

The FATCA Wars: Technical Knockout. Game, Set, Rematch?

by Filippo Noseda



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In this article, Noseda examines recent U.K. judgments in Jenny Webster's litigation to keep HM Revenue & Customs from sharing her data with the United States under the Foreign Account Tax Compliance Act and what they mean for the broader discussions of data privacy protection.

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FATCA Wars – The Story Thus Far

Tax Notes contributing editor Robert Goulder introduced Jenny and her David-versus-Goliath legal battle to protect her rights in the face of the devastatingly disproportionate effects of the Foreign Account Tax Compliance Act. His articles also considered the issue of funding (because Jenny's case cost several hundred thousand pounds to run).¹

¹ Robert Goulder, "The FATCA Wars: Jenny Goes to Court," *Tax Notes Int'l*, Nov. 22, 2021, p. 959; see also Goulder, "The FATCA Wars: Who's Funding Jenny's Case?" *Tax Notes Int'l*, Apr. 1, 2024, p. 157; see further Goulder, "Interview: The FATCA Wars: Jenny Goes to Court," *In the Pages*, Feb. 2, 2022 (Goulder interviewing Noseda and his client Jenny Webster).

In two recent English judgments, the High Court² and the Court of Appeal³ backed HM Revenue & Customs' strategy of preventing Jenny's case from being heard by the courts unless she disclosed the identity of her main funder (as explained below, there were 815 small funders who donated just over £100,000 through crowdfunding, but HMRC decided to direct its efforts against the main funder, who pledged the balance of the funds that were necessary to file the claim and cover HMRC's costs in the event of defeat).

The judgments have implications for other citizens of modest means wanting to bring the state to account through anonymous funding. They also run against the grain of recent pronouncements made by the U.K. government to support litigation funding for these so-called David-versus-Goliath cases after the United Kingdom's biggest miscarriage of justice at the hands of the government-owned Post Office.⁴

Although the state has thwarted Jenny's claim on procedural grounds, her contentions about FATCA remain valid, well-known to HMRC, and untested by the courts. The war is far from over.

I will revisit the litigation later in the article, but I start with a couple of obvious observations about FATCA that are important for a proper understanding of HMRC's tactics of wanting to avoid a court debate about it.

FATCA Does Not Work

Launched with fanfare in 2010, FATCA was projected to produce \$8.7 billion from fiscal 2010

² *Webster v. HM Revenue & Customs* [2024] EWHC 530 (KB).

³ *Webster v. HM Revenue and Customs*, CA-2024-000721 (June 5, 2024).

⁴ The U.K. Post Office scandal is discussed later in the article; there are parallels between the two cases.

through 2020, according to the Joint Committee on Taxation.⁵

Twelve years later, the U.S. Treasury Inspector General for Tax Administration released a damning report in which it confirmed that FATCA cost the IRS more than half a billion dollars (\$573,643,874) to implement for those 11 years but yielded a measly \$14 million in additional penalties and led to a paltry 847 nudge letters to taxpayers.⁶

There are several reasons why FATCA did not work.

Let's start with accuracy. According to the TIGTA report, about 10 million reports (out of a total of 34 million) were useless (they could not be validated).

Then there is funding, or lack thereof. In 2022 written testimony to Congress,⁷ then-IRS Commissioner Charles P. Rettig acknowledged that the IRS was "forced to make difficult decisions regarding priorities, the types of enforcement actions we employ, and the service we offer." He went on to say:

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 the Foreign Account Tax Compliance Act (FATCA). Congress enacted FATCA in 2010, but we have yet to receive any significant funding appropriation for its implementation.⁸

The TIGTA report put it thus: "The IRS has significantly departed from its original comprehensive FATCA Compliance Roadmap."⁹

⁵ See JCT, "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," JCX-6-10 (Mar. 4, 2010).

⁶ U.S. Treasury Inspector General for Tax Administration, "Additional Actions Are Needed to Address Non-Filing and Non-Reporting Compliance Under the Foreign Account Tax Compliance Act," 2022-30-019 (Apr. 7, 2022).

⁷ Written testimony of Charles P. Rettig, Commissioner, Internal Revenue Service, Before the House Ways and Means Committee, Subcommittee on Oversight on the Filing Season and IRS Operations (Mar. 17, 2022).

⁸ *Id.* at 19.

⁹ TIGTA, *supra* note 6, at 2.

FATCA Disrupts Ordinary People's Lives

Ever since FATCA was introduced, Americans, especially those living abroad, have started complaining about denial of service and account closures by foreign banks overwhelmed with the complexities of FATCA. Some banks have simply decided to show American clients the door. There is ample evidence of this, including reports from American associations, such as Democrats Abroad, who first sounded the alarm in 2014:

Of the more than 6,500 FATCA research survey participants, 16.2 percent reported having had accounts closed by financial service providers in the country in which they lived.

Nearly 60 percent of those reporting account closures are over the age of 55; 60 percent have lived abroad for 20 or more years; 40 percent moved abroad to join a partner; two-thirds are married to a non-American spouse and 72 percent have no plans to relocate back to the US.

These are not the accounts of wealthy people living the high life in Monaco. These are the accounts of ordinary people living middle class lives in places outside the United States because that is where life took them.¹⁰

This is a bipartisan issue. It was flagged at a recent hearing of the Senate Budget Committee by ranking member Chuck Grassley, R-Iowa:

Due to the law, many Americans living overseas have seen their bank accounts closed or have been unable to open an account.

For many foreign financial institutions, the business of Americans living abroad simply isn't worth the additional burdens and cost of complying with [FATCA].¹¹

¹⁰ Letter from Democrats Abroad to Mark Mazur, Treasury deputy assistant secretary, domestic and international policy (Sept. 8, 2014); see also Democrats Abroad, "2014 FATCA Research Project: FATCA: Affecting Everyday Americans Every Day" (Sept. 2014).

¹¹ Senate Budget Committee, Opening Statement by Sen. Chuck Grassley, "Sunny Places for Shady People: Offshore Tax Evasion by the Wealthy and Corporations" (Apr. 10, 2024).

The group Republicans Overseas has raised similar concerns.¹²

The plight of Americans living abroad has also been highlighted by the national taxpayer advocate in a recent report.¹³ As part of Jenny's case, we put together a long list of individual cases of ordinary U.S. citizens living abroad whose bank accounts have been closed or who reported that they can't open investment accounts or put in place pension arrangements.

We recorded cases in Australia, France, Germany, Italy, Luxembourg, the Netherlands, New Zealand, Spain, Sweden, and the United Kingdom. This is a worldwide phenomenon, and it can be safely assumed that both the IRS and HMRC are fully aware of the impact of FATCA on ordinary citizens.

FATCA Affects Ordinary Citizens

During the legal proceedings, HMRC kept stressing that FATCA was part of a strategy to root out tax evasion, as if to suggest that any attempt to question the measure must have been driven by this nefarious goal. However, look beyond this scaremongering narrative and it is quite clear that many citizens affected by the measure are not wealthy Americans intent on stashing undeclared funds abroad. Rettig made the point vividly in an article he wrote before he was elevated to the top job at the IRS:

Eighty Percent of Non-Resident Filers have No U.S. Tax Liability! . . . Even [if] they have no resulting tax obligations, under FATCA non-resident Americans are generally required to file tax returns and reports regarding their "foreign" financial accounts. . . . Presumably these Americans are not "tax cheats."¹⁴

One of the reasons many Americans living overseas do not owe any U.S. tax is a direct result

¹² Republicans Overseas, "The Unintended Consequences of FATCA" (Apr. 26, 2017); Republicans Overseas, "What Is FATCA?" (last visited July 10, 2024).

¹³ U.S. Taxpayer Advocate, Annual Report to Congress 2023, "Most Serious Problem #9: Compliance Challenges for Taxpayers Abroad: Taxpayers Abroad Continue to Be Underserved and Face Significant Challenges in Meeting Their U.S. Tax Obligations," at 116-131 (Dec. 31, 2023).

¹⁴ Rettig, "Why the Ongoing Problem With FBAR Compliance?" SSRN, at 2 (Oct. 25, 2016).

of U.S. tax policy: In 1981 the Reagan administration reintroduced a foreign earned income exclusion as part of the Economic Recovery Tax Act.¹⁵ The act's legislative history indicates that the foreign earned income exclusion, at least initially, was intended to foster foreign trade by providing an incentive for American workers to go abroad and by placing them in an equal position with citizens of other nations who are not taxed by their native countries.¹⁶

The exemption was \$75,000 in 1981, and today it's \$126,500, which is far above the median gross annual earnings of £34,963 for full-time employees in the United Kingdom.¹⁷ It is certainly above Jenny's earnings (during the proceedings it was uncontested that Jenny did not owe any U.S. tax).

FATCA Forces Many Americans to Leave

Ultimately, FATCA leads many ordinary Americans who want control over their finances to give up their U.S. citizenship.¹⁸ This fact was obliquely acknowledged by the State Department when it invited comments on a proposal¹⁹ to reduce expatriation fees:

While there is no legal requirement for individuals to declare their motivation for renouncing U.S. citizenship, anecdotal evidence suggests that difficulties due at least in part to stricter financial reporting requirements imposed by the Foreign Account Tax Compliance Act on foreign financial institutions with whom U.S. nationals have an account or accounts may well be a factor.²⁰

¹⁵ Economic Recovery Tax Act of 1981 (P.L. 97-34).

¹⁶ See Glenn Kurlander, "Foreign Earned Income Exclusion: Redefining the Exception for Amounts Paid by the United States Under I.R.C. 911," 68(4) *Cornell Law Review* 592 (1983).

¹⁷ See Office for National Statistics, "Employee Earnings in the UK: 2023" (Nov. 2023).

¹⁸ Laura Snyder, Karen Alpert, and John Richardson, "Should Overseas Americans Be Required to Buy Their Freedom?" *Tax Notes Int'l*, July 12, 2021, p. 161.

¹⁹ U.S. State Department, Proposed Rules, Schedule of Fees for Consular Services: Administrative Processing of Request for Certificate of Loss of Nationality Fee, 88 *Fed. Reg.* 67687 (Oct. 2, 2023). See also Helen Burggraf, "American Expats Urged to Comment on State Dept Fee Reduction Plan," *American Expat Financial News Journal*, Oct. 29, 2023.

²⁰ 88 *Fed. Reg.* at 67689.

The issue has also been raised by associations of Americans overseas²¹ and the press.²²

I am not American, but I find a policy aimed at facilitating expatriations, rather than dealing with the underlying problem, un-American, and I know from my conversations with Jenny that she suffered a great deal after her decision to give up her citizenship. But FATCA made it impossible for her to manage her finances and build an investment portfolio to support her future retirement in the United Kingdom.

Defeat That Smells Like Victory

Jenny filed her lawsuit on October 29, 2021. The crux of her case was that (1) she was an ordinary citizen with an ordinary income; (2) she did not owe any U.S. tax; (3) nevertheless, she was subject to the brutal effects of FATCA; (4) the transfer of her sensitive data to the United States represented a violation of her fundamental right to data protection under EU/U.K. law; and (5) the transfer of her personal data to the United States without any indicia of tax evasion exposed her to unnecessary data security risks.

Jenny's lawsuit was the culmination of a years-long personal struggle to be heard. In the years preceding her lawsuit, Jenny wrote to her member of Parliament, to the U.K. Treasury, and to HMRC. She filed an unsuccessful complaint against HMRC before the U.K.'s data protection regulator (U.K. Information Commissioner's Office, or ICO). This was all before she heard about the law firm Mishcon de Reya and my work to raise awareness on the data protection implications of various transparency measures at an international taxpayers' rights conference.

Everyone had turned Jenny down, including the ICO, which is supposedly tasked with protecting citizens' data. In its decision, it held that HMRC's actions were justified on the basis that:

The UK has long-standing ties with the US which, at the time of the request, remained one of the UK's closest allies on the international stage. In assessing the prejudice that would be caused to the UK's relations with another state, the Commissioner is also required to consider the wider context and long-term consequences in which the disclosure of the requested information would result.²³

Politics, then, trumped data protection. When pressed with another complaint filed by Mishcon de Reya on Jenny's behalf, the ICO claimed that the delay in reaching a decision was in part a result of the need to seek "a policy view."²⁴

More politics, then. Fed up, Jenny decided to take her case to court, first by attempting to seek assurances from HMRC that it would not transfer her data to the United States and then (when HMRC refused) by threatening to ask the courts to review the lawfulness of HMRC's decision (a type of court proceeding known as judicial review) of HMRC's decision.

HMRC's Procedural War

HMRC's first reaction was to tell Jenny that judicial review was the last resort and that she should first seek to bring a private law claim under the EU and U.K. data protection legislation, which she did.

After a long pretrial stage and various procedural tussles in court, Jenny's case was finally listed for hearing before the High Court in November 2023.

Except that by now HMRC had claimed that Jenny's data protection claim represented an abuse of process on the basis that her true intentions were to challenge FATCA as a whole. For that, Jenny should have filed a judicial review when FATCA was first extended to the United Kingdom in 2016, and as luck would have it, that claim should have been brought within three months, meaning that Jenny's alleged claim was now time barred.

²¹ See, e.g., Democrats Abroad, "Taxation Task Force Submission for House Financial Services Committee on the Hearing Entitled: Oversight of the Financial Crimes Enforcement Network (FinCEN)" (Feb. 28, 2024); Snyder, "The Unacknowledged Realities of Extraterritorial Taxation," 47 *Southern Illinois University Law Journal* 243 (2023).

²² See, e.g., Alice Kantor, "Americans Abroad Renounce Citizenship to Escape Tax Law's Clutches," *Bloomberg*, Sept. 30, 2022.

²³ ICO, Decision notice, FS50751683 (Mar. 1, 2019).

²⁴ See letter from Filippo Nosedà, Mishcon de Reya, to Owen Prendeville, Information Commissioner's Office (May 22, 2020) (quoting email from Prendeville to Nosedà, May 20, 2020, attached to the letter).

Litigating in the United Kingdom is not cheap. Jenny managed to secure the support of 815 small donors via crowdfunding.²⁵ However, the £106,426 collected in this way was insufficient to take HMRC to task, given the complexity of a claim that included U.S. law, EU data protection law, and the implications of Brexit for the existing data protection framework.

Luckily, Jenny secured additional funding through a donor that approached her lawyers, asking to remain anonymous — that is, anonymous to Jenny (any U.K. law firm is regulated and must know who they are dealing with and carry out extensive due diligence).

Driving a Wedge

Sensing that the funder was keen to retain its anonymity, HMRC then devised a procedural strategy to drive a wedge between Jenny and her main funder (but don't forget all those other funders who donated through crowdfunding just yet).

HMRC claimed that in order to establish Jenny's true intentions, the court also had to establish the intentions of her funder (mind you, only the main funder, because there was no mention of the 815 people who had donated through crowdfunding). HMRC claimed that this was central to HMRC's procedural defense that Jenny had abusively dressed a tardy public law challenge as a private data protection claim (which can be brought at any time) and that the intentions of the funder were a key consideration.

Readers accustomed to looking behind a procedural strategy to assess its intended target will see that HMRC's attempt to extract disclosure of the intentions (and therefore, also the identity) of the anonymous funder was designed to drive a wedge between the anonymous funder and Jenny.

Some readers may object that HMRC's strategy should be taken at face value. But if this were true, why didn't HMRC demand disclosure of the identity (and intentions) of the 815 small funders who donated an average of £124 per person to Jenny's data protection claim?

Readers can form their own view. Mine is that HMRC portrayed Jenny's claim in Disneyesque terms of good versus evil. Had HMRC really cared about the funder's intentions, they should have enquired about the intentions of all 816 funders. Indeed, many of the modest funders used the comments section of Jenny's CrowdJustice page to willingly publicize their intentions for offering support. For example, an anonymous person who donated £10 wrote:

I am only a small-time donor, but I want to indicate my continued support for this initiative. I am not a US citizen, but my children are, and they have been seriously impacted by FATCA regulations. This case focuses on the privacy aspect, but hopefully will bring about a reconsideration.²⁶

Someone called Josh, who donated £20, added:

FATCA is hurting the wrong people. I cannot open a Savings account for my 9-month-old son, who was born and lives in the UK, because he is also a US citizen by birth. Thank you Jenny for leading the fight against this unjust law.²⁷

Or take Miriam (who donated £25):

My biggest problem is my inability to open a UK investment or bank account and the fear that my bank will close my account. This has happened several times already and the number of banks willing to accept Americans as customers is getting smaller and smaller.

Joseph (a £50 donor) made a similar point:

I believe in paying your fair share of taxes, but FATCA and US filing obligations punish US citizens with crushing financial filing costs, and make it impossible for us to open normal bank accounts.²⁸

²⁵ See Jenny, "FATCA & HMRC: Breaching My Human Rights to Data Protection and Privacy," CrowdJustice (last updated Mar. 31, 2024).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

An anonymous donor (who gave £100) made the following point for remaining anonymous:

I fully believe in [the] fundamental right of privacy for anyone's personal data. However, I will remain anonymous because I also find FATCA a disgraceful ploy by Uncle Sam to flex financial muscle with threat.²⁹

And Patricia (who gave £20) seconded Jenny's data protection concerns:

FATCA is a complete abuse of not only GDPR [the EU general data protection regulation] but also to my fundamental right to privacy and the protection of my personal data.³⁰

None of those identities mattered to HMRC because it only asked for the disclosure of the identity of the big funder, in the full knowledge that this funder was vital to keeping Jenny's claim afloat.

So instead of having her day in court in November 2023 and listening to the evidence prepared by U.S. law experts on both Jenny's side and HMRC's side, Jenny had her hearing date usurped by a dry procedural battle on the disclosure of intentions and the main funder's identity.

Jenny's barrister³¹ did the best he could to unmask HMRC's ploy, but eventually the judge granted HMRC's application and issued a so-called unless order on October 31, 2023. Under the terms of the order, Jenny's claim would fail if the funder refused to disclose its identity, unless Jenny could strike out HMRC's procedural defense that her claim was an "abuse of process" and that her intentions (and those of the main funder) were irrelevant. Jenny's legal team moved to have HMRC's defense struck out, so the matter came back before the same judge, who sided with HMRC:

Funder identity goes, on HMRC's case, to the core issue of whether this is a genuine

private law claim, albeit a test case, generously funded by a disinterested and publicity-shy benefactor with a commitment to human rights, or whether the court's processes are being abused by an unregulated attack, on a government department exercising statutory public functions in the public interest, made in the service of agencies whose own commitment to the UK public interest, and the interests of justice, is unapparent.

The full contextual balance between public and private interests, and the interests of justice, are put in issue by HMRC's abuse defence.

On the basis that that defence goes to trial generally, I have been given no good reason for splitting out funder identity from the factual matrix at this stage, as being a proposition as to relevance which has no reasonable grounds for being advanced and an unreal prospect of being successfully established.³²

Needless to say, I don't agree with this decision. Why would a funder's intention be relevant? The claim is Jenny's and only Jenny's. It is Jenny's right to data protection and privacy that has been violated by the mindless and senseless processing, collection, and transfer of data between financial institutions and HMRC for onward transmission to the IRS — which, as we know from Rettig's written testimony to Congress, doesn't do anything with the data it receives from abroad. And copious reports in the United States confirm the data are at risk of being lost by the IRS.³³

³² Webster, [2024] EWHC 530 (KB), at para. 100 (Mar. 8, 2024).

³³ See, e.g., TIGTA, "Sensitive Business and Individual Tax Account Information on Microfilm Cannot Be Located," Report 2023-IE-R008 (Aug. 8, 2023); see also U.S. Government Accountability Office, "Security of Taxpayer Information: IRS Needs to Address Critical Safeguard Weaknesses," GAO-23-105395 (Aug. 14, 2023). See also comments made by Dan Fort, former chief of the IRS Criminal Investigation division: "So much of the money goes into keeping those 60 years' old systems tied together with bubble gum, basically." Center for Taxpayer Rights, "Tax Chat! With the Center for Taxpayer Rights on Artificial Intelligence & Tax Administration Part 1," YouTube, May 30, 2023. For an academic article, see Matthew Jensen, "Keeping Federal Data Secure," 60 *National Affairs* (Summer 2024) ("America's administrative data are not safe: Information insecurity prevails. . . . Notable losses of information have flowed from the Internal Revenue Service.") (emphasis in original).

²⁹ *Id.*

³⁰ *Id.*

³¹ In England, the lawyer (in this case, the author) instructs a barrister who stands up in court to plead the case.

I am comforted by the fact that Goulder reached a similar conclusion:

Allowing HMRC to allege the abuse of process comes across as the latest in a string of dilatory tactics. It pushes us back a few steps in the quest to settle the GDPR question. It feeds the narrative that EU governments are grasping at straws to keep the issue away from the Court of Justice of the Europe Union. Arguably this invocation of the defense conflates the abuser with the abusee.³⁴

How This Battle Ended

After the High Court issued its judgment, Jenny's team filed an appeal before the Court of Appeal, but by then the direction the wind was blowing was clear, and so it came as little surprise that leave to appeal was eventually refused with the following dry commentary:

The [High Court] judge delivered a full and careful judgment the ultimate conclusions of which were that “the abuse defence cannot fairly be disposed of on a summary basis” and that the defence had “sufficient substance, reality and prospect to make it unfair to dispose of it on an interlocutory basis on this application.”³⁵

But We May Win the War

Thanks to the work carried out by Jenny, her legal team, and other campaigners,³⁶ as well as independent U.S. authorities (such as the Government Accountability Office and TIGTA), there is now a mountain of evidence to show that (1) FATCA does not work; (2) the IRS does not really care; and (3) data collected through FATCA is at risk of being lost to hacking.³⁷

In addition, the Belgian data protection authority issued a 77-page decision confirming that FATCA violates fundamental principles of EU data protection law,³⁸ and although that decision is under appeal, the European Parliament came to a similar conclusion in a report published shortly after the enactment of the EU's general data protection regulation.³⁹ In an update published in 2022, the European Parliament paid heed to the work of campaigners and the endless institutional dithering of EU institutions, guilty of initiating “an approach of institutional deference” and “establishing a policy of institutional forbearance”⁴⁰ (internal quotation marks omitted) aimed at deflecting accountability for a well-known issue,⁴¹ and tying campaigners in knots.

In the courts, HMRC's procedural strategy and dilatory tactics have prevented any discussion of the subject matter of Jenny's claim. Instead, what we have is a precedent about litigation funding that will have wide repercussions for other citizens of modest means wanting to bring the state to account through anonymous funding.

Clearly, HMRC was concerned about the merits of the case, which is why it opted for a procedural barrage using the state's endless finances to thwart Jenny's courageous claim to see justice done.

Readers will agree that when the state adopts belligerent tactics to prevent accountability, a miscarriage of justice begins to emerge.

The recent judgments are an affront to the principle of access to justice, and they serve no other purpose than to prevent the accountability of HMRC for breaching Jenny's basic rights to

³⁴ Goulder, “Who's Funding Jenny's Case?” *supra* note 1.

³⁵ Webster, CA-2024-000721 (June 5, 2024).

³⁶ These include several EU citizens who filed individual petitions with the European Parliament, as well as the French Association of Accidental Americans (available on the Michon de Reya website).

³⁷ The inadequacy of the IRS IT-systems and the loss of the data of millions of taxpayers has been at the center of various reports. *See, e.g.*, GAO, *supra* note 33; TIGTA, *supra* note 33; Center for Taxpayer Rights, *supra* note 33; and Jensen, *supra* note 33. As part of Jenny's claim, we put together a 200-plus-page list of hacking and data breaches affecting the IRS, HMRC, other tax authorities and government agencies, central banks, financial institutions, and the private sector.

³⁸ Autorité de Protection des Données/ Gegevensbeschermingsautoriteit, “Belgian DPA Prohibits the Transfer of Tax Data of Belgian ‘Accidental Americans’ to the USA” (May 24, 2023).

³⁹ Carlo Garbarino, “FATCA Legislation and Its Application at International and EU Level,” Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union, European Parliament, PE 604.967 (May 2018).

⁴⁰ Garbarino, “FATCA Legislation and Its Application at International and EU Level: An Update,” Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union, European Parliament, PE 734.765, at 5 (Sept. 2022).

⁴¹ *See* letter from Nosedà to Emmanuel Crabit, European Commission (Sept. 27, 2021); *see also* letter from Nosedà to High Level Working Party (Taxation), European Council (Feb. 24, 2021). Both letters are available on the Mishcon de Reya website.

data protection and data privacy as a result of HMRC's own misconceived actions. Those actions include its decision to extend FATCA to the United Kingdom, notwithstanding well-documented concerns from the British Bankers Association,⁴² the European Banking Federation,⁴³ and the European Commission,⁴⁴ and with crippling effects for ordinary citizens.

HMRC referred copiously to the author's research and online correspondence with the EU and the OECD⁴⁵ as part of its defense of an attack against the state. Therefore, HMRC cannot claim that it does not have any knowledge of the "worrying concerns"⁴⁶ linked with FATCA. I see parallels with the recent Post Office scandal, in which the government-owned Post Office secured the convictions of hundreds of its staff (some of whom died by suicide) for alleged misappropriation of funds in circumstances for which the Post Office appears to have known that its own IT-systems were to blame.⁴⁷ The Post Office did its best to bury the crowdfunded litigation brought by a courageous subpostmaster (Alan Bates) whose campaign against the Post Office brought to light the issues and eventually led to a quashing of the convictions and an official enquiry into the scandal.⁴⁸

⁴²The author's research into internal documents of the EU, which includes various statements by professional bodies, is available on the Mishcon de Reya website. The letter from the British Bankers Association to the IRS (Oct. 17, 2011) is contained in the documents disclosed by the European Commission to Dutch MEP Sophie in 't Veld after an appeal to the EU ombudsman (case 1398/2013/ANA: Disclosure Ref. Ares(2015)459787 - 04/02/2015; EBF Ref. RK11027); the letter is quoted in a letter from the author to the European Commission (Aug. 6, 2021).

⁴³Disclosure Ref. Ares(2015)497021 - 06/02/2015, "Foreign Account Tax Compliance Act (FATCA), Financial Sector Taxation and CCTB, Meetings in Washington DC on 14, 15 and 16 December," disclosed to in 't Veld after an intervention from the EU ombudsman, EU Disclosure Ref. Ares(2015)447406 - 04/02/2015.

⁴⁴Letter from Nosedo to Crabit, *supra* note 41.

⁴⁵The correspondence is available on the Mishcon de Reya website.

⁴⁶See, e.g., the email from the commission to an anonymous accidental American (June 29, 2011) (reproduced on page 9 of the author's letter to the European Parliament (Nov. 16, 2019)).

⁴⁷For a timeline of the U.K. Post Office scandal, see "Mr Bates vs the Post Office: Timeline of the UK Horizon Scandal," PBS (2024). Alan Bates promised to fight back using crowdfunded litigation. See Robert Dex, "Post Office Campaigner Alan Bates Promises to Crowdfund Private Prosecutions if Justice Is Not Done," *The Standard*, Apr. 12, 2024.

⁴⁸The Post Office Horizon IT Enquiry is an independent public statutory inquiry established to gather a clear account of the implementation and failings of the Horizon IT system at the Post Office over its lifetime.

Bates was knighted for services to justice,⁴⁹ prompting the U.K. government to make bold pronouncements in support of funding to enable David-versus-Goliath litigation.⁵⁰ In the words of U.K. Justice Minister Alex Chalk:

It's crucial victims can access justice — but it can feel like a David and Goliath battle when they're facing powerful corporations with deep pockets.

This important change will mean more victims can secure vital third party funding to level the playing field and support their fight for justice.

The sub-postmasters were able to secure third party funding in their legal action against the Post Office. Now others will too.⁵¹

There are similarities between the Post Office scandal and HMRC's handling of Jenny's claim, notably a determination by public authorities to (1) avoid any debate on official documents that show that they ignored worrying concerns about the implications of measures they were in charge of; and (2) deny claimants a voice by burying their claim under a barrage of procedural tactics. Obviously, HMRC has not been paying attention to the changing mood in the country and instead adopted the same intimidatory approach toward Jenny and her funders. This won't go unnoticed.

Interestingly, on the same day the Court of Appeal sealed HMRC's victory, the French Senate wrote a letter to President Emmanuel Macron, asking him to discuss the FATCA issue with his U.S. counterpart.⁵² And more recently, the office of the French President acknowledged in a letter to the President of the Association of Accidental Americans that "your concerns are the subject-matter of a total mobilization by the State, which leads a constant dialogue with the U.S.

⁴⁹Press release, Gov.UK, "Alan Bates, Top Executives and Leading Innovators Honoured for King's Birthday" (June 15, 2024).

⁵⁰Press release, Gov.UK, "New Law to Make Justice More Accessible for Innocent People Wronged by Powerful Companies" (Mar. 4, 2024).

⁵¹"UK to Reverse Top Court's Ruling on Litigation Funding," Reuters, Mar. 4, 2024.

⁵²Letter from the French Senate to Emmanuel Macron, President of France (June 5, 2024) (in French).

administration in relation to the entirety of the points that you raise.”⁵³

HMRC might be celebrating its tactical victory, but the party could be short-lived.

Time to Reverse the Tide

HMRC has been able to influence judges thanks to the perception that FATCA is necessary to eradicate tax evasion and by creating a narrative in which HMRC casts itself in the role of the victim of a malicious campaign to prevent the fight against tax evasion. However, the evidence shows that FATCA has failed to achieve that objective and instead hurts ordinary people. In a recent editorial, *The Wall Street Journal* referred to the “ineptitude” of the IRS in administering

FATCA,⁵⁴ and both the *Journal* and *The Washington Post* have highlighted the deficiencies in document management and the lack of funding of the IRS.⁵⁵ There is also some awareness in the press on the plight of ordinary Americans affected by the devastating unintended effects of FATCA.⁵⁶ Our research shows fierce opposition from the European Banking Federation⁵⁷ and the previous European Commission.⁵⁸ However, reasons of political convenience have prevented a balanced discussion of FATCA’s failings. Expat organizations have tried to raise the issue in Washington, but they have been unable to move the compass needle of political discourse. The time has come for everyone affected to come together and launch a public campaign to demand the end of this scandalous situation. ■

⁵⁴ The Editorial Board, “This Is Your IRS at Work,” *The Wall Street Journal*, Aug. 19, 2022 (referenced in letter from Nosedà to Crabit (Aug. 21, 2022)).

⁵⁵ Catherine Rampell, “Why Does the IRS Need \$80 Billion? Just Look at Its Cafeteria,” *The Washington Post*, Aug. 9, 2022.

⁵⁶ Kantor, *supra* note 22.

⁵⁷ See letter from Nosedà to G20 Finance Ministers (June 30, 2014).

⁵⁸ See letter from Nosedà to Crabit, *supra* note 41.

⁵³ Letter from Rodrigue Furcy, chief of cabinet of the president of France, to Fabien Lehagre, president of the Association of Accidental Americans (June 21, 2024) in response to a letter from Lehagre to Macron (June 8, 2024) (both in French, translation by the author).