

## ACTA – Report of the 6<sup>th</sup> Round of negotiations Seoul, 4-6 November 2009

This is to report on the sixth round of ACTA negotiations that took place on 4-6 November 2009 in Seoul, hosted by South Korea.

### Summary

**Participants:** Australia, Canada, the European Union (COM+PRES+11 MS+Council Sec), Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States.

COM delegation was led by Trade ( ) and included Markt ( ) JLS ( ) and Info ( ). **Excellent atmosphere and cooperation among the COM services**, with valuable contributions on their respective chapters.

PRES represented by Swedish Ministry of Justice. 11 other MS attended (UK, FI, ES, NL, RO, FR, DE, IT, AU, CZ, IRL).

### **Issues discussed:**

1. Enforcement in the Digital Environment (hereinafter referred to as "Internet");
2. Penal Enforcement and
3. Transparency

A productive meeting, particularly considering that it addressed two of the most complex and sensitive subjects: Penal and internet enforcement.

1. The **Internet chapter** was **discussed on a text-basis for the first time**, and most participants did not yet have final positions, but mainly questions and comments to the US (authors of the draft text). Anyway, there was a general feeling that the US text is very complex and even confusing. Several ACTA parties off-the-record said that they wait for a EU text to "balance" the US one.
2. **Good progress on criminal enforcement**, partly due to EU improved revised proposal that made important efforts to approach itself from the level of ambition proposed by US and JPN.
3. Also some progress on **Transparency**, where parties quickly agreed (but after a **tense exchange of views between US and EU**) on an update to the Joint Summary issued a few months ago in order to include the issues discussed in

the last two rounds and mainly a description of the Internet chapter. However, there is no agreement yet on the release of negotiating texts.

To be noted that the day before the launch of negotiations, a **Commission memo** (distributed to MS and to the EP's INTA committee) about the Internet chapter was **leaked** to the press and widely reported, first on-line and later on the general press. Other ACTA partners were upset about this, and **particularly the US**.

Also to be noted that **UK** and **IT** insist that certain aspects of internet chapter be handled by **PRES/MS**.

Parties remain committed to **conclude ACTA in 2010**.

### Details

Two coordination meetings with MS. **Cooperative and constructive atmosphere with PRES, but IT and UK raising once more issues of competency**, particularly regarding the future discussion of penal sanctions for internet infringements. On side talks, the PRES and SP (future PRES) indicating that these two countries may wish to re-open the "negotiating guidelines" to ensure that MS will be in the lead for the above issue. Both SW and SP assured COM that they oppose such approach but are concerned about the possibility. SW even proposed that there will be no oral debriefing of this round at 133 to avoid giving IT and UK the chance to raise the matter.

### 1. Digital Environment (including Internet)

First text-based discussion of a draft chapter circulated **by US (alone and not with JPN, like for all other first draft chapters)** around 4 weeks before the round.

US explained that drafting process included consultation, under confidentiality obligation, of stakeholders, including Congress, industry and a couple of NGOs. EU noted that since we don't have similar confidentiality mechanisms, this disclosure to selected industry and NGOs is a problem to us because so far we haven't shown the text to any of them.

No other ACTA partner presented a written reaction. Discussion focused on preliminary comments and many clarification questions, due to the complex and sometimes confusing drafting. **AUS stated that US text was broadly acceptable.**

EU comments focused on

- a) elements that are part of the *acquis* but lacking in the **US** proposal, such as broad coverage of IPR infringements **v. US emphasis on copyright piracy. JPN and CH in favour of inclusion of other infringements.**
- b) **aspects where the US proposal substantially differs or goes beyond EU harmonised law: obligation of civil and penal enforcement mechanisms; concept of "3<sup>rd</sup> party liability"; obligation for ISPs to implement "reasonable" anti-piracy**

policies; the obligation to have notice & takedown system; the relation between TPM protection and exceptions & limitations to copyright; the protection of access TPMs; the position regarding interoperability, etc.

- c) request for clarification of concepts such as "digital environment", the definition of ISP, the need or not of judicial decisions to terminate/suspend internet access (in the US such judicial decision is required), the treatment of infringers information and the definition of "repeated offenders", etc.

## **2. Penal Enforcement**

Chapter was negotiated by PRES, on behalf of EU. Good progress and removal of a number of brackets from the text, mainly due to:

- a) EU revised proposal that took important steps to approach from the level of ambition proposed by US and JPN and acceptable to most other ACTA partners;
- b) opening by US and JPN to the structure proposed by the EU in the Paris round, which is closer from EU tradition on penal enforcement;
- c) good work by Korean chair, with firm push to seek agreed solutions.

Important for EU to make final effort in areas that are acceptable to a large majority of MS, but not yet consensual, such as "ex officio" penal enforcement and the removal of the requirement "predominantly used" for the confiscation of machinery and other implements.

## **3. Transparency**

Participants confirmed their intention to continue consulting with their respective stakeholders, and to share the results of the consultations at their next meeting. However, on the question of releasing negotiating documents to the public, there is not yet a consensus among the parties.

Other ACTA partners, and particularly US, were upset by leak of internet related document, which was widely publicised in the press and is clearly of EU origin. It was a memo prepared by COM and circulated to MS (133) and to EP (INTA committee) with classification "limited".

As mentioned above, EU also expressed worry with the fact that US shows negotiating documents "in confidence" to selected stakeholders, while we don't have the legal mechanism to do the same without risking leaks.

On the positive side, parties updated the joint summary report of ACTA negotiations that had been prepared by CH and CAN in April, so that it now describes the recent Internet discussions. Although this revision was made in record time, there was a tense exchange of views between EU and US with the latter apparently upset that most

delegations around the room didn't understand the confusing formulation they proposed. Finally EU and **US** experts got to an intelligible agreement.

#### **4. Next Steps**

Next (7<sup>th</sup>) round in Mexico (likely in Mexico City) at the end of January 2010. Parties agreed tentatively to a 4 day round, covering a detailed discussion of **internet** as well as revisiting **civil** enforcement and **customs** measures.

The subsequent (8<sup>th</sup>) round should take place in New Zealand, in April 2010.

Parties remain committed to **conclude ACTA in 2010**.

At the end of the session, **US** distributed the first aggregated negotiating text, putting together all the ACTA chapters. Parties should comment on the accuracy of this compilation by **20 November**. Regarding the first written reactions to the internet chapter, the deadline is **17 December**.



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No other ACTA partner presented a written reaction. Discussion focused on preliminary comments and many clarification questions, due to the complex and sometimes confusing drafting. **AUS stated that US text was broadly acceptable.**

The EU main comments were the following:

- **The scope of ACTA for digital environment. The US proposal mainly deals with copyright, apart from a single reference to trademarks in paragraph 1. Relevant EU legislation is generally broader in scope and this issue will require further clarification from a policy perspective. This clarification concerns paragraphs 2 and 3 as paragraphs 4 to 7 are only applying to copyright. EU proposed to consider infringements against all IPR.**
- **Definition of the concept "digital environment". The US proposal refers to the "Digital Environment". This seems to imply all digital technologies. Digital technologies are not only used in an online environment but also off-line, for example in CDs, DVDs and Blue Ray. However, this chapter has been nicknamed "the Internet chapter". Does it cover both online and offline? The EU *Acquis* wording refers to "Information Society Service". This concept defined ISS as "services normally provided for remuneration, supplied at a distance, by electronic means and at the individual request of a recipient of services". According to the discussions, the US proposal encompass online and offline services.**
- **Civil and criminal sanctions. Contrary to WPT and WPPC and to EU *Acquis*, the proposal seems to suggest a cumulative protection for circumventions of TPM or RMI. Furthermore, the paragraph on the ISP liabilities specifies only civil liabilities but the E-**

Commerce Directive (ECD) has a more horizontal approach. The US considers ACTA as a good opportunity to have a "WIPO plus approach"

- The "*general obligations*" of the proposal grant "*effective*", "*expeditious*" and "*deterrent*" procedures. However, the proposal does not state that the procedures etc. also shall be *fair, equitable* and/or *proportionate* in relation to, for example, an alleged infringer. Against this background, it appears like the proposed paragraph is not coherent with TRIPs and IPRED. The EU made similar comments on the draft "*Civil Chapter*", which is still under discussion. **The EU has proposed as solution to insert an introductory general provision (which could refer to TRIPs) applying to the whole Agreement.**
- The definition of "*third party liability*" as proposed in the text appears unclear as to the conditions which would trigger such liability. Furthermore, while accepting the necessity to ensure legal certainty, the current EU policy is **not** to specify the exact circumstances **triggering** liability (differences between Member States). EU legislation only provides for clear **exemptions**. The US considers ACTA as a good opportunity to give a detailed definition in line with the US legislative framework.
- The exemptions from the ISP liability for third party's illegal activity as proposed by the US are a clear reproduction of the Digital Millennium Copyright Act (DMCA) and therefore the concepts and/or wordings are different from the EU *Acquis* as stated in the ECD. This paragraph was the most discussed one by all participants. The EU has mainly stressed three concerns. Firstly, the EU has explained that the ECD does neither contain a **definition** of "*online service provider*" nor of "*ISP*". It relies on the definition of *information society services* (ISS) found in Directive 98/34/EC (as amended by Directive 98/48/EC). Secondly, among the list of the three exemptions as provided by the proposal, the EU discussed more specifically the **scope** of the third one which, according to the US, is intended to cover "*search engines*". Literally, "*search engines*" are not covered by the ECD but might be encompassed by non commercial hosting services. Finally, the EU stressed that by no means an **enforcement policy by ISP** as foreseen by the proposal should lead to impose to ISPs a general obligation to monitor the information which they transmit or store. Furthermore, the issue of **termination of subscriptions** and accounts is subject to debate in some MS. In addition, the proposal seeks to implement a **NTD procedure** (so far left in the EU to self-regulation). In its comments, the EU was also supported by other partners such as JP and CH. For them the US proposal seems very difficult to understand *prima facie*.
- **Obligations concerning Technological Protection Measures (TPM)**. The aim of the US proposal is to be a "WCT and WPPT *plus* provisions" by rendering compulsory their protection by *ad hoc* civil and criminal procedures. The EU has explained that this went beyond the EU *Acquis*. The EU noted that this also applies to the US proposal as far as Right Management Information (RMI) are concerned. Furthermore, the EU explained that there is no apparent possibility to safeguard exemptions and limitations to copyright/related right in case of protection against the circumvention of TPM. CH had similar questions on this topic. Finally, the question of **interoperability** was discussed as the EU philosophy is to encourage compatibility and interoperability between devices.

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- the removal of the requirement "*predominantly used*" for the confiscation of machinery and other implements.

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COM team