



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 February 2011

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LIMITE

**JAI 85
USA 9
RELEX 128
DATAPROTECT 8**

NOTE

from : German delegation
to : delegations

Subject : Europol's role in the framework of the EU-US TFTP Agreement¹ and state of play of operational and strategic agreements of Europol (specific focus: the agreement on exchange of personal data and related information that Europol has with the US)
- EU information policy on the TFTP Agreement

1. Germany's Federal Commissioner for Data Protection and Freedom of Information, member of the Joint Supervisory Body of Europol according to Art. 34 Europol Council Decision, asked the Federal Ministry of the Interior numerous questions about the Agreement which can be answered only by the European Commission, which led the negotiations, and partly by Europol, which is involved in executing the Agreement. Therefore, the Europol Management Board agreed at its meeting on 13-14 October 2010 that the Member States' questions about the interpretation and application of the TFTP Agreement should be forwarded to the European Commission and Europol for a co-ordinated appropriate reply. However, in its letter of

¹ 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, OJ L 195, 27.7.2010, p. 5-14.

20 December 2010 the Commission expressed its view that neither the Commission nor Europol nor the Member States had the legal power to interpret the Agreement. Therefore, the Commission suggested that a workshop should be conducted where Member States could thoroughly discuss existing and new questions.

Nevertheless, it is not likely that the questions will be answered following Commission's proposal.

2. In December 2010 a member of the German Bundestag asked the Federal Ministry of the Interior several questions about the TFTP Agreement. Europol was not able to say how many requests the USA has made, how many data, in particular German data, had been transferred to the USA or whether Europol has rejected US requests pursuant to Art. 4 of the Agreement, stating that these questions touched upon a politically sensitive area.
3. Following an enquiry by the *Financial Times Deutschland* of 25 January 2011, Europol refused to answer Germany's question whether the USA had requested data pursuant to Art. 4 of the Agreement already before the EU scrutineer started to work in Washington on 26 August 2010. Europol explained that all documents concerning the TFTP Agreement were now "top secret" so that no information could be provided.

Germany is deeply concerned about this information policy. Repeatedly sidestepping questions or not answering them at all will raise further questions and add to growing scepticism. Moreover, MPs and journalists will likely point out this issue to one another, as has already happened in Germany and is probably happening also in other Member States.

The European Commission's opinion that neither the Commission nor Europol nor the Member States have the power to bindingly interpret the Agreement is not helpful in the political discussion about the interpretation and application of the Agreement. This opinion will lead to growing public mistrust towards the Agreement and its effects, which will ultimately also cast a shadow over the negotiations on an EU-TFTP. The Commission, which negotiated on behalf of the European Union, is essential for interpreting the Agreement because it is the only one who knows the motivation and attitudes of the contracting partner.

In any case, the EU Member States are bound by the Agreement and have a right to all information concerning the Agreement.
