

-----Oprindelig meddelelse-----

Fra: Ante Wessels [mailto:ante@ffii.org]

Sendt: 9. november 2011 09:49

Emne: FFII objects to secret INTA committee meeting on ACTA

Dear Members of Cosac, Dear Permanent Representatives,

Please find below an open letter to the Chairman of the European Parliament Committee on International Trade (INTA).

Yours sincerely,

Ante Wessels

Open letter

to: The Chairman of the European Parliament Committee on International Trade (INTA),

Dear Mr Moreira,

According to the agenda, the Committee on International Trade will discuss ACTA (Anti-Counterfeiting Trade Agreement) behind closed doors on 23 November. [1] We object to this discussion being held behind closed doors. Since the publication of the ACTA text, discussions have to take place in public.

ACTA's predecessor, the TRIPS agreement, killed millions of people. 500 Million Europeans, and billions abroad, are entitled to full transparency.

On 23 November the INTA committee will discuss the confidential European Parliament legal service's opinion on ACTA. There is an overriding public interest in disclosure of this document (compare European Court of Justice Turco case). Prior to the meeting, the opinion should be released in a timely manner. The committee can then discuss the opinion in public.

The legal service's opinion goes against the academic communis opinio (see below). It fails to notice that ACTA's damages beyond actual loss upset millennia of legal tradition and fails to notice violations of fundamental human rights. It does not provide a public justification.

After all the discussion in public on ACTA, in particular after the release of the final text, it is hard, or even impossible, to conclude that ACTA does not go beyond the current EU legislation and does not violate fundamental rights. To convincingly state that ACTA stays in line with current EU legislation and fundamental rights, one has to address the prior findings, eliminate the doubts, and do this in public. The legal service fails to comply with this standard. We suggest to withdraw the legal service's opinion.

= Prior discussion

Prior to the legal service's opinion, civil society and prominent academics analysed ACTA and found that ACTA goes beyond the current EU legislation and violates fundamental rights. Health groups pointed out ACTA harms access to medicine. The Commission's response to the critique was very weak. In one case, the

Commission actually even states it insisted ACTA would go further than current EU legislation. A study commissioned by the INTA committee evaluated the prior discussion, and concluded that ACTA indeed goes beyond the current EU legislation. After that, fundamental rights experts confirmed ACTA violates a list of fundamental rights. An academic study confirmed ACTA harms access to medicine. [2]

Let's take one example. In EU law, damages are based on actual loss suffered, including lost profits. ACTA goes beyond actual loss. Civil society, prominent academics and the INTA study pointed this out.

Korff and Brown, fundamental rights experts, conclude: "In our opinion, here too ACTA is deficient: without express clarification to the effect that damages awarded to right holders must be a reasonable reflection of actual loss, equitably assessed by a court (rather than an exaggerated assessment based on an unchallengeable but rigged formula), the Agreement violates both the right to property and the right to a fair (civil) trial of the defendants." [3]

ACTA's damages beyond actual loss upset millennia of legal tradition. The decision to do this, is a grave decision. It should not be taken lightly, nor should the importance and the detrimental effects be obfuscated. Even, since the decision violates fundamental human rights, it can not be taken.

= The legal service's opinion

According to a European Digital Rights initiative publication, in response to the question about whether ACTA is in line with existing EU legal provisions, the legal service explains that the text is open to interpretation but, on the face of it, the agreement appears to be in line with current EU law. [4]

This is rather amazing. The legal service goes against the academic communis opinio, it fails to notice that ACTA's damages beyond actual loss upset millennia of legal tradition and fails to notice violations of fundamental human rights.

Reports on the opinion indicate that the legal service did not address the prior findings, nor did it eliminate the doubts. The opinion certainly isn't public. The legal service shows contempt for the European discourse on ACTA. It seems to fear scrutiny.

There is an overriding public interest in disclosure of this document (compare European Court of Justice Turco case). [5]

= The legal service is the Parliament's house lawyer

The legal service is the Parliament's house lawyer. Its task is to defend the Parliament's positions in court. The legal service is not an impartial organisation. It is not an independent court. Before the legal service's opinion was ready, Members of Parliament already expressed their expectation that the opinion would state that ACTA is in line with the current EU legislation - seen the Academics' Opinion and INTA's own study, a remarkable expectation. These Members, and the legal service, did not avoid the appearance that the legal service delivered what was asked for. Only publication of the opinion may restore the Parliament's credibility.

= Illegal request

On 21 June 2011, the coordinators of the INTA committee decided to ask the Parliament's legal service an opinion on ACTA. [6] This decision was illegal for two reasons. First, the ACTA text had already been published, the discussion should have taken place in public. Second, coordinators can prepare decisions, but can not take them.

Withdrawing the opinion may provide the best way out. The INTA committee can then ask, after a public discussion, for a public legal service's opinion on ACTA, which has to take into account the prior discourse on ACTA. Asking the European Court of Justice an opinion on ACTA is a better option.

= A cultus of secrecy

In violation of the Treaties, the INTA committee and legal service cultivate secrecy:

- on 13 July 2010, the coordinators of the INTA committee decided to commission an external study on the impact of ACTA on access to medicines,
- on 25 October 2010, the coordinators decided to convert the study on "Impact of ACTA on Access to medicines (AVC)" into a fully fledged ACTA Impact Assessment,
- we already mentioned the coordinators' decision to ask the Parliament's legal service an opinion on ACTA,
- all these decisions were illegal for two reasons. First, the ACTA text had already been published, the discussions should have taken place in public. Second, coordinators can prepare decisions, but can not take them,
- the Parliament's register and INTA secretariat denied the existence of the INTA coordinators' minutes four times, [7]
- the legal service keeps its opinion confidential,
- on 23 November 2011, the INTA committee plans another meeting behind closed doors.

Yours sincerely,  
on behalf of the Foundation for a Free Infrastructure,

Ante Wessels

This letter on line: <http://acta.ffii.org/?p=853>

[1] Agenda INTA meeting 23 November:  
<http://bit.ly/vaHP2z>

[2] FFII ACTA analysis:  
<http://action.ffii.org/acta/Analysis>

Opinion of European Academics on ACTA:  
<http://www.iri.uni-hannover.de/acta-1668.html>

European Commission's services comments to the European Academics' Opinion on ACTA.  
[http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc\\_147853.pdf](http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf)

FFII: The EU Commission lacks basic reading skills  
<http://acta.ffii.org/wordpress/?p=598>

European Parliament INTA study on ACTA:  
[http://www.erikjosefsson.eu/sites/default/files/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment.pdf](http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf)  
<http://acta.ffii.org/?p=681>

Douwe Korff & Ian Brown, Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights, 2011:  
<http://rfc.act-on-acta.eu/fundamental-rights>

Oxfam Statement regarding ACTA and Public Health:  
[http://www.oxfamsol.be/fr/IMG/pdf/Oxfam\\_ACTA\\_analysis\\_FINAL.pdf](http://www.oxfamsol.be/fr/IMG/pdf/Oxfam_ACTA_analysis_FINAL.pdf)

Public Citizen on ACTA and access to medicine:  
<http://www.citizen.org/documents/Letter-to-Members-of-the-Committee-on-Legal-Affairs-on-the-ACTA.pdf>

Sean Flynn and Bijan Madhani, ACTA and Access to Medicines, 2011:  
<http://rfc.act-on-acta.eu/access-to-medicines>

Internet Society:  
<http://www.isoc.org/internet/issues/acta.shtml>

[3] see above: Douwe Korff and Ian Brown, 2011

[4] European Digital Rights initiative:  
<http://www.edri.org/edriagram/number9.20/acta-ep-legal-service-opinion>

[5] <http://action.ffii.org/acta/Analysis#Attachment: The Turco case>

[6] INTA coordinators' minutes 21 June 2011 <http://people.ffii.org/~ante/acta/INTA-minutes/Coordinators%27s%20minutes%202011%200621.pdf>

[7] European Parliament releases "nonexistent" coordinators' minutes on ACTA  
<http://acta.ffii.org/?p=849>  
<http://people.ffii.org/~ante/acta/INTA-minutes/>

-----Oprindelig meddelelse-----

Fra: Ante Wessels [mailto:ante@ffii.org]

Sendt: 12. november 2011 12:57

Emne: RE: FFII objects to secret INTA committee meeting on ACTA

Dear all,

On 9 November, the FFII sent the Chairman of the European Parliament Committee on International Trade (INTA), Mr Moreira, an open letter in which we protested against an INTA meeting behind closed doors on ACTA. On 10 November, Mr Moreira replied.

You will find Mr Moreira's letter below, together with the FFII's answer. You can also find the letter on our blog <http://acta.ffii.org> . To limit the amount of emails, if there are any subsequent emails, we may only publish them on the blog.

Yours sincerely,

Ante Wessels

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Dear Mr Wessels,

Thank you for your open letter. However, openness would entail including all the addressees in an open copy, enabling the reply to be sent to all of them. Unfortunately, that is not the case.

As regards, the contents of your letter, I believe there are clarifications that need to be made.

Firstly, the Committee on International Trade has on its agenda for 23 November a presentation of the legal opinion on ACTA by the EP Legal Service. This is not to be confused with an exchange of views on the ACTA file itself, which will certainly be conducted in public.

Secondly, there is a workshop on ACTA planned for March 2012 in the EP, which will provide yet another public forum to express different views on its various aspects.

Thirdly, the opinion of the Legal Service is, for the time being, a confidential document; therefore its presentation is foreseen to take place in an "in camera" part of the Committee meeting.

Fourthly, as to the question whether there is an overriding public interest in disclosure of the opinion under Regulation (EC) No. 1049/2001: under legislation in force and related jurisprudence, it is for the institution concerned to balance the interest to be protected by non-disclosure and public interest in disclosure.

Yours sincerely,

Vital Moreira

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Dear Mr Moreira,

We would like to kindly thank you for your answer to our letter.

We agree that the Parliament will have to balance the interest to be protected by non-disclosure and public interest in disclosure. While doing this, the Parliament will have to take into account art 103 of its Rules of Procedure: "1. Parliament shall ensure that its activities are conducted with the utmost transparency, in accordance with the second paragraph of Article 1 of the Treaty on European Union, Article 15 of the Treaty on the Functioning of the European Union and Article 42 of the Charter of Fundamental Rights of the European Union." (emphasis added)

We believe that the utmost transparency regime necessitates that the Parliament publishes the legal service's opinion prior to the INTA committee meeting.

Our letter was also distributed by way of our press release mailing list. For reasons of privacy, we can not give you the email addresses. We will publish your letter at our blog, <http://acta.ffii.org> and will give it widespread distribution.

Your sincerely,

Ante Wessels