

## Observations on the Council's opinion

Complaint 90/2009/(JD)OV,  
Ante Wessels, FFII

concerning the Council's refusal to grant access to documents nos 12875/08, 13448/08, 13750/08, 13382/08, 13637/08 and 13949/08 relating to the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA).

- I. A document we refer to in our complaint has been changed after the complaint. To prevent possible misunderstandings, we would like to clarify this. In the complaint we quote: "Participants have agreed that the draft final text will be made public at the end of negotiations before governments consider signing."

[http://www.med.govt.nz/upload/56291/ACTA\\_%20PPT.PPT](http://www.med.govt.nz/upload/56291/ACTA_%20PPT.PPT)

Since then, the document was changed, the abovementioned quote was removed and the url was changed. The document still says: "IP Enforcement Workshop 12 November 2008" The document still contains: "Draft versions of the text will not be made available."

New url: [http://www.med.govt.nz/upload/56291/ACTA\\_PPT.PPT](http://www.med.govt.nz/upload/56291/ACTA_PPT.PPT)

The FFII then published the original document:

[http://action.ffii.org/acta/Analysis?action=AttachFile&do=get&target=ACTA\\_+PPT.PPT](http://action.ffii.org/acta/Analysis?action=AttachFile&do=get&target=ACTA_+PPT.PPT)

- II. Legislative character of the requested documents

In many documents the Commission and Council have stated that the ACTA will contain a new legal framework. Substantially, part of the ACTA is legislation. It may be labeled otherwise, that does not change its character. The substantial character has never been denied by the Council.

The Council remarks (page 7): "*The Council would recall that, in accordance with the second subparagraph of Article 207(3) EC, the Council defines in its Rules of Procedure the cases in which it is to be regarded as acting in its legislative capacity for the purposes of laying down detailed provisions on access to its documents. Accordingly, Article 7(1) of the Council's Rules of Procedure provides that*

*"The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the*

*basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).” ”*

Here the Council labels what is substantially clearly legislation, as non-legislation. The Council can not do that. Art 207 does not give the Council full freedom, otherwise it could also exclude directives. Art 207: “(...) cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process.”

Art 207 merely gives the Council room to work more effectively in cases that do not have to be regarded as legislation. Labeling legislative cases as non-legislative goes against art 207.

If the Council excludes trade agreements (as it does), then trade agreements can not contain legislation (as the ACTA does).

If a trade agreement contains legislation (as the ACTA does), the Council can not exclude that trade agreement, as its Rules of Procedure are then in violation with art 207.

The Council cannot give itself the right to make legislation without parliamentary and public scrutiny.

III. On page 3 of the Council's opinion, the Council refers to the ECJ case C-266/05 P Sison v. Council. Mr Sison faced the accusation of terrorism.

In a fight against terrorism, information may be highly sensitive, may stay sensitive for a long time, and disclosure of such sensitive information may seriously damage international relations.

In a legislative process, information isn't sensitive, and the final version will be made public anyway if adopted. Earlier drafts, the history of the legislative act, helps in interpreting the act. Without earlier drafts, the legislative act comes out of the blue, is harder to interpret, creates more legal uncertainty. Withholding earlier drafts is disserving democracy.

The non-sensitive character of the ACTA documents is also clearly shown by the following. In the U.S., hundreds of advisors, many of them corporate lobbyists, are considered “cleared advisors.” They have access to the ACTA documents.

<http://www.keionline.org/blogs/2009/03/13/who-are-cleared-advisors/>

Apparently there is room to give the ACTA documents to corporate lobbyists. The confidentiality the Council claims does not exist. If the U.S. can give access to documents, the EU can do that too.

One group, often multinationals, already has access. Other groups, the public, have right of access too (non-discrimination).

The group that already has access, can focus its lobby work on points that are not yet covered in

the ACTA. Other groups do not have that possibility. The result will be biased legislation. Biased legislation will have terrible effects. An example. Dutch customs authorities sent legitimate generic antiretroviral medicines in transit from India to Nigeria back to India. The shipment's delay could lead to HIV-positive Nigerian patients missing "critical treatment", health advocates said in March of this year.

<http://www.ip-watch.org/weblog/2009/03/06/alarm-escalates-over-delayed-generic-drug-shipments-as-action-sought/>

The rights of the patent owner seem more important than human lives. Disproportional anti-piracy measures can actually kill people. The EU likes to export this murderous policy? The public has the right to know. Only primary texts will clarify this. Once "exported" it will be harder to change.

- IV. The Council considers (page 6): *"that disclosure of the documents in question would be seriously prejudicial to the EU's capacity to conduct those negotiations in a climate of confidence and in constructive cooperation with its negotiating partners, which are considered essential for the efficiency of the negotiations."*

As we say above, corporate lobbyists do receive ACTA documents. The "climate of confidence" is actually a group of people with an agenda. The parties are protecting "the efficiency of the negotiations" against parliamentary and public scrutiny – against democracy.

- V. The Council remarks (page 9): *"Furthermore, under the special conditions applying for the European Parliament's privileged access to documents, documents relating to the ACTA negotiations relevant for the parliamentary work have been made available to Members of the responsible committee."*

A parliament can not vote on documents only available to a few members under non disclosure. Members of a trade committee may see the importance of strong measures, but fail to see the importance of proportionality – which is more the task for a civil rights committee. Again, giving access to some leads to biased legislation.

The documents made available were superficial, the EP asked for the real documents twice (18 December 2008 and 1 March 2009). It is a sick and illegal situation that lobbyists receive texts Members of Parliament do not get.

With the Computer Implemented Inventions Directive, the Commission and Council denied it was about software patents. After scrutiny revealed its true character, the European Parliament rejected the proposal in second reading. As we saw with the Computer Implemented Inventions (software patents) Directive, only the primary documents reveal the true character of proposals. Sad as it is, in the field of exclusive rights, the Commission and Council have a track record of misinformation.

- VI. Member of the European Parliament Jens Holm asked the Council whether the final draft of the ACTA will be published prior to political agreement in the Council. He also asked whether

parliaments will have enough time to scrutinise the ACTA, and whether the Council can ensure that the ACTA is not quietly passed during parliamentary recess. The Council declined to answer these questions.

<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20090312&secondRef=ANN-01&language=SV&detail=H-2009-0089&query=QUESTION>

or: <http://tinyurl.com/c2ggqke>

The Council wrote in its answer: “Since the stage of the final determination of the legal basis has not yet been reached, it is not possible for Council to reply in detail to the procedural questions raised by the Honourable Member.”

This answer is not correct, since the Council can publish the texts prior to political agreement regardless of the legal basis. No legal basis obliges the Council to pass the ACTA silently during parliamentary recess.

As far as the Council is concerned, it may pass the ACTA, new legislation for 500 million people, without publication of the final draft, without parliamentary scrutiny, during parliamentary vacation. Such behavior may fit a autocratic empire, not a democratic union.