



The Hague, 13 June 2012

DIRECTOR

Mr Juan Fernando López Aguilar
Chairman
Standing Committee on Civil Liberties, Justice and
Home Affairs (LIBE Committee)
European Parliament
By email

**EU–US Terrorist Financing Tracking Program (TFTP) Agreement:
Request for access to the final inspection report of the Joint Supervisory Body
(JSB) of Europol, classified as “SECRET UE/EU SECRET”**

- Letter from the Chairperson of the Standing Committee on Civil Liberties, Justice and Home Affairs – LIBE Committee – of the European Parliament, file no 202443, dated 24 May 2012, received at Europol on 29 May 2012

Dear Mr López Aguilar,

I would like to thank you for inviting me to attend the LIBE hearing on 21 June 2012 which I am pleased to accept.

Referring to the public access request submitted by you, concerning the final inspection report of the JSB (classified as “SECRET UE/EU SECRET”), this is subject to Europol’s specific legal framework, in particular concerning public access to Europol documents¹.

As such, Europol shall consult the relevant third parties whose information is contained in a classified document that is subject to a public access request. In this case, the parties to be consulted by Europol are the US authorities (US Office of Foreign Assets Control – OFAC) and the Joint Supervisory Body (JSB) as originator (author) of the inspection report.

On receiving your public access request on 29 May 2012, I issued letters to the US authorities and the JSB on 4 June 2012, with a view to requesting them to inform Europol, as soon as possible, about their position regarding the public access request of the LIBE Committee of the European Parliament.

Concerning the JSB’s view regarding the request, as originator of the document, I am informed that the JSB will discuss this matter in the course of this week. I have asked the JSB to provide me with their observations on the request as soon as possible.

I should highlight, in this context, that the US authorities have not yet received the final version of the classified inspection report of the JSB. On 19 April 2012, Europol asked the JSB for its agreement to issue a copy of the classified inspection report to the US authorities. We are still awaiting a reply. In the meantime, it is difficult for the US to consider a public access request to a report it has not seen.

While the US authorities will consider the request on the individual merits of the case, I note that the US has always taken a consistent policy position to protect sensitive

¹ Decision of the Management Board (MB) of Europol laying down the rules concerning access to Europol documents, Europol file no. 3550-95r3 [360875v9], 8 July 2009
File no. 2130-99; (612956v12B)

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knowledge of TFTP from entering the public domain. It is unlikely therefore, that they will accept the request.

Meanwhile, I intend to deliver an oral presentation at the LIBE Committee hearing on 21 June 2012 regarding Europol's activities in this area. The content of the information note², prepared by Europol for last year's session of the LIBE Committee of 11 April 2011, is still valid, especially regarding the role of Europol under the EU-US TFTP Agreement. The information note can, therefore, still serve as a prime reference document in the forthcoming LIBE hearing.

Against this background, I would like to update you as follows:

Main developments:

- The Joint Review Report of the European Commission³ and the efforts undertaken by the JSB to monitor the implementation of the EU-US TFTP Agreement, have had a significant impact on the continuous, qualitative improvement of the requests processed under Article 4 of the TFTP Agreement throughout 2011 and early 2012.
- Europol is satisfied with the progress noted by the JSB in its second inspection report, submitted to Europol on 20 March 2012. The public statement of 21 March 2012 reflects considerable efforts invested by Europol last year to address the relevant issues, working in close partnership with the JSB, the Europol Data Protection Officer (DPO) and the US authorities, through a series of four workshops. Europol provided comments on the draft version of the report which were not fully reflected in the final classified inspection report.
- The JSB's second inspection report considers 2 of the 5 recommendations from the first inspection as fully implemented (Recommendation N° 1: revision of Europol's applied process to implement the TFTP Agreement –also referred to as operating instructions – and Recommendation N° 2: Proper involvement of the DPO). The hard-deletion of Article 4 request related information from Europol's systems is still subject to technical verification (Recommendation N° 3: ongoing) by the JSB, while the request for even more written documentation to support the Article 4 requests (Recommendation N° 4 and Recommendation N°5 from the first inspection report) has been taken forward as an area for further refinement in the second inspection report.

Key issues identified in the JSB's public statement and second inspection report:

A. Data forwarded to the US – Level of abstraction of Article 4 requests

- The EU-US TFTP Agreement regulates the transfer of data from the Designated Provider in Europe to US authorities for the prevention and fight against terrorism and its financing⁴. The nature of the programme was highlighted in the public debate regarding the conclusion⁵ and implementation of the TFTP Agreement.
- Article 4 of the EU-US TFTP Agreement provides that Europol shall verify as a matter of urgency whether the US requests comply with the specific criteria set out in Article 4. Europol does not see or manage the provided data, which is transmitted directly from the Designated Provider to the US authorities. Nor is Europol responsible for the other safeguards contained in the agreement, in particular in those articles relating to searches and the transfer and storage of data.

² Europol Activities in Relation to the TFTP Agreement – Information Note to the European Parliament – 1 August 2010 – 1 April 2011, Europol file no. 2566-566 [535308v17], 8 April 2011

³ Report on the joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, European Commission file no. SEC (2011) 438 final, 30 March 2011

⁴ Article 4: "... in order to obtain data necessary for the prevention, investigation, detection, or prosecution of terrorism or terrorism financing that are stored on the territory of the European Union."

⁵ For example by the European Data Protection Supervisor (EDPS) in the press release and opinion published on 22 June 2010, www.edps.europa.eu

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- B. Worldwide (geographic) scope and time-frame of Article 4 requests
- Contrary to the implications given in the JSB public statement, Article 4 requests do not have a worldwide coverage of financial messaging data. The financial transaction data requested from the Designated Provider are limited regarding the range of financial messaging services and related data categories which are operated by the designated provider. For instance, Single Euro Payments Area (SEPA) data and many other financial transaction services are not covered by Article 4 requests.
 - Mass public events such as the 2012 Olympic Games in London underline the need for a broad, preventive scope by law enforcement authorities, also in time, given that the purpose of the Article 4 request specifically mentions obtaining data necessary for the purpose of preventing terrorism or its financing.
- C. Oral information and supporting documentation for Article 4 requests
- All verification decisions are made on the basis of a rigorous scrutiny of requests submitted by the US and all supplementary information available in writing. The verification decisions, therefore, do not rely on any oral, unrecorded briefings.
 - Since the EU–US TFTP Agreement came into force, to date, six verbal briefings have been held by the US authorities, thus the briefings are not Article 4 specific, but part of wider cooperation on terrorism aspects (such as threat levels). Article 4 requests under the EU-US TFTP Agreement are submitted by the US, in contrast, every month for verification by Europol. For each of the 23 Article 4 requests received to date, a dedicated record of documentation is available, now numbering over 100 pages per request (concerning the request received in May 2012). In the interests of transparency, reference is included in the documentation to Europol's regular discussions with US authorities as one of the main sources of background information available to Europol in the maintenance of its counter terrorism knowledge and expertise, which forms the general context within which Europol is able to discharge its specific responsibilities under TFTP.
- D. Involvement of the Data Protection Officer (DPO) of Europol
- As part of the actions to follow-up the second recommendation of the first JSB inspection report, the DPO has been consulted and closely involved in all subsequent follow-up activities. A new version of the TFTP operating instructions strengthened the engagement of the Europol DPO in the handling of requests under Article 4 of the EU–US TFTP Agreement, leading to a mandatory involvement of the DPO upon their receipt.
 - In respect of the first Article 4 request, submitted in August 2010, the DPO expressed data protection concerns, on which Europol acted by seeking additional information from the US authorities. Since the outcome of the first JSB inspection was known (in February 2011), the DPO has referred to the continuous dialogue with the JSB regarding the implementation of their recommendations. Thus, Europol would like to underline that the positive Article 4 verification decisions by the concerned authorising officer within Europol are not taken against the advice of the DPO.
 - The DPO holds the view that any concrete guidance provided by the JSB has been implemented by Europol without delay. During the second JSB inspection held on 15 November 2011, the DPO provided, in addition, the feedback that the JSB's recommendations have been implemented by Europol to the best of its possibilities, in view of the dependence on cooperation with the US.

In summary, I believe Europol has made exhaustive attempts to fully implement its responsibilities under the EU–US TFTP Agreement, in particular through extensive dialogue with US authorities and the JSB and through urgently addressing all recommendations made by the latter. In this sense, significant progress was made during 2011, with the advanced state of implementation maintained in 2012.

I would like to underline that Europol is committed to meet the interest of transparency and public accountability. I trust that the members of the LIBE Committee can recog-

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nise, from the information provided in this letter and previous correspondence, Euro-pol's efforts to address the recommendations made by the JSB.

It is important to bear in mind, though, that Europol's specific verification role under Article 4 of the EU-US TFTP Agreement, which is key subject of the JSB recommendations, is only one of several safeguards built into the EU-US TFTP Agreement. Against this background, the JSB inspection report and Europol's comments only give a partial account of the functioning of the EU-US TFTP Agreement. This overall assessment is subject to the European Commission's reporting, in the framework of the regular joint EU-US reviews under Article 13 of the EU-US TFTP Agreement. The first Article 13 review took place in February 2011, and, as I have been informed, the next one is foreseen later this year.

Yours sincerely,



Rob Wainwright
Director