EDPS opinion on the role of the European Central Bank in the SWIFT case

1- Procedural background

1. At the end of June 2006, press coverage in European and US media raised the issue of the compatibility with European data protection law of the transfers of personal data from the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"), a Belgian based cooperative active in the processing of financial messages, to the Office of Foreign Assets Control of the United States Department of the Treasury.

2. On 6 July, the European Parliament adopted a resolution requesting clarifications, both from national and EU institutions, on the lawfulness of the alleged transfers. In particular, the resolution "demands that the role and functioning of the ECB be clarified, and asks the European Data Protection Supervisor to check as soon as possible whether, in accordance with Regulation (EC) No 45/2001, the ECB was obliged to react to the possible violation of data protection which had come to its knowledge".

3. On 10 July, the EDPS sent a letter asking the European Central Bank ("ECB") to provide - with a view to assessing the applicability of Regulation 45/2001 to the case - information on its role as a user of the SWIFT system as well as one of the members of the SWIFT oversight group.

4. In the course of July, complaints relating to the processing of personal data by SWIFT were lodged with several European and non European data protection authorities.

5. On 28 July, the Chairman of the Article 29 Working Party, the working party bringing together EU data protection authorities[1], announced that the European data protection authorities had decided to coordinate their activities in the investigation of the case in order to determine whether current privacy regulations have been violated.

6. On 3 August, the ECB replied to the EDPS letter, providing information both on its role as an operator of payment systems and on its role as one of the SWIFT overseers.

7. From 28 August on, SWIFT provided the EDPS, directly or indirectly through the Belgian Privacy Commission and the Article 29 Working Party, with detailed information about the modalities of the processing of personal data through the

[1] This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy of which the EDPS is a member. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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SWIFTNet FIN service as well as about the legal assessment carried out by SWIFT lawyers.

8. On 26 September, the Article 29 Working Party ("WP29") held a first plenary discussion about the case. The Working Party heard from the Belgian Data Protection Authority about progress in its investigations, carried out as a result of SWIFT being established in Belgium and thus subject to Belgian jurisdiction and data protection legislation. The WP29 agreed to continue fact-finding and conduct further analysis based on all relevant factual and legal elements.

9. On 27 September, the Belgian Privacy Commission issued its opinion on the transfer of personal data by SWIFT to the US Department of the Treasury[2]. The report, focussing on the role of SWIFT, highlighted inter alia that SWIFT should have complied with its obligations under the Belgian privacy law, amongst which the notification of the processing, the information of data subjects, and the obligation to comply with the rules concerning personal data transfer to countries outside the EU.

10. On 4 October, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, together with its Committee on Economic and Monetary Affairs, organised, pursuant to the European Parliament resolution, a joint hearing on "The interception of bank transfer data from the SWIFT system by the US secret services". This public hearing was attended by high level representatives of SWIFT, the ECB, the European Commission, the National Bank of Belgium and the Belgian Senate. The Chairman of the Article 29 Working Party and the EDPS also participated, presenting some preliminary findings[3].

11. On 18 October, the EDPS had a meeting in Frankfurt with the President of the European Central Bank, with a view to exchange further information on the state of play of the EDPS inquiry and to get additional information on the role of the ECB. From the procedural point of view, it was agreed that further relevant documents would be provided to the EDPS and that the EDPS would send his draft opinion to the ECB for comments before its definitive adoption. Furthermore, the EDPS website introduced on 25 October a link to the ECB website, where the ECB's response to the preliminary findings had been made available.

12. Further to EDPS request, the ECB sent on 2 November documents on its confidentiality obligations and arrangements. A further exchange of e-mails provided some clarifications on the ECB obligations on professional secrecy with regard to information received as SWIFT overseer.

13. On 22 November, the WP29 unanimously adopted its Opinion on the processing of personal data by SWIFT[4]. The Working Party concluded that Directive 95/46/EC is applicable, through national laws that implement it, to SWIFT data transfers of personal information to the US Department of Treasury Office of Foreign Assets Control. The WP29 further concluded that both SWIFT and instructing financial

[2] The text of the Belgian data Protection Commission's Opinion on the transfer of personal data by the CSLR SWIFT by virtue of UST (OFAC) subpoenas is available at http://www.privacycommission.be/.

[3] A summary of the contributions is available at http://www.europarl.europa.eu/news/expert/infopress_page/017-11292-275-10-40-902-20061002IPR11291-02-10-2006-2006-false/default_en.htm.

[4] Article 29 Working Party, Opinion 10/2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), WP 128, available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp128_en.pdf.

institutions share joint responsibility, although in different degrees, for the processing of personal data as data controllers. In particular, SWIFT must comply with its obligations under the Directive, amongst which are the duty to provide information to individuals whose data is transferred, the requirement to notify the processing to the Belgian national data protection Authority, the obligation to provide an appropriate level of protection in order to meet the requirements for international transfers of data. On the other hand, financial institutions in the EU as data controllers have the legal obligation to make sure that SWIFT fully complies with the law, in particular data protection law, in order to ensure protection of their clients. Furthermore, according to the opinion, central banks, besides possibly bearing the same responsibilities as other financial institutions using the SWIFTNet FIN service, should also ensure that neither limitations in the scope of their oversight on SWIFT nor their professional secrecy obligations prevent compliance with data protection rules from being properly addressed.

14. On 14 December the EDPS sent his draft opinion to the ECB for comments.

15. The ECB sent its comments on 10 January 2007. These comments have been taken into account in the preparation of this opinion, where appropriate.

16. The EDPS adopted his opinion on 1 February 2007.

2 - Applicable legal framework and EDPS competences

17. Article 286 of the Treaty establishing the European Community states that "Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty". Furthermore, Article 8 of the Charter of Fundamental Rights of the European Union, after recognizing that everyone has the right to the protection of personal data concerning him or her, enumerates the basic rights of data subjects and requires that compliance with data protection rules shall be subject to control by an independent authority.

18. Against this background, Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, adopted on the basis of Article 286, entrusts the EDPS with the responsibility for "*ensuring that the fundamental rights and freedoms of natural persons, and in particular the right to privacy, are respected by the Community institutions and bodies*" (Article 41). This includes supervising EC institutions and bodies when they process personal data, advising them on all matters concerning the processing of personal data, as well as cooperating with national data protection authorities.

19. The EDPS stresses that the access by US authorities to EU banking data through SWIFT prompts his competences not only in supervision, but also in consultation and cooperation.

20. With regard to supervision, Regulation 45/2001, pursuant to its Article 3(1), applies to "*the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall*

within the scope of Community law"[5]. In this context, the EDPS is competent to supervise the processing of personal data carried out by the ECB[6]. In particular, the EDPS, pursuant to Article 46(b), may "*conduct inquiries either on his or her own initiative or on the basis of a complaint*"[7].

21. On the contrary, Regulation 45/2001 does not apply to processing of personal data carried out by SWIFT, which, being established in Belgium, is subject to Belgian law pursuant to Article 4(1)(a) of Directive 95/46/EC, regardless of where the processing takes place. However, since the positions of the ECB and of SWIFT are interlinked, the EDPS will also incidentally consider in this opinion the role of SWIFT. He will do so by mainly referring to the factual elements provided by SWIFT and to the opinions adopted by the Belgian Privacy Commission and by the WP29.

22. As far as his consultative role is concerned, the EDPS is also responsible, pursuant to Regulation 45/2001, to advise all Community institutions and bodies, either on his own initiative or in response to a consultation, on all matters concerning the processing of personal data. This consultative role is relevant in this case especially when it comes to assessing the important role that the ECB, in the framework of the European System of Central Banks ("ESCB"), plays in shaping the structure of the EU payment systems.

23. With regard to cooperation with national data protection authorities, it should be noted that the EDPS, as a member of the WP29, has supported the coordinated approach adopted by the group in this case and actively contributed to the drafting of its opinion. In this context, it should be noted that the WP29 has specifically dealt also with the role of central banks in its opinion.

24. Duly taking into account the opinions adopted by the Belgian Privacy Commission and by the WP29, and on the basis of the inquiry carried out on his own initiative, the EDPS will address in this opinion the position of the European Central Bank in relation with the different roles it plays with regard to SWIFT: as an overseer, as a user of the SWIFTNet FIN service, and as a central policymaker.

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[5] The "PNR judgment" of the European Court of Justice (Joined Cases C-317/04 and C-318/04 European Parliament v. Council and Commission) is not relevant for this case, for different reasons which cannot be dealt with in detail in this opinion. However, it should be briefly highlighted that in the PNR case the Court of Justice annulled a Community international agreement based on Article 95 TEC and a Commission decision based on Directive 95/46 concerning transfer of personal data to a third country for law enforcement purposes, on the basis of third country's legislation making compulsory such transfer of personal data. Therefore, the judgment does not limit the applicability of Directive 95/46 to cases, like this one, where personal data are transferred to a third country for commercial purposes, on the basis of a free choice of the controller(s). However, even in the hypothetical case that Directive 95/46 would not apply, national data protection authorities would still retain the supervisory competences granted by national data protection laws, which in most of the cases extend to third pillar matters. Furthermore, the PNR judgment does not refer to or affect EDPS competences, which are clearly defined by Article 3 of Regulation 45/2001, adopted on the basis of Article 286 TEC. See, in the same line, the Belgian Privacy Commission's "*Avis relatif à la préparation d'une convention concernant la transmission de données a caractère personnel par SWIFT à l'US Department of the Treaury (UST)*", Opinion 47/2006 of 20 December 2006, paragraph C.3, available at http://www.privacycommission.be/.

[6] At the same time, applicability to the ECB of the German Federal Data Protection Act is explicitly excluded by Article 11 of the Headquarters Agreement between the Federal Republic of Germany and the ECB. Article 11: "*Die EZB unterliegt nicht deutschem Datenschutzrecht*", Abkommen zwischen der Europäischen Zentralbank und der Regierung der Bundesrepublik Deutschland über den Sitz der Europäischen Zentralbank vom 18. September 1998, BGBl. 1998 II S. 2745.

[7] Rules of procedure pursuant to Article 46(k) of Regulation 45/2001 will be laid down in due course. However, they are not a condition for the EDPS to conduct an inquiry, insofar as basic procedural rights are respected.

3 - Factual background

3.1 The processing of personal data by SWIFT

25. SWIFT is a Belgian based cooperative active in the processing of financial messages. SWIFT has two operation centres - one in Europe, one in the US - where all messages processed by SWIFT in the framework of its SWIFTNet FIN service, are stored "in mirror" for 124 days.

26. In the aftermath of the terrorist attacks of 11 September 2001, the United States Treasury ("UST") addressed multiple subpoenas to the SWIFT operation centre in the US. SWIFT did not oppose the subpoenas, but privately negotiated with the UST an arrangement on how to comply with them. Personal data were therefore communicated by the SWIFT US operating centre to the UST through a "black box" construction, which first permits a massive transfer of data from the SWIFT database to the "black box", owned by the UST, and in a second time, allows for a focused search by the UST. Further details on the communication of personal data to the UST can be found in the report of the Belgian Privacy Commission.

3.2 The role of the ECB

3.2.1 The ECB as overseer

27. SWIFT is subject to cooperative oversight by the Central Banks of the Group of Ten countries (G-10 Group)[8]. The ECB is member of this group. The oversight focuses primarily on ensuring that SWIFT has effective controls and processes to avoid posing a risk to the financial stability and the soundness of financial infrastructures. Furthermore, "overseers review SWIFT's identification and mitigation of operational risks, and may also review legal risks, transparency of arrangements and customer access policies. SWIFT's strategic direction may also be discussed with the Board and senior management"[9]. Since SWIFT is neither a financial institution nor a payment system, its overseers have limited competences, contrary to, for instance, the supervision of financial institutions[10]. The major instrument for the oversight of SWIFT is moral suasion, and overseers can formulate recommendations to SWIFT. However, it is also clear that the oversight of SWIFT does not grant SWIFT any certification, approval or authorisation by Central banks.

28. The oversight of SWIFT is part of the tasks of central banks to ensure financial stability. A general obligation of professional secrecy is established in Article 38 of the Statute of the European System of Central Banks and the European Central Bank, stating that "*Members of the governing bodies and the staff of the ECB and the*

[8] The G-10 Group is composed of the National Bank of Belgium, Bank of Canada, Deutsche Bundesbank, European Central Bank, Banque de France, Banca d' Italia, Bank of Japan, De Nederlandsche Bank, Sveriges Riksbank, Swiss National Bank, Bank of England and the Federal Reserve System (USA), represented by the Federal Reserve Bank of New York and the Board of Governors of the Federal Reserve System

[9] Financial Stability Review 2005, published by The National Bank of Belgium and available on its web site www.nbb.be, p.102.

[10] *Ibidem.* However, in the Financial Stability Review 2005 it is also made clear that, even though on one hand "*[n]o G10 central bank currently has direct statutory instruments (such as sanctions, fines or formal prior approval of changes) to formally enforce decisions upon SWIFT*", on the other hand "*[t]his has never proven to be a drawback. Overseers can still influence via a series of mechanisms to ensure that SWIFT takes account of their recommendations, including informing SWIFT users and their supervisors about oversight concerns related to SWIFT*".

national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy". This professional secrecy obligation was further developed and formalised, with regard to SWIFT oversight, when the National Bank of Belgium prepared a Memorandum of Understanding and signed it bilaterally with each of the other G10 central banks. Memoranda of Understanding between the National Bank of Belgium and the central banks co-operating in the oversight of SWIFT were concluded during 2004 and 2005[11].

29. The G-10 Group was informed by SWIFT in the course of 2002 about the data transfers to US authorities. However, the Group considered that this issue fell outside the scope of its oversight role. Furthermore, the ECB and many central banks interpreted their rules on professional secrecy and, at a later stage, the Memoranda of Understanding as preventing them from referring this issue to competent authorities at national and European level. Therefore, the ECB, as a member of the G-10 Group, did not address the consequences of the transfers to US authorities for personal data protection, and neither informed relevant authorities nor used its powers of moral suasion to urge SWIFT to do so.

3.2.2 The ECB as user of the SWIFTNet FIN service.

30. ECB operates a payment system, which is a component of the TARGET system. TARGET is an EU-wide RTGS (Real-time Gross Settlement) system, consisting of RTGS systems of 16 EU Member States and of the European Central bank payment mechanism, which are interlinked to provide a uniform platform for the processing of inter-Member State euro payments.

31. Within this framework the ECB also settles cross-border payment instructions for the benefit of individuals that have a contractual relationship with the ECB (e.g. settlement of invoices, salary payments). Even though these payments represent only a very small part of the ECB payment activities, they are all channelled, because of the technical set-up of the ECB system, via the SWIFT network for both inward and outward traffic.

3.2.3 The ECB as policymaker

32. The ECB and central banks play a crucial role in shaping the European payment infrastructure, notably through the ESCB and the Eurosystem (the Central banking system of the euro area).

33. Pursuant to Article 105.2 of the EC Treaty, one of the basic tasks of the European System of Central Banks is to promote the smooth operation of payment systems. Furthermore, according to Article 110 of the EC Treaty and Article 22 of the ECB Statute, "the ECB and national central banks may provide facilities, and the ECB may

[11] See Financial Stability Review 2004, p.65 and Financial Stability Review 2005, p.102, both published by the National Bank of Belgium. Information on the professional secrecy obligations of central banks in the framework of SWIFT co-operative oversight was also provided during the hearing at the European Parliament of 4 October 2006 on "The interception of bank transfer data from the SWIFT system by the US secret services". See, in particular, the contributions by Mr Trichet, President of the European Central Bank, and by Mr Praet, Executive Director at the National Bank of Belgium, available at the following link http://www.europarl.europa.eu/hearings/default_en.htm.

make regulations to ensure efficient and sound clearing of payment systems within the Community and with other countries".

34. In this context, attention shall be drawn in particular to the TARGET system (see above), which is one of the largest payment systems in the world. The ultimate decision-making body for all TARGET domestic and cross-border activities is the Governing Council of the ECB. In exercising its management and control of the system, the Governing Council is assisted by a Committee and a subgroup composed of representatives of national central banks[12]. Since SWIFT has been selected as the network service provider for the TARGET Interlinking, the logical and physical technical platform for this interlinking is based on the SWIFTNet FIN network.

35. Because of developments such as the future enlargement of the euro area, the Eurosystem is currently building a next generation system, called TARGET2. The new system, which should be operational by the end of 2007, is aimed at providing improvements and consolidation of the technical infrastructure. Also in this case, TARGET2 will use the SWIFTNet FIN service for the exchange of payments information.

4 - Legal assessment

4.1 SWIFT

36. With regard to the position of SWIFT, the EDPS, on the basis of the factual elements provided by SWIFT, shares the legal analysis and the conclusions of the opinions adopted both by the Belgian Privacy Commission - the authority which is competent, pursuant to Directive 95/46, for monitoring the application of data protection by controllers established in Belgium - and by the WP29.

37. In particular, both opinions concluded that SWIFT shall be considered as a controller and that, as such, it breached certain provisions of the Belgian data protection law implementing Directive 95/46/EC[13].

4.2 The ECB

4.2.1 The ECB as SWIFT overseer

38. The EDPS acknowledges that the G10 Group has a limited role in the co-operative oversight on SWIFT. This entails that the ECB, when acting as SWIFT overseer within the G10 Group, cannot determine the means and the purposes of processing operations carried out by SWIFT. Therefore, the participation in the co-operative oversight on SWIFT as such does not even partly confer to the ECB the role and responsibilities of a controller, as defined by Community legislation on protection of personal data[14].

[12] Article 7 of the Guideline of the European Central Bank of 30 December 2005 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET).

[13] However, it should be highlighted that, even if SWIFT were to be considered as a data processor - and therefore in the present case the ECB had to be considered as the sole data controller -, violation of relevant data protection law would still subsist.

[14] This analysis goes in the same line as the Opinion adopted by the Belgian Privacy Commission, which, after carefully reviewing the role of the Belgian national Bank as lead overseer, concludes: "*From the previous elements it comes out that the compliance with the DPL is not yet considered to be part of the individual or cooperative oversight*" (paragraph D.3 of the Opinion).

39. However, with regard to the scope of the role as overseer, the EDPS considers, along the same lines as the WP29, that the lack of compliance with data protection legislation may actually hamper also the financial stability of the payment system for at least two reasons: first of all, it could seriously affect consumers trust in their banks; secondly, it might lead European data protection authorities, as well as judicial authorities, to use their enforcement powers to block the processing of personal data which are not in compliance with data protection law.

40. As far as professional secrecy obligations are concerned, the EDPS notes that when the ECB was informed during 2002 about the transfers of personal data from SWIFT to the US authorities, specific arrangements on confidentiality were not yet formalised, and the rules on professional secrecy applicable to the ECB were merely those stemming from Article 38 of the ESCB Statute.

41. In any case, neither G-10 Group's restrictive interpretation of its oversight role on SWIFT, nor the professional secrecy obligations would have prevented central banks from using their power of moral suasion, by recommending SWIFT to properly address data protection concerns and to refer this matter to relevant authorities at national and EU level.

42. In this context, the EDPS stresses that rules of professional secrecy should not prevent independent scrutiny by data protection supervisory authorities, which is one of the basic principles of European data protection law. This is the case especially where these authorities, as in the case of EDPS, are also bound by rules on professional secrecy that would guarantee that processing of disclosed information is confidential and carried out only for their supervisory purposes.

43. The secrecy that surrounded the data transfers carried out by SWIFT for more than 4 years is regrettable and calls for a clarification of both the oversight on SWIFT and the rules on confidentiality. Therefore, the EDPS recommends the European Central Bank - if necessary, in cooperation with other central banks and relevant actors in the financial sector - to urgently explore and promote appropriate solutions in order to clearly bring compliance with data protection rules within the scope of the oversight - to the extent in which lack of compliance may affect financial stability and without prejudice to the competences of relevant national or European data protection authorities - as well as to ensure that rules on confidentiality would not prevent relevant authorities from being duly and timely informed where necessary. This would ensure that on future occasions proper data protection safeguards are taken and that the current lack of transparency is avoided.

4.2.2 The ECB as user of the SWIFTNet FIN service

44. First of all, as already stated in opinions of the Belgian Privacy Commission and the WP29, it should be highlighted that the limited role that central banks currently play in SWIFT oversight does not exclude that also a central bank might be considered - just like any other financial institution using SWIFTNet FIN service - as a (joint) controller whenever it acts as a SWIFT customer.

45. Article 2 of Regulation 45/2001 defines controller as "*the Community institution or body [...] which alone or jointly with others determines the purposes and means of the processing of personal data*". Like other financial institutions, the ECB processes

personal data in the context of some of its payment transactions. In doing so, the ECB determines how to carry out these transactions and may decide to use a service provider, such as SWIFT. In particular, when signing contractual arrangements with SWIFT and adhering to its compliance policy, the ECB accepts the risks relating to the SWIFT system, notably with regard to the protection of personal data. This choice contributes to determining for which purposes and by which means personal data relating to persons having a contractual relationship with the ECB are processed in the framework of payment transactions. Against this background, the EDPS considers that the ECB is not only data controller as to its own data processing activities, but also bears some responsibility as regards the data processing activities of SWIFT. This means that the ECB shall be considered as a data controller, jointly with SWIFT, in any case to a sufficiently relevant extent, whenever it uses the SWIFTNet FIN service to process personal data for its payment transactions.

46. As data controller, the ECB has a legal obligation to ensure that personal data are processed according to the provisions of Regulation 45/2001. In particular, the ECB should, also with regard to the processing operations carried out through the SWIFT network, ensure full compliance with, *inter alia*, the following principles:

    - Purpose limitation - Personal data shall be processed for the purpose for which they were collected (in the specific case, the economic purpose of carrying out a payment transaction), and not further used for incompatible purposes, unless exceptions are applicable, within the limits and the conditions laid down by Article 20 of Regulation 45/2001 and the relevant case law of the European Court of Justice.

    - Information to the data subject - The controller shall provide the data subject with information concerning the existence, purpose and functioning of its data processing, the recipients of personal data and the right of access, rectification and erasure by the data subject.

    - Transborder data flows - Personal data shall be transferred to recipients, other than Community institutions and bodies, which are not subject to Directive 95/46, only if the relevant conditions laid down by Article 9 of Regulation 45/2001 are met. Trans-border data flows may take place, inter alia, where an adequate level of protection is ensured in the country of the recipient, where consent is given by the data subject, where the transfer is necessary for the performance of a contract, or where appropriate contractual clauses ensure adequate safeguards.

    - Notification and independent supervision - A data controller shall provide the Data Protection Officer with complete notifications and shall guarantee the appropriate involvement of the EDPS.

47. In this case, the ECB trusted the assurances given by SWIFT that the processing of personal data by SWIFT - including the transfers to the US and the further processing of personal data for the purpose of terrorism investigations - did not infringe European data protection law. However, the opinions by the Belgian Privacy Commission and by the WP29 concluded that SWIFT breached several provisions of the Belgian data protection law, as well as fundamental principles of EU and international legislation on the protection of personal data.

48. Therefore, the ECB has, when using the SWIFT network for its payment operations, put at risk the personal data of individuals that have a contractual relationship with the institution, by not ensuring as joint data controller that personal data relating to these payments operations are processed in full compliance with Regulation 45/2001. Furthermore, there is no doubt that the ECB, just as all other financial institutions using the SWIFT network, is currently fully aware of these violations. However, the EDPS also acknowledges that the ECB does not currently have adequate and readily available alternatives at its disposal to the use of the SWIFT system in payment transactions, and that full compliance by SWIFT with data protection rules is beyond the direct control of the ECB and might require some time.

49. On the basis of these considerations, the EDPS, pursuant to the powers laid down in Article 47 of Regulation 45/2001, urges the ECB to explore - if necessary, in cooperation with other central banks and relevant actors in the financial sector - solutions to make its payment operations fully compliant with data protection legislation and take appropriate measures as soon as possible. In this context, relying merely on the consent of the data subject would not be a satisfactory solution. The EDPS invites the ECB to prepare at the latest by April 2007 a report concerning the measures or provisional measures taken to develop compliance with this opinion. Further to this report, the EDPS will consider, taking into account possible coordination with other data protection supervisory authorities, any further action on the basis of his powers pursuant to Article 47 of Regulation 45/2001.

4.2.3 The ECB as a policymaker

50. ECB and national central banks play a crucial role in shaping European payment systems. When doing so, they are bound by the respect of fundamental rights, enshrined both at EU and national level. In particular, the protection of privacy and of personal data are guaranteed not only by the European Convention for the protection of Human Rights and Fundamental freedoms, but also by the legal systems - often, by the Constitution - of the Member States.

51. The ECB is bound, also when acting as a policymaker, by Article 6 EU Treaty according to which "*[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States"*.

52. In the case of payment systems, lack of compliance with data protection rules would not only breach EU citizens' fundamental right to protection of personal data, but could also expose European companies to risks of use for economic espionage of data relating to their commercial transactions. It is also a matter of sovereignty to prevent that data relating to citizens and companies based in the EU are accessed by third countries authorities without respecting the conditions and safeguards that would be imposed to similar authorities within the EU.

53. Furthermore, the EDPS stresses that it would not be acceptable that the architecture of the European payment systems would continue to allow and facilitate that personal data relating to any euro payment between Member States are transferred to third countries in breach of the data protection legislation and made available - routinely, massively, and without appropriate guarantees - to third countries authorities. Therefore, the EDPS calls on the ECB, in cooperation with other central banks and

financial institutions, to ensure that European payment systems, and in particular the TARGET systems, are fully compliant with European data protection law.

54. In a broader perspective, the EDPS notes that, as the WP29 has highlighted in its opinion, a wide range of EU and international instruments in the payment systems area - aimed at fighting crime and terrorism while ensuring protection of fundamental rights - are already available and should be fully exploited before proposing new agreements at international level. In any case, the fight against crime and terrorism should not circumvent standards of protection of fundamental rights which characterise democratic societies.

5 - Conclusions and remedies

The EDPS summarizes his main findings and recommendations to the ECB as follows:

- With regard to the role of the ECB as SWIFT overseer, the EDPS considers that the participation in the co-operative oversight on SWIFT as such does not confer to the ECB the role and responsibilities of a controller. However, the secrecy that surrounded the data transfers carried out by SWIFT for more than 4 years is regrettable and calls for a clarification of both the oversight on SWIFT and the rules on confidentiality.
  Therefore, the EDPS recommends the European Central Bank to urgently explore and promote - if necessary, in cooperation with other central banks and relevant actors in the financial sector - appropriate solutions in order to clearly bring compliance with data protection rules within the scope of the oversight - to the extent in which lack of compliance may affect financial stability and without prejudice to the competences of relevant national or European data protection authorities - as well as to ensure that rules on confidentiality would not prevent relevant authorities from being duly and timely informed where necessary. This would ensure that on future occasions proper data protection safeguards are taken and that the current lack of transparency is avoided.

- With regard to the role of the ECB as user of the SWIFTNet FIN service, the EDPS considers that the ECB shall be considered a data controller, jointly with SWIFT, in any case to a sufficiently relevant extent, whenever it uses the SWIFTNet FIN service to process personal data for its payment transactions. The ECB has, when using the SWIFT network for its payment operations, put at risk the personal data of individuals that have a contractual relationship with the institution, by not ensuring as joint data controller that personal data relating to these payments operations are processed in full compliance with Regulation 45/2001.
  Therefore, the EDPS, pursuant to the powers laid down in Article 47 of Regulation 45/2001, urges the ECB to explore - if necessary, in cooperation with other central banks and relevant actors in the financial sector - solutions to make its payment operations fully compliant with data protection legislation and take appropriate measures as soon as possible. The EDPS invites the ECB to prepare at the latest by April 2007 a report concerning the measures or provisional measures taken to develop compliance with this opinion. Further to this report, the EDPS will consider, taking into account possible coordination with other data protection supervisory authorities, any further action on the basis of his powers pursuant to Article 47 of Regulation 45/2001.

- With regard to the role of the ECB as policymaker, the EDPS stresses that it would not be acceptable that the architecture of the European payment systems would continue

to allow and facilitate that personal data relating to any euro payment between Member States are transferred to third countries in breach of the data protection legislation and made available - routinely, massively, and without appropriate guarantees - to third countries authorities. Therefore, the EDPS calls on the ECB, in cooperation with other central banks and financial institutions, to ensure that European payment systems, and in particular the TARGET systems, are fully compliant with European data protection law.

- In a broader perspective, the EDPS notes that, as the WP29 has highlighted in its opinion, a wide range of EU and international instruments in the payment systems area - aimed at fighting crime and terrorism while ensuring protection of fundamental rights - are already available and should be fully exploited before proposing new agreements at international level. In any case, the fight against crime and terrorism should not circumvent standards of protection of fundamental rights which characterise democratic societies.

- The EDPS remains available to advise the ECB and other relevant institutions on all matters concerning the processing of personal data in the framework of payment systems.

Done at Brussels on 1 February 2007.

Peter HUSTINX
European Data Protection Supervisor