



Council of the  
European Union

Brussels, 13 November 2019  
(OR. en)

11277/09  
DCL 1

DROIPEN 48  
WTO 121  
COASI 109

## DECLASSIFICATION

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of document: 11277/09 RESTREINT UE/EU RESTRICTED

dated: 22 June 2009

new status: Public

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Subject: Free Trade Agreement with Korea.  
- Draft position of the Member States of the European Union on criminal provisions (Sub-section 2-criminal enforcement) to be included in the Free-Trade agreement with South Korea

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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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# RESTREINT UE



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THE EUROPEAN UNION

Brussels, 22 June 2009

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## NOTE

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from : Presidency

to : Working Party on Substantive Criminal Law

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Subject : Free Trade Agreement with Korea.  
- Draft position of the Member States of the European Union on criminal provisions (Sub-section 2-criminal enforcement) to be included in the Free-Trade agreement with South Korea

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On 7 April 2009 the Permanent Representatives Committee (Part II) reached consensus on the text of criminal provisions (Sub-section 2-Criminal enforcement) to be included in the Free-Trade Agreement, currently under negotiation with South Korea, as set out in document 8602/09 DROIPEN 21 WTO 70 COASI 56 RESTREINT UE.

The above mentioned text of criminal provisions was sent to the Korean side, which reacted by sending a counter-proposal, which was communicated by the Presidency to the delegations on 12 June 2009 with a request for comments expiring on Thursday 18 June 2009.

On the basis of these comments received by Member States, the Presidency prepared a text of the Sub-section 2 -Criminal enforcement, as set out in the Annex to the present Note. Modifications with regard to the document 8602/09 DROIPEN 21 WTO 70 COASI 56 RESTREINT UE are highlighted in bold. Renumbering is underlined.

## SUB-SECTION 2 CRIMINAL ENFORCEMENT

### ARTICLE 10.24.1 SCOPE OF CRIMINAL ENFORCEMENT

~~1.~~ [...] (deleted)

~~2.~~ Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting and copyright piracy **and related rights**<sup>1</sup> on a commercial scale.

### ARTICLE 10.24.2. GEOGRAPHICAL INDICATIONS, DESIGNS AND [...] COUNTERFEITING

Subject to its national or constitutional law and **regulations**, each Party may adopt measures to establish the **criminal** liability for **counterfeiting** geographical indications **and** designs.

[...] (deleted)

### ~~ARTICLE 10.24.3 SPECIFIC CASES~~

(deleted)

### ARTICLE 10.24.3 LIABILITY OF LEGAL PERSONS

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 10.24.1.

~~2.~~ [...] (deleted)<sup>2</sup>

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<sup>1</sup> Presidency proposes to accept the Korean proposal in order to avoid any possible concern that this sub-section would constitute TRIPS minus. Above that, under existing EC law (Directive 2001/29/EC on the harmonisation of certain aspects of **copyright and related rights** in the information society, Directive 93/98/EEC harmonizing the term of protection of **copyright and certain related rights**, Directive 93/83/EEC on the coordination of certain rules concerning **copyright and rights related to copyright** applicable to satellite broadcasting and cable retransmission) this term is being largely used, although there is no definition of copyright related rights. Therefore Presidency considers that all Member State can interpret this term, as there is an obligation to implement the existing EC Directives mentioned above.

<sup>2</sup> Presidency proposes to refuse Korean proposal to insert “criminal” in paragraph 1 in order to keep flexibility as regards the concept of liability of legal persons. Deletion of paragraph 2 would not infringe maintenance this flexibility.

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

### ARTICLE 10.24.4 AIDING AND ABETTING

The provisions of this **sub**-section shall apply to aiding and abetting of the offences referred to in Article 10.24.1.

### ARTICLE 10.24.5 SEIZURE

In case of an offence referred to in Article 10.24.1, 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 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 10.24.6 PENALTIES

For the offences referred to in Article 10.24.1, each Party shall provide for penalties that include sentences of imprisonment and/or monetary fines that are effective proportionate and dissuasive ;

### ARTICLE 10.24.7 CONFISCATION

1. For the offences referred to in Article 10.24.1, each Party shall provide that its competent authorities shall have the authority to order confiscation and/or destruction of all counterfeit trademark goods or pirated copyright goods, [...] materials and implements predominantly used in the creation of counterfeit trademark goods or pirated copyright goods **and** [...] the assets derived from, or obtained directly or indirectly, through the infringing activity.
2. Each Party shall ensure that the counterfeit trademark goods and pirated copyright goods that have been confiscated under this **Article** 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.

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3. **Each** Party shall further ensure that confiscation and destruction under this **Article** shall occur without compensation of any kind of the defendant.
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 10.24.8 RIGHTS [...] OF THIRD PARTIES

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

### ~~ARTICLE 10.24.10 RENDEZ-VOUS CLAUSE~~

(deleted)

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