

Info note



EDPB Plenary meeting, 26 September 2018

ITEM 3.5.1 - 26 September 2018

INFO NOTE - FATCA - Discussion/Request for mandate

Financial Matters Subgroup

I. Background

In the last few years, the WP29 has addressed the US law Foreign Account Tax Compliance Act (FATCA) issue and the impact of automatic exchange of information for tax purposes on the right to the protection of personal data in several documents.

The WP29 sent two letters the EU Commission (DG TAXUD), respectively adopted on 21st June 2012¹ and on 1st October 2012², concerning FATCA where the Group undertook a first analysis of the interaction between FATCA and Directive 95/46/CE. In 2015, the WP29 issued (i) a statement on automatic inter-state exchanges of personal data for tax purposes³ and (ii) 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 purposes⁴.

During its 107th meeting (27-28 September 2016), the WP29 Plenary confirmed the mandate given to the Financial Matters subgroup to continue working on the monitoring of FATCA implementation in EU Member States.

¹See: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf

²See: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20121001_letter_to_taxud_fatca_en.pdf

³ http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp230_en.pdf

⁴ http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp234_en.pdf

II. Current state of play

On 1 September 2016, a petition was addressed by a group of individuals to the European Parliament on the implications of FATCA on human rights and data protection, in particular in respect of processing of data related to “accidental Americans” or dual European/US nationals (see attachment).

The petitioners request, inter alia, that the European Parliament recognises the predicament of European “accidental Americans” and the consequences for them and their families and that the EU Commission and EU Governments engage with the U.S. Government to restrict and amend the scope of the Intergovernmental Agreements and FATCA to remove “Accidental Americans” and dual E.U. citizens from their scope.

This petition was then brought to the attention of the WP29 Chair in January 2017 by email requesting the views of the WP29 on FATCA. The Presidency team responded through the WP29 Secretariat in July 2017, by sending the 2012 WP29 letters on FATCA recalling the WP29 position. The petitioners responded considering the letters outdated and without reaching to a conclusion on FATCA. In September 2017, the petitioners requested again the WP29, as custodian of these issues, to react on the impacts of FATCA on “accidental Americans” as regards Article 8 of the ECHR and EU data protection legislation. The petitioners anticipated that failing any response from the WP29 they will have to turn to the Courts.

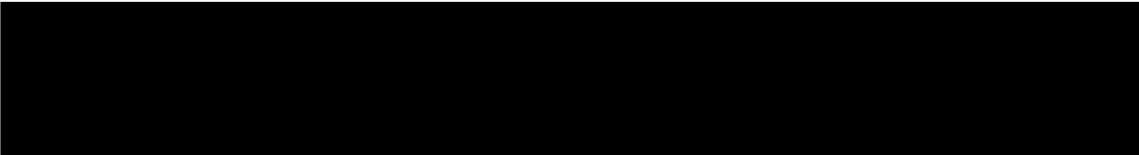
The WP29 sent a letter (*attached to this infonote*) to this collective of “accidental Americans” clarifying that the WP29 is not the appropriate body to render an opinion on the scope of application of FATCA and on its application to “accidental Americans”. In this letter, the WP29 also highlighted its previous actions on the issue and the importance of the respect and compliance of data protection principles when processing and transferring data on the basis of FATCA.

On March 30, 2018, the collective of “accidental Americans” responded by email to our letter stating that our response does not address their query which is: **whether FATCA and its web of implementing Intergovernmental agreements (IGAs) is compatible with EU laws and in particular with Article 8 of the ECHR. They also argue that they are EU citizens and as such have rights under EU laws. Therefore, as a matter of EU law, is FATCA compatible with EU laws and in particular data privacy laws?**

In addition, a resolution was adopted by the European Parliament with regards to FATCA on July 5th 2018 (see attachment). The European Parliament urges in this resolution:

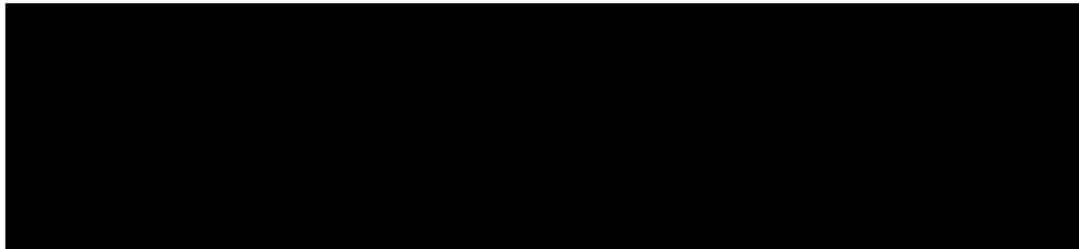
“the Commission and the European Data Protection Board to investigate without delay any infringement of EU data protection rules by Member States whose legislation authorises the transfer of personal data to the US IRS for the purposes of FATCA, and to initiate infringement procedures against Member States that fail to adequately enforce EU data protection rules;”

III. Discussion points



Request to the Plenary:

In the light of the further request of the Association of “accidental Americans” and of the European Parliament’s resolution, the Financial matters subgroup requests the plenary to decide on whether the subgroup should:



- (ii) prepare a short statement in response to the European Parliament’s resolution mentioning that the EDPB has already initiated its work on the elaboration of guidelines on legally binding and enforceable instruments between public authorities and bodies which could serve as a basis for Member States in the event of reviewing their IGAS and if necessary amend them in order to be in full compliance with EU data protection legislation.***

Attachments:

- Petition to the European Parliament by “accidental Americans”, 1 September 2016 + supplement
- Answer to the collective of European “accidental Americans” by the WP29, 8 February 2018

- European Parliament Resolution on the adverse effects of the US Foreign Tax Compliance Act (FATCA) on EU citizens and in particular 'accidental Americans' (2018/2646(RSP))
- EU Parliament report on FATCA and its application at international and EU level