
The Role of Atypical Acts in EU External Trade and Intellectual Property Policy

Henning Grosse Ruse-Khan, Thomas Jaeger and
Robert Kordic*

Abstract

This article discusses atypical acts of the European Union (EU) concerning intellectual property (IP) protection within the EU's internal legal order and its external relations. Internally, atypical acts are used in IP for flexible pre- and post-regulation purposes or for soft guidance and steering. Yet in IP and elsewhere, those flexibilities come at the cost of deficits in democratic legitimacy, legality, and legal certainty. Atypical acts are also common in the external trade relations of the EU. Like more formal conduct of trade relations by means of international agreements, they focus on the enforcement of IP rights. The less formal (and legal) character of these acts often allows them to be more policy-driven and so makes it easier to address key political concerns relevant for EU external trade relations in a more flexible and current manner. Some of these policies are subsequently turned into 'hard' law – for example in the course of the negotiations over the controversial Anti-Counterfeiting Trade Agreement (ACTA). Based on the comparative analysis of the role of atypical acts in the EU's internal legislation for IP vis-à-vis their role in external action, this article explores possibilities of limiting the drawbacks while preserving the benefits of a use of atypical acts in external policies.

1 Background for and Aim of this Article

The adoption of the standard legislative instruments laid down in the Treaty on the Functioning of the European Union (TFEU)¹ can prove lengthy and rigid. Here, the EU

* The authors are researchers at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich. Emails: Thomas.Jaeger@ip.mpg.de; henning.gr-khan@ip.mpg.de, and rkord2712@hotmail.com.

¹ See Art. 288 TFEU.

institutions use non-standard instruments, so-called atypical acts, as a way to obtain greater flexibility in the lead up to legislation or flanking legislative activity. They may also contribute significantly to the legislative and policy process in terms of soft steering, and may yield additional beneficial effects like enhancement of information and transparency. In turn, atypical acts are also associated with some drawbacks in terms of democratic legitimacy, legality, and legal certainty.

While atypical acts are most commonly associated with internal EU legislation under Article 288 TFEU, this article sets out to examine the functioning and effects of atypical acts in the area of EU foreign policy and in the lead-up to international agreements under Article 218 TFEU. The troubles associated with the use of atypical acts were highlighted in particular by the multilateral negotiations over the highly controversial² Anti-Counterfeiting Trade Agreement (ACTA) that formally commenced in 2008.³ ACTA is, however, but one illustration of a broader issue associated with the use of atypical acts, arising, for example, also in the context of the EU's strategy for the international enforcement of intellectual property (IP) rights or in its negotiations over Free-Trade Agreements (FTAs) with developing overseas trade partners in particular. Against the background of these recent controversies and in the interest of precision of analysis and argument, the focus of this article will be laid on the specific field of the EU's external trade instruments in the field of IP. That cross-cutting vertical and subject-specific approach allows for a pinpointed comparative analysis of the roles of atypical acts in the EU's internal legislation on IP and in its external action.

The article is accordingly structured in three main parts: following a brief layout of the notion of atypical acts, the forms and functioning of atypical acts in the internal EU legislation for IP and in the EU's external IP strategy respectively are examined and contrasted. On the basis of the results obtained, conclusions are drawn as to what changes are called for in the rules governing the use of atypical acts or in the patterns of their practical use by the EU institutions.

² See, e.g., EDPS Press Release of 22 Feb. 2010, 'Anti-Counterfeiting Trade Agreement: EDPS warns about its potential incompatibility with EU data protection regime', EDPS/10/3; Editorial News, 'Kritik an mangelnder Transparenz der ACTA-Verhandlungen', *MMR-Aktuell*, Mar. 3/2010, 299165; Editorial News, 'Internationales – Verhandlungen über ein Anti-Counterfeiting Trade Agreement (ACTA): Europäisches Parlament verlangt mehr Transparenz', [2009] *GRUR Int.* 457.

³ Cf. Klopschinski, 'Internationales – Ankündigung eines Anti-Counterfeiting Trade Agreement (ACTA)', 56 *GRUR Int.* (2007) 1054; Editorial News, 'Internationales – Beginn offizieller Verhandlungen über ein Anti-Counterfeiting Trade Agreement (ACTA) in Genf', 57 *GRUR Int.* (2008) 783. For a summary of the state of negotiations (2 Oct. 2010) see the Commission website at http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf.

2 Atypical Acts in Brief

A Types of Acts

Article 288 TFEU states that '[t]o exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions'. However, unlike what this wording seems to suggest, EU decision-making is not limited to the types of acts expressly listed in Article 288 TFEU.⁴ In fact, the catalogue of decision-making instruments available to EU actors is open: acts other than those mentioned in Article 288 EU are referred to in various sections of the Treaty and include, e.g., inter-institutional agreements,⁵ *sui generis* decisions (decisions without a recipient),⁶ conclusions,⁷ incentive measures,⁸ guidelines⁹ and guiding directives,¹⁰ internal opinions,¹¹ or rules of procedure¹² for each institution.¹³ Other instruments, such as declarations, deliberations, resolutions, communications, codes of conduct, timetables, conclusions, and green and white papers, even letters,¹⁴ have simply emerged in practice.¹⁵ The Treaty of Lisbon has brought some consolidation of instruments as compared to the *status quo ante*,¹⁶ but, as can be seen, the range of forms and purpose of action is still impressive. The broad variety of decision-making instruments beyond

⁴ To this effect see Case 22/70, *Commission of the European Communities v. Council of the European Communities* [1971] ECR 263, at paras 41 *et seq.*; Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339, at paras 24 *et seq.*; Case 59/75, *Publicco Ministero v. Flavia Manghera and others* [1976] ECR 91, at paras 11 *et seq.*

⁵ Cf., e.g., Arts 177, 287(3), and 295 TFEU.

⁶ Cf., e.g., Art. 127(6) TFEU; for more see K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (2nd edn, 2005), at para. 17-141.

⁷ Cf., e.g., Arts 121 and 148(1) TFEU.

⁸ Cf., e.g., Arts 19(2), 149, 165(4), 167(5), and 168(4)(c) TFEU.

⁹ Cf. Art. 121(2), 148(2), or 171(1) TFEU.

¹⁰ Cf., e.g., Art. 218(2) TFEU.

¹¹ Cf., e.g., Arts 126(4), 127(4), 132(1), and 134(1) TFEU.

¹² Cf. Arts 232, 240, 254, 256, 287, and 306 TFEU.

¹³ Some of these Treaty-based authorizations for action will in practice, however, be exercised in the form of a decision in the sense of Art. 288 TFEU; cf. Lenaerts and Van Nuffel, *supra* note 6, at para. 17-140, fn. 619.

¹⁴ Cf. Case C-313/90, *Comité International de la Rayonne et des Fibres Synthétiques and others v. Commission of the European Communities* [1993] ECR I-1125, at paras 3 and 10.

¹⁵ Cf., e.g., K. Lenaerts and P. Van Nuffel, *supra* note 6, at paras 17-140 *et seq.*; Cosma and Whish, 'Soft Law in the Field of Competition Policy', 14 *European Bus L Rev* (2003) 25, at 37 *et seq.* and 46; Hofmann, 'Negotiated and Non-negotiated Administrative Rule-making: The Example of EU Competition Policy', 43 *CML Rev* (2006) 153, at 170 *et seq.*; Everling, 'Zur rechtlichen Wirkung von Beschlüssen, Entschlüssen, Erklärungen und Vereinbarungen des Rates oder der Mitgliedstaaten der Europäischen Gemeinschaft', in G. Lücke, G. Röss, and M.R. Will (eds), *Gedächtnisschrift für Léontin-Jean Constantinesco* (1983), at 133, 134 *et seq.*

¹⁶ For the pre-Lisbon situation cf. Lenaerts and Van Nuffel, *supra* note 6, at paras 17-140 *et seq.*

the forms spelt out in Article 288 TFEU is generally referred to as atypical acts (sometimes also non-standard acts) of the EU institutions.¹⁷

The distinction between typical and atypical acts does not coincide with the question of their character as legally binding or not: both typical and atypical acts may in principle contain hard law as well as soft law.¹⁸ In particular, the ECJ scrutinizes any acts adopted by the institutions on the merits of their substance, not their form or denomination.¹⁹ The test here is whether the decision-maker actually intended the instrument to have legal effects, even if its form (e.g., as an opinion, letter, etc.) *prima facie* indicates a non-binding nature.²⁰ This means that whatever a given instrument is formally designated as, the examination of its substance may lead to the conclusion that it essentially constitutes a decision (or regulation) in the meaning of Article 288 TFEU. Binding character owing to the substance of the atypical act has, for example,

¹⁷ Cf. Bieber and Salomé, 'Hierarchy or Norms in European Law', 33 *CML Rev* (1996) 907, at 921; Lenaerts and Van Nuffel, *supra* note 6, at para. 17-140; W. Cairns, *Introduction to European Union Law* (2nd edn, 2002), at 79 *et seq.*; Klabbers, 'Informal Instruments before the European Court of Justice', 31 *CML Rev* (1994) 997, at 1003 ff; see also Ruffert, 'Art. 249 EG, paras. 129 *et seq.*', in C. Calliess, H.-J. Blanke, and M. Ruffert (eds), *EU/EGV-Kommentar* (3rd edn, 2007); Berg, 'Art. 153 EG, para. 17', in J. Schwarze (ed.), *EU-Kommentar* (2000); Schroeder, 'Art. 249, paras. 23 *et seq.*', in R. Streinz (ed.), *EU/EGV-Kommentar* (2003); Everling, 'Probleme atypischer Rechts- und Handlungsformen bei der Auslegung des europäischen Gemeinschaftsrechts', in R. Bieber and G. Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts* (1987), at 417, 417 *et seq.*; Everling, 'Zur rechtlichen Wirkung von Beschlüssen, Entschliefungen, Erklärungen und Vereinbarungen des Rates oder der Mitgliedstaaten der Europäischen Gemeinschaft', in Lücke, Ress, and Will (eds), *supra* note 15, at 133, 134 *et seq.*; J. Wuermeling, *Die Rechtsakte der Gesamtheit der EG-Mitgliedstaaten insbesondere der Gemeinschaftskonventionen nach Art. 220 EWGV* (1988), at 164 *et seq.*; H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (1972), at 466 ff; Schmidt, 'Art. 249 EG, paras. 16 *et seq.*', in H. von der Groeben and J. Schwarze (eds), *Kommentar zum EU-/EG-Vertrag* (6th edn, 2003).

¹⁸ On this distinction in the context of atypical acts cf. Snyder, 'Soft Law and Institutional Practice in the European Community', EUI Working Paper Law No. 93/5, at 2 *et seq.*; Cosma and Whish, *supra* note 15, at 25, 27 *et seq.*; Hofmann, *supra* note 15, at 164 and the references cited there; Wellens and Borchardt, 'Soft Law in the European Community', 14 *EL Rev* (1989) 285, at 285 *et seq.*; Thurer, 'The Role of Soft Law in the Actual Process of European Integration', in O. Jacot-Guillarmod (ed.), *L'avenir du libre-échange en Europe: vers un espace économique européen?* (1990), at 132, 133; Cini, 'From Soft Law to Hard Law?: Discretion and Rulemaking in the Commission's State Aid Regime', EUI Working Paper 2000/35, at 4 *et seq.*; Beveridge and Nott, 'A Hard Look at Soft Law', in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (1998), at 291, 291 *et seq.*; Klabbers, 'The Undesirability of Soft Law', 67 *Nordic J Int'l L* (1998) 381, at 381 ff; Klabbers, 'The Redundancy of Soft Law', 65 *Nordic J Int'l L* (1996) 167, at 167 *et seq.*

¹⁹ See, e.g., Case 60/81, *IBM v. Commission* [1981] ECR 2639, at para. 9; Joined Cases T-125 and 127/97, *Coca-Cola Co and Coca Cola Enterprises Inc. v. Commission* [2000] ECR II-1733, at para. 78; Judgment of 20 Nov. 2008 in Case T-185/05, *Italy v. Commission*, not yet reported, at para. 40.

²⁰ Cf., e.g., Case C-57/95, *Commission v. France* [1997] ECR I-1627, at paras 7 *et seq.*; Case 22/70, *Commission v. Council* [1971] ECR 263, at para. 42; Case C-325/91, *France v. Commission* [1993] ECR I-3283, at para. 9; Case C-313/90, *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) and others v. Commission* [1993] ECR I-1125, at para. 52; Judgment of 20 Nov. 2008 in Case T-185/05, *Italy v. Commission*, not yet reported, at para. 39.

been confirmed in respect of codes of conduct, letters, or general communications issued by the Commission,²¹ or for proceedings adopted by the Council.²²

Where an act of whatever form or denomination is assessed as essentially constituting a decision (or regulation) in the meaning of Article 288 TFEU, that act is to be judged by the same standards, e.g., in terms of the possibility of seeking annulment under Article 263 TFEU²³ or of a possible infringement of competences or procedural rules.²⁴ For such quasi-decisional, binding acts, the Court therefore exercises strict control of legality in the sense that they must not infringe or alter the rules established by the Treaty or by any provisions of higher hierarchical status.

B Functions of Soft Atypical Acts

Non-binding, soft law acts cannot infringe higher ranking EU law provisions. Unlike quasi-decisional binding acts, they can therefore generally not be the object of an action for annulment under Article 263 EC.²⁵ Nonetheless, non-binding or non decision-type atypical acts are not completely devoid of effects. In literature,²⁶ three types of functions of soft atypical acts have been described: Atypical acts as bases for public consultations by the Commission over changes in competition enforcement policies in a given field (essentially Green Papers); atypical acts (of any institution) seeking behavioural steering as an alternative to formal legislation (essentially resolutions, codes of conduct, etc.); and finally atypical acts (again predominantly of the Commission) informing third parties of how certain Treaty provisions will be interpreted and applied and how discretion will be used (essentially communications, guidelines, etc.).

Clearly, the function of public information and enhancement of transparency is particularly important in practice for private individuals seeking to anticipate policies and actions which will be of concern to them.²⁷ Information and transparency documents are also required from the institutions under the principle of sound administration.²⁸

²¹ Cf., e.g., Case C-57/95, *Commission v. France* [1997] ECR I-1627; Case C-325/91, *France v. Commission* [1993] ECR I-3283, at paras 30 *et seq.*; Case C-313/90, *CIRFS* [1993] ECR I-1125; Case C-325/91, *France v. Commission* [1993] ECR I-3283, at para. 31.

²² Cf. Case 22/70, *Commission v. Council* [1971] ECR 263, at para. 53.

²³ Cf., e.g., Case C-57/95, *Commission v. France* [1997] ECR I-1627, at paras 24 *et seq.*

²⁴ Cf., e.g., Case C-325/91, *France v. Commission* [1993] ECR I-3283, at para. 31; Case C-303/90, *France v. Commission* [1991] ECR I-5315, at paras 15 *et seq.*; Case 22/70, *Commission v. Council* [1971] ECR 263, at para. 53.

²⁵ Cf., e.g., Case 114/86, *United Kingdom v. Commission* [1988] ECR 5289, at para. 13; Case C-180/96, *United Kingdom v. Commission* [1998] ECR I-2265, at para. 28; Case T-308/05, *Italy v. Commission* [2007] ECR II-5089, at para. 102; Judgment of 20 Nov. 2008 in Case T-185/05, *Italy v. Commission*, not yet reported, at para. 41.

²⁶ Cf. Cosma and Whish, *supra* note 15, at 47 *et seq.*

²⁷ Cf. Case C-310/99, *Italy v. Commission* [2002] ECR I-2289, at para. 52; Case C-387/97, *Commission v. Greece* [2000] ECR I-5047, at para. 87; see also Cini, *supra* note 18, at 4 *et seq.*; Cosma and Whish, *supra* note 15, at 34.

²⁸ Cf. Bieber and Salomé, *supra* note 17, at 921 and 924; Hofmann, *supra* note 15, at 169.

Nonetheless, the public information function may also be seen from the point of view of its steering aspect: Any information handed out to third parties by an institution will impact on their behaviour in economic terms and in terms of normative compliance (including evasion strategies). This does not hold true just in the vertical relationship between EU institutions and private individuals, it is also true for information exchanged on the horizontal level in the cooperation between EU institutions (e.g., by way of opinions). It would seem that the indirect steering effect inherent in information documents is not just an incidental by-product but a major motivation behind the soaring²⁹ use made of soft law atypical acts, especially by the Commission. The recourse to soft atypical acts has accordingly and rightly been described as a form of ‘regulation by information’³⁰ or ‘regulation by publication’.³¹

Soft steering instruments show several regulatory advantages which are attractive for EU regulators, and particularly for the Commission as the internal market watchdog: atypical acts afford a relatively greater degree of flexibility as regards both the formal process for their adoption and the intensity of their legal effects. Soft law instruments may even allow authorities an opportunity to act outside their statutory competences.³² Adoption of such acts typically requires only compliance with the internal procedures for decision-making or the rules on official representation within the institution involved. In addition, they are not subject to mandatory publication in the EU’s Official Journal under Article 297 TFEU. All this lowers the thresholds for the adoption of such acts, reduces costs, speeds up decision-making and reform, and reduces backlog.³³

As regards steering potential in particular, soft atypical acts allow for a carefully tailored differentiation of those effects on the part of the addressees, affording manoeuvring space for both the adopting institutions in terms of self-binding effect and intensity of enforcement and the addressees in terms of compliance.³⁴ Soft atypical acts are therefore, for example, an excellent instrument for institutions to prepare the launch of new policies and test their impact.³⁵ Since soft steering instruments may function as a precursor to subsequent hard law regulation,³⁶ this function goes beyond what some authors³⁷ perceive as mere preparatory consultation. Some areas rely particularly heavily on the possibility for soft steering, consultation, and preliminary policy testing. This is so in the highly politicized field of state aid policy,³⁸ but holds

²⁹ Cf. Cosma and Whish, *supra* note 15, at 25; Cini, *supra* note 18, at 3 and 17, and the references cited there.

³⁰ Cf. Hofmann, *supra* note 15, at 153, 164, and 169 *et seq.*

³¹ Cf. Snyder, *supra* note 18, at 3.

³² Cf. Cosma and Whish, *supra* note 15, at 34; Lenaerts and Van Nuffel, *supra* note 6, at para. 17–140; to that effect possibly Case C–322/88, *Grimaldi* [1991] ECR 4407, at para. 13.

³³ Cf. Cini, *supra* note 18, at 18; Cosma and Whish, *supra* note 15, at 32 *et seq.*

³⁴ Hofmann, *supra* note 15, at 169 *et seq.*, is of a similar opinion.

³⁵ Cini, *supra* note 18, at 19 *et seq.*, is of a similar opinion.

³⁶ Cf. *ibid.*, at 20 ff; Cosma and Whish, *supra* note 15, at 34.

³⁷ *Ibid.* at 47 *et seq.*

³⁸ Cf. L. Hancher, T. Ottervanger, and P.J. Slot, *EC State Aids* (3rd edn, 2006), at para. 1-019; Cini, *supra* note 18, at 4 *et seq.*

equally true in relation to policies seeking to regulate highly dynamic technological markets.³⁹ In such fields, recourse to soft steering rather than political compromise disguised as hard law works to enhance enforcement credibility.⁴⁰

One prominent example of the soft steering potential of atypical acts is competition law. Competition law enforcement is often based on informal pronouncements (press releases, oral statements, etc.)⁴¹ and soft law instruments (guidelines etc.). Likewise, the Commission uses soft law steering instruments to provide legal guidance to firms, national competition authorities, or courts, e.g., by way of staff Working Papers⁴², Green⁴³ or White⁴⁴ Papers, consultation papers,⁴⁵ notices,⁴⁶ guidelines,⁴⁷

³⁹ Cf. Cosma and Whish, *supra* note 15, at 33.

⁴⁰ Cf. Cini, *supra* note 18, at 18 *et seq.*; see also Cosma and Whish, *supra* note 15, at 33.

⁴¹ The Commission usually issues press releases following the adoption of a formal decision. In addition it occasionally adopts press releases to comment on or clarify certain developments in EU and national competition laws, often in the form of 'Memos' or 'Frequently Asked Question'. E.g., the Commission's disagreement in the *Tetra Laval Case* (Case T-5/02, [2002] ECR II-4381), see Commission Press Release, 'Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice', IP/02/1952, 20 Dec. 2002.

⁴² Commission staff working paper accompanying the White Paper on damages actions for breach of the EU antitrust rules, SEC(2008)404 final; Staff working paper, accompanying the Commission Communication on scientific information in the digital age: access, dissemination and preservation, COM(2007)56 final.

⁴³ Green Paper on damages actions for breach of the EU antitrust rules, COM(2005)672 final; Green Paper on European Union Consumer Protection, COM(2001)531 final; Green Paper on the Review of the Consumer Acquis, COM(2006)744 final.

⁴⁴ White Paper on damages actions for breach of the EU antitrust rules, COM(2008)165 final; White Paper on the review of Regulation 4056/86, applying the EU competition rules to maritime transport, COM(2004)675 final; White Paper on the modernization of the rules implementing Articles 85 and 86 of the EU Treaty, Commission Programme No 99/027.

⁴⁵ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Dec. 2005.

⁴⁶ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ (1997) C 372/5; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ (2001) C 368/13; Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ (2002) C 45/3; Commission Notice on Cooperation within the Network of Competition Authorities, OJ (2004) C 101/43; Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, OJ (2004) C 101/54; Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EU Treaty that arise in Individual Cases (Guidance Letters), OJ (2004) C 101/78; Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EU Treaty, OJ (2004) C 101/65.

⁴⁷ Guidelines on Vertical Restraints, OJ (2000) C 291/1; Guidelines on the applicability of Article 81 of the EU Treaty to horizontal cooperation agreements, OJ (2001) C 3/2; Guidelines on the application of Article 81 of the EU Treaty to technology transfer agreements, OJ (2004) C 101/2; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ (2006) C 210/2; Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ (2004) C 101/81; Guidelines on the application of Article 81(3) of the Treaty, OJ (2004) C 101/97.

communications,⁴⁸ opinions,⁴⁹ documents,⁵⁰ etc. One major purpose of these instruments is to assist firms in complying prospectively and voluntarily with competition law and to allow third parties like suppliers, customers, competitors, etc. to detect and report potential breaches or to act against them in court.⁵¹ These soft steering effects in favour of prevention and enforcement in competition law cannot similarly be achieved by any of the classical legal instruments laid down in Article 288 TFEU because of the defined legal effects (binding effect for regulations, directives, and decisions) or characteristics (recommendations are typically addressed to other institutions or Member States)⁵² associated with those explicit forms of action.

C Third-party Effects of Soft Atypical Acts

The European Court of Justice has recognized two aspects of indirect steering effects of soft atypical acts which carry legal significance for third parties in terms of the creation of enforceable obligations. First, the Court obliges national courts to take non-binding instruments into account to comply with their obligation to interpret national law in conformity with EU law or where those instruments are designed to supplement binding EU law provisions.⁵³ Indirectly thus, via the detour of court enforcement, private parties are caught by a potential third-party effect of soft law atypical acts.

Secondly, the EU legal order protects the legitimate expectations of parties that the institution deliberately issuing information on its policy or position in a given

⁴⁸ Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM(2007) 5406; Report from the Commission to the Council and the European Parliament – Evaluation Report on the application of the Council Regulation (EC) No 994/98 of 7 May 1998 regarding the application of Articles 87 (ex-Article 92) and 88 (ex-Article 93) of the EU Treaty to certain categories of horizontal State aid, pursuant to Article 5 of this Regulation, COM(2006)0831 final.

⁴⁹ Petit and Rato, 'From Hard to Soft Enforcement of EU Competition Law – A Bestiary of "Sunshine" Enforcement Instruments', SSRN Working Paper, 3, available at: <http://ssrn.com/abstract=1270109>.

⁵⁰ Explanatory brochure for Commission Reg. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, available at: http://ec.europa.eu/competition/sectors/motor_vehicles/legislation/explanatory_brochure_en.pdf; DG Competition, Merger Remedies Study, available at: http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

⁵¹ Petit and Rato, *supra* note 49, at 3.

⁵² Cf., e.g., Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ (2004) L 124/36.

⁵³ Cf. Case C-322/88, *Salvatore Grimaldi v. Fonds des Maladies Professionnelles* [1991] ECR 4407, at para. 18; Case C-207/01, *Altair Chimica SpA v. ENEL Distribuzione SpA* [2003] ECR I-8875, at para. 41; Case C-55/06, *Arcor AG & Co KG v. Bundesrepublik Deutschland* [2008] ECR I-2931, at para. 94; Case C-188/91, *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* [1993] ECR I-363, at para. 18.

context will adhere to that policy line.⁵⁴ Departure from pre-announced general policy lines may furthermore infringe the general principles of equal treatment⁵⁵ and legal certainty.⁵⁶ In other words, even atypical acts incapable of formally binding third parties bear a certain self-binding effect on the issuing authority. If the self-binding character is not respected, any discrepancies between the policy announcement in the soft law atypical act and a subsequent binding individual decision can be attacked in the course of an action for annulment of that later decision.⁵⁷

D Drawbacks of Soft Atypical Acts

In spite of the attractiveness of soft atypical acts as regulatory instruments for EU institutions, they also yield some evident drawbacks.

Procedural flexibility in the adoption of atypical acts may decrease the number of institutional players involved in decision-making and increase the hurdles in the way of interested parties getting involved in the decision-making process.⁵⁸ In addition, procedural flexibility may also mean that the legal basis upon which some atypical acts rest may be questionable.⁵⁹

The substantial flexibility afforded by atypical acts in terms of differentiation of their legal effects may also give rise to uncertainties in the determination of the addressees and, even more importantly in that regard, require a determination of legal effects on a scale ranging from no binding effect to self-binding effects to full third-party binding effect (disguised Article 288-type decision).⁶⁰ Likewise, the preconditions and extent

⁵⁴ Cf., e.g., Joined Cases C-189, 202, 205 to 208/02 P and 213/02 P, *Dansk Rørindustri A/S and others v. Commission* [2005] ECR I-5425, at paras 209 *et seq.*; Case C-313/90, *CIRFS v. Commission* [1993] ECR I-1125, at paras 34 and 36; Case C-409/00, *Spain v. Commission* [2003] ECR I-1487, at para. 95; Case C-91/01, *Italy v. Commission* [2004] ECR I-4355, at para. 45; Case T-380/94, *Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v. Commission* [1996] ECR II-2169, at para. 57; Case T-214/95, *Het Vlaamse Gewest v. Commission* [1998] ECR II-717, at paras 79 and 89; Case T-149/95, *Etablissements J. Richard Ducros v. Commission* [1997] ECR II-2031, at paras 61 *et seq.*; Case T-105/95, *WWF UK (World Wide Fund for Nature) v. Commission* [1997] ECR II-313, at paras 53 *et seq.*; Case T-23/99, *LR AF 1998 v. Commission* [2002] ECR II-1705, at para. 274.

⁵⁵ Cf. Joined Cases C-189, 202, 205 to 208/02 P and 213/02 P, *Dansk Rørindustri* [2005] ECR I-5425, at para. 211.

⁵⁶ To that effect see Case C-310/99, *Italy v. Commission* [2002] ECR I-2289, at para. 52; Case C-387/97, *Commission v. Greece* [2000] ECR I-5047, at para. 87; see also Hofmann, *supra* note 15, at 162.

⁵⁷ Cf., e.g., Case C-443/97, *Spain v. Commission* [2000] ECR I-2415, at paras 33 *et seq.*; Judgment of 20 Nov. 2008 in Case T-185/05, *Italy v. Commission*, not yet reported, at para. 41.

⁵⁸ Hofmann, *supra* note 15, at 177, is of a similar opinion. A similar debate over transparency in lawmaking taints the use of the comitology procedure: cf. Christiansen and Polak, 'Comitology between Political Decision-Making and Technocratic Governance: Regulating GMOs in the European Union', 1 *eipascope* (2009) 5, at 5 *et seq.*; Peters, 'European Democracy After the 2003 Convention', 41 *CMLRev* (2004) 37, at 59 *et seq.*

⁵⁹ Cf. Cini, *supra* note 18, at 20.

⁶⁰ Cf. also Cosma and Whish, *supra* note 15, at 32.

of a potential third-party effect of soft law atypical acts before national courts as recognized by the ECJ in principle are far from clear,⁶¹ and thus emerge as a source of legal uncertainty for the addressees. Both effects are aggravated by a lingering notion that non-binding instruments may at times be drafted in a less elaborate manner than hard law.⁶² Ambiguities in a soft law steering document may thus lead to confusion rather than clarification.⁶³

Furthermore, since atypical acts are not subject to mandatory publication in the Official Journal, it may become more difficult for potential addressees to become aware of policy changes affecting them. Similarly, the wide variety of atypical instruments used in practice has been criticized for its systemic complexity and its unclear status in the hierarchy of norms in EU law, entailing a lack of legislative and administrative transparency *vis-à-vis* third parties.⁶⁴ It was shown that some soft atypical acts, like Green Papers, pursue and show precisely the effect of involving a broad range of interested parties in the decision-making process via public consultations, so that the negative effects on transparency cannot be deemed to exist generally in relation to all atypical acts. Nonetheless, certain soft atypical acts may result in a decrease in intra-institutional as well as third-party transparency, e.g., where they are difficult to access, ambiguous in language, of unclear normative status in relation to other documents, etc.

Finally, where atypical acts are not binding upon individual parties, parties affected merely by the soft steering effect resulting from such acts cannot attack them before a Community Court. Neither can general policy lines or policy changes announced in atypical acts be attacked by the addressees of such policies in any formalized way. At the same time, corrective principles like the protection of legitimate expectations and the principle of equal treatment, seeking to protect individuals from negative effects of soft policy changes, are often too vague really to encourage parties to take on the risk of enforcing them in court.⁶⁵ Adding to these uncertainties is the fact that the EU Courts are not bound by the interpretation of norms suggested by the Commission in a steering document,⁶⁶ so that individuals cannot be fully certain to act in conformity with the law even when complying with such an instrument.⁶⁷

⁶¹ Cf. *ibid.*, at 30 *et seq.*, and the case law and discussions reflected there.

⁶² Cf. *ibid.*, at 33.

⁶³ Cf. *ibid.*

⁶⁴ Cf. Hofmann, *supra* note 15, at 170 *et seq.*; Bieber and Salomé, *supra* note 17, at 920 ff; see also Cosma and Whish, *supra* note 15, at 25 *et seq.*

⁶⁵ Cf. Hofmann, *supra* note 15, at 171.

⁶⁶ Cf., e.g., Case 310/85, *Deufil GmbH & Co KG v. Commission* [1987] ECR 901, at para. 22; Case C–313/90, *CIRFS v. Commission* [1993] ECR I–1125, at paras 34 ff; Case C–311/94, *IJssel-Vliet Combinatie BV v. Minister van Economische Zaken* [1996] ECR I–5023, at para. 42; Case C–382/99, *Netherlands v. Commission* [2002] ECR I–5163, at para. 24.

⁶⁷ Cf. Cosma and Whish, *supra* note 15, at 34 *et seq.*

3 Atypical Acts in Internal EU IP Law

A General Remarks

Internal market legislation today is multi-layered.⁶⁸ Not only is there a problem in terms of an abundance of regulatory acts, but there is also concern over regulatory quality.⁶⁹ In trying to make sense of the array of atypical acts in particular, classification is difficult and is best undertaken along the lines of the acts' functions and objectives. It is nonetheless understood that any classification necessarily carries some inherent vagueness due to overlaps between functions and objectives in practice.

Against that reservation, a basic categorization that can be drawn⁷⁰ is between the pre-regulation and the post-regulation function of the act, i.e., the role an atypical act plays before or after new legal provisions are created. The pre-law function can be understood in two different ways. First, it can be considered to refer to the fact that a particular atypical act is adopted with the objective of elaborating and preparing future Community legislation and policies. Secondly, the pre-law function can also be understood in a more substantive way, in the sense that soft law acts to pave the way for the adoption of legislation in the future. Therefore, soft law acts may facilitate the subsequent adoption of legislation by providing or increasing the basis of support for the rules contained therein.⁷¹

Additionally or alternatively, three categories⁷² of atypical acts in IP law can be distinguished. The first major category encompasses preparatory instruments. These instruments are adopted in view of preparing future Community law and policies by providing information on Community action.⁷³ The second category includes the interpretative and decisional instruments. These instruments aim at providing guidance for the interpretation and application of existing Community law. More particularly, the decisional instruments indicate in what way a Community institution will apply Community legal provisions to individual cases when it has implementing and discretionary powers.⁷⁴ The third category covers what one could call steering instruments. These aim at establishing or giving further effect to Community objectives and policies or related policy areas, sometimes in a rather political and declaratory way but also often with a view to establishing closer cooperation or even harmonization between Member States in a non-binding way.⁷⁵

⁶⁸ L. Senden, *Soft Law in European Community Law* (2004), at 10.

⁶⁹ *Ibid.*, at 11.

⁷⁰ Thüerer, 'The Role of Soft Law in the Actual Process of European Integration', in O. Jacot-Guillarmod and P. Pescatore, *L'avenir du libre-échange en Europe: vers un Espace économique européen?* (1990), at 133.

⁷¹ Senden, *supra* note 68, at 120.

⁷² H. Adam, *Die Mitteilungen der Kommission* (1999) 72; Senden, *supra* note 68, at 118.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at 119.

⁷⁵ *Ibid.*

B Pre- and Post-regulation Instruments

IP law preparatory instruments in the pre-law area encompass Green Papers and White Papers, which are used solely by the Commission,⁷⁶ and action programmes, which may be adopted by the Council at a later stage.⁷⁷

The purpose of a Green Paper⁷⁸ is to foster a debate on a special topic in which it aims to set out a number of issues connected with it and intends to launch a consultation on these issues.⁷⁹ The primary objective is to get the relevant facts and the different opinions of the contributors⁸⁰ which exist on a particular issue, in order to be able to decide on the next steps to be taken.⁸¹ Green Papers usually start with an overview of the present situation and regulatory framework. By doing this, they focus on the impact IP rights have on the single market⁸² and the need for regulation.⁸³ Specific issues are usually accompanied by questions from the Commission, which represent the topics that are the focus of the discussion and so of the Green Paper itself.⁸⁴ Although the Commission is primarily interested in the discussion generated, this does not mean that a Green Paper cannot already offer some solutions.⁸⁵ As the contributors comment on the questions they will also comment on the solutions offered. Additionally, even though Green Papers focus on special topics, they sometimes expand to other areas which do not fall within their initial parameters but which have a value in enhancing knowledge.⁸⁶ This is an important feature since, as mentioned earlier, IP rights meet within different situations in different combinations, it thus being possible to identify new problematic areas. Unfortunately, after a Green Paper has been created, subsequent information regarding how the Commission goes on to act and adopt the Paper's content remains unclear.⁸⁷

⁷⁶ *Ibid.*, at 124, 126.

⁷⁷ *Ibid.*, at 128.

⁷⁸ As a rule, neither Green Papers nor White Papers indicate by virtue of what competence or on what legal basis they have been adopted.

⁷⁹ Green Paper, Copyright in the Knowledge Economy, COM(2008)466, July 2008, at 1.1.

⁸⁰ The contributors include Member States, corporations, NGOs, different institutions, scientists, researchers, students, etc. Even when parties are specified, it is generally added that any other interested party may submit its comments as well.

⁸¹ Senden, *supra* note 68, at 124.

⁸² Green Paper on the Community patent and patent system in Europe, COM(97)314, June 1997, at 2; Green Paper, Combating Counterfeiting and Piracy in the Single Market, COM(98)569, Oct. 1998, at 1.2.

⁸³ Green Paper, The Protection of Utility Models in the Single Market, COM(95)370, July 1995, at II *et seq.*

⁸⁴ See, e.g., the questions in the Green Paper, Copyright in the Knowledge Economy, *supra* note 79; Green Paper on the Community patent and patent system in Europe, *supra* note 82.

⁸⁵ Green Paper, Combating Counterfeiting and Piracy in the Single Market, *supra* note 82, at 5; The Protection of Utility Models in the Single Market, *supra* note 83, at III *et seq.*

⁸⁶ Green Paper, Copyright and Knowledge Economy, *supra* note 79, at 1.2: 'the Green Paper is not limited to scientific and educational material'.

⁸⁷ Senden, *supra* note 68, at 125.

White Papers serve a twofold objective. On the one hand, they constitute documents for discussion; on the other, they also aim at laying down the main lines or strategy of action for the future.⁸⁸ White Papers can also be follow-ups to Green Papers,⁸⁹ and as such they often even go a step further by containing or announcing proposals or even revealing some information about the scheduled timing. This can be seen, for example, in the implementation of a single Community-wide broadcasting area⁹⁰ or in the announcement of necessary supplementary proposals for the creation of the Community Trade Mark.⁹¹

Council Directive 91/250/EEC on the legal protection of computer programs⁹² is another example of the adoption of a proposal featured in a White Paper. The Directive was a 'first' for copyright law. The fact that a proposal is announced in a White Paper still does not mean immediate or even fast realization. This is best seen in the history of Directive 98/44/EC on the legal protection of biotechnological inventions.⁹³ While the White Paper on completing the internal market prompted a proposal for a directive,⁹⁴ moral issues regarding the patentability of living matter primarily slowed down its adoption procedure. This was because the proposal did not sufficiently take into account the dimension of patenting biotechnological inventions. It took almost 10 years of negotiations between the Commission and the European Parliament (EP) before the Directive was adopted.⁹⁵

Since the Green Paper launches a public debate, it sometimes opens a number of pathways. For the sake of efficiency, action plans refer to a limited number of priority initiatives to be launched at Community level and include a number of schemes put into action.⁹⁶ In doing so, action papers summarize the results of the Green Paper initiative and can be seen as a 'follow-up'⁹⁷ to them, informing people about future steps, namely the next measures to be taken by the Commission, such as setting up research centres, development, or the 'promot[ion of standardization] processes'.⁹⁸ They also enable an overall review of the legal system structure in the IP field, identifying gaps

⁸⁸ *Ibid.*, at 126.

⁸⁹ See, e.g., the White Paper, Completing the Internal Market, COM(85)310, which states its function as a follow-up at 117, to the Green Paper, on the establishment of the common market for broadcasting, especially by satellite and cable, COM(84)300, May 1984.

⁹⁰ White Paper, Completing the Internal Market, COM (85) 310, at 117

⁹¹ *Ibid.*, at 146.

⁹² OJ (1991) L 122/42.

⁹³ OJ (1998) L 213/13.

⁹⁴ Proposal for a Council Dir. on the Legal Protection of Biotechnological Inventions, COM(88)496 final.

⁹⁵ See O. Mills, *Biotechnological Inventions, Moral Restraints and Patent Law* (2010), at 124 *et seq.*

⁹⁶ The first action plan for innovation in Europe, Innovation for growth and employment, COM(96)589, at 5.

⁹⁷ Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee – Follow-up to the Green Paper on combating counterfeiting and piracy in the single market, COM(2000)0789 final.

⁹⁸ See, e.g., Communication from the Commission to the Council and the European Parliament, Stimulating Technologies for Sustainable Development: An Environmental Technologies Action Plan for the European Union, COM(2004)38, at 4.1.3.

within it,⁹⁹ especially confirming ‘that the disparities between the national systems of intellectual property rights [are] having a harmful effect on the proper functioning of the internal market’. As such, they can set out adequate recommendations.¹⁰⁰ Although every issue of an action plan is not always adopted, the special topics will be, as they can be more easily ‘politically’ realized. Among the initiatives proposed in the follow up action plan to the Green Paper on counterfeiting and piracy, for instance, was a directive which would harmonize national provisions on the means by which intellectual property rights were enforced.¹⁰¹ Because action programmes are quite often established or integrated on the basis of a principle in the TFEU, in the formal binding character of Article 288 TFEU,¹⁰² their adoption is much more formalized than that of Green and White Papers.¹⁰³

Another atypical act which adopts a sort of pre-regulatory function is the Staff Working Paper. In the ambit of the increased culture of consultation and dialogue among the EU bodies and the participants, the Commission is able to consult interested parties, who contribute their views to studies conducted by that institution.¹⁰⁴ While Green and White Papers are meant to start a discussion or to emphasize the result of such a discussion, Staff Working Papers aim to present facts, evidence, and examples relating to a specific issue.¹⁰⁵ The European Commission publishes different documents in order to launch a debate on the need for Community action in a specific field, and Staff Working Papers analyse its issues in more depth, indicating the next steps that could be taken.¹⁰⁶ The objective of a Staff Working Paper in the field of copyright, for example, is ‘to improve the operation of the *acquis communautaire* in the field of copyright and its coherence; to safeguard the good functioning of the Internal Market’.¹⁰⁷ Under the first aspect, the paper considers adaptations to the early directives¹⁰⁸ in this field and measures to increase their consistency with each

⁹⁹ The first action plan for innovation in Europe, Innovation for growth and employment, COM(96)589, at 2.4.

¹⁰⁰ Communication, *supra* note 97, at 8 *et seq.*

¹⁰¹ Dir. 2004/48/EC of the European Parliament and of the Council, of 29 April 2004 on the enforcement of intellectual property rights, OJ (2004) L 157/45.

¹⁰² See Annex in Dec. 2228/97/EC of the European Parliament and of the Council, of 13 Oct. 1997, establishing a Community action programme in the field of cultural heritage (the Raphael programme, OJ (1997) L 305/31).

¹⁰³ Senden, *supra* note 68, at 131.

¹⁰⁴ Majer, ‘Handlungsoptionen der EU-Politik im Bereich der Verwertungsgesellschaften’, in K. Riesenhuber, *Wahrnehmungsrecht in Polen, Deutschland und Europa* (2005), at 167.

¹⁰⁵ Staff working paper, accompanying the Commission Communication on scientific information in the digital age: access, dissemination and preservation, COM(2007)56 final, at 1.1.

¹⁰⁶ Commission Staff Working Document, Media pluralism in the Member States of the European Union, SEC(2007)32, 16 Jan. 2007, at 1.

¹⁰⁷ Commission Staff Working Paper, on the review of the EU legal framework in the field of copyright and related rights, SEC(2004)995, 19 July 2004, at 1.1.

¹⁰⁸ The review of the Community copyright legislation concerns the provisions in the Dirs adopted in the field of copyright and related rights between 1991 and 1996 and Dir. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ (2001) L 167/10.

another. Under the second aspect, the paper addresses certain specific issues which are currently not harmonized, in order to verify whether the lack of harmonization has had an adverse effect on the functioning of the Internal Market.¹⁰⁹ By offering some options as a solution, as in Green Papers, Staff Working Documents show the viewpoints in favour of or against a certain measure of the interested parties in a specific field.¹¹⁰ In so doing the pros and cons of the interested parties can be identified, and the necessary solution can be found.

It is not only the Commission which uses atypical acts. Other atypical acts, which have an influence on future legislation in the IP law field, are the resolutions of the EP.¹¹¹ These are the adoption of opinions and recommendations from the EP. Nonetheless they have a significant political influence.¹¹² This is due to the fact that resolutions consider a number of directives, Green Papers, and Working Papers, among others, calling upon the Commission or Member States to initiate new legislative incentives or promote clearer legislative solutions.¹¹³ Members of the EP also use atypical instruments, which has an influence on IP law. Such is the case of the so-called written question. Members of Parliament can point out cases to the Commission where there is a need to monitor situations in which the Internal Market is threatened by other legal systems,¹¹⁴ or where the members seek clarity on legislative questions.¹¹⁵ While this atypical act has an inter-institutional character (it is not aimed at the public for consultation purposes), it nevertheless plays a special role in transparency, as it not only points to future actions of the Commission, but also functions similarly to an annotation of the Commission's legislative acts.

Finally, the post-regulation function is fulfilled by instruments which are subsequently adapted to existing Community law with a view to implementing legislation or facilitating correct interpretation and (uniform) application.¹¹⁶ Atypical acts of this type are the reports from the Commission to the EP and to the Council. Notwithstanding

¹⁰⁹ Commission Staff Working Paper, *supra* note 107, at 1.1.

¹¹⁰ See submissions by the music industry and interested parties in the Commission staff working document, Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, SEC(2005)1254, 11 Oct. 2005.

¹¹¹ Everling, 'Probleme', *supra* note 17, at 419.

¹¹² E. Grabitz and M. Hilf, *Das Recht der europäischen Union* (2008), at Para. 21, IV, 4., 10; von der Groeben and Schwarze, *supra* note 17, at para. 21, III, 4.

¹¹³ European Parliament Res of 25 Sept. 2008 on collective cross-border management of copyright and related rights for legitimate online music services, OJ (2010) C 8E/105; EP, Res on the impact of new technologies upon the press in Europe OJ (1997) C 339/415; EP, Res on the situation and role of artists in the EU, OJ (1999) C 175/ 42.

¹¹⁴ See Written Question P-1141/04 by Göran Färm (PSE) to the Commission, OJ (2004) C 88E/573.

¹¹⁵ See Written Question P-2514/04 by Dorette Corbey (PSE) to the Commission, OJ (2004) C 88E/90.

¹¹⁶ Senden, *supra* note 68, at 120.

the fact that the legal source of some atypical acts is unclear, the reports have their source in legal acts themselves or in the resolutions of the EP.¹¹⁷

C Guidance and Steering Instruments

Guidance and steering effects are closely related and will here be dealt with together. Steering instruments play a relatively more important law in competition law, as briefly discussed above, than in IP regulation. In practice, however, there is a cross-impact of competition law steering instruments also on IP practice. One example here is the assessment of pool formation scenarios, which is not part of the Commission's regulatory powers for IP law,¹¹⁸ but which is extensively dealt with in the competition-law-based Technology Transfer Guidelines.¹¹⁹ As for the approval of patent pools, an atypical instrument was used – the so-called 'comfort letter' – however, due to the change brought about by Council Regulation 1/2003,¹²⁰ it has fallen into disuse. A similar type of cross-cutting IP/competition steering instrument is the oral statement. Speeches given at international symposia and interviews at a press conferences provide insider explanations.¹²¹

Nonetheless, some IP-related steering dissociated from competition law effects also exists. As one example, the Commission Report on Modernizing Universities¹²² demonstrates how directives are transposed into Member States' laws.¹²³ In that context, the report is a trouble-shooter in transposition and also serves as guidance for the harmonious application of EU law.

4 Atypical Acts in the External Trade and IP Policy

A General Context

The above findings in relation to the general functioning and flaws of atypical acts and their particular application in the field of internal market IP legislation will now

¹¹⁷ See, e.g., the Report from the Commission to the European Parliament and the Council, Development and implications of patent law in the field of biotechnology and genetic engineering, COM(2002)545 final, 7 Oct. 2002: '[t]his report is provided for by Article 16(c) of Directive 98/44/EC on the legal protection of biotechnological inventions, which lays down that the Commission must transmit each year to the European Parliament and the Council a report on the development and implications of patent law in the field of biotechnology and genetic engineering'.

¹¹⁸ Commission Reg. 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ (2004) L 123/11.

¹¹⁹ See Guidelines on the application of Article 81 of the EU Treaty to technology transfer agreements, OJ (2004) C 101/2, at 210 *et seq.*

¹²⁰ Council Reg. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ (2003) L 1/1.

¹²¹ Cf. also Case T-3/93, *Air France v. Commission* [1994] ECR II-121, at paras 46–48.

¹²² Report from the Commission to the Council, on the Council Resolution of 23 Nov. 2007 on Modernizing Universities for Europe's competitiveness in a global knowledge economy, COM(2008)680 final, 30 Oct. 2008.

¹²³ *Ibid.*

be contrasted with atypical acts relating to the treatment of IP rights and IP protection in the EU's external trade relations. As will be shown, just like internal regulation, external trade policy is home to a diverse collection of atypical acts.

In substance, those acts have recently tended to focus strongly on the international enforcement of IP rights in particular. This is not surprising – given that the acts at stake either relate to unilateral actions addressed at third countries or bi- or multilateral actions conducted together with third countries in the area of international trade and IP. In this field, the EU's and other IP exporting countries' interests have centred *inter alia* on strong enforcement of IP rights in the more formal conduct of trade relations via Free Trade Agreements (FTAs), Economic Partnership Agreements (EPAs), or Association Agreements (AAs).¹²⁴ It thus appears only natural that this focus is carried over into more 'informal' areas such as atypical acts. The less formal (and legal) character of these acts often allows them to be more policy-driven, and so makes it easier to address key political concerns relevant for EU/EC external trade relations in a more flexible and current manner.

B Types of Acts

For Europe, the economic importance of industries producing goods and providing services which in one or several aspects may be subject to IP protection is significant: The copyright sector for example represents more than 5 per cent of European gross domestic product (GDP) and employs more than 3 per cent of the workforce.¹²⁵ Considering further that about half of the EC's exports consist of so-called 'upmarket products'¹²⁶ (selling at premium prices due to quality, branding, and related services) which are relatively more dependant on IP protection, it is therefore not surprising that the EU is pursuing a policy agenda which demands effective protection, and especially the enforcement of IP in markets abroad. Apart from entering into binding agreements with third countries which include specific additional obligations to protect and enforce IP, the EU uses various flexible tools which can be considered as atypical acts of the Union. The following provides an overview of these tools relating to IP in the context of the EU's external trade relations.

1 The 2004 Strategy for the Enforcement of Intellectual Property Rights in Third Countries

In late 2002, DG Trade took the initiative to prepare a survey on the enforcement of intellectual property rights 'with the objective of assessing in a detailed manner the current situation in third countries and identifying the most problematic intellectual

¹²⁴ See, e.g., the comprehensive subsection 3 of the IP and Innovation Chapter in the EU – CARIFORUM EPA, (OJ (2008) L 289/1/3) containing 12 detailed provisions on IP Enforcement.

¹²⁵ See McMahon, 'Current Developments – European Union Law – Intellectual Property', 56 *ICLQ* (2007) 899.

¹²⁶ EU Commission, Commission Staff Working Document, SEC(2006)1230, 4 Oct. 2006, at 5.

property areas and countries'.¹²⁷ The resulting study intends to provide a diagnostic tool allowing the Commission 'to act more efficiently and to develop a clear strategy to tackle the growing problems caused by violations of IPR and by the deficient enforcement of such rights in third countries'.¹²⁸ For this purpose, DG Trade sent a questionnaire¹²⁹ to EU Delegations in 23 countries, as well as to associations of right holders and to companies known to be particularly concerned by piracy and counterfeiting. In the context of examining atypical EU acts, this questionnaire warrants attention – although it is in itself without any legal effect. DG Trade acknowledges that the responses to the questionnaire 'reflect the view of the parties and their perception of the situation; and not necessarily the strict reality' and that 'the information provided has not been verified by the Commission or submitted to the authorities of the countries to which they refer for comments'.¹³⁰ Still, the EU seems to rely on the (unverified) results of the survey as an appropriate basis for further action which is described in the following atypical act.

Shortly after the survey, the Commission in 2004 introduced 'a new comprehensive and long-term action plan'¹³¹ to tackle IP infringements abroad by focussing on *effective implementation and enforcement* of existing IP regulation.¹³² A paper from the Commission's DG Trade sets out in detail this 'Strategy for the Enforcement of Intellectual Property Rights in Third Countries'.¹³³ This strategy aims to set 'the guidelines for the European Commission towards a reduction of the level of IPR violations taking place beyond the EU borders, worldwide'.¹³⁴ The Commission views it as 'logical sequence' following the 2004 Enforcement Directive and the 2003 amendment to the Border Measures Regulation.¹³⁵ In a nutshell, this strategy comprises:

¹²⁷ EU Commission – DG Trade, *Survey on the enforcement of intellectual property rights in third countries* (July 2003), available at: http://ec.europa.eu/trade/issues/sectoral/intell_property/survey_en.htm (accessed 10 Aug. 2009).

¹²⁸ *Ibid.*

¹²⁹ The questions asked in this questionnaire can be retrieved in the overview of the survey's results (available at: http://trade.ec.europa.eu/doclib/docs/2004/august/tradoc_113229.pdf (accessed 10 Aug. 2009)) as well as the results on the individual third countries' being surveyed, available at: http://ec.europa.eu/trade/issues/sectoral/intell_property/survey_en.htm (accessed 10 Aug. 2009).

¹³⁰ EU Commission – DG Trade, *supra* note 127.

¹³¹ European Commission – DG Trade, *Strategy for the Enforcement of Intellectual Property Rights in Third Countries* (12 Apr. 2005), available at: http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf (accessed 10 Aug. 2009), at Annex I.

¹³² EU Press Release, 'EU strengthens fight against piracy and counterfeiting beyond its borders' (IP/04/1352), Brussels, 10 Nov. 2004. The press release quotes the then Trade Commissioner Pascal Lamy as stating that 'devising the right tools to enforce [IP rights] is now our priority'.

¹³³ EU Commission – DG Trade, *supra* note 131.

¹³⁴ EU Press Release, *supra* note 132. The Strategy Document itself describes the purpose as, first, providing a 'long-term line of action for the Commission with the goal of achieving a significant reduction of the level of IPR violations in third countries'; and, secondly, describing, prioritizing, and co-ordinating the mechanisms available to the Commission for achieving this goal.

¹³⁵ EU Commission – DG Trade, *supra* note 131, at 3; see also Dir. 2004/48/EC of the European Parliament and of the Council of 29 Apr. 2004, OJ (2004) L 157/45, and Council Reg. 1383/2003 of 22 July 2003, OJ (2003) L 196/7.

1. *Identifying priority countries*: EU action will focus on the ‘most problematic countries in terms of IPR violations’, including source countries, transit countries, and target countries.¹³⁶ The strategy paper explicitly refers to the 2002 survey and demands as further specific action the need to ‘put in place a mechanism that will periodically conduct an exercise similar to the survey . . . based on a questionnaire’ which is to be distributed to various stakeholders.¹³⁷ Together with those from ‘other reliable sources’, these data from right holders and their associations will form ‘the basis for renewing the list of priority countries’.¹³⁸
2. *Systematically raising IP enforcement concerns in multilateral, regional, and bilateral contexts*: On the multilateral level, the EU aims to place IP enforcement on the agenda of the TRIPS Council and respective WIPO Bodies.¹³⁹ This is not only to ‘monitor and discuss enforcement problems from a very early stage’, but also to address perceived ‘shortcomings’ of the TRIPS Agreement by, for example, proposals for an ‘extension of the obligation to make available customs measures to goods in transit and for export’.¹⁴⁰ The EU further plans to utilize the TRIPS Council to monitor the TRIPS compliance of national enforcement legislation – in particular in the priority countries. Bilaterally and regionally, emphasis is placed on extending and clarifying enforcement provisions in trade agreements, using the IP Enforcement Directive and the Border Measure Regulation as an ‘important source of inspiration and a useful benchmark’.¹⁴¹
3. *Technical assistance*: Realizing that improving IP enforcement involves not primarily drafting legislation – but training judges, police forces, and customs officials and setting up relevant task forces and agencies, the EU wants to re-focus its technical assistance accordingly. IP enforcement assistance will (a) focus on identified priority countries; (b) move away from being merely ‘demand driven’ to integrate specific EU concerns (for example by illustrating how to extend border measures beyond TRIPS obligations to the ‘control of exports and goods in transit’); (c) align with activities of WCO,¹⁴² WIPO,¹⁴³ EPO,¹⁴⁴ and OTD;¹⁴⁵ and (d) be offered under Article 67 TRIPS and the Doha Development Round framework.¹⁴⁶
4. *Dispute settlement and sanctions*: The EU envisages ‘publicly identifying’ countries where IP violations are systematic and no official response exists. Concerned

¹³⁶ EU Commission – DG Trade, *supra* note 131, at 17–18 and EU Press Release, *supra* note 132.

¹³⁷ EU Commission – DG Trade, *supra* note 131, at 5.

¹³⁸ *Ibid.*

¹³⁹ See World Trade Organization, *Enforcement of Intellectual Property Rights – Communication from the European Communities*, IP/C/W/448, 9 June 2005.

¹⁴⁰ Commission – DG Trade, *supra* note 131, at 6.

¹⁴¹ *Ibid.*

¹⁴² World Customs Union.

¹⁴³ World Intellectual Property Organization.

¹⁴⁴ European Patent Office.

¹⁴⁵ Office for Community Trademarks and Designs.

¹⁴⁶ Commission – DG Trade, *supra* note 131, at 8–10.

right holders will be informed about the existing mechanisms under the Trade Barriers Regulation¹⁴⁷ for lodging complaints which set off a Commission investigation which in turn may lead to lodging dispute settlement proceedings under the WTO or applicable bilateral agreements.¹⁴⁸

5. *Political dialogue, institutional cooperation, raising public awareness, and creating public–private partnerships*: Finally, the EU strategy includes several other elements. (a) A ‘carrot and stick’ political dialogue should ‘strongly convey the message that the EU is willing to assist them in raising the level of enforcement, but also that it will not refrain from using the instruments at its disposal in cases where deficient enforcement is harming its right-holders’.¹⁴⁹ The dialogue – such as the ‘EU–China Dialogue on Intellectual Property’¹⁵⁰ – may target individual countries or – like the ‘EU–Japan Joint Initiative for IP Enforcement in Asia’ – be conducted with cooperation partners.¹⁵¹ (b) The Commission wishes to achieve greater coordination of all its services involved in work relating to IP enforcement and to make right holders aware of relevant contact points.¹⁵² (c) It further aims to raise awareness among users in third countries about ‘the benefits of IPR’ and ‘the dangers of IPR violations’, as well as among its own right holders about the risks incurred in trading in countries where IP enforcement is ineffective and the need to use all means available to enforce their rights. For public authorities in developing and least developed countries, the Commission has commissioned the preparation of a ‘Guidebook on Enforcement of Intellectual Property Rights’.¹⁵³ (d) Finally, the Commission considers private entities – in particular right holders and related trade or industry associations – an invaluable source of information and key partners for any awareness-raising initiatives. In particular in border enforcement training programmes, private operators have for a long time cooperated with the Commission. It plans further to increase such ‘public–private partnerships’ for facilitating IP enforcement – for example in the form of ‘local IP networks’ in the relevant third countries.¹⁵⁴

2 Implications

In sum, this strategy comprises a comprehensive action plan to facilitate IP enforcement in third countries with eight distinct themes ranging from identification of

¹⁴⁷ Council Reg. 3286/94 of 22 Dec. 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the WTO, OJ (1994) L 349/71.

¹⁴⁸ Commission – DG Trade, *supra* note 131, at 10.

¹⁴⁹ *Ibid.*, at 7.

¹⁵⁰ See, e.g., the Press Release on a joint EU–China IP Enforcement plan, IP/09/193, Brussels, 30 Jan. 2009.

¹⁵¹ See Joint Press Statement of the 16th EU–Japan Summit, Berlin, 5 June 2007, available at: www.eu2007.de/en/News/download_docs/Juni/0506-RAA1/010Statement.pdf.

¹⁵² Commission – DG Trade, *supra* note 131, at 13.

¹⁵³ M. Blakeney, *Guidebook on Enforcement of Intellectual Property Rights*, available at: http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122641.pdf.

¹⁵⁴ Commission – DG Trade, *supra* note 131, at 11.

'priority countries' via technical assistance and utilizing multilateral, regional, and bilateral fora for threatening/bringing dispute settlement cases and related sanctions. It involves mainly soft law mechanisms – such as surveying and monitoring IP enforcement in third countries, initiatives for negotiating stronger IP enforcement provisions, providing tailored technical assistance, conducting political dialogues, or preparing guidelines. Most of these actions or acts are of a merely political nature with no (direct) legal effect. In this regard, they are flexible tools for conducting international relations and a foreign policy which is responsive to the EU's objective of facilitating strong IP enforcement abroad.

Some of these acts further implement (or at least are viewed by the EU as a means of implementing) specific legal obligations – for example, relating to technical assistance under Article 67 TRIPS.¹⁵⁵ Here a legal effect can be seen in reliance on these acts in order to discharge an international obligation owed by the EU (and its Member States). Whether such action indeed has such an effect of course depends on its meeting the requirements set out for fulfilling the international obligation in question. A similar situation exists where the EU seems to rely on a right under a treaty or a function of an international institution in order to 'justify' an element of its strategy: for example, the strategy paper refers to the monitoring function of the TRIPS Council (as provided for under Article 68 TRIPS¹⁵⁶) as a means of checking IP enforcement abroad.¹⁵⁷ Given that the EU considers the IP enforcement obligations under TRIPS to be insufficient, it is questionable whether the monitoring it is interested in is limited to examining TRIPS compliance as mandated by Article 68 TRIPS.

Finally, other atypical acts – such as surveying and monitoring IP enforcement abroad – may have important further legal consequences: On the basis of the information provided in an EU survey, right holders may lodge complaints under the Trade Barrier Regulation or the Commission may initiate dispute settlement proceedings in the WTO or under bilateral arrangements. These cases may lead to binding and enforceable decisions which ultimately justify countermeasures or 'sanctions' by the EU against the third country in question.

¹⁵⁵ Art. 67 TRIPS provides: '[i]n order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.'

¹⁵⁶ In its relevant first sentence Art. 68 TRIPS provides: '[t]he Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights'.

¹⁵⁷ Commission – DG Trade, *supra* note 131, at 5–6.

This brief review of the strategy shows that being a ‘priority country’ can have further (semi-legal) implications: such countries are specific targets for the EU’s new approach to technical assistance which focuses on IP enforcement. If that is conducted under Article 67 TRIPS, one may question whether such a focus is truly ‘in favour’ of the receiving country. Even if one agrees with the highly contested EU position that IP enforcement is also in the interests of the receiving country, an overall IP strategy tailored to the domestic circumstances is generally much more needed.¹⁵⁸ The receiving country will very likely find it difficult to request other, more tailored technical assistance from the EU – although Article 67 TRIPS sets out a binding obligation. Secondly, the EU strategy indicates that it will try to make use of the monitoring function of the TRIPS Council under Article 68 TRIPS especially in relation to priority countries. For these countries, this will most likely entail negative effects: apart from being singled out in an international forum such as the TRIPS Council on the basis of right holders’ responses to a Commission questionnaire, other WTO Members may be more willing to initiate a dispute based on alleged inconsistencies.

Another more subtle effect may be that the mere threat of initiating a WTO dispute may ‘convince’ a country with a poor IP enforcement record to change its laws or adopt measures requested by the EU.¹⁵⁹ Similarly, technical assistance may lead a country to adopt new (i.e., stronger) IP enforcement laws or other measures which the assistance suggests. In particular countries with little legal expertise and lack of human resources may be tempted to follow advice without assessing whether it is primarily in their own best interests. An example is the extension of border measures to exports and goods in transit – an apparent high priority of the EU which it has promoted in its technical assistance programmes¹⁶⁰ and hopes to insert into TRIPS.¹⁶¹ Introducing customs controls on exports and even transits places a huge burden especially on poor countries the scarce resources of which may well be better used elsewhere.¹⁶² These types of controls primarily benefit target countries. Acknowledging

¹⁵⁸ The only example of technical assistance in the area of IP enforcement contained in the strategy paper is unlikely truly to favour the interests of the receiving country: extending border measures to exports and goods in transit primarily aims at safeguarding other markets.

¹⁵⁹ Particularly in the first 5 years after the coming into force of TRIPS, most TRIPS disputes brought to the WTO dispute settlement body (DSB) were initiated by a developed country (US or EC) and were resolved in the form of a ‘mutually accepted solution’: compare Fukunaga, ‘Enforcing TRIPS: Challenges of Adjudicating a Minimum Standard Agreements’, 23 *Berkely Technology LJ* (2008) 867. For the list of TRIPS disputes see http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#trips.

¹⁶⁰ Cf Commission – DG Trade, *supra* note 131, at 10.

¹⁶¹ See EU Commission, Communication on a Customs Response to Latest Trends in Counterfeiting and Piracy, COM(2005)479 final, 11 Oct. 2005, at 13, where the EU Commission proposes to extend border measures under Art. 51 TRIPS to ‘cover also controls on export, transit and transshipment movements’ and further to consider expanding the scope of such measures to cover all types of IP infringements.

¹⁶² It is further questionable whether stringent IP enforcement against goods in transit is consistent with the freedom of transit under Art. V GATT and/or the limits imposed by Arts 51–60 TRIPS. On this issue see Jaeger and Grosse Ruse-Khan, ‘Policing Patents Worldwide? EU Border Measures against Transiting Generic Drugs under EC- and WTO Intellectual Property Regimes’, 40 *IIC* (2009) 502. In any case, such controls will be based on the local IP laws and hence may not lead to results compatible with the application of domestic IP laws in the target countries. Hence, little may be gained by the EC’s emphasis on transplanting its own border control system in other countries.

the natural focus and main objective of the EU strategy as a tool for pursuing European external trade interests, it is equally natural that it will not primarily focus on the interests of third countries and their stakeholders. While the interests may overlap to some extent, historical evidence as well as economic theory suggests that a tailored approach to IP protection which is responsive to domestic needs is what (developing) countries really need.¹⁶³

3 Subsequent Implementation of the IP Enforcement Strategy

In June 2005, the EU implemented one element of its new strategy on IP enforcement. In a communication circulated to WTO Members in a TRIPS Council meeting,¹⁶⁴ the EU requested the issue of IP enforcement to be placed on the Council's agenda. In line with one of the strategy's proposed actions, the EU asked for an examination of WTO Members' compliance with the enforcement provisions of the TRIPS Agreement under the mandate of Article 68 TRIPS. In making its case for a compliance review on IP enforcement, the EU uses much of the language found in its strategy paper.¹⁶⁵ Further, two other elements of the strategy find mention in the communication to WTO Members: the EU argues that such a compliance review would allow much more targeted provision of technical assistance; and that identifying the main difficulties and shortcomings in implementation should lead to recommendations for improvements. The EU sees such improvements primarily by achieving 'a higher level of IP enforcement' and proposes to focus on areas like methods used for calculating damages, the right to obtain information, and customs measures for exports and goods in transit.¹⁶⁶ These measures are all crucial elements in the EC's domestic enforcement system (as laid out in the 2003 Border Measures Regulation and the 2004 IP Enforcement Directive), but they clearly go beyond the existing obligations in Articles 41–61 TRIPS. So far, this attempt to raise the enforcement issue in the TRIPS Council has failed because of strong resistance from developing countries, although the EU tried again in 2006 in a joint communication with the US, Switzerland, and Japan.

¹⁶³ See UNCTAD, *The Least Developed Country Report 2007 – Knowledge, Technological Learning and Innovation for Development* (2007), at 105–107; World Bank, *Global Economic Prospects and the Developing Countries 2002* (2001), at 129; on the historical evidence for tailoring national IP policy and regulation to the domestic economic, technological, and development needs of a country see further Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property and Development Policy* (2002), at 18–20, available at: www.iprcommission.org and especially the two related background papers: Khan, 'Study Paper 1a: Intellectual Property and Economic Development: Lessons from American and European History' and Kumar, 'Study Paper 1b: Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries', both available at: www.iprcommission.org/graphic/documents/study_papers.htm (last accessed Sept. 2010). For an economic and trade theory justification see M. Trebilcock and R. Howse, *The Regulation of International Trade* (3rd edn, 2005), at 397–401.

¹⁶⁴ World Trade Organization, *supra* note 139.

¹⁶⁵ See *ibid.*, at 2–3.

¹⁶⁶ *Ibid.*, at 4.

Another atypical act which appears as a spin-off from the 2004 EU strategy discussed above is the ‘EU–US Action Strategy for the Enforcement of Intellectual Property Rights’ agreed on 20 June 2006 and endorsed at the EU–US Summit on the following day.¹⁶⁷ With its sole focus on IP enforcement in third countries, it resembles much of the 2004 EU strategy. In particular, the EU–US strategy plans to (a) increase cooperation on EU and US customs and border control; (b) simultaneously encourage third countries to strengthen domestic IP enforcement (with a joint focus *inter alia* on China and Russia); (c) continue to press IP enforcement issues in various multi-lateral forums (such as OECD, G8, WIPO, and the TRIPS Council); and (d) focus the respective technical assistance and capacity building programmes on strengthening IP enforcement abroad.¹⁶⁸ Furthermore, the EU–US Strategy places particular importance on involving the private sector (i.e., right holders): Under the notion of public–private partnerships, it aims to bring industry to the table in third country meetings and discussions on IP issues and to offer industry a close relationship with law enforcement agencies (sharing information and intelligence, responding to requests for assistance).¹⁶⁹

Several months later, EU customs reported the establishment of a ‘Joint Business–Customs Working Group’ and an ‘Anti-Counterfeiting Task Force’ working in close cooperation with right holders and industry sectors concerned. Interestingly, the Commission again stresses the need to press for an extension of border measures to ‘exports, transit and transshipment movements in other regions’.¹⁷⁰ According to a February 2007 press release, further elements of the joint strategy had reached the implementation phase – such as joint efforts for training and technical assistance in South America, Asia, and Eastern Europe, as well as renewed campaigns on ‘IP theft’ in multilateral forums like G8 and OECD. With regard to the WTO, the statement tried to present the joint communication with Switzerland and Japan as an ‘important’ success,¹⁷¹ although it had been flatly rejected by most developing countries.¹⁷²

Another atypical act confirms the focus on IP enforcement in third countries and places it within the wider context of the external trade relationships of the Community. In October 2006, the EU Commission published the Communication entitled ‘Global Europe: Competing in the World’.¹⁷³ It calls for inserting ‘provisions on

¹⁶⁷ EU–US Action Strategy for the Enforcement of Intellectual Property Rights, available at: www.eurunion.org/partner/summit/Summit06212006/2006EUUSSummitIntellProp.pdf (accessed 12 Aug. 2009).

¹⁶⁸ *Ibid.*, at 1–3.

¹⁶⁹ *Ibid.*, at 3.

¹⁷⁰ EU Press Release, ‘Customs: Commission publishes 2005 Customs seizures of counterfeit goods’, IP/06/1541, 10 Nov. 2006.

¹⁷¹ EU Press Release, ‘EU/US review progress in joint anti-counterfeiting drive: plan to expand work in 2007’, IP/07/123, 1 Feb. 2007.

¹⁷² See Intellectual Property Watch, ‘WTO TRIPS Council Stumbles Over Inclusion of Enforcement’, 26 Oct. 2006, available at: www.ip-watch.org/weblog/2006/10/27/wto-trips-council-stumbles-over-inclusion-of-enforcement/.

¹⁷³ EU Commission, Global Europe: Competing in the World, COM(2006)567 final, 4 Oct. 2006.

enforcement of IP rights along the lines of the EU Enforcement Directive' into FTAs negotiated with EU trading partners and stresses the need to reinforce IP enforcement activities in 'priority countries'.¹⁷⁴ In a Commission Staff Working Document annexed to the Communication, the policy rationales underlying the focus on IP enforcement become evident: in order to retain a comparative advantage in innovative and creative knowledge goods and services and in light of great technological advances in emerging economies such as India and China, IP enforcement abroad is a key factor. It is perceived as crucial for safeguarding 'EU investments in creativity, research, design and quality' which are considered 'unique assets of the EU economy'.¹⁷⁵

The Working Document is also more direct in expressing the EC's future policy goals: the EU considers TRIPS (among other WTO Agreements) as an 'essential but not sufficient' framework for liberalizing trade and removing non-trade barriers. It therefore aims to move beyond TRIPS obligations also in the field of IP protection. Apart from general calls to 'strengthen IPR provisions in future bilateral agreements',¹⁷⁶ again IP enforcement takes the centre stage: future FTAs shall 'promote enforcement-enhanced legal frameworks and binding enforcement commitments on IPR in order to reduce IPR violations and the production and exports of fake goods'.¹⁷⁷ Finally, the Commission Staff Working Document emphasizes another policy goal already addressed in the 2004 strategy paper: the EU aims to establish a new technical assistance programme focused on IPR enforcement in China.

In 2007, the EP issued a resolution entitled 'Global Europe – External Aspects of Competitiveness' which contains a more ambivalent approach to IP protection in third countries. On the one hand, it calls for the EU to 'adopt a more resolute stance in its approach towards third countries' in defending IP rights and considers their effective enforcement the 'bedrock of a global economy'.¹⁷⁸ It also 'insists that the major trading partners of the EU, such as Russia and China, enforce IPRs in accordance with WTO/TRIPS obligations'.¹⁷⁹ At the same time, however, the Parliament '[s]tresses that European IPR policy towards developing countries should not go beyond TRIPS Agreement obligations, but that it should instead encourage the use of TRIPS flexibilities'.¹⁸⁰ This resolution thus opposes the Commission strategy which aims for TRIPS-plus IP enforcement obligations within bilateral and regional trade agreements, including those with developing countries. It also calls into question technical assistance which aims at TRIPS-plus IP enforcement measures advocated by the Commission – in particular regarding border measures for exports and goods in transit.

¹⁷⁴ *Ibid.*, at 9 and 10.

¹⁷⁵ EU Commission, Commission Staff Working Document, SEC(2006)1230, 4 Oct. 2006, at 7.

¹⁷⁶ EU Commission, *supra* note 173, at 10.

¹⁷⁷ EU Commission, *supra* note 175, at 21.

¹⁷⁸ EU Parliament Resolution, Global Europe – External Aspects of Competitiveness, 2006/2292(INI), 22 May 2007, at paras 55 and 56.

¹⁷⁹ *Ibid.*, at para. 59.

¹⁸⁰ *Ibid.*, at para. 60.

Also in the most recent years, several other atypical acts emanating from the Commission confirm that the EU's 2004 strategy is continuously being implemented: in a 2008 Commission Communication entitled 'An Industrial Property Rights Strategy for Europe', it emphasized the importance of preventing the distribution and manufacture of IPR-infringing goods abroad.¹⁸¹ For this purpose, the EU in January 2009 signed an EU–China action plan for customs cooperation on IP rights which gives effect to the 2004 strategy's calls for increased institutional cooperation and technical assistance.¹⁸² Three months later, the Commission launched a 'European Observatory on Counterfeiting and Piracy' which serves as a platform for data collection, best practices exchange, and other means of cooperation between customs authorities and the private sector.¹⁸³ This implements not only the aim of creating public–private partnerships for IP enforcement, but fits well with the emphasis on integrating and engaging the private sector. As early as in 2008, the Commission tried to achieve greater cooperation with right holders by proposing an 'inter-industry deal' at EU level which was to focus especially on online copyright infringements and selling counterfeits over the internet.¹⁸⁴ The 2008 communication had also reiterated the other elements of the 2004 strategy. On the multilateral level, it endorsed a new instrument for increasing IP enforcement protection which has been a highly contested element ever since: the negotiation of a new, international 'Anti-Counterfeiting Trade Agreement' (ACTA). Although initially proposed by the US and Japan, ACTA fits well in the EU Commission's plans for further increasing international standards on IP enforcement, for example regarding mandatory border measures against exports and goods in transit.

Finally, the focus of atypical acts emanating from EU institutions on IP enforcement abroad is echoed by recent resolutions of the EU Council. In September 2008, the Council issued a resolution on a 'comprehensive European anti-counterfeiting and anti-piracy plan'. The resolution acknowledges the 2004 strategy and the more recent 2008 strategy, and invites the Commission and EU Member States to (a) submit an anti-counterfeiting customs plan for 2009–2012; (b) assess the effectiveness of the current (EU) legal framework for IP enforcement; and (c) step up IP enforcement internationally – *inter alia* through bilateral and multilateral agreements and by taking an active part in the ACTA negotiations.¹⁸⁵ About six months later, the Council issued another resolution initiating the implementation process for several elements it had called for in September 2008. The resolution endorses a detailed 'EU Customs Action Plan to combat IPR infringement for the years 2009 to 2012'. A key element

¹⁸¹ EU Commission, Communication – An Industrial Property Rights Strategy for Europe, COM(2008)465/3, 16 July 2008, at 14.

¹⁸² Commission Press Release, 'Customs: EU and China Agreements to strengthen cooperation on protecting Intellectual Property Rights', IP/09/193, 30 Jan. 2009.

¹⁸³ Commission Press Release, 'Internal Market: Commission launches European Observatory on Counterfeiting and Piracy', IP/09/497, 30 Mar. 2009.

¹⁸⁴ EU Commission, *supra* note 181, at 15.

¹⁸⁵ Council of the European Union, Council Res. on a comprehensive European anti-counterfeiting and anti-piracy plan (25 Sept. 2008), OJ (2008) C 253/1, at 4.

is the review of the 2003 Border Measures Regulation ‘with the aim to clarify and harmonise interpretation’, *inter alia* relating to external transit and transshipment, a potential extension of the definition of counterfeit goods, and the simplified procedure for the destruction of seized goods.¹⁸⁶ In the Appendix to the Council resolution the Commission is asked to prepare a proposal to amend the 2003 Regulation in light of the review’s results. Next to several other proposed actions aimed at improving operational performance and business cooperation, the resolution again calls for support for the ACTA negotiations to ensure the inclusion of ‘ambitious provisions concerning border enforcement’.¹⁸⁷

4 The Role and Function of Atypical Acts in EU External Trade Relations

On the basis of the example of EU policies on IP enforcement in third countries, the above analysis reveals the following main function of atypical EU acts in this area: the 2004 IP enforcement strategy and other atypical acts offer a good indication of the EU’s political priorities and policy choices in relation to IP enforcement in third countries. They sometimes even point to specific fora (WTO, WIPO, regional or bilateral trade relations, for example in the ACP context) and legal tools (amending existing international agreements, negotiating new FTAs and plurilaterals such as ACTA) which the EU aims to utilize. While these policy statements do not bind the EU itself and certainly depend for their realization on the willingness of other countries, they do offer insights into the political motives and priorities which push for more formal legal action on the international level. They may thus explain the rationale for the issuing state actor’s behaviour – in this case the EU.

A good example is custom controls on exports and transiting goods. In a Commission Communication transshipment and breaking routes to disguise the true country of origin have been identified as particular new threats.¹⁸⁸ While the legal mechanisms in the relevant 2003 EU Border Measures Regulation are considered largely sufficient, the multilateral system under TRIPS imposes merely an obligation to search imports for certain types of IP infringing goods. Thus, the Communication proposed to extend border measures under Article 51 TRIPS to ‘cover also controls on export, transit and transshipment movements’ and further to consider expanding the scope of such measures to cover all types of IP infringements.¹⁸⁹ Other atypical acts, such as the 2004 strategy and the 2005 communication to the TRIPS Council, contained a similar proposal for action. While these proposals so far have failed in the WTO context due to strong and widespread opposition, they are far more successful in bilateral and regional negotiations: the EU–CARIFORUM EPA, the first comprehensive new Economic Partnership Agreement signed by the EU and a regional group of ACP

¹⁸⁶ Council of the European Union, Council Res. on the EU Customs Action Plan to combat IPR infringement for the years 2009 to 2012 (16 Mar. 2009), OJ (2009) C 71/1, at 4.

¹⁸⁷ *Ibid.*, at 6.

¹⁸⁸ EU Commission, Communication on a Customs Response to Latest Trends in Counterfeiting and Piracy, OJ (2006) C 67/1, at 6.

¹⁸⁹ *Ibid.*, at 13.

countries, for example contains a provision extending border measures to exports and goods in transit as well as covering a much wider range of IP infringements.¹⁹⁰ Similar provisions are on the table in other EPA negotiations with other ACP country groups, India, or Latin American countries.¹⁹¹ And, last but certainly not least, the current ACTA negotiations – although still continuing at the time of writing – contain ambitious additional obligations on these types of border measures.¹⁹² The failure to generate consensus in the WTO/TRIPS forum has probably led the EU and other demanders for stronger international IP enforcement to shift towards negotiating a new, self-standing plurilateral Agreement. The atypical acts examined here thus offer valuable insights into the policy background and framework which drive the more formal legal acts negotiated in the context of external trade and IP.

Against the background of the general analysis of the role of atypical acts in the EU, one may further question to what extent objectives like transparency and flexibility are achieved.¹⁹³ As regards greater flexibility in achieving policy objectives in its external trade relations, it certainly appears as a key rationale of the acts examined above. From a legal perspective, international relations concerning trade and the protection of IP in particular are primarily driven by formal mechanisms like treaties between states.¹⁹⁴ As IP protection is built on individual rights granted in national laws, it is an area where international legal obligations usually demand specific and concise treaty language. This requires consensus among the contracting parties – something which seems increasingly difficult to obtain. Here, states and other entities like the EU to some extent have moved to atypical acts along the lines of those examined above to pursue their policy goals. While they certainly do not replace ‘hard obligations’ in international treaties, they are ‘soft law’ tools which are able to influence the behaviour of other actors (mainly states) in relation to the protection of IP. The EU has (successfully) relied on acts like drawing up ‘priority watchlists’, raising enforcement concerns in various fora, providing technical assistance, conducting political dialogues, or preparing guidelines to further its agenda for stronger IP enforcement abroad. These acts have certainly contributed to the conclusion of legally binding obligations in this area in bilateral and regional trade relations. They have also influenced third countries’ behaviour in matters of IP enforcement. Other forms of semi-legal implications and impacts on the IP enforcement behaviour of third countries are described in greater detail in section 2 above. In sum, the goal of increased flexibility by reliance on atypical acts certainly applies to the EU’s external trade relations.

¹⁹⁰ See Art.167 of the EU–CARIFORUM EPA, *supra* note 124.

¹⁹¹ See, e.g., the leaked draft text of the EU–India FTA Negotiations of 9 Sept. 2008, Art. 27 of the IP Chapter (Trade C3/AG/pg–D(2009)1855), Brussels, 24 Feb. 2009, available at: www.bilaterals.org/IMG/pdf/EU-India-Texts_Goods_SPS_IPR_feb2009.pdf.

¹⁹² See the Section on Border Measures in the publicly released ACTA Draft: Anti-Counterfeiting Trade Agreement, *Consolidated Text Prepared for Public Release* (Apr. 2010), available at: http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf, at 9–11.

¹⁹³ On the objectives and functions of atypical acts in general see section 2. B. above.

¹⁹⁴ Apart from the area of international investment law with its traditional notions of diplomatic protection, issues of customary international law are of little relevance for IP protection.

As for the transparency rationale for atypical acts, key differences exist from those acts found in the EU's internal (legal) order, as set out above. In the context of external trade relations, the acts do give some insights into the policies pursued by the EU. They however do not aim for wide public participation in decision-making processes or consultation on issues of external trade and IP protection. Instead, only some stakeholders, notably the business and IP right-holder community, are able to express their view and influence the policy (and treaty) making process. Examples are the questionnaires to right holders, the public-private partnerships for IP enforcement, and the dialogue with business stakeholders described above. There does not seem to be any equivalent opportunity for other stakeholders (e.g., consumer or environmental NGOs or other civil society groups) to make their views known. Equally, these groups are not – in an equivalent manner – able to access documents or obtain information about EU policies. The debate about access to the draft negotiating text of ACTA offers a good example. Their general influence on the policy-making process thus is significantly less than that of the right holders and the business community. This leads to the question whether EU law on access to documents or the new role of the EP under the Lisbon Treaty may provide any remedies here.

5 Access to Documents

External trade negotiations suffer from lack of transparency, i.e., the scope of the negotiations and draft documents are typically not publicly accessible. Interested NGOs or constituents cannot voice their concerns during negotiations, but are confronted with the negotiation outcome. At that stage, however, changes are no longer possible and the choice is whether to oppose the agreement altogether or accept it in spite of certain flaws. In terms of enriching the debate during the negotiation stage, NGOs in particular have valuable contributions to make to the design of international agreements. Some NGOs, particularly academic institutions, may also be more neutral in their assessment of the provisions under negotiation than the parties themselves, who are typically seeking trade-offs. Many of the EU's external trade agreements are characterized not only by an imbalance in negotiation power, but also by an imbalance in expertise in fields requiring detailed knowledge and training. IP, clearly, is such a field where imbalances in expertise prove detrimental to the negotiation result for developing countries.¹⁹⁵ Here, the scrutiny of trade agreements by NGOs could provide developing countries with the expertise required to attain more balanced and better tailored agreements.

EU legislation stipulates a comprehensive principle of transparency for all institutions, not least with the aim of promoting civil society involvement in the legislative process:¹⁹⁶ '[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their

¹⁹⁵ Cf., e.g., Yu, 'Building Intellectual Property Coalitions for Development', in J. de Beer (ed.), *Implementing WIPO's Development Agenda* (2009), at 79 ff.

¹⁹⁶ Cf. also Lenaerts and Van Nuffel, *supra* note 6, at paras 10-160 *et seq.*

work as openly as possible'.¹⁹⁷ Accordingly, any citizen or EU resident has a right of access to the documents of any EU institution.¹⁹⁸ This principle of open access to documents is limited only to the extent required on grounds of certain public or private interest. The details governing access to documents and its limits and a closer definition of the grounds of public or private interest for refusal of access are laid down in Regulation 1049/2001.¹⁹⁹

A closer look at that Regulation reveals that access to documents relating to external trade agreements, especially where they have IP aspects, is deemed particularly sensitive: access to a document is to be refused in particular where 'disclosure would undermine the protection of . . . the public interest as regards . . . international relations [and] economic policy of the [EU] or a Member State' or the 'commercial interests of a natural or legal person, including intellectual property'.²⁰⁰ By the same token, access to a document 'drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.²⁰¹

This means that the general principle of open access to documents in principle applies also to documents relating to external trade negotiations and agreements.²⁰² However, the ability to obtain access to negotiation documents hinges upon the interpretation of the concept of undermining the public interest in external relations and economic policies. As far as concerns, first, the public interest in keeping negotiation strategies for international agreements secret, that interest can quickly be pinpointed to consist mainly in safeguarding trade secrets as well as the state party's bargaining advantage. This leaves the second element, the undermining effect of granting access, as the key element to govern the legitimacy of an access request.

Clearly, that effect will have to be assessed on a case-by-case basis. However, two main assertions should govern that assessment. First, the ECJ has long held that the aims pursued by the individual right of access to documents²⁰³ and the principle of good administration²⁰⁴ now enshrined in the Charter are 'to provide the public with the widest possible access to documents . . . , so that any exception to that right of

¹⁹⁷ Art. 15(1) TFEU.

¹⁹⁸ Cf. Art. 15(3) TFEU.

¹⁹⁹ OJ (2001) L 145/43; currently under review, cf. Report on the Outcome of the Public Consultation on the Review of Reg. 1049/2001 regarding public access to European Parliament, Council and Commission documents, SEK(2008)29/2.

²⁰⁰ Art. 4(1)(a) and (2) of Reg. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ (2001) L 145/43.

²⁰¹ *Ibid.*, Art. 4(3).

²⁰² Cf., to this effect, Case T-204/99, *Olli Mattila v. Council of the EU and Commission* [2001] ECR I-2265, at paras 63 *et seq.*; Case T-105/95, *WWF UK v. Commission* [1997] ECR II-313, at para. 58.

²⁰³ Now Art. 42 (OJ (2010) C 83/389) and Art. 15 TFEU.

²⁰⁴ Now Art. 41 Charter.

access must be interpreted and applied strictly'.²⁰⁵ Accordingly, the concept of undermining effect is also to be interpreted narrowly and the anticipated detrimental effects and their likelihood must be closely substantiated. The duty to substantiate the reasons for refusing access is lifted only where that information would jeopardize the confidentiality of the document, i.e., where it is impossible to justify the need for confidentiality without disclosing the content of the document.²⁰⁶ Secondly, likewise under the jurisprudence of the ECJ, the principle of proportionality requires that the possibility of granting partial access to a document must be considered before access is refused altogether.²⁰⁷ The principles of proportionality and of good administration also mean that the excessive administrative burden associated with the granting of partial access to a document and the blacking out of sensitive parts may be a valid reason for refusing access, yet the existence of such a burden must likewise be substantiated.²⁰⁸ There is no *per se* rule that cleansing of the document would be excessively burdensome.

In terms of access to documents relating to the negotiation, therefore, the public interests in safeguarding trade secrets and a bargaining advantage in the negotiations are in principle legitimate and may justify refusal of access to documents. However, those interests are to be interpreted narrowly and can therefore not be deemed to exist for all of the various documents produced in the course of a lengthy negotiation process. For example, trade negotiations typically produce a great number of drafts exchanged between the parties. Since those drafts are known to all parties, it is hard to see why wider public access to them should hamper the negotiation effort or jeopardize the parties' strategic trade interests *vis-à-vis* uninformed third parties. Under a narrow construction of the undermining effect of public access in particular, any danger to the strategic trade interests of the parties *vis-à-vis* other states must be sufficiently manifest and cannot be deemed to exist as a matter of principle. Likewise, as far as concerns the Council authorization for the Commission to open negotiations and the negotiating directives issued alongside it, access should be granted as a matter of principle where these documents are worded in terms sufficiently general to rule out the danger of undermining the success of the negotiations by allowing public access.

Where it is not opportune to make the aforementioned text drafts and negotiation authorizations and guidelines accessible as a whole, at least their non-confidential portions should and must be opened to public scrutiny. The principle of proportionality requires that the institutions need to make a serious effort to try to distinguish

²⁰⁵ Case C-353/99 P, *Council of the EU v. Heidi Hautala* [2001] ECR I-9565, at para. 25; likewise, see, e.g., Joined Cases C-174 and 189/98 P, *Netherlands and Gerard Van der Wal v. Commission* [2000] ECR I-1, at para. 27.

²⁰⁶ Cf. Case T-204/99, *Mattila v. Council of the EU and Commission* [2001] ECR I-2265, at para. 87; Case T-105/95, *WWF UK v. Commission* [1997] ECR II-313, at para. 65.

²⁰⁷ Cf. Case C-353/99 P, *Council v. Hautala* [2001] ECR I-9565, at para. 27; Art. 52(1) Charter is now to the same effect.

²⁰⁸ Cf. Case C-353/99 P, *Council v. Hautala* [2001] ECR I-9565, at para. 30; Case T-204/99, *Mattila v. Council* [2001] ECR I-2265, at para. 87.

confidential and non-confidential text parts and cannot easily claim confidentiality of the whole text. The blacking out of the confidential parts and the making available to the public of the remainder of the document is a practice known from other areas of EU law (e.g., competition).

6 Parliamentary Involvement

Parliamentary involvement in the formulation of the EU's external IP policies would enhance third-party transparency and might allow for the broader involvement of NGOs and constituents. Coming back to the example of ACTA mentioned at the very outset, the EP has, along with NGOs and scholars, called on the Commission and Council to ensure the widest possible access to ACTA documents on various occasions in the past.²⁰⁹ All of the documents which the EP wished to see are atypical acts, in particular the ACTA negotiation mandate by the Council, the minutes of ACTA negotiation meetings, the draft chapters of ACTA, and the comments of ACTA participants on the draft chapters in order.²¹⁰ Until recently, those demands were to no avail and the atypical character of the instruments involved helped in preserving their secrecy, since no procedural or publication requirements exist which foster or risk the dissemination of those documents.

Upon the entry into force of the Treaty of Lisbon in December 2009, however, the EP gained significant import in the external policy field as compared to its previous competences.²¹¹ The precise extent of the expansion of EP competences in external policy depends on the field concerned. Outside the specifics of the Common Foreign and Security Policy,²¹² most policy areas require considerable involvement of the EP in the conclusion of international agreements: whenever an agreement covers fields where EP consent is required for internal EU legislation, i.e., where the ordinary legislative procedure²¹³ applies, the EP also has a veto power in the ratification process.²¹⁴

In addition, the Lisbon Treaty codifies the already pre-existing practice for the Commission to update the EP on the progress of the negotiation of agreements relating to external trade (i.e., under the Common Commercial Policy).²¹⁵ Also as regards the framework for internal legislation for the implementation of external trade agreements, the EP is fully involved alongside the Council.²¹⁶ However, the Treaty does

²⁰⁹ Cf., e.g., Oral Question of 24 Feb. 2010 pursuant to Rule 115 of the Rules of Procedure by Carl Schlyter on behalf of the Verts/ALE Group, Daniel Caspary on behalf of the PPE Group, Kader Arif on behalf of the S&D Group, Niccolò Rinaldi on behalf of the ALDE Group, Helmut Scholz on behalf of the GUE/NGL Group, Syed Kamall on behalf of the ECR Group to the Commission, O-0026/10.

²¹⁰ Cf. *ibid.*

²¹¹ For a general overview see also Maurer, 'The European Parliament after Lisbon: Policy-making and Control', Paper presented to the Federal Trust Workshop, 'The European Parliament in an enlarged European Union: Beyond the Lisbon Treaty', 25 Apr. 2008, London (Deliverable No. 19), at pt. 5.8.

²¹² Cf. Art. 23 ff EU; Maurer, *supra* note 210.

²¹³ Cf. Art. 294 TFEU.

²¹⁴ Cf. Art. 218(6)(a) TFEU. The same is true for certain types of agreements covering other areas (e.g., association or budgetary agreements).

²¹⁵ Art. 207(3) TFEU.

²¹⁶ Art. 207(2) TFEU.

not lay down details on the substance or the frequency of the Commission's reporting obligation during negotiations. Furthermore, the EP has no formal right to issue directives regarding the negotiation strategy. In practice, however, the Commission will hardly be able to ignore EP positions enjoying broad support even during negotiations, since the EP has the power to block ratification.

The substantive²¹⁷ and procedural²¹⁸ provisions relating to IP protection invariably relate to the completion of the internal market, where the ordinary legislative procedure and thus EP involvement apply.²¹⁹ Accordingly, agreements laying down obligations relating to the protection of IP rights will likewise require EP consent for their ratification under the rule just described. Furthermore, such agreements will fall under the provisions for external trade obligations²²⁰ and therefore also give rise to the pre- (reports) and post- (implementing legislation) ratification powers accorded to the EP under the Lisbon Treaty.

In relation to ACTA, the changes to the legal framework mean that the Commission and Council can no longer deny the EP access to any of the documentation needed to exercise the new powers accorded to it under Article 218 TFEU. Against that background, the EP recently boldly stated that it now 'demands immediate and full information at every stage of negotiations on international agreements, in particular on trade matters and other negotiations involving the consent procedure, to give full effect to Article 218 TFEU'.²²¹ EP involvement, which is now imminent and can no longer be denied,²²² will probably introduce new issues into the debate, like the need for an impact assessment of the effect of ACTA's implementation or the difficulties of shaping and enforcement of ACTA internet provisions.²²³

On a broader scale, a new inter-institutional framework agreement will be drawn up between the Commission and the EP, which will entail informing Parliament immediately and fully at every stage, including the definition of negotiating directives, of negotiations on international agreements, in particular on trade matters, and other negotiations involving the consent procedure, and which will also contain general rules to ensure respect of the necessary confidentiality.²²⁴

²¹⁷ Cf. *Opinion 1/94, WTO-Agreement* [1994] ECR I-5267, at para. 59; Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, at para. 24; Case C-350/92, *Spain v. Council* [1995] ECR I-1985, at para. 23; Judgment of 11 Sept. 2007 in Case C-431/05, *Merck Genéricos*, [2007] ECR I-07001, at paras 33 *et seq.*; see also Hilty, 'Intellectual Property and the European Community's Internal Market Legislation – Copyright in the Internal Market', 35 *IIC* (2004) 761, at 761 *et seq.*

²¹⁸ Cf., e.g., the legislative basis for Dir. 2004/48/EC, *supra* note 135.

²¹⁹ Cf. Art. 114 TFEU.

²²⁰ See Art. 207 TFEU.

²²¹ Cf. Oral Question, *supra* note 208.

²²² Cf. also Answer of 25 Feb. 2010 by Mr De Gucht on behalf of the Commission, P-0090/2010.

²²³ Cf. Oral Question, *supra* note 208.

²²⁴ Cf. Written Question of 23 Feb. 2010 by Carl Schlyter (Verts/ALE), Eva Lichtenberger (Verts/ALE), Christian Engström (Verts/ALE), Niccolò Rinaldi (ALDE), Daniel Caspary (PPE), Syed Kamall (ECR), David Martin (S&D), Helmut Scholz (GUE/NGL), Bernd Lange (S&D), and Robert Sturdy (ECR) to the Commission, E-0726/10.

5 Conclusions: Towards A Balancing of Effects

A Asymmetry between the Internal and External Functions of Atypical Acts

As has been shown, the advantages of atypical acts as compared to standard Article 288 instruments are essentially greater flexibility (by lowering the formal requirements and enhancing quality throughout the adoption process and in the differentiation of legal effects and enforcement) and transparency (over policies). Atypical acts may contribute significantly to the legislative and policy process in terms of soft steering and may yield additional beneficial effects like the enhancement of information and transparency. In turn, atypical acts are also associated with some drawbacks in terms of democratic legitimacy, legality, and legal certainty.

The negative repercussions of atypical acts are particularly grave in the area of external trade policy. The lack of international consensus to conclude binding international agreements seems to push the EU to rely more extensively on atypical acts in conducting its external trade relations pertaining to IP protection and enforcement abroad. These atypical acts indicate the EU policies and offer flexible ways of working towards their realization where formal agreement (for the time being) remains not feasible in multilateral fora such as the WTO or WIPO. Although political or at best ‘soft law’ in nature, these acts often have semi-legal implications and have the potential to influence the behaviour of third countries. While careful analysis of these acts offers insights into the policy goals the EU pursues in the area of external trade relations concerning IP enforcement, they do not fulfil the transparency rationale followed by such acts in the internal order of the EU. Instead, most stakeholders have no input or say on the formulation of EU policies in this area. Nothing equivalent to ‘Green Papers’ and/or consultation processes exists where constituents can make their views known and influence the policy debate. This is true with the exception of the business community and right holders, which can rely on several mechanisms and atypical acts which take their position into account or are drafted to obtain their input.

A comparative analysis with internal EU legislation in the field of IP reinforces this picture. That comparison shows that whereas atypical acts in the internal context are generally used to enhance decision-making transparency and the involvement of civil society and/or to achieve better enforcement or post-regulatory steering and guidance, virtually none of those effects can be associated with atypical acts in external trade. While atypical acts in external policy are used to render the diplomatic and decision-making process more flexible in a way similar to the internal policy process, that flexibility is not also employed to bring about the flexible involvement of civil society and pluralism in external policy-making beyond the formal procedural requirements of Article 218 TFEU.

B Short-term Remedies: Access to Documents and Parliamentary Involvement

Remedies towards a better balancing of the positive and negative effects of the recourse to atypical acts in external trade policy can be envisaged *de lege lata*, i.e., on the

basis of the existing framework of primary law after the Lisbon Treaty, on two levels. They are a more critical approach to confidentiality in the context of granting access to documents and a full exploitation of the possibilities for parliamentary involvement offered under the TFEU's new regime.

In terms of access to documents, in spite of the fact that the terms governing access to documents relating to external trade negotiations and other documents of the institutions are legally the same, access to trade-related documents is difficult in practice. It would seem that, accordingly, more careful scrutiny of the confidential character of trade-related documentation is called for, and that under such an approach draft texts and the negotiation authorization in particular could typically be made available to the general public. Finally, a comparison of external trade with other EU policies (again particularly competition) also reveals that non-confidential information deemed important or informative for third parties is often published on the internet or in part C of the EU's Official Journal as a rule and without waiting for specific information requests. There is no obvious reason why such a practice should not also be adopted in the field of external trade. In fact, the principles of democracy and good administration speak out clearly in favour of the adoption of such a practice also for documents relating to external trade negotiations. A more carefully differentiated policy for publicizing trade-related documentation could also significantly contribute to reducing the existing imbalances between the EU and its developing trade partners in terms of IP and other expertise for free-trade agreements.

This also means that the existing asymmetry in information and influence could change to some extent once EU law on access to documents is taken more seriously by the EU institutions and, more importantly, if the EP utilizes its extended powers under the new TFEU. One crucial aspect here is also the onward dissemination to civil society of non-confidential information obtained by the EP under its new powers. As was mentioned before, confidentiality rules will be contained in the new inter-institutional agreement drafted to give effect to Article 218 TFEU.²²⁵ It will therefore be up to the EP to apply these rules with a discerning attitude and use them to invigorate public debate while at the same time not compromising negotiation objectives. For example, NGOs with access to the ACTA draft negotiation text can make their views known and so influence the public debate on IP enforcement and its links to the right to privacy, data protection, and other public interests. Their analysis can also be helpful for third countries which may lack the expertise and resources fully to appreciate the implications of the EU's policies for their own (domestic) interests. The extended role of the EU Parliament should equally lead to more transparency by bringing the policy formation process into the public domain. Assuming more diversity amongst those stakeholders whose voices are taken into account by the Parliament, its new role could also widen the spectrum of views with a potential influence on the policy formation process. In the case of the ACTA, for example, several EU Parliamentarians recently requested full

²²⁵ Cf. *ibid.*

access to the draft negotiating text.²²⁶ Their request received strong support from (and may be driven by) consumer groups and Internet Service Providers.

In terms of parliamentary involvement, the Treaty of Lisbon secures the extensive involvement of the EP at all stages of the negotiation and conclusion of IP-related external trade agreements. There is, accordingly, democratic control over trade negotiations and their results. Via the EP furthermore, NGOs and constituents may exert an indirect influence on the course, outcome, or adoption of such negotiations and enrich the debate during the negotiations. This is a quantum leap forward as compared to the previous situation. However, the downside remains that any dissemination of information and any degree of public involvement in trade negotiations still hinge upon the EP: unless the EP is open to transmitting information and receptive to the arguments of third parties and willing to carry them to the negotiating floor, trade negotiations remain obscure and off limits to constituents.

C Long-term Remedies: A Meta-rule in Primary Law

In the EU legal order, the infringements the principles of legality and legal certainty in particular which may potentially ensue from atypical acts of the institutions are not acceptable. Consequently, general remedies must be found to forestall such infringements and enhance the positive effects of soft atypical acts. They should be instigated *de lege ferenda*, i.e., going beyond the body of law as established by the Treaty of Lisbon and awaiting the next Treaty reform, even if such a new revision of primary law can now not be expected at any time soon. In academic writing and in policy practice, several attempts to balance the positive and negative effects of recourse to atypical acts have been voiced in the past. They are all directed at atypical acts in the context of internal EU legislation, but some of the solutions suggested may, at least *mutatis mutandis*, also fit the external policy context.

One practical attempt to remedy deficits of democratic legitimacy and legality was made in the preparation of the – failed – European Constitution, where the preliminary European Convention discussed the possibility of a restriction of the use of atypical acts in the EU legal order.²²⁷ Although the final report of the Convention working group responsible identified 15 ‘legal instruments’²²⁸ throughout the three pillars of the current Union structure and recommended a reduction to six,²²⁹ it eventually did

²²⁶ See New Europe, ‘MEPs opposition to secretive Anti-Counterfeiting Trade Agreement grows’, 24 Feb. 2010, available at: www.neweurope.eu/articles/MEPS-opposition-to-secretive-AntiCounterfeiting-Trade-Agreement-grows/99294.php.

²²⁷ See Working Document 24 of Working Group IX (Simplification), WG IX – WD 24, 7, referring to questions raised in Document CONV 392/02.

²²⁸ Reg., convention (EU law), convention (EC law), dir., framework dec., dec., dec. (in the sense of Title V EU), dec. (in the sense of Title VI EU), principles and general approaches, joint strategy, joint action, common position (in the sense of Title V EU), common position (in the sense of Title VI EU), recommendation, and opinion: cf. Final report of Working Group IX on Simplification, CONV 424/02, at 3 *et seq.*

²²⁹ Law, framework law, dec., reg., recommendation, and opinion: cf. Final report of Working Group IX on Simplification, CONV 424/02, at 3 *et seq.*

not opt for a general codification or regulation or reduction of recourse to atypical acts 'in order to safeguard the flexibility required in the use of such acts'.²³⁰ However, '[t]he Group suggests including in the Treaty a rule whereby the legislator (Parliament/Council) should abstain from adopting non-standard acts on a subject when legislative proposals or initiatives on the same subject have been submitted to it. The use of non-standard acts in legislative areas may give the erroneous impression that the Union legislates through the adoption of non-standard instruments.'²³¹ This suggestion is evidently directed at ensuring a strictly formal and legalistic approach in the adoption process, while at the same time not precluding atypical acts informing of policy changes (like communications) or seeking to open public debate on policy changes (like Green Papers). In other words, the rule proposed by the Convention working group aims at excluding atypical acts from certain stages of institutional action. This (unimplemented) proposal addresses part of the problem of legality associated with the use of atypical acts, but only in the context of a current legislative procedure. The bulk of soft atypical acts, which do not concur with such a legislative procedure, and the aforementioned problems of legality and legal certainty in particular are not addressed here. Instead, the Convention working group opted to safeguard the full range of regulatory advantages of soft atypical acts by explicitly refraining from the imposition of procedural or substantive rules governing those instruments.

For the Treaty of Lisbon, these proposals were not implemented. Nonetheless, that Treaty shows a limited tendency to reduce the proliferation of atypical acts by aligning a few of them with standard instruments.²³² In this regard, for example, the inter-institutional agreements between the Parliament, the Council, and the Commission under the former Article 193 EC were transformed into the instrument of a regulation for the new Article 226 TFEU, albeit one for which special quora (and thus a special legislative procedure) apply. Likewise, the terminology of ex-Article 249 EC was adapted for some language versions of the new Article 288 TFEU to include *sui generis* decisions (e.g., in German, 'Beschluss' instead of the former, possibly narrower term 'Entscheidung'). *Sui generis* decisions were formerly counted among the atypical instruments of EU law,²³³ but are thus transformed into a standard instrument by the Lisbon Treaty. Still, actual remedies for the problems associated with atypical acts cannot be derived from any of these changes.

By contrast, the remedies discussed in literature go somewhat further. All of them aim at the establishment of some form of 'meta rules on administrative rule-making'.²³⁴ The simplest suggestion in this regard extends to the amendment of Article 288 TFEU to include at least the most commonly used instruments, the

²³⁰ *Ibid.*, at 6.

²³¹ *Ibid.*, at 6 ff.

²³² Cf. also Lenaerts and Van Nuffel, *supra* note 6, at para. 17-140 in fn. 619 thereof.

²³³ See Bast, 'On the Grammar of EU Law: Legal Instruments', Jean Monnet Working Paper 9/03 (2003), at 24.

²³⁴ Hofmann, *supra* note 15, at 178.

applicable procedures, and their legal effects.²³⁵ Likewise, it may be sufficient to distinguish clearly between the procedural and substantive aspects of atypical acts and to elaborate the procedural rules while continuing to allow for flexibility in terms of the differentiated application of substance.²³⁶ One suggestion is to focus more on the link between procedural rules and legal quality of atypical acts by suggesting the delegation of a power for the Commission to issue formal implementing rules, which would be similar to block exemption regulations, and could potentially be coupled with control and participation mechanisms as under the comitology procedure.²³⁷ It is argued that such formalization would also facilitate judicial control over such acts.²³⁸ Both proposals, however, significantly limit the procedural flexibility currently afforded for the adoption of atypical acts. In particular, formal implementing rules comparable to block exemption regulations would necessarily be generally applicable hard law, thus removing the possibility of pursuing soft steering effects and soft enforcement or testing policy changes. Finally, it may not seem beneficial to do away with all types of information and consultation documents in favour of a limited number of binding implementing rules. This solution therefore clearly goes too far in limiting the use of atypical acts.

For the area of foreign policy or at least for external trade policy, too, recourse to atypical acts in the pre-negotiation and negotiation processes could be made subject to a meta-rule of the kind indicated, which should then incorporate minimum standards of third-party transparency and public consultation and establish clear rules for negotiation stages which are to be publicized as compared to information that is to be kept secret. The same could be envisaged in terms of meta-rules stipulating a public discussion over policy and strategy papers, like the Commission's 2004 IP enforcement strategy, in the way that Green Papers are discussed in the internal policy sphere. In both instances, a soft form of formalization by way of a meta-rule might help to save the positive effects of atypical acts by retaining most of their flexibility, while ensuring the widest possible public involvement in the preparation of an international agreement or an international EU strategy for the parts that are non-confidential and where broad public involvement can contribute to bettering the overall quality of the outcome. The aforementioned inter-institutional agreement between the Commission and the EP over the implementation of Article 218 TFEU may be one step in that direction, but it can certainly not be the end of the road towards a meta-rule for atypical acts in external trade policy.

Where a meta-rule is envisaged, finally, the wide variety of soft atypical acts and the wide range of policy areas concerned may render flawed an approach which sought to adopt one-size-fits-all approaches, thus imposing the same rules for all types of instruments over all policy areas. This is not just true for the distinction between the rules

²³⁵ Cf. Bieber and Salomé, *supra* note 17, at 924 *et seq.*

²³⁶ Cf. Cini, *supra* note 18, at 24.

²³⁷ Cf. Hofmann, *supra* note 15, at 171 and 178.

²³⁸ Cf. *ibid.*, at 175 *et seq.*

governing the use of atypical acts in internal as against external policies respectively, but may also require a further differentiation even within those areas. The assessment or balancing²³⁹ of positive versus negative effects associated with the use of soft atypical acts is therefore likely to differ for each type of act and the various policy areas. The probable need for a differentiated approach to a meta-rule for atypical acts should however not detract from the need to lay down a relevant set of such rules on the next possible occasion in European integration.

²³⁹ Cini, *supra* note 18, at 25 ff, is of a similar view.