Autorité de protection des données
Gegevensbeschermingsautoriteit

Decision 79/2025 of April 24, 2025

File number: DOS-2021-00068

Subject: Complaint concerning the transfer by the Federal Public Service (FPS) Finance of personal data to the US tax authorities (IRS) in implementation of the "FATCA" agreement

Unofficial Summary of Decision

Note to readers: The original decision is available in French and Dutch. This summary, including the table of contents, has been produced by Mishcon de Reya for general information purposes only and should be read in conjunction with the actual decision. The summary is not intended to be exhaustive, nor does it follow the systematic formatting of the actual decision. To assist readers, we have included cross-references to paragraphs of the decisions using superscript numbers in square brackets (e.g. "[25]").

Correspondence: For additional background on the issues discussed in the decision, and in particular the systemic EU failures, see our correspondence with the EU, the OECD and national data protection authorities, together with a timeline and chronology of institutional failings.

Implications for the UK: The case commonly known as Jenny's claim is currently subject to a separate complaint before the Information Commissioner's Office originally filed in 2019.

Contents

Unofficial Summary

1. Facts and procedural history

Pages 1–43 contain the background of the claim filed by the Belgian Association of Accidental Americans (AAAB) and deal with procedural points.

By way of background, this is the second decision handed down by the Belgian data protection authority (**DPA**) following a complaint filed by the AAB. On 24 May 2023 the Belgian DPA had already declared that data transfers taking place under the Foreign Account Tax Compliance Act (**FATCA**) to be illegal in a 77-page-long decision. The Belgian state filed an appeal before the Belgian Court of Appeal, mainly on procedural grounds. On 20 December 2023, the Court of Appeal struck down the original decision on the basis that it had been taken by the wrong body within the Belgian DPA; and that the DPA failed to discuss a report issued by the Inspection Service of the Belgian Tax Authority, thus breaching a principle of fair trial.

2. FATCA and data protection – a systemic EU failure

2.1 Lack of harmonisation and failure to cooperate

The Belgian DPA notes that one of the aims of the General Data Protection Regulation (**GDPR**) consists in strengthening the level of harmonisation of data protection rules in the EU [154]. In relation to FATCA, the Belgian DPA is aware that other data protection authorities have already ruled in various directions on the same issue. This calls for consistency within the EU. Unfortunately, the Belgian DPA does not have standing to refer questions to the CJEU for a preliminary ruling [106].

The failure of Member States to implement their obligation to cooperate undermines the effectiveness of the right to data protection and its enforcement via an independent data protection authority, a principle enshrined in Art. 8.3[1] of the EU Charter of Fundamental Rights (**EU Charter** or **Charter**).

Since the introduction of the GDPR, data protection authorities have been entrusted with the mission of contributing to an effective and uniform

[1] *"Protection of personal data: 1. Everyone has the right to the protection of personal data concerning him or her; 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified; 3. Compliance with these rules shall be subject to control by an independent authority."*

application of the GDPR, as emphasised by the CJEU in the *Schrems II* judgment [179].

2.2 Inertia by Member States

Member States are bound by their duty of loyal cooperation under Art. 4.3 TFEU[2] applied in the light of Art. 351 TFEU and Art. 8 Charter [186].

It is now 9 years since the GDPR entered into force. Throughout this period, there has been no sign of the Belgian State's willingness to request a review of the existing FATCA Agreement. The more time passes, the less acceptable this inertia of the State becomes [178].

In 2021, the European Data Protection Board (**EDPB**) called on Member States to bring existing international data transfer agreements (including those in the area of taxation) in line with the GDPR (Statement 4/2021) [178].

3. Lack of proportionality

The Belgian FATCA agreement was concluded on 23 April 2014, i.e. two years before the adoption of the GDPR on 27 April 2016. Art. 96 of the GDPR provides that pre-existing international agreements involving the transfer of personal data to third countries shall remain in force until amended, replaced or revoked, provided they comply with Union law as applicable prior to 24 May 2016 [153].

Existing EU law in force prior to 24 May 2016 includes the EU Charter and the EU Data Protection Directive 95/46/EC [185].

3.1 Art. 52 EU Charter

- The Belgian FATCA Agreement violates Articles 8 and 52 of the EU Charter [244]. Art. 8 Charter provides that everyone has the right to the protection of personal data concerning him or her, and Art. 52 Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms and be subject to the principle of proportionality, meaning that limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

- The CJEU imposes very strict conditions on international agreements that have an impact on the exercise of the rights to privacy and personal data protection enshrined in Art. 8 of the Charter and on proportionality generally (Opinion 1/15 on the draft PNR agreement with Canada; C-817/19 *Ligue des droits humains*; C-362/14 *Schrems*;

[2] *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."*

C-311/18 *Schrems II*; C-465/00 *Österreichischer Rundfunk*; C-293/12 *Digital Rights Ireland* [180]; C-175/20 *Valsts ieņēmumu dienests* [226]).

— [Many of these judgments were issued before the adoption of the GDPR and are therefore relevant in relation to the scope of Art. 96 GDPR discussed below.]

— The CJEU has clearly stated that data transfers to third countries must comply with Articles 7, 8 and 47 of the Charter [186].

— The transfer of data to the IRS takes place automatically without any indication that any tax law would have been violated. This is not a system of data transfer on an ad-hoc basis operated at the request of the US tax authorities and based on the presence of indicia requiring a transfer in view of the purposes pursued [219]. The Belgian DPA is of the opinion that this system does not satisfy the principle of proportionality, particularly in the light of the case law of the CJEU [220]. *Digital Rights Ireland* related to a case of automatic retention of communications which was disproportionate because the obligations *applied "even to persons for whom there is no evidence to suggest that their conduct may be connected, even indirectly or remotely, with serious offences"* [221]. In C-175/20 the CJEU expressly stated that a generalised and undifferentiated collection of personal data by a tax authority for the purpose of combating terrorism and tax fraud by a tax authority is not permitted [226-230].

— In the context of automatic exchange of information, it was identified from the outset that there was a risk of receiving irrelevant data, and that this risk should be avoided [234].

— In the context of an exchange of data – especially if automatic and unrelated to any tangible detection of tax evasion – it is appropriate at the very least to exclude categories of persons that can be exempted from reporting as well as those that present a very low risk of evasion [229].

— The transfer of FATCA data concerns *a priori* all US nationals and takes place automatically. If the declared purpose of the measure is to combat tax evasion of all Americans residing abroad, the processing is generalised and indiscriminate, since it targets all Americans regardless of any indicia of tax evasion [230-231].

— So, if people subject to FATCA reporting are not actually subject to tax in the US, because their foreign income does not exceed the [Foreign Earned Income Exclusion] threshold[3], the transfer of their personal data will not be proportionate [229].

[3] The FEIE allows qualifying individuals to exclude up to $130,00 of foreign-earned income for the 2025 tax year (the amount is indexed and increases every year, see the IRS's website).

— The FATCA Agreement provides that "low value accounts, in this case below US$50,000 are not subject to reporting procedures, unless the reporting financial institution decides otherwise"[232].

3.2 **Proportionality: Art. 6.1(b) of the old Data Protection Directive**

— If the option mentioned above (i.e. the exclusion of bank accounts below US$50,000) exists, it is because sending data relating to these accounts is not really necessary within the meaning of Article 6.1(b) of the old EU Data Protection Directive [233]. That article provided that:

> *"personal data must be… adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed."*

— In its opinion dated 15 December 2016 (AF 52/2016), the Belgian Committee for the Protection of Private Life already concluded that:

> *"in order to avoid excessive numbers of accounts being communicated to the US, the Committee invites financial institutions to apply the US$50,000 threshold to guarantee the proportionality of the processing".*

While the opinion referred to financial institutions, its deliberation is nevertheless directed to the tax authorities, who were warned. As data controller, it is incumbent on the tax authority to transfer only relevant and non-excessive (i.e. necessary) data to the IRS [233].

— The CJEU case law supports the conclusion that the principle of proportionality laid down in Art. 6.1(b) of the old Data Protection Directive. The tax authority has failed to demonstrate that only adequate, relevant and non-excessive data is transferred to the IRS [236].

— As regards the compliance with the old Data Protection Directive, a data controller must, in addition to complying with the specific rules governing data flows, also comply with all the applicable data protection obligations and principles. Thus, the tax authority may not transfer data for a purpose that does not meet the requirement of Art. 6.1(b), nor transfer personal data that is inadequate, irrelevant or excessive in relation to this purpose without violating Art. 6.1(b) of said directive.

3.3 **Proportionality: Art. 5.1(c) GDPR *("data minimisation")***

— In replacing the old Data Protection Directive of 1995, one of the purposes of the GDPR was to strengthen the effectiveness of individuals' right to data protection, since enshrined as an EU fundamental right in 2000. The other purpose was to strengthen the harmonisation of data protection throughout the EU [154].

— The GDPR did not alter the principle of proportionality contained in the old Data Protection Directive. Therefore, the considerations made in

relation to the old Data Protection Directive apply also to the GDPR [241, 244].

— The FATCA Agreement violates the principle of data minimisation set out in Art. 5.1(c) GDPR in the same way as it violated the principle of proportionality under Art. 6.1(c) of the old Data Protection Directive, or the principle of necessity under Articles 8 and 52 of the EU Charter [244].

3.4 Art. 96 GDPR

Article 96 GDPR (saving clause for pre-existing international data transfer agreements) does not assist the tax authority.

— The CJEU has clearly stated that data transfers to third countries must comply with Articles 7, 8 and 47 of the EU Charter [186].

— In addition, Art. 96 is limited *to the content* of the relevant agreement [161, 196]. Recital 102 to the GDPR specifies that international data transfer agreements *must include an appropriate level of protection* for the fundamental rights of data subjects [195] to ensure that personal data transferred to a third country benefits from a level of data protection substantially equivalent to that guaranteed within the EU by the GDPR (see C-311/18, *Schrems II*).

These minimum requirements include in particular (a) basic data protection principles; (b) the rights of data subjects in respect to data processing; (c) restrictions on data sharing; (d) the right to an effective remedy; and (e) the principle of accountability [253].

The FATCA Agreement does not contain any basic data protection principles. None of the provisions of the FATCA Agreement deals with data protection concepts, despite the fact that the very essence of the agreement is based on a chain of data processing operations [256].

Nor does the FATCA Agreement contain any commitment in relation to the retention of data, nor any maximum retention period on the part of the IRS [259].

In addition, the FATCA Agreement does not mention any right to an effective remedy, nor any right to access and/or rectify information [261]. There is no indication that the IRS will inform the data subject of any data processing (principle of transparency) [262].

Furthermore, the FATCA Agreement does not provide any guarantee that the IRS will not carry out any profiling (see Art. 22[4] GDPR) [265].

[4] *"The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."*

Finally, the FATCA Agreement does not contain any independent control mechanism to verify that the Agreement is correctly applied and monitor any breaches [269].

— The tax authority may not rely on the lack of any renegotiation of the FATCA Agreement. Member States are bound by their duty of loyal cooperation under Art. 4.3 TFEU applied in the light of Art. 351 TFEU and Art. 8 Charter [186]

By providing for a 2-year implementation period[5], the EU legislator made it clear that ongoing data processing operations would have to comply with all the provisions of the GDPR, as confirmed by Recital 171 of the GDPR[6] [155]. This compliance is essential to achieve a stronger level of data protection as a fundamental right. If existing data processing is not brought into line with the GDPR, two different data protection regimes would coexist, which in essence would be contrary to the very nature of the GDPR [156].

The more time passes, the less acceptable it is for data protection authorities to be restricted in the exercise of the mission entrusted to them by the GDPR [180].

The same goes for the inertia of the State. As early as 2021, the EDPB invited EU Member States to review their international agreements in the light of the GDPR (Statement 4/2021).

4. Lack of appropriate safeguards

4.1 Old Data Protection Directive and GDPR

— On 16 December 2015, the Article 29 Working Party issued guidelines aimed at providing indications as to the data protection safeguards to apply *inter alia* to exchanges with a third country that had not been the subject of an adequacy decision by the EU Commission (WP234) [197].

[In addition to the requirement of proportionality, those guidelines mentioned *inter alia* (a) necessity and proportionality; (b) the principle of purpose limitation (including in relation to data retention); (c) transparency, fair processing and data subject's rights; (d) the requirement of a Privacy Impact Assessment; and (e) the prohibition against the processing of tax information for additional purposes.]

— Chapter V of the GDPR sets out specific requirements that need to be met by any cross-border data flows to third countries [245]. In the absence of an adequacy decision, a data controller may only transfer personal data to a third country if it has provided appropriate safeguards and on condition that the data subjects have enforceable

[5] The GDPR was adopted in 2016 but entered into effect in 2018.

[6] *"Processing already under way on the date of application of this Regulation should be brought into conformity with this Regulation within the period of two years after which this Regulation enters into force."*

rights and effective legal remedies within the meaning of Article 46.1 GDPR. These appropriate safeguards can take various forms, including that of a legally binding instrument (Article 46.2(a) GDPR). Finally, in the absence of an adequacy decision and appropriate safeguards, a transfer of data to a third country may only take place if one of the derogations listed Article 49 of the GPDR applies. Failing to meet the requirements of Articles 45 to 49 of the GDPR, the transfer of personal data to a country outside the EU is prohibited [246].

It is not disputed that there is no adequacy decision covering the transfer of data to the IRS [247].

The relevant safeguards must ensure that individuals whose personal data is transferred to a third country enjoy a level of data protection substantially equivalent to that guaranteed within the EU under the GDPR [250].

In its Guidelines 4/2020 the EDPB confirms, based on existing case law from the CJEU, that the minimum safeguards must be included in the international agreement [252].

4.2 **Purpose limitation**

— Art. 6.1(b) of the old Data Protection Directive required that data be collected for specific, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. This principle is also enshrined in Art. 8.2[7] Charter [200].

A "purpose" must be sufficiently determined [202]. The 2015 guidelines issued by the Art. 29 Working Group in the context of Automatic Exchange of Information (document W234) stated as follows:

> *"Purpose limitation*
>
> *The wording on the purpose ("tax evasion"/"improvement of tax compliance") for example may appear vague and insufficiently clear, allowing too much flexibility to the competent authority. It is not clear whether such purposes include, for example, legal acts of tax evasion, illegal acts of tax evasion or (serious) financial crimes.*
>
> *Citizens shall be always aware of the exact purpose behind the processing of their data and such purpose shall be used as a parameter for assessing the necessity and proportionality (and thus the legality) of the data exchange."*

The FATCA Agreement mentions (a) *the improvement of international tax rules*; and (b) *the implementation of obligations arising from the US FATCA law* [204].

[7] *"Personal data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."*

This description is too vague and does not constitute a specific and determined purpose within the meaning Art. 6.1(b) of the old Data Protection Directive [205].

The FATCA Agreement states that "following the entry into force of this Agreement, each authority shall provide written notification… that the information received shall be used solely for tax purposes" [208].

In its Opinions 61/2014 and 49/2015, the Belgian Commission for the Protection of Private Life confirmed that the mere mention of "tax purposes" did not meet the requirements of purpose limitation [209].

In conclusion, the "purpose" of data processing under the FATCA Agreement is neither sufficient nor sufficiently determined in the FATCA Agreement itself [213] and therefore does not meet the requirements set out by Art. 6.1(b) of the old Data Protection Directive [214].

— As mentioned above in relation to data minimisation, one of the aims of the GDPR was to strengthen the level of data protection.

The GDPR did not alter the principle of purpose limitation contained in the old Data Protection Directive. Therefore, the considerations made in relation to the old Data Protection Directive apply also to the GDPR [241, 244].

The FATCA Agreement violates the principle of purpose limitation set out in Art. 5.1(b) GDPR in the same way as it violated the principle of purpose limitation under Art. 6.1(b) of the old Data Protection Directive, or the principle of necessity under Articles 8 and 52 of the EU Charter [244].

4.3 **Retention period**

In relation to the old Data Protection Directive, the opinion issued by the Article 29 Working Party (document WP234) [240] stated as follows:

> *"Proportionality should also guide data retention… a consequence of CJEU case law."*

The GDPR did not alter this principle [241].

The FATCA Agreement makes no provision for a retention period [241].

4.4 **Right to information ("transparency")**

In relation to the old Data Protection Directive, the opinion issued by the Article 29 Working Party (document WP234) [240] stated as follows:

> *"Transparency, fair processing and data subject´s rights*
>
> *Clear and appropriate information should place data subjects in a position to understand what is happening to their personal*

> *data and how to exercise their rights, as foreseen by Articles 10 and 11 of the Directive. Any restriction or exemption to those provisions (or to any data subject´s right) shall be limited and duly justified and respect the strict criteria set forth in Article 13 of the Directive. Also, it has to be prescribed by law, as indicated by the mentioned Bara jurisprudence."*

Here, too, the GDPR did not change the principle [242].

The right to information is absent from the FATCA Agreement [262].

The obligation to inform on the part of financial institutions does not *ipso facto* exempt the tax authority from its transparency obligation with regard to the further processing of the data received from financial institutions [281].

While the tax authority's website provides information on the FATCA Agreement, this information is both general and technical, and aimed for the most part at financial institutions, and not directly at the citizens concerned [297] within the meaning of Art. 14.1 and 14.2 GDPR. This is a **particularly serious breach**, given that the right to information is a **cornerstone** of data protection law. Without information, the data subject is unable to be aware that his or her data is being processed. Moreover, they are unable to exercise their rights [298].

Furthermore, the information is neither easily accessible, nor comprehensible for the people concerned, as required by Art. 12.1 GDPR [299]:

> *"The controller shall …provide any information referred to in Articles 13 and 14 GDPR… in a concise, transparent, intelligible and easily accessible form, using clear and plain language."*

In conclusion the data protection authority finds a breach of the principle of transparency laid out in Art. 14. 1 and 14.2 GDPR, read in conjunction with Art. 12 GDPR [301].

5. No derogation for important reasons of public interest

Article 49.1(d) GDPR provides for a derogation where the transfer is necessary for important reasons of public interest.

As a derogation to the general rules, Art. 49 GDPR must be interpreted restrictively. The data protection authority finds that this derogation cannot take place on a large scale and systematically as is the case with FATCA. The derogation contained in Art. 49.1(d) cannot become "the rule" in practice, but needs to be limited particular situations (see the EDPB's Guidelines 2/2018) [276]:

> *Derogations under Article 49 are exemptions from the general principle that personal data may only be transferred to third countries if an adequate level of protection is provided for in the*

third country or if appropriate safeguards have been adduced and the data subjects enjoy enforceable and effective rights in order to continue to benefit from their fundamental rights and safeguards.

Due to this fact and in accordance with the principles inherent in European law, the derogations must be interpreted restrictively so that the exception does not become the rule. This is also supported by the wording of the title of Article 49 which states that derogations are to be used for specific situations ("Derogations for specific situations").

When considering transferring personal data to third countries or international organizations, data exporters should therefore favour solutions that provide data subjects with a guarantee that they will continue to benefit from the fundamental rights and safeguards to which they are entitled as regards processing of their data once this data has been transferred.

As derogations do not provide adequate protection or appropriate safeguards for the personal data transferred and as transfers based on a derogation are not required to have any kind of prior authorisation from the supervisory authorities, transferring personal data to third countries on the basis of derogations leads to increased risks for the rights and freedoms of the data subjects concerned."

The Belgian DPA concludes that the transfer of the claimants' data to the IRS did not pass this test [276].

Summary prepared by Filippo Noseda / Mishcon de Reya LLP
27 April 2025