



15.11.2010

## **MOTION FOR A RESOLUTION**

to wind up the debate on the statement by the Commission

pursuant to Rule 110(2) of the Rules of Procedure

on ACTA - preparing for the Consent Procedure

**Carl Schlyter, Eva Lichtenberger, ...**  
on behalf of the Greens/EFA Group

## **European Parliament resolution on ACTA - preparing for the Consent Procedure**

*The European Parliament,*

- having regard to the Consolidated Text of the Anti-Counterfeiting Trade Agreement of 17 November 2010
- having regard to the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union
- having regard to its resolution of 10 March 2010 on transparency and the state of play of ACTA negotiations
- having regard to its Written Declaration 0012/2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA)
- having regard to the Plenary Debate on 20 October 2010 on the Anti-Counterfeiting Trade Agreement
- having regard to the European Ombudsman's decision on complaint 90/2009/(JD)OV relating to access to ACTA documents
- having regard to the statements of the Swedish Minister of Justice on ACTA on 21 October 2010
- having regard to the opinions of the European Data Protection Supervisor (EDPS) on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement, and the letter from the Data Protection Working Party to the European Commission
- having regard to the the E-Commerce Directive 2000/31/EC, the Information Society Directive 2001/29/EC and the Commissions communication on A Digital Agenda for Europe
- having regard to the report Rethinking creative rights for the Internet age by the Committee on Culture, Science and Education of the Council of Europe (Doc. 12101, 7 January 2010)
- having regard to the European Parliament decision of 20 October 2010 on the revision of the framework agreement on relations between the European Parliament and the European Commission
- having regard to the Inter-Institutional Agreement on Better Law-Making between the European Parliament, the Council and the Commission (2003/C 321/01)
- having regard to the Council Conclusions on Policy Coherence for Development (PCD)
- having regard to Council Regulation (EC) No 1383/2003
- having regard to World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- having regard to the Doha Declaration on the TRIPS Agreement and Public Health, adopted on November 14, 2001 by WTO
- having regard to WTO Dispute DS409, European Union and a Member State - Seizure of Generic Drugs in Transit

- having regard to the WTO Dispute DS362, China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights
- having regard to interventions of WTO members on ACTA at the WTO TRIPS Council 26-27 October, 2010
- having regard to the WTO news item on the June 8-9 2010 TRIPS Council
- having regard to the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969
- having regard to Rule 110(2) of its Rules of Procedure,

A. whereas ACTA negotiators have stressed that effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally; whereas ACTA negotiators made public the largely finalized text on October 6 and thereafter, the Commission briefed the Parliament and its responsible Committee; whereas a final package deal solving the post-Tokyo reservations in the ACTA text at the end of the Tokyo round was accepted by the remaining parties and thereafter the text was made public on 17 November 2010;

B. whereas the Commission has repeatedly affirmed the importance of enforcing the protection of geographical indications (GIs); whereas it has been agreed by parties that ACTA will provide for the enforcement of GIs in the general sections, as well as in the civil, customs and digital sections;

C. whereas the Commission has referred to the decision of the Ombudsman to justify that ACTA is negotiated as a trade agreement and not as an enforcement treaty; whereas the Ombudsman appraised that "the conclusion of the ACTA may indeed make it necessary for the EU to propose and enact legislation. In that case, the ACTA would constitute the sole or the major consideration underpinning that legislation, and citizens would have a clear interest in being informed about the ACTA"; whereas some governments consider ACTA will require changes in national law that increase the powers of the police to act on its own initiative to enforce intellectual property rights;

D. whereas the Institutional Arrangements in ACTA confer the ACTA Committee with authority related to, inter alia, the implementation and operation of the Agreement, the amending of the Agreement, non-governmental participation and decisions regarding the Committee's rules and procedures; whereas Article 21 TEU guides the Union to seek the advancement of democracy;

E. whereas the Vienna Convention on the Law of Treaties establishes the importance of preparatory works for the purpose of treaty interpretation; whereas statements made by the Commission on elements of ACTA, in particular on "three strikes" measures, contradict the few preparatory texts that are publicly available;

F. whereas the Commission stated in its Communication on 19 October 2010 that the "Union's action must be above reproach when it comes to fundamental rights" and that the "Union must be exemplary in this respect"; whereas the Commission stated in Plenary on 20 October 2010 that ACTA "is not yet initialled" and that "it is the Commission's prerogative, as a negotiator, to determine the point at which negotiations are technically finalised and at which the agreement can be initialled";

G. whereas the Directive 2001/29/EC aims to provide for a harmonised legal framework on copyright and related rights; whereas Article 5 of the Directive presents an exhaustive enumeration

of possible exceptions and limitations and limits Member States' ability to provide new exceptions and limitations, an approach described by the Council of Europe as "a failure"; whereas ACTA does not address the possibility of expanding existing exceptions and limitations and may constrain discretion of national courts to flexibly interpret existing exceptions; whereas technological advances have multiplied and diversified the vectors for creation, production and exploitation of creative works and a fair balance of interests between right holders and users requires new approaches to more flexible access to these works through digital technologies; whereas the Commission is preparing a legislative proposal on orphan works to facilitate the digitisation and dissemination of culture works in Europe;

H. whereas ACTA parties have agreed that the coverage of patents in the civil enforcement section will be optional; whereas ACTA negotiators have asserted that "ACTA will not hinder the cross-border transit of legitimate generic medicines"; whereas Parliament in its resolution and written declaration has declared that any measure aimed at strengthening powers for cross-border inspection and seizure of goods should not affect global access to legitimate, affordable and safe medicines; whereas EU Council Regulation 1383/2003, the provisions of which are being discussed in a WTO dispute case, provides border enforcement measures for in-transit goods; whereas businesses, manufacturers of generic medicines and global health advocates have alerted against the inclusion of patents in ACTA and warned of potential detrimental effects on technological innovation, access to medicine and generic competition;

I. whereas the Parliament takes the view in its written declaration that internet service providers should not bear liability for the data they transmit or host through their services to an extent that would necessitate prior surveillance or filtering of such data; whereas EDPS' opinion on ACTA warns that internet service providers (ISPs) might insert "clauses in their customer's contracts allowing the monitoring of their data and the cutting of their subscriptions";

J. whereas Parliament in its 10 March Resolution was deeply concerned that no legal base was established before the start of the ACTA negotiations; whereas the Criminal Enforcement section of ACTA concerns provisions on criminal procedures, criminal liability, criminal offenses, criminal enforcement and penalties; whereas the Presidency of the Council has negotiated the criminal enforcement provisions in ACTA; whereas the definition of "commercial scale" in the criminal measures of ACTA is broader than WTO interpretation in the China enforcement case;

K. whereas ACTA parties have committed to upholding obligations under Article 7 of the TRIPS Agreement to contribute to the promotion of technological innovation; whereas fundamental EU policies related to interoperability rely on provisions in the *acquis communautaire* supporting reverse engineering;

L. whereas some important safeguards have been inserted in the last versions of ACTA in both the preamble and substantive provisions of the text; whereas ACTA provisions may still constrain the use of statutory exceptions under national laws, require changes in legislation to comply with increased standards for damages and other penalties or foreclose the creation of liability rule approaches to limit remedies for infringements; whereas Article 1.2 of the agreement states that "[E]ach Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice."; whereas there are no general provisions that allow a Party to ignore the specific obligations in the ACTA;

M. whereas the aim of the negotiating parties is to extend ACTA to developing and emerging country trade partners; whereas important trading partners have asserted at the WTO TRIPS Council that ACTA may conflict with the TRIPS Agreement and other WTO agreements, pose a risk to WTO law and process by operating outside the WTO legal framework, undermine the

balance of rights, obligations and flexibilities that were carefully negotiated in various WTO agreements, distort trade or create trade barriers, and undermine flexibilities built into TRIPS and the Doha Declaration on TRIPS and Public Health such as for public health and trade in generic medicines;

1. Commends the Commission on its efforts to improve transparency of ACTA negotiations and its commitment towards protecting the EU's innovation and competitiveness; recognises that a careful balance between the interests of right holders and of society at large is essential to ensure the EU's leading role in the knowledge economy; welcomes the constructive cooperation of the Commission and Parliament in the spirit of the revised framework agreement;

2. Supports the Commission's ambition to ensure the full enforcement of the *acquis communautaire* on GIs but regrets that significant improvements regarding the enforcement of GIs are absent; urges the Commission to work actively towards ensuring the prosperity of European products in the world economy through effective enforcement of GIs in ACTA and their equal treatment to other IP rights;

3. Takes note of the Ombudsman's decision and is of the opinion that citizens have a clear interest in being informed and in monitoring if the public interest is being served, particularly if ACTA necessitates legislation; recognises the public criticism of the secrecy of the negotiations as a clear signal of the political unsustainability of the negotiation process adopted; reminds the Commission of its treaty obligation under TFEU art 15 "to promote good governance and ensure the participation of civil society" and to conduct its "work as openly as possible"; instructs the Commission to provide for an opportunity to receive and duly consider input from EU citizens on the agreement text before initialling it;

4. Takes the view that the ACTA Committee should operate in an open, inclusive and transparent manner; instructs the Commission before the initialling of the Agreement to provide recommendations for the democratic governance of the ACTA Committee, particularly with respect to stakeholder participation, and to chart the specific procedures to be followed for amending the Agreement, including processes that assure transparency, allow for public input in line with the EU's obligations under Article 15 of TFEU and specify the role of the Parliament;

5. Calls on the Commission to make publicly available all relevant preparatory work, for the purpose of permitting an informed political decision by the Parliament on the meaning of the texts of the Agreement;

6. Insists that the Commission does not initial ACTA before it has concluded and made public an assessment of the impact of ACTA on fundamental rights in accordance with its Communication of 19 October 2010;

7. Asks the Commission to provide evidence in writing to the responsible Committees, in due time before initialling the Agreement, that ACTA will not constrain the harmonisation of exceptions and limitations for copyright and related rights in the EU; will not constrain the possibility of future expansion of the exceptions and limitations beyond those listed in Directive 2001/29/EC; will not foreclose future policy options and judicial actions to expand access to creative works given technological advances through the use of exceptions; will not limit legislative options being considered by the Commission on orphan works or prevent Member States from introducing legislation to expand access to orphaned copyrighted works, that limit the remedies of infringing such works;

8. Observes that patents undoubtedly remain within the scope of several sections of ACTA; notes that applying civil enforcement measures in ACTA to patents could seriously hamper access to legal, affordable, life-saving drugs and act as a vehicle to delay the market entry of generic medicines and distort competition; asserts that marked increases in damages and severe penalties for possible IP violations will increase legal uncertainty and deter manufacturers and third parties involved in the production, sale or distribution of generic medicines such as manufacturers of active pharmaceutical ingredients, humanitarian organisations, funders of health programs and drug regulatory authorities, particularly if these provisions are applied to in-transit goods;

9. Notes that patent challenges are often commercial disputes and is concerned that applying ACTA civil enforcement provisions to patents may increase investment risk, market uncertainty and threaten technological innovation, particularly in sectors where infringement is difficult to determine, slow down the diffusion of green technology essential to global efforts to combat climate change, threaten effective knowledge sharing, development of the economy of the commons and the vitality of the public domain, and shift the balance against the public interest with respect to enforcement of patents on living things, indigenous products and traditional medicines; asks the Commission to address, before the initialling of the Agreement, the far ranging concerns listed in this motion with regards to the option of applying civil provisions to patents and subsequently present a report to Parliament;

10. Instructs the Commission to present to Parliament, before initialling the Agreement, a legal analysis of the meaning, legality and enforceability of ACTA's desired policies regarding cooperation between service providers and right holders, particularly in reference to how cooperative efforts within the business community will not limit fundamental rights of citizens, including the right to privacy, the right to freedom of expression and the right to due process; reminds the Commission that it is precluded by the 2003 Inter-Institutional Agreement from supporting self- and co-regulatory mechanisms where fundamental rights, such as the right to freedom of expression, are at stake; asks the Commission to assess whether over all, ACTA may change the current balance in EU law between legal obligations of the internet service providers to protect personal data of end users and to disclose such data to intellectual property right holders or administrative and judicial authorities;

11. Reiterates its deep concern of 10 March over the lack of established legal base; directs the Commission to clarify the division of competence between the Council and Commission regarding the Criminal Enforcement section of ACTA, including in relation to its initialling; insists that the Parliament be presented with evidence that the legal base for negotiating ACTA is fully compliant with the Lisbon Treaty before the initialling of the Agreement; instructs the Council and Commission to provide a legal assessment before initialling of the agreement of whether the ACTA definition of "commercial scale" is consistent with the WTO China ruling, is fully in line with the EU principles of proportionality and subsidiarity, and will not limit the use by Member States of national exceptions in relation to criminal enforcement measures;

12. Asks the Commission to explicitly confirm, in due time before the initialling of the Agreement, that ACTA's provisions leave unaffected the provisions in the *acquis communautaire* such as those contained in the Software Directive 91/250/EEC and the Information Society Directive 2001/29/EC and Member State implementations thereof that permit in some cases reverse engineering of computer programs and circumvention of TPMs in order to enable interoperability, thereby promoting competition and innovation;"

13. Welcomes those improvements in the ACTA draft text that provide more safeguards for privacy, public health and some of the protections under the TRIPS Agreement; directs the Commission to assess whether the safeguard provisions in ACTA are enforceable equally in

relation to the enforcement provisions; asks the Commission to provide evidence that ACTA will not prevent Member States or the Union from availing of flexibilities under the TRIPS Agreement to guarantee a full range of future policy options; asks the Commission to provide a legal assessment of whether ACTA will in fact be a binding agreement and whether its Article 1.2 provides for a general flexibility for any element that might contradict ACTA in national law; asks the Commission to present the mechanisms enabling flexibility for Parties to adopt legitimate exceptions to the obligations of the Agreement, available within the text of the Agreement or in the procedures of the ACTA Committee;

14. Takes the opinion that the Commission should advocate that procedures and terms of accession to ACTA are appropriately flexible and take into account the development levels, needs and objectives of acceding countries, in line with the Council Conclusions on Policy Coherence for Development; asks the Commission to inform the Parliament of the potential impact of ACTA on EU foreign and development policy with special reference to its role in the WTO and World Intellectual Property Organization and the TRIPS plus provisions in ACTA;

15. Repeats the call of March 10 on the Commission to conduct an impact assessment of the implementation of ACTA with regard to fundamental rights and data protection, ongoing EU efforts to harmonise IPR enforcement measures, and e-commerce, prior to initialling the Agreement; additionally requests an assessment of the potential costs of directing enforcement resources to acts of civil infringement through the international framework of ACTA, in the light of the agreement's primary objective to combat the proliferation of counterfeiting and piracy;

16. Reminds the Commission and the Council that the Parliament's consent to ACTA will be dependent on full and equal cooperation with the Parliament and the complete discharge of this resolution, particularly in regards to the initialling of the Agreement, and acting with due consideration of the Parliament's opinions;

17. Instructs its President to forward this resolution to the Commission, the Council and the governments and parliaments of states party to the ACTA negotiations.