

**Overview of the European Commission's referral of ACTA
to the European Court of Justice**

On 10 May, the European Commission submitted its request for an opinion on ACTA to the European Court of Justice. The request, which is non-public in accordance with the Court's procedures, contains the question for the Court and a detailed legal analysis by the Commission. This document summarises the position taken by the Commission.

Background of the request

The Commission supports ACTA since it considers that the effective enforcement of intellectual property rights is critical for sustaining growth across all industries and an economic basis for the exercise of fundamental rights important for a living democratic society, including freedom of the arts and sciences, right to education and cultural diversity. Given that people across Europe have nevertheless expressed their concern that ACTA could potentially harm their fundamental rights, the Commission decided to obtain an independent clarification of this issue by submitting the following question to the Court: "Is the envisaged Anti-Counterfeiting Trade Agreement (ACTA) compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union?"

Content of the request

In its request, the Commission explains why it believes that ACTA is compatible with the Treaties and in particular the Charter of Fundamental Rights.

The Commission starts by addressing the argument that the alleged "vagueness" of certain ACTA provisions does not sufficiently guard against implementations which could be inconsistent with EU fundamental rights. The Commission explains that international agreements, such as ACTA, necessarily contain broader provisions than domestic law. ACTA sets out international obligations to be implemented by the ACTA parties and will not be

directly applied by the courts in the Union. ACTA provides flexibility, for example through voluntary ("may") provisions, sufficiently broad language and frequent clauses requiring an implementation only "in accordance with [the] law and regulations" of the ACTA parties. Wherever ACTA leaves the Union such flexibility, the Union must choose the implementation which is compatible with the Treaties and in particular the Charter. In the view of the Commission, the Union can achieve this on the basis of the existing Union legislation.

In the following sections, the Commission sets out that ACTA contains numerous detailed safeguards which further ensure that the Union is not obliged to act in a way that would be incompatible with the Treaties or the Charter. Some of these safeguards apply across the board to all procedures for the enforcement of intellectual property rights. Thus, Article 6 ACTA requires that enforcement procedures "*be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse*", "*be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected*" and "*take into account the need for proportionality*". Other safeguards specifically address those enforcement procedures which may be particularly sensitive from a human rights perspective, in particular in the field of internet enforcement. Article 27.4 ACTA, for example, provides that any rules on the disclosure of subscribers' data by online service providers – which ACTA parties are explicitly not obliged to introduce – "*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*". Furthermore, where ACTA does not contain explicit safeguards in its text, Article 1 ACTA incorporates by reference those already contained in the WTO TRIPS Agreement. In its request, the Commission examines the most relevant ACTA provisions and the related safeguards in detail.

Against this background, the Commission concludes that ACTA respects the principle of proportionality and strikes a fair balance between the right to property of the right holders and the fundamental rights of others, such as the protection of personal data, the right to respect for private life or the right to be heard. In the view of the Commission, ACTA is

therefore compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union.

Next steps

In accordance with its rules of procedure, the Court will invite the Council, the European Parliament and the Member States to submit written observations on the Commission's request. Following an oral hearing, the Court will deliver its opinion.