Note on ACTA (Anti-Counterfeiting Trade Agreement)

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The ACTA treaty, whose negotiation took place in the most complete opacity, hidden from citizens as well as from the members of the parliaments of signatory countries, aims at setting a regime of disproportionate criminal sanctions targeting alleged infringements to "intellectual property", as well as tremendously strengthening the pertaining civil sanctions. Written at the initiative of surrogates of the attorney lobbies, which will benefit from the inflation of litigation whatever the price might be for the economy, innovation, and essential freedoms, it is the latest avatar of an outdated vision of economic development. We will address here the most obvious problems justifying its rejection by members of parliaments of all countries, focusing more specifically on the European Union.

An outdated vision

The new repressive measures envisioned by ACTA[1] will have no impact on large scale counterfeiting. The complete absence of success of directives such as EUCD and IPRED is not the indication that their repressive measures were not of sufficient extent, but rather that these measures are inappropriate and inefficient by nature. On the basis of staggering yet unfounded estimations of losses, endlessly repeated by some corporate associations, members of parliaments have been lead to vote bills ever more detrimental to civil liberties and freedom of entrepreneurship, yet pictured one after the other as the ultimate panaceas to save developed countries' jobs. The essential problem has not been solved, but legal layers have been added that uselessly complicate laws[2], or even create insoluble conflicts of legal norms[3].

The planned sanctions will be as ineffective as the previous ones because:

- the strengthening of legislations in emerging countries will have no impact on the main issue, which is access, at a reasonable price, to the different goods and services (medicines, cultural goods) with respect to the standards of living of these countries;
- the increase of the overall price of goods and services induced by the costs of litigation and of the mechanisms of global surveillance encouraged by this text, will make counterfeited or third-party goods even more attractive[4];
- making all citizens, rather than only the clients of companies that favour these policies, bear the over-cost of these control measures, does not make these measures less unbearable, especially in developing countries.

A major strategic mistake

The vision borne by this treaty is that the more legal tools are created to set up and enforce monopolies by law, the more the economy will flourish. History has however shown the superiority of the free trade model, which favours entrepreneurship, over the rent monopolies of the feudal period (tolls and octrois) decoupled from all effective production. The obligation to negotiate and the importance of transaction costs, induced by self-censorship of entrepreneurs due to the amount

1 Contrary to what its negotiators pretend, ACTA aim sat introducing new repressive measures in Community law, regarding the criminalisation of abetting to infringement.

2 Right on data bases (1996/9/CE), technical protection measures (EUCD, 2001/29/CE), etc.

3 Conflict between technical protection measures (2001/29/CE) and interoperability (1991/250/CE), etc.

4 For instance, "patent battles" and the buying at high price of "defensive patent portfolios" by companies, like the $ 12.5 billion paid by Google to buy Motorola Mobility and its patent portfolio, do not bring any benefit to innovation, because most of these patents are trivial. Yet, they increase the price of goods for consumers, onto whom these costs are propagated. Only attorney lobbies benefit from this unwarranted bonanza.

of potential sanctions, lead to make activities that could otherwise innovations and future jobs[5] economically non viable.
One of the most blatant examples of this mirage was a statement by M. Tchuruk, then CEO of Alcatel, who wanted to make of the latter a "*fabless company*". This fantasy was built on the idea that subcontractors of emerging countries would remain docile executors of the Western research departments, without any ability to acquire themselves the knowledge necessary to the conception of the goods they produce, and unable to become competitors thanks to the "intellectual property" owned by the company. One knows what happened[6]. The off-shoring of production units prevents the necessary return of experience between production and research units, weakening the latter, and leads to the off-shoring of research departments, the legal hurdles preventing laid off personnel to go on carrying out competing and job creating activities in developed countries.
Emerging countries, towards which innovation tends to move, intend to profit in turn from this legal system to dominate the world market and subvert their competitors[7]. The system's advocates will therefore find new masters, while European companies will no longer have access to their own markets, and while signatory members of parliaments will cry in vain after the lost jobs.

A biased wording

The ACTA treaty uses non defined elements of speech, opening the door to extremist interpretations in the transpositions to come :

- the notion of "*commercial scale*" is defined in a non limitative way, and includes the getting of indirect advantages, while it constitutes the threshold for triggering criminal measures. If one considers that any digital technology connects a "provider" and users seen as "customers", then any multiple exchange on digital networks can be seen as a "commercial scale", even without any intention of financial profit, whether direct or indirect. This places an enormous burden on service providers, hindering the availability of innovative services (peer-to-peer software, advanced search engines, …);
- it is intellectually dishonest to justify, using the danger to consumers' health brought by the distribution of tampered drugs, already fought by existing legal means, the set up of measures aiming at controlling the distribution of generic drugs that are essential to the populations of developing countries[8]. It is not fair that a shipment of generic drugs could be seized in an in-transit signatory country, on the pretext that these drugs would look "confusingly similar" to branded medicines ;
- the possibility to dispose of goods *infringing* any right while not being *counterfeits* is a completely disproportionate measure.

Measures toxic for innovation

The ACTA treaty is in multiple respects detrimental to innovation. Among them:

- the possibility for an alleged plaintiff to request communication of all documents that can be used as evidence of the fraudulent activity of an alleged counterfeiter, allows any company with enough financial means to attack an innovative start-up on the basis of patent

5 Let us recall that the Philips company started its business in Netherlands by "licitly counterfeiting" Edison patents on lightbulbs, in a period when the patent system had been revoked in this country.

6 One can cite as an example the Japanese saying: "*look, copy, understand, do better*", which turned the counterfeiters of the 1960's into innovators of the 1990's.

7 In November 2010, the State Bureau of Intellectual Property of China published a document entitled "National S*trategy of Patent Development (2011-2020)*". The Chinese goals for 2015 are considered by D. J. Kappos, former head of USPTO, as "*mind blowing figures*" (source : NYT). A report from Thomson Reuters dated from October 2010 indicates that patent filings in China would overwhelm those of the USA this very year. China also wishes to double its filings in foreign countries.

8 Let us recall that one of the consequences of the TRIPS agreement of 1994 has been to allow pharmaceutical companies to sell AIDS drugs with higher prices in Africa than in Western countries.

infringement in order to discover its industrial secrets. Potential fines are minimal with respect to the potential benefits, and will be of no help to the competitor bashed out of the market, rendered bloodless by legal fees necessary to prove its good faith. Trial time is not innovation time, and dilatory measures are so common, that winning after ten years and one's own bankruptcy is not much comfort[9]… This text is a de facto legalisation of industrial espionage[10] ;

- the methods for calculating damages prescribed by ACTA are completely unreasonable and favour self censorship of all innovators. For instance, regarding digital file sharing, to imagine that the loss for the editor is equal to the number of copies shared, multiplied by the retail price, is meaningless, because Internet users listen both to what they will buy, and to what they would not have bought. This vision is all the more unrealistic since Internet users that share more are those that buy more, after having made up their minds[11]. It is the very same for disputed patented drugs, for which the retail price in Europe is incommensurable with respect to that of the generic drug in Africa.

Measures incompatible with freedom of speech

The damages sought for in case of copyright infringement, and the possibility of injunctions to technical intermediaries and access providers on the basis of alleged commercial damages, may allow any company to prevent the disclosure of evidences of misconduct. Even some governments can resort to it[12]. It is a major danger for journalistic enquiry and freedom to inform. Pressure is specifically put on providers and hosting services in order to prevent such documents from reaching the public.

Measures contrary to the *acquis communautaire*

Although it refers to it explicitly, ACTA does not comply with the principle of proportionality enshrined in EU law. The extent of the sanctions it implements (setting of prescribed damages and associated calculation rules), as well as the absence of effective safeguard clauses (in particular for public health concerns), do no comply with the acquis communautaire (and especially with the IPRED directive). These are some of the reasons that motivated the recommendation of rejection issued by the study commissioned by the INTA commission of the European Parliament.

9 One can be convinced by thinking about the lawsuit between the late Netscape and Microsoft, in the 1990's, on a “simple” accusation of abuse of dominant market position regarding the Internet Explorer web browser.

10 The defence of the judicial lobby is to say that the ACTA treaty does not compel to the implementation of such measures (“*shall*”) but only allows for them (“*may*”). We will answer that, given the toxicity of such measures, the simple fact of inciting governments to implement them is an aberration.

11 Studies carried out in many countries: Canada, Germany, Netherlands, Norway, USA, … In France, this fact has even been confirmed in p. 45 of the 2011 report of HADOPI, the agency in charge of tracking down file sharing.

12 One can cite in the United Kingdom the case of a person charged with infringement of Crown Copyright while he leaked confidential documents that were of interest to the public.