Autorité de protection des données
Gegevensbeschermingsautoriteit

Litigation Division Decision

on the merits 61/2023 of 24 May 2023

File number: DOS-2021-00068

Subject: Complaint concerning the transfer by the Federal Public Service (FPS) Finance of personal data to the U.S. tax authorities in execution of the agreement "FATCA"

The Contentious Chamber of the Data Protection Authority, consisting of Mr. Hielke Hijmans, chairman, and Mr. Yves Poullet and Mr. Christophe Boeraeve, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the *protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC* (General Data Protection Regulation), hereinafter "GDPR" ;

In view of the Act of December 3, 2017, *establishing the Data Protection Authority* (hereinafter DPA);

Having regard to the Act of July 30, 2018, *relating to the protection of individuals with respect t o processing of personal data* (hereinafter LTD);

Having regard to the Rules of Procedure as approved by the House of Representatives on December 20, 2018 and published in the *Belgian Official Gazette* on January 15, 2019;

Considering the documents in the file;

Made the following decision regarding:

Plaintiffs: Mr. **X**,

Hereinafter "the first complainant";

The non-profit organization Accidental Americans Association of Belgium (AAAB), whose registered office is located at clos Albert Crommelynck, 4 bte 7 in 1160 Brussels,

Hereinafter "the second plaintiff";

Hereinafter referred to together as "the plaintiffs";

Having both for council Mr. Vincent Wellens, lawyer, whose office is established Chaussée de la Hulpe, 120 in 1000 Brussels.

The defendant :

The **Federal Public Service Finance (FPS Finance)** with its registered office at Boulevard du Roi Albert II, 33 in 1030 Brussels,

Hereinafter referred to as "the Respondent";

Having for counsel Mr. Jean-Marc Van Gyseghem, lawyer, whose office is established boulevard de Waterloo, 34 in 1000 Brussels.

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I. FACTS and PROCEEDINGS

1. On December 22, 2020, the plaintiffs file a complaint with the Data Protection Authority (DPA) against the defendant. The complaint denounces the unlawfulness of the transfer of personal data relating to the first plaintiff as well as relating to Belgian accidental Americans (whose interests the second plaintiff defends) by the defendant to the American tax authorities in the context of the application of the intergovernmental "FATCA" agreement concluded between the Belgian State and the United States, as well as other breaches of the GDPR attributable to the defendant in this context.

2. The facts giving rise to the complaint are detailed below in points 3 to 23, followed by the proceedings leading up to the present decision (points 24 to 111).

I.A. The relevant facts

3. The first complainant resides in Belgium and has dual Belgian and American nationality. With respect to the latter nationality, the first Complainant describes himself as an *accidental* American because he was only born in the United States at Stanford without having retained any significant ties to that country. The complainant resides in Belgium.

4. The second plaintiff is a non-profit association under Belgian law (ASBL) whose purpose is to defend and represent the interests of persons of Belgian-American nationality - such as the first plaintiff - who reside outside the United States. The purpose of the association is described as follows in Article 4 of its September 28, 2019 charter:

> *"The purpose of the association is to defend the interests of natural persons of American nationality residing outside the United States, against the harmful effects of the extraterritorial nature of American legislation.*
>
> *The association pursues the realization of its object by all means of action and including by :*
>
> - *representation of interests to the Belgian and American public authorities and with the European institutions*
> - *the realization of communication supports*
> - *the organization of events*
> - *Collaboration with law professors to make available legal information for the use of members*
> - *legal action to defend the interests of persons of Belgian-American nationality*

The means listed above are indicative and not limitative.

5. Because of his American nationality, the first plaintiff is considered to be subject to the control of the American tax authorities in view of the American tax system. This system is based on the principle of taxation on the basis of *nationality* and applies to the accidental American as well as to any other taxpayer established in the United States or having activities in relation to this country, the fact that his residence is not established in the United States being irrelevant. Only certain exceptions apply to non-residents in the United States.

6. In order to facilitate the collection of relevant information by the Internal Revenue Service (IRS) for the purpose of taxing Americans residing abroad (including accidental Americans such as the first plaintiff), the U.S. government has entered into intergovernmental agreements with various states around the world. These agreements require domestic financial institutions (such as banks) to provide data on these overseas Americans to the domestic tax authority (such as the defendant), which is then required to transfer the data to the IRS.

7. It is in this context that the "*Agreement between the Government of the Kingdom of Belgium and the Government of the United States of America to improve International tax compliance and to implement Fatca",* signed by the representatives of the Governments of the Kingdom of Belgium and the United States of America on April 23, 2014, intervenes. This agreement is commonly and hereinafter referred to as the "FATCA Agreement "[1], as it implements the U.S. Foreign Account Tax Compliance Act from which the acronym "FATCA" is derived. A comparable bilateral intergovernmental agreement has also been signed with various states around the world, including the member states of the European Union (hereafter EU).

8. The Belgian Law of December 16, 2015 *regulating the communication of financial account information by Belgian financial institutions and the FPS Finance, in the context of an automatic exchange of information at the international level and for tax purposes* (hereinafter the Law of December 16, 2015), which is invoked by the defendants in several respects, is part of the more *general* context of the exchange of tax data between States, including but also beyond the exchanges with the US IRS in execution of the agreement "FATCA" mentioned above.

9. The purpose of this legislation, as defined in Article 1, is to regulate the obligations of Belgian financial institutions and of the defendant with regard to the information that must be communicated to a competent authority of another jurisdiction in the context of

[1] This intergovernmental "FATCA" agreement signed with Belgium was the subject of an assent law of December 22 2016.

of an automatic exchange of information relating to financial accounts, organized in accordance with the commitments made by the Belgian State and resulting from the texts below:

- Council Directive 2014/107/EU of 9 December 2014 *amending Directive 2011/16/EU as regards automatic and compulsory exchange of information in the field of* taxation[2];
- The Joint OECD/Council of Europe Convention on *Mutual Assistance in Tax Matters* of January 25, 1988 *(the Multilateral Convention* or "the Convention");
- A bilateral convention for the avoidance of double taxation in respect of taxes on income ;
- A bilateral tax information exchange t r e a t y (such as the "FATCA").

10. The December 16, 2015 Act became effective on January 10, 2016 with respect to information to the United States (Section 20)[3].

11. On April 22, 2020, the first plaintiff received a letter from Bank Z, with which he has bank accounts. The subject line of the letter reads: *"Confirmation of your status as a U.S. person for purposes of Fatca and other regulatory purposes".* The letter asks the complainant to confirm that he or she is neither a U.S. citizen nor a resident of the United States for purposes of fulfilling Z Bank's obligations under the applicable automatic data exchange regulations. The complainant is asked to complete a specific form from the US authorities for this purpose. The letter explains that the objectives of the U.S. legislation are, on the one hand, to identify all accounts held by U.S. citizens and/or residents with non-U.S. financial institutions and, on the other hand, to exercise better control over income and securities held by Americans. The letter specifies that if the signed and completed document is not returned, the law obliges the bank to consider the first complainant as a "US Person" by default: consequently, his contact details as well as information on his assets, income and gross proceeds will continue to be communicated to the relevant tax authorities. Finally, the letter specifies that if the first complainant is a US citizen or resident, he/she will have to go to the branch to complete the necessary formalities.

[2] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards automatic and compulsory exchange of information in the field of taxation, OJ 2014, L 359/1.

[3] The Law of December 16, 2015 was published in the Belgian Official Gazette on December 31, 2015. In its article 20, the law provides that it
will become effective 10 days after its publication with respect to information destined for the United States.

12. On May 12, 2020, the first plaintiff is informed by Bank Z that since he had several bank accounts in Belgium in 2019, these are subject to the obligation to report to the defendant in execution of the legal obligations incumbent on banking institutions with which tax residents of a country other than Belgium have, as is his case, one or more bank accounts.

13. In this second letter, Bank Z thus tells the first plaintiff that it is required to report the following data to the defendant: the name, address, jurisdiction of which the person is a resident, the tax identification number (TIN) or date of birth of each person to be reported, the account number(s), the balance of the account or its value as of December 31 (special case: If the account is closed, a zero amount is reported), interest, dividends, proceeds from the sale, redemption or repayment of financial audits and other income generated by the financial assets held in the account.

14. Attached to this letter is Bank Z's data on the first plaintiff, which will actually be communicated to the defendant in fulfilment of this reporting obligation.

15. This letter of May 12, 2020 makes *no reference to the "FATCA" agreement*. In addition to the list of data mentioned above and information on the principle of automatic exchange of financial information to which bank Z is exposed to be subject, the first complainant is, for any questions, referred to the defendant in the following terms: *"For more information on the automatic exchange of financial information, you can consult the website of the FPS Finance or the OECD. You can also call us at XXX*".

16. In a third letter dated May 18, 2020, Bank Z again contacts the first complainant and (a) explains in general terms the principle of the FATCA agreement, (b) lists the data to be reported in this context and (c) indicates that if the complainant had one or more accounts subject to the reporting obligation in 2019, it is obliged to report them to the competent tax authorities. Bank Z states that for further information on the FATCA agreement, the first complainant can call his bank at the telephone number indicated.

17. On December 22, 2020, the same day he filed a complaint with the DPA with the second complainant (complaint no. 1 - point 1), the first complainant requested that the defendant erase the personal data it had obtained from the banks under the "FATCA" agreement, pursuant to Article 17.1.d) of the GDPR. The first plaintiff also requests that the defendant take the necessary measures to obtain this deletion from the IRS or, failing that, the limitation of their processing pursuant to Article 18.1.b) of the GDPR. In any

In any event, the first plaintiff is requesting an immediate halt to the exchange of information between the defendant and the IRS that takes place every year on the basis of the "FATCA" agreement: in his view, this transfer involving personal data concerning him would indeed disregard several key principles of the right to the protection of personal data as applicable in Belgium and, more generally, within the EU. The second plaintiff is making the same request on his behalf for the benefit, in accordance with its statutory purpose, of Belgian accidental Americans.

18. More specifically, the complainants support their claim on the following grounds: the unlawfulness of the transfer of personal data to the IRS under the "FATCA" agreement (in violation of Articles 45, 46 and 49 of the GDPR); the failure to comply with the principles of purpose limitation (Article 5.1.b) of the GDPR), proportionality and data minimization (Article 5.1.c) of the GDPR) and limited retention (Article 5.1.e) of the GDPR); failure to comply with the principle of transparency (Articles 12 to 14 of the GDPR) and failure to carry out a data protection impact assessment (DPA - Article 35 of the GDPR). This letter details each of the alleged grievances. As these allegations also form the basis of the complaint filed with the DPA, they will be explained below when the Contentious Chamber discusses the respective points of view of the parties, including the complainants (points 54 et seq.).

19. In its reply letter of March 30, 2021, the defendant refuses to grant the plaintiffs' request, arguing that there is no basis for the alleged unlawfulness. The defendant explains that the legal basis for the transfer it is making is the agreement
"FATCA" as well as in the Law of December 16, 2015. The Respondent further invokes Article 96 of the GDPR and concludes in support of it that if the Complainants fail to demonstrate how the FATCA Agreement would infringe EU law before May 24, 2016, their claims are unfounded. The Respondent also refutes all other claims against it.

20. For the proper understanding of the decision, the Contentious Chamber quotes the following article at the outset
96 of the GDPR entitled "Relationship with International Agreements" which provides:

> *"International agreements involving the transfer of personal data to third countries or international organizations that were concluded by Member States before 24 May 2016 and that comply with Union law as applicable before that date shall remain in force until they are amended, replaced or revoked."*

21. Following this response from the defendant, only the first plaintiff renews its request on July 9, 2021, pointing out that the said data transfers from the defendant to the IRS are also illegal under Directive 95/46/EC.[4]

[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31.

22. In a decision dated October 4, 2021, the defendant refused to grant the first plaintiff's requests, rejecting the arguments developed by the latter with regard to the alleged breaches of both the GDPR and Directive 95/46/EC. For a proper understanding of the rest of its decision, the Contentious Chamber specifies that the defendant also considers that *"in the present case, the condition of a basis resting on an important ground of public interest - within the meaning of Article 49.1(d) of the [RGPD5] or Article 26.1(d)[6] of Directive 95/46/EC] - is well met since the basis for the lawfulness of the disputed processing is an international agreement [i.e., the "FATCA" agreement] and the law of December 16, 2015."*

23. An action for annulment before the Council of State (CE) was filed against this administrative decision of the Respondent. In their pleadings and during the hearing before the Contentious Division, the parties indicated that this appeal was still pending. They stated that the Respondent had requested that the EC await the outcome of the proceedings before the DPA before making a decision. The plaintiff, for its part, requested that the EC refer questions to the Court of Justice of the European Union (hereinafter CJEU) for a preliminary ruling on the legal basis for the transfers made under the FATCA agreement, on the admissibility of the use of Article 49.1. d) of the GDPR or its equivalent in Directive 95/46/EC if Article 96 of the GDPR is applied, as well as the respect of the principles of transparency, purpose, minimization and limited retention as enshrined in the relevant articles of the GDPR or their equivalents in Directive 95/46/EC if the application of Article 96 of the GDPR is retained.

I.B. Retroacts of the procedure

24. As mentioned in point 1 above, the complainants file a complaint with the ODA on 22 December 2020 (complaint #1**)**.

I.B.1. Admissibility of the complaint

25. On March 22, 2021, **Complaint No. 1 insofar as it is brought by the first complainant is declared admissible** by the Front Line Service (FLS) of the ODA on the basis of articles 58

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[5] Article 49.1. d) of the GDPR: *"In the absence of an adequacy decision under Article 45(3) or appropriate safeguards under Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or to an international organization may take place only under one of the following conditions: (...) d) the transfer is necessary on important public interest grounds."*

[6] Article 26.1. d) (Derogations) of Directive 95/46/EC: *"By way of derogation from Article 25 and subject to contrary provisions of their national law governing specific cases, Member States shall provide that a transfer of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2) may be carried out, provided that: (…) d) the transfer is necessary or legally required for the protection of an important public interest.*

and 60 of the *Act of December 3, 2017 establishing the Data Protection Authority* (hereinafter DPA) and the complaint is referred to the Contentious Chamber pursuant to Article 62, § 1 of the DPA.

26. Complaint No. 1 insofar as it is filed by the **second complainant, on the other hand, is declared inadmissible** on February 12, 2021 by the SPL of the DPA on the grounds that the second complainant does not meet the conditions provided for in Article 220.2. 3° and 4° of the Law of July 30, 2018 *on the protection of individuals with regard to the processing of personal data* (hereinafter LTD)[7].

27. The Contentious Chamber specifies from the outset that on **July 9, 2021, the second complainant** will file a new complaint (complaint no. 2). This complaint consists of a reformulation of her complaint n°1 of December 22, 2020. The second complainant further clarifies her interest in acting. She thus explains that she is acting in her own name, in accordance with her statutory purpose, and not in the name and on behalf of one or more Belgian accidental Americans. The second complainant therefore states that she is not acting as a representative within the meaning of Article 80.1. of the GDPR[8] . The conditions for the application of this article as executed by article 220.2. 3° and 4° of the LDA must therefore, in her view, not be met. The second plaintiff, on the other hand, relies on Article 58 of the LCA, which states that *"any person may file a written, dated and signed complaint or request with the Data Protection Authority".* The second respondent considers itself entitled to file a complaint with the DPA on this basis, especially since the purpose of its complaint is in line with its statutory purpose. It also argues that in its decision-making practice, the DPA has, in support of decision 30/2020 of the Contentious Chamber, for example, recognized that the interest to act is broad and that the

[7] Article 220 of the LTD: § 1. The person concerned has the right to mandate a body, organization or non-profit association to lodge a complaint on his behalf and to exercise on his behalf the administrative or jurisdictional remedies either with the competent supervisory authority or with the judicial order as provided for by the specific laws, the Judicial Code and the Code of Criminal Procedure.
§ 2 In disputes under paragraph 1, a body, organization or nonprofit association shall:
- 1° be validly constituted in accordance with Belgian law;
- 2° have legal personality;
- (3) have statutory objectives of public interest;
- 4° be active in the field of protection of the rights and freedoms of the persons concerned in the context of personal data protection for at least three years.

§ (3) The body, organization or non-profit association shall provide proof, through the presentation of its activity reports or any other document, that its activity has been effective for at least three years, that it corresponds to its corporate purpose and that this activity is related to the protection of personal data.

[8] Article 80.1. of the GDPR "Representation of data subjects": The data subject shall have the right to mandate a non-profit body, organization or association, which has been validly constituted in accordance with the law of a Member State, whose statutory objectives are of public interest and is active in the field of protection of the rights and freedoms of data subjects in the context of the protection of personal data concerning them, to lodge a complaint on his behalf, to exercise on his behalf the rights referred to in Articles 77, 78 and 79 and to exercise on his behalf the right to obtain redress referred to in Article 82 where the law of a Member State so provides.

possibility of filing a complaint is not limited to the natural persons concerned and that a complaint may be brought by associations by virtue of their specific corporate purpose.[9]

28. On October 5, 2021, this Complaint No. 2 will be **declared admissible** by the LPS of the DPA on the basis of Articles 58 and 60 of the LCA. This complaint will be forwarded to the Contentious Chamber pursuant to Article 62, § 1 of the LCA.

29. In view of the above, the Contentious Chamber specifies that in the present decision, the use of the term "the complaint" refers to the two complaints filed (no. 1 and no. 2), which will be joined by the Contentious Chamber (see point 47).

I.B.2. The subject of the complaint

30. The Complainants' complaint seeks, *primarily,* to obtain pursuant to section 58.2(f) and (j) of the GDPR the prohibition, or even suspension, of the transfer of data (those of the first plaintiff and, beyond that, those of all Belgian accidental Americans whose interests the second plaintiff is defending) by the defendant to the IRS pursuant to the "FATCA" agreement.

31. In their reply (points 54 et seq. below), the plaintiffs add that they request, *in the alternative,* that the Contentious Chamber order, pursuant to Article 58.2. f) and j) of the GDPR, that the transfer of data relating to account balances by the defendant to the IRS within the framework of the application of the "FATCA" agreement be prohibited, or even suspended, with regard to both the first plaintiff and the Belgian accidental Americans whose interests the second plaintiff is defending

32. During the hearing held before the Contentious Chamber[10], the complainants clarified that the use of the terms "prohibition or even suspension" is based on the exact wording of Article 58.2. f) and j) of the GDPR and does not imply a request for a *temporary* suspension of the transfers, but rather their outright cessation for the future.

I.B.3. The Inspection Service's investigation

33. On April 20, 2021, the Contentious Chamber decides to request an investigation from the Inspection Service (hereinafter SI), pursuant to articles 63, 2° and 94, 1° of the LCA. On the same date, in accordance with article 96, § 1 of the LCA, the request of the Contentious Chamber to conduct an investigation is transmitted to the SI.

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[9] In this regard, the Contentious Chamber refers to its note on the Complainant's position https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la-position-du-plaignant-dans-la-procedure-au-within-the-contentious-chamber.pdf, in particular point B. (in fine) on page 2. It also refers to its decision 24/2022 and the references cited therein.

[10] See item B of the hearing minutes of January 10, 2023.

34. On May 26, 2021, the SI investigation is closed, the report is attached to the file and the latter is transmitted by the Inspector General to the President of the Contentious Chamber (art. 91, § 1 and § 2 of the LCA).

35. Under the terms of the report, IS concludes that there is, in its words, *"no apparent violation of the GDPR"* (page 5 of the report).

36. The SI bases its conclusion on the fact that the basis for the lawfulness of the transfers of bank data of U.S. nationals (including the first complainant) is based on the "FATCA" agreement and the Law of December 16, 2015. The SI also notes the applicability of the aforementioned Article 96 of the GDPR (point 20).

37. In its review of the compliance of the FATCA agreement with the data protection regulatory framework applicable prior to May 24, 2016, i.e., according to its terms, with Directive 95/46/EC as transposed by the Law of December 8, 1992 *on the protection of privacy with regard to the processing of personal data* (hereinafter "LVP"), the SI notes the following elements

- On December 17, 2014, the Commission on Privacy Protection[11] (hereinafter OPC) issued a favorable opinion 61/2014 subject to strict conditions precedent on the first draft of the future Law of December 16, 2015. The OPC then issued a favorable opinion in its opinion 28/2015 of July 1, 2015 on the second draft of the law which implemented the remarks and conditions issued in its opinion 61/2014.
- Under its deliberation AF 52/2016 of December 15, 2016, the Sectoral Committee for Federal Authority[12] (hereinafter SCFA) of the OPC authorized the Respondent to transmit to the IRS the financial information of reportable accounts of U.S. taxpayers sent to it by financial institutions under the "FATCA" agreement. The SI emphasizes that the SCFA has, on this occasion, assessed the admissibility of the tax purposes of the processing as well as the proportionality of the data and the security of the processing. The SCF also ordered the defendant, in compliance with the principle of transparency, to inform the citizen by means of an accessible and comprehensible text on its website about the circumstances in which his personal data (including financial data) may be transmitted to the IRS. The SI notes in this respect that a web page dedicated to "FATCA" is

[11] The Commission for the Protection of Privacy (CPVP) was the Belgian data protection authority within the meaning of Article 28 of Directive 95/46/EC. It was succeeded by the Data Protection Authority (DPA) as of May 25, 2018 in execution of Article 3 of the LCA.

[12] Article 36bis of the Privacy Act provided that any electronic communication of personal data by a federal public service or by a public body with legal personality that is under federal authority requires an authorization in principle from the SCFA, unless the communication has already been authorized in principle by another sectoral committee created within the CPVP. The task of the SCFA is to verify whether the communication complies with the legal and regulatory provisions.

available on the Respondent's website. Finally, the SI recalls that, pursuant to article 111 of the LCA[13], the authorizations granted by the sectoral committees of the OPC (such as the CSAF) before the entry into force of this law remain in principle legally valid[14].

38. Finally, the IS dismisses the applicability of the Schrems II[15] ruling of the CJEU. It notes that this judgment invalidates the Privacy Shield, which dealt with the transfer of personal data to the United States for *commercial* purposes (and not for tax purposes including the fight against tax evasion and avoidance as in this case). The SI also refers to Article 17[16] of the Law of December 16, 2015, which refers both to the FATCA agreement and to the agreements to which the latter itself refers, i.e., the aforementioned OECD and Council of Europe Convention.

39. At the end of its investigation, the SI considers that, in view of these considerations and in accordance with Article 64.2 of the LCA, it is not appropriate to pursue its investigation further and that, as already mentioned (point 35), there *is no apparent violation of the GDPR*.

I.B.4. The complementary investigation of the Inspection Service

40. On June 24, 2021, the Contentious Chamber requests, pursuant to article 96.2. of the LCA, that a complementary investigation be conducted by the SI.

41. Upon examination of the report of May 26, 2021 (points 33 et seq.), the Contentious Chamber noted a lack of information regarding certain elements raised by the complainants in support of their complaint, including

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[13] Article 111 of the LCA: Without prejudice to the supervisory powers of the Data Protection Authority, the authorizations granted by the Sectoral Committees of the Privacy Commission before the entry into force of this law shall retain their legal validity. After the entry into force of this Act, adherence to a general authorization granted by deliberation of a sectoral committee shall be possible only if the applicant sends a written and signed undertaking to the Data Protection Authority, in which he/she confirms adherence to the conditions of the deliberation in question, without prejudice to the supervisory powers that the Data Protection Authority may exercise after receipt of such undertaking. Unless otherwise provided for by law, pending requests for authorization submitted before the entry into force of the law shall be processed by the data protection officer of the institutions involved in the data exchange.

[14] The Litigation Division will not make a general ruling on the validity of these authorizations. It will examine the relevance of the one invoked by the Respondent in the specific context of the complaint leading to the present decision.

[15] CJEU judgment of July 16, 2020, C-311/18, Facebook Ireland and Schrems (Schrems II), ECLI:EU:C:2020:559.

[16] Article 17 of the Law of 16 December 2015: § 1. Information transferred to a reporting jurisdiction shall be subject to the confidentiality obligations and other safeguards set forth in the treaty on tax matters that permits the automatic exchange of information between Belgium and that jurisdiction and in the administrative agreement that organizes such exchange, including provisions limiting the use of the information exchanged. § 2. However, notwithstanding the provisions of a tax treaty, the Belgian competent authority : - (a) the taxpayer shall not be required to provide the information to the competent authority of the country to which the information is transferred; and (b) the competent authority of the country to which the information is transferred shall not be required to provide the information to the competent authority of the country to which the information is transferred; - subject to the first indent, may not authorize a jurisdiction to which the information is transferred to use the information for any purpose other than the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in the Treaty or the oversight of any of the foregoing; and - may not authorize a jurisdiction to which the information is transferred to communicate the information to a third jurisdiction.

- Whether or not appropriate safeguards are in place with respect to transfers to the United States?
- The existence or not of further processing for other purposes? And the existence or not of guarantees if applicable?
- How long will the data be kept, taking into account any further processing that may be required?
- The precise data provided and the volume of data per data subject as well as the number of data subjects in Belgium?
- The existence or not of a reciprocity clause and, if applicable, its implementation concrete in practice?
- The question of whether a PIDA within the meaning of Article 35 of the GDPR has been (or will be) conducted realized), in what form and at what date?
- Whether the first complainant has filed other lawsuits with the same or similar subject matter before other bodies (judicial, administrative) since filing his complaint? And what, if any, was the outcome?

42. On July 9, 2021, during the course of the investigation, the Complainants requested the IRS to temporarily suspend the transfer of data from the "FATCA" *reporting* for the year 2020 to the IRS as a *provisional measure* taken on the basis of the LCA, until the Contentious Chamber has made a final decision and at least until September 30, 2021. The plaintiffs argue that the transfers complained of, as soon as they take place, are likely to cause serious, immediate and difficult to repair harm to them.

43. On August 10, 2021, the SI replied to the Complainants that the taking of provisional measures is one of the powers of investigation conferred on the SI by the LCA and that it is not an obligation but rather a possibility left to its discretion and autonomy. The IS also recalls that, pursuant to section 64.2 of the CAA, it ensures that the useful and appropriate means are used for the purposes of the investigation. It adds that it has no instructions to receive from anyone on the investigative measures to be implemented, thereby rejecting the complainants' request.

44. On September 14, 2021, the complementary investigation of the SI is closed, the report is attached to the file and it is transmitted by the Inspector General to the President of the Contentious Chamber (art. 91.1 and 91.2 of the LCA).

45. In its supplementary report, the SI notes that there is no evidence of a lack of guarantees concerning the protection of the transferred data or of non-reciprocity of the exchanges. The SI states that it can only note the fairly robust legal framework for the transfer of US citizens' tax data by the defendant to the IRS. In this respect, it refers to the description of the guarantees surrounding the said

transfers made by the defendant's Data Protection Officer (hereinafter DPO), to the parliamentary work of the law assenting to the "FATCA" agreement as well as to articles 3.[7][17] and 3.[8][18] of said agreement. The SI also refers to the judgment of July 19, 2019 of the French Council of State referred to by the French sister association of the second plaintiff, a judgment in which the plea based on the disregard of Article 46 of the GDPR was rejected[19]. The IS report also includes in its report the elements provided by the defendant to justify the absence of an impact assessment (point 95).

I.B.5. Examination of the merits by the Contentious Chamber

46. On January 20, 2022, the Contentious Chamber decides, in accordance with article 95, § 1, 1° and Section 98 of the CCA, that Complaints #1 and #2 can be processed on the merits.

47. On the same date, the parties are informed by registered mail of the provisions as contained in article 95, § 2 and article 98 of the LCA. The Contentious Chamber decided in this letter to **join complaints no. 1 and no. 2,** which concern the same processing of personal data (data related to the same facts), are both lodged against the defendant and raise the same complaints against the latter. The Contentious Chamber therefore considers them to be so closely related that it is in its interest to investigate them and to take a decision on them at the same time in order to guarantee the consistency of its decisions.

48. In the same letter, the Contentious Chamber grants the parties the following deadlines to conclude: March 17 and May 16, 2022 for the Respondent and April 15, 2022 for the Complainants.

49. In support of the complaint and the SI reports, the Dispute Chamber also identifies the grievances on which it invites the parties to present their arguments:

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[17] Article 3.7. of the FATCA Agreement: "All information exchanged shall be subject to the confidentiality and other protections provided for in the Convention, including the provisions limiting the use of the information exchanged. "Convention" refers to the Convention on Mutual Administrative Assistance in Tax matters of January 25, 1988.

[18] Article 3.8. of the "FATCA" Agreement: "Following the entry int force of this Agreement, each Competent Authority shall provide written notification to the other Competent Authority when it is satisfied that the jurisdiction of the other Competent Authority has in place (i) appropriate safeguards to ensure that the information received pursuant to this Agreement shall remain confidential and be used solely for tax purposes, and (ii) the infrastructure for an effective exchange relationship (including established processes for ensuring timely, accurate, and confidential information exchanges, effective and reliable communications and demonstrated capabilities to promptly resolve questions and concerns about exchanges or requests for exchanges and to administer the provisions of Article 5 of this Agreement). The Competent Authority shall endeavor in good faith to meet, prior to September 2015, to establish that each jurisdiction has such safeguards and infrastructure in place.

[19] The French Conseil d'Etat had been seized by the French Association of Accidental Americans with a request for annulment on the grounds of excess of power of the decisions by which a refusal was made to its requests for the repeal of a decree and its ministerial order organizing the collection and transfer of personal data to the American authorities. In its ruling, the French Conseil d'Etat concluded that, in light of the specific guarantees provided by the agreement "FATCA" of November 14, 2013 (agreement concluded with France) surrounds the disputed processing and the level of protection provided by the legislation applicable in the United States with respect to personal data that make it possible to establish the tax situation of taxpayers (the French CE refers to the U.S. Federal Personal Data Protection Act of 1974 and to the Federal Tax Code), the plea alleging disregard for Article 46 of the RGPD as well as for Articles 7 and 8 of the EU Charter of Fundamental Rights must be dismissed (points 23 et seq. of the judgment).

- Unlawfulness of the data transfers to the IRS by the Respondent under Articles 45 and 49 of the GDPR and lack of legal basis;
- Failure to comply with the principles of purpose limitation, proportionality and data minimization (Article 5. 1 b) and c) of the GDPR) as well as a failure to comply with the principle of limiting data retention (Article 5.1. e) of the GDPR) ;
- Failure to comply with the principle of transparency and the obligation to provide information (articles 5.1.
  (a), 12 and 14 of the GDPR);
- Failure to comply with Article 16 of the GDPR (right of rectification) in that the defendant's procedures do not provide for the possibility for data subjects to obtain a correction of their status under the "FATCA" legislation;
- Failure to conduct a DPIA under Article 35 of the GDPR;
- The failure to comply with Articles 5.2. and 24 of the GDPR, coupled with the failures mentioned above;
- Failure to comply with Section 20 of the Act of July 30, 2018 (LTD).

50. The Litigation Division also invites the parties to conclude on Article 96 of the GDPR invoked by the defendant in its letter of October 4, 2021 (point 22).

51. The Contentious Chamber states at the outset that on March 30, 2022, it sent an additional request to the parties. In this request, the Litigation Chamber states that it has learned from the press that the second complainant would, in December 2021, have lodged an appeal with the (Belgian) EC with regard to the issue of accidental data transfers from the United States to the United States. Without prejudice to the respective competences of the EC and the DPA, the Dispute Chamber requests the second complainant to clarify in its future reply or in a separate document, at the latter's discretion, the purpose of this appeal to the EC and, if possible, the timetable for its submission. The Contentious Chamber specifies that this information is intended to enable it to assess whether (the outcome of) this appeal is likely to have an impact on the procedure underway before the DPA and/or on its future decision. Indeed, under the terms of the complaint form, the complainant is asked to inform the DPA of the existence of any complaint(s) filed with other bodies. As this appeal to the EC had not yet been lodged at the time the complaint was filed with the DPA, the second complainant is asked to inform the Dispute Resolution Chamber of this. In this respect, the Contentious Chamber refers to the information provided in point 23 above.

52. On January 31 and February 8, 2022, the defendant requested a copy of the file (art. 95, §2, 3° ADA), which was sent to her on February 9, 2022.

I.B.6. The arguments of the parties

53. On March 16, 2022, the Contentious Chamber received the Respondent's submissions in response. As the Respondent has also filed additional and summary submissions at a later stage (hereinafter the summary submissions), a summary of its full argument will be detailed in paragraphs 79 et seq.

I.B.6.1. Plaintiffs' position

54. On April 15, 2022, the Contentious Chamber received the complainants' reply.

55. The plaintiffs' argument can be summarized, grievance by grievance, as follows.

➢ *As for Article 96 of the GDPR*

56. As a preliminary point, the plaintiffs state that Article 96 of the GDPR does not apply since the condition it lays down that the international agreement must, in order to continue to have effect, comply with EU law as applicable before May 24, 2016, is not met. Indeed, the complainants consider that the "FATCA" agreement is neither compliant with Directive 95/46/EC (applicable before May 25, 2016) nor otherwise compliant with the GDPR. The Complainants also state that, in any event, aspects not regulated or imposed by or under the FATCA agreement, such as the obligation to inform data subjects (Title II.E.2), are subject to the GDPR without any interference from its Article 96.

➢ *As for compliance with the rules governing cross-border flows*

57. As for the transfer to the IRS, the Complainants note that prior to its reply of March 16, 2022, in which it states that it relies on Article 46.2.a) of the GDPR (point 82 et seq.), the Respondent appeared, as evidenced by its administrative decision of October 4, 2021 (point 22), to rely on Article 49.1.d) of the RGPD (or on Article 26.1.d) of Directive 95/46/EC), i.e. on the "important reason of public interest", the basis for the lawfulness of the transfer resting, according to it, on the "FATCA" agreement and on the Law of December 16, 2015.

58. For the sake of completeness, the plaintiffs argue that the lack of equivalent reciprocity and the systematic nature of the transfers complained of are obstacles to the defendant's reliance on Article 49.1(d) of the GDPR, even though since its reply submissions, the defendant has refrained from relying on this provision.

- As for the lack of reciprocity, the plaintiffs cite several letters from European authorities and other American positions that attest to this lack of reciprocity;
- As to systematicity, the complainants rely on the European Data Protection Committee (hereinafter EDPS) Guidelines 02/2018 *on*

to the derogations provided for in Article 49 of EU Regulation 679/2016 [20] which state that recourse to Article 49.1.d) of the GDPR cannot be invoked for recurrent, systematic or large-scale transfers: the derogations - of restrictive interpretation - provided for in Article 49 *"must not become 'the rule' in practice, but must be limited to specific situations (...)".*

59. The Complainants further point out that Article 49.1. d) of the GDPR provides for one of the possible derogations to the prohibition of international transfers where, according to the cascade system set up by Chapter V of the GDPR and before that by Articles 25 and [2621] of Directive 95/46/EC, no adequacy decision pursuant to Article 45.3. of the GDPR has been adopted for the country concerned or in the absence of appropriate safeguards pursuant to Article 46 of the GDPR. By mobilizing Article 26.1. d) of Directive 95/46/EC as specified in Article 16.2. of the Law of December 16, [201522], the legislator thus recognized, according to the plaintiffs, that there were no appropriate safeguards in place. It is therefore in vain that the Respondent relies on Opinions 61/2014 and 28/2015 of the OPC to conclude that the "FATCA" agreement complies with EU law (including the rules on transfer)as of 24 May 2016. These opinions focused on the said Belgian law text and did not examine the existence of appropriate safeguards present in the "FATCA" agreement itself.

60. The complainants point out that these "appropriate safeguards" must be reflected in the agreement "FATCA" itself to bind the parties to it. These safeguards are those identified by the EDPS in his Guidelines 02/2020 *on Article 46(2)(a) and (3)(b) of the GDPR for transfers of personal data between public authorities and bodies established in the EEA and those established outside the EEA* (hereinafter Guidelines 02/2020)[23]. The Complainants state that the FATCA agreement provides

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[20] European Data Protection Committee (EDPS), *Guidelines 02/2018 of 25 May 2018 on derogations under Article 49 of Regulation EU 679/2016:* https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_fr.pdf

[21] Article 26.1. of Directive 95/46/EC states that it applies by way of derogation from Article 25 (on the principle of adequacy) in cases where the third country does not ensure an adequate level of protection within the meaning of Article 25.2. of the Directive. Article 26.2 provides that *"Without prejudice to paragraph 1, a Member State may authorize a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2), where the controller offers adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses*.

[22] Article 16.2. of the Law of December 16, 2015: *"§ 2. To the extent that such transfers are part of a reciprocal exchange of information for tax purposes and condition the obtaining by Belgium of comparable information allowing to improve compliance with the tax obligations to which taxpayers subject to tax in Belgium are subject, such transfers are necessary to safeguard an important public interest of Belgium. To this extent, these transfers are carried out in accordance with article 22, § 1, paragraph 1, of the aforementioned law of December 8, 1992 when they are carried out to a jurisdiction outside the European Union which is not generally considered to ensure an adequate level of protection*. The Contentious Chamber emphasizes.

[23] European Data Protection Committee (EDPS), *Guidelines 02/2020 of 15 December 2020 on Article 46(2)(a) and (3)(b) of Regulation (EU)2016/679 for transfers of personal data between public authorities and bodies established in the EEA and those established outside the* EEA: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22020-articles-46-2-and-46-3-b-regulation_en

The agreement does contain a scant reference to "confidentiality and other protections of other treaties on the exchange of data in tax matters" (article 3.7. of the agreement). However, it contains nothing in terms of "appropriate safeguards" apart from some vague objectives and a list of data that does not respect the principles of necessity and minimization (see below).

61. More specifically, the plaintiffs believe that the defendant has not assessed the level of protection offered by the United States or at least not motivated the "adequacy" of the possible safeguards and measures put in place on both sides as it was required to do in execution of the Schrems II judgment of the CJEU and the EDPS Guidelines 02/22020 to be able to validly rely on Article 46.2. a) of the RGPD which it now invokes.

62. The complainants point out that the following required safeguards are lacking: (a) specification of the types of processing, (b) purpose limitation principle, (c) data minimization principle, (d) retention limitation principle, (e) statement of security measures including a mutual data breach notification mechanism, (f) rights of data subjects: (i) information and transparency, (ii) access, rectification, erasure, restriction and objection: the complainants point out that if the US Privacy Act, to which the agreement

(ii) The "FATCA" reference appears to provide for similar rights, but these rights are not included in the agreement. Moreover, the IRS does not communicate on these rights that the data subjects would have, (iii) Prohibition of automated decisions: according to the complainants, it is not excluded that an automated decision will take place after the transfer to the IRS given the objective pursued by the U.S. authorities, as specified during the bill that led to the Act of December 16, 2015 in these terms: *"This information will provide such other State with increased means to improve tax compliance by its residents (and citizens in the case of the United States) and to make the best use of the information provided via automatic cross-referencing with domestic intelligence a n d automated data analysis. "*[24]

63. ~~In conclusion,~~ the plaintiffs are of the opinion that, in the absence of compliance with the requirements of Chapter V of the GDPR, the data transfers denounced by the defendant to the IRS are unlawful.

- *As for the principles of purpose, necessity and minimization*

64. *As for the principle of finality*, the complainants consider that the purposes pursued by the agreement

The "FATCA" agreement is not sufficiently specific in that it is too broadly and vaguely aimed at (a) improving compliance with international tax rules and (b) implementing the obligations arising from the US "FATCA" legislation aimed at combating tax evasion by US citizens (see in particular the introductory recitals to the agreement). The complainants also point out that the data exchanged may also

[24] The Contentious Chamber underlines this.

through other instruments be used for non-tax purposes, including for purposes such as combating the financing of terrorism where appropriate under the conditions of Article 17 of the Law of December 16, [201525].

65. *As for the principles of necessity and minimization*, the complainants denounce the aggressive nature of the data processing implemented by the "FATCA" agreement, under which an *automatic* exchange of data takes place and not (anymore) a communication of data following an *adhoc* request. This model raises important questions of necessity and minimization: the plaintiffs believe that the collection of data under the FATCA agreement is not necessary and does not respect the principle of data minimization. Based on the relevant work of both the Article 29 Working Party (hereinafter Working Party 29) and the EDPS, as well as on the rulings of the CJEU (paragraphs 66 et seq. below), the Complainants are of the opinion that, in the absence of specific criteria justifying the processing operations, the collection and transfer of the data concerned to the IRS is disproportionate, contrary to the principle of minimization enshrined in both Article 5(1)(c) of the RGPD and Article 6(1)(c) of the Directive 95/46/EC already. They also recall Article 52 of the Charter of Fundamental Rights of the Union (hereinafter the Charter), according to which *"Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essential content of those rights and freedoms. In accordance with the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.*

66. The plaintiffs point in particular to the April 8, 2014, ruling of the [CJEU27] which annuls Directive 2006/24/EC *on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks* in that this directive *"applies (...) even to persons for whom there is no evidence to suggest that their conduct may be connected, even indirectly or remotely, with serious offenses."* They also cite the CJEU ruling of February 24, [202228] which prohibits the generalized and indiscriminate collection of personal data for the purpose of combating tax fraud. The complainants believe that the collection and transfer under FATCA are carried out in the same generalized and undifferentiated manner and should be prohibited under the cited case law. The complainants also point to DPA opinion [122/202029] in the same vein. In the light of the

[25] See note 16 above.

[26] The Contentious Chamber underlines this.

[27] CJEU, judgment of April 8, 2014, joined cases C-293/12 and C-594/12 Digital Rights Ireland, ECLI : EU :C :2014 :238, point 58.

[28] CJEU, judgment of February 24, 2022, case C-175/20, ECLI :EU :C :2022 :124, points 74 to 76.

[29] Data Protection Authority, Opinion 122/2020 on Chapter 5 of Title 2 of the Draft Program Law – Articles 22 to 26 inclusive: https://www.autoriteprotectiondonnees.be/publications/avis-n-122-2020.pdf See item 25.

In the specific situation of Belgian accidental Americans, the plaintiffs specify that they do not seek to say that before each exchange of information under the FATCA agreement, the defendant should carry out an *ex ante* control on the basis of its own criteria in order to determine whether or not a particular account holder represents a low or high risk of tax evasion. They point out, however, that in light of the concept of tax evasion as defined under US law by 26 US Code, section 7201, it is not understandable that the defendant does not take into account, for example, the income threshold below which US citizens who live abroad for 330 days (including accidental Americans) can ask the IRS to exclude income earned abroad via the clause in Annex II of the agreement that allows other categories of accounts to be excluded from FATCA reporting even after the agreement has been signed.

- *As for information and transparency*

67. The complainants address this aspect both as a warranty to be included in the agreement "FATCA" pursuant to Article 46.2. a) of the GDPR (paragraph 62) than as an autonomous grievance (Title II.E.2).

68. They denounce that, contrary to what is requested by the EDPS under his Guidelines 02/2020, neither the "FATCA" agreement nor the international conventions to which the agreement refers contain provisions on transparency and provision of information as an "appropriate safeguard" in execution of Article 46.2.a) of the GDPR mobilized by the Respondent

69. The Complainants also point out that the Respondent does not even attempt to comment on the existence of and compliance with such an obligation of transparency on the part of the IRS as required by Article 16.3. of the Act of December 16, 2015.[30] At most, the IRS would be required to comply with the principle of transparency applicable to it under its domestic legislation, which does not translate into an obligation equivalent to that required under Article 14 of the GDPR.

70. The complainants add that point 2.4.1. of the EDPS Guidelines 02/2020 clearly states that *"the public body transferring the data should inform the data subjects individually in accordance with the notification requirements of Articles 13 and 14 of the GDPR"* and concludes that *"a general information notice on the website of the public body in question will not be sufficient".* In this regard, the complainants consider that

[30] Article 16.3. of the Law of December 16, 2015: *"Notwithstanding the other provisions of the law, the application of the law is postponed or suspended with regard to a jurisdiction that is not a member of the European Union if it is established that this jurisdiction has not put in place an infrastructure that guarantees that the financial institutions established on its territory and its tax administration inform in a sufficient manner the residents of Belgium about the information concerning them that will be communicated by this jurisdiction in the context of an automatic exchange of information relating to financial accounts. (...) ".*

In this respect, the defendant's website does not present the required information and the reference to a few pages of this site does not constitute an active form of communication[31].

71. The plaintiffs also complain that, since the defendant states that it relies on "In order to comply with the requirements of Article 46 of the GDPR, it was particularly required to comply with Article 14.1. f) of the GDPR and to indicate *"the reference to the appropriate or adequate safeguards and the means of obtaining a copy of them or the place where they have been made available".*

72. Finally, the Complainants believe that the Respondent could not rely on Article 14.5. c) of the GDPR if the appropriate measures required to make use of this exception are not provided for by Belgian law.

➢ *As for the absence of an AIPD*

73. The plaintiffs believe that the defendant was required to conduct a DPIA even before the GDPR came into force. This obligation, they argue, is implicitly derived from Article 22.2. of the Privacy Act and article 26.2. of Directive 95/46/EC and, more generally, of article 16.4. of the PSA transposing Article 17.1. of Directive 95/46/EC. Complainants also cite the *December 16, 2015 Guidelines of Group 29*, which already recommended that EU member states conduct a PIA in the context of automatic data exchange for tax purposes.[33] The Complainants also point to the December 16, 2015 Guidelines of *Group 29, which recommended that EU member states conduct a* PIA in the context of automatic data exchange for tax purposes.34 The Complainants also point to the December 16, 2015 Guidelines of Group 29.

74. Finally, the complainants consider that, in any case, Article 35 of the GDPR introduces this obligation for processing operations that present a *high risk*, which is, in their view, the case of the processing operation complained of. Based on several criteria from *the EDPS Guidelines on data protection impact assessment (DPIA) and how to determine whether the processing is "likely to result in a high risk" for the purposes of Regulation (EU) 2016/679* (hereinafter the EDPS DPIA Guidelines)[34] , the complainants conclude that a DPIA was required in this case. The Complainants identify the following criteria: systematic surveillance, sensitive or highly personal data, data processed on a large scale, cross-referencing or combination of data sets, data concerning vulnerable persons, as well as

[31] Article 29 Working Party, *Transparency Guidelines under Regulation* (EU) 679/2016 (WP 260): https://www.cnil.fr/sites/default/files/atoms/files/wp260_guidelines-transparence-fr.pdf These guidelines were endorsed by the EDPS at its inaugural meeting on May 25, 2018.

[32] Plaintiffs anticipate a possible argument from the Defendant that the Defendant will not raise.

[33] Article 29 Working Party, Guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of automatic exchanges of personal data for tax purposes, WP 234 of 16 December 2015:https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp230_en.pdf

[34] Article 29 Working Party, *Guidelines on data protection impact assessment (DPIA) and how to determine whether processing is "likely to result in a high risk" for the purposes of Regulation (EU) 2016/679* (WP 248) : file:///C:/Users/win-verbvale/Downloads/20171013_wp248_rev_01_en_D7D5A266-FAE9-3CA1-65B7371E82EE1891_47711-1.pdf These Guidelines were endorsed by the EDPS at its inaugural meeting on May 25, 2018.

that, to some extent, processing "that prevents the exercise of a right or the provision of a service or contract".

75. In the absence of a PIDA within the meaning of Article 35 of the GDPR, the defendant has, according to the

the complainants, guilty of a breach of this provision.

➢ *As for accountability*

76. The complainants point out that the accountability principle requires the data controller to comply with the GDPR but also to be able to demonstrate this compliance at any time. The complainants believe that no EU Member State, including Belgium, is currently in a position to do so.

➢ *With respect to section 20 of the ADA (obligation to enter into a protocol)*

77. In their complaint, the plaintiffs also allege a breach of section 20 of the LTD which provides that *"except as otherwise provided in specific statutes, in furtherance of section 6.2 of the Regulation [read RGPD], the federal public authority that transfers personal data on the basis of Article 6.1(c) and (e), of the Regulation [read RGPD] to any other public authority or private organization, shall formalize such transfer for each type of processing by a protocol between the original data controller and the data recipient (§1)."* Accordingly, the defendant was, according to the plaintiffs, required to enter into a protocol within the meaning of Article 20 of the DTA with the IRS.

78. In their reply submissions, however, the Complainants state that they are waiving their argument based on a failure to comply with this provision.

I.B.6.2. Position of the defendant

79. On May 16, 2022, the Contentious Chamber received the Respondent's summary conclusions.

80. The Respondent's argument can be summarized, grievance by grievance, as follows.

➢ *With regard to compliance with the rules governing cross-border flows and Article 96 of the GDPR*

81. The defendant does not deny that before its conclusions (in its decision of October 4, 2021 - point 22), it argued that article 49.1. d) of the GDPR allowed it to base the denounced data transfer to the IRS. It adds that in reality, Article 49.1. d) of the GDPR cannot be applied in this case since this transfer is not occasional.

82. As already mentioned, the Respondent states that it relies on Article 46.2. RGPD[35] since the transfer of data to the IRS is based on an "*instrument*

[35] Article 46 of the GDPR: 1. In the absence of a decision under Article 45(3), the controller or processor may transfer personal data to a third country or to an international organization only if it has provided appropriate safeguards and on condition that the data subjects have enforceable rights and

binding and enforceable legal instrument between public authorities or bodies" within the meaning of this provision. The Respondent states in this regard that *the binding legal instrument* is, on the one hand, the "FATCA" agreement and, on the other hand, the Law of December 16, 2015 and that these are both national and international legally binding and enforceable instruments over which it has no control and which, moreover, are part of a global international framework recalled in point 9.

83. The Respondent also invokes the aforementioned Article 96 of the GDPR. In support of its application, it argues that the FATCA agreement complied with EU law at the time it was concluded and that this is undoubtedly apparent, as the SI points out in its investigation (paragraphs 37 et seq.):

- From OPC Opinions 61/2014 and 28/2015 on the draft Act of December 16, 2015;
- From the OPC's SCF Deliberation 52/2016 of December 15, 2016, which authorizes the Respondent to transmit to the IRS the financial information of the reportable accounts of U.S. taxpayers sent to it by financial institutions under the "FATCA" agreement, this deliberation still exiting its effects under Section 111 of the ICA ;
- From the ruling of the Constitutional Court of March 9, 2017, which states the compliance of the Law of December 16, 2015 with the LVP through Article 22 of the Constitution and Article 8 of the European Convention on Human Rights (ECHR).

84. In conclusion, the Respondent argues in support of these elements that the "FATCA" agreement is at least consistent with EU law applicable before May 24, 2016. Since the conditions of Article 96 of the GDPR are met, there was no reason for the defendant not to apply the Law of December 16, 2015. It adds that it cannot be blamed for not having carried out another conformity assessment exercise since the legislator had done so itself by requesting the opinion of the CPVP and by integrating the latter's remarks.

85. The defendant also adds that the plaintiffs' reference to the Schrems II judgment of the CJEU is irrelevant and that they give this decision a scope that it does not have, since the judgment concerned the transfer of personal data for *commercial* purposes, which is not the case here, since it concerns a transfer between public authorities for the purposes of taxation and the fight against tax evasion and fraud, without any commercial scope. Moreover, according to the defendant, there is no question here of mass collection of personal data within the meaning of this judgment.

effective legal remedies. 2. The appropriate safeguards referred to in paragraph 1 may be provided, without the need for specific authorization by a supervisory authority, by (a) a legally binding and enforceable instrument between public authorities or bodies (...).

86. As to the existence of appropriate safeguards within the meaning of Article 46.2. a) of the GDPR, the Respondent believes that the essential principles of the GDPR are, independently of Article 96 of the GDPR, in any event complied with (see below). In this respect, the Respondent refers to the notification of the data protection measures and infrastructure required by Article

3.8. of the above-mentioned "FATCA" agreement[36] which attests that it has indeed carried out this analysis of

the existence of sufficient guarantees.

87. *As for automated decisions*, the Respondent argues that there is no doubt that the processing it carries out in the context of the "FATCA" agreement does not fall within the scope of Article 22 of the GDPR, since it is "neither processing that produces legal effects on the data subject" nor "significantly affecting him in a similar way". The defendant insists on its exclusively logistical role in this respect. Even assuming that the processing would, *quod non* according to the defendant, fall within the scope of Article 22 of the GDPR, the latter would consider itself to be in one of the exceptional cases. In particular, Article 22.2. b) of the GDPR would be applicable in support of Recital 71, which explicitly mentions that *"decision-making based on such processing [referred to in Article 22.1.] (...) should be permitted where it is authorized by EU law or the law of a Member State to which the controller is subject, including for the purposes of monitoring and preventing fraud (...) "*[37].

88. Finally, as to the retention period, the Respondent states that the answer is given by Article 12.4. of the Law of December 16, 2015, which provides that *"the reporting financial institutions shall keep the computerized databases that they have communicated to the Belgian competent authority for seven years as of January 1 of the calendar year following the calendar year in which they communicated them to that authority. The data banks shall be deleted at the end of this period",* as well as by article 15.3. of the same law, which sets the same period of 7 years for the retention by the defendant of the data banks communicated to the competent authority of another jurisdiction, i.e. to the IRS in this case. In this respect, the defendant denounces the position of the plaintiffs, which artificially tends to separate the "FATCA" agreement from the Law of December 16, 2015 (with regard to the principle of limited retention discussed here in particular) and more generally from other rules on automatic exchanges of information in tax matters to which the defendant is *bound.*

[36] See note 18 above.

[37] The Contentious Chamber underlines this.

➢ *As for the principles of purpose, necessity and minimization*

89. *As to the purpose limitation*, the Respondent refers to Article 3.8. of the "FATCA" agreement as well as to Article 17 of the Law of December 16, 201538[38]. It also refers to the aforementioned opinions and authorization of the OPC (point 83).

90. *As to the principles of necessity and minimization*: the defendant emphasizes the following elements which, in its view, reflect compliance with the above principles: (1) in compliance with the "FATCA" agreement, only data concerning US citizens subject to US tax laws are transmitted to the IRS; (2) banks are not obliged to consider as declarable bank accounts whose balance or value does not exceed a certain amount (focus of the FATCA agreement on high balances); (3) only the data listed in article 2.2. of the FATCA agreement are communicated and these data are necessary for the identification of taxpayers and the execution of its tasks by the IRS in execution of articles 4 and 22 of the Multilateral Convention of 1988. Here again, the Respondent relies on the aforementioned SCFA authorization and Constitutional Court ruling of March 9, 2017, which allegedly validated the *proportionality of* the processed data. The defendant also considers that the plaintiffs' reference to the CJEU's judgment of April 8, 2014 is irrelevant since in this case, unlike the situation referred to in that judgment, there is no generalized and undifferentiated collection. The defendant points out that the collection only concerns a specific category of persons (American nationals) and establishes a threshold below which the declaration is not required. There are therefore specific criteria that justify the collection.

➢ *As for information and transparency*

91. The defendant states that its website provides comprehensive information combining more theoretical explanations, news, links to relevant documents and an FAQ.

92. It adds that according to Article 14 of the Law of December 16, 2015 *"each reporting financial institution shall inform each natural person concerned that personal data concerning him or her will be communicated to the Belgian competent authority"* and that it is therefore in any case up to the banks to inform the persons concerned such as the first complainant and the Belgian accidental Americans. These data are the following:

- The purposes of disclosures of personal data (a);
- The ultimate recipient(s) of personal data (b);
- Reportable accounts for which personal data is reported (c);

[38] See note 16 above.

- The existence of a right to obtain, upon request, disclosure of specific data that will be or has been disclosed regarding a reportable account and the manner in which this right may be exercised (d) ;
- The existence of a right to rectify personal data concerning him/her and the modalities for exercising this right (e).

93. The Respondent also states that this information was provided to the first complainant by its bank Z on May 18, 2020 (point 16). During the hearing, the Respondent clarified that it could therefore rely on the information exemption in Article 14.5. a) GDPR.

➢ *As for the absence of an AIPD*

94. Referring to Article 35 of the GDPR, the defendant mentions that its DPO specified in a letter dated June 30, 2021, addressed to the Inspector General that "*according to the working methodology adopted by the FPS Finance [read the defendant], and developed by the Service for Information Security and Privacy Protection (SSIPV), a pre-impact analysis had been carried out.*"

95. On the basis of this pre-impact analysis, the Respondent's DPO states that it was concluded that that an AIPD was not required when :

- That the Act of December 16, 2015 had incorporated the remarks made by the OPC in its two opinions 61/2014 and 28/2015 already cited;
- That the CSAF had issued a deliberation authorizing the transmission of data to IRS and that the terms of that deliberation have been implemented;
- That the processing complies with the requirements of the AEOI standard for privacy and data protection, as well as the Respondent's information security policies based on ISO 27001 ;
- That the U.S. authorities are also required to provide the necessary security measures to ensure that the information remains confidential and is stored in a secure environment, as set forth in the FATCA *Data safeguard workbook.*

96. The defendant adds that the content of this letter was reproduced *in extenso* in the report of the SI supplemental survey (item 40).

97. The Respondent also considers that the Complainants have not demonstrated the elements that would justify an AIPD. It is of the opinion that the criteria set out in the EDPS Guidelines on AIPD are not met in the context of the processing it carries out. It also points out that it does not analyze the data but only prepares them for direct transmission to the IRS.

➢ *As for accountability*

98. The Respondent believes that in view of the elements reported in the preceding points, it has sufficiently demonstrated its compliance with Article 5.1. of the GDPR.

➢ *With respect to section 20 of the ADA (obligation to enter into a protocol)*

99. The defendant points out that although the plaintiffs raised a breach of this article in their complaint, they abandoned it in their reply. The defendant considers that it is clear from the preparatory works of the Data Protection Act that the obligation to conclude such a protocol does not apply in the case of data transfers to or from third countries within the meaning of the GDPR. As the reported transfer was to the United States, the company cannot be accused of any breach.

I.B.6.3. Additional findings on the Constitutional Court's ruling of March 9, 2017

100. On August 17, 2022, as an exception, the Contentious Chamber authorizes the parties to conclude additionally on the reference to the Constitutional Court's judgment of March 9, 2017 that the Respondent makes in its aforementioned summary conclusions.

101. On August 31, 2022, the Contentious Chamber received the plaintiffs' additional conclusions. In it, the latter insist above all on the fact that since the judgment dates back to 2017, the Constitutional Court was unable to take into account the evolution of the relevant case law to assess the compliance of the "FATCA" agreement with the data protection rules, in particular the lack of proportionality of the collection of the personal data of the data subjects and their subsequent transfer. In 2017, the CJEU had already initiated its case law as to the principles to be taken into account in the analysis of the proportionality of a legislative measure with regard to Article 8 ECHR and Articles 7, 8 and 52 of the Charter. According to the complainants, the above-mentioned judgment C-175/20 of 24 February (point 66) leaves no doubt as to the unlawfulness of a generalized collection of data in the specific context of the fight against tax fraud. In this respect, the complainants emphasize that the CJEU in this judgment rejects the distinction suggested by the Advocate General between, on the one hand, ex-ante research and detection, for which the proportionality requirement could be assessed more flexibly, and, on the other hand, *ex-post* verification in a specific case, which, according to the Advocate General, should be assessed more strictly[39]. The data listed in the agreement as well as the thresholds[40] provided for in the agreement (below which the account is not declarable) do not constitute, according to the plaintiffs, criteria within the meaning of the case law of the CJEU; there is in fact no analysis of the risk of tax evasion or fraud on the part of the persons whose data

[39] See. CJEU, Case C-175/20 - Opinion of Advocate General Michal Bobek of 2 September 2021, paragraphs 70 et seq.

[40] In this regard, the plaintiffs cite the CJEU's judgment C-184/20, Vyriausioji tarnybinės etikos komisija, ECLI:EU:C:2022:601.

are addressed. Finally, the plaintiffs point out that the Constitutional Court was unable to take into account the May 2018 study commissioned by the European Parliament[41] which states that the FATCA reporting obligations are not sufficiently limited with respect to the risk of tax evasion.

102. On 21 September 2022, the Contentious Chamber received the Respondent's additional submissions on the same judgment. The Respondent's main request is that the Contentious Chamber should set aside those aspects of the Complainants' additional submissions that go beyond the request made by the Contentious Chamber. According to the Respondent, the Complainants go beyond the invitation of the Litigation Chamber by developing a new argument concerning the minimization/proportionality of the data.

103. In addition, the Respondent also invokes Article 96 of the GDPR with regard to the complaint of violation of the principle of minimization invoked by the complainants[42].

104. With regard to the ruling of the Constitutional Court itself, the Respondent insists, as it had done in its summary conclusions, that the ruling has the character of legal/constitutional truth. It adds that after a precise and complete analysis, the Constitutional Court considered that the Law of December 16, 2015 and, consequently, the "FATCA" agreement, were not contrary to either article 22 of the Constitution, or to the Privacy Act, or to Directive 95/46/EC, including the condition of proportionality. Therefore, there was no reason for it to refuse to apply the Law of December 16, 2016.

105. Finally, the Respondent states that if, by impossibility, the Contentious Division were to analyze the case law of the CJEU cited by the Complainants - *quod non* -, it should be noted that the Complainants draw erroneous conclusions from it. Thus, the defendant argues that in the judgment C-175/20 of February 24, 2022 cited by the plaintiffs, the CJEU asks the referring court to verify whether the Latvian administration would be able to target advertisements by means of specific criteria. In this regard, the defendant considers that the Belgian Constitutional Court having qualified the collection of data - listed by law - in execution of the "FATCA" agreement and the Law of December 16, 2015 as proportionate, the concern of the CJEU is met.

I.B.7. The hearing of the parties

[41] See https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU(2018)604967_EN.pdf

[42] The Contentious Chamber notes that in its summary conclusions, given the structuring of the securities used, the defendant seemed to invoke Article 96 of the GDPR only with regard to the appropriate guarantees that should surround the transfer of data to the IRS.

106. By emails dated August 17 and September 8, 2022, the parties were informed that the hearing would be held on September 13, 2022. This hearing was subsequently rescheduled to November 7, 2022 and then to January 10, 2023.

107. On September 23, 2022, the plaintiffs transmit to the Contentious Chamber 2 documents that they describe as "new documents" in the file. More specifically, they are an opinion of August 23, 2022 of the Slovak Data Protection Authority on the "FATCA" agreement and its compliance with the RGPD (and its unofficial translation into French) as well as the updated report *"FATCA legislation ans its application at international and EU level - an update"* of September 2022 of the 2018 report commissioned by the European Parliament.

108. There followed an exchange of letters between the parties regarding the admissibility of these documents
transmitted outside the time limits set for the filing of their respective conclusions and exhibits.

109. On October 3, 2022, the Contentious Chamber informed the parties that it would give them the opportunity to express themselves on these documents at the beginning of the hearing.

110. On January 10, 2023, the parties were heard by the Contentious Division. During the hearing, and as reflected in the minutes, the Contentious Chamber indicated that it was authorized to examine all relevant documents. No document is excluded from the proceedings as long as the exercise of the rights of defense is possible, either during the hearing or, if necessary, after it. The parties do not return to this point.

111. On January 27, 2023, the minutes of the hearing were submitted to the parties. The Contentious Chamber received no comments from the parties on the minutes.

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II. MOTIVATION

II.A. As to the competence of the ODA's Contentious Chamber

112. In particular, the GDPR has given the EU's data protection authorities ("supervisory authorities") the task of dealing with complaints submitted to them (Article 57(1)(f) GDPR). These authorities must investigate such complaints with all due diligence.[43]

113. In carrying out their tasks, including when dealing with complaints, data protection authorities must contribute to the consistent application of the GDPR throughout the EU. To this end, they shall cooperate with each other in accordance with Chapter VII of the GDPR (Article 51.2. GDPR).

[43] Judgment of 16 July 2020, C-311/18 - Facebook Ireland and Schrems ("Schrems II"), ECLI:EU:C:2020:559, paragraph 109.

114. In this case, the complaint submitted to the Contentious Chamber concerns the communication (transfer) (i.e. processing within the meaning of Article 4.2. of the RGPD) of personal data (within the meaning of Article 4.1. of the RGPD) by a Belgian public authority (the defendant) to a foreign public authority (the IRS) in execution of the "FATCA" agreement and the Belgian Law of December 16, 2015. **The one-stop shop mechanism provided for in Article 56 of the GDPR does not apply in view of Article 55.2. of the GDPR, which provides that *"2. Where processing is carried out by public authorities or private bodies acting on the basis of Article 6(1)(c) or (e)[44], the supervisory authority of the Member State concerned shall be competent. In this case, Article 56 shall not apply*.** Nevertheless, the DPA is unquestionably competent to deal with it pursuant to Article 55 of the GDPR and Article 4 of the ACL.

115. Since this transfer is taking place in execution of an intergovernmental agreement, which is certainly bilateral between Belgium and the United States, but similar in content to other bilateral agreements signed by the United States with other EU Member States, the compliance with the GDPR of the transfer based on this agreement, even if bilateral (and supplemented by national legislation), must be assessed with as much consistency as possible in the different EU Member States.

116. To this end, **the Litigation Division will take particular account of the Guidelines relevant to the case in question issued by both the Working Party [29][45] and the EDPS [46] as well as the relevant judgments of the CJEU**.

II.B. As for the sovereign appreciation of the Contentious Chamber

117. As stated in the feedback of the proceedings, the Respondent repeatedly emphasizes in its submissions that the inspection reports did not find any deficiencies on its part and that the arguments it provided in the course of the investigation are the basis for the conclusion of the SI reports.

[44] The defendant processes the data in execution of an international agreement and Belgian legislation.

[45] Article 30(1)(a) of Directive 95/46/EC entrusted the Article 29 Working Party (the "Working Party") with the task of examining any question relating to the implementation of the national provisions adopted pursuant to this Directive, with a view to contributing to their uniform application. Pursuant to Article 30.1. b), the Article 29 Working Party was charged with giving an opinion to the European Commission on the level of protection in third countries.

[46] As stated in Recital 139 of the GDPR, the EDPS is established for the purpose of promoting the consistent application of the GDPR in the EU through his different activities. It follows both from Recital 139 and from the tasks entrusted to him under Article 70 of the GDPR that the EDPS has an essential role to play with regard to the consistent application of the rules of the GDPR on cross-border data flows. See in this respect, in addition to the reference to his task of advising the European Commission on the level of protection in third countries, Article 70(c), (i), (j) and (s) as well as Article 64(e) and (f) of the GDPR, which all specifically relate to the role of the EDPS with regard to such flows.

118. As it had already done in its decision 81/2020, the Administrative Jurisdiction Division clarifies that recourse to an inspection is not systematically required by the ICA. Indeed, it is up to the Dispute Resolution Division to determine whether or not an investigation is necessary following the filing of a complaint (article 63, 2° ICA - article 94, 1° ICA). The Contentious Chamber may thus decide to deal with the complaint without referring it to the SI (art. 94, 3° LCA).

119. When the matter is referred to it, the findings of the SI certainly enlighten the Dispute Division on the facts of the complaint and on the qualification of these facts with regard to data protection regulations. As such, they may support one or other of the breaches *ultimately* retained by the Dispute Division in its decision. However, **the Contentious Chamber remains free, in support of all the documents produced during the procedure, including the arguments developed during the adversarial debate that follows its decision to deal with the case on the merits (article 98 LCA), to conclude in a reasoned manner that there are failings that may not have been raised in the inspection report(s).**

II.C. As to the defendant's status as a data controller

120. The Contentious Chamber notes that the Respondent claims to be a data controller[47] in support of Article 13.2 of the Law of December 16, 2015, which explicitly qualifies it as such, both in its submissions and at the hearing[48].

121. Article 13.2. provides that *"§ 2. For the application of the law of December 8, 1992, each reporting financial institution and the FPS Finance [read the defendant] shall be considered to be the "controller" of "personal data" with respect to the information referred to in this law that relates to natural persons.*

122. Defendant is therefore expressly qualified as a data controller under the Act of December 16, 2015. Admittedly, this law refers to the PVA repealed by the LTD (Article 280 of the LTD). However, the definition of "controller" in Article 1.4. of the Privacy Act and the definition in Article 4.7. of the GDPR are identical.

123. Article 4.7. of the RGPD states that the controller is *"the natural or legal person, public authority, agency or other body which alone or jointly with others determines the purposes and means of the processing".* Article 4.7. adds that *"where*

[47] See for example page 3 of the minutes of the hearing of January 10, 2023.

[48] As the Dispute Chamber will note in paragraph 208, the FATCA agreement does not provide for any qualification or definition in terms of data protection.

[49] The Contentious Chamber underlines this.

the purposes and means of such processing are determined by Union law or the law of a Member State, the controller may be designated or the specific criteria applicable to his designation may be provided for by Union law or the law of a Member State "[50]. This is the case of the Respondent under Article 13.2 of the aforementioned Law of 16 December 2015.

124. In his *Guidelines on the concepts of controller and sub-processor in the* GDPR[51] , the EDPS considers that when the controller is specifically identified by law, this designation is decisive in defining who acts as controller. This presupposes that the legislator has designated as controller the entity that is actually in a position to exercise control.

125. On several occasions in its submissions and during the hearing (see the minutes of the hearing), the defendant also pointed out that it did not have access to the content of the "bundle" of data that it received from the financial institutions (in this case from Bank Z) for the purpose of transferring these data to the IRS, and this *as an organisational measure to guarantee the security and integrity of the data*[52] . As already mentioned, the defendant does not deny that it is a data controller (paragraph 120).

126. Insofar as necessary, the Litigation Division wishes to point out that the fact that the defendant does not have access to the data communicated is irrelevant. Indeed, this circumstance has no consequence on its status as controller, as the CJEU specified in its Google Spain and Google judgment of May 13, 2014.[53]

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[50] The Contentious Chamber underlines this.

[51] European Data Protection Committee (EDPS), Guidelines 07/2020 on the concepts of controller and processor in the GDPR, https://edpb.europa.eu/system/files/2022- 02/eppb_guidelines_202007_controllerprocessor_final_en.pdf (point 23).

[52] See the minutes of the hearing: answer of the defendant to the question of Mr. C. Boeraeve as to the technical and organizational measures taken. Boeraeve about the technical and organisational measures that have been put in place.

[53] CJEU judgment of 13 May 2014, C-131/12, Google Spain and Google, ECLI :EU :C :2014 :317, points 22 - 41, and especially points 22 and 34:

" 22. According to Google Spain and Google Inc. the activity of search engines cannot be considered as processing of data that appear on third party web pages displayed in the list of search results, since these engines process information accessible on the Internet as a whole without sorting out personal data from other information. Furthermore, even if this activity is to be qualified as "data processing", the operator of a search engine cannot be considered as "responsible" for this processing, since he has no knowledge of the data and does not exercise any control over it.

" 34. Furthermore, it should be noted that it would be contrary not only to the clear wording but also to the objective of that provision, which is to ensure, by means of a broad definition of the concept of 'controller', effective and comprehensive protection of the data subjects, to exclude from it the operator of a search engine on the ground that it does not exercise control over the personal data published on the web pages of third parties."

See also CJEU judgment C-25/17, Jehovan Todistajat, EU:C:2018:551, para 69 and CJEU judgment C-210/16, Wirtschaftsakademie Schleswig-Holstein, C-210/16, EU:C:2018:388, para 38, as well as the already cited EDPS Guidelines 7/2020 on the concepts of controller and processor in the GDPR, para 45.

127. In conclusion, and in support of the combined reading of article 4.7 of the RGPD and article 13.2. of the Law of December 16, 2015, **the Contentious Chamber retains the qualification of data controller in the defendant's case with regard to the data processing challenged by the plaintiffs, namely the communication (transfer) of data to the IRS.**

128. As for the financial institutions (in this case, Bank Z, with which the first complainant held bank accounts), they were deliberately not implicated by the complainants[54] . Nevertheless, they play an important role in the chain of data processing that takes place in the context of the implementation of the "FATCA" agreement and the Law of 16 December 2015. Indeed, they are the ones who, in the first instance, ensure the status of the account holders concerned by the obligation to communicate data to the respondent. They are the ones who collect the data required under Article 2.2. of the "FATCA" agreement and Article 5 of the Law of December 16, 2015 and transmit it to the defendant who in turn transfers it to the IRS. As such, financial institutions are also qualified as data controllers by the Belgian legislator for the purposes of the Law of December 16, 2015[55].

II.D. As for Article 96 of the GDPR

129. As set out in paragraph 83, the Respondent, relying on Article 96 of the GDPR, argues (taking into account favorable opinions of the OPC, a transfer authorization from the SCFA of the OPC and the Constitutional Court's ruling of March 9, 2017) that the "FATCA" agreement read in combination with the Law of December 16, 2015 is in compliance with EU law as applicable on May 24, 2016. The defendant therefore considers itself entitled to base the transfer of the first plaintiff's data in particular, on these texts.

130. In view of this argument, the Litigation Division considers it necessary to **clarify the scope of the Article 96 of the GDPR**. It does so in the following paragraphs.

131. By opting for a regulation to replace Directive 95/46/EC, the European co-legislators have chosen to strengthen the harmonization of personal data protection rules in the EU. The regulation is directly applicable in the legal order

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[54] See the minutes of the hearing on this point.

[55] As mentioned in point 121, article 13.2. states that *"§ 2. For the application of the law of December 8, 1992, each reporting financial institution and the FPS Finance [read the defendant] shall be considered to be the 'controller' of 'personal data' with regard to the information referred to in this law which relates to natural persons".* The Contentious Chamber underlines.

The Litigation Division will not consider in this decision whether the institutions and the respondent should or should not be qualified as joint controllers within the meaning of Article 4.7. of the GDPR and therefore whether or not the conditions of article 26 of the GDPR should have been met. In view of the objections against the Respondent, a possible qualification as a co-responsible party is indeed not likely to lead to a different decision of the Contentious Chamber.

of each Member State and if it contains a number of references to the legislator These references do not call into question the objective of strong harmonization.

132. By providing for the application of the GDPR two years after its entry into force, i.e., May 25, 2018 (Article 99 of the GDPR), the European co-legislators not only granted a two-year compliance period for the new obligations of the GDPR but also made it clear that on this same date of May 25, 2018, data processing in progress as of May 24, 2016, should comply with all the provisions of the GDPR.

133. Recital 171 of the GDPR provides in this regard that *"processing operations already in progress on the date of application of the Regulation should be brought into conformity with it within two years of its entry into force".*

134. **This compliance is indeed essential to achieve the objective of strong harmonization pursued by the Regulation**. If processing operations in progress before the entry into force of the GDPR are not brought into conformity with the Regulation, two protection regimes would coexist. This would, in essence, be contrary to the very nature of the Regulation and, *a fortiori,* to that of a fundamental right enshrined in the Charter (Article 8).

135. It is in the light of this *ratio legis* of the transitional provisions of the GDPR that Article 96 must be understood and applied, both in its material scope (rationae materiae) and in its temporal scope (rationae temporis).

136. Article 96 of the GDPR does not exempt data controllers who process data pursuant to international agreements concluded before May 24, 2016 either totally or indefinitely from the material and temporal scope of the GDPR. Article 96 entitled *"Relationship with international agreements concluded before"* provides for a *transitional* regime *under conditions*, the objective pursued by Article 96 of the RGPD being *"to ensure comprehensive and consistent protection of personal data in the Union"* and to avoid any legal vacuum.[56]

II.D.1. As to the material scope of Article 96 of the GDPR

137. **Only the content of the international agreement concluded by the Member State is covered by Article 96 of the**

The* wording of the RGPD unequivocally targets *"international agreements involving the

[56] This objective is expressly spelled out in Recital 95 of Directive 2016/680/EU, in relation to Article 61 of that Directive, which is identical to Article 96 of the GDPR. This Recital 95 thus provides that "in order to ensure comprehensive and consistent protection of personal data in the Union, international agreements which have been concluded by the Member States before the date of entry into force of this Directive and which comply with the relevant provisions of Union law applicable before that date, should remain in force until they are amended, replaced or revoked." (Emphasis added by the Litigation Chamber).

transfer of personal data to third countries". The material scope of Article 96 must be interpreted in strict compliance with this formulation.

138. The Contentious Chamber notes from the outset that Article 96 of the RGPD is only invoked by the defendant with regard to (1) the complaint based on the failure to comply with the framework for the transfer of data to the American IRS[57] and with regard to (2) the complaint based on the violation of the principles of purpose, necessity and minimization. It does not appear to the Contentious Chamber that the defendant would invoke this article 96 of the RGPD with regard to all of its data protection obligations. According to the examination of the Contentious Chamber, article 96 of the RGPD is not invoked by the defendant with regard to the complaint based on a breach of the obligation to provide information, which is alleged by the plaintiffs, for example, nor is it invoked with regard to the applicability of article 35 of the RGPD, if applicable.

139. The Contentious Chamber agrees with this analysis. Indeed, as the "FATCA" agreement does not contain any specific provision concerning the obligation to provide information, for example, it is excluded from the scope of application of article 96 of the RGPD. The application of Articles 12 and 14 of the GDPR by the defendant is therefore beyond doubt (see Title II. E.2 below).

140. Moreover, the new obligations arising from the RGPD will be fully applicable: they do not exist in Directive 95/46/EC and are therefore not regulated in the 2014 "FATCA" agreement. To assert the contrary would mean, for example, admitting that a data leakage on the part of the defendant should not be notified in compliance with the conditions set forth in Article 33 of the GDPR or that the transfers denounced by the complaint should not be covered by the defendant's register of processing activities (Article 30 of the GDPR). This cannot be the case. **The application of Article 96 of the GDPR is limited to the content of the agreement alone. The letter of article 96 is clear on this point and this reading is moreover in line with the *ratio legis* of article 96 which, as the Contentious Chamber will explain below (point 143), aims at preserving the rights acquired by third countries under the said agreements.**

141. The Contentious Chamber will thus assess whether or not the Respondent was obliged to carry out a DPIA in the light of Article 35 of the GDPR without interference from Article 96 of the GDPR (see Title II. E.3 below). The Contentious Chamber points out that the accountability obligation is also applicable. Its compliance by the Respondent will be examined by the Contentious Chamber only in the light of articles 5.2. and 24 of the RGPD read together, without interference from article 96 of the RGPD (see Title II. E.4 infra*)*. Finally, the Contentious Chamber will assess the Respondent's compliance with article 20 of the Data Protection Act under the same conditions (see Section II. E.5. below*)*.

II.D.2. As to the temporal scope of Article 96 of the GDPR

[57] Point 6.2. of its summary conclusions and point 103 above.

142. Article 96 of the GDPR provides for the continued application of international agreements involving transfers of personal data to third countries *"until they are amended, replaced or repealed".* Although no concrete deadline is set for such modification, replacement or repeal, their mention constitutes a time limit in itself. By these words, **the co-legislators mean that the maintenance of such international agreements is inherently limited in time. This reading is also the only one that, according to the Contentious Chamber, reconciles the harmonization objective of the GDPR (points 131 et seq. above), the preservation of the rights of third countries with which an international agreement is concluded (point 143) and the duty of loyal cooperation of the Member States of the Union (point 144).**

143. Article **96 of the GDPR is indeed aimed at preserving the rights of third countries**. It is obvious that negotiating an international agreement takes time and that the rights acquired by a third country party t o an international agreement cannot simply be immediately removed as a result of the entry into force of new legislation when the agreement was in conformity with EU law at the time of its conclusion.

144. **Without prejudice to what has just been said, EU member states are nonetheless obliged to comply with EU law**. This obligation arises from Article 4.3 of the Treaty on European Union (TEU), which enshrines, among other things, the principle of loyal cooperation by member states.[58] The TEU is binding on all member states. Article 4.3 TEU is binding on the Member States, including their independent data protection authorities charged with tasks based on applicable European law (Article 8.3 of the Charter and Articles 51 et seq. of the GDPR).[59]

145. In this respect, Article 96 of the GDPR is in line with Article 351 of the Treaty on the Functioning of the EU (TFEU)[60], in respect of which the CJEU has already ruled that:

- On the one hand, *"the rights and obligations resulting from a convention concluded prior to the date of accession of a Member State between that State and a third State shall not be affected by the provisions of the Treaty. The purpose of this provision [read Article 351 TFEU] is to specify, in accordance with the principles of international law, that the application of the Treaty does not affect the commitment of the Member State concerned to*

[58] Article 4.3. TEU: In accordance with the principle of sincere cooperation, the Union and the Member States shall respect and assist each other in carrying out tasks which flow from the Treaties. Member States shall take any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union. Member States shall facilitate the achievement of the Union's tasks and shall refrain from any measure which could jeopardise the attainment of the Union's objectives.

[59] See in this sense: Judgment of the CJEU of June 15, 2021, Facebook Ireland and others v. Gegevensbeschermingsautoriteit, C-645/19, ECLI:EU:C:2021:483, para 60.

[60] Article 351 TFEU: The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third States, on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall use all appropriate means to eliminate the incompatibilities established.

respect the rights of third States resulting from a previous convention and to observe its obligations[61] ".

- On the other hand, practices must be brought into conformity with European law
  This is the case of the "practice of the Member State concerned in the performance of its obligations to third States under a previously concluded convention".62 The practice of the Member State concerned in the performance of its obligations to third States under a previously concluded convention is also a matter of concern to the Commission.

146. Thus, the Contentious Chamber shares the view that it follows from this position of the CJEU that *"the meaning of the two paragraphs have been reconciled, and it is now safe to affirm that art. 351(1) TFEU provides temporary protection to allow the Member States not to incur international responsibility while the ultimate goal established by art. 351(2) TFEU (that is, the removal of all incompatibilities) is achieved in a sustainable (for the Member State involved) and lawful (from an international law perspective) manner [63]".*

147. The Contentious Chamber cannot therefore subscribe to an interpretation according to which article 96 of the RGPD would authorize, without any time limit, the continued application of international agreements concluded before May 24, 2016 - even if they were in conformity with Directive 95/46/EC and EU law on that same date - without any further compliance with the RGPD. Following such an interpretation, the co-legislators would have allowed, in disregard of the European case law cited above, the coexistence, without time limit, of international agreements that comply with the state of EU law as it stood on May 24, 2016 (including Directive 95/46/EC, which was repealed on May 24, 2018) on the one hand, and international agreements concluded after that date that must comply with the RGPD on the other.

148. This reading of Article 96 of the GDPR would also imply that data protection authorities assess the compliance of these international agreements with the state of the law as of May 24, 2016 many years after this date, This reading of Article 96 of the RGPD would also imply that data protection authorities assess the compliance of these international agreements with the state of the law as of May 24, 2016, many years after this date, in particular with regard to a Directive 95/46/EC that has been repealed for a number of years that will only increase over time and without taking into account any developments in the case law of the CJEU with regard to key concepts of data protection, if any, that are common to Directive 95/46/EC and the RGPD, or with regard to the Charter.

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[61] CJEU, Judgment of 3 March 2009, C-205/06, ECLI:EU:C:2009:118, Commission v. Austria, para 33. This judgment concerns the second paragraph of Article 307 of the Treaty establishing the European Community (repealed by Article 351 TFEU). Article 307: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third States, on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State(s) concerned shall use all appropriate means to eliminate the incompatibilities established.

[62] CJEU, Judgment of 28 March 1995, C-324/93 The Queen / Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith, ECLI:EU:C:1995:84, p 33.

[63] It is the Contentious Chamber that points out: https://www.europeanpapers.eu/es/europeanforum/court-of-justice- finally-rules-on-analogical-application-art-351-tfeu

149. **On the contrary, the Contentious Chamber is of the opinion that the fact that Article 96 of the GDPR does not provide for** a **time limit (by reference to a deadline or by reference to a number of years elapsed, for example) does not exempt EU Member States,**[64] **data controllers or data protection authorities from their respective obligations.**

150. **As far as the EU Member States are concerned, Article 96 of the RGPD does not exempt them from (re)negotiating, in execution of their duty of loyalty, an agreement in conformity with the RGPD. The more time passes, the less acceptable is the inertia of the States in this respect**. As early as 2021, the data protection authorities - including the DPA - called on the EU member states to review their international agreements in light of the RGPD.[65]

151. The Contentious Chamber specifies here that it is of the opinion that it is up to the Belgian State to negotiate an agreement in conformity with the RGPD, in execution of its duty of loyal cooperation (article 4.3 TEU - point 144). It points out that on the date of the adoption of the present decision, **7 years have passed since the entry into force of the RGPD**. The Contentious Chamber notes in this respect that there is no sign of the Belgian government's willingness to request the revision of the agreement

The company has not been made aware of any "FATCA" issues in the context of this case.

152. The role of the Belgian State (as well as that of any other Member State that has signed a "FATCA" agreement comparable to the one signed by the Belgian State) does not exempt **the data controller** who, like the defendant, intends to rely on article 96 of the RGPD, from examining whether the conditions for recourse to article 96 are met. **Indeed, independently of the accountability obligation (Title II.E.4), the recourse to article 96 of the RGPD implies intrinsically, by the condition it sets (i.e. the conformity of the agreement with EU law as applicable on May 24, 2016), that the data controller carries out this evaluation.**

153. **As for the data protection authorities,** the Contentious Chamber is also of the opinion that the more time passes, the **less acceptable it is that they are limited in the exercise of the mission entrusted to them by the RGPD** since May 25, 2018, a mission that consists precisely, as has been pointed out in points 113 et seq. to **contribute to the effective application**

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[64] Nor, more generally, the states subject to the RGPD.

[65] Declaration 04/2021 of 13 April 2021 on international agreements, including transfers: https://edpb.europa.eu/system/files/202205/edpb_statement042021_international_agreements_including_transfers_fr. pdf The EDPS (EDPB) considers that *"in order to ensure that the level of protection of natural persons guaranteed by the GDPR (...) is not compromised when personal data are transferred outside t h e Union, account should be taken of t h e objective of bringing such agreements into line with the requirements of the GDPR (. . .) applicable to data transfers where this is not yet the case. The EDPB therefore invites Member States to assess and, where appropriate, review their international agreements involving international transfers of personal data, such as those relating to taxation (e.g. automatic exchange of personal data for tax purposes), (....) that were concluded before 24 May 2016 (for agreements relevant to the RGPD).(. . .). The EDPB recommends that Member States take into account, for this review, the GDPR (...), the relevant EDPB guidelines applicable to international transfers [the EDPD cites its Guidelines , as well as the case law of the Court of Justice, in particular the Schrems II judgment of 16 July 2020."*

and uniformity of the GDPR. In its previously cited Schrems II judgment, the CJEU emphasizes the following in this regard with regard to the competence of the supervisory authorities as enshrined in Articles
8.3. of the Charter and 57.1. a) of the RGPD :

- *(...) Consequently, each of them [read supervisory authorities] is vested with the competence to verify whether a transfer of personal data from its Member State to a third country complies with the requirements of this Regulation. (...) The exercise of this task is of particular importance in the context of a transfer of personal data to a third country, since, as is clear from the very terms of recital 116 of that regulation, "when personal data cross the external borders of the Union, this may increase the risk that individuals will not be able to exercise their data protection rights, in particular to protect themselves against the unlawful use or disclosure of that information"* (paragraphs 107 and 108 of the judgment).

154. The Contentious Chamber will also take into particular consideration the following elements

- The CJEU imposes very strict conditions on *international agreements* that have an impact on the exercise of the rights to privacy and personal data protection enshrined in Articles 7 and 8 of the Charter. In particular, it follows from the CJEU's Opinion 1/15 on the draft PNR agreement between Canada and the EU (as well as from the C-817/19 judgment of June 21, [202266]) and the Schrems [II] judgment67 that *"the communication of personal data to a third party, such as a public authority, constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, regardless of the subsequent use of the information communicated. The same applies to the storage of personal data as well as to access to such data for use by public authorities. In this respect, it is irrelevant whether or not the information relating to private life concerned is sensitive or whether or not the persons concerned have s u f f e r e d any disadvantages as a result of this interference"* (paragraph 124).[68]

- Any limitation to the fundamental rights enshrined in the Charter (including the fundamental right to data protection in Article 8) must meet the conditions of the above-mentioned Article 52.1 of the Charter, which states that "*Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essential content of those rights and freedoms. In accordance with the principle of*

[66] CJEU, judgment C-817/19 of 21 June 2022, Ligue des droits humains, ECLI:EU:C:2022:491.

[67] See note 43 above.

[68] CJEU Opinion of 26 July 2017 (EU-Canada PNR Agreement), ECLI:EU:C:2017:592, paras 123 and 124.

proportionality, limitations may only be made if they are necessary and effectively meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

155. **It follows from all of the above elements**, both (1) the ratio legis of article 96 of the RGPD, and (2) the obligation of loyal cooperation that is imposed on the Member States and, by repercussion, on the supervisory authorities such as the DPA (of which the Litigation Chamber is the administrative litigation body), (3) the necessary restrictive interpretation of Article 96 of the RGPD required by the CJEU since the effects of this article are likely to limit the exercise of fundamental rights, in particular the rights to privacy and data protection enshrined in Articles 7 and 8 of the Charter respectively, **that the effect of "*standstill*" in Article 96 of the GDPR must be read and interpreted restrictively and proportionate.**

156. **The Litigation Division is thus of the opinion that the text of Article 96 of the GDPR does not preclude the interpretation according to which its "*standstill*" effect diminishes with time and with the evolution of the interpretation of EU law, *a fortiori* with regard to the principles already enshrined in Directive 95/46/EC and reproduced as such in the GDPR. In its assessment of the use of Article 96 of the GDPR, the Litigation Division will thus verify whether its application is necessary to preserve the acquired rights of the United States with regard to the specific situation of the first plaintiff and the Belgian accidental Americans that the second defendant is defending in support of the obligation of loyal cooperation that is incumbent on it by implication, it will weigh the interests of the United States against the rights of the latter and could, if necessary, set aside Article 96 of the GDPR if the application of the latter would have a disproportionate effect on these rights. In this balancing exercise, the Litigation Division will, if necessary, take into account case law developments since May 24, 2016.**

II.E. As for the grievances raised

157. Pursuant to Article 44 of the GDPR, a data exporter such as the Respondent who transfers personal data to a third country must, in addition to complying with Chapter V of the GDPR, also meet the requirements of the other provisions of the GDPR. All processing must comply with the GDPR in its entirety.

158. The Contentious Chamber will thus proceed in a first step to the examination of the conformity transfer of data to the IRS (Title II.E.1).

159. This examination will entail an analysis of compliance with the principles of purpose, necessity and proportionality of the transfer by the Respondent to the IRS from the point of view of the principles of purpose, necessity and proportionality/minimization enshrined both in article 6 §.1.b) and c) of Directive 95/46/EC, given the invoked applicability of article 96 on these aspects, and in article 5.1. b) and c) of the RGPD (Title II.E.1.1).

160. This examination will also entail an analysis of compliance with the specific framework for transfers to the United States as a third country required by Chapter V of the GDPR (and its equivalent under Directive 95/46/EC applied in combination with Article 96 of the GDPR as well) (Title II.E.1.2).

161. Finally, the Contentious Chamber will proceed with the examination of the Respondent's obligations to inform (Title II.E.2), to carry out an AIPD (Title II.E.3) and to be accountable (Title II.E.4) before concluding its analysis by examining compliance with article 20 of the LTD (Title II.E.5).

II.E.1. As to the compliance of the data transfer to the IRS

II.E.1.1. As for the breach of the principles of purpose, necessity and minimization

II.E.1.1.1. As for the principle of purpose limitation

162. The purpose principle as enshrined in Article 5.1.b) of the GDPR - as it was in Article 6.1.b) of Directive 95/46/EC - requires that data be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Whether or not the processed data are actually necessary for the fulfilment of the purpose depends on the purpose being sufficiently defined. Purposes that are too broadly defined thus leave too much room for the controller and do not allow for an effective application of the purpose principle, which is an essential principle of the data protection regulation.

163. The Contentious Chamber notes that the purposes of the "FATCA" agreement, as specified in the introduction to the agreement, are (a) the improvement of international tax rules and (b) the implementation of the obligations arising from the American "FATCA" law aimed at combating tax evasion by American nationals[69].

[69] See the following recitals: *"Whereas the government of the Kingdom of Belgium and the Government of the United States of America (...) desire to conclude an agreement to improve international tax compliance through mutual assistance in tax matters based on an effective infrastructure for the automatic exchange of information"* and *"Whereas, the Parties desire to conclude an agreement to improve tax compliance and provide for the implementation of FATCA based on domestic reporting and reciprocal automatic exchange pursuant to the Convention [read the Convention on Mutual Administrative Assistance in Tax Matters done in Strasburg on January, 25, 1988](...)".*

164. Already in 2015, the Article 29 Working Party stated in its document WP 234 specifically devoted to data protection requirements in the context of automatic data exchange that *"any international agreement should clearly identify the purposes for which data are collected and validly used. The wording of the purpose ("tax evasion/improvement of tax compliance"), for example, may seem vague and insufficiently clear, leaving too much room for maneuver to the competent authority."* The CJEU confirmed this requirement in its Opinion 1/15 (EU-Canada PNR) already cited, in which it ruled that an international agreement must be formulated in a very precise manner.[70]

165. In light of the above, **the Contentious Chamber is of the opinion that the purposes expressed in the "FATCA" agreement are not sufficiently determined** in that they do not allow for an assessment of the extent to which the data processed are necessary to achieve the purposes expressed. Such formulations do not allow data subjects or the DPA to discern the exact purposes and, above all, the data processing that may result from them, even though the data processed have been listed (Article 2.2. of the "FATCA" agreement and Article 5 of the Law of 16 December 2015).

II.E.1.1.2. As for the principles of necessity and minimization/proportionality

166. As the plaintiffs point out the transfer of data to the IRS in the context of the execution of the "FATCA" agreement is a system of automatic and annual transfer of data on the basis of the criterion of American nationality and declarable bank accounts (articles 2 of the "FATCA" agreement and 5 of the Law of December 16, 2015) without any indication that any tax law has been violated and not a system of transfer of data on an *ad hoc* basis at the request of the American authorities, taking into account the presence of indications that require the said transfer of data in view of the purposes pursued

167. In this respect, the Contentious Chamber recalls the principle of proportionality (according to the terminology used in article 6.1. c) of Directive 95/46/EC) or, alternatively, the principle of minimization (according to the terminology used in article 5.1. c) of the RGPD), in application of which the processing of data must be **strictly necessary for the achievement of the purpose.**

168. As early as 2015, the data protection authorities gathered in the Article 29 Working Party insisted on the necessary respect of this principle in the context of "FATCA" in the following terms: *"while this case concerned the necessity and proportionality of certain counter-terrorism measures, the Article 29 Working Party is of the opinion that the balancing exercise prescribed by the Court of Justice applies to any public policy implemented (including*

[70] See. H. Hijmans, PNR Agreement EU-Canada Scrutinised: CJEU Gives Very Precise Guidance to Negotiators, European Data Protection Law Review, 2017/3.

tax cooperation policies) that affect personal data protection rights. It is therefore imperative that tax cooperation agreements demonstrate that the planned data exchange is necessary and that it covers the minimum amount of data required to achieve the intended purpose.

169. This position of Group 29 in its WP 234 followed the annulment of Directive 2006/24/EC by the CJEU under the terms of a judgment of April 8, 2014 for reasons related to the failure to respect the principle of proportionality. The Court had thus ruled that the retention of data generated or processed in the context of the provision of publicly available communication services or public communication networks was disproportionate in that this obligation applied *"even to persons in respect of whom there is no indication that their conduct may have a link, even indirect or remote, with serious offences".*[72]

170. The Contentious Chamber agrees with the view expressed by the Group 29 at the time that there is no reason to limit this consideration to measures adopted in the context of the fight against terrorism. Other public policy measures intended to pursue distinct objectives, in particular through the collection of personal data, are also subject to the same respect for the principle of proportionality in Article 6(1)(c) of Directive 95/46/EC, which was applicable at the time, and is now set out in Article 5(1)(c) of the RGPD. This is the case of data collection imposed in execution of agreements organizing automatic exchanges of tax data such as the "FATCA" agreement. For this reason, the analogy with the positions of both the G29 and the EDPS, but especially the CJEU, are particularly relevant.

171. The Group 29 further stated, also in 2015, that *"accordingly, tax cooperation agreements should include provisions and criteria that explicitly link the exchange of information and, in particular, the provision of personal data on financial accounts to possible tax evasion and that exempt low-risk accounts from reporting obligations. In this regard, these criteria should be applicable ex ante to determine which accounts (and information) should be reported.*

172. In 2017, the EDPS says no different when it insists in its guide for evaluating the necessity of measures limiting the fundamental right to data protection on the basis that *"not all measures that might be useful for the given purpose are*

[71] Working Party 29, *Guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of the automatic exchange of personal data for tax purposes*, WP 234 of 16 December 2015. The Litigation Chamber emphasizes.

[72] CJEU, Judgment of 8 April 2014 C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, ECLI:EU:C:2014:238, pt 58.

It is not enough that the measure is merely convenient or cost-effective. It is not enough that the measure is merely convenient or cost-effective.

173. The EDPS also stated that the annual nature of the FATCA disclosure in itself demonstrated that the disclosure was not based on indications of fraud but was systematic.

174. Finally, in 2018, a study commissioned by the European Parliament stated that the reporting requirements under the "FATCA" agreement are not sufficiently limited with regard to the risk of tax evasion. The study states that *"in conclusion, the limitations introduced by FATCA within the European Union through the IGAs [read intergovernmental agreements] appear, at this stage and in certain circumstances, to be neither necessary nor proportionate, insofar as they do not restrict reporting obligations to individuals suspected of tax evasion. Instead, the limitations introduced by FATCA would constitute "necessary and proportionate measures" provided that the United States provides, on a case-by-case basis, evidence that U.S. expatriates are using the Union's financial system to engage in offshore tax evasion. In the absence of such evidence, FATCA's limitations appear to go beyond what is strictly necessary to achieve the goal of combating offshore tax evasion."* The updated version of this study concludes along the same lines.[73]

175. All of these elements therefore already existed as of May 24, 2016. They were to be taken into account as early as 2014, i.e. well before the RGPD came into force. They were repeated and reinforced in the years that followed, including after May 24, 2016, which the defendant could not have been totally unaware of.

176. More recently,[74] on February 24, 2022, the CJEU issued a judgment in which it expressly stated that a generalized and undifferentiated collection of personal data for the purpose of combating tax fraud by a tax authority was not permitted. The administration concerned must refrain from collecting data that are not strictly necessary for the purposes of the processing (paragraph 74 of the judgment). The administration must also consider whether its requests cannot be more targeted on the basis of more specific criteria. The CJEU made these considerations with regard to the request made by the Latvian tax authorities to an economic operator to provide it each month with

[73] See https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734765/IPOL_IDA(2022)734765_EN.pdf

[74] CJEU, Judgment of 24 February 2022, C-175/20, Valsts ieņēmumu dienests (Processing of personal data for the purpose of
See also judgment C-817/19, Ligue des droits humains (PNR), already cited, of 21 June 2022:
" 115. With regard to the principle of proportionality, the protection of the fundamental right to privacy at the level of the Union requires, in accordance with the Court's consistent case law, that derogations from and limitations on the protection of personal data be kept within the limits of what is strictly necessary. Moreover, a general objective cannot be pursued without taking into account the fact that it must be reconciled with the fundamental rights affected by the measure, by carrying out a balanced weighing of the general objective on the one hand and the rights in question on the other.

data relating to advertisements for the sale of private cars published on its website in the previous month. Even in the exercise of the public interest mission with which it has been entrusted, the data controller cannot, according to the CJEU, proceed in a generalized and indiscriminate manner to collect data and must consider the possibility of further targeting, in this case targeting certain advertisements by means of specific criteria.

177. It follows from this judgment that the recipient of the data request has an obligation to examine the merits of the request and to verify whether it is legally authorized to respond. Otherwise, the recipient of the request risks violating its own obligations under the GDPR.

178. In this respect, the Contentious Chamber is of the opinion that the sole nationality of the first complainant and, more generally, of the Belgian accidental Americans defended by the second complainant, is an insufficient criterion with regard to the purpose pursued. The fact that a list of data concerning them has been drawn up does not constitute a relevant and sufficient targeting criterion. The communication of personal data relating to all Belgian accidental Americans - apart from those whose account balances are below the declarable threshold - without any other indication of tax evasion or avoidance is disproportionate, especially with regard to those who would not be subject to taxation in the United States, taking into account any exemptions authorized by American law, as pointed out by the complainants.

II.E.1.1.3. Conclusion on the breach of the purpose limitation, necessity and minimization principles

179. **The case law cited with regard to the principles of necessity and minimization is admittedly partly subsequent to May 24, [201676]. However, it confirms the position adopted by the CJEU as early as 2014 and on which, as just recalled, the data protection authorities alerted as early as 2015 and have not stopped doing so since. In view of the diminishing standstill effect of Article 96 of the GDPR, the Respondent could not disregard this in its assessment of the use of Article 96 of the GDPR and the continuation of processing on that basis. In the opinion of the Contentious Chamber, the argument of a possible compromise of the acquired rights by the United States could not be invoked here since before May 24, 2016, the compliance with the principles of necessity and minimization/proportionality of the "FATCA" agreement was already vitiated.** It is true that the CJEU did not rule on the "FATCA" agreement as such, but the interpretation that it had

[75] In this context, it should be noted that the plaintiff's bank specified in its letter of April 22, 2020 that the objective of the American legislation was to identify ALL accounts held by American citizens or residents, which at the very least attests to the difficulty in understanding the (overly broad) purpose of the agreement.

[76] By citing this judgment in support of its reasoning, the Contentious Division neither accepts nor rejects the Complainants' argument as requested by the Respondent in its additional submissions regarding the Constitutional Court's judgment of March 9, 2017 (paragraph 102). The Contentious Chamber is free to invoke it on its own as well as any other case law that it deems relevant in the exercise of its decision-making competence.

Given the principles of necessity and minimization in a comparable context, it was therefore necessary to consider both the "FATCA" agreement and the Law of 15 December 2016. This is *even more* the case after the recent rulings of the CJEU in the same line. The same conclusion applies to the failure to comply with the purpose limitation principle, a pillar principle of data protection since before the GDPR (see above).

180. **In support of the above, the Contentious Chamber notes that as of May 24, 2016, the compliance of the data transfers provided for by the "FATCA" agreement and the Law of December 16, 2015 with the principles of purpose, necessity and proportionality/minimization could be very seriously doubted. If doubts about this compliance were to remain in the eyes of some, *quod non* according to the Contentious Chamber, these doubts are completely dispelled in 2023 given the evolution of the case law of the CJEU[77].**

181. In conclusion, the Contentious Chamber is of the opinion that **neither the "FATCA" agreement nor the Law of December 16, 2015 respect the principle of finality, necessity and minimization/proportionality. The Contentious Chamber concludes that the Respondent cannot rely on article 6.1. e) and 6.1. c) of the GDPR, which contain this necessity condition, which is not met, to carry out the denounced transfers.**

II.E.1.2. As for compliance with the rules governing the transfer to the IRS

II.E.1.2.1. Reminder of the principles

182. Chapter V of the GDPR deals with the transfer of personal data to third countries or international organizations. Third country means any country that is not a member of the European Economic Area (EEA). Defendant's transfer of First Plaintiff's personal data to the IRS is a transfer to a third country within the meaning of the GDPR.

183. As the parties point out in their respective submissions (paragraphs 53 et seq.), the Chapter V of the GDPR organizes a cascade system between different instruments that can be used by a controller or processor to transfer personal data to a third country.[78] This system is in line with the data transfer regime provided for by Directive 95/46.[79] Thus, in the absence of an adequacy decision within the meaning of

[77] The Litigation Division recalls here again the CJEU judgment of October 6, 2020, which emphasizes that limitations on the exercise of the rights enshrined in Articles 7 and 8 of the Charter are permissible only, "provided that those limitations are provided for by law, that they respect the essential content of those rights and that, with due regard for the principle of proportionality, they are necessary and effectively meet objectives of general interest recognized by the Union [...]. Judgment of the CJEU, Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and others, ECLI :EU :C :2020 :791, pts 120 and 121.

[78] See. Kuner, in Kuner a.o. The EU General Data Protection Regulation: A Commentary, OUP 2020, p. 846.

[79] For a comparison between Directive 95/46/EC and the RGPD, Kuner, in Kuner a.o. The EU General Data Protection Regulation: A Commentary, OUP 2020, p. 758.

Under Article 45 of the GDPR, the controller or processor may only transfer personal data to a third country if it has provided appropriate safeguards and on condition that data subjects have enforceable rights and effective remedies under Article 46 of the GDPR. These appropriate safeguards can take different forms such as a legally binding instrument, *Binding Corporate* Rules (BCR), standard data protection clauses or a code of conduct or a certification mechanism under the conditions set out in Articles 46 and 47 (as regards BCR) of the GDPR. Finally, in the absence of an adequacy decision and appropriate safeguards, a transfer of data to a third country can only take place if one of the derogations listed in Article 49 of the GDPR applies.

184. Failure to meet the requirements of Articles 45 to 49 of the GDPR prohibits the transfer of personal data to a country outside the EEA.

185. It is not disputed **that there is no adequacy ruling** covering the transfer of the first plaintiff's data (and more broadly the Belgian accidental Americans whose interests the second plaintiff is defending) to the IRS in the United States, since the ruling

The "Privacy Shield "[80] - which was invalidated by the CJEU in the "Schrems II" judgment cited above - does not

does not apply to this type of transfer.

186. **In other words, the transfer of data *by an authority* in the EU such as the defendant to, as in this case, an authority in a third country that does not provide adequate protection, can only take place if the controller, i.e. the defendant, has provided for *appropriate safeguards* and on the condition that the data subjects have enforceable rights and effective remedies** either through "a legally binding and enforceable instrument between public authorities or public bodies" (Article 46.2.a) of the GDPR); or by "*provisions to be included in administrative arrangements between public authorities or public bodies that provide for enforceable and effective rights for data subjects*" within the meaning of Article 46.3. b) of the GDPR.

187. **It has already been mentioned that the Respondent relies in this case on Article 46.2. a) of the GDPR, in combination with Article 96 of the GDPR as well as autonomously (paragraphs 82 et seq.).**

188. It is clear from the text of Article 46.2. a) of the GDPR (as it is from Article 46.3. b)) that *the appropriate safeguards must be included in* the legally binding instrument (or in the relevant administrative arrangement).[81] Article 46.2. a) reads as follows:

[80] Commission Implementing Decision (EU) 2016/1250 of July 12, 2016, pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Data Protection Shield, OJ 2016, L 207/1.

[81] See also the EDPS Guidelines 02/2020 already cited, p.21 ff.

"the appropriate safeguards (...) may be provided (...) by a legally binding and enforceable instrument between public authorities or bodies "[82].

189. Recital 102 of the GDPR, which relates to Article 96 of the GDPR, states in the same sense that *"This Regulation is without prejudice to international agreements concluded between the Union and third countries to regulate the transfer of personal data, including appropriate safeguards for the benefit of data subjects*.

190. While the French wording of this recital is not the most clear-cut, a reading of the English[84] and Dutch[85] versions clarifies that these agreements must contain appropriate safeguards for the benefit of the persons concerned. Indeed, where the French version retains the wording "The English and Dutch versions explicitly link the agreements (...) including appropriate safeguards to the safeguards that are to be included in the agreements. The English version thus states *"agreements (...)* ***including*** *appropriate safeguards for data subjects"* and the Dutch version, the most explicit, mentions *"international overeenkomsten waarin [**in** which] passende waarborgen zijn opgenomen [appropriate safeguards are included]".*

191. **In other words, pursuant to Article 46.2.a) of the GDPR, whether or not it is applied in combination with Article 96 of the GDPR as interpreted and applied as set out by the Litigation Chamber in paragraphs 129 et seq., these guarantees must be included *in* the international agreement itself.**

192. Why this requirement? Since the international agreement constitutes the legal basis for the data transfers it provides for, it must contain the appropriate guarantees in terms of data protection required. Indeed, it is only if these guarantees are included in the agreement that they will be enforceable against the non-EU country with which the agreement is concluded. The Litigation Chamber recalls, as it did above, that we are in a situation where there is no adequacy decision for the benefit of the third country. Compliance with the European data protection rules to which the EU Member States are bound therefore requires, when the choice is made, as in this case, to conclude an international agreement, that this agreement be in conformity with these rules. This conformity requires the inclusion in the agreement of

[82] The Contentious Chamber underlines this.

[83] The Contentious Chamber underlines this.

[84] Recital 102 (English version): This Regulation is without prejudice to international agreements concluded between the Union and third countries regulating the transfer of personal data including appropriate safeguards for the data subjects.

[85] Recital 102 (Dutch version): Deze verordening doet geen afbreuk aan internationale overeenkomsten die de Unie en derde landen met elkaar hebben gesloten om de doorgifte van persoonsgegevens te regelen en waarin passende waarborgen voor de betrokkenen zijn opgenomen.

safeguards that, as will be explained below, reflect the minimum European data protection requirements that will be applied to the transferred data. If not included in the agreement (by or under the agreement), these safeguards will not be enforceable against the third State. In his Guidelines 02/2020, the EDPS underlines in this sense that "*international agreements must expressly state that both parties are obliged to guarantee the essential principles of data protection*" (point 17). Consequently, moreover, the fact that these guarantees would result, as the defendant points out with regard to some of the said guarantees (see below), from the Belgian Law of December 16, 2015 is insufficient in this respect since this legislation is not binding on the third state.

193. In view of the fact that the Respondent invokes Article 96 of the GDPR with regard to the claim that the transfer to the United States is unlawful, the Contentious Chamber points out that in its document WP 234 of December 16, 2015, the Working Party 29 already listed the safeguards that, without prejudice to additional *adhoc* safeguards, must always be present in the legal basis (whether legislation or international agreement) in the context of the automatic exchange of data for tax purposes.

194. In his Guidelines 02/2020, the EDPS also lists, in support of Article 44 of the GDPR and the case law of the CJEU, in particular the Schrems II judgment already cited, the minimum safeguards that must be found in the binding legal instrument to take only the case of Article 46.2(a) of the GDPR invoked by the Respondent in this case. These recommendations reinforce those already made explicit by the Group 29 in its document WP 234 cited above. **More than recommendations, these are minimum guarantees that *must* be included in the international agreement**. These guarantees aim, as has just been recalled, to ensure that the level of protection of individuals under the GDPR is not compromised when their personal data is transferred outside the EEA and that the individuals concerned benefit from a level of protection substantially equivalent to that guaranteed within the EU.

195. Among these minimum guarantees are the following requirements, which are found both in the above-mentioned WP 234 document - albeit implicitly - and in the most recent EDPS Guidelines 02/2020

- As for the key concepts of data protection :

196. International agreements must contain definitions of the basic concepts and rights relating to personal data that are relevant to the agreement in question. The EDPS Guidelines 02/202086 indicate that if they refer to these concepts, international agreements must provide definitions of important concepts

[86] Point 16 of the EDPS Guidelines 02/2020.

personal data", "processing of personal data",
"controller", "processor", "recipient" and "sensitive data".

197. The Contentious Chamber notes that although document WP 234 of the Working Party 29 did not explicitly mention this, it is nonetheless essential, whether under the Directive 95/46/EC or the RGPD, that the parties to an international agreement agree on the definition of the key concepts of the data processing operations provided for in the agreement - *a fortiori* when the purpose of the agreement is based on these operations, as in the case in point - and that these concepts be defined therein. Otherwise, the effectiveness of any of the other data protection safeguards mentioned could be compromised. These definitions are, with limited exceptions[87], otherwise identical in Directive 95/46/EC and in the GDPR.

➢ As for the data protection principles:

198. *Purpose limitation* principle[88] : the international agreement must delimit its scope and must specify the purposes for which personal data are processed (transferred), including compatible purposes for further processing and ensure that the data will not be further processed for incompatible purposes.

199. *Minimization* principle[89] : the international agreement must specify that the data transferred and further processed must be adequate, relevant and limited to what is necessary for the purposes for which they are transmitted and further processed.

200. *Retention Limitation* Principle[90] : the international agreement must contain a clause on data retention. In particular, this clause should specify that personal data shall be retained in a form which permits identification of the data subjects only for as long as is necessary for the purposes for which they were transferred and further processed. Where a maximum retention period is not set in national law, a maximum period should be set in the text of the agreement.

➢ As for the rights of the persons concerned:[91]

201. The international agreement must guarantee enforceable and effective rights for the data subject, as provided for in Article 46.1. of the GDPR and Recital 108. The rights of data subjects, including specific commitments made by

[87] The notion of processing in the GDPR (Article 4.7.) is completed by a reference to the structuring and listing of sensitive data in Article 9 includes new data.

[88] See page 6 of WP 234 and point 18 of the EDPS Guidelines 02/2020.

[89] See page 6 of WP 234 and points 21 et seq. of the EDPS Guidelines 02/2020.

[90] See pages 6-7 of WP 234 and point 24 of the EDPS Guidelines 02/2020.

[91] See page 7 of WP 234 and section 2.4 (points 27 et seq.) of the EDPS Guidelines 02/2020.

to guarantee these rights, must be mentioned in the agreement. For these rights to be effective, the international agreement must provide mechanisms to ensure their practical application. In addition, any violation of the rights of the person concerned must be accompanied by an appropriate remedy.

202. As such:

- The international agreement must clearly describe the obligations of the parties with respect to

  transparency.

- The agreement must guarantee the data subject the right to obtain information about and access to all personal data being processed.

- In principle, the agreement should include a clause stating that the receiving organization will not take automated individual decisions, including profiling, which produce legal effects concerning the person concerned or significantly affect him or her exclusively on the basis of automated processing operations within the meaning of Article 22 of the GDPR. Where the purpose of the transfer includes the possibility for the receiving organization to make such decisions, the conditions for such decision making shall be defined in the agreement and shall comply with Article 22. 2-4 of the GDPR.

  ➢ As for recourse mechanisms :

203. In order to ensure the enforceable and effective rights of data subjects, the international agreement must provide for a system that allows data subjects to continue to benefit from redress mechanisms after their data has been transferred to a country outside the EEA. These redress mechanisms should allow data subjects whose rights have been violated to lodge a complaint and have it adjudicated.

204. The Contentious Chamber does not reproduce here the complete list of the minimum guarantees required pursuant to article 46.2. a) of the GDPR. It limits itself to stating those that it will examine. **Indeed, the absence of one or the other guarantee in the agreement is sufficient to conclude to the unlawfulness of the transfers operated on the basis of this agreement, if any, and this, whether or not under article 46.2. a) of the RGPD applied in combination with article 96 of the RGPD, since these guarantees were required both before May 24, 2016 and after this date.**

205. In the absence of appropriate safeguards under Article 46 of the GDPR, the only possibility is to rely on Article 49 of the GDPR. In its *Guidelines 2/2018 on derogations under Article 49 of Regulation (EU)* 2016/679[92] the EDPS clarified that Article 49 of the GDPR cannot be relied upon for repetitive and/or structural processing. Article 49 of the GDPR

[92] European Data Protection Committee, *Guidelines 2/2018 on derogations under Article 49 of Regulation (EU) 2016/679* https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_fr.pdf, p.5.

is therefore excluded in this case (which the defendant admits) since the communication of data by the defendant to the IRS is automatic and annual.

II.E.1.2.2. In this case

206. **The Contentious Chamber considers, as the parties do (points 57-59 and 81), that article 49.1. d) of the aforementioned GDPR cannot be invoked. Indeed, as has been pointed out, this exception cannot be invoked in the case of recurrent and systematic transfers as is the case of the denounced data transfers**.

207. On the other hand, the Chamber will examine below whether the "FATCA" agreement presents the appropriate safeguards required by article 46.2. a) of the RGPD - applied both in combination with article 96 of the RGPD invoked by the defendant but also autonomously since the defendant defends the point of view that, in any case, even supposing that the Contentious Chamber does not retain article 96 of the RGPD, the appropriate safeguards required exist.

- As for the key concepts of data protection :

208. With regard to the definitions of such essential data protection concepts as "personal data", "processing" or "controller", the Contentious Chamber notes that the "FATCA" agreement contains none. Although Article [1] of the agreement is exclusively dedicated to definitions (1 litera a) to z) + litera aa) to mm), **none of them deals with data protection concepts, even though the very principle of the agreement is based on a chain of personal data processing**.

- Retention Limitation Principle:

209. The Contentious Chamber notes that the "FATCA" agreement does not contain any commitment as to the limited retention of the data processed and transferred under the agreement. It is true that, as the defendant points out (point 88), the Law of 16 December 2015 provides for a retention period of 7 years. This period provided for by the national legislation is only binding on the defendant. The Respondent **does not demonstrate that the IRS is bound to a limited retention period for the transferred data**.

- Rights of the persons concerned :

210. With regard to the rights of the persons concerned, the Dispute Chamber notes that the "FATCA" agreement does not contain any mention of the rights of the person concerned as recalled for some of them in point 201 above. The defendant pleads in this respect that it informs the persons concerned via its Internet site in a section dedicated to the agreement "FATCA". Even if this information is provided in a compliant manner, *quod non* (see Title II.E.2 below), **such information does not amount to the consecration of the rights of the persons concerned (which include many other rights than the right to transparency**

and information) required in the agreement itself. The rights of the data subjects are not covered by the FATCA agreement - nor by the texts to which the agreement refers (the rights enshrined in the Privacy Act being limited and not equivalent to those provided by the RGPD

- this guarantee is lacking. With specific reference to Article 22 of the GDPR, the Respondent argues that it does not carry out any processing operations that fall under this provision. This circumstance, if verified (see Section II.E.4 on the AIPD) is irrelevant. In fact, what is required as a guarantee in the agreement is the commitment of the parties, including the recipient of the data (i.e. the IRS), not to carry out this type of processing. This guarantee is not provided for by or under the agreement.

211. The Contentious Chamber notes that here too the **defendant has failed to demonstrate that this appropriate guarantee of the "rights of the persons concerned" is binding on the parties to the agreement.**

- As for recourse mechanisms :

212. On this point, the Contentious Chamber can only note that **the defendant has not demonstrated that such a recourse mechanism would exist for the benefit of the first plaintiff and, more generally, for the benefit of the persons concerned by the processing operations complained of once the data have been transferred, including the Belgian accidental Americans.**

213. **In support of the above,** the **Contentious Chamber concludes, as the Slovakian Data Protection Authority did before** [it93] **, that the Respondent does not demonstrate that the appropriate safeguards required by Article 46.2. a) of the GDPR that it invokes, applied as the case may be in combination with Article 96 of the GDPR, are provided for by or pursuant to the agreement "FATCA". Consequently, the Contentious Chamber finds a violation o f article 46.2. a) of the RGPD (and more broadly of Chapter V of the RGPD) combined with Articles 5.1. and 24 of the RGPD (accountability - see infra Title II. E.4) in the case of the Respondent.**

II.E.1.3. Conclusion on compliance of data transfer to the IRS

214. **As already explained (paragraphs 129 et seq.), the defendant could only rely on Article 96 of the GDPR if it had assessed the compliance of the FATCA agreement and concluded that it complied with the useful reading of Article 96.**

[93] Opinion of the Office for Personal Data Protection of the Slovak Republic of 23 August 2022 addressed to the Ministry of Finance of the Slovak Republic. This opinion was issued following the request for an assessment of the compliance of international agreements on tax information exchange with the GDPR made by the EDPS in his statement 04/2021. The Slovak DPA concludes in this regard that as regards the transfer to the US authorities, the conditions of Chapter V of the GDPR are not met. The appropriate safeguards as set out by the EDPS in his Guidelines 02/2020 are not provided for in the FATCA agreement as required by Article
46.2.a) of the GDPR.

This assessment obligation arises from the text of Article 96 of the GDPR itself and superabundantly from Defendant's *accountability* obligation as of May 24, 2018, which otherwise required Defendant to conduct this review on an ongoing basis (Title II.E.4 below).

215. In order to attest to both its assessment and this compliance, the Respondent states that it relies on documents issued by the OPC, which was succeeded by the ODA. Two of these documents consist, as already mentioned, of opinions (61/2014 and 28/2015) issued by the OPC on the successive versions of the draft law that will lead to the Law of December 15, 2016 (point 83).

216. The Contentious Chamber notes that it is not disputed that these opinions relate to the draft law that will lead to the future Law of December 16, 2015 and not to the content of the "FATCA" agreement as such, which the OPC regrets in its opinion. The same applies to the deliberation 56/2015 of the CSAF. Moreover, since this legislation was based on the equivalent of Article 49.1. d) of the GDPR, the existence of appropriate safeguards within the meaning of Article
46.1. a) of the GDPR was not examined.

217. As for the judgment of the Constitutional Court of March 9, 2017, also invoked by the defendant, the Litigation Division considers that for the reasons derived from the application of the cited case law of the CJEU with regard to the principles of necessity and minimization, its conclusions on proportionality /minimization in particular, could not form the basis for the defendant's conviction that the "FATCA" agreement was compliant.

218. **In conclusion, in view of the foregoing and in support of its conclusions in sub-headings II.E.1.1. and II.E.1.2., the Contentious Chamber is of the opinion that the arguments put forward by the Respondent in support of the compliance of the agreement with Directive 95/46/EC and EU law as of May 24, 2016 did not allow it to conclude that it could continue to transfer data to the IRS on the basis of Article 96 of the GDPR. It also follows from these same conclusions that the "FATCA" agreement is no more compliant with the RGPD than it was with EU law before May 24, 2016.**

II.E.2. As for the alleged breach of the duty to inform

219. As a data controller, the defendant is bound by Articles 13 and 14 in combination with the requirements of Article 12 of the GDPR with respect to the data processing operations it carries out.

220. In this case, the first plaintiff had to be informed by the defendant about the transfer of his personal data to the IRS. As this was a processing of data that it had not obtained directly from the first complainant (these data having been

transferred in this case by Bank Z), the defendant had to comply with Article 14 of the GDPR, combined with the requirements of Article 12 of the GDPR.

221. Article 14 of the GDPR indeed requires that where personal data have not been obtained from the data subject as in the present case, the controller shall provide the data subject with all the information listed below. The data protection authorities have agreed that *all the* information in Article 14 of the GDPR, whether required by its §1 or §2, must be provided to the data subject.[94] The data protection authorities have also agreed that the data subject must be informed of the following information This information is as follows:

- The identity and contact details of the controller and, where applicable, of his representative (Article 14.1. a));
- If applicable, the contact details of the Data Protection Officer (DPO) (Article 14.1.b));
- The purposes of the processing operation for which the personal data are intended and the legal basis for the processing (Article 14(1)(c));
- Categories of personal data concerned (Article 14(1)(d));
- If applicable, the recipients or categories of recipients of personal data (Article 14.1.e);
- Where applicable, the fact that the controller intends to transfer personal data to a recipient in a third country or an international organization, and the existence or absence of an adequacy decision by the [European] Commission or, in the *case of transfers referred to in Article 46 or 47, or Article 49(1), second paragraph, the reference to the appropriate* or adequate *safeguards* and the means of obtaining a copy of them or the place where they have been made available (Article 14(1)(f)) ;
- The length of time for which the personal data will be kept or, where this is not possible, the criteria used to determine this length of time (Article 14.2.a));
- Where the processing is based on Article 6.1.f), the legitimate interests pursued by the controller or by a third party (Article 14.2.b)) ;
- The existence of the right to request access to data from the data controller to personal data, the rectification or deletion of such data or a limitation of the

[94] Panel 29, *Guidelines on Transparency under EU Regulation 2016/679*, WP 260 (item 23): https://ec.europa.eu/newsroom/article29/items/622227 These Guidelines were endorsed by the European Data Protection Committee at its inaugural meeting on May 25, 2018.

processing relating to the data subject, as well as the right to object to the processing and the right to data portability (Article 14.2.c));

- Where the processing is based on Article 6.1.a) or Article 9.2.a), the existence of the right to withdraw consent at any time, without affecting the lawfulness of the processing based on consent carried out prior to the withdrawal of consent (Article 14.2.d));
- The right to lodge a complaint with a supervisory authority (Article 14.2.e);
- The source of the personal data and, where appropriate, a statement as to whether or not it is derived from publicly available sources (Article 14.2(f));
- The existence of automated decision-making, including profiling, as referred to in Article 22.1 and 4 and, at least in such cases, relevant information concerning the underlying logic, as well as the importance and the foreseen consequences of this processing for the data subject (Article 14.2.g)).

222. The defendant does not contest the applicability of Article 14 of the GDPR (as already pointed out, it does not invoke Article 96 of the GDPR with regard to this information obligation - point 138), but argues that it can rely on the exception of Article 14.5(a) of the GDPR (point 93), which provides that the items of information in Article 14.1-2 do not have to be provided to the data subject *"where and insofar as the data subject already has such information"*.

223. The Contentious Chamber recalls here that the defendant considered in its submissions and at the hearing that it was the responsibility of the banks to inform the first complainant and that bank Z would have informed the latter. The defendant thus invokes article 14.1 of the *Law of December 16, 2015*, which requires the reporting financial institutions (i.e. the banks) to inform the persons concerned *"that the information referred to in the law will be communicated to the competent Belgian authority "*[95]. The Contentious Chamber points out that this obligation to inform aims to inform that data will be communicated to the defendant and not to the IRS.

224. In the view of the Dispute Chamber, the obligation to inform on the part of the banks leaves intact the defendant's obligation to inform with regard to the processing that it in turn carries out in its capacity as data controller, in particular the transfer of the data to the IRS. Indeed, even if it was legally obliged to inform the first plaintiff, Bank Z (and the reporting financial institutions in general) did not have to provide all the elements that the defendant must communicate with regard to its own processing. There is no perfect identity

[95] The Contentious Chamber underlines this.

The defendant's argument that it was the banks' responsibility to inform the plaintiff (even if it was in compliance with the law) cannot therefore be accepted. The defendant's argument that it was the banks' responsibility to inform the plaintiff (even if it was in compliance with the law) cannot therefore be accepted. In this respect, the fact that the Respondent did not have access to the communicated data is irrelevant. Indeed, this circumstance has no consequence on its capacity as controller, as the Contentious Chamber has already stated (point 126). This circumstance - apart from the fact that it results from the defendant's choice not to access the contents of the bundle for organizational reasons, as it explained at the hearing[96] - is in any case not such as to prevent the communication of at least some of the information listed above that is specific to "its" processing, such as, for example, the guarantees governing the flow to the United States (article 14.1. f)), the rights of the data subjects or the retention period, to mention only a few elements.

225. The information exemption of article 14.5. a) of the RGPD must also be applied within the strict limits of the text. In this sense, it may only concern some of the information items listed above. This is what results from t h e unequivocal use of the terms *" in that "* [97]...

226. In this respect, the Contentious Chamber notes first of all that Article 14.1 of the Law of December 16, 2015 does not in any event provide for all the elements required by Article 14.1-2 of the RGPD. Moreover, it goes without saying that article 14.5.a) of the RGPD can only be invoked if the information has already been provided in relation to the processing concerned

227. In support of the exhibits submitted, the Contentious Chamber was able to find that certain information had indeed been provided to the plaintiff (paragraphs 11-16). However, in order to be able to rely on article 14.5.a) of the GDPR as it believes it can, the defendant had to examine whether all of the elements of information in article 14.1-2 of the GDPR mentioned above had been communicated by bank Z with regard to the processing which is its own responsibility (and not that of bank Z), i.e. the transfer to the IRS. This was not the case. It is not clear from the documents submitted by the parties that the first plaintiff was informed by Bank Z of all the information required by Articles 14.1 and 14.2 of the GDPR with regard to the processing carried out by the defendant (points 11-16), but only some of it as required by the Law of December 16, 2015 (point 226).

[96] See footnote 52 referring to the minutes of the hearing.

[97] Panel 29, *Guidelines on Transparency under EU Regulation 2016/679*, WP 260 (item 56): https://ec.europa.eu/newsroom/article29/items/622227 These Guidelines were endorsed by the European Data Protection Committee at its inaugural meeting on May 25, 2018.

228. Article 14.5(c) of the GDPR (the applicability of which the plaintiffs reject without it being invoked by the defendant) also provides that the items of information listed in paragraphs 1 and 2 do not have to be provided to the data subject where *"the obtaining or communication of the information is expressly provided for by Union law or by the law of the Member State to which the controller is subject and which provides for appropriate measures to protect the data subject's legitimate interests."*

229. The Contentious Chamber notes a difference in language between the French version and, for example, the Dutch version of this provision. Indeed, whereas the French version of article 14.5.c) mentions "when and insofar as the obtaining or communication of information[98] is expressly provided for by the law of the Union or of the Member State", the Dutch version of the text uses the following terms: *"wanneer en voor zover het verkrijgen of verstrekken van de gegevens[99] uitdrukkelijk is voorgeschreven bij Unierecht or lidstaatelijk recht".*

230. The Contentious Chamber is of the opinion that it is the obtaining and communication *of data* that must be provided for by national law (and not the information listed in article 14.1-2), notwithstanding the terms of the French version of article 14.5.c) of the GDPR.

231. **The Contentious Chamber is of the opinion that article 14.5. c) of the RGPD does not apply in this case, as the conditions for its application are not met**, even though the processing is provided for by the "FATCA" agreement and the Law of December 16, 2015. This exception can only be invoked *if appropriate measures* to protect the legitimate interests of the data subjects are provided for by the said regulation, which is not demonstrated by the defendant.

232. As no exemption of information is applicable, **the Contentious Chamber will examine to what extent the Respondent fully complies with its obligation of information mentioned above (article 14.1-2 of the RGPD) as it claims**. The Contentious Chamber adds that according to article 12.1. of the RGPD, this information must be concise, transparent, understandable and easily accessible, formulated in clear and simple terms.

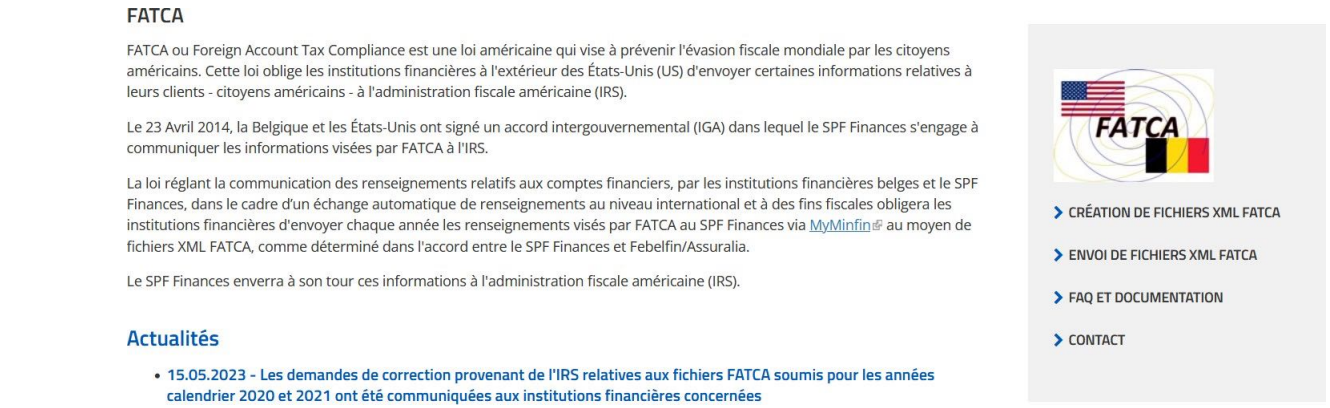
233. The Contentious Chamber notes that the defendant does inform the persons concerned on its website via, as it states in its conclusions, *"more theoretical explanations, news, links to relevant documents and an FAQ" (point 91)*.

234. The Contentious Chamber was thus able to note the following:

[98] The Contentious Chamber underlines this.

[99] It is the Contentious Chamber that underlines

235. https://finances.belgium.be/fr/E-services/fatca100 : this is a general page that describes the principle of the "FATCA" agreement in general terms as below and also includes a number of news items of a technical nature:



FATCA

FATCA ou Foreign Account Tax Compliance est une loi américaine qui vise à prévenir l'évasion fiscale mondiale par les citoyens américains. Cette loi oblige les institutions financières à l'extérieur des États-Unis (US) d'envoyer certaines informations relatives à leurs clients - citoyens américains - à l'administration fiscale américaine (IRS).

Le 23 Avril 2014, la Belgique et les États-Unis ont signé un accord intergouvernemental (IGA) dans lequel le SPF Finances s'engage à communiquer les informations visées par FATCA à l'IRS.

La loi réglant la communication des renseignements relatifs aux comptes financiers, par les institutions financières belges et le SPF Finances, dans le cadre d'un échange automatique de renseignements au niveau international et à des fins fiscales obligera les institutions financières d'envoyer chaque année les renseignements visés par FATCA au SPF Finances via MyMinfin au moyen de fichiers XML FATCA, comme déterminé dans l'accord entre le SPF Finances et Febelfin/Assuralia.

Le SPF Finances enverra à son tour ces informations à l'administration fiscale américaine (IRS).

Actualités

- 15.05.2023 - Les demandes de correction provenant de l'IRS relatives aux fichiers FATCA soumis pour les années calendrier 2020 et 2021 ont été communiquées aux institutions financières concernées

236. https://financien.belgium.be/fr/E-services/fatca/creation_de_fichiers_xml_fatca101 : this is the "Fatca XML file creation" page which details how FATCA XML files must be formatted according to the XSD schema defined by the US tax authorities (IRS). The page is therefore aimed at financial institutions (banks) and refers to the various user guides and IRS pages in English only. Only the note on the correction process and the note on use exist in French for example.

CRÉATION DE FICHIERS XML FATCA

Les fichiers XML FATCA doivent être formatés conformément au schéma XSD défini par l'administration fiscale américaine (IRS) et décrit dans le User Guide FATCA XML et en tenant compte des Business rules établies de commun accord entre le SPF Finances et Febelfin / Assuralia. Après l'envoi d'un fichier XML FATCA, le SPF Finances, au moyen d'une série de règles de validation, déterminera si le fichier XML FATCA satisfait aux conditions reprises ci-dessus.

Schéma XSD et documentation

- Schéma XSD FATCA
- Schema XSD FATCA (v2.0) < à partir de janvier 2017>
- FATCA XML User Guide (V1.1.)
- FATCA XML User Guide (v2.0) < à partir de janvier 2017>
- Business Rules convenues d'un commun accord entre Febelfin/Assuralia et le SPF Finances (**NEW - 06.12.2021**)
- Processus de correction (PDF, 225 Ko)

Application web EOI XML Tool

- Accès à l'application
- Note d'utilisation (PDF, 273.6 Ko)

237. https://financien.belgium.be/fr/E-services/fatca/envoi_de_fichiers_fatca_xml102: this is the page that describes the process of sending the files to the defendant and is therefore also intended for financial institutions.

[100] Consultation of the website by the Contentious Chamber on May 23, 2023.
[101] *Same as*
[102] *Same as*

ENVOI DE FICHIERS XML FATCA

En tant qu'institution financière belge, vous devez communiquer chaque année au SPF Finances les renseignements visés par la loi FATCA en envoyant un fichier XML FATCA valide via MyMinfin.

Pour être autorisé à envoyer un fichier XML FATCA, vous devez au préalable :

- enregistrer d'abord votre institution financière auprès de la Sécurité sociale (si ce n'est pas déjà fait). Cela vous permettra d'accéder aux services en ligne sécurisés et de désigner ensuite un gestionnaire d'accès principal ;
- vous attribuer ou attribuer à vos collaborateurs le rôle « FATCA » via l'application Ma gestion des rôles eGov.

Une fois le rôle attribué, connectez vous à MyMinfin en choisissant « au nom d'une entreprise ».

Sélectionnez le numéro d'entreprise pour lequel vous voulez charger le fichier XML FATCA.

Sous « Mes outils professionnels » :

- cliquez sur « Fichiers FATCA » puis,
- chargez le fichier XML FATCA que vous avez créé.

Vous recevrez un accusé de réception après transmission et validation du fichier par le SPF Finances.

Si votre fichier n'est pas valide, vous recevrez alors un rapport d'erreur.

Plus d'information concernant l'attribution d'un rôle via l'application « Ma gestion des rôles eGov »

Envoi de fichiers XML FATCA

Accès au portail :

238. https://financien.belgium.be/fr/E-services/fatca/faq_et_documentation[104]: the "FAQ and documentation" section contains a list of numerous links to various documents relevant in the context of transfer or taxation by foreign tax authorities, mostly in English.

FAQ ET DOCUMENTATION - FATCA

FAQ

- FAQs IRS
- Généralités
- Création de fichiers
- Envoi de fichiers
- Test
- Renseignements à fournir dans le cadre des échanges internationaux de renseignements fiscaux (CRS et FATCA)

Documentation pratique

- GIIN (Global Intermediary Identification Number)
- GIIN Registration
- Belgian Guidance notes (PDF, 2.4 Mo)
- IRS Notice 2017-46: Revised Guidance Related to Obtaining and Reporting Taxpayer Identification Numbers and Dates of Birth by Financial Institutions
  - Note (PDF, 673.12 Ko) aux institutions financières concernant l'obligation de communiquer le TIN et la date de naissance pour les personnes rapportables
  - Note (PDF, 230.87 Ko) aux institutions financières concernant les valeurs autorisées pour déclarer l'élément TIN US
  - Notice 2023-11 et notes (PDF, 192.59 Ko) aux institutions financières à propos des procédures d'allègement temporaires concernant l'obligation de communiquer le TIN

Bases légales et accords administratifs

- Foreign Account Tax Compliance Act (FATCA 18/03/2010)
- Intergouvernmental Agreement Between US and BE (IGA 23/04/2014)
  - Supplemental Agreement to the IGA (from 29/09/2015) (PDF, 277.38 Ko)

239. https://financien.belgium.be/fr/E-services/fatca/faq_et_documentation/faq/generalites[105]: As an example, the FAQ General refers to a number of questions (cited in the defendant's conclusions as contributing to the fulfillment of its obligation to inform).

[103] *Same as*
[104] *Same as*
[105] Same as

GÉNÉRALITÉS

Généralités - FATCA

- Pour certains clients, il n'y a pas de TIN (Taxpayer Identification Numbers), mais bien une date de naissance. Comment doit-on transmettre cette information dans le fichier XML ? Qu'en sera-t-il à partir du 1er janvier 2017 ?
- Comment doit-on communiquer un revenu pour lequel la balance ne doit pas être déclarée ? L'élément « account balance » est en effet un champ « validation », donc soumis au contrôle de validation XSD.
- Les institutions financières doivent-elles obligatoirement demander un numéro GIIN pour envoyer un fichier XML FATCA ?
- Quelle est la date limite pour l'envoi d'un fichier XML FATCA ?
- Doit-on communiquer le GIIN US dans le champ TIN de l'élément ReportingFI ?
- Une déclaration Nihil doit-elle obligatoirement être communiquée lorsqu'aucune information ne doit être rapportée pour une année de revenus spécifique ?
- Après avoir soumis une déclaration nihil, aucun accusé de réception n'a été reçu par mail. La déclaration nihil a-t'elle bien été enregistrée ?
- Autres questions?

240. In support of the foregoing, the Contentious Chamber notes that the elements of the defendant's website do provide information on the FATCA agreement, on the obligations of the Belgian banks and on the manner in which the latter should provide the data to the defendant, which in turn will transmit them to the IRS. This information is both general and technical and is directed to a substantial part to the financial institutions and not directly to the potentially concerned citizen. Many of the documents are only available in English.

241. **In support of the preceding paragraphs, the Contentious Chamber notes that this information does not, however, meet the requirements of article 14.1-2 of the GDPR.**

242. **Furthermore, the various pieces of information, even if they are contained in one or another document, *quod non*, are neither easily accessible nor comprehensible to the data subjects as required by article 12.1. of the GDPR.**

243. These findings of the Contentious Chamber are in line with those formulated by the SCFA in its deliberation 52/2016 which, already in 2016, expressed the following:

> 60. Le Comité constate qu'en dépit de quelques éléments d'information de politique générale, l'information fournie sur le site n'est pas en mesure de rencontrer les attentes des personnes concernées[6]. Les informations « vulgarisées » sont principalement à destination des Institutions financières et outre le texte de la Loi du 16 décembre 2015, la documentation qu'on y trouve n'est que rarement si pas du tout traduite dans les langues nationales belges.
>
> 61. Le Comité constate dès lors que l'analyse et la compréhension cet accord n'est pas à la portée de tous et ne suffit pas à l'information claire et transparente pour les personnes concernées.

244. In conclusion of the foregoing, the Contentious Chamber **finds a breach of article 14.1. and 14.2. combined with Article 12.1. of the GDPR in the case of the Respondent**.

II.E.3. As for the alleged failure to carry out an AIPD

245. The Contentious Chamber recalls that Article 35.1. of the GDPR provides that *"where a type of processing, in particular through the use of new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall carry out, prior to the processing, an analysis of the impact of the envisaged processing operations on the protection of personal data. A single analysis may cover a set of similar processing operations that present similar high risks*. This obligation for the controller to conduct a DPIA in certain situations must be understood in the context of its general obligation to appropriately manage the risks presented by the processing of personal data.

246. The Contentious Chamber also recalls that if the controller carries out one of the processing operations listed in Article 35.3. of the GDPR[106], he is required to carry out this PIA. The same applies if the proposed processing operation is included in the list of processing operations requiring a DPIA adopted by the DPA pursuant to Article 35.4 of the GDPR[107]. The processing operations covered by the complaint are not covered by these provisions.

247. As it has already stated (paragraph 141), the Litigation Division is of the opinion that the obligation to

performing a PIDA is not covered by the scope of Article 96 of the GDPR

248. As to the application of the obligation to conduct a DPIA over time, the data protection authorities (including the DPA) have agreed that a DPIA is not necessary in particular where the processing was authorized before May 24, 2018 by a supervisory authority in accordance with Article 20 of Directive 95/46/EC[108] and the implementation of that processing has not changed since that prior checking.

249. Regardless of whether or not the SCFA's decision is an "authorization" within the meaning of Article 20 of Directive 95/46/EC, **the Contentious Chamber considers that the SCFA's authorization cannot, in any event, serve as a basis for the exemption**

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[106] Article 35.3 of the GDPR provides that a DPIA is required in the following 3 cases: (a) the systematic and extensive evaluation of personal aspects relating to natural persons, which is based on automated processing, including profiling, and on the basis of which decisions are taken which produce legal effects on a natural person or which significantly affect him or her in a similar way, (b) the large-scale processing of special categories of data referred to in Article 9.1 or of personal data relating to criminal convictions and offences referred to in Article 10, or (c) large-scale systematic surveillance of a publicly accessible area.

[107] The list of processing operations that the DPA believes require a DPIA pursuant to Article 35.4. of the GDPR can be found here: https://www.autoriteprotectiondonnees.be/publications/decision-n-01-2019-du-16-janvier-2019.pdf

[108] Article 20.1 of Directive 95/46/EC: Member States shall specify the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall ensure that such processing operations are examined prior to their implementation.

to conduct a DPIA. The analysis of the SCFA did not in fact focus on the existence or not of appropriate safeguards within the meaning of Article 46.2. a) of the GDPR or its equivalent under Directive 95/46/EC. The Contentious Chamber also considers that it cannot be considered that the implementation of the processing (transfer) has not changed since this authorization dated December 15, 2016. The analysis of the evolution of the risks likely to call into question the exemption necessarily includes the evolution of the context - including the legal context - in which this processing is operated. In this respect, as already mentioned in Title II.E.1 above, several conditions of the transfers that must be examined in the context of the DPIA (see Article 35.7 of the GDPR, which lists the required elements[109]), such as minimization (proportionality), have been strengthened since the entry into force of the GDPR, in particular under the terms of CJEU case law.

250. Therefore, the Contentious Chamber considers that the defendant was not in a situation in which it could invoke a possible exception "rationae temporis" to its obligation. It therefore had to examine, in the context of its accountability obligation, whether or not the transfer to the IRS required it to carry out a PIA as of May 25, 2018 and thereafter on an ongoing basis.

251. The Contentious Chamber stated that in its defense, the defendant specified that when questioned about this by the IS on June 30, 2021, its DPO replied that on the basis of a pre-impact analysis, it had been concluded that an impact analysis was not necessary in view of the fact (point 46):

- That the law had incorporated the remarks made by the OPC in the two opinions issued on the bill;
- That the SCFA had issued a resolution authorizing the transmission of data to the U.S. tax authorities and that the conditions of this resolution have been implemented;
- That the processing complies with the requirements of the AEOI standard on confidentiality and data protection, as well as the information security policies of the defendant based on ISO27001: the transmission of information is doubly protected, at the level of encrypted and signed files and at the level of the channel through which the information is communicated (platform

[109] Article 35.7. of the GDPR requires that the DPIA contain at least: (a) a systematic description of the processing operations envisaged and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller, (b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes, (c) an assessment of the risks to the rights and freedoms of the data subjects, (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation, taking into account the rights and legitimate interests of data subjects and other persons affected.

MyMinfin secure platform for data transmission by Belgian banks and IDES secure platform for transmission to the IRS);

- That the U.S. authorities are also required to provide the necessary security measures to ensure that the information remains confidential and is stored in a secure environment, as set forth in the FATCA Data safeguard workbook.

252. The Contentious Chamber notes that the defendant's DPO does not specify the date on which this pre-analysis was carried out. Although the IS explicitly requested that this analysis be communicated to it, the defendant failed to do so. This pre-analysis is not in the record.

253. The Contentious Chamber also submits that t h e Respondent's argument cannot be followed for the following reasons.

254. The Contentious Chamber recalls here Article 35.10 of the GDPR: *"where the processing carried out pursuant to Article, paragraph 1(c) or (e) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of processing operations in question and a data protection impact assessment has already been carried out as part of a general impact assessment carried out in connection with the adoption of the legal basis in question, paragraphs 1 to 7 shall not apply unless Member States consider it necessary to carry out such an assessment prior to the processing activities".*

255. The Belgian legislator has taken the view in Article 23 of the DTA that even if an impact assessment has been carried out in the context of the adoption of the legal basis for the lawfulness of the processing (Article 6.1. c) or Article 6.1. e) of the GDPR), the data controller is not exempted from carrying out a DPIA within the meaning of Article 35.1. of the GDPR when the conditions for its application are met.

256. **Thus, even if they were relevant, *quod non* as the Litigation Division demonstrated above, the opinions rendered by the OPC could not exempt the Respondent from conducting an IPDD. These statements could not be the basis for the Respondent's conclusion that an IPSA was not required.**

257. Indeed, while the Belgian legislator has taken the trouble to provide that the PIA carried out in the context of parliamentary work does not exempt the controller from carrying out a PIA within the meaning of Article 35 of the GDPR prior to the operationalization of the processing operations concerned, it would be contrary to this option to admit that a pre-analysis could be based on the existence of such opinions in order to conclude that the controller is not required to carry out a PIA.

258. Defendant's DPO also argues that the pre-analysis relied on the existence of other standards. These standards alone, however, were not sufficient, as will be shown below, to exempt the Respondent.

259. **The Contentious Chamber is indeed of the opinion that the transfer of data to the IRS is a processing operation likely to result in a high risk for the rights and freedoms of natural persons within the meaning of article 35.1. of the RGPD.**

260. **Several criteria** cited under Recital 75 of the GDPR as well as in the EDPS Guidelines on AIPD [110] are indeed **present in this case.**

261. Thus, the Contentious Division holds:

- Systematic monitoring "[111] in that the data concerned are, with the exception of the "declarable" threshold of the bank accounts, systematically transferred to the IRS on an annual basis, whether or not there is any indication of fraud or tax evasion (see Title II.E.1.1.);
- The data provided are financial data that fall into the category of "highly personal data "[112] within the meaning of the above-mentioned Guidelines;
- The data are processed "on a large scale "[113] in that they concern, a priori, with limited exceptions, the data of all persons of U.S. nationality with bank accounts in Belgium. The scope of the obligation and its recurrence, even on an annual basis, play a role in the assessment of the "large-scale" character

[110] Article 29 Working Party, *Guidelines on data protection impact assessment (DPIA) and how to determine whether processing is "likely to result in a high risk" for the purposes of Regulation (EU) 2016/679*, WP 248: https://ec.europa.eu/newsroom/article29/items/611236 . The European Data Protection Committee (EDPS) endorsed these guidelines on May 25, 2018 under the terms of the decision found here: https://edpb.europa.eu/sites/default/files/files/news/endorsement_of_wp29_documents.pdf

[111] In its *Guidelines on Data Protection Impact Assessment (DPIA) and how to determine whether processing is "likely to result in a high risk" for the purposes of Regulation (EU) 2016/679*, WP 248, the 29/ECPD Group defines data processing operations used for the purpose of observing, monitoring or controlling data subjects, including the collection of data via networks for example, as falling under surveillance. Surveillance" is therefore not limited to camera surveillance, for example. Systematic" also means that the surveillance meets one or more of the following criteria: the surveillance is carried out according to a system; it is prepared, organized or methodical; it is carried out within the framework of an overall collection plan; it is carried out within the framework of a strategy.

[112] In its *Guidelines on Data Protection Impact Assessment (DPIA) and how to determine whether processing is "likely to result in a high risk" for the purposes of Regulation (EU) 2016/679*, WP 248, the 29/ECPD Group clarifies that beyond Articles 9 and 10 of the GDPR, certain categories of data may be considered to increase the possible risk to individuals' rights and freedoms. They are considered as
This is the case of "sensitive" data in the common sense of the term. Financial data is one of them, especially when its communication is intended to fight against offences that could be imputed to the persons concerned.

[113] In determining whether a processing operation is "large-scale", the 29/ECPD recommends in the AIPD Guidelines cited in footnote 110 above, that the following factors in particular be taken into account: the number of data subjects, the volume of data and/or the range of different data elements processed; the duration or permanence of the processing activity; and the geographical scope of the processing activity.

of the processing, along with the number of data subjects and the volume of data transferred;

- The persons concerned can be described as "vulnerable persons" (see recital 75) if an imbalance in their relationship with the defendant and even more so with the IRS can be identified. This imbalance results not only from the fact that the transfer is imposed on the persons concerned without their being able to oppose it, but above all from the complexity of the legal framework, including the existence of possible means of appeal for the exercise of their rights (see below the finding regarding the absence of this guarantee - point 212).
- the purpose pursued and the subsequent processing likely to be carried out in the United States entails, according to the Contentious Chamber, a potential "cross-referencing or combination of data sets", another criterion of the guidelines already cited as mentioned in the preparatory works of the Law of December 16, 2015 cited by the plaintiff (point 62).

262. Finally, although this does not constitute one of the 9 criteria listed by the EDPS, the transfer takes place to a country outside the EEA whose level of data protection is not considered adequate and has been the subject of constant controversy for many years. The defendant could not be unaware of this and this situation, according to the Contentious Chamber, required a particularly rigorous attention and risk assessment.

263. The Contentious Chamber recalls that the EDPS is of the opinion that in most cases, the controller may consider that a processing operation that meets 2 of the 9 criteria listed in his Guidelines requires a DPIA. In general, the EDPS considers that the more criteria the processing operation "meets", the more likely it is to present a high risk to the rights and freedoms of data subjects and therefore to require a DPIA, regardless of the measures the controller intends to adopt.

264. **Combined, the presence of the five criteria identified in paragraph 261 - whose respective weight may vary - indicates a high level of risk for the reported transfer to the IRS. This high level of risk justified, according to the Litigation Chamber, that a PIA within the meaning of article 35.1. be carried out by the defendant. This analysis was not, by the Respondent's own admission, carried out for reasons that the Dispute Chamber has rejected in the preceding paragraphs.**

265. **Therefore, the Contentious Chamber concludes that there is a breach of article 35.1. of the RGPD in**

the respondent's head.

II.E.4. As for the alleged breach of accountability

266. In compliance with the principle o f accountability, the defendant was obliged (point 141), taking into account the nature, scope, context and purposes of the processing and the risks, which vary in probability and severity, to the rights and freedoms of natural persons, to implement appropriate technical and organizational measures to ensure that the processing is carried out in accordance with the GDPR and to be able to demonstrate that this is the case.

267. As such, not every failure, for example a one-time failure or one resulting from human error, necessarily implies a breach of Articles 5.2. and 24 of the GDPR. However, this is not the case here.

268. In this case, the nature of the processing, its scope and purpose, i.e. in this case (1) a transfer of personal data to a country outside the EEA for which no adequacy decision exists, (2) for the purposes of possible taxation and the fight against tax evasion and fraud - i.e. for the purposes of determining a possible infringement of a foreign law (3) even though the persons concerned have no connection with the state in question other than its nationality, and (4) no evidence of an offence has been established, **would certainly present risks for the rights and freedoms of the persons concerned (as the Contentious Chamber demonstrated in Title II.E.3 above).**

269. It is true that in the context of the complaint leading to the present decision, the defendant claims to have relied on favourable opinions and authorizations of the OPC prior to the entry into force of the RGPD, in particular, invoking Article 96 of the RGPD, the scope and exact consequences of which are not, it is true, obvious on first reading.

270. At the same time, the defendant could not ignore the repeated calls (some of them subsequent to these opinions and authorizations), in particular from the data protection authorities within the Group 29 and then the EDPS (including the DPA), to evaluate an international agreement such as the "FATCA" agreement in the light of the GDPR. **While some of these political appeals were aimed directly at the Belgian State, other more technical appeals in the form of the Guidelines cited in this decision, for example, were addressed directly to data controllers such as the defendant.**

271. **The Contentious Chamber further demonstrated that the aforementioned opinions and other authorization of the OPC did not in fact exempt the defendant from carrying out this assessment in view of both (1) its accountability obligation, (2) its obligation to carry out a DPIA within the meaning of Article 35 of the GDPR and (3) Article 96 itself of the GDPR. Article 96 intrinsically requires, as already noted, that this assessment be made in order to bring out its effects, taking into account in particular the reinforcement of the case law of the CJEU relating to the principles of necessity and minimization/proportionality, compliance with which had already put**

under the regime of Directive 95/46/EC with regard to comparable data processing.

272. **The Contentious Chamber considers that the defendant did not take the exact measure of the risks for the rights and freedoms of the first plaintiff and the Belgian accidental Americans whose interests are defended by the second plaintiff, nor did it adopt the appropriate measures to these risks. The defendant remains, as it results from the findings of the Contentious Chamber with regard to the various breaches identified (headings II.E.1, II.E.2. and II.E.3), in default of demonstrating that it has put in place the appropriate measures to guarantee compliance with the RGPD in their respect.**

273. Without prejudice to the foregoing, the Contentious Chamber is aware that the Respondent intended to implement an international agreement and Belgian legislation over which it pleaded that it had little or no control, and that these texts were part of a broader international context.

274. However, this circumstance is not such as to eliminate any breach on its part, given its capacity as a data controller. Indeed, the purpose of the accountability principle is to make data controllers - whether they are authorities, public bodies or private companies - accountable, and to allow control authorities such as the DPA (and through it, the SI and the Contentious Chamber) to verify the effectiveness of the measures taken to implement it. This principle would be largely undermined, or even emptied of its substance, if it were sufficient for a data controller to invoke, once confronted with a complaint brought before the supervisory authority, the fact that a legal obligation or the exercise of a public interest mission would not allow it to comply with the GDPR.

275. In application of its obligation of accountability, the Respondent could have, at the end of its assessment, at least alerted the relevant authorities to the situation in which the implementation of the "FATCA" agreement placed it in relation to its obligations arising from the right to data protection. In this respect, the Contentious Chamber cannot completely disregard the idea that if the Respondent had carried out the PIDA referred to in Section II.E.3, it would have quickly realized that, notwithstanding the measures it could have taken, which were admittedly limited in the legal context in which this transfer took place, it was still faced with a high residual risk A prior consultation of the DPA within the meaning of Article 36 of the GDPR might therefore have been necessary.

276. Taking into account all the above elements, **the Contentious Chamber concludes that the Respondent has violated articles 5.2. and 24 of the GDPR.**

II.E.5. As for the breach of section 20 of the LTD

277. As the Contentious Chamber stated in paragraph 77, the Complainants state in their reply that they do not invoke a violation of article 20 of the LDA by the Respondent.

278. The Contentious Chamber is nevertheless competent to examine whether this provision was to be complied with in this case and, if so, whether this was the case.

279. Indeed, **once the matter is referred to the Litigation Chamber, it is competent to independently monitor compliance with the RGPD and its national implementing laws, such as the LTD, and to ensure their effective application, notwithstanding, as in this case, the waiver during the proceedings of one or other of the complaints initially raised**.

280. This **waiver of the complaint is not such as to eliminate any possible previous failure on the part of the Respondent, nor is it such as to deprive, as a matter of principle, the Contentious Chamber of the exercise of its powers with regard to the Respondent**. The effective control that the DPA must exercise in this case in application of articles 51 et seq. of the RGPD and article 4.1 of the LCA, unquestionably precludes this. In view of the subject matter of the complaint, the Contentious Chamber intends to examine any potential violation[114].

281. This control must nevertheless be exercised **with due respect for the rights of the defence**. In this respect, the Contentious Chamber notes that the Respondent defended itself with regard to the complaint of violation of article 20 of the LDA in its reply of March 16, 2022[115] before the Complainants indicated that they would waive it in their subsequent reply of April 15, 2022, as well as in its summary conclusions.

282. Article 20 of the LTD provides as already mentioned that "*the federal public authority that transfers personal data on the basis of Article 6.1.c) and e), of the Regulation [read RGPD] to any other public authority or private organization, formalizes this transmission for each type of processing by a protocol between the initial controller and the controller receiving the data*".

283. The travaux préparatoires[116] of this article indicate that the obligation to conclude a protocol to formalize data communications from federal public authorities cannot be imposed for flows to foreign countries.

[114] See also decision 41/2020 of the Litigation Chamber. In its policy note on the dismissal of complaints, the Litigation Chamber states that if a complaint is withdrawn, it will be dismissed except in special circumstances https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite- de-la-chambre-contentieuse.pdf

[115] Heading 6.2. points 16-17. See also Respondent's summary submission of May 16, 2022 (section 6.3, points 23-24).

[116] Bill on the protection of individuals with regard to the processing of personal data, Doc, Ch 54K3126, p. 44.

284. The preparatory works justify this exclusion by referring to Article 1 of the GDPR, which states that *"the free movement of personal data within the Union shall not be restricted or prohibited on grounds relating to the protection of individuals with regard to the processing of personal data*.

285. In its recommendation[117] on this obligation, the DPA clarifies on this basis[118] that disclosures (transfers) of data to EEA countries cannot be made conditional on the conclusion of a protocol between the original data controller and the recipients of the data. Nevertheless, the Recommendation concludes, data controllers involved in a disclosure of personal data must ensure that the disclosure complies with all applicable regulations, in particular the GDPR.

286. With regard to data flows outside the EEA, as in the present case, the recommendation mentions that Chapter V of the GDPR must be respected and that in the event of the application of Article 46 of the GDPR - which the defendant has invoked in this case - the federal public authorities must provide appropriate guarantees for the supervision of these flows. This framework was examined in Section II.E.1. above.

287. In line with this interpretation, the DPA has developed a model protocol from which it is clear that the communication of data covered by the obligation to conclude a protocol within the meaning of Article 20 of the DTA takes place between a federal public authority on the one hand and a recipient "residing" in Belgium on the other.[119]

288. **In support of the above, the Contentious Chamber concludes that the obligation to conclude a protocol within the meaning of article 20 of the Data Protection Act only applies to transfers between federal public authorities and does not apply to data transfers to or from third countries within the meaning of the GDPR. This obligation to enter into a protocol does not therefore apply to the defendant in relation to the transfer to the IRS of the data that is the subject of the complaint and it cannot therefore be accused of any breach of this obligation.**

II.F. Corrective measures and sanctions

289. According to article 100 of the LCA, the Contentious Chamber has the power to:

[117] h ttps://www.autoriteprotectiondonnees.be/publications/recommandation-n-02-2020.pdf

[118] The Contentious Chamber agrees with the legislator's analysis in view of the provisions on applicable transborder data flows contained in Chapter V of the GDPR and the fact that the DTA is an implementing act of the GDPR, at least with respect to Article 20. However, the Contentious Chamber is of the opinion that mentioning this derogation in the text of the DTA itself would have been clearer and more predictable.

[119] See https://www.autoriteprotectiondonnees.be/professionnel/premiere-aide/toolbox which provides a model protocol for data communication under Article 20 of the LTD.

(1) to close the complaint with

no further action; (2) to

dismiss the case;

(3) to pronounce a suspension of

pronouncement; (4) to propose a

settlement;

(5) issue warnings or reprimands;

(6) order compliance with the requests of the person concerned to exercise his or her

rights; (7) order that the person concerned be informed of the security problem;

8° to order the freezing, limitation or temporary or definitive prohibition of the

processing; 9° to order the compliance of the processing;

10° to order the rectification, restriction or erasure of data and the notification of the recipients of the data;

11° to order the withdrawal of the accreditation of certification bodies;

12° to impose fines;

13° to impose administrative fines;

14° to order the suspension of transborder data flows to another State or an international organization;

15° transmit the file to the Public Prosecutor's Office of Brussels, which informs it of the follow-up given to the file;

16° decide on a case-by-case basis to publish its decisions on the website of the Data Protection Authority.

290. On the basis of the documents in the file and at the end of its analysis, the Contentious Chamber concludes, as mentioned in the conclusion of Title II.E.1., that the processing of the first complainant's personal data by the defendant, including their transfer to the IRS, is unlawful, since this processing is in violation of the principles of purpose, necessity and minimization/proportionality and the rules of Chapter V of the GDPR. The Contentious Chamber has shown that this unlawfulness affects not only the processing of the plaintiff's personal data but also, more generally, the processing of personal data of Belgian accidental Americans.

291. In view of this unlawfulness, **the Contentious Chamber decides to order the prohibition of the processing of the data of the first plaintiff and the Belgian accidental Americans in execution of the "FATCA" agreement and the Law of December 16, 2015, in application of article 100.8 of the LCA as well as article 58.2 f) and j) of the GDPR**. The Litigation Chamber

considers that this corrective measure is **the only one capable of putting an end to the unlawfulness observed**, each category of breach taken in isolation (whether the breach of the principles of purpose and minimization on the one hand (Title II.E. 1.1.) or the breach of the rules of Chapter V of the RGPD on the other hand (Title II.E.1.2.) justifying this ban. This prohibition entails the suspension of the flow of said data to the IRS in execution of Article 100.14 of the LCA.

292. **In accordance with the aforementioned Schrems II judgment of the CJEU of July 16, 2020, the Litigation Chamber adds that it is furthermore obliged to issue such a ban**. The operative part of that judgment in fact states that *"Article 58(2)(f) and (j) of Regulation 2016/679 must be interpreted as meaning that, unless there is an adequacy decision validly adopted by the European Commission, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country based on standard data protection clauses adopted by the Commission, where that supervisory authority considers, in the light of all the circumstances specific to that transfer, that those clauses are not or cannot be complied with in that third country and that the protection of the transferred data required by Union law, in particular by Articles 45 and 46 of that Regulation and by the Charter of Fundamental Rights, cannot be ensured by other means, if the controller or its processor established in the Union has not itself suspended or terminated the transfer" (*paragraph 121 of the judgment)[120].

293. The fact that the CJEU requires in this judgment that standard contractual clauses be set aside is not such as to exclude the obligation of the Contentious Chamber to prohibit data transfers to be carried out under an international agreement such as the "FATCA" agreement.

294. Indeed, the operative part and points 119-121 of the judgment establish more generally what is expected of data protection authorities with regard to the exercise of their powers in relation to cross-border data flows that would take place in violation of the GDPR, in particular in violation of Articles 45 and 46 as in the present case.

295. In view of all the circumstances of the transfers complained of and the findings of the Dispute Division, **the protection of the transferred data required by EU law can only be ensured by the prohibition imposed by the Dispute Division, as the Respondent, in its decision of October 4, 2021, refused to suspend**

[120] The Contentious Chamber also refers to points 111 and 112 of the judgment which state that
" 111. When such an authority considers, at the end of its investigation, that the data subject whose personal data has been transferred to a third country d o e s not benefit from an adequate level of protection in that country, it is required, pursuant to Union law, to react appropriately in order to remedy the shortcoming found, regardless of the origin of that shortcoming. To this end, Article 58.2 of the Regulation lists the various corrective measures that the supervisory authority may adopt. 112. Although the choice of the appropriate and necessary remedy is a matter for t h e supervisory authority and it must make this choice taking into account all the circumstances of the transfer of personal data in question, the authority is nonetheless obliged to carry out its task of ensuring full compliance with the GDPR with all due diligence.

the transfer of such data and defended in the present proceedings that it was authorized to pursue them.

296. The Contentious Chamber finds that the defendant is also guilty of a **violation of Article 14.1-2 in combination with Article 12.1 of the GDPR** in that the defendant did not sufficiently inform the first plaintiff and did not sufficiently inform the Belgian accidental Americans and more generally the persons concerned by the data processing carried out in execution of the "FATCA" agreement (Title II. E.2).

297. For this failure**,** the Contentious Chamber issued **a reprimand to** the defendant on **the basis of article 100, 5° of the LCA together with an order to comply** on the basis of article 100, 9° of the LCA to **provide complete, clear and accessible information on the transfer of data to the IRS on its website.**

298. The Contentious Chamber finds that the Respondent is also guilty of a **violation of Article 35.1. of the GDPR in that** the Respondent did not carry out a PIA (Title II.E.3).

299. For this breach**,** the Contentious Chamber has issued a **reprimand to** the defendant on **the basis of article 100.5° of the LCA, together with an order to comply with article 100.9° of the LCA to carry out a data protection impact assessment in** accordance with article 35 of the GDPR. The Contentious Chamber is of the opinion that notwithstanding the prohibition of the processing, the performance of such an analysis remains useful. A rigorous DPIA should contribute to the establishment of a future framework in compliance with the GDPR.

300. Finally, the Contentious Chamber finds that the Respondent has also been guilty of a **violation of Articles 5.2. and 24 of the GDPR in** that the Respondent has failed to comply with its accountability obligation (section II.E.4).

301. For this failure, the Contentious Chamber issues a **reprimand** to the Respondent on the **basis of article 100. 5° of the LCA, together with an order to bring the competent legislator into compliance with** the failures noted in the present decision and the ban on the treatment pronounced.

III. PUBLICATION AND TRANSPARENCY

302. Given the importance of transparency in the decision-making process and the decisions of the Dispute Chamber, this decision will be published on the DPA's website. The Dispute Chamber has so far generally decided to publish its decisions with the deletion of the direct identifying data of the complainant(s) and the

persons named, whether natural or legal persons, as well as those of the defendant(s).

303. In this case, the Contentious Chamber decides to publish the present decision with identification of the parties to the exclusion of the first complainant.

304. The Contentious Chamber specifies that this publication with identification of both the second plaintiff and the defendant has several objectives.

305. It has a public interest objective as far as the defendant is concerned, because this decision addresses the issue of the liability of a federal public service (the defendant) subject to obligations arising from an international agreement ("FATCA") concluded with a country outside the EU, which obligations are deemed to be contrary to the GDPR under the terms of this decision.

306. The identification of the respondent is also necessary for the proper understanding of the decision and thus for the realization of the objective of transparency pursued by the policy of publication of the decisions of the Litigation Chamber.

307. As regards the second complainant, a useful reading of the decision also requires that her identity be disclosed since she is defending a category of persons affected by the data processing operations deemed to be in breach of the GDPR and the examination of the parties' objections and defenses is based in particular on the specificities of this category of persons.

308. Furthermore, although this is not an overriding argument, the Contentious Chamber is aware that the complaint filed by the second plaintiff against the defendant was reported in the press at the initiative of her counsel and therefore made public.

309. Finally, the publication of the identity of the second complainant and the respondent also contributes to the objective of consistency and harmonized application of the GDPR. As explained in point 114, the complaint was not intended to be dealt with under the one-stop shop mechanism, but the "FATCA" problem is felt well beyond the Belgian borders and it cannot be excluded that other EU data protection authorities will have to deal with similar complaints in the future; complaints for the examination of which the present decision may be useful, each supervisory authority exercising its competences in full independence.

BY THESE REASONS,

the Contentious Chamber of the Data Protection Authority decides, after deliberation

- Pursuant to Article 100.8. of the LCA, to prohibit the processing by the defendant of the data of the first plaintiff and Belgian accidental Americans pursuant to the FATCA agreement and the Law of December 16, 2015 *regulating the communication of financial account information by Belgian financial institutions and the FPS Finance, in the context of an automatic exchange of information at the international level and for tax purposes.*
- Pursuant to Article 100.5. of the LCA, to issue a reprimand to the Respondent with regard to the violation of Article 14.1-2 in combination with Article 12.1 of the GDPR together with a compliance order on the basis of Article 100.9. of the LCA consisting of providing information in accordance with the GDPR on its website;
- Pursuant to Article 100.5. of the LCA, to issue a reprimand to the Respondent with regard to the violation of Article 35.1 of the GDPR together with a compliance order on the basis of Article 100.9. of the LCA consisting of the performance of a DPIA within the meaning of Article 35 of the GDPR ;
- The documents proving the compliance ordered must be sent to the Dispute Resolution Division at the address litigationchamber@apd-gba.be within 3 months of the notification of the present decision;
- Under section 100.5. of the CAA, to issue a reprimand to the Respondent with regard to the violation of Articles 5.2. and 24 of the GDPR.

In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged with the Court of Contracts (Brussels Court of Appeal) within thirty days of its notification, with the Data Protection Authority as defendant.

Such an appeal may be brought by means of an interlocutory motion, which must contain the information listed in Article 1034ter of the Judicial Code.[121] The interlocutory motion must be filed in writing. The interlocutory motion must

[121] The request shall contain, under penalty of nullity
1° the indication of the day, month and year;
2° the surname, first name, domicile of the applicant, as well as, if applicable, his or her qualifications and national registration number or
company number;
3° the surname, first name, domicile and, where applicable, the capacity of the person to be summoned; 4° the subject matter and a summary of the grounds of the request;
(5) an indication of the judge before whom the application is made;

be filed with the clerk of the Court of Contracts in accordance with Article 1034quinquies of the Judicial Code,122 or via the e-Deposit information system of the Ministry of Justice (Article 32ter of the Judicial Code).

(sé). Hielke Hijmans

President of the Litigation Division

(6) the signature of the applicant or the applicant's attorney.

122 The application, together with its annex, shall be sent, in as many copies as there are parties to the proceedings, by registered letter to the clerk of the court or deposited at the clerk's office.