Decision on the merits

79/2025 of April 24, 2025

File number: DOS-2021-00068

Subject: Complaint concerning the transfer by the Federal Public Service (FPS) Finance of personal data to the US tax authorities (IRS) in implementation of the "FATCA" agreement

The Litigation Division of the Data Protection Authority, comprising Mr Yves Poullet, Chairman, and Messrs Christophe Boeraeve and Jelle Stassijns, members, taking up the case in this composition following the Market Court's judgment of December 20, 2023 (2023/AR/801)[(1)];

In view of the decision of the Court of Markets of December 20, 2023 (2023/AR/801);

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 data and on the free movement of such data, and repealing Directive 95/46/EC* (General Data Protection Regulation), hereinafter "GDPR" ;

Having regard to the Act of December 3, 2017 *establishing the Data Protection Authority* (hereinafter
"LCA");

Having regard to the internal regulations (hereinafter "RoI") of the Data Protection Authority as approved by the House of Representatives on December 20, 2018 and published in the *Belgian Official Gazette* on January 15, 2019[2];

Having regard to the documents in the file ;

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[1] The Cour des marchés ruling is published here https://www.autoriteprotectiondonnees.be/publications/arret-du-20-decembre- 2023-de-la-cour-des-marches-ar-801.pdf

[2] The new internal regulations of the DPA, following the amendments made by the Law of December 25, 2023 amending the Law of December 3, 2017 establishing Data Protection Authority (LCA), came into force on 01/06/2024. In accordance Article 56 of the Law of December 25, 2023, it is only applicable to complaints, mediation files, requests, inspections and proceedings before the Contentious Chamber initiated on or after this date: https://www.autoriteprotectiondonnees.be/publications/reglement-d-ordre-interieur-de-l-autorite-de-protection-des-donnees.pdf Files initiated before 01/06/2024 as in the present case are subject to the provisions of the LCA not amended by the Law of December 25, 2023 and the internal regulations as they existed before this date.

Has taken the following decision concerning :

The plaintiffs : Mr X, hereinafter referred to as "the first plaintiff";

The ASBL Accidental Americans Association of Belgium (AAAB), whose registered office is at clos Albert Crommelynck, 4 bte 7, 1160 Brussels, hereinafter referred to as "the second plaintiff";

Hereinafter referred to together as "the plaintiffs";

With Vincent Wellens and Maxime Vanderstraeten, lawyers, both of whom have offices at chaussée de la Hulpe, 120, 1000 Brussels.

The defendant : **Service Public Fédéral Finances (SPF Finances),** whose registered office is at boulevard du Roi Albert II, 33, 1030 Brussels,
Hereinafter referred to as "the defendant";

Represented by Jean-Marc Van Gyseghem, lawyer, whose office is located at boulevard de Waterloo, 34, 1000 Brussels.

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I. Facts and feedback from 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 US 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 19 (section I.1.). They are followed by a review of the proceedings leading up to decision 61/2023 of the Contentious Division, annulled by the Court of Contracts on December 20, 2023, at points 20 to 59 (section I.2.), and then by a review of the proceedings leading up to the present decision at points 60 to 94 (sections I.3 to I.6).

I.1. Relevant facts

3. The first plaintiff resides in Belgium and holds dual Belgian and American nationality. With regard to the latter nationality, the first plaintiff describes himself as a so-called "*accidental* American", since he has American nationality only by virtue of having been born in Stanford, USA, without having retained any significant ties with that country. The Contentious Chamber makes it clear from the outset that the notion of

   The term "accidental American" is not defined in law, as the Market Court pointed out in its interlocutory ruling of June 28, 2023[3]. For their part, the plaintiffs argue that, for the purposes of the proceedings, this notion includes AAAB members.

4. The second plaintiff is a non-profit association under Belgian law (ASBL) made up of accidental Americans whose purpose is to defend and represent the interests of people of Belgian-American nationality - such as the first plaintiff - who reside outside the United States and maintain no significant ties with this country. The association's purpose is described in article 4 of its September 28, 2019 constitution:

   > *"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 action and including :*

[3] https://www.autoriteprotectiondonnees.be/publications/cour-dappel-arret-provisoire-du-28-juin- 2023-2023-ar-801.pdf

- *represent our interests to the Belgian and American public authorities and European institutions*
- *production of communication media*
- *event organization*
- *Collaboration with law professors to make available legal information for members*
- *legal action to defend the interests of Belgian-American nationals*

The means listed above are indicative and not limitative.

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

6. In order to facilitate the collection of relevant information by the Internal Revenue Service (hereinafter "IRS") for the purpose of taxing Americans residing abroad (including accidental Americans such as the first plaintiff), as well as to counter the risk of tax evasion, **the U.S. government has entered into intergovernmental agreements with various states around the world. These agreements provide for the communication of data relating to these Americans residing abroad by national financial institutions** (hereinafter "financial institutions" or "banks") **to the national tax authorities** (such as the defendant), **the latter then being required to transfer this data to the IRS.**

7. This is the background to 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 representatives of the Governments of the Kingdom of Belgium and the United States of America on April 23, 2014. This agreement is commonly and hereinafter referred to as the "FATCA" Agreement[4]. This is because it gives effect to the US Foreign Account Tax Compliance Act from which the acronym "FATCA" is derived. A comparable bilateral intergovernmental agreement (IGA) has also been signed with various states around the world, including the member states of the European Union (hereafter EU).

[4] This intergovernmental "FATCA" agreement signed with Belgium was subject of a law assent on December 22, 2016.

8. The **Belgian Law of December 16, 2015** *regulating the communication of financial account information by Belgian financial institutions and the FPS Finance, within the framework an automatic exchange of information at the international level and for tax purposes* (hereinafter
the "December 16, 2015 Law") 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, exchanges with the US IRS alone in execution of the agreement
"FATCA" mentioned above.

9. The purpose of this legislation, as defined in Article 1er, is to regulate the obligations of Belgian financial institutions and the defendant with regard to the information which must be communicated to a competent authority of another jurisdiction in the context of an automatic exchange of information relating to financial accounts, organized in accordance with the commitments made by Belgian State and resulting from the texts below:

   - Council Directive 2014/107/EU of December 9, 2014 *amending Directive 2011/16/EU as regards automatic and compulsory exchange of information in the field of taxation*[5];
   - The Joint OECD/Council of Europe Convention of January 25, 1988 *on Mutual Assistance in Tax Matters (the Multilateral Convention* or "OECD Convention");
   - A bilateral agreement for the avoidance of double taxation respect of taxes on income ;
   - A bilateral treaty on exchange of tax information (such as the "FATCA").

10. The Act of December 16, 2015 came into force on January 10, 2016 with regard to information intended for the United States (Article 20)[6].

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 US person for Fatca and other regulatory purposes"*. The complainant is asked to confirm that he or she is neither a US citizen nor resident in the USA, for the purposes of Z's obligations under the applicable automatic data exchange regulations. The complainant is invited to complete a specific form issued by the US authorities for this purpose. The letter explains that the aims of the US legislation are to

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

[6] The Law of December 16, 2015 was published in the Moniteur belge on December 31, 2015. In Article 20, the Act provides that it comes into force 10 days after its publication with respect to information intended for the United States.

to identify all accounts held by US citizens and/or residents with non-US financial institutions, and 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 and 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 national or resident, he or she must visit the branch to complete the necessary formalities.

12. On May 12, 2020, the first plaintiff was informed by his bank Z that since he had several bank accounts in Belgium in 2019, these were subject to the obligation to declare to the defendant in execution of the legal obligations incumbent banking institutions with which tax residents of a country other than Belgium have, as is his case, one or more bank accounts. Z thus indicates to the first plaintiff that it is required to declare the following data to the defendant: the name, address, jurisdiction of residence, tax identification number (TIN) or date of birth of each person to be declared, account number(s), account balance or value as at December 31 (special case : if the account is closed, an amount of zero is communicated), interest, dividends, proceeds from the sale, redemption or repayment of financial audits and other income generated by the financial assets held on the account. In addition to the list of data cited above and information on the principle of automatic exchange of financial information to which Z exposes being subject, the first plaintiff is, for any questions, referred to the defendant in these terms: "For further information on automatic exchange of financial information, you can consult the website of the SPF Finances or the OECD. You can also call us on the number XXX". Attached to this letter, bank Z encloses the data of the first complainant which will actually be communicated to the defendant in fulfilment of this reporting obligation.

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

14. On **December 22, 2020**, the same day he filed a complaint with APD with the second complainant (complaint no. 1 - point 1), **the first complainant requests that <u>the defendant</u>**

erase the personal data it has obtained from the banks pursuant to the "FATCA" agreement and this pursuant to Article 17.1.d) of the GDPR. The first plaintiff also requests that the defendant take the necessary steps to obtain this erasure from the IRS or, failing that, the limitation of their processing pursuant to Article 18.1.b) of the RGPD. In any event**, the first plaintiff is calling for an immediate halt to the exchanges of information between the defendant and the IRS taking place every year on the basis of the "FATCA agreement**. In his view, this transfer of personal data disregards several key principles of data protection law as applicable in Belgium and more generally within the EU. The second plaintiff is making the same claim on his behalf, for the benefit, in accordance with its statutory purpose, of Belgian accidental Americans.

15. More specifically, the plaintiffs support their claim on the following grounds: the unlawfulness of the transfer of personal data to the IRS under the "FATCA" agreement (in breach of Articles 45, 46 and 49 of the GDPR); non-compliance with the principles of purpose limitation (Article 5.1.b) of the GDPR), proportionality or 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 transparency (Articles 12 to 14 of the GDPR) and a breach of the obligation to carry out a data protection impact assessment (hereinafter DPA - Article 35 of the GDPR). The said letter details each of the alleged grievances. As these also form the basis of the complaint filed with the DPA, they will be explained below when the Litigation Chamber debates the respective viewpoints of the parties, including that of the plaintiffs (point 82)

16. **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 thus states that **the legal basis for the transfer** it is carrying out **lies in the "FATCA" agreement as well as in the Law of December 16, 2015**. The defendant also **Article 96 of the RGPD**[7] and concludes in support of its claim that, in the absence of evidence from the plaintiffs as to how the "FATCA" agreement transgresses EU law prior to May 24, 2016, i.e. Directive 95/46/EC, their claims are unfounded. The defendant also refutes all the other claims made against it.

17. Following this response from the defendant, only **the first plaintiff renewed its claim 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**.[8]

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[7] Article 96 of the GDPR: "International agreements involving the transfer of personal data to third countries or international organizations which were concluded by Member States before May 24, 2016 and which comply with Union law as applicable before that date shall remain in force until they amended, replaced or revoked."

[8] 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.

18. In a **decision dated October 4, 2021, the defendant refused to grant the first plaintiff's claims rejecting the arguments developed by the latter with regard to the alleged breaches of both the RGPD and Directive 95/46/EC**. In this decision, the defendant, relying on the reading of Article 96 of the RGPD by the French Conseil d'Etat in a judgment of July 19, 2019 (to which the Contentious Chamber will return at point 165), indicates that for the application of this Article 96, it is appropriate to first verify the compliance the "FATCA" agreement with the RGPD and, in the absence of compliance, to examine whether this agreement complies with EU law on the date of May 24, 2016. This reading breaks with the content of its aforementioned letter of March 30, 2021 (point 17). For a proper understanding of the remainder of the decision, the Contentious Chamber specifies that the defendant further considers under the terms of its decision *"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 RGPD[9] or Article 26.1(d)[10] of Directive 95/46/EC] - is indeed fulfilled since the basis for the lawfulness of the disputed processing relies on an international agreement [i.e. the "FATCA" agreement] and the law of December 16, 2015".*

19. **An appeal for annulment was lodged with the Conseil d'Etat (hereinafter "CE) against this administrative decision by the defendant**. At the request of the Contentious Division, the parties indicated in their pleadings and at the hearing on January 10, 2023 that this appeal was still pending. In particular, they pointed out that the defendant had argued that the EC should await the outcome of the proceedings before the DPA before making a decision. The plaintiff, for his 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 carried out under the FATCA agreement, on admissibility of mobilization of Article 49.1. d) of the GDPR or, where applicable, its equivalent in Directive 95/46/EC in the event of the application Article 96 of the GDPR, as well as with regard to compliance with 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 Article 96 of the GDPR were to be retained.

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[9] Article 49.1. d) of the GDPR: *"In the absence of an adequacy decision under Article 45(3) or appropriate safeguards 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 only take place under one of the following conditions: (...) d) the transfer is necessary on important grounds of public interest".*

[10] 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 paragraph 2 may be carried out, provided that: (...) d) the transfer is necessary or legally required important public interest grounds".*

I.2. Feedback from the procedure leading to the annulled decision 61/2023

20. As mentioned in point 1 above, the **plaintiffs filed a complaint with the APD on 22 December 2020 (complaint no. 1)**.

I.2.1. Admissibility of the complaint

21. On March 22, 2021, **complaint no. 1 insofar as it is filed by the first complainant is declared admissible** by the APD's Service de Première Ligne (hereinafter SPL) on the basis of articles 58 and 60 of the *Law of December 3, 2017 establishing the Data Protection Authority* (hereinafter LCA) and the complaint is forwarded to the Chambre Contentieuse pursuant to article 62.1 of the LCA.

22. Complaint no. 1 insofar as it is lodged by the **second complainant is, for its part, declared inadmissible** on February 12, 2021 by the SPL of the APD on the grounds that the second complainant does not meet the conditions laid down 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")[11].

23. From the outset, the Contentious Division specifies that on **July 9, 2021, the second plaintiff will file a new complaint (complaint no. 2).** This consists of a reformulation of her complaint no. 1 of December 22, 2020. In it, the second plaintiff further clarifies her interest in acting. She explains that she is acting in her own name, in accordance with her statutory purpose, and not in the name and on behalf one or more Belgian accidental Americans. The second plaintiff therefore states that she is not acting in representation within the meaning of Article 80.1. of the RGPD[12]. The conditions for the application this article executed article 220.2. 3° and 4° of the LTD must not therefore, from her point of view, be met. The second complainant, on the other hand, relies on **article 58 of the LCA**, which stipulates *that "any person may lodge a complaint*

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[11] Article 220 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 non-profit association must :

- 1° be validly constituted in accordance with Belgian law;
- 2° have legal personality;
- 3° have statutory objectives of public interest;
- 4° have been active in the field protecting the rights and freedoms of data in the context of personal data protection for at least three years.

§ 3 non-profit body, organization or association provides 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.

[12] Article 80.1. of the RGPD "Representation of data subjects": The data subject shall have the right to mandate a body, organization or association, which has been validly constituted in accordance with the law of a Member State, statutory objectives are of public interest and is active in the field of the protection of the rights and freedoms of data subjects in the context of the protection of personal data, 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 obtain compensation referred to Article 82 where the law a Member State so provides.

or a written, dated and signed request to the Data Protection Authority". The second defendant considers itself entitled to lodge a complaint with the DPA on this basis, especially as the aim pursued by 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 possibility of lodging a complaint is not reserved to the natural persons concerned, and that a complaint can be lodged by associations by virtue of their specific corporate object[13].

24. **On October 5, 2021, this complaint n°2 will be declared admissible** by the SPL of the APD on the basis of articles 58 and 60 of the LCA. This complaint will be forwarded to the Chambre Contentieuse under article 62.1 of the LCA.

25. In view of the foregoing, the Litigation Division specifies that, for the purposes of this decision, the use of the term **"the complaint" refers to the two complaints filed (n°1 and n°2)**, which will be **joined by the Litigation Division** (point 43).

I.2.2. The subject of the complaint

26. The ***main purpose of*** the **plaintiffs'** complaint **is to obtain, pursuant article 58.2.f) and j) of the RGPD the prohibition, or even suspension, of the transfer of data** (those relating to the first plaintiff and beyond, those of all Belgian accidental Americans whose interests the second plaintiff is defending) **by the defendant to the IRS in application the "FATCA agreement and the Law of December 16, 2015**.

27. Under the terms of their reply submissions, the plaintiffs will add that they request ***in the alternative*** **that the Contentious Chamber order pursuant to Article 58.2. f) and j) of the RGPD that the transfer of data relating to account balances by the defendant to the IRS** in the context of the application of the "FATCA" agreement be prohibited, or even suspended, as regards both the first plaintiff and the Belgian accidental Americans whose interests the second plaintiff is defending.

28. During the hearing held before the Contentious Chamber[14], the complainants will clarify 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 RGPD and does not imply a request for *temporary* suspension of transfers but rather their **outright cessation for the future**.

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[13] In this respect, the Contentious Chamber refers to note it adopted concerning the plaintiff's position https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la-position-du-plaignant-dans-la-procedure-au-sein-de-la-chambre-contentieuse.pdf, in particular point B. (in fine) on page 2. It also refers to its decision 24/2022 and the references cited therein.

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

I.2.3. Inspection survey (SI)

29. 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 article 96.1 of the LCA, **the Contentious Chamber's request for an investigation is forwarded to the SI.**

30. On May 26, 2021, the SI investigation is closed, the report is attached to the file and the latter is forwarded by the Inspector General to the President of the Contentious Chamber (art. 91.1-2 of the LCA).

31. Under the terms of its report, SI concludes that there is, in its words, ***"no apparent breach of the RGPD"*** (page 5 of the report).

32. **In support of Article 96 of the RGPD** (point 20 of the report), **the SI** notes at the end of its examination of the compliance of the "FATCA" agreement and the Law of December 16, 2015 with the data protection regulatory framework applicable before May 24, 2016, i.e. according to its terms, with Directive 95/46/EC as transposed under the Law of December 8, 1992 *on the protection of privacy with regard to the processing of personal data* (hereinafter LVP), **the following elements**:

    - On December 17, 2014, the Commission for the Protection of Privacy[15] (hereinafter "CPVP") issued a **favorable opinion 61/2014 subject** strict suspensive conditions on the first draft of the future Law of December 16, 2015. The CPVP then **issued** a **favorable opinion in its opinion 28/2015 of July 1th, 2015** on the second draft of the law, which implemented the remarks and conditions issued in its opinion 61/2014.

    - Under the terms of its deliberation AF 52/2016 of December 15, 2016, the Sectoral Committee for the Federal Authority[16] (hereinafter "SCFA") of the CPVP authorized the Respondent to transmit to the IRS the financial information of declarable accounts of US taxpayers sent to it by financial institutions under the "FATCA" agreement. The SI points out that the SCFA, 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 SCFA had also ordered the defendant, in compliance with the principle of transparency, to inform the public by means of a text.

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[15] The Commission de la protection de la vie privée (CPVP) was the Belgian data protection authority within meaning of Article 28 of Directive 95/46/EC. It was succeeded on May 25, 2018 by the Data Protection Authority (DPA) pursuant to Article 3 of the LCA.

[16] Article 36bis of the Privacy Act stipulates that any electronic communication of personal data by a federal public service or by a public body with legal personality which comes under the federal authority requires authorization in principle from the Sectoral Committee for the Federal Authority (SCFA), unless the communication has already been authorized in principle by another sectoral committee created within the CPVP. The SCFA's task is to check that the communication complies with legal and regulatory provisions.

accessible and comprehensible on its website as to the circumstances in which its personal data (including financial data) may be transmitted to the IRS. In this respect, the SI notes that a web page dedicated to "FATCA" is available on the defendant's website. Finally, the SI points out that, pursuant to article 111 of the LCA[17], authorizations granted by the CPVP's sector committees (such as the CSAF) prior to the entry into force of this law remain in principle legally valid[18].

33. Finally, the SI rejects the applicability of the CJEU's Schrems II[19] ruling. It notes that this judgment invalidates the Privacy Shield, which concerned the transfer of personal data to the United States for *commercial* purposes (and not for tax purposes as in the present case). The SI also refers to Article 17[20] of the Law of December 16, 2015, which enshrines in particular the obligation of confidentiality with regard to the information exchanged as well as its limited use. This article refers both to the "FATCA" agreement and to the agreements to which the latter itself refers, namely the aforementioned OECD Convention.

34. At the end of its investigation, the SI concludes that, in view of the above considerations and in accordance with Article 64.2 of the LCA[21], **it is not appropriate to pursue its investigation further** and that it **does not find**, as already mentioned (point 32), ***any "apparent breach of the RGPD".***

[17] Article 111 of the LCA: "Without prejudice to the supervisory powers of the Data Protection Authority (DPA), authorizations granted by the sector committees of the Commission for the Protection of Privacy (CPVP) before the entry into of this law retain their legal validity. After the entry into force of this law, adherence to a general authorization granted by deliberation of a sectoral committee is only possible if the applicant sends a written and signed undertaking to the Data Protection Authority, in which he 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 this undertaking. Unless otherwise provided for by law, pending authorization requests submitted before the law comes into force are processed by the data protection officer of the institutions involved in the data exchange".

[18] The Contentious Chamber will not give a general ruling on the validity of these authorizations. It will examine the relevance of the one invoked by the defendant in the specific context of the complaint leading to the present decision.

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

[20] Article 17 of the Law of December 16, 2015: § 1. Information transferred to a jurisdiction subject to declaration is subject to the confidentiality obligations and other protective measures provided for by the treaty on tax matters that allows for the automatic exchange of information between Belgium and that jurisdiction and by the administrative agreement that organizes this exchange, including the provisions limiting the use of the information exchanged. § 2. However, notwithstanding the provisions of a tax treaty, the competent Belgian authority : - may, as a general rule and to reciprocity, authorize a jurisdiction to which the information is transferred to use the information as evidence in criminal proceedings where the information contributes to the initiation of criminal proceedings for tax fraud; - 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, the determination of appeals in relation to, or the oversight of, the taxes referred to in the treaty; and - may not authorize a jurisdiction to which the information is transferred to communicate the information to a third jurisdiction.

[21] Article 64.2 of the LCA: In exercising the powers referred to in this chapter, the Inspector General and the inspectors shall ensure that means they use are appropriate and necessary.

I.2.4. Further investigation by the Inspection (SI)

35. On June 24, 2021, the Chambre Contentieuse requested that the SI carry out a **supplementary investigation,** pursuant to article 96.2. of the LCA.

36. On examining the report of May 26, 2021 (points 32 et seq.), the Dispute Chamber notes a lack information on certain points raised by the plaintiffs in support of their complaint, including :

- Whether or not appropriate safeguards have been put in place with regard to transfers to the United States ;
- The existence or otherwise of further processing(s) other purposes and existence or otherwise of

  no warranties where applicable ;
- How long the data will be kept, taking into account any further processing;
- The data precisely communicated and the volume of such data per data subject as well as the number of data subjects in Belgium;
- Whether or not a reciprocity clause exists, and if so, how it is implemented

  in practice ;
- The question of whether a DPIA within meaning of Article 35 of the RGPD has been carried out (or will be

  in what form and on what date;
- The question of whether the first complainant has lodged other claims with the same or similar object before other bodies (judicial, administrative) since lodging his complaint and, if so, what outcome was.

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

38. On August 10, 2021, the SI replied to the complainants that the taking of provisional measures is one of the investigative powers conferred on it by the LCA, and that it is not an obligation but rather a possibility left to its autonomous discretion. The SI also points out that, pursuant to article 64.2 of the LCA, it must ensure that all useful and appropriate means are used for the purposes of the investigation. It adds that it has no instructions to receive from anyone as to the investigative measures to be , **thereby rejecting the complainants' request**.

39. On September 14, 2021, the SI's supplementary investigation is closed, the report is attached to the file and the latter is forwarded by the Inspector General to the President of the Contentious Chamber (art. 91.1 and 91.2 of the LCA).

40. Under the terms of its **supplementary report, the SI notes that there is no evidence of a lack of guarantees concerning the protection of the data transferred**, or of **non-reciprocity in the exchanges**. The SI states that it can only note the **fairly robust legal framework** (these terns being those of the report) which frames the transfer of US nationals' tax data by the defendant to IRS. In this respect, it refers to the description of the safeguards surrounding said transfers, provided by the defendant's Data Protection Officer (hereinafter "DPO"), to the parliamentary work on the law assenting to the "FATCA" agreement, to articles 3.7[22] and 3.8[23] of the agreement . The SI also refers to the aforementioned July 19, 2019 judgment of the French Council of State referred to by the French sister association of the second plaintiff, a judgment under which the plea disregard for Article 46 of the RGPD was notably rejected[24]. The SI report also reproduces the elements put forward by the defendant to justify the absence of an AIPD.

I.2.5. Examination of the merits by the Contentious Chamber

41. On January 20, 2022, the Litigation Division decided, pursuant to article 95.1 1° and article 98 of the LCA, that **complaints no. 1 and no. 2 can be dealt with on their merits**.

42. On the same date, the parties were informed by registered mail of the provisions of article 95.2 and article 98 of the LCA. Under the terms of this letter, the Litigation Division decided to **join complaints no. 1 and no. 2**, which concern the same processing of personal data (data linked to the same facts), are both

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[22] 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 the Convention on Mutual Administrative Assistance in Tax matters of January 25, 1988.

[23] Article 3.8. de l'accord "FATCA" : "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.

[24] The French Conseil d'Etat had been seized by the French Association of Accidental Americans with an application annul, on the grounds of ultra vires, the decisions refusing its requests for the repeal a decree and its ministerial order organizing the collection and transfer of personal data to the US authorities. In its ruling, the French Conseil d'Etat concludes that, in view of the specific safeguards afforded by the "FATCA" agreement of November 14, 2013 (an agreement concluded with France) surrounding the disputed processing and the level of protection provided by the legislation applicable in the United States with regard to personal data used to establish the tax situation of taxpayers (the French CE refers to the US Federal Personal Data Protection Act of 1974 and the Federal Tax Code), the plea alleging infringement Article 46 of the RGPD and Articles 7 and 8 of the EU Charter of Fundamental Rights must be rejected (points 23 et seq. of the judgment). French Council of State, judgment of July 19, 2019, No. 424216 ECLI:FR:CEASS:2019:424216.20190719: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000038801233?isSuggest=true

lodged against the defendant and raise the same complaints against the latter. The Litigation Division therefore considers that they are so closely linked that it is in its interest to hear and decide on them at the same time, in order to ensure the consistency of its decisions.

43. In the same letter, the Litigation Division granted the parties the following deadlines for concluding: March 17 and May 16, 2022 for the defendant and April 15, 2022 for the plaintiffs.

44. In support of the complaint and the SI reports, the Dispute Resolution Division also identifies the following

the parties to set out their arguments:

- The unlawfulness of the defendant's data transfers to the IRS under articles 45 and 49 of the RGPD 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 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 RGPD);
- Failure to comply Article 16 of the RGPD (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 with regard to the "FATCA" legislation ;
- Failure to carry out a DPIA within meaning of Article 35 of the GDPR;
- The breach of Articles 5.2. and 24 of the RGPD coupled with the breaches invoked above;
- Failure to comply Article 20 of the Act of July 30, 2018 (LTD).

45. The Litigation Division also invites the parties to **conclude on Article 96 of the RGPD** invoked by the defendant in its letter of October 4, 2021 (point 19).

46. On January 31 and February 8, 2022, the defendant requested a copy of the file (art. 95.2, 3° LCA), which was sent to her on February 9, 2022.

47. On March 16, 2022, the Contentious Division received **the defendant's reply**.

48. On March 30, 2022, the Contentious Chamber sent a supplementary request to the parties regarding the action brought by the second plaintiff before the EC (Belgium) concerning the issue of accidental data transfers from the U.S. to the U.S. (point 19) Without prejudice to the respective competences of the EC and the DPA, the Contentious Chamber requests the second plaintiff to clarify in its future reply or in a separate document, at the latter's option, the subject matter of this request.

of this appeal to the CE and, if possible, of the timetable for it. The Litigation Division specifies that this information is intended to enable it to assess whether (the outcome of) this appeal is likely have an impact on the proceedings underway before the DPA and/or on its future decision[25].

49. On April 15, 2022, the Contentious Division received the **plaintiffs' reply**.

50. On May 16, 2022, the Contentious Division received the **defendant's summary submissions.**

51. On August 17, 2022, on an exceptional basis, the Contentious Division authorized the parties to **conclude additionally on the reference to the Constitutional Court's ruling of March 9, 2017** made by the defendant in its aforementioned summary submissions.

52. On August 17, 2022, the parties were informed that the hearing would take place on the following September 13. The hearing was subsequently postponed to November 7, 2022 and January 10, 2023.

53. On August 31, 2022, the Litigation Division received the **plaintiffs' additional submissions regarding the aforementioned Constitutional Court ruling of March 9, 2017**.

54. On September 21, 2022, the Contentious Division received the **defendant's additional submissions on the same judgment**.

55. On September 23, 2022, the plaintiffs submitted 2 documents to the Litigation Division, which they described as "new documents" in the file. More specifically, they refer to an opinion dated August 23, 2022 from the Slovak Data Protection Authority (and its unofficial translation into French) relating to the "FATCA" agreement, concluding that the "FATCA" agreement does not comply with the RGPD, on the one hand, and the updated report *"FATCA legislation ans its application at international and EU level - an update"* of September 2022 commissioned by the European Parliament, on the other.

56. This led to an exchange of letters between the parties concerning the admissibility of these documents.

transmitted outside the deadlines set for the submission of their respective pleadings and exhibits.

57. On October 3, 2022, the Litigation Division informed the parties that it would give them the opportunity to comment on these documents at the start of the hearing.

[25] Under the terms of the complaint form, complainants are asked to inform the DPA of the existence of any complaint(s) lodged with other bodies. As this appeal to the Conseil d'Etat had not yet been lodged at the time the complaint was submitted to the DPA, the second complainant was asked to inform the Chambre Contentieuse of this.

I.2.6. January 10 hearing 2023

58. On January 10, 2023, **the parties were heard by the Contentious Division**. At the hearing, and as reflected in the minutes, the Litigation Division indicated that it was authorized to examine all relevant documents. No documents are excluded from the proceedings, provided that the exercise of the rights of defence in respect of them is made possible, at the hearing or, if necessary, afterwards. The parties will not return to this point.

59. On January 27, 2023, the **minutes of the hearing were submitted to the parties**. The Dispute Resolution Chamber received **no comments from the parties on these minutes**, the parties expressly indicating - on January 29, 2023 (for the plaintiffs) and February 3, 2023 (for the defendant) respectively - to the Dispute Resolution Chamber that these minutes reflected the discussions that had taken place during the hearing.

I.3. Decision 61/2023

60. On **May 24, 2023**, the Litigation Division, comprising Mr Hielke Hijmans, Chairman, Mr Yves Poullet and Mr Christophe Boeraeve, members, adopted **decision 61/2023**.

61. Under the terms of this decision, the Litigation Division decides:

- Pursuant to Article 100.1, 8 of the LCA**, to prohibit the processing by the defendant** of the personal data of the first plaintiff and the Belgian accidental Americans in application of the "FATCA" agreement and *the Law of December 16, 2015 regulating the communication of information relating to financial accounts 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 100.1, 5° of the LCA, to issue **a reprimand against the Defendant with respect to Article 14.1-2 combined with Article 12.1 of the RGPD accompanied by a compliance order on** the basis of Article 100.1, 9° of the LCA consisting of providing RGPD-compliant information on its website ;
- Pursuant to Article 100.1, 5° of the LCA, to formulate a **reprimand against the Respondent with regard to the violation Article 35.1 of the RGPD accompanied by a compliance order** the basis of Article 100.1, 9° of the LCA consisting of carrying out a DPIA within the meaning of Article 35 of the RGPD ;
- Supporting documents attesting to the compliance measures ordered must be sent to the Litigation Division within 3 months of the notified decision;

- Under article 100.1, 5° of the LCA, to formulate a **reprimand with regard to the defendant for breach of articles 5.2 and 24 of the RGPD**.

I.4. The appeal against decision 61/2023 to the Court of markets

62. By application dated June 14, 2023, the **defendant** lodged an action **for suspension and annulment of decision 61/2023** with the Procurement Court. APD is the defendant in this action.

63. On June 27, 2023, the plaintiffs filed a motion for voluntary intervention.

64. In its defense before the Contract Court, APD developed various arguments in support of which it asked the Court to declare the defendant's appeal admissible but unfounded.

65. It also invites the Court, insofar as it has any doubt as to any of the above, to points raised, to refer the **following questions to the CJEU for a preliminary ruling**:

- 1°) "*a national law approving an international agreement between an A "public interest" within meaning of Article 26, §1 may be founded in a Member State and a non-Member State, d) of Directive 95/46/EC if that third country does not guarantee effective reciprocity*?
- 2°) "*Does the transfer of personal data to the tax authority of a third country by virtue of national legislation approving an international agreement between the Member State in question and that third country infringe Article 6, §1, b) of Directive 95/46/EC insofar as the purposes of the processing of personal data, as they appear from the agreement in question, are expressed in vague terms, such as "compliance with international tax rules" or "implementation of the obligations arising from the US "FATCA law aimed at combating tax evasion by US nationals?* " ;
- *3°) "Does the transfer of personal data to the tax authority of a third country pursuant national legislation approving an international agreement between the Member State in question and that third country violate Article 6, §1, b) of Directive 95/46/EC insofar as the third country has not put in place adequate safeguards to prevent the data in question from being used for purposes other than those set out in the agreement?*
- *4°) "the transfer of personal data to the tax authority of a third state pursuant to national legislation approving an international agreement between the Member State in question and that third state violate Article 6, §1, c) of Directive 95/46/EC insofar as the national legislation and the international agreement in question do not include provisions and criteria that establish an explicit link between the transfer of personal data and the tax authority of the third state?*

disclosure of personal data concerning financial accounts and possible fraud or tax evasion?

- *5°) "Does the transfer of personal data to the tax authority of a third state by virtue of national legislation approving an international agreement between the Member State in question and that third state infringe Article 6, §1, e) of Directive 95/46/EC insofar as there are no adequate safeguards in place to ensure that the data in question are not kept longer than necessary to accomplish the purposes pursued once the data are transferred to the tax authority of that third state?"*
- *6°) "In the event an international agreement between a Member State and a third country concerning the transfer of personal data to tax authority of that third country, must the "sufficient guarantees" within the meaning of Article 26, §2 of Directive 95/46/EC be included in the international agreement itself?*
- *7°) "Can Article 96 of Regulation (EU) 2016/679 of the 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 such data, and repealing Directive 95/46/EC (General Data Protection Regulation), taken alone or read in conjunction with Article 4, paragraph 3 of the Treaty on European Union and/or article 351 of the Treaty on the Functioning of the European Union, be interpreted as meaning that member states are obliged to use their best endeavors amend, replace or revoke international treaties to which they are party which do not comply with the provisions of this regulation?*
- *If so, can a Member State which in 2023 has not made its best efforts to amend, replace or revoke an international treaty, to which it is a party, which does not comply with the provisions of Regulation (EU) 2016/679, Article 96 of that Regulation to justify conduct incompatible with that Regulation?"*

I.5. Market Court rulings of June 28 and December 20 2023

66. On June 28, 2023, the Cour des Marchés issued an interlocutory ruling (2023/AR/801) **suspending[26] the execution of decision 61/2023 of the Chambre Contentieuse** with immediate effect, until it had ruled on the merits of the action for annulment.

[26] Pursuant to article 108.1 paragraph 2 of the LCA, the decisions of the Chambre Contentieuse are in fact provisionally enforceable, save in exceptional cases: *"Save in the exceptions provided for by law or unless the Chambre Contentieuse decides otherwise in a specially reasoned decision, the decision is provisionally enforceable, notwithstanding any appeal. The decision to delete data in accordance with article 100, § 1, 10°, is not provisionally enforceable".*

67. On December 20, 2023, the Cour des Marchés issued a judgment (2023/AR/801), in which it **annulled decision 63/2021 of the Chambre Contentieuse** and ruled that the case be referred back to the Chambre Contentieuse "otherwise composed", for a new decision on the merits, with reasons, taking into account the considerations developed in its judgment.

68. With regard to these considerations, the Cour des Marchés criticizes the Chambre Contentieuse for not having sufficiently motivated its decision, in violation of articles 2 and 3 of the Law of July 29, 1991 on the formal motivation of administrative acts. More specifically, the Market Court states that the **requirement to state reasons has not been met**, since *"there is no indication that the said decision had regard to the reports of the Inspectorate General and concrete analysis carried out by this service; it does not state the reasons for departing from the findings made therein with regard to the legality of the data processing by SPF Finances"* (point 35 of the judgment). In this respect, the Court points out that **the Contentious Division's sovereign assessment must be accompanied a reinforced duty to state reasons when it departs from the SI's findings**. Once the Litigation Division has requested an investigation report, the parties involved can legitimately expect **that this report** will **be taken into account by the Litigation Division in its assessment.** Consequently, the Dispute Division must give reasons for not following the SI's findings or conclusions (point 30 of the judgment).

69. The Cour des marchés points out the following:

- As for compliance with the principle of finality, the decision is based solely (§ 164) on a passage from the WP 234 report of the Article 29 Working Party and on a doctrinal article written by the President of the Administrative Jurisdiction Division himself on the subject of an analysis by the CJEU, i.e. on general and theoretical references. In so doing, decision 61/2023 disregards the concrete analysis carried out by the SI, which noted (1) that the CPVP had, in its two opinions, been able to assess the legitimacy of the tax purposes and the necessity of transferring data to third countries on the grounds of an important public interest of Belgium and in view of the reciprocity of exchanges; (2) that the SCFA had likewise authorized the defendant to transmit the requested data to the IRS, and had on that occasion been able to assess the admissibility of the tax purposes of the processing, the proportionality of the data processed and the security of the processing; and (3) that, in application of article 111 paragraph 1 of the LCA, the authorizations granted by the CPVP' sector committees retain their legal validity in principle.

- In its examination of the principles of necessity and minimization, the Court also points to the overly general nature of the European sources (Group 29 opinion, European Parliament study) used by the Litigation Division. It concludes that the latter failed to take into account the analysis carried out by the SI, which pointed out that both the

Both the OPC and the SCF had favorably assessed the necessity and proportionality of the data transfers. The Court is also of the opinion that the decision also failed to take into account the concrete answers provided by the defendant's DPO to questions 6, 7 and 8 included in the SI's supplementary report, specifically relating to the concrete assessment of the data minimization principle.

- Lastly, with regard to the rules governing the transfer of data to the IRS, the Cour des Marchés notes that as regards the "appropriate safeguards" provided for in Article 46.2 a) of the RGPD, decision 61/2023 considers that these must be included in the international agreement itself and examines these in the light of EDPS Guidelines 02/2020. In so doing, the Court notes that the Contentious Chamber failed to have regard to the safeguards identified by the SI, in particular in its supplementary report, arising from the fact that:
    - Article 3.7 of the "FATCA" agreement refers to the "confidentiality obligations and other safeguards set out in the OECD Multilateral Convention (articles 21 and 22 - page 3/22 of the SI supplementary report;
    - Article 3.8 of the FATCA agreement stipulates that each competent authority must notify the other in writing when it is satisfied that the other has put in place the appropriate safeguards (page 3/22 of the IS supplementary report);
    - The answers provided by the DPO of the FPS Finance to questions 1 to 4 asked by the IS in relation to the guarantees put in place and in particular the notification made by the Belgian tax authorities to the US tax authorities in relation to the implementation of the guarantees (answer to question 2).

70. As to possible questions referred for a preliminary ruling, the Court states in the operative part of its judgment,

"that, at this stage, there is no need to refer questions to the Court of Justice for a preliminary ruling".

(page 52 of the judgment).

I.6. Feedback from the takeover procedure leading to the present decision

I.6.1. The March 20, 2024 decision on composition

71. Following the Market Court ruling of December 20, 2023, on **March 20, 2024**, the President of the Litigation Division, H. Hijmans[27] , decided **to entrust the resumption of proceedings in this case to a seat composed of** the following **three members: Yves Poullet** as Chairman, **Christophe Boeraeve** and **Jelle Stassijns**.

[27] The Contentious Chamber means the president appointed by the House of Representatives in application of Chapter 3 of the LCA, particular article 39.

72. This decision is based **on article 43 of the RoI of the APD**[28] which empowers the Chairman of the Contentious Chamber to allocate cases among its members and to decide whether, in a given case, the Contentious Chamber should sit with 3 members.

73. The reasons for this decision are as follows:

- *"fundamental principles personal data protection are at stake, so that the case must be dealt with by a 3-member panel"*: note that the words *"fundamental principles of personal data protection"* refer precisely to article 43 of the RoI;
- *the language of the proceedings in this case is French: in accordance with the principles of good administration and in the spirit of the legislation on the use of languages, it is preferable that the majority of the seat, including its president, be part of the French-speaking linguistic role of the Chambre Contentieuse ;*
- *one of the French-speaking members has - or may be perceived to have - a conflict of interest within meaning of article 58 of ODA RoI"*[29].

74. In view of this, President H. Hijmans concludes that the **renewal of the Contentious Division's membership can only be partial**.

I.6.2. Examination resumed on merits

75. On **May 30, 2024**, the Litigation Division notified the parties of the resumption *ab ovo* of the examination of the merits of the complaint, and to this end sent them an invitation to conclude with regard to the grievances listed below. It also reminds them of the joinder of complaints no. 1 and no. 2 which it effected in its letter of January 20, 2022. The final timetable for the exchange of arguments between the parties, as modified by the e-mail of June 11, 2024[30], is as follows: August 7 and October 4, 2024 for the defendant and September 5, 2024 for the plaintiffs.

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[28] Art. 43 RoI: Cases referred to the Litigation Division are allocated by its Chairman to the members of the Litigation Division. The member to whom the case is assigned sits alone. The Litigation Chamber may sit with three members if the Chairman so decides. This decision takes into account the nature of the complaint and the violation of the fundamental principles data protection. In view of the circumstances described in the previous paragraph, the member to whom a file is assigned may, however, ask the Chairman to sit with three members. The Chairman ensures assistance by appointing agents from the DPA administration, who form part of the Dispute Chamber secretariat.

[29] Article 58 of the RoI states that the President of the Chambre Contentieuse is responsible for deciding whether a member the Chambre Contentieuse has a conflict of interest. Conflict of interest is defined as follows: *"A conflict of interest arises when the impartial and objective exercise of the function/mandate or respect for the principles fair competition, non-discrimination and equal treatment is compromised due to an interest shared with a person or body mentioned in the file to be examined".*

[30] This e-mail follows a request by the defendant to modify the time limits. On the other hand, the Litigation Division did not grant the defendant's request to organize a single round of submissions, beginning with the plaintiffs and ending with the defendant.

76. The grievances on which the parties are invited to defend themselves are identical to those formulated by the Litigation Division in its letter of January 20, 2022 (points 41 et seq.), with the exception of the grievance relating to non-compliance with article 20 of the LTD, in respect of which the Litigation Division invites the parties to defend themselves *"insofar as this grievance is maintained by the plaintiffs, the latter having abandoned it during the exchange of pleadings which led decision 61/2023 of the Litigation Division annulled by the Procurement Court".*

77. The Contentious Chamber also invites the parties to clarify the applicability of Article 96 of the RGPD as well as the existence of appropriate safeguards put in place with regard to data transfers to the IRS by indicating the precise provisions on which they are based and this, whether they are based on the provisions of Directive 95/46/EC, the RGPD or other texts applicable at time of the facts complained of as well as at the time.

78. Finally, the Contentious Division particularly invites the parties to take into account in their respective arguments the considerations made by the Cour des Marchés in its annulment judgment of December 20, 2023 with regard to the findings made by the SI, in particular those pinpointed by the Court in point 34 of its judgment.

79. On May 30, 2024, the **plaintiffs notified the Contentious Chamber that they wished to be heard** at the end of the exchange of conclusions pursuant to article 98 of the LCA juncto articles 48 to 54 of the RoI of the APD.

80. On August 5, 2024, the Contentious Division received the **defendant's main submissions**.

81. On September 3, 2024, the Dispute Resolution Chamber **informed the parties of the decision taken on March 20, 2024 by Mr. Hielke Hijmans concerning the renewed composition** the Dispute Resolution Chamber referred to in point 72.

82. On September 5, 2024, the Litigation Chamber received the **plaintiffs' submissions**.

- The plaintiffs note that the Chambre Contentieuse is otherwise composed, as requested by the Cour des marchés in its ruling of December 20, 2023.
- The plaintiffs state that the banks are not parties to the case (see the defendant's criticism in this regard below) not *"because of a conflict interest with plaintiff's counsel"* but because it is not the financial institutions that are data controllers with regard to the processing that consists of transferring personal data to the IRS.
- As for Article 96 of the RGPD, the plaintiffs consider that the conditions for its application have not been met and that none of the texts put forward by the defendant in an attempt to demonstrate that the "FATCA agreement would comply with Union law

applicable on May 24, 2016 does not stand up to scrutiny, and in particular to primacy it case law of the CJEU in its ruling C-175/22.

- The plaintiffs consider that the "FATCA" agreement does not contain the minimum guarantees required Article 46.2. a) of the GDPR. They also point out that, in view of Article 49.1 d) initially invoked by the defendant, it cannot be applied in this case.
- The plaintiffs also argue that the defendant is not fulfilling its obligation to provide information in breach of Article 14 of the GDPR and the principle of transparency.
- The plaintiffs consider that the defendant has breached Article 35 of the GDPR by failing to carry out a DPIA.
- The plaintiffs also consider that Articles 5.2 and 24 of the RGPD have been violated in case.

83. On October 4, 2024, the Contentious Chamber received the **defendant's additional summary submissions**. The defendant having filed a second supplementary submission, a summary of its arguments is given below at point 86.

84. On October 18, 2024, the Contentious Chamber addressed the parties, noting that the defendant's additional and summary submissions contained a number of requests directly addressed to the plaintiffs and their counsel[31]. In order to ensure that the case file was in order, the Litigation Division decided to grant the plaintiffs a final deadline of November 4, 2024 to respond. It added that if the plaintiffs were to respond, the defendant would be granted an equal period for a final reply.

85. On November 4, 2024**, the plaintiffs filed additional pleadings**.

86. On November 19, 2024, the Contentious Chamber received the **defendant's second additional summary submissions**.

- The defendant contests that the Contentious Division should be "otherwise composed" as requested by the Market Court in its judgment of December 20, 2023.
- The defendant requests that the case be suspended pending the intervention of the financial institutions in the proceedings. In its view, their absence constitutes a violation of the principle of equality enshrined in articles 10 and 11 of the Constitution, since neither the defendant nor the ODA is authorized to compel them to intervene in the case.

[31] The defendant requests the production of specific documents (see below). It also requests that counsel for the complainants are deported due to a conflict interest on their .

even though they play an essential role in the processing chain leading disputed transfers to the IRS.

- The defendant requests that the plaintiffs produce the CNIL decision of May 23, 2022, by which the CNIL closed a complaint similar to the one that led to the present decision. As will be explained in paragraph 91, this document was produced by the plaintiffs on November 29, 2024.
- The defendant considers that the conditions of Article 96 of the RGPD are met and that the "FATCA agreement read in combination with the Law of December 16, 2015, from which it is inseparable, complies with EU law applicable on May 24, 2016. The disputed transfers to the IRS, which it does not deny is responsible for processing, are therefore not vitiated by any illegality and may be carried out.
- The defendant argues that without prejudice to the application Article 96 of the RGPD, the "FATCA agreement complies with the RGPD and that on its basis and that of the Law of December 16, 2015 the transfers to the IRS are lawful.
- The defendant defends itself against any breach of obligation to provide information which, in its view, is incumbent on banks. Nevertheless, it provides adequate information to those concerned via its website
- The defendant is of the opinion that it was not obliged to carry out an AIPD in view of the pre-analysis it had carried out.
- The defendant considers that it has not violated the principle of accountability enshrined in the law.

  articles 5.2 and 24 of the RGPD.

I.6.3. The invitation to hearing and the hearing of parties

87. On November 28, 2024, the parties are informed that **the hearing is scheduled for December 11, 2024.**

88. In its letter of invitation, the Dispute Resolution Chamber states that it is **thus acceding to the plaintiffs' request to be heard and is therefore summoning the parties**. The Contentious Chamber therefore does not accede to the defendant's request in paragraph 75 of its second additional form of order to dismiss the plaintiffs' request to be heard, on the grounds that such a hearing would be unnecessary, given that the Contentious Chamber is still composed of two members, including the acting president, who attended the hearing on January 10, 2023 as part of the phase of the proceedings which led to decision 61/2023.

89. The Litigation Division adds that, as of the date of dispatch and given the state of the file, it is not granting the request for suspension of the case pending the intervention of the

The defendant also formulated the invitation to the financial institutions in the operative part of its second additional pleadings. The Litigation Division notes that at the date of the invitation, the financial institutions were neither parties nor interveners in the proceedings.

90. Finally, with regard to the defendant's request that the case be suspended production by the plaintiffs of the decision handed down by the President of the CNIL on May 23, 2022, the Litigation Division notes that, in response to the defendant's request this effect in its additional and summary submissions of October 2, 2024, the plaintiffs state that they do not hold this decision, nor are they its addressees. More generally, the Litigation Division notes that the documents requested by the defendant in its pleadings have not been produced by the plaintiffs at the end of the additional schedule for the exchange of pleadings provided for this purpose. Without granting the defendant's request for a stay of proceedings on this ground at the date of its dispatch and on the basis of the state of the file, the Litigation Division grants the plaintiffs a final deadline for the production of documents until December 5, 2024, **taking the view it must have at its disposal all the documents that may be relevant to resolution of the dispute** (or at the very least cannot be deprived of them).

91. On November 29, 2024**, the plaintiffs produced the CNIL President's decision** of May 23, 2022[32].

92. On December 11, 2024**, the parties were heard by the Litigation Division**. At the end of the hearing, the Contentious Chamber decided to stay the case pending production by the defendant of the document entitled "*Notification of adequacy of data safeguards and infrastructure",* signed by both the defendant and the IRS. Indeed, the said document produced in the defendant's file only bore the signature of the Belgian authorities dated January 10, 2017. The Contentious Chamber indicates that the case will be taken under advisement once the document has been received.

93. On December 17, 2024, the defendant produced the copy signed by both parties (the IRS on the one hand and the defendant on the other) of *the "Notification of adequacy of data safeguards and infrastructure"* referred to above.

94. On December 24, 2024, the **minutes of the hearing are submitted to the parties**. Both parties notify the Contentious Division (respectively on January 20, 2025 for

[32] This decision pronounces the closure by the Commission Nationale Informatique et Libertés (CNIL), the French data protection authority, of the complaint by the French Association of Accidental Americans seeking the suspension of automatic transfers of tax data operated between France and the United States pursuant to the international agreement concluded on November 14, 2013 between the Government of the French Republic and the Government of the United States of America, ("FATCA agreement".) CNIL states that the French Conseil d'Etat has already ruled on the matter in a judgment of July 19, 2019 (see supra note 24) under the terms of which it concluded that the "FATCA" agreement was compatible with the RGPD. CNIL states that, having studied the arguments in the complaint, it appears that there is nothing to authorize it to question the position established by the French supreme administrative court.

the defendant and January 23, 2025 for the plaintiffs) that these minutes hearing **does not call for any comment on their part**.

II. Motivation

II.1. As for the Contentious Chamber's competence to the APD

95. In particular, the RGPD has entrusted EU data protection authorities ("supervisory authorities") with the task of dealing with complaints submitted to them (Article 57.1.f) of the RGPD).

96. When dealing with complaints, data protection authorities must **contribute to consistent application of the RGPD throughout EU**.

97. In this case**, the one-stop-shop mechanism provided for Article 56 of the GDPR does not apply** in view of Article 55.2. of the GDPR, which provides that *"where processing is carried out by public authorities or private bodies acting on the basis of Article 6(1)(c) or (e) , the supervisory authority of the Member State concerned shall be competent. In such cases, Article 56 shall not apply"*.

98. The complaint submitted to the Contentious Chamber for examination in fact 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.

99. Thus, when it comes to assessing the compliance of a bilateral intergovernmental agreement with data protection rules, even if this agreement is similar in content to other bilateral "FATCA" agreements signed by the United States with other EU member states, **the DPA has sole jurisdiction pursuant Article 55 of the RGPD** and Article 4 of the LCA. The same applies to any other EU data protection authority to which the same issue is referred.

100. Contrary to what is provided for when the one-stop-shop mechanism applies, EU data protection authorities in this have no right of review over the DPA's draft decision (Article 60.1-3 of the RGPD). In the event of differences of opinion the application of the GDPR, no relevant and reasoned objection within the meaning of Article 60.4 of the GDPR may be raised by another data protection authority against the DPA's draft decision and no binding decision[33] taken pursuant to

[33] Article 65.1 of the GDPR: In order to ensure the correct and consistent application of this Regulation in individual cases, the Committee [read European Data Protection Committee - EDPS] shall adopt a binding decision in the following cases:

Article 65 of the RGPD by the European Data Protection Committee (hereinafter "EDPS") will not see the light of day in the event of disagreement between data protection authorities as the application of the RGPD to the case in question. This applies not only to the DPA's decision, but also to decisions that have been taken or will be taken in the future by other EU data protection authorities on the same issue.

101. Among the EDPS's powers is also that of issuing *opinions* on the basis of Article 64-2 of the RGPD[34]. However, the request for such an opinion must relate to a matter of general application and not to a particular case/processing operation.

102. The non-applicability of the one-stop-shop mechanism and EDPS's lack of competence to rule on the question of the compliance of the "FATCA" agreement with the applicable EU data protection regulations does not, however, absolve the DPA - quite the contrary - applying the RGPD as consistently as possible.

103. To this end, the Litigation Division will give **the utmost consideration to the relevant CJEU rulings**.

104. The Contentious Chamber will also take the utmost account of the **relevant Guidelines and opinions adopted and made public both by Group 29 and by the EDPS, of which it was/is a member and in whose adoption it participated as an (administrative) data protection authority.** As far as the EDPS is concerned, it is clear from the tasks entrusted to him under Article 70 of the GDPR that he has an essential role to play with regard to consistent application of the rules that the GDPR lays down with regard to cross-border data flows, notably through the adoption of Guidelines (see also recital 139).[35] Admittedly, the EDPS Guidelines are not legally binding, at least for their recipients. On the other hand, they are binding on the data protection authorities that have adopted them, which may not depart from them without a clear reason, on pain of creating legal uncertainty for those to whom they are addressed, i.e. both the data subjects and the data controllers who have complied with them (in line with the position of the data protection authorities which, without prejudice to the jurisdiction of the , are responsible for supervising these guidelines).

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a) where, in the case referred to in Article 60(4), a supervisory authority concerned has raised a relevant and reasoned objection to a draft decision of the lead supervisory authority and the lead supervisory authority has not acted on the objection or has rejected the objection on the grounds that it is not relevant or reasoned. The binding decision covers all the issues that are the subject of the relevant and reasoned objection, including whether there has been an infringement this regulation;

[34] Article 64.2 of the GDPR: Any supervisory authority, the chairman of the Committee [read European Data Protection Committee - EDPS] or the Commission may request that any matter general application or having effects in several Member States be examined by the Committee with a view to obtaining an opinion, in particular where a competent supervisory authority fails to comply with the obligations relating to mutual assistance in accordance with Article 61 or the obligations relating to joint operations accordance with Article 62.

[35] See in this respect, in addition to the reference to its task of advising the European Commission on the level of protection in third countries, litera c), i), j) and s) Article 70 of the GDPR as well as Article 64 e) and f) of the GDPR, all of which specifically relate to the role of the EDPS with regard to such flows.

The Contentious Chamber must therefore invoke them when it considers them relevant to the complaint before it.) It is therefore incumbent on the Litigation Division to invoke them when it considers them relevant to the complaint before it. The same applies to Group 29 opinions.[36]

105. The Chambre Contentieuse adds that it is aware that other data protection authorities, as well as other administrative jurisdictions, which be the appeal bodies of the said data protection authorities, have already ruled in various directions on the same issue of the transfer of personal data to the IRS in execution "FATCAagreements. Since each data protection authority remains exclusively competent, it can independently assess the merits of the complaint submitted to it, and is not bound by the positions taken by its European counterparts on the sole grounds that the latter have previously received similar complaints. As already mentioned, however, consistency must be sought.

106. In this respect, and even though it will have recourse to the rulings of the CJEU and the Guidelines adopted by the European data protection authorities under the aegis of Group 29 and the EDPS, the Litigation Division adds, insofar as necessary, that it is **not authorized to refer questions to the CJEU for a preliminary ruling** (Article 267 TFEU) even if it were to consider, as it did in its first decision, that an interpretation enshrined by the CJEU of a provision of the GDPR proves necessary for the resolution of the dispute referred to it as well as to avoid divergent applications of the GDPR with regard to similar complaints.

II.2. As for the composition of the Chamber Contentious

107. As explained in paragraph 71, **on March 20, 2024**, the President of the Litigation Division**, H. Hijmans, adopted a decision on the composition of the Litigation Division** for the resumption of the case, on the basis of **article 43 of the RoI**[37].

[36] Article 30(1)(a) of Directive 95/46/EC entrusted the Article 29 Party (Groupe 29) with the task of examining any question concerning the implementation of the national provisions adopted pursuant to this Directive, with a view to contributing to their uniform application. article 30.1. b), the Article 29 Working Party was tasked with advising the European Commission on the level of protection in third countries.

[37] The Litigation Division communicated the decision of March 20, 2024 to the parties on September 3, 2024. In the Contentious Division's view, it cannot be criticized for not having communicated this decision until that date. It was not obliged to communicate the composition of its seat to the parties beforehand, and the document was included in the procedural file, which the parties could request, as indicated in the Contentious Division's letter of May 30, 2024. In any event, even supposing, *quod non*, that it had been required to do so, the failure to communicate this decision to the parties on May 30, 2024 has no bearing on its validity.

108. This decision was taken by Chairman H. Hijmans in compliance with article 43 of the RoI, since article 33.2[38] of the LCA refers to the RoI for all matters concerning the composition of the Chambre Contentieuse.

109. With regard to this composition, the Contentious Chamber notes that the defendant is of the opinion that the 2 members who had already sat at the time of the adoption of decision 61/2023 are in conflict of interest, that they make up the majority of the renewed seat and that one of them (Mr. Y. Poullet) now chairs it, which is all the more open to criticism. The defendant adds that the appointment of the chairman is also a privilege of the House of Representatives. In short, the defendant considers that this composition, with only one new member, does not meet the condition of a *"Chambre Contentieuse autrement composée"* set by the Cour des Marchés in its ruling of December 20, 2023, and is also contrary to the principle of impartiality.

110. In the operative part of its second supplementary submission, defendant asks the Litigation Division *to "rule that Mr. Yves Poullet has not demonstrated the powers of which he avails himself, that the Litigation Division has not complied with the judgment of the Court of Contracts December 20, 2023 in that it is not otherwise composed, and that Mr. Yves Poullet must withdraw"*. It requests
To "re-set the case with a differently constituted Contentious Chamber".

111. As for the plaintiff, he concludes that the Contentious Chamber is indeed "otherwise composed" in accordance with the request of the Contract Court and defers to the competence of the Contentious Chamber as to this.

112. As explained in the March 20, 2024 decision (points 71 et seq.), **the composition of the Litigation Division for this case is based on a number of considerations**, which are explained below.

113. As for the decision to sit with 3 members: the compliance with the RGPD of personal data transfers operated by a public administration in execution of an intergovernmental agreement framing an automatic exchange of information in tax matters concluded with the United States **is a** major **issue** as regards a question protection of personal data transferred to a country outside the European Union and which part of a context linked to a public interest of the State moreover as the Court of Markets emphasized in its judgment of June 28, 2023 in particular. As stipulated in article 43 of the aforementioned RoI this issue justified the first 3-member seat. As the first decision was adopted with such a seat, it did not appear relevant to the Chairman (H. Hijmans).

[38] Article 33 of the LCA: 1. (...) The Chairman or one of the members the Litigation Division shall sit as a single member, unless the Chairman of the Litigation Division decides to sit with three members in accordance with the provisions of the rules of procedure. § 2. § 2 In all other respects, the rules of procedure specify the composition of the Litigation Division at meetings and its working methods.

of the Chambre Contentieuse to reduce its seat to a single member. This 3-member composition is in line with the practice[39] of the Contentious Division (based on its RoI as mentioned above), which is, with rare exceptions, to deal with cases on the merits, i.e. those which present a major issue and require the exchange of conclusions, with a 3-member seat.[40]

114. Even supposing that the Chambre Contentieuse had departed from its practice and opted for a single-member seat, this member would necessarily have had to belong to the French-speaking section of the Chambre Contentieuse, as the language of the proceedings in this case was French (see below). Two scenarios would then have arisen: (1) since the only French-speaking member who had not sat during the adoption of decision 61/2023 had a conflict of interest or could be perceived as having one (see below), one of the two French-speaking members who had already sat would have sat alone; or (2) since president H. Hijmans being the only member of the Chambre Contentieuse considered to be bilingual[41] or not belonging exclusively to one or other linguistic role, the only alternative would have been to maintain President H. Hijmans sitting alone. These options would therefore not have complied with the condition laid down by the Court of Markets of an "otherwise composed Chambre Contentieuse", since in either case, the member sitting alone would already have been sitting when decision 61/2023 was adopted.

115. *As for the language of the present proceedings*, **it is not disputed that it is French**. The complaint was lodged in French (the documents filed in support of it, including the correspondence exchanged with the defendant, were also in French) and this was followed by correspondence from the Chambre Contentieuse in French, an investigation by the SI in French and conclusions filed by each of the parties in French. The parties also spoke French at the hearings, and decision 61/2023 was also adopted in French.

116. With regard to the decision to maintain a majority of French-speaking members[42] (i.e. 2 out of 3), the Litigation Division has, in **keeping with the principle of legal certainty**, followed the practice it had followed until now and to which it has remained committed.

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[39] This practice is well known to the public, since the decisions of the Litigation Division are published on its website, and decisions on the merits can be selected search criteria based on the type of decision.

[40] Decisions on the merits are those which, unlike those adopted pursuant to Article 95.1 of the LCA, involve the parties in an exchange of submissions and which may pronounce the corrective measures and sanctions identified Article 100.1 of the LCA, i.e. all the corrective measures and sanctions provided for by the RGPD, including prohibition of processing, reprimand or fine, whereas in execution of Article 95.1 of the LCA, the corrective measures and sanctions that can be pronounced are limited.

[41] Article 40.1 paragraph 1 of the LCA: *"The Management Committee has as many French-speaking members as Dutch-speaking members, with the exception of the President of the Chambre Contentieuse".*

[42] Article 40.1, paragraph 4 of the LCA: "The six members of the Chambre Contentieuse are appointed in equal numbers for each linguistic role, and at least one member must have a working knowledge of German". These 6 members (3 belonging to the French-speaking role, 3 to the Dutch-speaking role) do not include the Chairman.

had publicly committed itself to in its *Note on language policy*[43]. This practice consists of assigning the case to a seat with a majority of members belonging to the linguistic role of the language of the case in the case of a 3-member seat, with the chairman being considered - as already mentioned - as belonging specifically to neither or both of these roles. The Litigation Division made this Note public on its website from January 1, 2021 to December 17, 2024.[44] At the time of the decision of March 20, 2024 on the renewed composition of the Litigation Division in this case, this Note had therefore already publicly available for more than 3 years. The Chairman of the Litigation Division (H. Hijmans) applied its contents, reproduced below, taking the view that there were no grounds for departing from it[45].

Composition de la Chambre

En vertu de l'article 33 de la loi APD, la Chambre Contentieuse siège avec un seul ou trois membres.

Dans la pratique, le président – qui est officiellement bilingue – siège seul ou préside la Chambre composée de trois membres. Par ailleurs, au moins 1 membre, appartenant au rôle linguistique dans lequel la procédure est traitée, siège en principe dans la Chambre composée de trois membres.

Si le président ne siège pas, il est remplacé – au titre de membre siégeant seul – par un membre du rôle linguistique dans lequel la procédure est traitée. S'il ne siège pas dans la Chambre composée de trois membres, celle-ci est composée d'au moins deux membres du rôle linguistique dans lequel la procédure est traitée.

117. Application of the RoI on this point thus offers, in event of a procedure in the English language, the following advantages

the following possibilities:

- or the Contentious Chamber is made up of Chairman H. Hijmans (bilingual), a French-speaking member and a 3rd member, either French- or Dutch-speaking (option 1);

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[43] https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la-politique-linguistique-de-la-chambre-contentious.pdf

[44] This note has now been removed from APD website in view of ruling 144/2024 of the Constitutional Court of November 28, 2024 (roll no. 8110: In zake: de prejudiciële vragen betreffende artikel 57 van de wet van 3 december 2017 "tot oprichting van de Gegevensbeschermingsautoriteit", gesteld door het Hof van Beroep te Brussel.

[45] In this respect, see the Market Court's judgment of March 19, 2025 (2024/AR/1690): in this judgment, the Market Court criticizes the Chambre Contentieuse for not having followed its own policy note, which it had published on its . In this regard, the Court writes *"die (read de bestreden beslissing) derhalve niet in lijn is met de eigen beleidsnota die de GBA op haar website vermeldt"* (free translation: this decision is therefore not in line with the first policy note that the GBA published on its website). The Court adds *"Aansluiting kan hier worden gezocht bij rechtspraak van de Raad van State die stelt dat de rechtszekerheidsbeginsel vereist dat een administratieve overheid (zoals de GBA) niet zonder objectieve en redelijke verantwoording mag afwijken van haar eigen beleidslijnen die zij bij de toepassing van de reglementering aanhoudt"* (point 22) (Free translation:: here we can align ourselves with the case law of the Conseil d'Etat, which stipulates that the principle of legal certainty requires that an administrative authority (such as the DPA) cannot deviate from its own policies in the application of regulations without objective and reasonable justification)..

- or, in the absence of Chairman H. Hijmans, the Contentious Division is made up of two French-speaking members and a 3rd member, either French- or Dutch-speaking (option 2).

118. The application of these two scenarios led to the following options in the present case, given the conflict of interest (or the perception of such a conflict) on the part of the 3rd French-speaking member of the Chambre Contentieuse, the only one not to have sat during adoption of decision 61/2023 (points 73 and 122):

- a Chambre Contentieuse composed of the president H. Hijmans having already sat in decision 61/2023, a French-speaking member having already sat in decision 61/2023 and a 3rd new member: either a seat composed of two members having already sat including the president H. Hijmans (option 1);
- a Chambre Contentieuse composed of two French-speaking members having already sat on decision 61/2023 and a third new member, necessarily Dutch-speaking, with any 3rd French-speaking member being excluded on grounds of conflict of interest: either as in option 1, with a seat composed of two members having already sat but without chairman H. Hijmans (option 2).

119. In the absence of any specific provision to this effect, Chairman H. Hijmans chose to resign. This decision, apart from being within his discretionary power, is no more open to criticism than one which would have consisted in continuing to sit. Option 2 therefore adopted, which led, as would have been the case with option 1, to a necessarily partial renewal of the composition of the Contentious Division.

120. With regard to Mr. Y. Poullet in the renewed composition, the Contentious Chamber is of the opinion that, following the defendant's criticism that the office of President is the privilege of the House of Representatives, the composition of the Chamber should always include President H. Hijmans. This position is untenable, as the President may be prevented from attending or absent, situations for which provision is made both in the RoI[46] and in the Language Policy Note already cited[47].

121. As for the fact that it is indeed a member who previously sat who now chairs the seat (Mr. Y. Poullet), the Contentious Chamber has also followed its Note on language policy here. As a result, the chairmanship of the seat goes either to the bilingual Chairman H. Hijmans, or in his absence, to a member of the Board of Directors.

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[46] See article 44 of the ROI. In the event absence or impediment, the Chairman of the Litigation Division is replaced, when required to sit, by another member designated by him for this purpose.

[47] The extract from the Litigation Division's Language Policy Note quoted in point 117 above explicitly states: *"If the president does not sit, (...).*

the linguistic role in which the case is handled[48]. As the language of the proceedings in this case is French, the chairmanship of the renewed seat therefore falls to a French-speaking member - who has already sat on the seat for the reasons explained above.

122. As for the conflict of interest in the case of the only French-speaking member who did not sit for the adoption of decision 61/2023, the Contentious Chamber points out that the **prerogative** to dismiss a member of the Contentious Chamber on the grounds of conflict of interest **rests with the President of the Contentious Chamber** (article 58 of the RoI already cited).

123. In **conclusion**, as the Chambre Contentieuse had only 2 French-speaking members who could potentially sit - being those who had already sat for the adoption of decision 61/2023 - President H. Hijmans had, in compliance with the provisions of the LCA, the RoI and the Chambre Contentieuse's Language Policy Note, no choice but to appoint them, as they were essential to the composition of the Chambre Contentieuse.
The "otherwise composed" seat is made up of three members, two of whom are French-speaking, the language of the proceedings being French. A 3(rd) member, necessarily Dutch-speaking, has been added.

124. As indicated in the decision of March 20, 2024, **it follows that the change in the seat of the Contentious Division adopting the present decision is necessarily partial[49] and that it cannot be criticized for not having complied with the request of the Cour des marchés for a *"Contentious Division otherwise composed"*.**

125. The Chambre Contentieuse adds that in any event, and without prejudice to the foregoing, when they sit as a panel of 3, the members - who in this case are not accused of any lack of impartiality - adopt a **collegial decision**. This collegiality meets the requirement of the Cour des Marchés to base its decision on a strong statement of reasons, and nowhere is it stipulated that the chairman of the board has the casting vote.

126. Accordingly**, in support of the foregoing, there is no reason to grant the defendant's request to reconvene the case with a differently constituted Contentious Division, nor to grant Mr. Yves Poullet's request for a postponement.**

II.3. As for the absence of financial institutions at procedure

127. The defendant criticizes "**the absence of intervening parties in the case**" (heading 6.2 of its second additional claim, which is tantamount to a claim), thereby referring to the

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[48] The extract from the Litigation Division's Language Policy Note quoted in point 116 above explicitly states: *"If the Chairman is not sitting, he is replaced - as a member sitting alone - by a member of the language group in which the case is being dealt with".*

[49] In a judgment of February 22, 2023 (2022/AR/,889), the Cour des Marchés already took into account the fact that the complete renewal of the seat of the Chambre Contentieuse could not be carried out given the limited number of members belonging to one or linguistic role.

financial institutions. As already mentioned (point 86), the defendant is even requesting that the Litigation Division suspend its examination of the complaint pending a response from the financial institutions.

128. In view of their role in the processing chain leading to the transfer of data to the IRS, the defendant considers that *"it was up to the plaintiffs to direct their complaints against the financial institutions"* (point 12 of the second additional statement of claim), while acknowledging that the procedure before the DPA does not provide for forced intervention *"so that only the plaintiffs can direct their complaint to the parties they arbitrarily choose"*. The defendant adds that this situation deprives her of the same right to defend herself as the plaintiffs, who can choose their target, depriving her of the possibility of calling other parties to the case. According to the defendant, there has therefore been a violation articles 10 and 11 of the Constitution.

129. As for the plaintiffs, they conclude that the financial institutions are not parties to the case, not *"because of a conflict of interest with the plaintiffs' counsel"* as the defendant claims (points 136-137), but because it is not the financial institutions that are responsible for the denounced processing consisting of transferring the data to the IRS.

130. As explained in points 87 et seq., in its letter invitation to the hearing of November 28, 2024, the Dispute Resolution Chamber did not grant the defendant's request for a stay, given the state of the case at that date. Noting that the financial institutions were neither parties nor interveners in the case, the Litigation Division summoned the parties, heard them and took the case under advisement.

131. **The Chambre Contentieuse cannot require either party to intervene in the proceedings**. As the law currently stands, its procedure does not provide for any compulsory intervention mechanism comparable to that used by the courts (which are not subject to the Judicial Code, apart from exceptions that do not apply here, such as the calculation of certain time limits). The Chambre Contentieuse also notes that **the SI,** which was asked to carry out an investigation, did **not extend the scope of its investigation** by implicating the financial institutions, as it is authorized to do under article 72 of the LCA. The failure to implicate the financial institutions is therefore an autonomous choice on the part of the SI, which cannot be attributed to the Chambre Contentieuse[50]. Moreover, the Contentious Chamber is not competent to hear complaints of a violation of articles 10 and 11 of the Constitution invoked by the defendant, and thus to review the constitutionality of its procedures, such as

[50] Insofar as necessary, the Contentious Chamber adds that it cannot require a new *ex officio* investigation to be carried out by the SI, including the financial institutions.

provided for by the legislator with regard to these provisions. This control goes beyond its material competence delimited by the LCA and the RGPD.

132. In the opinion of the Litigation Division, the fact that the defendant is the only party to the case, to the exclusion of the financial institutions, **does not in any event rule out the relevance of examining the complaint and taking a decision against it** at the end of the present proceedings, which have been conducted in accordance with the principles impartiality, independence and adversarial procedure, and which are not tainted by the absence of the banks from the case.

133. In the following section on the defendant's capacity as data controller (section II.4), the Litigation Division demonstrates that **the defendant is bound by its own obligations as data controller** with regard to the processing it carries out, i.e. the transfer of personal data to the IRS (a capacity which the defendant explicitly acknowledges). The fact that the banks are also bound by certain number of obligations arising in turn from *their* capacity as data controllers with regard to the collection of data and their transmission to the defendant, **does not *ipso facto* dispense with or diminish the defendant's own responsibilities**. **Should this legitimately be the case, the Contentious Chamber will take it into account in its decision**[51].

134. More generally, **it** is **not the responsibility of the DPA to implicate all the parties involved in a problem**. The Contentious Division points out that the Market Court, which hears appeals against its decisions, does not sanction the procedural choice of the plaintiff or the authority not to involve all related parties and not to request an SI investigation for all parties. On the other hand, the Market Court considers that proceedings and sanctions must be directed against a party who is recognized as a data controller, which is the case of the defendant in this instance.

135. In a ruling dated December 13, 2024, the Administrative Court of the Grand Duchy of Luxembourg, hearing an appeal against a decision adopted by the Administration des Contributions Directes (ACD) also relating to the sending of personal data to the IRS in application of the "FATCA" agreement and the relevant Luxembourg legislation, states the following in the same vein[52] :

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[51] See in this sense the reasoning of the Contentious Chamber with regard to the information obligation in section II.6.3. The Contentious Chamber takes into account, in accordance with the RGPD (Article 14), the extent to which the data subject would have already received the information, in this case from the financial institutions.

[52] This decision follows an appeal against a judgment handed down by the Administrative Court of the Grand Duchy of Luxembourg on September 29, 2023, in which the said court declared itself incompetent to hear the subsidiary appeal for reversal against a decision of the Director of the Administration des Contributions Directes (ACD) of March 22, 2021 rejecting a request to halt the automatic exchange of information between the tax authorities of the Grand Duchy of Luxembourg and the United States pursuant to the "FATCA" agreement signed with the Grand Duchy and approved by a law of July 24, 2015.Duchy of Luxembourg and that of the United States pursuant to the "FATCA" agreement signed with the Grand Duchy approved by a law of July 24, 2015.

"In the present case, the appellants are essentially challenging the legality of the data transfer to the United States of America (cf. "this data transfer disregards several key principles of the right to the protection of personal data" in appellants' request to the ACD), but not the communication of the same data by Luxembourg financial institutions to the ACD. Now, having regard to Article 3, paragraph (3), of the law of July 24, 2015 quoted above, it is the ACD, as the author of the said transfer of the data collected to the United States, which is to be considered responsible for this processing.

The State's criticism that the Luxembourg financial institutions involved in the collection of the data transferred not involved should therefore be dismissed as unfounded, given that the personal data processing carried out by them is not the subject of the appellants' criticism. It should be added that the State has not stated legal consequences it intends to attach to this reproach, and that in the present case there is any case no obligation on the part of those concerned to prosecute all those potentially responsible for the violation they allege".

136. Because the defendant raised it in its conclusions, the Contentious Chamber adds the following. The defendant points out that at the hearing before the Contentious Chamber on January 10, 2023 (the hearing preceding the adoption of decision 61/2023), counsel for the plaintiffs stated that the plaintiffs had not filed a complaint against the financial institutions because of a conflict of interest, since he or his firm was counsel to several of these financial institutions. Accordingly the defendant concludes the plaintiffs' counsel should terminate their involvement in this matter, in accordance with the principles of independence and loyalty.

137. The Litigation Division notes that this request is addressed directly to the plaintiffs' counsel, who have maintained their involvement in the case notwithstanding this request. Insofar as necessary, the Litigation Division states that it is not competent to conclude whether or not there is a conflict of interest on the part of the plaintiffs' counsel, irrespective of the disagreement between the parties as to what was said at the hearing on January 10, 2023[53]. The question of whether plaintiffs' counsel should withdraw in this case does not fall within its jurisdiction, any more than does the question of ordering plaintiffs' counsel to withdraw. He

[53] The Contentious Division confines itself to noting that the minutes of the hearing of January 10, 2023 mention the following: *"In response to Me van Gyseghem's question as to why the banks were not implicated in the complaints lodged, MeV. Wellens explained that this was not due to a conflict of interest, as his firm also advises banks"* (page 5 of the minutes). As mentioned in point 59, the Litigation Division also points out that the plaintiffs' counsel did not express any reservations or make any comments on these minutes.

In any event, it does not appear to the Litigation Division that the existence of a conflict of interest on the part of the plaintiffs' counsel would taint the present decision with illegality, as the question of the absence of the financial institutions does not, as explained above.

138. In **conclusion**, the Litigation Division considers that **it is right not to suspend the examination of the complaint in view of the absence of the financial institutions in the case, and that it adopts the present decision with regard to the defendant alone**.

II.4. As to the defendant 's status as data controller

139. The Contentious Chamber notes that throughout the proceedings, **the defendant indicates that it assumes the capacity of data controller with regard to the transfer of** personal data to the IRS support of article 13.2 of the Law of December 16, 2015, which explicitly qualifies it as such (see in particular point 17 of its second additional and summary conclusions).

140. As this is a decisive qualification with regard to the RGPD and for the obligations arising therefrom, the Contentious Chamber will endeavor below to verify the defendant's capacity as data controller, notwithstanding the latter's recognition of this with regard to the transfer to the IRS.[54.]

141. The Contentious Chamber thus notes that article 13.2. of the Law of December 16, 2015 provides that:

> *" § 2. For the application of 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, and of the Act of July 30, 2018 on the protection of individuals with regard to the processing of personal data, each Reporting Financial Institution and the FPS Finance shall be deemed to be "controller" of "personal data" with respect to the information referred to in this Act that relates to individuals.[55]".*

142. The defendant is therefore expressly qualified as a data controller under the terms of the Law of December 16, 2015. Since the amendment made by the Law of November 20, 2022, express reference has been made to the RGPD.

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[54] Cour d'appel de Bruxelles Section Cour des marchés 19e chambre A, Chambre des marchés, judgment of February 23, 2022 - 2021/AR/65.

[55] Emphasis added by the Chambre Contentieuse.

143. Article 4.7. of the RGPD thus 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 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 a Member State"*[56]. This is the case for the defendant under Article 13.2 of the aforementioned Law of December 16, 2015.

144. As the EDPS points out in his *Guidelines on the concepts of controller and sub-contractor in the RGPD*[57] , the Contentious Chamber considers that when the controller is specifically identified by law, this designation is decisive in defining who acts as controller. This in fact presupposes that the legislator has designated as the controller the entity that is genuinely in a position to exercise control. On the other hand, the Contentious Chamber agree with the plaintiffs' argument that, since the Belgian State negotiated the FATCA agreement, it is responsible for the resulting processing operations. As in the case of the Belgian Law of December 16, 2015, the defendant's status as data controller derives from the fact that the "FATCA" agreement entrusts it (as "Competent Authority") with the processing that consists in transferring data to the IRS.

145. In its defense, the defendant points out that it not have access to the contents of the "This was done *as an organizational measure to guarantee the security and integrity of the data*[58] , limiting its intervention to the logistical role of "preparing" the shipment. As already mentioned, the defendant nonetheless acknowledges its capacity as data controller (point 139). **It cannot avoid its obligations as data controller by not having access to said data**.

146. Insofar as necessary, the Litigation Division points out that the fact that the defendant does not have access to the communicated data is **irrelevant to its standing**

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[56] Emphasis added the Chambre Contentieuse.

[57] European Data Protection Committee (EDPS), Guidelines 07/2020 concerning the concepts of controller and de processor in le RGPD, https://edpb.europa.eu/system/files/2022- 02/eppb guidelines 202007 controllerprocessor final en.pdf (point 23).

[58] This is shown in particular by the second additional submissions filed in the resumed case.
leading up to this decision (e.g. point 61) and the minutes of the hearing held on December 11, 2024.

data controller, as the CJEU made clear in its judgment in Google Spain and Google ruling of May 13, 2014, as well as in its IAB ruling of March 7, 2024[59].

147. **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 upholds the defendant's classification as a data controller with regard to the data processing challenged by the plaintiffs, namely the communication (transfer) of personal data to the IRS.**

148. As for financial institutions (such as the plaintiff's bank Z in this case), they are not, as already mentioned, parties to the proceedings (section II.3). They nonetheless 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 December 16, 2015. As the defendant points out (see point 17 of its second supplementary submission), it is they who first ascertain the status of the account holders concerned by the obligation to communicate data to the defendant. It is they who collect the data required under article 2.2. of the "FATCA" agreement and Article 5 of the Law of December 16, 2015, and then forward them to the defendant, which in turn transfers them 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. As set out in point 133, in complying with the RGPD, the Contentious Chamber takes into account the possible division of obligations provided for by law between the financial institutions on the one hand and the defendant on the other, and the consequences thereof. In other words, if there should be consequences for the defendant in terms of obligations resulting from obligations specific to financial institutions, the Contentious Chamber takes them into account in this decision.

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

" 22. According to Google Spain and Google Inc. the activity of search engines cannot be regarded as processing data that appears on third-party web pages displayed in the list of search results, since these engines process the information accessible on the Internet as a whole without distinguishing between personal data and other information. Furthermore, even supposing that this activity is to be qualified as
"The operator of a search engine cannot be considered to be 'responsible' for data , since it has no knowledge of said data and exercises no control over it".

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

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

See also CJEU judgment of March 7, 2024, C-604/22, IAC v. Data Protection Authority, ECLI:EU:C:2024:214, paragraph 69.

II.5. As for Article 96 of RGPD

149. Article 96 of the GDPR is unquestionably at the heart of the discussion on the legality of the personal data transfers to the IRS denounced by the plaintiffs.

150. Thus, the SI raises the applicability Article 96 of the GDPR and decides not to pursue its investigation further, for lack of an apparent violation of the GDPR, noting, as already set out in points 31 et seq. that the OPC and the CSAF had favorably assessed the Law of December 16, 2015 and authorized the flow.

151. As for the defendant, it maintains on the basis of Article 96 of the RGPD, and in line with the findings of the SI recalled above, that **the "FATCA" agreement, inseparable from the Law of December 16, 2015, complies with EU law applicable on May 24, 2016**. The defendant therefore considers itself authorized, pursuant to Article 96 of the RGPD, to base the transfer to the IRS of the data of the first plaintiff and that of the accidental Americans represented by the second plaintiff, on the basis of these texts (point 86).

152. In view of the SI's findings, the defendant's arguments taken in support of this article and their challenge by the plaintiffs, the Contentious Chamber considers it necessary to examine the purpose, scope and conditions of application of Article 96 of the RGPD. It sets out to do so in the following paragraphs.

153. Article 96 of the RGPD reads as follows:

> *"International agreements involving the transfer of personal data to third countries or international organizations which were concluded by Member States before May 24, 2016 and which comply with Union law as applicable before that date shall remain in force until they are amended, replaced or revoked."*[60]

154. The Litigation Chamber points out that by opting for a regulation (the RGPD) intended to replace a directive (Directive 95/46/EC), the European co-legislators have chosen to **strengthen the harmonization of personal data protection rules in the EU**. Unlike the Directive, the Regulation is directly applicable in the domestic legal order of each Member State. The RGPD also pursues the objective of **strengthening the effectiveness of the right to data protection**, enshrined as a fundamental right in the meantime by the EU Charter of Fundamental Rights of December 7, 2000 (Article 8).

155. By providing for the RGPD to come into force on May 25, 2018, two years after its entry into force on May 24, 2016 (Article 99 of the RGPD), and a repeal Directive 95/46/EC

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[60] Recital 102 of the GDPR: *"this Regulation (GDPR) 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".*

on that same date (Article 94 of the RGPD), the European co-legislators not only granted a two-year compliance deadline for the new obligations of the RGPD but also made it clear that by May 25, 2018, ongoing data processing operations would have to comply with all the provisions of the RGPD. Recital 171 of the RGPD illustrates this objective and provides in this regard that *"processing 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"*[61].

156. This compliance is essential to achieving the strong harmonization objective pursued by the RGPD and to strengthening the protection the fundamental right it . If processing in progress before the RGPD comes into is not brought into line with it, two protection regimes would coexist. This would, in essence, be contrary to the very nature of the regulation and a fortiori, that of a fundamental right.

157. The regime provided Article 96 of the RGPD is an exception in this respect, since it authorizes the maintenance international agreements concluded before May 24, 2016 (on the condition, admittedly, that they comply with EU law applicable on that date) until their possible amendment, replacement or revocation, even if they do not comply with the RGPD,

158. The Contentious Chamber is of the opinion that it is in the light of the *ratio legis* of the RGPD as a whole, and in particular of the transitional provisions noted above (Articles 94 and 99), that the regime provided for by Article 96 of the RGPD must be apprehended, both in its material scope (rationae materiae) and in its application in time as well as, in fine, in the assessment of the satisfaction of the essential condition it lays down, namely *"compliance with Union law on the date of May 24, 2016"*.

159. As for the material scope, only the content of the international agreement concluded by the Member State is covered by Article 96 of the GDPR, the wording of which unequivocally targets *"international agreements involving the transfer of personal data to third countries"*.

160. Without prejudice to any conclusions to be drawn in terms of compliance, the agreement
As "FATCA" does not contain any specific provisions concerning the obligation to provide information, for example, it is necessarily excluded from the scope of Article 96 of the RGPD. The defendant is therefore bound by Articles 12 and 14 of the RGPD (as this is an indirect collection - see section II.6.3 below). As for the obligations arising from article 35 of the RGPD (AIPD) as well as articles 5.2 and 24 (accountability), these are new obligations that will find full application. They do not exist in the agreement.

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[61] The Contentious Chamber clarifies, insofar as necessary, that it is not saying here that Article 96 of the RGPD would only apply to
only for a period.

"FATCA" of 2014 and arise from the obligations placed on the defendant in its capacity as data controller since May 24, 2018.

161. In other words, the application of Article 96 of the RGPD is circumscribed to the content of the agreement alone. The letter of Article 96 is clear on this point and this reading is moreover consistent with the *ratio legis* of Article 96 which, the Contentious Chamber will explain below, is intended to preserve the rights acquired by third countries under the terms of the said agreements, not to exempt the defendant from its autonomous obligations arising from the RGPD.

162. Here, the Contentious Chamber makes it clear from the outset that the **principle *accountability*** (which consists of the controller implementing technical and organizational measures designed to meet the requirements of the RGPD as well as reporting on them) **includes the obligation for the defendant to demonstrate that it was in a position to invoke the application Article 96 of the RGPD**, as the principle accountability relates to the entire text of the RGPD.

163. The Litigation Division will thus verify and demonstrate whether the defendant is indeed justified in concluding that the "FATCA" agreement complies with EU law applicable on May 24, 2016. The Litigation Division considers it is first required to verify whether the "FATCA" agreement complies with EU law applicable on May 24, 2016. Only if it concludes that this is not the case will it examine the compliance of the transfers made by the defendant with the RGPD, and hence the defendant's right to continue these transfers in execution of the agreement. The Contentious Chamber considers that this reading is the only one that respects the will of the European co-legislators to grant Member States more time to comply with their international commitments it results from the preparatory work of the RGPD (see below).

164. Thus, the Contentious Chamber does not subscribe to the analysis of the French Conseil d'Etat which, seized an appeal against a decision of the CNIL following a complaint also relating to the "FATCA" agreement, has, in a judgment of July 19, 2019, for its part a different reading of Article 96 of the RGPD[62] :

> *"It clearly follows from these provisions that the authors of the Regulation have fully determined the conditions of the relationship between European Union law and agreements concluded prior to its signature that involve the transfer of personal data to third States. For the application of this article (i.e. Article 96 of the GDPR), it is necessary to investigate, firstly, whether the agreement of November 14, 2013 complies with the provisions of the Regulation of April 27, 2016, which are of direct effect, and only in event that this is not the case*

[62] See footnote 24.

In this case, the second step is to check whether the agreement complies with European Union law it applied before the regulation was signed".

165. Nor does the Contentious Chamber agree with the defendant's own reading of the case in its decision of October 4, 2021. Thus, after having indicated to the plaintiff on March 30, 2021 that it was up to him to demonstrate that the "FATCA" agreement violated Directive 95/46/EC" (point 16), the defendant repeats in its decision of October 4, 2021 the terms of the aforementioned judgment of the French Conseil d'Etat of July 19, 2019, according to which it is first necessary to verify the compliance of the "FATCA" agreement with the RGPD (point 18). The Contentious Chamber notes that the defendant has, however, remodified its reading under the terms of the submissions filed in the present proceedings and now shares the reading set out by the Contentious Chamber in paragraph 163 above.

166. These discrepancies show that while it may seem clear in its wording and provides for a wholly specific regime, Article 96 of the RGPD is neither uniformly understood nor uniformly applied. This difference is not insignificant given that, according to one reading or another, the reference text is either Directive 95/46/EC (repealed 7 years ago) or the RGPD (a regulation offering enhanced protection), whose gaps Directive 95/46/EC would fill if it were not to be fully complied with.

167. Provided they comply with EU law applicable on May 24, 2016, international agreements involving transfers of personal data to third countries remain in force *"until they are amended, replaced or repealed",* even, as already highlighted, if they do not comply with the GDPR.

168. However, for the reasons set out below, the Contentious Chamber considers that it would be contrary to Union law to consider that this Article 96 regime is intended apply indefinitely.

169. Article 96 of the RGPD aims to preserve the rights of third countries: iIt is certain that negotiating an international agreement takes time and that the rights acquired by a third country party to an international agreement cannot be purely and simply immediately abolished as a result of the entry into force of new legislation when that agreement complied with EU law at the time it was concluded. The Council's preparatory work, cited by the defendant, states that Article 96 *"guarantees legal certainty for data controllers and avoids an unnecessary administrative burden Member States. It also takes account of the fact that Member States are dependent on the cooperation of the third country or international organization concerned to amend existing agreements".*

170. Without prejudice to the , EU member states are obliged to comply with EU law. This obligation derives art. 4.3.

of the Treaty on European Union (TEU), which enshrines the principle of loyal cooperation between Member States[63]. Article 4.3 of the TEU is binding on the latter, including their independent data protection authorities entrusted with tasks based on applicable European law (Article 8.3 of the EU Charter of Fundamental Rights and Articles 51 et seq. of the GDPR).[64]

171. In this respect, Article 96 of the GDPR is in line with Article 351 of the Treaty on the Functioning of the EU (TFEU)[65] 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 the latter 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 make it clear, 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 respect the rights of third States resulting from a previous convention and to observe its obligations"[66].

- On the other hand, the practices must be brought into line with European law, the Member State in question being obliged to use all appropriate means to eliminate the incompatibilities found "unless this practice is necessary to ensure the fulfilment by the Member State concerned of obligations towards third States resulting from a convention concluded previously[67]".

172. It follows from this position of the CJEU that "the meaning of the two paragraphs [read article 351 TFEU] 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

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[63] 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. The 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 Union. Member States shall facilitate the achievement by the Union of its tasks and refrain from any measure which could jeopardize the attainment of the objectives of Union.

[64] See in this regard: CJEU judgment of June 15, 2021, Facebook Ireland e.a. v. Gegevensbeschermingsautoriteit, C-645/19, ECLI:EU:C:2021:483, para 60.

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

[66] CJEU, Judgment of March 3, 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 out of conventions 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, the other hand, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, Member State(s) concerned shall use all appropriate means to eliminate the incompatibilities established".

[67] CJEU, judgment of March 28, 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.

all incompatibilities) is achieved in a sustainable (for the Member State involved) and lawful (from an international law perspective) manner [68]".

173. 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 complied with EU law on that same date - without further compliance with the RGPD. To follow such an interpretation, the co-legislators would have allowed, in defiance of the CJEU case law cited above, the coexistence, without any time limit, of international agreements complying with the state of EU law frozen on May 24, 2016 (including Directive 95/46/EC, which incidentally was repealed on May 24, 2018) on the one hand and international agreements concluded after that date, obligatorily complying with the RGPD on other.

174. The Contentious Chamber further notes that Article 49.5 of the RGPD contains the same words of *"until they are amended, replaced or repealed"*. Article 45.9 thus provides that *"decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC [i.e. adequacy decisions] shall remain in force until they are amended, replaced or repealed by a Commission decision adopted in accordance with paragraph 3 or 5 of this Article"*[69].

175. The European Commission - whose exclusive responsibility it is to adopt an adequacy decision - has nonetheless re-examined the 11 existing adequacy in the light of the RGPD. Under the terms of its report of January 15, 2024[70], the Commission decides to maintain the adequacy decisions adopted for the 11 countries and territories concerned, noting that its re-examination has demonstrated that the data protection frameworks in force in these countries and territories have continued to converge towards the EU framework and have strengthened the protection of the personal data to which they apply. It notes that the GDPR has inspired positive changes such as the introduction of new rights for data subjects and the strengthening of the independence and powers of data protection authorities.

176. The European Commission also points out that, *"the adequacy decisions [*some of which, at the date of the RGPD's entry into force, date back more than 20 years (Canada, Switzerland)] *have laid the foundations for closer cooperation and greater regulatory convergence between the EU and like-minded partners. By allowing the free circulation of personal data, these decisions have opened up*

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[68] The Contentious Chamber points out: https://www.europeanpapers.eu/europeanforum/court-of-justice-finally- rules-on-analogical-application-art-351-tfeu

[69] Emphasis added by the Chambre Contentieuse.

[70] Report from the Commission to the European Parliament and the Council on the first review of the operation of adequacy decisions adopted on the basis of Article 25(6) of Directive 95/46/EC COM/2024/7 final. https://eur- lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024DC0007

commercial channels for EU operators, notably by complementing and amplifying the benefits of trade agreements, as well as facilitating cooperation with foreign partners in a wide range of regulatory areas".

177. The analogy with Article 96 of the RGPD is not perfect. However, content of article 45.9 of the RGPD, on the one hand, and this review of the adequacy decisions carried out by the European Commission - even though these adequacy decisions also create, in a way, a framework that has been in place for years, facilitating the communication of personal data from the Union to third countries - on the other hand, are indicators. They bear witness to the fact that the ultimate aim - notwithstanding the period of tolerance granted under both Article 45.9 or 96 of the RGPD - is to do away with the coexistence of two distinct protection regimes. To this end, it was incumbent on the European Commission (responsible for adequacy decisions) to contribute, which it has been quick to do by initiating a review in the light of the requirements of the RGPD of the adequacy decisions it had previously adopted. It is up to the Member States to do the same in the light of the international agreements they have concluded.

178. The Chambre Contentieuse is aware that the Belgian State, in its role as negotiator, is not a party to these proceedings. Nevertheless, it points out that the more time passes, the less acceptable is the inertia of the States in this respect. As early as 2021, data protection authorities - including the DPA - thus invited EU member states to review their international agreements in the light of the RGPD.[71] At the date of adoption of the present decision, almost 9 years have passed since the RGPD came into force, 7 since its entry into application. In this regard, the Contentious Chamber notes that no sign of the Belgian government's willingness to request a review of the "FATCA" agreement was brought to its attention by the defendant in the context of this case, nor that the defendant, the IRS's privileged interlocutor, would at any time have carried out this assessment in order help the Belgian government to be able to initiate a review request.

179. With regard to data protection authorities such as the DPA, a reading of Article 96 of the GDPR that would authorize its application without time limit, combined with the absence of any renegotiation of the agreement, would also imply that the DPA assesses the compliance of these international agreements with EU law applicable on May 24, 2016 of numerous

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[71] Declaration 04/2021 of April 2021 on international agreements, y including the transfers: https://edpb.europa.eu/system/files/202205/edpb statement042021 international agreements including transfers en.pdf In it, the EDPS (EDPB) considers *"that, in order to ensure that the level of protection of natural persons guaranteed by the RGPD (...) is not compromised when personal data are transferred outside the Union, account should be taken of objective of bringing such agreements into line with the requirements of the RGPD (...) 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 May 24, 2016 (for agreements relevant to the RGPD).(...). The EDPB recommends that Member States take into account, for this review, the RGPD (...), 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 July 16, 2020."*

years after that date, particularly in light of a Directive 95/46/EC that has been repealed for a number of years that will only increase with time. In this respect, the Contentious Chamber is of the opinion that the more time passes, **the less acceptable it is for data protection authorities to be restricted in the exercise of the mission entrusted to them by the RGPD** since May 25, 2018, a mission which consists precisely as previously emphasized in **contributing to effective and uniform application of the RGPD**. In the Schrems II judgment[72] already cited, the CJEU stresses in this respect the following with regard to the competence of 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 empowered to verify whether a transfer of personal data from 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 a transfer of personal data to a third country, since, as is clear from Recital 116 of the Regulation, "when personal data cross the external borders of Union, this may increase the risk that individuals will unable to exercise their data protection rights, in particular to protect themselves against the unlawful use or disclosure of such information*(points 107 and 108 of the judgment).

180. In this way, the failure of Member States to implement their obligation to cooperate undermines the effectiveness of the right to data protection (via its control by an independent data protection authority, guaranteed by Article 8.3[73] of the EU Charter of Fundamental Rights), even though the CJEU is particularly demanding as regards the protection that international agreements must guarantee, on the one hand, and the role of data protection authorities, on the other.

- 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 Opinion 1/15 of the CJEU on the draft PNR agreement between Canada and the EU[74] (well as from Judgment C-817/19 of June 21, 2022[75]) and Schrems II judgment that *"the communication*

[72] The Litigation Division points out that when it cites this judgment, it does so in order to draw lessons from it regarding importance of supervising cross-border data flows and the role of data protection authorities in this respect, even when the purposes of the flows are not commercial.

[73] Article 8.3 of the EU Charter of Fundamental Rights: Compliance with these rules (i.e. the right to data protection as enshrined in paragraphs 1 and 2) shall be subject to control by an independent authority.

[74] CJEU, Opinion 1/15 of July 26, 2017 (EU-Canada PNR Agreement), ECLI:EU:C:2017:592.

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

of personal data to a third party, ***such a public authority***[76] *, constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated. The same applies to the storage of personal data and 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 interested parties have any disadvantages as a result of this interference"* [77].

- Any limitation on the fundamental rights enshrined in the Charter (including the fundamental right to data protection under Article 8) must satisfy the conditions of the aforementioned 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 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".*

181. Thus, it would be reductive to consider that the question of the temporal application of Article 96 of the RGPD would only arise if the DPA (via its Contentious Chamber) or other data protection authorities were to conclude that the "FATCA" agreement complied with Union law as applicable on May 24, 2016. As such, Article 96 limits the effective exercise by data protection authorities, here the DPA, of the tasks entrusted to them/it by the RGPD.

182. In its decision of December 13, 2024 already mentioned with regard to the qualification of data controller, the Administrative Court of the Grand Duchy of Luxembourg applies Article 96 of the RGPD, explicitly qualifying it as a transitional provision.

> *"The provision of Article 96 of the RGPD is in substance a transitional provision that allows member states to continue to apply international agreements that provide for transfers of protected personal data to third states and that they had concluded before May 24, 2016, the date of entry into force of the RGPD, even if the terms agreed in these agreements do not correspond to the standards enacted by the RGPD and this, in order to avoid that the continued execution of the said agreements comes up against new requirements*

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[76] Emphasis added by the Chambre Contentieuse.

[77] Opinion of the CJEU of July 26, 2017 (EU-Canada PNR Agreement), ECLI:EU:C:2017:592, paras 123 and 124 and the judgments cited: see, to this effect, judgments of May 20, 2003, Österreichischer Rundfunk e.a., C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraphs 74 and 75; of 8 April 2014, Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 33 to 35, and of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, paragraph 87).

or more stringent provisions of the new EU regulation. The exemption from compliance with the RGPD allowed by this provision is nevertheless conditional compliance with "Union law as [it was] applicable before [May 24, 2016]", i.e. the standards applicable before May 24, 2016. Furthermore, this exemption is only intended to last until such time as these previous international agreements are amended, replaced or revoked."

183. This passage of the judgment and in particular the qualification Article 96 as a transitional provision leads the Contentious Chamber to the following question: if Article 96 of the RGPD is indeed a transitional provision, is it permissible for this transitional period to potentially last indefinitely and *de facto* deprive data subjects of the enhanced protection offered by the RGPD? Isn't this absence of a time limit for a transitional regime contrary to the general principles of transitional law characterized, admittedly, by the non-retroactivity of the norm but without having the effect (and therefore authorizing) that the benefit of enhanced protection be indefinitely denied to the persons concerned? If it is potentially indefinitely transitional, doesn't Article 96 of the RGPD enshrine a pure and simple and permanent derogatory regime to the RGPD, the compatibility of which with the Union's Charter of Fundamental Rights should be questioned? Any provision of a Union regulation, i.e. Article 96 of the RGPD at issue here, must itself be compatible with the said Charter.

184. Irrespective of the question of the application of Article 96 over time, the role and responsibility of Belgian State (like that of any other member state signatory an agreement In any event, a "FATCA" agreement comparable to the one signed by the Belgian State does not exempt **a 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 have been met and demonstrating to the competent supervisory authority (here the DPA) that this is the case**. **In fact, recourse to Article 96 of the RGPD intrinsically implies, through the condition it imposes (complying with EU law applicable on May 24, 2016), that the controller carries out this assessment.**

185. *"Union law as applicable on May 25, 2016"* includes primary law such as Article 16 TFEU and Articles 7[78], 8 and 47[79] the EU Charter of Fundamental Rights as well as Directive 95/46/EC. Insofar as necessary, the Litigation Division specifies that

[78] Article 7 of the EU Charter of Fundamental Rights - Respect for private and family life: Everyone has the right to respect for his private and family life, his home and his communications.

[79] Article 47 of the EU Charter of Fundamental Rights - Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms as guaranteed by Union law are violated has the right to an effective remedy before a court, subject to the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone has the right to be advised, defended and represented. Legal aid shall be granted to those who do not have sufficient resources, insofar as such aid is necessary to ensure effective access to justice.

the use of the words "as applicable on May 25, 2016" does not mean that this law is frozen in its interpretation on the date of May 25, 2016. Article 96 dispenses with compliance with the RGPD (conditionally) by not adding any new data protection regulatory text to those applicable on May 24, 2016 with the aim of preserving, as recalled, the rights derived from the agreement by the third state with which the agreement is concluded. On the other hand, it does not obviate the need to include in the examination of the condition of compliance with EU law as at May 24, 2016 the interpretation, which may be evolving, given by the CJEU to the key concepts of data protection - including with regard to the RGPD when they are concepts common to both texts.

186. In conclusion, clarifying the scope Article 96 of the RGPD is directly in line with the requirement for uniformity and legal certainty, in a context where this provision is subject to divergent interpretations within the Union even though the RGPD is intended to guarantee a harmonized application of data protection law and the CJEU has clearly stated that data transfers to third countries must comply with Articles 7,8 and 47 of the EU Charter of Fundamental Rights. Article 96 exempts data controllers who operate data transfers to third countries pursuant to international agreements concluded before May 24, 2016 neither totally nor indefinitely from the RGPD. Article 96 RGPD is only a derogation that is essentially temporary and strictly conditional on compliance with Union law applicable before May 24, 2016. Therefore necessarily restrictive in interpretation, it provides for a transitional regime subject to conditions, objective it pursues being "to ensure exhaustive and consistent protection of personal data in the Union" on the one hand and to avoid any legal vacuum on the other[80]. Avoiding this legal vacuum is not, for the reasons set out above by the Contentious Chamber, equivalent to assessing compliance with EU law as interpreted on the fixed date of May 24, 2016. Thus, the data controller who like the defendant intends to rely on Article 96 of the GDPR will have to include the relevant developments in CJEU case law in its assessment of the condition of compliance with EU law as at May 24, 2016. It will need to be able to demonstrate that, this rigorous, documented and updated assessment, it is justified in relying on Article
96 of the RGPD. This assessment will not, however, exempt it, as the Chamber

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[80] This objective is expressly explained in Recital 95 of Directive 2016/680/EU, with reference to Article 61 of that Directive, which is identical to Article 96 of the RGPD.

Article 61 - Relationship with previously concluded international agreements in the field of judicial cooperation in criminal matters and police cooperation: *"International agreements involving the transfer of personal data to third countries or to international organizations which were concluded by the Member States before May 6, 2016 and which comply with Union law as applicable before that date shall remain in force until are amended, replaced or revoked."*

Recital 95 states that "in order to ensure comprehensive and consistent protection of personal data in the Union, international agreements concluded by the Member States before the date of entry into force this Directive, 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 Chambre Contentieuse).

Contentious will develop this further in the decision, nor of carrying out a DPIA, nor of its ongoing duty of accountability. In so doing, the controller could also contribute to the process of renegotiating the agreement. The Member States, including the Belgian State, are bound by their duty of loyal cooperation under article 4.3 TEU, applied in the light of article 351 TFEU and article 8 of the EU Charter of Fundamental Rights.

II.6. As for the grievances

187. As set out in the procedural backgrounder, the Cour des Marchés points out that the Chambre Contentieuse did not give sufficient consideration to the SI's findings in its decision 63/2021,

188. As the Cour des Marchés emphasized in its ruling of December 20, 2023, the Chambre Contentieuse has decided to refer the to the SI, it take account of the latter's findings and give reasons for any departures from them. The Litigation Division is of the opinion that it can only depart from the SI's material findings if it has evidence to the contrary. On the other hand, it remains free to substitute its reasoned legal assessment for that of the SI, based on the latter's material findings in the exercise of its investigative powers.

189. As it will explain below, the Contentious Chamber is not unaware of either the opinions of the CPVP 61/2014 and 28/2015, or the authorization of the CSAF 52/2016, or the other elements gathered by the Si at the end of its investigation. In exercising its competence to rule on compliance with the RGPD in its capacity as the DPA's administrative litigation body, the Contentious Chamber has its own reading of the matter and will draw other consequences in law, as the case may be, in a reasoned manner.

190. The Contentious Division notes that the SI's first report did not conclude that the FATCA agreement complied with EU law until May 24, 2016. The SI considers, on the basis of the aforementioned texts, that it is not *appropriate* for it to pursue its investigations further, explicitly invoking article 64.2 of the LCA in this sense and concluding that there is no "apparent breach of the RGPD".

191. In its supplementary investigation report, Si concludes that there is no evidence of a lack of guarantees concerning the protection of transferred data, or of non-reciprocity of exchanges.

II.6.1. Can the defendant rely Article 96 of the RGPD ?

II.6.1.1. Introduction

192. The Litigation Division examines the compliance of the transfers complained of by the plaintiffs in light of Article 96 of the GDPR. It therefore verifies whether, as the defendant maintains, the "FATCA" agreement complied with Union law on May 24, 2016 and authorized the defendant to transfer the data of the first plaintiff to the IRS and authorizes it to continue these transfers with regard to the personal data of the accidental Americans that the second plaintiff is defending.

193. As the Litigation Division has just explained, the requirement of Article 96 implies not only compliance with Directive 95/46/EC, but more generally compliance with EU law including Article 8 of the Charter of Fundamental Rights.

194. With regard to compliance with Directive 95/46/EC, the Litigation Division emphasized from the outset that a data exporter such as the defendant who transfers personal data to a third country must, in addition to complying with the specific rules governing cross-border data flows, also comply with **all the applicable obligations and principles of protection**. Thus, the defendant may not transfer data for a purpose that does not meet the requirements article 6.1.
b) of Directive 95/46/EC nor transfer personal data that is not adequate, relevant and not excessive in relation to this purpose without violating Article
6.1. c) of the said Directive.

195. Recital 102 of the RGPD specifies with regard to Article 96 that the agreement must contain appropriate safeguards for the benefit of data subjects.[81]

196. The defendant does not dispute that Article 96 of the GDPR applies only to the agreement "FATCA". It adds, however, that the Law of December 16, 2015 is inseparable from it and that therefore *"analyzing the "FATCA agreement in the context of Article 96 of the RGPD requires an analysis of the said law"* (point 24 of its second additional and summary conclusions). It argues that the "FATCA" agreement complies with Union law applicable on May 24, 2016 and that therefore both the agreement and the Law of December 16, 2015 remain valid in application

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[81] Recital 102: *"this Regulation (GDPR) 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".* The Contentious Chamber points out. While the French wording of this recital is not the clearest, a reading of the English and Dutch versions clarifies that these agreements must contain appropriate safeguards for the benefit of data . Indeed, where the French version retains the wording
"The English and Dutch versions explicitly link these agreements to guarantees, stipulating that these must be included in the agreements. The English version thus states
"The Dutch version, the most explicit, mentions *internationale overeenkomsten waarin [in which] passende waarborgen zijn opgenomen [international agreements in which appropriate safeguards are included]".*

of article 96. According to the defendant, this compliance follows, as found by the SI, from the analyses carried out by the OPC in its opinions 61/2014 and 28/2015 as well as from the deliberation of 52/2016 of the CSAF. The defendant also invokes the judgment of the French EC of July 19, 2019 from which it emerges that the "FATCA" agreement is not contrary to the RGPD, as well as a deliberation of September 17, 2015 of the CNIL having authorized the implementation data processing consisting of a transfer to the IRS of data collected in execution of the French "FATCA" agreement, the content of which is similar to that signed by Belgian State. It also relies on the aforementioned CNIL decision of May 23, 2022, which closed a complaint lodged by the French AAA seeking the suspension of data transfers to the IRS in execution of the French "FATCA agreement. Finally, the defendant relies on the Constitutional Court's ruling of March 9, 2017 rejecting the annulment appeal directed against the Law of December 16, 2015. According to the defendant, all these texts attest to the compliance of the "FATCA" agreement, read in combination with the Law of December 16, 2015, with Union law applicable on May 24, 2016.

197. The **Contentious Chamber** considers, for the reasons it develops below, that the "FATCA" agreement, even read and applied in combination with the Law of December 16, 2015, does not comply with EU law applicable on May 24, 2016. It does not comply with the principles of finality and proportionality notwithstanding the SI's findings and the defendant's arguments. Nor does the agreement contain, in addition to the guarantees of compliance with the principles of purpose and proportionality, the other guarantees required by Directive 95/46/EC as explained, specifically with regard to data transfers to a third country forming part of the automatic exchange of data by Group 29 from 2015[82]. Accordingly, it concludes that **the "FATCA" agreement does not comply with Union law as applicable on May 24, 2016 within meaning of Article 96 of the GDPR**.

198. The Contentious Chamber notes that it is not disputed that opinions 61/2014 and 28/2015 of the CPVP relate to the draft law that will lead to the future Law of December 16, 2015. They are therefore not opinions on the "FATCA" agreement as such, which the OPC explicitly regrets in its opinion 61/2024 (point 8 of the opinion)[83]. As for deliberation 56/2015 of the CSAF, it authorizes, subject to conditions, transfers to the IRS in execution of the Law of December 16, 2015, but does not express an opinion on the "FATCA" agreement itself.

199. The defendant accuses the DPA of artificially splitting the "FATCA" agreement from 2015 Act. This is not the case. The DPA must examine whether the condition set out in Article 96 of the GDPR, namely the compliance of the "FATCA" agreement with Union law as at May 24, 2016, is established and

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[82] Groupe 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 December 16, 2015. Litigation Chamber underlines.

[83] The SCF also states that the OPC was not consulted regarding the "FATCA" agreement in point 8 of its deliberation 52/2016.

demonstrated. The whole ratio legis article 96 is linked to the fact an international agreement is complex to modify, and that States are dependent on the goodwill of the third-party State. It is therefore the "FATCA" agreement that is at issue, not the law of December 16, 2015, which is not binding on the third-party state, in this case the United States. The commitments must be made by the parties to the agreement, and while certain data protection guarantees are included in the December 16, 2015 Act, they are, as the case may be, a priori binding only on the defendant and not necessarily on the third-party state to which the data is transferred - whose commitments, for their part, must be included in the agreement. The Litigation Division will therefore examine the compliance of the defendant's transfer with the relevant provisions of the "FATCA" agreement and the Law of December 16, 2015, where these are relevant.

II.6.1.2. As for the principle of finalité

200. The **purpose principle**, as enshrined 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 (including when transferred to a third country) in a way incompatible with those purposes. This principle is also enshrined in Article 8.2 of the Charter of Fundamental Rights[84] and must be applied in compliance with the requirements of Article 52 of the Charter.

201. The "purpose" is the sufficiently determined, specific and of course legitimate reason which the data is processed: this is the objective or intention of the data processing. An interest, on the other hand, is the broader interest that a data controller may have in the processing, or the benefit that the data controller derives - or that society could derive - from the processing such as improving application of tax legislation or combating tax evasion [85].

202. A sufficiently specific purpose is essential for analyzing whether and to what extent the processing of data is actually necessary achieve the purpose, as required by the principle of proportionality enshrined in Article 6.1.c) of Directive 95/46/EC. Thus, under the guise of "purpose", a general or broadly defined objective, even if its legitimacy is not questionable, leaves too much latitude to the data controller and does not allow for effective application of either the principle purpose or the principle of proportionality.

203. **As early as 2015,** the Article 29 Working Party, of which the OPC was a member, specified in this sense in its WP 234 document specifically devoted to protection requirements

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[84] Article 8.2 of the EU Charter of Fundamental Rights: Such data must be processed fairly, for specified purposes and on the basis of the consent of the data subject or some other legitimate basis laid down by law. Any person has the right access the data collected concerning him or her and to have it rectified.

[85] See. Group 29, Opinion 06/2014 on the notion legitimate interest pursued by the data controller within the meaning of the Directive.
Article 7 of Directive 95/46/EC, WP217 of April 9, 2014, title III.3.1 (page 26).

of data in the context of automatic data exchange that *"any international agreement should* ***clearly identify the purposes*** *for which data is collected and validly used. The wording of the purpose* ***("tax fraud/improvement of tax compliance"), for example, may seem vague and insufficiently clear, leaving too much room for maneuver to the competent authority****".*

- The purpose of FATCA

204. With regard to the "FATCA" agreement, the Contentious Chamber notes that the "purposes" of the automatic exchange of data specified in the introduction to the agreement are worded as follows: (a) *the improvement of international tax rules - a wording pointed out as too broad in the opinion above* - and (b) *the implementation of obligations* arising from the US "FATCA" law [(86)].

205. Such formulations are at most the expression of a general objective, albeit a legitimate one. On the other hand, **they do not constitute a specific and determined purpose(s) -** within the meaning of article 6.1.b) Directive **95/46/EC** - of the processing of personal data intended to enable this purpose to be achieved.

206. In this respect, the Contentious Chamber is aware that the "FATCA" agreement, as mentioned in the statement of facts, is in line with other international commitments of the Belgian State, including the fight against tax fraud and tax evasion, for which the automatic exchange of data has been set up and to which the "FATCA" agreement also refers (see below). **However, this context, and more generally these other commitments, do not mean that the "FATCA" agreement would necessarily comply with EU law applicable on May 24, 2016**.

207. Article 3.7 of "FATCA" agreement states that *"All information exchanged shall be subject the confidentiality and other protections provided for in the Convention, including the provisions limiting the use of the information exchanged"*. "Convention" refers to the *aforementioned* OECD Convention *on Mutual Assistance in Tax Matters*. The Contentious Chamber notes , as such, this article of the FATCA Agreement does not specify the specific and determined purpose of the data processing concerned, in this case transfer to IRS. Instead, it refers to the OECD Convention, the purposes of which are as follows

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[86] See the following the following recitals of Fatca agreement: *"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](...)".*

were deemed imprecise by the APD[87]. This indirect reference lacks clarity and predictability for those concerned.

208. Article 3.8. of the "FATCA" agreement states that *"Following the entry into 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".*

209. On reading this provision, it is clear that the parties to the FATCA agreement will have to confirm to each other that they have put in place safeguards to ensure that the information received remains confidential and will only be processed for "tax purposes". The Contentious Chamber cannot but note the vagueness of this

"This is precisely what the OPC did in its opinion 61/2024, when it indicated, with regard to the first version of the draft law that will lead to the Law of December 16, 2015, **that the mere mention in the draft law of the automatic exchange of information "for tax purposes", did not meet the requirements of the principle of finality** (points 11 et seq. of the opinion, point 9 opinion 28/2015). The Respondent cannot therefore, any more than the SI can, assert that the OPC would have considered that the purposes of the FATCA agreement as such would comply with the requirements Article 6.1.b) Directive 95/46/EC and Article 8.2. of the Charter of Fundamental Rights.

- The purpose of the December 16, 2015 Act

210. In its opinion 61/2014 on the draft law that will lead to the Law of December 16, 2015, the OPC therefore makes it clear that the mere mention of an exchange "for tax purposes" does not meet the requirements of the purpose principle. In particular, the OPC requests that the purposes of criminal investigation and prosecution in tax matters be specifically excluded (point 11 et seq. opinion point 12 in particular).

211. In the OPC's view, the OECD Convention referred to in articles 3.7 and 3.8 of the the "FATCA agreement, does not exclude the use of transferred data for the purposes of

[87] It should be noted that the Centre d'Autorisation et d'Avis de l'APD has since issued an opinion 51/2024 that is particularly critical of the purposes of the OECD Convention, which it does not consider sufficiently defined: https://www.autoriteprotectiondonnees.be/publications/avis-n-51-2024.pdf

investigation and criminal prosecution, but conditions this use on the agreement of the Party communicating the data. Article 17.2 of the draft Law of December 16, 2015 has, at the request of the OPC, thus been amended and provides in its final version that *"the Belgian competent authority may not authorize a jurisdiction to which the information is transferred to use it for any purpose other than the assessment or collection of the taxes mentioned in the treaty, proceedings or prosecutions relating to such taxes, decisions appeals relating to such or the monitoring of the foregoing"* (points 9 et seq. of Opinion 28/2015). This § makes it a little clearer as to the purposes of transfers to the IRS. However, the question of what is meant by "prosecution" in the United States to which the data is transferred remains in the eyes of the Contentious Chamber undetermined.

212. As evidence of this, the Contentious Chamber points out that in its deliberation 52/2016, the SCFA states that it *"considers therefore that Article 17 of the law of December 16, 2015 must be interpreted in the sense that (the authorization) of the re-use (by US non-tax jurisdictions) of data obtained for non-tax matters (e.g. mutual legal assistance in criminal matters, money laundering, corruption or counter-terrorism), or for transfer to countries without an adequate level of data protection is a priori excluded"* (point 30 of the deliberation).

➢ Conclusion

213. In conclusion, the Contentious Chamber finds that **the "purpose" of data processing following the "FATCA" agreement is neither specific nor sufficiently determined in the "FATCA" agreement itself** (point 209). Under the terms of the Law of December 16, 2016, it is "specified" **only by the reference** made article 3.7 of the agreement to the OECD Convention - whose processing purposes are not deemed sufficiently specific and determined under the terms of DPA opinion 51/2024 - as well as by article 17.2 of the law, the exact contours of which remain unclear.

214. The Contentious Chamber considers, contrary to the conclusions of the OPC in its opinion 28/2015 and to the authorization 52/2016 of the SCF, that in such circumstances where the purpose of the transfers of personal data to the IRS is neither specific nor determined in the "FATCA" agreement on the one hand and where this purpose is very indirectly mentioned and remains imprecise under the terms of the Law of December 16, 2015 on the other, the transfer to the IRS by the defendant **does not meet the requirements of the principle of specific and determined purpose within the meaning of article 6.1.b) of Directive 95/46/EC**. Neither the Contentious Chamber nor the data subject whose data is sent to the IRS are in a position to determine the purpose of the transfer.

able identify the purpose(s) for which the data is sent to the IRS and for which it may be processed once in its hands[88].

215. In response to the Cour des Marchés' observation on this point, the Chambre Contentieux notes that neither the OPC's opinions nor the SCFA's authorization expressed an opinion on the purpose of the FATCA agreement as such. On the contrary, the CPVP and the CSAF stressed that the agreement had not been submitted to them. As for the favorable assessment made by its predecessors with regard to the Law of December 16, 2015, the Contentious Chamber considers, in the light in particular of an in-depth examination of the purposes of the OECD Convention to which reference is made, that they are not sufficiently determined, including with regard to subsequent processing once the data has been transferred.

216. With regard to authorization 52/2016 of the CSAF in particular, the Contentious Chamber is aware that article 111 of the LCA mentions, as the Court points out, that *"authorizations granted by the sector committees of the Commission for the Protection of Privacy (CPVP) before the entry into force of this law retain their legal validity"*. Article 111 adds, however, that this is *"without prejudice to the supervisory powers of the Data Protection Authority"*. In the context of the examination of the complaint leading to the present decision, the Contentious Chamber is therefore authorized to re-examine this authorization and, if necessary, to depart from it. In any event, this authorization was granted subject to conditions, which the Dispute Division will note later in the decision have not been met since 2016 (see points 233 and 300).

217. Without prejudice to the foregoing, the Contentious Chamber further finds that this
This very indirect "determination" is in any case fragile, as it depends on texts that are distinct from the "FATCA" agreement as such - which is the only text that binds the Paries to each other - and therefore this determination is conditional on the continued applicability of these texts and their content.

II.6.1.3. As for the principle of proportionality

218. The Litigation Division points out that, in application of the **principle of proportionality enshrined in Article 6.1. c) of Directive 95/46/EC**, only data that is adequate, relevant and not excessive to the achievement of the purpose may be processed. It is not sufficient for data to be merely useful, and less intrusive alternatives must be taken into account to satisfy this principle.

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[88] If the defendant also produces the written notification signed by both the Belgian State and the IRS in which each party (the Belgian State on the one hand, and the United States the other) acknowledges compliance with its respective obligations in terms of confidentiality in particular, this document is not such as to call into question the finding of the Contentious Chamber.

219. As the plaintiffs point out, the transfer of data to the IRS in the context of the implementation of the "FATCA" agreement is a system of automatic and annual transfer of data on the basis of the criterion of US nationality and declarable bank accounts (Article 2 of "FATCA" agreement and Article 5 of the Law of December 16, 2015) without any indication that any tax law would have been violated. This is not a system of data transfer on an *ad hoc basis* operated at the request of the US authorities and based on the presence of indications requiring said data transfer in view of the purposes pursued.

220. The Contentious Chamber is of the opinion that this system, as provided for in the agreement

"FATCA" does not satisfy the principle of proportionality, particularly in view of the **case law of the CJEU**, which has on several occasions already had occasion to indicate, including on preliminary questions, how this principle should be applied with regard to treatments comparable to those complained of by the plaintiffs.

221. Thus, under terms of a judgment of April 8, 2014, the CJEU ruled that the retention of data generated or processed in connection with the provision of publicly accessible communication services or public communication networks was disproportionate in that this obligation applied *"even to persons for whom there is no evidence to suggest that their conduct may be connected, even indirectly or remotely, with serious offences"*[89]. It concluded that the EU legislator had exceeded the limits imposed by respect for the principle of proportionality under Articles 7, 8 and 52.1 of the EU Charter of Fundamental Rights, and invalidated Directive 2006/24/EC on this basis.

222. In the wake of this judgment, the data protection authorities, including the CPVP at the time, meeting within Group 29, adopted the aforementioned WP 234 opinion at the end of 2015, in which the Group argues that there is no reason to limit the CJEU's considerations to measures adopted in the context of the fight against terrorism. Other public policy measures designed to pursue distinct objectives, notably through the collection of personal data, are also subject to the same respect for the principle of proportionality in Article 6.1(c) of the then applicable Directive 95/46/EC.

223. The data protection authorities insist on the need to respect this principle, including in the context of "FATCA", in the following terms: *"while this case concerned the necessity and proportionality of certain measures to combat terrorism, 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 (in particular tax cooperation policies) which has an impact on the right to privacy.*

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[89] 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: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62012CJ0293

protection of personal data. It is therefore imperative, in tax cooperation agreements, to demonstrate that the planned exchange of data is necessary and that it concerns the minimum amount of data required to achieve the desired objective"[90].

224. Group 29 further specifies that *"accordingly, tax cooperation should include provisions and criteria which explicitly link the exchange of information and, in particular, the communication of personal data concerning financial accounts to possible tax evasion, and which exempt low-risk accounts from reporting obligations. In this respect, such criteria should be applicable ex ante to determine which accounts (and which information) should be declared"*.

225. In 2017, the European Data Protection Supervisor (EDPS)[(91)] said as much when he insisted in his Guide assessing the necessity of measures limiting the fundamental right to data protection[92] on the fact that *"all measures that might prove useful for the purposes of the given objective are desirable or can be considered a necessary measure in a democratic society. It is not sufficient that the measure be merely convenient or cost-effective"*. The EDPS also stated that the annual nature of the communication in execution of the agreement
"FATCA" as such demonstrates that the communication is not based on clues.
evasion or fraud, but operates systematically [93].

226. On February 24, 2022, the CJEU handed down a ruling [94] in which it expressly stated that a generalized and undifferentiated collection of personal data for the purpose of combating terrorism.

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[90] Groupe 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 December 16, 2015. Emphasis added by the Chambre Contentieuse.

[91] The European Data Protection Supervisor (EDPS) is the equivalent a national data protection authority for European Union institutions. See Regulation (EU) 2018/1725 of the European Parliament and of the Council of October 23, 2018 on the protection of individuals with regard to the processing of personal data by the institutions, bodies, offices and agencies of the Union and on the free movement such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

[92] https://www.edps.europa.eu/sites/default/files/publication/17-06-01 necessity toolkit final en.pdf

[93] See also a 2018 study commissioned by the European Parliament, which states that the reporting requirements under the "FATCA" agreement are not sufficiently limited with regard to the risk of tax evasion. The study in question states that *"in conclusion, the limitations introduced by FATCA within the European Union via the IGAs [read intergovernmental agreements] appear, at the current 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. On the other hand, these limitations introduced by FATCA would constitute "necessary and proportionate measures" on condition that the US provides, on a case-by-case basis, evidence that US expatriates are using the EU financing system to engage in tax evasion abroad. In the absence of such evidence, the limitations of FATCA appear to go beyond is strictly necessary to achieve the objective combating offshore tax evasion"*. The updated version of this study comes to the same conclusion https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734765/IPOL IDA(2022)734765 EN.pdf

[94] CJEU, Judgment of February 24, 2022, C-175/20, Valsts ieņēmumu dienests (Processing of personal data for tax purposes), ECLI:EU:C:2022:124. See also Judgment C-817/19, Ligue des droits humains (PNR), already cited, of June 21, 2022: *"115. As regards the principle of proportionality, the protection of the fundamental right to respect for private life at Union level requires, in accordance with the Court's settled case-law, that derogations from and restrictions on the protection of personal data must be kept within the limits of what is strictly necessary. Furthermore, a general objective cannot*

tax fraud by a tax authority is not permitted. The administration concerned must refrain from collecting data that is not strictly necessary the purposes of the processing operation (point 74 of the judgment). The administration must also consider whether its requests can be more targeted on the basis of more specific *criteria*.[95] Thus, even in the exercise of the public interest mission with which the data controller has been entrusted, the CJEU specifies that the data controller may not collect data in a generalized and indiscriminate manner, and must consider whether its requests can be more targeted on the basis of specific criteria (points 74-76 of the judgment).

227. It also follows from this ruling that the recipient of the data request is obliged to examine the validity of the request and to verify whether he is legally authorized to respond to it. Otherwise, the recipient of the request runs the risk of violating its own obligations data protection law.

228. In the defendant's view, this case law is irrelevant, as this is not a case of generalized and undifferentiated collection, nor of subsequent transfers that could also be qualified as such. According to the defendant, data processing under the FATCA agreement concerns a specific category of persons, namely those of US nationality, some of whom would not be affected if the amount in their bank account did not reach the declarable threshold. However, as the defendant points out, the Constitutional Court specifically considered in its ruling of March 9, 2017 (see below) that *"the collection of information in execution of the agreement*

"FATCA" is proportionate insofar as the law defines in its appendices the criteria taken into account to determine which data must be communicated (...)". Still according to the defendant, the Constitutional Court's ruling would therefore be all the more in line with the CJEU's 2022 ruling, which uses the same terms "proportionality" and "criteria".

229. The Contentious Chamber considers that, in line with the 2014 CJEU case law cited above, the lessons of this C-175/2020 judgment are, on the contrary, entirely relevant. Applied to the case in point, it follows for the Litigation Division that, as the data protection authorities stressed as early as after the June 8, 2014 judgment, in order to comply with the principle of proportionality in the context of an exchange of data - automatic moreover - and unrelated to any tangible indication of evasion, it is appropriate, as a criterion, at the very least to exclude the categories of persons or accounts that can be exempted from the reporting obligation under "FATCA" as well as those that

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be pursued without taking account of the fact that it must be reconciled with the fundamental rights affected by the measure, by striking a balanced balance between, on the one hand, the general objective and, on the other hand, the rights in question".

[95] The CJEU makes these considerations with regard to the request made by the Latvian tax authorities to an economic operator to provide it, for a specified period, with data relating to advertisements for the sale of passenger cars published on its website, and to restore permanent access to the data relating to such sales advertisements and, failing thatto provide it with data relating to such advertisements on a monthly basis (paragraphs 14-16 of the judgment).

present a very low risk of evasion. So if the people targeted are not actually taxable in the USA under the non-resident tax regime, provided their foreign income does not exceed the threshold, the transfer of their personal data will not be proportionate. This situation is likely to apply to accident victims in the United States, precisely because they are non-residents.

230. The transfer of data to the IRS, as opposed to specific processing on adhoc request, concerns a priori all US nationals. The general nature of the processing must be assessed in relation to the recipients of the standard itself, who may form an identified group. If the declared purpose is to combat tax evasion (at the very least, the assessment of proportionality being in any case rendered difficult given the absence of a sufficiently precise purpose (see above) on the basis of American nationality, and the processing concerns the data - even if listed - of all Americans residing abroad (in this case in Belgium), the processing is generalized. In the same way that the CJEU considered that the communication of data relating to the advertisements of all sellers of second-hand vehicles, or the permanent availability of such data via the Internet, constituted generalized collection, in the same way the transfer of personal data of all Americans living in Belgium is generalized.

231. Moreover, the transfer to the IRS appears to the Contentious Chamber to be highly indiscriminate, since it targets all Americans regardless of any indication that the purpose of the transfer to IRS is tax evasion, with the "exception" declarable accounts. The Contentious Chamber stresses that, in its view, the fact that the personal data to collected and subsequently transferred are listed is not a relevant and sufficient targeting "criterion" that differentiates the Americans concerned from one another with regard to this purpose.

232. The only exception relating to declarable accounts in point A of Part I Annex II of the FATCA agreement is not really an exception at all, since banks can exempt themselves from this requirement. It states that "low-value accounts, in this case below US$50,000, are not subject to the reporting procedures, unless the reporting financial institution decides otherwise".

233. If this option exists, it is because sending data relating to these accounts is not really necessary within the meaning of Article 6.1.b) of Directive 95/46/EC. The SCFA's deliberation 52/2025 already stated in this respect*: "The Committee therefore notes the optional nature of this threshold. However, the applicant has indicated that some financial institutions have confirmed that they use it. In order avoid excessive numbers accounts being communicated to the United States, the Committee invites financial institutions to apply the US$50,000 threshold (...) to guarantee the proportionality of the processing"* (point 16 of the

deliberation). While the SCF certainly targets the banks, its deliberation is no less directed at the defendant, who was warned. In this respect, the defendant cannot, *a fortiori* in view of deliberation 52/2016, hide behind the behavior of the banks who do not make use of the option given to them. As data controller, it is incumbent on the defendant to transfer only relevant and non-excessive (i.e. necessary) data to the IRS, and to remind financial institutions of this duty.

234. In the context of automatic data exchange, it was identified from the outset in the Convention that there was a risk of receiving irrelevant data, and that this risk should be avoided[96]. In the "FATCA" agreementAnnex II thus lays down the principle a regular review of the categories of persons and/or declarable accounts (having regard to the ceiling amount) which would present a low risk tax evasion, and which should be excluded from the exchange of automatic data concerning them[97]. In view of this requirement, it is all the more questionable for the defendant to transfer the personal data of undeclarable account holders on the grounds that the banks would collect them and/or that it would not have access to the content of the data. How, then, can the defendant ensure compliance with the principle of minimization, as it claims to the SI in particular?

235. Insofar as necessary, the Contentious Chamber mentions that this judgment is admittedly subsequent May 24, 2016, as are certain documents that the Contentious Chamber mentioned above. For the reasons set out in section II.5, including the *ex tunc* effect of rulings on preliminary questions, the Litigation Division takes into account the way in which key concepts of data protection are interpreted by the CJEU, including the interpretation given to concepts of the RGPD that are common to Directive 95/46/EC and all the more so when, as in this case, it is merely a confirmation, in a tax context this time, of case law that has existed since 2014 .

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[96] Extract from the Explanatory Report of the OECD Convention (article 6): 62. A characteristic feature of automatic exchanges of information is that they concern a mass of specific information of the same kind relating, usually, to payments originating in the State providing the information and to taxes withheld at source in that State. Information of this type can be obtained periodically, within the framework of the State's own system, and transmitted systematically and regularly. Automatic exchange of information makes it possible to improve tax honesty and detect fraud that would otherwise have gone undetected. States must strive to exchange information as efficiently as possible, given the sheer volume .

63. If taxpayers are aware of this arrangement and, consequently, of the nature of the information exchanged, they will be led to better compliance with their tax obligations, and the number of cases and the amount of minorities in tax returns should decrease after a few years. However, there may be ways of maximizing efficiency and minimizing costs, for example, by limiting automatic exchange to areas where tax honesty is weakest, by modifying, after a few years of exchange, the nature of the information exchanged and by using standardized forms (see also paragraph 66 below).

[97] See Annex II of the FATCA agreement: "This Annex II may be modified by a mutual written decision entered into between the Competent Authorities of Belgium and the United States: (1) to include additional Entities and accounts that present a low risk of being used by U.S. Persons to evade U.S. tax and that have similar characteristics to the Entities and accounts described in this Annex II as of the date of signature of the Agreement".

236. In support of the **CJEU jurisprudence** it has set out as applied to the case in point, the Litigation Division notes that **the principle of proportionality** enshrined article 6.1b) of Directive 95/46/EC is not complied with. The defendant does not demonstrate that only adequate, relevant and non-excessive personal data, even if such data is listed (whether in the "FATCA agreement (article 2.2) or in the Law of December 16, 2015 (article 5)), is transferred to the IRS, their transfer not being in certain circumstances such as to achieve the purpose pursued (without prejudice to the considerations issued by the Contentious Chamber with regard to the purpose).

237. Given the primacy in law of this CJEU case law[98] with regard to the principle of proportionality, the Litigation Division can only note that the opinions of CPVP, the deliberation of the CSAF, the deliberations of the CNIL or even the judgment of the French Conseil d'Etat of July 19, 2019, could not form the basis of the defendant's conviction that the "FATCA" agreement was indeed compliant with EU law applicable on May 24, 2016. The defendant cannot rely on them since their conclusions, in particular on proportionality, are contrary to what the CJEU expects in terms of with this principle. This also applies to the Constitutional Court's ruling of March 9, 2017, on which the defendant particularly relies. In this respect, the Contentious Chamber notes that, in any event, this ruling could not form the basis for the defendant's conviction that the "FATCA agreement and the Law of December 16, 2015 comply with EU law applicable to the May 24, 2016. In view of the arguments before the Court[99], the Contentious Chamber considers that it cannot be inferred that, in concluding as it did that the interference satisfied the conditions of Article 8 § 2 of the ECHR - without ruling on Article 8 of the Charter of Fundamental Rights, which was referred to in the plea[100] - the Constitutional Court would also have concluded that not only the Law of December 15, 2016, but also the "FATCA" agreement complied with both Directive 95/46/EC in its entirety and the EU Charter of Fundamental Rights.

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[98] See, for example, regarding this primacy: CJEU, judgment of September 14, 2017, C-628/75, The Trustees of the BT Pension Scheme and references cited: ECLI:EU:C:2017:687

[99] In its ruling of March 9, 2017, the Constitutional Court responds in particular to a 5th plea *"based on the violation of article 12 of the contested law (i.e. the Law of December 16, 2015), article 8 of the European Convention on Human Rightsarticles 7, 8 and 52 of the Charter Fundamental Rights of the European Union as well as article 4, paragraph 3 of the Law of December 8, 1992 on the protection of privacy with regard to the processing of personal data"*. In this respect, article 4.1 paragraph 3 reads as follows: *"Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are obtained and for which they are further processed"*.

[100] As for the examination in the light of the EU Charter of Fundamental Rights, the Contentious Division finds no trace of this the judgment. However, Article 8 of the EU Charter of Fundamental Rights offers more extensive protection than Article 8 of the ECHR, including the principle of finality (8.2.) and the requirement of independent review (8.3). Article 52.3 of the Charter of Fundamental Rights states that "insofar as this Charter contains rights corresponding to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope shall be the same as those conferred by that Convention. This provision shall not prevent Union law from affording more extensive protection".

238. The Contentious Division also points out that the Constitutional Court concludes that this plea is unfounded, in particular in view of the consideration that *"the collection of information makes it possible to achieve the objective of the law and is proportionate insofar as the law defines in its appendices the criteria taken into consideration to determine which data must be communicated (point A of part I appendix II)"*. In the view of the Contentious Chamber, the purpose of the law is not equivalent to the purpose of processing, and the data listed is not a criterion (point 236). As for the above-mentioned reference to Annex II, as already mentioned, this is merely an option (points 232-233). The Litigation Division is aware that the Constitutional Court's annulment rulings dismissing actions for annulment are binding on the courts in respect of the questions of law decided by those rulings. As already mentioned, however, this must give way to the primacy of EU law (including the case law of the CJEU).

II.6.1.4. Other benefits for people

239. In addition to the fact that the data processing it provides for must comply with the principles of purpose and proportionality already discussed, the FATCA agreement must, in order to meet the requirement of Article 96 of the RGPD and as provided for in Recital 102, contain a number of other guarantees for the benefit of data subjects. On their own, breaches of the principles of finality and proportionality render the transfer unlawful under the FATCA agreement and the Law of December 16, 2015. However, the Contentious Chamber notes, without being exhaustive in this respect, that other guarantees required by the agreement are lacking.

240. In its aforementioned opinion WP 234, Group 29 identified these guarantees resulting from application of Directive 95/46/EC to automatic data transfers for tax purposes.

241. Thus, in addition to the principles of purpose and proportionality, the WP 34 retains the requirement of proportionality in retention periods (article 6.1 of the opinion). The Contentious Chamber will also examine compliance with this principle from the angle of the RGPD, and the considerations it makes in point 259 also apply with regard to Directive 95/46/EC, as the RGPD has not altered the requirements of this principle. FATCA agreement makes no provision for a retention period, even by reference to the relevant parameters. There is IRS commitment this.

242. WP 234 also includes a transparency requirement. The agreement must provide information in accordance with Articles 10 and 11 of Directive 95/46/EC[101]. Here too, the Litigation Division refers to its examination of this point in relation to the RGPD (points 262 et seq.). Even if the information required by Directive 95/46/EC is more limited than that required by Article 14 of the RGPD, the "FATCA" agreement contains no guarantees in terms of information, particularly on the part of the IRS.

II.6.1.5. Conclusion on compliance with EU law applicable as of May 24 2016

243. In support of the foregoing, the Contentious Chamber is of the opinion that the elements invoked by the defendant in support of the compliance of the "FATCA" agreement with EU law on May 24, 2016 did not authorize it to conclude that it could continue to transfer the data to the IRS by relying on Article 96 of the RGPD. The defendant does not demonstrate that the conditions for the application of Article 96 were and are met or that the "FATCA" agreement alone, and even with the Law of December 16, 2015, complies with EU law applicable on May 24, 2016.

II.6.2. Transfers to the IRS and compliance with RGPD

II.6.2.1. Principles

244. As a result of the above developments, the "FATCA" agreement is **no more compliant with the RGPD** today **than it was with EU law before May 24, 2016 with regard to the principles of finality and minimization enshrined in Articles 5.1.b) and 5.1 c) of the RGPD**, which translate into the RGPD the principles of finality and proportionality of Articles
6.1.b) and 6.1.c) of the RGPD. However, the Contentious Chamber has just concluded that the data transfers carried out under the "FATCA" agreement did not comply either Article 6.1.b) or Article 6.1.c) of Directive 95/46/EC or Articles 8 and 52 of the EU Charter of Fundamental Rights (Titles II.6.1.3 and II.6.1.4).

245. **Nor does** the transfer of data to the IRS **meet the requirements of the framework for transborder data flows to third countries**[102] such as the United States as required by Chapter V of the RGPD.

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[101] "*Clear and appropriate information should place data subjects in a position to understand what is happening to their personal data and how to exercise their rights, as foreseen by Articles 10 and 11 of the Directive". (*Clear and appropriate information should place data subjects in a position to understand what is happening to their personal data and how to exercise their rights, as foreseen by Articles 10 and 11 of the Directive".)

[102] Third country means any country that is not a member of the European Economic Area (EEA). The transfer of the first plaintiff's personal data by the defendant to the IRS is a transfer to a third country within the meaning of the GDPR.

246. As the parties point out in their respective conclusions, Chapter V of the RGPD organizes a cascade system between different instruments that can be mobilized by a controller or processor to transfer personal data to a third country.[103] This system is in line with the data transfer regime provided for by Directive 95/46/EC.104 Thus, in the absence of an adequacy decision within the meaning of Article 45 of the RGPD, the data controller may only transfer personal data to a third country if it has provided appropriate safeguards and on condition that the data subjects have enforceable rights and effective legal remedies within the meaning of Article 46.1 of the RGPD. These appropriate safeguards can take various forms, including that of a legally binding instrument (Article 46.2. a) of the RGPD). Finally, in the absence of an adequacy decision and appropriate safeguards, a transfer of data to a third country may only take place if one of the derogations listed Article 49 of the RGPD applies. Failing to meet the requirements of Articles 45 to 49 of the RGPD, the transfer of personal data to a country outside the EEA is prohibited.

247. It is not disputed **that there is no adequacy decision** covering the transfer of the data of the first plaintiff (and more broadly of the Belgian accidental Americans (whose interests the second plaintiff defends) to the IRS in the United States, since the decision "Privacy Shield"[105] - moreover invalidated by the CJEU in the aforementioned "Schrems II" judgment - does not apply to this type of transfer, nor does the July 10, 2023[106] adequacy decision, which the parties do not dispute.

II.6.2.2. Application of articles 46.1 and 46.2. a) of RGPD

248. It has already been mentioned that, without prejudice to Article 96 of the RGPD, which it invokes as its principal claim, **the defendant relies in this case on Article 46.2. a) of the RGPD** since the transfer of the defendant's data to the IRS that it is carrying out is based on a legally binding and enforceable instrument between it and the IRS that does not require any authorization from the DPA, namely the "FATCA" agreement on the one hand and the Law of December 16, 2015 on the other.

249. It follows from Article 46.2. a) of the RGPD *that appropriate safeguards must appear in* the legally binding instrument.[107] Article 46.2. a) reads as follows:

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

[104] 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.

[105] 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.

[106] Commission Implementing Decision (EU) 2023/12795 of July 10, 2023 determining, pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council, the adequate level of protection of personal data provided by the EU-US Data Protection Framework, OJEC of September 20, 2023, L-231/118.

[107] See also EDPS Guidelines 02/2020, p.21 ff.

"appropriate guarantees (...) may be provided (...) ***by*** *a legally binding and enforceable instrument between public authorities or bodies"*[108]. They may be based on a binding norm national law, but the reference to it must be express[109].

250. Although these appropriate safeguards are not mentioned as such in Article 46 of the GDPR or its Recital 108, they must be **such** as **to ensure that individuals whose personal data is transferred to a third country benefit a level of protection substantially equivalent to that guaranteed within the EU by the GDPR and that this level of protection is not compromised**[110].

251. In its Guidelines 02/2020[111], the EDPS lists, support of Article 44 of the RGPD CJEU case law, in particular the Schrems II judgment already cited, the minimum guarantees that must be found in the binding legal instrument (Article 46.2.a) of the RGPD).

252. These reinforce the recommendations made by the Group 29 in its document WP 234 back in 2015. **More than recommendations, these are minimum guarantees *that must* be included in the international agreement compliance with Article 42.a), and for which it is up to the defendant to demonstrate that they are actually in place and effective on an ongoing basis**. The EDPS includes therein the enforceable rights and effective remedies **required** as to them by **Article 46.1.** of the RGPD already cited.

253. These minimum requirements concern in particular (1) definitions of basic concepts, (2) basic data protection principles, (3) the rights of data subjects, (4) restrictions on onward transfer and data sharing, (5) effective means of redress, (6) control mechanisms and (7) accountability.

254. The Litigation Division will not examine exhaustively each of the minimum guarantees to be provided by the FATCA agreement. **Indeed, the absence of a certain number of them is sufficient to conclude that transfers carried out on the basis of the agreement are unlawful.**

255. **Definition of basic concepts** (point 2.2. of the EDPS Guidelines): it is essential for the parties to agree on the definition of key concepts for the processing of

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[108] Emphasis added by the Chambre Contentieuse.

[109] See point 14 of EDPS Guidelines 02/2020.

[110] See in this sense CJEU judgment July 16, 2020, C-311/18, Facebook Ireland and Maximilian Schrems ("Schrems II judgment), points 92 and 96; EDPB guidelines 2/2020, points 6 and 12

[111] EDPS, Guidelines 2/2020 of 15 December 2020 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 from the EEA: https://www.edpb.europa.eu/system/files/2021-06/edpb_guidelines_202002_art46guidelines internationaltransferspublicbodies v2 en.pdf (point 12).

The agreement between the two parties must define these notions. Otherwise, the effectiveness of any other guarantee could be compromised. The EDPS thus lists the definitions of notions important following: "data to personal character", These include "personal data processing", "controller", sub-processor", "recipient" and "sensitive data" [112].

256. The Contentious Chamber notes that the "FATCA" agreement contains no such provisions. While Article 1er of the agreement is devoted exclusively to definitions (1 litera a) to z)+ litera aa) to mm), **none of them deals with data protection concepts, despite the fact that the very principle of the agreement is based on a chain of personal data processing operations**. The agreement refers to "information", which demonstrates the importance of agreeing on , any, constitutes personal data. So while, of course, the defendant is bound by the definitions contained in the RGPD (and the Law of December 16, 2015), this is not the case for the IRS, which will receive the data. Nor does the agreement mention any US legislation(s) that would define these concepts.

257. **Purpose limitation principle** (point 2.3.1 of the EDPS Guidelines)[113]: on this point, the Contentious Chamber refers to its conclusions in section II.6.1.3 above. Furthermore, the FATCA agreement does not specify the type of data processing be transferred and processed under the agreement[114].

258. **Principle of minimization and accuracy** (point 2.3.2 of the EDPS Guidelines)[115] [116]: with regard to compliance with the principle of minimization, the Contentious Chamber refers to its conclusions above (section II.6.1.4).

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[112] Point 16 of EDPS Guidelines 02/2020.

[113] See page 6 of WP 234 and point 18 of EDPS Guidelines 02/2020: 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 guarantee that the data will not be further processed for incompatible purposes.

[114] See section 2.1 of EDPS Guidelines 02/2020.

[115] See page 6 of WP 234 and points 21 et seq. of EDPS Guidelines 02/2020. the categories of personal data that are transferred and processed under the agreement must be clearly mentioned in the international agreement, ensuring that this mention only concerns data that are adequate, relevant and limited what is necessary with regard to purposes for which they are transmitted and further processed. In practice, compliance with this principle helps prevent the transfer of inadequate or excessive data. Furthermore, the data transferred should be accurate and up to date in relation to the purposes for which they are processed. It is therefore important for the international agreement to stipulate that the transferring party must ensure that the data transferred under agreement is accurate and, where appropriate, up-to-date.

[116] Furthermore, the agreement should provide that, if either party becomes aware that inaccurate or obsolete data has been transmitted or is being processed, that party must inform the other without delay. Finally, the agreement should ensure that where it is confirmed that the data transmitted or processed is inaccurate, each party processing the data will take all reasonable steps to rectify or erase the data.

259. **Principle of limited retention** (point 2.3.3 of the EDPS Guidelines)[117] [118]: the Contentious Chamber notes that the "FATCA" agreement contains no commitment as to the limited retention of data processed and transferred pursuant to the agreement, nor any maximum retention period. Admittedly, as the defendant points out in its conclusions, the Law of December 16, 2015 provides for a retention period of 7 years under its head (article 15.3 of the said law). This retention period only binding on the defendant. This does not demonstrate that the IRS would be bound by a proportionate retention period for transferred data as well. However, the data must remain protected once in the United States, which, as mentioned above, the defendant must ensure. In its pleadings, the defendant produces a table listing a number of retention periods applicable to the IRS, which it itself describes as "guidelines", including a period for which it states that it is "generally" 5 years (point 66 of the defendant's second additional and summary pleadings). Apart from the fact that nothing is mentioned in the agreement itself, the Dispute Chamber is not in a position to assess the proportionality of these time limits with regard to the purposes of the processing operations.

260. **Rights of data subjects**[119]: in accordance **Article 46.1 of the RGPD** and Recital 108, the international agreement must guarantee **enforceable and effective rights** for the data . This implies that the agreement should list all the rights enjoyed by data subjects, including the specific commitments made by the Parties to guarantee these. For these rights to be effective, the international agreement must include mechanisms to ensure that they are applied in practice. In addition, any violation of the rights of the person concerned must be accompanied by an **appropriate remedy**.[120]

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[117] See pages 6 and 7 of WP 234 and point 24 of EDPS Guidelines 02/2020: the international agreement must contain a clause on data retention. In particular, this clause must specify that personal data shall be kept 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 subsequently processed. Where a maximum retention period is not specified in the national legislation of the parties, a maximum period should be specified in the text of the agreement.

[118] On the importance of setting an appropriate retention period see Opinion 2/2015 issued by the European Data Protection Supervisor.
(EDPS) on agreement between the EU and Switzerland on the automatic exchange of tax information:
"Specifying an explicit retention period for the personal data collected and exchanged have ensured that the data would be kept for the time strictly necessary to pursue legitimate policy objectives, and once this had been done, that it would be deleted, thus fully restoring individual rights. If this were not the case, the large-scale and continuous exchange of tax information concerning the citizen would result in vast archives that would be difficult to control and could be detrimental to citizens". https://www.edps.europa.eu/sites/default/files/publication/15-07-08 eu switzerland exsum en.pdf a
nd https://www.edps.europa.eu/sites/default/files/publication/15-07-08 eu switzerland en.pdf

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

[120] In this respect, the EDPS specifies that the international agreement must clearly describe the obligations of the parties in terms of transparency (section 2.4.1 of the EDPS guidelines). The agreement must also guarantee the data subject the right to obtain information on, and access toall personal data processed. Finally, the agreement must include a clause stating that the receiving organization will not take any automated individual decision, including profiling, producing legal effects concerning the person in question or significantly affecting 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 recipient organization to make such decisions, the conditions for such decision-making will have to be defined in the agreement comply with article 22. 2-4 of the RGPD.

261. The Contentious Chamber notes that the "FATCA" agreement contains no mention of the rights of the data subject, be it the right to information, the right of access, the right of rectification, the right erasure, the right to limitation or the right of opposition. It does not contain indication of when these rights may be invoked or how may be exercised.

262. *As for the right to information*, which is absent from the FATCA agreement, the defendant cannot argue that this information arises for it from the Law of December 16, 2015 or from the RGPD, since its position consists precisely in saying that it is exempt from this information since it would fall exclusively to the banks (see section II.6.3). However, the minimum guarantee required article 46.2.a) of the RGPD is formulated as follows *"the public body transferring (i.e. here the defendant) the data should inform the data subjects individually in accordance with the notification requirements laid down in Articles 13 and 14 of the GDPR"*, specifying in this regard *"that a general information notice on the website of the public body in question will not be sufficient"*.

263. The IRS to which the data is transferred under the agreement should also have a duty to inform. In this respect, the defendant has not demonstrated that this requirement has been met, and as indicated, this duty to inform does not arise from the agreement.

264. *As for the other rights*, the Litigation Division can only note that they do not appear in the agreement, nor are they apparent from the texts to which the agreement refers. The Litigation Division notes that the plaintiffs point out that the IRS website, which deals with the FATCA agreement, contains no information about these rights. With regard to the right of access (a pillar of data protection law), the international agreement should specify that individuals have the right to ask the recipient public body to confirm whether personal data concerning them is being processed and, if so, to have access to this data as well as to specific information concerning the processing, including the purpose, the categories of data, the recipients of the data, the retention periods and the means of redress. This is not the case.

265. With regard more specifically to *the required reference to Article 22 of the RGPD*, the defendant pleads that it not operate any processing operations that fall under this provision. This circumstance, even if verified, is irrelevant. In , what is required as a guarantee in the agreement is an undertaking by the parties, including the recipient of the data (i.e. the IRS), not to carry out this type of processing in particular (hence the importance, as already mentioned, of identifying the types of processing as indicated in point 257). This guarantee is not provided the agreement.

266. As the rights of the persons concerned are neither enshrined in nor covered by the agreement "FATCA" - it fails to satisfy Article 46.1. a) of the RGPD, which as a reminder requires *"data subjects to have enforceable rights and effective legal remedies"*. The defendant remains in default of demonstrating that these rights are indeed enforceable and effective.

267. *As for redress*[121] : in order to guarantee these enforceable and effective rights, the agreement must provide for a system that enables data subjects to continue to benefit from **redress mechanisms** after their data has been transferred to a country outside the EEA. These redress mechanisms must enable data subjects rights have been violated to lodge a complaint and have it resolved.

268. On this point, the Contentious Chamber can only observe that the defendant has not demonstrated that such redress mechanisms would exist for the benefit of the data subjects of the processing operations complained of once the data had been transferred, including to accidental Belgian Americans.

269. **Control mechanism**[122] : in order to guarantee that all the obligations created under the international agreement are respected, the agreement must provide for independent control to verify that it is correctly applied and to monitor infringements of the rights provided for the agreement. The Contentious Chamber notes the defendant has not provided any information on this point, apart from the reference to a Peer Review system (reply to question 2 of the SI - supplementary investigation report), which does not offer the required guarantees. Such a mechanism does not appear in the agreement.

II.6.2.3. Conclusion

270. Under the heading of "Sufficient Guarantees" in its words, the defendant relies on the opinions of the CPVP, the authorization of the CSAF and the ruling of the Constitutional Court of March 9, 2017, which the Contentious Chamber has already set aside during the discussion of the principles of finality and proportionality. These defenses are therefore not such as to call into question the Contentious Chamber's finding that many of the guarantees required by Article 46.2. a) of the RGPD are lacking since these guarantees specifically include compliance with the principle of proportionality on the one hand and it has not been demonstrated that the condition of Article 46.1 of the RGPD (effective and enforceable rights with remedies) is satisfied.

271. As the SI points out (page 3/22 of its supplementary report), article 3.7 of the agreement "FATCA" refers to the confidentiality obligations and other guarantees set out in the

[121] Points 50 et seq. of EDPS Guidelines 02/2020.

[122] Points 56 et seq. of EDPS Guidelines 02/2020.

OECD Convention (articles 21 and 22). The SI also points out that article 3.8 of the agreement

"FATCA" requires each competent authority to notify the other in writing when it is satisfied that the other has put in place the appropriate safeguards (page 3/22 of the SI's supplementary investigation report).

272. The defendant did in fact produce this document, entitled *"Notification of adequacy of Datasafeguards and infrastructure"* signed by both itself and the IRS, on January 10, 2017 for the defendant and January 24, 2017 for the IRS, respectively. The said notification reads as follows:

> *"This constitutes the notification required by Article 3.8 of the Agreement between the Government of the United States of America and the Kingdom of Belgium for the purpose of improving compliance with international tax obligations and implementing Fatca ("the Agreement") and once signed, will serve inform the other party that our respective jurisdictions have put in place (i) appropriate safeguards to ensure that information received under the Agreement will remain confidential and will be used only for tax purposes, and (ii) the necessary infrastructure for an effective exchange relationship, including established processes to ensure timely exchanges of information, accurate and confidential exchanges of information, effective and reliable communications, and demonstrated capabilities to promptly resolve questions and concerns regarding exchanges or requests exchanges and to administer the provisions Article 5 of the Agreement*.

273. The Contentious Chamber notes that this notification is signed in 2017 and that indication has been given to the Contentious Chamber that the commitments made under this notification, which dates back more than 8 years, are maintained and updated. Above all, the content of this notification does not attest to guarantees equivalent to those required by Article 46.1 and Article 46.2. a) of the RGPD. Thus, with regard to compliance with the purpose, the Contentious Chamber in any event disputed the sufficiently specific and determined nature of the "tax purposes" to which the text refers and for which the data could be processed once transferred (this same specified Article 17 of the Law of December 16, 2015). Confidentiality(in addition to the fact that it is not further specified in what it covers), the commitments made with regard to an "infrastructure" as well as the reference to Article 5 of the agreement, while they refer to security commitments[123], do not concern the guarantees that the Contentious Chamber found lacking in the "FATCA agreement, such as the limitation of retention, the recognition of rights, remedies or even a control mechanism. Visit

[123] In this respect see APD opinion 51/2024, cited in note 67.

The "Competent Authority Arrangement" mentioned in the SI and the Data Safeguard Workbook (also mentioned in the SI with regard to the pre-analysis referred to in section II.6.4, and which the company itself relates to security), which are linked to article 3.8, do not alter the view of the Chambre Contentieuse. Indeed, they precisely implement - without their binding status being attested - article 3.8, the content of which is deemed insufficiently aligned with the guarantees required by articles 46.1 and 46.2. a) of the RGPD.

274. **In conclusion**, the Contentious Chamber finds in support of the foregoing, as the Slovak data protection authority had similarly done before it[124], that the defendant to demonstrate that the appropriate safeguards required article 46.2. a) of the RGPD (as well as by article 46.1) that it mobilizes, are provided by the "FATCA" agreement. Consequently, the Contentious Chamber finds a breach of articles 46.1 and 46.2. a) on the part of the defendant.

II.6.2.4. As for Article 49 of RGPD

275. The Contentious Chamber notes that in its decision of October 4, 2021, the defendant relied on Article 49.1. d) of the RGPD (point 18). In the present proceedings, on the other hand, it is relying on Article 46.2. a) of the RGPD. Thus, while initially invoking the exception of Article 49.1. d) of the RGPD, which presupposes the absence of guarantees as set out above with regard to the cascade system of the RGPD, the defendant then mobilizes Article 46.2 a) of the RGPD and pleads that the appropriate guarantees required are all in place. It concludes *in fine* that, in reality, Article 49.1.d) of the RGPD find application in the present case (point 50 of the defendant's second summary submissions).

276. Insofar as necessary, the Contentious Chamber dismisses the application of Article 49.1 d) of the RGPD in this case. It points out that this derogation - necessarily of restrictive interpretation - applies only when transfers are authorized for reasons of important public interest in a spirit of reciprocity, which transfers cannot, however, take place on a large scale and systematically as is the case here. The general principle that derogations article 49.1 d) become "the rule" in practice, but must be limited to specific cases, must be respected.

[124] Opinion of the Office for Personal Data Protection of the Slovak Republic of August 23, 2022 addressed to the Ministry of Finance of the Slovak Republic (unofficial translation into French). This opinion made follows the request for an assessment of the compliance of international agreements on the exchange of tax information with the GDPR formulated by the EDPS in its statement 04/2021. In this regard, the Slovak DPA concludes that, as far as the transfer to the US authorities is concerned, the conditions of Chapter V of the RGPD 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 RGPD.

special situations[125]. Each exporter of data must also ensure that the transfer meets the strict **necessity/minimization test**. The Litigation Division concluded in section II.6.1.3 that the defendant's transfer to the IRS did not pass this test.

II.6.3. Compliance with obligation to provide information

277. For the reasons set out in paragraph 160 above and resulting moreover from the finding made in paragraph 242, the Contentious Chamber considers that Article 14 of the GDPR applies to the defendant independently of Article 96 of the GDPR.

278. As this case concerns personal data that it did not obtain directly from the first plaintiff - since it obtains them from financial institutions (this is referred to as indirect collection) -, the defendant must in its capacity as data controller, unless it can rely on an exception, comply Article 14 of the GDPR, combined with the requirements of Article 12 of the GDPR with regard to the transfer of personal data to the IRS.

279. The information to be provided pursuant Article 14 of the GDPR is as follows [126]: the identity and contact details of the controller and, where applicable, its representative (Article 14.1. a)); where applicable, the contact details of the data protection officer (DPO) (Article 14.1.b)); the purposes of the processing for which the personal data are intended and the legal basis for the processing (article 14.1.c)); the categories of personal data concerned (article 14.1.d)); where 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 issued by the [European] Commission **or, *in the case of transfers referred to in Article 46*** *or 47, or in Article 49, paragraph 1, second subparagraph,* ***the reference to appropriate*** **or adequate *safeguards* and the means of obtaining a copy thereof or the place where they have been made available** (Article 14.1.f)); the length of time 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 processing is based on article 6.1.f), the legitimate interests pursued by the controller or by a third party (article 14.2.b));

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[125] EDPS, Guidelines 2/2018 of May 25, 2018 on derogations Article 49 of Regulation (EU) 2016/679: https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf

[126] In this respect, 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 communicated to the data subject when it is relevant to the processing being carried out. Group 29, *Guidelines on transparency within the meaning of Regulation EU 2016/679*, WP 260 (point 23): https://ec.europa.eu/newsroom/article29/items/622227 These Guidelines have been taken up by the EDPS at at its meeting inaugural at 25 May 2018 : https://edpb.europa.eu/sites/default/files/files/news/endorsement of wp29 documents.pdf

the existence of the right to request from the controller access to personal data, their rectification or erasure or a restriction on the processing relating to the data subject, as well as the right to object to processing and the right to data portability (article 14.2.c)); where 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 prejudice to the lawfulness of processing based on consent carried out prior to withdrawal (article 14.2.d)); the right to lodge a complaint (read complaint) a supervisory authority (article 14.2.e)); the source from which personal data originate and, where applicable, a statement indicating whether or not they originate from publicly accessible sources (article 14.2.f)) and the existence of automated decision-making, including profiling, as referred to articles 22.1 and 22.4 and, at least in such cases, useful information concerning the underlying logic, as well as the significance and anticipated consequences of such processing for the data subject (article 14.2.g)).

280. In support of article 14.1 of the Law of December 16, 2015[127], the defendant concludes that it was the banks' legal responsibility to inform the first plaintiff and not its own. It points out that, in the present case, Bank Z also informed the latter. The defendant adds that, notwithstanding the absence of any obligation on its part, it nonetheless informs the persons concerned of transfers to the IRS via its website.

281. The Contentious Chamber is of the opinion that the obligation to inform on the part of the banks does not *ipso facto* exempt the defendant from its obligation with regard to the processing that it in turn carries out in its capacity as controller, in particular the transfer of data to the IRS. Indeed, even if bank Z is legally obliged to inform the first plaintiff accordance with article 14.1 of the Law of December 16, 2015, Z did not have to provide all the elements that the defendant must communicate with regard to its own processing.

282. The information exemption provided for in Article 14.5. a) of the GDPR, according to which the controller must inform the data subject "except where and insofar as" he or she already this information, must also be applied within the strict limits of the text.[128] It goes without saying that Article 14.5.a) of the GDPR can only be invoked if the information has already been provided in relation to the same processing concerned.

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[127] Article 14.1 of the Act of December 16, 2015 requires reporting institutions (i.e. banks) to inform persons concerned "that the information referred to the law will be communicated to the competent Belgian authority".

[128] In this sense, the exemption may relate only to certain items of information. This is what results from the unequivocal use of the terms *"insofar as"* ··Groupe 29, *Guidelines on transparency within the meaning of Regulation EU 2016/679*, WP 260 (point 56): https://ec.europa.eu/newsroom/article29/items/622227 These Guidelines were taken up by the EDPS at his inaugural meeting on May 25, 2018: https://edpb.europa.eu/sites/default/files/files/news/endorsement of wp29 documents.pdf

283. In order to rely Article 14.5. a) of the GDPR, the defendant must therefore demonstrate that the banks inform about the elements of its own processing, namely the transfer to the IRS **AND** that all the relevant elements of Article 14 of the GDPR with regard to the latter processing are covered (a priori only the elements Article 14.2 b) and 14.2. d) are automatically excluded).

284. In this respect, the Contentious Chamber notes that Article 14.1 of the Law of December 16, 2015 does not provide for all the elements required by Article 14.1-2 of the RGPD. The elements listed in the said article 14.1 of the Law of December 16, 2015 are relatively limited: (a) the purposes of the communications of personal data, (b) the ultimate recipient or recipients of the personal data, (c) the declarable accounts for which the personal data is communicated, (d) the existence a right to obtain, on request, communication of the specific data that will be or has been communicated concerning a declarable account and the procedures for exercising this right and (e) the existence of a right to rectification of the personal data concerning it and the procedures for exercising this right.

285. The defendant's argument that it is the banks alone that are responsible for providing information (even though their obligation stems from the Law of December 16, 2015) cannot therefore be accepted.

286. With regard to the information given *in casu* to the plaintiff, the Contentious Chamber notes in support of the exhibits communicated that certain information was indeed provided to the plaintiff (points 11-13) but does not cover everything required by Article 14.1-2 of the RGPD with regard to the transfer to the IRS. Thus, the guarantees for the supervision of the transfer to the IRS are not mentioned by Bank Z (article 14.1.f) of the RGPD), nor are the contact details of the defendant's DPO (article 14.1.b)), the right to lodge a complaint with the DPA (article 14.2.e), or the procedures for exercising or the limits of the right of access (article 14.2. c)). The Contentious Chamber also notes that one of the letters refers for further information to the SPF Finances, which is in total contradiction with the defendant's position that it is the sole responsibility of the banks to provide information (point 11) and testifies to the defendant's admittedly limited but certain role, and in any case, on the basis of complaints from the persons concerned, that of ensuring that the banks comply with their duty to provide information.

287. 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 *"obtaining or communicating the information is expressly provided for by Union law or the law of the Member State to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests"*.

288. In a "Mäsdi" ruling C-169/23 of November 28, 2024 the CJEU clarified and ruled that it is indeed the obtaining and communication of data that must be provided for by national law (and not that of the information listed in Article 14.1-2), notwithstanding the terms of the French version of Article 14.5.c) of the RGPD.[129]

289. The Contentious Chamber is of the opinion that Article 14.5. c) of the RGPD does not apply in case, as the conditions for its application have not been met, even though the processing is provided for by the "FATCA" agreement and the Law of December 16, 2015. This exception article

14.5.c) of the RGPD can in fact 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. While the latter certainly does not invoke this provision, neither does it respond to the plaintiffs' argument that this exception would in no case find application.

290. As no information exemption applies, the Contentious Chamber will examine the extent to which the defendant fully complies with its information obligation as it claims to do via its website without even being obliged to do so via *"more theoretical explanations, news, links to relevant documents and an FAQ" (point 68 of its second additional and summary conclusions)*. The Contentious Chamber adds that in accordance with Article 12.1. of the RGPD, this information must be concise, transparent, comprehensible and easily accessible, formulated in clear and simple terms. Without prejudice to the observation it will make in this regard, the Contentious Chamber stresses that this is all the more the case if, as it sets out, the defendant does not have the identity of the Americans concerned in order to provide them with individual information. The Contentious Chamber recalls that the EDPS requires individualized information (see above)[130].

291. The Contentious Division thus noted the following:

292. https://finances.belgium.be/fr/E-services/fatca(131): this is a general page which describes the principle of "FATCA" agreement in general terms as below, and also includes a number of news items of a technical nature:

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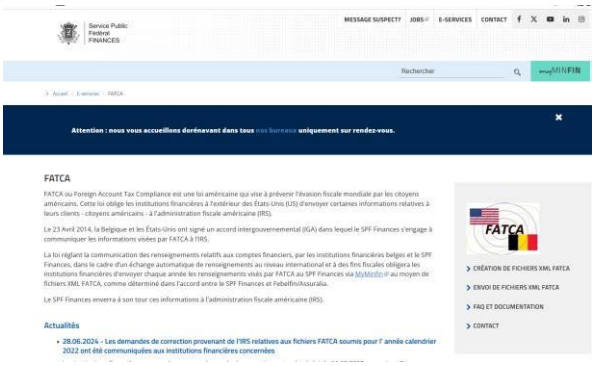
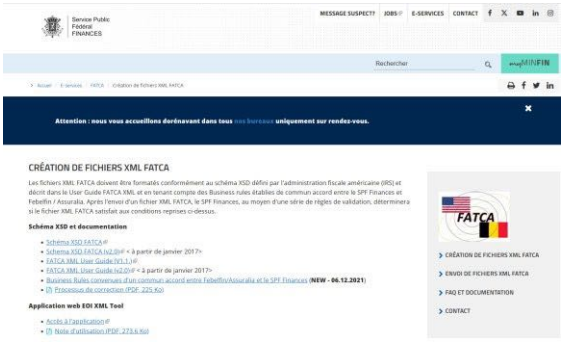
[129] See. ECLI:EU:C:2024:988, paragraphs 40 to 43: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62023CJ0169. There is in fact a difference in language between the French version and, for example, the Dutch version of this provision. Whereas the French version of article 14.5.c) mentions "lorsque et dans la mesure où l'obtention ou la communication des informations sont expressément prévues par le droit de l'Union ou de l'Etat membre", the Dutch version of the text uses the following terms: *"wanneer en voor zover het verkrijgen of verstrekken van de gegevens[129] uitdrukkelijk is voorgeschreven bij Unierecht of lidstaatelijk recht"*.

[130] The Chambre Contentieuse is of the opinion that this individualized information can take the form an explicit reference to the SPF Finances website via the individualized information that financial institutions must provide to the persons concerned.

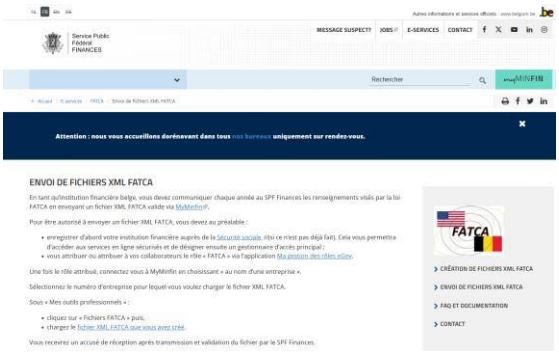
[131] Consultation of the website by the Chambre Contentieuse on April 23, 2025.



293. https://financien.belgium.be/fr/E-services/fatca/creation_fatca_xml_files[132]: is the "Fatca XML file creation" page, which details how FATCA XML files must be formatted in accordance with 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.



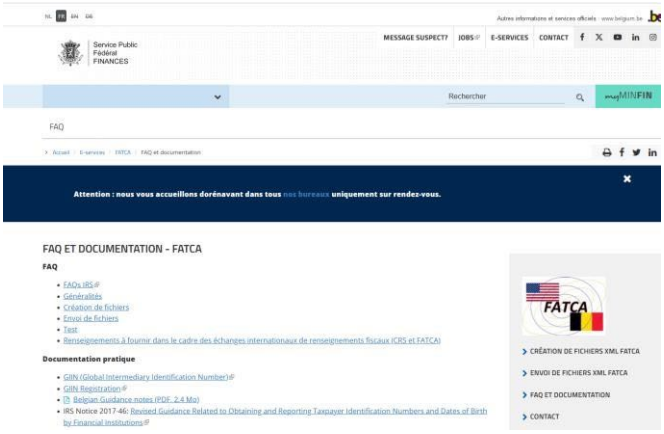
294. https://financien.belgium.be/fr/E-services/fatca/envoi_fatca_xml[133] files: this page describes the process for sending files to the defendant, and is therefore also aimed at financial institutions.



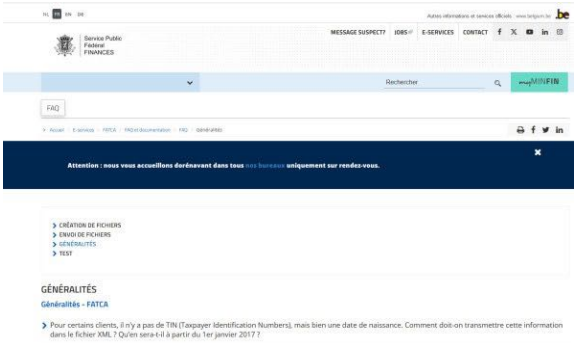
[132] *Idem*

[133] *Idem*

295. https://financien.belgium.be/fr/E-services/fatca/faq and documentation[135]: this section "FAQ and documentation" contains a list of numerous links to various documents relevant to the transfer or taxation by foreign tax authorities (not exclusively "FATCA"), many of them in English.



296. https://financien.belgium.be/fr/E-services/fatca/faq and documentation/faq/generalites[136]: way of example, the FAQ Generalities refers to a number of questions (cited in the defendant's conclusions as contributing to the fulfillment of its duty to inform).



297. The Contentious Chamber notes that the elements of the defendant's website do provide information on the "FATCA" agreement, in particular on the obligations incumbent on Belgian banks and on the way in which the latter should provide the data to the defendant, which will in turn transmit it to the IRS. This information is both general and technical, and aimed for the most part at financial institutions, and not directly at the citizen potentially concerned. Many of the documents are only available in English.

298. In support of the preceding paragraphs, the Litigation Division notes that this information is not what needs to be actively *provided* to the public.

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[134] *Idem*

[135] *Idem*

[136] Idem

concerned within the meaning of article 14.1-2 of the RGPD. The Contentious Chamber considers this to a particularly serious breach, given that the right to information is a cornerstone of data protection law. Without information, the data subject is unable to be aware that his or her data is being processed. Moreover, they are deprived of the possibility of exercising the control over their data that the RGPD allows them to exercise, through the exercise of rights of which they are informed neither of the existence nor of the modalities exercise (see article 14.2 e) and 14.2.c) of the RGPD).

299. Furthermore, the various pieces of information, be they contained document or another, *quod non*, are neither easily accessible nor even less comprehensible to data subjects as required by Article 12.1. of the RGPD.

300. As the SI points out, these findings by the Chambre Contentieuse are in line with those made by the CSAF back in 2016 in its deliberation 52/2016:

> 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.

301. 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 RGPD** on the part of the defendant both because it failed to inform the first plaintiff with regard to the transfer of his personal data to the IRS and because of the insufficient information it makes available to the data subjects, including the Belgian accidental Americans represented by the defendant.

II.6.4. As for failure to comply with the obligation to carry out a AIPD

302. For the reasons set out in paragraph 160 above, the Contentious Chamber considers that Article 35 of the GDPR applies to the defendant independently of Article 96 of the GDPR, this without prejudice to the fact that as early as 2015, Group 29 advocated the completion of a DPIA with regard to data processing taking place in the context of the automatic exchange of data for tax purposes[137].

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[137] See Group 29 document WP 234, quoted above: *"Each Member State should consider implementing an agreed Privacy Impact* Assessment *aiming to ensure that the data protection safeguards are adequately addressed, and a consistent standard is applied for the tax cooperation agreements by all EU countries"*.

303. When the controller carries out one of the processing operations listed in Article 35.3. of the RGPD[138], it is obliged to carry out a DPIA. The same applies when the planned processing operation is included in the list of processing operations requiring a DPIA adopted by the DPA pursuant Article 35.4. of the GDPR[139]. The processing operations covered by the complaint are not covered by these two paragraphs of Article 35.

304. This exclusion does not exempt the controller from checking whether it does not fall within the conditions for application Article 35.1. of the RGPD, which 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 presenting similar high risks".*

305. This obligation must be understood in the context of the controller's general obligation to appropriately manage the risks posed by the personal data processing operations it carries out. It thus forms part of its accountability obligation (Articles 5.2 and 24 of the RGPD).

306. The defendant therefore had to consider whether the transfer to the IRS required it to carry out a DPIA or not, and to do so as early as May 25, 2016 in order to be in compliance by May 25, 2018 at the latest, and then remain vigilant to any changes - factual or in the legal framework - that would require a reassessment of the risks.

307. In this regard, the defendant states in its defense that when questioned as to what by the IS on June 30, 2021, its DPO responded that on the basis of a pre-impact analysis, it had been concluded that a DPIA was not necessary given the fact:

- That the law had incorporated the remarks made by the OPC in the two opinions issued on the bill;

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data are adequately taken into account and that a consistent standard is applied to tax cooperation agreements by all EU countries).

[138] Article 35.3 of the GDPR provides that a DPIA is required in the following 3 cases: (a) the systematic and in-depth evaluation of personal aspects concerning natural persons, which is based on automated processing, including profiling, and on the basis of which decisions are taken which produce legal effects with regard to 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 as referred to article 10, and (c) the large-scale systematic surveillance of a publicly accessible area.

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

- That the CSAF had issued a resolution authorizing the transmission of data to the US tax authorities, and that the terms of this resolution had been implemented;

- That the processing complies with the requirements of the AEOI standard on confidentiality and data protection, as well as the defendant's information security policies based on the ISO27001 standard: the transmission of information is doubly protected, at the level of the encrypted and signed files and at the level of the channel through which the information is communicated (MyMinfin secure platform for data transmission by Belgian banks and IDES secure platform for transmission to the IRS);

- That the US 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 out in the "FATCA" Data Safeguard Workbook.

308. The SI did not issue any considerations with regard to this response, limiting itself in its additional investigation report to reproducing the response of the defendant's DPO. In its conclusion, the SI does not specifically mention the AIPD provided for by the RGPD, generally concluding on the presence of guarantees concerning the protection of transferred data and on the reciprocity of exchanges.

309. As for the complainants, they are of the opinion that an AIPD should have been carried out.

310. The Contentious Division immediately notes that the defendant's DPO does specify the date on which this pre-analysis was carried out. While the SI explicitly requested that this analysis be communicated to it during the course of the investigation, the defendant has so far refrained from doing so. This pre-analysis does not appear in the file, and the defendant therefore remains unable provide proof that it was carried out during the period in question.

311. In any event, the Litigation Division considers that the arguments of the
based on this pre-analysis cannot be followed for the following reasons.

312. The Contentious Chamber recalls Article 35.10 of the GDPR, which provides that *"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 a data protection impact has already been carried out as part of a general impact carried out in connection with adoption of the legal basis in question, paragraphs 1 to 7 shall not*

do not apply, unless Member States deem it necessary carry out such an analysis prior to the processing activities"[140].

313. Article 23 of the Belgian Data Protection Act states that even if an impact analysis has been carried out as part of the adoption of the legal basis on which the processing is lawful (Article 6.1. c) or Article 6.1. e) of the GDPR), the controller is **not** exempt from carrying out a DPIA within the meaning of Article 35.1. of the GDPR when the conditions for its application are met.

314. The Belgian legislator has thus expressly provided that the DPIA carried out in the context of parliamentary work does not exempt the controller from carrying out a DPIA within the meaning of Article 35 of the RGPD prior to the operationalization of the processing operations concerned[141]. Opinions issued by the OPC and SCF's authorization with regard to compliance with Directive 95/46/EC are not relevant as a DPIA within the meaning of Article 35.10 of the RGPD. **In any event, it would be contrary to Article 23 of the LTD, read in the light of Article 35.10 of the RGPD, to admit that a pre-analysis based on these texts to conclude that the data controller is not required to carry out a DPIA, be admitted as an exemption.** Finally, the Contentious Division refers to its conclusions with regard to these opinions and deliberations (section II.6).

315. The fact that the pre-analysis also based on the existence other standards is also irrelevant. As will be shown below, these standards alone, which mainly guarantee a certain level of safety, are not sufficient to absolve the defendant.

316. The Contentious Chamber is in fact of the opinion that the transfer of data to the IRS is processing likely to give rise to a high risk to the rights and freedoms of data subjects within the meaning of Article 35.1. of the GDPR for which a DPIA was required.

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[140] Emphasis added by the Chambre Contentieuse.

[141] See the LTD's preparatory work on Article 23: "It is stipulated that a data protection impact assessment must be carried out before the processing activity is implemented, even if an impact assessment has already been carried out when the implementing law or regulation was drawn up, in order ensure an effective and timely analysis when all the elements are brought to the attention of the . All the elements of the impact are set out in article 35 of the Regulation. The analysis must contain at least a systematic description of the operations, the purposes, including, where applicable, the legitimate interest pursued, an assessment of the necessity and proportionality of the processing operations with regard to the purposes, an assessment of the risks to the rights and freedoms of the data subjects, the measures envisaged to address the risks, including safeguards, security measures and to ensure the protection of personal data and to provide evidence compliance with the Regulation, taking into account the rights and legitimate interests of the data subjects and other persons affected. When drawing up the legal basis, it is often difficult to see in detail which practical and technical security measures and mechanisms will be most likely to respond to the risks identified in the analysis. Similarly, when the processing is implemented, it may turn out that the measures and mechanisms put in place generate additional risks that had not been taken into account in the initial analysis": https://www.lachambre.be/FLWB/PDF/54/3126/54K3126001.pdf (House of Representatives, Doc. Parl., 54 3126/001, page 48.

317. **Several criteria cited under Recital 75 of the RGPD as well as in the Lines EDPS guidelines on AIPD [142] attest a potentially high risk** in this case.

318. Thus, the Contentious Division held:

- Systematic monitoring[143] in that the data concerned are, except in the case of the "exception" linked to the "declarable" threshold of bank accounts systematically transferred annually to the IRS, whether or not there is any indication of tax evasion (section II.6.1.3);

- The data transferred to the IRS is financial data which falls into the category of "highly personal data"[144] within the meaning of the aforementioned Guidelines;

- The data is processed on a "large scale"[145] in that it concerns, a priori and with limited exceptions, the data of all US nationals with bank accounts in Belgium. The scope of the obligation and its recurrence, even on an annual basis, play a role here in assessing the "large-scale" nature of the processing, alongside the number of data subjects and the volume of data transferred (see also section II.6.1.3);

- The data subjects can be described as "vulnerable persons" (recital 75) if an imbalance in their relationship with the defendant can be identified, and even more so with the IRS, the recipient of the data. This imbalance arises not only from the fact that the transfer is imposed on the data subjects without their being able to object, but above all from the complexity of the legal framework, including the existence of possible remedies for the exercise of their rights;

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[142] 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 EDPS endorsed these guidelines on May 25 2018 at terms of the decision that you find here: https://edpb.europa.eu/sites/default/files/files/news/endorsement of wp29 documents.pdf

[143] The EDPS's AIPD Guidelines define surveillance as data processing used to observe, monitor or control data subjects, including data collection via networks, for example. Surveillance" is therefore not limited to camera surveillance, for example. It also includes
"Systematic" means any surveillance that meets one or more of the following criteria: it is carried out according to a system; it is prepared, organized or methodical; it is carried out as part of a general collection plan; it is carried out as part of a strategy, which is the case here.

[144] The EDPS's GDPR Guidelines specify that beyond Articles 9 and 10 of the GDPR, certain categories data may be considered to increase the possible risk to individuals' rights and freedoms. These considered "sensitive" in the common sense of the term. Financial data is one such category, a fortiori when its disclosure is intended to combat breaches that could be imputed to the individuals concerned.

[145] To determine whether a processing operation is "large-scale", the EDPS recommends, in his AIPD Guidelines, 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.

- According to the Contentious Chamber, the purpose of the data processing (at the very least, to combat tax evasion) and the subsequent processing likely to be carried out in the United States entail a potential "cross-referencing or combination of data sets", another criterion of the guidelines already cited.

319. 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, at least as far as the disputed processing is concerned. The defendant cannot be unaware of this, and this situation, according to the Contentious Chamber, requires particularly rigorous attention and risk assessment.

320. The Contentious Chamber clarifies 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 its Guidelines requires a DPIA. Generally speaking, the EDPS considers that the more criteria a 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.

321. **Combined, the presence of the 5 criteria identified** in point 318 **indicates a high level of risk** for the reported transfer to the IRS. This high level of risk justified, in the view of the Litigation Division, a DPIA within the meaning of article 35.1. to be carried out by the defendant, as has already been recommended since 2015 (point 302). Furthermore, an assessment by the defendant of the compliance of the agreement

"This would have enabled the Belgian public authorities to be alerted and a revision of the agreement to be initiated. This analysis was, by the defendant's own admission, not carried out for reasons that the Litigation Division rejected under the terms of the preceding paragraphs.

322. Accordingly, the Contentious Chamber **concludes that** the defendant has **failed to comply with Article 35.1. of the RGPD** with regard to the processing operations complained of by the plaintiffs.

II.6.5. As for the breach of article 20 of LTD

323. The Contentious Chamber recalls that, since the complaint concerned non-compliance with article 20 of the LTD, it invited the parties to defend themselves with regard to this grievance in its letter of May 30, 2024 *"insofar as this grievance is maintained by the plaintiffs, the latter having abandoned it during the exchange of conclusions which led to decision 61/2023 of Contentious Chamber annulled by the Court of Contracts"*(point 76).

324. The Litigation Division notes that the parties have not reached any further conclusions on this grievance in the context of the resumed proceedings leading to the present decision. It notes that the subject matter of the complaint no longer includes it and does not rule on it.

II.6.6. As for the failure to accountability

325. In execution of the principle of responsibility or "accountability", the defendant was required, taking into account the nature, scope, context and purposes of the processing as well as the risks, varying in degree of probability and seriousness, to the rights and freedoms of natural persons, to implement appropriate technical and organizational measures to both ensure that the processing is carried out in accordance with the RGPD as well as to be able to demonstrate this (Article 24 of the RGPD.

326. In this case, the nature of the processing operation, its scope and purpose, **certainly risks for the rights and freedoms of the data subjects (as the Litigation Division demonstrated in section II.6.4 above on the obligation to carry out an AIPD).**

327. The Litigation Division ruled that the defendant had not accurately assessed the risks to the rights and freedoms of the first plaintiff and the Belgian accidental Americans whose interests were being defended by the second plaintiff, nor had it adopted the appropriate measures to deal with these risks.

328. The defendant could not have been totally unaware of the repeated calls (some of them subsequent to the opinions and authorizations it relies on) particularly from data protection authorities including the DPA meeting within Group 29 and then the EDPS to assess an international agreement such as the "FATCA agreement in the light of the RGPD. While some of these political appeals were aimed directly at the Belgian "negotiating" state, which is not in the cause with this hat on, others of a more technical nature in the form of the Guidelines cited in this decision, for example, were addressed directly to controllers such as the defendant.

329. In application of its accountability obligation, the defendant, as the only party responsible for the transfer to the IRS, to ensure compliance with the various safeguards governing the transfer to the IRS, in particular proportionality and the provision of information to the persons concerned - two aspects emphasized by the CSAF in its authorization 52/2016 with conditions without attempting to absolve itself of these obligations by hiding behind the fact that it would only be a logistical intermediary (even if this is the result of an international consensus on how to transfer data, as the defendant specified at the hearing of December 11, 2024) - even it is

responsible for processing. Indeed, its responsibility cannot be limited to guaranteeing a secure data transfer to the IRS.

330. In view of the various breaches found under headings II.6.2, II.6.3 and II.6.4, the Contentious Chamber finds that **the defendant has breached its obligation of accountability**. In support of the foregoing, it concludes that the defendant has **breached Articles 5.2. and 24 of the RGPD** (accountability) with regard to the processing operations complained of by the plaintiffs.

III. Corrective measures and sanctions

331. Under article 100.1 of the LCA, the Chambre Contentieuse has the power to:

1° dismiss the complaint; 2°

dismiss the case;

3° to suspend delivery; 4° to propose a

settlement;

5° issue warnings or reprimands;

6° order compliance with requests from the person concerned to exercise his or her rights;

7° order that the person concerned be informed of the security problem;

8° order the freezing, limitation or temporary or definitive prohibition of processing; 9°

order the processing to be brought into conformity;

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

11° order the withdrawal of approval from certification bodies; 12°

impose fines;

13° impose administrative fines;

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

15° forward the file to the Brussels Public Prosecutor's Office, which informs it of the action taken;

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

332. On the basis of the documents in the file and at the end of its analysis, the Litigation Division concludes that the transfer of the first plaintiff's personal data by the defendant to the IRS was unlawful, since this transfer occurred in violation of the principles of

purpose, minimization and the rules of Chapter V of the RGPD, in particular Article 46.2. a) of the RGPD. The Contentious Chamber also demonstrated that this unlawfulness more generally also affects, the transfer of personal data of Belgian accidental Americans that the second plaintiff is defending.

333. In its Schrems II judgment already cited, the CJEU 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 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 data transferred 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, in the absence of the controller or its processor established in the Union having itself suspended or terminated the transfer"* (paragraph 121 of the judgment).[120]

334. In view of the fact that these processing operations are part of an international commitment by the Belgian State, the Contentious Chamber does not issue a prohibition but, in support of articles 58.2. d) and 100.1.9° of the LCA, **that the defendant bring its data transfer to the IRS into line within one year of the date of this decision, taking into account all the considerations put forward by the Contentious Chamber** with regard to the principles of purpose, proportionality and all the appropriate safeguards that should govern the said transfer.

335. The Contentious Chamber finds that the defendant is guilty of a **breach Article 14.1-2 combined with Article 12.1 of the RGPD** in that the defendant did not sufficiently inform the first plaintiff and does 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.6.3).

336. The Contentious Chamber finds that the defendant was also guilty of a **breach of Article 35.1. of the GDPR** in that the defendant did not carry out a DPIA with regard to the processing operations complained of by the plaintiffs (section II.6.4).

337. Lastly, the Contentious Chamber finds that the defendant has also been guilty a **breach of Articles 5.2. and 24 of the RGPD** in that the defendant has failed to fulfil its obligation of responsibility with regard to the processing operations complained of (accountability) (section II.6.6).

338. **For these breaches**, the Contentious Chamber issues **a reprimand** to the defendant on the basis of articles 58.2.b) of the RGPD and 100.1, 5° of the LCA. This reprimand **is accompanied a compliance order** based on articles 58.2. d) and 100.1 9° of the LCA aimed at:

- **to bring the transfers of personal data carried out in execution of the FATCA agreement into compliance with the RGPD within one year of notification of this decision**, taking into account the considerations issued by the Contentious Chamber in this decision with regard to the principle of proportionality in view of the purpose as well as with regard to the requirements of Chapter V of the RGPD (Articles 5.1. b) and 5.1.c) of the RGPD; Article 46.1 and 46.2. a) of the RGPD);
- to **provide, one year of notification of this decisionfull, clear and accessible information about the transfer of personal data to the IRS under the "FATCA" agreement** on its website (Articles 12.1 and 14 of the RGPD) ;
- **to carry out, one year of notification of this decision, a DPIA in accordance with article 35 of the RGPD**. In this respect, the Contentious Chamber is aware that the RGPD does not require the publication of the DPIA and that it is at the discretion of the data controller whether or not to publish it. However, at least partial publication, in the form a summary or conclusion of its DPIA, could be considered by the defendant. Such a practice would be useful to instill confidence in transfers it carries out in its capacity as public authority, and to pledge accountability and transparency to data subjects[146].

IV. Publication of decision

339. Given the importance of transparency with regard to the decision-making process and the decisions of the Litigation Division, **this decision will be published on DPA website.** Up to now, the Litigation Division has generally decided to publish its decisions with the deletion of the direct identifying data of the plaintiff(s) and persons named, whether natural or legal persons, as well as those of the defendant(s).

340. In the present case, the Litigation Division has decided to publish the present decision **with identification of parties to the exclusion of the first plaintiff**.

[146] See EDPS Guidelines on AIPD, page 21 of the French version.

341. The Litigation Division points out that this **publication, which identifies** both the second plaintiff and the defendant, **pursues several objectives**.

342. As far as **the defendant is** concerned, it has an **objective of general interest**, because the present decision addresses the question 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/EEA. The identification of the defendant is also **necessary for a 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 Administrative Jurisdiction Division[147].

343. As far as **the second plaintiff** is concerned, a useful reading of the decision also requires that her identity be disclosed, since she is **defending a specific and identified category of persons concerned**. Furthermore, although this is not an overriding argument, the Litigation Division is aware that the complaint lodged by the second plaintiff against the defendant **was reported in the press on the initiative one of her counsel** and was therefore made public.

344. Finally, the publication of the identity of the **second complainant and the defendant** also contributes to the quest for consistency and harmonized application of the RGPD. As set out in section II.2, the complaint was not intended to be dealt with under the one-stop-shop mechanism provided for by the RGPD. The "FATCA" issue is no less topical and of concern well beyond Belgium's borders. It cannot therefore be ruled out that, as has already been the case, other EU/EEA data protection authorities will have to deal with similar complaints in the future; complaints for the examination of which taking cognizance of the present decision may be useful, each supervisory authority exercising its powers in complete independence as has already been explained.

147 See also https://www.autoriteprotectiondonnees.be/publications/politique-de-publication-des-decisions-de-la-chambre- contentious.pdf

BY THESE REASONS,

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

- Pursuant to Articles 58.2.b) of the RGPD and 100.1, 5º of the LCA, to formulate a reprimand against the defendant
    - As regards the violation of Articles 5.1.b) and 5.1. c), 46.1 and 46.2.a) of the RGPD, together with an order to bring transfers of personal data to the IRS in execution of the ' FATCA " agreement into compliance with the RGPD within one year of notification of this decision ;
    - with regard to the violation Article 14.1-2 combined with Article 12.1 of the RGPD, accompanied by a compliance order on the basis of Articles 58.2.d) and 100.1.9° of the LCA consisting of providing RGPD-compliant information on data transfers made pursuant to "FATCA" agreement on its website one year of the notification of this decision ;
    - as regards the violation Article 35.1 of the RGPD, with a compliance order on the basis of Articles 58.2.d) of the RGPD and 100.1.9° of the LCA consisting of the completion of a DPIA within meaning of Article 35 of the RGPD within one year of the notification of this decision with regard to data transfers carried out in execution of the "FATCA" agreement ;
    - regarding the violation of articles 5.2. and 24 of the RGPD.

  Supporting documents attesting to the compliance measures ordered must be sent to the Chambre Contentieuse at litieationchamber@apd-Vba be one year of notification of this decision.

In accordance article 108.1 of the LCA, an appeal against this decision may be lodged with the Cour des Marchés (Brussels Court of Appeal) within thirty days of its notification, with the Autorité de protection des données (APD) as defendant.

Such an appeal may be lodged by means an interlocutory application, which must contain the information listed article 1o34ter of the Codejudiciairel[48]. The interlocutory application must be

[48] The request shall contain, under penalty of nullity:
1º day, month and year:
2º the surname, first name and address of the applicant, as well as, where applicable, his or her capacity and national register number or company number;
3º the name, , address and, where appropriate, the capacity of the person to be summoned, 4º the subject and summary of the grounds for the request;
5º an indication of the judge hearing the claim

filed with the clerk's office of the Cour des Marchés in accordance with article *1034quinquies* of the C. jud.[149], or via the Ministry Justice's e-Deposit information system (article *32ter* of the C. jud.).

(Sé).Yves Poullet

Chairman of the Litigation Division

6° the signature of the applicant or his lawyer.

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