European Data Protection Board

To the attention of: Dr. Andrea Jelinek, Chair
edpb@edpb.europa.eu

To the attention of its members

Copy to:

European Commission

Commission PETI of the European Parliament

Paris/Brussels/Luxembourg/Amsterdam, 13 April 2023

Subject: FATCA and the assessment of its compatibility with the GDPR

Dear Dr. Jelinek, dear members of the EDPB,

We are writing on behalf of the Association of Accidental Americans and on behalf of your fellow EU citizens who are accidentally born in the US and referred to as "accidental Americans". As you know, personal information has been and is still sent in bulk to the United States by EU/EEA Member States under the FATCA framework for more than seven (7) years, even when they have no real link with the US besides being born there.

1. The EDPB call for a compliance check on the FATCA agreements two years ago

In a statement dated 13 April 2021 ("Statement 04/2021 on international agreements including transfers")¹, the European Data Protection Board (EDPB) has invited the EU/EEA Member States to evaluate and, if necessary, review international agreements involving the transfer of personal data to third countries, particularly in the area of taxation.

An informational note that was annexed to the statement later on, has made it very clear that this call for assessment directly concerned the different FATCA agreements between the individual EU/EEA Member States and the US.

2. No significant progress but a ping-pong game between the EU and national levels

Now we are exactly two years later and, at least looking at it from the outside, no significant progress has been made in this matter.

Unless we are mistaken, there is no single EU/EEA Member State which has communicated about this assessment and/or which has explicitly and publicly confirmed that their FATCA agreements are compliant with the EU/EEA personal data protection acquis.

The only echo we hear is that the EU/EEA Member States are having difficulties making this assessment and send the ball back to the EU level in order to have a coordinated approach (see, e.g., the EU Presidency Working Paper of 12 May 2021):

"After the Commission invited the Member States to engage with their national data protection authorities, several Member States suggested a coordinated approach to tackle the matters at hand. Some Member States also expressed the need for more detailed guidance on how to proceed in relation to Member States’ international agreements that provide for data transfers for tax purposes, as well as on the adequacy under the GDPR of the exchanges of information for tax purposes that occur under the OECD’s Common Reporting Standard."

Also, the further discussions at the EU level did not seem to lead to any tangible results (see, e.g., The EU Presidency Working Paper of 19 October 2021).

In annex, we provide for an update overview, which we already had provided to you in September 2022, on the reactions of several ministries of finance and/or national data protection authorities following the letters that the AAA has sent to them on 18 August 2022 and, earlier, on 29 June 2021. The difference in approaches make it once clear again that an intervention of the EDPB is necessary. Based on an e-mail that we have received from the Irish ministry of finance on 17 November 2022, it seems that the different national data protection authorities are working together under the Article 63 GDPR consistency mechanism, as it seems under the form of a working group within the EDPB.

3. The violations of EU data protection law are multiple and serious.

Neither at the level of the Council of the EU, nor at the level of the EU/EEA Member States, a clear statement has been made as to the compatibility of the FATCA agreements with the EU data protection legislation, most certainly because the FATCA legal framework simply cannot be defended from a data protection regulatory perspective for several reasons, some of which we have – without being exhaustive – explained more in detail in our previous letter of 13 April 2022 and which we are most happy to repeat again here.

This situation is surprising and unacceptable and requires immediate remediation as

- the relevant GDPR provisions in essence do not differ significantly from the Directive 95/46/CE which was applicable at the time of the adoption of the FATCA agreements between the different EU/EEA Member States and the US; and

- the EDPB's predecessor, the so-called Article 29 Working Party, already had issued very clear directives in its 2015 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.

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2 https://vu.fr/KQBV
a. A serious violation of the principle of accountability

According to these 2015 guidelines, “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.”

Obviously, the EU/EEA Member States have not carried out such a privacy impact assessment and, logically, do not seem to know where they stand in terms of their personal data protection compliance. If they do, they would not have any problems in providing the necessary justifications that their FATCA agreements are compliant from a data protection regulatory perspective.

This lack of documentation and of a serious prior assessment of the data protection risks in relation to the relevant FATCA agreements is a blatant violation of the principle of “accountability” within the meaning of Articles 5 and 24 GDPR. This is reprehensible as such, independently from the violations of other GDPR provisions that may result from this lack of analysis.

Even when the EDPB has clearly called to assess the FATCA agreements under the provisions of the GDPR, we know that some EU/EEA Member States (Belgium and Luxembourg to mention some) like to play “cat and mouse” and refer to article 96 GDPR, in which event things should be analysed in the light of Directive 95/46/EC.

To the extent that these EU/EEA Member States justify the international transfer of personal data on “appropriate safeguards” (art. 26(2) Directive 95/46/EC and art. 46(2)(a) GDPR, see point b. below), it is obvious that they should have made a prior assessment on the processing of FATCA induced data and their transfer to the US in order to be sure that the safeguards adopted are “appropriate” taking into account the risks identified in the course of that assessment. A justification afterwards is not sufficient.

But even when some EU Member States start to come up with some reasoning that there are “appropriate safeguards” (for example, the guarantee that the FATCA induced data cannot be used for other than tax purposes), those advanced safeguards are highly fragmentary and do not provide for a complete set of “appropriate safeguards”.

Furthermore, many of them do not find their source in the FATCA or other bilateral international agreements in the tax space, whereas art. 46(2)(a) GDPR requires that the “appropriate safeguards” must be “provided [...] by : (a) a legally binding and enforceable instrument between public authorities or bodies”, i.e., must stem from the bilateral agreements themselves.

b. A serious violation of the rules on international data transfers

The current FATCA agreements with all EU/EEA Member States violate the provisions of the GDPR on international data transfers, as well as those of Directive 95/46/EC (which has been replaced by the GDPR but which, as per article 96 of the GDPR that some EU/EEA still dare to refer to, would still be in force for international agreements concluded before the adoption of the GDPR) for, amongst others, the following reasons:

- No public interest. Many tax authorities and/or FATCA related legislation⁴ in the EU Member States rely on “public interest” as a derogation for international data transfers within the meaning of article 26(1)(d) of Directive 95/46/EEC and article 49(1)(d) GDPR in order to justify the international data transfer and, also, the European Parliament came in a recent study to the conclusion that no other justification ground could be relied upon⁵.

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However, it is a settled position of the EDPB that “public interest” refers to the public interest of the EU/EEA or an EU/EEA Member State and not to the sole interest of a non-EU/EEA country, so that when an authority of a non-EU/EEA country requests data, this must take place “in the spirit of reciprocity for international cooperation”.

Under the different FATCA arrangements – and even when they made promises in this respect in the respective FATCA agreements –, the US have until date not foreseen an equivalent reciprocity in relation to the type of data that they receive via such an automatic exchange from the different EU/EEA Member States every year. Indeed, the IRS does not send information related to the account balance or value at the end of the calendar year, whereas the tax authorities of the EU/EEA Member States have to provide such information. The reason for the IRS not doing so, is – very ironically – that the US banks do not want to provide that data … for privacy reasons.

In our exchanges with some tax authorities, several EU/EEA Member States (e.g., France, Belgium and the Netherlands) dare to say that there is an equivalent reciprocity. This shows at what point some EU/EEA Member States hopelessly try to defend their FATCA agreements because both the EU and the US have clearly stated that there is no equivalent reciprocity.

Indeed, the Finish Presidency of the Council of the EU has come to the hard conclusion in December 2019 that there is a “lack of equivalent reciprocity in exchange of financial account information”. This position was approved by the Council High Level Working Party on Tax issues, which unites the representatives of all EU Member States.

Also, the Commissioner of the IRS, Mr. Charles Rettig, admitted in a hearing in front of the US Senate on 7 April 2022 that

“When FATCA was passed, we committed to our partners, our exchange partners around the world, that we would pass a similar provision with respect to reciprocal FATCA and it has not occurred yet, and so we are receiving information from them but S institutions are not providing that information”

Even if there would be an equivalent level of reciprocity, it is the position of the EDPB that the derogation ground in article 26(1)(d) of Directive 95/46/EEC and article 49(1)(d) GDPR cannot serve for “large scale” and “systematic” data transfers.

Therefore, there cannot be any other conclusion than that the derogation ground of an “important public interest” cannot be relied upon and that, in the absence of another justification ground, this international transfer of data is illegal.

- No appropriate safeguards. The EU/EEA Member States start to understand that article 26(1)(d) of Directive 95/46/EEC and article 49(1)(d) GDPR may not be a reliable ground to legitimise the transfer of FATCA induced personal data to the US, and this for the reasons set out above.

They are trying to justify these transfers on the ground that “appropriate safeguards” within the meaning of article 26(2) Directive 95/46/EC and article 46.2(a) GDPR would have been put in place in the FATCA legal framework. The EU/EEA Member States refer in this respect to the principle that FATCA induced data will only be used for tax and no other purposes.

However, as the Article 29 Working Party Guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of the automatic exchange of personal data

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for tax purposes (2015) and the EDPB Guidelines 2/2020 on articles 46(2)(a) and 46(3)(b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies clearly show that many other requirements must be met in order to conclude that “appropriate safeguards” are guaranteed. We will show below – and again without being exhaustive – that the FATCA legal framework does not even respect some of the most basic principles of EU data protection law and, more particularly, the principles of proportionality and purpose limitation.

As indicated above, no single EU/EEA Member State has demonstrated that it fully complies with the EDPB Guidelines 2/2020.

Moreover, as the FATCA data transfers have been implemented before the entry into force of the GDPR, they need to benefit from an authorisation of the EU/EEA Member State concerned as per article 26(2) of Directive 95/46/EC.

In any event, tax authorities in EU/EEA Member States that are serious about relying on “appropriate safeguards”, must in principle, make a “reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available” in the information that they must provide to the relevant data subjects as per article 14 GDPR.

We have seen that tax authorities or the financial institutions (collecting the FATCA data) never make any reference to such appropriate safeguards in their information towards the relevant data subjects.

c. **A serious violation of the principle of purpose limitation**

Furthermore, FATCA agreements are concluded for vague purposes (e.g., “to improve international tax compliance”), whereas in the 2015 guidelines of the Article 29 Working Party, the predecessor of the EDPB correctly stated that purpose wording such as “tax evasion” or “improvement of tax compliance” “may appear vague and insufficiently clear, allowing too much flexibility to the competent authority”. In this respect the FATCA agreements and the corresponding data transfers thus infringe article 6(1)(b) of Directive 95/46/EC and 5(1)(b) GDPR.

d. **A serious violation of the principle of proportionality**

It is impossible that the FATCA arrangements meet the necessity, proportionality and minimisation requirements in article 6(1)(c) of Directive 95/46/EC and 5(1)(c) GDPR.

In its letter of 21 June 2012 in relation to FATCA, the Article 29 Working Party had already raised significant questions on the proportionality and the necessity of the bulk data transfers that would be the consequence of FATCA:

> “FATCA must be mutually recognised as necessary from an EU perspective. This requires ensuring that there is a lawful basis for the processing through careful assessment of how FATCA’s goals balance with that of the EU’s fundamental right enshrined in Article 8 of the Charter of Fundamental Rights – the right to a private and family life, i.e. by demonstrating necessity by proving that the required data are the minimum necessary in relation to the purpose. A bulk transfer and the screening of all these data is not the best way to achieve such a goal. Therefore more selective, less broad measures should be considered in order to respect the privacy of law-abiding citizens, particularly; an examination of alternative, less privacy-intrusive means must to be carried out to demonstrate FATCA’s necessity.

> It might appear to some that there is a significant amount of personal data required under FATCA. Therefore consideration must be given to: a) whether the personal data processed is

limited to the amount that is truly recognised as necessary for the purpose of meeting the requirements of FATCA; b) is limited to only those purposes it is to be collected for; and c) exploring other ways of achieving the goals of FATCA which would result in processing less personal data i.e. via aggregation, anonymisation, pseudo-anonymisation etc.

The quantity and type of data required in future to achieve the same goal should remain under regular review to ensure that the data remains necessary and proportionate.”

As the Article 29 Working Party has further confirmed in its 2015 guidelines (under reference to the seminal judgment of the CJEU in cases C-293/12 and C-594/12, Digital Rights Ireland, Seitlinger a.o.,) that

“tax cooperation agreements should include provisions and criteria that explicitly link information exchange and, in particular, the reporting of personal data concerning financial accounts to possible tax evasion”.

Also, the EDPS has correctly stated in its Opinion 2/2015 on the EU-Switzerland agreement on the automatic exchange of tax information that

“the Agreement should have included provisions and criteria that explicitly link the reporting of personal data concerning financial accounts to possible tax evasion and that exempt low-risk accounts from reporting. In this respect, such criteria should be applicable ex ante to determine which accounts (and which information) would need to be reported. Only at that stage once the relevance (or irrelevance) of the reporting for the purpose of countering tax evasion has been established- the electronic search might help determining the residence of the account holder.”

Even more importantly, the CJEU, in a fairly recent judgment of 24 February 2022 in case C-175/20, has stated very clearly that tax authorities cannot proceed in a generalised and undifferentiated manner to the collection of personal data and should refrain from collecting data which are not strictly necessary to achieve the goals of the objectives. Also, the CJEU calls for the introduction of a more targeted approach on the basis of specific criteria.

This means that any automatically exchanged information under FATCA must relate to a proven risk of tax evasion. Such evidence is simply lacking here. Even when some (bank account) thresholds exist (below which no FATCA reporting is required), there is no proof that the information required above these thresholds contain a risk of tax evasion. On the contrary, only a fraction of less than 10% of accidental Americans who file a tax declaration, are eventually due to pay taxes in the US, as confirmed by a Dutch court in a judgment of 25 August 202112.

Furthermore, in the event that a financial institution reports accounts with an amount below the thresholds at hand (which they often do in order to de-risk and to avoid compliance issues), the tax authorities of the EU/EEA Member States do not have any room under the FATCA agreements to delete the relevant accounts, which must be, nonetheless, automatically transmitted to the US tax authorities. As a “data controller” within the meaning of Directive 95/46/EC and the GDPR, a national tax authority in the EU must, at all times, have the capacity to halt the transfer of non-relevant data and fulfil its role as gatekeeper. Any arrangement that constitutes an obstacle to this possibility, is illegal.

Finally, when analysing the proportionate character of a measure, its efficiency should also be taken into account. In this respect, the head of the US tax authority, IRS Commissioner Mr. Charles Rettig has admitted in a testimony of 17 March 2022 that FATCA data have not been really exploited as to date:

“Limited IT resources preclude us from building adequate solutions for efficiently matching or reconciling data from multiple sources. As a result, we are often left with manual processes to analyze reporting information we receive. Such is the case with data from the Foreign Account Tax Compliance Act (FATCA). Congress enacted FATCA in 2010, but we have yet to receive any significant funding appropriation for its implementation. This situation is compounded by the fact that when we do detect potential non-compliance or fraudulent behavior through

This calls a serious **doubt on the efficiency** of the FATCA arrangements and, hence, on the proportionality of those arrangements.

In a report of 7 April 2022 the US Treasury Inspector General for Tax Administration (TIGA) has quantified this screaming lack of efficiency of the FATCA measures\(^\text{14}\). Whereas the implementation of FATCA has costed about half a billion of US dollars to the IRS, billions of euros to the EU/EEA financial institutions and loads of troubles for the data subjects concerned and the accidental Americans in particular (financial institutions refuse to open an account or to further service them, …), the IRS has recovered only 14 million US dollars on the basis of its FATCA compliance activity (p. 22). More importantly, the report came to the finding that the IRS does not really leverage on FATCA data and did not follow its own compliance roadmap (p. 19):

> “However, in July 2018, we reported that the IRS had not updated the FATCA Compliance Roadmap since January 2016 and had taken limited or no action on a majority of the planned activities outlined in it.\(^\text{42}\) By October 2018, the IRS departed from the Compliance Roadmap and has not developed a revised comprehensive plan to manage efforts to leverage FATCA data to improve taxpayer compliance.”

As the EDPB has correctly recalled in its letter of 28 March 2023 on data sharing for AML/CFT purposes\(^\text{15}\) (and in line with the principle of accountability), for the introduction of privacy intrusive legislative measures “one should first review the effectiveness of the proposed measures in comparison with existing or alternative less intrusive measures” and that in case of “the lack of studies attesting to the effectiveness of these provisions”, the measures must be considered to be disproportionate.

In the same vein, not only when the effectiveness of the privacy intrusive measures has not assessed in advance but when the measures, in practice, prove to be inefficient later on, the only logical consequence is to abolish or to amend them.

### 4. Immediate action needs to be taken

In the light of the serious violations of EU/EEA data protection law set forth above and the actual risk that EU/EEA Member States and the EU institutions seem to be unwilling to take appropriate actions, we urge the EDPB as well as its members to remediate this situation.

We believe that the EDPB, as the case may be via its members (i.e., the national data authorities), should urgently request from the respective EU/EEA Member States the results of the assessment of their FATCA agreements, as requested by the EDPB in its letter of 13 April 2021.

For those EU/EEA Member States that do not respond in a satisfactory manner to this request, we call upon the different national data protection authorities to take enforcement measures, it being understood that the lack or a delay in delivery of the assessment is in itself a violation of the GDPR and, more particularly, the accountability principle.

Furthermore, we recall that the CJEU has confirmed in the seminal Schrems II-case that national supervisory data protection authorities have the **obligation**\(^\text{16}\) “to suspend or prohibit a transfer of personal data to a third

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\(^{14}\) https://www.treasury.gov/tigta/auditreports/2022reports/202230019fr.pdf#page18


\(^{16}\) In cases such as the present case where the international transfer is not covered by an adequacy decision of the European Commission.
country if, in its view, in the light of all the circumstances of that transfer” no valid transfer mechanism can be applied and “where the controller or a processor has not itself suspended or put an end to the transfer”.

In this context, we would also like to remind that the EDPB has, per article 70 GDPR, the mission to ensure a “consistent application” of the GDPR. Even when it is true that each EU/EEA Member State signs a bilateral FATCA agreement with the US, these agreements are all based on the same templates so that all EU/EEA Member States have more or less the same data protection issues in this respect.

When the EDPB does not take any action now, this would mean that its statement of 13 April 2021 would remain meaningless and unenforced. Justice delayed, is justice denied.

5. Transparency going forward

On a final note, we trust that the EDPB will be transparent about its actions that it undertakes and will provide the AAA “the broadest possible access” to any requested documents in line with the EU Ombudsman’s recommendation of 29 March 2023 in the joint cases 509/2022/JK and 1698/2022/FA.

* * *

Yours sincerely,

Fabien Lehagre  
President of the  
Association des Américains Accidentels

Vincent Wellens  
NautaDutilh

Annex: Reactions of several ministries of finance and/or national data protection authorities following the letters that the AAA has sent to them on 18 August 2022 and, before, on 29 June 2021
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Annex

Reactions of several ministries of finance and/or national data protection authorities following the letters that the AAA has sent to them on 18 August 2022 and, earlier, on 29 June 2021

- The **Belgian** minister of finance refers to an Opinion 28/2015 of 1 July 2015 of the then Belgian Commission for the Protection of Privacy in order to attest the alleged compliance of the FATCA arrangement between Belgium and the US. He does not take into account the developments that have taken place since (see also the point in relation to France as well as the case law of the CJEU in the seminal cases C-293/12 and C-594/12, *Digital Rights Ireland, Seitlinger a.o.*). Furthermore, that opinion did not review the presence of “appropriate safeguards” (as Belgium has initially based this transfer on the “public interest” derogation) and has explicitly put as a condition that the obligations of Belgium and the US would be reciprocal, which they are not.

The Belgian national data protection authority did not reply to the AAA’s letter of 18 August 2022 but has heard the complaint that the Association of Accidental Americans Belgium and at least one physical accidental American had filed with the authority. That case is currently taken into deliberation and a decision should follow in the coming months.

- In an earlier statement of 28 July 2021 (in reply to the AAA’s letter of 29 June 2021), the **Croatian** data protection authority has indicated that it was in contact with the different ministries for the review of the international agreements within the scope of the EDPB Statement 04/2021 and in view of the inclusion of appropriate safeguards.

- Its letter of 14 November 2022 the **Cypriot** minister of finance has replied that the FATCA arrangement contains provisions that prohibit a processing of the data for non-fiscal purposes.

In its Statement 04/2021 on international agreements including transfers, as adopted on 13 April 2021, the EDPB has requested the EU Member States to reassess their international agreements, such as the IGA, in taking into account its Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies. In these guidelines the EDPB explains what an international agreement needs to provide for "appropriate safeguards" and these requirement go way beyond the guarantee that the FATCA induced data are not used for non-fiscal purposes.

- By letter of 24 October 2022, the **Czech** ministry of finance chose to hide behind Article 96 GDPR but had to admit that there are “uncertainties considering the application of GDPR obligations in the area of international tax cooperation” and that “it is currently analysing possibilities how” to resolve those.

- The **Dutch** minister of finance has stated at several occasions that it “does not want to interfere” in the various procedures launched by the AAA and various individual accidental Americans but the different procedures before the national data protection authority are pending for several years now without any tangible progress being booked.

It is also worth to mention that throughout these procedures, the Dutch minister of finance first relied exclusively on Article 49(1)(d) GDPR but progressively tried to invoke that the FATCA arrangement between the Netherlands and the US contains appropriate safeguards. In this respect it relies on the rule that the FATCA induced data would, in principle, not be used for non-tax related reasons but dramatically fails to demonstrate compliance with the EDPB Guidelines 2/2020 on articles 46(2)(a) and 46(3)(b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies.

- On 16 February 2023 the **Estonian** ministry of finance confirmed the following:
“Since FATCA and other relevant instruments are implemented throughout the EU by very similar legal instruments and the GDPR rules apply in a uniform manner to all EU Member States, it is important to approach this matter in a coordinated manner at the EU level. Therefore, Estonia has not made any unilateral decisions on the appropriate safeguards to meet the GDPR requirements in various international cooperation instruments. These issues are being actively discussed at the EU level. We hope to share more details when these discussions have resulted in a uniform understanding of sufficient safeguards necessary to ensure compliance with European data protection regulations.”

Estonia refuses thus to assess the presence of “appropriate safeguards” on a EU Member State level whereas it (and not the EU) has concluded a bilateral FATCA arrangement with the US and the EDPB has requested Estonia to review this arrangement. In any event, implicitly but undeniably, this answer shows that the different EU Member States are still figuring out what sort of appropriate safeguards are needed for FATCA to comply with the GDPR and that, in other words, such safeguards are lacking at this very moment.

- By letter of 26 September 2022, the Greek national data protection authority has confirmed to be in contact with the Greek ministry of finance in relation to FATCA, without any response from the latter so far.

- For the French data protection authority, the CNIL, "nothing authorizes the CNIL to call into question the position established by the French administrative supreme court which ends its analysis by recalling that the interpretation of the invoked provisions of the regulation of the European Union is obvious such that it leaves no room for any reasonable doubt."

In doing so, it voluntarily decides to ignore many elements subsequent to the decision of the French Administrative Supreme Court (“Conseil d’Etat”) that was handed down in 2019, such as:

- the EDPB Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies;
- the EDPB statement 04/2021 on international agreements including transfers;
- the conclusion of the Finish Presidency of the Council of the EU in December 2019 that in the context of FATCA there is a “lack of equivalent reciprocity in exchange of financial account information”17;
- the fact that at the level of the Council of the EU itself, the EU Member States are still figuring out how to make automatic exchange of data for tax purposes compliant with the GDPR;
- different statements about the functioning of the IRS, conforming both the lack of reciprocity18 and the lack of efficiency and, hence, the necessity of the FATCA framework19-20, as well as
- the most recent case law of the CJEU on the matter and, more particularly, the recent judgment of 24 February 2022 in case C-175/20, where the CJEU has stated very clearly that tax authorities cannot proceed in a generalised and undifferentiated manner to the collection of personal data and should refrain from collecting data which are not strictly necessary to achieve the

18 https://www.finance.senate.gov/hearings/the-irs-the-presidents-fiscal-year-2023-budget-and-the-2022-filing-season (as from 01:25:45: “When FATCA was passed, we committed to our partners, our exchange partners around the world, that we would pass a similar provision with respect to reciprocal FATCA and it has not occurred yet, and so we are receiving information from them but S institutions are not providing that information”
20 https://www.treasury.gov/tigta/auditreports/2022reports/202230019fr.pdf#page18
goals of the objectives. Also, the CJEU calls for the introduction of a more targeted approach on the basis of specific criteria. Last but not least, the AAA has started a new procedure before the French Administrative Supreme Court in order to challenge the latest position of the CNIL in relation to the GDPR compliance of the FATCA agreement between France and the US. These proceedings are pending. In a reply to a parliamentary question of 18 October 2022 the French Government does not refer, however, to the decision of the 2019 judgment of the French Administrative Supreme Court but to ongoing discussions on EU and national level. The fact that these discussions take so long, cannot be interpreted otherwise than things are far from clear and that no sufficient safeguards are in place so that the current and past FATCA induced transfers are illegal. France, just like any other EU Member State, is blatantly violating article 24 GDPR and the principle of accountability on the basis of which it should be able at any moment which safeguards are implemented and why they must be considered to be appropriate and sufficient.

- The German ministry of finance has confirmed on 5 October 2022 that the German federal data protection authority, i.e., the German Federal Commissioner for Data Protection and Freedom of Information “has launched a review of the relevant legal frameworks of the exchange information in tax matters with regard to the GDPR”. Here again, Germany should have carried that assessment before implementing its FATCA arrangement with the US and not more than seven (7) years later. Furthermore, this statement seems to be in contradiction with the message of the federal data protection authority of 23 February 2023 according to which “The Federal Commissioner for Data Protection and Freedom of Information has not been asked by the German government to issue an opinion on the EDPB Statement 04/2021 on international agreements including transfers (adopted on 13 April 2021).”

- The Hungarian national supervisory authority could/did not want to confirm whether the Hungarian minister of finance but some kind of procedure seems to be on going.

- On 17 November 2022 the Irish ministry of finance indicated that “Officials in the Department of Finance have consulted with the relevant Irish authorities, and have been informed that a working group within the European Data Protection Board (EDPB) has been established and is considering this matter under the Article 63 of GDPR and corresponding with the relevant parties. As this is an ongoing operation of the EDPB the members are awaiting the conclusion of this work and therefore we cannot provide any formal documentation at this time.”

- By letter of 6 October 2022, the Latvian ministry of finance has acknowledged that since the adoption of the FATCA arrangement with the US, the case law in the field of data protection has developed but that the question of its compatibility with the GDPR should be tackled on an EU level.

- On 14 February 2023, the Lithuanian minister of finance in substance replied that “the European Commission together with competent entities of the United States, are in the process of preparation of the Trans-Atlantic Data Privacy Framework replacing the Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 on the adequacy of the protection provided by the EU-U.S. Privacy Shield annulled by the Court of Justice of the European Union”. This framework only applies to data transfers to commercial entities which, moreover, have to be self-certified in terms of GDPR compliance. Therefore, it does not have any incidence on the “appropriate safeguards” that are needed for transfers of FATCA induced data to the US tax authority.

- The Luxembourg minister of finance consequently refers to the discussions that are on going within the Council of the EU in respect to this topic, but no progress whatsoever has been made on this level. The minutes of the relevant working group within the Council of the EU in 2021 clearly show that the EU Member States agree that the automatic exchange of data must be further brought in line with the

21 “car les travaux sur l'articulation des accords internationaux avec la réglementation européenne se poursuivent au niveau européen et au niveau national”
GDPR and, therefore, implicitly but non-ambiguously indicate that the current situation may not be compliant.

- By letter of 19 October 2022, the **Polish** ministry of finance relies on the exception ground of “public interest” laid down in Article 49(1)(d) GDPR. As explained in the body of the present letter, this exception ground cannot be relied upon to justify the transfer of FATCA induced data because:
  - o of a lack of an equivalent level of reciprocity in the exchange of information under FATCA, and, moreover,
  - o it is the position of the EDPB that the derogation ground in Article 49(1)(d) GDPR cannot serve for “large scale” and “systematic” data transfers.

The ministry further deferred the question of the compliance of the Polish FATCA arrangement with the GDPR to the Polish national data protection authority. The ministry seems to minimise its responsibility there because the EDPB Statement 04/2021 was addressed to the EU Member States and thus, as far as FATCA is concerned, in the first place to the ministries of finance.

- On 27 December 2022, the **Romanian** ministry of finance has indicated that “the Ministry of Finance has initiated consultations with the Romanian Supervisory Authority in order to ascertain whether the provisions of FATCA IGA are in compliance with the EU regulations on data protection”.

- The **Slovenian** ministry of finance has confirmed\(^{22}\) that a working group has been set up at a national level and that discussions are ongoing.

Very surprisingly, the Slovenian national supervisory authority has indicated that it does not have the authority to pronounce itself on the GDPR compliance of the FATCA Arrangement between Slovenia and the US.\(^{23}\) We believe that the Slovenian authority should be firmly reminded that it does.

- The **Slovak** data protection authority is the first authority that has carried out an assessment of the FACTCA arrangement between its country and the US following the the EDPB Guidelines 2/2020, as the EDPB had requested in its declaration of 13 April 2021. It came to a preliminary conclusion that this arrangement did not contain sufficient appropriate safeguards as required in Article 46 GDPR.

The conclusion of the Slovak authority is, from a legal perspective, the only correct one. In this respect, the AAA reminds that in the Schrems II case, the CJEU has clarified that applying the sanctions of suspension or prohibition of the processing of personal data is not just a possibility but a real obligation if the GDPR provisions re international data transfers are not complied with:

> “Article 58(2)(f) and (j) of Regulation 2016/679 must be interpreted as meaning that, unless there is a valid European Commission adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority and in the light of all the circumstances of that transfer, those clauses

\(^{22}\) [https://vu.fr/KsrT](https://vu.fr/KsrT)

\(^{23}\) [https://vu.fr/4DBG](https://vu.fr/4DBG): “Informacijski pooblaščenec (v nadaljevanju IP) je prejel zahtevo v zvezi s Sporazumom o izboljšanju spoštovanja davčnih predpisov na mednarodni ravni in izvajanju FATCA, ki ga je Republika Slovenija z ZDA podpisala dne 2. junija 2014, in sicer v zvezi z neskladnostjo sporazuma z določbami Splošne uredbe o varstvu podatkov. Informacijski pooblaščenec nima pristojnosti odločanja o skladnosti dogovora s Splošno uredbino, saj je to v pristojnosti držav članic EU, zato se s pozivom obrambo na vas, kot resorno ministrstvo”

**Free translation:** "The Information Commissioner (hereafter IP) received a request regarding the Agreement on improving compliance with tax regulations at the international level and the implementation of FATCA, which the Republic of Slovenia signed with the United States on June 2, 2014, namely regarding the **non-compliance of the agreement with the provisions General Data Protection Regulations**. The information commissioner **does not have the authority** to decide on the compliance of the agreement with the General Regulation, as this is the responsibility of the EU member states, so we are appealing to you, as the line ministry"
are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of that regulation and by the Charter of Fundamental Rights, cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.”

The CJEU has clarified that data protection authorities are not entitled to set aside valid decisions of the European Commission; only the CJEU can. However, in the case of the FATCA Agreements between the various EU Member States and the US, there is no European Commission decision to be set aside. The national authorities have, as the case may be, to set aside national provisions but it is settled case-law of the CJUE that “both the administrative authorities and the national courts called upon, within the exercise of their respective jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means” (see, to that effect, in relation to administrative authorities: CJEU, judgment of 14 September 2017, The Trustees of the BT Pension Scheme, C-628/15, ECLI:EU:C:2017:687 referring to judgments of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, paragraph 31, and of 29 April 1999, Ciola, C-224/97, EU:C:1999:212, paragraphs 26 and 30).

Therefore, it should be reminded to the national supervisory authorities that if they find any GDPR non-compliance in the context of the GDPR assessment of the FATCA arrangements between their countries and the US, they should suspend or prohibit the FATCA induced data transfers to the IRS accordingly.

- The Swedish ministry of finance did not refer to any inclusion of the local supervisory authority but seems to admit that the FATCA agreement between Sweden and the US does not provide for appropriate safeguards within the meaning of Article 46 GDPR. The ministry relies on the exception ground of “public interest” laid down in Article 49(1)(d) GDPR. As explained in the body of the present letter and in relation to the position of the Polish ministry of finance, this exception ground cannot be relied upon to justify the transfer of FATCA induced data.