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Legal Service

SJ-0501/11

Brussels, 05 OCT. 2011

D(2011)47454

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LEGAL OPINION

Re: Anti-Counterfeiting Trade Agreement (ACTA)

I. INTRODUCTION

1. By letter of 18 July 2011 (annexed), received by the Legal Service on 19 July 2011, the Chairman of the Committee on International Trade (INTA) sought the opinion of the Legal Service on various questions concerning the ACTA, in particular the legal basis proposed by the Commission for its conclusion, its conformity with the EU *acquis*, its conformity with existing international obligations of the EU and its Member States and the question of transparency in relation to the preparatory works of the international negotiations on ACTA¹. On 28 September 2011, the Chair also requested the Legal Service's opinion on the conformity of ACTA with Parliament's position on the IPRED2 proposal.²

II. BACKGROUND

2. Further to the adoption of the negotiating directives by the Council on 14 April 2008, negotiations on the ACTA were launched on 3 June 2008. The negotiations included the European Union, its Member States and various third countries, namely Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America. As explained by the Commission in the explanatory memorandum to its proposal, while the Commission led the negotiations on the general provisions of ACTA, the rotating EU Presidency led the negotiations on matters of penal enforcement, based on positions agreed and adopted in COREPER. The negotiations were concluded on 15 November 2010 and the text was initialled on 25 November 2011, after 11 rounds of negotiations.

¹ 2010/0289(COD)

² "Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights", COM/2006/0168 final - COD 2005/0127.

3. The Commission proposed the signature and conclusion of the Agreement on 24 June 2011. Council adopted a decision to sign the Agreement on 23 August 2011³. There is no proposal to provisionally apply the Agreement pending its conclusion.
4. The Commission proposes that the Agreement be concluded as a "mixed agreement"⁴. The Agreement must be concluded in accordance with the procedures foreseen in Article 218 TFEU, in particular its paragraph 6(a)(v) requiring a decision by Council following the consent of Parliament. Moreover, it must be ratified by all the Member States in accordance with the national requirements and procedures.
5. While Parliament has been notified of the proposal to conclude the Agreement, Parliament's consent has not yet been requested by Council. Such request is generally sent to Parliament immediately after Council adopts the decision to sign the Agreement.

III. LEGAL ANALYSIS

Question 1:

The legal basis for adopting ACTA.

³ Council Document 12192/11 dated 23.8.2011, not yet published in the Official Journal.

⁴ This can be seen from the title itself of the Agreement which refers to the European Union and the Member States.

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Question 2:

The conformity of ACTA with the EU *Acquis* with regard to (a) border measures, (b) the criteria for damages in ACTA in relation to the criterion of "*appropriateness of the damage to the actual prejudice suffered*" as envisaged in Directive 2004/48/EC, and (c) criminal measures.

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Question 3:

The conformity of ACTA with the existing international obligations of the EU and its member States: How does Legal Service evaluate the relationship between ACTA and the TRIPS Agreement?

page 11.

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Question 4:

Finally, Parliament and myself have received various requests from NGOs and Interest Groups for access to ACTA preparatory works as well as requests that all relevant preparatory documents (drafts distributed by the European Commission and associated briefing notes from the Commission) received by the Parliament should be published and/or communicated directly to Stakeholders as soon possible: is the Commission obliged to publicly disclose preparatory works and previous versions of ACTA, according to the Vienna Convention on Law of Treaties? Is the European Parliament obliged to disclose documents that originate from another EU institution?

Is the Commission obliged to publicly disclose preparatory works and previous versions of ACTA, according to the Vienna Convention on Law of Treaties?

47. The Vienna Convention on the Law of Treaties (VCLT) limits its requirement of publication to the final agreement itself. It does not provide any requirement of publication for preparatory works and draft versions of *agreements*. There is no requirement of public international law to publish such preparatory documents.

48. It has been argued that Article 32 VCLT establishes such an obligation. In its Chapter on Interpretation of Treaties, the Vienna Convention provides that "*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

(a) *leaves the meaning ambiguous or obscure; or*

(b) *leads to a result which is manifestly absurd or unreasonable*" (Article 32, VCLT).

49. It is the national courts, or the European Court of Justice in the case of the European Union, to interpret international agreements concluded by those States or by the EU. But this only applies where the documents are available²⁴. One cannot interpret this provision of the Vienna Convention as creating an obligation on the Commission (or on the Member States) to make public all preparatory documents leading to the adoption of an international agreement.

Is the European Parliament obliged to disclose documents that originate from another EU institution?

50. Under Article 15(3) TFEU, the European Parliament is submitted to the obligation of transparency, according to which "*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions [...]*". This right of access to documents is specified by Regulation (EC) No. 1049/2001 pursuant to which any citizen may request the disclosure of documents of the institutions "*subject to the principles, conditions and limits defined in this Regulation*" (Article 2 of Regulation (EC) No. 1049/2001).
51. Within the European Parliament, the implementation of Regulation (EC) No. 1049/2001 is ensured by the Unit for Transparency - Public Access to Documents and Relations with Interests representatives ("responsible unit") to which citizens may submit requests for access to documents. Moreover, access to documents is possible via the directly accessible electronic register of the European Parliament. *Initial* applications submitted to the European Parliament are handled by the Secretary general under the authority of the Vice-President responsible for supervision of the handling of applications for access to documents, whereas the reply to *confirmatory* applications is a matter for the Bureau of the European Parliament on behalf of which the Vice-President responsible for the processing of applications for access to documents shall take a decision.
52. Pursuant to its Article 2(3), Regulation (EC) No. 1049/2001 applies to "*all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union*". It follows from the foregoing that documents transmitted to the European Parliament from other EU Institutions or third parties, such as the preparatory documents in possession of the International Trade Committee of the European Parliament with regard to the negotiations conducted in the

²⁴ See Aust, *Modern Treaty Law and Practice*, Cambridge, 2007, page 244-248.

context of the Anti-Counterfeiting Trade Agreement, fall within the scope of Regulation (EC) No. 1049/2001.

53. However, as far as the obligation of the European Parliament to disclose such documents to the public is concerned, the Regulation provides for several exceptions. Indeed, pursuant to Article 4(1)(a) of Regulation (EC) No. 1049/2001, *"the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) international relations"*.
54. Moreover, as far as third-party documents are concerned, it follows from Article 4(4) of Regulation (EC) No. 1049/2001 that *"the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed"*²⁵.
55. In the aforementioned context, disclosure of preparatory documents concerning international negotiations might be susceptible to undermine the protection of the public interest as regards international relations of the EU, as the negotiation of international agreements depends on trust among the parties subject to the negotiations. For this reason, the unilateral disclosure of documents directly related to those negotiations (as are the debriefing notes from the Commission as a negotiator) could undermine future trust in the negotiating mechanisms of the European Union²⁶.
56. It follows from the foregoing that in a given case, the European Parliament would have to verify the possibility of disclosure of documents concerning the negotiations conducted in the context of the Anti-Counterfeiting Trade Agreement on a case by case basis and after consultation of the EU Institution or the other third party concerned.

²⁵ For the purposes of this provision, the Commission and the Council are "third parties" (Art. 3 b) of the mentioned Regulation).

²⁶ As far as *classified* documents are concerned, it has to be noted, that Regulation (EC) No. 1049/2001 provides for a specific legal *regime*. Indeed, pursuant to Article 9 of this Regulation, specific rules apply for "sensitive documents" originating from the institutions or the agencies established by them, from Member States, third countries or international organizations which are classified "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned. In this regard, Article 9(3) provides for prior consent of the originator. The prior consent rule has been acknowledged again in Annex 2 point 2.1 of the Framework Agreement concluded between the European Parliament and the Commission. If an EU institution is the originator, a potential refusal to grant access has to be substantiated in light of the exceptions laid down in Article 4 of the Regulation. Documents classified as RESTREINT UE/EU RESTRICTED are not mentioned by this Regulation, but they are foreseen in the internal security rules of the institutions.

IV CONCLUSIONS

57. Having regard to the above, the Legal Service concludes as follows:

Question 4:

- f) It follows from Article 4 of Regulation (EC) No. 1049/2001 that the European Parliament would have to verify the possibility of disclosure of documents concerning the negotiations conducted in the context of the ACTA on a case by case basis and after consultation of the EU Institution or the other third party concerned;
- g) According to Article 4(1)(a) of Regulation (EC) No. 1049/2001, "*the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations*". Disclosure of preparatory documents concerning international negotiations may undermine the protection of the public interest as regards international relations of the EU, as the negotiation of international agreements depends on trust among the parties subject to the negotiations.

Annexes: 1.) Letter of 18 July 2011 from Mr Vital MOREIRA, Chairman of the Committee on International Trade
2.) Letter of 28 September 2011 from Mr Vital MOREIRA, Chairman of the Committee on International Trade



ЕВРОПЕЙСКИ ПАРЛАМЕНТ PARLAMENTO EUROPEO, EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
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Committee on International Trade
The Chairman

AM/ZU
D(2011) 35697

312222 18.07.2011

Mr. Christian Pennera
Jurisconsult
Legal Service of the European Parliament

Subject: "Anti-Counterfeiting Trade Agreement" (ACTA)

Dear Mr Pennera,

I would like to request your Service's opinion on the issue of the Anti-Counterfeiting Trade Agreement (ACTA). On 24 June 2011, the Commission forwarded its proposal to the Council (COM(2011)380 - 2011/0167(NLE), and the Council has just referred it to Parliament under the consent procedure.

As you are certainly aware, the EU and a number of other WTO members began working on ACTA in 2007. The negotiating parties are Australia, Canada, the EU, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the USA. ACTA will provide a WTO-plus legal framework (in addition to the TRIPS) against counterfeiting and piracy and harmonised rules on civil and criminal enforcement and on customs procedures, as well as improved cooperation between authorities and stakeholders.

In this context, the Committee on International Trade would appreciate to know your opinion on the following matters:

- The legal base or bases for adopting the ACTA. The Commission's proposal is based on Article 207 (4), 1st subparagraph, in conjunction with Article 218(6)(a)(v) TFEU. I wonder whether the Legal Service agrees with this choice.
- The conformity of ACTA with the EU Acquis with regard to (a) border measures, (b) the criteria for damages in ACTA in relation to the criterion of "appropriateness of the damage to the actual prejudice suffered" as envisaged in Directive 2004/48/EC, and (c) criminal measures.

- The conformity of ACTA with the existing international obligations of the EU and its member states: How does the Legal Service evaluate the relationship between ACTA and the TRIPS Agreement?
- Finally, Parliament and myself have received various requests from NGOs and Interest Groups for access to ACTA preparatory works as well as requests that all relevant preparatory documents (drafts distributed by the European Commission and associated briefing notes from the Commission) received by the Parliament should be published and/or communicated directly to Stakeholders as soon as possible: Is the Commission obliged to publicly disclose preparatory works and previous versions of ACTA, according to the Vienna Convention on Law of Treaties? Is the European Parliament obliged to disclose documents that originate from another EU institution?

I thank you in advance for your cooperation.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Vital Moreira', written in a cursive style.

Vital Moreira



ΕΥΡΩΠΕΪΚΗ ΠΑΡΛΑΜΕΝΤ ΠΑΡΛΑΜΕΝΤΟ ΕΥΡΩΠΕΟ EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
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Committee on International Trade
The Chairman

MKO/mt
EXPO-COM-INTA (2011)48501

203924 28.09.2011

Mr. Christian Pennera
Jurisconsult
Legal Service of the European Parliament

Subject: "Anti-Counterfeiting Trade Agreement" (ACTA)

Dear Mr Pennera,

With reference to my previous letter of 18 July 2011 on this matter I would like to request your Service's opinion on an additional issue regarding the Anti-Counterfeiting Trade Agreement (ACTA).

As you are certainly aware, the EP is expecting official *saisine* for a consent procedure on this agreement soon. In order to provide the Members with the best possible advice, the Committee on International Trade would appreciate to know your opinion on the conformity of ACTA with the EU *acquis*:

- regarding criminal measures in relation to the conditions set by the European Parliament, in its position of 25 April 2007 on the IPRED2 proposal of the Commission.

I thank you in advance for your cooperation in this rather late submission.

Yours sincerely,

Vital Moreira

Annex: Request for Legal Service's opinion of 18 July 2011.