



CIVIL SOCIETY MEETING

ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA)

Date: 25 March 2011

Time: 10:30 – 12:30

Location: Centre Albert Borschette, room AB-3D, 36, rue Froissart, 1040 Brussels

Key-note Speakers

Mr Pedro Velasco Martins, Deputy Head of Unit, Public Procurement and Intellectual Property Unit, DG Trade, European Commission

Mr Benoît Lory, Policy Officer, Legal and Policy Affairs, Enforcement of Intellectual Property Rights Unit, DG Markt, European Commission

Moderator

Ms Ramona Samson, Civil Society Coordinator, DG Trade, European Commission

Agenda

1. Update on the Anti-Counterfeiting Trade Agreement (ACTA)
2. Open discussion

Panel Presentations

DG TRADE (Pedro Velasco Martins) recalled the last developments preceding the conclusion of the ACTA agreement. Negotiations on the substance of the text came to an end mid-November 2010 after agreement was reached on the few outstanding issues that could not be agreed upon during the Tokyo round. The definitive text was adopted at the end of the last meeting of « legal scrubbing » in Sydney, and has been made publicly available since 6 December 2010. This text is now going through domestic procedures of approval in each Party. At the EU level, the agreement will have to be approved and signed by the Council and the European Parliament will have to vote its « consent ». The Parliament's intervention in such a procedure results from a new rule introduced by the Lisbon Treaty, which has so far only been applied for the EU-Korea Free Trade Agreement (FTA).

The Commission considers it to be a balanced and positive agreement improving the international standards in matters of intellectual property rights (IPR) enforcement. This agreement is expected to play a key-role at a time where the economic crisis makes the safeguard of the EU competitiveness even more critical. It requires no modification of EU legislation, since the IPR enforcement standards in the EU *acquis* are higher than the standards agreed in ACTA. No implementation measures are hence needed at the EU level.

DG TRADE (Pedro Velasco Martins) explained the main objectives pursued by the EU in ACTA. The improvement of international standards as regards the fight against widespread and systematic infringements to IPR is a fundamental issue, which the EU has raised at several occasions in multilateral fora. The successful conclusion of ACTA shows that the adoption of a common set of

rules between interested parties is possible.

One of the major EU successes resides in the broad coverage of IPR. Even though some provisions are optional, the Commission is convinced that the ACTA commitments are considerably better than a *status quo*, in particular as regards geographical indications (GI). Another innovative element of ACTA is the « Digital environment » chapter, which sets an initial frame to fight against the fast growing use of the Internet as a tool for massive IPR infringements. ACTA is often criticised for its « Criminal enforcement » chapter, which is alleged to require criminal law harmonisation at the EU level. This allegation is unfounded. This chapter was negotiated by the rotating EU Presidency on behalf of the Member States, and on the basis of negotiating positions unanimously agreed. National authorities examined in detail the negotiated provisions to ensure compliance with their national laws. Lastly, as regards customs enforcement, an important achievement is the agreement on controls for exports.

DG TRADE (Pedro Velasco Martins) tackled the three main criticisms raised against ACTA. Firstly, as repeatedly mentioned by Commissioner De Gucht, the Commission takes fundamental rights seriously and answered to every concern on this issue. ACTA will have no negative impact on fundamental rights, since it is not directly applicable and it does not go further than the EU enforcement rules, which have existed since 2004 without raising any concern of this kind. Secondly, the Commission fully understands the concerns of access to medicines in developing countries and has made sure that, indeed, ACTA does not affect it: i) ACTA contains a reference to Doha Declaration on TRIPs and Public Health and article 7 & 8 TRIPs, which refer, *inter alia*, to the safeguard of public health; ii) patents are not covered by border controls, including transit and lastly; iii) the final version of ACTA leaves it optional for signatories to apply the civil remedies chapter to patents (« may »). In other words, this means *de facto* that ACTA would not oblige its signatories to apply any of its provisions on patents. Finally, many rumours have circulated on « three strikes » measures and other measures restricting the access to internet. It is important to clarify that no such rules were ever proposed by any of the parties involved in the ACTA negotiations. On the other hand, ACTA introduces some common rules as regards internet, which are still below the level of the EU legislation while striking a balance between the rights of internet users (freedom of expression, right to privacy) and their obligations (respect the same law that applies to them in the physical world).

Discussion Highlights / Questions and Replies

The **Society of Audiovisual Authors (Cécile Despringre)** asked for further details about the mixed nature of the agreement, and particularly for clarifications about the allocation of competences between the EU and its Member States as regards the « Criminal enforcement » chapter.

The **Vrijsschrift Foundation (Ante Wessels)** inquired whether the Commission did not exceed its mandate by negotiating provisions on criminal sanctions, whereas in his view such measures may not be considered as essential for the enforcement of IPR.

In reply to these interventions, **DG TRADE (Pedro Velasco Martins)** pointed out the evolution of the EU's competence in criminal law matters that occurred with the entry into force of the Lisbon Treaty. Given the novelty and the lack of precedent with these new rules, it is difficult to give a definitive answer at this stage. Nevertheless, the Commission will soon transmit its position on the issue, which will then be open for debate in the Parliament.

DG TRADE (Pedro Velasco Martins) also recalled that, pursuant to the negotiating guidelines, it was not the Commission but the rotating EU Presidency that negotiated the penal enforcement provisions of ACTA, on behalf of the EU Member States and on the basis of positions unanimously

supported. There is not yet an EU *acquis* in terms of penal sanctions for IPR infringements, but instead 27 national laws and this will not be modified by ACTA.

The **Greens/EFA** requested precisions on the moment when the Commission informed the Parliament of its intention to initiate the negotiations, pursuant to its new obligation under the Lisbon Treaty. They also asked who (Commission and/or EU Presidency) initialed what chapters of ACTA.

Concerning the initialling question, **DG TRADE (Pedro Velasco Martins)** offered to follow-up in writing. It was nevertheless made clear that the Commission had discussed the issue of the « initialling » with the Parliament on different occasions, including during the discussions of the latest ACTA Resolution. It was also noted that initialling an agreement is a prerogative of the negotiator, which signals the conclusion of the negotiating process but does not legally bind the EU. This commitment comes at a later stage, with the signature by the Council.

The **Panaoptikon Foundation (Katarzyna Szymielewicz)** sought the Commission's reaction to an Opinion paper recently released by a group of academics.

DG TRADE (Pedro Velasco Martins) confirmed being aware of this document. Even though the Commission was not in a position to comment it thoroughly in the framework of this meeting, a couple of initial thoughts were shared with the audience. To start with, a positive evolution in the type of criticisms was noticed, moving from arguments on fundamental rights to issues of legal interpretation. However, many criticisms are related to the non-repetition of existing rules from the TRIPS, the EU legislation, constitutional principles, etc, which remain applicable, since the ACTA Treaty is not rewriting the law but is inserted into an existing legal framework. Another type of criticism is based on the optional character of some provisions (« may » provisions), which is paradoxical given the frequently repeated requests for ACTA to be a flexible instrument, taking account of the differences between the parties. Several of these optional provisions indicated precisely that there was not a consensus among the parties to make them a legal requirement.

The **ACP civil society forum** asked whether the EU will propose consultations with the ACP countries to discuss the impact of ACTA upon them.

DG TRADE (Pedro Velasco Martins) replied that he was not familiar with the specific mechanisms of consultation foreseen between the EU and ACP partners but that the Commission is open to address any requests for clarification regarding ACTA. He nevertheless stressed that ACTA should not have an impact upon countries not-party to the agreement.

The **Trans-Atlantic Consumers Dialogue (David Hammerstein)** asked for Commission's comments on alleged statements by US officials that ACTA was not a binding international agreement. They also expressed their concern about the absence of impact assessment, in particular as regards the potential impact on fundamental rights.

DG TRADE (Pedro Velasco Martins) did not comment statements made by US officials but confirmed that ACTA is an international treaty, fully binding to its parties. This is without prejudice to several clauses within ACTA that were merely optional (e.g. the above mentioned « may » provisions). Regarding the assessment of ACTA's impact, he recalled the line expressed by Commissioner De Gucht at the European Parliament, according to whom 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.

The **Trans-Atlantic Consumers Dialogue (David Hammerstein)** inquired whether the ACTA agreement would not prevent the adoption of future legislation introducing new exceptions and derogations to the current IPR system.

The **Panaoptikon Foundation (Katarzyna Szymielewicz)** sought clarification on the impact of the agreement on existing exceptions.

La Quadrature du Net (Félix Tréguer) expressed concerns about the impact of enforcement practices included in ACTA on general principles of law (e.g. due process) and on the liability exemption regime established by the E-commerce Directive.

DG TRADE (Pedro Velasco Martins) and **DG MARKT (Benoît Lory)** recalled that ACTA is neutral on substantive protection of IPR and only addresses enforcement matters. Exceptions and derogations consist in lawful uses and not infringements to IPR. They can hence not be affected by the agreement. Moreover, the language contained in ACTA already safeguards existing exceptions and ensures the necessary flexibility.

The **Trans-Atlantic Consumers Dialogue (David Hammerstein)** asked whether the concept of « commercial scale » present in ACTA (including at least commercial activities carried out for direct or indirect economic or commercial advantage) does not contradict the Parliament's definition, which includes the requirement of a « criminal intent ».

DG TRADE (Pedro Velasco Martins) noted that the Parliament's definition mentioned refers to an Opinion of the European Parliament on a legislation which has not been adopted, and is hence not legally binding. Moreover, the text in ACTA is the result of a negotiation by the Member States, which adopted it unanimously and ensured the compatibility with their national legislations. As far as the Commission is aware, there are no issues of incompatibility between national legislations and the definition agreed in ACTA.

The **Vrijschrift Foundation (Ante Wessels)** expressed its views on the inclusion of patents into the scope of the agreement. According to the organisation, the U.S. does not intend to apply the ACTA provisions to patent infringements, which results in disequilibrium with the EU's commitments in this respect.

DG TRADE (Pedro Velasco Martins) explained the importance of pushing forward the application of enforcement rules to patents, as it is a key-element for the EU competitiveness which is already part of the EU *acquis*.

The **Sustainable Europe Research Institute (Thomas Ruddy)** asked how the Commission envisages future relationship between the EU and China after ACTA.

DG TRADE (Pedro Velasco Martins) confirmed the interest of having China involved in ACTA, as it is still the major source of counterfeit goods.

Vrijschrift Foundation (Ante Wessels) inquired whether China was invited to join the negotiations.

DG TRADE (Pedro Velasco Martins) answered that the project was discussed with several countries at a preparatory stage, but only some of them went on to the negotiations stage. The agreement is now open for other parties to join.

DG MARKT (Benoît Lory) concluded the meeting by highlighting the ongoing initiatives of the Commission in the area of IPR enforcement, and in particular the ongoing public consultation on the revised Strategy for the enforcement of IPR in third countries.