

Commission negotiations on SWIFT re-launched

The LIBE Committee discussed on 7 April 2010 the re-launch of negotiations on a SWIFT II agreement. A new draft-negotiating [mandate](#) has been indeed submitted by the College of Commissioners on 24 March 2010 to the Council, which in turn is expected to approve it on 22/23 April. The Commission foresees that the new agreement might be concluded at the beginning of June of this year.

The current situation

The Mutual Legal Assistance of 2003 as well as bilateral agreements on mutual legal assistance between the EU and the US constitute the legal framework on financial data exchanges, following the European Parliament refusal to provide its consent on the US-EU Agreement, last February.

The provisions of these agreements limits the scope of data requests to investigations of specific individuals or companies suspected of or charged with a criminal offence. Furthermore, it establishes that requests for information must identify the person, indicate the grounds for suspecting he/she has committed a crime and show how the information relates to the criminal investigation or proceeding.

The new draft negotiating mandate

The new draft negotiating mandate as agreed upon by the College of Commissioners on 24 March 2010 and upon approval of the Council foresees - among others- the following elements:

Safeguards to ensure the respect of the fundamental right to the protection of personal data;

Transfer to third countries of only information derived from terrorism investigations ("lead information");

A judicial public authority in the EU with the responsibility to receive requests from the United States Department of the Treasury, verify if the substantiated request meets the requirements of the Agreement and if appropriate require the provider to transfer the data on the basis of a "push" system;

Retention of personal data extracted from the TFTP database for no longer than necessary for the specific investigation or prosecution and non-extracted data retained for five years;

Onward transfer of information obtained through the TFTP under the Agreement shall be limited to law enforcement, public security, or counter terrorism authorities of US government agencies or of EU Member States and third countries or Europol or Eurojust as well as Interpol.

The Agreement shall provide for:

- 1) the right of individuals to information relating to the processing of personal data;
- 2) the right to access his/her personal data;
- 3) to the rectification, and
- 4) as appropriate erasure thereof.

Hence, it appears that the College of Commissioners has tried to address some of the past concerns addressed by the MEPs.

However, while demonstrating the willingness to explore grounds for a new agreement on the SWIFT data-sharing, some of the Members of the LIBE Committee, expressed a variety of concerns, most of which were already raised in the previous report of the European Parliament and that can be summarised as follows:

Legal basis and Judicial authorisation

Some MEPs expressed their concerns on the current legal basis, requesting the possibility to scrutinise alternative frameworks.

Although the Commission affirmed that currently no alternative ways are foreseen, it did not exclude such a possibility. However, if alternative legal basis will be taken into account, they may lead to exclude the obligation to submit the transfer requests to prior judicial authorisation. As a consequence, control and oversight of the transfer of data will be severely reduced.

Proportionality

Members of Parliament still have concerns that the transfer of bulk data will not be addressed properly. Furthermore, it remains to be seen whether SWIFT has the technical ability but not the willingness to bare the costs derived from selecting and transferring individual data instead of 'data in bulk'.

Data storage period

Although the new mandate limits the storage of data to five years, some MEPs pointed out that this period is still too long.

Access, rectification, compensation and redress outside the EU

The issue of redress should be further developed

No evidence on the effectiveness

There still is no evidence that cases of terrorism have been prevented or prosecuted based exclusively on the financial data.

Procedural concerns

The fact that the EU is planning to conclude an executive agreement on exchanges of data before negotiating the general agreements on rules governing the data protection raise additional concerns. Indeed, the acceleration of the envisaged SWIFT II agreement will limit the margin of maneuver for negotiators on the overarching transatlantic agreement on data sharing and data protection. In other words, it will force the latter to simply accept praxis established before the development of the general principles governing data protection.

Also the Commission -using the words of the Director General of DG JLS Mr Jonathan Faull- is of the opinion that “in an ideal world” general norms should be established before specific ones. However, no sufficient reasons have been provided to explain why the European Union is accelerating the negotiations on the SWIFT agreement instead of giving precedence to the establishment of overarching general framework on EU-US data protection and exchange.

In conclusion, the European Union is engaging in a delicate exercise trying to define at the same time internal, external, specific and general data protection norms. This would have been possible -in theory- if the European Union had clear objectives and points of reference. However, following the LIBE Committee debate on 7 April this seems far from being the case.