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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.

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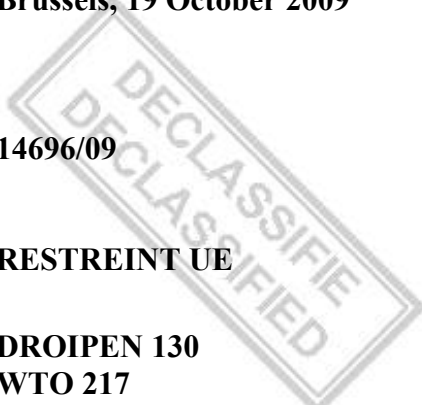
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OUTCOME OF CONSULTATIONS

of : "Friends of Presidency "Group

on: 14 October 2009

prev.doc.: Doc.13867/09 DROIPEN 112 WTO 197 PI 94 RESTREINT UE

Subject : Anti-Counterfeiting Trade Agreement (ACTA)
-Chapter 2
Criminal provisions

The "Friends of Presidency" Group met on 14 October 2009, to continue discussions on the draft text of criminal provisions to be included in the Anti-Counterfeiting Trade Agreement (ACTA), as set out in document 13876/09 DROIPEN 112 WTO 197 PI 94.

The text of the criminal provisions as it arose from the discussions in the "Friends of Presidency" Group, is set out in the Annex. Modifications with regard to the previous document are highlighted in **bold** and underlined. Deletions are marked out by [...]. Comments and outstanding reservations are set out in footnotes.

DRAFT POSITION OF THE MEMBER STATES OF THE EUROPEAN UNION ON THE CRIMINAL PROVISIONS IN CHAPTER 2

Section 3: Criminal Enforcement

ARTICLE 1. OFFENCES/CRIMINAL INFRINGEMENTS

1a. TRADEMARK COUNTERFEITING, COPYRIGHT AND RELATED RIGHTS PIRACY ON A COMMERCIAL SCALE

Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting¹ and copyright or related rights piracy² on a commercial scale.³

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- ¹ In case the other ACTA-partners would move towards the Japanese proposal to add “confusingly similar trademark goods” in the text, the “Friends of Presidency” Group decided to use as fall-back position, the phrase “infringements of registered trademarks”.
- ² The “Friends of Presidency ” Group agreed to insert the following Negotiator's note. **Negotiator’s note: The term “related rights” is defined by each party in accordance with its international obligations.**
- ³ The EU Member States do not wish at this stage to include in the text the footnote proposed by Japan and U.S. on importation/exportation. Instead, the “Friends of Presidency ” Group decided to request the Presidency to encourage Japan and U.S. to explain the footnote in more detail.

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1b. TRAFFICKING/IMPORTATION AND DOMESTIC USE IN THE COURSE OF TRADE OF/IN COUNTERFEIT/ILLCIT 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.¹

1c. UNAUTHORIZED CAM-CORDING

(deleted)²

ARTICLE 2. LIABILITY , [...] PENALTIES AND SANCTIONS

2a. LIABILITY OF LEGAL PERSONS³

(i) 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 1.

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

¹ Bearing in mind that UK's final position on the inclusion of services in this provision depends on how this shall be interpreted, the Presidency believes that it is advisable, for the sake of consistency with previous EU's Member States positions, to put this word in square brackets. Furthermore, the Presidency intends to underline to the attention of the other ACTA partners the need for clarification of an inclusion of services in the text.

² The "Friends of Presidency" Group concluded that since the large majority of delegations still oppose the inclusion of an article on unauthorized cam-cording, the position of the EU's Member States will not contain such a provision.

³ The "Friends of Presidency" Group confirmed its readiness to be flexible, if necessary, as to the wording, but decided to maintain the current wording for the time being.

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

2b. INCITING, AIDING AND ABETTING

The provisions of this section shall apply to inciting to, aiding and abetting the offences referred to in Article 1.

2c. PENALTIES AND SANCTIONS¹

(i) For the offences referred to in Article 1, each Party shall provide for **effective proportionate and dissuasive penalties. The available penalties shall include imprisonment and monetary fines.**

(ii) For legal persons held liable under Article 2a, each Party shall provide for effective, proportionate and dissuasive sanctions, including monetary sanctions.

ARTICLE 3. SEIZURE, FORFEITURE/CONFISCATION AND DESTRUCTION

3a. SEIZURE

(i) In case of an offence referred to in Article 1, 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 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.

¹ The “Friends of Presidency” Group expressed its support for this re-drafted version of the Article, including following Negotiator's note: *"This does not imply an obligation for a Party to provide for the courts, a possibility to impose both penalties in parallel"*. However, a number of delegations indicated that they needed to consult their capitals before final approval.

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(ii) Each party shall, if a prerequisite for such an order is the identification of the items, ensure that the order need not determine the items that are subject to seizure in more detail than necessary to allow their [...] identification for the purpose of the seizure.

3b. FORFEITURE/CONFISCATION and 3c. DESTRUCTION

(i) For the offences referred to in Article 1, each Party shall provide that its competent authorities shall have the authority to order confiscation/forfeiture and/or destruction of all counterfeit trademark goods or pirated copyright goods, of materials and implements predominantly¹ 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.

(ii) Each Party shall ensure that the counterfeit trademark goods and pirated copyright goods that have been confiscated/forfeited under this subparagraph shall, if not destroyed, be disposed of outside the channels of commerce, under the condition that the goods are not dangerous for the health and security of persons.

(iii) Each Party shall further ensure that confiscation/forfeiture and destruction under this subparagraph shall occur without compensation of any kind of the defendant.

(iv) Each Party may provide that its judicial authorities have the authority to order the confiscation/forfeiture of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing activity.

¹ AT still has a reservation on the eventual deletion of "predominantly" in this Article. The "Friends of Presidency" Group concluded that if AT agrees to drop its reservation, "predominantly" will be deleted from the position of the EU's Member States.

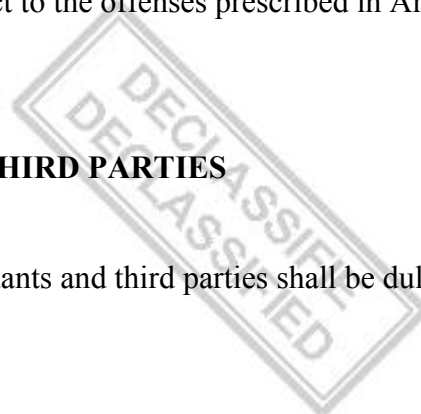
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ARTICLE 4. *EX OFFICIO* ENFORCEMENT

[Each Party shall provide that its competent authorities may act upon their own initiative to initiate investigation and/or legal action with respect to the offenses prescribed in Article 1, at least in case of significant public interest.]¹

ARTICLE 5. RIGHTS OF THE DEFENDANT AND THIRD PARTIES

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



¹ AT, EL, PT and PL still have reservations on the inclusion of this Article. The “Friends of Presidency” Group concluded that if these delegations lift their reservations, this Article will be included in the position of the EU's Member States.