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Legal Service

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NOTE FOR THE ATTENTION OF MR VITAL MOREIRA, CHAIRMAN OF THE COMMITTEE ON INTERNATIONAL TRADE

**Re: Questions asked to the Legal Service after the presentation of the Legal Opinion
 on ACTA at the meeting of INTA on 23 November 2011**

Questions from MEP Lange, S&D

- a) **With regard to conclusions of the opinion on question 2, point d) - conformity of ACTA with EU acquis, who would identify the need for an amendment of an EU legislative act? Who would decide on whether there is a lacuna in the EU acquis in order to fully and correctly implement ACTA? Which procedure would be applied for such an amendment?**
1. It will be for the Commission to decide on whether there is a lacuna in the EU *acquis* in order to fully and correctly implement ACTA. If it deems appropriate, the Commission would have to propose new or amending legislation. The procedures to be followed for the adoption of such legislation would depend on the content of the proposal.
- b) **In which areas is there room for interpretation where such adaptations in EU law would be needed?**
2. As is the case with all legislation, all the provisions of ACTA will be subject to interpretation by the Courts.

- c) **If, for example in criminal measures or disclosure of information, there are no EU acquis provisions, will they not have to be adopted because of ACTA?**
3. The criminal measures fall under an area of shared competence between the EU and the Member States. 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 EU considers that this competence should, at this stage, be left to the Member States, then there will be no need for the EU to adopt specific legislation in this regard. In this case, ACTA must be concluded as a mixed agreement, as proposed by the Commission¹.
- d) **How will the room for manoeuvre by the Member States in introducing guarantees (point 32. of the opinion) work out? Can you confirm that Member States cannot introduce such guarantees if they contradict ACTA?**
4. As explained in point 32, ACTA does not prohibit or oppose such provisions in the laws of its Contracting Parties. It will be up to each Member State to decide on whether to introduce or maintain such guarantees, according to EU law and their own national laws.
5. The balance between ACTA provisions and those guarantees will have to be examined on a case-by-case basis, depending on the laws introduced in the Member States to implement ACTA.
6. See also the reply to question (i) on human rights.
- e) **Regarding access to documents, should the preparatory works not be made available? Are these works considered as confidential information? When will these documents then be made available for the public?**
7. First of all, one must distinguish between the requirement that the preparatory works be made available to members of the European Parliament and the public access to the documents.
8. With regard to access to all the preparatory works to the members of the European Parliament, it must be stated that the obligation to inform Parliament cannot be modified or limited by any agreement among the institutions because this obligation is foreseen in Article 218(10) TFEU. Where documents originate from a third party, the Union negotiator may be justified not to disclose such information without the consent of the third party concerned. In such circumstances, Parliament should nonetheless be provided with information. In the case of a persistent refusal to provide it with information, Parliament may initiate proceedings for illegal failure to act. Therefore, Parliament has a right under Article 218 (10) TFEU to have access to the preparatory works of ACTA.
9. However, this does not mean that the preparatory works must be made available to the public. In this case, the provisions of Regulation 1049/2001 apply. The Legal Opinion to INTA concludes that: *"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*

¹ For more detail, refer to the reply to Question 1 of the Legal Opinion.

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".

Questions from MEP Schaake, ALDE

- f) **The European Parliament has voted several times on a need for transparency in the ACTA negotiation process. The INTA committee has now decided to hold the meeting 'in camera' and to hold the opinion of the Legal Service confidential. This legal opinion is not part of the international negotiation process, so there is no reason why the opinion should be kept confidential. Will the opinion be released to the public?**
10. The opinion of the Legal Service is confidential and it is for this reason that the meeting was held in camera. After a thorough analysis, the Legal Service proposed granting partial access to the legal opinion to a person who asked to have access to it. The same person has requested full access to the opinion and the request is pending before the Bureau.
 11. With regard to the remaining parts of the legal opinion in question, i.e. the legal analysis and the conclusions with regard to questions 1, 2 and 3, Parliament refused public access for the reasons outlined below in application of Article 4(1)(a), 4(2)(second indent) and 4(3)(first paragraph) of Regulation No 1049/2001.
 12. Firstly, pursuant to Article 4(1)(a) third indent of the Regulation (EC) No. 1049/2001, the Institutions shall refuse access to a document where disclosure would undermine the protection of international relations. The legal opinion under consideration was drawn up as an advice for a committee of the European Parliament in the context of the EU-ratification process of the Anti-Counterfeiting Trade Agreement (ACTA).
 13. Important trading partners of the EU, such as the United States and Canada, are contracting parties to the ACTA-agreement. Disclosure of questions 1, 2 and 3 of the legal opinion under consideration would seriously interfere with complex procedure of ratification of the ACTA and the EU's relations with the aforementioned third countries, as it might prejudice the ratification procedures by these countries.
 14. Secondly, under Article 4(2) second indent of Regulation (EC) No. 1049/2001, *"the Institutions shall refuse access to a document where disclosure would undermine the protection of legal advice"*. The process of legal advice provided by the Legal Service to political bodies of the European Parliament in the context of the ongoing ratification process of ACTA has not been completed.
 15. Thirdly, according to the first paragraph of Article 4 (3) of the Regulation No. 1049/2001, *"access to a document, drawn up by an institution for internal use which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.

16. So far, the Parliament has not yet taken its final decision on the matter. The procedure for the conclusion of ACTA is still at its very early stage. Following the Commission's proposals 24/6/2011 (COM(2011)379 final and COM(2011)380 final), INTA Committee requested the abovementioned opinion of the Legal Service but has not yet discussed this matter.
- g) How does the accession procedure for new States work? Will ACTA be part of FTAs?**
17. Article 43 of ACTA provides that *"After the expiration of the period provided in Article 39(signature), any Member of the WTO may apply to accede to this Agreement. The Committee shall decide upon the terms of accession of each applicant. This Agreement shall enter into force for the applicant thirty days after the date of deposit of its instrument of accession based upon the terms of the accession referred to in paragraph 2"*.
18. Therefore, there are two conditions for third countries to accede to ACTA: (a) the third country must be a WTO member; and (b) it must fulfil the terms of accession which are decided upon on a case-by-case basis by the Committee. The Committee consists in representatives of each Party to ACTA.
19. The EU may require that countries concluding an FTA with it and which are WTO members also become Parties to ACTA.
- h) One of the most controversial parts of ACTA is the digital chapter. The Legal Service devotes only one sentence to this chapter. A key driver of Internet freedoms in democratic societies are rules limiting liability of internet intermediaries. Such rules remove incentives to carry out surveillance and punishment of alleged infringers:**
 - a) In footnote 13 of ACTA, any such measure can only be implemented on condition that the "legitimate interests" of rightsholders are preserved. This prioritises certain rights above other. In the Promusicae/Telefonica case about conflicting rights online, the European Court of Justice explained that an appropriate balance must be achieved between competing rights. The recent Scarlet/Sabam case even stated that users fundamental rights should take precedence over copyrights. How does the legal service interpret the balance of rights issue in footnote 13? Is this in contradiction with European Court of Justice case law?**
 - b) Increased liability of intermediaries for third parties (the users) will reduce investment in innovation due to chilling effects. In addition, an increase in legal liability for third parties will lead to self-censorship of internet services. Does ACTA increase injunctions and the risk of liability for intermediary online services?**
20. As regards the measures to be taken against the infringement of intellectual propriety rights in the digital environment in general, the parties put particular emphasis on the requirement of implementing ACTA in conformity with their own legal orders. Accordingly, the proposed Agreement underlines that the parties have to implement any enforcement measure in the digital environment or any cooperation efforts with the business community provided by ACTA in a manner that *"consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process and privacy"* (Articles 27(2), (3) and (4) of ACTA).

21. Moreover, Article 27(8) of ACTA explicitly preserves the right of parties to adopt and maintain appropriate exceptions and limitations to the protection measures and legal remedies provided for by Article 27(5), (6) and (7). This would allow the maintenance of the existing EU *acquis* in this respect.
- i) **The research by Professor Douwe Korff shows how ACTA will - in practice - most likely violate fundamental rights. When included in an FTA, the EU would be exporting an agreement which infringes fundamental rights to third countries, thereby violating its own principle of article 21.1 Treaty on European Union, which states that EU seeks to advance human rights and fundamental rights abroad.**
22. As results from Article 6 TEU, fundamental rights, as guaranteed by the Charter of Fundamental Rights of the European Union, form part of primary Union law (Article 6(1) TEU). In particular, since the entry into force of the Lisbon Treaty, the Charter has had the same legal value as the Treaties. In addition, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's legal order (Article 6(3) TEU).
23. As the Court has held, obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU Treaty, which include the principle that all Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.²
24. It is evident that the provisions of ACTA fall within a sensitive area of potentially conflicting fundamental rights protected under the EU legal order, such as the right to (intellectual) property on the one hand, and the right of information, the freedom of expression, the protection of personal data or the right to fair and due process on the other hand.
25. The parties to ACTA are aware of such potential conflicts and therefore expressed in the recitals to the preamble of the agreement their desire "*to address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright and related rights, in a manner that balances the rights and interests of the relevant right holders, service providers and users*".
26. It appears that ACTA *per se* does not impose any obligation on the EU that is manifestly incompatible with one or several of the fundamental rights concerned, but allows the parties to implement the agreement in a manner which balances the positions of the different right holders involved.

² Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, paragraph 285.

27. With regard to fundamental rights, the most sensitive section of ACTA concerns the criminal enforcement of intellectual property rights. Article 23, in particular, sets out the obligation of parties to provide for criminal offences in the case of certain violations of intellectual property rights on a commercial scale. Article 24 sets out the obligation to provide for the corresponding penalties.
 28. While these provisions fall within the scope of Article 83(2) TFEU, it results from the Explanatory Memorandum of its proposal that *"the Commission has opted not to propose that the European Union exercise its potential competence in the area of criminal enforcement"*. As a consequence, it falls under the competence of the Member States to implement the relevant provisions of ACTA in their national criminal laws in compliance with their respective constitutional standards.³
 29. The implementation and application of ACTA by the EU institutions and the Member State parties and its interpretation by the Court of Justice will have to be done in conformity with the fundamental rights concerned and will have to strike a fair balance between the conflicting positions of different right-holders in accordance with the principle of proportionality.
 30. In this respect, Article 6(3) of ACTA explicitly provides in its chapter on the general obligations concerning the legal framework for the enforcement of intellectual property rights: *"In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties"*.
 31. This horizontal provision applies to the whole range of the intellectual enforcement measures provided for by ACTA and therefore obliges the parties to the agreement to implement these enforcement measures in a fair and balanced manner, the legality of which will be under the control of the Court of Justice.
- j) Can the Legal Service explain the enforcement term "proportionate measures" - can this be interpreted differently in various Member States?**
32. The term "proportionality" is used in Article 6(3) of ACTA which provides that *"In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties"*.
 33. In EU law, the principle has developed as a fundamental principle deriving from the rule of law and requiring, in particular, that *"the individual should not have his freedom of action limited beyond the degree necessary in the public interest"*⁴.

³ Legal Opinion of 5 October 2011, paragraph 30.

⁴ Case C-11/70, Internationale Handelsgesellschaft, [1970], E.C.R. 1125, 1147.

34. The possibility that Member States apply the term "proportionate" differently is possible. In particular, since the intention is that the criminal enforcement section of ACTA will fall under Member State competence, it will be up to them to ensure that the measures they adopt (or maintain, if they already have such measures) to implement ACTA are proportionate. As is the case with all legislation, the review of such measures to determine whether they are proportionate is done by the courts.
- k) **How would ACTA impact on the competitive position of the EU towards the US, as the US do not consider it a binding agreement (only executive one), are we not putting ourselves at a competitive disadvantage?**
35. From a legal perspective, in the EU, ACTA is being concluded as an international agreement under Article 218 TFEU and will thereby be binding under EU law, with regard to the aspects which fall under the competence of the Union. The Contracting Parties which conclude agreements consent to be bound by the agreement according to the principles of international law, in particular the principle of *pacta sunt servanda* and the principle of good faith.

Questions from MEP Schlyter, Greens

- l) **Which provision of Regulation 1049/2001 makes the legal opinion in question confidential, ie being legal advice is not enough it must also qualify to threaten the interests?**
36. Refer to the reply to question (f) above.
- m) **According to ACTA, procedures should be fair and equitable, but it does not use the usual term of "due process", why, what can this difference mean, since a conscious choice was made not to use "due process"?**
37. Article 6 which comes under the General Obligations section, covering all Chapter II on enforcement provides that "(2) *Procedures adopted, maintained, or applied to implement the provisions of this Chapter shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. (3) In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties*".
38. Therefore, the terminology used in ACTA refers to procedures that are "fair and equitable" and "proportionate" but does not refer to the right to "due process" *per se*. One could argue that the terms fair and equitable are broader terms which do not specifically impose "due process". The Charter of Fundamental Rights of the EU, in its Title VI also uses

terms such as "fair and public" hearing and "proportionate" remedies⁵ and does not specifically refer to "due process". In legal terms, it is important to note that:

- (a) ACTA requires fair, equitable and proportionate procedures to be applied by its Parties; and
 - (b) ACTA does not limit the human rights provisions found in the national laws of the Members States and in the Charter on Fundamental Rights, which remain applicable to each procedure, including those which relate to infringements of ACTA when the latter comes into force.
- n) **With regard to point 32. of the opinion ACTA does not prohibit or oppose provisions on guarantees. What does it mean, considering that not all safeguards are in it? Is it not true that not only can the Commission question any safeguards but also the other contracting parties as not fulfilling the agreement?**
39. Refer to the reply to question (d) above.
- o) **With regard to point 44. of the opinion, would the specific provisions of ACTA not take preference over the general provision in Article 1 stating that nothing in ACTA derogates from any obligation under TRIPS and thereby excluding application of TRIPS?**
40. Article 1 of ACTA which holds that *"nothing in this agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement"* implies that it is not the intention of the Parties to limit or replace the provisions of TRIPS. As explained in conclusion (e) of the Legal Opinion, *"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."*
41. There does not seem to be the risk whereby ACTA provisions will be interpreted in a way that is contrary to certain provisions of the TRIPS Agreement. On the other hand, this does not exclude the fact that the flexibility provided to WTO members under the TRIPS Agreement on how to enforce intellectual property rights will be limited for the ACTA Parties. Such a limitation is not contradictory to TRIPS as WTO Members can, unilaterally, decide on how to enforce IPRs within the flexibility provided there under.
- p) **Acts carried out by private users for personal and not-for profit purposes were to be excluded from the scope IPRED2 according to position of the EP. Is this still the case with ACTA's definition of commercial use?**
42. As explained in paragraph 31 of the Legal Opinion, in its position on the IPRED 2, Parliament defined *"infringements on a commercial scale"*, emphasising that this should *"exclude acts carried out by private users for personal and not-for-profit purposes"*. Under the EU *acquis* trademark protection is limited to preventing the use of the

⁵ Charter of fundamental Rights of the European Union, in particular Articles 47 and 49.

trademark "*in the course of trade*"⁶ and in relation to copyright, Member States can exclude reproductions "*for private use*" subject to certain conditions.⁷

43. In ACTA, Contracting Parties are obliged to apply the criminal enforcement sections to acts carried out on a commercial scale which must, at least, include those carried out "*as commercial activities for direct or indirect economic or commercial advantage*". In other words, Contracting Parties are not obliged to apply ACTA to private users for personal and not-for-profit purposes. The decision as to how far to apply criminal enforcement measures will depend on the national law of the EU Member States.
- q) **With regard to point 22. of the opinion, does ACTA cover broader scope of IP rights?**
44. This question is replied to in paragraphs 22-24 of the Legal Opinion.
45. ACTA refers to border measures in relation to all intellectual property rights. In the EU border measures are limited to counterfeit and pirated goods only (Article 2 of the Border Measures Regulation 1383/2003/EC⁸). ACTA therefore seeks to cover a broader scope.
46. However, Article 13 limits the provisions of ACTA on border measures to "*as appropriate, and consistent with its domestic system of intellectual property rights protection and without prejudice to the requirements of the TRIPS Agreement*". While this wording is subject to interpretation, it seems that: (a) the provisions of TRIPS are given precedence, and this would include the Doha Declaration on TRIPS and Public Health⁹; and (b) since the EU's legislation is limited to border measures in relation to counterfeit and pirated goods, the ACTA provisions on border measures should be interpreted as binding the EU only in that regard.

Questions from MEP Kamall, ECR

- r) **Regarding compatibility of ACTA with the EU acquis and no need for introduction of new acts nor amendment of existing ones - if ACTA is concluded and any internal legislation needed is not adopted - if a plaintiff brings a case, can the ECJ decide that adaptations in existing EU legislation is required?**

⁶ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Official Journal L 299 , 08/11/2008 P. 0025 - 0033) and Regulation 40/94 of 20 December 1993 on the Community trade mark, as amended.

⁷ Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. (hereinafter "the Copyright Directive").

⁸ Article 2 provides that: "*goods infringing an intellectual property right*" means: (a) "*counterfeit goods*" (...); (b) "*pirated goods*" (...) and (c) goods which, in the Member State in which the application for customs action is made, infringe: (i) a patent under that Member State's law; (ii) a supplementary protection certificate of the kind provided for in Council Regulation (EEC) No 1768/92(7) or Regulation (EC) No 1610/96 of the European Parliament and of the Council(8); (iii) a national plant variety right under the law of that Member State or a Community plant variety right of the kind provided for in Council Regulation (EC) No 2100/94(9); (iv) designations of origin or geographical indications under the law of that Member State or Council Regulations (EEC) No 2081/92(10) and (EC) No 1493/1999(11); (v) geographical designations of the kind provided for in Council Regulation (EEC) No 1576/89(12)".

⁹ Footnote 9 of ACTA provides specifically that "*The Parties agree that patents and protection of undisclosed information do not fall within the scope*" of the Section on border measures.

47. As explained in conclusion (c) of the Legal Opinion, 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
48. The Legal Service has also concluded that 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.
49. Should the Court of Justice be called upon to examine existing legislation in the light of ACTA and decide that such secondary legislation of the EU is incompatible with ACTA, it will then be up to the Commission to propose the appropriate legislation which responds to the requirements imposed by the Court. The procedure to be followed for the adoption of that legislation will depend on the subject matter.
- s) **With regard to point 43. of the opinion - the definition of "commercial scale" is foreseen to be determined on a case by case basis by national courts of ACTA members. How can we ensure that a definition of "commercial scale" does not capture individual citizens?**
50. Article 23 of ACTA already defines "commercial scale" as including "at least those carried out as commercial activities for direct or indirect economic and commercial advantage". As with all legislation, if there is a question about what is direct or indirect economic or commercial advantage, it will be for the Courts to determine the scope of that definition.
- t) **With regard to point 53 which states that "the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations "How would public disclosure of the ACTA documents undermine the protection of the public interest as regards international relations"?**
51. Refer to reply to question (e) above.


Daniela GAUCI

Seen:


Ricardo PASSOS, Director

Copy: Ms Miriam KORTEWEG, INTA Secretariat