

EDPB Secretariat
Brussels

Cc: EU FATCA Petitioners

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24 February 2025

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Dear PETI Secretariat

FATCA and AEOI | Documents Access Request - clarifications

I refer to our [Documents Access Request](#) (together with its [timeline](#)) and your holding email dated 12 February 2025 asking for a number of clarifications.

Broadly, the documents covered by our Documents Access Request relate to the following areas:

1. The EDPB's powers under Art. 70 GDPR

Our correspondence provided the EDPB with direct evidence of an inconsistent application of the GDPR in relation to FATCA, with details of the approach taken by various national DPA, from Belgium ("breach") to Germany ("breach? What breach?"), see e.g. [here](#), [here](#), [here at Footnote 2](#), [here](#).

As part of our Documents Access Request, we would like to obtain all documents (see para 5 below for the format) relating to any discussion of the EDPB's powers in relation to FATCA and AEOI in general, whether

- (a) in response to our correspondence, which started on [16 November 2019](#);
- (b) in relation to the adoption Guidelines 02/2024 (see our letter [here](#)); or
- (c) more generally as a result of the work of the EDPB.

2. Guidelines 02/2024 and FATCA/AEOI

This is closely linked to item 1. As part of our Documents Access Request, we want to better understand what discussion, if any, there has been in relation to the application of Guidelines 02/2024 to FATCA and AEOI exchanges with third countries.

Previously, the EDPB specifically issued [Statement 1/2019](#) ahead of the publication of [Guidelines 2/2020](#), confirming that the new guidelines would apply to FATCA.

As part of our Documents Access Request, we want to understand why the EDPB resisted [calls from campaigners](#) to make a direct reference to FATCA and AEOI in Guidelines 2/2024 in the light of the 'long-standing' nature of FATCA's data protection issues. We also want to understand the degree of political interference (if any) into the working of the EDPB (see e.g. our letters [here](#) and [here](#)).

Following (a) the CJEU judgment in *Schrems II*; (b) the conclusion reached by the European Parliament in relation to the lack of constitutional safeguards in the US¹ ([here at p. 100](#)); and (c) [recent developments in the US](#), it should be clear to everyone, including the EDPB, that transfers of sensitive personal and financial data to third countries is a legal issue that should not be held hostage to political considerations by EU institutions. Our Documents Access Request aims at establishing whether the EDPB's work has been motivated / influenced by political considerations.

As part of our previous correspondence, we directly referred the EDPB to the work from the previous Commission, who, as early as 2012 and in relation to FATCA, concluded that the US did not have adequate safeguards (Ares(2015)459646_Annex5, discussed [here](#) and [here at p. 2](#)).

By way of additional context, following the publication of the EDPB's Statement 1/2019 and the EDPB's Guidelines 2/2020, we carried out an [examination](#) of the compliance of bi-lateral FATCA IGAs with those guidelines. We did this as early as 6 March 2020. That examination is part of our online correspondence and therefore we assume that it is known to you. Four years later, and after *Schrems II*, a national DPA confirmed our assessment, and there is therefore an overriding public interest in understanding the EDPB's potential role in toning down the wording of the new guidelines 02/2024 and/or avoiding any reference to FATCA and AEOI transfers to third countries in those guidelines. This is particularly relevant in the light of the European Parliament's [direct criticism of the EDPB's work](#) in terms of "*insufficient level of enforcement of the GDPR in the area of international transfers, the lack of prioritisation and overall supervision and the absence of meaningful decisions and corrective measures*" – which also covers Art. 70 GDPR.

3. **The EDPB's work in relation to national investigations concerning FATCA**

This is also closely linked to items 1 and 2 above.

Notwithstanding the existence of clear evidence of an inconsistent application of the GDPR in the area of FATCA and AEOI (which brings into play Art. 70 GDPR), the EDPB's official position is that FATCA is not a direct concern of the EDPB, but rather a matter for DPAs.

Nevertheless, it is clear that the EDPB has been paying close attention to what happens at national level. Indeed, in [response](#) to a letter from an MEP (discussed [here](#)), the EDPB referred to a number of steps taken by national DPAs and we would like to better understand the interaction between the EDPB and national DPAs, whether as part of the works of its plenary or sub-committees, or as part of the EDPB's correspondence with / oversight of, national DPAs.

As is well known thanks to the documents released by the Commission to Sophie in 't Veld MEP, the Commission concluded that FATCA was an EU matter and that the conclusion of bilateral agreements was a '[temporary solution](#)'.

Given the EU dimension, the direct relationship between "national steps" and the existence of inconsistencies, our Documents Access Request covers all documents that relate to the interaction between the EDPB and national DPAs, including interactions

¹ *"Our analysis shows that no US federal or state privacy law is likely to provide "essentially equivalent" protection compared to the EU GDPR in the foreseeable future. Indeed, there are serious and in practice insurmountable US constitutional and institutional as well as practical/political obstacles to the adoption of such laws"*

within the EDPB, where national DPAs actively participate to the work of committees and sub-committees.

4. **The interaction between the EDPB and the European Commission / the Council in the area of AEOI and FATCA**

This is closely linked to item 2.

Since its establishment, the EDPB departed radically from the approach taken by its predecessor both in relation to [FATCA](#) and [AEOI](#) more in general. The EDPB has ignored [direct criticism](#) from the European Parliament and, notwithstanding the clear case law in this area (*Schrems II*, but also *Facebook*, *Mousse* (C-394/23) on data minimisation, *Prokuratuur* (C-746/18) on strict necessity and *Bindl* (T-353/22) on transfers to the US – all discussed [here](#)), the EDPB has been avoiding any criticism of the current Commission's handling of the FATCA and AEOI files.

This change of approach is all the more striking, as the GDPR – of which the EDPB is a product – was introduced with the [express aim](#) of "giving citizens back control of their personal data and create a high, uniform level of data protection across the EU fit for the digital era".

Accordingly, our Documents Access Request extends to any documents relating to the interaction between the EDPB and other EU institutions, notably the European Commission and the European Council in relation to the data protection implications of FATCA and AEOI, whether at the level of the EDBP (e.g. as part of the Commission's participation to the EDPB's meetings), the Working Party on Information Exchange and Data Protection ([DAPIX](#)), or otherwise.

5. **Format of documents**

In our Documents Access Request we referred to "proposals, impact assessments, communications, triologue documents, working party documents, legal opinions, position papers, agendas, interinstitutional correspondence, information notes and minutes of meetings". I am therefore slightly puzzled by your request to be more precise. However, to avoid any doubt and be more specific, the request includes all documents and (internal and external) written communication (such as letters, proposals, emails, WhatAPP messages, committee/sub-committee agendas and minutes, etc.).

In terms of timing, I would suggest starting with 16 November 2019, which is the date of our first letter. This is a few months after the adoption of the EDPB's [Statement 1/2019](#) on FATCA, so it's a reasonable timeframe. Since our first letter, we wrote to the EDPB on 216 occasions raising the various issues mentioned in this letter. Therefore, the subject-matter of our Documents Access Request is well-known to the EDPB and the precise nature of our previous correspondence should enable the EDPB to locate the information requested.

6. **Extent of disclosure**

Our Document Access Request, and the clarifications contained in this letter, confirm the overriding public interest in disclosure. Therefore, in responding to our Document Access Request, the EDPB should refrain from the kind of [extensive redactions](#) adopted in the past to prevent transparency and accountability. The EDPB has already been found [guilty of maladministration](#) in relation to the handling of information requests pertaining to FATCA and I would therefore invite the EDPB to avoid the repeat of history.

Finally, I confirm that I have no need to see the documents I drafted and shared with you – what a bizarre suggestion.

Best regards,

Filippo Nosedà
Partner