



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 1 October 2012

**7021/10
EXT 1**

**DROIPEN 19
WTO 68
PI 25**

PARTIAL DECLASSIFICATION

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Subject:	Anti-Counterfeiting Trade Agreement (ACTA) - Chapter 2 Criminal Provisions
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Delegations will find attached the partially declassified version of the above-mentioned document.



ANNEX

**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 2 March 2010

**7021/10
EXT 1 (1.10.2012)**

**DROIPEN 19
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PI 25**

NOTE

from: Presidency
to: Delegations
No. prev. doc. : 6270/10 DROIPEN 15 WTO 34 PI 16

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

In view of the next "Friends of Presidency" Group meeting on 8 March 2010, the Presidency submits to the delegations the text of the criminal provisions, which will be the basis for the discussions.

CHAPTER 2

Section 3: Criminal enforcement

Article 2.14: Criminal offences

1.- Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark¹ counterfeiting² and³ copyright or related rights piracy⁴ on a commercial scale.⁵

2.- 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

¹ Proposal from **NOT DECLASSIFIED**: add "geographical indications".

² **NOT DECLASSIFIED**

³ Agreed fallback position: "or".

⁴ **Negotiator's note: The term "related rights" is defined by each Party in accordance with its international obligations.**

⁵ **NOT DECLASSIFIED** [EU: delete footnote].

- (ii) which is intended to be used on goods or services which are identical to goods or services for which the trademark is registered.⁶

3.- Unauthorised cam-cording
(Deleted)⁷

Article 2.15: Liability, penalties and sanctions

1.- Liability of legal persons

(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 2.14.

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

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

2.- Inciting, aiding and abetting

The provisions of this section shall apply to inciting⁸, aiding and abetting the offences referred to in Article 2.14.

⁶ Reservation from **NOT DECLASSIFIED**.

⁷ Reservation from **NOT DECLASSIFIED**.

⁸ Agreed fallback position: delete “inciting”.

3.- Penalties and sanctions

(i) For the offences referred to in Article 2.14, each Party shall provide for effective proportionate and dissuasive penalties. The available penalties shall include imprisonment and monetary fines⁹.

(ii) For legal persons held liable under Article 2.15.1, each Party shall provide for effective, proportionate and dissuasive sanctions, including monetary sanctions.

Article 2.16: Seizure, forfeiture/confiscation and destruction

1.- 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 implement used in the commission of the alleged offence, [any]¹⁰ documentary evidence relevant to the alleged offence, and any assets derived from or obtained, directly or indirectly, through the infringing activity.

Each Party shall, if a prerequisite for such an order, according to its national law, is the identification of the item, 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.

⁹ **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.**

¹⁰ This word was originally not included in the Member State's position. Scrutiny reservation by **NOT DECLASSIFIED** on the deletion of the word.

2.- Forfeiture/confiscation and destruction

(i) For the offences referred to in Article 2.14, 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 implements¹¹ 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.

¹¹ With regard to confiscation, **NOT DECLASSIFIED** requested the inclusion either of the word "predominantly" or of a reference that the rights of good faith third parties are duly taken into account.

Article 2.17: *Ex officio* criminal enforcement¹²

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 offences prescribed in article 2.14, at least in case of significant public interest [as defined by national law/in accordance with national law].¹³

Article 2.18: 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.¹⁴

¹² Reservation from **NOT DECLASSIFIED** on this point.

¹³ This wording comes from Doc. 14696/09 DROIPEN 130 WTO 217 PI 102 RESTREINT UE with an addition that may facilitate consensus.

¹⁴ Agreed fallback position: move this paragraph to Chapter one, Section A, “Initial Provisions”.