

Moritz Körner MEP
European Parliament
Rue Wiertz 60
B-1047 Brussels
Belgium

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Dear Mr. Körner,

I would like to thank you for your letter of 23 January 2020 regarding the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data for the purposes of the Terrorist Finance Tracking Program, the so called TFTP agreement.

Both of your questions go to the heart of the matter and reflect concerns which the European Data Protection Board also continues to share. More specifically, you raised questions, in the framework of the program, as to whether individuals can have their personal data corrected or deleted as well as to the amount of personal data collected and retained by U.S. authorities. I would like to respond to both of your questions in turn.

The TFTP agreement provides, in its Article 16, for the right of the individual to seek correction or deletion of his/her personal data processed by the US Treasury Department when the data is inaccurate or the processing contravenes the agreement. Such request must therefore be «duly substantiated» by the data subject, which implies that the requester has to be sure that his/her personal data is actually processed by the US authorities, and in particular the data subject has to know what precise data is processed in order to be able to spot any inaccuracy and ask for its rectification.

Consequently, it is only possible to guarantee the exercise of the right to correction or deletion if the right of access to such data is ensured as well. However, the TFTP agreement provides for a mechanism according to which any person has the right (as a minimum) to receive confirmation as to whether her or his data protection rights have been upheld in compliance with the agreement. Such a procedure might however result in a situation where the data subject is not informed of whether her or his data is stored in the TFTP database or whether any breaches to the agreement had to be remedied in response to her or his request. This broad and unverified restriction to the exercise of the right of access – expressly and specifically recognised as a fundamental right in Article 8(2) of the EU Charter of the Fundamental Rights – clearly prejudices the exercise of the other data subject's rights¹.

¹ It remains to be clarified in the review of the EU-U.S. Umbrella Agreement whether that agreement substantially improves the effectiveness of the right of access for the data subject.

I understand that such a response may be dissatisfactory to the requesting citizen. While it is to be noted that this situation corresponds to the provisions of the agreement, ratified by both parties, and that such provisions are also foreseen in other international agreements. The EDPB considers these provisions to be insufficient. In its recent *Schrems II* ruling, the Court of Justice of the European Union stressed again – in the context of personal data transfer to third countries – the importance and necessity of ensuring data subjects’ rights’ enforceability against authorities in the courts, in order to provide for an effective judicial remedy.

In this regard, I would like to recall however that data subjects can exercise their right to have their personal data corrected or deleted by sending a request to their competent national supervisory authority, which will transmit the request to the Privacy Officer of the United States Treasury Department. The TFTP agreement also foresees a joint review process in which individual members of the EDPB take part as experts for the European Commission. The reviews may improve the process in general and provide for some accountability.

With regard to the statement of DG HOME calling the amount of data collected in the framework of the agreement “big data”, reference can be made to the Joint Supervisory Body (JSB) of Europol and its statement in 2015. The JSB stated in its report on the Europol's implementation of the TFTP agreement²: *“In this respect, the JSB likes to restate its assessment that due to the nature of the TFTP, the situation in terms of mass data transfer remains unchanged. The JSB restates that, in view of the nature of the TFTP and the scope of the agreement there is a massive, regular, data transfer from the EU to the US. There is a clear tension between the idea of limiting the amount of data to be transmitted by tailoring and narrowing the requests and the nature of the TFTP.”*³ It seems that the situation was still similar in 2019, as indicated by the reference in the EDPS TFTP inspection report where it is stated findings that *“the inspected requests [from the Treasury] are voluminous”*.⁴

As regards the retention of the provided data, it follows from the Agreement that non-extracted data may be retained for five years. Such retention of non-extracted financial information continues to be of great concern to the EDPB, as it is also very problematic in view of the jurisprudence of the Court of Justice of the European Union⁵.

² Report 15/28, Joint Supervisory Body of Europol, Council of the European Union document 12338/15, p. 5

³ The EDPB notes the recommendation from the COM, in the 5th Joint review report on the implementation of the TFTP agreement, to minimise the amount of data requested by the designated provider. More specifically, it is recommended that the US Treasury should assess the message types and geographic regions that are the most and least responsive to TFTP searches. (Report from the Commission of 22 July 2019, COM(2019) 342).

⁴ EDPS TFTP Inspection public report, of 28 May 2019, in https://edps.europa.eu/sites/edp/files/publication/19-05-28_edps_inspection_report_art4_tftp_en.pdf

⁵ See in particular CJEU Opinion 1/15 of 26 July 2017 (EU-Canada PNR Agreement).

In view of these concerns, the EDPB would like to reiterate its call to review not only the PNR agreements, which face similar problems, but also the TFTP agreement with the United States.

Yours sincerely,



Andrea Jelinek