



AUTORITEIT
PERSOONSgegevens

Dutch Data Protection Authority

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Fabien Lehagre
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Date
26 August 2021

Your letter
29 June 2021

Subject
RE: Your letter regarding "FATCA and its inevitable incompatibility with the RGPD"

Dear Mr Lehagre,

I am writing you in response to your letter to the Chair of the *Autoriteit Persoonsgegevens* (Dutch Data Protection Authority) dated 29 June 2021.

On behalf of the Dutch Data Protection Authority I would first like to thank you for reaching out to us and sharing with us your concerns about international agreements involving the transfer of personal data to third countries, particularly in the area of taxation.

I understand from your letter that your concerns particularly relate to the intergovernmental FATCA agreements concluded between EU Member States and the US that involve the transfer of personal data to the US in the area of taxation.

In your letter you state that all FATCA agreements currently in force and concluded between EU Member States and the US violate both the GDPR as well as its now repealed predecessor Directive 95/46/EC (the Data Protection Directive), citing, amongst others, deficits in legal bases for lawfulness of processing and for international transfers of that data, insufficiently circumscribed purposes and non-compliance with principles of necessity, proportionality and data minimisation.

In your letter you furthermore point to the fact that EU Member States are called upon, pursuant to the judgment of the Court of Justice of the European Union (CJEU) in case *Schrems II* and a statement from the European Data Protection Board dated 13 April 2021, to assess and review the different



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FATCA agreements concluded between the US and the individual EU Member States in order to determine whether further alignment with current EU data protection legislation, case law and EDPB guidance is needed.¹

In that context, you express some doubts as to the degree of objectivity and independence with which EU Member States will perform this assessment of FATCA agreements. I understand from your letter that this is the primary reason that you seek involvement of the national supervisory authorities, including the Dutch Data Protection Authority.

In that regard, I would like to draw your attention to the fact that the issues experienced by Accidental Americans in relation to obligations under FATCA receive ongoing attention from responsible Ministries within the Dutch Government and from members of the Dutch Parliament. The Dutch Ministry of Finance provides the Dutch House of Representatives with regular updates on the efforts undertaken by the Dutch Government, both bilaterally and within the EU, to improve the arrangements made with the US and the situation of Accidental Americans in general. The most recent update is dated 8 June 2021.² As was also remarked by the Chair of the EDPB, Andrea Jelinek, in her letter to MEP Sophie in 't Veld dated 7 July 2021, the review of any international agreement needs to happen diligently and can hence be a long process.³

In keeping with Article 46(2)(a) GDPR, the review and possible renegotiation of applicable agreements is not subject to approval or authorisation from the Dutch Data Protection Authority. The review of the bilateral intergovernmental agreement concluded on 18 December 2013 between the USA and the Dutch Government concerning FATCA and its possible renegotiation with the USA is hence the primary responsibility of the responsible Ministries within the Dutch Government. Since this is an ongoing process, the Dutch Data Protection Authority awaits the outcomes of the efforts of the Dutch Government before deciding on any further actions.

¹ Judgment of the CJEU of 16 July 2020 in case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* ('*Schrems II*'). ECLI:EU:C:2020:559; Statement 04/2021 of the European Data Protection Board on international agreements including transfers, adopted 13 April 2021.

² Letter of government from Minister and State Secretary of Finance Hoekstra & Vijlbrief to the President of the House of Representatives of 11 November 2020, *Reactie op zwartboek van Accidental Americans*, retrieved from <https://www.rijksoverheid.nl/ministeries/ministerie-van-financien/documenten/kamerstukken/2020/11/23/kamerbrief-reactie-op-zwartboek-van-accidental-americans> (only in Dutch); Letter of government from Minister and State Secretary of Finance Hoekstra & Vijlbrief to the President of the House of Representatives of 2 February 2021, *Stand van zaken toezeggingen Algemeen Overleg Toeval-Amerikanen*, retrieved from: <https://www.rijksoverheid.nl/ministeries/ministerie-van-financien/documenten/kamerstukken/2021/02/02/kamerbrief-stand-van-zaken-toezeggingen-ao-toeval-amerikanen> (only in Dutch); Letter of government from Minister and State Secretary of Finance Hoekstra & Vijlbrief to the President of the House of Representatives of 8 June 2021, *Voortgangsbrief toezegging AO FATCA 10 februari*, retrieved from <https://www.rijksoverheid.nl/documenten/kamerstukken/2021/06/08/voortgangsbrief-toezeggingen-algemeen-overleg-fatca> (only in Dutch).

³ Response of the European Data Protection Board to MEP Sophie in 't Veld regarding the EDPB's statement 04/2021 on international agreements including transfers of 7 July 2021.



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Notwithstanding, I would like to assure you of our commitment to ensuring that data transfers are lawful and fully compliant with EU law, including most recent case law and EDPB guidance, and assure you that the Dutch Data Protection Authority maintains regular contact with all relevant organs within the Dutch Government.

With this letter I hope to have responded adequately to your letter. I would like to thank you again for reaching out to us and for your vigilance in advocating for the rights of data subjects all over Europe.

Kind regards,

Marianne Niessink

Director International Affairs and Communication