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AK Position Paper

Anti-Counterfeiting Trade Agreement (ACTA) negotiations

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

With regard to the ongoing ACTA negotiations, the Federal Chamber of Labour (AK) sees a number of problematic aspects that affect the vital interests of Austrian citizens and consumers. It is vital for the AK that private individuals/consumers are clearly exempted from the civil law and criminal law measures contained in the agreement. The negotiation of criminal law measures should likewise be rejected as there is no standard European acquis for this. In addition, we advocate passing on personal data to authorities in third countries only in so far as the data protection law standards in these countries are equal to the European regulations. All in all, the AK feels that the political and economic value added of the Anti-Counterfeiting Trade Agreement (ACTA) should be called into question particularly as the actual target countries (China, Russia among others) are not part of the negotiations and their later accession to the agreement is unlikely. The conclusion of relevant bilateral agreements (bilateral FTAs, customs cooperation agreements etc.) seems more promising to the AK.

The AK's comments refer to the ACTA negotiation process in general as well as to the proposals on Civil Enforcement and Criminal Enforcement circulated in the negotiations in particular.

The AK position in detail

1. General observations on the negotiation process

Transparency of the negotiations worthy of improvement

The agreement concerns regulations on intellectual property and law enforcement. It will influence European and national law considerably as a top-down regulation. However, with the topics under negotiation not only the interests of right holders are addressed, but also those of the "public" (e.g. consumer rights, innovation promotion, access to knowledge, fundamental rights).

The interests of right holders naturally are related to effective law enforcement with rules that are as strict as possible. With regard to the interests of third parties, the question arises as to the appropriate extent of the regulations and possible negative effects of the regulations on the public (restriction of consumer rights, innovation being hindered, restriction of access to knowledge, fundamental rights, data protection etc.) due to provisions that are interpreted too strictly.

The AK points out a lack of necessary information and transparency for the public concerned and key stakeholders.

With regard to the negotiations, there is however a lack of necessary information and transparency for the "public" concerned and key stakeholders. We also consider as problematic the fact that the public and a large number of different stakeholders have no access to the concrete regulations being discussed in order to also be able to refer to possible negative effects from their point of view and be able to represent their interests.

The "Fact Sheet" published by the European Commission (September 2008) is rather general. It is a source of information, although it does not go into the negotiating basis in detail. It can therefore only constitute a small first step towards creating the necessary transparency for third parties.

Value added of the ACTA not clear at present

The AK also believes there can be no doubt that there are deficiencies on the part of certain countries when it comes to monitoring adherence to intellectual property rights (IPR). China as well as Russia and other newly industrialised and less developed countries are rightly mentioned here time and again. The European Union has reacted to the increase in trade involving counterfeit products and services in recent years with a whole string of measures and instruments. Only the European Commission's Strategy for the Enforcement of Intellectual Property Rights in Third Countries is cited here vicariously. In addition, there have been increased efforts for great-

The AK says that the disproportionality of the measures with regard to consumer and data protection matters has been fiercely criticised many times and rightly so.

er cooperation by customs authorities within the framework of both the World Customs Organization (WCO) and at bilateral level. The conclusion of the bilateral customs cooperation agreement between the EU and China represents an important step here. In addition, separate chapters on the topic "Enforcement of Intellectual Property Rights" have been included in the bilateral free trade agreements negotiated since 2006. The AK is of the opinion that such bilateral cooperation and trade agreements open up the possibility of inducing those countries that do not satisfactorily guarantee adherence to intellectual property rights to employ suitable cooperation and support mechanisms for effective law enforcement. In contrast, we see a serious weakness in the fact that the ACTA is being negotiated between mainly developed countries. As is well-known, countries like China and Russia in particular that exhibit law enforcement problems are not negotiating partners. The hope expressed on the part of the advocates of ACTA negotiations that these countries might become members to the agreement at a later date seems extremely optimistic, not to say naive. If the trade policy reality of recent years has shown us something, then it is the fact that those large newly industrialised countries in particular, which is what we are talking about here, have behaved very self-confidently and have resolutely rejected proposals or agreements that run counter to their interests. This is why the AK doubts whether the legitimate economic interests of European enterprises vis-à-vis those countries in which these interests are disregarded can really be promoted effectively by this agreement.

No obligations from international agreements until there is a consolidated opinion / harmonised acquis within the EU

It is acknowledged in principle that infringements of intellectual property rights because of cross-border manufacturing, advertising and sales channels suggest treatment at international level. However, the question as to the appropriate extent of information rights and legal protection possibilities of right holders under civil and criminal law has not been answered once conclusively within the EU. The disproportionality of the measures with regard to consumer and data protection matters has been fiercely criticised many times and rightly so.

- Relevant ECJ proceedings (e.g. pertaining to Directive 2006/24/EC on the retention of data, which applies inter alia to Internet traffic data and the copyright and data protection directive – Directive 2001/29/EC, Directive 2004/48/EC, Directive 2002/58/EC – with

regard to the obligation of access providers to disclose information) have still not been concluded. In these proceedings, the ECJ has to tackle the controversy between the interests of publishing customer data for purposes of prosecution and the secrecy rights of those affected.

- The proposal for a Directive [COM(2006) 168 final, Brussels, 26.4.2006] to increase criminal sanctions in the event of infringements of intellectual property rights on a commercial scale throughout Europe has still not been finalized, and that for good reason. Wordings like "criminal offences" (according to the Directive, these are intentional infringements of intellectual property rights on a commercial scale as well as an attempt at infringement or aiding and abetting an offence) are dangerously imprecise for consumers and Internet users. These run the risk of having their buying and user behaviour criminalised. The European Consumers' Organisation BEUC has also vehemently rejected the proposal for this reason: "In its efforts against piracy and counterfeiting the European Parliament must not confuse consumers with criminals. They will potentially criminalise consumers, increase legal uncertainty, limit freedom of expression and innovation, deny access to justice for individual consumers, and inhibit competition." (BEUC Position Paper, 16.11.2005) or in another section "We support the protection of intellectual property rights, but not by means of a bad law and a massive and direct interference in police and judicial procedures of the member states." (Position Paper, 25.04.2007).

- During the German EU Presidency, the German Ministry for Consumer Protection (BMELV) launched the European "Digital Rights Charter" in order to look at the development of the digital sector not only from the viewpoint of right holders, but also to recognise the needs and concerns of users (for effective data protection, protection of privacy, interoperability of digital services, elimination of information deficiencies and unfair licence terms and much more). In the meantime, the call for a well-orchestrated balance between the rights and obligations of both sides – those of right holders and final consumers (but also others entitled to free usage of works such as education centres) – cannot be longer ignored in Europe.

Against this background, there can be no talk of either a mature legal framework within Europe or at least a consolidated opinion on how to proceed in future. It would therefore be untenable to end the opinion-forming process at EU level with the topic being raised to the level of plurilateral negotiations in which the legitimate interests of parties other than the right holders are not taken into account at all. The result of these negotiations would prejudice

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work on the European legal framework in an unacceptable way.

2. No inclusion of acts by private individuals in the negotiations (consumer interests)

In its Fact Sheet, the Commission assures us that the agreement in question involves combating the proliferation of IPR infringements. According to this explanation, the aim of the agreement is apparently to combat organised crime and infringements on a commercial scale. In its Fact Sheet, the Commission establishes that consumer acts should not be affected.

Although the Commission affirms that consumer acts should not be affected, the AK criticises that the draft negotiating papers also refer to private acts.

When examining the draft negotiating papers that have been submitted, it turns out that the measures should also refer to private acts.

As far as using the expression "on a commercial scale" is concerned, experiences in connection with the process for creating the Enforcement Directive 2004/48 EC (concerning civil law measures) show that using the expression "on a commercial scale" in the regulation text is not enough to exempt consumer acts from the scope of the regulations. If this expression is not defined further, there is the tendency that it will be interpreted extremely broadly to the detriment of private individuals. We should therefore proceed very carefully in the event of a concrete definition "on a commercial scale". Proposals that are geared to behaviour that "can lead to direct or even indirect income losses" incorporate acts by private individuals. This would also apply with regard to the wording "carried out for direct or indirect advantage". A reference like the one for example in recital 14 of the Directive on enforcement in civil law (Directive 2004/48/EC of 29.4.2004) is likewise unsatisfactory ("Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end consumers acting in good faith").

3. Comments on the planned civil law measures

In the topic under negotiation, the Commission refers to Directive 2004/48 EC (enforcement directive) when it comes to civil law measures for enforcing intellectual property rights. Regarding this, it should be stressed in principle that the provisions of this directive are extremely controversial not only with consumer organisations, but also e.g. with several SME representatives (open software enterprises).

In connection with this, reference should also be made to Art 18 of the enforcement directive. It provides for an assessment of the provisions with regard to their effects. By concluding the ACTA quickly, the European Community would commit itself ex ante to an agreement and certain regula-

tions. As a result, the provision on the assessment would not only lose its meaning (Art 18), the process for forming an opinion on the directive would be shifted to the level of a multilateral agreement, with the public unable to bring their interests to bear.

The AK rejects a deviation from the text of the enforcement directive 2004/48 EC.

As regards the Commission's concrete draft proposal on the topic under negotiation regarding civil law measures (EU proposal, chapter 2, 23 September 2008), it should be emphasised that it is geared in principle to the text of the enforcement directive (2004/48 EC). However, the wording of the directive is not adhered to exactly. This results in the Commission proposal setting stricter standards than the individual articles in the directive. We reject such a deviation from the directive provisions. The provision on Article 2.2 ("Damages") is to be cited as an illustration in this regard:

In Article 2. 2. Para 1, the passage "the value of the infringed good or service, measured by the market price, the suggested retail price…" is additionally included. The passage of the accompanying Article 13(1)lit a of the directive "in appropriate cases, elements other than..." is omitted.

Article 2.2 Para 2 regulates "pre-established damages" and "presumptions for determining the amount of damages". These provisions as well as the accompanying footnote 2 are not to be found in the enforcement directive. We reject them given that these provisions can have a detrimental effect on private individuals (particularly the regulations in the footnote)

Another sensible provision from the viewpoint of consumers and workers is the right of information regulated in 2.4 of the negotiating text. This article also contains wordings ("Such information may include information...") that enlarge the right of information in favour of right holders beyond what is stipulated in the relevant text of the enforcement directive.

4. Rejection of the draft negotiating paper on "Criminal Enforcement"

The AK firmly rejects the inclusion of criminal regulations in the ACTA. There is no harmonised basis for criminal regulations at Community level. The Commission introduced a proposal for a directive (COM 2006/168 final) on this, although it was met with fierce resistance. The individual provisions of the proposal are highly controversial (definitions, scope of the directive, competence issues, different concepts in the Member States).

We therefore urgently request that the Austrian government declares itself against including criminal regulations in the ACTA and informs the Commission of this.

We find the concrete provisions proposed in the discussion paper (MD 424b-08) unacceptable.

Article 1

a): The expression in the proposed option: "trademark infringement caused by confusingly similar trademark goods" makes it unclear which acts might fall under this.

- Besides "trademark counterfeiting", copyright infringements should likewise be subject to criminal sanctions. In the wording, copyright infringements "on a commercial scale" are taken into account to begin with. However, the following definition of the expression "on a commercial scale", "willful copyright or related rights piracy on a commercial scale includes: significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and willful copyright or related rights infringements for purposes of commercial gain" reveals that this term has a very broad meaning, and not only commercial, professional behaviour, but also acts by private individuals should be criminalised. In addition, the expression "piracy" is not explained in more detail.

However, acts by private individuals should be exempted from criminal provisions in a specific and clear manner.

- "Non-commercial" infringements can also have criminal law relevance in Austria. The Austrian legislator did not want to sanction several illegal acts that can be prosecuted under civil law. Only those cited in § 91 UrhG (Copyright Act) are subject to a criminal sanction. These regulations (§ 91 Para 1, final sentence – e.g. reproduction for one's own use or free of charge to order for someone else) would have to be omitted in the event of non-commercial behaviour being integrated in the Commission proposal.

In connection with the criminal sanctioning of industrial property rights (like e.g. the trademark right), we would also like to point out that in Austria (§ 60 Trademark Protection Act, § 159 Patent Act, § 22 Semiconductor Protection Act, § 35 Law on the Protection of Designs, § 42 Utility Model Protection Act, § 10 Conditional Access Law) the legal situation provides for a special ground of excuse for workers and economically dependent persons. Accordingly, they cannot be punished if they act on instructions issued by their employer and cannot be expected to refuse to perform the punishable act due to their economic dependency. This special ground of excuse specifies less stringent prerequisites than the necessity as excuse in § 10 Criminal Code (StGB). With regard to economic dependency (threat of losing one's job in case of refusal), it is justified and appropriate. The question arises to what extent these protection provisions can still be maintained.

- Article 2.16: Unauthorised camcording:

We refer to Finland's line of reasoning, which proposes deleting the provision as it goes too far.

- Article 2.17: Member States should

continue to decide whether a criminal offence should be prosecuted ex officio or be structured as a civil action offence.

5. Data protection relevance of the proposal

A four-page discussion paper (source and date unknown) on the planned agreement argues that cooperation (between the partner countries ratifying the agreement) is a key part of any future agreement. This includes exchanging information as well as working together with the authorities entrusted with enforcement (including the customs authorities and "other important authorities").

The AK underlines that the legal situation varies even within the EU: the Directive on the retention of data enables Member States to have periods of retention that are different in length.

Even without knowing the detailed plans, scepticism is called for. The legal situation varies even within the EU: the Directive on the retention of data enables Member States to have periods of retention that are different in length. The prerequisites under which information on persons suspected of having infringed laws can be collected differ from country to country (direct information from Internet providers, information only on the basis of civil or criminal instructions, only from a certain seriousness of offence etc.). Even more varied are the guarantees granted by law by those countries that are currently working on concluding the agreement. For example, the USA or Mexico do not belong to those countries that have a data protection level equal to the EU legal framework. With regard to their interest in effectively combating organised forms of product piracy and the generation of pirate copies, China and Russia would probably be the most important signatories to an agreement in the long term. However, a data transfer from Europe to all these countries based on EU law cannot be done just like that for lack of secure data protection standards.

The deficiencies of bilateral agreements have already revealed themselves in the agreement negotiated between the USA and the EU on the transmission of European airline passenger data to the USA in order to support measures on counterterrorism. In view of the widely different data protection traditions, an agreement should actually be rejected from the outset. For European standards the USA declared a need for a large number of data without sufficient cause, specified no sufficient guarantees on dealing with these data within the USA and had a completely different idea of the protection of privacy of those affected compared with the understanding of fundamental rights and the legal framework within the EU with regard to transmissions to various authorities and the retention period of data.

Against this background, it is extremely disconcerting that the international exchange of information will be one of the key areas of the agreement. The AK believes that it is essential to fully consult with national data protection authorities and the Art.29 Data Protection Working Party established on the

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basis of the EU data protection directive 95/46/EC. Unfortunately, on the strength of the experiences made so far, we cannot assume that contractually agreed data protection guarantees offer an adequate replacement for an effectively enforced legal framework. This is why the idea of a standardised exchange of information for sensitive data categories, like e.g. the presumption of a criminal offence of an individual, with countries without a developed data protection level can only be implemented if binding legal protection guarantees have been negotiated beforehand.

The AK reserves the right to deliver further opinions on the ongoing ACTA negotiations and requests that the position cited in this paper is taken into account.

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