

ISDA  
To the attention of Mr Roger Cogan  
Senior European Policy Director  
Square de Meeus 38/40, 4th floor  
1000 BRUSSELS

**Case treated by:** Dieter Verhaeghe  
**T:** +32 2 274 48 51  
**F:** +32 2 274 48 35  
**E-mail:** dieter.verhaeghe@privacycommission.be

Your reference	Our reference	Enclosure(s)	Date
	DOS-2013-02154-006-DV		07-08-2013

**Re:** your request for information of 24 July 2013 related to the CFTC requests

Dear Mr. Cogan,

I refer to your request of 24 July 2013 related to the subject mentioned above.

All EU member states are bound by the same legal instrument, i.e. the Directive 95/46/EC<sup>1</sup>. For some unknown reason, your list of jurisdictions seems to be restricted to a minority of all EU member states. Could you inform me of the reason why most EU member states were omitted from your list of jurisdictions impacted by the CFTC reporting rules? In any event, such omission could indicate a major gap in the ISDA approach, which could be resolved by contacting the data protection authorities ("DPAs") of the other member states.

Even though national differences exist between member states on the methods to achieve data protection, the basic principles of the reply that follow from Directive 95/46EC and the relevant opinions of the Working Party 29.

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<sup>1</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal L 281*, 23/11/1995 P. 0031 - 0050, published on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

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### On your question A.

1. The Belgian privacy act contains the possibility for the Commission to investigate complaints and, after a mediation procedure, enforce any violations of the privacy act via the Belgian courts (article 31 of the Belgian privacy law).
2. Without prejudice to the competence of the regular courts and tribunals regarding the application of the general principles concerning the protection of privacy, the President of the Commission may submit any dispute relating to the application of this Act and its corresponding measures to the Court of First Instance.
3. A transfer of personal data from a controller under Belgian jurisdiction to a SDR or to the CFTC, is a transfer of personal data to a country that does **not** ensure an adequate level of protection in the meaning of article 21 of the Belgian Privacy Act. According recital 57 of Directive 95/46/EC, such transfer "**must be prohibited**".

### On your question B.

1. The applicability of the Belgian privacy law depends on whether the reporting party (data controller) processes personal data in the context of effective and actual activities on Belgian territory. This is the case in the event of location and registration in Belgium of the reporting counterparty, in case of location in Belgium of the reporting counterparty as a branch, including a branch of a U.S. person and/or in case of use by the reporting counterparty outside Belgium of automatic or other means located on Belgian territory (for instance use of reporting tools on Belgian territory to comply with CFTC rules,...) (article 3bis of the Belgian privacy law).
2. (Counterparty) "Identity information" is personal data in the meaning of the Belgian privacy law.
3. "Processing" personal data includes disclosure (transfer) of personal data (article 1 § 2 of the Belgian privacy law).
4. Using the definition of (data) "Controller" in both the Directive 95/46/EC and article 1 § 4 of the Belgian Privacy law, the reporting counterparties can be considered as Controller.
5. Previous interpretation by the Working party 29 of the articles 25 and 26 of Directive 95/46/EC on international transfer in AML/CFT<sup>2</sup>, illustrate that in case the reporting party would act "pursuant to

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<sup>2</sup> See page 4, point 2.2. of the letter of the working party published on [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20130404\\_aml\\_letter\\_to\\_ep\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20130404_aml_letter_to_ep_en.pdf)

the reporting rules" of a third country such as the US, this does not constitute a ground for "important public interest grounds" as basis for legitimate data transfer in the meaning of article 26 of Directive 95/46/EC. Taking into account previous opinions of our Commission on the matter of data transfers to the US in the PNR<sup>3</sup> and PCAOB<sup>4</sup> files and the interpretation of article 22,4° of the Belgian privacy law, I have no reason to believe that the conclusion should be different for the reporting rules to the CFTC.

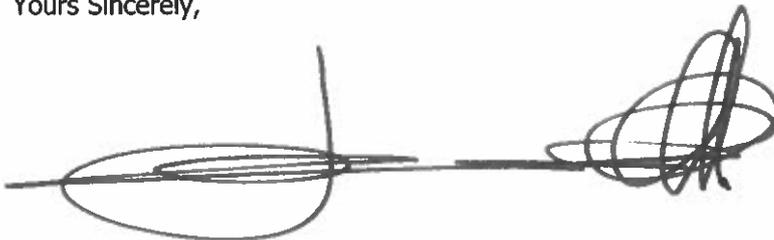
6. In case of reporting rules to the CFTC, consent of the data subject cannot be a legitimate basis for transfer of personal data (article 22,1° Belgian data protection law cannot apply).

7. The transmission of personal data to U.S. Federal Authorities is outside the scope of the "Safe Harbor" rules

8. Additionally a reporting party (data controller) under Belgian jurisdiction would (in compliance with article 17 of the Belgian privacy law) have to register the fact, that such transmissions will be made, in the public Data Processing Register (DVR) kept by the Commission.

9. Under the following link you (or your legal advisors) can download a PDF with an unofficial, English translation of the Belgian privacy law:  
[http://www.privacycommission.be/sites/privacycommission/files/documents/Privacy\\_Act\\_1992\\_0.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/Privacy_Act_1992_0.pdf)

Yours Sincerely,

A handwritten signature in black ink, consisting of a long horizontal line with a large loop on the left and a more complex, scribbled loop on the right.

Willem Debeuckelaere  
President

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<sup>3</sup> See the Opinion 48/2003 of 18 December 2003 on the passenger Name Record transfers ("PNR") to the US (available in Dutch and French only)

<sup>4</sup> See points 63 and following of the the Opinion 11/2013 of 14 April 2013, dealing a.o. with the transfer of personal data To the Public Company Accounting Oversight Board ("PCAOB") (available in Dutch and French only)