

Opinion of the Economic and Social Committee on the 'Commission Green Paper "Combating Counterfeiting and Piracy in the Single Market"'

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(1999/C 116/09)

On 16 October 1998 the Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Community, on the above-mentioned green paper.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 11 February 1999. The rapporteur was Mr Malosse.

At its 361st plenary session (meeting of 24 February 1999), the Economic and Social Committee unanimously adopted the following opinion.

1. Introduction

1.1. The Economic and Social Committee is pleased at the European Commission's initiative to launch a wide-ranging debate on counterfeiting and piracy in the single market. This matter has been the subject of the ESC's concern on many occasions, as in an opinion on the competitiveness of the textile industry(1) and an opinion on the proposal for a Council Regulation amending Regulation No 3295/94 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods(2).

1.2. Regulation 3295/94 in fact is only concerned with combating counterfeit and pirated goods from non-EU countries. But, as the ESC pointed out in its opinion, the regulation only covers operations relating to trade with non-EU countries at the Community's external borders. The ESC also wanted the Green Paper to cover the subject of coordinating national rules within the borders of the single market, both for goods from non-EU countries and for goods produced fraudulently in the EU itself.

1.3. The ESC congratulates the Commission for taking the initiative of launching a wide-ranging debate on this matter, given the serious damage that such fraudulent practices cause to the competitiveness of European industry and services. In many sectors most of the value added to European goods and services is the fruit of the creativity, imagination and talent of European entrepreneurs, creators, craftsmen and workers. In addition, such fraud is increasingly affecting activities connected with the new information technologies and is thus handicapping the development of European industry in these high-growth sectors.

2. General comments

2.1. In the field of counterfeiting and piracy it is not desirable to separate instruments of internal policy from those of external policy. The ESC has already made suggestions on external controls(3). They must be recalled and reinforced, for they may well also concern action within the EU, and especially:

2.1.1. Improving information and cooperation between the monitoring services (customs, combating of fraud) and holders of property rights.

2.1.2. Maintaining and promoting a skilled and well-trained monitoring body.

2.1.3. Heightening public awareness.

2.1.4. Harmonising national rules on controls and penalties.

2.1.5. Providing simple and streamlined procedures for taking action against offenders.

2.1.6. Ensuring that seizure applications are valid for at least one year and throughout the whole of the EU.

2.1.7. Ensuring that only the guilty party, and not the property right holder, has to pay for the costs of

destroying pirated or counterfeit goods.

2.1.8. Reducing the length and cost of procedures so as not to put off small firms that are wronged, and setting up new special procedures in special courts that are well informed about the realities and effects of counterfeiting and piracy.

3. Specific comments (questions in the Green Paper)

3.1. Nature and characteristics of the phenomenon:

The ESC approves of the Commission's attempt to define counterfeiting and piracy in the broad sense as an "infringement of an intellectual property right (trade mark or trade name, industrial design or model, patent, utility model and geographical indication) of a copyright or neighbouring right (the rights of performing artists, the rights of producers of sound recordings, the rights of the producers of the first fixations of films, the rights of broadcasting organisations), or of the 'sui generis' right of the maker of a database".

3.2. Although the ESC understands the Commission's concern to limit the field for discussion to anything that jeopardises property rights, the fact remains that other forms of parasitic activity (flagrant imitations, "look alike" products) mislead the consumer. While these cannot be combated with the same legal weapons as counterfeiting or piracy, it is necessary to encourage the fight against such practices, which are being used more and more systematically by counterfeiters, especially within the EU, to escape lawsuits. When such activities resemble unfair trading practices or attempts to mislead consumers, legal action must be taken against them. The ESC therefore feels that the debate opened by the Commission must also take account of all parasitic activities of this kind, especially as regards information necessary for consumers and protecting their rights.

3.3. Unfortunately consumers cannot always be regarded purely as victims. Often they help fuel the problem by purchasing goods which, in view of their low price, might reasonably be assumed to be counterfeit, rather than genuine. Consumers and consumer organizations have a very important part to play in combating the problem.

4. Scale and consequences of the phenomenon

4.1. The ESC notes the estimates provided by the Commission. They are the fruit of research undertaken by firms of consultants. The ESC is surprised that the customs services of the Member States and the professional associations of the sectors concerned do not have or have not provided the Commission with data that are easier to verify.

4.2. Regarding this matter, the ESC wonders whether the number of jobs lost each year (100000 according to the Commission) has been assessed correctly. Indeed the Commission itself, in its communication on competitiveness in the European textile and clothing industry(4), calculates that in this sector alone 100000 jobs are lost each year in EU industry because of counterfeit and pirated goods.

4.3. In view of the size of the phenomenon and the very great importance of having the most accurate data possible, the ESC proposes that there should be some sort of EU observation machinery, in the form of a network of national or sectoral observation posts. Such a "European observatory" could operate with the help of economic bodies on the ground.

4.4. Counterfeit or pirated goods, which are illegal by their very nature, are often made in underground businesses that disregard the laws on social security, hygiene and safety at work. It is also clear that such activities flout the tax laws and are more and more often linked to networks of organised crime. The ESC therefore stresses the need for a comprehensive approach, especially in the field of monitoring and surveillance, to put a stop to every aspect of such fraudulent activities: social surveys, tax inspections, fighting counterfeiting, stamping out banditry and money laundering. The monitoring and legal services that specialise in combating these scourges should cooperate more closely.

5. Monitoring by the private sector

5.1. The ESC feels that the role of professional organisations, trade unions and consumer movements, especially at European level, is of vital importance in assessing the phenomenon and organising action against unlawful practices. The ESC supports the principle of making them legally entitled to take legal action for the purpose of defending the collective interests on whose behalf they have a mandate to act.

5.2. The ESC believes that such monitoring must also concern the distribution sector, which should be encouraged - in association with manufacturers - to develop labels of quality and codes of ethics to root out suspect products and services. The ESC suggests that the Commission should take initiatives in this sector in partnership with associations representing commerce, so as to make their members aware of the problem and given training. When mentioning this sector, it must be made clear that both wholesale and retail distribution

are concerned, as well as both large distributors and small traditional retailers and services for people in the trade or private individuals.

5.3. One way of combating counterfeit goods could be to develop data bases on designs and models, with the support of professional associations. Generally speaking, the role of the professional organisations and associations concerned in supervising the market, alerting and cooperating with the authorities, informing and training legal professionals and informing the public is essential. The example of the REACT network in the textile and clothing sector is to be welcomed here. The ESC urges the Commission to launch pilot projects to encourage such activities on a European scale.

6. The use of technical devices

6.1. The ESC thinks it would be useful to search out technology for identifying and "tracking" fraudulent goods. The ESC feels here that pilot schemes for transferring technology would be welcome, preferably for high-RTD projects, for transferring techniques already used in other areas. Such projects should be of benefit primarily to professional associations or groupings of SMEs and craftsmen.

6.2. The ESC feels that if such measures are to combat counterfeiting and pirating effectively, they must not be allowed to have any adverse effects on the free movement of goods within the single market.

6.3. It is essential to train groups for monitoring and identifying such procedures. Cooperation between producers and the authorities is vital for setting up early warning and monitoring networks.

7. Sanctions and other means of enforcing intellectual property rights

7.1. Practically all the professional organisations and trade unions concerned feel that repression, together with prevention, is the best way of combating counterfeiting and piracy effectively. They do not criticise the laws in force so much as their application, which is too uneven to be a real deterrent to pirates. Of course, pirates are helped by the existence of a single frontier-free market and the lack of a real European legal area.

7.2. Effective action against counterfeiting and pirating is obviously hampered by the vast differences which exist between procedures for implementing complaints and penalties. In this area the EU should use its new "Third Pillar" powers to undertake in-depth action aimed at establishing cheap and simple procedures - that are recognised in all the Member States - along the lines of those proposed by the Commission to combat payment delays. In the medium term, in view of the Brussels Convention being beefed up, a firm that has been wronged should be able to apply directly in its country of establishment for an enforcement order in another Member State, including Member States of transit for incriminated goods.

7.3. The ESC feels that the work on the preparation of "Rome II" convention (on the law applicable to non-contractual obligations) is of prime importance. In particular, the adoption of this convention will have a significant impact on the fight against certain acts of counterfeiting or piracy committed with the help of the Internet. Similarly, if all the Member States ratified the Hague Convention of 18 March 1970 on cooperation between legal authorities to obtain evidence in civil and commercial cases, this would help to combat all forms of parasitism and unfair trading more effectively.

7.4. The Green Paper speaks of defending rights while forgetting that in most countries such defence is based on protection being obtained beforehand for these rights. There should be a large-scale information campaign explaining this fact to firms, especially SMEs. The campaign should include specific information on legal procedures (jurisdiction, location, etc.).

7.5. It is essential to see that existing texts are applied, even if they differ; let us try and get faster and simpler legal procedures. Better training for judges and the setting-up of special courts throughout the EU would prevent any backsliding and inconsistency in judgments, especially in places where a blind eye is still turned to certain forms of counterfeiting or piracy. Mention should be made here, as an example, of Community trade mark regulation No 49/94 of 20 December 1993, which set up "Community trade mark courts" designated by the Member States as national courts of first and second instance with jurisdiction in the field of counterfeiting and the validity of Community marks. One could thus imagine the development of competent and qualified courts organised into a Community network for handling all cases of counterfeiting and piracy (marks, patents, designs and models, copyright and derived rights ...).

7.6. The ESC is a keen supporter of a policy of systematically publishing judgments in the press at the violators' expense, and of making it compulsory for violators to reveal information. Penal measures must also be taken against distributors who knowingly indulge in practices that encourage counterfeiting and piracy, such as supermarkets who replace branded goods by unlisted counterfeit goods. Where offences are many and repeated, there should be no hesitation in closing down shops or establishments that distribute counterfeit products, since fines often bear no comparison with the enormous profits that can be made. Another way of stepping up the fight would be to involve customs departments by making acts of counterfeiting an offence under customs legislation, as is the case in France.

8. Administrative cooperation between the competent authorities

8.1. The ESC considers this aspect as crucial. It is surprised that the Green Paper does not mention the vast differences in approach and behaviour in the attitude of the different national authorities. This particularly applies to countries that have tolerated counterfeiting and piracy on a large scale as they did not consider it a priority when fighting crime. In its opinion on external control measures⁽⁵⁾ the ESC underlined that there were huge differences and mentioned the case of one country that did not apply adequate punitive measures, which made it a "potential gateway". The ESC feels that such cooperation really must be backed up by a harmonisation of rules and practices, large-scale training schemes and support for the "weak links" in the EU set-up. Publishing the true figures concerning procedures undertaken per country, giving examples of notorious cases of fraud and giving publicity on a political scale to such "weaknesses" are measures that seem more likely to get things moving.

8.2. The ESC is worried here at the risk of the loss of motivation and cuts in the numbers of customs officials and investigators; on the contrary, numbers should be increased and quality and motivation improved, within a common framework of cooperation. The ESC would congratulate the various initiatives taken by the EU to ensure cooperation and training for national officials responsible for implementing legislation, especially the Karolus programme. Other programmes concern customs (Mathaeus) or combating organised crime (Falcone). The ESC suggests that a horizontal programme involving all the authorities concerned (customs, police, inland revenue, welfare authorities) and magistrates should be launched to encourage a European-scale network for combating the underground networks organised throughout the single market.

8.2.1. The ESC feels that it is time to prepare joint action to combat international traffickers: common files and data bases, joint investigating teams, exchanges of good practices, etc. While the services for combating counterfeiting have limited resources, small territories and procedures that are cumbersome, slow and technocratic, traffickers are using the Internet to market fraudulent products ...

8.3. Above all, there must be a real political awareness if counterfeiting and piracy are to be countered effectively. The ESC proposes that large-scale conferences be held in each of the Member States to highlight the negative effects on jobs, health and consumer safety and draw attention to the best preventive measures and penalties. The media, consumer movements, producers', workers' and distributors' professional organisations, especially those of SMEs, and the education sector should all be involved in this.

9. Other points to be raised

9.1. In addition to the points raised by the Green Paper, one must deplore the delays in the EU over setting up a full-blown European legal arsenal for protecting intellectual property (no real EU patent, delay in bringing out an EU design or model and harmonised utility models, insufficient time to assess the effectiveness of the designs and models directive, lack of EU legislation on copyright and allied rights).

9.2. The non-completion of the single market in the field of indirect taxes is a known source of fraud and misappropriation (no harmonisation of VAT rates, VAT exemption for products going from one Member State to another, excise duties, derived rights, etc.). It therefore constitutes an obstacle to effective checks on fraud, since counterfeit and pirated goods are often systematically channelled on to neighbouring markets.

9.3. Public awareness campaigns drawing attention to the health and/or safety dangers of counterfeiting are essential. Cases of serious injury suffered by consumers are proliferating: counterfeit drugs with often mortal health dangers, defective medical equipment that can cause fatal accidents, vehicle spare parts that do not provide the protection necessary in an impact, inflammable or allergenic textiles in children's clothes, the use of azo colorants, dangerous toys, etc. This subject should be tackled more fully during the debate on the Green Paper and machinery should be set up at EU level, with the support of consumers' organisations, to warn about such cases.

10. Recommendations

10.1.1. All forms of counterfeiting, piracy and other parasitic acts cause severe damage to European firms and creative people.

10.1.2. Such acts deceive the customer and the consumer, and may involve serious risks to their safety and health.

10.1.3. They have a negative impact on employment and creativity in Europe.

10.1.4. Very often, illicit counterfeiting and piracy are tied up with undeclared work, tax avoidance, disregard for social and labour law and organised crime.

10.2.1. In view of all this, the ESC recommends that the EU adopt an overall approach to the phenomenon that takes account of the external and internal political aspects and introduces appropriate measures for

preventing and stamping out all forms of counterfeiting, piracy and other parasitic acts.

10.2.2. Bearing in mind the importance of prevention, the ESC notes the importance of having a single set of laws containing uniform protection, at reasonable cost, for all forms of intellectual property, proper information for creative people and entrepreneurs about their rights, and campaigns to warn consumers and appeal to their sense of civic duty.

10.2.3. The ESC would stress the need to launch information campaigns for the general public, coordinated at European level and involving consumers' organisations, trade unions and the professional organisations concerned, including those in the distribution sector.

10.2.4. The ESC recommends the setting-up of a "European observatory to combat counterfeiting, piracy and other parasitic acts", operating in a network with all the organisations and associations concerned; it suggests pilot schemes to encourage projects on a European scale aimed at alerting and informing the public and training the authorities concerned.

10.2.5. The ESC stresses the urgent need to strengthen legal and police cooperation, in liaison with the organisations and associations concerned. It considers that to combat organised large-scale counterfeiting and piracy effectively, the proper way, together with prevention, is to apply the law very strictly with the support of effective cooperation at European level.

10.2.6. The ESC thinks it would be wise to allow the organisations and associations concerned to sue on behalf of wronged firms, inventors or consumers.

10.2.7. The ESC feels that justice must be encouraged to apply the laws strictly, especially in the event of repeated offences and organised crime, and that complainants should not have to bear the cost of destroying illegally-manufactured goods. Appropriate ways for achieving this would be to provide specialist training for judges, set up special courts and extend the provisions concerning the Community trade mark to cover other areas of intellectual and industrial property.

10.2.8. The ESC recommends that the combating of counterfeiting, piracy and other forms of parasitism should be closely linked to the combating of undeclared work, tax avoidance and organised crime. Cooperation between authorities should be extended and strengthened through European training programmes involving and mobilising all the types of authority concerned.

Brussels, 24 February 1999.

The President

of the Economic and Social Committee

Beatrice RANGONI MACHIAVELLI

(1) OJ C 214, 10.7.1998.

(2) OJ C 284, 14.9.1998.

(3) OJ C 284, 14.9.1998.

(4) COM(97) 454 final

(5) OJ C 284, 14.9.1998.