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What can TTIP learn from ACTA?

Lobbying regulations in the EU and the impact of civil society lobbies on EU decision-making processes

Master's thesis

Author: Sara Vošinek

Mentor: Matthias Waechter

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Povzetek

Pričujoča naloga želi odgovoriti na raziskovalno vprašanje, zakaj je bil ACTA sporazum zavrnjen in kaj to pomeni za nadaljnja mednarodna trgovinska pogajanja, posebej za TTIP? Zavrnitev sporazuma ACTA s strani EP v letu 2012, je bila presenetljiva, saj je ni bilo mogoče predvideti iz zanimanja in mnenja javnosti v času pogajanj leta 2010. Hkrati, naloga raziskuje povezave med lobiranjem, javnim mnenjem in vplivom lobiranja na odločevalce. Cilj je pokazati, kako je dejstvo, da je evropska javnost začela dajati vedno večji pomen evropskim zadevam, botrovalo spremembi v odločanju na evropskem nivoju. Posledično je sledila tudi sprememba prizorišča, kjer delujejo evropski odločevalci, iz arene interesih skupin v areno široke javnosti. Kakšen vpliv ima lahko lobiranje na javno mnenje in posledično na odločevalce, je prikazano na študijskem primeru ACTA. Organizacije civilne družbe so namreč z zunanjimi taktikami lobiranja uspele vplivati na javno mnenje, ki je posledično vplivalo na zavrnitev sporazuma ACTA v EP leta 2012. Naloga zaključi, da bi morali biti odločevalci pri pogajanjih o TTIP bolj taktni kot v primeru ACTE, bolj osredotočeni na strategije lobiranja in seveda bolj upoštevati javno mnenje od vsega začetka pogajanj.

Ključne besede: lobiranje, urejanje lobiranja v EU, javno mnenje, ACTA, TTIP

Abstract

The thesis answers the question of why was the ACTA agreement not ratified and what implications does this have for future international trade agreements touching intellectual property, especially TTIP? The non-adoption of the ACTA agreement was a surprise, when looking at the general public's interest and positions about the agreement at the time of negotiations (in 2010) and then in 2012, before ratification. The aim is to explore the links between lobbying, public opinion and their influence on the decision-makers. The paper shows, how European citizens are giving higher importance to EU issues and how this resulted in the shift of arenas for EU decision-makers from interest group arena to mass arena. To add lobbying in the equation, its impact on public opinion in the case of ACTA is explored. The ACTA agreement was thus ultimately rejected by the EP because of the pressure of the general public that was managed (and lobbied) by CSOs. For TTIP in particular, this implicates more caution by decision-makers, more attention on selecting lobbying strategies and ultimately the rejection urges the decision-makers to take public opinion more into account from the very beginning.

Key words: lobbying, EU lobbying regulations, public opinion, salience of issues, ACTA, TTIP

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“Ten people who speak make more noise than ten thousand who are silent.”

Napoleon Bonaparte

Index

Index of Figures

1. Introduction

In February 2013, less than a year after the decisive rejection of the Anti-counterfeiting trade agreement (ACTA) by the European Parliament (EP), the start of negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the European Union (EU) and the United States of America (USA) was announced, together with an expected 86 billion EUR of added annual income to the EU economy (EC, 2013). Although TTIP is much wider in terms of content, both agreements contain provisions to regulate and enforce intellectual property.

At the same time, the EU itself is changing, and the ever-tighter European integration started regulating issues of high importance for EU citizens and their political identity. A significant change in the functioning of the EU in the 21st century, is in the shift from *permissive consensus* to *constraining dissensus* from the EU citizens (please refer to chapter 5; Waechter, 2011). This is accompanied by calls to end the democratic deficit of the EU and it manifests itself in the growing success of Eurosceptic parties in both the Member States and on the European level. The latter is not surprising taking into account the Friends of Earth (FoE) survey which showed that 7 out of 10 EU citizens think business lobbies have too much of an influence on EU decision-making (FoE et al., 2013). The European public was never as focused on European issues as it is now so it is only natural that the European citizens want the EU to reflect more of their views in policy-making. The former was brilliantly shown in the case of ACTA, where under pressure of the public opinion the agreement finally met its end (Dür & Mateo, 2014). In the changed EU it is crucial to understand how lobbying, public opinion and EU decision-making are intertwined and what some of the implications of these phenomena are.

Luckily, a considerable amount of literature has already explored these links; there are studies on interest group influence in the EU (Dür & Mateo, 2014; Klüver, 2013), and on issue salience (Wlezien, 2005; Weaver, 1991);

several empirical studies about perceptions and lobbying were made (OECD, 2012; Burson Marsteller, 2013; Vaubel, Klingen, & Müller, 2012; FoE et al., 2013); and finally, scholars have focused on ACTA itself – its shortcomings, the negotiation process and the reasons behind its demise (Bitton, 2012; Blakeney, 2013; Geist, 2011; Mercurio, 2012; Silva, 2011; Weatherall, 2011). On TTIP, however, the literature is very scarce. Although, keeping in mind that the agreement is still in negotiations, the lack of research is understandable.

This thesis wants to contribute to all of these studies, while focusing especially on connecting the public opinion, lobbying and EU international trade agreements touching intellectual property. The aim is to look at what implications ACTA might have on future trade agreements, or in this case TTIP specifically. To this end, this paper will attempt to answer the question: Why was the ACTA agreement not ratified and what implications does this have for future international trade agreements touching intellectual property, especially TTIP?

In the first chapter, a definition of the basic terminology will be given – the emphasis will be placed the definition of lobbying and actors thereof, with an additional definition of Civil Society Organizations (CSOs). In the second chapter, the perceptions of the EU officials, lobbyist themselves and the general public about what is lobbying, who is lobbying and how much influence lobbying has, will be explored. The third chapter will describe why it is important to include interest groups in the EU decision-making process and, what regulations for the Commissioners of the European Commission (EC), Members of the EP (MEPs) and the EU staff in general are currently in place. The review is enriched with shedding light on some of the shortcomings of the mechanisms and suggestions for improvements. The chapter will be concluded with a short review of codes of conduct implemented by lobbying organizations themselves. An introduction into the text of ACTA will follow, with a review of the criticisms of the process of negotiations and the content itself. To understand why ACTA was not

implemented, the chapter will also show how international agreements are adopted in the EU. This legislative explanation will be followed by exploring how issues become salient for the public, how public opinion influences decision-making and why is public opinion ever more important in the EU looking at the shift of arenas and the change from *permissive consensus* to *constraining dissensus*. To conclude with, the lessons that should be taken from ACTA will be presented and applied to the case of TTIP in order to identify the implications of ACTA in this case.

The qualitative research of primary and secondary sources will be enriched with a review of quantitative data. Descriptive and comparative analysis and synthesis will be used, together with an interview of former member of the EP (MEP) Mojca Kleva Kekuš (in office from 2011 until 2014) conducted by the author in Brussels, 2015[1].

2. Lobbying and actors thereof - terminology

Before sailing into perceptions and regulations on lobbying one should start with terminology and define needed expressions. This short chapter aims to define lobbying and present actors involved in lobbying, namely CSOs.

2.1 Lobbying

How to define lobbying is a challenge, being dealt with for decades. While of course there are number of different definitions, there is no consensus on what lobbying is and everything that it entails (OECD, 2012). The problem is, that lobbying can be seen as an attempt to influence various levels of government from the local level to, nonetheless, transnational level. The influence is also exercised on all three branches of the government and most importantly, it is carried out by a variety of different actors with various interests, using different methods. The Organization for Economic Co-operation and Development (OECD) report talks about 'direct lobbying'

[1] Mojca Kleva Kekuš was a part of the S&D group and has been a member of the Committee on Regional Development and a substitute for Committee on Economic and Monetary Affairs and Committee on Women's Rights and Gender Equality.

being an attempt at direct contact made by the lobbyist with decision-makers and 'grassroots lobbying' being an appeal to the general public, thereby having public opinion influence decision-makers (more on the role of public opinion in lobbying in Chapter 5).

In the Council of Europe (CoE) report, the authors define lobbying in a wider sense as public actions or activities aimed to attain wanted results by influencing decision-makers. In a more restrictive sense, the CoE report sees lobbying as protection of economic interest by the corporate sector (CoE, 2009, p. 5).

Generally, lobbying in academia is more philosophically defined; Milbrath defines lobbying as "the stimulation and transmission of communications, by someone other than a citizen acting on his own behalf, directed to a governmental decision-maker with the hope of influencing his decision" (Milbrath, 1963, p.7 in OECD, 2012, p. 22).

However, for the purpose of this thesis, the lobbying definition found in the Interinstitutional agreement between the EP and EC establishing the Transparency Register will be adopted (for a systematic review of the mechanism refer to Chapter 4). The definition widely embraces "all activities /…/ carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of communication used /…/" as lobbying. As 'directly influencing' the document recognizes direct contact or communications with an officials and as 'indirect influence' the use of intermediaries (like media and public opinion) is recognized (Transparency Register, 2014, para 7).

Svendsen (2011, p. 132) adds that lobbying shapes decisions "that are taken, by ensuring that some decisions are never taken, and by shaping the culture

and the consciousness of actors to ensure that some issues are not recognized as being those for which decisions should be taken."

2.2 Actors in lobbying

That lobbying is done by a variety of actors is not a secret and as defining lobbying in the previous paragraphs has shown, the definition can be very wide, even including activities that are not perceived as lobbying by the general public. Most importantly, the general public's perception about the actors of lobbying is a bit misguided, since it usually perceives only corporate actors as lobbyists and excludes CSOs from this equation. This is namely because corporate actors are not seen as working in the general public's interest whereas CSOs are perceived as stemming from the general public, thus representing it (CoE, 2009).

Before continuing, let us define CSOs. The definition from OECD will be taken, that spells out CSOs "/.../to include all non-market and non-state organizations outside of the family in which people organize themselves to pursue shared interests in the public domain." (UNDP, 2013, p. 123). Latter includes also non-governmental organizations (NGOs), for which definitions are also very diverse in academia. To find help in the Joint Transparency Register Secretariats' guidelines (JTRS), NGOs are defined as: "not-for-profit organizations (with or without legal status) which are independent of public authorities or commercial organizations" (JTRS, 2015, p.8). In terms of funding, CSOs can be founded both by government authorities as well as public sources.

A quick scan through CSOs registered in the Transparency Register shows that there is a variety of different organizations representing different interests. On the list is for example *Allgemeiner Deutscher Automobil-Club e.V.* (ADAC), German automobile club, or *Associazione Italiana Politiche Industriali* (AIP) working for greater competitiveness of the Italian market, or for example *Združenje Manager*, a Slovenian organization that advocates management as a profession, the competitiveness of the Slovenian economy

and aims to protect professional interests (Transparency Register, 2015a). The examples are thus far away from what is generally associated with CSOs like Friends of Earth, Transparency International or Red Cross (though all of these are also included in the register).

Additionally, Richardson and Coen (2009, p. 5) have recognized an increasing importance of CSOs and their presence in lobbying EU institutions *vis-à-vis* corporate actors. In the continuation we will see how this is shown in practice and what an increased voice of civil society in EU decision-making entails, specifically on the study case of ACTA.

3. Perception of lobbying and its influence in the EU decision-making process

In order to understand what kind of influence lobbying has on the decision-making process, we will take a look at the perceptions about lobbying among EU officials, among lobbyists themselves and in the general public. Perception is important not only because the expected influence of lobbying can be smaller if the perception is not positive but also because it influences lobbyists' choices of tactics.

3.1 Perception of EU officials

Insight into how members of the EP, national parliaments, senior officials from national governments and the EU perceive who the lobbying actors are, is given in the study by Burson Marsteller Company (Burson Marsteller, 2013). Close to 600 interviews were conducted in EU institutions and 19 Member States[2]. In the following paragraph, only the results from MEPs will be presented.

[2] Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom.

Figure 1: Who are lobbyists?

Source: (Burson Marsteller, 2013, 8).

The interviewees were asked "Who from the following is a lobbyist?" and the results you see in Figure 1; a majority of respondents firstly connected lobbying to trade associations (86%), professional organizations (73%), NGOs (68%) and public affairs agencies (66%) (*ibid.*).

The next question was what are some of the positive and negative aspects of lobbying. Respondents did not overwhelmingly agree on this question. The participation of different actors and citizens in the decision-making process was identified by 39% of interviewees as a positive aspect of lobbying. Providing useful information (information lobbying) to decision-makers was seen as positive by 25% (*ibid.*, p. 62). Kleva Kekuš has pointed out the latter as the most positive aspect of lobbying, since, as she states, a lot of research/surveys made by private entities are inaccessible to the public but made accessible to 'the lobbied' (2015, q. 9). Not providing accurate information was identified by 34% of respondents as a negative aspect of

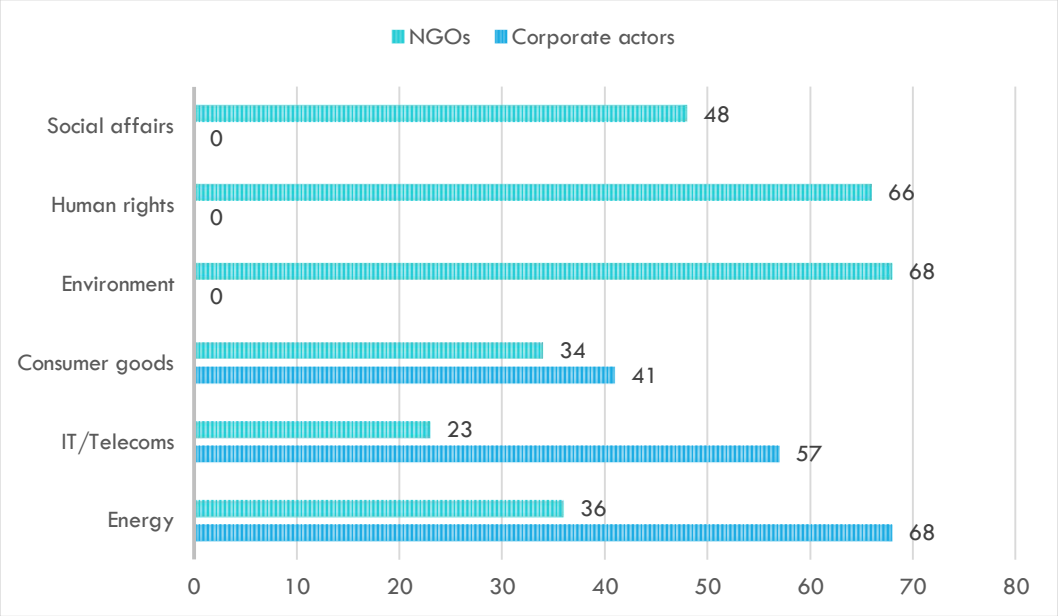
lobbying, followed by lack of transparency (30%) and the perception that lobbying gives more voice to wealthy and to the elites (16%). The average of the survey for all respondents was here 24% (Burson Marsteller, 2013).

It is also remarkable, how EU officials perceive transparency by lobbying entities. According to the answers, the most transparent in their lobbying endeavors are companies and embassies (both with 71%) followed by trade associations and professional organizations (both with 70%). With respect to NGOs, 59% of EU officials think they are transparent, while journalists and academics are not considered very transparent at all (only 21% think they are)(*ibid*., p.64).

In terms of how effective civil society is, in comparison to certain fields of corporate lobbying, this is what the research showed: from the corporate sector, in the fields of environment, social affairs and human rights, EU officials detected virtually no competition to the influence of CSOs. For us relevant IT sector is perceived to be lobbied mostly by corporate actors and only 23% of the respondents answered that NGOs are effective in influencing decision-making in this field (see Figure 2).

Also, NGOs are perceived by 34% of respondents as not sufficiently informed about the process of decision-making, are too early or too late in the process (50%) and basing their position on emotion rather than facts (75%). Corporate actors, on the other hand, are seen as not sufficiently transparent in the interests they represent (55%) and as being too aggressive (48%)(ibid., 70-71). Kleva Kekuš (2015, q. 11) has also mentioned, that NGOs in particular are, for the most part, not very well organized. Instead of asking for a meeting in advance, which would bring more success to their endeavors, they would approach her once already in the EP.

Figure 2: How effective are NGOs vs. corporate actors in lobbying



Source: (Burson Marsteller, 2013, 15).

To conclude the chapter on EU officials' perception on lobbying, a quick review of the practice is in order. Both the survey and Kleva Kekuš said, that they would be more willing to meet with a lobbyist if they are registered, if the topic is from their field of expertise (77% of EU officials) and if the lobbyists are transparent (Burson Marsteller, 2013; Kleva Kekuš, 2015). Kleva Kekuš (2015) mentioned her assistants as a filter, to 'interrogate' the lobbyists in advance; why they are coming, what is the purpose and the topic of discussion. This is sometimes even followed by a request in advance to submit relevant documentation. 59% of EU officials have said that they have already refused a meeting with a lobbyist and Kleva Kekuš falls into this category. However, worrisome is that more than a third of EU officials have never refused a meeting (Burson Marsteller, 2013, p. 67).

That meetings with lobbyists can change decisions was confirmed by Kleva Kekuš (2015, q. 8) citing an example of a technical file about information exchanges between branches of banks. Additional information she received from the lobbyist made her even withdraw some of the amendments, since they "would not work".

Finally, what the research and the interview have shown is that: ***generally, lobbying among EU officials is perceived as positive and necessary, that a variety of different actors are recognized as lobbyists and that there are big differences of perceptions about various entities in terms of how they operate, how are their positions made and their influence in certain policy fields.***

3.2 Perception of the lobbyists

This short section focuses on the already mention OECD report, which also includes a survey, made on behalf of 189 representatives of contract lobbyists, 'for-profit organizations' and 'non-profit organizations' (NPOs)[3]. Approximately half of them work on the EU level and half on the national level.

The survey has shown, much to the surprise of the authors of the survey that most lobbyists want to participate in a (mandatory) registry and do not have a problem with disclosing plenty of their lobbying activities publicly (OECD, 2012, p. 68).

More than 90% of respondents indicated that they are already subject to a code of conduct, be it an association code, business code or governmental code of conduct. Additionally, 60% of questioned lobbyists agree that codes of conduct provide guidelines that can be easily applied to specific situations (*ibid*., 70). The latter, however, resulted a bit differently among NPOs – only 36.1% of NPO respondents found codes of conduct meaningful, and 16.6% answered either that is not really meaningful or not at all meaningful, making this group the most skeptical of the three about codes of conduct in general.

[3] The abbreviation 'NPO' will only be used in this section, since this is the terminology chosen by the survey.

Lobbyists clearly want more incentives to follow codes of conduct because only 12.2% believe that the rewards for compliance are sufficient. Whereas penalties for breaches are perceived as adequate by 37.7% of respondents (*ibid*., 72). Interestingly, (only) 39.2% of questioned lobbyists have been aware of lobbyists being penalized for breaching a code of conduct whereas more than 50% has not been aware of any penalties. However, 38.6% did recognize "inappropriate influence-peddling, such as seeking official favors with gifts or misrepresenting issues" a problem (*ibid*., 74). This percentage was almost 30% higher among NPO respondents.

And how do lobbyists perceive public perception towards them? Clearly, lobbyists are aware of the public perception about lobbying (for which an analysis is made in the next chapter) with more than 85% answering that frequently or occasionally the public perceives that lobbyist are inappropriately influencing decision-makers (*ibid*., 75).

The survey concludes that 76.2% of respondents felt that increased transparency would contribute to a reduction of inappropriate lobbyist behavior, 61.4% called for a mandatory registry and 44.4% think that lobbyist transparency programs should be managed by lobby associations, (this percentage was only 25% among NPOs because 63.9% of these respondents were in favor of governmental control).

What this section has shown is that: ***lobbyists are aware of how they are perceived by the general public. This is the reason for their call to increase transparency, make registries mandatory and increase incentives for compliance with the codes. Additionally, non-appropriate behavior by lobbyists is not perceived as very common. And while they do not recognize the need to increase sanctions, the reviewed OECD study shows that more than half of respondents were not aware of lobbyists being penalized for a violation of a code of conduct.***

3.3 Perception of the general public

In the reviewed literature, there are several references to the perception of the general public towards lobbying being distinctly negative. Attributing dishonesty to lobbyists, not perceiving CSOs as lobbyist initiatives and believing that lobbyists have too big of an influence on decision-makers, especially considering that they are not perceived as entities that work in the (public) interest of the citizens (OECD, 2012).

However, finding an empirical study that would confirm these presumptions proved to be a bigger challenge than anticipated. There is a study by several different CSOs called "Citizens opinion poll on transparency, ethics, and lobbying in the EU[4]". It was conducted in 2013 on more than six thousand people from Austria, Czech Republic, France, the Netherlands and the United Kingdom (FoE et al., 2013). Before presenting the results, however, it has to be pointed out that the questions given to the respondents were quite loaded, even if the study empirically confirmed the previously mentioned presumptions found in reviewed academic sources.[5]

To start with, 70% of the questioned citizens believe that lobbyists have a strong influence on the EU decision-making process and 77% think, that lobbying by businesses can result in policies that may not be in the public interest (*ibid.*). About the latter, 73% of citizens agree that business sector lobbyists, in particular, have too much influence on the EU decision-making process. Eight of ten respondents also think that lobbying regulations should be mandatory (referring to a mandatory Transparency Register for lobbyist groups).

[4] The study was conducted by FoE, Access Info Europe, Aitec, Environmental Law Service, Health Action International and Spinwatch, with the support of the Austrian Federal Chamber of Labour (AK Europa).

[5] The first question presented in the study is, for example, formulated "'It is widely known that lobbyists have a strong influence on EU policy-making" and the three possible answers are 'I agree', 'I disagree' and 'I do not know'. A suggestion for a less loaded question would be, for example, "Do you think lobbyists have a strong influence on EU policy-making?" with given answers 'yes', 'no' and 'I do not know', which would allow for a less suggested answer.

Kleva Kekuš was able to shed some light in terms of how this influence works in practice. When asked what does she think about these results, she did not agree that lobbyists have too big of an influence in EU decision-making processes. She stated, that for legislation makers and politicians it is ultimately on them how they decide and while lobbyists come and share their opinion, this does not necessarily mean the opinion of the 'lobbied' will change (Kleva Kekuš, 2015, q. 12)

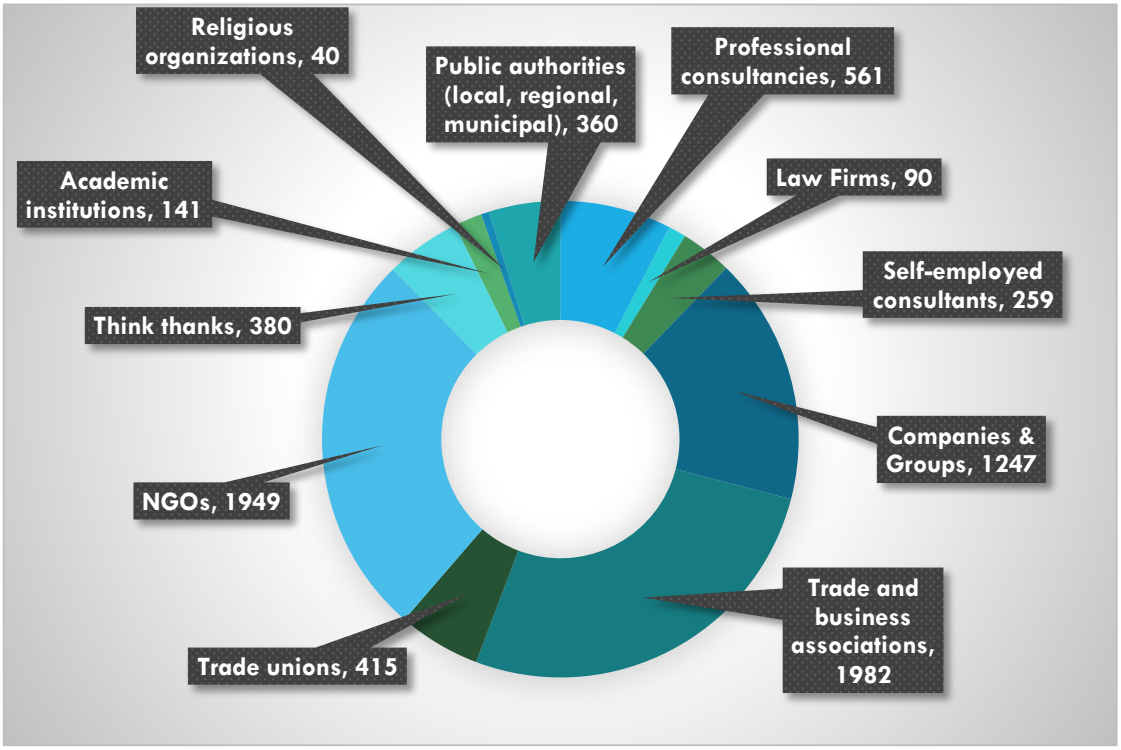
There is likewise a perception by an overwhelming majority of respondents that MEPs do not represent the best interests of citizens if they also work for a lobby group or a private company and that from this kind of situation a conflict of interest may arise. 67% of respondents also say that MEPs should not be allowed to work for lobby groups or private companies in addition to their activities as MEPs since 69% of citizens think that being an MEP is a full-time job that does not leave time for other employment (FoE et al., 2013).

An important part of the general public's perception is the romanticized view of CSOs versus the lobbying of big industries or even trade unions. To shed some light on reality in Figure 3 you can see the distribution of entities in the EC and EP Transparency Registered, described in detail in the next chapter. As we can see in terms of registration, NGOs are only second to trade and business associations (some 40 registrations difference), followed by companies and groups, professional consultancies, think thanks and public local/regional/municipal authorities. Almost two thousand NGOs are registered in the Transparency Register and are lobbying EU decision-makers on a daily basis. However, to be fair, a quote from Kleva Kekuš (2015, q. 5) illustrates the practical understanding of Transparency Register registrants:

> *The problem that we realized from the practice however, is that many lobbyists are actually not in the registry, many lobby companies that are registered as lobby companies are not in the registry and so they would send their employees who are registered just with their name and surname and not as a company. On the other hand you have a NGO with 3 employees*

that will try to be very transparent and they would be in the registry. From the practice we thus realized then the gap between those who are register and actually lobby is quite big.

Figure 3: Transparency Register - registrant's composition



Source: Transparency Register (June 2015)

What we can conclude is that: ***perception of the general public about lobbying and actors involved in this activity is largely negative, although CSOs do enjoy a more positive connotation than other groups. Additionally, the Transparency Register shows that the general publics' perception on which entities lobby the most is not necessarily corresponding to reality. However, in practice, the credibility of the number of registrations and entities registered is questioned also by Kleva Kekuš.***

4. Regulations on lobbying in the EU

After a clear definition of lobbying and groups that use lobbying, we will now examine in detail what kind of regulations on lobbying the EU has codified. The chapter starts with explaining from where stems the obligation of EU institutions to include and consult interest and expert groups in the first place. It continues with an overview of the Transparency Register, established to register lobby groups for both the EC and EP, followed by what the CoC-MEP and CoC-EC mandate to parliamentarians and Commissioners respectively, what rules have to be followed by other EU officials. Finally, to put the EU framework in context, a study of Transparency International will be presented, comparing lobbying regulations among EU institutions and some Member States.

4.1 Obligations to include interest groups in the EU

The EU is, and was from the very beginning, an elite driven project; that is to say that the decisions made are taken by a handful of politicians on the EU level. For now it is important that we are aware, the EU bureaucracy is relatively small, compared to some nation states' public sector employees, and was even smaller in the past. So, the EU decision-making process always included interest groups and experts to help politicians, with relevant information, to make smart decisions.

However, the obligation to include interest groups in the decision-making process also has basis in the Treaties; namely, the Treaty of Amsterdam[6]. Protocol 7, on the application of the principles of subsidiarity and proportionality, orders the EC to: "except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents" (EU, 1997, Protocol 7(9)).

[6] European Union, *Treaty of Amsterdam*, 2 October 1997, available at: http://www.europarl. europa.eu/topics/treaty/pdf/amst-en.pdf (10.6.2015).

The EC mentions the duty to "/listen/ to all parties with a direct interest" and to justify their decisions in the Code of Conduct of Good Administrative Behavior from 2000. The EC also defines four general principles of good administration, these being: lawfulness, proportionality, consistency and non-discrimination and equal treatment (EC, 2000).

A more comprehensive look, on how the obligation to include interest groups should look like, is set in the EC's White Paper on European Governance (White Paper) (EC, 2001). It recognizes five principles of good governance which the EC wants to include more in the decision-making process. These are:

a) Openness: essentially it means better communication about the EU in general and EU legislation by the institutions and Member States;
b) Participation: wide participation of different stakeholders is recognized as essential, from conception to implementation of legislation;
c) Accountability: clearer roles in legislative and executive processes are recognized as important to improve accountability;
d) Effectiveness: includes time, content and appropriate level dimension and;
e) Coherence: which is especially important since the number of tasks performed by the EU and the number of members is ever-increasing.
f) The five principles of good governance reinforce the principles of proportionality and subsidiarity (EC, 2001).

The White Paper also calls for higher involvement of different groups in the EU decision-making process, namely regional and local governments and civil society, encouraging the latter to also adopt the principles of good governance (*ibid.*).

While we will see in the following chapter that there are obligations given by the EU to all EU officials and that lobby organizations have their own codes of conduct, the EC has, in a communication, provided general principles and minimum standards for consultation of interested parties

and thus "defined the environment" in which the consultations take place (EC, 2002, p. 15). In the document, the EC reinforces its commitment to the principles of good governance and defines the following minimum standards:

a) The contents of the consultation process must be public and clear;
b) The EC should be especially attentive to invite relevant interested parties to consultation, respecting the need for a proper balance of diversity of interest represented (for example to invite both larger constituencies and smaller specific groups);
c) The EC should promptly publish the call for open public consultation and ensure "awareness raising publicity"[7];
d) A sufficient time frame should be provided in order to allow the interested parties to prepare: eight weeks' time for comments in written public consultations and twenty working days in advance notice for meetings and;
e) The results of the open public consultations and the feedback received should also be published on the Internet and receipt of contributions, given by interest groups, should be acknowledged (EC, 2002).

To sum up the benefits of the provided general principles and minimum standards by the EC, we can see that the EC demands the relevant groups subscribe to the principles of good governance, which, on one hand, enhances the credibility of their submissions to the consultations but, on the other hand, creates additional obstacles for interest groups to engage in the EU decision-making process (Obradovic & Vizcaino, 2006, p. 1085). Nevertheless, the White Paper does introduce a structured environment for interest representation within the EU decision-making process, which can only be seen as positive.

One can thus conclude that: ***the EC has set a comprehensive framework for consultations with interest groups, which, on***

[7] (EC, 2002, p. 20).

one side, enhances the credibility of submissions by these groups but at the same time creates obstacles for the groups to participate in the EU decision-making process.

4.2 Transparency Register for organizations and self-employed individuals engaged in EU policy-making and policy implementation

The Transparency Register was established in June 2011 with an inter-institutional agreement between the EC and the EP. The intended role of the register is to cover all activities that want to (in)directly influence the decision-making and implementation processes by establishing a comprehensive framework of rules, that potential interest-group representatives have to follow. The Transparency Register, however, is not entirely new but built on old foundations of the previously existing, also voluntary, mechanisms in place in the EP and EC (European Parliamentary Research Service, 2014).

The Transparency Register contains a set of guidelines about the scope of the register, sections of registration, a list of information that the registering parties should include in their application, a code of conduct the registered parties have to subscribe to, a complaint mechanism and measures in the event that the parties breach the code of conduct and implementation guidelines with practical information for registered parties.

The activities covered by the register are: "all activities /…/carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of communication used/…/" including influence through informal networks or indirectly such as in conferences or events. This is a recognized step forward from the previous systems (Greenwood & Dreger,

2013). Every organization or individual engaged in these activities is expected to register (yet it is not mandatory). The Transparency register specifically excludes professional and legal advice needed to exercise the right to a fair trial, activities of participants in the social dialogue as covered in the Treaties and activities, that are directly requested in the format of data or expertise and other factual information (Transparency Register, 2014,para 9-12). Churches and religious committees, political parties, local, regional and municipal authorities and networks and platforms have to register in certain circumstances, for instance if they have legal entities or offices representing them before EU institutions.

The Transparency Register subscribes to transparency and public availability of information and urges all registered to act in accordance with the code of conduct, provide true information, respect the measures given in the event of a breach of rules and have to provide their correspondence and other documents upon request (Transparency Register, 2014, para 21).

In order to implement the system, EP and EC have established the Joint Transparency Register Secretariat (JTRS), that is staffed by both institutions and its role is to manage the Transparency Register, validate provided declarations and improve the quality of data, facilitate a consistent interpretation of rules and answer potential questions as well as take action in response to alerts and complaints.

Due to recognized shortcoming by a study of the EP, the 2014 Transparency Register document aims to strengthen the system through incentivisation[8]. The EP can, for the registered parties: facilitate further access to EP, allow for (co)organization of events on its premises, allow the registrant access to a special mailing list, invite the registrants as speakers in committee hearings and give patronage (Transparency Register, 2014, para 30). The

[8] So far, the main incentive was the possibility for registrants to gain access to the EP as well as to receive alerts from EC consultations (European Parliamentary Research Service, 2014).

EC can: take measures for better information flow (specific mailing list, transmission of information for public consultations and expert groups) and can also give patronage (*ibid.*; European Parliamentary Research Service, 2014).

The following are provisions in case of non-compliance (elaborated in Annex IV – refer to the next page), arrangements for the involvement of other institutions and final provisions. Annex I contains a classification of three main sections organizations can register under: professional consultancies, law firms, self-employed consultants; in-house lobbyists and trade/business/professional associations; NGOs; think tanks, research and academic institutions; churches and religious communities; organizations represented local, regional and municipal authorities and others.

Annex II requires the registrants to provide information about the organization's leadership and representatives, number of members they are representing, their goals, field of interest, planned and past activities, countries in their sphere of influence and potential affiliation to networks. Furthermore, they have to provide a financial statement covering last year's spending on activities, falling in the scope of the registry, with some specific criteria for certain sections (for example NGOs also have to provide their total budget).

The Code of Conduct in Annex III, calls for the registrants to always identify themselves, not to abuse obtained information and not to exert pressure, not to claim a formal relationship with EU institutions on the basis of the registration, ensure that the information they provide is up-to-date and not misleading, not to sell documents obtained from EU institutions to third parties, not to encourage breach of any rules or standards from EU officials and their employees formerly working in EU institutions and to communicate these rules to the organizations that they represent.

Annex IV, contains penalties for registrants that did not provide true information or have breached the code of conduct. These range from written notification to temporary suspension or removal (for up to two years) from the register and withdrawal of access badges. It is the responsibility of the JTRS to implement these penalties. Unfortunately in 2013 the JTRS was only composed of four people and obviously could not take care of the thousands of entries and verify them all – a call for a stronger secretariat is thus in order (Greenwood & Dreger, 2013). Additionally, their tasks also include investigating and deciding on complaints.

Besides the small secretariat, criticism of the Transparency Register also includes its voluntary nature. The EP has, on several occasions in 2008, 2011 and 2014, called for the establishment of a mandatory registration and asked the EC to submit the proposal for a regulation by the end of 2016 (European Parliamentary Research Service, 2014). The problem seems to be in the Art. 298(2) TFEU that allows the EU to regulate transparency only in regards to EU officials and thus not lobbyist in general. Some believe, however, that the mandatory register could be adopted with accordance to Art. 352 TFEU with a special legislative procedure, which would require Councils unanimity and EP's consent.

Which organizations and self-employees are registered in the Transparency Register will be presented at a later stage. For now we can conclude that: ***in order for the Transparency Register to serve its purpose a larger secretariat should be provided, the control of entries should be enhanced and the mandatory registration of interest organizations should be required.***

4.3 Code of Conduct for Members of the European Parliament with respect to financial interests and conflicts of interest

The CoC-MEP was approved with 619 votes in favor, two votes against and six abstentions in December 2011. It came into force on the 1st of January 2012, the process being initiated after the 2011 'cash for amendments scandal'[9] (Cingotti et al., 2014; EP, 2011). Jerzy Buzek, at the time president of the EP, saw the CoC-MEP as "a strong shield against unethical behavior" and in general, the document was welcomed by all the different stakeholders (Cingotti et al., 2014).

The nine articles long document covers guiding principles, main duties of the MEPs, conflicts of interest, regulations on the declarations made by MEPs, gifts and similar benefits, activities of the former MEPs, establishes the Advisory Committee on the Conduct of Members, defines the procedures in case of CoC violations and concludes with provisions on implementation.

Figure 4: Art.1 of the CoC-MEP

Guiding principles

In exercising their duties, Members of the European Parliament:

(a) are guided by and observe the following general principles of conduct: disinterest, integrity, openness, diligence, honesty, accountability and respect for Parliament's reputation,

(b) act solely in the public interest and refrain from obtaining or seeking to obtain any direct or indirect financial benefit or other reward.

Source: (EP, 2011a)

Firstly, the CoC-MEP encourages the MEPs to follow the principles of dignity, honesty and accountability, to respect the EPs reputation and to act solely in public interest (EP, 2011a). While, at the same time, giving them the

[9] In 2011, four MEPs (allegedly) accepted a cash bribe in exchange for tabling specific amendments. These where: Adrian Severin (Romania), Ernst Strasser (Austria), Pablo Zalba Bidegain (Spian) – he was cleared of wrongdoing and Zoran Thaler (Slovenia). The Slovenian and the Austrian MEP were both found guilty and got a prison sentence (two and a half and four years respectively), the case against the Romanian is still pending (Cingotti et al., 2014; EP, 2011b).

obligation not to act or vote in the interest of any other parties but themselves and not to receive any direct or indirect (financial) benefits in exchange for any kind of influence in the decision-making process (*ibid.*). Art. 3(1) of the CoC-MEP defines conflict of interest as a: "/.../personal interest that could improperly influence the performance of his or her duties as a Member" further on putting the responsibility on the MEPs themselves to recognize the conflict of interest and also to promptly address it and, in the case of a concrete matter under consideration, inform the relevant EP bodies (*ibid.*).

Within 30 days of taking up office, the MEPs are obliged to submit a declaration of their financial interests containing their occupations within the past three years and corresponding salary, other regular enumerated activities, membership on boards and committees of any kind, additional enumerated activities if they exceed the threshold of five thousand euro per calendar year, holdings and partnerships in companies, any financial, staff or material support resulting from other political activities and finally, any other financial interests. These declarations need to be publicly accessible on the EP's website. Any MEP that has not submitted a declaration cannot fully participate in all the EP activities including, for example, being appointed as a rapporteur (*ibid.*). The MEPs should also refrain from accepting gifts with a value over 150 euro and can only receive gifts as a courtesy as representatives of the EP which have to be handed over to the president of the EP.

With regards to activities of the former MEPs, Art. 6 of the CoC-MEP states that they should not abuse the privileged access to EP facilities and, in general, the process of decision-making for professional lobbying and representational activities (*ibid.*). Art. 7 establishes a special five member Advisory Committee on the Conduct of Members which is supposed to be the body to go to in case of breaches of the CoC. The Advisory Committee contains representatives from all political groups, rotating presidency every six months, and in the case of an alleged violation, the Committee can hold

hearings and also take a decision about punishment in accordance with Rules 166(3) and 167 of the Rules of Procedure of the EP.

The possible repercussions for violating the CoC-MEP are reprimands, deprivation of daily subsistence allowance for two to ten days, temporary suspension from EP's activities for the same period and removal from one or more offices held by the MEP (EP, 2015a, Art. 166(3)).

Three years after the acceptance of the CoC-MEP, CSOs and MEPs themselves are critical about its implementation. Kleva Kekuš explains, that the CoC-MEP was a must, since every time someone had a bad experience (with the lobbyist) and needed some guidance, the following was lacking. However, she remains critical of the code in its current form: pointing out that the code is very broad and general. Because of the variety of nationalities in the EP, practices between MEPs differ greatly, making it even more important to properly define the provisions; stating, that the sanctions are not sufficient and that some colleagues who openly violated some of the provisions, were not given any disciplinary measures. Kleva Kekuš suggests stricter sanctions, namely, linking them to MEPs salaries. She disapproves, that the initiative to follow the code lies completely on MEPs themselves since it is up to them, if they decide to check if the person coming to visit them is present in the Transparency Registry. She concludes that the CoC-MEP is a step in the right direction although its shortcomings should not be ignored (or underestimated) (Kleva Kekuš, 2015).

Cingotti et al. (representing FoE, Lobby Control, Corporate Europe Observatory, Spin Watch and ALTER-EU) in the reports about the implementation of the CoC-MEP, point out the role of Martin Schulz, as the current president of the EP, marking him as "lacking ambition in his role of guardian of the code", calling him out for his lack of action, narrow interpretation of the code and not following recommendations from the Advisory Committee and the code's procedures (Cingotti et al., 2014, 3;

Cingotti et al., 2013; Cingotti & de Clerck, 2015)[10]. The reviewed reports thus uncover a big gap between the written provisions of the CoC-MEP and the practical implementation thereof, mostly being critical about the non-implementation of the already weak sanction system and the very narrow interpretation of the code, not allowing for its full implementation.

Combining the recommendations from Kleva Kekuš and made by the NGOs we come up with the following guidelines to improve CoC-MEP:

a) Making a broader definition of conflicts of interest but also preventing them from occurring and addressing them as they appear;
b) Proactively check the submitted declarations and investigate any discrepancies;
c) Reforming the Advisory Committee by including experts and not rely on the peer-to-peer system, giving the Advisory Committee the possibility to spontaneously check the submitted declarations, take into account the decisions of the Advisory Committee and provide it with a secretariat to help with the increased control;
d) Making sanctions stricter by extending the period of exclusion from EP's activities including (shadow) rapporteurship, by following through with them and making them public and by connecting them with the MEPs salaries;
e) Tightening the disclosure requirements for outside financial interest by lowering the threshold of earnings;
f) Lowering the threshold of value of gifts that can be accepted by MEPs from 150 EUR to 50 EUR and;

[10] In Cingotti et al. (2014, p. 8), they describe several cases where the EP President did not put forward civil society complaints about the codes shortcoming and ignored the recommendations of the Advisory Committee. One such case is MEP Louis Michel, found submitting over 200 amendments to the EU data protection bill, drafted by lobby groups. The Advisory Committee concluded, that the CoC-MEP was violated andn EP President Schulz and refused to take any action, arguing that sanctions were not needed because the MEP admitted his mistakes. The MEP in fact said, that it was his assistant who filed the amendments in the MEPs name and the person in question was laid off (De Morgen, 2014).

g) Including the declaration of the cost of hospitality (costs of the travels paid) as obligatory by the MEPs and create guidelines conditioning the acceptance travel and hospitality.

The conclusion that we can thus draw is that: ***while the CoC-MEPs is a step towards greater transparency, the code's shortcomings in content, monitoring and sanctioning are undermining its effectiveness***.

4.4 Code of Conduct for Commissioners

The CoC-EC was first adopted in 2004 and then revised in 2011 (EP, 2014). Compared to CoC-MEP this code is not divided into articles but into two chapters and sixteen subchapters. The first chapter talks about independence, dignity and ethical issues, the second contains final provisions.

The first subchapter deals with the outside activities of Commissioners during the term of office. The provisions quite extensively specify what kind of outside activities Commissioners are allowed (for example giving speeches, publishing books, giving unpaid courses, hold honorary positions etc.), under which conditions they are in accordance with the code. If the speech is, for example, paid, the Commissioners can still give it, on condition of giving the money to a charity of their own choice, if they publish a book in connection with the Commissioner's function, the royalties should go to a charity as well, etc. What the Commissioners should refrain from doing; making statements on behalf of trade unions or political parties, not engaging in any other professional activity, not taking part in elections and thus the institute of "unpaid electoral leave" is also created so the Commissioners would not use their staff in preparation for elections, etc. (EC, 2011, p. 2-4).

In continuation, the document describes procedures for the next eighteen months after the end of office, how to engage in "post-term of office

activities" (*ibid*., p. 4). The ex-Commissioners should inform the EC at least four weeks before taking a new occupation to see if there are some similarities with the "content of the portfolio" of the Commissioner and, if such a disparity is suspected, the Ad Hoc Ethical Committee should decide on the matter. The second subchapter also states, that lobbying by the ex-Commissioners is forbidden for the next eighteen months on matters in connection to their portfolio (*ibid*). This is obviously not sufficient since the Commissioners are not excluded to lobby on other topics which calls for abuse of the privileged access Commissioners had.

Commissioners must also declare their (and their spouses') financial interests and assets that might create a conflict of interest which is itself unfortunately not specified. Real estate also has to be declared, but only that not used exclusively by the owner or his family, clearly leaving a lot of maneuvering space. The Commissioners must also declare their spouses' professional activities, including the name of the employer and the title of the position he/she holds (*ibid*.). The former provisions, from the third, fourth and fifth subchapter, are realized if a Declaration of interests (Annex to the CoC-EC) is fulfilled.

Subchapter six allows for the relocation of files between Members of the Commission if the Commission, initially dealing with the file, has a family or financial conflicts of interest. The next subchapter states that the Commissioners should refrain from giving statements that would shed doubt on EC decisions or even discuss, in-term and out-of-term, what is covered by the obligations of professional secrecy (for example, EC meetings) (*ibid*.).

The eighth, ninth and tenth subchapters refer to other EU guidelines/decisions governing: missions, receptions and professional representation and the use of the EC's resources. Subchapter eleven does not allow Commissioners to accept gifts valued higher than 150 EUR or, in such an occasion, hand it over to the Protocol Department of the EC, who

will also keep a public register of gifts over this value (*ibid.*). Hospitality should be declined and money compensation, which would come from a prize or an honor awarded to them, should be given to charity.

The last, twelfth subchapter of the first chapter, provides for the composition of the Commissioner's cabinets, which may not include employment of family members.

The second chapter deals with final provisions, determining, that Commissioners have to step down upon request of the President of the EC and that the European Court of Justice may compulsory retire a Commissioner or deprive him from his/hers pension's benefits (in cases of serious misconduct).

The Ad Hoc Ethical Committee may also answer all potential questions concerning the interpretation of the CoC-EC, as provided by the third subchapter in the second part. The last provision of the code calls for application of the code in good faith and in accordance with the principle of proportionality (*ibid.*).

The EP, however, in its updated study on the CoC-EC, recognizes several shortcomings of the code, even comparing the old and the new versions (EP, 2014). The exact recommendations by the EP are presented in the Figure 3 below, which are basically equal to the recommendations, with regards to the 2004 CoC-EC, given by EP in 2009.

The gist of the criticism in the report goes along the lines of enhancing the role and size of the Ad Hoc Ethical Committee and the Secretariat (currently with one delegated employee), enhancing transparency and public availability of information, defining 'conflict of interest', extending the eighteen month period in number of provisions, limiting political activity to passive party membership and not allowing Commissioners to accept gifts from EU Member States and to publicly disclose the non-EU gift-givers.

The failure to address these shortcomings in the revision of the CoC-EC in 2011 is also pointed out and the study marks the code as: “characterized by /…/ poor checks and balances, the absence of a coherent implementation system, and opacity surrounding its operation” (EP, 2014, p. 8).

What the EP report did not point out however, is the need to broaden the application of the code outside Commissioners’ portfolios along with the provisions for lobbying. After the call of Junker to Member States about nominating Commissioners with strong political backgrounds it is clear that the Commissioners are not only experts in their field but they also have to be good politicians (eubusiness.com, 2014). This is especially important since “There is Life after Commission” as the empirical study of private interest representation by former EU Commissioners uncovered (Vaubel et al., 2012). Vaubel and his colleagues made a comprehensive empirical analysis by sampling 92 ex-Commissioners in office between 1981 and 2009. The study shows that almost 40% of Commissioners afterwards started representing private interests and that: “an ex-commissioner is significantly more likely to turn lobbyist if he or she is still young and has been in charge of competition, the internal market, industry or taxation” (*ibid*., p. 59). It is thus vital, that the scope of the CoC-EC and lobbying regulations in particular be broadened.

Figure 5: Recommendations on CoC-EC by the EP

Area	Recommendation
Prevention	Establish a structure to oversee the application of the CoC, with members to be nominated in agreement between the EC and EP, and supported by a Secretariat (e.g. 1 staff within the EC SG)
	Entrust this structure with providing guidance on the CoC's requirements, regular monitoring and evaluation, and oversight in relation to the EC President
	Establish guidance materials (e.g. define the term 'conflict of interest') and disseminate information on ethics 'cases'
Reporting	Publish annual reports on the CoC's application
Dissemination	Establish a dedicated website on the CoC's application
Complaints	Introduce a reference to the European Ombudsman function
Sanctions	For minor infringements: Introduce sanctions (e.g. reporting of infringements)
Declaration of interests	Declare all financial interests (assets and liabilities) over a certain value (e.g. €10,000)
	Dependent family members to disclose the same information as spouses / partners
	Introduce electronic format
Political activity	Limit national political activity to passive party membership
	Alternative: define 'availability for service' and provide criteria for assessing availability
	Publish assessments of availability for service
	Introduce timelines for notifying political activity (e.g. two months before engaging in political activity) and withdrawals (e.g. maximum withdrawal time of one month)
Post-office employment	Provide criteria for assessing the compatibility of post-office employment
	Publish assessments of compatibility
	Extend the post-office employment restriction to two years
	Introduce timelines for notifying post-office employment
Travel	Publish Commissioner travel on an annual basis, indicating the date of travel, the destination, the purpose of travel, the type of transport used, the number of persons accompanying the Commissioner, total travel costs and whether the Commissioner was accompanied by his spouse / partner
Register of gifts	No gifts to be accepted from donors from a EU Member State
	Disclose the identity of donors from outside the EU
Handling conflicts of interest	Establish a procedure for dealing with conflicts of interest
	Introduce divestment of financial interests above a certain value

Source: (EP, 2009, p. 48)

Besides the difference in legal-design representation of CoC-MEP and CoC-EC, and that the CoC-EC was adopted prior to the EP's one, the two

documents differ also in content. While both address conflict of interest, only the CoC-MEP defines the term. The CoC-EC is broader in terms of covering spouses and has stricter measures, which can be implemented in the event of a breach of code. The Commissioners can thus be urged to resign their post and must do so, if the President of EC demands it, though the MEPs can only be excluded from (some) EP activities for a limited time. On the other hand the lobbying provisions in CoC-MEP are valid for all forms of lobbying whereas in the CoC-EC they apply only to Commissioners' portfolios. The time limit of the provisions for the Commissioners is only eighteen months after end-of-term while the provisions of the CoC-MEP are valid for all former MEPs without limitations. But both of the codes face the same challenges as well, namely a small secretariat, no real supervision, the verification of information submitted by the Commissioners/MEPs themselves and both have relatively weak supervision bodies blurring the connection with the presidents of EP and EC.

What we can conclude is that: ***in order to strengthen the CoC-EC, the scope of the code and regulations on lobbying in particular, have to be broadened on all ex-Commissioners' activities and that the comparison between CoC-EC and CoC-MEP showed, that both codes have some advantages and some shortcomings. But both also shared the same challenges, so no clear 'winner' can be pointed out.***

4.5 Staff Regulations of Officials and the Conditions of Employment of other EU servants

In the Staff Regulations of Officials and the Conditions of Employment of other EU servants (Staff Regulation), Title II provides for the rights and obligations of officials employed by the EU (EU, 2014). The document is valid for all officials employed in the EU. The Staff Regulations was first adopted in 1962, with more than one hundred adjustments throughout the years. The document is massive, so only regulations in Title II, relevant to prevent lobbying (by officials and against them) are discussed. Following

are the current provisions (adopted in 2013) and for Art. 11 and 16, a comparison with 2004 Staff Regulations is made.

Art. 2 (*ibid.*) of the Staff regulations stipulates that "/e/ach institution shall determine who within it shall exercise the powers conferred by these Staff Regulations on the appointing authority". However, more information on exactly who or what is the Appointing Authority, its composition, regulation and similar, remains a mystery. What is clear from the text is, that the Appointing Authority should act solely in the interest of the EU, with no regard to nationality; that the assignments of officials in function groups must be compatible with their grade and; that every institutions has its own Appointing Authority.

The Staff Regulations dictate, that all officials should only work in the EU's interest, that officials should not get any instructions from any national government, authority, organization or individual outside the institution they are working for and finally, to conclude the first paragraph of Art. 11, their duties should be carried out objectively, impartially and being loyal to the EU (*ibid.*). Honors, decorations, favors, gifts and payments of any kind are also forbidden to be accepted from donors outside institutions. In 2013, in order to strengthen the article, a provision about an obligatory form, containing information about actual or potential conflict of interest was added, with the Appointing Authority as the guardian and controller of these statements. The following is also required after the officials return from leave.

Art. 11a was added in 2004 and includes provisions on the prohibition of performing duties if the official has personal, family or financial interest either directly or indirectly. Officials that recognize a potential conflict of interest should refer to the Appointing Authority, which will further decide on the matter. In the new version the article remained unchanged (*ibid.*).

The next article is one sentence long and urges officials to refrain from activity or behavior that would reflect poorly on their positions and the EU in general.

Art. 16 (*ibid.*) extends the obligation of officials after leaving the service, instructing, that in two years after leaving the service, the official has to inform the Appointing Authority of their institution about their new "occupational activity", with or without financial benefits, in order to see, if the interests of the institutions could be in harm's way. In the new version the following paragraph was added:

> *In the case of former senior officials /.../, the appointing authority shall, in principle, prohibit them, during the 12 months after leaving the service, from engaging in lobbying or advocacy vis-à-vis staff of their former institution for their business, clients or employers on matters for which they were responsible during the last three years in the service.*

This is also the only reference to lobbying activities in the whole document and should be recognized as a very positive development.

Art. 17 and 19 state, that officials shall not disclose any information (even in legal proceedings if not so permitted by the Appointment Authority) received in line of duty, except what has already been made public and stipulates again that all these obligations are valid after leaving the service (*ibid.*).

Finally, Art. 86 talks about disciplinary measures, which are at discretion of the Admission Authority or European Anti-Fraud Office (OLAF) and are further specified in Annex IX. Section III, Art. 9 of the latter defines eight potential disciplinary measures:

a) a written warning;
b) a reprimand;
c) delay of professional promotion for a period of between one and 23 months;
d) relegation in step;

e) temporary downgrading for a period of between 15 days and one year;
f) downgrading in the same function group;
g) classification in a lower function group, with or without downgrading and;
h) removal from post and, where appropriate, a pension reduction for a fixed period (*ibid.*).

The Corporate Europe Observatory welcomed the new changes to the Staff Regulations but also pointed out that in order to "block the revolving door" between institutions and the private sector some additional improvements should be made, namely:

a) The cooling-off period contained in Art. 16 should be extended to two years and be valid for all officials, not just seniors;
b) Regulate more of the temporary staff's potential to later on engage in lobbying activities;
c) Sufficient resources must be given, in order to investigate and monitor 'revolving door cases' and;
d) Publicly publish all such cases (Corporate Europe Observatory, 2013).

While these criticism are valid, the review of the document shows, that there is a positive trend towards more regulation of lobbying and connected-with-lobbying activities.

We can conclude that: ***in general, the Staff Regulations on Officials in the EU is satisfactory in terms of regulations covering lobbying, influence on officials from third parties, acceptance of rewards and honors, the disciplinary measures in the event of breaches and the duties and obligations of officials upon leaving the service. However, the institute of Appointing Authority should be elaborated upon.***

4.6 Codes of conduct by lobbying organizations

Because there is, of course, an interest from the lobby organizations not to be presented as non-transparent but also set the rules on how lobbyists representing their organizations have to act, some lobby organizations have also drafted their own codes of conduct. Namely, we shall review two of them (even if there are several) – the Society of European Affairs Professionals Code of Conduct (SEAP-CoC) and European Public Affairs Consultancies' Association Code of Conduct (EPACA-CoC).

Firstly, the SEAP represents some three hundred public affairs professionals including those from trade associations, corporations and consultancies lobbying EU institutions. The SEAP-CoC, adopted in 1997, is obligatory for all the members and the members have to undergo a 90 minutes seminar on it (OECD 2012, 54).

The seven articles long document, urges the members to:

a) Act and treat others with integrity and not to improperly sway or offer bribes to EU officials;
b) Maintain the highest standards of transparency, always identify and never intentionally misrepresent oneself and one's interests;
c) Provide accurate information;
d) Honor confidentiality and not sell the information/documents obtained by the EU;
e) Avoid, disclose and take action in potential conflict of interest;
f) Only employ former EU personnel in accordance with the rules of these institutions and;
g) Comply with the code and accept sanctions in event of misconduct (SEAP, 2009a).

Non-compliance with the code brings either a private or a public written warning by the President, three months suspension from SEAP or expulsion from the organization altogether, the latter three also being published on the website (SEAP, 2009b).

The EPACA-CoC on the other hand, is only a page long and contains twelve provisions that representatives of 37 groups/companies, members of EPACA, have to follow. The provisions are basically the same as in SEAP-CoC, urging members to identify themselves, to clearly declare the interest they are representing, not to give misleading or inaccurate information, honor confidentiality, avoid conflict of interest, not to obtain information by dishonest means and exert improper influence on EU officials (EPACA, 2013). The sanctions are also the same: a warning, suspension of the member or permanent exclusion (EPACA, 2015).

What we can conclude after this brief review is that these: ***codes of conduct, imposed by the professional lobby organizations, are only welcome to increase transparency of lobbying and to enhance the existing EU regulatory framework.***

4.7 Evaluation of the system

In the already mentioned Burson Marsteller (2013, p.12) survey, they also asked the EU officials, how satisfactory the system of lobbying regulations is; 48% thought it was sufficient, 34% did not see the system as satisfactory and 18% of respondents chose neither. However, one cannot say that the results are surprising – nevertheless, there is a big chance that the asked officials were somewhat included in the set-up of the framework. However, 79% of the respondents does want a mandatory Transparency Register and expect it in the next three years (until 2016 thus)(*ibid*., p. 22). Additionally, the interview with Mojca Kleva Kekuš (2015) has shown a higher level of criticism, mostly towards the CoC-MEP.

The voice of civil society is brought together by a report from Transparency International from this year that examined the practice of lobbying and its regulations in 19 EU countries[11] and three institutions of the EU: the EC, EP

[11] The included countries are: Austria, Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Cyprus, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and the United Kingdom.

and CEU (Transparency International, 2015). The study covers three core dimensions and ten sub-dimensions (see Figure 6).

Figure 6: Transparency International survey results for EU institutions

Scores from 0-100 for EU institutions		European Commission	European Parliament	Council of EU
TRANSPARENCY	Access to public information	67	67	67
	Lobbyist registration system	50	50	0
	Control of registration system and disciplinary measures in case of non-compliance	38	38	0
	Legislative footprint, proactive disclosure of information	38	25	0
Overall score: Transparency		**48**	**45**	**17**
INTEGRITY	Measures to prevent 'revolving door'	67	50	42
	Codes of conduct for public officials	50	58	25
	Codes of ethics for lobbyist and	30	30	20
	Self-regulation by lobby organizations	n/a	n/a	n/a
Overall score: Integrity		**49**	**46**	**29**
EQUALITY OF ACCESS	Consultation and public participation mechanism	67	42	25
	Composition of expert groups	60	0	0
Overall score: Equality of access		**63**	**21**	**13**
OVERALL SCORE		53	37	19

Source: (Transparency International, 2015)

The results are very interesting; the EU institutions did surprisingly bad. The best performing entity, out of all reviewed, was Slovenia with a score of (only) 58 points and the EC is the only EU institution with an overall score above 50. The EP achieved all together 37 points, whereas the Council of EU received a staggering 19 points (see Figure 6). The study also confirmed what we recognized as shortcomings of EP and EC systems. Transparency International concludes on the institutions, that their measures are insufficient, uncoordinated and a lot of time confusingly defined or not at all. Although praise was given for the definition of lobbying.

Combining our analysis and the recommendations given by the study there are several improvements to be made to better regulate lobbying namely in the EC and EP but also the Council of EU (CEU):

a) ***In terms of obligations to include interest groups in the decision-making process: ensure common selection criteria to balance different interests and be more accurate and transparent with the publication of what expert groups (consulted by the EC to make a legislation proposal based on expertise) do and how they are selected;***
b) ***Make the Transparency Register mandatory, enhance the control mechanism and extend it to the CEU;***
c) ***Publish legislative footprints to be more transparent whose input was received in drafting decisions;***
d) ***The CoC-MEP should be revised content-wise (broader scope), it should enhance disciplinary measures and increase proactive control and verification of documents submitted by the MEPs, including a 'cooling off' period in order to prevent 'revolving door' and should reform the Advisory Committee (expand it with experts and actually take it into account);***
e) ***The CoC-EC should strengthen the scope of the code and regulations on lobbying, namely, broaden the regulations***

for all (ex)-Commissioner activities (not only those connected with their portfolio);

f) the Staff Regulations on Officials in the EU is sufficient, however the mechanism of Appointing Authority should be elaborated upon.

5. ACTA

5.1 Introduction in the text of ACTA

ACTA is a three year project that was started in 2007 and concluded in December 2010. The agreement was negotiated by the, then 27, members of the EU, United States of America (USA), Japan, Australia, Canada, New Zealand, Mexico, Switzerland, Singapore, South Korea and Morocco (ACTA, 2010). The, initially very ambitious agreement, was negotiated in order to introduce stricter and internationalized intellectual property enforcement measures, create an international legal framework for counterfeit goods, generic medicines and copyright infringement on the Internet, and establish a new dispute settlement mechanism outside World Trade Organization (WTO), World Intellectual Property Organization (WIPO) or United Nations (UN) (Dür & Mateo, 2014; Weatherall, 2011). ACTA was supposed to include stricter provisions than are in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[12] and the main idea was to establish a framework that would allow other parties to join at a later stage, since Doha Development Round has been largely unsuccessful (Mercurio, 2012; Weatherall, 2011)[13].

[12] The TRIPS agreement came into force in 1995 and all WTO members are also signatories of the agreement. It sets down minimum standards of intellectual property regulation and includes a dispute settlement mechanism, enforcement procedure and remedies. Some provisions in ACTA follow the so called TRIPS-Plus provisions – the provisions that go beyond the text of TRIPS agreement (more on this in Mercurio (2012)).

[13] Doha Development Round is the current trade-negotiation round aiming also to further and update existing intellectual property regulations. It started in 2001 but until today failed to fulfil its goals (*ibid*).

Figure 7: Abstract from ACTA preamble

/.../DESIRING TO combat such proliferation through enhanced international cooperation and more effective international enforcement;
INTENDING TO provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in their respective legal systems and practices;
DESIRING TO ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;
DESIRING TO address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, in a manner that balances the rights and interests of the relevant right holders, service providers, and users; /.../

Source: (ACTA, 2011)

The preamble of the ACTA agreement details its goal to fight against the proliferation of pirated and counterfeit goods with enhanced international cooperation and effective enforcement, bearing in mind the differences in legal systems and practices of contracting parties (ACTA, 2011).

Chapter I contains initial provisions ensuring the compatibility of the ACTA with TRIPS agreement, giving countries free hands in terms of implementation of the agreement and the transfer of provisions in their own "legal system and practice". Shielding contracting parties from submitting information in accordance with the agreement but contrary to national law (*ibid.*). The first chapter also defines key terms such as counterfeit trademark goods and pirated copyright goods.

The second chapter of ACTA is divided into five sections: general obligations, civil enforcements (provisions about civil procedures, injunctions, damages, other remedies, information related to infringement and provisional measures), border measures (including provisions on personal luggage, security or equivalent assurance, requests for information, remedies and fees), criminal enforcements (provisions about

criminal offences, penalties, seizure, forfeiture and destruction of goods and *ex officio* criminal enforcement) and enforcement of intellectual property rights in the digital environment (for more details refer to the ACTA agreement in Appendix 2).

The next chapter contains a number of enforcement practices (enforcement expertise, management of risk at boarders, transparency, public awareness and environmental awareness when destroying infringed goods). Chapter IV continues with provisions on international cooperation with regards to information sharing, capacity building and technical assistance. The fifth chapter establishes the ACTA Committee and regulates contact points and consultations. Chapter VI concludes the agreement with final provisions on entry into force, amendments, the accession of other parties to the agreement and similar (*ibid.*).

The ACTA Committee

The ACTA Committee, established in Chapter 4 of the agreement, was one of the most controversial points. The body was to consist of each parties' representatives and tasked to:

a) Review the implementation and functioning of the agreement;
b) Consider matters for further development of the agreement;
c) Deliberate on amendments proposed under Art. 42 of the agreement;
d) Consider the applications for accession to the agreement by other WTO members in accordance with Art. 43 of the agreement and;
e) Consider other matters touching upon the implementation or functioning of the agreement (*ibid.*).

The body would have been allowed to create ad hoc committees, seek advice from CSOs, make recommendations and share best practices. The decisions were to be taken unanimously and the ACTA committee would not be allowed to oversee or supervise domestic or international enforcement and/or criminal investigations.

5.1.1 Criticism of ACTA

ACTA did not leave a positive impression in terms of content, the way the agreement was negotiated, in civil society and academia alike. The following is a short description of the major criticisms.

Secrecy of negotiations

How eleven round of negotiations were proceeding the amount of information given to the general and interested parties, was the most criticized part of the process. In December 2007, before formal negotiations started, the US Trade Representative (USTR) called for confidentiality of the agreement and had marked all correspondence as matter of 'national security' (Blakeney, 2013). For the next three years no official draft of the agreement was released and even the specific terms of the negotiations were not communicated. The 'fight against secrecy' started in September 2008 with a lawsuit of the Electronic Frontier Foundation and Public Knowledge but without success[14]. In 2009 it was revealed to the public that several corporations and some CSOs did receive text of the agreement to review. But the agreement was still not made public since the official position of the parties was that a draft does not exist (*ibid.*, 102). That was until April 2010, after calls from supporters and opponents of the agreement, a first draft was finally released. This came following the March 2010 resolution of the EP expressing "its concern over the lack of a transparent process in the conduct of the ACTA negotiations". It called on the EC and the European Council to make ACTA negotiation text public, condemned the "calculated choice" of the parties not to engage in negotiations through already established forums (mentions WTO and WIPO) and finally demanded to be duly informed in all the stages of negotiations (EP, 2010). A second document was officially released in October 2010 and in December 2010, the final agreement, ready to be signed and ratified was published. Thus, in the course of three years' negotiations, only three documents were officially released and all in the final year (Weatherall, 2011, p. 232).

[14] For a detailed analysis of the whole process of negotiations see Blakeney (2013).

In February 2012 the EC replied with a press release about the transparency of ACTA negotiations, detailing all the information it made available to the MEPs and the general public during those negotiations (EC, 2012). It detailed who was participating, including who was representing EU, listing 24 different communications sent to parliament (explaining that, because of the agreement to keep the negotiations confidential, not all the MEPs had access to the documents). It talked about the three plenary sessions in EP in 2010, six committee meetings on this topic, four informal briefings on advancement of negotiations and fifty written and oral answers to MEP questions. The press release also stated that four stakeholders meetings in Brussels were opened to the public, two of which happened before 2010. The EC denied that any kind of preferential treatment was given to a specific group of stakeholders.

However, a further inspection of the report actually shows, that before the March 2010 resolution, the EP received only three draft consolidated texts, the first in January 2010. Additionally, all other mentioned correspondences with the EP happened without a written report. Prior to March 2010, an on camera discussion about trade negotiations in general is mentioned along with a number of notes and internal working papers are mentioned, although it is not clear to whom they were made available. The timing of the press release should also be discussed since it came almost two years after the EP's resolution, though we must take into account that ACTA only gained high pubic saliency at the beginning of 2012 (more on this in Chapter 5.3.1). So the EC's timing makes political sense.

Threats to freedom and fundamental rights

Hombach (2012, p. 17) sums up the threat of ACTA to freedom and fundamental rights as seen by CSOs; ACTA posed a threat to freedom of expression and violated communication privacy. The agreement would have created "a culture of surveillance and suspicion" and would have posed a threat to the development, availability and use of free software.

Both the European Data Protection Supervisor and the EP have recognized the danger of the so called 'three strikes policy' which would allow for the disconnection of users from the Internet by online service providers[15] in the case of supposed intellectual property infringements and the transfer of this data to third-party countries upon request (EP, 2010a; EP, 2010b; Silva, 2011, p. 614). The 'three strikes policy' was not included in the final agreement. However, Silva (2011, p. 634) argues that the policy "survived" in the provision to promote cooperation in the business community since online service providers could adopt such a policy to avoid litigation with rights holders.

Figure 8: Article 4 of ACTA

Privacy and Disclosure of Information
1. Nothing in this Agreement shall require a Party to disclose:
(a) information, the disclosure of which would be contrary to its law, including laws protecting
privacy rights, or international agreements to which it is party;
(b) confidential information, the disclosure of which would impede law enforcement or otherwise
be contrary to the public interest; or
(c) confidential information, the disclosure of which would prejudice the legitimate commercial
interests of particular enterprises, public or private.
2. When a Party provides written information pursuant to the provisions of this Agreement, the
Party receiving the information shall, subject to its law and practice, refrain from disclosing or
using the information for a purpose other than that for which the information was provided, except
with the prior consent of the Party providing the information.

Source: (ACTA, 2011)

[15] The initial definition of the 'online service providers', found in the first drafts of ACTA, was very broad, including individuals and not only Internet-based providers but any online service providers. The final text however, does not include a definition of 'online service providers' at all (Silva, 2011, p. 622-3).

Additionally, Silva (2011, p. 617-8) states that Art. 4 of the agreement, that was included upon request of the EU in order to prevent the transfer of data inconsistent with domestic law to third parties, was very limited in scope and objective. It only referred to the transfer of data to third countries and did not prevent the abuse of intellectual property enforcement, jeopardizing privacy and data protection.

Silva (2011, p. 616) continues, that the contained safeguards in ACTA and the freedom of parties to implement the treaty in accordance with their domestic law, did not change the fact that countries would have been obliged to adopt measures that would go against the right to privacy and the protection of personal data.

Art. 14 of ACTA was not only criticized for its violation of privacy but most importantly, the strengthening of criminal enforcement, so far provided by the TRIPS agreement. ACTA allows for searches of "small quantities of goods of a non-commercial nature contained in travelers' personal luggage". The whole provision is based on suspicion and does not require proof, like in TRIPS (Bitton, 2012). The EP also touched upon that in their resolution "demand/ing/ that no personal searches will be conducted at EU borders and request/ing/ full clarification of any clauses that would allow for warrantless searches and confiscation of information storage devices such as laptops, cell phones and MP3 players by border and customs authorities" (EP, 2010a). This article was however, partially updated in the final version, allowing the parties to exclude personal luggage from the scope of border searches.

Criminalizing generic medicine

A (controversial) topic, which we have not yet touched upon, is the question of patents. Are patents included in the scope of the agreement or does ACTA cover only copyrights and trademarks? This is especially important for trade in generic medicines. Initially, ACTA, like TRIPS, wanted to cover all intellectual property rights. This concern was enhanced with several

seizures and detentions of generic medicine from 2008-2009 by the Netherlands[16]. The EP also called for "global access to legitimate, affordable and safe medicinal products", obviously interpreting the first draft as a potential barrier to the access of generic medicine (EP, 2010a).

The fear proved to be redundant since the text of ACTA, in its final version, explicitly excluded patents from the scope of border measures so generic medicine confiscation would not be covered by the agreement (Mercurio, 2012).

The ACTA Committee

What the CSOs recognized as controversial in the provisions about the ACTA Committee, was the (potential) democratic deficit, if the committee would indeed be allowed to unanimously decide on amendments, arguing that non-elected officials should not have such a mandate (La Quadrature du Net, 2010). How exactly would the EU follow the procedure set down in Art. 36 ("Each Party shall be represented on the Committee") was also a question from MEP Hans-Peter Martin – in particular he was interested if all the member states would be represented in the ACTA Committee or if the EU would be represented with one vote. Whose decision would this representative base his/her vote and would the EP have a say in this decision (Martin, 2012). Interestingly, in May 2012, Mr. De Gucht answered on the behalf of the EC that since ACTA has not yet entered into force, thus: "/.../the Commission considers it premature to prejudge on the positions that it would take at the moment of the discussion on the rules and procedures on the functioning of the ACTA Committee". He continues by making a reference to the Lisbon Treaty and the revised Framework Agreement on relations between the EP and EC saying, that the relevant provisions will be followed (EC, 2012a). No clear answer was thus given to the MEPs question, how the ACTA Committee would work in practice.

[16] In years 2008-2009, the Netherlands detained at least 19 shipments of generic medicine exported from India, transiting EU to other developing countries because of patent regulations (Mercurio, 2012, p. 374).

With regards to the dispute settlement mechanisms, entrusted to the ACTA Committee, Mercurio (2012, p. 373) points out that the mechanism contained in the first presented draft had the potential to be a properly functioning mechanism. Whereas the provisions included in the final draft allow only for a weak oversight of powers and no dispute settlement of any kind.

Potential implications for the EU's legislation

One of the concerns, pointed out in the literature, was potential implications for the EU's legislation if ACTA was adopted. The EP (2010a; 2010b) in the two resolutions calls upon the EC to negotiate ACTA in full conformity with *acquis communautaire* and explicitly states, that any changes to ACTA will have to be approved by the EP. Since the EU's legislation on intellectual property enforcements is already more elaborate than that of other negotiating parties, the EP urged to not change EU standards.

In October 2010, the EP's Legal Service, on the request of International Trade Committee (INTA) stated, that ACTA would not require any revision or adaptation of new EU laws and would not require Member States to change existing measures or instruments (EC, 2012b).

Potential contradiction with existing international framework

That parties, negotiating ACTA, wanted to get as many signatories as possible, is not a secret. There were several criticisms on this topic; firstly, the rules and procedures of the ACTA Committee were only to be made by parties and not signatories of the treaty; secondly, the dispute settlement mechanism, included in the first draft of the agreement, had the potential to actually supplement the work of international organizations, but was then not included in the final version and; thirdly, concerns were raised that developing countries would be forced to ratify the agreement in other trade negotiations and that the goods made by non-accession parties could fall out of the safe harbor protections thus giving even more incentive to third

parties to ratify the agreement without having any say in negotiations (Mercurio, 2012; Hombach, 2012; Geist, 2011).

While mentioned authors recognize the shortcomings of existing mechanisms and the lack of willingness of developing countries to even discuss intellectual property enforcements, they still point out, that bypassing WTO, WIPO and UN entirely, is not the correct way to establish new standards on the international level. The same assessment was also made in the two EP resolutions, calling the EC to include more developing countries in the negotiations (EP, 2010a; EP 2010b).

For the EC, this criticism was not at all relevant, stating that the EU would prefer to negotiate in existing forums even though other members are opposed to any discussion about enforcement and that the EU has not imposed ACTA in any bilateral trade negotiations and had no further intentions to do so (EC, 2012b).

If we sum up the chapter on criticism one can see, that most of the controversial points that were bothering the interested public, were more myths than facts. However, authors do not see the weakened final version as very positive, saying that ACTA would fail to establish a comprehensive international framework for intellectual property enforcement and that some 'compromises' made the agreement even more unclear and open for interpretation (Bitton, 2012; Mercurio, 2012; Weatherall, 2011; Geist, 2011; Silva, 2011).

We can thus conclude that: ***while ACTA strived for an establishment of comprehensive international intellectual property enforcement standards and a mechanism for dispute settlement, it failed to do so both in terms of the process, that was non-transparent and exclusive and in terms of content that was weakened by the negotiating parties during the negotiations.***

5.2 Conclusion of international agreements in the EU

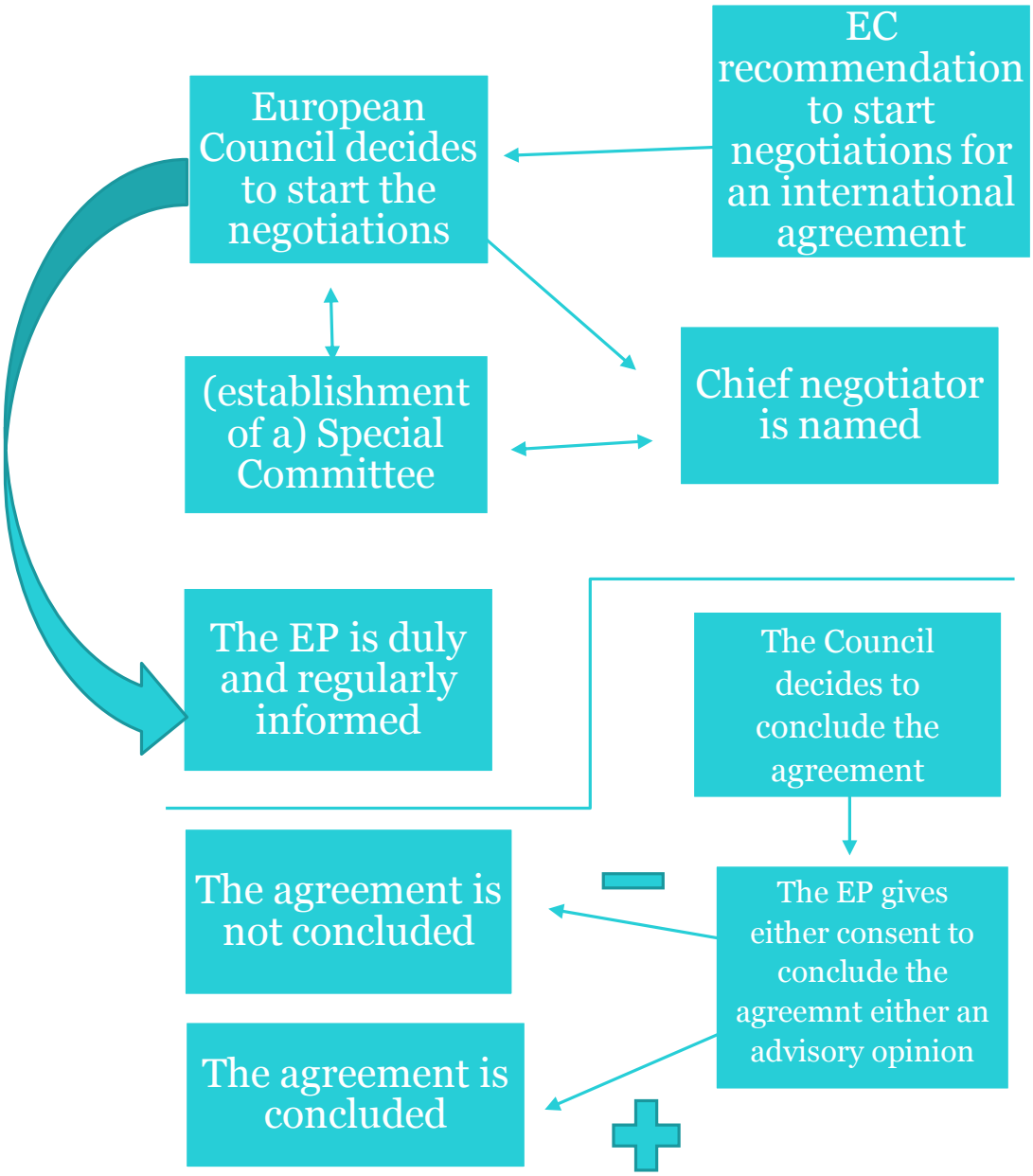
Ever since the Treaty of Lisbon came into force, the EU acquired legal personality, meaning that the EU is capable of negotiating and concluding international agreements on its own behalf (EC, 2010). The procedure that the EU has to follow however, is determined in Art. 216.-218. of the Treaty of the functioning of the EU (TFEU)[17]. It states that the EU may conclude an international agreement if provided by the Treaties and if the conclusion of an international agreement is necessary in order to achieve EU's objectives, or if other legally binding acts of the EU provide for a conclusion of one (EU, 2012). All the international agreements concluded by the EU are also binding for Member States and EU institutions. The EU can conclude agreements which establish an association with third parties that contain (complementary) rules and obligations, common action and special procedure mechanisms (*ibid*., Art. 217).

The initial opening of negotiations surrounding an international agreement is authorized by the European Council based upon the (possible) recommendation of the EC. The decision also contains the principle negotiator for the EU being the EC or the High Representative, if the agreement contains provisions from the common foreign and security policy field alone (*ibid*., 2012, Art 218). Furthermore, the European Council adopts directives in accordance with which the negotiators have to conduct the negotiations and may name a special committee for further instructions (see Figure 9). The European Council then, on the proposal of the negotiator, adopts a decision concluding the agreement after obtaining the EP's consent, that is given when concluding association agreements, agreements on the EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, agreements establishing new frameworks through cooperation procedures, when

[17]European Union, *Treaty on the functioning of the European Union*, Rome, 25 March 1957, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN (25.6.2015).

budgetary implications can be expected and in all the ordinary and special procedure legislative fields.

Figure 9: Conclusion of international agreements



Source: (EU, 2012)

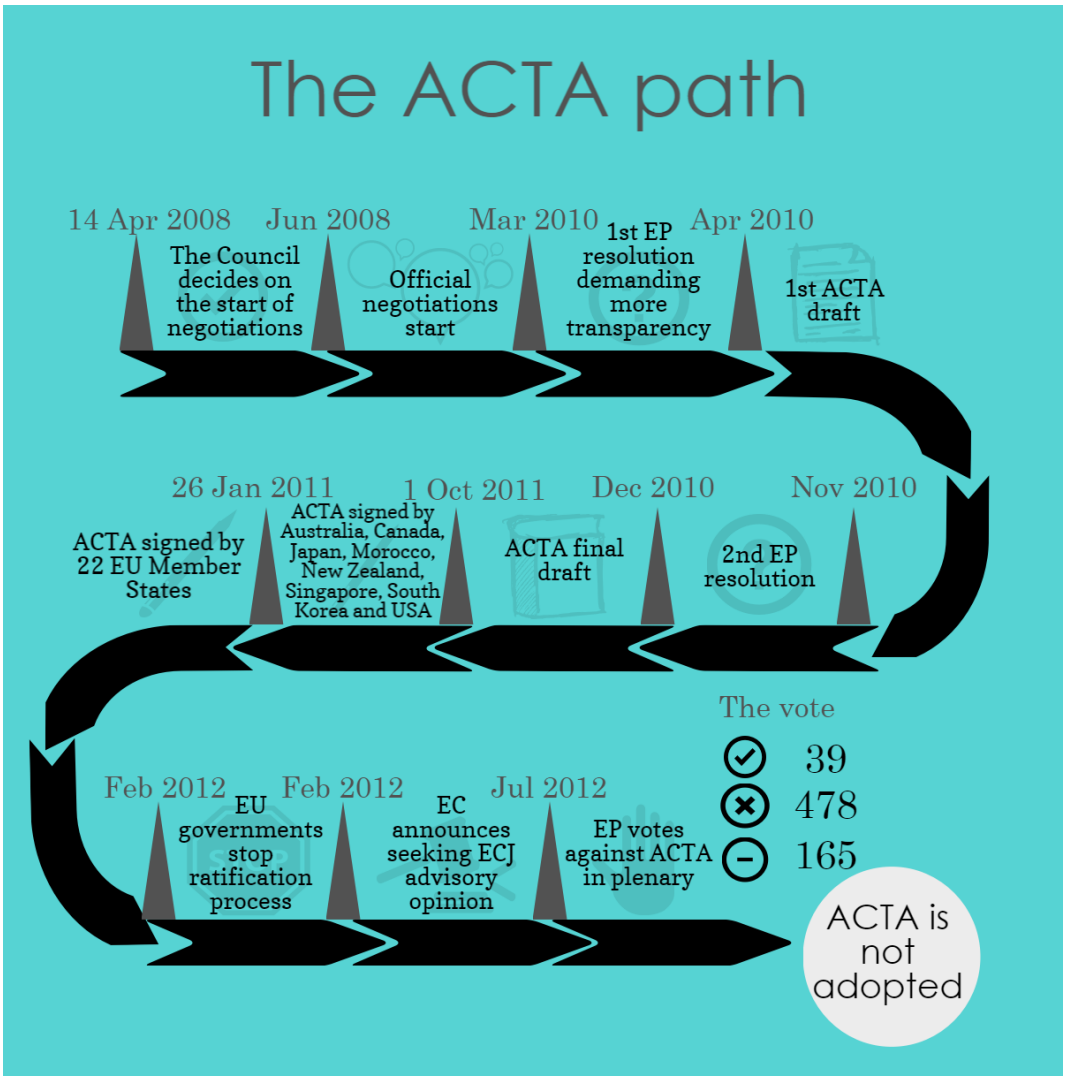
The EP should, however, be consulted for international agreements covering all fields. It also has to be fully and rapidly informed at all stages (EU, 2012, Art. 218). The European Council then decides to conclude the agreement, which has to be signed and ratified by the Member States. The

international agreement can also be immediately transmitted into EU legislation, if the scope is in one of the exclusive competences of the EU. The European Council acts with a qualified majority or with consensus where the Treaties demand so (*ibid.*).

The non-conclusion of ACTA

The European Council gave its consent to the EC to start negotiations for a plurilateral anti-counterfeiting trade agreement on April 14, 2008 (Council of the EU, 2011).

Figure 10: Important dates for ACTA



Source: (Weatherall, 2011; Dür & Mateo, 2014; Blakeney, 2013; CEU, 2011).

In June 2008 the negotiations between parties officially started. The EP adopted its first resolution[18] on ACTA in March 2010, which was followed by the first officially released draft of text in April the same year.

In October 2010 another draft text of ACTA was made available, followed by the second EP resolution on this topic. It called on the EC to submit the final version of the agreement after a technical meeting in Sydney in December 2010. On the 1st of October 2011, almost a year after the final draft of the agreement was released as planned in December 2010, ACTA was finally signed by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and USA. On the 26th of January 2012, twenty-two Member States of the EU followed, by signing the agreement in Tokyo. The Member States that withdrew their signatures in Tokyo were Cyprus, Estonia, Slovakia, Germany and the Netherlands. The signing itself was not without controversy; following the signature, the Slovenian ambassador to Japan, Helena Drnovšek Zorko, made this statement:

> *I signed ACTA out of civic carelessness, because I did not pay enough attention. Quite simply, I did not clearly connect the agreement I had been instructed to sign with the agreement that, according to my own civic conviction, limits and withholds the freedom of engagement on the largest and most significant network in human history, and thus limits particularly the future of our children* (Drnovšek Zorko, 2012).

The statement was not very diplomatic; the ambassador represented Republic of Slovenia and did not sign the agreement in personal capacity. The statement was made after the ambassador received a staggering amount of Facebook messages which clearly shows the general perception connected with ACTA (Drnovšek Zorko, 2012). The public opposition to ACTA was so strong, that Poland, Czech Republic, Bulgaria, Latvia, Lithuania and Slovenia stopped the process of ratification in February 2012 (Dür & Mateo, 2014). Mexico signed the agreement in July 2012 and the the

[18] For the content of the resolution see Chapter 5.

Swiss government announced that it would wait until deliberations in the EU were done (*ibid.*; Ministry of Foreign Affairs of Japan, 2012a).

Since the biggest concerns expressed by Member States' governments and the general public were the potential change of *acquis communautaire* and the meaning of ACTA for civil liberties, the EC, in May 2012, requested the European court of Justice for an opinion on ACTA. It specifically asked if the agreement was: "compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union" (EC, 2012c). The same month Japan was the first party to ratify the agreement (Ministry of Foreign Affairs of Japan, 2012b).

However, the European Court of Justice did not even have a chance to decide on the matter of ACTA, since on May 31, 2012, the EP's Committees on Industry, Research, and Energy, on Legal Affairs and on Civil Liberties, Justice and Home Affairs rejected the agreement. This was followed by a rejection from the Committee on Development that led to the decision of the EP on the 22nd of June where it: "declines to consent to conclusion of the agreement" (EP, 2012). The rejection was justified by the EP saying that the unintended consequences of the text were a "serious concern" and that the expected benefits of the agreement were exceeded by potential threats to civil liberties (*ibid.*).

The final count of the ACTA agreement was one ratification (by Japan) and thirty signatures by other negotiating parties. With the rejection by the EP it was indeed abundantly clear that the project of ACTA would not be successfully concluded. However, to truly understand how ACTA was ultimately derailed, one has to look beyond legal formalities and understand the wider, social, context.

5.3 Lobbying in the case of ACTA and lessons learnt

This chapter connects the description of how lobbying works and the case of ACTA to see, how issue salience and the shift of interest arenas in EU

decision-making helped CSOs to derail the ACTA agreement. The lessons learnt will be elaborated upon and connected with the trade agreement TTIP is currently negotiating.

5.3.1 Theory of public saliency and shift of arenas

What is clear from our everyday lives is that not all issues are of equal importance in the political discussion. What determines an issue's salience, or rephrased, what "concern, interest or importance is placed on a given issue", has been a subject of academic studies for decades (Wlezien, 2005). The latter concludes his studies with an observation that issues that are deemed salient are changing over time. At the same time there are methodological problems when asking the general public about the saliency or importance of certain issues. This is because by making respondents talk about 'the most important issue' the researchers are making them pick between different issues and it is not clear, based on how an individual arrives at the final answer – is the most important issue salient for him personally, or for the society in general? (Wlezien, 2005).

Irrespective of how the most important issues are chosen, however, Bromley-Trujillo et al. (2014) argue that public opinion does shape policy decisions, as it is also expected from the democratic theory's point of view. If the state comes from the people, it is also expected, that the policy-makers, elected by the people, will act in accordance with wishes from the general public.

That being said, Weaver (1991) has found a clear correlation between the salience of issues and general knowledge about this issue, the strength and direction of public opinion regarding possible solutions of this issue and consequently political behavior. He continues that "/…/ increased salience of /…/ issue was accompanied by increased knowledge of its possible causes and solutions, stronger opinions, less likelihood of taking a neutral position, and more likelihood of participating in politics through such behavior as

signing petitions, voting, attending meetings, and writing letters." The latter is especially important for our case, because the involvement of the general public in this kind of activity was very much increased in the time before the EPs vote on ACTA (Kleva Kekuš, 2015).

To apply these assumptions to the EU's case, we cannot continue without the theory of shifts of arenas in the EU. From the birth of the project, European citizens did not see the EU as very important. Waechter (2011, p. 16) describes, that the process of European integration was regarded as "an elite-driven process, managed by forward-looking statesmen and –woman, civil servants, industrialists, trade unionists etc." This phenomena is named as *permissive consensus* by Hooghe and Marks (2008) arguing that before the 1990s, the majority of the general public did not interfere with the European integration process (was even indifferent) and that decision-makers have mostly chosen the 'interest group arena' to advance the integration. After the 1990s however, a change in the general public's opinion is detected and the *permissive consensus* changes in *constraining dissensus* (mostly seen in increased public interest and scrutiny of EU legislation). The reason behind it lay in an increasingly political European integration, touching upon issues that are very relevant for the political identity of the citizens, such as monetary union, the Schengen area, common foreign and security policy and similar (Waechter, 2011, 17). At that time, support for membership in the EU had fallen for 13%, and continued war in Yugoslavia also not helping with the decreasing support (Hooghe & Marks, 2008).

More attention to European integration from the general public, has also brought a shift in choice of arenas for decision-makers. From 'interest group arena' issues moved to the 'mass arena' with the general public demanding to be more and more included, calling the elite out on the democratic deficit surrounding the most important EU institutions (*ibid.*). The shift of arenas naturally brought a shift of tactics used and one can easily say, that the power of public opinion on salient issues was not to be underestimated.

A conclusion drawn is: ***saliency of issues, as perceived by public opinion, is ever-changing and correlated with policy responses, general knowledge of the issue and formulation of an opinion. In the context of the EU, permissive consensus of the general public for the elite-driven project has changed in constraining dissensus which resulted in the shift of arenas from interest group arena to mass arena.***

5.3.2 How civil society movements derailed ACTA

Dür & Mateo (2014) describe, how in the case of ACTA, the negotiations started in the interest group arena with governments proactively approaching industries with requests for their input. Additionally, associations, representing European trademark owners, have high costs for lobbying the EU institutions.

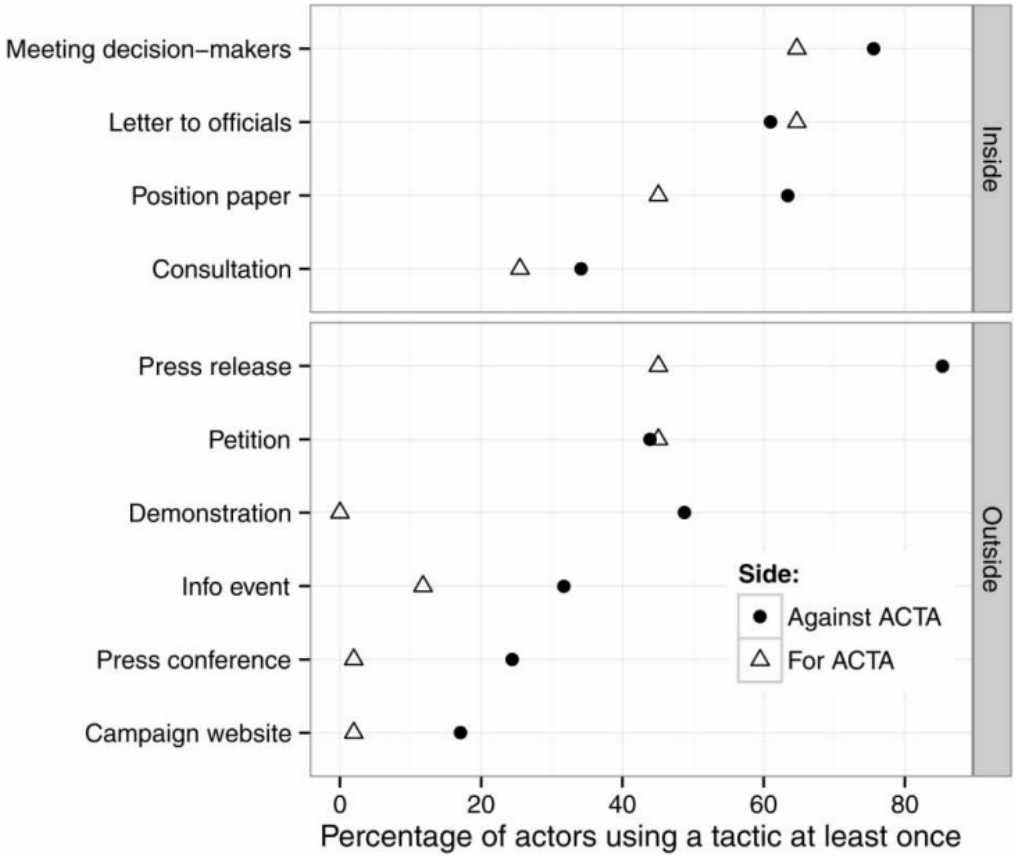
However, from the very beginning, CSOs became aware of negotiations about the ACTA agreement and its potential implications for European citizens' lives. We have seen what some of their criticisms were but at this point, content can be put aside; what is important is that CSOs have, from the very beginning, been attentive to ACTA, yet were excluded from the negotiation process. This raised serious questions about the transparency of the negotiations both in terms of content and the dynamics of the negotiator group (*ibid*). Even if, at the end, the content of ACTA was less controversial than anticipated, how the pressure of public opinion managed to stop ratifications of the agreement, even after the signature and even influenced the final vote in the EP was without precedence.

To increase saliency of issues and impact the positions on the issues, taken by the general public, CSOs use outside strategies. In the case of ACTA this included demonstrations, information events, press releases and a petition containing 3 million signatures against ACTA, given to the EP (*ibid.*). And while it was not clear at the beginning, whether public opinion will oppose

the agreement, the adopted outside strategies by CSOs helped to shape the general public's perception.

The Dür & Mateo (2014, p. 1203) study[19] shows the outside and inside strategies used by supporters and opponents of ACTA (as seen in Figure 11). What is clear is that anti-ACTA side was much more active in terms of lobbying (using both inside and outside strategies). When asked about the importance of ACTA, the pro-ACTA side, surprisingly said, that ACTA was not very important on their agenda until it became so publicly salient and also the reputation of their companies was at stake. The outside lobbying from CSOs resulted in a successful mobilization of the general public, which lead to a 'bandwagon' effect and actually deterred counteractive lobbying (*ibid.*, p. 1204).

Figure *11*: Tactics used by the two sides in the ACTA campaign



[19] The study was conducted in 2012-2013 period, on 94 representatives from different interest groups (both pro and against ACTA) and working either on European level or in one of the five countries namely Austria, Czech Republic, Germany, Ireland and Spain. For more methodology on the study please refer to Dür & Mateo (2014, p. 1206).

Source: (Dür & Mateo, 2014, p. 1208)

Higher saliency of issues thus actually discouraged interest groups to lobby against the dominant public opinion. Additionally, because of these methods, CSOs are more likely to influence public opinion on issues rather than other interest groups and it is more likely that decision-makers will adopt their preferences, if supported by public opinion (*ibid.*).

In the end, the pressure of public opinion against ACTA was enormous and in July 2012 with 39 votes for, 478 votes against and 165 abstentions, the EP had rejected the ACTA agreement with an overwhelming majority (*ibid.*). As mentioned before, the negative vote in the EP ended the process of accepting ACTA.

Kleva Kekuš (2015, q. 14) remembers getting thousands of e-mails in the period before the vote in the EP. She was also one of the MEPs voting against ACTA and pointed out the role young people played in the fight. Especially since they are generally not very active and attentive to issues connected with the EU but rose to this occasion. Kleva Kekuš (2015, q. 15-17) assesses this campaign as very positive. She says internet rights have never been seen and presented like this in the public discourse before and concludes, that she would very much like the same amount of public interest and scrutiny for all the issues.

To conclude this subchapter we can summarize: ***In case of ACTA, CSOs have, with the extensive use of outside strategies, managed to make the agreement publicly salient and created a negative perception of the agreement. Extensive lobbying against ACTA discouraged the pro-ACTA side. They increaseed their lobbying efforts so as not to go against public opinion, which, ultimately, influenced greatly the negative vote in the EP.***

5.3.3 The lessons learnt and prospects for the future (TTIP)

There are several lessons that should be learnt on the case of ACTA; Firstly, as Weatherall (2012) argues, the failure of ACTA and the immense negative pressure of the general public can be explained by growing wariness of accepting new intellectual property measures. Indeed, there was a number of intellectual property agreements trying to be enforced by (national) governments all over the globe. This has left the general public with a bitter taste. To mention just two: the Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA) were both rejected in January 2012 in the USA. The rejection of both acts followed massive protests all over the USA, a petition with millions of signatures, internet protests by big internet service providers (including Google, Wikipedia and Mozilla) and denial-of-service attacks on SOPA/PIPA supporters' websites (Dür & Mateo, 2014; Weatherall, 2011). The methods of pressure, the 'outside' strategies, were thus the same against ACTA.

Secondly, as for SOPA/PIPA and ACTA, all gave the perception drafted mainly in the interest of corporate internet property holders and had little input from consumers and users. The rejection of ACTA is also correlated with a general concern of the public that governments were acting in accordance with corporate rather than citizens' interests (Weatherall, 2011, p. 590). The lack of transparency during the negotiations and perceived asymmetry of the treaty did not help with the phenomenon.

Thirdly, ACTA had shown weaknesses in pluri-lateral approaches to intellectual property enforcement outside WIPO and WTO. The USA had systematically included international property provisions beyond the TRIPS agreement in a number of bilateral agreements and it is no secret that the USA (or rather its intellectual property corporate actors) were the driving force of these provisions in ACTA (*ibid.*). What they did not take into account are the specificities and general positions on intellectual property enforcement in all the negotiating parties, obviously making reaching consensus very difficult. Additionally, the agreement was supposed to be

extended with other parties, without possibility that these countries (re)negotiate some requirements.

Finally, we should take into consideration the changed circumstances in the EU, especially the shift of arenas and the *constraining dissensus* which stipulates that because of an increased interest and scrutiny of the general public towards EU issues, the general public and the CSOs have to be more included in EU decision-making process.

The final question remains: were these lessons taken to heart by EU decision-makers in the following international agreement negotiations?

Currently, there are three important international trade agreements in negotiations: the Transatlantic Trade and Investment Partnership (TTIP) being negotiated with USA, the Comprehensive Economic Trade Agreement (CETA) being negotiated with Canada and the Trade in Services Agreement (TiSA) being negotiated with Australia, Canada, Chile, Columbia, Costa Rica, Hong Kong, Iceland, Israel, Japan, South Korea, Lichtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Switzerland, Taiwan, Turkey and the USA (Government of Republic of Slovenia, 2015). To help us find an answer on the posed question, we shall look only at TTIP, since it proved to be the most controversial in public opinion.

The negotiations for TTIP started in June 2013 – a year after the rejection of ACTA (EC, 2015). The first part of the TTIP covers market access (regulating trade in goods and customs duties, services, public procurement and rules of origin). Provisions on regulatory cooperation follow, providing for regulatory coherence in technical barriers to trade, food safety and animal and plant health, chemicals, cosmetics, engineering, medical devices, pesticides, information and communication technology, pharmaceuticals, textiles and vehicles (*ibid.*). The last part contains rules on sustainable development, energy and raw materials, customs and trade facilitation, small and medium-sized enterprises, investment protection and

Investor-State Dispute Settlement (ISDS), competition, intellectual property and geographical indications and Government-Government Dispute Settlement (*ibid.*).

Clearly, the TTIP is a very comprehensive agreement covering a number of different fields including intellectual property provisions. This did not resonate good with the general public, and even before the end of negotiations were in sight, the Stop-TTIP organization had collected more than 2.2 million signatures against TTIP (stop-ttip.org, 2015a). The general public fears, that TTIP will be ACTA through the back door. What again seems to be the problem is the secrecy of negotiations and the perceived exclusion of CSOs; Stop-TTIP states, that more than 590 meetings took place between the EC and lobbyists, 92% of these representing companies (stop-ttip.org, 2015b). The EP disagrees, however, stating that these are by far the most open trade negotiations conducted by the EU. Reemphasizing, that transparency is a must and calling the EC to continue good practices, developed for this agreement, but also to further increase the level of transparency (EP, 2015b).

Secondly, the ISDS proved to be very controversial for the general public and the EP alike, since it would give foreign investors "the right to sue for damages if they believe that they have suffered losses because of laws or measures of the EU or of individual EU member states." (stop-ttip.org, 2015b). The issue of the ACTA dispute settlement system and the perception of the general public that the EU and the government did not work in the interest of the citizens is thus revisited here. Mostly, big fears about the lowering of high European consumer protection standards are present and since the ISDS would operate outside any current legal system/mechanism, the CSOs see it as a threat to current EU legislation (*ibid.*). Additionally, the WIPO, WTO and UN are again completely bypassed.

If one had to assess the decision-makers implemented the lessons they should have taken from the experience with the ACTA agreement, one could

see that while there is progress, it's only partial. What decision-makers did not take into account is the (negative) resonance on agreements covering intellectual property enforcement. However, of course, to expect that government would stop trying to reach an agreement on this very important topic, because of general public's disapproval, is delusional. Disagreement with the ACTA agreement in the wider international context has also been transmitted to TTIP since again the mechanisms outside exiting frameworks are negotiated and WTO, WIPO and UN are again not consulted.

On the other hand, the TTIP negotiation process has been notably more transparent, since dates of meetings, negotiators with names and surnames and draft texts of chapters are all provided on the EC's webpage, dedicated to TTIP in particular (EC, 2015). While the CSOs do point out the poor diversity of consulted interest groups, they are, however, included. The EC seems to have all the intentions to keep the general public informed as much as the courtesy rules of such trade negotiations permit.

Also the EP has learned to be more tactical, since public pressure on MEPs about TTIP is already increasing. On June 9, 2015, recommendations of the EP to the EC on TTIP negotiations, after first being adopted in the INTA committee, were supposed to be voted upon in the plenary session. Mr. Schulz informed the MEPs that more than 200 amendments had been tabled, so the document was returned to INTA to consider these amendments (EP, 2015b). The final document after considering these amendments in the EP would probably be very different and the unpredictability of the final provisions made the EP president act with caution and postpone the vote. This was a wise decision, since there are big disputes between the MEPs, especially regarding the ISDS mechanism and in order for the EP to take a stronger and a more unified (and thus also more legitimate) stance, more time is needed.

Thus the: ***European decision-makers have taken into account some of the lessons from the ACTA fiasco. While still being criticized for the choices of covered fields and the main actors consulted about the content of the agreement, negotiations for TTIP have been the most transparent trade negotiations.***

6. Conclusion

Throughout the thesis we have concluded that:

a) generally, lobbying among EU officials is perceived as positive and necessary;
b) a variety of different actors are recognized as lobbyists and that there are big differences of perceptions about various entities in terms of how they operate, how are their positions made and their influence in certain policy fields;
c) lobbyists are aware of how they are perceived by the general public., this being the reason for their call to increase transparency, make registries mandatory and increase incentives for compliance with the codes of conduct,
d) the reviewed OECD study shows that more than half of respondents were not aware of lobbyists being penalized for a violation of a code of conduct, so stricter implementation of the existing provisions is in order;
e) perception of the general public about lobbying and actors involved in this activity is largely negative, although CSOs do enjoy a more positive connotation than other groups. Additionally, the Transparency Register shows that the general publics' perception on which entities lobby the most is not necessarily corresponding to reality, although, in practice, the credibility of the number of registrations and entities registered is questioned also by Kleva Kekuš;
f) the EC has set a comprehensive framework for consultations with interest groups, which, on one side, enhances the credibility of

submissions by these groups but at the same time creates obstacles for the groups to participate in the EU decision-making process;

g) in order for the Transparency Register to serve its purpose a larger secretariat should be provided, the control of entries should be enhanced, the mandatory registration of interest organizations should be required and the Register should be extended to CEU;

h) while the CoC-MEPs is a step towards greater transparency, the code's shortcomings in content, monitoring and sanctioning are undermining its effectiveness;

i) the CoC-MEP should be revised content-wise (broader scope), it should enhance disciplinary measures and increase proactive control and verification of documents submitted by the MEPs, including a 'cooling off' period in order to prevent revolving door and should reform the Advisory Committee (expand it with experts and actually take it into account);

j) in order for the CoC-EC to work more efficiently, the scope of the code and regulations on lobbying should be strengthened, namely, the regulations for all (ex)-Commissioner activities (not only those connected with their portfolio) should be broadened;

k) the comparison between CoC-EC and CoC-MEP showed, that both codes have some advantages and some shortcomings, but both share the same challenges, so no clear 'winner' can be pointed out;

l) legislative footprints, to be more transparent whose input was received in drafting decisions, should be published;

m) in general, the Staff Regulations on Officials in the EU is satisfactory in terms of regulations covering lobbying, influence on officials from third parties, acceptance of rewards and honors, the disciplinary measures in the event of breaches and the duties and obligations of officials upon leaving the service, however, the institute of Appointing Authority should be elaborated upon;

l) codes of conduct, imposed by the professional lobby organizations, are only welcome to increase transparency of lobbying and to enhance the existing EU regulatory framework;

m) in terms of obligations to include interest groups in the decision-making process common selection criteria, to balance different interests, must be ensured;
n) a more accurate and transparent reports, with the publication of what expert groups (consulted by the EC to make a legislation proposal based on expertise) do and how they are selected, should be provided;
o) while ACTA strived for an establishment of comprehensive international intellectual property enforcement standards and a mechanism for dispute settlement, it failed to do so both in terms of the process, that was non-transparent and exclusive and in terms of content that was weakened by the negotiating parties during the negotiations;
p) saliency of issues, as perceived by public opinion, is ever-changing and correlated with policy responses, general knowledge of the issue and formulation of an opinion;
q) in the context of the EU, *permissive consensus* of the general public for the elite-driven project has changed in *constraining dissensus* which resulted in the shift of arenas from interest group arena to mass arena;
r) in case of ACTA, CSOs have, with the extensive use of outside strategies, managed to make the agreement publicly salient and created a negative perception of the agreement;
s) extensive lobbying against ACTA has discouraged the pro-ACTA side to increase their lobbying efforts as not to go against public opinion, which has, ultimately, influenced greatly the negative vote in the EP and;
t) European decision-makers have taken into account some of the lessons from the ACTA fiasco, however, while still being criticized for the choices of covered fields and the main actors consulted about the content of the agreement, negotiations for TTIP have been the most transparent trade negotiations.

What has the thesis thus show in the context of the question in the introduction, why was the ACTA agreement eventually not ratified and what implications does this have for future international trade agreements on intellectual property, namely TTIP? Technically, ACTA failed because of the rejection of the EP, the process of which is elaborated upon in the chapter on adoption of international agreements. However, if we look at the broader picture, the non-adoption of ACTA is mostly a success of CSOs that have, with 'outside strategies' lobbied the general public and the decision-makers, which in turn lead to less lobbying from the pro-ACTA side. Additionally, this was successful because of the general disapproval of regulating intellectual property, highly connected with internet freedoms. The changed Europe, where *permissive consensus* turned into *construing dissensus*, because of EU regulations touching upon areas important for individuals political identity, a simultaneous shift of arenas from interest-group arena to mass arena is noted, which implicates a change of tactics and also EU decision-makers became more attentive to increased interest in EU affairs by the general public.

What implications does this give us for the negotiations on TTIP? From the four presented lessons, that the EU decision-makers should have taken from ACTA, TTIP has a mixed record; while it is understandable that the area of intellectual property cannot just remain unregulated, issues around transparency of negotiations, mainly the consulted parties, are again being criticized. It is worth noting, however, that the EP has called this negotiations the most transparent trade negotiations by the EU so far. Just being transparent, however, will not be enough – if the EU decision-makers want to adopt the TTIP, the general public must be more included and also lobbied with outside strategies to better inform the interested public on what the TTIP is actually about and what are the potential gains and challenges as not to allow one-sided information released in public by the CSOs. For the latter, if they want to stop TTIP, a similar campaign as was in the case of ACTA is in order, since there are controversies in the agreement

that would mobilize a big portion of the European citizens to work against the conclusion of the TTIP.

Be this how it may, the TTIP is not yet a concluded agreement, so for the final analysis and comparison with ACTA some more time is needed. Academia would definitely benefit from a *post festum* analysis of tools used in lobbying against and for TTIP, the main actors that showed interest and the influence of this lobbying on general public and the public perception about TTIP. Additionally, more empirical analysis on the general public about their perception of lobbying, actors involved and their influence on decision-makers is needed.

To conclude, one can say that the changed circumstances in EU are making the process of adopting international agreements, such as TTIP, increasingly challenging. The latter urges the EU decision-makers to be more cautious, in the political sense, than ever but also to transmit more the wishes of the European citizens, their voters and/or source of legitimacy, in the decisions taken.

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APPENDIX 1: Interview with Mojca Kleva Kekuš

1. If we start with the Code of Conduct (CoC); Did you get the CoC for MEPs the first day you assumed the office?

No, I did not get it, because when I became a MEP, the CoC was still under discussion but I did get it when it was adopted by the EP. People were waiting for the CoC for MEPs quite a long time, apparently. The practice was there, but every time someone was faced with a bad experience and wanted some guidance or some legal framework, that was unavailable.

2. The CoC includes the conflict of interest and the declaration of the MEPs about their earnings for the last two years and where they got this earnings and also contains provisions about gift receiving and includes some articles about the former MEPs. Do you think this is sufficient? Does it cover everything to prevent abuses?

No, I do not think it's sufficient; it's very broad and general. Since we are talking about MEPs from various EU countries, what is a good and what a bad practice is obviously depending also on the way MEPs are used to doing their work in home countries, of the traditions. There are some who are more used to getting friends of friends into the office and others that will make a big barrier for this kind of visits. The CoC of the EP is just a beginning of what it should be. You are not supposed to have any paid positions in companies for example, but when we were writing our financial statements, many of my colleagues wrote that they did have some paid positions and nothing happened. There is no measures and there were no repercussion for my colleagues that openly said they are even board members of some companies. There were some scandals, mostly revealed by the journalists but the EP did not react on that.

3. The sanctions are not sufficient then?

No, they are not. They should be much stricter. I think sanctions should firstly be linked to the salaries of MEPs and secondly there should be a

possibility to end the mandate of the MEP if they are not following the relevant procedures. It is not fair, because then we are all considered the same, even if the vast majority is honest and it is doing their job transparently but there are always some who are there only for their own interest and not for the interest of the public or people who elected them.

4. That being said however, would you still say that the CoC was a step into the right direction?

Yes, definitely a step into the right direction but in my opinion it should be even stricter. It would be really good if they did include some sanctions. Because for example, if you have a visit from a lobbyist you can decide to check if this lobbyist is in the register or not –this should be controlled somehow because to get a badge as a lobbyist in the EP is really not that difficult.

5. To continue on that – there is some criticism that the registry is not implemented as it was meant, that there are breaches, that there are lobbyists writing only initials of the people who they talked with and so on. In your opinion, was the registry a step into the right direction but it is just badly implemented or do you think the project is all together flawed?

No, I think that the registry is very useful and I know a lot of colleagues that were actually checking people who were coming in their office. So again it works for people who want to do things transparently. The problem that we realized from the practices however is that many lobbyist are actually not in the registry, many lobby companies that are registered as lobby companies are not in the registry and so they would send their employees who are registered just with their name and surname and not as a company. On the other hand you have a NGO with 3 employees that will try to be very transparent and they would be in the registry. From the practice we thus realized then the gap between those who are register and actually lobby is quite big.

6. In your everyday work as an MEP, did you get a lot of requests from different lobby groups? How did it work? Did you chose who you meet or were you taken in the hallway, the lobby?

Personally I had really strict measures; the first filter were my assistants and we had really strict rules in the office. I always met lobbyists in my office, they were always asked why they are coming, with what purpose, for which topic and in most of the cases they even sent us documents in advance so we could be prepared. 99% of the lobbyist I saw were registered and we checked that. I only have one bad experience, because someone brought a friend of a friend. I finished the meeting immediately when I realized that the purpose of the meeting was not the same as I was told. If the person coming was 'dodgy', I preferred to meet them in the EP bar for example, where I was visible and surrounded by people. But the ones that come with good information, analysis or because they want to present to you a study or something, it was always the office. So if you have your own rules and you do not meet in hotels in the city center or in the middle of the night then it is really not a problem; the person that comes to visit you has to register at the desk and my assistants always escorted them after the meeting to the exit because we did not want them to wonder around the building on my behalf.

7. Other than this self-imposed rules was there any other form of control that you were following the CoC or is this something that journalists then do?

No, there was no control and yes, unfortunately journalist are the ones that control us in a way. But I also have bad experience with them because they were just coming to the office, unannounced, so I never accepted them like this. The EP is such an institution that you have to announce your purpose for coming to the office in advance. The EP itself did not control us, the only thing they (could) do is check who is coming to your office.

8. Did a lobbyist ever change your mind?

Yes, they did actually. I was working on a very technical financial file, prepared by the EC and the EP. I wanted it to be even more ambitious and it was about how the banks should exchange information between their branches all over the world and here in EU. There was a lot of bank's representatives lobbying and explain to us why this preposition could not work in practice. Of course, we do not want legislation that cannot be applied in practice so I actually withdrew some of my amendments. The EC, at the time, also realized that this will not work so there were significant changes made to the proposal.

9. Do you see any value added of lobbying?

Yes, I do. I think it's a great way of exchanging information. You are a politician and at the end you decide which information you will take into account. The kind of strategic documents that I got from the lobbyists, I would not get just searching through the web. This is because they're doing their internal research, evaluations or analysis that are just not public. When I was working on the directive for 40% women quota on boards of companies the big multinationals all did their own research and realized that it's actually a good thing to have more women included. So the value added that we got from them was immense, completely different from what we got from for example NGOs.

10. Do you think that lobbying in the EP is easy considering that you have to lobby more than 700 people?

I think it is easy because the lobbyist are really well prepared. They come with a structure and they know exactly who to lobby because they do not lobby everyone. In the end they lobby maybe 10-15 people. This is because lobbying is connected with the committees – most of the lobbying is done when the committee work is done so when the proposal goes to the plenary, 90% of it is already done. Most of the lobbying is happening in the moment where there is this proposal between them and between the amendments in the committee.

11. If we move now to the perception of lobbying; you said earlier that in Brussels NGOs and civil society movements are already considered lobbyist but there was a research on 600 MEPs and 66% of them said that they firstly connect lobbying with the trade associations and on the forth place are NGOs. In your experience did you have more this kind of professional associations or civil society lobbying?

I had more visits from the professional organizations. One or two NGOs would come to the committee for example and they would meet you right after the discussion. They really try to get around once they are in the EP already. I do not have the experience that they would ask just for a meeting on a special topic but I was dealing a lot with banking associations.

12. There was another poll made in six European counties and it showed that 73% of all responders think that the lobbyist representing business have a too big of an influence on the EU decision-making process. Do you agree with that? Can you compare this to the role that civil society movements have?

I do not agree with this statistics because they come, they talk to you, they present their point of view but ultimately it's you as a politicians that makes a choice. From what I saw, especially from the work in committees, I realized that there will always be a member who will just give the exact same amendment as the lobbyists presented them. There is this perception of a European comprise which is usually far from what lobbyists want so they will always have someone who will work in their interest but in the end, in the political process a lot of their ideas just disappear. I would say that 80% of their ideas are just not voted for. What I find fair, is that the lobbyists will go to everyone. For example, trade company would go to the ones who they know they will support them and defend their interest but also to those who they know will not support them. They will also tell you in advance who will table the amendment. In the end, I really do not think that they're influence is as big as it is perceived by general public.

13. Do you think that civil society has an important role here? Did you rather accept NGOs?

Me? Yes, but because I have a NGO background and I know how difficult it is when you work with 3 different people and then you have to read a directive and come even with some proposals. My doors were always open for NGOs. But they are not so structured and well prepared as the trade companies were, or financial institutions.

14. If we continue with ACTA and public opinion; ACTA is a special case – at first we did not talk about it at all and then suddenly the NGOs and civil society movements made the issue very publicly salient and I would dare say that also for the decision in the EP the public opinion was very important because I know you got a lot of e-mails from your constituencies…

Yes, I remember thousands and thousands of emails and I even made the effort to answer everyone. At that time there was a lot of misinformation what ACTA was; nobody really knew where or on what topic they were negotiating. The anger of MEPs combined with the anger of young people – I think the fall of ACTA is a huge achievement of young people. People who will probably not go to vote in election but will send 100 emails if it's necessary so I think it was a really big achievement. I do not know if other generation really knew and cared about ACTA. I also saw that because they were writing emails to me with name and surname, it was not just a general e-mail that was going around but I got a lot of email saying 'look, I do not want ACTA because of this and that'. I found it really great – the power of mobilization of a generation that just saw really a big threat in one international agreement before we even knew – it was just a bilateral agreement between EU and USA until then.

15. The pressure probably really increased in that period; did you have more visitors at that time?

Not so much no. A lot of countries that were linked to negotiations were trying to persuade MEPs to vote in favor of ACTA because they were

negotiating it. MEPs that were in governments or similar at home they had a really big problem with that. But I just did not care; at that time I was one of the rare people that has actually read it. The problem is that a lot of MEPs did not even read the ACTA so to say yes or no it's not enough. You got a lot of MEPs that were really in favor and tried to persuade other colleagues but once you read the agreement you realized that it was just not good. I think the campaign was really great because it showed 'internet rights' in a way that was never seen before. But that is just because there was interest of people who are using internet. I supposed that the second fight will be TTIP.

16. Do you asses this influence as positive?

Yes, this was great. I think it was really a story of success on how to influence the decision-makers.

17. Do you wish that this kind of interest of the general public would be shown also for other issues that the EP deals with?

Yes, for everything! The problem of MEPs most of the time is that you have no idea if what you are doing is important for people or not. Of course you think that what you do is the most important thing in your life. But if you do not even get into the main media the day your text was adopted that you really think twice. When you get a reaction for your work you are actually really happy because you see that at least someone sees what you were doing. I would love to have European society that is really rigid and checking everything that the EU is dealing with.

18. You were working on two different reports: one on energy efficiency in buildings and on tax havens, tax evasion.. Did you get more lobbying at that time from Slovenian organizations?

No, to be honest for Slovenia I had to look for the partners myself. The report on energy efficiency was mostly done in Slovenia but I personally was going around organizing events and including also the Faculty we have in Slovenia that deals with that. This report was Slovenian already. But then I got lobbyist for the European level because there is a big difference between

east and west Europe. When Western Europe was giving a lot of money for this in the 80' the east was fighting for independence. For the report on tax havens I got a lot of tax havens coming and explaining that they are not tax havens and why not and a lot of banks and everyone that has to deal with money transferring. But for Slovenia no, Slovenians were involved as much as their European counterpart associations were. The perception of EU politics in Slovenia is still far away from what it should be.

19. The EP got a more important role in co-deciding also about international agreements with the Lisbon treaty. Do you see this as something positive?

EP is an elective body so it's the only way how ordinary people can enter the process of the EU level because in the Council of EU you have governments, in the EC they are not really reachable and then there is the EP where you can reach your elected representative. The role of the EP changed a lot and I hope it will get even more powers. Comparing with 1979, the EP now it's a real parliament, before it was just a consultation body. The EP makes legislation and a lot of headaches to the EC. The practice still shows that the Council does not fully see EP as an equal counterpart and the problem is that the EP is also more ambitious. EP is not caught in this games between countries.

20. Do you have any concluding remarks?

Well I think that the regulation on lobbying ultimately will be accepted, we just need more time and maybe some new faces. When you have so much old people in the parliament that are in pension of right before it and are there *ad honorem* they of course act completely differently that someone who is just starting their career in the EP and does not want to harm their reputation.

APPENDIX 2: Anti-counterfeiting trade agreement

TOKYO, 1 OCTOBER 2011

The Parties to this Agreement,

- Noting that effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally;
- Noting further that the proliferation of counterfeit and pirated goods, as well as of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and, in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public;
- Desiring to combat such proliferation through enhanced international cooperation and more effective international enforcement;
- Intending to provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in their respective legal systems and practices;
- Desiring to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;
- Desiring to address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, in a manner that balances the rights and interests of the relevant right holders, service providers, and users;
- Desiring to promote cooperation between service providers and right holders to address relevant infringements in the digital environment;
- Desiring that this Agreement operates in a manner mutually supportive of international enforcement work and cooperation conducted within relevant international organizations;
- Recognizing the principles set forth in the Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, at the Fourth WTO Ministerial Conference;

Hereby agree as follows:

CHAPTER I

INITIAL PROVISIONS AND GENERAL DEFINITIONS

Section 1: Initial Provisions

ARTICLE 1: RELATION TO OTHER AGREEMENTS

Nothing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement.

ARTICLE 2: NATURE AND SCOPE OF OBLIGATIONS

1. Each Party shall give effect to the provisions of this Agreement. A Party may implement in its law more extensive enforcement of intellectual property rights than is required by this Agreement, provided that such enforcement does not contravene the provisions of this Agreement. Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice.

2. Nothing in this Agreement creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.

3. The objectives and principles set forth in Part I of the TRIPS Agreement, in particular in Articles 7 and 8, shall apply, mutatis mutandis, to this Agreement.

ARTICLE 3: RELATION TO STANDARDS CONCERNING THE AVAILABILITY AND SCOPE OF INTELLECTUAL PROPERTY RIGHTS

1. This Agreement shall be without prejudice to provisions in a Party's law governing the availability, acquisition, scope, and maintenance of intellectual property rights.

2. This Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under its laws and regulations.

ARTICLE 4: PRIVACY AND DISCLOSURE OF INFORMATION

1. Nothing in this Agreement shall require a Party to disclose:

(a) information, the disclosure of which would be contrary to its law, including laws protecting privacy rights, or international agreements to which it is party;

(b) confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest; or

(c) confidential information, the disclosure of which would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. When a Party provides written information pursuant to the provisions of this Agreement, the Party receiving the information shall, subject to its law and practice, refrain from disclosing or using the information for a purpose other than that for which the information was provided, except with the prior consent of the Party providing the information.

Section 2: General Definitions

ARTICLE 5: GENERAL DEFINITIONS

For the purposes of this Agreement, unless otherwise specified:

(a) ACTA means the Anti-Counterfeiting Trade Agreement;

(b) Committee means the ACTA Committee established under Chapter V (Institutional Arrangements);

(c) competent authorities includes the appropriate judicial, administrative, or law enforcement authorities under a Party's law;

(d) counterfeit trademark goods means any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked;

(e) country is to be understood to have the same meaning as that set forth in the Explanatory Notes to the WTO Agreement;

(f) customs transit means the customs procedure under which goods are transported under customs control from one customs office to another;

(g) days means calendar days;

(h) intellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement;

(i) in-transit goods means goods under customs transit or transhipment;

(j) person means a natural person or a legal person;

(k) pirated copyright goods means any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked;

(l) right holder includes a federation or an association having the legal standing to assert rights in intellectual property;

(m) territory, for the purposes of Section 3 (Border Measures) of Chapter II (Legal Framework for Enforcement of Intellectual Property Rights), means the customs territory and all free zones[1] of a Party;

(n) transhipment means the customs procedure under which goods are transferred under customs control from the importing means of transport to the exporting means of transport within the area of one customs office which is the office of both importation and exportation;

(o) TRIPS Agreement means the Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement;

(p) WTO means the World Trade Organization; and

(q) WTO Agreement means the Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994.

CHAPTER II

LEGAL FRAMEWORK FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Section 1: General Obligations

ARTICLE 6: GENERAL OBLIGATIONS WITH RESPECT TO ENFORCEMENT

1. Each Party shall ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner

as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures adopted, maintained, or applied to implement the provisions of this Chapter shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties.

4. No provision of this Chapter shall be construed to require a Party to make its officials subject to liability for acts undertaken in the performance of their official duties.

Section 2: Civil Enforcement[2]

ARTICLE 7: AVAILABILITY OF CIVIL PROCEDURES

1. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right as specified in this Section.

2. To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, each Party shall provide that such procedures shall conform to principles equivalent in substance to those set forth in this Section.

ARTICLE 8: INJUNCTIONS

1. Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to issue an order against a party to desist from an infringement, and inter alia, an order to that party or, where appropriate, to a third party over whom the relevant judicial authority exercises jurisdiction, to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce.

2. Notwithstanding the other provisions of this Section, a Party may limit the remedies available against use by governments, or by third parties authorized by a government, without the authorization of the right holder, to the payment

of remuneration, provided that the Party complies with the provisions of Part II of the TRIPS Agreement specifically addressing such use. In other cases, the remedies under this Section shall apply or, where these remedies are inconsistent with a Party's law, declaratory judgments and adequate compensation shall be available.

ARTICLE 9: DAMAGES

1. Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order the infringer who, knowingly or with reasonable grounds to know, engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement. In determining the amount of damages for infringement of intellectual property rights, a Party's judicial authorities shall have the authority to consider, inter alia, any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.

2. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer to pay the right holder the infringer's profits that are attributable to the infringement. A Party may presume those profits to be the amount of damages referred to in paragraph 1.

3. At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following:

(a) pre-established damages; or

(b) presumptions[3] for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or

(c) at least for copyright, additional damages.

4. Where a Party provides the remedy referred to in subparagraph 3(a) or the presumptions referred to in subparagraph 3(b), it shall ensure that either its judicial authorities or the right holder has the right to choose such a remedy or presumptions as an alternative to the remedies referred to in paragraphs 1 and 2.

5. Each Party shall provide that its judicial authorities, where appropriate, have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of at least copyright or related rights, or trademarks, that the prevailing party be awarded payment by the losing party of court costs or fees and appropriate attorney's fees, or any other expenses as provided for under that Party's law.

ARTICLE 10: OTHER REMEDIES

1. At least with respect to pirated copyright goods and counterfeit trademark goods, each Party shall provide that, in civil judicial proceedings, at the right holder's request, its judicial authorities have the authority to order that such infringing goods be destroyed, except in exceptional circumstances, without compensation of any sort.

2. Each Party shall further provide that its judicial authorities have the authority to order that materials and implements, the predominant use of which has been in the manufacture or creation of such infringing goods, be, without undue delay and without compensation of any sort, destroyed or disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.

3. A Party may provide for the remedies described in this Article to be carried out at the infringer's expense.

ARTICLE 11: INFORMATION RELATED TO INFRINGEMENT

Without prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority, upon a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. Such information may include information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of such goods or services and of their channels of distribution.

ARTICLE 12: PROVISIONAL MEASURES

1. Each Party shall provide that its judicial authorities have the authority to order prompt and effective provisional measures:

(a) against a party or, where appropriate, a third party over whom the relevant judicial authority exercises jurisdiction, to prevent an infringement of any intellectual property right from occurring, and in particular, to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. Each Party shall provide that its judicial authorities have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. In proceedings conducted inaudita altera parte, each Party shall provide its judicial authorities with the authority to act expeditiously on requests for provisional measures and to make a decision without undue delay.

3. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the seizure or other taking into custody of suspect goods, and of materials and implements relevant to the act of infringement, and, at least for trademark counterfeiting, documentary evidence, either originals or copies thereof, relevant to the infringement.

4. Each Party shall provide that its authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to procedures for such provisional measures.

5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

Section 3: Border Measures[4][5]

ARTICLE 13: SCOPE OF THE BORDER MEASURES[6]

In providing, as appropriate, and consistent with its domestic system of intellectual property rights protection and without prejudice to the requirements of the TRIPS Agreement, for effective border enforcement of intellectual property rights, a Party should do so in a manner that does not discriminate unjustifiably between intellectual property rights and that avoids the creation of barriers to legitimate trade.

ARTICLE 14: SMALL CONSIGNMENTS AND PERSONAL LUGGAGE

1. Each Party shall include in the application of this Section goods of a commercial nature sent in small consignments.

2. A Party may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travellers' personal luggage.

ARTICLE 15: PROVISION OF INFORMATION FROM THE RIGHT HOLDER

Each Party shall permit its competent authorities to request a right holder to supply relevant information to assist the competent authorities in taking the border measures referred to in this Section. A Party may also allow a right holder to supply relevant information to its competent authorities.

ARTICLE 16: BORDER MEASURES

1. Each Party shall adopt or maintain procedures with respect to import and export shipments under which:

(a) its customs authorities may act upon their own initiative to suspend the release of suspect goods; and

(b) where appropriate, a right holder may request its competent authorities to suspend the release of suspect goods.

2. A Party may adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control under which:

(a) its customs authorities may act upon their own initiative to suspend the release of, or to detain, suspect goods; and

(b) where appropriate, a right holder may request its competent authorities to suspend the release of, or to detain, suspect goods.

ARTICLE 17: APPLICATION BY THE RIGHT HOLDER

1. Each Party shall provide that its competent authorities require a right holder that requests the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures) to provide adequate evidence to satisfy the competent authorities that, under the law of the Party providing the procedures, there is prima facie an infringement of the right holder's intellectual property right, and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspect goods reasonably recognizable by the competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures).

2. Each Party shall provide for applications to suspend the release of, or to detain, any suspect goods[7] under customs control in its territory. A Party may provide for such applications to apply to multiple shipments. A Party may provide that, at the request of the right holder, the application to suspend the release of, or to detain, suspect goods may apply to selected points of entry and exit under customs control.

3. Each Party shall ensure that its competent authorities inform the applicant within a reasonable period whether they have accepted the application. Where its competent authorities have accepted the application, they shall also inform the applicant of the period of validity of the application.

4. A Party may provide that, where the applicant has abused the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures), or where there is due cause, its competent authorities have the authority to deny, suspend, or void an application.

ARTICLE 18: SECURITY OR EQUIVALENT ASSURANCE

Each Party shall provide that its competent authorities have the authority to require a right holder that requests the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures) to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. A Party may provide that such security may be in the form of a bond conditioned to hold the defendant harmless from any loss or damage resulting from any suspension of the release of, or detention of, the goods in the event the competent authorities determine that the goods are not infringing. A Party may, only in exceptional circumstances or pursuant to a judicial order, permit the defendant to obtain possession of suspect goods by posting a bond or other security.

ARTICLE 19: DETERMINATION AS TO INFRINGEMENT

Each Party shall adopt or maintain procedures by which its competent authorities may determine, within a reasonable period after the initiation of the procedures described in Article 16 (Border Measures), whether the suspect goods infringe an intellectual property right.

ARTICLE 20: REMEDIES

1. Each Party shall provide that its competent authorities have the authority to order the destruction of goods following a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing. In cases where such goods are not destroyed, each Party shall ensure that, except in exceptional circumstances, such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder.

2. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

3. A Party may provide that its competent authorities have the authority to impose administrative penalties following a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing.

ARTICLE 21: FEES

Each Party shall provide that any application fee, storage fee, or destruction fee to be assessed by its competent authorities in connection with the procedures described in this Section shall not be used to unreasonably deter recourse to these procedures.

ARTICLE 22: DISCLOSURE OF INFORMATION

Without prejudice to a Party's laws pertaining to the privacy or confidentiality of information:

(a) a Party may authorize its competent authorities to provide a right holder with information about specific shipments of goods, including the description and quantity of the goods, to assist in the detection of infringing goods;

(b) a Party may authorize its competent authorities to provide a right holder with information about goods, including, but not limited to, the description and quantity of the goods, the name and address of the consignor, importer, exporter, or consignee, and, if known, the country of origin of the goods, and the name and address of the manufacturer of the goods, to assist in the determination referred to in Article 19 (Determination as to Infringement);

(c) unless a Party has provided its competent authorities with the authority described in subparagraph (b), at least in cases of imported goods, where its competent authorities have seized suspect goods or, in the alternative, made a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing, the Party shall authorize its competent authorities to provide a right holder, within thirty days[8] of the seizure or determination, with information about such goods, including, but not limited to, the description and quantity of the goods, the name and address of the consignor, importer, exporter, or consignee, and, if known, the country of origin of the goods, and the name and address of the manufacturer of the goods.

Section 4: Criminal Enforcement

ARTICLE 23: CRIMINAL OFFENCES

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale.[9] For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.

2. Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation[10] and domestic use, in the course of trade and on a commercial scale, of labels or packaging:[11]

(a) to which a mark has been applied without authorization which is identical to, or cannot be distinguished from, a trademark registered in its territory; and

(b) which are intended to be used in the course of trade on goods or in relation to services which are identical to goods or services for which such trademark is registered.

3. A Party may provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public.

4. With respect to the offences specified in this Article for which a Party provides criminal procedures and penalties, that Party shall ensure that criminal liability for aiding and abetting is available under its law.

5. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability, which may be criminal, of legal persons for the offences specified in this Article for which the Party provides criminal procedures and penalties. Such liability shall be without prejudice to

the criminal liability of the natural persons who have committed the criminal offences.

ARTICLE 24: PENALTIES

For offences specified in paragraphs 1, 2, and 4 of Article 23 (Criminal Offences), each Party shall provide penalties that include imprisonment as well as monetary fines[12] sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity.

ARTICLE 25: SEIZURE, FORFEITURE, AND DESTRUCTION

1. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence, and the assets derived from, or obtained directly or indirectly through, the alleged infringing activity.

2. Where a Party requires the identification of items subject to seizure as a prerequisite for issuing an order referred to in paragraph 1, that Party shall not require the items to be described in greater detail than necessary to identify them for the purpose of seizure.

3. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the forfeiture or destruction of all counterfeit trademark goods or pirated copyright goods. In cases where counterfeit trademark goods and pirated copyright goods are not destroyed, the competent authorities shall ensure that, except in exceptional circumstances, such goods shall be disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall ensure that the forfeiture or destruction of such goods shall occur without compensation of any sort to the infringer.

4. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the forfeiture or destruction of materials and implements predominantly used in the creation of counterfeit trademark goods or pirated copyright goods and, at least for serious offences, of the assets derived from, or

obtained directly or indirectly through, the infringing activity. Each Party shall ensure that the forfeiture or destruction of such materials, implements, or assets shall occur without compensation of any sort to the infringer.

5. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party may provide that its judicial authorities have the authority to order:

(a) the seizure of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the allegedly infringing activity; and

(b) the forfeiture of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity.

ARTICLE 26: EX OFFICIO CRIMINAL ENFORCEMENT

Each Party shall provide that, in appropriate cases, its competent authorities may act upon their own initiative to initiate investigation or legal action with respect to the criminal offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which that Party provides criminal procedures and penalties.

Section 5: Enforcement of Intellectual Property Rights in the Digital Environment

ARTICLE 27: ENFORCEMENT IN THE DIGITAL ENVIRONMENT

1. Each Party shall ensure that enforcement procedures, to the extent set forth in Sections 2 (Civil Enforcement) and 4 (Criminal Enforcement), are available under its law so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements.

2. Further to paragraph 1, each Party's enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.[13]

3. Each Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related

rights infringement while preserving legitimate competition and, consistent with that Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy.

4. A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.

5. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures[14] that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.

6. In order to provide the adequate legal protection and effective legal remedies referred to in paragraph 5, each Party shall provide protection at least against:

(a) to the extent provided by its law:

(i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and

(ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and

(b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that:

(i) is primarily designed or produced for the purpose of circumventing an effective technological measure; or

(ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.[15]

7. To protect electronic rights management information,[16] each Party shall provide adequate legal protection and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights:

(a) to remove or alter any electronic rights management information;

(b) to distribute, import for distribution, broadcast, communicate, or make available to the public copies of works, performances, or phonograms, knowing that electronic rights management information has been removed or altered without authority.

8. In providing adequate legal protection and effective legal remedies pursuant to the provisions of paragraphs 5 and 7, a Party may adopt or maintain appropriate limitations or exceptions to measures implementing the provisions of paragraphs 5, 6, and 7. The obligations set forth in paragraphs 5, 6, and 7 are without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party's law.

CHAPTER III

ENFORCEMENT PRACTICES

ARTICLE 28: ENFORCEMENT EXPERTISE, INFORMATION, AND DOMESTIC COORDINATION

1. Each Party shall encourage the development of specialized expertise within its competent authorities responsible for the enforcement of intellectual property rights.

2. Each Party shall promote the collection and analysis of statistical data and other relevant information concerning intellectual property rights infringements as well as the collection of information on best practices to prevent and combat infringements.

3. Each Party shall, as appropriate, promote internal coordination among, and facilitate joint actions by, its competent authorities responsible for the enforcement of intellectual property rights.

4. Each Party shall endeavour to promote, where appropriate, the establishment and maintenance of formal or informal mechanisms, such as advisory groups, whereby its competent authorities may receive the views of right holders and other relevant stakeholders.

ARTICLE 29: MANAGEMENT OF RISK AT BORDER

1. In order to enhance the effectiveness of border enforcement of intellectual property rights, the competent authorities of a Party may:

(a) consult with the relevant stakeholders, and the competent authorities of other Parties responsible for the enforcement of intellectual property rights to identify and address significant risks, and promote actions to mitigate those risks; and

(b) share information with the competent authorities of other Parties on border enforcement of intellectual property rights, including relevant information to better identify and target for inspection shipments suspected of containing infringing goods.

2. Where a Party seizes imported goods infringing an intellectual property right, its competent authorities may provide the Party of export with information necessary for identification of the parties and goods involved in the exportation of the seized goods. The competent authorities of the Party of export may take action against those parties and future shipments in accordance with that Party's law.

ARTICLE 30: TRANSPARENCY

To promote transparency in the administration of its intellectual property rights enforcement system, each Party shall take appropriate measures, pursuant to its law and policies, to publish or otherwise make available to the public information on:

(a) procedures available under its law for enforcing intellectual property rights, its competent authorities responsible for such enforcement, and contact points available for assistance;

(b) relevant laws, regulations, final judicial decisions, and administrative rulings of general application pertaining to the enforcement of intellectual property rights; and

(c) its efforts to ensure an effective system of enforcement and protection of intellectual property rights.

ARTICLE 31: PUBLIC AWARENESS

Each Party shall, as appropriate, promote the adoption of measures to enhance public awareness of the importance of respecting intellectual property rights and the detrimental effects of intellectual property rights infringement.

ARTICLE 32: ENVIRONMENTAL CONSIDERATIONS IN DESTRUCTION OF INFRINGING GOODS

The destruction of goods infringing intellectual property rights shall be done consistently with the laws and regulations on environmental matters of the Party in which the destruction takes place.

CHAPTER IV

INTERNATIONAL COOPERATION

ARTICLE 33: INTERNATIONAL COOPERATION

1. Each Party recognizes that international cooperation is vital to realizing effective protection of intellectual property rights and that it should be encouraged regardless of the origin of the goods infringing intellectual property rights, or the location or nationality of the right holder.

2. In order to combat intellectual property rights infringement, in particular trademark counterfeiting and copyright or related rights piracy, the Parties shall promote cooperation, where appropriate, among their competent authorities responsible for the enforcement of intellectual property rights. Such cooperation may include law enforcement cooperation with respect to criminal enforcement and border measures covered by this Agreement.

3. Cooperation under this Chapter shall be conducted consistent with relevant international agreements, and subject to the laws, policies, resource allocation, and law enforcement priorities of each Party.

ARTICLE 34: INFORMATION SHARING

Without prejudice to the provisions of Article 29 (Management of Risk at Border), each Party shall endeavour to exchange with other Parties:

(a) information the Party collects under the provisions of Chapter III (Enforcement Practices), including statistical data and information on best practices;

(b) information on its legislative and regulatory measures related to the protection and enforcement of intellectual property rights; and

(c) other information as appropriate and mutually agreed.

ARTICLE 35: CAPACITY BUILDING AND TECHNICAL ASSISTANCE

1. Each Party shall endeavour to provide, upon request and on mutually agreed terms and conditions, assistance in capacity building and technical assistance

in improving the enforcement of intellectual property rights to other Parties to this Agreement and, where appropriate, to prospective Parties. The capacity building and technical assistance may cover such areas as:

(a) enhancement of public awareness on intellectual property rights;

(b) development and implementation of national legislation related to the enforcement of intellectual property rights;

(c) training of officials on the enforcement of intellectual property rights; and

(d) coordinated operations conducted at the regional and multilateral levels.

2. Each Party shall endeavour to work closely with other Parties and, where appropriate, non-Parties to this Agreement for the purpose of implementing the provisions of paragraph 1.

3. A Party may undertake the activities described in this Article in conjunction with relevant private sector or international organizations. Each Party shall strive to avoid unnecessary duplication between the activities described in this Article and other international cooperation activities.

CHAPTER V

INSTITUTIONAL ARRANGEMENTS

ARTICLE 36: THE ACTA COMMITTEE

1. The Parties hereby establish the ACTA Committee. Each Party shall be represented on the Committee.

2. The Committee shall:

(a) review the implementation and operation of this Agreement;

(b) consider matters concerning the development of this Agreement;

(c) consider any proposed amendments to this Agreement in accordance with Article 42 (Amendments);

(d) decide, in accordance with paragraph 2 of Article 43 (Accession), upon the terms of accession to this Agreement of any Member of the WTO; and

(e) consider any other matter that may affect the implementation and operation of this Agreement.

3. The Committee may decide to:

(a) establish ad hoc committees or working groups to assist the Committee in carrying out its responsibilities under paragraph 2, or to assist a prospective Party upon its request in acceding to this Agreement in accordance with Article 43 (Accession);

(b) seek the advice of non-governmental persons or groups;

(c) make recommendations regarding the implementation and operation of this Agreement, including by endorsing best practice guidelines related thereto;

(d) share information and best practices with third parties on reducing intellectual property rights infringements, including techniques for identifying and monitoring piracy and counterfeiting; and

(e) take other actions in the exercise of its functions.

4. All decisions of the Committee shall be taken by consensus, except as the Committee may otherwise decide by consensus. The Committee shall be deemed to have acted by consensus on a matter submitted for its consideration, if no Party present at the meeting when the decision is taken formally objects to the proposed decision. English shall be the working language of the Committee and the documents supporting its work shall be in the English language.

5. The Committee shall adopt its rules and procedures within a reasonable period after the entry into force of this Agreement, and shall invite those Signatories not Parties to this Agreement to participate in the Committee's deliberations on those rules and procedures. The rules and procedures:

(a) shall address such matters as chairing and hosting meetings, and the performance of organizational duties relevant to this Agreement and its operation; and

(b) may also address such matters as granting observer status, and any other matter the Committee decides necessary for its proper operation.

6. The Committee may amend the rules and procedures.

7. Notwithstanding the provisions of paragraph 4, during the first five years following the entry into force of this Agreement, the Committee's decisions to adopt or amend the rules and procedures shall be taken by consensus of the Parties and those Signatories not Parties to this Agreement.

8. After the period specified in paragraph 7, the Committee may adopt or amend the rules and procedures upon the consensus of the Parties to this Agreement.

9. Notwithstanding the provisions of paragraph 8, the Committee may decide that the adoption or amendment of a particular rule or procedure requires the consensus of the Parties and those Signatories not Parties to this Agreement.

10. The Committee shall convene at least once every year unless the Committee decides otherwise. The first meeting of the Committee shall be held within a reasonable period after the entry into force of this Agreement.

11. For greater certainty, the Committee shall not oversee or supervise domestic or international enforcement or criminal investigations of specific intellectual property cases.

12. The Committee shall strive to avoid unnecessary duplication between its activities and other international efforts regarding the enforcement of intellectual property rights.

ARTICLE 37: CONTACT POINTS

1. Each Party shall designate a contact point to facilitate communications between the Parties on any matter covered by this Agreement.

2. On the request of another Party, a Party's contact point shall identify an appropriate office or official to whom the requesting Party's inquiry may be addressed, and assist, as necessary, in facilitating communications between the office or official concerned and the requesting Party.

ARTICLE 38: CONSULTATIONS

1. A Party may request in writing consultations with another Party with respect to any matter affecting the implementation of this Agreement. The requested Party shall accord sympathetic consideration to such a request, provide a response, and afford adequate opportunity to consult.

2. The consultations, including particular positions taken by consulting Parties, shall be kept confidential and be without prejudice to the rights or positions of either Party in any other proceeding, including a proceeding under the auspices of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 to the WTO Agreement.

3. The consulting Parties may, by mutual consent, notify the Committee of the result of their consultations under this Article.

CHAPTER VI

FINAL PROVISIONS

ARTICLE 39: SIGNATURE

This Agreement shall remain open for signature by participants in its negotiation[17] and by any other WTO Members the participants may agree to by consensus, from 1 May 2011 until 1 May 2013.

ARTICLE 40: ENTRY INTO FORCE

1. This Agreement shall enter into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval as between those Signatories that have deposited their respective instruments of ratification, acceptance, or approval.

2.This Agreement shall enter into force for each Signatory that deposits its instrument of ratification, acceptance, or approval after the deposit of the sixth instrument of ratification, acceptance, or approval, thirty days after the date of deposit by such Signatory of its instrument of ratification, acceptance, or approval.

ARTICLE 41: WITHDRAWAL

A Party may withdraw from this Agreement by means of a written notification to the Depositary. The withdrawal shall take effect 180 days after the Depositary receives the notification.

ARTICLE 42: AMENDMENTS

1. A Party may propose amendments to this Agreement to the Committee. The Committee shall decide whether to present a proposed amendment to the Parties for ratification, acceptance, or approval.

2. Any amendment shall enter into force ninety days after the date that all the Parties have deposited their respective instruments of ratification, acceptance, or approval with the Depositary.

ARTICLE 43: ACCESSION

1. After the expiration of the period provided in Article 39 (Signature), any Member of the WTO may apply to accede to this Agreement.

2. The Committee shall decide upon the terms of accession for each applicant.

3. This Agreement shall enter into force for the applicant thirty days after the date of deposit of its instrument of accession based upon the terms of accession referred to in paragraph 2.

ARTICLE 44: TEXTS OF THE AGREEMENT

This Agreement shall be signed in a single original in the English, French, and Spanish languages, each version being equally authentic.

ARTICLE 45: DEPOSITARY

The Government of Japan shall be the Depositary of this Agreement.

Notes

1. For greater certainty, the Parties acknowledge that free zone means a part of the territory of a Party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory.
2. A Party may exclude patents and protection of undisclosed information from the scope of this Section.
3. The presumptions referred to in subparagraph 3(b) may include a presumption that the amount of damages is: (i) the quantity of the goods infringing the right holder's intellectual property right in question and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement; or (ii) a reasonable royalty; or (iii) a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question.
4. Where a Party has dismantled substantially all controls over movement of goods across its border with another Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.
5. 5 It is understood that there shall be no obligation to apply the procedures set forth in this Section to goods put on the market in another country by or with the consent of the right holder.
6. The Parties agree that patents and protection of undisclosed information do not fall within the scope of this Section.
7. The requirement to provide for such applications is subject to the obligations to provide procedures referred to in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures).
8. For the purposes of this Article, days means business days.
9. 9 Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties under this Article. A Party may comply with its obligation relating to importation and exportation of counterfeit trademark goods or pirated copyright goods by providing for distribution, sale or offer for sale of such goods on a commercial scale as unlawful activities subject to criminal penalties.
10. A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.
11. A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to be applied to attempts to commit a trademark offence.
12. It is understood that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.
13. For instance, without prejudice to a Party's law, adopting or maintaining a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of right holder.
14. For the purposes of this Article, technological measures means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party's law. Without prejudice to the scope of copyright or related rights contained in a Party's law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.

15. In implementing paragraphs 5 and 6, no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise contravene its measures implementing these paragraphs.
16. For the purposes of this Article, rights management information means: (a) information that identifies the work, the performance, or the phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram; (b) information about the terms and conditions of use of the work, performance, or phonogram; or (c) any numbers or codes that represent the information described in (a) and (b) above; when any of these items of information is attached to a copy of a work, performance, or phonogram, or appears in connection with the communication or making available of a work, performance, or phonogram to the public.
17. Australia, the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, Canada, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Union, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, Ireland, the Italian Republic, Japan, the Republic of Korea, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the United Mexican States, the Kingdom of Morocco, the Kingdom of the Netherlands, New Zealand, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Singapore, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.