

Our Ref: 5999/FXN/60052.1/fxn

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Cc: - Sophie in 't Veld MEP  
- Nederlandse Accidental Americans  
- Association of Accidental Americans  
- J.R., EU petitioner (Petition No 1088/2016)

1 August 2021

Dear Sir / Madam

## FATCA | Review of compatibility of IGA with GDPR and the EU Charter

I am writing in relation to the massive bulk transfers of EU citizens' personal data to the USA under the Foreign Account Tax Compliance Act (**FATCA**), implemented in the Netherlands through the bilateral intergovernmental agreement (**IGA**) dated 18 December 2013.

Whilst this letter is only 4 pages long, I have included a table of contents for ease of reference.

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## EXISTING CONCERNS

### 1. Concerns raised by the banking community

Concerns about the lack of proportionality of extending FATCA to the UK have been raised the European Banking Federation (**EBF**), the British Bankers' Association (**BBA**) and the Institute of International Bankers (**IIB**) – See Annex 1

### 2. Concerns raised by the European data protection community

Concerns were also raised by all relevant data protection authorities, including the Article 29 Working Party (**WP29**), the European Data Protection Supervisor (**EDPS**) and the group of experts appointed by the European Commission (**AEFI**) – See Annex 2.

### 3. Concerns raised by the European Commission (Sophie in 't Veld MEP documents)

- 3.1 Our analysis of [internal documents](#) released by the European Commission to Dutch MEP Sophie in 't Veld shows that the European Commission had expressed 'worrying' concerns about the data protection implications of FATCA as far back as 2011<sup>1</sup>. In particular, an internal note from 28 November 2011 (reproduced [here](#) at p. 6) concluded that:

*"Our data protection experts, following their examination of the US reply, believe that the US data protection rules do not offer the same standard of protection as EU data protection laws".*

- 3.2 This was a whole 9 years before the Court of Justice of the European Union (**CJEU**) [struck down](#) the EU-US data transfer framework (known as 'Privacy Shield') for the same reason (inadequate data protection in the US).

### 4. Concerns raised by the European Parliament

- 4.1 More recently, in a [study](#) on *Schrems II*, the European Parliament, concluded that:

*"Our analysis shows that no US federal or state privacy law is likely to provide "essentially equivalent" protection compared to the EU GDPR in the foreseeable future. Indeed, there are serious and in practice insurmountable US constitutional and institutional as well as practical/political obstacles to the adoption of such laws."*

- 4.2 Concerns raised by the European Parliament In a previous study, and as regards the proportionality of FATCA, the European Parliament [concluded](#) that:

*"FATCA (operating in the EU through Intergovernmental Agreements or IGAs) appears to be neither proportionate, nor necessary, as it fails to narrow down the reporting obligations to individuals suspected of tax evasion".*

<sup>1</sup> See also [here](#), [here](#) and [here](#) for more internal documents.

## 5. Requests for infringement proceedings under Art. 258 TFEU / EU Ombudsman

- 5.1 Accordingly, and independently of each other, on [3 October 2019](#) and [3 April 2020](#) respectively, the Association of Accidental Americans chaired by Fabien Lehagre and two individuals (including J.R., the French individual whose [petition](#) led to the European Parliament's study on FATCA), filed two complaints with the European Commission asking that infringement proceedings be brought against France (in the case of the AAA) and EU Member States more generally.
- 5.2 One of the [complaints](#) is currently [before the EU Ombudsman](#), which is what [happened](#) to Sophie in 't Veld MEP when she tried to extract internal documents from the Commission.
- 5.3 The current Commission's apparent departure from the correct approach taken by its predecessor (mentioned above) indicates the need for proactive action by national data protection authorities in order to ensure the respect of the data protection concerns of the vast number of individuals affected by FATCA in the EU (153,000 individuals in Germany alone according to [official statistics](#)).

## INVITATION TO REVIEW

### 6. EDPB Statement 4/2021

Separately, in its [Statement 4/2021](#) the EDPB invited EU Member States to review automatic tax information agreements in the light of the CJEU's judgment in *Schrems II* ([C-311/18](#)).

### 7. Powers of AP

- 7.1 *Schrems II*, and its predecessor *Schrems I* ([C-362/14](#)) also provide authority for the role of national data protection authorities when it comes to the transfer of data outside of the EU. In *Schrems I* and *Schrems II*, the CJEU held as follows (at para 43 and 121 respectively):

*"<sup>43</sup> To ensure the protection of the fundamental right to privacy, national authorities have a wide range of powers..., in particular, investigative powers... effective powers of intervention, such as the power to temporarily or permanently prohibit data processing, or the power to bring legal proceedings." – Schrems I*

*"<sup>121</sup> ... unless there is a valid Commission adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country... if, in the view of that supervisory authority... the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of the GDPR and by the Charter, cannot be ensured by other means" – Schrems II*

- 7.2 Emphasising the role of national data protection authorities, on 15 June 2021 the CJEU [recognised the direct effect](#) of [Art. 58\(5\)](#) GDPR:

*'Each supervisory authority shall have power to bring infringements of this Regulation to the attention of the judicial authorities and where appropriate, to commence or engage otherwise in legal proceedings, in order to enforce the provisions of this Regulation' – Facebook v. Gegevensbeschermingsautoriteit ([C-645/19](#)).*

## 8. Lack of safeguards

In terms of safeguards and effective equivalence with the protections under EU law, we took the liberty of [comparing](#) one of the standardised IGAs with the [EDPB guidelines 2/2020](#), which are also relevant for FATCA - see [EDPB Statement 1/2019](#). The standardised IGAs do not contain any of the safeguards required by the EDPB, let alone the requirements set out by the CJEU for effective equivalence.

## 9. Requests

- 9.1 In light of (a) the above; (b) the CJEU case law on the national data protection authorities' role; and (c) the invitation contained in the EDPB Statement 4/2021, we hereby invite you to review the compatibility of the Dutch FATCA IGA with the GDPR as well as the provisions on which the GDPR is based, notably (i) Art. 7, 8, 47 and 52 of the EU Charter of fundamental right; and (ii) Art. 8 of the European Convention on Human Rights.
- 9.2 If you have doubts about the compatibility of the [US-Dutch IGA](#) dated 18 December 2013 ([as amended](#)<sup>2</sup>) and any implementing legislation with EU law, we would ask you please to put forward the objections before the Dutch courts in order for them, if they share its doubts as to the validity of the IGA, to make a reference for a preliminary ruling for the purpose of examination of the IGA's validity (see *mutatis mutandis* paragraph 65 of *Schrems I* judgment).

Best regards,

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**Annex 1** - Concerns raised by the banking industry

**Annex 2** - Concerns raised by the European data protection community

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<sup>2</sup> The [amendment](#) relates solely Annex II of the IGA and does not add any data protection safeguards.

## Annex I – FATCA concerns raised by the banking industry

1. In a letter sent to the IRS on 17 October 2011 (which is contained in the documents disclosed by the European Commission to Dutch MEP Sophie in 't Veld) by the British Bankers Association (**BBA**) summarised the lack of proportionality as follows<sup>3</sup>

**"Making FATCA more targeted and proportionate**

*We also discussed a number of areas where the BBA believes that... you could make FATCA more proportionate and targeted to where the risks of tax evasion law."*

2. The European Banking Federation (**EBF**) raised similar concerns in a note to the Commission dated 4 February 2011 (also contained in the documents disclosed to Sophie in 't Veld MEP):<sup>4</sup>

**"List of Key concerns identified by the European banking industry**

Lack of proportionality

*FATCA was intended to recover tax from high net worth US individuals with significant offshore assets, but has lost sight of this and is now indiscriminately impacting all types of client (US and non-US, high worth and low worth) at huge cost to those clients and foreign intermediaries and for very limited return...*

*FATCA implementation measures and rules are not proportionate to its essential aims... [putting] Foreign Financial Institutions at a competitive disadvantage against US financial intermediaries."*

3. The Institute for International Bankers (**IIB**) raised the following additional point during a meeting in Washington alongside the EBF - presumably because of the *unilateral nature of information exchange* (EU to US) under FATCA<sup>5</sup>:

*"There is a degree of irony in the Act as the compliance costs for foreign entities are probably going to be tax deductible, effectively **forcing foreign countries to subsidise the compliance with FATCA.**"*

<sup>3</sup> Disclosure Ref. Ares(2015)459787 – 04/02/2015; EBF Ref. RK11027

<sup>4</sup> Disclosure Ref. Ares(2015)497021 – 06/02/2015, 'Foreign Account Tax Compliance Act (FATCA), Financial Sector Taxation and CCTB, Meetings in Washington DC on 14, 15 and 16 December', disclosed to Sophie in 't Veld MEP following an intervention from the EU Ombudsman, EU Disclosure Ref. Ares(2015)447406 - 04/02/2015

## Annex 2 – FATCA concerns raised by the European data protection community

1. In 2012, one month before the UK signed the first bilateral agreement with the US, the independent Data Protection Working Party Article 29 (**WP29**) - which represented the ICO and its counterparts – issued the first of a [number of damning opinions](#) on the proportionality of FATCA:

*"A bulk transfer and the screening of all these data is not the best way to achieve such a goal. Therefore more selective, less broad measures should be considered in order to respect the privacy of law-abiding citizens, particularly; an examination of alternative, less privacy-intrusive means must be carried out to demonstrate FATCA's necessity."*

2. In 2015, the European Data Protection Supervisor (**EDPS**) raised concerns about the proportionality of automatic exchange of information in an [opinion](#) issued in relation to the Common Reporting Standard, which is a derivation of FATCA:

*"26. ... the exchange of information on a certain number of accounts on an annual basis confirms our view that the information exchange is independent of the detection of any actual risk of tax evasion, thus questioning the proportionality of the measure itself."*

3. In 2018, following a petition by a dual US-French citizen, the European Parliament's Petitions Committee (**PETI**) commissioned a [46 page long study](#) from an independent data protection expert, which came to the following conclusion:

*"So essentially the issue is about requirement (iii), i.e. whether FATCA restrictions operating within the EU through IGAs are necessary and proportionate measures. (...)"*

*In conclusion, FATCA restrictions operating within the EU through IGAs at the current stage and under certain circumstances appear to be neither proportionate, nor necessary in so far they fail to narrow down the reporting obligations to individuals suspected of tax evasion. By contrast, these FATCA restrictions would constitute "necessary and proportionate measures" upon the condition that the U.S. provided, on a case-by-case basis, specific evidence that U.S. expatriates are using the EU financial system to engage in offshore tax evasion. Lacking such evidence FATCA restrictions appear to go beyond what is strictly necessary to achieve the goal of fighting against offshore tax evasion."*