

## Article

# Privacy versus transparency: it's time to look at the data

Filippo Nosedo\*

\*Partner, Mishcon de Reya LLP, and Visiting Professor, King's College, London WC2B 6AH, UK. Tel: +44 20 3321 7980; Email: [filippo.nosedo@mishcon.com](mailto:filippo.nosedo@mishcon.com), [www.mishcon.com](http://www.mishcon.com)

### ABSTRACT

In previous articles published in this Review, ('FATCA, CRS and Public BO registers: a report on the direction of travel—the next 12 months', 28 *Trusts & Trustees* (2022), 482–487. <https://academic.oup.com/tandt/article/28/6/482/6586702>; 'FATCA and CRS: Recent EU judgment on public BO registers shines a light on the direction of travel', 29 *Trusts & Trustees* (2023), 469–474. <https://academic.oup.com/tandt/article/29/6/469/7163198>) the author argued for a balanced approach to the whole issue of transparency in the area of taxation. The underlying legal analysis touched on data protection and Human Rights legislation, and was supported by eloquent opinions from data protection experts in the European Union. Now it's time to look at the hard data supporting both sides of the argument.

### INTRODUCTION

Following a torrent of revelations in the early 2000s, from 2010, the international community started taking vigorous steps to counter tax evasion. The US shot the opening salvo with the Foreign Accounts Tax Compliance Act (FATCA) that was introduced into domestic legislation in 2010 and rolled out internationally (through bilateral agreements) between 2012 and 2017. The rest of the international community, spurred on by Gordon Brown at the G20 in London, followed suit with the Common Reporting Standard (CRS), a global model of automatic exchange of information closely modeled on FATCA, which was developed by the Organization for Economic Cooperation and Development (OECD) between 2012 and 2016. In 2013, the UK announced another transparency measure in the shape of central registers of beneficial ownership, which were intended to be interconnected, but which the UK made publicly accessible in 2016,<sup>1</sup> followed by another public register in 2023.<sup>2</sup> The European Union (EU), too, introduced public registers of beneficial ownership in 2018,<sup>3</sup> followed by Canada in 2023,<sup>4</sup> whereas the USA enacted a central (non-public) register of beneficial ownership in 2021.<sup>5</sup>

In less than a decade, the pendulum swerved from absolute secrecy to absolute transparency, with the promise that this would yield more tax and stamp out corruption, which should justify and outweigh any concerns around data privacy and data protection.

Save that the reality is a bit more complicated than that.

### “FATCA WILL BRING IN \$8.6BN IN ADDITIONAL REVENUE OVER THE NEXT DECADE (2010-2020)”

This was the projection made by the US Congress in 2010.<sup>6</sup> However, a report by the US Treasury Inspector General for Tax Administration (TIGTA) revealed that FATCA cost the US Inland Revenue Service (IRS) over half a billion to implement, yielding extra tax for \$14 million.<sup>7</sup> That is a success ratio of 2.4%.

The IRS has also revealed that understaffing and financial constraints coupled with poor data have led the agency to “*significantly depart from its original comprehensive FATCA Roadmap*”.<sup>8</sup>

<sup>1</sup> Registers of Persons with Significant Interest (PSC-Register), see Part 21A of Companies House 2006.

<sup>2</sup> Register of Overseas Entities (ROE), introduced by the Economic Crime (Transparency and Enforcement) Act 2022.

<sup>3</sup> Art. 30 of the 5th EU Anti-Money Laundering Directive, Directive (EU) 2015/849, since invalidated.

<sup>4</sup> Bill C-42, introducing changes to the Canada Business Corporation Act (CBCA), received Royal Assent on 2 November 2023.

<sup>5</sup> Corporate Transparency Act (CTA).

<sup>6</sup> See Joint Committee on Taxation, JCS-6-10, Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 2847, the Hiring Incentives to Restore Employment Act.

<sup>7</sup> Discussed in this letter to the EU dated 13 April 2022, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3480/13%20Apr%202022%20to%20COM%20-%20US%20Treasury%20Report%20on%20FATCA%20failure.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3480/13%20Apr%202022%20to%20COM%20-%20US%20Treasury%20Report%20on%20FATCA%20failure.PDF) (last accessed 7 May 2024).

<sup>8</sup> Discussed in this letter to the EU dated 13 April 2022, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3480/13%20Apr%202022%20to%20COM%20-%20US%20Treasury%20Report%20on%20FATCA%20failure.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3480/13%20Apr%202022%20to%20COM%20-%20US%20Treasury%20Report%20on%20FATCA%20failure.PDF) (last accessed 7 May 2024).

In the UK, HM Revenue and Customs (HMRC) refused to provide aggregate data on FATCA,<sup>9</sup> but official projections released by the UK government in 2013 estimated the cost of implementing FATCA in the UK to anywhere between £0.9bn and £1.6bn with an ongoing cost of £50m–£90m a year,<sup>10</sup> whereby there are no direct tax benefits for the UK (in a letter to the European Commission, the Institute of International Bankers commented on the “irony” that FATCA was effectively a form of subsidy of the US tax collection system by its trade partners, without receiving anything in return)<sup>11</sup>.

As to the CRS, data released by the OECD confirm that, in 2022, the CRS affected 103 million accounts for an aggregate value of €12 trillion.<sup>12</sup> The costs of implementing this measure around the world are unknown.

There is no independently verified data concerning the success ratio of the CRS, but if the statistics released by TIGTA in relation to FATCA are anything to go by, it stands to reason that most of the accounts belong to compliant taxpayers. The OECD claims that voluntary disclosure programmes, offshore tax investigations and related measures have helped identify close to €126 billion in additional revenues so far.<sup>13</sup> However, this could not be independently verified.

### Conclusion #1

There are no independent data to underpin the tax authorities’ claim that FATCA, and the CRS, led to a seismic increase in tax collection. On the contrary, the data show that FATCA has been dropped as a priority by the IRS. What is clear, however, is that FATCA and the CRS significantly increased the level, complexity and costs of compliance borne by compliant citizens with bank accounts overseas. With FATCA, data show that this has led a number of banks to discriminate against US citizens, leading to account closures and the denial of service.<sup>14</sup>

### “FATCA AND CRS DATA ARE STORED SAFELY AND SUBJECT TO STRICT CONFIDENTIALITY MEASURES”

The importance of confidentiality and data security is set out in the CRS Commentary published by the OECD in terms of “cornerstone of tax systems” and the reflection of a “duty of care” by tax authorities:

*Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems. Both taxpayers and tax administrations have a legal right to expect that information exchanged remains confidential. In order to have confidence in their tax systems and comply with their obligations under the law, taxpayers need to know that the often sensitive financial information is not disclosed inappropriately, whether intentionally or by accident ... The ability to protect the confidentiality of tax information is also the result of a “culture of care” within a tax administration which includes the entire spectrum of systems, procedures and processes to ensure that the legal framework is respected in practice and information security and integrity is also maintained in the handling of information.*

The reality shows the aspirational nature of the OECD’s commentary.

In 2019, the tax system of an entire EU Member State has been compromised, with the incident affecting CRS data.<sup>15</sup>

The risks were highlighted in a letter written by the Chair of the EU’s data protection watchdog to the OECD just a few weeks before the CRS became a reality,<sup>16</sup> asking for a rethinking (emphasis added):

*The EU Data Protection Working Party wishes to reiterate its strong concerns regarding the repercussion on fundamental rights of mechanisms entailing major data processing and exchange operations such as those envisaged by the CRS. Additional concerns in relation to the security of massive automatic data processing have been raised by recent reports in the media of high-profile cyber-attacks.*

In the USA, concerns about the security of taxpayers’ data have been raised by the US Government Accountability Office (GAO) in a report published on 14 August 2023<sup>17</sup> with the following stern message:

*Security of Taxpayer Information: IRS Needs to Address Critical Safeguard Weaknesses.*

Similar concerns were raised by the US Treasury Inspector General for Tax Administration (TIGTA)<sup>18</sup>:

*Significant deficiencies exist in the IRS’s accounting for microfilm backup cartridges. Deficiencies result in the inability of the*

<sup>9</sup> See the decision notice dated 1 March 2019 from the Information Commissioner’s Office (ICO), available online at <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614446/fs0751683.pdf> (last accessed 7 May 2024).

<sup>10</sup> Response to written question in Parliament (UIN 204849), 14 July 2014, available online at <https://questions-statements.parliament.uk/written-questions/detail/2014-07-09/204849/>

<sup>11</sup> See F. Nosedá, ‘EU Documents Reveal Conflict Over Public Registers And Automatic Exchange of Information’, Tax Notes International, Vol. 107, 1 August 2022.

<sup>12</sup> Global Forum on Transparency and Information for Tax Purposes, 2023 Report, accessible online at <https://www.oecd.org/tax/transparency/documents/global-forum-annual-report-2023.pdf>

<sup>13</sup> <https://www.oecd.org/tax/transparency/>

<sup>14</sup> See Democrats Abroad, *A 2022 Update on Tax and Financial Access Issues of Americans Abroad, Once Uncomfortable, Now Suffocating*, available online at [https://www.democratsabroad.org/2022\\_report](https://www.democratsabroad.org/2022_report) (last accessed 7 May 2024).

<sup>15</sup> See Canada Revenue Agency, *Information on the Bulgarian Data Breach—August 7, 2019*, available online at <https://www.canada.ca/en/revenue-agency/news/2019/08/information-on-the-bulgarian-data-breach-august-7-2019.html> (last accessed 7 May 2024); see also OECD, *Statement on the data breach in the National Revenue Agency of Bulgaria*, available online at <https://www.oecd.org/tax/transparency/documents/statement-on-the-data-breach-in-the-national-revenue-agency-of-bulgaria.htm#:~:text=OECD%2C%2030%20August%202019%20%2D%20The,media%20on%2015%20July%202019> (last accessed 7 May 2024).

<sup>16</sup> Letter from the Chair of the Article 29 Working Party to the OECD and the EU, 12 September 2016, available online at <https://ec.europa.eu/newsroom/article29/items/610127> (last accessed 7 May 2024).

<sup>17</sup> GAO-23-105395, available online at <https://www.gao.gov/products/gao-23-105395> (last accessed 7 May 2024).

<sup>18</sup> TIGTA Report Number 2023-IE-R008, discussed in a letter to the European Commission dated 11 August 2023, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3657/11%20Aug%202023%20to%20EDPB%20re%20loss%20of%20IRS%20data%20\(TIGTA\).pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3657/11%20Aug%202023%20to%20EDPB%20re%20loss%20of%20IRS%20data%20(TIGTA).pdf) (last accessed 7 May 2024).

*IRS to account for thousands of microfilm cartridges containing millions of sensitive business and individual tax account records.*

Concerns about the lax data security of the IRS were also raised in investigations from the *Washington Post*<sup>19</sup> and the *Wall Street Journal*.<sup>20</sup>

Specifically in relation to FATCA, concerns about data security efficiency were raised by the former IRS Chief of Criminal Investigations during a webinar organized by the Center for Taxpayer Rights that took place on 30 May 2023<sup>21</sup>:

*so much of the money goes into keeping those 60 years' old system tied together with bubble-gum basically, means there was no money left over for anything else.*

Previously, the then Inspector General of the IRS, Charles Rettig, questioned the efficacy of FATCA in a written testimony before the US Congress<sup>22</sup>:

*Limited IT resources preclude us from building adequate solutions for efficiently matching or reconciling data from multiple sources. As a result, we are often left with manual processes to analyze reporting information we receive. Such is the case with data from FATCA. Congress enacted FATCA in 2010, but we have yet to receive any significant funding for its implementation.*

A US commentator recently summarized the position thus<sup>23</sup>:

*America's administrative data are not safe: Information Insecurity prevails.*

In Australia, concerns about the safety of tax data were raised by the local media, who in July 2023 reported that the Australian Tax Office lost over \$557 m to cyber-attacks.<sup>24</sup>

In the UK, HMRC's Annual Report for 2020–2021 contained the following warning<sup>25</sup>:

*Our strategist risks: HMRC security. Code red. There is a risk that business and critical services will fail because we do not operate security processes and controls or manage our infrastructure and vulnerabilities effectively enough to protect HMRC, our customers, people and assets from harm or misuse ... We have particularly focused on 2 critical areas of security issues associated with legacy IT systems and cyber*

*security/protection against external threats. Cyber security has proved more challenging ...*

There is more.

Through a number of Freedom of Information requests, the author's firm unearthed evidence showing that the system used by HMRC to process FATCA and CRS data uses software developed by Fujitsu, the Japanese company at the center of the Post Office scandal, the biggest case of miscarriage of justice in the UK's history resulting from the private prosecution of hundreds of sub-postmasters accused of stealing funds where in fact the discrepancies were the result of systemic bugs in Fujitsu's Horizon system, something that was known to Post Office executives.

Notwithstanding the revelations concerning the Post Office, data unearthed by the UK Parliament's Treasury Committee found that HMRC and HM Treasury awarded Fujitsu around £1.4 billion worth of deals since the High Court ruled that there had been numerous bugs and errors in its Horizon software, showing an institutional disregard for data security, and the safety of compliant taxpayers' data.<sup>26</sup>

And that is not all.

Research into official documents relating to the IT system developed and maintained by the OECD to transfer CRS data (the Common Transmission System or CTS) has shown the risk of intrusion by sovereign powers. The OECD's Secretary-General was asked to provide assurances that its organization had obtained formal assurances by member states that they did not maintain access to the CTS by way of backdoors and/or Trojan horses.<sup>27</sup> To date, he has not confirmed this.

However, the OECD's Secretary-General confirmed in a formal decision following a formal data protection complaint<sup>28</sup> that the OECD does not owe any data protection obligations to the 100+ million bank account holders whose personal data is affected by the CRS every year:

*Neither the OECD, nor the [OECD's] Center for Tax administration are accountable for the personal data of individual taxpayers transmitted through the CTS and thus not obliged to comply with the OECD data protection rules in relation to such data.*<sup>29</sup>

In other words, the OECD is unaccountable. No duty of care there, then.

<sup>19</sup> Discussed in a letter to the EU dated 20 August 2022, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3512/25%20Aug%202022%20to%20COM%20re%20WoPo%20investigation%20on%20IRS%20ineptitude.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3512/25%20Aug%202022%20to%20COM%20re%20WoPo%20investigation%20on%20IRS%20ineptitude.pdf) (last accessed 7 May 2024).

<sup>20</sup> Discussed in a letter to the EU dated 20 August 2022, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3513/21%20Aug%202022%20to%20COM%20re%20WSJ%20editorial.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3513/21%20Aug%202022%20to%20COM%20re%20WSJ%20editorial.pdf) (last accessed 7 May 2024).

<sup>21</sup> Discussed in a letter to the EU dated 25 July 2023, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3648/25%20Jul%202023%20to%20EDPB%20re%20BubbleGum%20fix.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3648/25%20Jul%202023%20to%20EDPB%20re%20BubbleGum%20fix.pdf) (last accessed 7 May 2024).

<sup>22</sup> Discussed in a letter to the EU dated 23 March 2022, which is available online at: [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3478/23%20Mar%202022%20to%20PETI%20Chair%20---%20IRS%20Commissioner\\_s%20testimony.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3478/23%20Mar%202022%20to%20PETI%20Chair%20---%20IRS%20Commissioner_s%20testimony.PDF) (last accessed 7 May 2024).

<sup>23</sup> See Matthew Jensen, *Keeping Federal Data Secure*, National Affairs, Number 59, Spring 2024.

<sup>24</sup> Discussed in a letter to the EU dated 27 July 2023, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3651/28%20Jul%202023%20to%20EDPB%20re%20massive%20ATO%20Hacking.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3651/28%20Jul%202023%20to%20EDPB%20re%20massive%20ATO%20Hacking.pdf) (last accessed 7 May 2024).

<sup>25</sup> See <https://www.gov.uk/government/publications/hmrc-annual-report-and-accounts-2020-to-2021>, at p. 95.

<sup>26</sup> See Common's Treasury Committee, statement dated 10 February 2024, available online at <https://committees.parliament.uk/committee/158/treasury-committee/news/199838/more-than-34-billion-of-fujitsu-contracts-active-with-treasury-affiliated-organisations-since-2019/> (last accessed 7 May 2024).

<sup>27</sup> Discussed in this letter to the OECD dated 26 April 2020, which is available online at <https://www.mishcon.com/upload/files/26%20Apr%202020%20to%20OECD%20PETI%20EDPB%20TAXUD%20%20ICO.pdf> (last accessed 7 May 2024).

<sup>28</sup> For a summary, see this letter dated 1 May 2020 to the OECD's Data Protection Commissioner, which is available online at <https://www.mishcon.com/upload/files/1%20May%202020%20to%20OECD%20DPC%20DPO.pdf> (last accessed 7 May 2024).

<sup>29</sup> Discussed in this GDPR complaint to the French data protection authority dated 15 July 2020, which is available online at <https://www.mishcon.com/upload/files/15%20July%202020%20to%20EDPB%20PETI%20CNIL%20OECD%20decision.pdf> (last accessed 7 May 2024).

## Conclusion #2

In the age of the Internet and computing clouds, there is no safety for personal data collected and processed electronically. Anyone promising the opposite is either a charlatan or a fool (or both).

### “TRANSPARENCY IS A PUBLICLY RECOGNIZED OBJECTIVE”

The bulk processing of personal data under FATCA, the CRS and public registers of beneficial ownership represents a limitation of concerned individuals' right to privacy and data protection. That is not in question.

The question is whether such intrusion is *justified and legitimate*.

In Europe, intrusions into one's rights to privacy and data protection are only justified and legitimate if they are proportionate and serve a publicly recognized objective.<sup>30</sup>

FATCA and the CRS pursue the fight against tax evasion. That is a publicly recognized objective.

In addition, public registers of beneficial ownership pursue transparency as a means to foster trust in the financial system, protect the rights of minority shareholders and more generally ensure public accountability of the private sector—in the words of the UK government when it announced the measure<sup>31</sup>:

*A stronger economy depends on investors, employees and the wider public having trust and confidence in companies and those that are running them.*

*We believe a public register, listing those who really own companies makes Britain a better place to invest and do business. People have a right to know who controls UK companies ...*

The point was further articulated in another official memorandum<sup>32</sup> thus:

*There is also a wider economic benefit in increasing the transparency surrounding business ownership and control. This is linked to reducing the risks around economic activity and increasing trust by reducing information asymmetry between those that trade with, or invest in, the company and those that control it.*

Not so fast.

In a seminal judgment handed down on 22 November 2022 following a small number of appeals in Luxembourg (including from Mishcon de Reya), the Court of Justice of the European Union (CJEU) confirmed that transparency of citizens' data for the sake of transparency is not a publicly recognized objective (paragraphs 60-62):

<sup>30</sup> See Art. 8(2) of the European Convention on Human Rights and Art. 52 of the EU Charter of Fundamental Rights.

<sup>31</sup> HM Government, Press release. 'Public register to boost company transparency', 31 October 2013, available online at <https://www.gov.uk/government/news/public-register-to-boost-company-transparency>

<sup>32</sup> Department for Business, Innovation and Skills, Small Business, Enterprise and Employment Bill, European Convention on Human Rights, Memorandum, November 2014, available online at <https://assets.publishing.service.gov.uk/media/5a75b71ced915d6faf2b5240/bis-14-1214-small-business-enterprise-and-employment-bill-european-convention-on-human-rights.pdf> (last accessed 7 May 2024).

<sup>33</sup> HM Government, 'Policy paper, Supplementary ECHR memorandum: amendments made to parts 1-3 Economic Crime and Corporate Transparency Bill (BEIS measures)' available online at: <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-echr-memoranda/supplementary-echr-memorandum-amendments-made-to-parts-1-3-economic-crime-and-corporate-transparency-bill-beis-measures> (last accessed 7 May 2024).

<sup>34</sup> UK government's ECHR Memorandum, supra, at paragraph 103.

<sup>35</sup> C-601/20 *Sovim v LBR*.

*In so far as the Council of the European Union also refers to the principle of transparency ... it should be noted that that principle ... guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system ...*

*The principle of transparency is given concrete expression primarily in the requirements of institutional and procedural transparency covering activities of a public nature, including the use of public funds, such a link with public institutions.*

*Accordingly, the principle of transparency cannot be considered, as such, an objective of general interest capable of justifying the interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, which results from the general public's access to information on beneficial ownership.*

Following the CJEU decision, the UK government issued a policy paper to defend the compatibility of UK public registers with Article 8 of the European Convention on Human Rights.<sup>33</sup> However, that policy paper is thin on the ground, and wholly unconvincing.

## Conclusion #3

Privacy and transparency are not two competing public objectives. In Europe at least, privacy is a fundamental right protected by the European Convention on Human Rights and the EU Charter of fundamental rights. Transparency is not.

While transparency may serve other legitimate objectives, it needs to be proportionate.

### “FATCA, THE CRS AND PUBLIC REGISTERS ARE PROPORTIONATE”

Governments as well as the OECD have been defending the proportionality of transparency measures.

In relation to public registers, the UK government defended the introduction of PSC registers thus<sup>34</sup>:

*To the extent that this policy interferes with the right to a private life, the Government considers the requirements of the register to be justifiable under Article 8(2) ECHR, and necessary in a democratic society both in the interests of the economic well-being of the country and for the prevention of crime ... The Government also considers the measure to be proportionate to the aims.*

The CJEU disagrees<sup>35</sup>:

*The provision whereby the information on the beneficial ownership of companies incorporated within the territory of the Member States is accessible in all cases to any member of the general public is invalid. The interference with the rights*

*guaranteed by the Charter entailed by that measure is neither limited to what is strictly necessary nor proportionate to the objective pursued.*

This judgment was greeted by a barrage of criticism in the media, with the Financial Times running a charged headline “ECJ’s gift to oligarchs under sanctions”<sup>36</sup>

In fact, the assessment in relation to the proportionality of transparency measures is more nuanced.

This includes the *Financial Times*, if one reads past the headline:

*The judgment is undoubtedly a setback. But it is more nuanced than some campaigners are portraying. Data minimization is not a bad principle to strive for with public records.*

Over to the USA, there has been a raging debate about the proportionality of FATCA.

In a recent hearing on offshore tax evasion held before the US Senate Budget Committee,<sup>37</sup> one of its Members warned:

*Targeted approaches are far preferable to broadly applicable ones that sweep up innocent taxpayers ... a key word is reasonable. One example of an overly broad sweep approach to offshore tax evasion is FATCA. Due to FATCA, many Americans living abroad have seen their bank accounts closed or have been unable to open an account.*

Previously, the US Congress had to abandon a plan by President Biden to introduce a domestic version of FATCA amidst a barrage of criticism from members of the US Senate,<sup>38</sup> Congress,<sup>39</sup> the American Bankers Association<sup>40</sup> and the US Independent Bankers Association.<sup>41</sup>

In particular, the American Bankers Association echoed concerns commonly raised in Europe in relation to transparency measures:

*The proposal would establish an expansive new tax information reporting regime that would directly impact almost every American with an account at a financial institution. This proposal would create serious financial privacy concerns. We urge members to oppose any efforts to advance this ill-advised new reporting regime.*

Concerns in relation to the proportionality of FATCA were also raised by Charles Rettig before he became IRS Commissioner<sup>42</sup>:

*Eighty percent of non-resident filers have no U.S. tax liability ... Presumably these Americans are not tax cheats seeking to conceal assets*

Questions concerning the legality of FATCA have also preoccupied academia, with one US author<sup>43</sup> lamenting that:

*During the more than one decade since Congress adopted FATCA Congress has failed to authorize the funding necessary to assure compliance. In the meantime, FATCA has served no purpose other than to harass and intimidate overseas Americans and financial institutions. There are no circumstances under which the United States has a rational—or moral—interest in harassing and intimidating its overseas citizens because they engage in normal banking activities in the countries where they live.*

This has led a number of petitions<sup>44</sup> before the European Parliament brought by affected EU citizens with a US connection, one of which (filed by a US-French citizen known by his initials “J.R.”) has now been pending for more than 6 years, leading to a stand-off between the European Parliament and other EU institutions, and a joint statement by the EU FATCA petitioners asking for more progress.<sup>45</sup>

Research into internal documents of the EU shows that the European Bankers Association and the British Bankers Association were firmly of the view that FATCA and the CRS are disproportionate. This position was articulated in a report issued on behalf of the European Commission<sup>46</sup>:

*On many aspects, [the CRS] may be compared with the Data Retention Directive which has recently been declared illegal by the CJEU.*

The same research shows that the European Commission had expressed “worrying concerns” about the data protection and data security implications of FATCA.<sup>47</sup>

By then, however, the implementation of FATCA had become a *political issue* and the election of Pierre Moscovici

<sup>36</sup> 1 December 2022, see <https://www.ft.com/content/6f62b79c-11c4-4a51-af8d-60360c200bc9> (last accessed 7 May 2024).

<sup>37</sup> Discussed in a letter to the EU dated 21 April 2024, available online at <https://www.mishcon.com/download/letter-to-the-eu-re-us-budget-committee> (last accessed 7 May 2024).

<sup>38</sup> Discussed in this letter to the EU dated 1 December 2021, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3405/8%20Dec%202021%20to%20EU%20re%20US%20Senate%20on%20Domestic%20FATCA.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3405/8%20Dec%202021%20to%20EU%20re%20US%20Senate%20on%20Domestic%20FATCA.PDF) (last accessed 7 May 2024).

<sup>39</sup> Discussed in this letter to the EU dated 12 December 2021, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3404/12%20Dec%202021%20to%20EU%20re%20US%20Congress%20letter%20to%20US%20Treasury%20domestic%20FATCA.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3404/12%20Dec%202021%20to%20EU%20re%20US%20Congress%20letter%20to%20US%20Treasury%20domestic%20FATCA.PDF) (last accessed 7 May 2024).

<sup>40</sup> Discussed in this letter to the EU dated 13 December 2021, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3403/13%20Dec%202021%20to%20EU%20re%20American%20Bankers%20Association%20Letter%20domestic%20FATCA.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3403/13%20Dec%202021%20to%20EU%20re%20American%20Bankers%20Association%20Letter%20domestic%20FATCA.PDF) (last accessed 7 May 2024).

<sup>41</sup> Discussed in this letter to the EU dated 14 December 2021, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3402/14%20Dec%202021%20to%20EU%20re%20US%20Bankers%20Association%20Letter%20domestic%20FATCA.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3402/14%20Dec%202021%20to%20EU%20re%20US%20Bankers%20Association%20Letter%20domestic%20FATCA.PDF) (last accessed 7 May 2024).

<sup>42</sup> Discussed in a letter to the EU dated 18 November 2022, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3533/18%20Nov%202022%20to%20EU%20re%20Rettig%20article.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3533/18%20Nov%202022%20to%20EU%20re%20Rettig%20article.pdf) (last accessed 7 May 2024).

<sup>43</sup> Laura Snyder, ‘Can extraterritorial Taxation Be Rationalised?’, 76 *Tax Law* 535 (2023), available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466430](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466430) (last accessed 7 May 2024).

<sup>44</sup> The petitions are summarized in a letter to the EU dated 13 July 2021, which is available online at <https://www.mishcon.com/upload/files/13%20July%202021%20to%20EDPB%20re%20Europarl%20Petitions.PDF> (last accessed 7 May 2024).

<sup>45</sup> The joint statement is available online at: [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3447/14%20Jan%202022%20re%20E2%80%93%20Joint%20EU%20Petitioners%20Statement.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3447/14%20Jan%202022%20re%20E2%80%93%20Joint%20EU%20Petitioners%20Statement.pdf) (last accessed 7 May 2024).

<sup>46</sup> ‘First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information’, March 2015, available online at [https://taxation-customs.ec.europa.eu/system/files/2016-09/first\\_report\\_expert\\_group\\_automatic\\_exchange\\_financial\\_information.pdf](https://taxation-customs.ec.europa.eu/system/files/2016-09/first_report_expert_group_automatic_exchange_financial_information.pdf) (last accessed 7 May 2024).

<sup>47</sup> As discussed in a letter to the EU dated 27 September 2021, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3370/27%20Sept%20to%20COM%20re%20substantive%20response%202.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3370/27%20Sept%20to%20COM%20re%20substantive%20response%202.PDF) (last accessed 7 May 2024).

(who as France's Finance Minister had negotiated the French–US FATCA Agreement) led to a change of direction within the Commission, with internal evidence suggesting that Commissioners might have misled the European Parliament on the existence of concerns and even of negotiations with the USA to try and find “more proportionate and workable” solutions.<sup>48</sup>

The *political* dimension of the debate surrounding the proportionality (and therefore, validity) of FATCA is evidenced in the stand-off between the current European Commission and the European Parliament, which on 14 May 2018 published a 46-page long study in which it confirmed the disproportionate nature of FATCA<sup>49</sup>:

*In respect of the first problem of denial of banking services, there is ample evidence that European financial institutions are systematically identifying customers whom they believe may be U.S. Persons for the purposes of FATCA denying them banking services for fear of being subject to FATCA reporting ...*<sup>50</sup>

And more down:

*So essentially the issue is whether FATCA restrictions are necessary and proportionate measures ... At the current stage they appear to be neither proportionate nor necessary in so far as they fail to narrow down the reporting obligations to individuals suspected of tax evasion.*<sup>51</sup>

Previously, the EU data protection watchdog had warned the European Commission that:

*A bulk transfer and the screening of all these data is not the best way to achieve the goal [of fighting offshore tax evasion]. Therefore more selective, less broad measures should be considered in order to respect the privacy of law-abiding citizens, particularly; an examination of alternative, less privacy-intrusive means must be carried out to demonstrate FATCA's necessity.*<sup>52</sup>

Less than 3 months later, on 12 September 2012, the UK government signed the first bilateral FATCA agreement with the US, opening the floodgates.<sup>53</sup>

A decade later, on 24 May 2023, the Belgian data protection commissioner issued a 77-page long decision in which it confirmed the illegality of FATCA.<sup>54</sup>

That decision is currently under appeal, and national tax authorities are strenuously fighting legal challenges brought by affected citizens who have been forced to go to Court to defend their fundamental rights to privacy and data protection

and the safety of their data, including two clients of Mishcon de Reya, whose cases have been widely reported in the press.

Claimants can rely on consistent case law from the CJEU, which stressed on several occasions that the principle of proportionality is a strict one. According to this case law, any interference in the fundamental rights to privacy and data protection which goes beyond what is strictly necessary is disproportionate and therefore illegal as a matter of EU law.<sup>55</sup>

#### Conclusion #4

The data show clearly that the official narrative according to which transparency measures are proportionate and necessary is shaky to say the least.

The official narrative attempts to frame the issue of transparency solely by reference to the objective pursued, notably the fight against tax evasion and money laundering.

Nobody should evade tax. However, compliant citizens have a legitimate expectation to have their personal data protected against unnecessary intrusion from government authorities, especially in circumstances where the data show that they are unable to protect such data from unauthorized access, hacking and data theft.

Questions about the proportionality and legality of transparency measures will not go away, and this article aims to contribute to the debate by offering objective data and suggesting that the debate be less politicized. Following the CJEU judgment in the public registers case, it is time to have a frank and balanced debate about the merits and limits of transparency measures designed in the early 2000, before Edward Snowden's revelations ushered a new awareness of the importance of protecting personal data in the digital age.

#### AUTHOR BIOGRAPHY

**Filippo Nosedà** is a partner at Mishcon de Reya and a visiting Professor at King's College in London, where he teaches international and comparative trust law to LL.M. students. Filippo is a dual qualified English solicitor and Swiss lawyer (Rechtsanwalt). He is also admitted in the BVI. Notable work includes advising a number of countries and territories in relation to the adoption of private foundations laws and the recognition of common law trusts, which reflects Filippo's unique ability to straddle the common law-civil law divide. Filippo is best known for his work in the area of transparency and data protection. He is currently working on a number of court cases in the UK and Europe against the excessive nature of FATCA, the CRS and public registers of beneficial ownership. Email: [filippo.nosedà@mishcon.com](mailto:filippo.nosedà@mishcon.com)

<sup>48</sup> As discussed in two letters to the EU dated 17 January 2023, available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3444/17%20Jan%202022%20to%20Commissioner%20Jourov%20re%20FATCA%20debate%20on%204%20July%202018.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3444/17%20Jan%202022%20to%20Commissioner%20Jourov%20re%20FATCA%20debate%20on%204%20July%202018.PDF) and [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3443/17%20Jan%202022%20to%20Commissioner%20Gentiloni.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3443/17%20Jan%202022%20to%20Commissioner%20Gentiloni.PDF) (last accessed 7 May 2024).

<sup>49</sup> European Parliament, 'FATCA Legislation and its Application at International and EU Level', PE 604.967, available online at [https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2018\)604967](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)604967) (last accessed 7 May 2024).

<sup>50</sup> *Supra*, at p. 27.

<sup>51</sup> *Supra*, at p. 32.

<sup>52</sup> Letter from the Chair of the Article 29 Working Party dated 21 June 2012, which is available online at [https://ec.europa.eu/justice/article-29/documentation/other-documents/files/2012/20120621\\_letter\\_to\\_taxud\\_fatca\\_en.pdf](https://ec.europa.eu/justice/article-29/documentation/other-documents/files/2012/20120621_letter_to_taxud_fatca_en.pdf) (last accessed 7 May 2024).

<sup>53</sup> For a timeline, see this letter to the EU dated 27 September 2021, which is available online at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3370/27%20Sept%20to%20COM%20re%20substantive%20response%202.PDF](https://www.mishcon.com/assets/managed/docs/downloads/doc_3370/27%20Sept%20to%20COM%20re%20substantive%20response%202.PDF) (last accessed 7 May 2024).

<sup>54</sup> The decision is available online at <https://www.dataprotectionauthority.be/citizen/belgian-dpa-prohibits-the-transfer-of-tax-data-of-belgian-accidental-ame-to-the-usa> (last accessed 7 May 2024).

<sup>55</sup> See *Digital Rights Ireland Ltd (C-293/12)*; *Maximilian Schrems v Data Protection Commissioner (C-362/14)*, *Tele2 Sverige AB and Watson (C-203/15 and C-698/15)*; *PNR Agreement between Canada and the EU (Opinion 1/2015)*; *Privacy International (C-623/17)*; *Spacenet (C-793/19)*; *Sovim v LBR (C-601/20)*; see also MEP expenses (T-639/15, paragraph 88) and the European Court of Human Rights' case *L.B. v Hungary*, (application no. 36345/16, judgment of 9 March 2023).

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