

**Update regarding:
Anti-Counterfeiting Trade Agreement
(‘ACTA’)**

ACTA - update

- Scope of update – to keep the members of the Electronic Communications Forum abreast of the Malta Communications Authority's ('MCA') contributions/involvement (if any) regarding ACTA.
- MCA was asked to attend and give feedback regarding ACTA to the Standing Committee on Foreign and European Affairs (the 'Committee') during the Committee meeting of 17 February 2012.
- ACTA is currently being discussed before the Maltese Parliament for ratification and the European Court of Justice for its opinion on whether ACTA is incompatible with the EU's fundamental rights and freedoms (expression, information, data protection and the right to property as regards intellectual property).

ACTA - update

- Supported by the European executive, ACTA is an international trade agreement, it was negotiated outside the WTO and in camera between 2007 and 2010 by Australia, Canada, South Korea, the United States, Japan, Morocco, New Zealand, Singapore and the EU.
- Its aim is to protect intellectual property from traditional counterfeiting (clothing, medicines), and from digital counterfeiting (illegal downloading), on the basis of harmonised international standards.
- ACTA does not seem to affect the EU *acquis* which already contains law that is more advanced than the current international standards.

ACTA - update

- Certain provisions are suspected of being detrimental to certain freedoms such as freedom of the internet, or access to generic medicines.
- In Council, several of the 22 Member States that signed the agreement at the end of January (only Germany, Estonia, Cyprus, the Netherlands and Slovakia had then refused signature for technical reasons) have since distanced themselves from the text (Bulgaria, Latvia, Poland, the Czech Republic and Romania). In Parliament, ACTA does not call up unanimity.

ACTA - update

- In essence the agreement aims to:
 - Establish an international legal framework for targeting copyright infringement
 - Assist the EU and its Member States to tackle more effectively intellectual property rights infringements which is seen by the EU as critical for sustaining economic growth.

ACTA - update

- ***ACTA - transparency and provider liability***

- This agreement has garnered worldwide notoriety due to the fact that all the negotiations were initially done in secret (lack of transparency) and not through the usual forums (such as World Trade Organisation and World Intellectual Property Organisation), keeping the general public and civil organisations out of the discussions.

ACTA - update

- ***ACTA - transparency and provider liability***

- The Council of the European Union's reply to these allegations:
 - The negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) started in June 2008 and were finalised in November 2010 and final draft is available to the public.
 - The European Commission, responsible for conducting the negotiations and the Presidency of the Council for matters under Member States' competence, shared with the European Parliament, during ACTA negotiations seven draft consolidated texts of the agreement, three detailed written reports on negotiation rounds and fourteen notes and internal working papers.

ACTA - update

- ***ACTA - transparency and provider liability***

- Furthermore, the European Commission and the Presidency of the Council of the European Union have kept the Parliament fully informed on several occasions in plenary, committee meetings and other informal debriefing sessions.

ACTA - update

- ***ACTA - transparency and provider liability***

- The final draft is a (heavily) watered down version of the initial document which included certain worrying elements such as:
 - privatised enforcement which could be said to be outside of the rule of law by for example promoting policing and punishment of alleged infringements by ISPs; and
 - wording (or the lack of it) that could potentially have adverse effects on fundamental civil and digital rights, including freedom of expression and communication privacy.

ACTA - update

- ***ACTA - transparency and provider liability***

- The wording of the final draft agreement, in line with what has been stated by the Commission, indicates that ACTA is to create improved international standards for actions against large-scale infringements of intellectual property as commercial activities.

ACTA - update

- In Malta, *prima facie*, the Agreement would seem to fall within the remit of the 'Industrial Property Registrations Directorate' (IPRD) which falls under the Commerce Department of the Ministry of Finance, the Economy and Investment and the 'Economic Crimes Unit' of the Malta Police Force both of which have competences related to intellectual property rights and copyright and does not fall within the remit of the MCA unless appointed as a competent authority in terms of the Agreement.

ACTA - update

- One aspect of the Agreement that could warrant further clarification to the public, in view of the public backlash that has been being experienced across many countries and that has resulted in countries either temporarily refusing to sign ACTA or stalling the ratification process is Article 27(4) of the Agreement which provides:

ACTA - update

ACTA Article 27 (4) – Enforcement in the Digital Environment

"A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy."

ACTA - update

Art 27.4 of the ACTA has certain similarities to Article 22 of the Electronic Commerce Act (Cap 426), which states that:

"Information society service providers shall promptly inform the public authorities competent in the matter of any alleged illegal activity undertaken or information provided by recipients of their service and shall grant to any such authority upon request information enabling the identification of recipients of their service with whom they have storage agreements:

Provided that nothing in this Part of the Act shall be interpreted as imposing an obligation on information society service providers to monitor the information which they transmit or store or to actively seek facts or circumstances indicating illegal activity in connection with the activities described in articles 19 to 21.2"

ACTA - update

- The ACTA provision is similar to the eCommerce provision however it goes a step further to state that the competent authority may, if provided with the authority, order “an online service provider to disclose... to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement”.
- While the eCommerce Act provides for the subscriber information to be submitted to the competent authority, under the ACTA, signatory States, **may** (not obligatory) empower a competent authority to oblige the service provider to provide subscriber information directly to a right holder that has filed a legally sufficient claim.

ACTA - update

- In this regard it may be appropriate for further clarification to be provided as to:
 - the instances when, if any, the identity of a subscriber would be provided to the rights holder given that the current practice already provides that such information is provided to the competent authority;
 - what would constitute the filing by the right holder of a 'legally sufficient claim', especially in cases where there is an alleged breach; and
 - the rights of privacy of the subscriber. Especially the fact that the disclosure of the subscribers information would not be limited to the competent authorities but also to 'rights holders' who have no legal power to investigate and prosecute criminal offences.



www.mca.org.mt