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USA to take account of EU data protection principles to process data received from Swift

Following a joint undertaking by the Commission and the Council Presidency, the European Union has got a set of unilateral commitments ("Representations") of the United States Treasury Department regarding their handling of EU originating personal data received from SWIFT in the United States under compulsion of administrative subpoenas. These "Representations" take account of EU data protection concerns.

Vice President Frattini, Commissioner responsible for Justice, Freedom and Security, stated: *"The EU will have now the necessary guarantees that US Treasury processes data it receives from Swift's mirror server in USA in a way which takes account of EU data protection principles. I welcome the United States' Treasury Department's unilateral representations and the opportunity the Treasury has given the European Union to have its views and concerns duly reflected in the representations. As well as SWIFT joining the Safe Harbour and its compliance with the Safe Harbour privacy principles, we now look to SWIFT and to the financial institutions which use its services to ensure that they fully comply with their information obligations under European data protection law. We urge them to take all the necessary steps to ensure their quick compliance with European data protection law"*.

Today the Commission and the Council of the European Union have taken note of the "Representations" of the United States Treasury Department regarding their handling of EU personal data received from SWIFT.

The text of the Representations, that the Commission considers to be adequate, was finalised by the U.S. Treasury following discussions between the U.S. Treasury on the one hand and the Council Presidency and the European Commission on the other. The Representations take account of EU concerns about the protection of EU originating personal data which may be subpoenaed in the United States by the U.S. Treasury under the U.S. Treasury's "Terrorist Finance Tracking Program".

The Representations include the following important safeguards:

- Commitments by the U.S. Treasury to use any data received from SWIFT exclusively for counter terrorism purposes – an obligation which applies also where such data are shared with other U.S. agencies and with third countries. Any other use of SWIFT data is therefore excluded, including for example use of those data for commercial or industrial purposes.
- The U.S. Treasury commit to analyse data subpoenaed from SWIFT on an on-going basis in order to identify and delete any data which are not necessary for counter terrorism investigation.
- The Representations impose strict data retention obligations, namely to retain dormant data (i.e. data subpoenaed by US Treasury which have not been identified as necessary for counter terrorism purposes) for **no more**

than five years from the date of receipt of data or, in the case of data received before publication of the Representations, to retain those data for no more than five years from the date of publication of the representations. This means for example that if the Representations are published on 1st September 2007, data that might be received on 15th September 2007 and which remain dormant would have to be deleted by no later than 15th September 2012.

- The Representations further provide for appointment of an "**eminent European**" who will carry out annual oversight of the U.S. Treasury commitments contained in the Representations. The eminent person will be appointed by the Commission in consultation with the President of the Committee of Permanent Representatives and of the European Parliament's Civil Liberties Committee. The eminent person will report to the European Commission which will report to Parliament and Council.
- To ensure transparency and legal certainty the Representations, together with U.S. and EU letters of transmission and receipt, will be published in the Official Journal of the European Union in all official languages. In the United States the Treasury Department will endeavour to ensure publication of the Representations in the U.S. Federal Register.

The U.S. Treasury's unilateral Representations will be transmitted by the Under Secretary of the U.S. Treasury Department to the Council Presidency and to the European Commission. The Commission, and the Council Presidency, will jointly reply to the Treasury to acknowledge receipt of the Representations.

The Representations constitute one of three main components to address the infringement of European data protection law due to SWIFT's transfer of data to the United States and possible access to some of those data by the U.S. Treasury under the Terrorist Finance Tracking Program on the basis of subpoenas served by the U.S. Treasury on SWIFT. To make lawful the transfer of SWIFT data for commercial purposes to its server in the United States, SWIFT is in the final stages of discussions with U.S. authorities regarding entry into the "Safe Harbour". SWIFT and the financial institutions which use SWIFT's services are working to ensure that bank customers will be properly informed, including that their personal data will be transferred to the U.S. and could be accessed by U.S. Treasury under the "Terrorist Finance Tracking Program".

The EU letter of reply to the U.S. Treasury notes that, if the necessary information obligations are met by SWIFT and the financial institutions which use its services, and if SWIFT respects the Safe Harbour principles, SWIFT and the financial institutions which use its services will be in compliance with their respective obligations under European data protection law. The European Commission considers that the legal framework resulting from the above mentioned elements is sufficient to guarantee respect for and the enforcement of European data protection rights.

To find out more about Vice President Frattini's work please visit his website: http://www.ec.europa.eu/commission_barroso/frattini/index_en.htm

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The SWIFT case and the American Terrorist Finance Tracking Program

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After the 11th September 2001 terrorist attacks, the United States Department of the Treasury ("U.S. Treasury") developed the "Terrorist Finance Tracking Program" ("TFTP"). The TFTP is based on United States statutory mandates and Executive Orders authorising the U.S. Treasury to use appropriate measures to identify, track and pursue those who provide financial support for terrorist activity.

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According to the U.S. Treasury, information derived from the use of SWIFT data has enhanced the United States' and third countries' ability to identify financiers of terrorism, to map terrorist networks and to disrupt the activities of terrorists and their supporters.

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Following press reports in June 2006, it was revealed that the U.S. Treasury's Office of Foreign Assets Control ("OFAC") operating on the basis of powers under the TFTP has served administrative subpoenas on the Society for Worldwide Interbank Financial Telecommunication ("SWIFT")¹. These subpoenas require SWIFT in the U.S. to transfer personal data held on its United States² server to OFAC where they are used for counter terrorism purposes regarding suspected individuals or entities.

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After these facts were unveiled by the press, the Belgian Data Protection Authority issued its opinion of 27 September 2006 stating that SWIFT processing activities for the execution of interbank payments are in breach of Belgian data protection law, which implements Directive 95/46/EC on the protection of personal data ("the Data Protection Directive")³. In its opinion the Belgian Data Protection Authority found several breaches to the fundamental data protection principles, including relating to transfers of personal data to third countries. The Belgian Data Protection Authority is now in discussions with SWIFT regarding appropriate compliance with Belgian data protection law.

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In late November 2006 the Article 29 Working Party (the independent advisory body to the European Commission on data protection and privacy) issued an opinion on the processing of personal data by SWIFT. The opinion concluded that SWIFT and the financial institutions which use SWIFT's services had breached Community data protection law as set out in Directive 95/46/EC, including as regards the transfer of personal data to the United States without ensuring adequate protection and failure to inform data subjects about the way in which their personal data were being processed. In its press release of 21st June 2007 the Article 29 Working Party set the 1st September 2007 as the deadline for financial institutions to take all necessary

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¹ SWIFT is a Belgium-based company with offices in the United States and which operates a worldwide messaging system used to transmit, inter alia, bank transaction information.

² For security of data reasons SWIFT operates two identical "mirror" servers, one located in the European Union and the other in the United States. All financial messaging data are held on each server for a period of 124 days.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; OJ L 281, 23.11.1995, p. 31–50.

steps to improve the current situation regarding the provision of appropriate information to their customers.

SWIFT and banks need to take the necessary measures quickly to ensure their compliance with national data protection laws in respect of the processing activities of personal data within the EU and address the findings of the national data protection authorities and the Article 29 Working Party in this regard.

SWIFT has chosen to join the "Safe Harbour". The Safe Harbour is a specific type of "Adequacy Decision" adopted by the Commission in order to allow the free flow of personal data between the EU and the US. It allows EU controllers to export personal data to US organisations that have joined the Safe Harbour, since the privacy principles it contains are recognized to afford the adequate protection required by the EU for international data transfers. The Commission has declared in 2000 the Safe Harbour offers an adequate level of protection in accordance with the Data Protection Directive (Decision of 26 July 2000). Once a US organisation has self-certified and is admitted by US Department of Commerce as a member of the Safe Harbour, it is able to accept transfers of personal data lawfully processed in the EU. SWIFT anticipate that they will join the Safe Harbour by early July 2007 once the US Department of Commerce has admitted and registered them as a member of the Safe Harbour. The Safe Harbour allows limitations on its data protection principles for important public purposes: "to the extent necessary to meet national security, public interest or law enforcement requirements". In this respect, it is necessary to show that the processing by the US of EU originating personal data is necessary and proportionate. This is precisely the aim of the Representations. Compliance with the Representations by U.S. Treasury provides this assurance and will permit SWIFT to transfer data to its U.S. server under the Safe Harbour in a way in which satisfies EU data protection law.

To find out more about Vice President Frattini's work please visit his website: http://www.ec.europa.eu/commission_barroso/frattini/index_en.htm

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