



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 7 November 2011

**10837/1/10
REV 1**

**DROIPEN 62
WTO 214
PI 65**

DECLASSIFICATION

of document:	10837/10 RESTREINT UE
dated:	8 June 2010
new status:	Public

Subject:	Pluri-lateral Anti-Counterfeiting Trade Agreement (ACTA) - Statement by Germany Consolidated Text of 16 April 2010
----------	--

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

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

RESTREINT UE



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 June 2010

10837/10

RESTREINT UE

**DROIPEN 62
WTO 214
PI 65**



NOTE

from:	German delegation
to:	delegations
Subject:	Pluri-lateral Anti-Counterfeiting Trade Agreement (ACTA) - Statement by Germany Consolidated Text of 16 April 2010

Chapter Two - Legal Framework for Enforcement of Intellectual Property Rights

General Obligations

Re Article 2.x, para. 5 (General Obligations with Respect to Enforcement)

The definition of "intellectual property" used in Chapter One of the Consolidated Text of the ACTA of 16 April is in principle in accord with that used in Part II, Sections 1 to 7 of the TRIPS Agreement (Art. 1.X, p. 3). This corresponds to the EU's position that ACTA should be applicable to **all** intellectual property rights. We support this position (except: no criminal-law provisions regarding patents).

RESTREINT UE

As regards the legal provisions, however, the EU in Chapter Two, Article 2.x, para. 5 (p. 4) then proposes defining the scope of intellectual property rights separately at the start of each chapter. This appears contradictory, confusing and – apart from the scope of application of the "Criminal Sanctions" section, in regard to which the EU Member States are already responsible for negotiations – unnecessary. The scope should be the same throughout.

Section 1 - Civil Enforcement

Re Article 2.2, para. 2 (Damages)

The EU should stick to its position ("may") on Article 2.2, para. 2 (p. 6). It would thus be left to the contracting states to establish or maintain the types of damages/means of determining the amount of damages referred to in Article 2.2, para. 2 (a) to (c). We reject obligating parties to establish types of damages/means of determining the amount of damages that go beyond the *acquis communautaire* (especially "pre-established damages"), and such obligation should therefore at all events be avoided.

Re Article 2.4 (Information Related to Infringement)

Germany has no concerns when it comes to extending the phrase "any information" to include the term "relevant" as proposed by CAN/NZ/US. By contrast, the preceding US/J/KOR/Aus proposal – "for the purpose of collecting evidence" – should not be backed. The meaning of the phrase is unclear, since it gives the impression that the information acquired on the basis of the enquiry must serve the obtaining of further evidence. However, the acquired information can, under certain circumstances, of itself already constitute sufficient evidence where, in individual cases, the court is convinced of that fact. In such cases it would not be necessary to collect further evidence. Nor is such an addition included in Article 8, para. 1 and 2 of the Enforcement Directive 2004/48/EC.

Re Article 2.5, para. 3 (Provisional Measures)

Article 2.5, para. 3 (p. 9) reads as follows: "*Each Party shall provide that its ... authorities have the authority to require the plaintiff, ..., to provide any reasonably available evidence ... and to order the plaintiff to provide a ... security or equivalent assurance ...*".

RESTREINT UE

Article 9 of the Enforcement Directive 2004/48/EC is, by contrast, worded slightly differently. Whilst – in line with Article 2.5, para. 3 – Article 9, para. 3 requires that "*The judicial authorities shall, ..., have the authority to require the applicant to provide any reasonably available evidence...*", Article 9, para. 6 of the Enforcement Directive reads as follows: "*The competent judicial **authorities may make** the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent...*".

We would ask the European Commission to notify us whether, in its view, there is any difference between Article 2.5, para. 3 and Article 9, para. 6. Should this not be the case, we would request written confirmation that the rule set out in Article 2.5, para. 3 is in accord with the *acquis* (in particular with Article 9 of the Enforcement Directive).

Section 2 - Border Measures

Re Article 2.X (Scope of the Border Measures (EU/CH))

We do not support Article 2.X, para. 2, second sentence in its current form as proposed by the EU ("However, Parties may decide to exclude from the scope ..."; p.10; see above, p. 1). We continue to hold the view that all intellectual property rights should be included in the Agreement and ask the EU Commission to clarify in writing why specifically GI should be treated differently from design rights and other rights. The "Border Measures" section in particular affects an area which is important when it comes to fighting counterfeiting and product piracy and it should, therefore, cover as many intellectual property rights as possible

Section 3 - Criminal Enforcement

Re Article 2.14 (Criminal Offenses)

Germany adheres to its position on Article 2.14, para. 1 (p. 15) – endorsing the inclusion of the footnote in Article 2.14, para. 1 ("*The term "wilful trademark counterfeiting and copyright and related right piracy" will be defined in accordance with Article 51 footnote 14 TRIPS.*"). The reference in footnote 34 (p. 15), a directory provision ("...should be used as context for this Section"), appears too vague and does not – like the GE proposal – contain a binding reference to the aforementioned footnote in TRIPS.

RESTREINT UE

The EU should stick to its position on Article 2.14, para. 3 (deletion of this provision on camcording).

Re Article 2.16, para. 1 (Seizure, Forfeiture/Confiscation and Destruction)

The EU should stick to its proposal, in particular regarding Article 2.16, para. 1 (b) (p. 17). We still object to the US proposal in this regard.

Section 4 - Special Measures Related to Technological Enforcement of Intellectual Property in the Digital Environment

Re Article 2.18, para. 3 (a) Option 2 EU

It would be desirable for Article 2.18, para. 3 (a) Option 2 EU (p. 20/21) to follow the E-Commerce Directive 2000/31/EC more closely with regard to the gradations of liability for mere conduit, caching, hosting and content providers. However, the current wording in regard to the removal of/disabling of access to infringing contents – taking account of the JPN proposal "such as those" – does not go beyond Article 14, para. 1 b) of the E-Commerce Directive and is therefore, from Germany's point of view, acceptable. Nevertheless, the inclusion, as JPN proposes, of "such as those" should have our backing.

Re Article 2.18, para. 3 (b) Option 2 EU

The provision in Option 2 (EU) (top of p. 22), according to which national regulations governing the removal of or disabling of access to infringing content would remain unaffected, is acceptable. The wording corresponds to Article 14, para. 3 of the E-Commerce Directive.

We welcome the clarification that, where online service providers act in accordance with the legal framework no general monitoring requirement will be imposed (corresponds to Article 15 of the E-Commerce Directive).

RESTREINT UE

Re Article 2.18, para. 3 (b) Option 1 US

We continue to strongly object to Article 2.18, para. 3 (b) (i) (US) (p. 21), despite the deletion of the US footnote in the last round of negotiations in New Zealand (which cited "the termination ... of subscriptions and accounts on the service provider's system or network" as an example of such a policy). The introduction of a corresponding "policy" for online service providers against the storage and transmission of infringing material is compatible neither with the liability regime set out in the E-Commerce Directive nor with German national law. The diverging approach in the US proposal is worded in a more open way, but could force blocking and filter mechanisms to be introduced. We emphatically reject that approach and ask the EU to uphold its own proposal.

Re Article 2.18, para. 4

With regard to Article 2.18, para. 4 we do not have any objections to the EU's proposal in the last paragraph on p. 22, which provides for the use of the term "adequate legal protection" in regard to the circumventing of effective technological measures. However, the EU's proposal of including the two alternatives ("*in the form of civil remedies or criminal penalties*") should at all events be retained. Germany is of the view that this is so important because only German civil-law provisions meet the ACTA requirements in that respect, whilst not all circumvention of effective technological measures is punishable. For instance, section 108b (1), second half-sentence, of the Copyright Act requires that for the circumvention of effective technological measures to be punishable that the act did not exclusively occur for the perpetrator's own private use or for that of persons personally linked with the perpetrator or that it refers to such use. Article 2.18, para. 4 does not contain such a restrictive condition.

The rule set out in Article 2.18, para. 4 (b) (p. 23) also differs from German criminal law on copyright. The "corresponding" provision in section 108b (2) of the Copyright Act requires that, for the act to be punishable, it served commercial purposes.

RESTREINT UE

Re Article 2.18, para. 6

The same applies to Article 2.18, para. 6 (p. 23/24) as does to para. 4: The term "adequate and legal effective remedies" would be acceptable without further specification. Where para. 6, second sentence (p. 24, second line) cites "civil remedies" as well as/or "criminal penalties", this is also acceptable if the alternatives are guaranteed, as is the case in the EU's proposal ("civil remedies **or** criminal penalties"). The altering or removal of rights management information is not always punishable under German law. The EU's proposal "or" should be retained.

Chapter Five - Institutional Arrangements

Re Article 5.1 (Oversight Committee):

The ACTA is a mixed agreement. That is why it is important for Germany that it and the other EU Member States are themselves represented on all committees relevant to the ACTA (including committees to be set up in the future).

Chapter Six - Final Provisions

Re Article 6.1 (Becoming Party to the Agreement):

1. Germany raises no objections to the inclusion of an accession procedure as proposed by the EU. However, the EU's proposal at the end of no. 1. does not appear to be consistent with no. 3. Either the Agreement should – as in no. 3. – provide for an open accession clause (possibly with membership of an international organisation as a material requirement). In that case the EU's proposal of an accession agreement should be deleted. Or, however, the Agreement should from the outset provide for a closed accession clause requiring an accession agreement (e.g. Article XII of the WTO Agreement).
2. The TRIPS Agreement contains procedural safeguards (e. g. fair and equitable procedures (Art. 42), indemnification of the defendant (Art. 48) or administrative procedures (Art. 49)). How will it be made sure that, in the future, a country which is not Party of the TRIPS Agreement but wants to become Party of ACTA has the same procedural safeguards as the Parties of the TRIPS Agreement?

RESTREINT UE

Re Article 6.5 (Texts of the Agreement):

Germany is of the view that it is important that the languages of all the EU Member States are legally binding and equally authentic contractual languages. The Agreement should incorporate the EU's standard clause in this regard, which is generally worded as follows:

"Done in a single original at ... this ... in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish and Swedish languages, each text being equally authentic".


