



Brussels, 08 February 2018

To the collective of European “accidental Americans”

### **Subject: FATCA**

Dear Mr. Ryan,

I am writing to you, on behalf of the Article 29 Working Party (WP29), to acknowledge receipt of your emails and notice of petition submitted to the European Parliament (EP) on September 1, 2016, and transmitted to WP29 on January 2017 regarding the impact of the U.S. Foreign Account Tax Compliance Act (FATCA) on European citizens who, due to U.S. citizenship law, are either “accidental Americans” or dual European/US nationals.

I understand that your correspondence was submitted on behalf of the collective of European “accidental Americans”.

In this correspondence, you requested the WP29 to provide its views on FATCA and the position European “accidental Americans” may find themselves in due to reporting requirements under FATCA, particularly as to the compatibility of these requirements with Article 8 of the European Charter of Human Rights (ECHR).

With this response, I would like to address your concerns and provide an overview of the several actions that the WP29 has already undertaken with regards to the automatic exchanges of personal data for tax purposes and more specifically with regards to FATCA and the compliance of its implementing measures with data protection principles.

In June 2012, the WP29 addressed a letter<sup>1</sup> to the European Commission informing it of its concerns about FATCA, in advance of the signature of the proposed intergovernmental agreements between the US and each EU Member State for the implementation of FATCA.

The letter made the argument that the personal data processing required by FATCA had no legal basis within EU or national law of a Member State and that this absence could lead to national Data Protection Authorities (DPAs) prohibiting the data processing in question.

The WP29 also underlined the requirement that intergovernmental agreements (IGAs) signed between the U.S. and the individual European Member States, would need to comply with the principles laid down by the Directive 95/46. These principles include that of purpose limitation, transparency, proportionality, security, limited data storage and necessity.

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<sup>1</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621\\_letter\\_to\\_taxud\\_fatca\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf)

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental rights and rule of law) of the European Commission, Directorate General Justice and Consumers, B-1049 Brussels, Belgium, Office No MO59 02/27

Website: [http://ec.europa.eu/justice/data-protection/index\\_en.htm](http://ec.europa.eu/justice/data-protection/index_en.htm)

Finally, the WP29 particularly stressed the importance of complying with Articles 25 and 26 of the Directive 95/46 with regards to transfers of personal data to the US tax authorities.

In 2015, the WP29 issued (i) a statement on the automatic inter-state exchanges of personal data for tax purposes<sup>2</sup> (in February 2015) and (ii) guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of the automatic exchange of personal data for tax purposes (in December 2015)<sup>3</sup>.

Through the February 2015 statement and the December 2015 guidelines, the WP29 provided insight to national governments and EU institutions for the framing of transfers of personal data for tax purposes with adequate and effective mechanisms to ensure the safeguard of fundamental rights and freedoms of individuals and an adequate level of data protection.

Annex of the December 2015 guidelines contained a questionnaire addressed by the WP29 to European national tax authorities on automatic exchanges of data for tax purposes, including those carried out under FATCA, which again denotes the constant interest and monitoring of the proper implementation of FATCA and of its compliance with data protection legislation.

As you will be most acutely aware, all EU Member States have now signed individual IGAs with the US. These IGAs provide the legal basis for the processing of the personal data of American nationals in the context of FATCA. In addition to the abovementioned questionnaire, EU DPAs have been monitoring the measures taken by European governments to implement FATCA at national level. As part of this ongoing exercise, there have been no occasions, to date, where a national DPA has had to prohibit the processing and transfer of personal data to the US under the FATCA regime.

We understand however, that you are particularly concerned by the application of FATCA to European citizens who are either “accidental Americans” or dual European/US nationals.

We regret to inform you that the WP29 is unable to form an opinion as to whether accidental Americans should be excluded from the scope of FATCA. Indeed, the interpretation of the notion of an “American taxpayer”, criterion triggering the application of FATCA, does not fall under our competence. The WP29 acts as an advisory body under the Data Protection Directive 95/46/EC to ensure that data protection principles are complied with consistently at EU level and cannot therefore comment on the scope of FATCA itself.

Irrespective of the above, affected individuals or parties who feel aggrieved by the FATCA regime or its implementation in their respective EU Member State can raise their concerns or a complaint on grounds of personal data violations to their relevant national DPAs providing all necessary information to the case at hand<sup>4</sup> or the appropriate court at national level as required. Also, in case of pure undue taxation issues, which do not fall under the realm of DPAs, affected individuals can contact their respective national tax authorities.

Before I close this letter, I would like to point out that on 25 May 2018, the new European General Data Protection Regulation (GDPR) will come into force. Under this new legal

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<sup>2</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp230\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp230_en.pdf)

<sup>3</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp234\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp234_en.pdf)

<sup>4</sup> Please find hereby the list of DPAs and their website links :

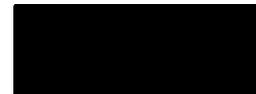
file:///C:/Users/IRU/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/20171127\_NationalDataProtectionAuthorities.pdf

framework, the same requirement for compliance with the principles of storage limitation, purpose limitation, data minimization, lawfulness, fairness, transparency, proportionality, security, necessity and oversight and redress will continue to apply. The GDPR also contains a newly established principle of accountability. Under that principle, it falls on data controllers to demonstrate how they are complying with the abovementioned principles as well as with all the provisions of the GDPR. This new regime also provides national DPAs with increased regulatory powers to ensure that data controllers meet their obligations.

We hope that the clarifications contained in this letter will be of help to the collective of European “accidental Americans”.

Yours sincerely,

On behalf of the Article 29 Working Party,



Isabelle FALQUE-PIERROTIN  
Chairwoman