

EUROPOL JSB INSPECTS FOR THE SECOND YEAR THE IMPLEMENTATION OF THE TFTP AGREEMENT¹

Public Statement

The Joint Supervisory Body (JSB) of Europol conducted, in November 2011, a second inspection of Europol's implementation of its tasks under the TFTP Agreement and the fulfillment of the JSB's recommendations from last year's inspection.²

During the inspection, carried out at Europol's headquarters in The Hague, the JSB conducted interviews, checked and assessed the content of the requests made by the US and verified relevant audit logs, security and other aspects relating to articles 4, 9 and 10 of the Agreement.

Article 4 gives Europol a specific role: to check whether requests from the US for SWIFT data comply with the terms of the Agreement.

Under Article 34(1) of the Europol Council Decision, the Europol JSB is tasked with reviewing the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and use of data held by Europol.

In line with JSB's normal inspection procedures, Europol was given the opportunity to comment on a draft version of the inspection report. The comments are included in the final report.

Due to Europol's classification of most TFTP-related information as EU SECRET, the JSB's final report is classified as EU SECRET.

With a view to ensuring transparency where possible, this document was developed in order to provide a publicly available overview of some of the general conclusions drawn by the JSB.

General Conclusions

The inspection report shows that Europol has made some progress on the implementation of its tasks under the Agreement, following the JSB's recommendations. Additionally, the fact that the Agreement has been in place for an additional year has allowed both Europol and the US to modify certain aspects of their working methods.

¹ In June 2010, the European Union and the United States of America signed an agreement on the processing and transfer of financial messaging data held by SWIFT (Society for Worldwide Interbank Financial Telecommunication), from EU to the US, for the purpose of the Terrorist Finance Tracking Program (TFTP)

² Available at <http://europoljsb.consilium.europa.eu/about.aspx>

Europol has maintained contacts with the US and organised various meetings with the JSB with a view to meeting the recommendations made by the JSB in the 2011 inspection report. The situation has improved in comparison to last year but there is still work to be done in a number of areas. This report makes recommendations aimed at addressing remaining shortcomings.

A positive procedural change is the implementation of a formal, specific role for the Data Protection Officer (DPO) regarding Article 4 requests. However, the DPO still uses the advice he provided in relation to the first request received as a basis for providing advice on all subsequent requests. This indicates that his previous advice has not been fully taken on board, which suggests that at least in some areas the DPO's concerns remain valid.

While some progress was noted regarding Article 4 requests, the JSB identified several key areas requiring further improvement to fully comply with the conditions laid down in the Agreement.

Europol has positively verified each request received to date. This means that SWIFT has provided the US with all the data requested since the Agreement entered into force.

In line with the provisions of the Agreement, Europol does not see or manage the SWIFT data or know the amount of data actually transferred. No information has been released by the US regarding the amount of data transferred.

Europol receives one request each month on average. Each request normally covers a period of one month in terms of time-span. The requests – when seen as a group – therefore essentially cover a continuous time-period.

To be clear, this means that one consequence of the Agreement, as it is currently being implemented, is that data relating to certain financial transactions are provided by the designated provider to the US for a time frame containing every single day of the year, year on year.

Each request specifies the geographical sphere and lists the required data categories. The JSB verified that the requests have a similar geographical scope, as acknowledged by Europol in a note³ to the European Parliament.

If it is the case that - in reality – narrowing the requested time frame or not requesting certain countries/territories' cross border transfers data would be impractical given the nature of the program, this could indicate that it is not possible to fulfill all intended safeguards of Article 4.

The JSB confirmed that the amount of written information substantiating Article 4 requests has increased; however, lengthier requests *per se* are not enough to fulfill the JSB's recommendation that more detailed written information, specific to each request, must be provided to Europol, in order to better determine whether the US can justifiably request – and therefore receive – the data in question.

³ Europol Activities in Relation to the TFTP Agreement Information note to the European Parliament, File no 2566-566, 8 April 2011

Recent requests include the results of annual assessments; additionally Europol supplied information which indicated the Agreement had been a useful tool in one particular case. This kind of information can contribute to substantiating necessity. A gradual positive change towards the provision of information in this regard was noted, but this is an area requiring closer attention.

The inspection report makes clear that the US must improve the information provided in the requests. Specific, relevant and up-to-date information particular to each request is key. The requests must better substantiate the necessity of the selected geographical scope, the individual data categories requested and the actual data within each message type requested.

This is particularly important considering the amount of non-suspects' data inevitably involved in such a program.

The JSB found that oral information provided by the US to Europol in regular, confidential briefing sessions apparently still plays a role in the verification of the requests. More transparency by the US is needed to allow Europol to verify the requests more effectively and to allow proper internal and external supervision by the DPO and the JSB respectively. Crucially, this information must be provided in writing.

Though the European Commission's report⁴ and Europol's note to the European Parliament do reveal various pieces of useful information, the current classification level applied to much of the information related to the Agreement prevents the release of a large proportion of relevant information.

The JSB is of the opinion that both Europol and the US, while ensuring that information is kept confidential where needed in order not to endanger the functioning of the TFTP, can be more open about the workings of the Agreement.

There is a need for greater transparency towards other parties, including the general public.

Brussels, 14 March 2012

⁴ Commission report on the joint review of the implementation 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 the purpose of the Terrorist Finance Tracking Program , 16 March 2011