



The Anti-Counterfeiting Trade Agreement (ACTA)

*Fact sheet **

Updated November 2008

What is ACTA about ?

Negotiations on a new Anti-Counterfeiting Trade Agreement (ACTA) were launched in 2007. The negotiations are still ongoing. There is, at this stage, no agreed text.

The goal of the ACTA negotiations is to provide an **international framework** that improves the **enforcement** of intellectual property right (IPR) laws. It does not purport to create new intellectual property rights, but to create improved international standards as to how to act against **large-scale infringements** of IPR.

This goal is pursued through three primary components of ACTA:

- (i) international cooperation;
- (ii) enforcement practices; and
- (iii) legal framework for enforcement of IPRs.

Trade in counterfeit products : a threat for the EU

The competitiveness of the EU economy depends on large part of economic activities that need IPR protection, *i.e.* high quality products and brands (trademarks, geographical indications), innovative industries (patents) or entertainment (copyright). Large scale abuse of these rights, by counterfeiters who free-ride on the innovative and quality-enhancing efforts undertaken by the EU industry has a devastating impact on growth and employment.

This proliferation of IPR infringements is not only a real economic problem worldwide, but it also has serious social consequences. Today, we face a number of new challenges: the increase of dangerous counterfeit goods (pharmaceuticals, food and drink, cosmetics or toys, car parts) which impact on consumer protection and public health; the speed and ease of digital reproduction; the growing importance of the Internet as a means of distribution; and the sophistication and resources of international counterfeiters. The gangs behind this traffic are often the same that do drug trafficking or money laundering. These activities are also responsible for considerable loss of qualified jobs and tax revenue. All these factors have made the problem more pervasive and harder to tackle.

* This fact sheet purports to explain the objectives of the ACTA negotiations. It does not in any way interpret or prejudice on the provisions of a future agreement.

What is ACTA NOT about

ACTA is about tackling large scale, criminal activity. It is **not about limiting civil liberties or harassing consumers**.

ACTA will not go further than the current EU regime for enforcement of IPRs – which fully respects fundamental rights and freedoms and civil liberties, such as the protection of personal data: This Community *acquis*¹ on IPR enforcement is without prejudice to national or Community legal provisions in other areas, in particular in the area of personal data protection, as regulated by the Data Protection Directive² and the Directive on privacy and electronic communications³.

ACTA is not designed to negatively affect consumers: the EU legislation (2003 Customs Regulation) has a *de minimis* clause that exempts travellers from checks if the infringing goods are not part of large scale traffic. EU customs, frequently confronted with traffics of drugs, weapons or people, do neither have the time nor the legal basis to look for a couple of pirated songs on an i-Pod music player or laptop computer, and there is no intention to change this.

Who is negotiating ACTA

The current **negotiating parties** of ACTA are a mix of developed and emerging economies : Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.

The ultimate objective is that **large emerging economies**, where IPR enforcement could be improved, such as China or Russia, will sign up to the global pact. ACTA is not intended to isolate these countries or point the finger at their enforcement efforts. In light of the growing international consensus on IPR enforcement, the Commission is confident that more countries will join ACTA when they feel the time is right.

The **EU** has a **mandate** to negotiate ACTA since the 14 April 2008. The Commission is negotiating in coordination with the Council and Member States. The European Parliament will continue to be consulted and informed. Moreover, consultations also take place with industry and other interested stakeholders such as consumers, NGOs Internet service providers, etc.).

¹ Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against counterfeit. Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market.

² Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,.

³ Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

What will ACTA contain ?

ACTA is **still under negotiation**, so it is too early to say what provisions ACTA will ultimately contain. From an EU perspective though, it is clear that the 3 primary components of ACTA should be filled in as follows :

As regards **international cooperation**, the EU's basic philosophy is that ACTA should, in the first place, be a framework in which parties can help each other and cooperate in IPR enforcement, including sharing of information and cooperation between law enforcement authorities, including customs and other relevant agencies. This will build on coordinated anti-counterfeiting work the EU is already doing with large partners like the US and Japan. These standards would then be spread to other countries if they wished to sign up to ACTA.

The EU considers that **transitional mechanisms**, technical assistance and capacity building measures must be included in ACTA to help emerging economies to join the pact in the future. The European Union is in any event continuing to work with countries like China, Russia and others to stop widespread and systematic piracy of European companies' intellectual assets.

ACTA will **strengthen and align enforcement practices** amongst the parties. It is necessary to establish enforcement practices that promote strong intellectual property protection in coordination with right holders and trading partners. Such "**best practices**" would support the application of the relevant legal tools, as outlined by the Legal Framework. Areas for possible provisions include:

- Formal or informal public/private advisory groups;
- Fostering of specialized intellectual property expertise within law enforcement structures to ensure effective handling of IPR cases;
- Measures for raising consumer public awareness about the importance of IPR protection and the detrimental effects of IPR infringements.

The EU is consistently pushing countries like China to enforce anti-counterfeiting legislation and to make the legal penalties for intellectual property theft more effective. Closer coordination on international benchmarks can reinforce this pressure;

ACTA will also create a **new international benchmark for legal frameworks on IPR enforcement, whilst fully respecting civil liberties and the rights of consumers, as is the case for the Community acquis**. It is critical to have a strong and modern legal framework –as is the case in the EU- so that law enforcement agencies, the judiciary, and private citizens have the most up-to-date tools necessary to effectively bring counterfeiters to justice. Areas for possible provisions include:

- **Border measures** : cf. mechanisms available in EU Customs Regulation of 2003, such as *ex officio* seizure of infringing goods at the borders, controls for imports, exports and in transit goods, increased cooperation with right-holders, etc.;

- **Civil enforcement** : e.g. the mechanisms available in EU Enforcement Directive of 2004, such as the availability of preliminary measures, preservation of evidence, damages and legal fees and costs;
- **Criminal enforcement** : It would be key to the effectiveness of ACTA as an enforcement instrument for it to contain clear standards for deterrent and efficient criminal action against counterfeit. There is no EU legislation in this area yet. The Commission has proposed a Directive harmonising the treatment of criminal IP infringements at EU level in 2006, but it has not been adopted so far. This means that The EU Presidency, on behalf of its Member States will coordinate this area of the negotiation;
- **Internet distribution and information technology** - e.g. mechanisms available in EU E-commerce Directive of 2000, such as a definition of the responsibility of internet service providers regarding IP infringing content.

State of play of the negotiations

Negotiations on ACTA were launched in 2007, but only started in spring 2008, when the Council mandated the EU to participate in the negotiations. The negotiations are still ongoing. This means that there is **no agreement yet**, and that, at the time of writing this fact sheet, there is not even a draft text on which negotiating parties converge.

A number of "texts", wrongly presented as draft ACTA agreements have been circulated on the web. At a preliminary stage of the discussions about the idea of a future ACTA, some of the negotiating parties have submitted *concept papers*, to present their initial views of the project to other partners. Some of these concept papers have been circulated on the net or commented in the press and presented as "draft ACTA texts or negotiating guidelines", which they are not.

So far, three rounds of negotiations have taken place : In early June in Geneva, at the end of July in Washington and on the 2nd week of October in Tokyo. At these meetings, the negotiating parties have discussed border enforcement and civil remedies for infringements of intellectual property rights, including the availability of preliminary measures, preservation of evidence, damages, and legal fees and costs, as well as penal enforcement for infringements on a commercial scale.

A timeframe for the conclusion of ACTA has not been determined. Timing will not take precedence over the quality and the balance of the final agreement. The next round of negotiations will be in Paris in mid-December. Negotiations should continue in 2009.

The negotiating process

It is alleged that the negotiations are undertaken under a veil of secrecy. This is not correct. For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion.

However, there has never been any intention to hide the fact that negotiations took place, or to conceal the ultimate objectives of the negotiations, the positions taken in

the negotiations or even details on when and where these negotiations are taking place.

The EU and other partners (US, Japan, Canada, etc.) announced their intention to start negotiations of ACTA on 23 October 2007, in well publicised press releases. Since then we have talked about ACTA on dozens of occasions, including at the European Parliament (INTA committee meetings), and in numerous well attended seminars. Commission organised a stakeholders' consultation meeting on 23 June in Brussels, open to all – industry and citizens and attended by more than 100 participants. US, Australia, Canada, New Zealand and other ACTA partners did the same. Civil society input will continue to be taken into consideration during the negotiations and further stakeholder meetings will be organised.

Press releases have also been issued after each of the negotiating rounds. Round 1; Round 2; Round 3.

Recent data on counterfeit trade

- The OECD estimates that infringements of intellectual property traded internationally (excluding domestic production and consumption) account for more than €150 billion per year (higher than the GDP of more than 150 countries). According to the OECD counterfeiting and piracy undermine innovation, which is key to economic growth.
- 79 million articles were seized at EU borders in 2007, in over 43.000 customs actions.
- There was growth in seizures of fakes dangerous to health and safety since last year: e.g. cosmetics and personal care products (+264%), toys (+98%), foodstuff (+62%), computer equipment (+62%) and medicines (+51%) show a remarkable percentage increase. These sectors correspond to 23% of the articles seized in 2007.
- Fake medicines are reckoned to account for almost 10% of world trade in medicines. Most of these fake drugs are headed for the world's poorest countries.

Annex : Q&A on ACTA

