



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 July 2012

**15588/2/08
REV 2**

**DROIPEN 90
WTO 218
PI 84**

DECLASSIFICATION

of document:	15588/08 RESTREINT UE
dated:	21 November 2008
new status:	Public

Subject:	Anti-counterfeiting Trade Agreement (ACTA) Chapter 2: Draft Criminal provisions
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Delegations will find attached the declassified version of the above document.

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

RESTREINT UE



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OUTCOME OF THE CONSULTATION

of: Friends of Presidency Group
on: 11 November 2008
Subject: **Anti-counterfeiting Trade Agreement (ACTA)**
Chapter 2: Draft Criminal provisions

In follow-up to the meeting of Justice and Home affairs Counsellors on 29 October 2008, the Friends of Presidency Group met on 11 November 2008 to continue examination of the revised joint Japan-USA proposal on criminal provisions to be included in ACTA, aiming at reaching an EU Common Position on those provisions, in view of the forthcoming 4rth Round of negotiations on this Agreement.

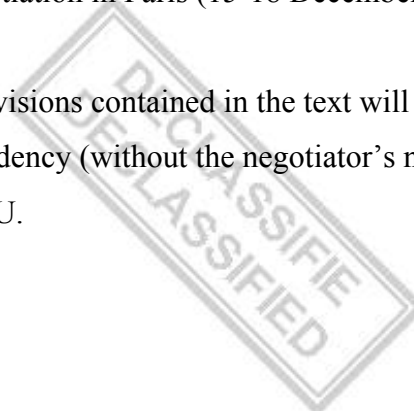
The Friends of Presidency Group worked on the basis of document 15004/08 DROIPEN 85 WTO 202 PI 80 RESTREINT UE and drafting proposals submitted by Member States on the spot. SE lodged a Parliamentary scrutiny reservation but indicated its readiness to participate in the discussions on the content of the criminal provisions.

The text of the criminal provisions as it arose from the Friends of Presidency Group's meeting is set out in the Annex. Negotiator's notes are included in footnotes as well as some comments by delegations.

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It is understood that this document is not intended to be formally adopted by the Council of 27-28 November. However, since there is a consensus on its provisions, subject to one parliamentary reservation, it will be used as a guideline by the presidency to ensure the coordination between the Member States during the next session of negotiation in Paris (15-18 December 2008).

For the preparation of the session in Paris, the criminal provisions contained in the text will be transmitted to the other partners as a non-paper of the presidency (without the negotiator's notes), it being understood that this is not a formal proposal of the EU.



Anti-Counterfeiting Trade Agreement

Legal Framework for Enforcement of Intellectual Property Rights

Section 1: Civil Enforcement

[CIRCULATED]

Section 2: Border Measures

[CIRCULATED]

Section 3: Criminal Enforcement

ARTICLE 2.14 – SCOPE OF CRIMINAL ENFORCEMENT

- (1.1) This section lays down criminal provisions to ensure the enforcement of trademark, copyright and related rights¹.
- (1.2) Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting and copyright or [related rights piracy]² on a commercial scale.^{3 4}

¹ **Negotiator's note:** For the purposes of this section, definitions of the offences are in accordance with national laws and regulations of the Parties.

² **Negotiator's note:** The Member States of the EU wish to clarify the scope of "related rights piracy".

³ CZ indicated that it wished a drafting excluding minor cases.

⁴ **Negotiator's note:** EU cannot accept indents 2.14 1 (a) and (b) of the joint USA-Japan proposal related to the definition of commercial scale. These indents are consequently deleted.

RESTREINT UE

(1.3) SPECIFIC CASES

(a) **Unauthorized cam-cording**¹
(deleted)

(b) **Importation and domestic use in the course of trade of counterfeit labels**

Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation and domestic use in the course of trade on a commercial scale of labels,

i) to which a mark has been applied, which is identical to or cannot be distinguished from a trademark registered in its territory, and

ii) which are intended to be used on either the goods or services which are identical to goods or services for which the trademark is registered.

ARTICLE 2.15 – LIABILITY OF LEGAL PERSONS

(1.1) Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the offences referred to in Article 2.14.

(1.2) Subject to the legal principles of the Party, the liability of legal persons may be criminal or non-criminal.

(1.3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.

¹ **Negotiator's note:** EU cannot accept inclusion in the scope of unauthorized cam-cording.

RESTREINT UE

ARTICLE 2.16 – COMPLICITY

The provisions of this section shall apply to complicity of the offences referred to in Articles 2.14.

ARTICLE 2.17 – SEIZURE

In case of an offence referred to in Article 2.14, each Party shall provide that its competent authorities shall have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements predominantly used in the commission of the alleged offence, documentary evidence relevant to the alleged offence and any assets derived from, or obtained directly or indirectly through the infringing activity.

ARTICLE 2.18 – PENALTIES

- (1.1) For the offences referred to in Article 2.14 each Party shall provide for
- (a) penalties that include sentences of imprisonment and/or monetary fines that are effective proportionate and dissuasive ;
 - ¹(b) that its competent authorities shall have the authority to order confiscation and/or destruction of all counterfeit trademark goods or pirated copyright goods, of materials and implements predominantly used in the creation of counterfeit trademark goods or pirated copyright goods, of the assets derived from, or obtained directly or indirectly, through the infringing activity.
- (1.2) Each Party shall ensure that the counterfeit trademark goods and pirated copyright goods that have been confiscated under this subparagraph shall, if not destroyed, be disposed outside the channels of commerce, under the condition that the goods are not dangerous for the health and security of persons.

¹ **Negotiator's note:** EU is of the view that there should be a clear distinction between confiscation and seizure and consequently it has changed the structure of the text.

RESTREINT UE

- (1.3) Each Party shall further ensure that confiscation and destruction under this subparagraph shall occur without compensation of any kind of the defendant.
- (1.4) Each Party may provide that its judicial authorities have the authority to order the confiscation of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing activity.

ARTICLE 2.19 – *EX OFFICIO* CRIMINAL ENFORCEMENT

(deleted)

ARTICLE 2.20 – RIGHTS OF THE DEFENDANT

Each Party shall ensure that the rights of the defendants and third parties shall be duly protected and guaranteed.
