

Our Ref: 60052.1
Your Ref: CPLT(2024)01020 et seqq

Bruno Gentiloni, Věra Jourová, Didier Reynders
European Commission

Cc. European Parliament (PETI); EDPB; EU-FATCA Petitioners

FATCA – Clearly within the EU's competence (as are fundamental rights)

Dear Commissioners

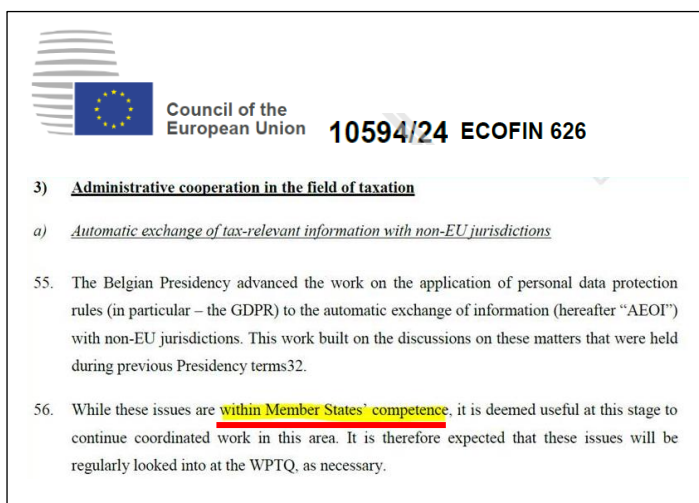
I write further to our [previous correspondence](#). Our research into internal EU documents shows that in 2011-12 the Commission was in [direct dialogue with the US](#) to find a "more proportionate and more workable" alternative to FATCA. This followed "[worrying concerns](#)" from the Commission and [an opinion](#) by the EU's data protection working party in relation to the interaction between FATCA and EU and Member States law, including in the area of data protection.

Our research also shows that following the UK's sabotage of the Commission's negotiations (the former EU Member State signed the first agreement with the US two months after the damning opinion from the WP29), the Commission remained convinced of the "temporary nature" of a government-to-government approach, which the Commission referred to as a "quick solution" and that "ultimately there should be a common EU-US approach", because the Commission was aware of the [lower US standards](#) (it's all [here](#)).

Our [quantitative analysis](#) of government US sources shows that the IRS does not look at FATCA data, that FATCA did not lead to additional tax and that the IRS is prone to data breaches, further confirming the absence of adequate safeguards under Art. 49 GDPR, as confirmed by the ECJ in the two *Schrems* cases.

The Commission is [aware](#) of the long-standing nature of the issue, but following the UK's betrayal prefers to hide behind what a European Parliament's study referred to as "[institutional forbearance](#)", i.e. the idea that dealing with data protection in this area is a matter for Member States. However, in the past the Commission accepted that FATCA falls within its remit. Indeed, where Member States violate EU fundamental rights, the Commission is well within its powers to enforce such rights, as reminded by the European Parliament in a [formal resolution](#) on FATCA. And so we have it:

The pretextual position in 2024



Council of the European Union
10594/24 ECOFIN 626

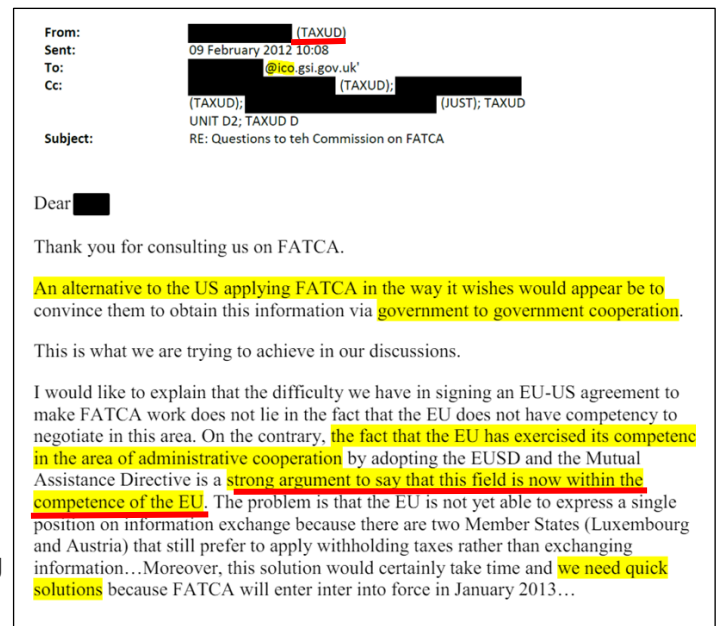
3) Administrative cooperation in the field of taxation

a) Automatic exchange of tax-relevant information with non-EU jurisdictions

55. The Belgian Presidency advanced the work on the application of personal data protection rules (in particular – the GDPR) to the automatic exchange of information (hereafter "AEOT") with non-EU jurisdictions. This work built on the discussions on these matters that were held during previous Presidency terms³².

56. While these issues are within Member States' competence, it is deemed useful at this stage to continue coordinated work in this area. It is therefore expected that these issues will be regularly looked into at the WPTQ, as necessary.

The honest position in 2012



From: [REDACTED] (TAXUD)
Sent: 09 February 2012 10:08
To: [REDACTED] @ico.gsi.gov.uk
Cc: [REDACTED] (TAXUD); [REDACTED] (JUST); TAXUD
Subject: RE: Questions to teh Commission on FATCA

Dear [REDACTED]

Thank you for consulting us on FATCA.

An alternative to the US applying FATCA in the way it wishes would appear to be to convince them to obtain this information via [government to government cooperation](#).

This is what we are trying to achieve in our discussions.

I would like to explain that the difficulty we have in signing an EU-US agreement to make FATCA work does not lie in the fact that the EU does not have competency to negotiate in this area. On the contrary, the fact that the EU has exercised its competence in the area of administrative cooperation by adopting the EUSD and the Mutual Assistance Directive is a strong argument to say that this field is now within the competence of the EU. The problem is that the EU is not yet able to express a single position on information exchange because there are two Member States (Luxembourg and Austria) that still prefer to apply withholding taxes rather than exchanging information...Moreover, this solution would certainly take time and we need quick solutions because FATCA will enter into force in January 2013...

The Commission should stop playing games and bring Infringement proceedings, not least after the [Belgian](#) decision.

Best regards,
Filippo Nosedà
Partner

24 May 2024