



30.10.2024

NOTICE TO MEMBERS

Subject: Petition No 1088/2016 by Mr J.R. (French) on the US' Foreign Account Tax Compliance Act's (FATCA) alleged infringement of EU rights and the extraterritorial effects of US laws in the EU

Petition No 1470/2020 by Ronald Ariës (Dutch) on problems with FATCA following a change of bank

Petition No 0323/2021 by G.L. (French), bearing four signatures, on alleged infringement of certain rights of bi-national European/American citizens resulting from FATCA

Petition No 0394/2021 by Lee Nicholas (American) on exemption of US nationals from PRIIPS regulations due to FATCA

1. Summary of petition 1088/2016

The petitioner's grievance mainly concerns the US' Foreign Account Tax Compliance Act (FATCA) - as well as the intergovernmental agreements implementing it in the EU - which obliges European and other foreign financial institutions to report to the US tax authorities all holdings of their "US persons" customers. In his view, this law violates various fundamental principles of European law (including the right to respect for private and family life, the prohibition of discrimination and data privacy,) as well as the Payment Accounts Directive.

While FATCA was purportedly targeted at fighting tax evasion by US resident taxpayers, the petitioner states that in practice it has affected a large number of European citizens and in particular so-called 'accidental Americans', citizens who are nationals both of the US and a Member State, as well as their non-US family members. Because non-compliance with the requirements imposed by FATCA results in heavy fines for financial institutions, many of them responded by avoiding all commercial business with customers presenting any US connection, whether actual or not.

The petitioner states also that the extraterritorial application of US laws comes at a very high

price for the EU's economies and companies. He mentions, in this respect, the case of BNP Paribas, which was fined \$8.9 billion by the US in 2014, even though it had not breached any French or European laws. The petitioner also expresses his concern about the fact that the exchange of information is not reciprocal and that the use by EU firms of US consultants and accountants is economic espionage under the veneer of legality.

Summary of petition 1470/2020

The petitioner, a pensioner in the Netherlands who changed his bank in November 2018, indicates that he then began to have problems with the Foreign Account Tax Compliance Act (FATCA) and that the Committee on Petitions failed to take any action, despite the fact that the matter had been discussed before it since November 2020. He also refers to Petition No 1088/2016, which was discussed in committee on 10 November 2020 without, in his view, producing any effective results, like a letter to the German President of the Council requesting an update. He calls for the issue to be put back on the agenda of the US Biden administration and for more to be done than seeking a letter from the EU Presidency.

Summary of petition 0323/2021

The petitioner explains that due to the Foreign Account Tax Compliance Act Intergovernmental Agreements (FATCA IGAs) signed between the Member States and the United States, bi-national European/American citizens are considered US citizens in Member states by banks, asset management and insurance companies, and governments. Under this regulation, all banks and companies are supposed to register the citizens with the American Internal Revenue Service in order to identify and report their US clients, even if they are also European citizens.

Therefore, the petitioner denounces that their personal data are being routinely exchanged with a non-member state and that some of these financial institutions are denying them to access their services or even prohibiting them from purchasing shares of mutual funds. The petitioner explains that this situation generates discrimination based on nationality, breaching Article 18 of the TFUE and Article 21.2 of the Charter of Fundamental Rights. She also points out that some national authorities in charge of financial markets have ignored this discrimination and that, although the EU is completely aware of the situation, it has never acted to address it.

The petitioner calls on the European Parliament to take action to put an end to this discrimination and to mandate the European Securities and Markets Authority to start an investigation against the national competent authorities that allow it. She also calls to urge the European Commission to negotiate with the US authorities to achieve the right for the bi-national European/American citizens to renounce the US citizenship without facing any kind of hindrances, entering into compliance with the IRS or paying the Exit Tax.

Summary of petition 0394/2021

The petitioner denounces that due to the applicability of the extraterritorial "Foreign Account Tax Compliance Act" (FATCA) it is difficult for "US Persons", resident in European Union Member States to obtain access to numerous financial services or products. He points out that this situation is specially problematic in the context of MIFID II (Market in Financial Instruments Directive II) and PRIIPs (Packaged Retail and Insurance-based Investment

Products) regulations that require all investment products sold to EU residents to contain a "Key Information Document", which, as he explains, to date no US domiciled funds have provided. Due to the lack of funds compliant with EU regulations, most US brokers refuse to sell responsible and safe investment products to a known EU resident.

The petitioner calls on the European Parliament to permit US-based brokers to sell publicly traded and SEC-regulated investment products to EU residents, provided that they meet the definition of a "US person" under FATCA, as an exception to MIFID II / PRIIPs rules.

2. Admissibility

Petition 1088/2016 was declared admissible on 11 January 2017.

Petition 1470/2020 was declared admissible on 31 March 2021.

Petition 0323/2021 was declared admissible on 24 June 2021.

Petition 0394/2021 was declared admissible on 9 July 2021

Information requested from Commission under Rule 233(5), Former Rule 227(6)

3. Commission reply, received on 30 June 2017

According to the petitioners, several "accidental Americans" or dual European/US nationals face repeated discrimination by European financial institutions, as they are precluded from accessing different financial products, including payment accounts, because of the compliance requirements imposed on European financial institutions by the Intergovernmental Agreements ("IGAs") to implement the Foreign Account Tax Compliance Act ("FATCA"). In the petitioners' opinion, compliance with FATCA would *de facto* be incompatible with the European Convention of Human Rights (ECHR) and the Payment Accounts Directive¹ (2014/92/EU).

Firstly, it must be noted that FATCA and the related IGAs are bilateral agreements negotiated between the United States and other countries, including Member States. Therefore, it is in the first place up to Member States to take into account the specifics of the US tax system as well as their Union law obligations when negotiating those Agreements, and to request revisions thereof in view of any practical issues or incompatibility with Union law faced or any further amendments, in particular with regard to full reciprocity.

Secondly, with regard to the alleged breaches of the right to privacy, reference is made to Article 8 ECHR. The Commission observes that the fundamental right to privacy and protection of personal data are enshrined in the Charter of Fundamental Rights of the European Union. Member States are required by Union law to respect those rights when they are implementing EU law.

Thirdly, with regard to the alleged incompatibility of the Payment Accounts Directive (PAD) with the FATCA IGAs, the Commission would like to point out that Chapter IV of the Payment Accounts Directive regulates access to payment accounts in the EU. Article 15 ("non-discrimination") of the Directive provides: *'Member States shall ensure that credit institutions do not discriminate against consumers legally resident in the Union by reason of their nationality or place of residence or by reason of any other ground as referred to in*

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0092&rid=1>

Article 21 of the Charter, when those consumers apply for or access a payment account within the Union. The conditions applicable to holding a payment account with basic features shall be in no way discriminatory'. Article 16 ("right of access to a payment account with basic features") provides, essentially, that Member States must ensure the right for any consumer legally residing in the Union to open a *payment account with basic features*, i.e. a new type of product whose features are enshrined in the Directive, provided that this consumer complies with anti-money laundering rules. Notwithstanding the reporting requirements imposed on EU credit institutions under FATCA and the related IGAs, credit institutions designated by Member States are required to grant access to *payment accounts with basic features* to any consumer legally resident in the EU, under the conditions set out in the Directive.

Conclusion

The Commission is of the view that credit institutions designated by Member States according to Directive 2014/92/EU will have to grant access to *payment accounts with basic features* to any consumer legally resident in the EU, under the conditions set out in the Directive.

4. Commission reply (REV), received on 13 February 2018

As stated in the Commission's initial observations, the US Foreign Account Tax Compliance Act (FATCA) is implemented through intergovernmental agreements (IGAs) negotiated bilaterally between the US and each Member State. Due to lack of support by Member States at the time, the European Commission did not submit a recommendation to the Council for an authorisation to open negotiations for an agreement on behalf of the Union. The information exchange requirements under FATCA as such are, however, similar to those in EU legislation (Directive 2014/107/EU) and to the OECD global standard for automatic exchange of financial account information, which is currently being implemented by over 100 jurisdictions.

The Commission acknowledges that FATCA and the related IGAs appear to have the unintended effect of hindering access to financial services in the EU for American citizens and any person presenting indicia suggesting that he/she may be subject to FATCA ('US persons'). This includes "accidental Americans" who were born in the US, but never requested US citizenship.

The Commission is currently working with the financial industry to gather more information on how many residents in the EU might have difficulties obtaining financial services because they present FATCA indicia. While the Commission cannot force financial services providers to offer services to persons with FATCA indicia, it will enforce the Payment Accounts Directive (2014/92/EU) under which all residents in the EU have the right to a payment account with basic features.

The Commission is also exploring with the financial industry how compliance with the existing FATCA rules can be made easier for financial services providers, reducing administrative burdens and the risk of incurring the heavy withholding tax that can be levied on the revenue of EU financial institutions from US sources.

Lastly, the Commission would like to draw the attention of the Committee on Petitions to a letter sent on 8 May 2017 by the Maltese Presidency of the Council to the US Treasury,

highlighting problems faced by residents, financial institutions and governments of the EU Member States in relation to FATCA, notably with regard to reporting data in the absence of a US tax identification or social security number.

5. Commission reply (REV II), received on 31 January 2019

As stated in the Commission's initial observations, the Foreign Account Tax Compliance Act (FATCA) is implemented through intergovernmental agreements (IGAs) negotiated between the United States and each Member State. The Commission has received no mandate to negotiate an agreement on behalf of all Member States nor any signal yet from the Council that it might consider attributing a formal role to the Commission in approaching the United States about FATCA. The Commission remains prepared to engage in a common reflection with the Council, would it so wish, with a view to assess the appropriateness and the possible conditions of an EU approach to FATCA.

Further to the analysis of Article 15 (non-discrimination) and Article 16 (Right of access to a payment account with basic features) of the Payment Accounts Directive² and of the relevant provisions of the national measures transposing them in the different Member States, the Commission has not been able to identify any issue which would be relevant in the context of this petition.

With respect to personal data protection, the Commission recalls that the independent data protection authorities of the Member States are in charge of enforcing the applicable rules. In a statement published in February 2018, those authorities came to the conclusion that there were no occasions where the processing including the transfer of personal data under the FATCA regime had to be prohibited. The Commission has, in the meantime, been informed that, on the basis of exchanges with the collective of European 'Accidental Americans', the data protection authorities will launch a fact-finding exercise in 2019 in order to further clarify the situation in the Member States. The Commission is in regular contact with the data protection authorities and continues to closely monitor any new developments in this file.

6. Commission reply (REV III), received on 15 February 2022

Petitions 1088/2016, 1470/2020 and 0323/2021

Following its meeting on 10 November 2020, the Committee on Petitions requested an updated reply, especially in view of the recent United States (US) elections and new US administration. The Commission is also providing an update in view of the Committee on Petitions meeting of 2 September 2021.

On 8 December 2020, the German Presidency of the Council of the EU wrote a letter to the US administration (Internal Revenue Service (IRS)) on the Foreign Account Tax Compliance Act (FATCA).

This letter (which is publicly accessible) can be found under the following link:

² Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance, *OJL 257, 28.8.2014*.

In its letter, the German Presidency stressed that, in spite of the relief measures taken thus far by the US authorities as regards individuals with US nationality wishing to relinquish their US nationality (measures previously reported by the Commission services to the Committee on Petitions), EU citizens with US nationality are still experiencing concrete difficulties (e.g. complex procedures and high renunciation fees – around 2 300 US dollars). Contacts between the EU Presidency and the US administration continued under the Portuguese Presidency. A meeting between the Presidency and the US IRS took place on 25 March 2021.

On 16 September 2021, the US IRS replied to the letter referred to above, indicating its willingness to better understand the circumstances under which Foreign Financial Institutions (FFIs) are not able to report a taxpayer identification number (TIN). The IRS indicated that such information would allow the US administration to give further consideration as to whether additional measures could be taken to encourage TIN reporting, and whether additional relief could be provided to FFIs or US taxpayers resident abroad.

The Commission's observations

Contacts between EU institutions and the US administration on FATCA are ongoing. FATCA was, in particular, discussed by the Commission services with high-level representatives of the US administration at the EU-US Joint Regulatory Forum on 24-25 March 2021 and again on 29-30 September 2021 at which the US administration stressed its willingness to cooperate with the Commission to find mutually acceptable solutions to the problems presented by the Commission services. The Commission services had in particular highlighted the impact of FATCA on the accessibility, by 'accidental Americans,' to basic financial services such as a bank account. The Commission services will now follow up on the US administration's invitation to cooperate.

The US IRS updated in May 2021 its frequently asked questions (FAQs) on general issues of FATCA. The updated FAQs provide information for Model 1 FFIs that are required, but have not been able to obtain and exchange the US TIN for each specified US person that is an account holder or a controlling person of a non-US entity.

The updated FAQs, dated 13 May 2021, include a new question (Q6), in the Reporting subsection of the FAQs. Q6 lists a series of codes that may be used by a reporting Model 1 FFI to populate the TIN field where the TIN has not been obtained in specified scenarios. The use of these codes is not mandatory but is expected to help the IRS better understand the facts and circumstances behind the missing TINs, and therefore assess the compliance of the FFI with its reporting obligations.

When one of the codes is used, the IRS system will generate an error notification to indicate that the entry is invalid. The error notification will provide 120 days to correct the issue by providing the TIN. If the TIN is not provided within 120 days, the IRS will evaluate the data received and determine through a consideration of facts and circumstances whether there is significant non-compliance. Such facts and circumstances include:

- reasons why the TIN could not be obtained;
- whether the FFI has adequate procedures in place to obtain TIN; and

- efforts made by the FFI to obtain TINs.

These changes go in the direction expected by the Commission regarding ways to address the difficulties in reporting the US TIN by the FFIs.

As regards data protection, the European Data Protection Board (EDPB) issued a statement³ on 13 April 2021 in which it recalls the principles enshrined in Article 96 of the General Data Protection Regulation (GDPR)⁴ and Article 61 of the Law Enforcement Directive (LED)⁵, according to which existing international agreements involving international transfers of personal data which comply with Union law as applicable prior to the entry into force of the Regulation or Directive remain in force until amended, replaced or revoked.

The EDPB considers that, in order to ensure that the level of protection under the GDPR and the LED is not undermined when personal data is transferred outside the Union, consideration should be given to the aim of bringing these agreements in line with the GDPR and LED where this is not yet the case.

On that basis, in the same statement, the EDPB invited Member States to assess and, where necessary, review their international agreements that involve international transfers of personal data, such as those relating to taxation (e.g. to the automatic exchange of personal data for tax purposes) to determine whether further alignment with current EU legislation, case law and EDPB guidance might be needed.

As also indicated in the EDPB statement, national data protection authorities, as the enforcers of the data protection rules, have an important role in providing assistance and advice to Member State authorities in this context.

Conclusion

The Commission services are in frequent contact with the Member States, the EU Presidency and the EDPB on this file. Contacts are also held with European banks to ensure access to a basic bank account by, in particular, EU citizens also possessing US nationality. The Commission views this file with utmost importance and will continue to inform the Committee on Petitions of any progress made, following in particular the discussions held at the Committee on Petitions meeting of 2 September 2021.

7. Commission reply (REV IX), received on 18 May 2022

³ Available at:

https://edpb.europa.eu/system/files/2021-04/edpb_statement042021_international_agreements_including_transfers_en.pdf.

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), *OJ L 119, 4.5.2016, p. 1–88*.

⁵ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, *OJ L 119, 4.5.2016, p. 89–131*.

EU debt securities are issued under Luxembourg law in accordance with the EU/Euratom Debt Issuance Programme, and the finance raised via debt securities issuances is destined to EU or Euratom programmes, respectively, including SURE and NGEU. EU debt securities are issued on the primary market solely in the form of syndicated transactions, auctions and private placements open to credit institutions and investment firms. In particular, only legal entities (credit institutions or investment firms) that have been admitted to the Primary Dealer Network (as established in accordance with Commission Decision 2021/625⁶) can participate directly in such issuances on the primary market.

The Debt Issuance Programme is based on market-standards documentation that is used by issuers in debt capital markets. Selling restrictions for some of the most relevant markets (including the US) are included in the documentation. Similar selling restrictions can be found in the borrowing documentation of peer institutions (e.g. ESM).

When assessing the questions raised in relation to the availability of EU debt securities for purchase by dual EU/US citizens, it is important to consider that the US tax and securities legislation applies to all ‘US persons’ irrespective of their country of residence or other nationalities. Limits to the distribution of debt securities to US persons (‘selling restrictions’) are a direct consequence of the far-reaching scope of US legislation, not a consequence of EU legislation or policy.

Furthermore, the far-reaching scope and consequences of the US legislation are testified to by the fact that similar ‘selling restrictions’ can be found in the borrowing documentation of peer institutions, but also of other issuers (including corporate issuers who offer their securities to retail investors).

In any case, the Commission does not offer directly EU and Euratom debt securities to retail investors in the EU. The Commission has chosen to restrict the offer of its securities to institutional investors. In this respect, US retail investors are not deprived of any investment opportunities compared to their EU retail investor counterparts.

Finally, should the Commission wish to offer its bonds in the US, the US regulatory and taxation regime would naturally apply. The experience of other EU issuers (incl. SSA⁷ issuers) has shown that the costs of completing the required regulatory and tax filings are very significant and time-consuming. Given these considerations, and the fact that EU Commission issuance is exclusively denominated in euros, the Commission has concluded that the costs and disadvantages of making its securities available in the US far outweigh any advantages.

Conclusion

In conclusion, the EU Commission does not offer securities to retail investors in the EU, US or any other jurisdiction. US retail investors and dual EU/US retail investors, regardless of which EU nationality they hold aside from their US citizenship, are not therefore discriminated against compared to their EU retail counterparts.

⁶ Commission Decision (EU, Euratom) 2021/625 of 14 April 2021 on the establishment of the primary dealer network and the definition of eligibility criteria for lead and co-lead mandates for syndicated transactions for the purposes of the borrowing activities by the Commission on behalf of the Union and of the European Atomic Energy Community, OJ L 131, 16.4.2021, p. 170

⁷ Sovereigns, supranationals and agencies

8. Further reply from the Commission, received on 30 October 2024

Update to Petitions 1088/2016, 1470/2020, 0323/2021 and 0394/2021

The Commission's observations

With regard to the overall impact of US' Foreign Account Tax Compliance Act (FATCA) on financial services, contacts between the EU institutions and the US administration are ongoing. In particular, FATCA is discussed by the Commission services with high-level representatives of the US administration (US Treasury Department) in the context of the bi-annual EU-US Joint Regulatory Forum to further remedy and mitigate the multiple problems faced by EU citizens covered by these FATCA agreements.

In the Forum meeting on 4-5 December 2023, the Commission asked the US administration to consider more permanent and comprehensive relief for credit institutions on providing US Tax Identification Numbers (TINs) for customers presenting limited links with the US and with no meaningful tax liability there. This would ensure greater legal certainty and facilitate access to financial services for so-called accidental Americans. The US Treasury Department has responded that work is underway to develop a permanent relief to the issue of missing TINs.

The US Treasury Department is awaiting initial data from the current temporary relief (IRS Notice 2023-11) in order to develop a permanent solution which would also address possible abuses. At the Forum, the Commission also welcomed consideration given to reducing the fee for those seeking to renounce their US citizenship from the current US\$ 2,350 to US\$ 450. These issues were also considered in a letter from the Spanish Presidency (Chair of the Working Party on Tax Questions) to the US Treasury in September 2023 and discussed during a bilateral meeting between the US side and the Spanish Presidency in November 2023⁸.

With respect to data protection, the primary responsibility to monitor and ensure compliance with the EU's data protection requirements lies with national data protection authorities (DPAs) and the courts. In May 2023, the Belgian DPA adopted a decision⁹ in which it ruled that the processing and transfer to the US of the personal data of so-called accidental Americans in Belgium pursuant to the FATCA intergovernmental agreement was in breach of the General Data Protection Regulation (GDPR)¹⁰.

Following an appeal by the Belgian government against the DPA's decision, the competent Belgian *Cour des Marchés* overturned the DPA's decision, referring in particular to insufficient reasoning provided to support the DPA's findings¹¹. The case has therefore been referred back to the Belgian DPA, which is currently handling it. In addition, following an earlier decision in July 2019¹² in which the French Council of State concluded that the French FATCA agreement with the US was not in violation of the GDPR, the French Council of State adopted a decision in January 2024¹³ that rejected an appeal against a decision of the

⁸ see point 78 of Ecofin report to the European Council on tax issues:

<https://data.consilium.europa.eu/doc/document/ST-16411-2023-INIT/en/pdf>

⁹ <https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-61-2023.pdf>.

¹⁰ OJ L 119, 4.5.2016, p. 1–88

¹¹ Judgment of 20 décembre 2023 (2023/AR/801).

¹² <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000038801233?isSuggest=true> .

¹³ <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000049066538> .

French DPA in which the DPA refused to suspend data transfers under the FATCA agreement.

The Commission is closely following further these developments and in other Member States where similar proceedings are taking place before DPAs and courts. To ensure coherence of the interpretation and application of the GDPR, it is important that the Commission is able to fully take their position into account. In this respect, the Commission is also closely following any follow-up discussions and/or actions at the level of the European Data Protection Board (EDPB, the body bringing together all national data protection authorities in the Member States).

With regard to the exemption of US citizens from the PRIIPS rules¹⁴ under FATCA, US persons resident in the EU who are retail investors may have access to US domiciled investment funds, provided such funds meet certain conditions. As regards non-EU investment funds, Directive 2011/61/EU¹⁵ (the Alternative Investment Fund Managers Directive (AIFMD)) qualifies such funds as alternative investment funds. Under Article 43 of the Directive, Member States may allow the marketing of all or certain types of alternative investment funds to retail investors in their territory. Since January 2023, undertakings for collective investment in transferable securities (UCITS) funds are subject to PRIIPS Regulation and have to provide a PRIIPs KID, same as for other investment products. Before, UCITS were subject to disclosure requirements in the form of a Key Investor Information Document (KIID), which has been replaced by the PRIIPs KIDs, applicable on a transversal basis, aiming to enable investors to compare products and make an informed decision.

Conclusion

The Commission continues to work with the US authorities and other EU institutions and bodies in various fora on issues affecting EU citizens covered by these FATCA agreements.

¹⁴ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352, 9.12.2014, p. 1–23

¹⁵ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1 – 73.