



Council of the
European Union

Brussels, 14 November 2019
(OR. en)

13259/09
DCL 1

DROIPEN 95
UD 186
SAN 228
COPEN 168

DECLASSIFICATION

of document: 13259/09 RESTREINT UE/EU RESTRICTED
dated: 14 September 2009
new status: Public

Subject: World Health Organisation (WHO) Framework Convention on Tobacco
Control: Protocol on illicit trade in tobacco products
- intersessional drafting groups (Autumn 2009)

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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13259/09

RESTREINT UE

**DROIPEN 95
UD 186
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NOTE

from :	Presidency
to :	Justice and Home Affairs Counsellors
prev.doc.:	Doc.11242/09 UD 139 SAN 175 COPEN 117 DROIPEN 47
Subject :	World Health Organization (WHO) Framework Convention on Tobacco Control: Protocol on illicit trade in tobacco products – intersessional drafting groups (Autumn 2009)

I. INTRODUCTION

The third round of negotiations on a new protocol on illicit trade in tobacco products (INB3) was held in Geneva from 28 June until 5 July 2009. The negotiations were based on the document FCTC/COP/INB-IT/3/ from 23 April 2009, “Revised Chairperson’s text for a protocol on illicit trade in tobacco products”. The work was conducted partly in plenary, partly in two Committees, Committee A and Committee B. Committee B dealt with issues involving criminal law and international cooperation (Title IV “Offences and sanctions” Articles 12-19 and Title V “International cooperation” Articles 20-33 in the draft protocol).

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The position of the Member States of the European Union, was coordinated in the Council amongst JHA Counsellors in a separate meeting and in joint meetings with the Working Party on Customs Union (Customs Legislation and Policy¹), Coordination meetings were also held during the negotiations in Geneva. The Presidency spoke on behalf of the Member States of the European Union.

II. OUTCOME OF THE THIRD ROUND OF NEGOTIATIONS (INB3)

During the third Round of negotiations many issues were discussed, and many proposals were put forward. It was however difficult to reach consensus on certain key issues, such as which are the behaviours in the protocol that would constitute “criminal offences/serious criminal offences” and how this would affect the Articles on “extradition” and “mutual legal assistance”. Consensus was provisionally reached in Committee B but not in the Plenary, on Articles 12.1 (partly), 23, 25.1 and 28² (see document FCTC/COP/INB-IT/3/5).

The discussions were mostly focused on Article 12 of the Revised Chairperson’s text (“Offences”). The main result of the discussions was that the list of criminal conducts in 12.1 was merged with the list of unlawful conducts in 12.2, and that it was in principle decided to leave it to the Parties to decide which of these conducts would be criminalised. However, due to the lack of time, the content of the list was not be discussed. Once the content of Article 12 will be agreed upon, the content of remaining Articles can be further developed.

III. FOURTH ROUND OF NEGOTIATIONS (INB 4) AND INB DRAFTING GROUPS

A fourth Round of negotiations (INB4) is scheduled to take place in Geneva on 14-21 March 2010, subject to the approval by the Bureau of the Conference of the Parties. Due to the difficulties experienced during the negotiations in INB3, it was decided to hold informal intersessional drafting meetings during autumn 2009. In this respect, and in view of the preparation of INB4, two working groups of 30 persons each, have been created. These working groups, named INB Drafting Groups 1 and 2, will meet twice in Geneva, to discuss pending issues.

¹ Doc. 11242/09 UD 139 SAN 175 COPEN 117 DROIPEN 47.

² See doc. FCTC/COP/INB-IT/3/5 p. 26-27, 34-35 and 37.

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INB Drafting Group 2, which is the former Committee B, will meet on 7-9 October and on 26-28 November 2009. The group consists of representatives from 30 countries, five countries from each region¹. The European Community and the European Union Presidency are represented in both INB Drafting Groups. The remaining representatives for the European Region in the INB Drafting Group 2 are Israel, the Russian Federation and Turkey.

The tasks of INB Drafting Group 2 will be to first examine Articles 12 (*Unlawful conduct*), 31 (*Measures to ensure prosecution or extradition*), 32 (*Prosecution of alleged offenders*), 33 (*Extradition of alleged offenders*), and then to examine Articles 13 (*Liability of legal persons*), 14 (*Sanctions*) and 30 (*Mutual legal assistance*). The discussions will have an informal character, they will be held in closed sessions and it will not be possible to hold coordination meetings on the spot, as was done during the INB3 meetings.

The drafting group will elect a chair and decide on the working method for the drafting group. The first meeting will involve a general consensus building discussion but drafting of texts is also to be expected. The second meeting is expected to result in drafted texts for submission to INB4 in order to facilitate the negotiations. The texts developed by the drafting groups will then be made available to the Parties by the Convention Secretariat in January 2010.

Following the consensus at INB3 to draft a list of unlawful conducts rather than specifying which conducts should be criminalised, the position of the MS of the European Union as agreed upon before the INB2 and INB3 is somewhat outdated. Thus there is a need to address these issues anew.

IV. CONCLUSION

In order for the Presidency to act in our common interest during the first intersessional drafting meeting in October, the JHA Counsellors are invited to give their view on the proposed EU position as set out in Annex I. A first coordination meeting will be held on the 18 September 2009 and a second is scheduled for the 22 September 2009.

¹ See Annex II « Drafting Groups INB4 ».

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At the outset it must be emphasized that the purpose of this coordination process is not to work towards a binding common position adopted by the Council. The aim is instead to reach a coordinated position of the Member States of the European Union, with which the Presidency can be guided by, during the intersessional meetings in Geneva. This position of the Member States of the European Union, should include some general views on certain issues of criminal law and international cooperation.

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ANNEX I

DRAFT POSITION OF THE MEMBER STATES OF THE EUROPEAN UNION IN VIEW OF THE FIRST INTERSESSIONAL DRAFTING

A coordinated position of the member States of the European Union could have the following content:

Article 12

- The margin of appreciation for MS when implementing the Protocol should be made as wide as possible.
- The Presidency should work towards consensus on the alternative in which only the most severe conducts set out in the new Article 12.1 should be established as criminal offences (the first “*or*-alternative” on page 27). It is left to the Parties to select these conducts in accordance with domestic law. The term *serious crime* should be avoided in order not to create confusion with the UNTOC-regulation.
- The Presidency should also be able to accept that the protocol prescribes that Parties *may*, in accordance with domestic law, criminalise also conducts which are not severe (the second “*or*-alternative” on page 27).
- Regardless of which option is chosen in the end the provisions on international cooperation need to be changed. (As a result of the possibility that State Parties choose different conducts to be criminalised or, with the first solution, conducts which not all State Parties consider as severe.) Two solutions are possible:

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- Make it a condition that the provisions on extradition can be applied only for criminal conducts/offences punishable by deprivation of liberty for a maximum period of at least one year or by a more severe penalty (i.e. two conditions; it needs to concern a criminal conduct/offence and the scale of punishment shall contain imprisonment for at least one year). Even with such conditions it should be considered to make the provisions on international cooperation facultative.
- Delete the provisions on extradition (and M.L.A.).

The Presidency should work towards consensus regarding the first alternative, but can also accept the second alternative.

- The present list in Article 12.1 contains conducts which might not be appropriate in a merged list of unlawful conduct, since they are criminal law terms with a specific meaning in many MS and are themselves linked to criminal acts. This applies to: various acts of concealing (f) and (g), conspiracy and attempt (h) and aiding and abetting etc. (i). The Presidency should try to exclude them from the list in 12.1 and, instead, link these conducts to the acts State Parties choose to criminalise in accordance with the Protocol.
- If possible, the EU MS should provide the Presidency with a position on which of the other conducts in the list should stay/go.

Article 13 – Liability of legal persons

The provisions on liability of legal persons should be linked to the acts State Parties have chosen to criminalise.

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ANNEX II

MEMBERS OF THE INB DRAFTING GROUPS

	Drafting Group 1	Drafting Group 2
	(on Articles 7,5,6 and time permitting 10 and 11)	(on Articles 12 and 31, 32, 33, then Articles 13, 14 and 30)
African Region	Algeria Cameroon Kenya Nigeria South Africa	Congo Niger Senegal Seychelles Swaziland
Region of the Americas	Brazil Canada Jamaica Mexico Panama	Brazil Canada Chile Mexico Panama
European Region	Armenia European Community EU Presidency (Sweden) Spain Turkey	Israel European Community EU Presidency (Sweden) Russian Federation Turkey
South East Asian Region	Bangladesh India Maldives Sri Lanka Thailand	India Maldives Nepal Sri Lanka Thailand

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**Eastern Mediterranean
Region**

Djibouti
Islamic Republic of Iran
Pakistan
Syria
United Arab Emirates

Bahrain
Jordan
Libyan Arab Jamahiriya
Oman
Saudi Arabia

Western Pacific Region

Australia
China
Cook Islands
Japan
Malaysia
Mongolia

Australia
China
Japan
Philippines

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