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EXECUTIVE SUMMARY OF THE EVALUATION

Accompanying the document

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMITTEE

Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights

{COM(2017) 708 final} - {SWD(2017) 431 final}

EXECUTIVE SUMMARY

Background

For the judicial enforcement of intellectual property rights, Directive 2004/48/EC[1] requires Member States to provide for effective, proportionate and dissuasive measures, procedures and remedies. Before its adoption, a diverse set of rules, procedures and practices relating to the enforcement of IPRs had developed among Member States which was found to be detrimental to the good functioning of the internal market. Therefore, as the first instrument to address IPR enforcement, the Directive aimed to 'approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market' (Recital 10).

The purpose of this evaluation is to assess the Directive's overall effectiveness, efficiency, coherence, relevance and EU added value. The evaluation aims, in particular, to assess whether the tools provided for by the Directive are still fit for purpose in today's fast developing digital environment and in a cross-border context. This evaluation provides the basis for the Commission's initiative to improve the enforcement of IPRs within the EU, as announced in the digital single market strategy[2] and the single market strategy[3].

Findings

According to the overall views gathered from experts and stakeholders, and complemented by extensive desk research, the tools provided for by the Directive have effectively helped to better protect IPR and have enabled a more effective handling of IP infringements in civil courts. The Directive has led to a common legal framework, where the same set of tools is to be applied across Europe. In this respect, it has achieved the objective of approximating the legislative systems of the Member States for the civil enforcement of IPR. In doing so, it has ensured a high, equivalent and uniform level of protection in the internal market overall.

The Directive is also considered to have been a cost-efficient intervention, preventing unnecessary administrative burden and implementation costs for stakeholders and Member States. It has helped to bring about more harmonisation across the EU and provides stakeholders with a common set of tools for litigating against IPR infringements.

The Directive remains a relevant instrument for facilitating enforcement of different IPRs in the digital era and appears to be coherent with other EU instruments such as voluntary stakeholder initiatives that can act as a powerful complement to judicial enforcement measures. Its EU added value is that it establishes a common set of tools for IP enforcement across the EU which would have been difficult to achieve without the Directive.

[1] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004

[2] Communication from the Commission "A Digital Single Market Strategy for Europe" (COM(2015) 192 final)

[3] Communication from the Commission "Upgrading the Single Market: more opportunities for people and business" (COM(2015) 550 final)

The evaluation, however, revealed, that there are differences in the way Member States apply certain provisions of the Directive (such as those on injunctions, damages and legal costs) across the Single Market, thereby limiting the effectiveness of the Directive. This is due to uncertainties and diverging views as to how those provisions should be understood, in particular given the challenges of the digital revolution and cross-border context. Furthermore, the Directive's consistent application is limited by differences in the national civil law procedural frameworks and differences in legal and judicial traditions.

The evaluation shows, in particular, that, while the text of the Directive is still fit for purpose, there is a need to offer further clarification on the exact scope of the Directive, the requirement to ensure that proceedings are inter alia 'fair and equitable' and strike a fair balance between the fundamental rights of the parties concerned, the presentation and preservation of evidence (including digital evidence), the right of information, the scope of injunctions and corrective measures, and the calculation of damages and legal costs which are particularly important to small- and medium-sized enterprises (SMEs).

While the evaluation includes an analysis of national judicial practices, such analysis is significantly hampered by a lack of transparency of national judgments on IPR enforcement. Specifically dedicated websites allowing public access to IP-related case law only exist in a few Member States. Such lack of transparency substantially hinders the development of one judicial area in Europe. The evaluation further shows that many stakeholders consider that the objective of the Directive is achieved thanks in no small part to the existence of national judicial authorities specialised in IPR enforcement matters. There was overwhelming support among the stakeholders for such specialised courts, which they saw as a key factor for efficient and effective IPR enforcement in general.

Conclusions

The Directive remains a relevant instrument for facilitating enforcement of different IPRs in the digital era and provides EU-added value through establishing harmonised rules across the EU. The measures, procedures and remedies provided for by the Directive constitute an effective, coherent and common toolbox for IP enforcement across the single market.

However, there are significant differences in the way the Directive is applied across Member States which affects the effectiveness of the Directive. Some differences are due, in part, to different national civil procedural law frameworks and dissimilar legal and judicial traditions. But some substantial divergences result from a lack of uniform interpretation of the Directive.

Therefore, the evaluation concludes that the Directive is still fit for purpose overall. However, the Directive's application by national authorities and other affected parties would benefit from appropriate guidance on how to interpret its key provisions, taking into account means especially important for SMEs. It would also benefit from more best practices for public exchange, more transparency on IP-related case law and more national judges able to deal with IPR infringement claims.