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**COUNCIL OF
THE EUROPEAN UNION**

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**JAI 449
USA 54
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DATAPROTECT 46
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NOTE

from : Presidency
to : COREPER/Council
No prev. doc : 11006/09 JAI 397 USA 43 RELEX 574 DATAPROTECT 42
Subject : Negotiating directives for negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing

At the Coreper meeting of 23 June 2009, a consensus was reached on the negotiating directives for an international EU-US Agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing, as set out in the annex to this note.

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ANNEX

NEGOTIATING DIRECTIVES

1. The Agreement is a very short term, and not longer than twelve months interim agreement to be negotiated on the basis of Articles 24 and 38 of the Treaty on European Union. In the event that the Lisbon Treaty enters into force, the Agreement shall provide that the Contracting parties resume negotiations for a new Agreement under the conditions of the appropriate legal framework;
2. The Agreement shall provide that the Parties may agree to designate providers of international financial payment messaging services ("Providers") for purposes of the Agreement. The Agreement shall further provide that a public authority will be designed with responsibility to receive requests from the United States Department of the Treasury for financial payment messaging data ("the Authority"). On receipt of such requests, the Authority shall verify the legality of the request according to the Agreement and as appropriate shall require the Provider to transfer, on the basis of a 'push' system, the relevant financial payment messaging and related data to the United States Department of the Treasury. The designated "Provider(s)", the "the Authority" concerned, as well as the scope of the financial payment messaging and related data to be covered shall be further specified in the Agreement and/or its Annex;
3. The Agreement will provide that relevant financial payment messaging data shall be only those financial payment messaging and related data which are necessary to combat terrorism and its financing taking account of past and current analyses focused on message types and geography as well as perceived threats and vulnerabilities. The request shall name as accurately as possible the data requested and substantiate their necessity. The Agreement shall provide clear rules concerning the lawfulness of data transmission. The Agreement will specify that any request by the United States Treasury Department for financial payment messaging data shall be narrowly tailored taking account of proportionality and necessity so as to minimise the amount of data requested and the number of data subjects affected by the request;

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4. The Agreement shall limit the purpose of the transfer and any subsequent processing of personal data contained in relevant financial payment messaging data exclusively to the investigation, prevention, detection or prosecution of terrorism and its financing. The definition of terrorism ought to correspond to that laid down by the Council Framework Decision 2002/475/JHA on Combating Terrorism, as amended by Council Framework Decision 2008/919/JHA;
5. The Agreement will ensure full respect for fundamental rights as enshrined in Article 6(2) of the Treaty on European Union and for the principles of proportionality and necessity regarding the right to respect for private and family life as well as protection of personal data as set out in Article 8(2) European Convention of Human Rights and Article 7 and 8 of the Charter of Fundamental Rights of the European Union. The Agreement will ensure the right to privacy with regard to the processing of personal data. The Agreement shall contain safeguards and controls which ensure an adequate level of protection of personal data in particular concerning the purpose for which personal data are made available to the United States Department of the Treasury and all subsequent processing of those data, the duration for which personal data may be retained, the security of data, onward transfers of personal data to specified government agencies or third countries, adequate provisions for oversight and regular review, the enforcement of the data subjects' rights and effective judicial and other remedies. Personal data are kept for no longer than necessary for the specific investigation or prosecution for which they were accessed. The Agreement should establish a maximum storage period of five years and provide for an ongoing and at least annual evaluation in order to identify and delete all non-extracted data that are not necessary for the execution of the purposes referred to in the Agreement. In case of onward transfers, further sharing of personal data by the US Treasury with other national authorities shall be limited, and sharing with other countries or international organisations shall be subject to equivalent conditions as those laid down in the Agreement;
6. The Agreement will prohibit that financial payment messaging data transferred to the United States Department of the Treasury, are subject to data mining, manipulation or otherwise interconnected with other databases;

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7. Safeguards and controls regarding the protection of personal data transferred to the United States Department of the Treasury pursuant to the Agreement, including the monitoring of such safeguards and controls, shall be at least equivalent to those set out in the TFTP Representations and shall reflect the relevant European standards on data protection including the Council of Europe Convention 108. The safeguards and controls shall be stipulated in the Agreement in such a way as to be legally binding on the United States authorities;
8. The Agreement will specify that the European Union will carry out reviews of the safeguards, controls and reciprocity provisions contained in the Agreement. Such reviews will include access to TFTP systems to verify compliance with surrounding safeguards and controls. As part of these reviews the US Treasury Department will be required to justify the scope of requested financial payment messaging data and to provide precise data concerning the quantity of financial messages processed and the extent to which these data have been shared with other US agencies and/or third countries or international organisations. For the purpose of these reviews, the European Union shall be represented by at least the Presidency of the European Union, the European Commission and representatives of Member States' data protection authorities;
9. Where safeguards or reciprocity obligations are not complied with, the EU will have the right to terminate the Agreement or require suspension of the transfer of financial payment messaging data. The Agreement will specify that it does in no way affect the data protection standards established by the relevant EU or national legislation applicable to the "Providers" or limit the supervisory competence and powers of data protection authorities competent for the supervision of data processing by the "Providers";
10. The Agreement shall ensure that competent authorities of the United States of America will make available in the most expedient manner to competent authorities of the European Union Member States as well as to Europol and Eurojust any information which is extracted from the TFTP database or otherwise derived there from which may contribute to the investigation,

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11. prevention, detection or prosecution of terrorism or its financing by one or more European Union Member States. The Agreement shall further provide that the U.S. Treasury Department will carry out appropriate searches of the TFTP database and, as appropriate, provide relevant extracted information in response to a request made by the competent authorities of one or more European Union Member States, Europol or Eurojust under the same conditions as those applying to the competent authorities of the United States of America;
12. The Agreement will state that in the event of the European Union setting up an EU TFTP, competent US authorities will agree to transfer relevant financial payment messaging data to competent EU authorities;
13. Where relevant financial payment messaging data include the data of one or more third countries, the United States shall indemnify the EU as regards any legal claim or challenge that the EU is not entitled to sanction the transfer of those data to the United States;
14. To avoid any risk that the envisaged agreement could be seen as a precedent for data transfers in other areas, the agreement shall state that it is specific to the fight against terrorism which represents a common EU-US interest and that the agreement in no way constitutes a precedent for data transfers for any other purpose, for transfers of any other data or for any future EU-US data protection arrangements;
15. The Agreement shall be equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish language and shall include a language clause to this effect;
16. The Agreement should be concluded for a maximum period of twelve months;
17. The Agreement shall provide for provisional application in the framework of existing national laws from the time of signature until entry into force of the Agreement.