

Speaking note

Dear Members of Parliament,
Dear Ladies and Gentlemen,

Thank you for your invitation. I was invited to clarify the role of the National Bank of Belgium in the oversight of SWIFT, and to explain the oversight arrangements that have been set up with the G-10 central banks, including the ECB.

Let me first introduce myself. I am an Executive Director at the National Bank of Belgium in charge of International Co-operation and Financial Stability, including the oversight of payment and related infrastructures. As part of this responsibility, we oversee SWIFT. While SWIFT itself is not a payment system, it is a critical service provider (messaging services) to payment and related infrastructures. The NBB also oversees systems such as Banksys, the processor in Belgium of retail card transactions, Euroclear, an international central securities depository, Ellips, the country's large value payment system, and the CEC, the automated clearing house for retail transactions.

The primary objective of the oversight function is to foster the stability of the financial system and the soundness of financial infrastructures. The legal basis for the NBB's oversight activities is laid out in the Organic Law of the National Bank of Belgium, which states that the NBB should ensure the "smooth operation of clearing and payment systems". Most other central banks have a similar oversight duty.

Our oversight of SWIFT centres on the security, operational reliability, business continuity, and resilience of the SWIFT infrastructure. Given that SWIFT provides financial messaging services globally, the NBB carries out this oversight in the context of an international co-operative framework. The principles for co-operative oversight were first developed by the G-10 in 1990 (the so-called Lamfalussy principles). Co-operative oversight helps to avoid unnecessary duplication of activity and thus reduces costs both for the overseen system and for the central

banks. It also promotes consistent oversight approach, minimising the risk that different central banks impose conflicting requirements on a system. And, most importantly, it helps avoid the possibility of oversight gaps that might arise if another authority is wrongly assumed or relied upon to address safety and efficiency issues adequately.

SWIFT, being a critical infrastructure in many countries of the world, exemplifies the importance of coordination of the oversight function. As the traffic to and from G-10 countries accounts for the largest share of SWIFT traffic, the co-operative central bank oversight of SWIFT has been set up among the G-10 central banks. As SWIFT is incorporated in Belgium, the NBB is the lead overseer. This means that the NBB is the point of contact for the exchange of information between SWIFT and the G-10 central banks. In addition, the NBB coordinates the oversight activities by establishing the work program and suggesting the oversight priorities. Each cooperating central bank participates in the oversight function in accordance with its national oversight mandate.

How is the SWIFT oversight organised in practice? The NBB and SWIFT have signed a Protocol that outlines the principal practical arrangements of the oversight of SWIFT, including the oversight objectives and the activities that will be undertaken to achieve those objectives. The protocol also refers to the legal provisions under Belgian law. In addition, the NBB has signed a Memorandum of Understanding with each of the other G-10 central banks that contains the principles for the co-operative oversight arrangement.

Similar to central bank oversight of other infrastructures, our oversight of SWIFT focuses on the extent to which SWIFT manages effectively the risks it may pose to financial stability and to the soundness of financial infrastructures. To assess whether risks are managed effectively, we take into account whether SWIFT has put in place appropriate structures, processes, risk management procedures and controls. For this purpose, the G-10 overseers and SWIFT's senior management and Board hold regular discussions, in a frank and open way. During this process, overseers gain access to confidential and sensitive information. We are informed of strategic issues related to our oversight mission such as policy on

telecommunications outsourcing, business continuity policy, security strategy, technology risk management, etc.

It was within this framework that SWIFT informed the National Bank of Belgium in February 2002 that it had been subpoenaed by the US Treasury. The information was subsequently relayed to the other G-10 central banks. The sole purpose of conveying this information was to assess the possible implications of the issue for financial stability and the soundness of financial infrastructures. The understanding of the overseers was that the investigation via the US Treasury subpoenas was properly monitored to be restricted to the tracking of terrorist financing. Overseers concluded that this issue was unlikely to have material adverse implications for financial stability and therefore outside the purview of our oversight.

I now want to explain why the NBB could not inform the Belgian Government.

NBB is bound by a stringent professional secrecy statute, penally sanctioned and even more restrictive than the professional secrecy organised by the Belgian penal law Code. According to this statutory secrecy duty, confidential information can only be shared with authorities that have oversight competence, which the Belgian Government does not have.

Under public law, the acts of a foreign authority should *prima facie* be considered as lawful. Therefore, the NBB could neither presume the irregular or illegal nature of the US subpoenas nor the irregular character of SWIFT's compliance. I refer in particular to the opinion nr 37/2006 of 27 September 2006 of the Belgian Privacy Commission¹ where the Commission states that *"it does not question the legality nor the enforceability of the US legislation and US subpoenas, which clearly belong to the competence of the American authorities"* ². The Commission declares in its opinion that the judgement of the qualification of SWIFT as *"responsible"* or *"processor"* is *"delicate"* in the given context and highlights several times the difficulties of the interpretation and the delicacy of the equilibrium that has to be reached between the two conflicting laws of the US and the EU.

¹ Opinion nr 37/2006 of 27 September 2006 of the Belgian Privacy Commission on the transfer of personal data by SCRL Swift following the UST (OFAC) subpoenas

²see point nr E.2.1 page 19 of the Opinion nr 37/2006 of 27 September 2006 of the Belgian Privacy Commission (here quoted in a free translation).

In the same opinion the Commission observes that the compliance of the law on the privacy protection of 8 December 1992 is at present not considered as part of the individual or co-operative oversight³. It thereby follows the view that this compliance check is outside the realm of the oversight competence. Faced with complex issues such as company law, competition law, penal law, labour law, tax law, accounting law or data protection law, etc., the NBB, in its capacity of overseer, does not have the statutory competence nor authority, either materially or territorially, to perform its own legal assessments or to act as a legal counsel to the company subject to the oversight, but can only rely on the professional handling by the company.

Therefore, it was not possible for the NBB as overseer to express a professional and balanced opinion on the compliance by SWIFT with the Belgian privacy legislation, nor to assess whether an infringement had been committed in the absence of such thorough examination of the case nor to presume the existence of an infringement. In those circumstances it was legally impossible for the NBB to lift the professional secrecy.

³ see point nr D.3 page 15 of the Opinion nr 37/2006 of 27 September 2006 of the Belgian Privacy Commission.