

**Council of the European Union  
General Secretariat  
Justice and Home Affairs (JAI)**

Africa House  
70 Kingsway  
London WC2B 6AH  
DX 37954 Kingsway  
T: +44 20 3321 7000  
www.mishcon.com

Cc: EDPB; PETI, EU FATCA Petitioners

London | Cambridge | Oxford | Hong Kong | Singapore

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## **FATCA | Data transfers to the US – Lower data protection standards**

I understand that the Working Party on Information Exchange and Data Protection (**DAPIX**) will meet on **29 January 2025** to discuss *inter alia* the following topic:

4. **Latest developments on the transfer of personal data to third countries and initiatives on international data flows**
  - Information from the Commission

EU institutions are well-aware of the [EU FATCA petitions](#) and the previous work of the [WP29](#), the [European Commission](#), the [European Parliament](#) as well as our [correspondence](#) in this area.

The current approach in relation to this "long-standing" issue has been to avoid any serious debate, through an endless [institutional ping-pong](#) (or 'institutional deference', using the words of the European Parliament).

While the EU has been ducking the issue, this week's article in the [New York Times](#) confirms what data protection campaigners and data protection experts have been saying for years, notably that the US has lower standards of data protection – punching a hole in [Art. 46 GDPR](#):

## **The New York Times**

### **Trump Seeks to Paralyze Independent Privacy and Civil Liberties Watchdog**

#### **Trump Administration**

Jan. 22, 2025



The board also plays a key role in [an agreement between the United States and the European Union](#), which allows businesses to transfer Europeans' personal data to the United States in part because the board exists as a check on surveillance practices and can oversee a process of addressing complaints from Europeans about any misuse of their data.

This is directly relevant for FATCA. The US Privacy and Civil Liberties Oversight Board was expressly mentioned in a **2011 FATCA report from Taxud** that **concluded** that the US had lower data protection standards than the EU<sup>1</sup>:

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In order to have a clear and complete picture of the US legal framework that would be applicable to the processing of personal data transmitted to the US under FATCA, we obtained from the US Treasury more information on the US standard of protection of data. Our data protection experts believe that the US data protection rules do not offer the same standard of protection as EU data protection laws and therefore that EU financial intermediaries which pass information to the US tax authorities may run into legal difficulties. **Nevertheless, the difficulties may be surmounted to some extent if the US:** i) clarifies that FATCA will not apply to certain persons, such as green card holders who are not considered permanent residents in the US and EU spouses of US citizens; ii) clarifies that personal data provided under FATCA will not be disclosed to a third party or third country; and iii) confirms that a proposed new **Privacy Civil Liberties Oversight Board** will oversee the processing activities of the US tax authorities under FATCA.

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TAXUD sent a letter to the US Treasury asking several questions on the data protection standards applicable in the US on personal information held by the US tax authorities. The US Treasury replied at the end of September and this reply was examined by DG JUST.

Our data protection experts, following their examination of the US reply, believe that the US data protection rules do not offer the same standard of protection as EU data protection laws and therefore that EU financial intermediaries which pass information to the US tax authorities may run into legal difficulties. Nevertheless, the difficulties may be surmounted to some extent if the US: i) clarifies that FATCA will not apply to certain persons, such as green card holders who are not considered permanent residents in the US and EU spouses of US citizens; ii) clarifies that personal data provided under FATCA will not be disclosed to a third party or third country; and iii) confirms that a proposed new **Privacy Civil Liberties Oversight Board** will oversee the processing activities of the US tax authorities under FATCA.

This was **9 years** before the CJEU reached the same conclusion with *Schrems II*. There is no way to sugar-coat this: EU institutions have been aware of the data protection deficiencies of FATCA for **over a decade** and when taken to task, **EU institutions took no action for reasons of political convenience**, only to be **stabbed in the back** by the new US administration.

This should be a matter of immense embarrassment for EU institutions. Internal documents provide some ground for concern that current Commissioners may have given misleading statements before the European Parliament on the existence of negotiations with the US led by the **previous Commission** and data protection concerns about FATCA (see [here](#), [here](#) and [here](#)). This is relevant, because in the US the Biden administration abandoned plans to introduce FATCA domestically due to privacy and data protection concerns (see [here](#), [here](#) and [here](#)), echoing concerns raised by the **European Banking Federation**. More importantly, evidence from US government agencies shows that FATCA **does not work** ([here](#)) and is **not used** (the IRS having 'significantly departed from its FATCA strategy'), making FATCA processing unnecessary and exposing EU citizens to disproportionate data security risks due to weaknesses within the IRS systems ([here](#), [here](#), [here](#) and [here](#)).

It is now time for EU institutions to put an end to this long-running saga, dust off the European Parliament's **resolution on FATCA**, learn the lessons from recent ECJ judgments (including *Schrems*, but also *Mousse* (C-394/23) on data minimisation, *Prokuratuur* (C-746/18) on strict necessity and *Bindl* (T-353/22) on transfers to the US and uphold EU citizens' rights under EU law.

**Filippo Nosedà**

Partner

<sup>1</sup> Ares(2015)459646\_Annex5 [disclosed](#) to Sophie in 't Veld MEP and discussed [here](#) (enclosed).