

**EDPB**  
**National DPAs (via EDPB Secretariat)**  
 Brussels

Cc: PETI, EU FATCA Petitioners

5 December 2024

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

London | Cambridge | Oxford | Hong Kong | Singapore

## FATCA | EDPB Guidelines 02/2024 on international data transfers

I have read the EDPB [Guidelines 02/2024 on international data transfers](#) that were adopted on 2 December 2024 with great interest, both for what they say, and what they do not say.



### What the Guidelines say:

*"Article 48 GDPR ("Transfers or disclosures not authorised by Union law") provides that: "Any... decision of an administrative authority of a third country requiring a transfer of personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty..."*

*Article 48 is **not a ground for transfer**. The provision itself contains no data protection safeguards... Any transfer or disclosure of personal data to a third country authority requires compliance with the requirements for transfers of personal data to third countries or international organisations (Chapter V GDPR).*

*Chapter V lists the grounds for transfers, starting with the European Commission's adequacy decisions under Article 45. If there is no adequacy decision, **appropriate safeguards** may be provided for by one of the transfer tools foreseen in Article 46.*

*[Therefore], cases a **"two-step test"** must be applied when it comes to any transfer of personal data to third countries: "first, there must be a legal basis for the data processing together with all relevant provisions of the GDPR; and secondly, the provisions of Chapter V must be complied with."*



### What the Guidelines do not say

The guidelines do not mention the bilateral FATCA agreements signed by EU Member States notwithstanding **1** the warnings from the European Commission that the US did not offer adequate data protection safeguards; **2** the [negative opinion](#) from your predecessor; **3** two judgments from the CJEU specifically concerning transfers of data to the US ([Schrems](#) and [Schrems II](#)); and **4** the European Parliament's [formal resolution](#) and [study](#).

The EDPB now also has an opinion from [Prof. Michael Hatfield](#), a US law professor who is expert in both US tax and data protection law, published on the topic of Privacy and Taxation and who considered whether the appropriate safeguards are available for FATCA data transferred from HMRC to the IRS under Art. 46 of the GDPR / UK GDPR read in light of [Schrems II](#); and

Finally, the EDPB is fully aware of the inconsistent application of the GDPR by EU Member States in this area<sup>1</sup>, and yet it has been [consistently refusing](#) to engage its powers under Art. 70 GDPR, effectively leaving [courageous](#) national data protection authorities to fend for themselves, without any support from a body that was to guarantee a higher level of data protection throughout the EU.

**What good does it do to issue guidelines if the main area of contention, recognised by the European Commission as a "long-standing issue" passes under silence? The risk is that the EDPB will be seen as aloof and detached from the reality of millions of EU citizens who are constantly discriminated against under a US measure that nobody seems willing to criticise.**

**Filippo Nosedà**  
 Partner

<sup>1</sup> Belgium, France, Germany, the Netherlands (see also [here](#)), Slovenia, Slovakia and Sweden. The Swedish position is particularly interesting, because the IMY first took [one position](#), and then the [opposite](#) one, showing the lack of consistency even within single EU Member States. The Commission, too, took [conflicting](#) over time, showing the lack of a consistent application of the GDPR in relation to FATCA.