COMPLAINT ABOUT MALADMINISTRATION
regarding confirmatory application 19/c/01/08
for public access to ACTA documents

I have requested 12 documents about the Anti-Counterfeiting Trade Agreement (ACTA), in full, without any deletions. The Council does not grant access (beyond the explanatory memorandum already on the website).

A confirmatory application was rejected as well:

REPLY ADOPTED BY THE COUNCIL ON 4 DECEMBER 2008
TO CONFIRMATORY APPLICATION 19/c/01/08
made by Mr Ante WESSELS to the Council
by e-mail on 9 November 2008,
pursuant to Article 7(2) of Regulation (EC) o 1049/2001,
for public access to documents

Conform; http://register.consilium.europa.eu/pdf/en/08/st15/st15476.en08.pdf
which was adopted as a formality on Dec 4, 2008:
http://register.consilium.europa.eu/pdf/en/08/st16/st16647.en08.pdf
and sent by paper mail to me.

General remarks

ACTA is partly legislation

I. Regulation No 1049/2001 seeks, as indicated in recital 4 of the preamble and Article 1, to give the public a right of access to documents of the institutions which is **as wide as possible**.

As appears from recital 1 of the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 of the EU Treaty, which was inserted by the Treaty of Amsterdam, to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As recital 2 of the preamble to Regulation No 1049/2001 notes, the right of public access to documents of the institutions is related to the democratic nature of those institutions.

Transparency is clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases.

II. ACTA will contain new legal framework and will be binding for the member states. It is (partly) **the facto legislation**. The Council does not deny this.

REGULATION (EC) No 1049/2001 stresses the importance of making legislative texts available:

Art 2.4 (...) "*In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12."*

Art 12.2: "*In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible."*

Note both art 2.4 and 12.2 Regulation read: "*documents drawn up or received"*.

III. The European Court of Justice stressed in the recent **Turco case** (joined cases C-39/05 P and C-52/05 P) the importance of public access to legislative proposals and preparatory texts:

"Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights."

IV. Our arguments apply to the documents as a whole, to parts of the documents, to all content of the documents, and especially to content related to legislation.

Deliberate Obstruction

V. Transparency in the legislative process is of utmost importance for citizens. On the other hand international relations have to be protected. It is possible to **fulfill both objectives** by informing negotiating partners beforehand that preparatory legislative texts will be made public. This way, decisions can still be taken as openly as possible and as closely as possible to the citizen.

The ACTA negotiation process is a legislative process and has to be conducted with transparency in mind. If transparency harms international relations, that is caused by the failure to inform the other parties beforehand that preparatory legislative texts will be made public.

Running the risk that a position becomes known is inherent in open, democratic societies. Their own transparency acts may cause it too. Governments do not have a right to secrecy. With ACTA, governments are mutually protecting themselves. They act like magicians. The legislative process has to be as open as possible? We call it a trade negotiation. And voilà, transparency is gone.

VI. A New Zealand government website mentions: *"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

This implies that the EU has deliberately agreed to keep preparatory texts secret, the Council deliberately hampered the proper application of REGULATION (EC) No 1049/2001. This is pure, deliberate, **obstruction**. Any agreement to keep documents secret can not extend the exceptions of the Regulation and has to be disregarded.

European Parliament resolution 18 December 2008

VII. The European Parliament: "28. Takes the view that the public interest in disclosure of ACTA preparatory drafts, including progress reports, and of the Commission's negotiating mandate should not be overridden by Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents(19) , and urges the Council to enforce Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents, provided that the necessary security measures are taken as required by data-protection law;"

http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0634

Regarding the Reply from the Council to Confirmatory Application 19/C/01/08

VIII. The Council remarks in paragraph 4: "*According to the Commission, it is important for the European Union to be at the forefront of efforts to improve IPR enforcement and to work with other partners to make them as effective as possible."*

Such an approach may **cripple our most innovative industries**. Ed Black is president and CEO of the Computer & Communications Industry Association. He wrote an opinion article for the Mercury News: Obama should change U.S. policy on intellectual property.

Black: "*Third, the type of IP provisions we are forcing on our trading partners might actually harm the most innovative sectors of our economy. U.S. law includes important exceptions, such as "fair use" and limitations on secondary liability. These have been critical to the success of companies, including Internet pioneers. Many foreign countries, however, don't have these exceptions. As a result, foreign courts now threaten U.S. companies. They have penalized Google and eBay for conduct that's legal in the United States. (...) Hollywood should direct movies — not trade policy."*

http://www.mercurynews.com/ci_11170951

Europe does not have fair use provisions, European companies are even threatened in the home markets, our innovative companies may be crippled from the start. An open discussion on ACTA is essential.

Documents 12875/08, 13448/08 AND 13750/08

IX. Council: "*5. Documents 12875/08, 13448/08 and 13750/08 are working documents from the Commission Services concerning the ACTA. The first two documents contain, respectively, the draft EU reaction to Japan/U.S. Joint proposal on Civil Enforcement and the revised draft EU reaction to the same proposal. Document 13750/08 contains a compilation of all comments provided by ACTA partners on the civil enforcement chapter. All three documents contain detailed information on the different ACTA partners' positions with regard to the sensitive subject of civil judicial proceedings concerning the enforcement of intellectual property rights, as well as comments concerning other negotiating partners' positions."*

As we saw above, **preparatory legislative texts** are not sensitive in nature. They are "*considerations underpinning legislative action"* (ECJ Turco case). It should have been clear from the onset for all negotiating partners that they have to be open. Art 2.4 and 12.2 Regulation read: "*documents drawn up or received"*.

X. Council: "*6. The Council considers that, given the sensitive content of the documents, their full release to the public would seriously undermine the protection of the public interest as regards the EU's international relations. Disclosure would negatively affect the climate of confidence in the on-going negotiations and hamper open and constructive co-operation, which is essential in this process. Moreover, if the EU's negotiating partners had reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the EU side, it would also have an adverse effect in future negotiations."*

In democratic societies, confidence does not rely on secrecy, and secrecy is in no way essential in a legislative process. Openness is part of democracy, and that should have been (made) clear from the onset.

XI. Regarding **partial access**, the Council writes: "*8. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but concluded that this is impossible since the content of the documents form an inseparable whole."*

REGULATION (EC) No 1049/2001 does not contain the words "*inseparable"* and "*whole"*. Regulation art 4.6: "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."*. In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly (see Case C-64/05 P Sweden v Commission and Others [2007] ECR I-0000, paragraph 66).

Distinctions can easily be made. For instance EU positions are not sensitive if they have been communicated with the other negotiating partners. And as far as they regard legal framework, they are not sensitive in a democracy.

Other countries have made information on ACTA available under their transparency acts. Like Canada. So, it is perfectly possible to make a distinction between what can be made public and what not. Canada can do it.

http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,21/

As we saw above (paragraph VI), participants have agreed that the draft final text will be made public at the end of negotiations before governments consider signing. Making such information public or confirming such information does not harm other parties nor does it harm the EU, it only serves as a cover up of agreements regarding secrecy.

XII. The Council must examine whether **disclosure of the parts of the documents** in question would undermine the protection of international relations. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

XIII. Council: "*9. (...) It is recalled that the legislator balanced the principle of the transparency of the institutions' decision-making when it laid down the general principles and limits on the right of public access to documents in Regulation (EC) No 1049/2001. In this regard, it is recalled that the exceptions provided for in Article 4(1)(a) of the Regulation, including the protection of public interest as regards international relations, are mandatory. In consequence, once it is established that the requested document falls within the sphere of international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests, such as those invoked by the applicant.*"

It was **not established** that the protection of the invoked interest would be impaired if the document were to be (partly) disclosed,

Documents 13382/08, 13637/08 AND 13949/08

XIV. Council: "*10. Documents 13382/08 and 13949/08 are notes from the Presidency to delegations and contain comments on the draft Community contribution made in response to a Japan-US joint document proposing civil law measures to be included in ACTA. These documents have been drafted on the basis of discussions in the meetings of the Working Party on Intellectual Property on 11 September (subgroup "Patents") and 6 October 2008 (subgroup "Copyright").*

Document 13637/08 (RESTREINT UE) is an outcome of the consultation of the Justice and Home Affairs Counsellors on 26 September 2008 concerning the Japan-US joint proposal on draft criminal law measures to be included in ACTA. The document has been drafted in view of the 3rd negotiating session on ACTA on 8-10 October 2008 in Tokyo, Japan.

11. All three above-mentioned documents contain detailed information on the EU's position in the framework of the negotiations on ACTA. The Council considers that full disclosure of these texts would reveal the EU's strategic objectives to be achieved in these negotiations. It would thereby compromise the overall conduct of the on-going negotiations and thus be prejudicial to the EU's interest in the efficient conduct of such negotiations."

As far as legal framework is concerned, "*the EU's strategic objectives"* are "*considerations underpinning legislative action"* (ECJ Turco case) and should be open. In fact sheets and other documents the Commission and Council have stated their **objectives** with ACTA. There can not be secret objectives regarding legislation in a democracy.

As we saw above (paragraph VIII), ACTA may cripple our most innovative industries, an efficient conduct of the negotiations may be very harmful for the objectives of the Community and thus a violation of art 5 TEC (proportionality).

Furthermore, any position communicated to the other negotiating partners can also be communicated with the public. That would not hurt international relations. It may only have impact on the relations with European citizens. But that is not a reason for secrecy at all, on the contrary!

XV. Other Council arguments regarding these documents are the same as arguments above and have been already addressed.

Solution

XVI. Again, transparency in the legislative process is of utmost importance for citizens. The right of public access to documents of the institutions is related to the democratic nature of those institutions. It is possible to both protect international relations and transparency, by informing negotiating partners beforehand that legislative texts will be made public. The EU failed in this. In fact, it deliberately agreed on secrecy (paragraph VI).

Accepting secrecy and obstruction would be an incentive for undemocratic behavior. The only correct solution is that the documents have to be made public, with the escape route of withdrawing from the ACTA negotiations.

Then, with a new mandate that takes into account the importance of informing other parties of the democratic nature of the Community, the Community can join the negotiations again. Transparency is not a problem, international intellectual property agreements have traditionally been conducted in a more open and transparent manner. There are no essential interests at stake, in fact it may be essential not to conclude ACTA. A rollback of democracy is not needed nor acceptable.