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*Committee on Civil Liberties, Justice and Home Affairs*

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**2011/0167(NLE)**

7.5.2012

## **DRAFT OPINION**

of the Committee on Civil Liberties, Justice and Home Affairs

for the Committee on International Trade

on the compatibility of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America with the rights enshrined in the Charter of Fundamental Rights of the European Union

(12195/2011 – C7-0027/2012 – 2011/0167(NLE))

Rapporteur: Dimitrios Droutsas

PA\_Leg\_Consent

The Committee on Civil Liberties, Justice and Home Affairs pursuant to Rule 36(2) of European Parliament Rules of Procedure makes the following observations with respect to the compatibility of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (ACTA) with the rights enshrined in the Charter of Fundamental Rights of the European Union (the Charter)<sup>1</sup>.

### ***General framework***

1. Acknowledges that intellectual property rights (IPRs) are important tools for the Union in the ‘knowledge economy’ and that adequate enforcement of IPRs is key; recalls that infringements of IPRs harm growth, competitiveness and innovation; points out that ACTA does not create new IPRs, but is an enforcement treaty aimed at tackling effectively IPR infringements;
2. Recalls that both the content of previous versions of the agreement as well as the current text together with the level of transparency connected with the negotiations of the agreement have been questioned repeatedly by Parliament;<sup>2</sup>
3. Underlines, at the same time, that it is crucial to strike the appropriate balance between enforcement of IPRs and fundamental rights such as freedom of expression, the right to privacy and protection of personal data, the right to due process and recalls the case-law of the Court of Justice of the European Union (CJEU) as regards this fair balance<sup>3</sup>;
4. Reiterates that the entry into force of the Treaty of Lisbon on 1 December 2009 has fundamentally changed the legal landscape of the Union, which should establish itself increasingly as a community of shared values and principles; recalls that the new, multi-level Union system of fundamental rights protection emanates from multiple sources and is enforced through a variety of mechanisms, including the legally binding Charter, the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the rights based on the Member States' constitutional traditions and their interpretation according to the jurisprudence of the European Court of Human Rights and the CJEU<sup>4</sup>; underlines that this enhanced human rights architecture and high level of protection that the EU is pursuing (‘the European model’) must be also upheld in its external dimension as the EU must be ‘exemplary’ in matters of fundamental rights<sup>5</sup> and should not be perceived as allowing ‘fundamental rights laundering’;

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<sup>1</sup> Takes note of the two opinions of the EP Legal Service on ACTA of 5 October 2011 and of 8 December 2011 <http://lists.act-on-acta.eu/pipermail/hub/attachments/20111219/59f3ebe6/attachment-0010.pdf>.

<sup>2</sup> See for example EP resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7\_TA(2010)0058.

<sup>3</sup> See also in this sense point (d) of the Opinion of European Academics on ACTA [http://www.iri.uni-hannover.de/tl\\_files/pdf/ACTA\\_opinion\\_200111\\_2.pdf](http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf); Case C-275/06 *Promusicae* [2008] ECR I-271 (para 62 to 68), Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (para 44), Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (para 42-44), and Case C-461/10 *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB*.

<sup>4</sup> EP resolution of 15 December 2010 on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, P7\_TA(2010)0483, para 5.

<sup>5</sup> Commission Communication ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’, COM(2010)573, p. 3.

5. Considers that ‘dignity, autonomy and self-development’<sup>1</sup> of human beings are deeply ingrained in this European model and recalls that privacy, data protection, together with freedom of expression have always been considered as core elements of this model as fundamental rights as well as political objectives; underlines that this must be taken into account when balancing against the right to protection of intellectual property and the right to conduct a business, rights also protected by the Charter;
6. Recalls the positions expressed by Parliament in its recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet<sup>2</sup> which are of relevance to the current debate, including ‘constant attention to the absolute protection and enhanced promotion of fundamental freedoms on the Internet’;
7. Points out to the case-law of the CJEU<sup>3</sup> according to which the requirements flowing from the protection of general principles recognised in the Union legal order, which include fundamental rights, are also binding on Member States when they implement Union rules, and according to which obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Union Treaties, which include the principle that all Union acts must respect fundamental rights;
8. Deeply regrets that no specific impact assessment on fundamental rights has been conducted on ACTA and does not consider that ‘there is no justification for an impact assessment on ACTA since it does not go beyond the EU *acquis* and no implementation measures are required’<sup>4</sup>, especially considering the view taken by the Commission in its 2010 Communication on the ‘Strategy for the effective implementation of the Charter’<sup>5</sup>;
9. Recalls that the Commission has decided to refer ACTA to the CJEU on the question of whether ACTA is compatible with Union Treaties, in particular the Charter<sup>6</sup>;

***The challenge of legal certainty and of appropriate balance***

10. Notes that ACTA includes provisions on fundamental rights and proportionality both general (e.g. Article 4<sup>7</sup> and Article 6<sup>8</sup>, Preamble) and specific (e.g. Articles 27(3) and (4)<sup>9</sup>); in this context, indicates, however, that Article 4 covers only disclosure of personal data by States and that the references included in Articles 27(3) and (4) should be considered as standard and minimal safeguards; points out that privacy and freedom of expression are not simple principles as referred to in ACTA, but are recognised as fundamental rights by *inter alia* the International Covenant on Civil and Political Rights,

<sup>1</sup> A Rouvroy and Y Poullet, ‘Self-determination as “the key” concept’ <http://www.cpdpconferences.org/Resources/Rouvroy-Poullet.pdf>.

<sup>2</sup> OJ C 117 E, 6.5.2010, p. 206.

<sup>3</sup> C-540/03 Parliament v Council (para 105); C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission (para 285).

<sup>4</sup> See Note ‘Civil Society Meeting ACTA’ [http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc\\_147497.pdf](http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc_147497.pdf).

<sup>5</sup> *ibid* n 1.

<sup>6</sup> Article 218(11) Treaty on the Functioning of the European Union.

<sup>7</sup> Privacy and Disclosure of Information.

<sup>8</sup> General Obligations with respect to Enforcement, more specifically, appropriate protection for the rights of all participants and the proportionality requirement.

<sup>9</sup> “in accordance with [the] laws and regulations [of Parties]”; [...] “consistent with that Party’s law, preserv[ing] fundamental principles such as freedom of expression, fair process, and privacy”.

the ECHR, the Charter, and the Universal Declaration of Human Rights<sup>1</sup>;

11. Considers, furthermore, that while it is understandable that an international agreement negotiated by Parties with different legal traditions will be drafted in more general terms that is the case for EU legislation<sup>2</sup>, taking into account the different means in which Parties deal with the balance between rights and interests and allowing for flexibility, it is also crucial that legal certainty and strong and detailed safeguards be embedded in ACTA;
12. Underlines that there is still significant legal uncertainty in the manner in which some key provisions of ACTA have been drafted (e.g. Article 11 (Information related to Infringements), Article 23 (criminal offences)<sup>3</sup>, Article 27 (scope of the enforcement measures in the digital environment), especially Article 27(3) (cooperation mechanisms), and Article 27(4)); warns against the potential to deliver 'fragmented approaches within the EU'<sup>4</sup> with risks of inadequate compliance with the right to protection of personal data;
13. Moreover, points out, that while several ACTA provisions (e.g. Article 27 (3) and (4)) are of non-mandatory nature and thus do not establish 'any legal obligation of the Parties which would be contrary to fundamental rights'<sup>5</sup>, the lack of specificity of the provisions, of sufficient limitations and safeguards casts a doubt on the necessary level of legal certainty required from ACTA (e.g. safeguards against misuse of personal data or to protect the right of defence<sup>6</sup>);
14. Takes the view that measures allowing the identification of a subscriber whose account was allegedly used for infringement would involve various forms of monitoring of individuals' use of the Internet; emphasises that the CJEU has ruled in unquestionable terms that monitoring of all electronic communications with no time limit and no precise scope such as filtering by internet service providers or collection of data by rights holders does not strike a fair balance between IPRs and other fundamental rights and freedoms, in particular the right to protection of their personal data and the freedom to receive or impart information or the freedom to conduct a business (Articles 8, 11 and 16 of the Charter)<sup>7</sup>;
15. Considers that when fundamental rights are at stake ambiguity must be avoided and at the least reduced to a minimum; moreover, and without assigning any wrongful intentions ("procès d'intention") to the ACTA implementation measures, takes the view that in the current state of affairs precaution should be exercised as regards ACTA in light of the serious and remaining question-marks surrounding the balance reached within the agreement between IPRs and other core fundamental rights and its level of legal certainty.

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<sup>1</sup> See also in this sense the Opinion of the EDPS of 24 April 2012 < [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24\\_ACTA\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf)> para 64.

<sup>2</sup> Commission Services Working Paper, 'Comments on the "Opinion of the European Academics on Anti-Counterfeiting Trade Agreement"' 27 April 2011.

<sup>3</sup> Various criticisms on the notion of 'commercial scale'.

<sup>4</sup> n 1 para 35.

<sup>5</sup> EP Legal Service Opinion of 8 December 2011.

<sup>6</sup> n 1 para 33.

<sup>7</sup> Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (para 47-49).

## SHORT JUSTIFICATION

Your Rapporteur believes that protecting intellectual rights in Europe is essential to maintain our continent's competitive advantage in a globalised, fast-moving and interconnected economy. Artists and innovators should be compensated for their genius. At the same time, those same artists, together with activists, political dissidents and citizens willing to engage in the public debate, should not in any way find their ability to communicate, create, protest and take action inhibited. Especially not today, when, around the world, we are experiencing, and we welcome, a vast, uncontrolled expansion of voices which are finally able to be heard. As the sole direct representative of 400 million European citizens, the European Parliament has the responsibility to safeguard that this expansion will remain unhindered.

The culture of file-sharing, enabled by the remarkable technological advance of the last decades, certainly poses direct challenges to the way we have dealt with compensation of artists and proper enforcement of intellectual rights for the past decades. Our task, as policymakers, is to overcome this challenge by striking an acceptable balance between the possibilities that technology unravels and the continuation of artistic creation, which is an emblematic token of Europe's place in the world.

We are therefore, at a defining moment of this debate, an exciting juncture of change. In this sense, your Rapporteur believes that ACTA comes at a very premature stage and a possible adoption of the Treaty would essentially freeze the possibility of having a public deliberation that is worthy of our democratic heritage. Against such a monumental challenge, what we absolutely need is that every expert we have, every affected organisation or institution we can spare, every citizen that desires to voice an opinion participates, from the beginning, in the creation of a modern social pact, a modern regime of protecting intellectual property rights. ACTA is not, and was not conceived to be, this. Instead, the Rapporteur believes that an adoption of ACTA would prematurely strangle the debate and tip the balance on one side, would allow for Member States to experiment on laws that could potentially harm fundamental freedoms and set precedents that could be undesirable for future societies. By highlighting these dangers, this opinion aims to enrich the discussion undertaken by the European Parliament and help its Members make the most informed and rounded decision on the fundamental issue of rejecting or giving our consent to ACTA.