



Legal Service  
Director

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**Note for the attention of Mr Vital MOREIRA,**  
Chairman of the Committee on International Trade

**Re: Anti-Counterfeiting Trade Agreement (ACTA)**

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 ACTA<sup>1</sup>. 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.<sup>2</sup>

In its opinion which you will find attached, the Legal Service has reached the following conclusions:

"Question 1:

- a) *When concluding ACTA, the Union must decide on whether or not to exercise its competence in the field of criminal enforcement under Article 83(2) TFEU. If the Union decides to exercise its competence, Article 83(2) TFEU must be added to the legal basis. If the Union considers that this competence should be left to the Member States, the Agreement must be concluded as a mixed agreement and on the basis of Articles 207 and 218(6)(a)(v) TFEU, as proposed by the Commission;*

<sup>1</sup> 2010/0289(COD)

<sup>2</sup> "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.

- b) *The inclusion of Article 82(2) TFEU in the legal basis is a matter of political choice. Article 83(2) TFEU would remove the requirement that ACTA be concluded as a mixed agreement. However, the application of Protocols 21 and 22 on the special position of the United Kingdom, Ireland and Denmark would have to be considered.*

Question 2:

- c) *In legal terms, an international agreement concluded by the EU must be compatible with the provisions of the Treaties, but there is no legal requirement that it must be compatible with acts adopted by the EU Institutions. An international agreement concluded by the Union may, in fact, alter existing secondary law;*
- d) *While it must be recognised that various provisions of ACTA are subject to interpretation, there does not seem to be, prima facie, provisions which are conflicting with existing EU Acquis or which require the introduction of new EU legislative acts or amendment of existing ones;*

Question 3:

- e) *ACTA can be seen as an agreement which obliges its Parties to enforce intellectual property rights, in some cases limiting the flexibility which they have under TRIPS as to whether and to what extent to enforce intellectual property rights. On the other hand, there do not seem to be any provisions which are contradictory to the provisions of TRIPS. Moreover, when interpreting ACTA, the European Court of Justice and national Courts are called upon to give precedence to TRIPS should they consider that there is an incompatibility. This results from Article 1 of ACTA which specifically provides that its provisions cannot be interpreted as derogating from any obligation under existing agreements, including TRIPS;*

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."*

The Legal Service remains, of course, at your disposal for any further information you may require.



By delegation of the Jurisconsult,  
Ricardo PASSOS  
Director

Annex