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**CORRIGENDUM:**

This document corrects document SWD(2020) 166 final of 12.08.2020

Modifications on pages 3 to 9 and pages 22 to 38.

The text shall read as follows:

**COMMISSION STAFF WORKING DOCUMENT**

**Report on the functioning of the Memorandum of Understanding  
on the sale of counterfeit goods on the internet**

**REPORT ON THE FUNCTIONING OF  
THE MEMORANDUM OF UNDERSTANDING ON  
THE SALE OF COUNTERFEIT GOODS ON THE INTERNET**

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# 1. INTRODUCTION

The sale of counterfeit and pirated goods (hereinafter referred to as ‘counterfeit goods’) continues to be a serious problem.

Counterfeit goods seek to deceive consumers, not least as to their value and quality. Counterfeiters used to target luxury fashion goods. Today, this trend has changed and the range extends to technologically advanced goods, as well as the simplest everyday ones, such as cosmetics, toys, electronic components, food and drinks, pharmaceuticals and vehicle parts<sup>1</sup>. In some cases, the impact on the health and safety of consumers can be significant<sup>2</sup>. Analysis of RAPEX (rapid alert system)<sup>3</sup> alerts shows that many recorded dangerous counterfeit goods, such as toys, involve serious risks<sup>4</sup>. The recent surge of counterfeit Covid-19-related personal protective equipment, pharmaceutical, healthcare and sanitary products, e.g. face masks and test kits, has shown how counterfeit goods can be detrimental to health<sup>5</sup>.

The sale of counterfeit goods can lead to important negative economic consequences for European companies, including revenue loss and a drop in employment<sup>6</sup>, as well as damage to brand equity, high enforcement costs and diminished incentive to innovate. For governments, counterfeiting results in a loss in tax revenues and social security contributions<sup>7</sup>.

Counterfeit goods also have a negative environmental impact, because counterfeiters do not tend to respect environmental regulations<sup>8</sup>.

Recent studies have also shown that the volumes of counterfeit goods reaching the EU are increasing steadily. In 2016, imports of counterfeit goods into the EU amounted to EUR 121 billion<sup>9</sup>. This represents up to 6.8% of EU imports, compared to 5% in 2013<sup>10</sup>.

In 2018, customs authorities in the EU made almost 70,000 detentions at the EU borders, consisting of a total of 26.7 million articles suspected of infringing intellectual property rights (IPR), with an estimated domestic retail value of almost EUR 740 million<sup>11</sup>. Customs authorities are increasingly having to deal with cases of counterfeit goods shipped by postal and express courier: more than 80% of all detentions at the EU borders involved small parcels in 2018<sup>12</sup>.

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<sup>1</sup> EUIPO, [Intellectual Property Crime Threat Assessment Study](#), 2019.

<sup>2</sup> EUIPO, [Qualitative Study on Risks Posed by Counterfeits to Consumers](#), 2019.

<sup>3</sup> The [Safety Gate rapid alert system](#) enables quick exchange of information between EU/EEA member states, the UK and the European Commission about dangerous non-food products posing a risk to health and safety of consumers.

<sup>4</sup> See footnote 2.

<sup>5</sup> See the [enquiry launched by OLAF](#) concerning imports into the EU of counterfeit Covid-19 related goods.

See Europol’s reports [Viral Marketing - Counterfeits, substandard goods and intellectual property crime in the COVID-19 pandemic](#), April 2020, and [Pandemic profiteering - how criminals exploit the COVID-19 crisis](#), March 2020.

See the actions of the [Consumer Protection Cooperation Network \(CPC\)](#) on rogue traders during the COVID-19 outbreak.

<sup>6</sup> EUIPO, [2020 Status report on IPR infringement](#), 2020.

<sup>7</sup> See footnote 6.

<sup>8</sup> See footnote 6.

<sup>9</sup> Organisation for Economic Co-operation and Development (OECD) and EUIPO, [Trends in Trade in Counterfeit and Pirated Goods](#), Illicit Trade, 2019. These amounts do not include domestically produced and consumed counterfeit and pirated goods, and pirated digital goods distributed online.

<sup>10</sup> See footnote 9.

<sup>11</sup> European Commission, [Report on the EU customs enforcement of intellectual property rights: Results at the EU border, 2018](#), 2019.

<sup>12</sup> See footnote 11.

Europol<sup>13</sup>, Interpol<sup>14</sup>, the United Nations Interregional Crime and Justice Research Institute (UNICRI)<sup>15</sup>, the United Nations Office on Drugs and Crime (UNODC)<sup>16</sup>, and the World Customs Organisation (WCO)<sup>17</sup>, have gathered evidence showing the links between counterfeiting and organised crime, and the use of profits from the sale of counterfeit goods to commit further crimes.

The development of e-commerce has offered unprecedented opportunities to both European businesses, including SMEs, and consumers, who benefit from increased choice and access to the single market. Online platforms are strong drivers of innovation and play an important role in Europe's digital society and economy. The vast majority of e-commerce is legitimate. However, counterfeiters seek to take advantage of online platforms to sell counterfeit goods. This is detrimental to all stakeholders, including online platforms, rights owners, and, most importantly, consumers. The technology and business models counterfeiters use are constantly changing. This means that combating counterfeiting requires continuous investment and greater cooperation among all stakeholders.

As part of its overall efforts to fight infringements of IPR, the Commission facilitates stakeholder dialogue that promote collaborative approaches and voluntary, practical solutions to better enforce IPR in an ever-changing technological and commercial environment. This approach complements the EU legislative framework, in particular the 2004 Directive on the enforcement of IPR (IPRED)<sup>18</sup>.

In particular, the Commission services facilitated the conclusion of a Memorandum of Understanding (MoU) on the sale of counterfeit goods on the internet in May 2011.

The MoU serves as a basis for dialogue and cooperation between stakeholders, with the aim of curtailing the offering of counterfeit goods – non-original physical goods that infringe registered trademarks, registered design rights or copyright<sup>19</sup> – on online marketplaces. It contains a series of commitments by rights owners and online platforms to prevent the online sales of counterfeits through the use of notice and take down procedures and pro-active measures.

This is the third report on the implementation of the MoU.

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<sup>13</sup> Europol and EUIPO, *IP crime and its link to other serious crimes, Focus on Poly-Criminality*, 2020, and <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/intellectual-property-crime/counterfeiting-and-product-piracy>

<sup>14</sup> <https://www.interpol.int/Crimes/Illicit-goods>

<sup>15</sup> [http://www.unicri.it/topics/counterfeiting/organized\\_crime/reports/](http://www.unicri.it/topics/counterfeiting/organized_crime/reports/)

<sup>16</sup> [https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf)

<sup>17</sup> [http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/ipr/operations/mirage\\_private\\_sector.pdf?db=web](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/ipr/operations/mirage_private_sector.pdf?db=web)

<sup>18</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 2.6.2004, p. 16-25.

<sup>19</sup> For the purposes of the MoU, 'counterfeit goods' mean non-original physical goods manufactured without the consent of the rights owner which infringe a registered trademark, design right or copyright, pursuant to applicable Member State or EU law. The MoU does not cover other forms of IPR infringement (infringements of other IP rights, parallel imports of goods, 'grey market' goods, disputes over licensing agreements, or issues relating to the exhaustion of rights and selective distribution). See paragraph 2 of the MoU.

## 2. THE MOU ON THE SALE OF COUNTERFEIT GOODS ON THE INTERNET

In 2010, the Commission services invited online platforms<sup>20</sup>, rights owners<sup>21</sup> and industry associations to sign a MoU on the sale of counterfeit goods on the internet<sup>22</sup>. The MoU was concluded in May 2011<sup>23</sup>.

The Commission is not a signatory, but it plays a facilitating role, e.g. by organising the meetings and ensuring that all signatories act constructively and in good faith.

In 2013, the Commission services adopted a first assessment report where it proposed the setting up of a system to measure the effects of the MoU<sup>24</sup>. As a result of this assessment, in 2016, the signatories agreed on a new version of the MoU establishing a set of key performance indicators (KPI) on the sale of counterfeit goods on the internet<sup>25</sup>.

In November 2017, the Commission services issued a second report on the functioning of the MoU<sup>26</sup>. The report formed part of a comprehensive package of measures to reduce counterfeiting and piracy (IP Package)<sup>27</sup>. The report included a description of the experiences of cooperation, and progress made, during the first year of cooperation under the revised MoU.

In its Conclusions on the IP Package adopted on 1 March 2018, the Council called on industry, in particular online intermediaries, to step up efforts to fight counterfeiting and piracy and encouraged the effective use of voluntary agreements. It called specifically on the online platforms that signed the MoU to include all the platforms they operate in the MoU. It also invited the Commission to promote the benefits of voluntary agreements, including by dissemination of best practice, and to regularly monitor their functioning and effectiveness, while identifying areas for future improvement. The Council invited the Commission to present the results of the monitoring in 2019<sup>28</sup>.

In line with paragraph 42 of the MoU, this third report on the functioning and application of the MoU answers that invitation.

This report first provides the results of the six data collection exercises based on the KPI framework. This is followed by an overview of the cooperation among the signatories, and the experience acquired from implementing specific MoU commitments. In addition, the report includes a series of reported practices shared by signatories as part of the MoU evaluation to help stakeholders develop effective anti-counterfeiting strategies.

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<sup>20</sup> For the purposes of the MoU, an ‘internet platform’ means any information society service provider whose service is used by third parties to initiate online the trading of physical goods, and which is operated by a signatory of the MoU, to the extent indicated by the service provider. In this document, the notion ‘internet platforms’ is used as a synonym for ‘online platform’, which is a reference more commonly used today.

<sup>21</sup> For the purposes of the MoU, ‘rights owner’ means a signatory of the MoU who holds a registered trademark, design right or copyright, pursuant to applicable Member State or EU law, for goods covered by this MoU, including exclusive licensees of such IPR.

<sup>22</sup> [https://ec.europa.eu/growth/industry/intellectual-property/enforcement/memorandum-understanding-sale-counterfeit-goods-internet\\_en](https://ec.europa.eu/growth/industry/intellectual-property/enforcement/memorandum-understanding-sale-counterfeit-goods-internet_en)

<sup>23</sup> Annex I lists the signatories.

<sup>24</sup> Report from the Commission to the European Parliament and the Council on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet, COM(2013) 209.

<sup>25</sup> See the [revised text of the MoU](#).

<sup>26</sup> Overview of the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet, SWD(2017) 430.

<sup>27</sup> [https://ec.europa.eu/growth/industry/intellectual-property\\_en](https://ec.europa.eu/growth/industry/intellectual-property_en)

<sup>28</sup> See the [conclusions](#) of the Council of the European Union on the enforcement of IPR.

The evaluation in this report mainly covers the period between June 2017 and October 2019. It is based on:

- the results of the monitoring exercises on KPIs carried out at the following intervals: 15.11-15.12 2016, 15.05-15.06 2017, 15.11-15.12 2017, 15.05-15.06 2018, 15.11-15.12 2018 and 15.05-15.06 2019;
- general feedback and good practice suggestions provided by signatories in the context of the plenary MoU meetings held between October 2017 and October 2019;
- feedback from a survey of signatories carried out in July-August 2019.

Therefore, the recent developments related to the Covid-19 crisis are not covered in this report, but will be assessed in the next report.

This document aims to present a factual overview of experiences of the MoU, based on the information provided by signatories to it. It does not reflect any legal or policy views or intentions of the Commission in relation to the issues under consideration, including any possible further developments related to the MoU.

Since the adoption of the second report in 2017, the Commission has presented new guidance on tackling illegal content online, such as the online sale of counterfeit goods, in a Communication entitled *Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms*<sup>29</sup> and a Recommendation on measures to effectively tackle illegal content online<sup>30</sup>. The experience gained within the context of the MoU fed into the text of the Recommendation.

The European Parliament and the Council have also adopted a Regulation on promoting fairness and transparency for business users of online intermediation services (P2B Regulation)<sup>31</sup>, as well as a Regulation on market surveillance and compliance of products<sup>32</sup> and new rules strengthening consumer rights<sup>33</sup>. These recent developments are relevant for the measures that signatories put in place to address the problem of counterfeiting. Where appropriate, this report refers to them.

Cooperation under the MoU is a dynamic process, with the voluntary agreement open to new stakeholders. Since the signature of the revised version of the MoU in June 2016, 10 new companies and associations have joined, whilst 3 signatories withdrew from the MoU since the latest data collection exercise covered. As much as possible, this report reflects the experiences of the new signatories. In particular, it takes into account their participation in the KPI data collection exercises after joining. As a result, the number of participants in the data collection exercises, as well as the type and volume of data covered, vary over time.

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<sup>29</sup> Commission Communication Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms, COM(2017) 555, 28.9.2017.

<sup>30</sup> Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C(2018) 1177.

<sup>31</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57-79 – applicable as of 12 July 2020.

<sup>32</sup> Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, OJ L 169, 25.6.2019, p. 1-44 – applicable as of 16 July 2021.

<sup>33</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 on better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7-28. Member States shall apply the measures necessary to comply with this Directive from 28 May 2022. The Directive was adopted following the Commission's initiative 'New Deal for consumers'. For more information, see [https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers\\_en](https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en).

### 3. EVALUATION OF THE KPI DATA COLLECTION EXERCISES

A set of KPIs was added to the MoU in June 2016<sup>34</sup> in order to assist the signatories with an objective and transparent tool for measuring the effectiveness of the MoU. The KPIs focus on the number of online offers of alleged counterfeit goods (KPI 1), the number of listings removed (KPI 2) and the number of imposed seller restrictions (KPI 3). These data sets are collected during two one-month ‘window periods’ every year.

Based on practical experience since 2016, it should be made clear from the outset that the collected KPI data, in particular in relation to KPI 1, have limited quantitative and statistical value given the following methodological limitations:

- KPI data concern only counterfeit versions of selected goods and categories of goods as reported by rights owners;
- the number of listings is limited and they are only monitored during pre-determined timeframes;
- there is a lack of harmonised methodology and reliable auditing;
- KPI data should be considered in the context of the evolving participation of signatories (see below the explanation on the dynamics of the collection exercise);
- there is no agreement amongst signatories on the interpretation of the measured numbers.

The results of the data collection exercises should therefore not be regarded as representing absolute volumes of counterfeit offers.

#### 3.1 The KPIs and the data collection exercises

The signatories agreed to collect data based on the KPIs every 6 months, during two one-month periods starting on 15 November and 15 May using the following procedure:

- the signatories collect data for the three KPIs and discuss the data bilaterally (between individual online platform and individual right owner);
- the agreed results are then sent to the European Union Intellectual Property Office (EUIPO)<sup>35</sup>, which acts as a trusted party and ensures the confidentiality of individual submissions and a neutral, non-discriminatory evaluation process;
- the EUIPO aggregates and analyses the agreed results reported by the signatories, then sends them to the Commission and the signatories;
- the results are discussed during the MoU plenary meetings.

In May 2019, the Commission circulated a ‘Guidance’ document to signatories to clarify practical issues regarding the data collection.

For the six data collection exercises that have taken place since 2016, data were provided by most rights owners and all online platforms (associations that are MoU signatories do not participate in the data collection exercises). Signatories which joined the MoU after June 2016 participated in the first data collection exercise that took place after they have signed the MoU, where possible. In addition, some of the rights owners decided not to provide data for some of the data collection exercises, and some of the new signatories were not ready to provide data already for the first exercise after their signing of the MoU.

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<sup>34</sup> The KPIs are included as a new Annex I to the MoU. The rest of the MoU remains unchanged.

<sup>35</sup> <https://euiipo.europa.eu/ohimportal/en/web/observatory/about-us>



As a result, participation in data collection exercises was as follows:

- first exercise: 5 online platforms, 8 rights owners;
- second exercise: 5 online platforms, 7 rights owners;
- third exercise: 5 online platforms, 8 rights owners;
- fourth exercise: 5 online platforms, 11 rights owners;
- fifth exercise: 5 online platforms, 11 rights owners;
- sixth exercise: 6 online platforms (Facebook Marketplace participated only for KPIs 2 and 3), 14 rights owners.

The KPI data presented in this report, as well as the conclusions derived from them, need to be seen in the context of this evolving participation.

## **3.2 Results of the data collection exercises**

### **3.2.1 KPI 1: Monitoring the number of offers of alleged counterfeit goods**

KPI 1 measures the number of search results that link to an offer<sup>36</sup> of alleged counterfeit goods<sup>37</sup> appearing within the first 100 unique listings<sup>38</sup> per online platform per country, obtained for a limited number of categories of products per brand, as specified in Annex I to the MoU.

Rights owners carry out the searches for goods<sup>39</sup> on the relevant online platforms, in principle for all EU Member States in which these online platforms operate<sup>40</sup>. The rights owners determine how many of the listings include offers of counterfeits of their original goods.

According to the KPI, the categories of goods monitored should be especially vulnerable product categories, which are presumably most affected by counterfeiting. The monitored categories include luxury brands (e.g. clothes, shoes, accessories; jewellery and watches), sporting goods (e.g. footwear; football jerseys), fashion brands (e.g. clothes, shoes, accessories; shirts, sweaters, polo shirts), fast-moving consumer goods (e.g. hygiene, cosmetics and personal care products), and electronics (e.g. printers and toners; electronic equipment devices; lighting/bulbs; telecoms equipment, including mobile phones and related accessories; computers and batteries).

In total, during the six data collection exercises carried out so far, more than 150,000 listings have been searched and examined, with the highest volumes for luxury brands, sporting goods and fashion brands.

Since the number of listings identified, as well as the number of rights owners participating, varied from exercise to exercise, a different amount of data points was analysed for each of the data collection windows. The total number of searched listings obtained by all rights owners declined somewhat from the first to the fifth exercise, but has increased significantly in the most recent exercise – the sixth one.

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<sup>36</sup> For the purposes of the MoU, ‘offer’ means a specific proposal for the sale of (a) good(s), entered by a seller on the system of the internet platform, established in the EU/EEA, in question.

<sup>37</sup> See footnote 19.

<sup>38</sup> In cases where fewer than 100 unique listings are found, the analysis is performed on the number of listings available.

<sup>39</sup> For each product category, the rights owners focus their searches on a specific product(s) or specific model(s) of a product. The number of products and/or models differs from one rights owner to another, with many rights owners carrying out the monitoring exercise for several products.

<sup>40</sup> Territorial coverage also varies from one internet platform to another. In addition, while some platforms use different domain names for different Member States, others use a universal .com domain that is available throughout the EU. Practice shows that even if data coverage is EU-wide, the exercise focuses mainly on six Member States (DE, ES, FR, IT, PL and the UK).

Comparison of the KPI 1 results from all six data collection exercises shows a changing trend in the rate of counterfeit goods. For the overall proportion of counterfeit goods, the increase in the first two exercises<sup>41</sup> was followed by a decline during the third and the fourth exercises. However, the percentage of alleged counterfeits increased again during the fifth and sixth exercises, reaching in the most recent exercise a similar level to the level reached in the second exercise.

Sporting goods has been the category with reportedly the highest average rate of offers of counterfeit goods, in every exercise except the third one. Fashion brands tend to have the lowest rate of alleged counterfeits. However, these aggregated data provided by rights owners are contested by one online platform for methodological reasons.

While the overall number of identified listings of counterfeit goods remains relatively quantitatively similar, signatories report that the nature of such listings has changed over time. Many signatories agree that MoU cooperation has led to a decrease in the number of listings that are obviously infringing IPR (e.g. directly referring to ‘replica’ goods or using rights owners’ trademarks in product descriptions). However, other signatories, mainly in the fashion sector, claim that the number of these blatant counterfeits has not gone down.

### **3.2.2 KPI 2: Monitoring the number of listings removed**

KPI 2 quantifies the number of listings<sup>42</sup> removed because of an alleged infringement of the signatories’ IPR. A distinction is made between the number of listings removed as a result of Pro-active and preventive measures (‘PPM’) put in place by online platforms (as defined in paragraphs 24-27 of the MoU), and the number of listings removed as a result of notifications from rights owners.

Under the MoU, rights owners can send justified notices concerning offers they firmly consider to be counterfeit to the online platforms on which they find them. The online platforms then take appropriate action (paragraphs 15-17 of the MoU).

The aggregate data for KPI 2 show an increasing trend in the number of listings removed. The total number of listings removed ranges from 0.1 million during the first exercise to 2.4 million in the last exercise. This trend applies both to the overall number of listings removed and to the listings removed as a result of PPM and rights owners’ notifications. Throughout the six data collection exercises, the overwhelming majority of listings (around 90%, up to 98.2%) have been removed as a result of PPM applied by the online platforms.

The increase in removals can partly be explained because new signatories have joined the MoU, increasing the number of listings to be examined. However, a sharp increase in the number of listings removed, observed in the results of the sixth exercise, is mostly from the higher figures reported by one of the online platforms that have participated in the MoU exercises from the beginning.

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<sup>41</sup> The results of these first two data collection exercises were published in the second report on the functioning of the MoU (SWD(2017)) 430, p. 2.

<sup>42</sup> Regarding the exact definition of a ‘listing’, it has been agreed that the distinction between a ‘private seller’ and a ‘business seller’ will not be taken into account for the purposes of the data collection exercise.

### **3.2.3 KPI 3: Monitoring the number of seller restrictions imposed**

KPI 3 measures the number of permanent and temporary seller restrictions imposed by online platforms for alleged infringements of rights owners' IPR. The results are expressed as a percentage of total restrictions imposed by online platforms for any alleged infringement of such rights. What is measured in practice is the number of actions against repeat infringers of rights owners' IPR<sup>43</sup> against the total number of such actions.

The overall number of seller restrictions imposed against repeat infringers range from about 150,000 during the first exercise to 337,000 in the sixth exercise. Linked to the signatories, the reported data are actions against 6,800 repeat infringers in the first exercise, and 24,600 in the sixth exercise. The proportion of seller restrictions, imposed on repeat infringers of rights owners' IPR using imitative goods, ranges from 4.5% in the first exercise, to 7.3% in the sixth exercise.

The data aggregate both permanent and temporary restrictions, since only half of the online platforms have been able to provide separate data for each type of restriction. Moreover, data provided by one of the online platforms have not been taken into account in the analysis, since this platform does not give the total number of restrictions imposed on repeat infringers.

The historical series show a variable volume of seller restrictions imposed, both in general and linked to MoU signatories, with no particular trend. The growing number of MoU signatories (mostly new rights owners) could be expected to cause an increase in the volumes of seller restrictions imposed linked to those signatories or, at least, an increase in the percentage these seller restrictions represent out of all seller restrictions. Those expected increases occurred in the fifth and sixth exercises especially.

### **3.3 Signatories' feedback on the KPI data collection exercises**

Most of the signatories participating in the online survey considered that the way the existing KPIs are measured could – and should – be improved, for a number of reasons.

#### **3.3.1 Bilateral contacts**

Signatories have stressed the importance of ensuring that all the signatories report the KPI data in a similar way, otherwise data comparability is not reliable.

The signatories collect data for the three KPIs. They should then discuss them bilaterally (between individual online platform and individual rights owner). Only afterwards should the agreed results be sent to the EUIPO Observatory.

However, signatories have indicated that these bilateral discussions do not always take place. There is also no mechanism to deal with disagreements on the application of the KPI collection exercise or on specific results.

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<sup>43</sup> In the MoU, internet platforms and rights owners undertake to cooperate in the detection of repeat infringers, especially, but not limited to, those selling high volumes, dangerous, pre-release or obvious counterfeit goods.

### 3.3.2 KPI 1: Monitoring the number of offers of alleged counterfeit goods

- Impact of variation in the monitoring exercise

The dataset examined in the fourth, fifth and sixth data collection exercises was different from the initial three exercises due to the participation of new signatories (in particular eight rights owners).

New rights owners also affect the types of goods monitored, and thus the proportion of searches carried out (and listings obtained) for each product category. For instance, counterfeit electronic goods were reported for the first time during the sixth data collection exercise.

- Categories of products

Online platforms have reported that there are significant differences in how rights owners conduct their searches. Some of them have claimed that categories of products monitored have not been agreed in advance between rights owners and online platforms.

- Filters

Rights owners have proposed further calibrating how KPI 1 is monitored, and suggested agreeing on the use of filters in order to make the results more meaningful. Such filters could include price ranges of the listings or the use of specific time slots, since, according to the rights owners, many of the sellers offering counterfeit goods are only active during the night or at weekends.

Online platforms have pointed out that the objective of the KPI exercise is to provide a snapshot of a particular consumer experience. The MoU focuses on monitoring high-risk product models. Online platforms believe that introducing additional filters for KPI monitoring would blur the data, so they would no longer be representative.

- Lack of a uniform searching methodology

Rights owners have also pointed out the significant differences in how online platforms operate. This requires changing the manner in which the search for infringing goods is conducted on each of the online platforms. Rights owners have indicated that users who are explicitly looking for offers of counterfeit goods would usually not use the brand as their search term. Rather, they would use a more descriptive text, which also needs to be written in the language of the Member State targeted by the online platform. Rights owners believe these factors make it particularly difficult to use similar search terms for monitoring different online platforms. In their view, this negatively affects the consistency of the KPI 1 data.

During the data collection exercises, certain rights owners did not limit themselves to the first 100 listings. Instead, they submitted hundreds or thousands of searches to online platforms. This could risk skewing overall results (no weighting process) and increasing resource allocation.

Online platforms have also pointed out the significant differences in how rights owners conduct their searches, with some reporting on the main brand of the company in question, others searching multiple sub-brands and yet others searching generic, unbranded terms. It has also been suggested that reported listings by rights owners not necessarily be limited to counterfeit goods, as stated in the MoU.

- ‘Unable to determine’ category

Although the ‘unable to determine’ (UTD) category is not part of the agreed structure of KPI 1, it became a bone of contention in the dialogues between rights owners and online platforms.

Rights owners have stressed that a significant number of listings examined for KPI 1 during the data collection exercises cannot be classified as counterfeit or genuine goods. This is because these listings do not contain sufficient information about the good offered. This seems to be an issue in particular for offers monitored in the sporting and luxury brands categories. As a result, rights owners have started reporting such unclear listings as UTD, providing examples and asking for online platforms’ support to tackle this issue – not only in their own interests, but also in the interests of consumers.

Online platforms claim that rights owners should do more to determine the authenticity of listings. Placing significant numbers of listings in the UTD category creates ambiguity. This is because all listings monitored should ultimately be sorted into two categories: offers of counterfeit goods and non-counterfeit goods. While online platforms understand that in some cases, the rights owners are not comfortable with taking a decision on whether a specific listing refers to a counterfeit good or not, they believe that the fact that each rights owner classifies offers as UTD according to its own, undefined criteria makes it impossible to obtain clear and comparable data.

### **3.3.3 KPI 2: Monitoring the number of listings removed**

In relation to KPI 2, rights owners have indicated that more information needs to be provided for the results of the monitoring exercise to be meaningful (in particular regarding the nature of the offers blocked, which appears to not be solely based on counterfeiting grounds). They consider that a rate over 90% of offers of counterfeit goods removed through PPM by online platforms to be a positive result. However, they believe there is insufficient transparency regarding the actual actions taken by the online platforms, and no feedback on their accuracy or impact. Rights owners would like to be able to verify KPI 2 data provided by online platforms. To that end, they have suggested that online platforms provide them with e.g. the URLs of the removed listings, information on the reasons for removing the listings, or details of sellers on whom restrictions have been imposed.

Online platforms have stressed that given the significant number of listings categorised by rights owners as UTD, it is not clear that rights owners could verify the removed listings (or that their doing so would be consistent with platform privacy practices).

### **3.3.4 KPI 3: Monitoring the number of seller restrictions imposed**

Concerning KPI 3, rights owners have pointed out that the online platforms are not reporting on the imposed account restrictions the same way, with many of the online platforms not distinguishing between temporary and permanent measures. Rights owners have therefore suggested introducing a uniform methodology for reporting account restrictions, stressing that introducing minimum criteria for imposing account suspension could be an option<sup>44</sup>.

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<sup>44</sup> Article 3(1)(c) of the P2B Regulation requires online platforms to ensure that their terms and conditions set out the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in the whole or in part, the provision of their online platform to business users.

### 3.4 Conclusion and next steps in the monitoring process

On 20 January 2020, technical experts representing signatory rights owners and online platforms discussed the KPI improvements and the corresponding data collection exercises to optimise the process and make it easier, more transparent and less resource-intensive. The following suggestions were favourably received:

- Signatories should report the KPI data in a similar way, to ensure comparability. The scope of ‘counterfeit goods’, as defined in the MoU, should be respected for KPIs 1 and 2. A uniform search methodology should also be used, and a uniform approach for keywords and risk factors should be developed, to guarantee consistency in the collection of data.
- Rights owners and online platforms should agree in advance of the data collection exercise on the categories of products to be monitored. A certain degree of flexibility is required to take into account the products searched by new signatories, as well as product innovation and diversification, but it is necessary to ensure a consistent approach and ease of comparison.
- Regarding the ‘unable to determine’ (UTD) category, signatories should refine the methodology for this category, to reduce the number of listings rights owners categorise as UTD, in addition to the discussion on keywords and risk factors. As a first step, two rights owners suggested making test purchases during the next data collection exercise, to assess the rate of counterfeit goods actually found among listings reported as UTD. The results of this pilot and examples of goods should then be discussed bilaterally with online platforms. The experiences should afterwards be shared at the general meeting of the MoU signatories.
- In relation to KPIs 2 and 3, online platforms should give rights owners feedback on trends during bilateral discussions. The pilot in the UTD category for KPI 1 will also be used to assess the relationship between KPI 1 data and data for KPIs 2 and 3.
- In case of disagreement on the application of the KPIs, signatories could ask the Commission services to add such issues to the agenda, for discussion at the next general meeting.

The experts representing the signatories also shared the following lessons learned on the data collection exercises:

- having a single contact point per signatory helps strengthen bilateral discussions between rights owners and online platforms;
- the KPIs and data collection exercises provide signatories with a useful and helpful framework to better structure their own monitoring processes;
- the KPIs and data collection exercises also provide rights owners with more insight into the visibility of the counterfeit versions of their goods on online platforms;
- bilateral discussions give the opportunity to signatories to raise broader issues, and to rights owners to provide feedback on online platforms’ reporting tools;
- the growing number of rights owners’ middle-market goods monitored in the data collection exercises is considered a positive aspect for getting an overall view of trends.

While signatories consider it useful to carry out data collection exercises and discuss its outcome, they recognised that direct comparison of quantitative data provided on the basis of the KPIs may continue to be a limited exercise. The ambition is therefore to develop a more qualitative dialogue by focusing discussions on new trends (e.g. the identification of design infringements), specific cases and the results of pilot projects, in bilateral exchanges and at general meetings.

#### **4. GENERAL EVALUATION OF COOPERATION UNDER THE MOU**

Within the parameters of MoU cooperation, signatories work together to follow through on the MoU commitments. In plenary meetings they discuss the challenges and how best to address them, the opportunities new technologies afford, their experiences and their disagreements. Rights owners and online platforms meet bilaterally to discuss KPI issues and ways of tackling counterfeiting in the online marketplaces in which they operate.

As part of the survey of signatories carried out in the summer of 2019, the Commission services have asked the signatories to provide their views on cooperation under the MoU. Their comments and suggestions were discussed in the MoU plenary meeting on 10 October 2019.

Online platforms see the results of MoU cooperation in a positive light, stressing the good cooperation among stakeholders. Almost all signatories have designated a single point of contact. Practically all of them have also advertised their participation, including at industry meetings and on social media.

Some rights owners have highlighted the serious challenges that still need to be addressed. Their views diverge as to the effectiveness of the MoU, in terms of its impact on the volume of counterfeits made available online. However, all signatories agree that the MoU has helped establish or strengthen their cooperation. It has facilitated access to relevant contact people and helped build mutual trust.

Generally, the signatories are satisfied with the practical organisation of the meetings and find that having two plenary meetings a year is sufficient. They consider it useful to invite external experts for the meetings, and appreciate in particular presentations by technology experts, as new technologies are crucial for staying ahead of counterfeiters.

Most of the signatories consider the MoU still to be fit for purpose. However, some rights owners are of the view that the MoU lacks the efficiency to combat counterfeiting and that the KPIs should be updated. They suggest improving the functioning of the MoU by finding solutions to issues such as repeat infringers and ‘unable to determine’ listings (offers of goods for sale that are suspicious, but for which it is difficult to identify IPR infringement). Some rights owners advocate amending the text of the MoU to broaden its scope, e.g. by including other categories of infringements besides counterfeits.

Signatories have made a number of suggestions for topics to be discussed in the next general meetings. Signatories mention particularly infringing listings, multiple accounts, seller anonymity, differentiation between private and commercial sellers, looking at how to enhance data exchanges (while ensuring compliance with EU personal data law), and the implications of the P2B Regulation, as well as design law cases. Rights owners have expressed the wish to discuss the implementation of good practices in more detail.

Most signatories have made suggestions for new actions. These include enhancing tripartite collaboration between online platforms, rights owners and law enforcement authorities, running an information campaign on the MoU at national level, looking more closely at the retail industry, and including other intermediaries involved in the supply chain both online and offline.

Some signatories have suggested conducting new studies, particularly on online platforms’ PPM and their treatment of repeat infringers, on technologies used to identify infringing listings and potential counterfeit goods, on sellers’ terms and conditions implemented by online platforms to address issues such as blurred/concealed logos and bot-generated seller’s contact details.

Signatories believe that it would be useful to allow a targeted extension of MoU participation. For example, rights owners have expressed their wish to include further categories of online intermediaries, such as social media, search engines, payment industry, price comparison sites and websites providing classified advertisement. One online platform has pointed out that the e-commerce supply chain involves many parties, including the payment industry, and shippers and carriers that transport packages. Another online platform has suggested that, if smaller European online platforms would join the MoU, it could enrich the debate.

## **5. PRACTICES REPORTED BY SIGNATORIES**

The signatories of the MoU shared a series of practice examples, which are an interplay between (compulsory) legal requirements and (voluntary) practices implemented on their own initiative as part of the MoU.

When undertaking voluntary actions as part of the MoU, the signatories of the MoU must comply with the applicable EU and national law, including the e-Commerce Directive<sup>45</sup>, the P2B Regulation, IPRED, competition law and rules on the protection of personal data.

These reported practices have been collected under the presumption that at least one signatory already applies at least one of them. In this section, they are presented within the context of the legal requirements and the voluntary commitments of the MoU. The aim is to help signatories and other stakeholders develop effective anti-counterfeiting strategies and contribute to preventing the online sales of counterfeit goods in the EU.

### **5.1 Proactive and preventive measures**

#### **5.1.1 General observations**

Proactive and preventive measures (PPM) aim to prevent offers of counterfeit goods from appearing online in the first place. All the signatories agree that cooperation on PPM is crucial for tackling the problem of counterfeiting more effectively, and the MoU includes several corresponding commitments<sup>46</sup>.

Rights owners, in particular, commit themselves to taking commercially reasonable and available steps to:

- effectively fight counterfeiting at its source, including at points of manufacture and initial distribution;
- actively monitor offers on the websites of online platforms, to identify counterfeit goods and notify online platforms of their existence;
- provide online platforms with information that could help identify counterfeit goods, including information on goods that are particularly susceptible to being counterfeited and keywords commonly used by sellers for the purpose of offering for sale obvious counterfeit goods<sup>47</sup>.

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<sup>45</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1.

<sup>46</sup> For the purposes of the MoU, ‘proactive and preventive measures’ mean any measures, technical or procedural, automated or non-automated, including the associated procedures and processes, taken by an internet platform or a rights owner, for a timely and adequate response to attempts to sell counterfeit goods on an internet platform, either prior to the offer being made available to the general public, or as soon as technically and reasonably feasible thereafter, according to each business’ model. See paragraphs 20-27 of the MoU.

<sup>47</sup> Paragraphs 20-23 of the MoU.



From their side, online platforms commit themselves to taking appropriate, commercially reasonable and technically feasible steps to:

- request seller contact information and verify it to gain reasonable assurance of a seller's identity;
- take into consideration information provided by rights owners that could help identify counterfeit goods;
- identify and/or prevent the sale of counterfeit goods, and prevent the offering of such goods through their services<sup>48</sup>.

Article 15 of the e-Commerce Directive obliges Member States (if certain conditions are met) not to impose on online platforms a general obligation to monitor the content they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal content. However, (again under certain conditions) Member States may oblige them to promptly inform the authorities about illegal content and their origin<sup>49</sup>.

As stated in the 2017 Commission Communication on tackling illegal content online, online platforms should adopt effective proactive measures to detect and remove illegal content<sup>50</sup>. The Commission has indicated that taking such voluntary, proactive measures does not automatically lead to the online platform's losing the benefit of the liability exemption under Article 14 of the e-Commerce Directive.

In its 2018 Recommendation on measures to tackle illegal content online, the Commission encourages hosting service providers to take, where appropriate, proportionate and specific proactive measures with regard to illegal content<sup>51</sup>. The Recommendation also specifies that such proactive measures could in certain cases, without prejudice to Article 15(1) of Directive 2000/31/EC, involve using automated detection means, which should be used only where appropriate and proportionate and subject to effective and appropriate safeguards<sup>52</sup>, to avoid, in particular, the removal of legal content. The Recommendation further specifies that proactive measures can be appropriate where the illegal character of the content has already been established, or where the type of content is such that contextualisation is not essential<sup>53</sup>.

### **5.1.2 Fighting counterfeiting at the source**

Rights owners report fighting counterfeiting at its source as a top priority, with the focus on tracing manufacturing facilities, supply routes and criminal networks, to make it possible to seize counterfeit goods and shut down factories and warehouses involved in manufacturing and distributing them (among others by supporting competent authorities in law enforcement actions). Rights owners report on the enforcement proceedings they carry out in the jurisdictions of origin of the sellers, including monitoring the investigations launched after notifying platforms of specific sellers.

Most rights owners and online platforms have set up dedicated internal teams responsible for IPR enforcement globally. These teams work with law enforcement authorities, including customs authorities. In key jurisdictions, rights owners provide up-to-date descriptions, photos and samples of their goods, and training to facilitate the identification of counterfeit goods. They also work with law enforcement authorities to investigate and take down international counterfeit distribution networks.

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<sup>48</sup> Paragraphs 24-27 of the MoU.

<sup>49</sup> Article 15 (1) and (2) of Directive 2000/31/EC.

<sup>50</sup> COM(2017) 555, point 10.

<sup>51</sup> C(2018) 1177, point 18.

<sup>52</sup> C(2018) 1177, points 18-20.

<sup>53</sup> C(2018) 1177, recital 25.

### **Reported practices:**

Rights owners and online platforms:

- ✓ cooperate in identifying the supply chain of counterfeit goods;
- ✓ cooperate in identifying the most serious IPR infringers, to be able to prioritise IPR enforcement efforts in relation to rogue operators.

Rights owners:

- ✓ register IP rights and enforce them offline and online – both in the EU and in countries the counterfeits are being manufactured in, imported into, transited through, offered for sale and sold in, using the available civil, criminal and administrative enforcement mechanisms;
- ✓ launch joint proceedings against the most harmful actors, in cooperation with online platforms;
- ✓ when opting for civil proceedings, apply not only for injunctions, but also for damages and any other measures suitable for deterring future counterfeiting activity;
- ✓ promote due diligence along the supply chains;
- ✓ use track and trace technologies in order to have greater control over distribution chains and help identify the origin of goods.

Online platforms:

- ✓ within the applicable legal framework, assist rights owners, including by launching joint proceedings against the most harmful actors.

### **5.1.3 Providing product information and keywords**

Rights owners monitor the behaviour of sellers offering counterfeit goods, to identify the goods most targeted by counterfeiters and keywords used in their marketing.

Rights owners report that they have provided online platforms with training and/or training materials, guidelines and tips facilitating the identification of counterfeit goods and permitting the recognition of high-risk sellers. They have also contributed to awareness-raising events and inform online platforms, where appropriate, of:

- new product releases, to alert them to goods that are particularly susceptible to being counterfeited;
- goods that are not manufactured by a specific brand;
- keywords used by sellers to refer to counterfeit goods;
- the latest trends.

There should be concerted action to stop new forms of counterfeiting as soon as possible. In practice, information can be shared either during bilateral exchanges between the signatories, or using online tools developed by online platforms.

Rights owners have indicated that they could benefit from receiving more feedback from online platforms on how they use this information to improve their PPM.

Online platforms would appreciate cooperation with rights owners to target goods that are the focus of rights owners' enforcement efforts. They agree that all the information provided by rights owners, including keywords, make a valuable contribution to improving PPM. They have indicated, however, that not all rights owners are providing such information. Online platforms have also noted that the information received is not always suitable for integrating into PPM.

### **Reported practices:**

Rights owners and online platforms:

- ✓ exchange reasonable and appropriate information on goods that are particularly susceptible to being counterfeited, on keywords used to refer to counterfeits and on other relevant trends.

Rights owners:

- ✓ provide online platforms with appropriate information on goods (both the goods that they produce and do not produce) to facilitate the identification of counterfeits.

Online platforms:

- ✓ inform rights owners of the optimal ways of sharing such information, so it effectively helps improve PPM;
- ✓ provide feedback to rights owners on the use and suitability of the information they shared.

#### **5.1.4 Seller's identity verification**

Signatories agree on the importance of knowing the players involved with online and offline counterfeits. Online platforms are constantly intensifying their efforts to ensure that sellers using their marketplaces are credible. Rights owners operating selective or exclusive distribution networks are constantly improving the protection of their supply chain and the due diligence of their collaborators.

Article 5 of the e-Commerce Directive requires Member States to ensure, in addition to other information requirements established by Union law, that the information service providers, such as online sellers, render easily, directly and permanently accessible at least the general information, such as names and other company details.

The P2B Regulation also provides that providers of online intermediation services must, in the context of their terms and conditions, ensure that the identity of the business user providing the goods or services is clearly visible<sup>54</sup>.

Recent EU consumer protection rules introduce a clear obligation on online marketplaces to inform consumers, based on the declaration provided by the third party providing the offer, whether the offer comes from a trader or a non-trader (such as a peer consumer). In addition, in the latter case, the online marketplace has to warn the consumer that EU consumer rights will not apply to the contract concluded<sup>55</sup>. In this context, falsely representing oneself as a consumer is a prohibited misleading commercial practice under the Unfair Commercial Practices Directive<sup>56</sup>.

Concerning the verification of the seller's contact information, online platforms indicated that they have a number of processes in place to vet sellers and identify bad actors, to ensure they do not negatively affect the experience of customers.

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<sup>54</sup> Article 3(5) and recital 21 of the P2B Regulation.

<sup>55</sup> Article 4(5) of Directive (EU) 2019/2161, which inserts a new Article 6a 'Additional specific information requirements for contracts concluded on online marketplaces' to Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

<sup>56</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004, OJ L 149, 11.6.2005, p. 22; practice no. 22 of Annex I.

These checks are usually carried out when a new seller applies to open an account, and, depending on the platform in question, may include examination of identity documents as well as payment instrument verification. Online platforms have developed various proprietary systems to analyse hundreds of unique data points gathered by the online platforms, to identify potential bad actors.

Rights owners are also monitoring online marketplaces to identify actors offering counterfeit goods as quickly as possible. While some rights owners have set up monitoring teams in their IPR enforcement or brand protection departments, others outsource monitoring online websites to specialised consultants. Rights owners also work closely with anti-counterfeiting associations and payment processors, and work on developing new technologies to help identify counterfeits. In that context, rights owners have indicated the usefulness of enabling automatic scanning using a search and enforcement application programming interface (API). According to rights owners, the use of such mechanisms should not be limited to entities participating in the brand protection programmes offered by online platforms.

Rights owners would like online platforms to carry out more thorough identity checks, to make it easy to identify sellers on the basis of the contact details displayed on their accounts. They would like to see further adoption of automated tools by online platforms, in particular to be able to link the data of new sellers to accounts that were previously suspended or restricted, thus eliminating the risk of repeat infringers returning to the platform, or check active accounts, to prevent multiple (unjustified) accounts.

Platforms indicate that they do carry out identity checks and use advanced tools, as they see security and safety as a top priority.

Rights owners stress the importance of confirming the authenticity of data provided by the sellers, and penalising them for faking their identity by removing their accounts. They indicate the possibility of introducing added verification of sellers, requiring them to confirm their identity using automated tools, by email or phone, by verifying whether face and ID picture match, or by matching the information on the origin of sellers with their IP address, geolocation, login hours, etc. Such checks could be particularly useful in preventing the automatic creation of accounts by sellers trying to distribute counterfeit goods on a commercial scale.

Rights owners also reported that they had identified cases of counterfeiters that pretend to be individual sellers, submitting data that would present them as such, but then offering wholesale quantities of (counterfeit) goods. Rights owners suggest that additional filters could be introduced to prevent such abuses, e.g. by introducing caps on a number of identical goods that can be offered by non-business sellers, or setting out more elaborate identity verification checks for individual sellers offering high volumes of goods or frequently selling small quantities of identical goods.

Some of the online platforms have said that they apply a higher level of scrutiny to sellers with levels of sales over a certain threshold, and additional confirmation requirements exist for registering accounts in a professional capacity (such as companies' register documents).

**Reported practices:**

Online platforms:

- ✓ exchange information on the use of seller verification systems that include identity confirmation schemes, as appropriate;
- ✓ explore ways to make it clear and easy to understand for the consumer whether he/she is dealing with a seller who is an individual or a business seller;
- ✓ cooperate to set a higher threshold for identity information required in relation to professional sellers (traders) and/or sellers reaching high levels of sales.

Rights owners:

- ✓ assist online platforms in identifying counterfeiters where appropriate and possible.

### 5.1.5 Proactive identification of offers of counterfeit goods

Signatories agree that providing sufficient product information (producer, origin and quality) is crucial for the consumer.

Online platforms report that they are continuously developing policies and tools that make it possible to verify offers before publishing them on the online marketplaces they manage. The online platforms started working on those policies and tools before joining the MoU, but in some cases, their involvement in MoU-related work has facilitated the roll-out of measures proactively identifying offers of counterfeit goods.

Online platforms report that their PPM systems are based on the input of rights owners (including risk signals reported through notices, and information registered by the brands participating in the protection programmes offered by the online platforms), as well as consumer feedback (e.g. ‘report abuse’ buttons, comments from consumers who have purchased a given product). Many of the PPM tools put in place are used not only to prevent sales of counterfeit goods, but also to avoid misinforming the consumer, or to identify other types of illegal content. The online platforms have also undertaken other voluntary measures (e.g. the Product Safety Pledge<sup>57</sup> in the EU context) to prevent or remove offers of goods that do not comply with safety requirements.

Online platforms indicate that significant investment in resources is needed to develop and maintain effective PPM, in particular to reap the full potential of data analytics. They stress that it is necessary to put appropriate safeguards in place, to avoid ‘false positives’ and make sure that the PPM are not abused to exclude legitimate sellers or goods from online marketplaces.

According to the feedback provided by online platforms, PPMs are strongly linked to their individual business models. They are an important tool for online platforms to differentiate themselves from their competitors. They may significantly influence customer satisfaction and consumer trust in the offers available on a particular site.

Rights owners acknowledge that many online platforms use automatic filters to identify offers of counterfeit goods, but believe that such filters should explore the possibility of including keyword-based filters and image-based filters (to detect digital fingerprinting embedded in images of goods, blurred logos, QR codes, etc.). Rights owners have proposed a list of indicators they use in their own enforcement efforts and which they believe should also be considered part of PPM by platforms:

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<sup>57</sup> [https://ec.europa.eu/info/files/product-safety-pledge\\_en](https://ec.europa.eu/info/files/product-safety-pledge_en)

- (high) quantity of goods offered by the seller;
- suspicious origin (e.g. goods sourced from a high-risk country, ‘delivery directly from factory’) or delivery time;
- suspicious seller name (e.g. name consisting of only signs, without any characters);
- suspicious seller data (e.g. obviously incorrect email or postal address);
- suspiciously low price;
- offering new goods without official packaging;
- negative comments about the authenticity of the good submitted by users;
- overnight sales;
- use of keywords suggesting that a good is counterfeit (e.g. ‘replica’);
- typographic mistakes in the product description;
- suspicious seller profile, including date of creation of account, use of identical contact details or bank account for related (current or past) accounts, suspicious patterns in positive consumer comments on seller;
- seller history, including prior history for reported infringing listings from other rights owners;
- seller transaction patterns, e.g. seller operating through a series of listings for low quantities of the same good over short periods.

Online platforms indicate that their proprietary PPM already use most of these indicators, where technically possible, but that it is necessary to put the information obtained on the basis of those indicators in the context of other data points that are being proactively examined by the platforms.

Online platforms stress that there are still technical limitations, and developing and maintaining effective systems is expensive in terms of the workforce involved and the direct cost of developing technical solutions. For this reason, they indicate the need for proportionality.

Signatories agree that the possibility to use content identification technologies to facilitate risk profiling should be further explored.

### **Reported practices:**

Rights owners and online platforms:

- ✓ cooperate to establish criteria that facilitate risk profiling;
- ✓ exchange information on how new content identification technologies and other automatic tools can be used, within the limits of the applicable Union and national law, notably of the e-Commerce Directive and the provisions on the protection of personal data, to make identification of counterfeits more effective, with adequate precision and limiting false positives.

Online platforms:

- ✓ exchange information on the use, within the limits of the applicable Union and national law, notably of the e-Commerce Directive and the provisions on the protection of personal data, where appropriate and proportionate and subject to effective and appropriate safeguards, of automatic tools to identify clear-cut cases of counterfeiting as part of their proactive tools.

Rights owners:

- ✓ assist online platforms that are rolling out effective proactive tools to identify offers of counterfeits before they are published on the platform;
- ✓ consider using electronic notice-and-take down tools and brand protection programmes to provide platforms with data that could enhance the functioning of their PPM.

### 5.1.6 Brand protection programmes

Most of the online platforms who are MoU signatories have created specific brand protection programmes<sup>58</sup>.

Participation in such programmes requires registration, submitting specific data (contact details, information on IPR owned, etc.) and fulfilling registration criteria. Conditions of participation in brand protection programmes, as well as the tools offered to participants, vary from platform to platform. Brands that decide to participate in brand protection programmes gain access to tools such as upgraded and/or simplified notice and take-down (NTD) procedures, dashboards with additional feedback on the follow-up given to the notification, or integrated search tools facilitating the identification of listings infringing IPR using text-based and image recognition. The IPR violations reported through such programmes are used by online platforms to train their machine-learning algorithms, which then use the information provided to boost their PPMs.

At least one online platform has launched a brand protection programme that gives rights owners access to a self-service tool permitting the immediate takedown of goods violating trademark rights.

According to online platforms, the rights owners that have enrolled in the brand protection programmes see fewer counterfeits, benefit from faster processing of notices, and gain access to additional technical functionalities, including brand protection tools<sup>59</sup>.

Online platforms also point out that active participation in programmes makes it possible to establish and strengthen cooperation by encouraging bilateral contacts. This in turn leads to a better understanding of the problems stakeholders have to contend with, and more effective collaboration on a daily basis.

Many rights owners have decided to join brand protection programmes offered by the online platforms in question, in line with the commitments they made under the MoU<sup>60</sup>.

However, some of the rights owners have decided not to join specific programmes, as they were not willing to accept certain unfavourable standard terms and conditions. At least one online platform has reacted to specific feedback from rights owners on such terms and conditions, and simplified them accordingly, to facilitate access to its brand protection programmes. Rights owners have reported that not all of their IPR are accepted for the brand protection programmes. In their view, this reduces the effectiveness of these programmes. Finally, rights owners have said that the brand protection programmes were too burdensome, not necessarily user-friendly, and that their membership would require considerable resources.

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<sup>58</sup> Allegro - '[Rights Protection Cooperation Program](#)'; Alibaba - '[IP Protection Platform](#)' and '[Anti-Counterfeiting Alliance](#)'; Amazon - '[Brand Registry](#)' and '[Project Zero](#)'; eBay - '[Verified Rights Owner Program](#)'; Facebook Marketplace - '[Commerce and ads IP tool application](#)'.

<sup>59</sup> Different programmes and technical tools (including automated tools) are put in place on every platform.

<sup>60</sup> Paragraph 15 of the MoU.

## 5.2 Notice and take-down (NTD) procedures

### 5.2.1 General observations

NTD procedures make it possible to notify online platforms and other intermediaries of infringing or allegedly infringing content that is available on a specific site. MoU cooperation focuses on using these procedures to inform online platforms of alleged counterfeit goods being offered on their websites, and enable the removal of individual offers of such counterfeit goods.

The MoU refers to voluntary commitments on NTD procedures<sup>61</sup>, to ensure they make it possible to set up a reporting system that is not only efficient and effective, but also provides proper safeguards to prevent abuse.

When undertaking those actions, the signatories of the MoU must comply with the applicable EU and national law. In particular, Article 14(1) of the e-Commerce Directive provides that hosting services providers are not liable for the information stored at the request of a recipient of the service and also harmonises the conditions under which those providers can benefit from that exemption from liability (in particular, the exemption applies on the condition that the hosting service provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information).

In its Communication on tackling illegal content online, the Commission has provided horizontal guidance on detection and removal of illegal content, while urging online service providers to have in place appropriate safeguards against unjustified removals. In particular, the Communication called on online platforms to establish an easily accessible and user-friendly mechanism that allows their users to notify content considered illegal. Such a mechanism should allow for easy notification by electronic means and facilitate the submission of notices that are sufficiently precise and adequately substantiated and, in particular, contain (i) an explanation of the reasons why the notice provider considers content to be illegal and (ii) a clear indication of the location of potentially illegal content<sup>62</sup>.

The Commission Recommendation on measures to effectively tackle illegal content online contains further recommendations on submitting and processing the notices, as well as on informing content providers, and on counter-notices for all types of illegal content<sup>63</sup>. The Recommendation recalls that, in accordance with the case law of the Court of Justice relating to Article 14 of Directive 2000/31/EC, notices should be sufficiently precise and adequately substantiated so as to allow the hosting service provider receiving them to take an informed and diligent decision as regards the effect to be given to the notice<sup>64</sup>.

In addition, the P2B Regulation lays down transparency obligations notably in relation to the restriction, suspension and termination of online intermediation services. It also introduces specific requirements for establishing complaint-handling systems and access to mediation<sup>65</sup>.

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<sup>61</sup> For the purposes of the MoU, ‘notice and take-down procedures’ mean any procedures, including the associated processes, put in place by an internet platform, that enables a rights owner to notify an internet platform efficiently of any relevant offer, including closed offers, of an alleged counterfeit good made publicly available using the relevant services of that platform, in order to allow it take appropriate action, including making the offer unavailable to the general public through the platform. See paragraphs 11-19 of the MoU.

<sup>62</sup> COM(2017) 555, p. 9-10.

<sup>63</sup> C(2018) 1177, points 5-13.

<sup>64</sup> C(2018) 1177, recital 17.

<sup>65</sup> Articles 3, 4, 11 and 12 of the P2B Regulation.



### **5.2.2 Rights owners' experience with NTD procedures**

The rights owners report that they continuously use the NTD procedures set up by online platforms to remove offers of counterfeit goods available on their websites. Rights owners have indicated that, while for most online platforms the NTD procedures work, the reaction time differs from several hours to over a week, depending on the platform and the circumstances of the case. In addition, while protecting 'simple' trademarks (e.g. logo, word mark) does not seem to pose many difficulties, online platforms seem to find notices based e.g. on a 3D trademark, registered design right or copyright more challenging. This is because, in some cases, assessment of whether the good in question is infringing these rights is not straightforward.

All of the rights owners have stressed that sufficient resources are required to be able to monitor the presence of counterfeit goods on online platforms and file notices. In this context, some rights owners have advocated further simplifying the NTD procedures and, to the extent possible, standardising them. While they understand that online platforms have different business models and in consequence, the notification procedures differ, they have indicated that introducing minimum requirements would make it easier to comply with those different procedures, in particular for small companies. Rights owners have also pointed out that in some cases, different standards are required in different national branches of the same platform.

Rights owners report that while most online platforms provide a possibility to notify multiple offers from the same seller, in some cases the process remains challenging, as separate identification is necessary for each item reported. Rights owners have also indicated that contacting the seller/content provider should not be a prerequisite for filing a notice.

According to rights owners, online platforms generally acknowledge the receipt of notices and provide feedback on the next steps in the process. However, where such feedback is limited to an automatic reply, it does not enable, in their view, an understanding of the circumstances of a specific case (in particular in case of refusal or partial refusal to remove content). The rights owners have indicated that they would appreciate receiving more information in response to their notices. In particular, they would like to know if a specific notified seller is a notorious IPR infringer (for example, in the light of notifications sent by other rights owners). This would help them to launch targeted infringement proceedings against the most detrimental sellers.

### **5.2.3 Online platforms' experience with NTD procedures**

Online platforms invest a lot in developing NTD procedures (e.g. dedicated teams of experts, new tools). These procedures are not only intended for processing notices related to counterfeit goods, but also to other illegal acts, such as illegal hate speech, disinformation, child abuse, or product safety.

Online platforms agree that cooperation under the MoU has a positive impact on their work on NTD procedures. Cooperation with and feedback from the rights owners, and the exchange of ideas and experiences with other marketplaces, have helped them improve existing processes, and in some cases introduce new functionalities. One online platform reported that a single point of contact, new reporting tools for trusted flaggers, and the possibility to report 'in-bulk' (notification on multiple listings) were introduced as a result of the MoU discussions.

Online platforms have stressed that rights owners are important in the NTD process, to better identify offers of counterfeit goods (and thus improve consumer experience), and to improve the situation of legitimate sellers committed to selling authentic goods, giving them the ability to do so freely without the risk of counterfeiters harming their business.

Some online platforms report that MoU cooperation has helped improve the quality of notifications, resulting in more efficient and more effective use of NTD by rights owners.

Notifications that are more accurate can more often be directly accepted, without the need to request additional evidence or clarification. Such notifications also help address the problem of repeat infringers in a more effective manner. Clear indication of what the infringement is, and in relation to which right it has occurred, helps with quick handling of the notice.

Quality notifications are also crucial for designing better PPM. Online platforms have stressed the importance of concise notices written in a clear language, and the need to indicate relevant IPR for specific listings (also taking into account the geographical scope of the protection granted by the IPR). They consider it important to make available submission forms for notices that make it possible to include all the relevant information in the initial notification.

However, online platforms report that, while most rights owners understand the importance of NTD in enhancing the anti-counterfeiting process, some remain reluctant to use the NTD procedures set up by online platforms.

#### **Reported practices:**

Online platforms:

- ✓ exchange information on (i) the use of NTD mechanisms for reporting infringing goods and/or sellers – including those infringing IPR, including mechanisms to facilitate multiple notification (more than one good/seller per request), as appropriate, and (ii) ways of allowing users (consumers) to report infringing goods and/or sellers, using the same or different notification mechanisms.

Rights owners:

- ✓ submit the notices as soon as possible after detecting the IPR-infringing offers;
- ✓ provide sufficiently detailed and substantiated notices;
- ✓ exchange information on the use of dedicated automatic reporting tools to speed up the processing of notifications as a prerequisite for platforms to learn about trends and improve systems (machine learning, training algorithms).

#### **5.2.4 The concept of ‘trusted flaggers’**

As stated in the Commission Communication on tackling illegal content online, the removal of illegal content online happens more quickly and reliably where online platforms put in place mechanisms to facilitate a privileged channel for notice providers with particular expertise in notifying the presence of potentially illegal content on their websites. These are so-called ‘trusted flaggers’, specialised entities with specific expertise in identifying illegal content and dedicated structures for detecting and identifying such content online<sup>66</sup>.

The Commission Recommendation on measures to effectively tackle illegal content online defines ‘trusted flagger’ for the purposes of that Recommendation as an individual or entity considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online<sup>67</sup>.

The Recommendation encourages cooperation between hosting service providers and ‘trusted flaggers’, in particular to provide fast-track procedures to process notices. It also encourages hosting service providers to publish clear and objective conditions for determining which individuals or entities they consider ‘trusted flaggers’<sup>68</sup>.

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<sup>66</sup> COM(2017) 555, p. 8.

<sup>67</sup> C(2018) 1177, point 1(g).

<sup>68</sup> C(2018) 1177, points 23-26.

Online platforms indicate that they are following the above recommendations. They agree that certain competent authorities (administrative and law enforcement authorities) can play an important role in this regard. They have also underlined that removing different types of illegal content calls for cooperation with different expert entities and organisations. While in some areas such expert entities have been vetted<sup>69</sup> and generally represent expert and independent not-for-profit, non-governmental organisations, there is so far no common understanding as to who can be seen as a trusted flagger when it comes to removing offers of counterfeit goods. In practice, each online platform set out its own policy on who can play the role of a ‘trusted flagger’, and what type of privileged treatment this role entails.

Rights owners consider that they should be seen as ‘trusted flaggers’ for the identification of content infringing IPR, and in particular for the removal of offers of counterfeit goods.

Online platforms regard rights owners as experts in relation to the IPR they hold, and rely on their assistance when removing offers of counterfeit goods. To facilitate this cooperation, the platforms have put in place special tools and programmes for better brand protection on their marketplaces (see section 3.1.6). However, there is no consensus on treating rights owners as trusted flaggers together with public authorities.

#### **Reported practices:**

Online platforms:

- ✓ exchange information on the possibility of recognising as trusted flaggers for IPR infringements the following entities: customs, police and market surveillance authorities, consumer protection authorities, competition authorities, any other enforcement authorities and administrative authorities.

### **5.2.5 Reacting to notices**

In the context of the MoU, the online platforms have undertaken a voluntary commitment to assess the completeness and validity of notifications, and deal with notifications in an efficient and comprehensive manner, without undue delay. They have also committed themselves to ensuring that valid notifications of offers of counterfeit goods lead to a swift removal or disabling of the notified offer, and to take deterrent measures in relation to sellers that have placed such an offer. Relevant sellers should be informed when an offer has been taken down, including the reason, and should be provided with the means to respond<sup>70</sup>.

The Recommendation on measures to effectively tackle illegal content online outlines similar rules on informing content providers when their content is removed, and ensuring easy-to-access and effective counter-notice mechanisms are available<sup>71</sup>, as a prerequisite to ensuring due process and protecting fundamental rights online.

In addition, the P2B Regulation requires online platforms to inform their business users when they restrict or suspend their services, and have an internal complaint-handling system<sup>72</sup>.

The MoU signatories agree that all notifications should be processed without undue delay.

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<sup>69</sup> For the purposes of cooperation under the Code of Conduct on countering illegal hate speech online, a list of organisations having the status of trusted reporter/flagger was agreed on. See [https://ec.europa.eu/newsroom/document.cfm?doc\\_id=45032](https://ec.europa.eu/newsroom/document.cfm?doc_id=45032)

<sup>70</sup> Paragraphs 18-19 of the MoU.

<sup>71</sup> C(2018) 1177, points 9-13.

<sup>72</sup> Articles 4 and 11 of the P2B Regulation.

## **Reported practices:**

### **Online platforms:**

- ✓ inform the relevant actors of what steps have been taken as a follow-up to the notice:
  - acknowledge the receipt of the notice, and inform the notice sender of the outcome of the assessment and proposed next steps;
  - where a notice was justified and the offer removed, inform the seller and explain why the offer was removed, who submitted the notice, and what actions he/she can take to appeal (e.g. filing counter-notice within a reasonable time period, contacting the notice sender).

## **5.3 Repeat infringers**

### **5.3.1 General observations**

As part of MoU cooperation, the signatories committed themselves to cooperating in the detection of repeat infringers, in particular those selling high volumes, dangerous, pre-release or obvious counterfeit goods.

More specifically, the online platforms committed themselves to implementing and enforcing deterrent repeat infringer policies, which include suspension or restriction of sellers' accounts. They also committed themselves to sharing with rights owners concerned, upon request and in so far as permitted by applicable laws and agreements, information on the suspension of repeat infringers, on an individual and case-by-case basis. Rights owners share with the platforms information on sellers they believe to be repeat infringers, as well as providing the platforms with feedback on the effectiveness of their policies regarding repeat infringers<sup>73</sup>.

The Commission has addressed the issue of repeat infringers and measures to sanction them in the context of the horizontal rules on illegal content and online intermediation services. In the Communication on tackling illegal content online, it called on the online platforms to take measures that dissuade users from repeatedly uploading illegal content of the same nature and that aim to disrupt effectively the dissemination of such illegal content<sup>74</sup>. The Communication also clarifies that if online platforms develop automatic tools to prevent the re-appearance of illegal content, a reversibility safeguard should be available for erroneous decisions. The use and performance of these tools should be made transparent in the platforms' terms and conditions.

The P2B Regulation set out the ground rules for the restriction, suspension or termination of online sellers' accounts, including exceptions to giving advance notice or explanations to repeat infringers<sup>75</sup>. If the systems put in place by the online platforms rely on providing access to data, the types of data being provided to business users, consumers and third parties need to be clearly described in online platforms' terms and conditions<sup>76</sup>.

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<sup>73</sup> Paragraphs 34-37 of the MoU.

<sup>74</sup> COM(2017) 555, p. 18.

<sup>75</sup> Articles 3 and 4 of the P2B Regulation.

<sup>76</sup> Articles 8(c) and 9 of the P2B Regulation.

### 5.3.2 Identification of repeat infringers

Rights owners and most online platforms agree that sellers should be considered repeat infringers if:

- they are identified and confirmed as infringers by PPM multiple times, or
- their listings have been notified as offering counterfeit goods multiple times by user(s) or rights owner(s), and the notifications were justified.

Under the MoU, online platforms commit to objectively implementing and enforcing deterrent repeat infringer policies in accordance with their internal guidelines, which should include the (temporary or permanent) suspension or restriction of accounts or sellers.

According to signatories' experience, repeat infringers in some instances operate through multiple seller accounts, which makes it harder to detect them. In some cases however, even if they register as different sellers, they use the same pictures, product description, or distribution details to describe the counterfeit goods they offer. They also often rely on the same bank account or payment service provider to conclude the transaction.

Online platforms use proprietary systems to analyse data of every new user who wants to register as a seller at their marketplace (seller quality monitoring). These systems depend on platforms' business models and the type of user data they collect. Thus, they differ on an operational level, as well as the level of detail controlled. Systems allowing seller quality monitoring analyse various unique data points and user information to identify potential counterfeit or other infringement risks, including verifying whether the account could be related to another account previously removed from a given platform. Such monitoring systems are based on various risk indicators depending on the platform, including, but not limited to, data provided through NTD procedures by users and rights owners. They also incorporate automatic filters to prevent the re-appearance of the same content, and make it possible to examine all accounts linked to a specific user.

Rights owners provide online platforms with information on sellers they believe to be repeat infringers, as well as with feedback on the effectiveness of platform policies regarding repeat infringers.

Most importantly, rights owners notify online platforms when specific sellers repeatedly offer counterfeit goods. The monitoring systems used by rights owners flag sellers whom they have reported multiple times. While repeat infringers are relatively easy to spot when they use the same seller account to publish listings of counterfeit goods, those using multiple accounts are harder to catch.

Rights owners compare seller data, pictures and descriptions used to detect counterfeiters that use different seller accounts. However, rights owners say that in their monitoring activities they cannot take into account information about listings removed proactively by online platforms, or other seller information solely visible to platforms (e.g. specific data confirming the identity of the seller; payment methods or bank accounts used to carry out the transactions; contact information). Rights owners therefore believe that online platforms should have the primary role in identifying repeat infringers.

Online platforms stress that the work done by rights owners and online platforms to identify offers of Counterfeit Goods is complementary, and only good cooperation can ensure efficient processes.

### **5.3.3 Repeat infringer policies and sanctions**

Online platforms use graduated measures restricting a seller's activity on their service to deter those who offered counterfeit goods in the past from continuing to do so. These measures include, depending on the platform, warnings, temporary account restrictions, temporary account blockades, and permanent account blockades. Once the seller is permanently blocked, re-registration is forbidden. Some platforms, under specific circumstances, would withhold payments for goods confirmed to be counterfeit. Applying these measures has a direct impact on a seller's rating and their possibility of becoming a recognised/certified seller.

Rights owners stress that account suspension should make it effectively impossible for the seller to further distribute counterfeits on the platform; in particular, it should not be possible for the seller to communicate with potential customers or obtain their shipping addresses.

MoU signatories agree that, while dissuasive action against repeat infringers is necessary, it should have appropriate safeguards built in, to ensure that legitimate businesses have a chance to rectify their mistakes. In some cases, sellers themselves are victims of fraudulent or corrupted supply chains. Online platforms have highlighted the need for educating sellers and raising their awareness of counterfeiting. This is why, as part of their policies, platforms give sellers the opportunity to explain and correct the situation before imposing sanctions and causing disruption to their business. The P2B Regulation requires online platforms to give sellers the opportunity to clarify the facts and circumstances through their complaint-handling system<sup>77</sup>.

Online platforms report that they inform users of their repeat infringer policies and related sanctions in their general terms and conditions. Some online platforms also present relevant information using special programmes and answers to 'frequently asked questions', to give them further visibility. Rights owners think these policies would benefit from more clarity, in particular making it clear for sellers and other users in which cases they risk having their account terminated.

Some online platforms have highlighted the importance of rights owners' starting legal proceedings against repeat infringers, to effectively tackle the problem of sellers offering counterfeits on a commercial scale.

### **5.3.4 Further cooperation needed**

Online platforms point out the significant progress made concerning repeat infringers thanks to the PPM they apply. They appreciate the cooperation with rights owners in that regard, stressing that their active involvement – be it by using NTD procedures, submitting seller-based notifications, joining the brand protection programmes or participating in bilateral exchanges under the MoU – makes it possible to roll out more targeted, and thus more effective, measures.

On the other hand, most rights owners consider that despite the policies and sanctions adopted by platforms, the problem of repeat infringers has not diminished over time. Some rights owners reported that they had to keep notifying the same sellers, despite – sometimes several – notifications previously sent to the same platform. Online platforms do not agree with this assessment, arguing that rights owners' complaints often prove to be unfounded.

Rights owners also claim that not all platforms provide them with feedback following their notifications against repeat infringers, as they consider that information about actions (including suspensions) taken against repeat infringers' accounts needs to be treated confidentially.

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<sup>77</sup> Article 4(3) of the P2B Regulation.

Rights owners believe that further improvements are necessary to address this concern, and propose to define MoU commitments concerning repeat infringers more clearly. They suggest in particular that some platforms should be more transparent about their repeat infringer policies (e.g. after how many notifications is an account suspended? how many notifications does it take to permanently block a seller?) and the results of measures carried out (how many account suspensions/terminations were applied? for what reasons? etc.).

Online platforms have pointed out that the behaviour of repeat infringers should be evaluated on a case-by-case basis, so that fair measures are imposed. A sufficient level of flexibility is needed to allow legitimate companies rectify their mistakes. Online platforms also argue that repeat infringer policies are continuously modified to be more sophisticated and sensitive to multiple variable factors that contribute to the decision to suspend an account.

Rights owners also suggest that online platforms should provide feedback on why they refuse to remove repeat infringers, and encourage them to exchange information on repeat infringers with other marketplaces and competent authorities. Some online platforms consider this inappropriate, because if a seller is not suspended after a notification, it is because they have not been identified as a repeat infringer.

Rights owners further suggest setting up a database that would contain information on such repeat infringers. According to the Communication on tackling illegal content online, privacy policies of companies should include transparent information on the processing of personal data in connection with such databases.

Rights owners and online platforms agree that more needs to be done to stay ahead of rogue sellers of counterfeit goods, and consider further cooperation on measures against repeat infringers, including providing appropriate safeguards, crucial.

The MoU signatories also agree on the importance of ensuring that removed offers do not come back to the marketplaces. Preventing the re-appearance of offers of counterfeit goods is one of the key issues that rights owners and online platforms are trying to tackle.

### **Reported practices:**

#### Online platforms:

- ✓ ‘Know your customers’: when vetting ‘new’ sellers, check against the list of infringers removed from the platform and information related to such sellers (across multiple data points);
- ✓ raise awareness of counterfeiting among users and educate sellers about the risks related to offering counterfeit goods for sale;
- ✓ put in place measures to deter sellers from offering counterfeit goods (e.g. a warning system, account suspension and termination) and give information about them upfront in a clear and transparent manner<sup>78</sup>;
- ✓ include in their terms and conditions clear criteria to establish who is a repeat infringer and what sanctions apply.

#### Rights owners:

- ✓ use the automatic notification processes set out by the platforms, as these data can be then automatically used for seller verification tools;
- ✓ report repeat infringers to the platforms.

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<sup>78</sup> From 12 July 2020, these measures will need to follow the procedures for restriction, suspension and termination in Article 4 of the P2B Regulation.

## 5.4 Cooperation, including sharing information

### 5.4.1 Setting out clear policies

As part of their work under the MoU, online platforms have agreed to adopt, publish and enforce IPR policies. They should communicate clearly on such policies on their sites and contracts with sellers should reflect the policies<sup>79</sup>.

The Commission recently recommended a similar approach to hosting service providers concerning their policy on removing or disabling access to the content they store, including content considered illegal<sup>80</sup>. The need to provide a clear, easily understandable and sufficiently detailed explanation of content policy was also underlined in the Communication on tackling illegal content online<sup>81</sup>.

The P2B Regulation introduces obligations to ensure transparency, fairness and effective redress possibilities. It specifies that online platforms are obliged to ensure that their terms and conditions set out the grounds for decisions to suspend, terminate, or impose any other kind of restriction upon the provision of their online intermediation services to business users<sup>82</sup>. This includes prescribing procedures for restriction, suspension or termination and linking these to the behaviour of repeat infringers<sup>83</sup> and the rights of sellers to make complaints<sup>84</sup>, seek reinstatement of accounts<sup>85</sup> and resolve disputes using mediation<sup>86</sup>. Online platforms will also need to include descriptions in their terms and conditions of when they share data generated on the platform with third parties, such as rights owners, when sellers are active on the online platform<sup>87</sup>, and after their accounts are terminated<sup>88</sup>.

All online platforms report that they have developed clear rules on protection and enforcement of IPR on the websites they operate. Some provide users with additional documents such as anti-counterfeit policy or specific guidelines for sellers.

In the course of discussions during the MoU meetings, the signatories indicated the following key elements for robust seller account policies:

- a clear indication that only genuine goods can be sold and the sale of goods infringing IPR is forbidden, and will lead to a sanction of the seller;
- clear requirements on providing correct information about the goods offered, in particular their brand and its origin (no consensus on the latter);
- an explanation of the PPM used, the NTD procedures, and policies against repeat infringers – including sanctions that can be applied, so sellers are aware that their listing may be removed and their accounts blocked;
- a requirement to use authorised pictures that sellers are authorised to use, and to use pictures of the actual goods offered.

In relation to the pictures uploaded by the sellers on online platforms, the rights owners suggested providing additional, specific guidance:

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<sup>79</sup> Paragraph 28 of the MoU.

<sup>80</sup> C(2018) 1177, point 16.

<sup>81</sup> COM(2017) 555, p. 16.

<sup>82</sup> Article 3(1)(c) of the P2B Regulation.

<sup>83</sup> Article 4 of the P2B Regulation.

<sup>84</sup> Article 11 of the P2B Regulation.

<sup>85</sup> Article 4(3) of the P2B Regulation.

<sup>86</sup> Article 12 of the P2B Regulation.

<sup>87</sup> Article 9(4)(d) of the P2B Regulation.

<sup>88</sup> Article 8(c) of the P2B Regulation.



- encouraging sellers to use several pictures of the good on offer, to help the consumer understand its quality and origin;
- encouraging sellers to use pictures showing relevant features of the good, such as the brand or certification number – not only for the consumer to get a better understanding of the good, but also to provide more information points for the automatic filtering/monitoring tools to analyse;
- strictly forbidding blurring or covering logos.

#### **Reported practices:**

##### Online platforms:

- ✓ establish clear seller account policies that:
  - set out the obligation to sell genuine goods and inform the consumer of the good's origin;
  - explain their PPM, NTD procedures and repeat infringer policies, including safeguards preventing the erroneous removal of offers embedded in these measures, procedures and policies;
- ✓ present these policies in a clear and user-friendly manner on their websites;
- ✓ enforce their policy requirements, when violated by users;
- ✓ allow users to report policy violations.

#### **5.4.2 Transparency**

In the Recommendation on measures to effectively tackle illegal content online, the Commission encourages hosting service providers to publish at regular intervals, preferably at least annually, reports on their activities relating to the removal and disabling of content considered illegal<sup>89</sup>. Those reports should include, in particular, information on the amount and type of content removed, the number of notices and counter-notices received and the time needed for taking action.

The P2B Regulation requires platforms to make easily and publicly available information on the functioning and effectiveness of internal complaint-handling mechanisms, including NTD procedures<sup>90</sup>.

While the MoU did not set out commitments on publishing transparency reports showing the effectiveness of the measures the signatories put in place, data collection exercises aim to verify whether implementation of the MoU commitments has improved the situation.

Many stakeholders already report on the measures they have put in place, either as part of a public consultation launched by the Commission or in their publicly available transparency reports.

Rights owners recognise that some online platforms provide feedback and information on PPMs they use, their effectiveness, and the categories of goods targeted. They also recognise that PPM are proprietary to the respective platforms and remain within their business discretion. Nevertheless, rights owners urge more transparency in this regard.

Online platforms stress that certain information on measures taken to ensure a safe trade environment cannot be publicly shared. This would defeat the purpose of the measures, as infringers could use it to circumvent them.

<sup>89</sup> C(2018) 1177, point 17.

<sup>90</sup> Article 11(4) of the P2B Regulation.

### **5.4.3 Facilitating legal actions**

Under the MoU, the signatories have committed themselves to exchanging information to facilitate legal proceedings and investigations into the sale of counterfeit goods<sup>91</sup>. To this end, platforms have undertaken to cooperate with rights owners in accordance with the applicable laws, and in particular, to disclose, upon request, relevant information. This includes the identity and contact details of alleged infringers and their user names, insofar as permitted by applicable data protection laws. Rights owners have undertaken to submit disclosure requests in good faith and in compliance with applicable law, including data protection laws.

Rights owners reported that they have approached platforms to request disclosure of the identity and contact details of alleged infringers to facilitate legal action. Many reported that they had difficulties obtaining relevant information even for commercial sellers, as platforms were claiming that rights owners' expectations were not in line with data protection rules. Rights owners also reported instances of the sharing of the requested information, but incorrect or fabricated data provided to the platform by the seller.

Platforms give examples of strict interpretation of data protection rules in some jurisdictions. For example, in Poland platforms are not supposed to communicate such data directly to rights owners unless a duty to do so is imposed by the Personal Data Protection Office, or data are communicated directly to law enforcement authorities, on official request.

### **5.4.4 Improved information exchange**

Signatories agree that one of the main achievements of the MoU was the creation of direct contact points with competent representatives of the signatories. This made it possible to build trust and ensure quality exchanges, speeding up the receipt of feedback.

Signatories have also started to cooperate more closely, in view of specific events that could increase levels of counterfeits.

## **5.5 Cooperation with customs and other law enforcement authorities**

Signatories agree on the importance of supporting the work of law enforcement authorities – including customs, police and market surveillance authorities – in the fight against counterfeiting, and see them as key partners. In the MoU, they committed themselves to assisting law enforcement authorities in the investigation of the sale of counterfeit goods<sup>92</sup>.

The Union Customs Code allows customs authorities and economic operators to exchange any information not specifically required under customs legislation, in particular for the purpose of mutual cooperation in the identification and counteraction of risk<sup>93</sup>. It also requires any person involved in the accomplishment of customs formalities or in customs controls, for example rights owners, to provide all the requisite documents and information and all the assistance necessary for the completion of those formalities or controls. The customs enforcement system put in place in the EU<sup>94</sup> relies on applications from rights owners or their representatives to initiate proceedings, and determine whether IPR infringement has occurred.

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<sup>91</sup> Paragraphs 29-30 of the MoU.

<sup>92</sup> Paragraphs 29-30 of the MoU.

<sup>93</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p. 1, in particular Articles 13 and 15.

<sup>94</sup> Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, OJ L 181, 29.6.2013, p. 15.

National customs and other law enforcement authorities cooperate in particular with the European Anti-Fraud Office (OLAF)<sup>95</sup>, an EU body with investigative and coordination capacity to fight IPR infringements, and with Europol<sup>96</sup>, to carry out cross-border operations targeting counterfeit goods. The success of such operations also depends on information provided by stakeholders, including both rights owners and online platforms. Stakeholders' feedback is crucial for all these authorities to be able to carry out proper risk assessment and be in a position to identify fraudsters.

In the Communication on tackling illegal content online, the Commission encourages online platforms to cooperate closely with law enforcement and other competent authorities, and alert law enforcement authorities to signs of online criminal activity<sup>97</sup>.

The Regulation on market surveillance and compliance of products provides that online providers, such as e-commerce platforms, shall cooperate with the market surveillance authorities, at the request of the market surveillance authorities and in specific cases, to facilitate any action taken to eliminate or, if that is not possible, to mitigate the risks presented by a product that is or was offered for sale online through their services<sup>98</sup>.

Rights owners and online platforms both reported that they regularly cooperate with law enforcement authorities. They do so in particular by launching proceedings against individual infringers, and by assisting law enforcement authorities in their own investigations. The signatories said that they cooperate both with the European authorities and authorities in third countries (mostly in Asia) to address the problem of counterfeiting at its source.

Some online platforms reported that they had put in place dedicated internal teams and processes to cooperate with law enforcement authorities and meet their information needs.

Many of the rights owners have long-standing specific programmes in place to cooperate with customs, police and other law enforcement authorities to detect and investigate the sale of counterfeit goods and prosecute counterfeiters. They often assist these authorities as experts on the authenticity of the goods, answering queries, providing expert reports, and sending experts directly on site to support the authorities' actions.

Rights owners regularly meet with law enforcement authorities, participate in enforcement operations, and launch criminal proceedings jointly with the authorities. They record their brands with customs and provide single points of contact for law enforcement agencies around the world. Many of them organise training sessions for customs and other law enforcement authorities, to make it easier for them to recognise counterfeit versions of their goods.

Rights owners claim that in only a few Member States do law enforcement authorities get enough resources to effectively tackle IP infringements, let alone online sales of counterfeit goods. The level and intensity of their cooperation therefore vary, depending on the jurisdiction. Rights owners believe that more efforts are needed to raise awareness amongst national policy-makers of the importance of IP in general, and thus the need for law enforcement authorities to address all IP infringements, including online sales of counterfeit goods. This includes awareness of the benefits related to carrying out public enforcement in this area (e.g. preventing tax evasion and fraud, consumer protection, safeguarding employment by supporting European industry etc.), to help them obtain sufficient resources to address this issue.

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<sup>95</sup> See for example operations [Postbox II](#) and [Hygiea](#).

<sup>96</sup> See for example operation [Aphrodite](#).

<sup>97</sup> COM(2017) 555, p. 7.

<sup>98</sup> Article 7 of Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, OJ L 169, 25.6.2019, p. 1-44 – applicable as of 16 July 2021.

Many rights owners are users of the IP Enforcement Portal<sup>99</sup> managed by the EUIPO. The IP Enforcement Portal enables rights owners to:

- securely share with law enforcement authorities information on their IPRs, along with contact information and product details, production and logistics;
- send alerts to law enforcement authorities;
- help law enforcement authorities to recognise counterfeit goods and take action, including by helping the authorities to quickly verify suspicious cases;
- streamline the process of filing an application for action, by offering a translation module.

Rights owners consider that, with appropriate resources, law enforcement authorities could play a bigger role in protecting consumers against counterfeit goods and counterfeit traders in the online environment. This is due to their unique position, that enables them to obtain specific reliable information from online platforms (which information platforms are not otherwise able to share) for the purposes of their investigations. Law enforcement authorities are also able to match this information with other existing sources such as customs declarations and databases, and criminal databases.

Rights owners would like to further cooperate with online platforms on the specific practical solutions that would allow them to bring to the attention of law enforcement authorities particularly serious infringers, including those offering dangerous counterfeits, those operating on a commercial scale, and repeat infringers. Such solutions could be based on improved data exchange between the online platforms and law enforcement authorities.

Rights owners suggest exploring how the MoU could stimulate and facilitate better collaboration between online platforms, rights owners and law enforcement authorities. They stress that law enforcement authorities should cooperate with all intermediaries whose services are used by third parties to trade counterfeit goods online – not only online marketplaces, but also the intermediaries responsible for processing payments, transporting, storing or delivering the goods.

Both rights owners and online platforms have suggested inviting representatives of law enforcement authorities to the MoU meetings, to start a discussion of how the signatories can support those authorities in their anti-counterfeiting actions in a more effective manner.

#### **Reported practices:**

Rights owners and online platforms, in line with applicable laws:

- ✓ assist national law enforcement authorities, in particular customs, police and market surveillance authorities, as well as European enforcement authorities, such as OLAF and Europol:
  - in identifying counterfeit goods and carrying out seizures;
  - in their investigation of the sale of counterfeit goods - where appropriate and in accordance with applicable law;
  - by alerting them to signs of online criminal activity;
  - by alerting them about consignors, consignees, sellers and buyers who engage in the distribution of counterfeit goods.

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<sup>99</sup> <https://euipo.europa.eu/ohimportal/en/web/observatory/ip-enforcement-portal-home-page>

Online platforms:

- ✓ explore efficient ways, in line with applicable laws, of proactively sharing with customs and other law enforcement authorities information about serious infringers, including those offering dangerous counterfeit goods, those operating on a commercial scale, and repeat infringers.

Rights owners:

- ✓ provide customs and other law enforcement authorities, where appropriate, with training and materials that will help them to distinguish between original and counterfeit goods.

## 5.6 Consumer confidence, information and protection

All signatories put consumers at the forefront of all they do: all are determined to ensure that consumers are not tricked into buying counterfeits.

The MoU recognises the active role of consumers in combating counterfeiting and is in line with the Commission's Consumer Agenda<sup>100</sup>, which encourages intermediaries and traders to move beyond mere compliance with legislation and to develop self-regulatory measures to enhance consumer protection.

A first step for allowing the consumer to be an informed buyer is to provide him/her with clear information about the seller, indicating whether the seller is acting as a business or an individual. A corresponding legal obligation for online marketplaces, based on the declaration by the seller concerned, has been introduced into EU consumer law (see section 5.1.4).

Under the MoU, the signatories have committed themselves in particular to providing consumers with appropriate tools to report counterfeit goods and rogue sellers. Online platforms and rights owners stand ready to assist consumers who have unintentionally purchased counterfeit goods.

Online platforms stress that ensuring a good experience for consumers (both buyers and sellers) and building trust is at the core of their business. All platforms make it possible for consumers to report violations of IPR, as do their policies, with the help of dedicated notification tools (e.g. 'report' button on the listing page, dedicated contact forms). All of them allow consumers to approach the sellers directly to obtain confirmation of goods' authenticity or other qualities (e.g. 'ask the seller' button), and make available product reviews and seller ratings, based on user feedback and selling history. They assist consumers who have unintentionally purchased counterfeit goods in obtaining compensation – by either directly refunding the purchase or by initiating a refund procedure with the seller. Some platforms have put in place special protection programmes for buyers.

Rights owners report that they are also approached by consumers who have questions on the authenticity of goods purchased online. They answer such questions both through dedicated tools to report counterfeits and through general customer service. In addition, some of them have put in place training programmes for their retail staff on how to answer the queries of customers reporting suspicious goods. Many rights owners use authentication systems (e.g. codes, labels) that allow consumers to verify the authenticity of the goods directly.

Rights owners actively participate in various campaigns to raise consumers' awareness of risks related to purchasing counterfeits. They stress the importance of letting the consumers understand the counterfeiting phenomenon, not only to make them aware of its detrimental economic effects, but also and most importantly, to alert them to potential health and safety risks, lower quality, links to fraud and crime, and the negative environmental impact.

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<sup>100</sup> COM(2012) 225.

### **Reported practices:**

#### Online platforms:

- ✓ provide information about the seller, indicating whether he/she is a business or an individual;
- ✓ make it possible for consumers to provide feedback on goods and sellers, make product reviews and seller ratings visible;
- ✓ provide clear and simple complaints and compensation policies.

#### Rights owners:

- ✓ provide consumers with an easy way to verify product authenticity, where possible;
- ✓ use new technologies, including track and trace systems, to be able to provide a consumer with quick feedback on product authenticity.

## **6. CONCLUSIONS AND NEXT STEPS**

The MoU has been operational since 2011, with KPIs added in 2016. In the last decade, there have been major developments at technological, societal and regulatory level in the area of online counterfeiting, which have had an impact on the experiences and evaluations of the signatories. Online counterfeiting is a moving target; technology and business models used by counterfeiters are constantly changing. Staying ahead requires continuous cooperation and investment by rights owners and intermediaries.

The majority of signatories assess their collaboration under the MoU positively.

Rights owners and online platforms stress that close cooperation and information exchange is key to improving the efficiency and effectiveness of their anti-counterfeiting measures. The signatories appreciate that the MoU is a good platform for exchange, allowing them to discuss the challenges in online counterfeiting in a regular and pragmatic manner. Since the revised MoU became operational in 2016, 10 new signatories have joined, including one online platform. Some other platforms and rights owners have recently shown interest in signing.

Cooperation under the MoU also shows that, in addition to legal obligations and with the right commitment, voluntary cooperation can provide the flexibility to discuss and deliver efficient solutions. For the Commission services, the discussions between the signatories result in a better understanding of how online markets function and of the challenges for IP protection.

At international level, the MoU is recognised as a good example of an industry-led initiative in the IP area, and has been discussed in meetings of the World Intellectual Property Organization (WIPO) Advisory Committee on Enforcement<sup>101</sup>.

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<sup>101</sup> 'Preventive Actions Developed by the European Commission to Complement Ongoing Enforcement Measures with a View to Reducing the Size of the Market for Pirated or Counterfeit Goods', document [WIPO/ACE/9/20](#); 'Stepping up Industry Efforts to Reduce Intellectual Property Infringements – An Update from the European Commission', document [WIPO/ACE/13/7](#). See also <https://www.wipo.int/enforcement/en/ace/>

However, certain signatories have expressed reservations about its impact.

A large group of rights owners has pointed out that many offers of counterfeit goods are still available on the online marketplaces. These signatories consider the cooperation and information exchange with online platforms to fall short of the commitments made under the MoU. Serious concerns have also been raised about the benefits of the KPI data collection exercises. In January 2020, three rights owners in the fashion and luxury goods sectors decided to withdraw from the MoU, as they believe that progress is not sufficient and the level of counterfeit offers is still too high<sup>102</sup>.

On the data collection exercises, in particular, signatories questioned the usefulness of directly comparing quantitative data provided through the KPI windows seeing the dynamics of the collection exercise, differences in methodology and the lack of reliable auditing. However, the majority of signatories agreed that it was useful to continue to collect data, provided it was easier, more transparent and less resource-intensive. In addition, signatories considered it important to foster qualitative dialogues with a focus e.g. on new trends and on the results of pilot projects.

The MoU can be considered a ‘laboratory’. Signatories exchange practical examples of practices on PPM, NTD procedures and ways to share information e.g. on repeat infringers. These reported practices could set a standard for online platforms and rights owners, and may prompt stakeholders not involved in the MoU to perform better in the fight against counterfeiting at national, EU and international level. Signatories encourage other interested parties to join the MoU, in particular traditional e-commerce platforms and classified ads websites. Signatories also recommend that further categories of online intermediaries, such as social media, search engines, payment services, shippers and price comparison portals, be engaged in the MoU process, taking into account the specificities of their business models.

Against this background, signatories have asked the Commission services to continue to support their involvement in the MoU initiative, in particular by ensuring that their reported practices identified in this report are further disseminated, by monitoring their application by online platforms and rights owners, and, if appropriate, by discussing amendments or additions to these practices.

In view of the above, most signatories agree that at this stage, the focus should not be on revising the text of the MoU. They wish to continue to meet twice a year under the auspices of the Commission, to discuss the KPI results quantitatively and qualitatively, optimise cooperation and monitor the application of good practices. Signatories also wish to discuss new trends, such as design infringements, new fraud patterns, changes in consumer behaviour and – recently – the consequences of the Covid-19 crisis for the fight against counterfeiting. Moreover, targeting counterfeit goods that threaten consumer health and safety, such as electronics, toys and personal protective equipment, could be a crucial next step in the MoU work. Finally, there is an interest in delving deeper into certain MoU areas, such as boosting pragmatic ways for online platforms, rights owners and law enforcement authorities to work more intensively together.

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<sup>102</sup> Chanel, Gant and Lacoste. Their previous contributions in the context of the MoU have been taken into account in the preparation of this report.

## **Appendix 1**

### **Signatories to the 2016 MoU on the sale of counterfeit goods on the internet**

#### **Rights owners**

1. Adidas International Marketing BV
2. Apple (joined March 2019)
3. Duracell (joined March 2019)
4. Hermès (joined March 2019)
5. Lexmark (joined October 2018)
6. Luxottica Group Spa
7. Moncler Spa
8. Nike Inc.
9. Procter & Gamble
10. Philip Morris International (joined April 2018)
11. Philipp Plein (joined April 2018)
12. Signify (joined March 2019)
13. Zanellato (joined April 2018)

#### **Online platforms**

14. Alibaba Group Inc.
15. Amazon Services Europe Sarl.
16. eBay
17. Facebook Marketplace (joined March 2019)
18. Allegro.pl sp. z o.o
19. Rakuten France

#### **Associations**

20. Anti-Counterfeiting Group (ACG)
21. AIM European Brands Association
22. Business Action to Stop Counterfeiting and Piracy (BASCAP)
23. Federation of the European Sporting Goods Industry (FESI)
24. International Video Federation (IVF)
25. Motion Picture Association (MPA) (joined April 2018)
26. Toy Industries of Europe (TIE)