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# US war on terror EU SWIFT(ly) signs blank cheque on EU data

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## ABSTRACT

### Keywords:

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The EU and the United States signed the Terrorist Finance Tracking Program (also known as SWIFT Agreement) agreement giving the US authorities access to bulk data containing the millions of records in the EU to enable the US authorities to trace financial transactions related to suspected terrorist activity (or to put it bluntly, against US interest). The SWIFT Agreement added some data protection safeguards, but the United States has been found to circumvent the agreement with the aid of the Europol. The EU Commission and the Europol have classified all documents concerning the SWIFT Agreement as secret. EU citizens confront a dark future where unelected EU bureaucrats continue to betray the trust of the people handing out bulk data to “counter terrorism” but at the same time undermining cherished values and violating human right standards and principles.

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## 1. Introduction

In the aftermath of the September 11, 2001 terrorist attacks and the Madrid bombing, government authorities have requested broader and more pervasive laws to counter this security challenge. The EU has cut controversial deals with US authorities to transfer data on personal information and financial transactions to thwart terrorism. The EU is gathering and turning over to the US millions of transactions and data, in searches for money laundering, terrorist financing or other unusual patterns.

There are two different thoughts to the issues. Defenders of the intercontinental agreements argue that terrorism amounts to a public emergency threatening the life of the nation and thus requires access by the United States authority to millions of data originating from the European Union. Government access to private information is needed to protect the citizens from terrorist attack and provide a secure environment.

Those who want to live in a free society contend that the amorphous war on terrorism raises grave concerns as the agreements undermine the privacy and data protection of

citizens and citizens of other countries. As such, it is a misconception that protection of privacy and personal data holds back the fight against terrorism and organized crime.

In 2008 the Council of Europe Commissioner for Human Rights Thomas Hammarberg expressed concern that individuals, selected through unreliable and ineffective computer profiles, are increasingly at risk of being targeted for being suspected extremists or threats to the constitutional legal order. The police and secret services search through such databases in order to find a “match” against a pre-determined (but dynamically updated) “profile”. He stressed that these technologies which enable “profiling” and “data mining”, may seem to work up to a point, but inevitably lead to actions against large numbers of innocent people, on a scale that is both unacceptable in a democratic society and without being effective in stopping real terrorists. The Commissioner warns:

*In the fight against terrorism and organized crime, these (data protection) principles should not be abandoned but, rather, re-asserted. Anti-terrorist “profiling” and EU cooperation on the basis of the “availability” principle as currently construed risk breaching these established standards. These policies and*

proposals should be reviewed to ensure that they comply with accepted European law, including the European Convention on Human Rights (as applied by the Strasbourg Court), CoE Convention 108 and CoE Recommendation R(87)15, and EC Directive 95/46/EC.<sup>1</sup>

Legislation currently stirring controversy is the terrorist finance tracking agreement between the US and the EU. This paper will take a closer look at some of the major issues in this agreement, in particular the tension between the protection of the human rights of citizens and at the same time ensuring their safety from terrorist attacks.

## 2. Finance Tracking Program

After the terrorist attacks on September 11, 2001, the United States Department of the Treasury under the Bush administration initiated the Terrorist Finance Tracking Program (TFTP) to identify, track, and pursue terrorists and cut-off the international sources of financing their networks. This cooperation initially took place in great secrecy. The Treasury cited Executive Order 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," as authority for the Terrorist Finance Tracking Program as a component of its "Terrorist Financing Tracking Program."<sup>2</sup>

Executive Order 13224, section 3 contains the following definition:

The term "terrorism" means an activity that—

- (i) involves a violent act or an act dangerous to human life, property, infrastructure; and
- (ii) appears to be intended—
  - (A) to intimidate or coerce a civilian population;
  - (B) to influence the policy of a government by intimidation or coercion; or
  - (C) to affect the conduct of a government by mass destruction, assassination, kidnapping hostage-taking.

E.O 13224 was issued by President Bush on September 23, 2001, pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706. The IEEPA permits the President to exercise broad powers over property or financial transactions, including transfers of credit or payments through banking institutions and securities or other obligations that involve any interest of a foreign country or

a national of that country.<sup>3</sup> The International Emergency Economic Powers Act of 1977<sup>4</sup> authorizes the President of the United States, during a declared national emergency, to investigate bank transfers and other transactions in which a foreign person has any interest. Similarly, the United Nations Participation Act of 1945 (UNPA) authorizes the President, when implementing United Nations Security Council Resolutions, to investigate economic relations or means of communication between any foreign person and the United States.

These international finance transactions are transmitted over the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network. SWIFT is a specialized business process network which connects all the major financial institutions around the globe for the purpose of exchanging information related to payments, securities, foreign exchange and letters of credit transactions. Its records contain names, addresses and account numbers of senders and receivers of international wire transfers between banks and between securities firms, thus providing a useful source for federal officials responsible for following money trails across international borders. A large amount of information on the daily lives of EU citizens therefore transits through it.

Under the TFTP, the Treasury Department issues administrative subpoenas for terrorist-related data to the SWIFT, a Belgium-based company with operational centre in the United States that operates a worldwide messaging system used to transmit financial transaction information. An administrative subpoena does not require prior judicial authorization and only needs to meet a reasonableness standard instead of the typical probable-cause standard required for criminal subpoenas.<sup>5</sup> The Treasury Department issued its first subpoena to SWIFT in October 2001.<sup>6</sup>

SWIFT is overseen by a committee drawn from major central banks – including the U.S. Federal Reserve, the Bank of England, the European Central Bank, the Bank of Japan, and the National Bank of Belgium. SWIFT responded to the broad US administrative subpoenas from millions of records and gave the US governments access to millions of records allegedly to enable the US authorities to trace financial transactions related to suspected terrorist activity. In 2006, the company routed about 11 million financial transactions daily between 7800 banks and other financial institutions in 200 countries, recording customer names, account numbers and other identifying information.<sup>7</sup>

<sup>1</sup> "Counter-terrorism measures must not violate the right to privacy" says Commissioner Hammarberg (04.12.08) Council of Europe Commissioner for Human Rights. Available at [http://www.coe.int/t/commissioner/News/2008/081204counterterrorism\\_en.asp](http://www.coe.int/t/commissioner/News/2008/081204counterterrorism_en.asp).

<sup>2</sup> See Statement Terror Finance Tracking Program: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs., H. REP. NO. 109–105, at 13 (2006) (statement of Stuart Levey, Under Secretary for Terrorism and Financial Intelligence, U.S. Department of the Treasury) [hereinafter *Levey Hearing*].

<sup>3</sup> J. Elsea and M. Murphy. (2006) Treasury's Terrorist Finance Program's Access to Information Held by the Society for Worldwide Interbank Financial Telecommunication SWIFT. Retrieved at <http://www.fas.org/sgp/crs/natsec/RS22469.pdf>.

<sup>4</sup> 50 U.S.C. § 1702(a)(1)(A)–(B).

<sup>5</sup> Katherine Scherb, Comment, *Administrative Subpoenas for Private Financial Records: What Protection for Privacy Does the Fourth Amendment Afford?* WIS. L. REV. 1075, 1076–85 (1996).

<sup>6</sup> SWIFT Statement, Francis Vanbever, Chief Financial Officer, European Parliament Hearing, Oct. 4, 2006, available at: [http://www.swift.com/index/index.cfm?item\\_id=60670](http://www.swift.com/index/index.cfm?item_id=60670).

<sup>7</sup> Brand, C. (2006) Belgian PM: Data Transfer Broke Rules. Associated Press. Retrieved from <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092800585.html>.

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