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USA 89
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NOTE

from: Commission
to: JHA Counsellors/COREPER

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Subject: Explanatory note the Europol mechanism under the draft TFTP mechanism

Article 4 of the draft Agreement gives Europol the task of verifying whether the Request of the US Treasury Department to obtain financial messaging data stored in the EU from designated providers complies with specific requirements established in paragraph 2 of Article 4 and notify the designated provider that it has verified that the request complies with the requirements.

Article 4 sets up the verification procedure and provides that the Parties shall jointly determine the modalities of the verification process.

- Requirements concerning US Treasury Request

1. The US Treasury Department Request must be issued with the exclusive purpose of obtaining data necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing.

2. In addition to serving the Request upon the designated provider, the US Treasury Department will send a copy of the Request to Europol together with supplemental documents. .

3. The Request (together with any supplemental documents) shall, as stated in Article 4(2) of the draft agreement:

(a) identify as clearly as possible the data, including the specific categories of data requested, that are necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing;

(b) clearly substantiate the necessity of the data;

(c) be tailored as narrowly as possible in order to minimize the amount of data requested, taking due account of past and current terrorism risk analyses focused on message types and geography as well as perceived terrorism threats and vulnerabilities, geographic, threat, and vulnerability analyses; and

(d) not seek any data relating to the Single Euro Payments Area.

- Role of Europol

1. Upon receipt of the copy, Europol shall verify whether the Request complies with the requirements of Article 4(2) and subsequently notify the Designated Provider that it has verified that the Request complies with the requirements of paragraph Article 4(2). Once Europol has confirmed that the Request complies with the requirements mentioned above, the Request shall have binding legal effect as provided under U.S. law, within the European Union as well as the United States.

2. If Europol finds that the Request for data does not meet these requirements, no data can be transferred.

- Consequences for the designated provider

1. Once Europol has confirmed that the request complies with Article 4(2), the Designated Provider is authorized and required to provide the data to the U.S. Treasury Department.
2. The designated provider receiving the US Treasury subpoenas has access to administrative and judicial redress available under US law.

- Legal aspects

1. Additional task given to Europol

The task of verification and notification given to Europol by Article 4 of the draft Agreement is not foreseen under Article 5 of the Europol Decision, which lists Europol's tasks. Therefore, the draft Agreement would assign a new task to Europol.

2. Task within the scope of Europol's mission:

This new task is compatible with the mission of Europol as defined by Article 88(1) TFEU and Article 4(1) of Europol Decision.

Article 88 (1) TFEU:

Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

Article 4(1) of Europol Decision:

Europol's competence shall cover organised crime, terrorism and other forms of serious crime as listed in the Annex affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences.

Hence, the new task falls within the scope of Europol's mission as defined by Article 88 TFEU and Article 4 of Europol Decision. Terrorism is explicitly mentioned in both provisions. Furthermore, financial intelligence and counter-terrorism are among Europol's strategic priorities.

Moreover, Europol activities include a well developed international dimension.

3. Task placed upon Europol by an international agreement

The TFTP agreement will therefore place a new task to Europol, in addition to those tasks that are provided for in the Europol's Decision.

There is a room for interpretation, whether such agreement will lead to Lisbonisation of Europol as envisaged under Protocol No. 36 on transitional provisions, Article 10(2):

"The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply".

The literal reading of Article 10(2) of Protocol 36 would advocate that such agreement will not constitute an amendment to Europol's Decision in terms of the Protocol and therefore it could be considered that the agreement would not "Lisbonise" the whole Europol decision and entail the effect of Article 10 § 2 of Protocol No 36, in particular as regards the extension of the ECJ competence. On the other hand, one could argue that this agreement leads to de facto amendment of Europol's Decision and hence entails all legal effects as provided under the Protocol. In sum, the better arguments speak in favour of the cautious, literal reading, i.e. no Lisbonising of the Europol Decision as such.

Independently of this question, judicial review will be ensured by the ECJ over the TFTP agreement itself. The ECJ will have full jurisdiction over the TFTP agreement and over the exercise by Europol of the new task provided for therein, since the TFTP agreement is a legal act adopted under the Lisbon Treaty. The ECJ has therefore judicial control over the legality of Europol verifications and authorisations made pursuant to Article 4 of the TFTP agreement.

4. Other tasks of Europol under the agreement

Under Article 10 of the agreement, Europol may request the US Treasury to carry out a TFTP search when there is reason to believe that a person or entity has a nexus to terrorism or its financing. Under Article 9 of the agreement, the U.S. Treasury Department shall ensure the availability to Europol, within the remit of its respective mandate, of information obtained through the TFTP that may contribute to the investigation, prevention, detection, or prosecution by the European Union of terrorism or its financing.

This cooperation is clearly distinct from the verification process under Art. 4. Europol will have to make administrative arrangements accordingly.

5. Technical modalities –Article 4(9)

The technical modalities to be set up to make the mechanism function smoothly will need to be coordinated between the Parties. Europol will be closely consulted. Such technical modalities will by no means affect the rules laid down in the agreement. They will cover aspects such as (1) the organisational set-up ("entity"), (2) elements needed for the verification, (3) the normal timeframe for the verification, (4) confidentiality arrangement. Technical modalities need to be set up before the agreement enters into force. The Management Board of Europol will be informed in detail and involved where necessary in the decisions to be taken by Europol