



Opinion no. 23/2016 of 18 May 2016

Subject: Own-initiative opinion on the contract of the company SWIFT scrl for the international transfer of data relating to the SWIFT financial information messaging service (CO-A-2016-031)

The Privacy Commission;

Having regard to the law of 8 December 1992 *on privacy protection with regard to the processing of personal data* (hereinafter referred to as the LVP), particularly Article 29;

Having regard to the report by Stefan Verschuere;

Is issuing the following opinion on 18 May 2016:

I. CONTEXT OF THE REQUEST

1. The Commission's opinion is being sought regarding the "SWIFT – Ad Hoc Data Transfer Agreement" contractual clauses signed between the company SWIFT SCRL and the company SWIFT INC pertaining to SWIFT Messaging Services involving transfers from the EEA or Switzerland to the US, in accordance with the memorandum of understanding entered into between the FPS Justice and the Commission on 25 June 2013¹.
2. The memorandum of understanding defines the aspects that must be taken into account in order to consider the contractual clauses as offering sufficient safeguards within the meaning of Article 22, §1, paragraph 2 of the law of 8 December 1992 to enable personal data to be sent to a European Union third country that does not offer an adequate level of personal data protection.

II. REVIEW OF THE CLAUSES

3. The Commission is of the opinion that these contractual clauses meet the conditions as listed in Part IV of the memorandum of understanding entered into between the FPS Justice and the Commission on 25 June 2013². This memorandum expresses at Belgian level the conditions developed by the "Article 29" data protection working party in its working document WP12.
4. These contractual clauses are drafted in accordance with the Commission's Decision of 9 December 2008 and taking into account SWIFT's role as de facto delegate for the financial community of its client users, data controller for the financial data messaging services.
5. These clauses notably require SWIFT SCRL to process the data in compliance with the Belgian law on personal data protection and in accordance with its role as de facto delegate complying with the financial community's instructions. The parties must comply with the data security measures, and SWIFT SCRL is required to verify but also guarantee compliance with these measures by SWIFT INC. SWIFT INC must inform SWIFT SCRL in the event of accidental or unauthorised access to the data. SWIFT INC may only process the data in accordance with the instructions of SWIFT SCRL, in accordance with the LVP, and may not call on sub-processors. As regards the rights of information, access, rectification and objection, the proposed rules are compliant with the Commission's Recommendation of 9 December 2008.

¹ This memorandum is available on the Commission's website.

² Idem.

6. As regards the possibility of further access and use by the US Department of the Treasury (UST), the Commission's analysis concludes that injunctions are limited by the fact that they concern data pertaining to a period of time, a given geographic area, specific types of message and by the fact that they must be motivated by indications linked to terrorism or the financing thereof³. The controls and other safeguards are described in the unilateral declarations ("Representations") of the UST published in the OJEU (C 166/18, OJEU 20.07.2007), together with the responses of the European Commission and of the Council of the EU, published on 20 July 2007 (C 166/10).
7. These safeguards are consequently sufficient within the meaning of Article 22, §1, paragraph 2 of the law of 8 December 1992 to permit personal data to be sent to a European Union third country that does not offer an adequate level of personal data protection.

FOR THESE REASONS,

the Commission is issuing a favourable opinion regarding the "SWIFT – Ad Hoc Data Transfer Agreement" contractual clauses signed between the company SWIFT SCRL and the company SWIFT INC pertaining to SWIFT Messaging Services involving transfers from the EEA or Switzerland (including Belgium) to the US and is of the opinion that the transborder data flows carried out by SWIFT SCRL, as described in the contractual clauses, to SWIFT INC and established in a country without an adequate level of protection, can be permitted.

The Acting Director,

The Chairman,

An Machtens Esq.

Willem Debeuckelaere Esq.

³ According to the CPVP ("Commission de la Protection de la Vie Privée"), the conditions listed in paragraph 59 of the CJEU ruling on the joined cases C-293/12 and C-594/12 are therefore met. Also see the Privacy Commission's decision of 9 December 2008 "Evaluation and recommendation procedure initiated with regard to the company SWIFT scrl".