

ARTICLE 29 Data Protection Working Party



Brussels, 7 June 2011
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Ms Melissa A. Hartman
Deputy Assistant Secretary
Privacy, Transparency and Records
U.S. Department of the Treasury
1500 Pennsylvania Ave. N.W.
Room 8119, 1750 Penn. Ave.
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By email: Melissa.Hartman@do.treas.gov

Dear Ms Hartman

According to Article 15 of the Agreement between the U.S. and the European Union on the processing and transfer of financial messaging data for the purposes of the terrorist financing tracking program (“TFTP Agreement”) any person has the right to obtain at least a confirmation as to whether his/her data protection rights have been respected in compliance with the Agreement. In addition, according to Article 16 of the TFTP Agreement any person has the right to seek the rectification, erasure, or blocking of his/her personal data where the data are inaccurate or the processing contravenes the TFTP Agreement.

Upon the entry into force of the TFTP Agreement, the U.S. Department of the Treasury (“UST”) has set up procedures (“procedural guidelines”) for seeking access, rectification, erasure, or blocking. In that sense, and in order to better exercise our task of protecting individuals’ rights, the European national data protection authorities (“NDPAs”) would like to raise the following questions related to the interpretation of the TFTP Agreement by UST. The questions outlined below seek your views to help to achieve some clarity in the search of common grounds in the benefit of a more safeguarding interpretation of the TFTP Agreement.

1. Questions related to practicalities

According to the procedural guidelines, a photocopy of an official document (passport, driver’s licence, etc.) is required for submission to the UST for verification purposes. The Article 29 Working Party has concerns to avoid any submission of additional personal data and documents, over and above that which is relevant for processing the request. In our opinion, the photocopy of an official document is not relevant for the further processing of the request. Experience so far in 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. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 6/36.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

European Member States has shown that this requirement deters individuals from exercising their rights of access, mainly because they feel uncomfortable with handing over more personal data to the U.S. authorities. This applies in particular to data which has to be submitted to UST for verification purposes only.

The Article 29 Working Party and its members, the European NDPAs, welcome the view you and the Director of the Office of Foreign Assets Control, Adam J. Szubin, expressed during a meeting with the German Federal Commissioner for Data Protection and Freedom of Information, Peter Schaar, on 29 March 2011 in Washington D.C. not to insist on the submission of a proof of identity if the European NDPAs verify the identity of the individual making the request.

On behalf of the European NDPAs the Article 29 Working Party, with this letter, would like to clarify that it is our understanding and position, that the relevant European NDPAs will request proof of identity which includes a signature (i.e. a copy of an official document signed by the individual) from the applicant, to verify his/her identity in line with Articles 15 and 16 of the TFTP Agreement and will confirm his/her identity themselves before transmitting only the personal data necessary for the request to be processed by the UST.

In addition to this, the Article 29 Working Party and its members would appreciate if you could provide us with your opinion on the following identified issues as a basis for further discussion.

1.1 Please could you specify in detail which personal/identifying data would be recommended in order to process the request (name, address, bank account details, etc.).

1.2 Is there a form (template) that could be used to ensure that requests are valid and in line with Articles 15 and 16 of the TFTP Agreement? If no form is currently available, could the UST and European NDPAs provide such a form?

1.3 What are the criteria for valid requests, under US law? i.e. are the criteria in your procedural guidelines?

2. General interpretation issues:

2.1 Could you please clarify your understanding of what is meant by the following terms in Article 15 TFTP of the Agreement:

- “his or her data protection authority in the European Union” (Article 15.1)
- “his or her European national supervisory authority” (Article 15.3)
- “the relevant European national supervisory authority” (Article 15.3)

2.2 According to your interpretation, is the "supervisory authority" as mentioned in Article 15 (3) the same as "data protection authority" mentioned in Article 15 (1) TFTP Agreement? If yes, could you please explain the rationale behind the difference in terminology?

2.3 Do you interpret the wording "national supervisory authority" as referring only to data protection authorities?

2.4 Does in your view the word "national" refer to the nationality of the data subject (for instance does a person with German nationality address his question to the German DPA)?

2.5 What is your understanding of the meaning of "all necessary verifications pursuant to the request", as used in Article 15 (3) of the TFTP Agreement?

3. Procedural issues:

3.1 Taking into account the current procedure, who is the correct addressee for requests submitted under Articles 15 and 16 of the TFTP Agreement? i.e.. who is the official and designated contact for requests under Article 15 and/or Article 16 of the TFTP Agreement? Is this the "Treasury Privacy Office"? If so, can you provide us with the full contact details?

3.2 Which requests should be sent to institutions (banks, etc.), instead of to the official and designated contact within the UST?

4. Cooperation issues NDPAs-UST.

4.1 In case the Working Party 29 has further questions related to Articles 15 and 16 of the TFTP Agreement, is there a designated person it should contact for more specific questions regarding any procedural issues?

4.2 Can we contact the chief Data Protection Officer of the UST and if so could you please supply us with his/her correct contact details?

5. Questions related to Article 15 of the TFTP Agreement

The Article 29 Working Party and the European NDPAs are concerned that the right of access according to Article 15 of the TFTP Agreement only applies to a limited part of the TFTP database, since it does not include all data stored on the TFTP database but only the data which were accessed by the analysts in the course of an investigation with a nexus to terrorism. The Article 29 Working Party has doubts as to whether the procedure, as applied today, is in line with its understanding of an adequate right of access.

5.1 What is your current experience with the application of Article 15 (right of access)?

5.2 If a nexus to terrorism has been established, it is likely that the national security exceptions according to Art. 15 (2) of the TFTP Agreement would apply? What would be the reply of the UST to a request, if a nexus to terrorism had not been established?

5.3. The Agreement is not meant to modify the national provisions regulating exercise of the right of access. Accordingly, the UST shall present a proper assessment of the case and verify the reasons for applying limitations to the right of access and communicate all the necessary information to the relevant NDPAs. In case personal data cannot be disclosed to the data subject, then the supervisory Authority will be bound not to disclose such information to the data subject and will provide a more neutral answer such as “a check has been done and there is no information that can be communicated to you” - as is usually the case with the exercise of the right of access in the field of police activities (including Europol). Do you agree with this interpretation? At all events, the judicial authorities of the requested country maintain their jurisdiction if the answer is challenged.

6. Questions related to Article 16 of the TFTP Agreement

The Article 29 Working Party and the European NDPAs have concerns regarding the findings of the European Commission’s report on the joint review of the implementation of the TFTP Agreement of 17 / 18 February 2011 with respect to the implementation of the right to rectification, erasure, or blocking in line with Article 16 of the TFTP Agreement (see Commission report, para. 3.1.7.4). According to the findings of the Commission report it is doubtful that these rights can indeed be exercised in practice since the UST cannot alter inaccurate data included in the TFTP database.

6.1 What is your current experience with the application of Article 16 of the TFTP Agreement (right of rectification, erasure or blocking)?

6.2 What is in your understanding the meaning of “erasure” in Article 16 of the TFTP Agreement, if “erasure” is not a practical possibility? How can erasure (deletion) then be obtained?

6.3 How would the UST discover an updated financial transaction message, even if an individual had successfully requested the correction of inaccurate records from their own bank?

7. Has the redress procedure already been applied in practice (Article 18 of the TFTP Agreement) and, if so, what was the UST’s experience with this procedure?

8. Can you inform the Article 29 Working Party of any current or potential cases of application and experience in relation to Articles 15, 16 and 18 (redress procedure), in order for European NDPAs

to better assess and provide guidance relating to processes in the articles, and to follow up submitted requests, either at the level of the UST or NDPA?

9. Taking into account that Article 20 (1) of the TFTP Agreement states that “this Agreement shall not create or confer any right on any person or entity, private or public”, the Article 29 Working Party would appreciate if you could provide us with your views on what should be the legal basis for data subjects to exercise their right of access under US law in line with Articles 15 and 16 of the TFTP Agreement.

10. Finally, the Article 29 Working Party would appreciate if we could receive a copy of the slideshow that was given to the joint review team in February 2011 that explains the procedures outlined in Articles 15 and 16 of the TFTP Agreement.

A copy of this letter has also been sent to the European Commission (Directorate-General for Home Affairs and Directorate-General for Justice) and the European Parliament (LIBE-Committee).

I look forward to receiving your reply.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman

Cc: Ms Jimma Elliot-Stevens, Director, Office of Privacy and Civil Liberties,
Mrs. Le Bail, European Commission, Director General, DG Justice,
Mrs. Boulanger, European Commission, Head of Data Protection Unit, DG Justice