

Proposed EU – US TFTP Agreement - Improvements by comparison with the Interim Agreement

The proposed EU-US TFTP Agreement contains considerable improvements compared to the rejected interim agreement:

- The Agreement acknowledges the twin track approach called for in the European Parliament's Resolution. Accordingly, while the Agreement sets out strict safeguards regarding the transfer of data, it acknowledges in the longer-term, the ambition for the European Union to establish a system which could allow for the extraction of data to take place on EU soil. The United States has committed in the Agreement to cooperate and provide assistance and advice to contribute to the effective establishment of such a system. This would imply a much more limited transfer of data to the U.S. and so takes account of the Parliament's key concern.
- The Agreement sets out a detailed set of legally binding commitments which ensure the protection of personal data transferred under the Agreement. These include for example:
 - A commitment that data will be processed exclusively for the prevention, investigation, detection or prosecution of terrorism or its financing;
 - A prohibition on any form of data mining – access to the data is strictly limited to cases where there is pre-existing evidence that an identified person has a nexus to terrorism;
 - The exclusion from any data transferred to the United States of all data relating to the Single Euro Payment Area.
- It also provides for stronger data protection guarantees. Concerning transparency, the US Treasury Department commits to post on its website full information about the TFTP, about the right of access, rectification and how to seek judicial and administrative redress. Unlike the Interim Agreement, the draft Agreement guarantees rights of access, and in the case of inaccurate data, the Agreement provides for rectification, erasure or blocking of those data. The Agreement states that the principle of proportionality is a guiding principle of the Agreement.
- Redress: the draft Agreement states that the "*U.S. Treasury Department shall treat all persons equally in the application of its administrative process, regardless of nationality or country of residence.*" It

goes on to say that "*All persons, regardless of nationality or country of residence, shall have available under U.S. law a process for seeking judicial redress from an adverse administrative action*".

- The Agreement sets out a comprehensive mechanism according to which *a European public authority*, namely Europol, will verify that US requests for data meet the conditions of the Agreement. More specifically Europol will check that requests for data (i) identify as clearly as possible the requested data, (ii) that they explain why those data are necessary for the fight against terrorism and its financing. Moreover Europol will verify that the Request is tailored as narrowly as possible in order to minimise the amount of data requested. If a US Treasury request for data does not meet each of these criteria, the Request will be rejected and the requested data will not be transferred.
- The Agreement provides for the Commission to appoint a person who will oversee the day-to-day extraction of and access to data from the TFTP database. This person will be posted on the spot where the queries are made and will monitor in real time the searches. He will have the power to block searches if it appears that there is not sufficient evidence to justify a search against an identified person.
- The Agreement provides for detailed and regular oversight of the TFTP and its implementation under the Agreement. The EU will undertake within 6 months of the entry into force of the Agreement, and then on a regular basis a detailed review of data protection compliance. The EU team will have the right among other things to call for a random and representative selection of searches made by the US authorities to verify that the privacy safeguards have been duly respected. The EU Review Team will be led by the Commission and will include representatives of two Data Protection Authorities and a person with judicial experience.
- The Agreement contains significantly more detailed requirements before lead information on a presumed terrorist can be sent to third countries, including a requirement to obtain the prior consent of the competent authorities of the relevant Member State where the data concern an EU citizen or resident.
- The Agreement establishes a link with the envisaged future binding agreement between the European Union and the United States regarding the protection of personal data and has the effect that once the future EU-US data protection agreement is concluded, the TFTP Agreement will be assessed in the light of that agreement.

What has not changed:

- Data Retention periods – The Parliament's Mandate states that the retention period should be "as short as possible and in any case no longer than five years". During negotiations the U.S. Treasury Department produced analysis showing the important value of data extracted which are between 3 and 5 years old (representing 28% of the information derived from the TFTP analysis). On that basis it was agreed to retain the 5 year period. However the Agreement now contains a provision to the effect that not later than three years after entry into force, the European Commission and U.S. Treasury Department will carry out a report on the value of TFTP data assessing whether the retention period should be reduced.