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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**

EXPLANATORY MEMORANDUM

- The Justice and Home Affairs Council of 30 November 2009 authorised the Presidency of the Council of the European Union to sign an interim agreement between the European Union and the United States on the processing and transfer of Financial Messaging Data from the EU to the U.S. for purposes of the Terrorist Finance Tracking Program (TFTP). The Agreement was signed by the Parties on 30 November 2009 and will be applied provisionally as from 1 February 2010. The Agreement has a maximum duration of 9 months and will be replaced in due course by a longer term agreement.
- The purpose of the 30 November 2009 Agreement is to ensure the continuation of the TFTP which has existed since end 2001 and pursuant to which the United States Department of the Treasury served administrative subpoenas on the U.S. arm of the Society for Worldwide Interbank Financial Telecommunication (SWIFT) for the transfer to the Treasury Department of limited sets of financial messaging data which transit over SWIFT's financial messaging network. It was necessary for the EU and the United States to enter into the 30 November 2009 Agreement since SWIFT's new systems architecture which has been operational since 1 January 2010 risked substantially undermining the benefit of the TFTP not least for the European Union.

- In early 2007 the Presidency of the Council of the European Union and the European Commission engaged in discussions with the U.S. Treasury Department concerning the latter's processing of EU-originating personal data accessed under the TFTP. As a direct consequence of these discussions, the Treasury Department made a series of unilateral commitments to the European Union in June 2007 ("the TFTP Representations").¹ The TFTP Representations expressly limit the Treasury's processing of EU-originating personal data accessed pursuant to the TFTP. Limitations include, for example, that data will be processed exclusively for counter terrorism purposes, that data can only be accessed if there is a pre-existing terrorism nexus (i.e. no data mining) and an obligation to delete data after a certain period. In addition, the TFTP Representations state that the Commission may appoint an "eminent European person" who will verify and report to the Commission on U.S. Treasury compliance with its commitments.
- In March 2008 the Commission announced that it had designated Judge Jean-Louis Bruguière as the TFTP "eminent European person" whose role would be to verify that the TFTP is implemented in accordance with the Representations. Judge Bruguière completed his first report in December 2008. The Report which was presented to the Justice and Home Affairs Council in February 2009 and to the European Parliament's Civil Liberties Committee in February and September 2009, finds that the U.S. Treasury Department complies with the commitments set out in the TFTP Representations. The Report further concludes that the TFTP has

¹ The TFTP Representations, were acknowledged by the European Union by letter of 29 June 2007. The TFTP Representations and EU letter of acknowledgement were published in the Official Journal OJ C 166/18 of 20.7.2007 and OJ C 166/26 of 20.7.2007.

generated considerable value for Member State authorities' investigation of terrorism and that Member State authorities have been the main beneficiaries of TFTP-derived information². There is currently no equivalent of the TFTP in the European Union.

- The Agreement aims to prevent and combat terrorism while respecting fundamental rights, and notably the protection of personal data. 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 of 30 November 2009 aims to ensure full respect for fundamental rights enshrined in Article 6 of the Treaty on European Union and for the principles of proportionality and necessity regarding the right to respect for private and family life and the protection of personal data as set out in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.
- Article 218(6)(a) of the Treaty on the Functioning of the European Union states that in the case of agreements covering fields to which the ordinary legislative procedure applies, the Council shall adopt a decision concluding the agreement, after obtaining the consent of the European Parliament.

- The Commission therefore recommends to the Council, after obtaining the consent of the European Parliament, to adopt a decision concluding 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.

² The "eminent European person" Report of December 2008 contains various examples of where TFTP-derived intelligence has been shared with EU Member State services in connection with the investigation, prevention and prosecution of terrorism in the European Union. The Report further states that United States authorities have shared approximately 1400 TFTP-derived leads with Member States since 2002.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 82(1)(d) and 87(2)(a), in conjunction with Article 218 (6)(a) thereof,

Having regard to the proposal from the Commission,

Having regard to the consent of the European Parliament³,

Whereas:

- (1) On 27 July 2009 the Council authorised the Presidency of the Council, assisted by the Commission, to open negotiations for an Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union and the United States for purposes of the Terrorist Finance Tracking Program.
- (2) In accordance with Council Decision 2009/XXX of 30 November 2009⁴ 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 was signed on, subject to its conclusion at a later date.
- (3) In accordance with its Article 15(2) the provisions of the Agreement shall apply provisionally from 1 February 2010 until its entry into force.
- (4) The Agreement has not yet been concluded. With the entry into force of the Lisbon Treaty on 1 December 2009, the procedures to be followed to that end by the European Union are governed by Article 218 of the Treaty on the Functioning of the European Union.

³ OJ C , , p. .

⁴ OJ L , , p. .

- (5) The Agreement should be concluded.
- (6) [In accordance with Article 3 of the Protocol on the Position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the United Kingdom and Ireland take part in the adoption of this Decision.]
- (7) In accordance with Articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by the Agreement or subject to its application,

HAS DECIDED AS FOLLOWS:

Article 1

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 Programme is hereby concluded.

The text of the Agreement to be concluded is attached to this Decision.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to the exchange of the instruments of approval provided for in Article 15 of the Agreement, in order to express the consent of the European Union to be bound by the Agreement.

Article 3

This Decision shall enter into force on the day of its adoption. It shall be published in the *Official Journal of the European Union*.

The date of entry into force of the Agreement shall be published in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
Jacques BARROT
Member of the Commission