



23.11.2010

B7-0617/2010 }
B7-0619/2010 }
B7-0620/2010 }
B7-0621/2010 } RC1

JOINT MOTION FOR A RESOLUTION

pursuant to Rule 110(4) of the Rules of Procedure

replacing the motions by the following groups:

Verts/ALE (B7-0617/2010)

ALDE (B7-0619/2010)

S&D (B7-0620/2010)

GUE/NGL (B7-0621/2010)

on ACTA

Kader Arif, Véronique De Keyser

on behalf of the S&D Group

Niccolò Rinaldi, Marietje Schaake, Alexander Alvaro, Marielle De Sarnez,

Renate Weber, Metin Kazak

on behalf of the ALDE Group

Carl Schlyter, Eva Lichtenberger, Sandrine Béliet

on behalf of the Verts/ALE Group

Helmut Scholz, Rui Tavares, Miloslav Ransdorf, Marisa Matias

on behalf of the GUE/NGL Group

European Parliament resolution on ACTA

The European Parliament,

- having regard to Articles 207 and 218 of the Treaty on the Functioning of the European Union,
- having regard to the Charter of Fundamental Rights of the European Union, and in particular Article 8 thereof,
- having regard to the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union,
- having regard to the conclusion, on 2 October 2010, of the last round of negotiations on the Anti-Counterfeiting Trade Agreement (ACTA),
- having regard to the public release of the final ACTA text on 15 November 2010,
- having regard to its resolution of 18 December 2008 on the impact of counterfeiting on international trade (2008/2133(INI))¹,
- having regard to its resolution of 10 March 2010 on transparency and the state of play of the ACTA negotiations²,
- 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 debates of 8 September and 20 October 2010 on ACTA,
- having regard to its decision of 20 October 2010 on the revision of the framework agreement on relations between the European Parliament and the Commission,
- having regard to the Interinstitutional Agreement on Better Lawmaking concluded between the European Parliament, the Council and the Commission (2003/C 321/01),
- having regard to the European Ombudsman's decision on complaint 90/2009/(JD)OV relating to access to ACTA documents,
- having regard to the opinions of the European Data Protection Supervisor (EDPS) on the current negotiation by the European Union of an Anti-Counterfeiting Trade Agreement, and to the letter from the Data Protection Working Party to the Commission,
- having regard to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce)³,
- having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the

¹ Texts adopted, P6_TA(2008)0634.

² Texts adopted, P7_TA(2010)0058.

³ OJ L 178, 17.7.2000, p. 1.

electronic communications sector⁴, as last amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009⁵,

- having regard to the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),
- having regard to the Council Conclusions on Policy Coherence for Development (PCD),
- having regard to WTO Dispute DS409, European Union and a Member State - Seizure of Generic Drugs in Transit,
- having regard to the WTO press release on the TRIPS Council meeting of 8-9 June 2010,
- having regard to Rule 110(4) of its Rules of Procedure,

Lisbon Treaty

- A. whereas the EU has exclusive competence in the area of the common commercial policy (CCP); whereas, as a result of the entry into force of the Lisbon Treaty, Parliament will be required to give its consent to the ACTA text prior to its entry into force in the EU,

General remarks

- B. whereas the fight against counterfeiting at global level represents a key element in the EU's political strategy to guarantee a level playing field for EU producers and jobs for EU citizens,
- C. whereas the 11th and final round of the negotiations on ACTA was concluded in Tokyo, Japan, on 2 October 2010; whereas a technical meeting to finalise the legal wording will take place in Sydney (30 November-3 December (or, if necessary, 4 December) 2010),
- D. whereas ACTA concerns to crucial issues, such as respect for fundamental rights, privacy and data protection, respect for the important role of a free Internet, and safeguarding of the neutrality of service providers and of access to medicines,
- E. whereas ACTA is being presented to the European Parliament by the Commission as a tool to improve the level of effectiveness of those standards which will benefit EU exports and protect rights holders when they operate in the global market, as they currently suffer systematic and widespread infringements of their copyrights, trademarks, patents, designs and geographical indications,
- F. whereas 11 countries (the EU being counted as a country), and among them only two developing countries (Morocco and Mexico), took part in the negotiations,
- G. whereas the aim of the negotiating parties is to extend ACTA to any party willing to join, including developing and emerging countries,

⁴ OJ L 201, 31.7.2002, p. 37.

⁵ OJ L 337, 18.12.2009, p. 11.

- H. whereas the ACTA negotiators made public the consolidated text on 6 October 2010, and the Commission then briefed Parliament; whereas the Commission publicly released the final ACTA text on 15 November 2010,
- I. whereas, after strong calls from the European Parliament, the level of transparency of the negotiations has improved,
- J. whereas clarification of the legal basis for ACTA is needed,
- K. whereas the Commission has referred to the decision by the Ombudsman in order to justify ACTA being negotiated as a trade agreement and not as an enforcement treaty; whereas the Ombudsman stated 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',
- L. whereas the Commission, as guardian of the Treaties, is obliged to uphold the *acquis communautaire*; whereas this implies that it cannot change the *acquis* when negotiating international agreements affecting legislation in the EU,
- M. whereas, the Commission repeatedly stated in plenary debates, ACTA addresses only enforcement measures and does not include provisions modifying substantive IPR law within the EU,
- N. whereas Directive 2001/29/EC provides for a legal framework on copyright and related rights and a system for their protection; whereas Article 5 of the directive presents an exhaustive list of exceptions and limitations, thereby preventing Member States from introducing new exceptions and limitations; whereas ACTA seeks to further extend the level of protection for rights holders by providing for more extensive copyright enforcement powers, but does not address the possibility of expanding the scope of existing exceptions and limitations and may constrain the discretion of national courts to interpret existing exceptions flexibly; whereas technological advances have multiplied and diversified the vectors for creation, production and exploitation of creative works and striking a fair balance of interests between rights holders and users requires new approaches to liberalising access to such works through digital technologies; whereas the Commission is preparing a legislative proposal on orphan works to facilitate the digitisation and dissemination of creative works in Europe,
- O. whereas the ACTA parties have undertaken to meet 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* which in some cases permit reverse engineering,

Patents

- P. whereas, at the 20 October 2010 plenary sitting, the Trade Commissioner invited Parliament to give its opinion on the outstanding issue of whether to include patents in the Civil

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PE450.452v01-00}
PE450.454v01-00}
PE450.455v01-00} RC1

Enforcement section; 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 stated that any measure aimed at strengthening powers of cross-border inspection and seizure of goods should not harm global access to legal, affordable and safe medicines; whereas Council Regulation 1383/2003, the provisions of which are being discussed in a WTO dispute case, provides for border enforcement measures for in-transit goods; whereas some actors, such as businesses in the pharmaceuticals sector, manufacturers of generic medicines and global health advocates, are warning against the inclusion of patents in ACTA and of the potential detrimental effects on technological innovation, access to medicines and generic competition,

- Q. whereas there is no EU legislation on patents,
- R. whereas patents may be excluded from the scope of the civil enforcement measures in ACTA; whereas the inclusion of patents in this section could hamper access to legal, affordable medicines,

Access to medicines

- S. whereas some significant trading partners which are not currently parties to ACTA 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 2001 Doha declaration on TRIPS and public health, such as for public health and trade in generic medicines,

Fundamental rights

- T. whereas in its Communication of 19 October 2010 the Commission stated 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',
- U. whereas any agreement reached by the European Union on ACTA must comply with the legal obligations imposed on the EU with respect to privacy and data protection law, as set out in particular in Directive 95/46/EC, Directive 2002/58/EC (as last amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009), Directive 2009/136/EC and Directive 2009/140/EC on electronic communications networks and services, and in the jurisprudence of the European Court of Human Rights and of the Court of Justice,
- V. whereas the Commission is bound by the 2010 Interinstitutional Agreement and therefore cannot support self- and co-regulatory mechanisms where fundamental rights, such as the right to freedom of expression, are at stake,

- W. whereas the Commission published a communication on impact assessment on 19 October 2010,
- X. whereas no provision in the ACTA Agreement may be interpreted in such a way as to create a precedent or to allow for current or future derogation from, or the amendment of, the *acquis* that could lead to the weakening of the protection of fundamental rights under EU law, and whereas the Commission and Council should explicitly state their agreement with this principle,

Geographical indications

- Y. whereas the Commission has repeatedly affirmed the importance of enforcing the protection of geographical indications (GIs); whereas it has been agreed by the parties that ACTA will provide for the enforcement of GIs,

Commercial scale

- Z. whereas Article 2.14.1 of ACTA contains a definition of commercial scale: 'For the purpose of this section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct economic or commercial advantage',
- AA. whereas ACTA footnote 9 states: 'Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties under this Article. A Party may comply with its obligation relating to exportation and importation of pirated copyright or counterfeit trademark goods by providing for distribution, sale or offer for sale of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties',

Criminal enforcement and sanctions

- BB. whereas the Criminal Enforcement section of ACTA contains provisions on criminal procedures, criminal liability, criminal offences, criminal enforcement and penalties; whereas the Council Presidency has negotiated the criminal enforcement provisions in ACTA on behalf of the Member States,

IPRs in the digital environment

- CC. whereas 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 the EDPS's 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',
- DD. 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',

EE. whereas the infringement of IPRs in the digital environment is dealt with by the national judicial authorities,

ACTA Committee

FF. whereas the institutional arrangements in ACTA confer on the ACTA Committee authority concerning, *inter alia*, the implementation and operation of the agreement, the amendment 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,

Lisbon Treaty

1. Notes that, in accordance with the Lisbon Treaty, Parliament's powers have been greatly extended in the area of the common commercial policy, and, in particular, that Parliament is required to give its consent to all trade agreements concluded by the EU;

General remarks

2. Reiterates that combating counterfeiting is a priority in its internal and external international political strategy and that international cooperation is a key to achieving this goal;

3. Deplores the fact that the global impact of this agreement is by nature limited by the fact that countries which are the main source of counterfeiting and most of the developing countries are not parties to the agreement;

4. Notes the conclusion of the 11th round of negotiations on ACTA; notes the release of the consolidated text on 2 October 2010, following the Tokyo round, and the release of the final text on 15 November 2010;

5. Deplores the fact that not all the negotiation texts discussed between 10 March 2010 and the release of the final text on 15 November 2010 were made public;

6. Deplores the fact that these negotiations have not been conducted and the agreement has not been concluded in the framework of the existing multilateral fora (e.g. WTO and WIPO), which is the reason for its current narrow membership base, excluding most developing countries;

7. Notes that ACTA membership is not exclusive and allows developing and emerging countries to join; therefore calls on the Commission to refrain from imposing this agreement on developing countries and to urge the other ACTA parties to agree that procedures and terms of accession to ACTA should be appropriately flexible and take into account the development levels of acceding countries, in line with the Council Conclusions on Policy Coherence for Development;

8. Calls on the Commission and Council to clarify the legal basis; asks the Commission to clarify the division of competences between it and the Council regarding the Criminal

Enforcement section of ACTA, including in relation to its initialling; insists that Parliament be presented with evidence that the legal basis for negotiating ACTA is fully consistent with the Lisbon Treaty prior to the initialling of the agreement;

9. Welcomes the Commission's repeated statements to the effect that the enforcement of ACTA provisions - especially those on copyright enforcement procedures in the digital environment – is fully in line with the *acquis communautaire* and that neither personal searches nor the so-called 'three strikes' procedure will be introduced by the agreement; no ACTA signatory, and in particular not the EU, may be mandated by the agreement to introduce 'three strikes' or similar regimes;
10. Urges the Commission to commit itself to providing evidence in writing to the European Parliament in good time prior to the initialling of the agreement that ACTA will not restrict the harmonisation of exceptions and limitations for copyright and related rights in the EU; restrict the scope for future expansion of the exceptions and limitations beyond those listed in Directive 2001/29/EC; rule out future policy options and judicial action to expand access to creative works given technological advances through the use of exceptions; limit legislative options on orphan works or prevent Member States from introducing legislation to expand access to orphaned copyrighted works or to limit the remedies for infringement of such copyright;
11. Calls on the Commission to confirm that ACTA will have no bearing, either now or in the future, on the EU *acquis* on fundamental rights and data protection, the EU's ongoing efforts to harmonise IPR enforcement measures or the E-Commerce directive;
12. Asks the Commission explicitly to confirm, in good time before the Parliament consent procedure commences, that ACTA's provisions leave unaffected the relevant 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 the Member State measures implementing those directives, which in some cases permit reverse engineering of computer programs and circumvention of TPMs in order to enable interoperability, thereby promoting competition and innovation;

Patents

13. Notes that patents may be excluded from the Civil Enforcement section of ACTA, but emphasises that an explicit and absolute exclusion is the only way to guarantee that ACTA will not hamper access to legal, affordable life-saving drugs;
14. Asserts that marked increases in damages and in other remedies for possible IPR violations could deter manufacturers and third parties involved in the production, sale or distribution of affordable generic medicines, particularly if these provisions are applied to in-transit goods; is concerned that applying civil enforcement provisions to patents in ACTA could go against the public interest, and may increase investment risk, market uncertainty and threaten technological innovation, particularly in sectors where infringement is difficult to determine, or in enforcing patents on living organisms, indigenous products and traditional medicines; asks the Commission to address, prior to the initialling of the agreement, the far-ranging

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PE450.452v01-00}
PE450.454v01-00}
PE450.455v01-00} RC1

concerns listed in this resolution with regard to the option of applying civil-law provisions to patents and subsequently present a report to Parliament;

Access to medicines

15. Acknowledges that in its preamble the ACTA text states that it intends 'to provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in the respective legal systems and practices' of the ACTA Parties; recognises that 'the principles set out in the Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the WTO at the Fourth WTO Ministerial Conference held in Doha, Qatar' are building blocks on which the ACTA text stands, and therefore considers that any enforcement of ACTA should comply with these principles;
16. Welcomes the improvements to the draft ACTA text that provide more safeguards for privacy and public health and incorporate some of the protections under the TRIPS Agreement; calls on the Commission to assess whether the safeguard provisions in ACTA are enforceable in the same way as the enforcement provisions; asks the Commission to provide evidence that ACTA will not prevent Member States from introducing legislation that limits remedies for infringements, including the expansion of access to orphaned copyrighted works or the use of flexibilities under the TRIPS Agreement, in order to guarantee a full range of future policy options; asks the Commission to make an assessment of whether ACTA will in fact be a binding agreement and whether its Article 1.2 provides for general flexibility in respect of any element that might contradict ACTA in national law; asks the Commission to present the mechanisms which provide the flexibility enabling parties to adopt legitimate exceptions to the obligations laid down in the agreement that are consistent with the objectives and principles of the TRIPS agreement and the 2001 Doha Declaration on TRIPS and public health;

Fundamental rights

17. Emphasises that privacy and data protection are core values of the European Union, recognised in Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, which must be respected in all the policies and rules adopted by the EU, in accordance with Article 16 TFEU;
18. Calls on the Commission to present to Parliament, prior to the initialling of the agreement, a legal analysis of the meaning, legality and enforceability of ACTA's desired policies regarding cooperation between service providers and rights holders, as proposed in Article 2.18.3., particularly with reference to how cooperative efforts within the business community will not limit the fundamental rights of citizens, including the right to privacy, the right to freedom of expression and the right to due process;
19. Calls once again on the Commission to conduct, in good time prior to the initialling of the agreement, an assessment of the impact of ACTA's implementation on fundamental rights and data protection, on the EU's ongoing efforts to harmonise IPR enforcement measures and on the E-Commerce Directive;

20. Concludes that the Commission must inform Parliament in good time about the results of these assessments;
21. Is concerned by the substance of Article 2.X of Section 3, which refers to the fact that, even when the goods carried are of a non-commercial nature, travellers' personal luggage is covered by the agreement unless parties decide to exclude it; considers that this article constitutes an incentive for parties to adopt stricter rules regarding checks on travellers' personal luggage at borders, while the Commission should instead have defended greater protection of people's fundamental rights, in particular the right to privacy, at international level;
22. Insists that the Commission takes speedy action in accordance with its communication of 19 October 2010 on an impact assessment as regards fundamental rights;

Geographical indications

23. Urges the Commission to work actively towards securing the inclusion of effective enforcement practices for GIs in ACTA; stresses the importance of the protection of GIs for European companies and employment in the EU; deplores the fact that the agreement does not define '*counterfeit geographical indications*' in its Article 1.X, as this omission might create confusion or at least complicate the work of the administrative and judicial authorities in interpreting and enforcing ACTA;
24. Disagrees with the position of the Commission, which claims to have secured significant improvements regarding the protection of GIs; considers that, since GIs will remain unprotected in all countries which do not recognise them in their national legislation, progress in this field is unsatisfactory;

Commercial scale

25. Is concerned that the definition of commercial scale in ACTA (Article 2.14.1) goes beyond that it adopted on 25 April 2007 in its vote on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights - 2005/0127(COD);
26. Takes into account the fact that the Council Presidency has negotiated the Criminal Enforcement section in ACTA on behalf of the Member States; requests the Commission and Council to present to Parliament a precise interpretation of 'commercial scale', as referred to in Article 2.14.1 of the agreement; requests the Commission and Council to reaffirm that Article 2.14.1 will not require any changes to the *acquis communautaire*, in particular as regards Parliament's votes on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights - 2005/0127(COD); asks the Council and Commission to provide, prior to the initialling of the agreement, a legal assessment 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

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PE450.452v01-00}
PE450.454v01-00}
PE450.455v01-00} RC1

measures;

27. Considers that the parties should not be obliged to criminalise 'camcording' and therefore welcomes the fact that the parties agreed, at the EU's insistence, that the criminalisation of 'camcording' should be merely optional (Articles 2.14.3 and 2.15);

Criminal enforcement and sanctions

28. Is concerned that ACTA allows judicial authorities to issue an order (i.e. injunction in Article 2.X) against a party, or a third party; notes that this injunction power runs counter to the Intellectual Property Rights Enforcement Directive, which only allows injunctions 'to prevent any imminent infringement'; in addition, under that directive third parties need to be involved in the infringement to be potentially subject to the judicial authority order;
29. Requests the EDPS to submit an opinion on the most recent ACTA text;

IPRs in the digital environment

30. Deplores the fact that Article 2.18.3 explicitly instructs parties (i.e. 'shall endeavour') to cooperate with the business community to 'effectively address' infringements; reminds the Commission that in the 2003 Interinstitutional Agreement it agreed to 'ensure that any use of co-regulation or self-regulation is always consistent with Community law (...) and will not be applicable where fundamental rights are at stake'; asks the Commission to assess whether, in overall terms, ACTA may change the current balance in EU law between the legal obligations of internet service providers to protect the personal data of end users and to disclose such data to intellectual property rights holders or administrative and judicial authorities;
31. Urges the Commission to ensure that the scope of the agreement is limited to the existing European IPR enforcement system against counterfeiting; the word '*unjustifiably*' should therefore be removed from Article 2.X;
32. Is concerned that a very broad definition of acts of 'commercial scale' (Article 2.14.1), coupled with an obligation to improve criminal enforcement sanctions in the event of IPR infringement in the digital environment (Article 2.18.1), including for 'aiding and abetting' (Article 2.14.4), may encourage parties to the agreement to adopt legislation which will in practice lead to the criminalisation of private users and intermediaries;

ACTA Committee

33. Takes the view that the ACTA Committee should operate in an open, inclusive and transparent manner; asks the Commission to submit, in good time before Parliament has to consider its opinion on consent, recommendations for the governance of the ACTA Committee, particularly with respect to European Parliament participation and the process of amending the agreement;
34. Stresses that any change to this agreement must undergo public scrutiny by all stakeholders and must receive parliamentary approval; asks the Commission to consult the Council and

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PE450.447v01-00}
PE450.452v01-00}
PE450.454v01-00}
PE450.455v01-00} RC1

the European Parliament before accepting or proposing any amendment to the current text in the ACTA Committee, in a process that guarantees transparency, parliamentary scrutiny and public participation;

EP's conditions for granting consent

35. Recalls that ACTA requires Parliament's consent and, possibly, ratification by the Member States in order to come into force; calls on the Commission and Council not to propose any provisional application of the agreement before Parliament has given its consent; reminds the Commission and the Council that Parliament reserves the right to withhold consent to ACTA; makes any possible consent to ACTA conditional on full cooperation on this resolution;
36. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of states party to the ACTA negotiations.