Joint Meeting of LIBE and ECON Committees on EU-US interim agreement following the entry into force of the new SWIFT architecture

European Parliament, Brussels, 3 September 2009

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Speaking points

1. Let me say first that I was consulted by the European Commission on the envisaged international agreement between the EU and the US on SWIFT and issued some comments on 3 July 2009 that were addressed to the Commission, the Council and the Parliament.

   However, these comments were EU-restricted since they referred to a negotiating mandate which is itself EU-restricted. They have therefore been sent only to the institutions involved in the decision-making process and have not been published.

   Nonetheless, I am glad to provide you with a brief summary of the main lines of the EDPS opinion.

2. As a second preliminary point, I would like to recall that the change in the SWIFT architecture, which triggered the present negotiations, was encouraged and welcomed by the European data protection authorities, as it was designed to bring all data originating in Europe within the jurisdiction and control of European authorities and thus ensure that the European standards for the protection of fundamental rights, including the protection of personal data, would fully apply.

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Different from the PNR issue - relating to the transfer of personal data of passengers of transatlantic flights - the proposed agreement in this case would concern data which have no territorial connection whatsoever with the US, as they relate to intra-EU financial transactions and not to financial transactions between the EU and the US.

3. In my comments in July, I expressed concerns with regard to **the necessity and proportionality of an agreement**, particularly in consideration of the **privacy-intrusiveness** of the proposal and of the existence of a well-developed EU and international legal framework in this area, which also aims at measures against Terrorist Financing. Therefore, I expressed some doubts on the **legal basis** of the agreement, since these similar EU measures have been based so far on the first pillar.

4. However, at this point it is crucial to ensure that **negotiations adequately take into account that data protection standards and safeguards** are essential conditions for the respect of the EU fundamental right to the protection of personal data, and thus for the conclusion of an international agreement.

   Personal data relating to EU transactions will now be stored on European territory under European jurisdiction, and guarantees could **not just be limited** to what was considered acceptable when data were on US territory under US jurisdiction. An agreement should contain and clarify not only the mechanisms for exchange, but also the mechanisms to ensure the respect of fundamental rights, and in particular of the protection of personal data, in line with EU standards. However, I want to emphasize that the respect for fundamental rights includes **more than privacy and personal data protection**. It is obvious that the proposed measures will affect a range of other fundamental rights and interests, such as the right to due process of law.

5. Against this background, I would like to highlight in particular the following essential elements and safeguards:

   - It is necessary to ensure that the **lawfulness and proportionality of the US requests for data is carefully checked** at the EU level - and especially whether they are specific and sufficiently targeted - so that they are subject to the same conditions and safeguards, including possible judicial authorisation and oversight, as requests of European law enforcement authorities. This is a crucial element, which - as far as I

know at this moment - is far from being clarified. In this context, the existing EU-US Agreement on Mutual Legal Assistance could point to a solution.

- **Redress mechanisms** must be available as well as compensation in case of unlawful processing of personal data. There is a need to ensure adequate **judicial redress**, beside the possibility of an administrative remedy. This is not only a data protection requirement - laid down by both the Directive and the Framework decision - but also a more general requirement stemming from the respect of fundamental rights, as also confirmed by the EU case law on restrictive measures with regard to Al-Qaida and Taliban. Redress mechanisms should be clearly laid down in the agreement not only for persons concerned by the extraction of data, but also for SWIFT, which should be able to challenge any possible excessive requests before a Court.

- **Further sharing** with other national authorities must be limited and sharing with other countries must be subject to the same conditions as laid down for EU law enforcement authorities by Council Framework Decision 2008/977 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. It would be paradoxical to allow that the EU accepts for third countries' authorities a softer regime than the one laid down for its own law enforcement authorities.

- **The supervision by EU data protection authorities** competent for data processing by SWIFT, financial institutions and EU law enforcement authorities must in no way be limited by the international agreement. Independent supervision is one of the essential elements of the EU data protection regime, and it includes ensuring data subjects' rights, hearing complaints and ordering the blocking of the transfer of relevant financial messaging data. In this context, I also want to mention the need for a regular review which is now part of the existing arrangements and should certainly be retained in any agreement for the future.