

**SUMMARY OF THE FIRST ANNUAL
REPORT ON THE PROCESSING OF EU
ORIGINATING PERSONAL DATA BY THE UNITED
STATES TREASURY DEPARTMENT FOR COUNTER
TERRORISM PURPOSES**

TERRORIST FINANCE TRACKING PROGRAMME

DECEMBER 2008

Judge Jean-Louis BRUGUIÈRE

Shortly after the 11th September 2001 terrorist attacks, the United States Department of the Treasury ("U.S. Treasury Department") developed the "Terrorist Finance Tracking Program" ("TFTP") to identify, track, and pursue terrorists and their financial supporters. Under the TFTP, the U.S. Treasury Department serves administrative orders (subpoenas) on the U.S. branch of the Belgium-based Society for Worldwide Interbank Financial Telecommunication ("SWIFT"). According to these administrative orders, SWIFT is required to provide to the U.S. Treasury Department specified financial transaction record data, which are stored in the United States. Once provided to the U.S. Treasury Department, these data are held on a highly secure U.S. Government database ("the searchable database"). Under the TFTP, U.S. Government counter terrorism analysts with appropriate security clearances may only query the searchable database to extract data which have a terrorism nexus. All searches are subject to strict and externally audited conditions designed to ensure, inter alia, that data can only be extracted from the searchable database for counter terrorism purposes.

Following public disclosure of the TFTP in U.S. media in mid-2006, certain aspects of the Programme remain classified. Following this disclosure, concerns were raised within the EU, notably by the European Parliament, the European Data Protection Supervisor and the Article 29 Working Party¹, with respect to fundamental rights on the protection of personal data. In addition, concerns were raised that by virtue of the TFTP, United States authorities would have access to highly sensitive economic and financial information on the activities of European businesses both within Europe and beyond. To address these concerns and to put the SWIFT / TFTP matter on an appropriate legal footing according to European law, discussions on the TFTP and safeguards to protect EU originating personal data took place between the Presidency of the Council of the European Union and the European Commission on the one hand and the U.S. Treasury Department on the other. These discussions culminated in the set of unilateral undertakings and representations given by the U.S. Treasury Department to the European Union in June 2007² and which are known as the "TFTP Representations"³.

The TFTP Representations specify a series of commitments and safeguards to ensure the protection of EU-originating personal data processed under the TFTP. These include for example that EU-originating personal data are used exclusively for investigating, detecting, preventing and/or prosecuting terrorism. The TFTP Representations state that the Treasury Department will ensure that TFTP subpoenas are framed narrowly and that

¹ The Article 29 Working Party is an Advisory Committee bringing together at EU level the Data Protection Supervisory Authorities of the EU 27 and set up by Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data

² In addition to the Representations, other elements designed to establish a proper legal basis for the transfer of SWIFT data to the United States where such data could be accessed by U.S. Treasury Department and used for counter terrorism purposes under the TFTP were that SWIFT would join the Safe Harbour, that SWIFT and banks would take necessary steps to inform their customers about the transfer of data to the U.S. and the possibility that such data could be accessed for counter terrorism purposes and that SWIFT would, if appropriate, make a notification to the Belgian Data Protection Authority.

³ The TFTP Representations and accompanying correspondence were published in the Official Journal of the European Union on 20.7.2007 at 2007/C 166/09. They were published in the United States Federal Register in October 2007.

searches of the TFTP database are performed in such a way as to minimise the volume of data extracted from the searchable database. The TFTP Representations further state that at least annual assessments will be carried out to identify data stored on the searchable database, which are no longer necessary for the investigation of terrorism and that such data will be deleted. Judge Bruguière's Report concludes that the Treasury Department has been vigilant from the outset in respecting the safeguards included in the TFTP Representations and notably the strict counter terrorism purpose limitation. In several areas Judge Bruguière considers that additional measures could be taken to enhance even further existing safeguards and these are set out in the form of Recommendations in the Report.

Judge Bruguière has also spent considerable time assessing the contribution which the TFTP has made to the fight against terrorism since the first TFTP subpoena in October 2001. The Treasury Department has provided Judge Bruguière with detailed classified information on a large number of concrete examples where the TFTP has contributed *inter alia* to apprehension of suspects and the disruption of terrorist networks. Judge Bruguière concludes that the TFTP has made and continues to make a significant contribution to the fight against terrorism. In addition Judge Bruguière can also reveal that the U.S. Treasury Department has readily shared intelligence derived from the TFTP with third countries, with EU Member States being the principal non-U.S. beneficiaries of TFTP lead information.

Background

Designation and Mandate of the "Eminent European Person"

The U.S. Treasury Department in its June 2007 unilateral Representations to the European Union acknowledged it would be appropriate to allow the European Union to verify compliance with the Treasury Department undertakings. Accordingly, the Representations state that the European Commission may designate, for a renewable two year period, an "*eminent European person*" for the purpose of verifying the protection of EU-originating personal data. The Representations require that the eminent person shall be independent and state that the eminent person shall "*in the performance of his or her duties, neither seek nor take instructions from anybody*". The Representations state that the eminent person will present his findings and conclusions in an annual report to the European Commission which in turn will report to the European Parliament and Council.

In August 2007 the European Commission's Vice President Frattini wrote to the Interior and Justice Ministers of the EU 27 inviting them to suggest possible candidates for the role of *eminent European person*. The letter stated that the person should be of "unimpeachable integrity and credibility in the political, financial, security and privacy worlds in the EU and the United States". Suggestions were received from eight Member States. The European Commission informed COREPER and the Chairs of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Committee on Economic and Monetary Affairs (ECON) of its preferred choice in

October 2007. Representatives of LIBE and ECON had informal discussions with the Commission's preferred candidate in Strasbourg in January 2008.

In March 2008 the Commission issued a press release announcing the designation of Judge Jean-Louis Bruguière as the SWIFT / TFTP "eminent European person". Vice President Frattini explained the rationale for the Commission's choice in the following terms: "*Jean-Louis Bruguière is a prominent and highly regarded figure in counter terrorism circles both in Europe and the United States. I believe Judge Bruguière's knowledge of security matters, his legal training and judicial experience mean that he is extremely well qualified to assess whether the "Terrorist Finance Tracking Programme" is implemented consistent with the U.S. Treasury Department's prior Representations to the European Union*".

Nature and Scope of the Eminent European Person's report

The TFTP Representations state that the eminent European person will be appointed to "*confirm that the program is implemented consistent with the Representations for the purpose of verifying the protection of EU-originating personal data*". Accordingly, Judge Bruguière's work has focused on verifying the commitments and safeguards set out in the TFTP Representations. An important focus of Judge Bruguière's report was to verify that robust mechanisms exist to monitor respect for the protection of European originating personal data and that the necessary formal audit procedures carried out in respect of these data indicate a satisfactory level of compliance. In addition and with a view to appreciating the proportionality of the programme, Judge Bruguière has sought to understand the value and efficiency of the TFTP in the fight against terrorism in the United States and third countries and in particular in Europe.

Working Methodology of the Eminent European Person

Since his designation in March 2008, Judge Bruguière has endeavoured to inform and consult a broad range of European stakeholders in the SWIFT / TFTP matter. He has held discussions with and sought the views of representatives of the data protection community, and with representatives of Central Banks and Finance Ministries. Judge Bruguière has sought the views of police and security services, as well as interior ministries. Mindful also of the views of the banking sector, Judge Bruguière has met representatives of the London Investment Banking Association's Data Protection and Privacy Working Group. Throughout this period a series of meetings have also taken place with SWIFT executives both in Europe and the United States.

To ensure a proper understanding of the functioning of the TFTP and the various data protection safeguards surrounding it, Judge Bruguière has undertaken three missions to Washington. In June 2008 senior officials at the U.S. Treasury Department discussed with Judge Bruguière the background to the TFTP, the process to identify relevant subsets of data to be requested from SWIFT and the value of intelligence derived from SWIFT / TFTP data. The importance and value of the TFTP was further emphasised by senior members of the agencies with which the Treasury Department shares information,

as required by U.S. law. The value of TFTP-derived information in the investigation of terrorism was also emphasised by representatives of the Director of National Intelligence and Assistants to the President for National Security.

A second mission to Washington was undertaken in September 2008 which focused on the stage of the TFTP from receipt of a subpoena by SWIFT's U.S. arm through transfer of data by SWIFT to the Treasury Department and the extraction of data by duly authorised counter terrorism analysts. During this mission Judge Bruguière was given demonstrations by counter terrorism analysts of how data are extracted from the TFTP database. In addition, a series of presentations and interview sessions took place with SWIFT's internal auditors, SWIFT's external auditors and with the so-called "scrutineers" employed by SWIFT to check that each and every search made in the searchable database has a properly justified terrorism nexus. During the second mission to Washington, Judge Bruguière also visited the sites hosting the SWIFT operating centre and the TFTP system.

Based on a random set of dates furnished by Judge Bruguière and covering the period from early 2002 to the current date, the U.S. Treasury Department provided detailed logs of a number of searches. In each case these demonstrated the contemporaneous justification for the search, which data were extracted from the searchable database and the follow-up given to these searches. The Treasury Department also provided Judge Bruguière with a sample of subpoenas covering the historical period of the TFTP, demonstrating how the volume of data requested has significantly narrowed over that time. The Treasury Department further provided Judge Bruguière with detailed classified information demonstrating that TFTP-derived information has provided lead information which has contributed to the apprehension of suspects and the disruption of terrorist networks. During this mission, the U.S. Treasury Department provided its answers to Judge Bruguière's TFTP Questionnaire, which has formed an important part of the methodology leading to production of the Report.

A third mission took place in November 2008, which focused on the use of data extracted from the searchable database, including the sharing of intelligence derived from those data with other U.S. agencies, with third countries and notably with EU Member States. During this mission, Judge Bruguière also conducted an interview with the Civil Liberties Protection Officer from the office of the Director of National Intelligence, who has oversight of the civil liberties and privacy aspects of programmes like the TFTP. Interviews were also conducted with the Treasury Department and other U.S. Government agencies concerning the dissemination and sharing of intelligence derived from the TFTP.

Throughout this process, the European Commission has provided Judge Bruguière with technical and administrative support in his role as *eminent European person*. In particular, Commission officials with expertise in the areas of data protection, terrorist financing and informatics security have supported Judge Bruguière in carrying out the work necessary to produce the Report.

Conclusions

Upon completion of his review, Judge Bruguiere found that the Programme was being run in conformity with the Representations made by the Department of the Treasury. More importantly, Judge Bruguiere was able to conclude that the Programme has made a real contribution to counterterrorism efforts and that Europe has benefited from leads produced by the Programme. The eminent person focused particular attention on the core undertakings set out in the TFTP Representations, namely that SWIFT data will be used exclusively for counter terrorism purposes; that the Treasury will ensure that subpoenas are narrowly focused; that searches against the TFTP database are targeted and designed to minimise extraction of data; that appropriate measures are in place to identify and delete data which are no longer considered necessary for the fight against terrorism; and that necessary physical and logical systems exist to ensure the security of subpoenaed data. Judge Bruguiere's Report demonstrates that the United States Treasury Department has implemented significant and effective controls and safeguards which ensure respect for the protection of personal data subpoenaed for the purpose of the Terrorist Finance Tracking Programme. Judge Bruguiere identified a number of areas where he believes additional steps could be taken to solidify measures already in place. However Judge Bruguiere did not find any systemic or other underlying concerns to indicate that the TFTP Representations were not being duly complied with by the U.S. Treasury Department. Following his review of the TFTP and its surrounding privacy-related safeguards, Judge Bruguiere formulated a series of detailed and specific recommendations regarding the operation of the Programme.

The eminent person focused significant attention on understanding the value of the TFTP in terms of producing intelligence which contributes to the fight against terrorism both in the United States and in other countries and notably in EU Member States. The Treasury Department furnished Judge Bruguiere with detailed classified information providing concrete examples of where intelligence derived from TFTP data played a key role in the investigation, detection, prevention and prosecution of terrorism in the United States, in Europe and elsewhere. TFTP-derived information has been the basis for a significant number of lead reports furnished to EU Member States (without revealing the TFTP as the source). For these reasons, Judge Bruguiere believes that TFTP must be sustained.

As a result of the information Judge Bruguiere has had access to during discussions with the U.S. Treasury Department, he has concluded that the Terrorist Finance Tracking Programme has generated since its implementation and continues to generate significant value for the fight against terrorism both in the United States and beyond. Moreover the U.S. Government has readily shared this intelligence with third countries, with EU Member States being the principal non-U.S. beneficiary of TFTP lead information.

Recommendations

The U.S. Government has reviewed the recommendations and is working with Judge Brugiere on their implementation.