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NOTE

from: General Secretariat of the Council
to: Delegations

Subject: Summary of the meeting of the Civil Liberties, Justice and Home Affairs
Committee of the European Parliament, held in Brussels on 24 September 2013:
Inquiry on Electronic Mass Surveillance of EU citizens

SESSION I

***Allegations of NSA tapping into the SWIFT database and possible repercussions for the Terrorist
Finance Tracking Programme (TFTP)***

In the introductory remarks the Chair, Mr Aguilar (S&D, ES), recalled the recent press reports regarding NSA's tapping into the SWIFT database and implications this could have for the 2010 TFTP agreement between the EU and US. The issue would be further debated at the plenary session on 8 October.

Mr Moraes (S&D, UK), the Rapporteur, informed LIBE that Mr Wood, Chargé d'Affaires at the U.S. Mission to the European Union, had not confirmed his participation at the hearing and that the Dutch Ministers for Justice and the Interior had also declined the invitation, referring to the opening of consultations with the US on this issue. The Belgacom affair would be discussed on 3 October with the possible participation of a representative from the UK authorities.

Commissioner Malström said she was very concerned at the recent press allegations about NSA's activities, as the *raison d'être* of the TFTP agreement was to have a legal framework to guarantee adequate data protection. The Commissioner explained she was still waiting to receive substantial information from the US and had therefore requested the opening of formal consultations seeking exhaustive and comprehensive information. The explanations given so far had not been satisfactory. She said that a decision to propose suspension required objective and comprehensive assessment. She promised the MEPs that she would keep them fully informed.

During the discussion the following issues were raised: the need to clarify if the alleged data collection activities had actually happened and if there had been violations of the provisions of the TFTP, possible suspension, termination, or review of the TFTP agreement, a possible European TFTP, the lack of EP control over international agreements once consent had been given.

The Commissioner confirmed that the issues at stake were indeed very serious, but explained that the first step taken had been to request consultations and that they were to start soon. If a breach were established the Commission would have to discuss the course of action internally but clearly a decision would have to be taken by the Council. She pointed out that such speculations were premature for the time being. The possibility of a European TFTP could be discussed in the future but of course had many wider implications.

Mr Wainwright, Director of Europol, explained that Europol had no contact with the NSA or CIA as it worked primarily in the law enforcement environment in the fight against serious organised crime. Its experience with working with security services was limited and related for example to the terrorist attacks in Madrid. All personal data processed by Europol had been processed according to EU law. Europol had very limited knowledge of the NSA, but it was working with the Treasury department in TFTP implementation (technical and operational tasks). Europol had no information to confirm or deny any of the allegations currently discussed.

Ms Petre, General Counsel of SWIFT, presented the origins of the company. Its core mission was to provide secure messaging services to banking organisations, as well as serving as a standardisation body. She stressed that SWIFT implemented top security standards for the protection of its network and respected its legal obligations regarding data protection. She concluded that SWIFT was of course aware of the recent allegations in the press but there was no evidence that there had been any unauthorised access to SWIFT data.

A representative of the Belgian data protection authority confirmed that SWIFT had been fully compliant with the data protection legislation in force.

During the discussion the following issues were raised: the possibility for Europol to investigate alleged NSA activities; Europol's role in cybercrime investigations; Europol's role in TFTP; SWIFT's technical expertise.

Mr Wainwright explained that no member state had made a request to Europol to investigate NSA or possible cybercrime activities. He stressed that Europol had no mandate to investigate any state espionage allegations. He pointed out that Europol had no knowledge of NSA activities, not because of ignorance or because it was failing its duties but because Europol operated in a different environment, namely that of law enforcement.

Ms Petre concluded that as a global company SWIFT would welcome such legal arrangements that would allow it to operate globally.

SESSION II

Feedback on the meeting of the EU-US Transatlantic group of experts on data protection of 19/20 September 2013

Mr Nemitz, European Commission, spoke about the meeting that took place on 19 and 20 September in the US. He explained that the American side had prepared an in-depth presentation of various forms of Executive, Congressional and Judicial oversight available in the US. They had also met with various bodies tasked to report to President Obama on this issues. The aim was clearly to demonstrate the existences of necessary checks and balances within US law.

During the discussion the following a number of MEPs questioned the usefulness of such meetings and wondered if the ad hoc group had been given any insight into the functioning of the surveillance or the number of EU citizens affected. Some asked about possible evidence of economic espionage and allegations regarding TFTP.

Mr Nemitz replied that the agenda of the meeting had been determined by the hosts, however the EU side had indicated that it would like to focus discussions primarily on the scope and extent of surveillance activities and also asked to be briefed on the declassified FISA court judgments in order to understand the relevance of the FISA Court. The EU side was also seeking clarifications on the various programmes. The information received so far was rather limited. There were clear concerns that international agreements were being undermined by unilateral activities. He pointed out that several attempts were made by the US side to broaden the discussions on the practices in the EU and move away from discussing EU's concerns. The ad hoc group was going to meet again and Commission would prepare a report before the end of the year. Mr Priebe, European Commission, replied to the question regarding the TFTP and explained that the existences of any breaches of TFTP could only be determined in the framework of the consultation process.

SESSION III

Exchange of views with US Civil Society

Mr Jeppesen, Director of the European Affairs Centre for Democracy and Technology, stated that reform on mass surveillance was underway in the US Congress. He pointed out that with the level of surveillance and the amount of data going through the US, the country had responsibilities with regard to data protection, including for the data of non US citizens. These responsibilities had not been properly met. He also called for the lifting of the secrecy around intelligence services with regard to surveillance activities. FISA Court decisions should be made available to the public. He urged the US to acknowledge the human right to privacy for EU citizens and other citizens around the world. He also felt that surveillance through the back-door should be prohibited. EU institutions had a major role in examining whether or not national surveillance legislation was in line with human rights and in enforcing legislation which could be globally influential in strengthening

human rights in this context. Reform incentives would be the strongest if US and EU authorities cooperated. He recommended that the EU begin a transatlantic dialogue with the US on a common oversight of surveillance activities in both transnational legislation and EU legislation. He pointed to difficulties vis-à-vis access to classified documents in Europe and national governments' silence on surveillance activities since the Snowden revelations. In answering questions from members of the committee he stressed that more effort was necessary on national level with regard to parliamentary inquiries because intelligence services operated in the scope of national legislation. Furthermore, he recommended that a European dialogue on member states' alignment with the Charter of Fundamental Rights of the European Union be started vis-à-vis intelligence service activities.

Mr Nojeim, Senior Counsel, Centre for Democracy and Technology, via video conference from the US, spoke about the current discussion in US Congress regarding possible reforms of the Foreign Intelligence Surveillance Act and Patriot Act. He explained that existing practice was difficult to assess due to the fact that a lot of information on the subject was not available for public scrutiny. He stressed that the surveillance should be carried out in greater transparency, with improved oversight, and should respect the principle of proportionality.

SESSION IV

Effectiveness of surveillance in fighting crime and terrorism in Europe

Dr Kreissl, coordinator of Increasing Resilience in Surveillance Societies (IRISS), an FP7 project, spoke about the effects of surveillance on a democratic society, namely was surveillance a useful tool to control terrorism and crime, could it prevent terrorist attack or what happened to the political accountability. So far studies have demonstrated that terrorist attacks could not be effectively prevented due to the problem of data overload. He pointed to four problems with regard to mass-surveillance of citizens. First, the problem of categorisation. If the wrong categorisation of information had been conducted, citizens could end up on a no-fly list even though this had not been intended. Furthermore, he pointed to the 'Chilling Effect', which describes the effect produced when citizens feel constantly under surveillance. This could lead to a change in behaviour among

citizens. He also emphasised the effects with regard to breaches vis-à-vis privacy regulations. He criticised the fact that for each surveillance measure there was a back-door in legislation which allowed these measures. He recommended that laws should clearly define the limits of surveillance activities because in his opinion the laws currently in place were no longer a protective shield. He also stressed that little had been done to tackle the side effects. Checks and balances were currently missing. Answering the questions from parliamentarians he pointed to the costs which were interlinked with maintenance of the surveillance programmes but also psychological as well as economical costs. All in all, the costs were higher than previously anticipated according to him. Moreover, with regard to law enforcement, he said that intelligence services enjoyed a monopoly on monitoring their own activities and performances. He emphasised the fact that each time data were copied to different servers within an organisation or sent to a different organisation the privacy protection decreased. He pointed to loopholes in the Safe Harbour Agreement in this context.

SESSION V

Presentation of the study on US surveillance programmes and their impact on EU citizens' privacy

Mr Bowden briefly commented on various aspects of his study, noting in particular that many documents provided by Snowden had still not been studied. His recommendations include the reduction of exposure through the development of a European Cloud, possible reinstatement of Article 42, the so called 'anti-FISA clause' in the new data protection regulation, and reform of the EU Data Protection Authorities.

Next meeting(s)

- ***30 September 2013, 15.00 – 18.30 (Brussels)***
