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Cc: PETI, EDPB, EDPS, COM, T-PD, National DPAs; EU-Petitioners

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Dear Professor Gambarino

FATCA | PETI Study Update dated 22 September 2022

I have read with interest today's [Study Update](#), which summarises developments since your [original report](#) and reiterates your previous conclusions about the incompatibility of FATCA with the GDPR.

I should like to provide additional background information which confirms the main findings of your report.

I. European Commission's obstructionism

In January 2022, the [authors](#) of the various EU FATCA petitions issued a [statement](#) to express their frustration at the '[merry-go-round](#)' between the Commission and the EDPB.

Our [chronology](#) (which is based on internal Commission documents obtained by Sophie in 't Veld MEP) shows that the European Commission raised 'worrying' data protection concerns in active negotiations with the US Treasury in 2010-2012, only to subsequently [negate](#) its own involvement and [deny](#) the existence of concerns once the agreements had been signed.

This goes well beyond "institutional forbearance". Some would say it amounts to a cover-up.

The Commission also engaged in active obstructionism to any attempt to throw light on past events and explore the issues highlighted in your studies:

- ➡ The Commission only released the internal documents that form the basis of research after a lengthy [appeal](#) brought by Sophie in 't Veld MEP before the EU Ombudsman;
- ➡ An Art. 258 TFEU complaint brought by J.R. (the original FATCA petitioner) and supported by all other EU FATCA petitioners has been languishing on the Commission's desk for over [two years](#). I attach the latest round of correspondence for your information. Again, the Commission only responded (by way of a meaningless 'Holding Reply') after the [intervention](#) from the EU Ombudsman. To date, there is no substantive response from the Commission.

2. EDPB's 'pass-the-buck' approach

The EDPB's predecessor (WP29) took a clear position in relation to the disproportionate nature of FATCA and other systems of automatic exchange of information (see [here](#) at para 8.3 as well as [here](#)), echoing the conclusions contained in the PETI Studies.

The EDPB turned its back on the work of the WP29. FATCA Petitioners [expressed frustration](#) at the attitude of the EDPB and the [lack of real progress](#), notwithstanding a formal [admonishment](#) from the European Parliament.

The EDPB's duty is to ensure the consistent application of the GDPR throughout the EU. In relation to FATCA, we have consistently [asked](#) the EDPB Chair to intervene, albeit without ever receiving a response from its Chair.

However, the [opinion](#) from the Slovak DPA following our [August letters](#) to national DPAs shows the need for active intervention on the part of the EDPB.

3. **Recent developments in the US**

FATCA was promoted on the premises that it was necessary. Recent developments show that this is not the case.

In October 2021, the US [rejected](#) the introduction of a domestic version of FATCA due to 'data protection concerns' and in the light of strong opposition from the [American Bankers Association](#), the [Community Bankers Association](#), members of [Congress](#) and members of the [Senate](#) (echoing the opposition from the European Banking Federation back in 2012). As a result, the IRS automatically receives information from EU banks on a yearly basis, whilst being prevented from receiving information from US banks.

The IRS has also confirmed that it is not using FATCA data, because of [lack](#) of technical resources and disproportionate implementation [costs](#) as well as the high number of [useless](#) reports. This led the head of the IRS (Charles Rettig) to make the following statement in a recent [interview](#) with Forbes:

"If you're wondering, 'Well, IRS has all this FACTA information and they've not been able to use.' We're waiting for the funding... We need funding for that. Otherwise, you're just building a bigger haystack to be out in the yard. By itself, those haystacks are not impactful."

More recent reports in the [Washington Post](#) and the [Wall Street Journal](#) show the dire state of the IRS internal document management systems.

The fact that the US does not use FATCA data goes to the heart of the necessity and proportionality argument raised by the CJEU in its constant jurisprudence, from *Digital Rights Ireland*, *Tele 2 Sverige* and *Max Schrems* to the *Telekom Deutschland* judgment handed down [two days ago](#).

4. **Data security**

We provided the EDPB and the Commission with a [100-plus pages Hacking and Data Breaches List](#) that shows how compliant EU citizens are exposed to unnecessary and disproportionate risks as a result of their data being subject to mass processing.

We also found disturbing evidence indicating that the IT system used to transfer FATCA data to the US (the International Data Exchange System - IDES) was designed by a company with [close links](#) to the US intelligence community.

I should like to thank you again for highlighting the plight of EU FATCA Petitioners and other compliant EU citizens in respect of the mass processing of sensitive personal data in the context of FATCA. Our correspondence with the EU is available [online](#), where you will also find excerpts from internal EU documents unearthed by Sophie in't Veld MEP.

Best regards,

Filippo Nosedà
Partner