ACTA is dead, long live ACTA? ACTA-like measures still in EU IP policies

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On 4 July, the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA) in an overwhelming 478 to 39 vote with 165 abstentions. Health Action International (HAI) Europe welcomes this important decision (i).

Tessel Mellema, HAI Europe: "The rejection of ACTA is a clear signal to the European Commission from both its Parliament and EU citizens that intellectual property (IP) enforcement should not predominantly protect commercial rights over those of EU citizens. Pieced together in an undemocratic and opaque process, ACTA would have hindered generic competition, which is crucial for access to affordable medicines in Europe and developing countries."

Worryingly, the strong and unbalanced push for strengthening IP enforcement that people objected to in ACTA is part of a wider trend. As we speak, ACTA-like and even ACTA-plus provisions are still included in current proposals for a new EU Regulation on the scope of customs authorities' power to detain products – including generic medicines – at the border (ii). The European Commission also systematically proposes ACTA-like IP enforcement measures as part of EU bilateral trade agreements, with for example Canadaiii and the MERCOSUR countries." (iv)

"ACTA's rejection does not signal that the fight against over-zealous IP enforcement is over. It is crucial that EU citizens and the European Parliament remain vigilant and vocal about the real-world impact of these IP enforcement measures on generic competition and access to affordable life-saving generic medicines", says Tessel Mellema.

IP enforcement measures can strengthen the substantive rights of IP rights holders (v), and harm fundamental rights and freedoms. Strengthening such rights is often done under the pretext of safety and public health – ACTA was for example systematically promoted by the Commission as necessary to combat counterfeiting. However, patent infringement and other types of civil trademark infringement have in principle nothing to do with trade in counterfeits (vi). Moreover, the main public health concern lies with the quality of the medicines, which has nothing to do with IP enforcement, but should be addressed by better regulation through quality standards (vii).

Conflating counterfeits with other types of IP infringements, actually increases the risk of right-holders using IP enforcement measures to target legitimate generics. The lesson learned from the DG Competition Pharmaceutical Sector Inquiry (2009) (viii) is that strong IP enforcement provisions have in the past been abused by rights holders to delay generic competition and hamper innovation. These company practices have contributed to an

unnecessary expenditure of billions of Euros for EU health systems, which had to purchase expensive brand medicines instead of more affordable generics. This example illustrates how an increase in global IP enforcement as proposed in ACTA and other EU regulations and trade agreements does not serve public health or EU consumers by definition.

Increasing IP right-holders' enforcement capacity requires a transparent and participatory approach, with a clear view on the interests that the EU wishes to protect, and a comprehensive understanding of the impact on society. However, in recent debates surrounding ACTA, the Commission ignored a request by the European Parliament regarding an impact study on ACTA (ix). In a critical review of the EU IPR Enforcement Strategy in Third Countriesx and the review of the previous EU Customs Regulation (xi) , a main point of critique was that the Commission has no clear view of the potential negative effects of strengthening IP enforcement measures on society.

Instead of a single-minded move for stronger IPR enforcement rules, the EU needs to commit to thorough assessment of the implications and possible impact of these measures, especially with regards to generic competition.

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Endnotes

i. ACTA conflates the need to combat the trade in counterfeits with IP enforcement in general. Because it does not properly limit strong enforcement measures to counterfeit medicines, ACTA allows multinational drug companies to ask customs officers to seize legitimate and safe generic medicines on the false grounds that they are counterfeit goods. Similar provisions have in the past led to the seizure of generic medicines in transit through Europe, denying their timely delivery to developing countries. Moreover, ACTA widens the enforcement net of IP right holders to include third parties such as purchasers of generic medicines, provides for excessive punishment, and increases the likelihood that wrongful searches, seizures and injunctions against legitimate suppliers and producers of generic medicines will be carried out. These measures, when implemented, can have a chilling effect on generic competition. For an in depth analysis of ACTA and Access to Medicines read HAI Europe's Policy Brief of 27 February 2012: http://haieurope.org/wpcontent/uploads/2012/02/27-Feb-2012-HAI-Europe-Policy-Brief-ACTA-and-Access-to-Medicines.pdf.

ii. Commission Proposal for a Regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, COM(2011) 285 and EU Parliament resolution 3 July 2012 on COM(2011)0285-C7-0139/2011-2011/0137(COD), P7_TA-PROV(2012)0272.

iii. Michael Geist, 9 July 2012, ACTA Lives: How the EU & Canada Are Using CETA as Backdoor Mechanism To Revive ACTA, available at: http://www.michaelgeist.ca/content/view/6580/135/.

iv. http://haieurope.org/wp-content/uploads/2012/01/29-Apr-2011-Policy-Brief-EU-Mercosur-ProtectingAccess-to-Medicines.pdf.

v. Seuba, Xavier, Joan Rovira, and Sophie Bloemen. 2010. Welfare Implications of

Intellectual Property Enforcement Measures. PIJIP Research Paper no. 5. American University Washington College of Law. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1005&context=research.

vi. Article 51 footnote 14 of the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) limits the definition of what constitutes counterfeit "the use of a sign that is identical to the brand owner's trademark".

vii. Oxfam Briefing Paper, 2 February 2011, Eye on the ball: Medicine regulation – not IP Enforcement – can best deliver quality medicines, p. 22-26.

viii. DG Competition Pharmaceutical Sector Inquiry (2009): executive summary paragraph 3.2.2., http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf.

ix. EP Resolution of 12 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058).

x. http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/enforcement/. A critical assessment of the policy was given by ADE in 2010, which was commissioned by the EC undertake a study on it: Evaluation of the IPR Enforcement Strategy in Third Countries, ADE: http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_147053.pdf.

xi. http://ec.europa.eu/taxation_customs/common/consultations/customs/ipr_2010_03_en.htm.