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Quality Criteria (to be used by reviewers)

Clear and precise language
Coherent analysis
Information up to date

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Draft study on possible best practices in IPR enforcement

Storage and destruction of infringing goods

1.0 Introduction

1.1 Purpose

The purpose of the study is to identify possible “best practices”¹ in respect of storage and destruction of goods involved in infringement of intellectual property rights. In most cases the goods in question are themselves infringing IPR. However, in some cases the goods in question are materials and implements principally used in the creation or manufacture of infringing goods².

1.2 The starting point for this study is the report prepared in 2010 by the then Legal Issues Working Group of the Observatory (LIWG) entitled Corrective Measures in Intellectual Property Rights:

http://ec.europa.eu/internal_market/iprenforcement/docs/corrective_measures_en.pdf

The report was prepared in the context of the then relatively recent implementation of the directive on the enforcement of intellectual property rights³ (the Directive).

1.3 The original report covered more than the issue of storage and destruction. It was set in the wider context of corrective measures dealt with in Article 10 of the Directive (see 3.1). It included the results of surveys of intellectual property practitioners and associations from most Member States on the legislation, practices and case law in the respective Member States. In order to have a proper base for the current study the Observatory public representatives of the 28 Member States were requested to confirm that the relevant information is still accurate and up to date or, if not accurate and up to date to supply the correct and up to date information. Member States whose responses did not feature in the previous report were given an opportunity to supply the relevant information. Amendments have been made in parts of the survey for Estonia, Germany, Hungary, Latvia, Portugal, Romania, Slovakia, Sweden and the United Kingdom. All the additions and substitutions, except typographical and grammar corrections, are reflected in Annex I in blue. The numbering of the question is the same as in the original report to facilitate comparison. Responses from Croatia⁴ have been included in that Annex.

It is clear from the comparison of the results of the original survey with that of the more recent one that there has been little substantive change in the meantime. This, in itself, indicates that there is no significant interest among national legislators to make changes in existing provisions with respect to storage and seizure.

¹ “best practice” is a term of art and does not mean that such a practice is ideal, but rather that it deserves recognition as being possibly suitable for imitation.

² Article 10 (1) of the Directive

³ Directive 2004/48/EC of 29 April 2004.

⁴ Croatia was not a member of the European Union at the time of the original report

1.4 Interim developments

The original report and the responses to the survey on which it was based were framed in the context of Council Regulation (EC) No 1383/2003. This is being superseded by Regulation (EU) No 608/2013 of the European Parliament and Council. Under certain conditions, the Regulation will introduce procedures to enable customs, to have goods destroyed without the need for formal legal proceedings, which can be costly. These decisions would be taken, depending on the type of infringement. In these cases it would be presumed that owner of the rights involved would have given agreement to destroy the goods and that destruction had not been explicitly opposed. However in some cases, the owner of the goods would have to agree explicitly to their destruction. In cases where no agreement is reached, the right-holder would have to initiate legal proceedings to establish the infringement; otherwise the goods would be released.

The Regulation will continue to provide that storage and destruction costs, directly incurred by customs, must be paid by the right-holders requesting customs action. This will not prevent rights holders from taking legal action to recover such costs from the liable party. Nevertheless there is an important exception for small consignments. In these cases storage and destruction costs will assumed by customs.

A specific procedure will also be introduced for small consignments of suspect goods covered by an application for action (AFA). This will allow goods to be destroyed without the involvement of the right-holder.

1.5 Outcome

The updating of the description of the law, practice and case law in the Member States is in itself a contribution to the understanding of the current situation.

2.0 Methodology

2.1 Initial approach

The LIWG initially agreed in early 2013 the following as a methodology for the compilation of studies on best practice:

Stage I: The WG should select a limited number (say three) of “practices” that appear in the findings of the expert report already circulated or others of which the WG is aware.

Stage II: A minimum of three experts in the area concerned will each be commissioned to write short peer review reports on the “practice”. They will do this independently of each other. Experts may be drawn from the public or private sector.

Stage III: The experts’ reports will be circulated to each other and to the WP. An enclosed seminar involving the experts and representatives of the WG, chaired by the project manager, will discuss the written contributions. A report of the proceedings of the seminar will be prepared.

Stage IV: The WG as a whole will consider this report and recommend whether it should be adopted with or without amendments. If the subject is approved by consensus, with or without amendments, arrangements will be made for publication in the appropriate manner. Where there is no consensus in favour of a particular practice the issue will be closed.

Note

In this case the seminar has not been held because given the volume of documentation already produced it might have hindered rather than helped the Working Group's consideration of the draft studies.

2.2 Review

Because the exercise is a pilot the WG should, in the light of the practical experience, review the methodology with a view to making changes to improve it.

One aspect that seems appropriate to be addressed is the issue of how proposals relating to national or Union legislation should be dealt with. In the course of consultations carried out to test the draft conclusions of this study (see 2.4 and 3.3) it was suggested that any such proposal should first be the subject of consultation with the public sector representatives of the Member States of the Observatory. It would not be sufficient to leave the issue in the hands of the LIWG alone.

2.3 Extension

Once the 2013 programme is finished and a revised methodology is agreed the process will be repeated with newly identified "best practices".

2.4 Consultation process

As mentioned above (1.3) public sector representatives of all the Member States were provided with their respective country description of legislation, practice and case law⁵ and asked to confirm its accuracy, correct it where necessary and provide any relevant case law updates.

A draft study was prepared by the Observatory which repeated the recommendations contained in the 2010 report. These are set out in Annex II. The draft report was the subject to review by three independent experts⁶ acting individually. In general the comments of the peer reviewers were supportive of the proposals in the 2010 report from the LIWG, but with some reservations. Reservations were expressed in particular where the recommendations seemed to go beyond the requirements of the Directive. There was also some questioning of the accuracy of the description of some practices in some of the Member States.

The draft study and the peer review comments were circulated to all members of the LIWG for their comments. Submissions were received from the European Commission and from representatives of the Member States and of associations represented in the working group. Some of these submissions were received after the deadline but have been taken into account in the compilation of this report. The outcome of the consultation is summarised in section 3.3.

⁵ Where no description was provided for the earlier study a template of the questions was provided.

⁶ Charles Gielen, John Gormley, Knud Wallberg

3.0 Legal issues

3.1 The earlier report led the then Working Group to reach conclusions and made proposals for the adoption of certain practices that are set out in Annex I. The areas concerned are covered by Article 10 of the Directive:

Article 10 Corrective measures

1. Without prejudice to any damages due to the right holder by reason of the infringement and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

- (a) ...*
- (b) ...*
- (c) destruction.*

2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so. 3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

3.2 Legal implications

The provisions of Articles 10 include conditionality, options and non-exhaustive examples. A brief examination of these demonstrates the possible implication for the degree of uniformity in the implementation of these provisions at national level.

3.2.1 Article 10 (1) lists a number of options that the judicial authorities may choose from in making orders with respect to goods involved⁷ in infringement of intellectual property rights. Destruction is not the only option. Furthermore, the list itself does not appear to be exhaustive.

3.2.2 Article 10 (2) lays down the general rule that corrective measures, including destruction, must be carried out at the expense of the infringer. However, the general rule is qualified by the possibility of particular reasons for not doing so are invoked.

There is an obligation on the judicial authority when considering corrective measures to take into account the need for proportionality between:

- the seriousness of the infringement
- and the remedies ordered
- as well as the interests of third parties.

⁷ See paragraph 1.1 for a definition

3.2.3 This brief look at the relevant provisions of the Directive demonstrate why such diversity can be found in the national legislation, practice and case law as outlined in Annex I.

3.3 Outcome of consultation

The consultation process (see 2.4) produced some degree of support from members of the working group representing associations of enterprises for the recommendations in Annex II.

However, comments from Member States' representatives were not so supportive. The reservations expressed in the peer review comments with regard to keeping within the provisions of the Directive were echoed in the Member State comments.

Furthermore, the European Commission, in its written comments, suggests that this study should take a different approach than simply addressing proposals on legislative change to Member States. Instead the Commission proposes a screening and assessment of relevant case law. Such screening could be of help for courts and parties dealing with the question of storage and destruction of infringing goods and their associated costs.

In addition, was a suggestion that in order to enhance the data on storage and destruction a study to calculate the cost to Member States and right holders of the current practice of having to pay up front the cost of storage of seized goods would be desirable.

3.4 The combination of the flexibility afforded, deliberately, by the Directive and the results of the consultation suggest that it is not appropriate or productive to revisit at this time the recommendations contained in the earlier report. A different approach to making progress needs to be explored.

4.0 Next steps

4.1 This report should be published in its current form on the Observatory website as soon as it is approved. This publication will provide readers with an up to date picture of the work done to date and show the current picture in respect of the questions reproduced in Annex I.

Annex I should also be made available separately and linked, with an appropriate note, to the 2010 report⁸. In this way anyone accessing the original report will immediately be able to see that the answers to the relevant questions have been updated and have instant access to that update. Future up dates will be provided as proposed in the following section.

⁸ http://ec.europa.eu/internal_market/iprenforcement/docs/corrective_measures_en.pdf

4.2 Annex I should be updated by the Observatory:

- (a) On a regular basis, initially every two years, as a result of Observatory questionnaires to the public representatives of the member States of the Observatory
- (b) When there is a significant change in the legislation, practice or case of a Member State.

4.3.1 The Commission proposal (which fits with proposals from others which emerged during the consultation process) that a screening and assessment of relevant case law in the area of storage and destruction has merit. There was a consensus within the Working Group that in order to enhance the data on storage and destruction a study to calculate the cost to Member States and right holders of the current practice of having to pay up front the cost of storage of seized goods would be desirable.

However, confining the assessment to case law is likely to be insufficiently comprehensive. Storage and destruction can arise as an issue not only in civil infringement actions but also in criminal proceedings. Here case law, if accessible, would be a useful source of information. However, there is also the issue of customs seizures where storage and destruction is also an issue. This would require more than a study of case law.

A comprehensive study, not confined to case law, will be undertaken to quantify the cost to Member States and right holders of the current practice of storage and destruction of seized goods.

4.3.2

This work will be carried out in conjunction with the more extensive study that the Observatory will make quantifying the economic impact of IPR infringement in the EU.

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COUNTRY	<p>4.1. Destruction.</p> <p>Is there a difference between destruction of goods in customs, civil and criminal proceedings?</p> <p><i>Is there an overlap between destruction in civil proceedings (covered by the IPR Enforcement Directive) and in customs proceedings (covered by the Customs Border regulation 1383/2003)?</i></p>
Austria	<p>(i) Customs proceedings: Product Piracy Act (same as the EC-Product-Piracy-Regulation 2004) is not applicable in any case of infringement of the distribution right (e.g. parallel imports). The application refers to the goods infringing IPR. If either the declared holder or owner of the goods and the right holder agree to an immediate destruction, the destruction can be executed.</p> <p>Civil proceedings: Any person whose exclusive rights are infringed may require that copies produced or distributed in violation of the Law or copies intended for unlawful distribution be destroyed and the devices intended exclusively or primarily for unlawful reproduction (moulds, stones, plates, films, etc.) be rendered unusable.</p> <p>Only the Copyright Act provides that the action shall be directed against the owner of the articles, only (not the holder, intermediary etc). Trademark Protection Act and Patent Act are applicable to the infringing person, insofar no <i>rights in rem</i> of third parties are violated. That is why the destruction is enforceable even if the infringer is not the owner of the goods, but the (absent) owner has to be an infringer in a juridical sense as well.</p> <p>Criminal proceedings: The criminal provision of the Copyright Act concerning ‘destruction’ provides that on a motion by the injured party the judge shall order the destruction of infringing articles intended for lawful distribution and the rendering unusable of infringing devices intended exclusively or primarily for unlawful reproduction, irrespective of the ownership of the articles and devices.</p> <p>(ii) Cause of the periods of time that are provided in the Product Piracy Act the various proceedings may overlap sometimes.</p>
Belgium	<p>There are differences as well as overlaps between customs, civil and criminal proceedings:</p> <p>In civil proceedings, the destruction can only be ordered by the courts. (decision that the goods infringe IP).</p> <p>Customs proceedings should in principle be followed by civil or criminal proceedings. However, in practice this is only seldom the case since a so-called simplified <i>procedure</i>, allows goods to be destroyed without there being any need to file court proceedings.</p>

	<p>Any breach of the Regulation also constitutes a customs offence in Belgium. Article 6(1) of the Law of 15 May 2007 empowers the courts to order the destruction and the definitive removal from the channels of commerce of any infringing goods that have been blocked by Customs and have been found to violate the Regulation.</p> <p>In criminal proceedings, the court can order the destruction of the infringing goods, even in those cases where the goods do no (longer) belong to the convinced infringer (see above in this regard).</p> <p>Earlier in the criminal proceedings, the Public Prosecutor or Investigating Magistrate can order the destruction of goods pending the criminal inquiry (i.e. prior to the filing of the court action) if their destruction is necessary to safeguard public security or public order or when the storage of the goods is problematic (i.e. the cost of storing the goods exceeds their value). The goods can only be destroyed in the absence of any claim on them being made in the two months following their seizure (Article 13(3) of the Law of 15 May 2007). The Public Prosecutor can also order the destruction of the goods when a settlement took place, provided that the infringer agreed to abandon the goods for destruction.</p> <p>Criminal proceedings also require the proof of the <i>infringer's bad faith</i>. In the absence of any fraudulent intent, the accused person is acquitted. Consequently, it will sometimes <i>be easier for the right holder to launch civil proceedings</i> than criminal proceedings. Moreover, in criminal proceedings, the destruction is treated as part of the sentence of a defendant found guilty (i.e. destruction is a criminal penalty), so if the defendant is acquitted, no destruction can be ordered, even if the infringement is established.</p> <p>There <i>can be an overlap</i> between the provisions laid down in the IPRED, the national provisions implementing the Directive and the provisions laid down in the Regulation and the Law of 15 May 2007 when the provisions of the Law of 15 May 2007 and the Regulation are applicable and are followed by civil proceedings (overlap between <i>civil infringement, customs offence and criminal offence</i>).</p>
<p>Bulgaria</p>	<p>Goods could be subject of destruction only after a final decision on the merits is pronounced. In criminal cases, infringing goods are subject of seizure in favour of the state and destruction upon the explicit provisions of the Penal Code. In cases originating from customs detention, goods could be subject of destruction only upon final civil court decision or criminal court sentence is pronounced.</p> <p>In civil proceedings goods are destroyed through bailiff's execution proceeding. In criminal cases infringing goods are destroyed upon court's/prosecutor's ruling by the respective police authorities under whose custody the goods are.</p> <p>As per cases originating from customs detention, goods are destroyed in accordance with the above mentioned civil or criminal procedures.</p>

Croatia	<p>The legal basis for destruction is different and therefore organisation of destruction in customs proceedings differs from the implementation of court decisions in both civil and criminal proceedings. The destruction in customs proceeding is based on the decision of the customs authorities upon the request of the parties and the destruction is supervised by the customs officials nominated in such a decision.</p> <p>In the court civil proceedings where the court decides on individual civil rights, it decides on the basis of requests made by the parties. If a party made a request for the “destruction of goods”, then the court decides on the request in the manner that it orders to the adverse party, participating in the proceedings, to destruct the goods. The court itself does not destruct, but it gives an order to the defendant to destruct the goods concerned within a time limit of 15 or 8 days, as prescribed by law.</p> <p>If the defendant fails to comply with his obligation arising from the final court decision within the time limit prescribed by law, then the plaintiff as the execution creditor initiates a compulsory execution on the basis of the final court decision, and the court orders an execution for the purpose of fulfilment of the obligation to act, or the execution for the realization of the non-monetary claim, respectively, within the meaning of Articles 246, 247 and 248 of the Execution Act („Official Gazette” Nos. 112/2012, 25/2013).</p> <p>Operational part regarding destruction is the same in customs, civil and criminal proceedings and all waste should be taken care of pursuing provisions of the Law on waste („Official Gazette” Nos. 178/2004, 111/2006, 60/2008, 87/2009). There is no overlap. If the right-holder initiates a civil proceeding, customs will keep the goods under customs surveillance until receipt of valid court decision.</p>
Cyprus	
Czech Republic	
Denmark	<p>Destruction of infringing goods in customs proceedings is executed by the Danish Customs, whereas destruction of infringing goods in civil and criminal proceedings is executed by the rights holder and the police authority respectively.</p> <p>The Customs Authorities may have goods <i>destroyed without the need to determine whether an infringement has in fact taken place</i> on the condition of consent from the involved parties, or if the importer fails to oppose destruction within a prescribed period, cf. Article 11(1) of the Customs Border regulation 1383/2003.</p> <p>In civil and criminal proceedings, the destruction of goods/products requires that the courts beforehand have established that the goods in question <i>constitute an infringement</i> of an IP-right or that the defendant accepts said destruction.</p> <p>The rights holder and the consignee may settle the dispute before civil proceedings are instituted. If civil proceedings are instituted as the parties have not been able to settle the dispute beforehand, there is an overlap between destruction in civil proceedings and in customs proceedings, as the rules pertaining to civil proceedings, including the rules implementing the IPRED, will apply.</p>
Estonia	There is a difference between destruction of goods in customs, civil and criminal proceedings.

	<p>Customs: the customs authorities shall decide the method of destruction at their own discretion.</p> <p>Criminal (and misdemeanour) proceedings: the counterfeit and pirated goods, which are confiscated in criminal and misdemeanour cases (e.g. by police), shall be transferred for destruction or any further transfer to customs.</p> <p>The legal problem here is that the Regulation <i>does not apply to the destruction of goods confiscated in other proceedings than customs proceedings</i>. The Regulation does also not prescribe how the counterfeit and pirated goods, which were confiscated in criminal and misdemeanour cases, <i>shall be destroyed</i>. It means that there are certain lacks in the legal regulation concerning the destruction of counterfeit and pirated goods, which were confiscated in criminal and misdemeanour cases.</p> <p>The situation is even similar regarding the destruction in civil proceedings as there is a general clause in our Law of Obligations Act allowing the person whose rights have been violated to request that in order to eliminate the violation, reasonable measures be applied with regard to the infringing goods and the materials and implements principally used in the manufacture or creation of those goods, including destruction, recall and definitive removal thereof from the channels of commerce. The application of the measures may be requested if the seriousness of the violation is proportional to the measures to be applied and the rights and interests of third parties. It may be requested that those measures be carried out at the expense of the violator unless it would be unreasonable. A person with regard to whom the application of the measures is requested may apply to a court for him or her to be obligated to pay financial compensation to the person whose rights were violated instead of the application of the measures, if the person has not acted intentionally or carelessly, the application of the measures would cause him or her disproportionately major damage and financial compensation may be considered sufficient compensation for the person who requested application of the measures. There are no specific regulation how the counterfeit and pirated goods shall be destroyed, nevertheless it is established by the court practice, that if court orders destruction, the court must also name specific actions by the defendant in order to <i>destroy the pirated or counterfeit goods</i>. .</p>
<p>Finland I. Finland II.</p>	<p>I. Yes, there is a difference. If the goods are destroyed in criminal proceedings, the destruction is done on the <i>cost of the storage</i> and the destruction is done by officials, mostly police.</p> <p>If the destruction order is given in civil proceedings the RHs normally claim that the destruction must be ordered to be made on the <i>infringer's cost</i> and under supervision of the officials involved.</p> <p>If the goods have been seized by the customs, then the court orders the goods to be destroyed under customs supervision. Most often in customs proceedings the <i>parties involved can amicably agree on the destruction</i>. Also then the destruction is done under supervision of the customs officials and the aim of the right holders is of course that the <i>infringer should pay for the destruction</i>.</p> <p>It is to be noted that the <i>simplified destruction procedure</i> has still <i>not</i> been implemented into Finnish national legislation and cannot therefore be applied in Finland yet. However, a proposal for an article of the simplified destruction procedure to be included in the Finnish Customs Law is currently under legal preparation.</p>

	<p>II. There is no difference between destruction of goods in customs, civil and criminal proceedings.</p> <p>The rules governing civil proceedings and customs proceedings both regulate destruction of goods but in practice there is no overlap as the authorities are competent in different situations.</p>
France	<p>In civil and criminal proceedings the destruction order must automatically be made by the Courts.</p> <p>French Customs have the power to independently order the destruction of the offending goods.</p>
Germany	<p>In criminal and customs proceedings, forfeiture is ordered and destruction takes place under official supervision, and the goods are sent to an incineration plant or to other service providers, e.g. to chaff the goods.</p> <p>In civil proceedings, the <i>court order usually only includes that the goods have to be destroyed, but does not describe the way, how.</i> This is left to the parties. Usually, either the infringer takes care of the destruction himself and issues a statutory declaration in this regard, or the goods are taken under a bailiff's custody and destroyed under his supervision by a service provider. The latter scenario is more typical.</p> <p>It is also possible in civil proceedings that the goods in question are delivered-up to the right owner for destruction under <i>his own responsibility</i>. This is <i>not available in customs or criminal proceedings</i> where the public authorities have to maintain a supervising position.</p>
Greece	<p>Destruction of goods in customs is conducted by the customs authorities. The expenses are paid by the IPR owner, but can be recovered from the infringer.</p> <p>In criminal proceedings, the infringing goods are destroyed by the police after the criminal court decision becomes irrevocable.</p> <p>In civil proceedings, the infringing goods are destroyed by the defendant or, following enforcement proceedings, by a court clerk.</p> <p>There is no overlap between destruction in civil proceedings and in customs proceedings.</p>
Hungary	<p>Yes, there are some differences in the preconditions of destruction (what it may be based on) and in the executing authorities. Overlap may be found only in the execution of destruction in civil and criminal proceedings as in civil procedures court bailiff may, and in criminal proceedings court bailiff is obliged to execute destruction as described below.</p> <p>In customs procedures: in the application of the simplified procedure if the alleged infringer agrees to or does not expressly oppose the destruction, the destruction is ordered and supervised by the <i>customs authorities</i>. Currently there is an on-going discussion about the prevalence of criminal proceedings over the simplified procedure, i.e. the practical applicability of the simplified procedure if the conditions of launching criminal proceedings are also met.</p> <p>In civil proceedings: in case no agreement is concluded and the infringement is established by the court, the court may order the destruction of goods. Practice shows that courts usually oblige the <i>defendant</i> to destroy the goods that are still in his/her</p>

	<p>possession; otherwise the destruction is executed by the <i>court bailiff</i> if the defendant does not comply with the court's order in time or if the goods in question had been previously seized and are out of the defendants' possession.</p> <p>In criminal proceedings: in every criminal case where it is established that the goods in question are counterfeit or pirated products, the court orders the <i>confiscation</i> thereof. If the confiscated goods infringe IPRs, their destruction is ordered as well. Infringing goods may not be returned to the defendant even if the defendant is not convicted (e.g. because he has not committed the criminal act intentionally etc.). The destruction is executed by the <i>court bailiff</i>.</p>
Ireland	
Italy	<p>In civil proceedings the destruction of goods is provided for as a <i>civil sanction</i> that the injured party should specifically ask for. While in criminal and administrative proceedings it may be ordered by the competent court/administrative board on its own. According to Italian Criminal Code, it is always ordered the <i>expropriation</i> of the goods which were used or were aimed to perpetrating the crime and of the goods that represent the object, the product, the price or the profit of the crime, regardless of their provenience, except for the rights of the offended person to the restitution and the compensation for the damages. In case of an impossibility to apply the measure referred to in paragraph 1, paragraph 2 states that the judge may order the expropriation of the goods possessed by the offender having a value corresponding to the profit resulting from the crime.</p>
Latvia	<p>There are differences in procedural terms, regarding the person/authority who takes care of the destructions. The <i>major number of destructions</i> is made in Customs cases. Customs destroy the goods in the presence of IPR owner and, where appropriate, in the presence of the declarant or holder of the goods in cases of simplified destruction according to Article 11 of EC Regulation 1383/2003 or in cases when goods are confiscated according to provisions of the Code of Administrative Penalties.</p>
Lithuania	<p>No essential differences between destruction of goods in customs, civil and criminal proceedings.</p> <p>However, customs authorities may apply the <i>simplified procedure</i>.</p> <p>In civil or criminal proceedings the goods can be destroyed just after court decision enters into force acknowledging the goods as manufactured infringing intellectual property rights.</p> <p>Yes, there is an overlap between destruction of goods in civil proceedings and in customs proceedings in a sense that the goods are destroyed by the actions of authorized state officials.</p>
Luxembourg	<p>Like in Belgium and the Netherlands, in the framework of criminal proceedings in Luxembourg, the courts may not order the confiscation and destruction of counterfeit goods when the defendant is not convicted (e.g. because he was in good faith).</p>
Malta	<p>Most provisions relating to customs are administrative in nature, the proceedings that need to be filed to enforce such provisions are civil in nature.</p> <p>In this regard, the proceedings in such scenarios as well as those scenarios which are <i>purely</i> civil in nature (and not involving any imported/exported goods or goods in transit) are practically identical.</p>

	<p>The main differences therefore need to be assessed in respect of Civil proceedings on one hand and Criminal proceedings on the other.</p> <p>In civil proceedings the destruction of the infringing goods is one of the remedies available for right holders who wish to take action against breaches of their intellectual property rights. It is a right which is in addition to the normal avenues for obtaining a remedy (damages claims and all such other relief as may be available in particular) and may at times be of invaluable importance to the rights holders (sometimes being more important than obtaining damages for such infringements).</p> <p>In criminal proceedings, the order for destruction of the goods is usually done as a punitive measure (and also to act as a deterrent).</p> <p>In practical terms the only practical difference in the destruction of the goods in Civil and in Criminal proceedings relates to costs.</p> <p>As already pointed out above, the Court proceedings which need to be initiated by right-holders under both this legislative instruments are civil in nature and are therefore practically identical.</p> <p>In transshipment cases the defendant is usually unknown. It is therefore very common in these types of cases for curators to be appointed by the Court to represent such absent persons and for the <i>Plaintiff to incur the costs of destruction</i>. This is opposed to those cases where the defendant is known and is ordered to pay for such costs him/herself.</p>
<p>Netherlands</p>	<p>In civil and criminal proceedings, the goods can only be destroyed if the claim of destruction is awarded by judgement.</p> <p>In the framework of criminal proceedings, like in Belgium the destruction of goods is considered to be a penalty and can only be imposed on a defendant who has been convicted. Hence, the criminal courts are not able to order the destruction of the goods when they have established that the goods are counterfeit but the defendant is not convicted (for example because the court is not convinced that the defendant was aware of the infringing nature of the goods).</p> <p>Only in customs proceedings it is possible, pursuant to article 11 of the Regulation, to destroy infringing goods without any judgement. If infringing goods are intercepted, the customs authorities will notify the recipient of the goods. If the recipient does not reply, the goods are considered to be infringing and therefore can be destroyed.</p>
<p>Poland</p>	<p>Customs proceedings: destruction may occur when the matter is settled and the infringing party is obliged to file a motion to the Customs office to destroy the goods infringing upon IP rights or when a court prescribes the forfeiture of physical evidence for the benefit of the State Treasury.</p> <p>In civil proceedings: the court may, at the right-holder's request, decide on unlawfully manufactured or marked products. In</p>

	<p>particular, the court is able to declare in its judgment the destruction of the goods.</p> <p>In criminal proceedings, destruction may occur when the court prescribes the forfeiture of physical evidence for the benefit of the State Treasury.</p> <p>The three above-mentioned types of procedure are all different and do not overlap one another.</p>
<p>Portugal</p>	<p>Customs procedure: Possibility of having goods being destructed outside a court decision with no need to determine whether there was or not an infringement of an intellectual property right. This destruction of goods not yet proven to be counterfeit can only be performed with a written agreement between the right holder and the goods owner within the term of 10 working days. It's possible to have a destruction of goods without the express consent of the goods owner, assuming his agreement, in case we have a request by the holder of the violated intellectual property rights and the goods owner does not opposes such request within the term indicated.</p> <p>To be noted that the European Parliament approved the new Customs Regulation concerning customs action against goods suspected of infringing certain intellectual property rights. This new instrument will enter into force on 01 January 2014 and will replace the Regulation nº 1383/2003. In this new instrument the rules on the destruction of seized counterfeiting products are clarified and under certain conditions, goods suspected of infringing an intellectual property right may be destroyed under customs control, without there being any need to determine whether an intellectual property right has been infringed. The new regulation will also establish a procedure for the destruction of goods in small consignments.</p> <p>The procedure of destruction in civil proceedings <i>is not regulated</i> as such. In case of criminal proceedings, the infringing goods are seized, they hence become property of the state and the destruction will take place in the presence and under signed confirmation of a committee constituted for taking over and destroying the goods. In case of customs proceedings: procedure described at criminal proceedings applies, except for bearing the costs.</p>
<p>Romania</p>	<p>The procedure of destruction in civil proceedings <i>is not regulated</i> as such. As well, there is not a relevant case-law in this respect. However, based on the civil decision enforcement procedure, the infringer shall normally destroy the goods by himself, ordering the enforcement preceding the right owner can be authorized by the court to destroy the goods in the name of the infringer and on his expenses.</p> <p>In case of criminal proceedings, the infringing goods are seized, they hence become property of the state and the destruction will take place in the presence and under signed confirmation of a committee constituted for taking over and destroying the goods. In this case there is no transparency of the destruction process in relation with the right owner who is not informed about the process. In case that the infringing goods are seized by the state based on other infringements of the law but the counterfeiting crime, then there is the risk that the state through the Ministry of Finance to sell the counterfeited goods. In the criminal proceeding there are no costs for storage and destruction to be charged to the right owner.</p> <p>In case of customs proceedings the right owner supports the costs in relation to the customs. The right owner is entitled to</p>

	<p>contract directly with the destruction service provider the necessary service. In this case the customs authorities inform the right-owner about the date, location and quantities of products which are to be destroyed. Thus, the right owner can be in the control of the process. This transparency of the process must exist in relation with all types of destructions.</p>
Slovakia	<p>Destruction is ordered by the court. In criminal proceedings, destruction is ordered by the presiding judge; in pre-trial proceedings, it can be ordered by the prosecutor or police officer.</p> <p>According to Regulation 1383/2003 there are two situations where the goods can be destroyed:</p> <p>So called “simplified procedure” – the imported goods are destroyed without court decision that the goods are infringing IPR. Destruction is carried out under customs supervision and under the responsibility of the right-holder.</p> <p>There is a court decision confirming that the imported goods are infringing IPR - customs office can decide on destruction of the goods. Destruction is carried out by holder of the goods (infringer) under customs supervision.</p>
Slovenia	<p>Differences in destruction of goods in criminal, customs and civil proceedings are mostly related to the question, which authority is competent to carry out destruction of goods in certain procedure:</p> <p>Criminal proceedings: destruction is performed by a competent court or an authorised executor;</p> <p>Customs proceedings: destruction of goods is performed by a competent customs office or by the infringing party under supervision of the competent customs office.</p> <p>Civil proceedings: in civil proceedings, destruction of goods partly overlaps with both of above stated possibilities, <i>depending on which authority had seized the infringing goods</i>. If goods to be destroyed were seized by customs office and if the infringed right holder enforces his rights, the same customs office is competent to destroy respective goods. Goods seized by other authorities (police, inspection services) are to be destroyed accordingly to the rules of destruction in criminal proceedings.</p>
Spain	<p>In customs proceedings, when the importer does not reply to the cease & desist letter sent by the intellectual property right holder, the destruction of goods is carried out by the customs authorities.</p> <p>In civil and criminal proceedings, the destruction must be ordered by the Court.</p>
Sweden	<p>Destruction both criminal and civil proceedings require a court ruling that establishes infringement. <i>In addition, in criminal</i></p>

	<p>proceedings the prosecutor has discretion to decide that goods should be destroyed. This happens if the IP crime is not brought to court, such as after a waiver of prosecution or when the prosecutor issues a summary punishment or a corporate penalty fee.</p> <p>In criminal proceedings the main rule is that the infringing goods should be <i>destroyed</i>, unless it is apparently unfair, whilst the court has a <i>wider discretion in civil proceedings</i> to order the appropriate measures to be taken with the goods, such as destruction, amendment, recall etc.</p> <p>In customs proceedings, however, the customs may destroy the goods upon suspicion of infringement and consent by the importer, without the infringement being established in a court ruling.</p>
<p>United Kingdom</p>	<p>There is <i>no difference</i> between destruction of goods in customs, civil and criminal proceedings.</p> <p>Trading Standards authorities and the Police have power to seize goods and/or or to bring criminal prosecutions for:(i) trade mark infringement under ss 92 & 93 of the Trade Marks Act 1994; and</p> <p>(ii) copyright infringement under s 107 of the Copyright, Designs & Patents Act 1988.</p> <p>The Proceeds of Crime Act may also be used to trace and confiscate the defendant's assets.</p> <p>The Police also have power to search premises for infringing goods in certain circumstances.</p> <p>Trading Standards authorities and the Police may act on their own initiative or in response to complaints. On discovering traders dealing in infringing goods, Trading Standards or the Police will seize the goods and try to obtain supplier information (which is notoriously difficult to obtain). Retailers may be formally warned or, in serious or repeat cases, a criminal prosecution may commence.</p> <p>The right to bring a private prosecution is a historical right enshrined in UK case law and preserved by section 6(1) of the Prosecution of Offences Act, 1985. However, the Magistrates Court may refuse to issue a summons if the claim is frivolous, vexatious or abusive.</p> <p>Further, the Director of Public Prosecutions can take over conduct of any case.</p> <p>A private prosecution may be cheaper and quicker than a civil action. In particular, there is no risk of liability to pay the accused's costs (unless the action was abusive) and the costs of a private prosecution can be recovered from central Crown funds. The trade-off is that the rights owner will not be able to recover any damages (although it may be able to share in a confiscation or compensation order), there is no interim relief (although this may not matter if goods have been seized), and it is not possible to withdraw from the prosecution unless it is in the public interest to do so (and so the case cannot be settled part way through). The rights owner will have to prove its case beyond a reasonable doubt in a private prosecution, and there are broad disclosure requirements on the rights owner, but very limited requirements on the defendant.</p>

	<p>Most of the offences are triable either way (i.e. in the Magistrates Court or Crown Court). The sentence for the main offences is up to 6 months imprisonment and/or a maximum of £5,000 fine on summary conviction and up to 10 years' imprisonment and/or an unlimited fine on indictment.</p> <p>It is possible to bring civil and criminal proceedings at the same time. Although, the civil proceedings will normally be stayed pending completion of the criminal action (so that the prosecution cannot benefit from the wide ranging disclosure available in civil claims). Urgent interim relief through the Civil courts can generally be obtained at the same time as a criminal action.</p> <p>In the UK, recent court decisions have made clear that criminal prosecutions should be reserved for the most serious and clear cases of infringement, such as counterfeiting of goods (see <i>Nottinghamshire County Council v Woolworths plc</i> [2007] FSR 19). Conversely, the courts have stated that the Chancery Division of the High Court will be the appropriate forum for complex IP/copyright cases (see <i>R v Higgs</i> [2008] All ER (D) 318; <i>R v Gilham</i> [2009] EWCA Crim 2293). [NOTE: Less complex/lower value IP cases can also now be brought in the Patents County Court]</p>
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COUNTRY	4.2. Destruction. <i>Who bears the costs of destruction, including possible supervision costs (bailiff, customs authorities, etc.)? Who bears the costs of the storage? Is the situation different when court proceedings are directed against good-faith intermediaries/service providers (Are there any precedents in this respect)?</i>	4.3. Destruction. <i>Have there been any particular reasons invoked by the infringers for not paying the costs of the destruction?</i>	5.1. Principle of proportionality. <i>In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. Has there been any interference with this principle (e.g. case-law)? Have there been cases when recall or destruction have been deemed disproportionate?</i>
Austria	<p>Civil and criminal proceedings: If the motion is granted, the failing defendant has to bear the costs of destruction (there is no supervision provided). The failing party has to pay the costs of storage due to a preliminary injunction or a seizure securing</p>	No.	<p>In particular in copyright cases, copies shall not be destroyed merely because the statement of source is lacking or is not in compliance with the law.</p> <p>In particular in trademark cases, the</p>

	<p>the destruction.</p> <p>Good-faith-intermediaries/ISPs: No difference in criminal copyright cases, but the articles and devices must be used exclusively or primarily for unlawful purposes! In trademark and patent cases the infringer will have to bear the costs, not the good-faith intermediary/ISP, if there is no evidence of his status as co-infringer.</p> <p>As far as we can see and from what has been published, there are no precedents in this respect in Austria.</p>		<p>removal of the trademark from the article is only sufficient, if another approach may lead to a disproportionate disadvantage for the infringer.</p> <p>As far as we can see and from what has been published, there are no precedents in this respect in Austria. Nevertheless, the cited provisions offer the possibility to consider the principle of proportionality.</p>
<p>Belgium</p>	<p>A distinction has to be made between the different types of proceedings:</p> <p>(i) In civil proceedings, <i>the infringer</i> bears the cost of destruction, unless particular reasons are invoked for not doing so. The destruction is ordered without prejudice to any damages due to the right holder: <i>the cost of destruction cannot be set off against the damages due to the right holder</i>. Consequently, legal scholars agree that <i>the damages due to the right holder cannot be indirectly reduced by ordering the right holder to bear part of the cost of destruction</i>. The defendant's good faith is usually not a valid defence in this regard. Of course, good-faith defendants, when being ordered by the court to bear the destruction and storage costs, may claim the reimbursement of these costs against the supplier, producer of the goods, etc. In practice, <i>settlements are very often reached with the right holder in those cases when the lawsuit has been filed against intermediaries</i> (the right holder usually</p>	<p>In civil proceedings, the infringer must bear the cost of destruction, unless particular reasons are invoked for him not to do so, as provided under the Directive. However, to date there is no case law brought to our knowledge on this point. In practice, good-faith intermediaries usually claim that they should not be ordered to support storage and destruction costs. However, good faith is normally not a valid defence in IPR-infringement cases. The courts usually consider that it is up to the defendant to claim these costs back from their clients (in the case of service providers), suppliers, etc.</p>	<p>The court will generally take into account the <i>end consumers' interests and reject claims for a market recall directed against end consumers</i>, provided that such consumers acted in good faith.</p> <p>Moreover, in civil actions, corrective measures can only be ordered when claimed by the claimant. The court cannot order such measures on its own initiative. Regarding the materials and implements principally used in the creation or manufacture of infringing goods, corrective measures can only be ordered <i>in appropriate cases</i>. There is no guidance in the case law on the interpretation of what constitutes an <i>appropriate case</i>.</p>

	<p>accepts to support the storage and destruction costs provided that the good-faith defendant accepts not to dispute the infringement and to abandon the goods. There have been several recent instances of such settlements in the case law of the Antwerp Courts, for instance, in the purview of patent infringement proceedings against shipping agents).</p> <p>(ii) In criminal proceedings, the cost of destruction is usually supported by the Exchequer. However, when the destruction is ordered by the Public Prosecutor or Investigating Magistrate, he/she can order that the costs are borne by the owner, the holder or the addressee of the goods, or by the right holder (Article 13 of the Law of 15 May 2007).</p> <p>(iii) In customs proceedings, the <i>right holder</i> bears the cost of the destruction in first instance (i.e. vis-à-vis the public authorities). However, the right holder can always file a recursive action against the infringer to <i>recover this cost or conclude a settlement</i> with the latter in this regard.</p>		
Bulgaria	<p>The destruction and storage cost must be borne by the state within criminal proceedings.</p> <p>In civil proceedings the costs incurred can be claimed by the plaintiff and are ruled with the court's decision on the merits.</p> <p>There is no case law with regard to good-faith intermediaries/service providers</p>	No.	No.
Croatia	In the civil proceedings the defendant is	In some customs cases, right-holders	No, there was no such case law.

	<p>ordered to bear the costs of destruction by himself, if it is finally established that he has infringed the legitimate rights of the plaintiff. Of course, if the plaintiff is adversely affected by the legal proceedings, the defendant may claim compensation of all the costs, and also compensation of damages, but in a separate procedure. If the offender is a company that is not active any more, the cost will be borne by the right-holder.</p> <p>In customs cases, the one who applies for destruction bears all the costs of the destruction. However, parties may sign a written agreement regarding destruction and also regarding bearing the costs.</p> <p>In customs proceedings, before July 1, 2013, the right-holder was responsible for the costs of the storage. From July 1, 2013 onwards, the owner of the goods is responsible for the costs of the storage.</p> <p>There are no precedents that would treat the situation differently when court proceedings are directed against good-faith intermediaries/service providers.</p>	<p>initiate destruction and cover costs of the destruction through simplified procedure of the destruction. In some other cases, if the infringer is a company that is not active any more, the right-holder bears the costs of the destruction.</p> <p>In civil proceedings, if the defendant is adversely affected by the legal proceedings he has to bear the costs of fulfilment of his obligation established by the final court decision. However, if the court establishes the existence of special reasons, it may not do so.</p>	<p>However, right-holders usually organize joint destructions to reduce destruction costs.</p>
Cyprus			
Czech Republic			
Denmark	<p>Once it has been established in court proceedings that an infringement has in fact taken place, the costs for the possible storage of the goods during the proceedings and/or the subsequent destruction, if claimed by the rights holder, shall be borne by <i>the defendant</i>, unless particular reasons are invoked for not doing so.</p> <p>In customs proceedings, <i>the rights holder shall bear all costs related to storage and</i></p>	<p>To our knowledge, there have not been any published cases.</p> <p>From other cases we know that alleged <i>good faith</i> is sometimes invoked by infringers as an argument for not paying the costs of destruction.</p>	<p>To our knowledge, there are no published Danish precedents in which the principle of proportionality has been invoked or applied in regards to recall of products/goods from the channels of commerce or destruction.</p>

	<p><i>destruction of the infringing goods/products and other related measures which need to be taken, but the rights holder can request to have the costs covered by the infringer as an ordinary damage claim.</i></p> <p>To our knowledge, there are no precedents showing whether good faith intermediaries/service providers in court proceedings can be required to cover the destruction and storage costs.</p>		
Estonia	<p>In case of customs proceedings, the destruction costs shall be born <i>by a person who was responsible for the occupation of the goods by customs.</i></p> <p>In case of criminal and misdemeanour proceedings, the costs of destruction of confiscated goods shall be born <i>by the convicted</i>; the costs of destruction of evidence shall be born by state</p> <p>In civil proceedings: at the expense of the <i>infringer</i> unless it would be. The costs related to the <i>transport, storage, and guarding of seized property and other costs related to the preservation of the property</i> are considered as enforcement costs (also for the <i>infringer to pay</i>).</p> <p>The <i>bailiff</i> may, by a decision, demand that a <i>claimant</i> (i.e. rights holder) make an <i>advance payment for particularly high enforcement costs</i>, such as costs related to the <i>transport, storage</i> etc.. If the enforcement costs are</p>	<p>No information.</p> <p>At the same time, we can assume that such reasons may be mainly economic and financial.</p>	<p>No relevant civil court practise available regarding the destruction, recall and definitive removal from the channels of commerce in Estonia.</p>

	<p>collected from the infringer in full, the bailiff shall return the advance payment of the enforcement costs to the claimant (if, enforcement costs have not been collected from an infringer, a bailiff shall repay to the claimant <i>at least half of the advance payment</i> of enforcement costs paid by the claimant).</p> <p>In this situation, one of the legal questions is whether the bailiff is entitled to ask from the claimant also the pre-payment of destruction costs in case of <i>destruction at the expense of the violator?</i></p> <p>The situation may be <i>different</i> when court proceedings are directed against <i>good-faith intermediaries/service providers</i> but there is no relevant court practice (precedents).</p> <p>It should also be noted that <i>acting in good faith does not directly reduce the liability of infringer</i>. A person who has obtained a pirated copy in good faith has the right to file an action in court against the person who sold or transferred the pirated copy to that person.</p>		
<p>Finland I. Finland II.</p>	<p>I. If the destruction is ordered in criminal proceedings the state pays for the destruction.</p> <p>If the destruction is ordered by the court in civil proceedings, the main rule is that the <i>infringing party</i> is obliged to bear all related</p>	<p>I. The reasoning usually given by the infringer is that the infringer does not have any assets to pay costs of the destruction or the infringer is of the opinion that the right holder's claim is unjust.</p> <p>Especially in transit shipments stopped</p>	<p>I. Not aware of any such case-law.</p> <hr/> <p>II. The principle of proportionality is recognised as a general principle of law that should be taken into account.</p> <p>We are not aware of any cases where recall/destruction would have been found</p>

	<p>costs but normally only the destruction claim (or alternatively removal of the infringing trademarks if possible) is made in proceedings. So far there is no legal praxis on the responsibility of the warehouse costs in IPR infringement cases.</p> <p>If court (civil) proceedings are directed against good-faith intermediaries/service providers like forwarding agents, it is likely that the court will order the goods to be destroyed under supervision of the officials but will most likely not order the good-faith intermediaries / service providers to pay for the destruction.</p> <p><i>Precedent from the Supreme Court:</i> forwarding agent was not found to be liable for the trademark infringement but the infringing products were clearly found infringing and were ordered to be destroyed. The court did not order specifically on the responsibility of the destruction costs but since it was a civil infringement case in praxis the execution of the court order meant that the right holder had to pay for the destruction.</p> <hr/> <p>II. There are no provisions in the Finnish IP legislation on who bears the costs of destruction or costs of the storage.</p> <p>The respondent is liable to pay the necessary costs caused by the enforcement of the payment obligation or other obligation, for the transport, storage or sale of property or the</p>	<p>by the customs: foreign parties/entities are involved; it is therefore often impossible to execute the judgement by way of making the infringer to pay e.g. the destruction costs. This is especially the situation where the infringer is from a country where a Finnish court decision cannot be executed as no execution agreement exists between said country (e.g. Russia) and Finland. This is why the right holders may have to pay themselves for the destruction in order to have the judgements executed and the goods out of the warehouses.</p> <hr/> <p>II. We are not aware of any reasons of this kind; this has not been a particular problem.</p>	<p>to be disproportionate, however.</p>
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	<p>other enforcement measures taken. These are secondarily the liability of the applicant. Separate provisions apply to fees that are to be paid to the State as compensation for the costs of enforcement.</p>		
France	<p>The costs of recall and destruction are borne by the <i>infringer</i>.</p> <p>As nothing is mentioned in the IPC on the issue of storage, in practice, the Courts generally put the <i>burden on the claimant</i>.</p>	<p>We are not aware of any particular reasons invoked by the infringer.</p>	<p>Because of the <i>relative recentness of the law</i>, the French Courts have not yet had the possibility to consider the principle of proportionality in corrective measures orders.</p> <p>Therefore, we cannot mention any particular case law on the matter.</p>
Germany	<p>From an economic point of view it is the infringer who bears the costs of destruction. The exact legal basis for this depends on the type of case though:</p> <p>In a civil law case the claim for destruction is directed against the infringer; the infringer thus also bears the costs of destruction. Moreover, one court assumed that freight carriers and hauliers to whom a specific infringement of IP rights has been indicated, must consent to the destruction (without having to bear the costs). If they do not declare their consent, they contribute to the infringement as the so-called interferer (Störer) and thus can be subject to claims to bear the costs of the destruction for this reason (Störerhaftung) (Düsseldorf Regional Court InstGE 6, 132-136 re patent law).</p> <p>In criminal proceedings the convicted party must bear the costs of proceedings associated with the ordering of seizure and</p>	<p>As the obligation to pay the costs of destruction is a legal consequence of the responsibility for the infringement infringers typically deny that an infringement has taken place or that they can be held responsible for it.</p> <p>An alleged infringer may e.g. argue infringing goods were not ordered by him or meant for private use only (applies to industrial property only). With differences depending on the type of case (civil, criminal, customs), it is then up to the relevant person or authority to demonstrate and prove the alleged infringer's responsibility.</p>	<p>The principle of proportionality had existed in German law already before the Enforcement Directive was adopted. When transposing it the relevant provisions were adapted to the wording of the directive. Now when examining proportionality account must be given to the existence of an appropriate relationship between the severity of the infringement and the corrective measures ordered on the one hand and the interests of third parties on the other hand. Thus, no claim to destruction may be raised where the infringement can be removed by other means and the destruction would be disproportionate for the infringer or rights owner in individual cases.</p> <p>To assess proportionality <i>inter alia</i> the following factors must be taken into account:</p> <p>(i) Level of negligence of infringer or even</p>

	<p>its enforcement.</p> <p>Under customs law the rights owner, in his capacity as applicant, initially bears the costs; he may claim reimbursement against the infringer afterwards. The customs authorities assume no responsibility to bear the costs since they generally act upon application by the rights owner to enforce his – i.e. private – rights. Pursuant to the general principle of causation and to avoid the general public bearing the costs, the rights owner is obliged to advance the costs incurred by the customs actions and to assume the risk of not being able to get these costs reimbursed from the infringer.</p>		<p>intent of infringer</p> <p>(ii) Severity of the infringement (e.g. in copyright law most severe case: 1:1 copy, or in contrast <i>only</i> illegal adaptation; in trademark law: 1:1 copy or <i>only</i> confusingly similar trademark</p> <p>(iii) Comparison of the damage occurred for the infringer due to the destruction or re-call to damage occurred to the rights owner</p> <p>(iv) Other measures to stop infringement, which cause less damage to infringer</p> <p>The German Federal Supreme Court emphasized that in particular the destruction claim also serves an aim of general prevention with respect to other infringements of the same type. Therefore, <i>disproportionality</i> will only be held as an exception to the rule. In the specific case, the infringer acted with more than slight negligence. Therefore, the quite easy possibility to remove the infringement did not prevent the destruction claim from being proportionate.</p>
<p>Greece</p>	<p>In criminal proceedings, the costs of <i>destruction</i> are borne by the <i>police</i>; the costs of the <i>storage</i> are usually borne by the <i>IPR owner</i>.</p> <p>In civil proceedings, the <i>defendant</i> bears the costs of destruction; the costs of <i>storage</i> are usually paid by the <i>infringer</i>.</p> <p>In customs proceedings, the costs are paid by the <i>IPR owner</i>, <i>but may be recovered from</i></p>	<p>In customs proceedings, when the procedure of article 11 of the EC Regulation 1383/2003 is followed, the infringers usually refuse to pay the destruction fees.</p> <p>In civil proceedings, however, there haven't been any reasons invoked by the infringers for not paying the costs of the destruction.</p>	<p>There have not been any cases where the destruction of the infringing goods has been deemed disproportionate.</p>

	<p><i>the infringer</i>; it is the <i>infringer</i> who bears the <i>storage costs</i>.</p> <p>The situation is not different when court proceedings are directed against good-faith intermediaries/service providers.</p>		
Hungary	<p>In simplified customs proceedings, the costs of destruction shall be paid by the person who consented to destruction (destruction takes place if the customs authority bears the written consent of the declarant, the holder or the owner of the goods – or if his consent is deemed to be given). The customs authorities, however, require the right holder for the <i>reimbursement of the costs of destruction</i> if the person who gave his consent thereof or whose consent is deemed to be given does not pay for the actual costs of destruction within 15 day from the delivery of the notice thereof or the unsuccessful delivery of such notice.</p> <p>If the customs authorities notify the declarant, the holder or the owner of the goods of the expiry of the applicable time limit, the costs of storage or detention shall be paid by the right holder for a period of 2 days after the delivery of such notice – these costs shall be paid by the declarant, the holder or the owner of the goods from the 3rd day thereafter.</p> <p>In civil proceedings, if the infringement is established by the court, the court shall order the destruction <i>at the expense of the infringer</i>, except when it is justified otherwise by the circumstances of the particular case. In ordering the destruction, the court shall</p>	<p>Infringers usually claim that they have not ordered the infringing goods and/or have acted in good faith.</p>	

	<p>take into account the interests of third parties and shall ensure the proportionality of the measures to the seriousness of the infringement. Any other costs of the infringement proceeding (e.g. <i>storage</i>) shall be borne by the parties in line with the proportion of the fulfilment of their claims according to the order of the court. Under the general rules of civil liability if the infringement is established, the right holder can claim compensation for the <i>storage and destruction costs</i> as damages from the infringer. However, such claims cannot be filed against good-faith intermediaries under Hungarian law.</p> <p>In criminal proceedings the <i>State</i> shall cover the costs of storage and destruction (including supervision costs). If the defendant is convicted, he/she can be ordered by the court to pay the legal costs of the criminal proceedings, including, <i>inter alia</i>, the storage and destruction costs (including supervision costs). However, in practice, criminal courts rarely order the reimbursement of such costs (storage and destruction costs) by the defendant, even though the state is lacking in financial resources to cover them, thus the goods seized in criminal proceedings are often stored for several years after the order in question. This explains why the authorities sometimes contact the right holders for financial aid to cover the costs of destruction.</p>		
Ireland			
Italy	The costs of the destruction and storage of the infringing goods are borne <i>by the infringer</i> . <i>We do not have any specific</i>	No precedents.	There are some specific cases in which the destruction is considered disproportionate, while no exception is

	<p><i>precedents concerning good-faith intermediaries/service providers. However the only exceptions to the order of destruction regards the cases in which the destruction of the infringing goods «harms the national economy» and those in which the articles which constitute an infringement of IP rights belong to a person who is using them for personal or domestic purposes and likewise no further exception should be made also with regard to the costs of the destruction. In particular Article 124 IIPC, paragraph 6, lays down that <i>Articles which constitute an infringement of industrial property rights may not be ordered to be removed or destroyed, nor may their use be prohibited, if they belong to a person who is using them for personal or domestic purposes. In applying the sanctions, the judiciary authority takes into account the necessary proportion between the violations and the sanction, as well as the interests of third parties.</i></i></p> <p>The provisions for destruction and delivery shall not apply to infringing specimens or copies acquired in good faith for personal use.</p>		<p>made for recall.</p> <p>In the Italian case law see for instance: Court of Appeal of Milan, 8 April 1977, that did not grant the destruction order in a patent infringement case, <i>since the patent would have expired after two months</i>; and Court of Milan, 11 March 1996, whereby it cannot be ordered the destruction of contrivances employed for the infringement which are <i>capable of licit uses</i>.</p>
<p>Latvia</p>	<p>The costs for destruction of goods detained by Customs are supported the IPR owner.</p> <p>In civil cases: costs for destruction are borne the defendant. <i>Otherwise, these costs are borne by the plaintiff, who may subsequently claim them back from the defendant.</i></p>	<p>No.</p>	<p>No case law.</p>

	<p>The law <i>does not determine</i> who is supposed to support destruction costs in criminal cases.</p> <p>Costs for storage:</p> <p>In customs cases, they are supported by the <i>IPR owner</i>.</p> <p>In civil cases, they are <i>initially supported by the plaintiff</i>, who may subsequently claim reimbursement from the defendant.</p> <p>The law does not make any distinction on these issues between mala fide infringers and good-faith intermediaries/service providers.</p>		
<p>Lithuania</p>	<p>Corrective measures shall be carried out <i>at the expense of the infringer</i>, without compensating and taking into account proportionality between the seriousness of the infringement and the measure applied as well as the legitimate interests of third parties.</p> <p>Law on Customs: The subject of intellectual property rights shall cover the expenses of shipment to storage location, storage and destruction of detained or suspended goods.</p> <p>According to the Law on Customs of the Republic of Lithuania Article 86 Paragraph 3, if the court acknowledges that released and suspended goods are manufactured in infringing intellectual property rights, according to the application of the rights holder (if such was submitted) it can adopt</p>	<p>-</p>	<p>The case law regarding the principle of proportionality is limited.</p> <p>Furthermore, according to the Supreme Court, there can be <i>exclusive exceptions</i>, but simple removing of trademarks which have been affixed to the counterfeited goods without authorisation shall <i>not be regarded as effectively depriving the persons concerned of any economic gains from the transaction</i>. However, The Supreme Court of Lithuania does not provide the list or definition of the exclusive exceptions that could be deemed as application of proportionality.</p>

	<p>the decision to destroy the counterfeited or pirated goods by the expenses of defendant.</p> <p>There are <i>no precedents</i> in Lithuania when court proceedings are directed against <i>good-faith intermediaries/service providers</i>.</p>		
<p>Luxembourg</p>	<p>The infringer bears the costs of the corrective measures, unless specific reasons are opposed.</p> <p>It can be assumed that the <i>costs of the storage are part of the costs of the corrective measures</i>, but there is no case law on this subject.</p> <p>Concerning good-faith intermediaries/service providers, there is no case law either.</p>	<p>There is no significant case law yet concerning corrective measures.</p> <p>Before the implementation, there have been very few cases where the right holder requested the destruction of the infringing goods. The destruction was only ordered in cases where the goods had been seized and/or were still in possession of the infringer.</p>	<p>In a case concerning copyright infringing design furniture, the right owner had requested that the defendant should recall and put the infringing goods which had been sold at his disposal in order to have them destroyed.</p> <p>The defendant had argued that his former clients who bought the infringing goods were protected by article 2279 of the Civil code which provides that in matters of personal property, possession of the goods equals property of the goods.</p> <p>The court dismissed the recall of the infringing goods in its judgment of 17 November 2009 simply stating that the defendant could not put the infringing goods at the disposal of the right owner because they were no longer in his possession.</p> <p>In this case, the court did not examine the claims in the light of the new Article 77 of the Copyright Act. Nevertheless, it can be assumed that in the future the courts will presumably continue to refuse</p>

			recall or destruction of goods that are in the possession of end consumers, deeming such measure disproportionate.
Malta	<p>In Civil proceedings (<i>including Customs</i>) all such costs are theoretically incurred by the defendant. Having said that, in various cases (transshipment cases being the most predominant), the defendant is unknown, it is the plaintiff who would incur such costs.</p> <p>Despite this, most right holders decide to go through with such proceedings in any case because the costs might be greater if the infringing goods are placed on the market.</p> <p>In Criminal proceedings, it is the accused who is ordered to pay for all such costs. That being said, it is in the Court's discretion whether to choose this option or else force the Government to incur the costs.</p> <p><i>In certain exceptional circumstances, the right-holder may even volunteer to incur all such costs himself (to expedite matters and ensure that the goods are ordered for destruction by the Court). To achieve this result however, the accused must consent to such request (since in criminal matters the issue of 'intent' plays a crucial role, and the accused might wish to contest the matter all the way). If the accused consents to such request by the right-holder, the goods can even be destroyed pendente lite.</i></p> <p>Concerning Good-faith intermediaries, not</p>	<p>The most common reason invoked in this regard is that the infringer <i>did not know</i> that what he/she was doing was illegal.</p> <p><i>Of course such a plea is only relevant in Criminal proceedings (where the requisite criminal intent is necessary for the occurrence of an offence) or else where the element of good faith plays a role.</i></p>	Although there have been cases wherein the destruction of the goods was not ordered by the Court, this was not on the basis of lack of proportionality.

	<p>aware of any prior cases. <i>Theoretically</i>, if the person concerned proves his/her good-faith in the matter, he/she might have a good argument for the <i>partitioning and/or sharing of costs</i> to be ordered by the Court. We do not envisage the <i>good-faith</i> plea being effective enough to <i>exonerate oneself from the payment of any costs</i> (for destruction etc.) both in civil as well as criminal proceedings.</p>		
Netherlands	<p>The costs of destruction are borne <i>by the infringer</i>. The destruction takes place under supervision of a Dutch Bailiff, who will order the destruction to the infringer.</p> <p>Costs of storage are in principle borne by the holder of rights. These costs however, can be claimed from the infringer in legal proceedings. If the goods are proved to be infringing, the infringer will bear these costs.</p> <p>If court proceedings are directed against good-faith intermediaries/service providers, costs will (in principle) be borne by the holder of rights.</p>	Not that we are aware of.	The Dutch courts always consider the proportionality of each case. On the basis of this principle, recall and/or destruction has more than once been deemed as disproportionate.
Poland	<p>The provisions of Customs Border regulation 1383/2003 state that the <i>right holder shall also agree to bear all costs</i> incurred under this Regulation in keeping goods under Customs' control, <i>including possible supervision costs or storage</i>. The destruction is carried out at the right holder's expense and it is also the right holder's responsibility to ensure this.</p>	<p>According to our experience drawn especially from customs seizure matters, <i>infringing parties</i> in most cases eventually agree to bear the costs of destruction, supervision and storage as a part of overall settlement, the reasons for refusal being that the importer did not realise that goods are illegitimate, or the exporter supplied goods that were not indeed ordered, and</p>	<p>We do not have any experience drawn from civil matters (again, it needs to be emphasised that very often right owners decide not to choose civil proceedings), nor are we aware of any cases where recall or destruction have been deemed disproportionate by the court.</p>

	<p><i>However, it is possible to provide in the settlement agreement that the infringer bears the costs of destruction, supervision and storage, which arrangements customs accept.</i></p> <p>In civil proceedings, when the court rule on the infringement of a right and declares in its judgment the destruction of goods, the infringing party should, in principle, bear the costs of destruction.</p>	for these reasons it would be unfair for the importer (being innocent) to bear any costs connected with the destruction.	
Portugal	<p>The law does not contain any provisions regarding this matter.</p> <p>The costs should be paid by the losing party of the proceedings.</p> <p>If we are facing a situation where the goods have been destroyed without prior court analysis, then the costs have to be supported by the owner or holder of the goods.</p> <p>However, until this payment of these expenses is made by the infractor, the holder of the right who decided to initiate the judicial proceedings against the infringer, has to support such expenses and must request the court to include these amounts in the condemnation decision.</p> <p>No precedents have been revealed regarding this matter.</p>	No precedents.	No precedents.
Romania	For civil proceedings , the costs of	Yes, the good faith as reason for	The corrective measures are always

	<p>destruction are supported by the right owner, but he is entitled to ask the reimbursement of the cost from the infringer.</p> <p>For criminal proceedings, there are contradictory provisions:</p> <ul style="list-style-type: none"> - <i>on the one hand</i>, principle of the infringer bearing the costs; - <i>on the other hand</i>, costs are to be borne by the person or the company <i>from which the goods were seized</i> (which might be the same as the infringer and/or other holders of the goods – distributors etc.) or, in case this person cannot be identified, <i>by the holder of the goods</i> (which means the institution where they are stored – e.g. the Copyright Office, the Police etc.) In practice, the state supports the costs, having the right to ask the infringer to pay for all the expenses. <p>For customs proceedings, costs are to be borne <i>by the right holders</i>, having the right to ask the costs as damages from the infringer.</p> <p>The good-faith or the bad-faith of the infringer does not limit their liability for the damages related to the costs. However, there are civil solutions rejecting the claim of damages based on the good faith of the infringer.</p>	<p>rejecting any liability.</p>	<p>based on the principles of proportionality and/or size and effect of the infringement. Nevertheless, the courts cases show that the measure of destruction of the products is by default granted in relation with the counterfeiting products</p>
<p>Slovakia</p>	<p>The infringer bears the costs of the destruction. Costs of destruction and costs of storage according to Regulation 1383/2003:</p> <p>In case of “simplified procedure” destruction is carried out at the expense and under the</p>	<p>No.</p>	<p>No practical experience.</p>

	<p>responsibility of the right-holder. Cost of storage bears the right-holder.</p> <p>In case there is a court decision confirming that the imported goods are infringing IPR, destruction is carried out at the expense of the holder of the goods (infringer). Costs of storage borne by the holder of the goods (infringer).</p>		
Slovenia	<p>1. Customs proceedings: Costs of storage and preservation of goods during temporary retention, seizure of goods until finality of court decision or until destruction of goods, incl. costs of goods destruction, are borne by the person against whom the right holder initiated the procedure.</p> <p>There are, however, certain cases, in which the costs are borne by the right holder (i.e. if no law suit is filed within the statutory time limit or the law suit is withdrawn or the court dismisses the lawsuit or does not find for the plaintiff as well as in some cases where goods are to be destroyed).</p> <p><i>If costs are not paid within the given time by the person against which the right holder initiated the procedure they have to be paid by the right holder or the person who agreed to pay them in the written agreement on destruction of goods (i.e. owner of the goods or person having control over the goods).</i></p> <p>2. Criminal proceedings: Costs are attributed to the State Budget.</p>	<p>We have found no such reasons invoked by infringers.</p> <p>In our practice the <i>main problem</i> is the fact that <i>infringers are either non-existing companies</i> or, if they do exist at the time when proceedings are initiated, they are <i>liquidated very shortly after the initiation of proceedings</i>.</p>	<p>We did not find any example of a court's decision rendering destruction of goods inappropriate. But, we are aware of cases where such decision was indeed made (e.g. in case of counterfeit clothes the court considered the removal of the label to be sufficient).</p>

	<p>3. Civil proceedings: Different possibilities of destruction depending on the type of destruction, attribution of costs is possible in a manner described in point 1 or point 2.</p> <p>In one case the Court held that intermediary service provider (carrier) <i>cannot be held responsible, since he had no knowledge of the type of cargo being carried. NB: The case deals with the carrier's liability in general and not the costs as such.</i></p>		
<p>Spain</p>	<p>Neither the Civil Procedure Rules nor the Criminal Procedure Rules contain provisions regarding the costs of destruction and storage. <i>In practice, in civil and criminal proceedings, it is at the Court's own expense.</i></p> <p>However, the Law on Intellectual Property and Trade Mark Law establish that the destruction costs should be borne <i>by the infringer.</i></p> <p>According to article 11 of the Customs Border regulation 1383/2003, the destruction of the infringing goods is carried out at the <i>expense and under the responsibility of the right holder.</i></p> <p><i>The law does not differentiate between good and bad faith intermediaries.</i></p> <p>We are not aware of any case-law regarding court proceedings directed against good-faith</p>	<p>Amongst the three main IP statutes (Trade Mark Law, Patent law and Designs Law) which refer to the destruction of the infringing materials <i>only the Patent Law that state that an infringer may invoke well founded reasons for not paying the costs of destruction.</i></p> <p>Article 63.2 of the Patent Law is very broad because it simply states that the seizure and transformation of the infringing goods will be at the expense of the infringer, unless well founded reasons are invoked. The reason mostly invoked by infringers is <i>insolvency.</i></p>	<p><i>Only the Patent Law expressly refers to the principle of proportionality.</i></p> <p>Article 66.2(b) Patent Law states in connection with compensation states that when assessing the possible damages, the following factors, amongst others, must be taken into account: the <i>financial importance</i> of the patent, <i>duration</i> of the patent when the infringing act commenced, the number and <i>type of licences granted.</i> There are no particular cases regarding the disproportion of recall and destruction.</p>

	intermediaries/service providers.		
Sweden	<p>With regard to customs proceedings, the cost related to the destruction of the goods is always paid by the requestor. Both the RO and the infringer can request the destruction of the goods. This request is sent to the customs authorities that only supervise the destruction. The destruction of the goods is carried out by a third party who also charges the requestor for the destruction. Costs for destruction may subsequently be reclaimed from the infringer.</p> <p>Once infringement is established by the court, the defendant is liable for the costs for storage, destruction or other measures. This does not apply in criminal proceedings.</p> <p><i>It should be noted though that this position in Swedish law is not entirely clear. The main rule is that a defendant acting in good-faith is liable for the costs involved in corrective measures also in regard to costs for destruction and storage. There are no Swedish precedents regarding destruction costs for good-faith parties.</i></p> <p><i>As for storage and destruction in Customs cases, the right holder is responsible for such costs and must in his/her turn, direct a claim for compensation for such costs from the importer of the counterfeit products.</i></p>	<p>All corrective measures in respect of infringement are to be paid by the defendant.</p> <p>There have been no particular reasons invoked by the infringers for not paying the destruction costs.</p>	<p>So far only a few cases where the corrective measures and the need for proportionality has been subject for assessment in Swedish courts.</p> <p>In one case it wasn't considered obviously unreasonable to order several hard drives to be destroyed, since they had at least been used as means for the crime. One aspect which may have been of relevance for the outcome in that respect is that it is not possible, or at least very hard, to permanently erase information from a hard drive.</p> <p>If the product is no longer in the possession of the infringer, the general rule is that the entire amount that the infringer got paid for the copied goods can be deemed as forfeited. Purchasing costs for the counterfeit good can be considered when deciding whether or not it would be unreasonable to forfeit the gross profit. Usually deductions for the purchases are allowed. If the infringer is imposed with a liability, it does not automatically mean that the forfeiture of the goods is omitted or adjusted, it is however considered in the general assessment of "reasonability". In this case it wasn't considered obviously unreasonable to forfeit the amount.</p>

United Kingdom	<p>The infringer.</p> <p>Further, the practice direction to Part 63 of the Civil Procedure Rules provides that where an order is made by the court for delivery up, it should state that delivery up should be carried out at the expense of the infringer.</p>	No.	<p>There has not been any interference with this principle, nor have there been cases when recall or destruction have been deemed disproportionate. <i>Proportionality</i> is a <i>key feature</i> of the Civil Procedure Rules, enshrined in the overriding objective of enabling the court to deal with cases justly.</p>

COUNTRY	<p>6.1. Internet cases.</p> <p><i>Are corrective measures applied differently in case the goods have been sold over the Internet?</i></p> <p><i>Are there any practices for seizures of materials and implements used in the creation or manufacture of infringing goods which were subsequently sold over the Internet (e.g. seizure of personal computers used for piracy?)</i></p>
Austria	<p>There is <i>no difference</i> between goods which are sold offline and/or over the Internet.</p> <p>Seizures and destructions of personal computers are difficult, because in most of the cases the personal computer does not satisfy the juridical condition of an <i>infringing device intended exclusively or primarily for unlawful reproduction</i>.</p>
Belgium	<p>The same principles apply to goods that have been sold over the Internet. In appropriate cases, corrective measures can be applied to materials and implements principally used in the creation or manufacture of those goods. Confiscation of such materials and implements is also possible. The courts (typically the criminal courts) have occasionally ordered the seizure of personal computers and materials used to produce infringing goods subsequently sold over the Internet. The same applies with respect to devices intended to circumvent TPMs (mod-chips, etc.).</p>
Bulgaria	<p>No they are applied in the same manner. There have been cases of seizure of computer hardware used to distribute counterfeits on the Internet.</p>

Croatia	Legislation is applied the same way in case of the counterfeit goods sold over the Internet. However, some right-holders do not have "zero" tolerance policy so that affects the results of Internet purchased goods cases.
Cyprus	
Czech Republic	
Denmark	The corrective measures outlined in the above-mentioned acts <i>do not differentiate between products/goods being sold online or through traditional means of trade</i> . Moreover, there are, to our knowledge, no published Danish precedents where corrective measures have been applied differently in matters concerning goods/products sold online.
Estonia	There is no separate legal regulation regarding the corrective measures in case the goods have been sold over the Internet. The existing legislation applies similarly to all forms of sales. There have been criminal cases where the personal computers used for piracy (reproducing of pirated copies and selling those over the Internet) have been seized.
Finland I. Finland II.	I. We are not aware of any practices for seizures of e.g. personal computers used for piracy or other similar equipments. If personal computer is used for an act which constitutes a crime, in such case the computer may be ordered to be lost to the government. II. Corrective measures are equally applicable in cases involving online and offline infringements. For example, computers that have been used for piracy may be seized as well as infringing files destroyed. Orders of this kind have been issued in Finland.
France	The IPC doesn't mention any specific provision concerning the Internet, therefore the <i>general provisions on corrective measures will apply</i> . All the articles on corrective measure contained in the IPC (i.e. articles stated in question 1) state that the judge can order, at the request of the applicant, that infringing goods and materials used in the creation or manufacture of those goods to be recalled from the channels of commerce, definitively removed from the channel of commerce or destroyed. The IPC does not specify whether the goods were to be sold over the Internet or through <i>traditional</i> channel of commerce. Therefore, such difference is not present in French law.
Germany	No different rules for sales over the Internet . This also applies to the rules on seizures of materials and implements which are based on the Enforcement Directive .

	<p>Accordingly, seizures are possible where an item is owned by the infringer and is principally used for the infringing purpose. The burden of proof lies with the rights owner. Devices which can be used for multiple purposes (e.g. a personal computer) may present some difficulties in this regard.</p> <p>Article 26 of Regulation (EU) No. 608/2013 concerning customs enforcement of intellectual property rights foresees a special procedure for the destruction of goods in small consignments.</p>
Greece	<p>In case the infringing goods have been sold over the Internet, corrective measures are not applied differently.</p> <p>In criminal proceedings, the means used for the creation, manufacture or distribution of the infringing goods (i.e. personal computers used for piracy), are seized <i>ex officio</i> by the authorities.</p>
Hungary	<p>The same provisions and procedures as are applicable for goods <i>irrespective of their channels of distribution</i>.</p> <p>Pursuant to the relevant legislation in Hungary, seizure of infringing goods as well as implements and materials <i>exclusively or principally</i> used in infringing activities may be ordered – even if they are not in the possession of the infringer, but the owner knew or had reasonable grounds to know about the infringement.</p> <p>Otherwise, we are not aware of any other relevant practices for seizures of materials and implements used in the creation or manufacture of infringing goods which were subsequently sold over the Internet.</p>
Ireland	
Italy	<p>No different rules for the Internet.</p> <p>In Italian case law there are no specific practices for seizures of materials and implements used in the creation or manufacture of infringing goods sold over the Internet. Therefore, it has to be concluded that, in such cases, general practices apply.</p>
Latvia	<p>The statutory provisions do not distinguish between goods that have been sold over the Internet and other goods. No case law on this point.</p>
Lithuania	-
Luxembourg	No case law.
Malta	<p>No difference in the corrective measures that apply in the case of goods which have been sold over the internet. Once those goods reach Malta (either as a final destination or a transit zone), the normal customs procedures (as well as subsequent civil proceedings) would take place.</p> <p>Practices for seizures of materials and implements: no practices which are tailor-made for such instances. In such cases the normal practices would generally apply.</p>
Netherlands	<p>In principle not. <i>Preliminary measures (without the hearing of the infringer) however, are more likely to be granted if the goods have been sold over the Internet.</i> One reason for that is the velocity of stock turnover that can be reached</p>

	<p>with selling over the Internet.</p> <p>The seizure of personal computers is <i>not allowed except in the event that there is infringing software installed on the personal computers</i>. This has recently been confirmed by the District Court of Haarlem on 8 January 2010 in interlocutory proceedings (Silver Holding vs. Siemens).</p>
Poland	<p>We have not observed any crucial differences.</p> <p>If the infringing activity consists of manufacturing (as opposed to trading in) infringing goods, then the police also seizes the materials, equipment and tools used in the unlawful activity.</p>
Portugal	<p>There are no special provisions, on this regard, in case of goods sold through the Internet.</p> <p>Also, up to the present date, no precedents have been revealed regarding this matter.</p>
Romania	<p>There are no differences provided for by the legislation in force in this respect.</p> <p>Also, the practice did not prove any discrimination.</p>
Slovakia	<p>No different practices in internet cases.</p>
Slovenia	<p>No difference in application of corrective measures in cases where goods were sold over the Internet.</p> <p>In publicly available case law, we have found no cases on the respective issue.</p>
Spain	<p>No special rules for the Internet.</p> <p>The seizure of personal computers used for piracy and any CD/DVD duplicators and “burning” machines used to carry out the infringing conduct is a common practice.</p>
Sweden	<p>IP laws contain seizure of accessories which were used in the manufacturing of infringing goods. These provisions have not been changed due to IPRED.</p> <p>The court must make a proportionality assessment when deciding on seizures.</p>
United Kingdom	<p>No.</p>

Annex II

Destruction

Infringing goods should normally be **destroyed**. The reason for this is that the infringer should not retain any advantage from his/her illicit activity and shall thus not be able to put the products on the market after having removed infringing items (e.g. trademarks) from the product, since that could contribute to the infringers business or finance payment of damages.

The destruction of the infringing goods and of the contrivances specifically employed for the infringement should thus be considered the normal outcome of all the legal proceedings in which an IPR infringement has been ascertained, unless the IPR owner does not ask for this measure or the application of the principle of proportionality deems it unreasonable. This would also be in line with the principle in Council Regulation 1383/2003 concerning the handling of products found to be infringing products.

Recommendations:

Therefore it must be clearly stated that any legal proceedings that ascertain the accomplishment of an infringing activity should **order the destruction of the infringing goods and of the contrivances specifically employed for the infringement as a general sanction for the infringing activity**, unless otherwise claimed by the IPRs holders or if found unreasonable by a proper application of the principle of proportionality.

It should also be considered the **possibility of ordering an earlier destruction of the infringing products/contrivances**, by introducing a system like the **simplified custom procedure, that should** be provided for both in civil and criminal proceedings, in the latter at least when the infringement is established, **even if the defendant is not convicted for other reasons** (in particular, because he was not aware of the infringing nature of the products). In civil cases the situation can be that the infringer has admitted to the infringement but contests the damages, which can result in lengthy court proceedings. In any case the **destruction should be carried out by a service provider under bailiff's supervision or by the infringer him/herself under the IPRs holder control** or requesting the services of a notary in order to certify the compliance.

The principle of proportionality should be specified, in order to make it clear that **for no reason the infringing materials cannot reach the market again** and that therefore the destruction could be avoided, unless otherwise agreed on with the IPR holder or in the case of it being unreasonable.

Costs

In most Member States, at least in civil proceedings, the costs of destruction, including bailiff's services and storage costs, have to be paid first by the right owner, who then has a claim for reimbursement from the infringer. However this reimbursement is very hard to be obtained, also because practice has shown that the infringers are often companies which are liquidated very shortly after an initiation of proceedings. In criminal cases, the general rule seems to be that the state bears the cost for storage and destruction.

Recommendations:

The **issue of the costs for the storage and destruction** should be specifically addressed, in order to avoid that these costs be borne by the IPRs holders and instead that these cost be borne by the infringer. Among the measures aimed at ensuring that the IPRs holders are able to recover the costs of the storage and destruction of the infringing goods, it should be admitted that at an early stage of the proceedings the assumed infringer should be asked to put a **financial warranty** for said costs, on the grounds of a prima facie evidence of infringement. Such financial warranty should also be possible to

request from the shipping agent, in case the name of final recipient, i.e the infringer, is not known. This warranty should be put in particular in **transshipment cases** where the infringer is a foreign entity, especially when the infringer is incorporated in a country with which there is **no bilateral (reciprocity) agreement on the recognition and enforceability of judgements**. **Good faith should not be normally considered a valid defence for the infringer** for not paying the costs of destruction, since it should be up to the defendant to claim these costs back from their suppliers or clients (in the case of service providers). For this reason, the destruction should therefore be ordered against **all the parties involved in the infringing activity, including holders and intermediaries**.