



Date de réception : 21/06/2012



AVIS 1/12 - 1

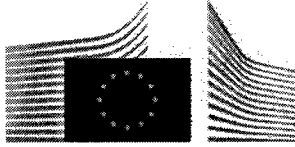
Lodgment reference	: D3511
File number	: 1
Person lodging document	: Christoph Hermes (R42743)
Date of lodgment	: 10/05/2012

Inscrit au registre de la  
Cour de justice sous le n° 904533  
Luxembourg, le

11 MAI 2012

Fax / E-mail :  
Déposé le : 10.05

Le Greffier  
Ramona Șerș  
Administrateur



**EUROPEAN COMMISSION**

Brussels, 10 May 2012  
sj.l.dir(2012)660144

**TO THE PRESIDENT AND THE MEMBERS OF THE COURT  
OF JUSTICE OF THE EUROPEAN UNION**

**REQUEST FOR AN OPINION**

lodged by the **EUROPEAN COMMISSION**, represented by Christoph HERMES and Hannes KRAEMER, both Members of its Legal Service, acting as Agents, with an address for service at the office of Antonio ARESU, of its Legal Service, located at BECH, 2721 Luxembourg

pursuant to Article 218(11) of the Treaty on the Functioning of the European Union (TFEU), on the following question:

"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?"

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## **I. INTRODUCTION**

### **A. Background**

1. The purpose of the envisaged Anti-Counterfeiting Trade Agreement (hereinafter: "ACTA") is to establish a comprehensive international framework on the enforcement of intellectual property rights (hereinafter: "IPR").
2. The background of the ACTA negotiations was the world-wide proliferation of counterfeit and pirated goods in recent years. A study of the Organisation for Economic Co-operation and Development (OECD) on "The Economic Impact of Counterfeiting and Piracy" of 2008 found an alarming expansion of the types of products being infringed, from luxury items (such as deluxe watches and designer clothing) to items that have an impact on personal health and safety (such as pharmaceutical products, food and drink, medical equipment, personal care items, toys, tobacco and automotive parts). The study also showed that criminal networks and organised crime thrive via counterfeiting and piracy activities and that the items that counterfeiters and pirates produce are often substandard, sometimes endangering the lives of those who purchase or use them.<sup>1</sup> The OECD estimated that international trade in counterfeit goods grew from just over US\$ 100 billion in 2000 to US\$ 250 billion in 2007.<sup>2</sup>
3. Against this background, ACTA aims at enhanced international cooperation and a new set of rules on more effective international enforcement of IPR which complement those contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>3</sup>
4. In the view of the Commission, the effective enforcement of IPR is critical for sustaining growth across all industries and an economic basis for the exercise of

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<sup>1</sup> See the executive summary at <http://www.oecd.org/dataoecd/21/20/40896133.pdf>.

<sup>2</sup> See <http://www.oecd.org/dataoecd/57/27/44088872.pdf>.

<sup>3</sup> See Recitals 2 to 4 of the ACTA Preamble. The text of ACTA is attached to the Commission proposal for a Council Decision on the signing, on behalf of the European Union, of ACTA (**Annex 1**).

fundamental rights important for a living democratic society, including freedom of the arts and sciences, right to education and cultural diversity.

## **B. Content of ACTA**

5. ACTA contains provisions concerning civil enforcement, border measures, criminal enforcement and the enforcement of IPR in the digital environment. In addition, it provides for cooperation mechanisms among the contracting Parties to assist them in their enforcement efforts and to establish best practices for effective IPR enforcement.
6. Chapter I contains initial provisions and general definitions. According to Article 1, "*[n]othing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement*". Articles 2 and 3 set out the nature and scope of ACTA obligations and their relationship with domestic law. In particular, Article 3.1 clarifies that ACTA is without prejudice to the substantive IPR law of the Parties. Article 4.1(a) provides that ACTA Parties are not required to disclose "*information, the disclosure of which would be contrary to its law, including laws protecting privacy rights*". Article 5 sets out definitions of terms used in ACTA.
7. Chapter II on "*Legal Framework for Enforcement of Intellectual Property Rights*" is divided into five sections.
8. Section 1 – which consists solely of Article 6 – contains general obligations with respect to enforcement. Importantly, enforcement procedures "*shall be applied in such a manner as to [...] provide for safeguards against their abuse*" (Article 6.1, second sentence) and "*shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected*" (Article 6.2, first sentence). When implementing ACTA, the Parties "*shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties*" (Article 6.3).
9. Section 2 provides for rule on civil enforcement from which the ACTA Parties may exclude patents and the protection of undisclosed information (Footnote 2). The section contains a general provision on the availability of civil procedures

(Article 7) as well as provisions on injunctions (Article 8), damages (Article 9), other remedies (Article 10), information obligations of the infringer (Article 11) and on provisional measures (Article 12).

10. Section 3 contains rules on border enforcement of IPR from which patents and the protection of undisclosed information are exempted (Footnote 6). Articles 13 and 14 address the scope of border measures. In addition, there are provisions on information obligations of the right holder (Article 15) and the range of border measures available for imports, exports and other situations of customs control (Article 16). Articles 17 and 18 set out more detailed provisions for customs procedures requested by the right holder, for example concerning the evidence and security which right holders need to provide. The remaining provisions of this section address procedures for determining infringements (Article 19), remedies (Article 20), fees (Article 21) and the disclosure of certain information to the right holder (Article 21).
11. Section 4 deals with criminal enforcement. Article 23 addresses criminal offences providing, in particular, for criminal procedures and penalties in cases of willful trademark counterfeiting and copyright or related right piracy on a commercial scale as well as certain willful preparatory acts for trademark counterfeiting on a commercial scale. The section also sets out obligations concerning penalties and the seizure, forfeiture and destruction of certain items (Articles 24 and 25) and provides for *ex officio* criminal enforcement (Article 26).
12. Section 5 addresses the enforcement of IPR in the digital environment. According to the general rule in Article 27.1, the ACTA procedures for civil and criminal enforcement shall be available against infringements in the digital environment. Article 27.2 requires the application of enforcement procedures to copyright and related rights infringements over digital networks. It sets out that "[t]hese procedures shall be implemented in a manner that [...], consistent with that Party's law, preserves fundamental principles such as freedom expression, fair process, and privacy", for example by means of limiting the liability of online service providers (see footnote 13). Other provisions encourage the ACTA Parties to promote cooperative efforts in the business community to address certain IPR infringements (Article 27.3) and point them to the possibility ("*may*

*provide, in accordance with its law and regulations*") to provide for an obligation of online service providers to disclose information identifying subscribers that allegedly infringed an IPR (Article 27.4). The latter provision is, again, subject to the additional caveat that "[t]hese procedures shall be implemented in a manner that [...], consistent with that Party's law, preserves fundamental principles such as freedom expression, fair process, and privacy". Article 27.5 to 27.8 contains detailed rules on the protection against the circumvention of effective technological measures.

13. Chapter III of ACTA contains provisions aiming at increasing the efficiency of IPR enforcement practices, ranging from the development of specialized expertise within enforcement authorities (Article 28.1) to enhancing public awareness of the importance of respecting IPR (Article 31).
14. Chapter IV addresses international cooperation among the contracting Parties. In addition to a general obligation to promote cooperation (Article 33), the chapter encourages Parties to exchange certain information on their enforcement practices and regulation (Article 34) and to provide capacity building and technical assistance to prospective ACTA Parties (Article 35).
15. Chapter V provides for certain institutional arrangements, such as an ACTA Committee to oversee the implementation and operation of the Agreement (Article 36), the designation of contact points (Article 37) and consultations between ACTA Parties (Article 38).
16. Chapter VI contains final provisions on signature (Article 39), entry into force (Article 40), withdrawal (Article 41), amendments (Article 42), accession (Article 43), authentic language versions (Article 44) and the depository (Article 45). In particular, Article 40.1 ACTA provides that ACTA "*shall enter into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval as between those Signatories that have deposited their respective instruments of ratification, acceptance, or approval*". Pursuant to its Article 40.2, ACTA "*shall enter into force for each Signatory that deposits its instrument of ratification, acceptance, or approval after the deposit of the sixth instrument of ratification, acceptance, or approval, thirty days after the date of*



*deposit by such Signatory of its instrument of ratification, acceptance, or approval".*

### **C. Procedure**

17. In 2008, following an initiative by Japan and the United States, the EU, its Member States and 10 other countries – Australia, Canada, Japan, Mexico, Morocco, New Zealand the Republic of Korea, Singapore, Switzerland and the United States – launched the negotiations for ACTA.
18. For the Union, the Council had authorized the Commission to negotiate ACTA in April 2008. Matters relating to the criminal enforcement chapter of ACTA were negotiated by the rotating Presidency on behalf of the Member States. The Council and the European Parliament were regularly informed about the progress of negotiations. After eleven rounds of negotiations, the text of ACTA was initialled on 25 November 2010.
19. On 24 June 2011, the Commission adopted proposals for a Council Decision authorising the signing of and for a Council Decision concluding ACTA.<sup>4</sup> ACTA contains a number of provisions on criminal enforcement that fall within the scope of Article 83(2) TFEU. The Commission has, however, opted for not proposing that the Union exercise its shared competence when signing and concluding ACTA.<sup>5</sup> Therefore, the Commission proposed that ACTA be signed and concluded both by the Union and by all Member States.
20. On 16 December 2011, the Council adopted the decision for the Union to sign ACTA.<sup>6</sup> The Union signed ACTA on 26 January 2012. On 14 February 2012, the European Parliament received the proposal for the Council Decision concluding ACTA from the Council in view of obtaining the Parliament's consent, pursuant to Article 218(6)(a)(v) TFEU.<sup>7</sup> As the European Parliament has not given its

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<sup>4</sup> COM(2011) 379 final ([Annex 1](#)); COM(2011) 380 final ([Annex 2](#)).

<sup>5</sup> Consequently, the Commission proposed that the Council Decision authorising the signing of and the Council Decision concluding ACTA be exclusively based on Article 207(4), 1<sup>st</sup> subparagraph TFEU; see COM(2011) 379 final ([Annex 1](#)); COM(2011) 380 final ([Annex 2](#)).

<sup>6</sup> See Press Release 18708/11 of the 3137<sup>th</sup> Council meeting on 15-16 December 2011 ([Annex 3](#)), at p. 43.

<sup>7</sup> See European Parliament, Minutes of 14 February 2012 ([Annex 4](#)).

consent so far, the Council has not yet adopted the Decision concluding ACTA. Consequently, the Union has not yet deposited its instrument of approval pursuant to Article 40 ACTA.

21. On 26 January 2012, all Member States with the exception of Cyprus, Estonia, Germany, the Netherlands and Slovakia also signed ACTA. Member States will have to ratify ACTA according to their own domestic procedures.

**D. Other relevant provisions of international and Union law**

22. Article 50 TRIPS provides

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

- (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

- (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial

authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

23. Article 7 of Directive 2004/48/EC<sup>8</sup> is worded as follows:

1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the

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<sup>8</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2002 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45.

case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

4. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

5. Member States may take measures to protect witnesses' identity.

24. Article 9 of Directive 2004/48/EC provides:

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.

4. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the

rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed.

5. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

6. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

25. Article 2 of Directive 95/46/EC<sup>9</sup> sets out the following definitions:

For the purposes of this Directive:

(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction; (...).

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<sup>9</sup> Directive 95/46/EC of the European Parliament and of the Council 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, OJ L 281, 23.11.95, p. 31.

## E. Background for this Request

26. Since the beginning of the ACTA negotiations, concerns have been raised on whether ACTA respects EU fundamental rights. Thus, a resolution by the European Parliament admonished the Commission to ensure that ACTA respects EU fundamental rights, in particular the rights to freedom of expression, privacy and the protection of personal data.<sup>10</sup> Similarly, a first opinion of the European Data Protection Supervisor called on the Commission to strike the right balance between the protection of IPR and the right to privacy and data protection.<sup>11</sup>
27. Controversial discussions on whether ACTA respects EU fundamental rights went on after the negotiating text first became public in April 2010 and after the negotiations were concluded in November 2010. Whereas a second resolution by the European Parliament of November 2010 acknowledged that "*the negotiated text reflects the main concerns expressed by Parliament over recent months, including on issues such as the observance of fundamental rights, privacy and data protection*"<sup>12</sup>, other voices keep questioning whether ACTA complies with EU fundamental rights.
28. Notably, an opinion signed by a number of European academics of January 2011 (hereinafter: the "Opinion of European Academics") invited the European Parliament to withhold consent to ACTA "*as long as [...] serious concerns on fundamental rights, data protection, and a fair balance of interests are not*

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<sup>10</sup> European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7\_TA(2010)0058 (see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN>) at points 7, 11 and 12.

<sup>11</sup> Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), OJ C 147, 5.6.2010, p. 1, at para. 82.

<sup>12</sup> European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), P7\_TA(2010)0432 (see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0432+0+DOC+XML+V0//EN>) at recital G.

*properly addressed*".<sup>13</sup> It identifies fundamental rights concerns with regard to the right to be heard and the freedom of expression, fair process and privacy.<sup>14</sup>

29. The compliance of ACTA with the right to privacy is also identified as a potential issue in a study commissioned by the European Parliament's Committee on International Trade (hereinafter: the "INTA Study").<sup>15</sup>
30. A study commissioned by the Greens/European Free Alliance goes further and concludes that "*ACTA, as currently drafted, seriously threatens fundamental rights in the EU and in other countries, at various levels*".<sup>16</sup> This study raises concerns with regard to various fundamental rights, including the right to freedom of expression and information, the right to protection of personal data and the right to fair trial and due process.<sup>17</sup>
31. A second opinion of the European Data Protection Supervisor on ACTA (hereinafter: the "Second EDPS Opinion") recently criticised that ACTA measures to enforce IPRs in the digital environment could threaten privacy and data protection if not properly implemented.<sup>18</sup>
32. These arguments have attracted considerable attention as part of the public debate on ACTA.

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<sup>13</sup> Opinion of European Academics on Anti-Counterfeiting Trade Agreement, at [http://www.iri.uni-hannover.de/tl\\_files/pdf/ACTA\\_opinion\\_200111\\_2.pdf](http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf), p. 6. The Commission commented on this Opinion in its Commission Services Working Paper of 27 April 2011, at [http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc\\_147853.pdf](http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf).

<sup>14</sup> See points 4 and 16 of the Opinion of European Academics.

<sup>15</sup> European Parliament, Directorate-General for External Policies, The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment, EP/EXPO/B/INTA/FWC/2009-01/Lot7/12, at <http://www.europarl.europa.eu/committees/en/INTA/studiesdownload.html?languageDocument=EN&file=43731>, at p. 60.

<sup>16</sup> Opinion on the Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights, published at <http://rfc.act-on-acta.eu/fundamental-rights>, at p. 58.

<sup>17</sup> See the summary at p. 58-61 of the Opinion.

<sup>18</sup> Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the [ACTA], [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24\\_ACTA\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf), at paras. 67-71.

33. In order to achieve legal certainty regarding the compliance of ACTA with the Treaties and in particular with the Charter of Fundamental rights of the European Union (hereinafter: the "Charter"), the Commission respectfully requests the Court to deliver an opinion, pursuant to Article 218(11) TFEU, on the following question:

"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?"

## **II. LEGAL ANALYSIS**

### **A. Admissibility**

34. In the view of the Commission, this request for an opinion pursuant to Article 218(11) TFEU is admissible.

35. Pursuant to Article 218(11) TFEU, "*the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties*". According to Article 6(1) TEU, the Charter shall have the same legal value as the Treaties.

36. According to its case law, the Court may be called upon to state its opinion pursuant to Article 218(11) TFEU at any time before the Union's consent to be bound by the agreement in question is finally expressed.<sup>19</sup> As the Union has not yet deposited its instrument of approval, pursuant to Article 40 ACTA, the steps necessary for its ratification by the Union have not been completed so that ACTA remains an "envisaged" agreement within the meaning of Article 218(11) TFEU.

37. The Commission would also like to stress that the present request exclusively concerns the compatibility of ACTA with the Treaties and in particular with the Charter.

### **B. Substance**

38. In this section, the Commission will explain why it believes that ACTA is compatible with the Treaties. The allegations of incompatibility with primary

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<sup>19</sup> See Opinion 1/94 of 15 November 1994 [1994] ECR I-5267, para. 12.



Union law of which the Commission is aware concern the rights set out in the Charter and Article 16 TFEU.

39. The Commission would note at the outset that many allegations of ACTA being incompatible with EU fundamental rights are of a rather general nature. Even where legal studies identify certain ACTA and Charter provisions, the arguments often lack a sufficient degree of substantiation to effectively address them. Therefore, the Commission will focus in its argumentation on those allegations which have been presented sufficiently clearly to address them in this request.<sup>20</sup>
40. This approach, which the Commission hopes is the most efficient to assist the Court in its task, however, does not mean that the Commission limits the scope of its request to the specific ACTA provisions discussed below. Should the Court, on its own motion or on the basis of observations by other participants in these proceedings, identify any additional ACTA provision which merit a more extensive assessment under any provision of the Charter or any other provisions of the Treaties, the Commission would welcome any such clarification from the Court.

*I. Preliminary remarks*

41. Before discussing specific ACTA provisions below, the Commission would note at the outset that the compatibility of ACTA with EU fundamental rights has been questioned on the basis of the alleged vagueness of certain ACTA provisions<sup>21</sup> which, according to the European Data Protection Supervisor and others, does not sufficiently guard against implementations which could be inconsistent with EU fundamental rights.<sup>22</sup>

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<sup>20</sup> For a wider range of allegations of inconsistency with the Charter, see the Opinion on the Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights (above at Fn. 16).

<sup>21</sup> See, e.g., the Second EDPS Opinion, at paras. 41, 71.

<sup>22</sup> See, inter alia, the Second EDPS Opinion, at para. 11, where it sets out the approach of checking "whether the provisions of the Agreement may open the door to possible undue and unacceptable side effects on individuals' privacy and data protection if they are not implemented correctly".

42. In the view of the Commission, such arguments clearly ignore the nature of ACTA and cannot form the basis for a finding of its incompatibility with the Treaties.
43. ACTA sets out international obligations for the contracting parties, but does not contain provisions of a nature to be directly applied within the Union legal order.
44. In such a situation, ACTA provisions would only be incompatible with the Treaties if they obliged the Union to act, in particular legislate, in a way which is incompatible with the Treaties. To the extent, however, that ACTA provisions leave the Union sufficient flexibility to implement ACTA in a manner which is compatible with the Treaties, such flexibility clearly does not indicate any incompatibility with the Treaties.<sup>23</sup> In a situation in which ACTA enables the Union to choose between several options of how to implement the obligations, the Union must choose those which are compatible with the Treaties.
45. ACTA does provide the Union with such flexibility<sup>24</sup>, in particular through sufficiently broadly phrased provisions and by providing for enforcement measures only in accordance with the internal law of contracting parties<sup>25</sup>. These features enable the Union to implement ACTA in a way which is compliant with the Treaties and in particular the Charter.
46. In addition, ACTA contains numerous detailed safeguards, either explicitly in its text or through incorporation by reference to the TRIPS Agreement (see Article 1 ACTA). These safeguards, some of which will be examined in greater detail below, are prevalent throughout ACTA<sup>26</sup> and, thus, further ensure that the Union

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<sup>23</sup> In the view of the Commission, an international agreement such as ACTA is not meant to explicitly exclude all possible implementing measures which could be incompatible under any of the legal systems of the contracting parties.

<sup>24</sup> An even greater degree of flexibility is provided where ACTA provisions do not contain any obligations and are explicitly (see the term "may") non-binding (see e.g. Articles 23.3 and 27.4 ACTA).

<sup>25</sup> See, e.g. Articles 11, 22, 27.2, 27.3, 27.4 ACTA.

<sup>26</sup> The Commission would, at this stage, in particular note the horizontal safeguards contained in Article 6.1, second sentence ACTA ("*These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.*"), Article 6.2, first sentence ACTA ("*Procedures adopted, maintained, or applied to implement the provisions of this Chapter shall be fair and equitable, and shall provide for the rights of all participants subject to*

can implement ACTA in a way which brings the involved fundamental rights into practical concordance.

## ***II. Compatibility of Article 12.2 ACTA with the Charter***

47. Doubts have been raised as to the compatibility of Article 12.2 ACTA on provisional measures *inaudita altera parte* with the right to be heard.
48. For instance, the Opinion of European Academics criticises that Article 12 ACTA does not explicitly refer to the procedural guarantees laid down in Articles 9(4) and 9(5) of Directive 2004/48/EC. According to the Opinion of European Academics, restrictions to the right to be heard, such as provisional measures *inaudita altera parte*, may be allowed in case of urgency, but require procedural guarantees in order to ensure a balance between the rights of right holders and defendants. Therefore, the Opinion of European Academics states that "[i]t is not easy to understand why ACTA provides for provisional measures *inaudita altera parte*, but does not at the same time take up the procedural guarantees which have been introduced in Directive 2004/48 and which are necessary to ensure that persons concerned by such proceedings have a later opportunity to challenge these measures".<sup>27</sup>
49. The Commission considers that these doubts are unfounded and that Article 12.2 ACTA is compatible with the right to be heard, which constitutes an element of the right to a fair hearing guaranteed by Article 47(2)Charter.

### ***1. Article 12.2 ACTA***

50. Article 12 deals with provisional measures in the context of civil enforcement of IPR. Paragraph 1 contains a general obligation to provide judicial authorities with the authority to order prompt and effective provisional measures to prevent IPR infringements and to preserve relevant evidence.

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*such procedures to be appropriately protected.") and Article 6.3 ("In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties.").*

<sup>27</sup> Opinion of European Academics, at point 4.

51. Paragraph 2 addresses more specifically the issue of provisional measures *inaudita altera parte* and provides: "*Each Party shall provide that its judicial authorities have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. In proceedings conducted inaudita altera parte, each Party shall provide its judicial authorities with the authority to act expeditiously on requests for provisional measures and to make a decision without undue delay.*"
52. With a view to the interests of defendants in provisional measures proceedings, including those *inaudita altera parte*, Article 12.4 ACTA sets out requirements for applicants with regard to evidence and the provision of security: "*Each Party shall provide that its authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to procedures for such provisional measures.*"
53. Article 12.5 ACTA then addresses the issue of compensation by the applicant to the defendant for possible injury caused by provisional measures: "*Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.*"
54. Article 12 ACTA does not explicitly provide for additional safeguards for the defendant, such as the requirement of ex post notice, the right to request a review and the right to request the cessation of provisional measures in case of inaction of the right holder. The Commission would, however, stress that Article 1 ACTA provides that "*[n]othing in this Agreement shall derogate from any obligation of*

*a Party with respect to any other Party under existing agreements, including the TRIPS Agreement".*

55. Article 50 TRIPS sets a number of additional obligations concerning provisional measures *inaudita altera parte* from which ACTA does not derogate. In particular, Article 50.4 TRIPS provides for a notice to the "*parties affected*" (which concept includes the defendant), and also gives the defendant the right to request a review of the measure: "*Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.*"

56. In addition, Article 50.6 TRIPS gives the defendant the possibility to request the cessation of provisional measures if main proceedings are not initiated within a reasonable period of time: "*Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.*"

## **2. *The relevant provisions of the Charter***

57. In the view of the Commission, provisional measures *inaudita altera parte* for the enforcement of IPR restrict the right to be heard which constitutes an element of the right to a fair hearing guaranteed by Article 47 Charter. However, Article 52.1 Charter permits restrictions of fundamental rights, subject to the principle of proportionality, *inter alia*, if they meet the need to protect the rights and freedoms of others. In the present context, the protection of the IPR holders' right to property (Article 17 of the Charter; which includes intellectual property) is of relevance.

58. The Court has held that "[t]hough the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency".<sup>28</sup>
59. In the same vein, the European Court of Human Rights has held that Article 6 ECHR in its civil "limb" applies to interim measures where the right at stake in both the main and the injunction proceedings is "civil" within the autonomous meaning of that notion under Article 6 of the Convention and where the interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force. However, the European Court of Human Rights has accepted that in exceptional cases – where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process – it may not be possible immediately to comply with all of the requirements of Article 6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue.<sup>29</sup>
60. In sum, three cumulative requirements must be met for a judicial measure adopted *inaudita altera parte* to comply with the requirements under Article 47 Charter. Firstly, the decision must aim at protecting the rights or freedoms of others. Secondly, the absence of a previous hearing of the person(s) affected by the measure must be necessary in order to ensure the effectiveness of the measure. Thirdly, there must be additional procedural guarantees ensuring that the person(s) affected by the measure may challenge the latter.

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<sup>28</sup> Case C-341/04 *Eurofood* [2006] ECR I-3813, para. 66.

<sup>29</sup> Application n° 17056/06, *Micallef v Malta*, judgment of 15 October 2009, paras. 83–86.

### 3. *Compatibility of ACTA with the Charter*

61. In the view of the Commission Article 12.2 ACTA is perfectly compatible with the aforementioned requirements.
62. As to the first requirement, it cannot be disputed that the measures provided for by Article 12.2 ACTA aim at protecting the right to property of the holder of an IPR that has requested their adoption.
63. Secondly, Article 12.2 ACTA only requires that measures *inaudita altera parte* be available "*where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed*". This provision, already in itself, does not require the Union to provide for provisional measures *inaudita altera parte* beyond the urgency situations in which the absence of a previous hearing of the person(s) affected by the measure is necessary in order to ensure the effectiveness of the measure. This is further supported if Article 12.2 ACTA is read in conjunction with Articles 6.2 and 6.3 ACTA which provide that enforcement procedures "be fair and equitable" and "take into account the need for proportionality".
64. It is worthwhile to mention in passing that the wording of Article 12.2 ACTA is strictly identical to that of Article 50.2 TRIPS on the one hand and largely identical to that of Articles 7(1), 3<sup>rd</sup> sentence and 9(4) of Directive 2004/48/EC on the other.
65. Thirdly, Article 12.2 ACTA does not abolish or dilute any of the additional procedural guarantees currently set out in secondary Union and in Article 50 TRIPS.
66. In that connection, the Commission would stress that additional procedural guarantees strictly necessary for a judicial measure adopted *inaudita altera parte* to comply with the requirements of Article 47 Charter are those ensuring that the person(s) affected by the measure may challenge the latter. This implies that the person(s) affected by the measure be given notice thereof and may initiate a procedure aiming at its review.

67. Concerning notice, Article 7(1) and Article 9(4), 2<sup>nd</sup> sentence of Directive 2004/48/EC provide that the parties affected by measures adopted *inaudita altera parte* shall be given notice "*without delay after the execution of the measures at the latest*". Article 50.4, 1<sup>st</sup> sentence TRIPS contains the same obligation requiring that "[w]here provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest".
68. As regards review, Articles 7(1) and 9(4), 2<sup>nd</sup> sentence of Directive 2004/48/EC set out that a "*review, including a right to be heard, shall take place*" upon request of the parties affected or of the defendant, as the case may be, "*with a view to deciding, within a reasonable time [Article 7(1): period] after [the] notification of the measures, whether [the/those] measures shall be modified, revoked or confirmed*". Article 50.4, 2<sup>nd</sup> sentence TRIPS contains, virtually verbatim, the same obligations when providing that "[a] *review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed*".
69. The Opinion of European Academics correctly notes that these procedural safeguards are not explicitly mentioned in Article 12 ACTA<sup>30</sup>. However, it is important to recall that Article 1 ACTA provides that ACTA – including, thus, its Article 12 – does not derogate from the obligations ACTA Parties have with respect to each other pursuant to the TRIPS Agreement. Therefore, Article 1 ACTA allows the Union to honour its obligations to provide for the procedural guarantees set out in Articles 50.4 and 50.6 TRIPS<sup>31</sup> without violating ACTA. In the view of the Commission, the procedural guarantees set out in Article 50 TRIPS apply to the entirety of Article 12 ACTA, including its third paragraph.

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<sup>30</sup> Opinion of European Academics, at point 4.

<sup>31</sup> The Commission would note that the Court in Case C-89/99 *Schieving-Nijstad* [2001] ECR I-5851, paras. 38-42 considered Article 50.4 and 50.6 TRIPS as safeguards to prevent the abuse of IPR enforcement and to ensure a balance between the competing rights and obligations of the right holder and the defendant. Furthermore, the fact that the Court requested that national law be interpreted in conformity with Article 50.6 TRIPS (at para. 54) would seem to suggest that the Court did not have any concerns as to the compatibility of Article 50 TRIPS with EU fundamental rights.



Although Article 12.3 ACTA does not expressly mirror Article 50 TRIPS, this provision constitutes a mere illustration of "prompt and effective provisional measures" within the meaning of Article 12.1 ACTA.

70. The Commission would also note that Article 12.2 ACTA does not require the Union to abolish other safeguards that are currently contained in secondary Union in the interest of person(s) affected by provisional measures, irrespective of the question whether they are strictly necessary for a judicial measure adopted *inaudita altera parte* to comply with the requirements of Article 47 Charter.
71. Regarding the cessation of provisional measures, Articles 7(3) and 9(5) of Directive 2004/48/EC require Member States to that provisional measures or measures to preserve evidence, as the case may be, "*are revoked or otherwise cease to have effect, upon request of the defendant [...] if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer*". These provisions mirror, almost verbatim, the obligation set out in Article 50.6 TRIPS according to which "*[...] provisional measures [...] shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer*".<sup>32</sup>
72. As regards the evidentiary requirements incumbent on the applicant, Article 7(1) of Directive 2004/48/EC requires the applicant for measures to preserve evidence to present "*reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed*". In the

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<sup>32</sup> See also INTA Study, at p. 53, which also concludes that "[r]ead in conjunction with TRIPS Article 50.6, ACTA parties are required to ensure that a defendant does have the opportunity to challenge the imposition of provisional measures within at most 31 calendar days".

same vein, Article 9(3) of Directive 2004/48/EC requires the applicant for interlocutory injunctions to provide "*any reasonably available evidence in order to satisfy [the judicial authorities] with a sufficient degree of certainty that [he] is the rightholder and that [the applicant's right] is being infringed, or that such infringement is imminent*". Article 12.4 ACTA corresponds, virtually verbatim, to Article 9(3) of Directive 2004/48/EC by requiring for both types of provisional measures, including those taken *inaudita altera parte*, the authority "*to require the applicant [...] to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent*".

73. Whereas Article 12.4 ACTA does not explicitly address evidence to substantiate that the applicant is the right holder, the Commission considers that the Union would not breach its ACTA obligations if Union legislation continued to provide (as does Article 9(3) of Directive 2004/48/EC) for the power of judicial authorities to require evidence also in this regard. In the view of the Commission, this follows from Article 1 ACTA in connection with Article 50.3 TRIPS pursuant to which "*judicial authorities shall have the authority to require the applicant to provide reasonable available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder (...)*".
74. Finally, Articles 7(2) and 9(6) of Directive 2004/48/EC provide for the possibility to make provisional measures "*subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant*". In a similar manner, Article 12.4 ACTA requires that the competent authority may "*order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse*". While Article 12.4 ACTA, in replicating language from Article 50.3 TRIPS<sup>33</sup>, does not explicitly refer to the "*adequacy*" of the security or the goal of ensuring compensation, the Commission considers that both elements are implied in the qualification, contained in Article 12.4 ACTA, that the security and the assurance be "*sufficient to protect the defendant and to prevent abuse*".

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<sup>33</sup> Article 50.3 TRIPS provides for the authority "*to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse*".

Thus, Article 12.4 ACTA does not oblige the Union to lower its threshold concerning securities and assurances below the threshold set out in Articles 7(2) and 9(6) of Directive 2004/48/EC. For a security that would be inadequate to ensure compensation could hardly be considered as being sufficient to protect the defendant and to prevent abuse within the meaning of Article 12.4 ACTA.

75. Article 12.4, 2<sup>nd</sup> sentence ACTA provides that "[s]uch security or equivalent assurance shall not unreasonably deter recourse to procedures for such provisional measures". This obligation does not find a direct equivalent in Articles 7 or 9 of Directive 2004/48/EC, but is reflected in its Article 3(1) which provides that IPR enforcement measures "*shall not be unnecessarily complicated or costly*". Moreover, in maintaining its current state of law, the Union can rely on Article 6.2 and 6.3 ACTA.

76. In sum, Article 12 ACTA requires the Union neither to provide for provisional measures *inaudita altera parte* beyond urgency situations in which measures without a previous hearing of the affected person(s) is necessary in order to ensure the effectiveness of the measures nor to abolish or dilute any of the additional procedural guarantees currently set out in secondary Union law. Rather to the contrary, the Union will remain bound under international law, namely under Article 50 TRIPS to maintain all essential additional procedural guarantees in place.

77. Therefore, the Commission concludes that Article 12.2 ACTA fully complies with the requirements of Article 47 Charter.

### ***III. Compatibility of Article 27.4 ACTA with the Charter and Article 16(1) TFEU***

78. Additional doubts have been expressed concerning the compatibility of Article 27.4 ACTA on the disclosure of subscribers' data by online service providers with several fundamental rights guaranteed by the Charter and the TFEU, most notably the protection of personal data and the right to privacy and the freedom to receive information.

79. Thus, the aforementioned Opinion of European Academics criticizes that Article 27.4 ACTA "mentions that fundamental principles 'such as freedom of expression, fair process, and privacy' shall be preserved" but "does not provide

more specific provisions on how these rights should be effectively ensured (compare with detail [sic] provisions on privacy in EU Directives 95/46/EC, 2002/58/EC, and 2006/24/EC)" which seems to contribute to the conclusion of the Opinion that ACTA poses "serious concerns on fundamental rights".<sup>34</sup>

80. Similarly, the European Data Protection Supervisor considers the reference to "fundamental principles such as freedom of expression, fair process, and privacy" in Article 27.4 unclear and regrets the absence of more specific safeguards.<sup>35</sup>
81. The resolution by the European Parliament of November 2010 calls, more generally, on the Commission "to confirm that ACTA's implementation will have no impact on fundamental rights and data protection, on the ongoing EU efforts to harmonise IPR enforcement measures, or on e-commerce".<sup>36</sup>
82. In the view of the Commission, Article 27.4 ACTA is compatible with the fundamental rights set out in the Charter and Article 16 TFEU.

#### **1. *Article 27.4 ACTA***

83. Article 27.4 ACTA is one of the provisions of the ACTA chapter on IPR enforcement "in the digital environment" (Section 5 of ACTA). The general provision of Article 27.1 ACTA sets out that the procedures for civil and criminal enforcement set out in Sections 2 and 4 of ACTA shall be available against IPR infringements in the digital environment. Article 27.2 ACTA does the same for the specific case of copyright or related right infringements over digital networks while providing that enforcement procedures "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".<sup>37</sup> In contrast to those

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<sup>34</sup> Opinion of European Academics, at point 16 and conclusion on p. 6.

<sup>35</sup> Second EDPS Opinion, paras. 63-66.

<sup>36</sup> European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), P7\_TA(2010)0432, at point 14.

<sup>37</sup> Footnote 13 gives the example of "a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of right holder [sic]".

two obligations and the ones concerning the circumventions of technological measures (see Article 27.5 to 27.8 ACTA), the third and fourth paragraphs of Article 27 ACTA do not contain proper obligations. Article 27.3 ACTA is a mere invitation ("shall endeavour to") for ACTA Parties to promote cooperation within the business community with regard to certain IPR enforcement. Article 27.4 ACTA is even explicitly voluntary and provides: "*A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures 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.*"

84. Thus, Article 27.4 ACTA allows ("may") the contracting Parties to provide its competent authorities with the authority to order online service providers to disclose information identifying alleged infringers (of trademarks or copyright/related rights) to right holders. The Commission would stress that Article 27.4 ACTA envisages the creation of disclosure obligations by a contracting Party only "in accordance with its laws and regulations".

85. In addition, the Commission would recall Article 4.1(a) ACTA which provides that a contracting Party is not required to disclose "*information, the disclosure of which would be contrary to its law, including laws protecting privacy rights*".

## **2. *The relevant provisions of the Charter and the TFEU***

86. Information identifying subscribers of online service providers, as addressed in 27.4 ACTA, constitutes "personal data" which falls within the scope of protection of Article 8 Charter and Article 16(1) TFEU. Article 2(a) of Directive 95/46 defines "personal data" as "*any information relating to an identified or identifiable natural person ('data subject'); and identifiable person is one who*

*can be identified, directly or indirectly, in particular by reference to an identification number [...]*".

87. The Court has confirmed that measures obliging internet service providers to communicate names and addresses of subscribers for the purpose of copyright enforcement through civil proceedings involve the processing of personal data<sup>38</sup> and affect the right to the protection of personal data (Article 8 Charter, Article 16(1) TFEU) and the right to respect for private life (Article 7 Charter).<sup>39</sup>
88. Article 52.1 Charter permits restrictions of fundamental rights, subject to the principle of proportionality, inter alia, if they meet the need to protect the rights and freedoms of others. In the present context, the protection of the IPR holders' right to property (Article 17 of the Charter which includes intellectual property) and the right to an effective remedy (Article 47(1) Charter) may be relevant.

### **3. *Compatibility of ACTA with the Charter and the TFEU***

89. In the view of the Commission, Article 27.4 ACTA is compatible with the right to protection of personal data (Article 8 Charter, Article 16(1) TFEU) and the right to respect for private life (Article 7 Charter) for the following reasons.
90. First and foremost, Article 27.4 ACTA cannot restrict these fundamental rights since it is explicitly (see the term "may") non-binding and, therefore, does not create any obligations for the Union.
91. Secondly, Article 27.4 ACTA envisages the creation of disclosure obligations by a contracting Party only "in accordance with its laws and regulations". Thus, even if the Union were to implement Article 27.4 ACTA, it could do so in a manner that fully respects the requirements of its internal law, in particular those emanating from the right to protection of personal data (Article 8 Charter, Article 16(1) TFEU) and the right to respect for private life (Article 7 Charter). This is confirmed by Article 4.1(a) ACTA which provides that a contracting Party is not

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<sup>38</sup> See Article 2(b) of Directive 95/46/EC.

<sup>39</sup> See Case C-275/06 *Promusicae* [2008] ECR I-271, paras. 61-64. See also, albeit for different types of IPR enforcement measures (filtering system involving the general monitoring of all transmitted communication) Cases C-70/10 *Scarlet Extended* [2011] ECR I-0000, paras. 46-49, and C-360/10 *Netlog* [2012] ECR I-0000, paras. 44-47.

required to disclose "*information, the disclosure of which would be contrary to its law, including laws protecting privacy rights*".

92. Thirdly, to the extent that measures envisaged in Article 27.4 ACTA entail a restriction to the rights to protection of personal data and respect for private life, Article 27.4 ACTA sets out elements which ensure the respect of the principle of proportionality and the balancing with the rights of others as required by Article 52(1) Charter.
93. The Court has held that disclosure obligations for internet service providers concerning names and addresses of subscribers in the context of IPR enforcement through civil proceedings must strike a "fair balance" between the various fundamental rights involved, in particular between the right to protection of personal data (Article 8 Charter, Article 16(1) TFEU) and the right to respect for private life (Article 7 Charter) of the subscribers on the one hand, and the right to (intellectual) property (Article 17 Charter) and the right to an effective remedy (Article 47(1) Charter) of right holders, on the other.<sup>40</sup>
94. According to the Court, "the mechanisms allowing those different rights and interests to be balanced" are, first, contained in several directives, namely Directive 2002/58/EC<sup>41</sup>, Directive 2000/31/EC<sup>42</sup>, Directive 2001/29/EC<sup>43</sup> and Directive 2004/48/EC.<sup>44</sup> Whereas the directives on data protection do "not preclude the possibility for the Member States of laying down an obligation to

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<sup>40</sup> Cases C-275/06 *Promusicae* [2008] ECR I-271, paras. 65-68.

<sup>41</sup> 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 electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37.

<sup>42</sup> 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, OJ L 178, 17.7.2000, p. 1.

<sup>43</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

<sup>44</sup> Case C-275/06 *Promusicae* [2008] ECR I-271, para. 66.

disclose personal data in the context of civil proceedings"<sup>45</sup>, the directives on IPR enforcement do not oblige Member States to do so.<sup>46</sup>

95. The Court added that the aforementioned balance between the various fundamental rights and the respect for the principle of proportionality must, secondly, be ensured by the Member States when transposing these directives and applying such transposition measures.<sup>47</sup> According to the Court, Member States' legislation "must be regarded as likely, in principle, to ensure a fair balance between the protection of intellectual property rights enjoyed by copyright holders and the protection of personal data enjoyed by internet subscribers or users" if it "enables the national court seized of an application for an order for disclosure of personal data, made by a person who is entitled to act, to weigh the conflicting interests involved, on the basis of the facts of each case and taking due account of the requirements of the principle of proportionality".<sup>48</sup> In the view of the Court, the legislation at issue allowed such a weighing of the conflicting interests and the respect for proportionality for the following reasons: First, it required as a condition for ordering the disclosure of data that there be *clear evidence of an infringement* of an IPR. Second, it required that the information can be regarded as *facilitating the investigation* into an infringement. Thirdly, the *reasons for the measure had to outweigh the nuisance or other harm* which the measure may entail for the person affected by it or for some other conflicting interest.<sup>49</sup>
96. Article 27.4 ACTA fully complies with these criteria.
97. Article 27.4 ACTA envisages the disclosure of subscriber data to right holders only "where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement". Against this background, the argument

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<sup>45</sup> Case C-275/06 *Promusicae* [2008] ECR I-271, paras. 53-54; C-461/10 *Bonnier* [2012] ECR I-0000, para. 55.

<sup>46</sup> Case C-275/06 *Promusicae* [2008] ECR I-271, paras. 57-59.

<sup>47</sup> Case C-275/06 *Promusicae* [2008] ECR I-271, para. 68

<sup>48</sup> C-461/10 *Bonnier* [2012] ECR I-0000, paras. 59, 60.

<sup>49</sup> C-461/10 *Bonnier* [2012] ECR I-0000, para. 58.



of the European Data Protection Supervisor that "the conditions to be fulfilled by right holders to be granted such an injunction are also not particularly satisfactory" because there is no express condition that the request be made "in the context of proceedings" seems unfounded.<sup>50</sup> The Commission would also note that a "legally sufficient claim" cannot be based on mere assertions, but requires the presentation of *clear evidence* supporting an IPR infringement.

98. Furthermore, the disclosure pursuant to Article 27.4 ACTA concerns information which can be regarded as *facilitating the investigation* into an IPR infringement. Article 27.4 ACTA concerns the disclosure of "information sufficient to identify a subscriber whose account was allegedly used for infringement [...] where such information is being sought for the purpose of protecting or enforcing [trademark or copyright or related rights]". In such a situation, obtaining information about the identity of subscribers is essential in order to investigate the alleged infringement.
99. Finally, Article 27.4 ACTA also complies with the requirement that the *reasons for the measure have to outweigh the nuisance or other harm* which the measure may entail. The second sentence of Article 27.4 ACTA explicitly acknowledges the need for such balancing between the interest in efficient IPR enforcement and other affected interests: "*These procedures 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.*" In the view of the Commission, this clause would oblige the Union, should it decide to implement Article 27.4 ACTA, to enable the competent authorities to balance the conflicting interests involved and to decide on disclosure orders on the basis of the facts of each case while respecting the principle of proportionality.

#### **IV. *Compatibility of other ACTA provisions with the Charter***

100. Doubts have also been expressed concerning the compatibility of certain other ACTA provisions with the Charter.

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<sup>50</sup> Second EDPS Opinion, para. 48.

101. It has been questioned whether Article 11 ACTA which provides for certain information rights in civil judicial proceedings is compatible with EU fundamental rights since it covers information rights also against alleged infringers and contains neither an explicit reference to the proportionality principle nor an explicit provision against misuse of acquired information.<sup>51</sup> Article 11 ACTA provides: “*Without prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority, upon a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. Such information may include information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of such goods or services and of their channels of distribution.*”
102. In the view of the Commission, Article 11 ACTA is compatible with the fundamental rights set out in the Charter. Article 11 ACTA obliges the contracting parties to introduce information rights only “[w]ithout prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data“. The Union is enabled to implement Article 11 ACTA in a manner which fully respects the requirements of the relevant fundamental rights. With regard to the right to protection of personal data in particular, the Commission would note again the aforementioned case law of the Court which holds that the existing Union law on data protection does “not preclude the possibility for the Member States of laying down an obligation to

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<sup>51</sup> See Opinion of European Academics, at point 11.

disclose personal data in the context of civil proceedings”.<sup>52</sup> Furthermore, the general safeguards contained in Articles 4 and 6 ACTA apply.<sup>53</sup>

103. It has also been stated that the notion of “commercial scale” in Article 23.1 ACTA is not sufficiently precise. Thus, the European Data Protection Supervisor argued that “Article 23 [...] appears to create new categories of offences that would be subject to criminal enforcement, without however providing for any definition that would meet the standards of legal certainty required as concerns criminal sanctions”.<sup>54</sup> Article 23.1 ACTA provides: “*Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.* (footnote omitted).”
104. The Commission considers that Article 23.1 ACTA is compatible with the principle of legality. As all other ACTA provisions, Article 23 ACTA is not directly applicable. Therefore, it is – as in the case of Article 61 TRIPS – for the contracting Parties to ensure that the criminal law provisions applicable in their domestic judicial systems which implement this obligation comply with the requirements of the legality principle.
105. In the view of the Commission, doubts that Article 27.1 ACTA would lead to disproportionate enforcement procedures in the digital environment, for example in the form of internet access barriers, are equally unfounded. Article 27.1 ACTA provides: “*Each Party shall ensure that enforcement procedures, to the extent set forth in Sections 2 (Civil Enforcement) and 4 (Criminal Enforcement), are*

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<sup>52</sup> Case C-275/06 *Promusicae* [2008] ECR I-271, paras. 53-54; C-461/10 *Bonnier* [2012] ECR I-0000, para. 55.

<sup>53</sup> Article 4.1(a) and (b) ACTA provide that contracting parties are not required to disclose information “the disclosure of which would be contrary to its law, including laws protecting privacy rights” or “confidential information, the disclosure of which would prejudice the legitimate commercial interests of particular enterprises, public or private”. Article 6.3 ACTA obliges the contracting Parties when implementing ACTA to “take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties”.

<sup>54</sup> See Second EDPS Opinion, para. 40.

*available under its law so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements.”* The general safeguard clauses in Article 6.2 and 6.3 ACTA provide that measures implementing the ACTA provisions “shall be fair and equitable” and “take into account the need for proportionality”.

106. Finally, the Commission does not share the concern of the European Data Protection Supervisor that the „cooperative efforts within the business community“ envisaged in Article 27.3 ACTA risk to “entail a monitoring of Internet users’ activities that is disproportionate to the aim of enforcing IP rights”<sup>55</sup>. Apart from the fact that Article 27.3 ACTA does not set out an obligation for the Union to actually promote such efforts (see the terms „shall endeavour to promote“), Article 27.3 ACTA is explicitly subject to a series of safeguards, namely that such cooperation “*preserv[es] legitimate competition and, consistent with that Party’s law, preserv[es] fundamental principles such as freedom of expression, fair process, and privacy*”.

### **C. Conclusion**

107. In the view of the Commission, the provisions of ACTA that have been examined above are compatible with the Charter and the TFEU.
108. The Commission is aware that the above analysis limits itself to certain provisions of ACTA. The Commission is, however, confident that its analysis may also, by way of example, assist the Court should it wish, *proprio motu* or following observations from other participants in these proceedings, to assess the compatibility of additional ACTA provisions with the Treaties and in particular the Charter.
109. For the reasons set out above, the Commission respectfully proposes the Court to answer the question referred to it under Article 218(11) TFEU in the following terms:

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<sup>55</sup> Second EDPS Opinion, para. 56.

**"The envisaged Anti-Counterfeiting Trade Agreement (ACTA) is compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union."**

**(signatures)  
Agents for the Commission**

## Table of Annexes

Annexes	Description of the document	Paragraph number where the Annex is mentioned
1	Proposal for a Council Decision on the signing, on behalf of the European Union of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America; COM(2011)379 final	3, 19
2	Proposal for a Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America; COM(2011)380 final	19
3	Press Release 18708/11 of the 3137 <sup>th</sup> Council meeting on 15-16 December 2011	20
4	European Parliament, Minutes of 14 February 2012	20