

**SWIFT**

**European Parliament resolution of 5 May 2010 on the Recommendation from the Commission to the Council to authorise the opening of negotiations for an agreement between the European Union and the United States of America to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing**

*The European Parliament,*

- having regard to the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union,
- having regard to the Agreement on Mutual Legal Assistance between the European Union and the United States of America<sup>1</sup>,
- having regard to the Recommendation from the Commission to the Council to authorise the opening of negotiations for an agreement between the European Union and the United States of America to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing<sup>2</sup>,
- having regard to its legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion 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 (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE))<sup>3</sup>,
- having regard to the request for consent submitted by the Council pursuant to Article 218 (6)(a) in conjunction with Articles 82(1)(d) and 87(2)(a) of the TFEU (C7-0004/2010),
- having regard to its resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing<sup>4</sup>,
- having regard to the proposal for a Council decision (COM(2009)0703 and 05305/1/2010 REV 1),
- having regard to the text 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 (16110/2009),
- having regard to the opinion of the European Data Protection Supervisor of 12 April 2010 (restricted),

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<sup>1</sup> OJ L 181, 19.7.2003, p. 34.

<sup>2</sup> SEC(2010)0315 final.

<sup>3</sup> Texts adopted, P7\_TA(2010)0029.

<sup>4</sup> Texts adopted, P7\_TA(2009)0016.

- having regard to Rule 110(2) of its Rules of Procedure,
- A. whereas it welcomed the Agreement on Mutual Legal Assistance between the European Union and the United States of America and the 'Washington Declaration', as adopted at the EU-US JHA Ministerial Troika on 28 October 2009, on enhancing transatlantic cooperation in the area of Justice, Freedom and Security within a context of respect for human rights and civil liberties,
- B. whereas it places strong emphasis on the need for transatlantic cooperation,
- C. whereas on 30 November 2009 the Council signed an EU-US interim agreement on the processing and transfer of financial messaging data (FMDA) for the purposes of the US Terrorist Finance Tracking Program (TFTP) to be provisionally applied as from 1 February 2010 and expire on 31 October 2010 at the latest,
- D. whereas under the Treaty of Lisbon its consent to the formal conclusion of this interim agreement was required,
- E. whereas on 11 February 2010 it decided to withhold its consent to the conclusion of the FMDA,
- F. whereas it requested the Commission immediately to submit recommendations to the Council with a view to a long-term agreement with the United States dealing with the prevention of terrorism financing,
- G. whereas it reiterated that any new agreement in this area should comply with the new legal framework established by the Treaty of Lisbon and the now binding Charter of Fundamental Rights of the European Union,
- H. whereas it renewed the requests made in its resolution of 17 September 2009, particularly those in paragraphs 7 to 13,
- I. whereas the Commission adopted the new TFTP Recommendation and Negotiating Directives on 24 March 2010,
- J. whereas the Council is expected to take a decision on the adoption of the Negotiating Directives on 22 April 2010,
- K. whereas the Negotiating Directives reflect important elements contained in the relevant European Parliament resolutions on this issue,
  1. Welcomes the new spirit of cooperation demonstrated by the Commission and the Council and their willingness to engage with Parliament, taking into account their Treaty obligation to keep Parliament immediately and fully informed at all stages of the procedure; reiterates its openness to an agreement which would help both Europe and the United States strengthen their fight against terrorism in the interests of the security of their citizens, without undermining the rule of law;
  2. Counts on a continuation of the commitment, spirit of constructive cooperation and fairness demonstrated by representatives of the US Government in the run-up to Parliament's vote on 11 February 2010 and thereafter;

3. Recalls its strong determination to fight terrorism and its conviction that the framework of transatlantic cooperation for counter-terrorism purposes should be further developed and improved; believes, at the same time, that European legal requirements for the fair, proportionate and lawful processing of personal information are of paramount importance and must always be upheld;
4. Reiterates that the EU's rules on the tracking of terrorist financing activities are based on the reporting of suspicious or irregular transactions by individual financial operators;
5. Emphasises that fundamental principles still need to be laid down by the EU stating how it will generally cooperate with the US for counter-terrorism purposes and how financial messaging data providers could be asked to contribute to this fight, or indeed more generally to the use in connection with law enforcement of data collected for commercial purposes;
6. Reiterates its emphasis on the 'purpose limitation' of the agreement in order to ensure that any exchange of information is strictly limited to that required for the purposes of combating terrorism and that this is done on the basis of a common definition of what constitutes 'terrorist activity';
7. Stresses that the principles of proportionality and necessity are key to the envisaged agreement, and points out that the problem that financial messaging data providers are unable (for technical and/or governance reasons) to search the 'content' of the messages, leading to the transfer of data in bulk, cannot subsequently be rectified by oversight and control mechanisms, since basic principles of data protection law have already been compromised;
8. Reiterates its opinion that bulk data transfers mark a departure from the principles underpinning EU legislation and practice, and asks the Commission and Council to address this issue properly in the negotiations, bearing in mind that the TFTP is currently designed in such a way that it does not allow for targeted data exchange; solutions should include restricting the scope of the transferred data and listing the types of data that the designated providers are able to filter and extract, as well as the types of data which may be included in a transfer;
9. Considers that the Agreement on Mutual Legal Assistance is not an adequate basis for requests to obtain data for the purposes of the TFTP, in particular because it does not apply to bank transfers between third countries and because it would, in any case, require the prior identification of a specific bank, whereas the TFTP is based on targeted searches of fund transfers; future negotiations should focus on finding a solution to make one compatible with the other;
10. Takes this view that, once a mandate has been established, a judicial public authority should be designated in the EU with the responsibility to receive requests from the United States Treasury Department; points out that it is crucial that the nature of this authority and the judicial oversight arrangements should be clearly defined;
11. Urges the Council and Commission, therefore, to explore ways of establishing a transparent and legally sound procedure for the authorisation of the transfer and extraction of relevant data as well as for the conduct and supervision of data exchanges; emphasises that such steps are to be taken in full compliance with the principles of necessity and proportionality

and the rule of law with full respect for fundamental rights requirements under EU law, by giving a role to a European authority, which would make it possible for relevant European legislation to become fully applicable;

12. Insists, if the above arrangements are not feasible in the short term, on a twin-track approach which differentiates between, on the one hand, the strict safeguards to be included in the envisaged EU-US agreement, and, on the other, the fundamental longer-term policy decisions that the EU must address; emphasises once again that any agreement between the EU and the US must include strict implementation and supervision safeguards, monitored by an appropriate EU-appointed authority, on the day-to-day extraction of, access to and use by the US authorities of all data transferred to them under the agreement;
13. In this respect, points out that the option offering the highest level of guarantees would be to allow for the extraction of data to take place on EU soil, in EU or Joint EU-US facilities, and asks the Commission and the Council to explore, in parallel:
  - ways to phase into a medium-term solution empowering an EU judicial authority to oversee the extraction in the EU, on behalf of Member States, after a mid-term parliamentary review of the agreement;
  - ways to ensure, in the meantime, that EU select personnel – from EU organs or bodies, including for example, the EDPS, or joint EU-US investigation teams – with high clearance, joins SWIFT officials in the oversight of the extraction process in the US;
14. Underlines the fact that any agreement between the EU and the US, regardless of the implementing mechanism chosen, should be limited in its duration and provide for a clear commitment on the part of both the Council and Commission to take all the measures required to devise a durable, legally sound European solution to the issue of the extraction of requested data on European soil; the agreement should also provide for evaluations and safeguard reviews by the Commission at set times during its implementation;
15. Calls for the agreement to be terminated immediately if any obligation is not met;
16. Points out that true reciprocity would require the US authorities to allow both the EU authorities and competent authorities in the Member States to obtain and use financial payment messaging and related data stored in servers in the US on the same terms as apply to the US authorities;
17. Requests that all relevant information and documents, including the underlying intelligence, must be made available for deliberations in the European Parliament, in line with the applicable rules on confidentiality, in order to demonstrate the necessity of the scheme in relation to already existing instruments; asks the Commission, further, to report regularly on the functioning of the agreement and to inform Parliament fully about any review mechanism to be set up under the said agreement;
18. Asks to be provided with full and detailed information on the specific rights of European and US citizens (e.g. access, rectification, deletion, compensation and redress) and as to whether the envisaged agreement is to safeguard 'rights' on a non-discriminatory basis, regardless of the nationality of any person whose data are processed pursuant to it, and requests the Commission to submit an overview of the respective rights to Parliament;
19. Expresses concern that the commercial position of one specific financial messaging

provider has been – and will continue to be – compromised if it continues to be singled out;

20. Emphasises that the envisaged agreement must ensure that personal data extracted from the TFTP database are kept on the basis of a strictly interpreted 'necessity' principle and for no longer than necessary for the specific investigation or prosecution for which they are accessed under the TFTP;
21. Points out that the concept of non-extracted data is not self-evident and should thus be clarified; calls for a maximum storage period to be established, which should be as short as possible and in any case no longer than five years;
22. Stresses the importance of the principles of non-disclosure of data to third states if no specific reasons are given for a request and of disclosure of terrorist leads to third states only subject to strict conditions and appropriate guarantees, including adequacy assessment;
23. Reiterates that a binding international agreement between the EU and the US on privacy and data protection, in the context of the exchange of information for law-enforcement purposes, remains of the utmost importance;
24. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, the US Congress and the Government of the United States of America.