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Steering Committee on Trade Capacity and Standards

**Working Party on Regulatory Cooperation
and Standardization Policies (WP.6)****Thirty-third session**

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Advisory Group on Market Surveillance**Report of the 21 February 2023 meeting on “Market
surveillance role in combatting counterfeit products”****Submitted by the subgroup Chair****Summary*

The Advisory Group on Market Surveillance (MARS) organized on 21 February 2023 a webinar on “Market surveillance role in combatting counterfeit products”. This document presents the report of this webinar.

Mandate

The Working Party on Regulatory Cooperation and Standardization Policies (WP.6) Programme of work for 2023 foresees the organization of a webinar in support of the possible update of *Recommendation M on Use of Market Surveillance Infrastructure as a Complementary Means to Protect Consumers and Users against Counterfeit Goods* (ECE/CTCS/WP.6/2022/12, paragraph 12a).

Proposed decision

“The Working Party endorses the report of the 21 February 2023 webinar on ‘Market surveillance role in combatting counterfeit products’. It encouraged governments to engage in dialogue with their market surveillance agencies in their jurisdiction to actively participate in the revision of *Recommendation M on Use of Market Surveillance Infrastructure as a Complementary Means to Protect Consumers and Users against Counterfeit Goods*. The Working Party also emphasized the critical importance of extra-budgetary funding for supporting capacity activities on this topic. It called on donors and development partners to consider providing additional funding for undertaking follow-up work.”

* This document is submitted under the responsibility of the subgroup Chair and has not been subject to a substantive clearance procedure through the Economic Cooperation and Trade Division Director. This document has not been edited by a professional editor.

I. Introduction

1. The Advisory Group on Market Surveillance (MARS) organized on 21 February 2023 a virtual webinar on “Market surveillance role in combatting counterfeit products”. Experts from the following ECE member States participated in the meeting: Armenia, Bosnia and Herzegovina, Czechia, Denmark, Estonia, France, Germany, Israel, Poland, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Experts from the following United Nations Member States also participated in the meeting: Benin, Cameroon, India, Jordan, Togo and Trinidad and Tobago.

2. The acting Chief of Section welcomed the participants to the MARS online meeting that was the first of its kind during the almost twenty years since establishing the advisory group and wished the meeting successful deliberations.

3. The World Trade Organization (WTO) Legal Affairs Officer and the Counsellor to its Trade and Environment Division presented the work done at the WTO on tackling illicit trade in medical products. Their intervention was based on a WTO policy note¹ and a working paper on “Leveraging WTO rules to combat illicit trade in medical products”.² This work has met positive responses from the Organisation for Economic Co-operation and Development (OECD), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Industrial Development Organization (UNIDO) and the United Nations Office on Drugs and Crime (UNODC).

4. The WTO rulebook plays a significant role in the fight against illicit trade. The speakers highlighted three key agreements, each of which contribute in their own way to the combat against illicit products:

- The WTO Trade Facilitation Agreement (TFA) aims at improving transparency, predictability and streamlined customs procedures, which all reduce incentives and opportunities for illicit traders, notably with specific provisions such as pre-arrival processing and advanced rulings, post-clearance audits, the development of risk management systems, and opportunities for customs cooperation.
- The WTO Technical Barriers to Trade Agreement (TBT) addresses conformity assessment procedures (CAPs) which provide governments the means to verify that products will comply with quality, health and safety standards and regulations, contributing to the fight against illicit trade without creating unnecessary obstacles to trade.
- The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets out minimum standards for intellectual property (IP) protection and enforcement and contains requirements to put in place border measures to fight trademark counterfeiting and copyright piracy, as well as criminal sanctions if on a commercial scale. It promotes cross-border customs cooperation and fosters exchanges of information that can help in targeting trade in IP-infringing products to overcome challenges.

5. Considering these agreements, the speakers confirmed the pertinence of the Economic Commission for Europe (ECE) *Recommendation M on Use of Market Surveillance Infrastructure as a Complementary Means to Protect Consumers and Users against Counterfeit Goods*. Moving forward, the following elements could be strengthened within this recommendation:

- Fostering greater coordination within and among members and building developing countries’ capacities to fight illicit trade

¹ https://www.wto.org/english/res_e/booksp_e/tackling-illicit-trade_e.pdf

² https://www.wto.org/english/tratop_e/markacc_e/illicit_trade_working_paper.pdf

- Harnessing e-commerce opportunities and tools to support licit trade and fight against illicit trade
- Ensuring supply chain integrity in times of crisis
- Using opportunities for technical assistance, coordination at the international and regional levels

II. Background: history of *Recommendation M*

6. The Secretary of WP.6 informed the meeting on the historical background of the conception of *Recommendation M* in 2007. He briefly outlined the main purpose of the recommendation: suggesting governments to explore the possibility, wherever feasible and where the national legal framework permits, to involve their market surveillance authorities in the fight against counterfeit goods – in a complementary way to existing national legal mechanisms – by implementing the following procedures:

- To provide mechanism for cooperation and coordination of market surveillance activities on the national level between market surveillance, customs and other authorities concerned
- To give the possibility to right holders to inform (with documented proof) the market surveillance and other relevant state authorities on counterfeit goods
- To enable market surveillance authorities to identify suspected counterfeit goods made available on the domestic market (in cooperation with other relevant authorities) during market surveillance activities, including, where appropriate, resorting to laboratories to test the goods
- To enable market surveillance authorities, after having examined the compliance with all applicable requirements of the national legislation, to also check if the goods might infringe intellectual property rights, and, whenever feasible and without prejudice to the national legislation on confidentiality, to involve other relevant authorities and intellectual property right holders

7. He explained that the wording of the 2007 recommendation was softened in order not to suggest integrating intellectual property rights (IPR) into terms of reference of market surveillance agencies, as there was some reluctance to revise mandates of existing IPR protection authorities. During the discussions in 2007, it was suggested that market surveillance agencies add IPR controls to existing inspection procedures, wherever feasible, at their discretion and within their current activities and budgets.

III. Experience of Serbia

8. The Chair of the MARS and Associate in Coordination and Improvement of Inter-Sector and Regional Cooperation in the field of Market Surveillance to the Ministry of Internal and Foreign Trade of Serbia explained the various categories of products and equipment surveillance that are distributed between Serbian authorities and outlined their roles in combatting against counterfeit products.

9. She explained that the market surveillance inspectors under the Ministry of Internal and Foreign Trade are the competent IPR enforcement authorities that:

- Perform inspection on the production and commerce of goods suspected of infringing industrial IPR
- Start administrative procedure ex officio or at the request of the IPR holder through the application for action (AfA)
- Identify counterfeit goods and relevant supply chains
- Provide evidence and samples / requests for expertise

- Undertake temporary measures including the detention of goods with the reasonable suspicion of infringement of the protected IPR, that should be verified by a competent court
- Agree on out-of-court settlements
- Exclude counterfeit or pirated goods from circulation
- Provide final administrative decisions
- Order the destruction of counterfeit and pirated goods
- Cooperate with IPR holders
- Cooperate with the market surveillance authority competent for dangerous waste and environmental protection and those competent for other risks depending on the kind of goods

10. She further explained the main tasks and cooperation objectives of the Serbian market surveillance authority which include:

- Cooperation between market surveillance authorities, IPR enforcement authorities and the customs authority
- Cooperation with specialized prosecution office for high-tech crime
- Coordinating cooperation with IPR holders and organizations for the collective protection of intellectual property rights, other professional organizations and consumer organization
- Monitoring and analyzing trends
- Assessment of the extent of counterfeiting, its consequences and the links to health and safety risks
- Monitoring public perception
- Cooperation with the Intellectual Property Office (IPO) for effective law enforcement

11. The Assistant Director of the Institute for Intellectual Property of the Republic of Serbia outlined the role of the IPO in the development of the IPR system in Serbia. This office is responsible for: tasks related to IPR, copyright and related rights; the supervision of the work of IPO by the Ministry of Economy; following international and European Union (EU) regulations in the field of legal protection of intellectual property and the implementation of these into the laws on IPR in Serbia; supervision of the work of collective management organizations for copyright and related rights; and the raising of public awareness on the importance of IPR protection through dissemination of information and educational material.

12. She then described the activities of the Coordination Body for Efficient IPR Protection in the Republic of Serbia that was established in 2014 and that was the result of the first EU twinning project – IPA 2011 “Enforcement of Intellectual Property Rights in Serbia” (SR11/IB/OT/02) that took place from 2014 to 2016. The second EU twinning project, IPA 2016 “Protection and Enforcement of Intellectual Property Rights in Serbia” (SR/16/IPA/FI/01/18), took place from 2019 to 2022. The task of the Coordinating Body is to monitor and direct certain tasks within the purview of several State administration bodies to ensure effective protection of IPR. The Coordinating Body has a president, and includes the director of the IPO, and includes multiple ministerial-level members: the Assistant Minister of Economy, the Assistant Minister of Internal and Foreign Trade, the Assistant Director of the Tax Administration, the Assistant Director of the Customs Administration, the Assistant Minister of Health, the Head of the Department for Suppression of Crime in the Field of Intellectual Property, and the Service for Combating Organized Crime in the Ministry of Internal Affairs.

13. In 2022, WIPO started a pilot project entitled “Study in Serbia on creating effective links between the national IP strategies and the innovation ecosystem”. The project will be implemented in three phases:

- Phase 1: Preparation of an assessment report on the Serbian national innovation system including its strengths, weaknesses, new opportunities and challenges
- Phase 2: (to be completed) Preparation of an assessment report on the current national innovation priorities and policies
- Phase 3: (pending) Facilitation of the work and providing comments to the WIPO international consultant to develop analytical and policy suggestions in view of the next Serbian national IP strategy

14. Serbia plans to develop its new IPR strategy for the period 2023 to 2027 where the lessons learned from the two previous strategies will be considered (i.e. strategic goals should be realistic, based on IPO capacities and capacities of all relevant institutions involved in achieving the goals). The new organizational unit within the IPO dedicated to the cooperation with enforcement bodies and organizations is planned to be established in 2023.

IV. Experience of Denmark

15. The independent IPR enforcement expert from Denmark elaborated on the experience of Danish governmental cooperation and its approach to the enforcement of IPR infringements. She firstly gave the definition of counterfeit goods which is based on EU regulation No 608/2013:

“Counterfeit goods are goods, including any packaging, label, sticker, brochure, operating instructions, warranty document or similar items which are sold under a brand's name without the brand owner's authorization”.³

16. She explained that the role of the enforcement authorities is to provide an effective system in the country against the illicit trade of goods with IP violations and how to build cooperation between the institutions.

17. In 2008, the Danish Ministerial Network against IPR infringements was established based on a cross-ministerial report on fighting counterfeiting and piracy and consists of twelve institutions.

18. Over the last fifteen years the Network has achieved several noteworthy results:

- Has increased criminal penalties (up to six years of imprisonment)
- Has created an information website
- Has introduced a case law database of criminal cases on IPR infringements
- Has cooperated on enforcement actions (e.g. “Operation Opson”, “Pangea”, etc.)
- Has organized training seminars for public enforcement authorities
- Has held continuous dialogue with the industry
- Has developed a standard template for reporting IPR crime
- Has contributed to IPR guidelines for police and prosecutors
- Has held awareness raising campaigns targeting consumers

V. Experience of the United Kingdom

19. The Chairperson of the United Kingdom National Markets Group for intellectual property (IP) Protection (NMG) informed the participants of the IP Crime Group that was established in 2005 and restructured in 2021–2022. The IPR Crime Group has developed

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0015:0034:en:PDF>

the IP Counter Infringement Strategy 2022–2027 and publishes an annual IP Crime report and an annual trading standards successes report.

20. The broad areas of work of the NMG are:

- Coordinated enforcement activity, coordinating intelligence and targeting markets that are identified as having serious problems with trading in counterfeit goods
- “Real Deal” initiative, which is a preventative campaign focused on a national markets charter, code of practice, information and promotional support to market operators and trading standards to ensure that participating markets stay fake-free
- “Real Deal Online”, a preventative partnership approach to IP protection for social media buy-sell groups

21. The speaker outlined that in the context of *Recommendation M* the NMG:

- Creates a mechanism for cooperation and coordination of market surveillance activities
- Allows right holders to inform market surveillance and other State authorities about counterfeit goods
- Enables market surveillance authorities to identify counterfeit goods distributed in the domestic marketplace
- Enables market surveillance and other relevant authorities to engage with IP right holders
- Attracts funding and economies of scale to reduce financial burdens on market surveillance authorities
- Cooperates and shares intelligence to enhance existing IPR enforcement tools
- Introduces measures that benefit consumers and rights holders that are conducive to establishing “rule of the law” principles in society and to fair competition and business development

VI. Discussion on the eventual evolution of ECE *Recommendation M*

22. The MARS Chair and the experts participating in the meeting confirmed the relevance of *Recommendation M* today and noted a few points that could beneficially be updated:

- Reflecting the reference to the updated United Nations Guidelines for Consumer Protection in 2015 in the recommendation text
- Consider adding references to other relevant United Nations and European Union documents on strengthening rules for the control of restrictive business practices
- Introducing more assertive and action-oriented language to the recommendation text

23. A project proposal for a revision of *Recommendation M* will be drafted and discussed at the next MARS meeting on 26 May 2023.
