

FATCA LEGISLATION AND ITS APPLICATION AT INTERNATIONAL AND EU LEVEL: - AN UPDATE



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Abstract

This in depth analysis updates a previous report commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs and describes the most relevant developments in the period 2018-2022 in chronological order and then draws conclusions which include a systemic view of the current institutional dynamics, a provisional legal analysis on the basis of existing rules and policy suggestions.

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AUTHORS

Prof Carlo Garbarino - Bocconi University, Milano, Italy

ADMINISTRATOR RESPONSIBLE

Giorgio MUSSA

EDITORIAL ASSISTANT

Ewelina MIAZGA

LINGUISTIC VERSIONS

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ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

Email: poldep-citizens@europarl.europa.eu

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LIST OF ABBREVIATIONS

GDPR	General Data Protection Regulation
FATCA	Foreign Account Tax Compliance Act
IGAs	Intergovernmental Agreements
IRC	Internal Revenue Code
IRS	Internal Revenue Service
PAD	Payment Account Directive

EXECUTIVE SUMMARY

Background

This in depth analysis updates a previous report commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of PETI ("Report 2018"). In the current situation neither FATCA legislation nor IGAs have been modified yet to address the problems indicated in the Report 2018, while on the EU side, no legislative changes have been made.

In the period 2018-2022 there was no top-down process of legislative change, but instead a dynamic interaction of different actors: the European Parliament adopted the resolution of 5 July 2018 in which advised fundamental actions in relation to personal data relating to FATCA ("FATCA Data") ; PETI continued to receive petitions, there were interrogations in the European Parliament to which the Commission responded establishing a policy of "institutional forbearance"; the Commission and the EDPB emphasized the role of national data protection authorities; and the CJEU issued important judgments about data protection and transfer that are potentially applicable to FATCA Data.

The policy of the Commission (i) defers action for monitoring and enforcing the application of EU data protection rules to national data protection authorities, and (ii) subordinates possible negotiation on behalf of the EU with the U.S. for replacing the existing IGAs to an unanimous Council Decision. At the same time the U.S. are not willing to adhere to multilateral agreements for the exchange of information in place of FATCA or to radically reform FATCA and IGAs and there have been only slight indications in the direction of reciprocity for the exchange of tax data. All together these trends contribute to identify the current situation and this in depth analysis describes at sections 2-6 the relevant developments in the period 2018-2022 in chronological order, and then at section 7 draws conclusions that include a systemic view of the current institutional dynamics, a provisional legal analysis on the basis of existing rules and policy suggestions.

1. INTRODUCTION

This in depth analysis updates a previous report commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions of the European Parliament ("PETI") ("Report 2018").¹ We fully make reference to the analysis, concepts and the abbreviations of terms of the Report 2018.

The Report 2018 highlighted that the unilateral extraterritorial reach of FATCA legislation in the U.S. through IGAs and the lack of reciprocity tend to create systemic negative externalities in the form of costs for the financial industry combined with a disincentive towards foreign investments in the U.S.

The Report 2018 also evidenced other negative externalities that affect certain U.S. citizens who have been denominated "*Accidental Americans*". These individuals are currently citizens and/or tax-residents of EU countries, but had automatically acquired U.S. citizenship at birth by being born on U.S. soil (defined by FATCA as "U.S. Persons"), and who retain no ties to the U.S. Two main FATCA problems arise for these individuals: first they were denied banking services by financial institutions in the EU because of FATCA-based costs; second, they were subject to U.S. onerous compliance which is not proportionate to their actual situation of EU law-abiding citizens.

The Report 2018 also emphasized that important negative externalities are those that impact not only on national laws of EU Member States but also on certain aspects of EU law itself. The flow of information from EU financial institutions directly to the IRS in the U.S. that is required by FATCA in fact violates a number of laws (especially banking laws) in the EU. The U.S. has requested changes to these laws and EU Member States sought to accommodate these requests in the form of IGAs. IGAs become part of the domestic laws of the Member States and therefore are indirectly are subject to EU law constraints.

There are two main instances in which FATCA via IGAs conflicts with EU law: in the former situation FATCA Data are retained and transmitted by EU financial intermediaries and create an issue of procedural safeguards and data protection, while in the latter situation data are not acquired by EU financial intermediaries who refuse to provide services, and in this situation the FATCA impact may directly infringe on substantive rights of individuals such as Accidental Americans.

At the outset it is necessary to make two premises in respect to the conclusions of the Report 2018 advising for certain changes to be made:

- on the U.S. unilateral and U.S.-EU bilateral side, neither FATCA legislation nor IGAs have been modified yet to address the problems indicated above and in the Report 2018;
- on the EU unilateral side, no legislative changes have been made: European Data Protection Board ("EDPB")² guidelines should have been adopted before the end of 2019, but have not released yet.

The result of this situation was that in the period 2018-2022 there was no top-down process of change, but instead a dynamic interaction of different actors unfolded in summary as follows:

¹ Garbarino, Carlo. "FATCA Legislation and its Application at International and EU Level." (2018).

² The EDPB is an independent European body, which contributes to the consistent application of data protection rules throughout the European Union, and promotes cooperation between the EU's data protection authorities. The EDPB is established by the General Data Protection Regulation (GDPR), and is based in Brussels.

- the European Parliament adopted the resolution of 5 July 2018 in which advised fundamental actions in relation to FATCA Data;
- PETI continued to receive petitions;
- there were interrogations in the European Parliament to which the Commission responded establishing a policy of “institutional forbearance” as defined further below;
- the Commission and the EDPB emphasized the role of national data protection authorities; and
- the European Court of Justice (“CJEU”) issued important judgments about data protection and transfer that are potentially applicable to FATCA Data.

All together these trends contribute to identify the current situation and this in depth analysis focuses on such developments. This paper will thus describe at sections 2-6 the relevant developments in the period 2018-2022 in chronological order, and then at section 7 will draw conclusions providing a systemic view of the current institutional dynamics, a provisional legal analysis on the basis of existing rules and policy suggestions.

2. ACTION BY PETI AND EUROPEAN PARLIAMENT (2018)

Topical developments occurred in 2018 just after the release of the Report 2018.

- At the beginning of May 2018 PETI was seized with a petition from a collective of European citizens raising concerns about the adverse effects of FATCA, IGAs and the extraterritorial impact of citizenship-based taxation.
- The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation, the "GDPR")³ entered into force on May 25, 2018 repealing the pre-existing Data Protection Directive.
- Further to the position expressed by PETI, in light of the GDPR, and possibly elicited by the Report 2018, the European Parliament adopted a resolution of 5 July 2018 in which - in addition to addressing substantial rights of Accidental Americans - essentially advised several internal UE actions in relation to FATCA data.
- ✓ First, the Parliament stressed the importance of providing an *adequate level of protection for personal data transferred to the U.S.* under FATCA, in full compliance with national and EU data protection law; called on the Member States to review their IGAs and to amend them, if necessary, in order to align them with the rights and principles of the GDPR; urged the Commission and the European Data Protection Board ("EDPB")⁴ to investigate without delay any infringement of EU data protection rules by Member States whose legislation authorises the transfer of personal data to the IRS for the purposes of FATCA, and to initiate infringement procedures against Member States that fail to adequately enforce EU data protection rules.
- ✓ Second, the Parliament *called on the Commission to conduct a full assessment of the impact of FATCA and the U.S. extraterritorial practice on EU citizens*, EU financial institutions and EU economies, taking into account ongoing efforts in France and other Member States, and to explain if a serious discrepancy exists between EU citizens and/or residents in different Member States, especially as regards EU data protection rules and fundamental rights standards as a result of FATCA and 'U.S. indicia'. The Parliament also called on the Commission to conduct a comprehensive assessment of the status of *FATCA reciprocity*, or the lack thereof, across the EU, and compliance by the U.S. with its obligations under the various IGAs signed with Member States.
- ✓ Third, the Parliament *called on the Commission to assess and, if necessary, take action to ensure that the EU fundamental rights and values enshrined in the Charter of Fundamental Rights and the European Convention on Human Rights*, such as the right to privacy and the principle of non-discrimination, as well as EU data protection rules, are respected in the context of FATCA and the automatic exchange of information with the U.S.

An additional important external dimension of the resolution of 5 July 2018 is that the Parliament regretted *the lack of reciprocity of IGAs* signed by Member States, especially in terms of the scope of information to be exchanged, which is broader for Member States than it is for the U.S. and called on all Member States to collectively suspend the application of their IGAs (or the sharing of all information

³ Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

⁴ The EDPB is an independent European body, which contributes to the consistent application of data protection rules throughout the European Union, and promotes cooperation between the EU's data protection authorities. The EDPB is established by the General Data Protection Regulation, and is based in Brussels.

other than that in respect of accounts held in the EU by U.S. citizens resident in the U.S.) until such time as the U.S. agrees to a multilateral approach to automatic exchange of information, by either repealing FATCA or renegotiating FATCA on an EU-wide basis and with identical reciprocal sharing obligations on both sides of the Atlantic.

Consequently the Parliament (i) called on the Commission and the Council to present a joint EU approach to FATCA in order to adequately protect the rights of European citizens (in particular Accidental Americans) and improve equal reciprocity in the automatic exchange of information by the U.S., and (ii) called on the Council to mandate the Commission to open negotiations with the U.S. on an EU-U.S. FATCA agreement, with a view to ensuring the full reciprocal exchange of information, upholding the fundamental principles of EU law, as well as the Payment Accounts Directive ("PAD"), and allowing Accidental Americans to relinquish their unwanted U.S. citizenship on a no-fees, no-filings, no-penalties basis.

3. EDPD POSITIONS AND SCHREMS II CASE (2019-2020)

The EDPD adopted on 25 February, 2019, the Statement 01/2019 on the FATCA. The EDPB made reference to the European Parliament resolution of 5 July 2018, and took charge of the call made to it to review the existing data protection safeguards under the legislation authorising the transfer of personal data to the IRS for the purposes of the FATCA, informing the public that it has initiated work on the preparation of guidelines that provide information to interested stakeholders on the elaboration of transfer tools based on Articles 46 (2) (a) and 46 (3) (b) of the GDPR. As mentioned, the EDPD guidelines were expected before the end of 2019, but have not released yet.

PETI hosted on 12 November 2019 a Public Hearing "FATCA and its extraterritorial impact on EU citizens" in order to facilitate an exchange of views between the various stakeholders and find solutions to the issues faced by EU citizens affected by FATCA.

A PETI petition was filed in 2020 by a retired Dutch KLM pilot named Ronald Ariës, who was born in the U.S. but who went on to grow up with his Dutch parents in the Netherlands⁵.

CJEU decisions in 2020 also established general criteria on data transfer and protection that can be possibly applied to FATCA Data, pointing in the direction of revisions. The "Schrems II case" of October 6 2020⁶ struck down the main mechanism used by the EU to protect the personal (non-tax) data of EU citizens when it is transferred and sets guidelines that, with adjustments, can be extended to the transfer of personal tax data.

The CJEU in the Schrems II Case declared the European Commission's EU-U.S. Privacy Shield Decision invalid, and, whilst, the CJEU upheld the use of Standard Contractual Clauses, provided clarity around the considerations that organisations and authorities when transferring personal data.

Finally, On 28 October 2020 the European Data Protection Supervisor ("EDPS")⁷ issued an Opinion 6/2020 on a proposal for an amendment of Council Directive 2011/16/EU relating to administrative cooperation in the field of taxation which has some bearing on FACTA-related problems. The EDPS put forward recommendations aiming at minimizing the impact of a Commission's legislative proposal amending Directive 2011/16/EU on the fundamental right to privacy and to the protection of personal data of individuals.

These recommendations were intended to ensure compliance with the applicable data protection legal framework, while avoiding jeopardizing the efficacy and efficiency of the administrative action on the fight against tax evasion and so have a bearing on FATCA Data. In this regard the EDPS called for particular attention to the implementation of the principles of data protection by design and by default, as well as data minimisation and data accuracy in the context of automatic exchanges of information between national tax authorities.

⁵ Petition No 1470/2020 by Ronald Ariës (Dutch) on problems with FATCA following a change of bank.

⁶ Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems (C-311/18).

⁷ EDPS is an independent supervisory authority whose primary objective is to ensure that European institutions and bodies respect the right to privacy and data protection

4. THE EDPB APPROACH AND ACTIVISM AT EP AND PETI (2021)

In 2021 there were two parallel trends: on the one hand, the institutional approaches of the EDPB emerged while several Parliamentary questions elicited clarifications of the Commission's approach, and on the other hand, there was activism at the level of the European Parliament and PETI.

4.1. The EDPB approach

The EDPB issued statement 4/2021 on 13 April 2021⁸ in which it recalled the principles enshrined in Article 96 of the GDPR and Article 61 of the Law Enforcement Directive ("LED")⁹, according to which existing international agreements involving international transfers of personal data which comply with Union law as applicable prior to the entry into force of the Regulation or Directive remain in force until amended, replaced or revoked. The EDPB considered that, in order to ensure that the level of protection under the GDPR and the LED is not undermined when personal data is transferred outside the Union, consideration should be given to the aim of bringing these agreements in line with the GDPR and LED.

On that basis, in the same statement, the EDPB invited Member States to assess and, where necessary, review their international agreements that involve international transfers of personal data, such as those relating to taxation (e.g. to the automatic exchange of personal data for tax purposes and obviously FATCA) to determine whether further alignment with current EU legislation, case law and EDPB guidance might be needed.

The EDPB statement also indicated that national data protection authorities, as the enforcers of the data protection rules, have an important role in providing assistance and advice to Member State authorities in this context.

As a matter of fact in making these indications in 2021 the EDPB initiated an approach of institutional deference to Member States and data protection national agencies. In its Statement 4/2021 the EDPB supported the role of national data protection authorities when it comes to the transfer of data outside of the EU.

This approach can be referred to the Schrems I and Schrems II cases, in which the CJEU held as follows (at para 43 and 121 respectively):

"43 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

"121 ... unless there is a valid Commission adequacy decision,¹⁰ 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

⁸ Available at: https://edpb.europa.eu/system/files/2021-04/edpb_statement042021_international_agreements_including_transfers_en.pdf.

⁹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

¹⁰ According to Article 45 of the GDPR a transfer of personal data to the U.S. may take place without any specific authorisation if the Commission has decided that the U.S. ensures an adequate level of protection ("adequacy decision"); for details see *infra* section 7.

Emphasising the role of national data protection authorities, in a judgement on 15 June 2021 the CJEU also 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'¹¹.

The EDPS, in parallel to these activities of the EDPB during 2021 following the Schrems II case, pursued and launched various activities and initiatives in the framework of the EDPS' Strategy for EU institutions, bodies, offices and agencies ("EUIs") to comply with such a judgment.¹² The strategy aimed to ensure and monitor the compliance of EUIs with the Schrems II case concerning transfers of personal data outside the EU and the European Economic Area (EEA), in particular the U.S.. As part of the strategy, the EDPS pursued three types of actions: investigations; authorisations and advisory work; and general guidance to assist the institutions in discharging their duty of accountability.

The EDPS issued a number of decisions on transfers of personal data to non-EU/EEA countries. EDPS decisions are based on assessing whether the tools that the EUI in question envisages to use to transfer personal data outside of the EU/EEA affords an essentially equivalent level of protection for individuals' personal data as in the EU/EEA.

4.2. Activism at EP and PETI

On 18 March, 2021 the Nederlandse Accidental Americans ("NLAA"), filed a petition No. 0323/2021, calling for change in the way that the EU allows companies and governments to share the personal and financial data of Accidental Americans. This is the fourth petition currently before PETI, adding pressure to address critical aspects of FATCA and also highlighting data protection concerns as a result of the way FATCA obliges EU banks and financial institutions to report to the U.S. on the bank accounts of Accidental Americans.

In the petition the NLAA asked the European Parliament to "take action to put an end" to the way the "personal data" of "bi-national European/American citizens" is "being routinely exchanged with a non-member state" (the U.S.), in compliance with FATCA, and called on the European Parliament to end the way they say "[certain] financial institutions are denying [dual EU/American citizens] access their services, or even prohibiting them from purchasing shares of mutual funds" that other European investors are able to buy, and to "mandate the European Securities and Markets Authority to [investigate] the national competent authorities that allo" this alleged discrimination".

The petition continues by noting that the situation is resulting in "discrimination based on nationality, breaching Article 18 of the TFEU, and Article 21.2 of the Charter of Fundamental Rights," but that "some national authorities in charge of financial markets have ignored this discrimination" and that, although the EU "is completely aware of the situation, it has never acted to address it."

The petition ends with a request that the European Commission "negotiate with the U.S. authorities to achieve the right for the bi-national European/American citizens to renounce [their] U.S. citizenship without facing any kind of hindrances, entering into compliance with the IRS, or paying the exit tax."

In July 2021 another FATCA-related petition was filed by an American resident in the Netherlands. In December 2021 the France-based Association of Accidental Americans filed a complaint against the U.S. against the U.S. State Department over the U.S.'s citizenship renunciation fee, on grounds that it violates the U.S. Constitution and international law.

¹¹ Facebook v. Gegevensbeschermingsautoriteit (C-645/19).

¹² EDPS' Schrems II Strategy, published on 29 October 2020.

5. PARLIAMENTARY QUESTIONS AND THE APPROACH OF THE COMMISSION (2021)

In 2021 there were additional evolutions: on the one hand, several Parliamentary questions elicited clarifications by the Commission about its approach, and on the other hand, there was activism at the level of the European Parliament and PETI.

In 2021 a series of Parliamentary questions was also initiated which evidenced a strategy of the Commission which can be defined of “*institutional forbearance*”¹³. The Commission espoused the EDPB approach of deferring to Member States and developed the strategy of “*institutional forbearance*” noting that *national data protection authorities are responsible for monitoring and enforcing the application of EU data protection rules* and that in 2018, those national authorities identified no grounds to intervene with respect to FATCA¹⁴ and that they were at that time looking into this issue again at the level of the EDPB.

In a Parliamentary question of 29 January 2021, the Commission replied that it was aware of FATCA’s possible implications, such as banks terminating these clients’ accounts and difficulties in switching banks and that it regularly informed the PETI of any developments on this file. The Commission also noted that it had raised this issue several times bilaterally with the U.S. authorities and that the U.S. administration took, in 2019, initiatives aimed at providing assistance to the U.S. nationals and financial institutions concerned. The U.S. authorities clarified the implications for banks of not reporting U.S. Tax or Social Security Identification Numbers and gave support to U.S. nationals abroad on issues such as how to obtain a Social Security Number and how to cease to be a U.S. citizen. The U.S. also adopted a new procedure that made it more affordable to relinquish U.S. citizenship in cases where tax liabilities are reasonably limited. The Commission also referred that the German Presidency of the Council wrote to the U.S. Treasury on 8 December 2020 to open a dialogue with a view to possible further initiatives.¹⁵

In a Parliamentary question of 25 October 2021 the Commission again replied that the monitoring and enforcement of EU data protection rules falls under the competence of national data protection authorities and courts¹⁶. The Commission also noted that the EDPB with statement 4/2021 on 13 April 2021 had invited Member States to assess international agreements concluded before the entry into force of the GDPR, to determine whether further alignment with EC law was needed¹⁷ and that the Commission was in regular contact with Member States, the EDPB, and the U.S. authorities on FATCA.

The Commission stated that concrete improvements in the situation of Accidental Americans had already been achieved but that some legal uncertainties for EU financial institutions applying FATCA rules still persisted creating a risk of sanctions for the banks and a risk of closure of accounts of consumers unable to provide some information.

¹³ The supranational politics of forbearance has been defined as the deliberate under-enforcement of the law (see: Kelemen, R. Daniel, and Tommaso Pavone. *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union*, Law Enforcement and the Politics of Supranational Forbearance in the European Union (2021). These authors explain why the European Commission became reluctant to launch infringements against European Union member states hypothesizing that aggressive enforcement was jeopardizing intergovernmental support for the Commission’s policy proposals and that the Commission sacrificed its role as guardian of the Treaties to safeguard its role as engine of integration.

¹⁴ Letter of the Chair of the ART 29 WP to FATCA, 8 February 2018 available at: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=614217

¹⁵ Letter made public through Council document n. 13977/20 of 16 December 2020.

¹⁶ Letter of the article 29 Working Party of 8 February 2018, cit..

¹⁷ Available at: https://edpb.europa.eu/our-work-tools/our-documents/other-guidance/statement-042021-international-agreements-including_en.

The Commission remarked that the Payment Accounts Directive¹⁸ ("PAD") grants consumers legally resident in the Union the right of access to a payment account with basic features, but the Commission also noted that the application of FATCA is not, per se, a breach of PAD, which does not set rules about the documentation to be presented by the consumer opening a payment account.

¹⁸ Directive 2014/92/EU: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0092>

6. LATEST DEVELOPMENTS (2022)

In 2022 Parliamentary questions evidenced the stance of the Commission in respect to negotiations with the U.S. about FATCA and there were the first responses by the U.S.

6.1. Commission position about negotiations with the U.S.

In a Parliamentary question of 11 January 2022 the Commission shed light on the complexity of international initiatives relating to FATCA by affirming that *any possible negotiation on behalf of the EU with the U.S. for replacing the existing bilateral FATCA agreements would require not only a unanimous Council Decision mandating the Commission to engage in such negotiations, but also the preparedness of the U.S. to adhere to the current standards of exchange of tax information in place of FATCA.*

The Commission also confirmed that the monitoring and enforcement of EU data protection rules fall under the competence of national data protection authorities and courts and stated that while the EDPB confirmed in the past that there had been no occasions where these national authorities ‘had to prohibit the processing and transfer of personal data to the U.S. under the FATCA regime’¹⁹, nevertheless they continued to assess the impact of such agreements on data protection rules, including as part of ongoing national investigations. This also includes advising and assisting the Member States in their assessment of international agreements concluded prior to the GDPR to determine whether further alignment with EC law is needed²⁰.

The Commission reiterated that the monitoring and enforcement of EU data protection rules fall under the competence of national data protection authorities and courts and that these national authorities confirmed in 2018 that there had been no occasions where they ‘had to prohibit the processing and transfer of personal data to the U.S. under the FATCA regime’²¹.

Again the Commission noted that the EDPB with statement 4/2021 of 13 April 2021 invited Member States to assess international agreements concluded before the entry into force of the GDPR, to determine whether further alignment with EC law was needed²². The Commission informed that it was in regular contact with Member States and the EDPB on this aspect and confirmed that was in regular contact with the U.S. authorities on FATCA. The Commission also confirmed its position that the application of FATCA is not a breach of on the PAD.

On 15 February, 2022, PETI issued a Notice to members about several FATCA-related petitions.²³ In its observations to this Notice, the Commission noted that contacts between EU institutions and the U.S. administration on FATCA are ongoing and that FATCA was, in particular, discussed by the Commission services with high-level representatives of the U.S. administration at the EU-U.S. Joint Regulatory Forum on 24-25 March 2021 and again on 29-30 September 2021 at which the U.S. administration stressed its willingness to cooperate with the Commission to find mutually acceptable solutions to the problems presented by the Commission services.

¹⁹ Letter of the article 29 Working Party of 8 February 2018, cit.

²⁰ See statement 4/2021 of the EDPB of 13 April 2021.

²¹ Letter of the article 29 Working Party of 8 February 2018, cit..

²² Available at: https://edpb.europa.eu/our-work-tools/our-documents/other-guidance/statement-042021-international-agreements-including_en

²³ Petition No 1088/2016 by Mr J.R. (French) on the US’ Foreign Account Tax Compliance Act’s (FATCA) alleged infringement of EU rights and the extraterritorial effects of US laws in the EU; Petition No 1470/2020 by Ronald Ariës (Dutch) on problems with FATCA following a change of bank; Petition No 0323/2021 by G.L. (French), bearing four signatures, on alleged infringement of certain rights of bi-national European/American citizens resulting from FATCA.

The Commission concluded noting that its services are in frequent contact with the Member States, the EU Presidency and the EDPB on this file and that contacts are also held with European banks to ensure access to a basic bank account by, in particular, EU citizens also possessing U.S. nationality. The Commission also added that it views this file with utmost importance and will continue to inform the PETI of any progress made.

6.2. Responses by the U.S.

It is only in 2022 that there were the first responses by the U.S. which can be inferred from their domestic political process. On 7 April 2022, IRS Commissioner Charles Rettig provided an update to members of the U.S. Senate Committee²⁴ and communicated his support for the Bill S. 725 ("Stop Tax Haven Abuse Act") which contains a "reciprocal FATCA" provision in section 202. Rettig stated that "the United States should make good on its promise to other nations now providing taxpayer information under the Foreign Account Tax Compliance Act, P.L. 111-147, to send them similar information in exchange".

Charles Rettig's written testimony signals how important the information obtained by the IRS is through its broad network of relationships and how it leads to successful IRS enforcement efforts against offshore tax evasion. He also noted that: "The ability to exchange information reciprocally is particularly important in connection with the implementation of the FATCA. Currently, however, the U.S. provides less information to foreign governments than we receive from them. The proposal would expand reporting by financial institutions and digital asset brokers in a number of ways – for example, by requiring financial institutions to report the account balance for all financial accounts maintained at a U.S. office and held by foreign persons. These new reporting requirements would enable the IRS to provide equivalent levels of information to cooperative foreign governments in appropriate circumstances to support their efforts to address tax evasion by their residents.

The Reciprocal FATCA Proposal is detailed in the General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals as follows:

- require certain financial institutions to report the account balance for all financial accounts held by foreign persons maintained at a U.S. office;
- expand the current reporting required with respect to U.S. source income paid to accounts held by foreign persons to include similar non-U.S. source payments;
- require financial institutions to report the gross proceeds from the sale or redemption of property held in, or with respect to, a financial account held by a foreign person;
- require financial institutions to report information regarding certain passive entities and their substantial foreign owners; for example, a financial institution maintaining an account for a passive entity that is a trust would be required to obtain and report to the IRS information on the owner(s) of the trust.

In revenue terms, FATCA has fallen short of expectations. At the time of enactment in 2010, the Joint Committee on Taxation forecast that FATCA would raise \$8.7 billion over the next 10 years but in the first 12 years the IRS has spent nearly \$600 million on enforcement but has only managed to collect \$14 million in penalties in return. The U.S. Treasury Inspector General for Tax Administration (TIGTA) report for 2021 contains six recommendations for how the IRS might deal with FATCA in the future that mainly address the action to be taken by the IRS to improve FATCA data collection.

²⁴ Charles Rettig's written testimony before the Senate Finance Committee on the Filing Season and IRS Budget (7 April 22).

7. LEGAL ANALYSIS AND CONCLUSIONS

In this section 7 a summary of the developments is first presented, followed by a provisional legal analysis of the situation as it stands at the present time and by policy suggestions.

7.1. Summary of the developments

As mentioned at the beginning at sections the EDPB guidelines that should have adopted 2019 have not been released. Thus in the period 2018-2022 a dynamic interaction of different actors unfolded. The finding of this paper is that in spite of the fact that already on 5 July 2018 the European Parliament in its resolution advised both unilateral and multilateral actions *vis-a-vis* the U.S., the Commission responded establishing a policy of “institutional forbearance”, the EDPB supported action by national data protection authorities, while there was no significant response on the side of the U.S..

This policy of the Commission basically (i) defers action for monitoring and enforcing the application of EU data protection rules to national data protection authorities, and (ii) subordinates any possible negotiation on behalf of the EU with the U.S. for replacing the existing IGAs to an unanimous Council Decision mandating the Commission to engage in such negotiations.

At the same time the U.S. are not willing to adhere to multilateral agreements for the exchange of information in place of FATCA or to radically reform FATCA and IGAs and there have been only slight indications in the direction of reciprocity for the exchange of tax data.

The Commission’s position to defer action to national data protection authorities is directly confirmed by positions of the EDPB of deferring to national data protection authorities and indirectly by the fact that the EDPB has not formally issued guidelines.,

With regard to alleged violations of EU law by FATCA there have been several petitions at PETI and continuing activism in the policy process and in courts by national associations of Accidental American, while it is possible that the new judicial decisions will be issued in the future at EUCJ and national level following the Schmers I and Schmers II cases.

These contingent factual conclusions do not prevent however legal analysis allowed by the fact that the GDPR is in force since 2018 providing a comprehensive regulatory framework that also include protection and transfer of tax data, including FATCA Data.

7.2. Legal analysis

Article 23 of the GDPR lists a set of restrictions to the right of data protection and provides that Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in the GDPR *when such a restriction respects the essence of the fundamental rights and freedoms* and is a *necessary and proportionate measure in a democratic society to safeguard* a set of societal values. Among them, in respect to FATCA Data, Article 23, lett. (e), indicates “other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security.”

It follows that to prove that the restrictions imposed in relation to FATCA Data are justified under the GDPR, the following requirements must be met: (i) such restrictions must be introduced in Union or Member State law; (ii) such restrictions respect the essence of the fundamental rights

and freedoms; and (iii) such restrictions are necessary and proportionate measures in a democratic society.

Requirement (i) is met by IGAs in so far as they become part of EU domestic laws, while requirement (ii) about the “essence of the fundamental rights and freedoms” implies a complex legal analysis of those fundamental rights in the digital world where tax and financial “big data” can be used to “profile” the behaviour of taxpayers which cannot be conducted here.²⁵

So on the assumption that FATCA Data transfers, for the time being, respect fundamental rights and freedoms, the issue is about requirement (iii), i.e. whether FATCA restrictions operating within the EU through IGAs are *necessary and proportionate measures*.

In this respect, there are certain critical indicators of the lack of these requirements in current FATCA practice. First, U.S. expatriates generally do not use the EU financial system to engage in offshore tax evasion. Second, FATCA does not request the existence of indicia of unlawful behaviour of taxpayers, so that it raises compliance costs for persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote, with tax evasion. Finally, most of the non-resident U.S. Persons falling under FATCA obligations do not effectively owe U.S. taxes so that FATCA just expose them to onerous fines and penalties for even inadvertent filing and reporting errors.

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.

In this respect, it is worth noting that Articles 12-15 of the GDPR expressly protects the rights of the data subject in terms of transparency and access to personal data and clearly applies to FATCA. Article 12 of the GDPR imposes on the controller the duty to take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language.

Article 13 defines the information to be provided where personal data – such as FATCA Data – are collected from the data subject and regulates access to personal data. Article 14 defines the information to be provided where personal data – such as FATCA Data – have not been obtained from the data subject. Finally Article 15 establishes the right of access by the data subject providing that the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data – such as FATCA Data – concerning him or her are being processed, and, where that is the case, access to the personal data and information about the data being used.

The IGAs bypass these data protections afforded by the GDPR as they do not contain provisions that would require a EU financial intermediary to provide notice to its clients that are qualified under FATCA as U.S. Persons that information is being collected on for eventual sharing with U.S. tax authorities. The IGAs should incorporate such notice provisions to encourage transparency with respect to bank

²⁵ See for example: Politou, E., Alepis, E., & Patsakis, C. (2019). Profiling tax and financial behaviour with big data under the GDPR. *Computer law & security review*, 35(3), 306-329.

information collection practices. A client who objects to such collection practices would hence be able to choose another EU financial institution that is exempt from the IGAs.

In conclusion *in the current situation in which EDPD guidelines are still pending, transfers of FATCA Data are generally subject to GDPR rules.* In this respect Chapter V of the GDPR introduces now special safeguards to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined when FATCA Data are transferred to the U.S.

According to Article 44 transfers of personal data – such as FATCA Data - which are undergoing processing or are intended for processing after transfer to the U.S. shall take place only if the conditions laid down in Chapter V are complied with by the controller and processor, including for onward transfers of personal data from the U.S. to another third country. According to Article 45 a transfer of such personal data to the U.S. may take place without any specific authorisation *if the Commission has decided that the U.S. ensures an adequate level of protection ("adequacy decision")*. This decision shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the U.S.

As mentioned, according to Article 46 in the absence of an adequacy decision of the Commission pursuant to Article 45(3), a controller or processor may transfer personal data such as FATCA Data to the U.S. only if the controller or processor has provided "*appropriate safeguards*", and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

The EDPB in 2019 announced guidelines on transfer tools based on Articles 46 (2) (a) and 46 (3) (b) of the GDPR. As suggested by the EDPB these appropriate safeguards may be provided for in the case of FATCA Data,:

- by IGAs which are legally binding and enforceable instruments concluded between public authorities and bodies (Article 46 (2) (a)); or
- by provisions to be inserted into agreements between financial intermediaries and the IRS that are administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights (Article 46 (3) (b)).

So far the Commission did not issue an adequacy decision with regard to FATCA Data, while the "appropriate safeguards" indicated above have not been included in IGAs or in agreements between financial intermediaries and the IRS. The conclusion is that *Article 49 should apply to FATCA Data pending the enactment of EDPB guidelines.*

According to Article 49 in this case the transfer of FATCA Data to the U.S. shall take place *only on one of the conditions that the transfer is necessary for important reasons of public interest (Article 49, lett. d)*. Therefore, waiting for the EDPB guidelines, essentially the issue that needs to be addressed is whether the transfer of FATCA Data to the U.S. is necessary for "important reasons of public interest" (Article 49, lett. d), namely the prevention of tax evasion.

7.3. Policy suggestions

This paper concludes confirming the policy suggestions of the Report 2018 and advised by the European Parliament in the resolution of 5 July 2018 that attain to (i) bilateral EU-U.S. policies, (ii) unilateral EU policies, and (iii) multilateral policies in a broader sense. These policy suggestions are obviously impacted by the institutional constraints that have been highlighted in this in depth analysis.

Bilateral EU-U.S. policies essentially imply the modifications of IGAs to align with GDPR and providing full reciprocity in the transfer of tax data between the EU and the U.S.

Unilateral EU policies are a second-best choice, should bilateral policies fail. There are three main actions in this area.

- The U.S.'s failure to honour reciprocal guiding information exchange could lead to an investigation into the possibility for the EU of enacting "*blocking legislation about reciprocity*" that would apply until such time as the reciprocity is re-established in relation to FATCA.
- "*Blocking legislation about selected items*" would apply until such time as certain FATCA criticalities in respect to Accidental Americans are mitigated by the U.S. If the EU were to block the application of FATCA (pending resolution of the outstanding issues surrounding FATCA) and, as a result, the U.S. were to impose a 30% withholding on U.S. source payments to EU financial institutions requested by FATCA,²⁶ then the EU could apply a mirroring 30% withholding on EU source payments to U.S. financial institutions and their operations in the EU.
- To *allow only transfers from the EU of FATCA Data associated with U.S. Persons who are not EU residents* until a predefined set of bilateral measures are adopted, for example: (a) renegotiation of IGA to afford reciprocal treatment with respect to exchange of tax information; and (b) establishment of safeguards to data protection under GDPR. This would imply that FATCA would continue to operate in respect to transfers of FATCA Data associated with U.S. persons who are not EU residents or citizens, but there would be standstill clause for transfers of FATCA Data associated with U.S. persons who are EU residents or citizens.

There are also options on the direction of *multilateral policies* in a broad sense. Automatic exchange of tax data and FATCA were established as multilateral measures in the fullest sense of the elimination of any kind of free rider to a global system of full sharing of tax information among countries. Multilateralism in the exchange of tax information should therefore be revived at EU-U.S. and multilateral level going back to the original spirit of FATCA as an initiator of such multilateralism, meant as a common method to share tax information to counteract tax evasion on a global scale.

²⁶ FATCA provides that a 30% withholding on U.S. source payments to EU financial institutions must be imposed if EU financial institutions do not respect the strict requirements of FATCA.

This in depth analysis updates a previous report commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs and describes the most relevant developments in the period 2018-2022 in chronological order and then draws conclusions which include a systemic view of the current institutional dynamics, a provisional legal analysis on the basis of existing rules and policy suggestions

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