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COVER NOTE

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL 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 purposes of the Terrorist
Finance Tracking Program

Delegations will find attached document COM(2017) 31 final.

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

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 purposes of the Terrorist Finance Tracking Program

{SWD(2017) 17 final}

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

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 purposes of the Terrorist Finance Tracking Program

On 1 August 2010, 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 purposes of the Terrorist Finance Tracking Program ("TFTP") entered into force¹.

Procedural aspects

Article 13 of the Agreement provides for regular joint reviews of the safeguards, controls, and reciprocity provisions to be conducted by review teams from the European Union and the United States, including the European Commission, the U.S. Treasury Department, and representatives of two data protection authorities from EU Member States, and may also include security and data protection experts and persons with judicial experience.

This report concerns the fourth joint review of the Agreement since it entered into force and covers a period of 22 months between 1 March 2014 and 31 December 2015. The first joint review of the Agreement conducted in February 2011² covered the period of the first six months after the entry into force of the Agreement (1 August 2010 until 31 January 2011) and the second joint review conducted in October 2012³ covered the subsequent period of twenty months (1 February 2011 until 30 September 2012). The third joint review conducted in April 2014 covered a period of seventeen months (1 October 2012 until 28 February 2014).⁴ On 27 November 2013, the Commission adopted the Communication on the Joint Report from the Commission and the U.S. Treasury Department regarding the value of TFTP Provided Data pursuant to Article 6 (6) of the Agreement⁵.

In line with Article 13 (3), for the purposes of the review, the European Union was represented by the European Commission, and the United States was represented by the U.S. Treasury Department. The EU review team was headed by a senior Commission official and in total consisted of two members of Commission staff, representatives from two data protection authorities, and one judicial expert from Eurojust.

¹ OJ L 195/5 of 27.7. 2010

² SEC(2011) 438 final

³ SWD(2012) 454 final

⁴ COM (2014) 513 final and SWD (2014) 264 final of 11.8.2014

⁵ COM (2013) 843 final of 27.11.2013

The fourth joint review was carried out in two main stages: on 1 March 2016 in The Hague at Europol's premises and on 15 and 16 March 2016 in Washington at the U.S. Treasury Department (hereinafter “the Treasury”).

This report is based on the information contained in the written replies that the Treasury provided to the EU questionnaire sent prior to the review, information obtained from the discussions with Treasury personnel as well as information contained in other publicly available Treasury documents. In addition, information provided by Europol staff during the review was used and the inspection report of Europol's Joint Supervisory Body (JSB) from September 2015 was considered. To complete the information available, the Commission also met and received information from the Designated Provider.

Recommendations and conclusion

On the basis of the information and explanations received from the Treasury, Europol, the Designated Provider and the independent overseers, verification of relevant documents and of a representative sample of the searches run on the TFTP provided data, the Commission is satisfied that the Agreement and its safeguards and controls are properly implemented and that the findings of the third joint review have been followed up by the Treasury. In particular, the Commission is satisfied with the outcome of the discussions on the interpretation of Article 15 concerning the right of access and the manner in which the Treasury continues to assess the necessity of retaining extracted data in the sense of Article 6 (7) of the Agreement.

Europol is accomplishing its verification tasks in full compliance with Article 4 on the basis of detailed and regularly updated supporting documentation received from the Treasury. The oversight mechanism is functioning smoothly and is effective in ensuring that the processing of data complies with the conditions laid down in Article 5. All non-extracted data is deleted on a semi-annual basis in order to ensure that all such data is deleted at the latest five years from receipt, in accordance with Article 6(4) of the Agreement. Treasury's regular evaluation of the extracted data includes an assessment of the data retention periods. The relevant information about the process of rectification of data has been included on the Treasury's website.

In terms of potential for further improvement, the Commission suggests that the Member States consider providing regular feedback on the TFTP data received from the Treasury which could further improve the quality and the quantity of information exchanged under Articles 9 and 10. The Commission also encourages Europol to continue its efforts to actively promote awareness of the TFTP and to support Member States seeking its advice and experience in devising Article 10 requests. It is important that Europol continues fulfilling its verification role under Article 4 as thoroughly and independently as at present.

In the context of the review, the Treasury confirmed in writing the validity of the assurances given during the 2013 consultations. It stated that since the TFTP Agreement entered into force in August 2010, the U.S. Government – including all departments and agencies – has not collected financial payment messages from the Designated Provider in the European Union, except as authorized by the TFTP Agreement. The Treasury also stated that, during that time, the U.S. Government has not served any subpoenas on the Designated Provider in the EU or on the Designated Provider in the United States requesting the production of data stored in the EU, except as authorized by Article 4 of the TFTP Agreement. The Treasury also confirmed that the United States has remained and intends to remain in full compliance with all of its commitments under the TFTP Agreement.

The TFTP remains an important instrument to provide timely, accurate and reliable information about activities associated with suspected acts of terrorist planning and financing. It helps to identify and track terrorists and their support networks worldwide.

The Commission welcomes the continued increased transparency of the U.S. authorities in sharing information illustrating the value of the TFTP in international counter-terrorism efforts. The detailed information about how the TFTP Provided Data can and is being used and concrete cases thereof provided in the Joint Value Report and in the context of this review constitute a considerable step forward in further explaining the functioning and the added value of the TFTP.

In the period under review, the EU has been able to benefit more from the TFTP than during the periods considered in previous reviews. In some cases, the information provided under the Agreement has been instrumental in bringing forward specific investigations relating to terrorist attacks on EU soil. The U.S. authorities have extensively made use of the possibility under Article 9 of the Agreement to spontaneously provide information from the TFTP to EU authorities. In addition, Europol has proactively initiated a series of requests under Article 10 of the Agreement in the period under review. This has helped raise awareness of the TFTP among EU authorities, resulting in an increased use of the TFTP by those authorities.

A regular review of the Agreement is essential to ensure its proper implementation, to build up a relationship of trust between the contracting parties and to provide reassurances to interested stakeholders on the usefulness of the TFTP instrument. It has been agreed between the Commission and the Treasury to carry out the next joint review according to Article 13 of the Agreement at the beginning of 2018.

The functioning of the Agreement, the joint review process, its outcome and recommendations are described in detail in the Staff Working Document attached to this Report.