

ARTICLE 29 Data Protection Working Party

Working Party on Police and Justice



Juan Fernando LÓPEZ AGUILAR
Chairman of the Committee on Civil
Liberties, Justice and Home Affairs
European Parliament
B-1047 Brussels

Dear Mr. López Aguilar,

I thank you for your letter of 8 January 2010 in which you have asked the Article 29 Working Party to examine the 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 of America for the purposes of the Terrorism Finance Tracking Program. This agreement has been signed by the Council on 30 November 2009 and shall be provisionally applied as from 1 February 2010.

We hereby enclose the assessment carried out by the Article 29 Working Party and the Working Party on Police and Justice.

We appreciate the fact that the concerns voiced by the European Parliament in its resolution of September 2009 were incorporated in the Interim Agreement to a large extent. However, we feel compelled to convey to you what we see as important data protection issues. We trust that the aforementioned concerns will receive due consideration by the European Parliament in its pending deliberation on the Interim Agreement.

Finally, we would like to confirm our availability, on behalf of the Art. 29 Data Protection Working Party and the Working Party on Police and Justice, to be heard by the European Parliament on this matter when necessary in order to clarify any question you might consider on this issue.

Yours sincerely,

Alex Türk

Francesco Pizzetti

Chairman of the Art. 29 Working Party

Chairman of the Working Party on Police and Justice

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC. The secretariat is provided by Directorate D (Fundamental Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/190.
Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

The Working Party on Police and Justice was set up as a working group of the Conference of the European Data Protection Authorities. It is mandated to monitor and examine the developments in the area of police and law enforcement to face the growing challenges for the protection of individuals with regard to the processing of their personal data.

Enclosure: Assessment of the Article 29 Working Party and the Working Party on Police and Justice.

Cc: Mr. Jerzy Buzek, President of the European Parliament

Mr. Jacques Barrot, Vice-President of the European Commission

Ms Viviane Reding, designated Vice-President of the European Commissioner responsible for Justice, Fundamental Rights and Citizenship

Ms Cecilia Malmström, designated Commissioner for Home Affairs

Mr. Jonathan Faull, Director General (DG Justice, Freedom and Security) European Commission;

Attachment

Assessment of the Article 29 Working Party and the Working Party on Police and Justice of the 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 purposes of the Terrorist Finance Tracking Program (hereafter "the Interim Agreement"), signed by the Council the 30 November 2009 (OJ L 8, 13.01.2010, p. 9)

At its plenary session of November 30th and December 1st last year, the Art. 29 Data Protection Working Party mandated its Subgroup Financial Matters to analyse the *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 purposes of the Terrorist Finance Tracking Program* (hereafter "the Interim Agreement"), and that has been signed by the Council the 30 November 2009. . . In addition, the Working Party on Police and Justice discussed the Interim Agreement at its meeting of 17th December 2009 and expressed concurrence with the concerns raised by the Subgroup Financial Matters.

This document presents the findings of this assessment. The Article 29 Working Party and the Working Party on Police and Justice would like to express a number of comments regarding the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data for the purposes of the Terrorist Finance Tracking Program (TFTP).

Scope of the agreement

The notion of terrorism, as defined in Article 2 of the Interim Agreement, differs from the notion defined in the Council Framework Decision of 13 June 2002 *on combating terrorism* (2002/475/JHA), the former being slightly broader in scope. Conceivably, the Interim Agreement would allow the transfer of data concerning persons considered to be terrorists in the US but not in the EU. Also, there may be implications for other provisions of the Agreement, such as Article 8 (EU Requests for TFTP Searches).

Necessity and proportionality of data transferred

We wish to express particular concern with respect to Article 4 paragraph 6, which provides that, in case the "designated provider" is not able to identify and produce the specific data that would respond to the request because of technical reasons, data shall be transferred in bulk to the US. Despite the fact that this clause is presented as an exception, we wonder whether, in practice, bulk transfer would be the rule. Indeed, it is not clear what will become of transferred data which does not match the parameters of the international request, notwithstanding the provisions of Article 5 paragraph 2 littera j-m of the Interim Agreement.

Assessment of the level of protection

Furthermore, the wording of Article 6 of the Interim Agreement, according to which the "U.S. Treasury Department is deemed to ensure an adequate level of data protection", has brought about a certain degree of perplexity amongst the Working Parties' members. Traditionally, adequacy is assessed by a thorough comparison of the level of protection provided by a specific country or entity with EU

standards. Without any such assessment, we cannot consider that the level of protection offered by the US Treasury is adequate. To our knowledge, no independent assessment of the level of protection offered by the US Treasury Department was conducted before the conclusion of the Interim Agreement. However, we are left wondering whether the Joint Review set out in Article 10 will offer the first opportunity for such an assessment.

We are aware of the Bruguière Report of December 2008 on the inner workings of the TFTP, following the mandate given to the “Eminent European Person” to “confirm that the [TFTP] program is implemented consistent with the Representations for the purpose of verifying the protection of EU-originating data”. However, this report cannot substitute an adequacy assessment in the traditional sense given its secret nature and its distinct aim.

It should be borne in mind that the effectiveness of the Joint Review stands or falls with the accessibility of all relevant information for all members of the review committee, including the representatives of the data protection authorities of the Member States.

Competence of data protection authorities - Redress

Regarding article 11 of the Interim Agreement, it is our understanding that this article must in no way impinge on the competences of Data Protection Authorities as defined by their national laws, in particular as regards their investigative powers as well as any existing procedures of access to data processed by law enforcement agencies. The non-derogation clause contained in article 13 supports this view, as does recital 13 of the Interim Agreement. The opposite position would, in our opinion, be contrary to the European *acquis* on this matter.

The Interim Agreement in itself does not organise any form of access to processing of transferred data in the US, neither for data subjects nor for data protection authorities in the EU. Even though the Interim Agreement stresses that data subjects may seek effective administrative and judicial redress in accordance with the laws of the United States, the question remains whether this will prove feasible/practicable for European citizens in practice.

We appreciate the fact that the concerns voiced by the European Parliament in its resolution of September 2009 were incorporated in the Interim Agreement to a large extent. However, we feel compelled to convey to you what we see as important data protection issues. We trust that the aforementioned concerns will receive due consideration by the European Parliament in its pending deliberation on the Interim Agreement.

Done at Brussels on 22 January 2010

Alex Türk

Francesco Pizzetti

Chairman of the Art. 29 Working Party

Chairman of the Working Party on Police and Justice

