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Committee on Legal Affairs

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DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on International Trade

on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, the Republic of Korea, the United States of America, Japan, the Kingdom of Morocco, the United Mexican States, New Zealand, the Republic of Singapore and the Swiss Confederation
(12195/2011 – C7-0027/2012 – 2011/0167(NLE))

Rapporteur: Marielle Gallo

PA_Leg_Consent

SHORT JUSTIFICATION

The Committee on Legal Affairs has been asked to give its opinion on the Anti-Counterfeiting Trade Agreement (ACTA). In its opinion, the rapporteur examines issues which fall within the competence of this committee and makes her recommendation accordingly.

Under Annex 7, point 16 of the Rules of Procedure of the European Parliament, the Committee on Legal Affairs is responsible for matters relating to the interpretation and application of Union law and compliance of Union acts with primary law and the interpretation and application of international law.

1. Two EP Legal Service opinions in favour of ACTA

By letter of 4 October 2011, the Chair of the Committee on Legal Affairs asked the European Parliament's Legal Service for its opinion on ACTA. The questions addressed to the Legal Service had been agreed upon by the political groups in our Committee.

The Legal Service delivered its opinion on 8 December 2011 (SJ-0661/11). It is noted that most of the questions asked by the Committee on Legal Affairs had already been addressed by the Legal Service in its opinion SJ-0501/11 delivered on 5 October 2011 in response to a request made by the EP Committee on International Trade. Our Committee coordinators have decided to make these two Legal Service documents publicly available.

The Legal Service concluded that ACTA does not *prima facie* require changes to the *acquis communautaire* in the area of intellectual property rights and their enforcement, including legal acts relating to the digital environment¹.

It also concludes that ACTA *per se* does not impose any obligation that would be manifestly incompatible with fundamental rights. On the contrary, according to the Legal Service, 'several provisions of ACTA provide for the respect of fundamental rights when the Contracting Parties implement the proposed Agreement'².

The rapporteur would also like to emphasise the following points.

2. ACTA does not create new intellectual property rights - ACTA imposes general obligations for proportionate implementation of the different measures

ACTA does not create new intellectual property rights for the Contracting Parties³. In other words, that which is currently protected by European legislation remains protected; that which was not protected is still not protected.

In addition, Article 6 is a provision that applies horizontally to the implementation of all the measures set out in the Agreement. This Article introduces the principle of proportionality by expressly stating that 'each Party shall take into account the need for proportionality between

¹ Legal Service opinion of 8 December 2011, SJ-0661/11, paragraph 40 c).

² Legal Service opinion of 8 December 2011, SJ-0661/11, paragraph 40 d).

³ Article 3 of ACTA.

*the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties"*¹. As a result, it follows from this provision that a European Union court cannot impose payment of exorbitant damages and interest as it has to assess the seriousness of the infringement and take the interests of third parties into account.

This horizontal provision also lays down that measures should be applied so as *‘to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse’*².

3. Border measures

With respect to border measures, Article 14 of ACTA permits the exclusion of small quantities of goods of a non-commercial nature contained in travellers’ personal luggage. Nor does this Section apply to patents and protection of undisclosed information so as not to affect legitimate trade in generic medicines³.

4. Criminal enforcement

These measures only apply to acts carried out on a commercial scale, including at least those carried out as commercial activities for direct or indirect economic or commercial advantage⁴. As they are only aimed at acts carried out on a commercial scale, no criminal sanctions can therefore be applied against a young person downloading illegally. Such sanctions would, moreover, be contrary to the principle of proportionality set out in Article 6(3) of ACTA.

In addition, this definition of the term ‘commercial scale’ is no broader than that in EU law. Recital 14 of Directive 2004/48/EC⁵, for example, defines acts carried out on a commercial scale as acts *‘carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith’*.

5. ACTA and the digital environment

With respect to Section 5 on enforcement of intellectual property rights in the digital environment, no reference is made to a graduated response. Paragraphs 2 and 3 of Article 27 of ACTA also lay down that the procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, preserving fundamental principles such as freedom of expression, fair process, and privacy.

As for information to be disclosed by an Internet Service Provider (ISP) as a result of a decision by a competent national authority⁶, it is expressly stated that this possibility accorded to the Contracting Parties has to be implemented in accordance with the laws and regulations of each Party. EU law is clear on this point. Article 15 of Directive 2000/31/EC⁷ prevents

¹ Article 6(3) of ACTA.

² Article 6(1) of ACTA.

³ Footnote to Article 13 of ACTA.

⁴ Article 23(1) of ACTA.

⁵ Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights.

⁶ Article 27(4) of ACTA.

⁷ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Member States from imposing on intermediary service providers such as ISPs a general obligation to monitor information. This point has also recently been confirmed by the CJEU¹. EU law thus prohibits general monitoring of the Internet. However, EU law² does lay down that in the context of clearly defined proceedings concerning an infringement of an intellectual property right, the judicial authorities may authorise disclosure of certain information. This point has also been confirmed by the CJEU which explained that the Court did not rule out the possibility that ‘*Member States may, pursuant to Article 8(1) of Directive 2004/48, place Internet access providers under a duty of disclosure*’³.

6. ACTA transposition measures

One of the fears often expressed about ACTA, and for which the rapporteur considers there is some justification, relates to the fact that even if the agreement is compatible with EU law, its transposition by the EU could infringe fundamental rights. The rapporteur would first like to point out that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU, which include the principle that all Community acts must respect fundamental rights⁴. As a result, the CJEU would immediately punish any transposition measures that infringed fundamental rights. On a political level, the rapporteur asks that the European Commission draw up a report on the measures taken both at EU level and by the Member States to transpose ACTA. This report should be submitted annually to the European Parliament in order that Parliament can make its recommendations.

The Committee on Legal Affairs calls on the Committee on International Trade, as the committee responsible, to propose that Parliament give its consent.

¹ Case C-360/10, *Sabam v Netlog*, of 16 February 2012.

² Article 8(1) of Directive 2004/48/EC.

³ Case C-557/07, *LSG v Télé2*, of 19 February 2009, point 41.

⁴ Joint Cases C-402/05 P, *Kadi et al*, and C-415/05 P, point 285.