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ONS KENMERK z2010-01508
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UW BRIEF VAN 14 April 2011
UW KENMERK Ares(2011)416700

ONDERWERP EU-US TFTP Review

Dear Sir,

In reference to your letter of 14 April 2011, I am happy to clarify my dissenting position on some parts of the TFTP Joint Review report. Before I can go into substance however, I first need to make some remarks on the procedure for the finalisation of the Review report. In my opinion this process was not as careful as it should have been and thus leads to the disagreement over the conclusions of the report we now face.

As you are well aware I have participated in the Joint Review of the EU-US TFTP Agreement on 17 and 18 February 2011. Upon conclusion of the visit to Washington, I have indicated to you that the review in my opinion was mostly carried out in a satisfactory way, notwithstanding some difficulties that arose due to the last minute indication of the requirement to present the US colleagues with a proof of security clearance. Furthermore, I have informed you of my willingness to work with you and your staff on the draft report of the Joint Review, which I also did in the days following the review. While working on the draft, I was under the impression that the draft report would be finalised around 1 April 2011.

Only on 8 March, I was informed by your head of sector Dick Heimans that the final report was supposed to be finalised by 17 March in order to present it to the European Parliament that day. Two days later, Mr. Heimans informed me that a hard copy of the final draft report was sent to me via registered mail. A deadline for comments was set for 14 March, 13h00. On several occasions, I have informed Mr. Heimans of the fact that the report had not yet arrived in my office. In fact, it only arrived on 17 March, after the final report was published by the Commission.

After several e-mails to Mr. Heimans, he agreed – I assume after consultation with the US delegation – to send a copy of the draft report via e-mail. This e-mail was received on 15 March around 13h00, with the request to send in any comments by the end of the day in order to ensure publication of the report on 17 March. Within a few hours, I have indeed provided the European Commission with my remarks, on which I will elaborate below. I also discussed these remarks with Mr. Heimans later that day by phone, at which point I learned that some of my comments – in my view most of my comments and at least the most important ones – could not be accepted “at this late stage” because they would “significantly change the tone or the key messages of the

report ". I have expressed my disappointment on this fact both in my telephone conversation with Mr. Heimans and in an e-mail sent on 16 March. It is regrettable that there has been no opportunity to assess the Review and discuss the draft report in the presence of the full team in order to reach an agreement on the text before publication. Furthermore, I have informed Mr. Heimans in our telephone conversation that I would voice my honest opinion on the points of disagreement whenever asked by my colleagues or by (members of) the European Parliament.

In both statements I have made on the Joint Review report, in the Article 29 Working Party, in the presence of Mr. Schieffer, and in the LIBE Committee of the European Parliament, in your presence, I have started out to say I consider the Joint Review very valuable and do subscribe to the majority of the report. Many of the elements of the TFTP2 Agreement have indeed been well implemented and do ensure the protection of the personal data of the European citizen. Were necessary, the recommendations will contribute to ensure an even better protection in the following years. On three points, I do however consider the Review report too positively formulated and would have liked to see that opinion reflected in the final report.

First of all, in the executive summary it is stated that "the EU review team has reached the conclusion that all of the relevant elements of the Agreement have been implemented in accordance with its provisions, including the data protection provisions". I have suggested to change that to "most of the relevant elements", in order to reflect that in my opinion not all data protection provisions have been fully implemented. This is for example also reflected in paragraph 3.1.7.4, from which it becomes apparent that the right of rectification, erasure of blocking in practice can not be exercised. Also, the right of access for individuals may be implemented in accordance with the letter of the agreement (namely that no searches can be made on the TFTP database to fulfill an access request, because that would mean a breach of the agreement because of the lack of a nexus to terrorism), but not in a satisfactory way from a data protection point of view. This procedure would in practice mean that no information would ever be given to individuals on the availability of their information in the TFTP database, either because of the lack of a nexus to terrorism, or on grounds of national security because such nexus does exist. Therefore, I cannot share the conclusion that "all (...) data protection provisions" have been implemented.

My second remark deals with the necessity of the Terrorist Finance Tracking Program. On several occasions during the Review, the US delegation has presented evidence as to the added value of the Program, an added value which I am ready to accept. However, also from a data protection perspective, added value is not all that is needed to substantiate the bulk transfer of data of European citizens to the United States. Therefore, I have asked to include references both in the executive summary and in paragraph 3.1.2 (including in the recommendation) to ensure that for future reviews more insight would be provided by the US delegation into the necessity of the information in order to fight terrorism. So far, this necessity has not been proven and given the suspected amount of data transferred to the US every month, such proof should in my view be required.

My final comment concerns the evaluation of the role of Europol. Both in paragraph 3.1.4 of the Review report and in the press release from the European Commission, it is stressed that "Europol clearly takes its role under the Agreement very seriously". I sincerely do not understand how this conclusion can be drawn based on the Joint Review. The Review team focussed its work on the implementation of the provisions of the Agreement in the US. The full team furthermore had one meeting with one representative of Europol and was provided with a brief summary of Europol's procedures regarding the TFTP2 Agreement. On this basis, and also given the fact that as part of the inspection team of the JSB Europol I have seen much more information proving the procedures at Europol were not in order, at least not at the time of the inspection, I do not share this conclusion and consider that this part of the report was drafted too positively.

I would like to reiterate that I have addressed these three points in my response to the European Commission on the final draft report as received on 15 March. Since I was aware of the limited timeframe and the need to finalise the report in order to present it to the European Parliament two days later, I have made my remarks accompanied by proposals to slightly change the wording of the report to reflect my views. I have specifically refrained from redrafting large parts of the report, since also I would have considered that too late. However, apparently and unfortunately also these proposals were not to be discussed.

Before concluding this letter, I would like to assure you that it is not and has never been my intention to play any political game based on the outcome of the Joint Review. I have taken part in the Joint Review with an open mind. I was however nominated by my European colleagues to take part in this review to guard the data protection perspective on the implementation of the TFTP2 Agreement. In my opinion, this is all that I have done: to stand up to ensure the problems that remain from this data protection point of view were addressed in the Joint Review process.

A copy of this letter will be sent to the members of the Review Team, as well as to Mr. Jacob Kohnstamm, chairman of the WP29. Another copy will be sent to Mr. Juan Fernando López Aguilar, chairman of the LIBE committee of the European Parliament, as requested by Baroness Ludford MEP during the meeting of this committee on 11 April.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'PB', enclosed within a large, horizontal, hand-drawn oval scribble.

Paul Breitbarth