

# Info note



EDPB Plenary meeting, 7 July 2021

## **ITEM 3.2 - 07/07 –Discussion and possible adoption –Reply to MEP Sophie in ‘t Veld on US law Foreign Account Tax Compliance Act (FATCA) and EDPB Statement 04/2021**

**ITES/FMESG**

### **I. Background**

The EDPB (and previously WP29) had dealt on several occasions with two types of automatic cross-border exchange of information against tax evasion: the US law Foreign Account Tax Compliance Act (FATCA) and the OECD Common Reporting Standard (CRS)<sup>1</sup>.

In March 2021, the EDPB adopted statement 04/2021 on international agreements including transfers (also referring to FATCA).

### **II. Current State of Play**

Following the adoption of this statement MEP Sophie In ‘t Veld sent a letter to the EDPB (attached) with a number of questions on the actions of the EDPB and national SAs regarding FATCA.

More specifically, the questions were the following:

- Whether the EDPB can explain why it has only issued this statement including an “invitation” to the Member States “to assess and, where necessary, review their international agreements that involve international transfers of personal data”, and why it has not examined the most questionable international agreements, such as the intergovernmental agreements implementing FATCA?
- Whether the EDPB follows up with national data protection authorities after it has issued statements? Will the EDPB recommend national data protection authorities to investigate the data protection aspects of the intergovernmental agreement between their Member State and US implementing FATCA?

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<sup>1</sup> See as well [Infonote-StateOfPlay-CRS-FATCA](#) shared at the 20 October 2020 Plenary and [Hearing by the PETI committee of the EP on FATCA of 2019](#) to which the EDPB was invited. The most relevant part starts at 12:00.

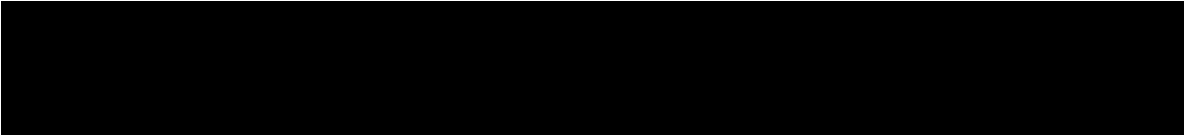

- Whether the EDPB can clarify when it has discussed the transfer of personal data to the US under FATCA? What exactly has been “looked into”? What is the EDPB’s view on the consistency of these intergovernmental agreements with the GDPR?

The ITES and FMES subgroups have prepared a draft reply to this letter that they propose to the plenary for adoption. In this reply the EDPB reminds the content of the statement adopted in March 2021 and provides information on the following:

- The scope of Article 96 of the GDPR and 61 of the Law Enforcement Directive (LED).
- The invitation of the EDPB to Member States to review their international agreements, if necessary, in order to align them with the GDPR and LED.
- The adoption by the EDPB of 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 December 2020 which set forth the standard regarding safeguards to be included in legally binding instruments or administrative arrangements between public bodies and which can be of help for MS for this exercise.
- The availability of SAs to assist MS in this process despite their limited resources and the distinction of missions and powers of the EDPB and SAs including the limited invalidation powers of such validly concluded agreements by SAs.
- That some SAs have already engaged in discussions with their governments for review of such international agreements and the safeguards to be included in the new ones they are planning to conclude.
- That the review and conclusion process of such agreements is long.

### **III. Additional elements and Discussion points:**

At the last joint ITS/FM expert subgroup, some delegations gave information regarding national developments on FATCA:

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- DE: The German SAs have not received a complaint but a letter from a member of the German Parliament on FATCA.
  - LU: The LU SA has not received a complaint so far. However, the Luxembourg tax authority was requested by a lawyer to suspend the transfers of data to the US based on FATCA. The tax authority refused to suspend such transfers and this decision was brought before the LU administrative tribunal. The tribunal has not yet rendered its decision. The LU Ministry of Finance has also received a parliamentary question on FATCA.
  - FR: FR has received a letter from a French Senator on the actions of the CNIL following the adoption of the EDPB Statement 04/2021. Following the CNIL’s response, an open letter on FATCA was sent by  to the Senator with the CNIL and EDPB in copy.

Taking into account the elements above and the increasing pressure on this subject, the ITS and FM expert subgroups would welcome a discussion at plenary level on the next steps on FATCA.

### **IV. Request to the Plenary:**

The plenary is kindly requested to:

- 1) discuss the draft reply and more specifically the sentence underlined in yellow regarding the powers of SAs regarding already validly concluded international agreements and adopt the letter
- 2) take note of the developments reported by some SAs on FATCA and encourage the sharing of such information at EDPB level through a forum created on Confluence
- 3) give a direction to the ITS and FM expert subgroups on the next steps regarding this issue.

**V. Attachments:**

Doc 1. Letter from MEP Sophie In 't Veld

Doc 2. Draft Reply of the EDPB