European Data Protection Supervisor: Opinion on the Anti-Counterfeiting Trade Agreement (ACTA)

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The European Data Protection Supervisor is the independent authority that monitors the practices of the European Union and advises on privacy and data protection-related matters. The supervisor was not officially consulted by the European Commission on the question of the future Anti-Counterfeiting Trade Agreement (ACTA), a treaty currently being negotiated by the European Union, the United States, Japan and a number of other countries, with a view to reinforcing the fight against the cross-border trade in counterfeit and pirated goods. Inevitably, negotiations on ACTA will have to take privacy and data protection matters into consideration. Due to the importance of these matters, the EDPS wrote an opinion on the current negotiations by the European Union on the agreement.

The opinion of the EDPS was given on its own initiative and is not an analysis of the negotiations on ACTA. Because of the secret nature of the agreement, no official information has been made public. The EDPS seeks to make the Commission and ACTA parties aware of the privacy and data protection-related aspects that should be taken into consideration from the very beginning of the realisation of the agreement.

The EDPS foresees measures being taken to oblige Internet Service Providers (ISPs) to adopt ‘three strikes Internet disconnection policies’. Such ‘graduated response schemes’ demand that alleged copyright infringers be monitored and identified by public or private parties. After several warnings by the ISPs, the infringer can be disconnected from Internet access. It is not certain yet whether this disconnection policy will be part of ACTA, but the EDPS finds in necessary to give its view on the possible risks for privacy and data protection that it might entail.

According to the EDPS, the three strikes Internet disconnection policy constitutes a disproportionate measure in relation to fighting counterfeiting and piracy crimes. The EDPS is convinced of the existence of less intrusive solutions. The benefits do not outweigh the impact on the fundamental rights of all the affected individuals. Furthermore, these policies are problematic, according to the EPDS, because the term that is necessary for the storage of log files is not consistent with current legislation. Before embracing new policies, the Commission should

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evaluate the effects that the adoption of the IPRE Directive (Directive 2004/48/EC) and the amended Citizens Rights Directive (Directive 2002/22/EC) have had. The supervisor also insists on the investigation of less intrusive models and measures.

The EDPS foresees that ACTA might take measures which enable private and public authorities to share information about alleged IPR infringements. The EDPS is concerned about the level of data protection, since most of the parties to ACTA are not part of the list of countries providing adequate protection drawn up by the Commission. The EDPS emphasises the need for the implementation in the EU of appropriate safeguards, while the supervisor should give his view on the form and content that these safeguards should have.

In general, the EDPS advocates that, from the beginning of the negotiations on ACTA, the right balance must be struck between the protection of IPRs and the right to privacy and data protection. The measures to be adopted must be in compliance with existing EU privacy and data protection law. The supervisor stresses that he regrets that he was not consulted by the European Commission on the agreement and advises the European Commission to establish a public dialogue on the counterfeiting agreement. The opinion of the European Parliament on this agreement is in line with the EDPS opinion. The EP voted by 663 votes to 13 against ACTA and adopted a resolution in which it was stated that the Commission must be transparent in the sharing of information on the details of the agreement. The EP even threatens to go to the European Court of Justice if it does not agree to disclose the details of the treaty.

Opinion of the European Data Protection Supervisor on the Current Negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf

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