

De Gucht's letter to ALDE 16 November 2010.

Dear friends,

Due to unexpected traffic problems, I was not able to join you tonight to have a political discussion on the topic of the negotiations of the ACTA Treaty [1]. I therefore express my views in writing. Indeed at the request of the Socialist group, the European Parliament is expected to adopt its third resolution or declaration on the topic.

It was not at all one the request of the S&D group. ALDE wanted the resolution already for September II to be in time before Tokyo round, but S&D insisted to postpone it to have more time to prepare....

1. The ACTA Treaty is a treaty to improve the enforcement by all parties (now 37 countries) of their legislation on intellectual property rights.

The Commission has recently started referring to ACTA as a "treaty" - and even as an "enforcement treaty". This change of terminology is welcome for clarity of discourse, and it timely puts in focus the core of the problem of the transparency debate. If ACTA is an enforcement treaty, and if the Presidency of the Council has been negotiating criminal provisions on behalf of Member States, ACTA clearly falls outside what constitutes a trade agreement, at least in the traditional understanding of the word. Law making requires transparency, public scrutiny and debate; trade negotiations require confidentiality, proper handling of sensitive documents and respect for trading partners. With ACTA we're in between, as recognised by the Ombudsman "[...] ACTA may indeed make it necessary for the EU to propose and enact legislation. In that case, the ACTA would constitute the sole or the major consideration underpinning that legislation, and citizens would have a clear interest in being informed about the ACTA".

In addition to the overall legislative character of ACTA, Parliament has a new legislative role in ACTA negotiations since the Treaty of Lisbon entered into force. The similarity is striking with the role of the US Congress in relation to its lawmaking, whereas the potential legislative effects of ACTA directly implicates US Congress involvement. The choice to negotiate ACTA under the authority of an "executive agreement" is, as is the case in EU, limiting the scope the negotiations as to not require changes in US law.

Using the term Treaty ties in with the stated objectives of negotiators to extend it to other countries, and is a particularly depraved PR attempt to elevate the instrument derived from a process designed to bypass multilateralism and the involvement of lawmakers in participating countries.

The negotiations started almost three years ago and ended late last week when the ACTA negotiators agreed on a package solution for the few outstanding issues that could not be addressed in their last meeting in Tokyo. This means that the text of the Agreement is now final. This final text is available since yesterday.

While the Commission's claims to improve transparency must be recognised, it is necessary to recall that the Parliament's resolution of 10 March carried a continued expectation of proper public disclosure. Parliament did not expect only one version of the text made available at only one single event; therefore it is difficult to understand why the Commission failed in convincing the parties to ACTA in their further negotiations that they had to comply with Parliament's stated expectation.

Further, it is clear from the many versions of the ACTA texts which are available as unofficial leaks that, if authentic, the Commission has made false statements on elements of ACTA, in particular on "three strikes" measures. It is therefore necessary, to be able to comply with the standards of the Vienna Convention on the Law of Treaties, that all relevant preparatory work is made publicly available. Such disclosure would also permit an informed political decision by the Parliament on the meaning of the language in ACTA.

2. My assessment is that overall ACTA is a balanced and positive agreement, that will bring improved international standards of Intellectual Property Rights enforcement. It is balanced because it fully respects the rights of citizens and the concerns of important stakeholders such as consumers, internet providers and partners in developing countries. These are respected because the EU will not have to modify its legislation if and when it ratifies the ACTA Treaty. This is because the enforcement standards of our "Acquis communautaire" are higher than what we agreed in the ACTA Treaty.

It is not reassuring that the Commissioner assesses that ACTA fully respects the rights of citizens before pending requests to the Article 29 Working Party to decide on compliance of ACTA with fundamental rights are answered. Further, the Commission has not yet acted on its Communication of 19 October 2010, which provides for an assessment of the impact of ACTA on fundamental rights. It is not appropriate for the Commissioner to state beforehand a conclusion desired, regardless if it is expected.

The Commissioner's statement that ACTA fully respects the concerns of internet providers is at odds with what internet providers say themselves. To quote directly from some of the many emails to the Parliament: "MIH Group is particularly concerned about the absence of clear wording in the ACTA text regarding the limitation of liability for content placed on-line by users, and the prohibition of monitoring of content stored or hosted by internet service providers (ISPs)... "; and "The EU already has a robust anti-counterfeiting framework encompassing border control, enforcement of IPR and the apportionment of legal liability in respect to online services. Nevertheless, ACTA touches on all these areas and in doing so it risks injecting legal uncertainty into the EU framework.". Further, some of the key internet platforms have highlighted open-ended provisions in ACTA that could easily be used by contracting states to circumvent current rules on intermediary limited liability. Concerns are also expressed by internet intermediaries with respect to potentially far-reaching injunctions against third parties who are not party to the legal proceedings in question.

With reference to concerns of partners in developing countries, it has to be acknowledged that the concerns raised by developing countries at WTO TRIPS Council of 8 and 9 June 2010, namely that ACTA:

- is in conflict with the TRIPS Agreement (a reference to TRIPS Art.1.1) and other WTO agreements, and cause legal uncertainty;**
- undermines the balance of rights, obligations and flexibilities that were carefully negotiated in the various WTO agreements;**
- distorts trade or creates trade barriers, and disrupts goods in transit or transshipment;**
- undermines flexibilities built into TRIPS (such as for public health, and trade in generic medicines);**
- undermines governments' freedom to allocate resources on intellectual property by forcing them to focus on enforcement;**
- sets a precedent that would require regional and other agreements to follow suit,**

have not yet been resolved.

Finally, the statement that "the EU will not have to modify its legislation" in relation to fundamental rights should be used cautiously in the light of recent statements by Member States' governments that ACTA will require changes in national law. Even if ACTA is a mixed agreement, statements on ACTA as a whole must be consistent and intelligible to the public.

It is also positive because it will help our European export businesses, of all sizes, to protect their inventions and intellectual property from violations - especially in the arts, culture, agriculture, industry and science sectors and so maintain their competitiveness and jobs at this critical time.

I think more jobs and more exports are crucial to Europe and fully in line with our liberal views.

3. At the same time, the final text of ACTA addresses the concerns that were expressed in the Parliament's Resolution of 12 March 2010 as regards the EU "acquis", access to medicines and "3 strikes".

Regarding the EU Aquis and "3 strikes", the Parliament's resolution of 10 March calls on the Commission "to conduct an impact assessment of the implementation of ACTA with regard to fundamental rights and data protection, ongoing EU efforts to harmonise IPR enforcement measures, and e-commerce, prior to any EU agreement on a consolidated ACTA treaty text, and to consult with Parliament in a timely manner about the results of the assessment". None of these assessments have been delivered, and all of them concern or relate to the EU Acquis and "3 strikes".

Regarding access to medicines, the Parliament has repeatedly stated that "any measure aimed at strengthening powers for cross-border inspection and seizure

of goods should not affect global access to legitimate, affordable and safe medicines". These concerns were still echoed by NGOs and manufacturers after the publication of the Tokyo text on 2 October. For example, on 5 November, European generic drug companies urged the MEPs of the INTA Committee to remove patents from ACTA concluding "the measures proposed in ACTA, which are designed to deal with the criminal activity of counterfeiting and piracy, are not appropriate for patents and would ask you to support their exclusion from the final agreement".

Under the final text of 15 November, coverage of patents in the civil enforcement section of ACTA will be optional, which undoubtedly implies that patents still remain within the scope of ACTA. Consequently, the concerns also remain that patents could seriously hamper access to legal, affordable, life-saving drugs and act as a vehicle to delay the market entry of generic medicines.

With patents in ACTA, it is also clear the Commission did not take note of the Parliament's call from 10 March to limit negotiations on ACTA to the existing European IPR enforcement system against counterfeiting.

Let me address the 3 main issues I have come across recently:

First: fundamental rights. As you know from my political action over the last 30 years, I take any issue that could have a negative impact on fundamental rights very seriously. I committed before the European Parliament to address any concrete allegations that ACTA breaches EU fundamental rights, including the right to privacy and data protection legislation. So far, no one has produced specific evidence that the ACTA Treaty would violate civil liberties.

It is not the role of the Parliament to produce specific evidence to the Commission. It is rather the other way around. TFEU 218.10 says that Parliament shall be immediately and fully informed at all stages of the procedure. At the time of writing the Commission's answers to Members' priority questions 9459, 9179, 9252, 9026, 8950, 9024, 8952, 9025, 9029 and 9346, some specifically relating to fundamental rights, have not been delivered to Members within the expected three weeks. There are also a number of answers to written questions pending, some of which would as well be helpful for clarifying if ACTA violates civil liberties, for example E-8847/2010 and E-8295/2010.

Secondly, access to medicines: I fully understand and share the concerns of access to medicines in developing countries. This is why, we, the Commission, have made sure that, indeed, ACTA does not affect access to medicines [2].

Furthermore, the final version of ACTA leaves it optional for signatories to apply the civil remedies chapter to patents (<<..may,,>>). In other words, this means de facto that ACTA would not oblige its signatories to apply any of its provisions on patents. This should allay the concerns of those who think that this civil enforcement chapter would negatively affect access to medicines.

The right to exclude patents in the civil enforcement section is not equivalent to actual exclusion. If a signatory country does not exclude patents actively, then all of the concerns previously expressed about civil enforcement apply, in particular concerns regarding third party liability for generic producers, agencies procuring generic medical technologies and global health NGOs. Further, the open-ended concept of "channels of commerce" creates liability (risk of injunctions and provisional measures) that extends to manufacturers of Active Pharmaceutical Ingredients (APIs), distributors, procurement agencies, and perhaps even regulators.

Global health NGOs acknowledge that ACTA has been improved and important safeguards have been included, however, some global health advocates retain that if the European Commission had been serious about its commitments to global public health, it would have eliminated patents from the scope of ACTA, as the US government suggested at the request of international humanitarian organisations, several WTO members, manufacturers of generic medicines and others.

Thirdly, on Internet: There were many rumours on the issue of "3 strikes" or other sanctions that would restrict access to internet. It is now clear to all that there is no language in ACTA that would oblige its signatories to apply any such sanctions.

The Commissioner's use of the word "oblige" every time he is talking about "3 strikes" exposes the fact that ACTA does not preclude voluntary agreements between internet providers and right holders with the same effect. That is why it is essential the Commission to present to Parliament a legal analysis of how ACTA's desired policies regarding cooperation between service providers and right holders, particularly in reference to cooperative efforts within the business community, will not limit fundamental rights of citizens, including the right to privacy, the right to freedom of expression and the right to due process.

The Commissioner should be reminded that he is precluded by the 2003 Inter-Institutional Agreement from supporting self- and co-regulatory mechanisms where fundamental rights, such as the right to freedom of expression, are at stake.

4. For the rest - yes - ACTA introduces some minimum rules as regards internet, which are still below what we apply in the EU. Here we face a basic choice:

- - do we believe that internet should be some safe haven where everything is possible, where the law does not apply? I would be surprised to see the ALDE group side with these views; or*
- - do we consider that internet users have both rights (freedom of expression) and obligations (respect the same law that applies to them in the physical world)?*

This is definitely not the choice. The EU does already have adequate enforcement rules that apply to the protection of IPR in the online environment. The choice is rather, - do we want the EU, despite the absence of statistical data about the true nature of the problem, to sign up to a number of open-ended obligations with

respect to internet enforcement, some of which are not even reflected in current EU legislation?

ACTA as it currently stands does contain a number of clauses that could easily be interpreted as at least giving permission to circumvent key principles on intermediary liability, which could lead to the introduction of general monitoring and filtering obligations. This would go way beyond the Acquis and would constitute a serious breach of fundamental rights and freedoms.

Deciding whether or not to give the Commission a blanket cheque to introduce such excessive measures with the devastating effect it would have on the civil freedoms and fundamental rights and the development of the online economy is the real choice.

A more constructive approach in the debate over the contested internet chapter would be to listen to the concerns of the part of the technology sector which is completely depending on internet as a free information infrastructure where freedom to innovate is safeguarded. And to use the hyperbolic language of the Commissioner, it is indeed essential the internet remains a safe haven where everything is possible in that regard.

5. A final point that I consider a EU success is the a broad coverage of intellectual property rights. Given the diversity of IPRs on which European operators rely to protect their inventions, we have fought for, and obtained this wide coverage.

In particular, we managed to ensure that Europe's geographical indications (like Champagne, Scotch Whisky, Parma Ham, Porto or Rioja wines), will be treated equally. For those who think that we can reach a better deal, let me tell you that they are dreaming. I fought very hard with our American partners.

We cannot obtain a better treatment and the one we got is much better than the status quo.

The Commission claims having achieved important improvements regarding the protection of Geographical Indications. Some Member States and MEPs strongly disagree with this position and say that ACTA is even detrimental to the protection of GIs under TRIPS.

- Section A Initial Provisions: Article 1.3, Par. 2 exempts countries which do not recognize "sui generis GIs" from any enforcement and it creates a conflict with the TRIPs, which does not submit the enforcement of IP rights to the condition of their previous internal recognition;

- Section Border measures: Article 2X of the actual text exempts countries who do not recognize "sui generis GI" from any custom enforcement of said GIs and at the same time does not introduce the obligation for countries who do recognize "sui generis GIs" to provide custom enforcement;

- Section Border measures: Art 2X bis of the section "border measures" and the formulation "where appropriate", the actual text introduces discretionally among IP rights for import and export controls;

- Section civil enforcement: Art. 2.2, Par. 2 (Payment of profits), Art 2.2, Par. 5 (Payment of court costs and attorney's fees), Art 2.3, Par. 1 and 2 (Destruction of

infringing products and materials) and Art 2.5, Par. 3 (Seizure of infringing goods) are discriminatory and/or "TRIPs minus", because they refer the inherent powers only to cases of copyright or related rights infringement and trademark counterfeiting, whereas Art. 45, 46 and 50 of TRIPs refers said powers to proceedings related to infringements of all IP rights;

- Digital Section: Art 2.18, Par 2,3 and 4, containing binding and non binding disposition, it includes - beyond copyright, which deserves a specific space because of multimedia piracy - only trademarks, again discriminating against GI and design.

The agreement doesn't go as far as EU would have liked. Differences will remain, and ACTA Parties will not be obliged to adopt the EU system of protecting GIs through sui generis systems. Is the current compromise sufficient to protect our goods outside the EU, given the strict EU legislation on geographical indications?

6. The next steps will be the legal verification of the drafting, which will take place in the coming couple of weeks and will be concluded in a technical meeting at the end the month in Sydney.

After this, the proposed agreement will then be ready to be submitted to the participants' respective authorities to undertake relevant domestic processes of entry into force. In the EU this means the signature by the Council, the submission for consent by the European Parliament and finally the ratification by Member States.

In the Plenary debate on 20 October, the Commissioner stressed "it is the Commission's prerogative, as a negotiator, to determine the point at which negotiations are technically finalised and at which the agreement can be initialled". Further the Commissioner made clear that "the initialling of the agreement is part of the Commission's prerogatives and it does not definitely bind the Union. The agreement will become definitive once the European Parliament has given its consent."

Therefore it would be appropriate if the Commission would mention and appreciate, in the context of preparing for the Consent Procedure, the Parliament's call on the Commission to make, prior to initialling, an impact assessment of the implementation of ACTA with regard to fundamental rights and data protection, ongoing EU efforts to harmonise IPR enforcement measures, and e-commerce.

7. Let me stress that if the EU does not ratify the agreement, the EU will have to justify why, while championing the importance of IP enforcement in its domestic legislation and in key policy papers on innovation, competitiveness and job creation, it refuses to join the only international Treaty initiative since the 1994 TRIPs Agreement. This risks undermining our international credibility. It is also clear for me that without the EU, ACTA will quickly revert to the copyright and trademark treaty that other negotiating partners had in mind from the outset, thus leaving unprotected our geographical indications and our designs.

As mentioned above, it was never the Parliament's view that ACTA should go beyond copyright and trademark enforcement, nor to exclude the enforcement of the GI Aquis.

8. To conclude, my assessment is that it is not possible to obtain more from our negotiating partners by re-opening the negotiations, therefore these should be considered as finalised.

It has never been the position of ALDE MEPs that the Commission should be sent back to the negotiation table for the purpose of obtaining more from our negotiating partners . But it is true ALDE MEPs have engaged intensively to secure ACTA is Lisbon compliant both with regards to content and procedure. A failure on either point would indeed risk to undermine both our international credibility and the standing of the Commission as the guardian of the Treaties.

I will defend the text as it stands.

Once formally requested by the Council to give its assent, it will be up to the Parliament to judge the ACTA Treaty and decide whether it should bind the EU or not.

I look forward to discussing this topic with you before the vote in Strasbourg.

[1] "ACTA" stands for "Anti-Counterfeiting Trade Agreement"

[2] This is essentially because: (1) The text contains a reference to Doha Declaration on TRIPS and Public Health and article 7 & 8 TRIPs, which refer, inter alia, to the safeguarding of public health; and (2) patents are not covered by border controls, not even for goods in transit.