

## CALL FOR EVIDENCE FOR AN INITIATIVE (without an impact assessment)

This document aims to inform the public and stakeholders about the Commission's work, so they can provide feedback and participate effectively in consultation activities.

We ask these groups to provide views on the Commission's understanding of the problem and possible solutions, and to give us any relevant information they may have.

<b>TITLE OF THE INITIATIVE</b>	EU Toolbox against counterfeiting
<b>LEAD DG – RESPONSIBLE UNIT</b>	DG GROW – Unit C4
<b>LIKELY TYPE OF INITIATIVE</b>	To be determined
<b>INDICATIVE TIMING</b>	Q4 2022
<b>ADDITIONAL INFORMATION</b>	<a href="https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement_en">https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement_en</a>

*This document is for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by this document, including its timing, are subject to change.*

### A. Political context, problem definition and subsidiarity check

#### Political context

The EU legal framework to combat counterfeiting includes [Directive 2004/48/EC](#) on the enforcement of intellectual property rights (IPRED) and [Regulation \(EU\) No 608/2013](#) concerning customs enforcement of IPR.

Besides these legal obligations, the Commission facilitates [IP-related industry-led initiatives](#) and continues to endorse the 'follow the money' approach to IPR enforcement<sup>1</sup>, building on the [2014 Action Plan on enforcement of IPR](#) and the [2017 comprehensive package of measures to improve the enforcement of IPR](#).

In its [Conclusions on the enforcement of IPR](#) of 1 March 2018, the Council stressed that '*the fight against IPR infringements requires concerted and coordinated efforts by all public and private actors concerned*'. In its [Conclusions on IP policy and the revision of the industrial designs system in the Union](#) of 10 November 2020, it also encouraged the Commission '*to establish principles in order to further enhance tripartite collaboration between right owners, intermediaries and law enforcement authorities to develop effective anti-counterfeiting strategies*'.

The [2020 Commission IP Action Plan](#) announced the establishment of an EU Toolbox against counterfeiting setting out principles for joint action, cooperation and data sharing among right holders, intermediaries and law enforcement authorities.

This sector-specific initiative is without prejudice to the EU legal framework. It will be implemented as part of a number of horizontal instruments and initiatives.

It will also draw on reported practices and principles developed in the context of the 'follow the money' approach to IPR enforcement and on industry-led initiatives facilitated by the European Commission, in particular the [Memorandum of Understanding \(MoU\) on the sale of counterfeit goods on the internet](#). In its [Conclusions on IP policy](#) of 18 June 2021, the Council underlined that anti-counterfeiting efforts made by signatories to this MoU would '*be strongly reinforced by the Digital Services Act and the upcoming EU Toolbox against counterfeiting*'.

Finally, it will benefit from the work of the [European Observatory on Infringements of IPR](#) managed by the EU IP Office (EUIPO Observatory). The Observatory shares information on IPR enforcement and best practice in this area. It also raises public awareness, works on getting all relevant stakeholders to cooperate, and works to develop better tools.

#### Problem the initiative aims to tackle

Counterfeit goods<sup>2</sup> mislead consumers, may put their health and safety at risk<sup>3</sup> and could be detrimental to the environment<sup>4</sup>. Counterfeiting also seriously jeopardises economic sectors where EU businesses are world leaders, hampers investments and growth in Europe, deprives governments of revenues, and tarnishes the reputation of right holders<sup>5</sup>.

<sup>1</sup> The 'follow the money' approach to IPR enforcement consists of designing policy measures that identify and disrupt the money trail for IPR-infringing activities on a commercial scale, diminishing their profit-making potential.

<sup>2</sup> Counterfeit goods in the context of this initiative are to be understood as non-original physical goods that infringe IPR as defined in Articles 1 and 2(1) of [Directive 2004/48/EC](#) and Article 2(1) of [Regulation \(EU\) No 608/2013](#). It does not cover parallel imports of goods or 'grey market' goods, disputes over licensing agreements, or issues relating to the exhaustion of rights.

<sup>3</sup> EUIPO, [Qualitative Study on Risks Posed by Counterfeits to Consumers](#), 2019.

<sup>4</sup> Counterfeiters tend not to respect environmental regulations. See EUIPO, [2020 Status report on IPR infringement](#), 2020.

<sup>5</sup> Footnote 4. Direct lost sales amount to EUR 50 billion annually and direct employment losses to 416 000 jobs annually, while loss in tax revenues and social security contributions amount to EUR 15 billion each year (average annual figures, 2013-2017).

Counterfeiters target goods from a broad variety of industries, such as pharmaceuticals and medical devices, consumer goods (e.g. food and drink, cosmetics and toys), luxury items, business-to-business products (e.g. vehicle spare parts) and IT goods (e.g. phones, chargers and batteries)<sup>6</sup>.

Despite the continued efforts of public and private stakeholders to turn the tide, counterfeiting is still thriving. In 2019, imports of counterfeit goods amounted to EUR 119 billion – up to 5.8% of EU imports<sup>7</sup>. The total amount of articles detained at the EU's borders further increased in 2019 compared to previous years<sup>8</sup>.

Counterfeiting remains a lucrative criminal activity with a relatively lower business risk in terms of the likelihood of detection and punishment if detected. Organised crime groups are heavily involved in counterfeiting and IP crime is often complementary to other forms of criminal activity (e.g. money laundering, tax fraud and tax evasion, human trafficking and, occasionally, forced labour)<sup>9</sup>.

The way organised crime groups involved in counterfeiting operate is becoming more sophisticated: globally tapping all the potential of physical markets and the digital economy<sup>10</sup>, as well as playing on supply chain vulnerabilities<sup>11</sup>:

- The surge in counterfeit COVID-19-related goods (e.g. personal protective equipment, test kits and vaccines), has shown the ability of counterfeiters to quickly adapt their fraud schemes and the way they operate to changing circumstances, in particular in terms of shifting product focus, marketing and packaging to suit or shape current demand<sup>12</sup>.
- With online sales booming, counterfeiters use the internet<sup>13</sup> and new technologies to advertise, sell and distribute their goods<sup>14</sup>. They also misuse the services of other supply chain intermediaries.
- Counterfeiters use more complex trade routes and extended distribution chains to transport goods from their countries of production to their destination markets. They misuse certain free trade zones and intermediary transit points to conceal the country of origin, repackage counterfeit goods and relabel them.
- Sea transport by container continues to be the main means of transporting counterfeit goods detained at the EU's external borders. However, e-commerce is conducive to the transport of counterfeits in small parcels. This is because using small shipments makes the detection and interception of counterfeit goods more difficult, laborious and costly.

In general, counterfeiters take advantage of:

- the sometimes suboptimal cooperation between law enforcement authorities, in particular in cross-border investigations, and their limited human and economic resources;
- the less widespread use of new technologies by right holders and law enforcement authorities, as well as suboptimal or non-interoperable electronic systems/databases/communication channels;
- the lack of willingness of various intermediaries to engage beyond the fulfilment of minimum legal obligations, and of closer cooperation and information sharing between law enforcement authorities, right holders and other intermediaries.

Given the challenges outlined above, compounded by the COVID-19 crisis, a specific instrument could be needed to more effectively tackle counterfeiting.

#### **Basis for EU action (legal basis and subsidiarity check)**

##### **Legal basis**

The legal basis for the adoption of this initiative would depend on the way forward following the ongoing consultations.

##### **Practical need for EU action**

The initiative will aim to protect the integrity of the single market. The cross-border nature of the trade in counterfeit goods and their online dissemination means that Member States alone cannot do this. EU intervention is therefore the best course of action.

<sup>6</sup> Organisation for Economic Co-operation and Development (OECD) and EUIPO, [Global Trade in Fakes: A Worrying Threat](#), Illicit Trade, 2021. These amounts do not include domestically produced and consumed counterfeit and pirated goods, and pirated digital goods distributed online.

<sup>7</sup> Footnote 6.

<sup>8</sup> European Commission, [Report on the EU customs enforcement of IPR: Results at the EU border, 2019](#), 2020: almost 41 million articles suspected of infringing IPR were detained in 2019, against almost 27 million in 2018 and 31 million in 2017.

<sup>9</sup> EUIPO, [2020 Status report on IPR infringement](#), 2020; EUIPO and Europol, [IP crime and its link to other serious crimes – Focus on poly-criminality](#), 2020; EUIPO and Europol, [IP Crime Threat Assessment 2019](#), 2019.

<sup>10</sup> European Commission, [Report on the protection and enforcement of IPR in third countries](#), 2021 and [Counterfeit and Piracy Watch List](#), 2020.

<sup>11</sup> Footnote 8; Europol, [EU serious and organised crime threat assessment \(SOCTA\)](#), 2021; EUIPO, [Monitoring and analysing social media in relation to IP infringement](#), 2021; EUIPO and Europol, [IP Crime Threat Assessment 2019](#), 2019; OECD and EUIPO, [Misuse of Containerized Maritime Shipping in the Global Trade of Counterfeits](#), 2021; [Trade in Counterfeit Goods and Free Trade Zones](#), 2018; [Misuse of Small Parcels for Trade in Counterfeit Goods: Facts and Trends](#), 2018; [Mapping the Real Routes of Trade in Fake Goods](#), 2017; EUIPO, [Research on Online Business Models Infringing IPR Phase 1](#), 2016, and [Phase 2](#), 2017.

<sup>12</sup> See the [enquiry launched by OLAF](#) concerning imports into the EU of counterfeit COVID-19 related goods, and Europol's reports [Viral Marketing – Counterfeits, substandard goods and IP crime in the COVID-19 pandemic](#), 2020 and [Pandemic profiteering – how criminals exploit the COVID-19 crisis](#), 2020.

<sup>13</sup> OECD and EUIPO, [Misuse of E-Commerce for Trade in Counterfeits](#), 2021, and OECD, [E-Commerce Challenges in Illicit Trade in Fakes](#), 2021.

<sup>14</sup> Through e.g. marketing by social media influencers and classified ads, and sales not only through established retailers, but also increasingly through livestream shopping and illegitimate dropshippers.

## B. What does the initiative aim to achieve and how

The **general objective** of the EU Toolbox against counterfeiting will be to set out coherent, effective and coordinated action against counterfeiting, both online and offline.

The **specific objectives** of the initiative will be to:

- clarify the actions, measures and roles, which could be taken by right holders and intermediaries, online and offline, to fulfil their responsibilities in a spirit of mutual cooperation and information sharing;
- enhance cooperation between right holders, intermediaries and national and EU public authorities;
- facilitate effective and efficient information sharing between all key actors;
- promote innovation, development and the use of adequate tools and new technologies to prevent and detect counterfeiting activities.

The initiative will build on existing and pending EU legislative and policy initiatives, including the ‘follow the money’ approach to IPR enforcement, and consist of:

- guiding principles to Member States, right holders and intermediaries, urging them to take new action and promoting innovation in developing tools and approaches;
- an accompanying Staff Working Document setting out the reasoning for the initiative, and an outline of good practices already implemented by key public and private sector actors at national, EU and even global level<sup>15</sup>;
- a wide range of other tools, such as databases and electronic systems, practical guidance, checklists, standard forms, e-learning modules and awareness-raising material, to be made available on a web platform; these tools would be developed and/or upgraded and rationalised by means of targeted national and EU projects.

Most of the guiding principles, good practices and tools developed as part of the EU Toolbox against counterfeiting could also prove useful for curbing piracy, for example: the voluntary actions taken by online intermediaries, closer cooperation between national enforcement authorities, and information sharing.

For **online and offline intermediaries** (such as marketplaces, social media, the advertising industry, transport and logistics companies, payment services, landlords, domain name registrars and registries, mobile app stores, price comparison portals, search engines, internet service providers, dedicated server providers), guiding principles and good practices could include:

- appointing a single contact point for IP enforcement;
- taking specific proactive and proportionate actions, and developing tools to be used voluntarily by intermediaries<sup>16</sup>, with appropriate safeguards in place to facilitate cooperation and information sharing;
- coordinating legal action with right holders against the most harmful IP infringers.

For **providers of digital intermediary services**, coherence with the (proposed) [Digital Services Act](#) should be ensured.

For **right holders**, principles and good practices could include:

- appointing a single contact point for IP enforcement;
- more actively engaging and participating in tools and systems made available by public authorities and intermediaries to facilitate cooperation and information sharing;
- lodging an [application for action](#) to request the customs authorities to take action with respect to goods suspected of infringing an IPR and ensuring related follow-up;
- conducting due diligence checks on their business partners in order to increase supply chain transparency<sup>17</sup>.

For **national and EU public authorities** (such as administrative bodies, customs, police and market surveillance authorities, judges and public prosecutors), guiding principles and good practices could include:

- appointing a national IP Enforcement Coordinator per Member State;
- giving them greater room for manoeuvre to adapt control and enforcement actions to new challenges;
- setting up channels and IT tools for effective cooperation in the Member States, and between national and EU bodies<sup>18</sup>, in particular to ensure coherence between initiatives and networks, and facilitate cross-border investigations;
- beefing up the [‘joint strategy related to IP crime’](#)<sup>19</sup> at EU level to further strengthen interagency cooperation<sup>20</sup> and ensure that partners align their strategies to tackle IP crime with each other.

The EU Toolbox is part of the [EU Strategy to tackle Organised Crime 2021-2025](#). Coherence with other aspects of the Strategy, the [EU Customs Action Plan to combat IPR infringements for the years 2018-2022](#), the new [EU Customs Plan for Action](#) and [EMPACT](#) (European Multidisciplinary Platform Against Criminal Threats)<sup>21</sup> should be ensured, notably as regards law enforcement.

<sup>15</sup> See for example the [MoU on the sale of counterfeit goods on the internet](#); the [MoU on online advertising and IPR](#); the [OECD Task Force on Countering Illicit Trade \(TF-CIT\)](#), in whose Bureau the European Commission and EUIPO Observatory play an active role; EUIPO, Discussion papers on [payment, domain names and social media](#), 2021; European Commission, [Study on evaluation of practices for combating speculative and abusive domain name registrations](#), 2020; AIM and BASCAP, [Joining forces in the fight against counterfeiting – intermediaries’ best practices](#), 2019; EUIPO, [Knowledge and Awareness Building Seminar, International Cooperation and the Role of Intermediaries](#), 2017; EUIPO, [Study on voluntary collaboration practices in addressing online infringements \[...\]](#), 2016.

<sup>16</sup> Such tools could include, in certain cases, automated tools, without prejudice to Article 15(1) of Directive 2000/31.

<sup>17</sup> Coherence with the [Sustainable corporate governance initiative](#) and the [Sustainable products initiative](#) will be ensured. See also European Commission, [Study on due diligence requirements through the supply chain](#), 2020.

<sup>18</sup> Such as the European Commission, EUIPO, Europol [IP Crime Coordinated Coalition \(IPC3\)](#), and Eurojust.

<sup>19</sup> Bringing together the European Commission, EUIPO, Europol, Eurojust, CEPOL, and more recently Frontex (see [here](#)).

<sup>20</sup> EUIPO, [Interagency cooperation at national and international level: an assessment of good practices for improving IPR enforcement](#), May 2021.

<sup>21</sup> See the [Council Conclusions of 26 May 2021 setting the 2022-2025 EU priorities for the fight against serious and organised crime through EMPACT](#).

<p>For <b>all key public and private sector actors</b>, guiding principles and good practices could include:</p> <ul style="list-style-type: none"> <li>– facilitating effective and efficient information sharing (including personal data) in compliance with EU data protection and competition law, to prevent and detect counterfeiting activities<sup>22</sup>;</li> <li>– promoting and upgrading tools for exchanging information<sup>23</sup>;</li> <li>– increasing the protection of supply chains from the infiltration of counterfeit goods or components, e.g. through the use of new technologies (such as data mining, AI-powered image recognition and blockchain-based solutions)<sup>24</sup>;</li> <li>– encouraging and strengthening public-private partnerships, e.g. by promoting awareness-raising activities<sup>25</sup> and enhancing public-private cooperation before, during and after IPR law enforcement operations<sup>26</sup>;</li> <li>– increasing training for public authorities, in particular law enforcement and judicial authorities<sup>27</sup>, intermediaries and right holders, in particular small and medium-sized enterprises (SMEs);</li> <li>– exploring the potential of alternative dispute resolution mechanisms, in particular mediation, to solve issues between right holders and intermediaries<sup>28</sup>.</li> </ul>
<p><b>Likely impacts</b></p> <p>While there is expected to be a gradual improvement in the fight against counterfeiting, the initiative will not have significant economic, social or environmental impacts.</p>
<p><b>Future monitoring</b></p> <p>Where appropriate, the initiative will be accompanied by benchmarks to make it possible to measure progress, based on information gleaned from Member States, the EUIPO Observatory, right holders and intermediaries in particular.</p>
<p><b>C. Better regulation</b></p>
<p><b>Impact assessment</b></p> <p>While there is expected to be a gradual improvement in the fight against counterfeiting, the initiative will not have significant economic, social or environmental impacts. Therefore, an impact assessment is not necessary. An accompanying Staff Working Document could be prepared as an analytical and evidential basis to support the initiative. The EU Toolbox, and in particular the possible Staff Working Document, will take into account significantly weighty fact-based evidence provided by an extensive collection of studies and reports recently conducted and drafted mostly by the <a href="#">EUIPO Observatory</a>. A literature review will complement this evidence. The initiative will also draw on <a href="#">reported practices identified under the MoUs facilitated by the Commission</a>, the ‘follow the money’ approach to IPR enforcement and experiences with ongoing projects/tools developed by the EUIPO Observatory.</p>
<p><b>Consultation strategy</b></p>
<p><b>Why we are consulting</b></p> <p>The Call for Evidence aims to capture the views and opinions of, as well as to get evidence from, all relevant public and private sector stakeholders. There will be no Public Consultation. However, the Commission is making use of high-level and technical meetings and conferences, such as meetings of the <a href="#">Commission Expert Group on IP Policy (GIPP)</a>, of the Council Working Party on IP, of the two MoUs, and of the EUIPO Observatory, as well as the outcomes of the <a href="#">2021 International IP Enforcement Summit</a>. It is also holding a stakeholder dialogue to reach out to a wider number of the most relevant stakeholders (e.g. intermediaries, right holders, law enforcement authorities and consumer associations). To this end, it is organising a multi-stakeholder dialogue meeting and targeted workshops with specific interest groups (e.g. social media platforms, the domain name ecosystem<sup>29</sup>, payment services and transport and logistics industries), as well as on horizontal topics, such as information sharing. A synopsis report summarising all the results of the consultation will be added as an annex to the accompanying Staff Working Document of the initiative.</p>
<p><b>Target audience</b></p> <p>Consulted stakeholders include public authorities at national, EU and global level, IP right holders (in particular SMEs, notably through representative business associations), the most concerned online and offline intermediaries, the <a href="#">network of the EUIPO Observatory</a>, consumer organisations and non-governmental organisations.</p>

<sup>22</sup> In particular maintaining accurate and complete databases of domain name registration data (WHOIS data), and providing lawful access to such data for purposes related to the fight against domain name system (DNS) abuse, and ensuring that effective measures are taken to mitigate DNS abuse, including counterfeiting. See the [proposal for a Directive on measures for a high common level of cybersecurity across the Union \(NIS2\)](#) and the recommendations of the [second Security, Stability, and Resiliency \(SSR2\) Review Team Final Report](#) to the Internet Corporation for Assigned Names and Numbers (ICANN) on measures to address DNS abuse.

<sup>23</sup> See for example the Commission Anti-counterfeit and Anti-piracy Information System (COPIS), Anti-Fraud Information System (AFIS), [Container Traffic Monitoring System](#), the EUIPO [IP Enforcement Portal \(IPEP\)](#), the Europol [Secure Information Exchange Network Application \(SIENA\)](#) and the World Customs Organisation [IPR CENcomm group](#).

<sup>24</sup> See for example the EUIPO [Anti-Counterfeiting Blockathon pilot project](#); EUIPO, [Anti-Counterfeiting Technology Guide](#), 2021; EUIPO, [IP Infringement and Enforcement: Tech Watch Discussion Paper](#), 2020; EUIPO, [Automated Content Recognition: Discussion Paper – Phase 1](#), 2020.

<sup>25</sup> See for example the EUIPO Observatory’s [public awareness campaign repository](#).

<sup>26</sup> See for example the following operations: [Pangea XIV](#) (medical items), [Postbox II](#) (goods delivered by post/express courier services), [Hygiea](#) (fast-moving consumer goods), [Opson X](#) (food and beverages) and [Aphrodite](#) (social media).

<sup>27</sup> See for example [tailored knowledge-building activities](#) developed by the EUIPO Observatory in cooperation with the European Commission, EU agencies (e.g. CEPOL) and international organisations.

<sup>28</sup> See for example the [EUIPO Boards of Appeal Alternative Dispute Resolution Services \(ADRS\)](#).

<sup>29</sup> In, for example, the context of the ongoing [Commission study on Domain Name System \(DNS\) Abuse](#).