



Civil Liberties Committee Hearing on the Anti-Counterfeiting Trade Agreement

16 May, 2012

Firstly, thank you to the Civil Liberties Committee and opinion Rapporteur Mr Droutsas for inviting European Digital Rights to speak to you today on the proposed Anti-Counterfeiting Trade Agreement. European Digital Rights is an association of 32 digital civil rights organisations from 20 European countries and we have followed the ACTA debate closely since the very beginning.

The European Union is, as you know, founded on values such as the respect for freedom, democracy and the rule of law. Restrictions on fundamental rights must be provided for by law and must be necessary and genuinely meet objectives of general interest. The failure to respect these obligations in ACTA are the clearest of all of its breaches of the Charter on Fundamental Rights.

Article 27.3 of ACTA places a binding international legal obligation on all parties to encourage private companies to police online communications. This binding legal obligation would, for example, require the United States to encourage companies under its jurisdiction to *effectively* enforce trademark and copyright law.

Who are these companies that would be encouraged to enforce the law? They are Verisign, the company that is the central registry for all .COM websites all over the world. They are global search engines – Bing, Yahoo and Google. They are advertising networks like Google. They are payment service providers like Paypal, Visa and MasterCard. US companies voluntarily and unpredictably enforcing US laws around the globe.

We already know that the United States uses American companies to obtain personal data of European citizens, in breach of our fundamental right to privacy.

They do this via the PATRIOT and FISA Acts. EPP LIBE coordinator Mr Busuttill captured the views of MEPs from across the political spectrum during the February plenary debate on this breach of our fundamental rights when he said that “no law of a third country should be able to short-circuit EU or national law”.

Imagine now adopting an international agreement to place an obligation on the USA to encourage private companies to short-circuit our rights to privacy, freedom of communication and freedom to do business! That this was even suggested by the European Commission is shocking.

Verisign, US company that is the global registry of .COM web domains has already demanded the right to enforce the law online and decide which companies may or may not

remain on the Internet.¹ Should we require the US to encourage them to do this?

Clearly the answer is “no” - the European Parliament has already passed two resolutions in the past three years saying that this is unacceptable.²

An American reseller of .COM domain names already voluntarily eliminated a Spanish company from the Internet, even though the company was never accused of breaking the law.³ It did so because the European company was on an official “watch list” of the US government.

Could it be legal for the EU to facilitate such breaches of European democratic rights, privacy rights, rights to do business?

Google already enforces US copyright law globally. When they receive a complaint under US law about a website accused of breaching US law, they remove the site from their global search engine – outside the rule of law and outside due process. Should we require the USA to encourage them to keep doing this and to expand the process to Bing, Yahoo and others?

Whatever one thinks about Wikileaks, the fact is that the organisation was never accused of committing a crime. However, Visa, MasterCard and Paypal, acting under political pressure, all blocked payment processing to that organisation.

What will increased political pressure on US companies to police the Internet do to the legal certainty of European companies and citizens? How much self-censorship is needed to be sure that you are not breaking US law, as enforced by Verisign, Google, Microsoft, Yahoo, MasterCard, Visa, Paypal and so on?

It is also important to consider the inevitable impact of ACTA on third countries. The European Union also has a Treaty obligation to support democracy and the rule of law in its international relations.

In a developing country, with the ACTA signatory government obliged to encourage privatised enforcement, Internet companies will be coerced into implementing restrictions of freedom of communication and privacy due to the cumulative effect of broad criminal sanctions for aiding and abetting infringements, the threat of excessive damages payments and the high cost of fighting injunctions.

And finally... the so-called safeguards. There is almost no provision in any part of ACTA that would require a party to implement any protective measure .

Despite proposing measures that pose risks to fundamental rights, ACTA says that existing legislation does not have to be repealed.

1 <http://arstechnica.com/tech-policy/2011/10/verisign-wants-power-to-scan-sites-for-malware-and-shut-them-down/> (the request was subsequently withdrawn)

2 <http://www.europarl.europa.eu/us/ressource/static/files/european-parliament-resolution-on-the-eu-us-summit-nov-2011.pdf> and <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0185&language=EN>

3 <http://www.nytimes.com/2008/03/04/us/04bar.html>

ACTA does not mention fundamental rights, it refers only to the vague concept of “fundamental principles”.

ACTA does not mention due process of law, it refers only to the fictional “fundamental principle of fair process” which exists nowhere else in international law.

Does ACTA breach fundamental rights? Yes. Obviously.