

Nicholas Lee

By email:  
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## Subject: Reply to your confirmatory application for access to documents – 2021ATD60

Dear Mr. Lee,

I refer to your confirmatory application of 11 November 2021 in which you requested the review of the position taken in EIOPA's letter of 28 October 2021 (EIOPA-21/786) by the ATD Coordinator.

The ATD Coordinator advised you in that letter that apart from a joint report of the European Supervisory Authorities on automation in financial advice, no documents were found in EIOPA's possession that would correspond to the description given in your access to documents application.

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access applies only to existing documents in the possession of EIOPA. Given that no such documents have been identified, EIOPA was not in a position to fulfil your request.

### SCOPE OF YOUR APPLICATION

In your access to documents application of 15 October 2021 you requested a list of all documents pertaining to the United States Foreign Account Tax Compliance Act (FATCA) or contributing to statements, guidelines and decisions referencing FATCA.

In your confirmatory application of 11 November 2021, in addition you refer to joint statements concerning a regularly held "EU - US Joint Financial Regulatory Forum" that includes EIOPA as an attendee, some of which discuss FATCA. In this context, you request EIOPA to ensure that all possible responsive documents are included in EIOPA's response, including preparatory documents that contributed to the joint statements that EIOPA is party to.

Against this background, I understand that your request concerns:

- (i) a list of all documents pertaining to FATCA or contributing to statements, guidelines and decisions referencing FATCA;

- (ii) all possible responsive documents, including preparatory documents that contributed to joint statements that EIOPA is party to.

## **EXAMINATION AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001**

### ***FINDINGS***

With regard to your reference to the EU-US Joint Financial Regulatory Forum (EU-US Forum), EIOPA carried out a thorough examination to identify any document that relates to FATCA in this context.

First, I note that the EU-US Forum is organized by the European Commission and the United States (US) Treasury. EIOPA is normally invited by the European Commission as an observer to the EU-US Forum. The joint statement that your referred to ([EU-US Financial Regulatory Forum – Joint statement – 29 March 2021 \(eifr.eu\)](#)) (Joint Statement) was written and published by the European Commission and US without EIOPA's involvement.

EIOPA did not produce or commissioned for internal or external purposes any document concerning FATCA in the context of the EU-US Forum. Therefore, EIOPA does not have in its possession any existing EIOPA documents, including preparatory documents that contributed to the Joint Statement that could be disclosed under your access to documents application.

Notwithstanding the above, we identified one document prepared by the European Commission and US authorities which relates to the EU-US Forum held on 29 and 30 September 2021. The document does not specifically relate to FATCA. Since this document is a third-party document in the meaning of Article 4(4) of Regulation (EC) No 1049/2001, EIOPA duly consulted the European Commission.

Following this consultation and taking into account the expressed opposition of the European Commission to disclosure, EIOPA carried out a thorough assessment with a view to assessing whether an exception in paragraphs 1 and 2 of Article 4 of Regulation (EC) No 1049/2001 is applicable.

### ***LEGAL FRAMEWORK***

According to Article 4(1)-(3) of Regulation (EC) No 1049/2001 EIOPA must or may, as the case may be, refuse to grant access to a document if such access is likely, specifically and actually, to undermine the interest protected by the exception, and that the risk of that interest being undermined is reasonably foreseeable and not purely hypothetical, unless in case of Article 4(2) and (3) there is an overriding public interest in disclosure.

EIOPA may also take into account more than one of the grounds for refusal set out in Article 4 of Regulation (EC) No 1049/2001. Subject to Article 4(6) of that Regulation, if only parts of a requested document are covered by any of the exceptions, EIOPA releases the remaining parts of that document.

Based on the above mentioned rules, my conclusions are as follows:

## **CONCLUSIONS**

The identified document is not a document that was prepared or commissioned by EIOPA. It is a document prepared by the European Commission in agreement with a third-country partner (US) during their international cooperation in financial regulation. This document prepared the meeting of the EU-US Forum on 29 and 30 September 2021 and was a result of confidential negotiations between the organizers. The document does not specifically relate to FATCA but generally to the EU-US Forum.

Its disclosure would reveal the underlying working arrangements and internal strategic considerations of the European Commission, thereby it would weaken its position towards its international partners and its margin of manoeuvre. Consequently, it would directly and practically prejudice the work of the EU-US Forum in the future. Moreover, its disclosure would have serious negative effects on the involvement of EIOPA and other European Supervisory Authorities in the international dialogue on financial regulatory topics led by the European Commission.

It follows that the disclosure of this document would be damaging to international relations and more specifically it would harm very seriously the mutual bilateral trust with the US authorities, which is essential for the proper functioning of the EU-US Forum. Quality relations with the US authorities as well as mutual trust are paramount for this cooperation.

The appropriate and necessary level of transparency was ensured with the publication of the Joint Statement after the meeting, while preparatory works and coordination between the European Commission and the US authorities shall be protected in view of ensuring high-level mutual trust and open discussions in sensitive matters. It is the public interest of the European Union, including the European Commission and EIOPA to maintain and continue this important international cooperation with the US authorities.

The third indent of Article 4(1)(a) of Regulation (EU) No 1049/2001 stipulates that the disclosure of a document shall be refused where it would undermine the protection of international relations. In this regard, Union courts have acknowledged that the EU institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest.

I consider that the case at hand fulfils the condition of that exception, notably, the disclosure of the third-party document identified in the context of the EU-US Forum would specifically and actually, undermine the interest in the protection of international relations under the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001. A refusal to disclose this specific document is therefore fully warranted on the grounds of that Regulation.

## **MEANS OF REDRESS**

I draw your attention to the means of redress available against this decision. According to Article 72(3) of Regulation (EU) No 1094/2010 this decision may be the subject of a complaint to the European Ombudsman or of proceedings before the Court of Justice of the European Union, following an appeal

to the Board of Appeal, as appropriate, in accordance with the conditions laid down in Articles 228 and 263 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'E. C. Fount', is written below the text 'Yours sincerely,'.