



EUROPEAN CENTRAL BANK

EUROSYSTEM

Jean-Claude TRICHET
President

Ms Pervenche Berès
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Affairs
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Chère Madame la Présidente,

Dear Ms Berès,

Thank you for your letter of 22 December 2006 concerning SWIFT, in which you submitted five questions. I hereby provide you with my answers to each of these questions.

- 1. What measures has the ECB as user of SWIFT services already taken or does it intend to take to comply with Directive 95/46/EC?*

The ECB is subject to Council Regulation (EC) No 45/2001 of 18 December 2000 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. It is not subject to the Directive 95/46/EC or its national implementing measures. As a user of SWIFT services, the ECB will seek the consent of individual counterparties in payment transactions (i.e. employees and individual service providers) and continue to make use of SWIFT services by means of an explicit condition in the relevant documentation. When asking for this consent, the ECB will explicitly refer to its use of SWIFT and SWIFT's database storage. Payment orders from natural persons who do not consent to the use of SWIFT will not be processed.

2. *The Article 29 WP deems appropriate for central banks to consider alternative technical solutions to the procedures that are currently used, in accordance with the principles of the Directive. What is the position of the ECB in this respect?*

The ECB has investigated possible alternatives to using SWIFT services and has had to conclude that at this stage no feasible alternatives are available.

As stated during the hearing at the European Parliament on 4 October 2006, the main issue at stake is to find ways to reconcile EU and non-EU data protection legislation, as well as to maintain a proper balance between such legislation and the legal instruments applied in the fight against terrorism. We are aware that this issue has the attention of the European Parliament, the Council and the Commission. However, as the matter is outside the competence of the ECB, it can only wait for the outcome of this process. We understand that initiatives have been taken in this context vis-à-vis the US Government. Joint action on this between the Community (which has competence both on data protection and on payment systems legislation) and the EU authorities responsible for the fight against terrorism is also urgently needed, but it is beyond the remit of the ECB. It has also been pointed out that SWIFT provides services elsewhere than in Europe, and we recommend that any measure adopted should take into account the global aspect of SWIFT's services.

3. *The Article 29 WP calls for a clarification of the oversight on SWIFT and recommends that appropriate solutions are found in order to bring compliance in particular with data protection rules clearly within the scope of oversight. What actions does the ECB intend to take to fulfil this recommendation?*

Central banks are responsible for fostering financial stability and promoting the smooth operation of payment and settlement systems. As SWIFT is essentially a messaging provider and not a payment system, central bank oversight of SWIFT focuses on its technical security, operational reliability, resilience, good governance, and its having in place risk management procedures and controls.

The ECB considers that a request to bring data protection compliance within the remit of central bank oversight would not be in line with the allocation of legal responsibilities; the task of policing compliance with data protection laws is clearly and exclusively allocated to the data protection authorities. Central banks are themselves subject to the monitoring and jurisdiction of the data protection authorities. Any involvement of the ECB in monitoring compliance with data protection rules would be inconsistent with its mandate (and outside its expertise) and would create overlaps and conflicts with the data protection authorities.

4. *The Article 29 WP considers that legal obstacles such as professional secrecy obligations of the overseers that could be used as arguments to limit the effective control by the independent data protection authorities should not be relied upon in a case of possible violation of constitutional or human rights. What is the position of the ECB in this respect?*

Professional secrecy and confidentiality are important elements of the set-up of the G10 central banks' oversight of SWIFT, which is neither a credit institution nor a payment system and is consequently neither licensed nor supervised. In particular, the flow of oversight information to the ECB is normally received via the lead overseer, the Nationale Bank van België/Banque Nationale de Belgique (BNB); the BNB is bound by Article 35 of its Organic Law on secrecy, which is complemented by several provisions of the Belgian Criminal Code protecting professional secrecy. Should the ECB disclose information received from the BNB, the BNB would have to stop sharing oversight information with the ECB. Similarly, any oversight information received from any other member of the Oversight Group has to respect the secrecy regime applicable to it. The ECB cannot accept that such confidentiality obligations should not be respected, since confidentiality is a legal obligation established by Article 38 of the Statute of the ESCB and is essential for the global cooperative oversight of SWIFT.

5. *Access to data managed by SWIFT makes it possible to get information on the economic activities of individuals, businesses and countries concerned which could give rise to forms of economic and business espionage. In view of this potential, what actions does the ECB as a user of SWIFT services intend to take?*

As a user of SWIFT services, we will make individuals fully aware of the continuous use of SWIFT and SWIFT's database storage, as is clear from the response to question 1. Of course, all forms of economic and business espionage based on the SWIFT subpoenas would be *ultra vires* and thus illegal. In addition, it would be a criminal activity on both sides of the Atlantic. The ECB has, however, no mandate to verify compliance with the law by US authorities and no capacity to engage in specific action in this domain.

The same letter of reply has been sent to Mr Cavada.

With kind regards,

Bien fidèlement à vous ,
