Draft Opinion on the proposal for a Council decision on the conclusion of ACTA

European Digital Rights is concerned that there are many elements in the draft Opinion which overlook points of major concern for development policy and also several points which appear to be factually inaccurate. Before this topic is discussed in Committee we would like very briefly to comment on the paragraphs of the draft Opinion.

1. **The draft Opinion asserts that protection of IPR is "essential for development"**

The 2011 European Parliament study[1] for the INTA Committee argues that "*it is not possible to say at what point IPR protection becomes counter productive*"[2] and that there is a "*built-in tension*"[3] between the costs and benefits of strengthened IPR protection for developing countries. As the European Commission has refused to undertake an impact assessment on the possible consequences of ACTA for either the EU or for developing countries, the assertion that IPR protection is "essential for development" has no obvious evidence base. It is even less certain that the harsh and inflexible regime proposed by ACTA would provide the flexibility that a developing economy would need.

2. **Welcomes the "WTO-plus legal framework"**

ACTA was born out of a decision to abandon multilateral frameworks such as the WTO and WIPO – a particularly extreme form of "forum shopping" where existing bodies and agreed procedures were abandoned to deliberately exclude developing countries. The damage done to trust, cooperation and existing frameworks will only become clear in the years to come – although the protest[4] from India and others at the TRIPS Council against the exclusion of less developed countries gives an indication of the scale of resentment which ACTA has created. Far from welcoming this framework, any policy-maker who is concerned about development and democracy should protest this new exclusionary environment.

3. **Welcomes "the fact that ACTA membership is not exclusive"**

This paragraph of the draft Opinion fails to address the serious democratic problem that developing countries were deliberately excluded from the negotiation process. It also ignores the fact that the whole purpose of ACTA was to create an exclusive "coalition of the willing" in order to subsequently roll out an unchangeable *fait accompli* to developing countries. The point was made very clearly by the 2008 study undertaken for the European Parliament: "*This approach [of ACTA] particularly penalizes developing countries as they do not have equal input to the agreement text they could adhere to.*"[5]

4. **Reminds the Commission not to impose ACTA through FTAs or partnership agreements**

It is obviously too early to tell if the Commission is going to respect this undertaking or not. However, we already see elements of ACTA appearing in Free Trade Agreements. For example, the EU is pushing for ACTA-like provisions in the EU/Canada deal, such as with regard to information provision. Bearing in mind that the Commission already reneged (without any negative consequences for itself) on its promises on impact assessments, specific fundamental rights impact assessments and compliance with the *acquis* in ACTA, the signs are not particularly positive that this undertaking will be respected.

5. **Commends the Commission for Union *acquis* and TRIPS compliance**

The entire criminal enforcement chapter is outside the EU *acquis*. The Parliament's request, in its resolution of 22 September 2010 that the *acquis* be respected was therefore ignored. The 2011 European Parliament

1 European Parliament Directorate-General for External Policies of the Union, "The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment," June 2011. The document is unavailable on the Parliament website but can be downloaded from http://www.edri.org/files/DG_EXPO_ACTA_assessment.pdf

2 Op .cit, European Parliament study, p.36

3 Ibid, p.37

4 Ibid, p.37 quoting 'Minutes of Meeting Held In The Centre William Rappard on 27-28 October and 6 November 2009' Council on Trade-related Aspects of Intellectual Property, IP/C/M/61, 12 February 2010, para. 264.

5 Dordi, C, "Comments on the Anti-Counterfeiting Trade Agreement" 14 May, 2008. p24. The document is unavailable on the Parliament website but can be downloaded from http://www.edri.org/files/dordi_2008.pdf

DG Expo study points out that "*given the uncertainties, it may be necessary to seek out such clarification if the conformity of ACTA with the EU Acquis is to be ensured,*" specifically raising the option of a referral to the European Court of Justice with regard to the provisions of ACTA on damages.[6]

Furthermore, the preamble and digital chapter refer to (criminal and civil) law enforcement being undertaken through "cooperation" between (private) stakeholders – in obvious contradiction with Article 21 of the Treaty on European Union, which requires support for the rule of law in the EU's international relations.

The 2011 study carried out for the European Parliament concluded that ACTA "*is significantly more stringent and rightholder friendly than the TRIPS Agreement*."[7]

6. Appreciates the "unequivocal language" of ACTA on generic medicines

Many civil society groups, among others Oxfam[8] and Public Citizen,[9] and an academic opinion[10] pointed out problems with access to medicine. The ACTA text only mentions the Doha Declaration once in the non-binding preamble. The combination of heightened measures with a non-binding reference to the Doha Declaration, and undermining the Doha Declaration in other fora does not provide sufficient safeguards for access to medicine.[11]

7. Takes note of the Commission's answer on access to medicines

Oxfam's analysis points out that "*ACTA will undoubtedly impact access to affordable medicines in the EU and other signatories by curbing generic competition*".[12] The Agreement provides for the seizure of in-transit medicines that do not infringe any IP in the place of production or consumption. It expands TRIPS border measure requirements, including requiring the authorisation of seizures where border agents "suspect" a medicine's label of being "confusingly similar" to a brand. This will lead to an increase in the risk of seizures of legitimate medicines.[13] According to an academic study analysing ACTA's impact on the access to medicines, *"[t]he lowering of minimum standards for procedural rights and evidence before seizures may also implicate international and European human rights norms governing fair trials and takings of property".*[14]

6 Op.cit, European Parliament Directorate-General for External Policies of the Union, p.6

7 Idem

8 Oxfam, "Oxfam statement regarding ACTA and public health" October 2011, available at http://www.oxfamsol.be/fr/IMG/pdf/Oxfam_ACTA_analysis_FINAL.pdf

9 Public Citizen, "Letter to Members of the committee on Legal Affairs, October, 2011, Available at http://www.citizen.org/documents/Letter-to-Members-of-the-Committee-on-Legal-Affairs-on-the-ACTA.pdf

10 Flynn, S with Madhani, B, ACTA and Access to Medicines, June 2011 available at http://rfc.act-on-acta.eu/access-to-medicines

11 Foundation for a Free Information Infrastructure (FFII), "Note on the Legal Service Opinion on ACTA, December 2011, available at http://acta.ffii.org/?p=992

12 Op.cit, Oxfam, p.1

13 See Articles 12, 13 and 16 of ACTA. Footnote 6 explicitly states that patent infringement and the protection of undisclosed information are not within the scope of the section on border measures

14 Op.cit, Flynn and Madhani, pp9-10, Compare TRIPS art. 58 (noting that competent authorities may act upon their own initiative in suspending the release of goods when they have acquired *prima facie* evidence of infringement), *with* ACTA Text–Dec. 3, 2010, *supra* note 3, arts. 16:1(a), 16:2(b), 17:1 (mentioning a *prima facie* evidentiary requirement for suspensions only in the case of requests by right holders, not when customs authorities act on their own).