

ARTICLE 29 Data Protection Working Party



Brussels,
Just.c.3(2012)866296

Mr Heinz Zourek
Director General of Taxation and
Customs Union
European Commission
B-1049 Brussels

Dear Mr Zourek,

1 Introduction

- 1.1 Following a request for assistance by DG TAXUD to evaluate the compatibility of the obligations under US Foreign Account Tax Compliance Act (FATCA) and the Directive 95/46/EC (the Directive), the Article 29 Working Party (hereafter WP29) has now considered how the provisions contained within it interact with the harmonized framework on data protection principles laid down in particular by the Directive.
- 1.2 WP29 feels that its advice should help the European Commission exercise its role as guardian of the Treaties, ensuring in particular, that the data transfer takes place between Member States or organisations which are entitled to make such a transfer and on the appropriate legal basis, ensuring that the data processing is compliant with the aforesaid EU/EEA legislative framework.
- 1.3 Some of the WP29 members had heard concerns voiced from the finance/insurance sector, that to be compliant with the Directive and FATCA would be likely to put them in a position where the two would be at odds.
- 1.4 Given the dynamic and fluid situation with regard to the implementation of FATCA, which is set to enter into force on the 1 January 2013, the WP29 has chosen to present this letter as its initial analysis of this issue. An opinion could be developed when the process is further defined.
- 1.5 Currently there is no legal basis within EU or national law of a Member State to ensure lawful processing of the data within the scope of FATCA. If this remains the case on the entry into force of FATCA, EU/EEA data protection authorities (DPAs) may consider prohibiting the data processing in question.
- 1.6 Therefore an assessment has been made of FATCA's interaction with the Directive and this letter outlines an analysis the data protection implications of FATCA in terms of the two approaches being suggested regarding its implementation (see par.4). These are FATCA's originally intended

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.

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Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

implementation and then the suggested "Intergovernmental Approach" that the US announced in its draft implementing regulations on FATCA on 8 February 2012¹ possible elements of which were set out in a joint statement issued with some Member States (UK, Italy, Spain, France and Germany) on the same day² (see para.5).

2. Background

- 2.1 FATCA was enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010 in the United States. The provisions of FATCA are set out between sections 1471 to 1474 of the internal revenue code.
- 2.2 The aim of FATCA is to significantly improve the ability of the Internal Revenue Service (IRS) to prevent tax evasion by US persons who use foreign financial institutions (FFIs) to shield their identities and US tax status from the US government. FATCA requires all (non-US) FFIs³ to enter into agreements with the IRS under which they are obliged to use enhanced due diligence procedures to identify US persons who have invested in either non-US financial accounts or non-US entities and to report certain information about these persons/accounts to the IRS. For the purposes of this analysis FFIs means European FFIs which are also subject to the Directive.
- 2.3 FATCA applies equally to pre-existing and new customers of FFIs. The FATCA proposed regulations provide different due-diligence requirements for pre-existing and new accounts held by individuals and entities.
- 2.4 For pre-existing accounts held by individuals whose balance is between \$50,000 and \$1 million, FATCA would require FFIs to search only automated files for US indicia⁴ in order to ascertain whether the account refers to a US person or not. Accounts with a balance that exceed \$1 million must be subjected to a review of their automated and manual files for US indicia. For new individual accounts, the FFIs would be required to review the information provided at the opening of the account, including identification and any documentation collected under Know Your Customer (KYC) or Anti-Money Laundering (AML) procedures.

¹ <http://www.irs.gov/newsroom/article/0,,id=254068,00.html>

² Joint statement of US Government UK HM Treasury press statement "UK sets out approach to US anti tax evasion legislation, FATCA http://www.hm-treasury.gov.uk/press_12_12.htm

³ See Section 1471 (5) FFI means any entity that: (A) accepts deposits in the ordinary course of a banking or similar business; (B) as a substantial portion of its business, holds financial assets for the account of others, or (C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or See Section 1471 (5) FFI means any entity that: (A) accepts deposits in the ordinary course of a banking or similar business; (B) as a substantial portion of its business, holds financial assets for the account of others, or (C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities. The US Treasury/IRS can modify this definition and provide that certain institutions are excluded or deemed compliant with FATCA. For this analysis FFIs are institutions in the banking and insurance sector.

⁴ According to the FATCA proposed regulations issued on 8 February 2012, possible indicia which could be indicative of a US person's tax status are US place of residence; US place of birth; current address in the US or telephone number in the US; standing instructions to transfer funds to an account maintained in the US; and power of attorney or signatory authority granted to a person with a US address or "in care of" address or "hold mail" address as sole address identified for the account holder.

- 2.5 With respect to entity accounts, FFIs are essentially required to focus on passive entities with a view to identifying substantial US owners⁵. For pre-existing accounts, FFIs may rely on information collected under AML/KYC procedures or, alternatively, may have to obtain information regarding all substantial US owners (depending on whether the account balance exceeds \$ 1.000.000 or not). For new entity accounts, the FFIs are required to determine whether the entity has any substantial US owners upon opening a new account, by obtaining a certification from the account holder.

3 Scope

- 3.1 Customers within the scope of FATCA will have their name, address, Taxpayer Identification Number (TIN), account number, year-end balance (provided that it is over \$1 million), gross receipts, and gross withdrawals and payments disclosed to the IRS through an annual reporting mechanism.

4 FATCA's originally intended approach: obligations for FFIs and consequences for FFIs and accountholders

- 4.1 It was originally intended that the above measures would be contained within agreements⁶ between the FFIs and the IRS. However, the US has announced, following discussions with the European Commission and some Member States, that an alternative to achieve dual compliance would be for FFIs to disclose the required information to their own tax authorities and for the tax authority to disclose the information to the IRS under existing tax treaties, or protocols or memoranda of understanding (MoUs) attached to those treaties (the "Intergovernmental Approach") (See para.5).
- 4.2 The original intention was to incentivise compliance with a number of sanctions for non-compliance including:
- any FFI that fails to enter into an agreement with the IRS would be subject to a 30% withholding tax on any "withholdable payment"⁷ made to its proprietary account;
 - any accountholder who does not provide the FFI with documentation would be deemed recalcitrant⁸ (i.e. non-compliant) would have a 30% withholding tax on any withholdable payment credited to their accounts and/or have their account closed.
- 4.3 Furthermore a compliant FFI is obligated to withhold a 30% tax on "passthru payments"⁹ made to non-compliant FFIs and their recalcitrant account holders.

⁵ See definition of "substantial US owner" in Section 1473(2)

⁶ The term agreement in this analysis is the agreement made directly between FFIs and the IRS directly. Whereas bilateral agreement are those agreements made between FFIs, tax authorities and the IRS.

⁷ See definition of "withhold able payments" in Sec 1473 Definition - Ref. Areas(2011)21743 10/01/2011 FATCA Excerpts of HIRE Act

⁸ See definition of "recalcitrant" in Sec 1471 (6) Definition - Ref. Areas(2011)21743 10/01/2011 FATCA Excerpts of HIRE Act

⁹ Essentially, any withholdable payment and any other payment to the extent it is attributable to a withholdable payment. See definition in Sec 1471(7) – Ref. Ares(2011)21742 FATCA Excerpts of HIRE Act

5 The Intergovernmental Approach

- 5.1 Under the Intergovernmental Approach outlined on 8 February, FFIs established in those Member States signing up to this alternative approach would not be subject to US withholding tax and would not be required to impose passthru payment withholding to or close the account of any recalcitrant account holders. Nor would they be required to impose passthru payment withholding to other FFIs organised in the same Member State or in another jurisdiction with which the US has a FATCA implementation agreement. However with regards to withholding on passthru payments to FFIs in non-FATCA partner countries, the Member States in question would agree to commit to developing practical means to achieve passthru payments¹⁰ withholding in the least administrative burdensome way.
- 5.2 In return for these commitments, the US would reciprocate the information exchange. The US has recently adopted regulations (TD 9584) that will take effect from 1 January 2013 and will require US banks, from 2014, to report annually to appropriate tax authorities (including EU ones) via the US Treasury, interest on savings accounts in relation to non-US persons.
- 5.3 Signatories to the alternative approach would be committed to creating new legislation or amending existing legislation that would introduce a legal obligation for FFIs to enhance their existing due diligence procedures and share the relevant information with their own tax authority. Provisions within existing tax treaties which already facilitate the transfer of personal data in relation to tax obligations have been suggested as a possible legal basis that these authorities share the personal data from FFIs under FATCA with the IRS, although in the case of some countries this obligation may need to be clarified by way of a protocol or other additional arrangements with the US.
- 5.4 The Intergovernmental Approach would reduce the administrative burden on FFIs by removing the requirement for them to:
- enter into an agreement with the IRS;
 - report information on US accounts directly to the IRS;
 - terminate the account of a recalcitrant account holder; and
 - withhold on passthru payments to recalcitrant account holders or to FFIs in FATCA partner countries.

6 The applicability of the Directive

- 6.1 Whilst FATCA is US law and its focus is US persons, it has an “ultra vires” effect because it is imposing its obligations to collect personal data about US persons on FFIs established within the EU who are also subject to obligations within the Directive and national legislation implementing the Directive. Therefore the Directive is applicable to any processing undertaken by a data controller established¹¹ in the EU and therefore the Directive will apply to any processing carried out for the purposes of FATCA.

¹⁰ Passthru payment definition “any withholdable payment or other payment to the extent attributable to any withholdable payment. Section 1471 (7) FATCA excerpts of HIRE ACT Ref Ares(2011)21743

¹¹ See Article 4 of Directive 95/46/EC

7 FATCA's interaction with the Directive

7.1 The following is an assessment of the data protection issues which should be taken into account when seeking to achieve compliance with both FATCA and the Directive.

8 Necessity of FATCA

8.1 The WP29 understands that the US government has introduced FATCA to tackle the issue of US persons putting their money in offshore accounts to avoid their US tax obligations. Unlike many other jurisdictions, US tax liability is attached to citizenship or green-card holder status rather than residence, which means regardless of where a US person resides, they will be liable to pay tax in the US.

8.2 Whilst there are a number of other mechanisms already established both globally and in the US to tackle tax evasion, weaknesses with the current regimes have been highlighted which has brought about FATCA's introduction¹²¹³.

8.3 However, FATCA must be mutually recognised as necessary from an EU perspective. This requires ensuring that there is a lawful basis for the processing through careful assessment of how FATCA's goals balance with that of the EU's fundamental right enshrined in Article 8 of the Charter of Fundamental Rights – the right to a private and family life, i.e. by demonstrating necessity by proving that the required data are the minimum necessary in relation to the purpose. A bulk transfer and the screening of all these data is not the best way to achieve such a goal. 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 to be carried out to demonstrate FATCA's necessity.

¹² The EU Savings Directive (EUSD) which is not currently extended to the US has been disregarded by the US as insufficient to meet the objectives of FATCA. For example a) the scope of income to be reported under the EUSD (interest payments) is much narrower than the scope under FATCA (year-end account balance plus dividends, interest and other income paid to the account); b) the scope of the financial institutions covered by the EUSD is much narrower than that of FATCA (which covers also intermediaries that do not have a direct relation with the final client); and c) the EUSD is based on the notion of tax residence (i.e. it does not cover nationality/citizenship) and only applies in cross-border situations so would not cover US citizens who are EU residents and who have bank accounts or other investments in the same country in which they are resident

¹³ The Qualified Intermediaries (QI) system already allows the US to obtain some information from foreign financial intermediaries on investments abroad by US citizens. However, this voluntary system is primarily aimed at providing upfront rather than refundable tax treaty relief from withholding tax that should be available to foreign investors in US securities. It provides a business opportunity for foreign financial intermediaries which can charge their clients for obtaining relief at source on their behalf. In return, they are required to provide information to the US tax authorities about US persons who receive US sourced income. While the QI system allows financial intermediaries not to report on certain US clients, FATCA would require them to report on all their US clients. Although US citizens could avoid being reported under the QI system by setting up offshore private holding companies, a look-through approach with respect to accounts held by entities is provided for under FATCA. Plus while US persons could avoid being reported under the QI system by investing in securities not producing reportable payments, all investments of US account holders must be reported under FATCA.

- 8.4 WP29 respects the legitimate goal of the US government to ensure tax compliance, but stresses that it must be done in accordance with the Directive, respect for Article 8 of the Charter of Fundamental Rights and Convention for the protection of individuals with regard to automatic processing of personal data (Convention 108). However in the absence of a lawful basis to legitimise the processing required, WP29 does not see how compliance of FATCA and the Directive could be simultaneously achieved.

9 Proportionality of the processing of the data

- 9.1 Linked to the concept of necessity is proportionality. Above is consideration of whether the obligations foreseen under FATCA can be considered as necessary and meet the necessity criteria under EU/Member State's law, as if the processing was done in the public interest of a Member State. This public interest might be affirmed in case an exchange of information with a Third State for halting tax evasion is allowed under the legislation of the EU Member State. However, proportionality deals with whether the personal data that is requested is proportionate to meet that goal. This directly links to principle contained in Article 6.1 b of the Directive i.e. adequate relevant and not excessive To this end the proportionality of the inclusion, in the context of the obligation envisaged under FATCA, of insurance companies specifically not acting as FFIs, has to be appropriately demonstrated
- 9.2 It might appear to some that there is a significant amount of personal data required under FATCA. Therefore consideration must be given to: a) whether the personal data processed is limited to the amount that is truly recognised as necessary for the purpose of meeting the requirements of FATCA; b) is limited to only those purposes it is to be collected for; and c) exploring other ways of achieving the goals of FATCA which would result in processing less personal data i.e. via aggregation, anonymisation, pseudo-anonymisation etc. The quantity and type of data required in future to achieve the same goal should remain under regular review to ensure that the data remains necessary and proportionate.

10 Legal basis

- 10.1 Two criteria within the Directive would allow for the processing of personal data in the context of FATCA. However, without any domestic law and/or EU law to recognise the extraterritorial applicability of FATCA, and in the absence of any bilateral or multilateral agreements derived from the Intergovernmental Approach, FFIs will not have any lawful grounds upon which to process the personal data required.
- 10.2 If a new EU or national law was created or an existing EU or national law was amended to oblige FFIs to disclose the personal data either to the IRS directly through binding agreements or through a binding bilateral arrangement between the FFIs and the IRS, via their own tax authorities, then FFIs/tax authorities could invoke Article 7(c) and use the criteria "processing is necessary for compliance with a legal obligation to which the controller is subject" or Article 7(e) and use criteria "processing is necessary for the performance of a task carried out in the public interest or in the exercise of

official authority vested in the controller or in a third party to whom the data are disclosed”.

- 10.3 However Member States may choose to recognise FATCA and/or implement it, they should take care to ensure that the law governing this mechanism has sufficient quality and foreseeability with regard to data protection safeguards contained within it. In this regard Member States could refer to case law of the European Court of Human Rights - Leander vs Sweden (26 March 1987) para. 51 and Rotaru (4 May 2000) para. 52. Member States should also ensure that any law governing the processing and transfer – and any (bilateral) agreement derived from it should take into account the obligations in the Directive and, where appropriate and necessary, engage with the relevant data protection authority to ensure that the best possible data protection safeguards are in place.
- 10.4 WP29 would like to underline the fact that Member States attempting to obtain a waiver from data subjects from any domestic or EU law which would prevent the reporting of any information required under FATCA via consent is not a valid criteria for processing given the imbalance between the position of the data subject and the data controller, and the improbability that consent could be withdrawn. Furthermore given the imposition of a sanction such as 30% withholding tax or closure of their account should the account holder fail to comply with such a demand, consent would not be “freely given” as defined in Article 2(h) of the Directive.
- 10.5 WP29 stresses that if no EU or national law is adopted ensuring a legal basis to comply with the obligations foreseen under FATCA, FFIs would be have no legal basis in place to process the data required under FATCA.

11 Data controllership under FATCA

- 11.1 The original intention when implementing FATCA was to have direct disclosure of the personal data to the IRS directly from the FFIs. WP29 recalls Opinion WP169 outlining the concept of data controllers and processors¹⁴ which gives a clear indication that a data controller is whoever determines the processing involved. Clearly in this instance the FFI will be deciding to use the data as it holds and determines the processing (including disclosure) of them.
- 11.2 The Intergovernmental Approach would mean the data controller relationship is adjusted by adding a further actor i.e. the tax authorities. The tax authorities will be determining the processing to the extent of transferring the data to the IRS and therefore will be required to take into account the security afforded to the data and determining how the data are to be processed for disclosure. WP29 urges the Commission and Member States to ensure that the exact role of the tax authority is clarified under any provisions surrounding this process.

12 Complying with the data protection principles

¹⁴ [Opinion 1/2010 on the concepts of "controller" and "processor"](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf)
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf

- 12.1 Given the data controllership outlined above, each data controller involved in this process will each have an obligation to ensure compliance with the data protection principles outlined in Article 6 of the Directive.
- 12.2 Whether processing the data under a narrow legal obligation for FFIs to create a binding contractual agreement directly between the FFIs and the IRS; under a bilateral arrangement using a tax treaty (including protocols or MoUs attached to those treaties); or any other national/EU legislation imposing such obligations, consideration must be given to the purpose of the processing in line with Article 6.1 (b) which states that “personal data must be collected for a specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes...”.
- 12.3 All data controllers should be clear about how long they will keep and update personal data in line with Articles 6 (c) and (d). For example, consideration of how a data subject may make a FFI aware of inaccurate information which has subsequently been disclosed to the IRS (and/or tax authority) and ensure there are mechanisms in place to amend, delete, block etc. the data as appropriate.
- 12.4 Articles 11, 12 and 14 also impose an obligation of transparency, subject access and rights on data controllers to object, block and erase personal data. WP29 stresses that these obligations and rights are essential to ensure that data subjects understand what is happening to their personal data. Mechanisms to ensure the minimal amount of effort by the data subject to take advantage of these provisions should be established.
- 12.5 All data controllers in this process must ensure compliance with Article 17 (security of the processing), i.e. taking all appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access. Particular regard should be had for notification of the other data controller(s) involved of any breach of the personal data so that they can take appropriate action. Furthermore confidential clauses regarding staff should also be in place.
- 12.6 Finally, given the possible criminal nature of tax evasion in some Member States in certain cases, personal data linked to it may be deemed as sensitive data and therefore care should be taken to afford it higher standards of data protection.
- 12.7 The above is not an exhaustive list of all that data controllers should do to ensure compliance with the EU data protection principles and legislation.

13 Making the transfer to the US

- 13.1 Clearly any data gathered about accountholders who are US persons by the FFI in the Member States would, under the requirements of FATCA, need to be transferred systematically outside of the EU to the US on an annual basis and is likely to, in line with past definitions of WP29, be a bulk transfer.

- 13.2 The US is a third country as defined by the Directive and does not have a positive adequacy finding by the European Commission. Furthermore the Safe Harbor scheme is not applicable in this context.
- 13.3 The factors in 13.1 and 13.2 will need to be taken into account when trying to achieve compliance with Article 25 and 26.2 of the Directive. The law or (bilateral) arrangement governing the transfer must ensure that there is an adequate level of protection afforded to the data. The possibilities surrounding this are foreseen as follows.
- 13.4 The first possibility is that a Member State could impose a narrow legal obligation that FFIs produce agreements which allow for the disclosure of the personal data required for the purposes of FATCA directly to the IRS. If this was the case then the FFI would be obliged to comply with provisions under Articles 25 and 26.2 of the Directive. Each Member State has implemented specific provisions which interpret this Article, and therefore compliance with it could mean, inter alia, prior authorisation from the national data protection authority, prior notification or the FFI undertaking its own adequacy assessment. If such a narrow legal obligation was imposed, then WP29 urges that, where appropriate/necessary, guidance from the relevant national data protection authority should be sought to ensure that the best possible data protection safeguards are provided for in this mechanism.
- 13.5 The WP29 also stresses that these contractual arrangements must be binding. One example of how to achieve is the introduction of sunset clauses.
- 13.6 The second possibility is that a Member State could sign up to the Intergovernmental Approach and obliging FFIs to disclose the required personal data to their own tax authority who would then subsequently disclose the personal data to the IRS. In this scenario the burden of compliance with Article 25 and 26.2 could be either shifted to or shared by the tax authority.
- 13.7 A third possibility is that the Member State chooses to adopt neither of the above approaches and decides a third alternative approach depending on its own customs and rules. Again, whatever approach is developed, the data controller responsible for the processing of personal data within the scope of FATCA should be obliged to comply with the obligations set out in Articles 25 and 26.2.
- 13.8 WP29 urges that in making an assessment of adequacy data controllers should take into account the foreseeability of the proposed reform of European data protection rules.
- 13.9 Data controller or legislators looking to the possibility of allowing disclosure of personal data within the scope of FATCA using Article 26.1(d) should recall WP114 which outlines WP29's thoughts on international transfers. Firstly we would echo its comments that "the Working Party would find it regrettable that a multinational company or a public authority would plan to make significant transfers of data to a third country without providing an appropriate framework for the transfer, when it has the practical means of providing such protection

(e.g. a contract, BCR, a convention)”¹⁵. The opinion continues that WP29’s rejection of transfers of personal data within PNR in its opinion on this matter in 2002¹⁶ was based on a lack of necessity but also because “it did not appear acceptable for a unilateral decision by a third country, on public interest grounds specific to it, to lead to regular bulk transfers of data protected by the Directive”. WP114 also highlights that “Recital 58 of Directive 95/46 refers, with regard to this provision, to cases in which international exchanges of data might be necessary “between tax or customs administrations in different countries” or “between services competent for social security matters”. This specification, which appears to relate only to investigations of particular cases, explains the fact that this exception can only be used if the transfer is of interest to the authorities of an EU Member State themselves, and not only to one or more public authorities in the third country.”

13.10 However, WP114 also states that use of derogations under article 26.1 (if used) should be “strictly interpreted” and that when there are “cases where mass or repeated transfers can legitimately be carried out on the basis of Article 26(1)”, and when certain conditions are met, “transfers of personal data which might be qualified as repeated (...) or structural should, where possible, and precisely because of these characteristics of importance, [must] be carried out within a specific legal framework(...).”

13.11 Therefore, and provided that an EU/national law is adopted, given the nature of FATCA as systematic bulk transfer, use of Article 26.1 (d), because it derogates from the general regime, can only be used if an important public interest is clearly defined and it is shown that it overrides the data subject’s right to privacy. Even if using it safeguards aimed to ensure that those rights and freedoms of the data subjects are upheld are strongly advisable.

14 Onward Transfers

14.1 WP29 would like to remind those data controllers involved about ensuring guarantees for onward transfers after the initial disclosure.

14.2 The Intergovernmental Approach, for example, could mean using existing double tax taxation treaties that have been agreed separately with all 27 Member States. Some tax treaties contain broad and overarching provisions which would allow EU tax authorities, if they so wished, to collect and disclose data to another tax authority even if this meant that the EU tax authority itself did not have any domestic interest in such information for its own tax purposes¹⁷.

14.3 The tax treaties might already offer some data protection safeguards for the onward use and further processing of the disclosed personal data.

¹⁵ Page 2 of the working document WP 114. Paragraph 3.

¹⁶ Opinion 6/2002

¹⁷ *If information is requested by the Contracting State in accordance with this Article, the other Contracting State shall obtain that information in the same manner and to the same extent as if the tax of the first-mentioned State were the tax of that other State and were being imposed but that the other State, notwithstanding that the other State may not, at any time, need such information for its own tax purposes*. UK/US Double taxation convention, signed 24 July 2001 amending protocol signed 2002, Article 27(2)

- 14.4 Whilst WP29 recognises that some clauses within the tax treaties may offer some safeguards it is not clear to what extent the tax treaties and/or any additional legal arrangements derived from them agreed with the EU Member States in connection with FATCA will be binding in the US, and therefore recommends that they are added to or amended to ensure that data subjects can fully enforce their rights of redress and access. In this respect WP29 would welcome clarification about the 'bindingness' of this mechanism.

15 Oversight and redress

- 15.2 The WP29 understands that whilst this issue will primarily affect US persons who may have access to redress for privacy breaches in the US under the Privacy Act, non-US persons' data may also be collected and processed as part of this mechanism, for example non-US insurance policy holders in the EU with US persons as their beneficiaries. This highlights the re-emerging issue of redress interoperability in relation to redress in the US. It is not yet clear to the WP29 how these persons' rights under the Directive would be protected and therefore consideration of this should be given to any legislation or (bilateral) agreement affecting this process. Neither is it clear any oversight mechanism which will protect such rights. In this context the WP29 would re-iterate the Commission's questions on the possible involvement of the Civil Liberties Oversight Board in this case.

16 Conclusion

- 16.1 The WP29 shares the concerns expressed by some in relation to dual compliance with FATCA and the Directive. Without an appropriate legal basis justifying both sets of obligations imposed on European FFIs would result in the unlawful processing of personal data¹⁸.
- 16.2 Our analysis shows that since the EU/national data protection laws do not allow for FFIs to process the personal data required under FATCA and transmit them to the US, a solution is required that will provide a legal basis for the processing and subsequent transfer from the EU to the US, whilst avoiding legal uncertainty for data controllers.
- 16.3 The Intergovernmental Approach currently being discussed by some Member States and the US that would allow for a binding bilateral agreement to be implemented through national legislation could provide a way of ensuring that both sets of obligations are taken into account with full consideration being given to Article 8 of the ECHR in order to demonstrate the necessity and proportionality of such a measure. WP29 stresses that only a binding agreement can be considered as providing the appropriate legal framework for

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For example: "Any information received by the Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State but may be disclosed to and only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by this Convention or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may only disclose the information in public court proceedings in judicial decisions". UK/US Double taxation convention, signed 24 July 2001 amending protocol signed 2002, Article 27(3)

allowing data controllers to collect and transfer the data referred to in the FATCA.

- 16.4 WP29 would also like to signal that it is ready to advise the Commission, and add any further clarification and attention to the detail needed to ensure the highest standards of data protection are offered by the bilateral agreements which are currently under discussion as part of the Intergovernmental Approach.
- 16.5 However, it must be clear that the Intergovernmental Approach is only one solution and that other Member States may have to develop other approaches as it may not be possible to adopt it given local rules and circumstances. Furthermore given the inconsistency that may arise from some Member States adopting one or several approaches to comply with both sets of obligations perhaps a harmonised EU approach, as in the case of PNR and SWIFT, should be strongly considered to avoid such discrepancies and uneven treatment of personal data across the EU. If such an agreement was produced then it must clearly demonstrate the common necessity amongst all Member States and its consistency provides international agreements (ie be legally binding) and provides for a legal basis for the processing of personal data envisaged under FATCA in those Member States under the agreement. The agreement should also clarify and define the objectives and finalities of the processing and the recipients of the data, taking into account the objectives, conditions and guarantees for the envisaged processing of the personal data.
- 16.6 The above should be helpful to all stakeholders, the European Commission and Member States with regard to achieving the desired outcomes of FATCA whilst ensuring compliance with the Directive. The WP29 remains at the Commission's disposal should further assistance be required.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman of the Article 29
Working Party