the process of acceding or were seriously considering doing so⁹.

– **Approximation of legislation**

At the same COPEN meeting on 7 May, the Presidency also presented its thoughts on the approximation of national laws in the field of counterfeiting (8183/21).

The Presidency indicated that it had learned from contacts with Eurojust that the absence of common rules defining criminal offences and setting applicable sanctions in the field of counterfeiting was hampering efforts to combat the most serious cross-border criminal activities endangering life, health and safety. In particular, counterfeiting is covered by different criminal legislation in the EU Member States. According to Eurojust, this lack of harmonisation in the legal classification of the modus operandi related to such activities linked to organised crime leads to situations where different types of evidence are required for successful investigations and prosecution.

The European Union Strategy to tackle Organised Crime 2021-2025 stresses that counterfeit products span across all continents through a global supply chain, that organised crime groups engaged in organised property crime move quickly across multiple jurisdictions to carry out their crimes and that, by operating across different jurisdictions, criminal groups avoid detection and exploit the differences in the applicable national laws¹⁰.

The approximation of laws and regulations of the Member States is a key factor in overcoming this situation by providing the grounds for the improvement of judicial cooperation in criminal matters based on the principle of mutual recognition as established in Article 82(1) TFEU.

⁹ 8985/21.

¹⁰ COM(2021) 170 final, p. 3.

Furthermore, according to Eurojust, organised criminal activities in this area cannot be considered offences relating to participation in a criminal organisation, as provided for in Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, since such activities are not punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty. There is no common definition of the maximum thresholds for the sanctions to be applied, and in some Member States such sanctions are of an administrative rather than a criminal nature.

In the experience of Eurojust, this issue causes problems particularly in cross-border investigations and in judicial cooperation. Such problems are also linked to the fact that special investigative techniques available to tackle serious and organised crime cannot be used to investigate criminal activities that are not covered by the legal concept of organised crime.

Finally, in some jurisdictions, victims of counterfeiting face serious problems in identifying individuals or legal persons against whom to bring civil law claims for compensation, something which could be facilitated in criminal proceedings. These difficulties are further aggravated in cases where the illicit activities take place in different jurisdictions.

The Presidency recalled that in the current legal context, any common rules could only be established on the basis of Article 83(2) TFEU. This provision requires that approximation measures must be adopted at EU level in the specific area concerned and that the adoption of the common criminal rules must prove essential to ensure the effective implementation of such measures.

In its communication of 2011, the Commission mentioned counterfeiting as a specific example of an area where common rules might be adopted on the basis of Article 83(2) TFEU¹¹.

¹¹ COM(2011) 573 final, p. 11.

In the area of intellectual property rights, harmonisation measures have been established, including by Directive 2004/48/EC on the enforcement of intellectual property rights¹², although this legal instrument only provides for civil and administrative measures. There are also other measures, procedures and remedies to tackle risks posed by counterfeiting, such as those contained in Directive 2001/83/EC on the Community code relating to medicinal products for human use¹³, as amended by Directive 2011/62/EU as regards the prevention of the entry into the legal supply chain of falsified medicinal products¹⁴.

However, if these measures cannot be implemented in a sufficient manner by the existing enforcement mechanisms and it proves essential to adopt criminal law rules to ensure their effective implementation, recourse could be made to Article 83(2) TFEU. The Presidency, therefore, considered that it could be advisable to reflect on how to better approach the criminalisation of the most serious forms of conduct related to the infringement of these rights and on the appropriate sanctions.

A first attempt to tackle this issue was made in 2006, when the Commission presented a proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights¹⁵.

On that occasion, the suggested approach was to regard all intentional infringements of an intellectual property right on a commercial scale as a criminal offence (Article 3). Concerning the sanctions, it was proposed that offences should incur a maximum term of at least four years' imprisonment¹⁶ when committed under the aegis of a criminal organisation or if they carried a health or safety risk (Article 5).

At the already mentioned COPEN WP meeting held on 7 May 2021, several Member States supported the approximation of criminal definitions and sanctions based on Article 83(2) TFEU.

¹² OJ L 157, 30.4.2004, p. 45.

¹³ OJ L 311, 28.11.2001, p. 67.

¹⁴ OJ L 174, 1.7.2011, p. 74.

¹⁵ COM(2006) 168 final.

¹⁶ The four-year threshold for imprisonment was chosen because it broadly corresponds to the criterion used to identify a serious offence, as defined by both EU legislation and the United Nations Convention against Transnational Organised Crime.

However, a larger group expressed some reservations. Various Member States stated that, before taking any further steps, they would be in favour of first investigating the legal differences between the Member States' existing criminal law frameworks in this area, and whether and to what extent those differences result in legal and practical problems in cross-border investigations and judicial cooperation in criminal matters within the European Union. It was also said that existing means to combat counterfeiting and possible ways to make those means more effective should be given priority.

The Presidency encouraged the Commission to further examine this issue in the light of the discussions at the meeting of the Ministers of Justice in January and at the COPEN WP meeting in May.

– **Follow-up to the meeting of 7 May**

Following the COPEN meeting of 7 May, the Presidency urged the Member States to send their written contributions based on the questions raised in 8183/21. The information provided by the delegations which answered this request was compiled in 8985/21 (as subsequently revised) and was presented during the COPEN meeting on 31 May. This written information largely confirmed the points of views conveyed during the meeting on 7 May.

As such, concerning the accession to the MEDICRIME Convention, the Member States which had already signed it mentioned that processes regarding the ratification are already ongoing. Among the Member States which had not yet signed or ratified the Convention, some declared that they were either starting the process or considering doing so, and only two stated they were not open to such efforts for the time being.

On the other hand, regarding the approximation of legislation, some of the delegations which submitted contributions stated that they were open to starting these discussions, but most of them continued to point out some reservations. In most cases, this was because they still considered this discussion to be premature, highlighting the need for a thorough analysis on the necessity and proportionality of such measures and further stocktaking on the existing legal framework within the European Union.

The Presidency also noted that there seemed to be more agreement with regard to the specific types of counterfeiting that should preferably be addressed in a possible effort to adopt common minimum rules in the fight against counterfeiting. On this particular aspect, most delegations referred to cases of threat to life and to public and individual health, some of them mentioning the scope of the MEDICRIME Convention as a good example in this context.

III. On the way forward

In light of the above, the Presidency would like to reiterate the importance of the issue of counterfeiting and its links with organised crime, particularly in a pandemic context, and to recall all the combined efforts already undertaken in the past months to address several of its most significant aspects.

The Presidency would, therefore, like to point out the fruitful debates held at several levels and the importance of taking advantage of this momentum to intensify actions to improve the current situation. EMPACT (2022-2025) and the EU Strategy to tackle Organised Crime 2021-2025 define the priorities and actions to be taken for fighting serious and organised crime. However, the Presidency believes that more needs to be done particularly regarding the approximation of national legislations to tackle counterfeiting and its links with organised crime at least where related activities endanger the life, health and safety of individuals.

In this context, the Presidency would like to emphasise that accession to the MEDICRIME Convention by as many Member States as possible is a first crucial step and welcomes the willingness and commitment of most Member States to accede and the fact that the Commission is committed to exploring the possibility of the European Union acceding to this instrument.

Moreover, regarding the approximation of legislation, taking into account the exchanges held and the positions conveyed, the Presidency would also encourage the Commission to further examine this issue and to carry out a “*stocktaking exercise on existing legal differences between the Member States’ criminal law frameworks, on possible criminal and prosecution gaps and on legal and practical obstacles to cross border cooperation within the EU*”, as stated in the draft Council conclusions on intellectual property policy¹⁷.

¹⁷ Point 27 of 8351/21, already mentioned.