



July 29, 2011

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Re: Draft Federal Postal and Telecommunications Surveillance Ordinance (PTSO)

The Computer & Communications Industry Association (CCIA) is dedicated to open markets, open systems, and open networks. CCIA members participate in the information and communications technology industries, ranging from small entrepreneurial firms to the largest in the business. CCIA members employ nearly one million people and generate annual revenues exceeding \$200 billion. CCIA and its members subscribe to principle of “full, fair, and open competition.”

CCIA, in line with comments from other trade organisations representing the technology sector such as SWICO and ASUT, has a wide range of serious concerns about the draft Federal Postal and Telecommunications Surveillance Ordinance (PTSO), which seeks to massively expand the scope of application on cooperation obligations on businesses in the context of fighting crime.

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We have serious concerns about proper process. We believe that in embarking on this process, the Federal Council may be violating the Swiss legislation. Further, the Federal Council is pre-empting the conclusion of the review of the Federal Postal and Telecommunications Act (PTSA). Moreover, the consultation process on the PTSO has not been sufficiently open.

We have serious concerns about the substance of the draft Ordinance. A series of concepts are introduced that are so imprecisely defined that they create enormous legal uncertainty. Some of the measures proposed appear clearly disproportionate and unreasonable. Further, the Federal Council has apparently not sufficiently considered the implications of the text outside the borders of the Swiss Confederation.

In summary, we believe the Federal Council should either drop these proposals in their entirety or postpone the revision at a time when the revised PTSA will be fully in force and effect, and harmonize the PTSO accordingly.

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Specific remarks regarding the response to the consultation process of the Federal Postal and Telecommunications Surveillance Ordinance (PTSO) by July 29, 2011.

1. We have serious concerns about proper process

a. Improper consultation process

CCIA regrets that only selected parties are invited to comment on the proposed Ordinance. Switzerland's highly sophisticated and differentiated political system of direct democracy invites everybody to contribute their viewpoints and positions to any given issue in the process of establishing new legislation. Any modification and extension of the current regime of the Service for Surveillance of Telecommunications is a very delicate and important process impacting directly on companies and citizens. The Federal Department of Justice and Police (FDJP) is attempting to implement such changes without any regular legislative consultation process (Vernehmlassung), bypassing the full legislative prerogatives through a simple consultation (Anhörung) by a restricted range of stakeholders. This is highly uncommon, and it disregards the respectful and responsible attitude one would expect, especially concerning the highly sensitive issue of legislation modification.

b. PTSA and PTSO

It is obvious that the revision of the Federal Postal and Telecommunications Act (PTSA) should be completed before the adoption of a new PTSO. Any revision of the ordinances to the PTSA should be based on a revised PTSA, once finalized, as opposed to be relying on the current Act. Neither industry nor parliament have been informed about the results of the consultation process on the review of the PTSA, despite the fact that it ended in 2010. In

this context of legal uncertainty, it is hard to understand how a new PTSO could legitimately be adopted.

c. **Constitutional issues**

We believe that a modification of the Ordinance can only be handled by the Federal Council within the limits of the powers granted to it by Section 164 of the Constitution. This section specifically reserves for Parliament the right to enact provisions creating, or substantially modifying, the regulatory regime, through a Federal Statute. We believe that the current proposals for a revised Ordinance so significantly extend the scope of the Ordinance that they fall outside the powers granted to the Federal Council and must be subjected to full Parliamentary scrutiny. We believe the current procedure is therefore potentially unconstitutional, especially when the main Statute under which the Ordinance is enacted is currently under review.

2. We have serious concerns about the substance of the draft Ordinance

a. **Concept of “Internet Provider”**

The current PTSO provides that it applies to “*Internet access providers*”. By contrast, section 1. al. 2 lit. of the draft PTSO refers to “telecommunications services providers, including ***Internet providers***”. A similar modification is proposed in relation to Art. 8 para. 1 of the Draft PTSO¹, so as to clarify that Internet services are targeted beyond the sole provision of Internet access. This is a very clear attempt to broaden the scope of the types of actors that can be called upon to cooperate with the authorities. However, while we appreciate that surveillance measures are necessary to prevent crimes and convict criminals, still the concept of “Internet providers” is so broadly

¹ Relating to the data processing center created and managed by the Surveillance Service

defined² that it creates enormous legal uncertainty for those operating within Switzerland, and potentially serious conflicts of law for those operating outside of Switzerland but who may be held to be subject to it. It could potentially be deemed to cover an immense range of actors operating in different industries and running businesses that, although to some extent based on “IP-related” mechanisms, substantially differ from a technology and infrastructure perspective. As a consequence, an imprecise range of companies running a number of services including, but not limited to, VoIP, instant messaging, social networks, Web forums, WLAN, or any IP-based infrastructure or service could be required to invest an enormous amount of time and financial resources to comply with the law. As such an obligation could potentially interfere with the constitutionally protected right of freedom of commerce (which includes the ability to decide how to allocate resources and invest money), a precise legal basis becomes an absolute priority³. Given the sensitive and onerous nature of the obligations, the definition of which services and companies are covered should be specific and limited to those who co-operation can be justified as essential for law enforcement purposes and should be accompanied with detailed technical requirements describing how surveillance measures should be implemented in the context of the substantially different IP-related services available today. Companies established and registered in Switzerland and providing Internet-related services, such as online media, but not providing directly any telecommunication or subscription social media services, should be clearly excluded from the definition of “Internet providers”.

b. Impact beyond Switzerland

i. Jurisdiction

² The notion of “*internet providers*” is broadly defined as “*telecommunications services providers, or sectors of telecommunications services providers offering a public service of transmissions of information on the basis of IP technology and IP addresses*”.

³ As recently pointed out by the Federal Administrative Court in its decision A-8284/2010, issued on June 21 2011.

We believe it is important that the Federal Council clarify its approach to jurisdiction on the Internet (notably with regard to foreign services accessible from Switzerland), and in so doing bear in mind the territorial limitations of domestic Swiss law and the precedent that it may be setting for other countries with less-developed constitutional and judicial protections for their citizens.

ii. **“Surveillance of foreign addresses”**

Section 24 deals with “surveillance of foreign addresses”. We are sure that the Federal Council is aware of the potential diplomatic impact of expanding surveillance to individuals located in other countries who enjoy the protections of local laws. This section therefore needs to be much more specific about the services, operators, and data that would be covered. Any such obligations should be specific and exhaustive in order to avoid ambiguity and legal uncertainty.

c. **Proportionality of measures**

i. **Passwords**

CCIA believes it is disproportionate to impose disclosure of user passwords to authorities.

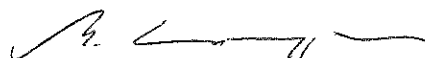
ii. **Concept of “retrospective surveillance”**

Section 24 of Draft Ordinance refers to “Internet Applications subject to real time or *retrospective* surveillance”. The concept of “retrospective” surveillance should be further clarified to avoid imposing disproportionate obligations. Any data retention obligations required to comply with retrospective surveillance need to be clearly specified and discussed with industry. Data retention & disclosure obligations require providers to make specific policy, system & tooling changes, which have resource and cost impacts so realistic time frames would need to be agreed for the implementation of any new obligations.

iii. **Potential expansion of powers without due process**

Art. 25 para 5 of the Draft Ordinance provides that the surveillance measures listed in the PTSO and in particular under art. 24a and 24b for Internet communications shall not be considered as exhaustive and that upon request of law enforcement authorities, Internet providers may be required to perform other surveillance measures not expressly specified in the Ordinance. This wording creates great uncertainty and would allow authorities to change or extend surveillance measures independently of the parliamentary process. This is not appropriate given the sensitive nature of the subject matter and the extent of the potential obligations imposed on service providers.

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