



**COUNCIL OF
THE EUROPEAN UNION**

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GENVAL 134
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DATAPROTECT 151
ENFOPOL 465**

NOTE

from:	Presidency
to	Delegations

No. prev. doc.:	14207/11 JAI 626 GENVAL 90 ECOFIN 580 DATAPROTECT 94 ENFOPOL 304
No. Cion prop.:	12957/11 GENVAL 81 JAI 522 ECOFIN 523 DATAPROTECT 75 ENFOPOL 245

Subject:	Communication from the Commission to the European Parliament and the Council – A European terrorist finance tracking system: available options State of play
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I. The Commission Communication

On 13 July 2011, the European Commission issued a Communication on the options available as regards the setting up of a Terrorist Finance Tracking System (TFTS) in the European Union. The preparation of this Communication was preceded by consultations with the Member States. This Communication will be followed by an impact assessment to be released by the Commission at the beginning of 2012. In both the Communication and the impact assessment, the Commission has relied/will rely on preparatory work by an external contractor.

The Commission Communication responds to a call made in the Decision of 13 July 2010 on concluding the TFTP Agreement, in which the Council, at the request of the European Parliament, instructed the Commission to study a "legal and technical framework for extraction of data on EU territory". The Parliament requested such a study because it had serious qualms about the bulk transfer of personal data to a third country. It is essential to understand that the Parliament's objections were aimed both at the transfer to a third country and the storage of bulk data of personal data of innocent individuals.

The stated principal objectives of the proposed system by the Commission are:

- 1) ensuring an effective instrument to prevent and to fight the financing of terrorism, and
- 2) limiting personal data flow to third countries.

II. State of play of Council discussions

At the CATS meeting of 5-6 September 2011 and the GENVAL (Working Party on General Matters, including Evaluations) meeting of 30 September 2011, orientation debates were held on the aforementioned Communication¹. At the Council meeting of 27 October 2011, the Ministers were given an opportunity to express their views regarding the Commission Communication. The Member States took note of the Communication and welcomed the possibility to contribute to the work of the Commission on the legislative proposal in this respect.

Whilst a considerable number of Member States are generally supportive to the idea of establishment of an EU TFTS², some Member States deem that the operational added value of such a system has not, as yet, been demonstrated.

¹ The topic of TFTS was discussed also by the EU FIU Platform on 18 October 2011.

² See the French delegation's document submitted to the Council: 15976/11 LIMITE JAI 766 ECOFIN 712 DATAPROTECT 118 ENFOPOL 373.

Keeping in mind the important role played by Europol with regard to exercising the 2010 EU – US TFTP Agreement and its experience gained within this process, the agency was also asked to provide its observations on the issue of a possible EU TFTS. Europol has referred to three main advantages that an EU TFTS would have:

- 1) processing of European data in a well-defined data protection environment;
- 2) respect for high data security standards; and
- 3) the possibility for Member States to retain full control over their own intelligence information and have access to the data in accordance with their own intelligence requirements.

All the Member States agree that further in-depth analysis is still required and therefore a thorough Impact Assessment needs to be conducted by the Commission. This should provide Member States with a comprehensive picture of the legal, practical and financial aspects of a possible future TFTS. It should also address in more detail the necessity of an EU TFTS, its operational added value and proportionality.

In particular the question of cost has been raised by a number of Member States. A vast number of delegations indicated the need to have a detailed estimation of the costs in the impact assessment, including in the case of a possible extension of the scope of an EU TFTS to serious threats to internal security other than terrorism. In this context some Member States have also argued that, inter alia given the significant cost of establishing an EU TFTS, serious thought should be given to the possible extension of the scope of such a system to other forms of crime than terrorism and its financing.

Some Member States also noticed that the issue of the legal basis of any future instrument should be further explored, taking into account inter alia Article 72 TFUE.

Some Member States have also underlined that the establishment of an EU TFTP should be closely linked to a high level of data protection, not least in terms of data retention periods. In this regard, both the Article 29 Working Party (in a letter of 29 September 2011 to Commissioner Malmström) and the European Data Protection Supervisor¹, have stated that the retention of bulk data under an EU TFTP can only be accepted if its necessity is sufficiently justified, the added value of the system is clearly proven, its functioning is safeguarded through procedural guarantees and oversight mechanisms and any overlapping with existing structures and legal provisions is avoided.

Regarding the three options advanced by the Commission in its Communication, some Member States have expressed a preference for the third option, under which the Financial Intelligence Units would play a central role², whereas others preferred to give Europol a central role. Most Member States thought however that the impact assessment should be awaited before a choice can be made. Some Member States have made a call for not limiting the debate to the three options in the Commission Communication and the Commission itself has announced that its impact assessment will also examine a fourth option under which the financial service provider(s) would be asked to store the relevant data for a significantly longer period of time, so that they would remain available for law enforcement/intelligence operations.

Both Europol and the EU Counter Terrorism Coordinator (CTC) have emphasised the very good cooperation with the United States of America under the 2010 EU-US TFTP Agreement, and have referred to the important intelligence leads which the EU and Member State authorities have received from the United States authorities in this context. All Member States agree that the possible establishment of an EU TFTP should not have any negative impact on the operational cooperation with the United States, which has been perceived positively. Any new developments should therefore always take into account the actual impact that an EU TFTP would have on the current implementation of the US TFTP, including lessons learned through the experience gained therefrom.

¹ Letter to the Council of 25 October 2011 (doc. PH/VP/et/D(2011)1869 C 2011-0699).

² It is worth to notice the discussion held during the 16th EU FIU Platform meeting on 18 October 2011, where “A great majority of MS expressed the view that the tasks contained in and required by option 3 of the Commission's Communication would overburden most FIUs and would simply not be feasible given FIUs' capacity constraints” (doc. DG HOME/A1/IW/mb Ares(2011)1274711).

The Presidency calls upon the Commission to take into account the observations made above with a view to returning to the Council with the follow-up to the EU TFTS dossier in the course of 2012. In particular the Presidency considers that the following issues require further in-depth analysis:

- 1) A clarification of the link between the future TFTS and other existing EU legal instruments concerning inter alia fight against money-laundering and terrorism financing. The possible link with the mandates of Europol and Eurojust should also be considered in order to ensure the most appropriate exploitation of data for the purpose of law enforcement and judicial cooperation;
- 2) An assessment of the proportionality of an EU-TFTS and its operational added value (based on concrete examples, where available) as well as of the costs of the new scheme, bearing in mind the impact of the creation of an EU TFTS on financial markets¹, including the global dimension; and
- 3) A reflection on how to explain, in concrete terms, the creation of an EU TFTS to the general public and to the various stakeholders present, inter alia, on the financial markets.

¹ Crucial to this is the question to which European payment actors the new system would apply: financial institutions, EU and domestic real-time gross settlement systems (RTGS) and automated clearing houses (ACHs), SEPA payment providers, messaging service providers (MSPs) and telecom providers.