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Our Ref: FN/5999/60052.1

10 February 2025

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Dear All

AEOI & GDPR | Access to Internal EU documents

EU institutions are aware of our work on the data protection implications of systems of automatic exchange of information (**AEOI**), which includes substantial correspondence with all EU institutions.

The purpose of this letter is to request full and unredacted access to certain EU documents under the TFEU[1] and the Access to Documents Regulation[2] based on an overriding public interest in disclosure.

I have included a table of contents for ease of reference.

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You will see that I have copied in several EU FATCA Petitioners, with whom I have discussed the content of this letter and who fully endorse the request for access to information contained in this letter.

[1] See *Sovim v LBR* (C-601/20), at paragraphs 60-62.
[2] Regulation (EC) No 1049/2001of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

1. Subject matter and context of the access request

Broadly, AEOI includes ❶ **FATCA** (which provides for the automatic transfer of personal data to the US), and ❷ the **CRS** or Common Reporting Standard (which provides for the automatic transfer of personal data to 100+ countries), as transposed in the EU through ⓐ bilateral agreements or **IGAs** (in the case of FATCA) and ⓑ the second Directive on Administrative Cooperation or **DAC2** (in the case of the CRS)[3].

The data protection implications of FATCA have been criticised by the EU's Data Protection Working Party (**WP 29**), as well as the European parliament, which adopted a formal resolution that was highly critical of the current Commission, while also criticising the insouciance of the WP's successor (the EDPB). Our research into internal EU documents[4] shows that the former Commission (under Commissioner Algirdas Šemeta) raised 'worrying' concerns about the compatibility of FATCA with EU data protection laws, with the EU Commission services confirming the lower standards of data protection in the US[5] and suggesting an EU competence to deal with FATCA (see here at p. 2 and here), with bilateral IGAs being a temporary solution ahead of an EU-US agreement (see here at p. 2). In the US, a domestic version of FATCA was abandoned in 2021 following concerns about data privacy and data protection.

Similar concerns were raised in relation to the CRS/DAC2 by the WP29 in a strongly worded letter to the Commission and in Recommendation 2 of the group of experts on the implementation of the DAC2 appointed by the Commission (AEFI Group).

Notwithstanding these concerns:

❶ both FATCA and the CRS/DAC2 were hastily implemented in a politically charged environment. Commissioner Šemeta was succeeded by Pierre Moscovici, who had previously signed his country's IGA with the US;

❷ our research shows that Commissioner Věra Jourová might have misled the European Parliament on the existence of negotiations between the EU and the US during the debate that led to the adoption of the European Parliament's FATCA resolution, and that Commissioner Bruno Gentiloni might have misled MEPs on the previous Commission's data protection concerns about FATCA (*'no evidence'*)[6]. And yet, in 2021 the Commission acknowledged that FATCA and data protection represent a "long-standing issue"; and

❸ the EDPB, which one would assume as being fully conversant with access requests, was handed two maladministration decisions by the

[3] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (**DAC2**).
[4] Our research is based on documents released to Sophie in 't Veld MEP. Some of the main document have been reproduced in the body of our letters here, here, here, and here.
[5] Ares(2015)459646_Annex5, reproduced here at p. 2.
[6] See also here.

EU Ombudsman in relation to FATCA[7] and has consistently refusing to engage its duties under the GDPR notwithstanding clear evidence of an inconsistent application of the GDPR throughout the EU.

Since the introduction of FATCA, official data released by US authorities in the last two years, including the Government Accountability Office (**GAO**), the US Treasury Inspector for General Tax Administration (**TIGTA**) and the Commissioner of the Internal Revenue Service (**IRS**), confirmed a lack of resources in respect of FATCA data which is not used, is subject to poor data security, with the IRS being affected by several incidents of data loss, hacking, lax access rules and outdated filing systems. This goes to the heart of basic GDPR principles ('necessity', 'lawfulness', 'data minimisation', 'integrity and confidentiality', 'accountability'). The shortcomings of FATCA and its negative implications for compliant taxpayers have also been raised during congressional hearings (see also here), with the US State Department directly linking FATCA to forced renunciations of citizenship as the ultimate sacrifice for the disproportionate effects of FATCA[8]. More recently, Donald Trump's firing of three representatives from Privacy and Civil Liberties Oversight Board (PCLOB) on 27 January 2025 has a direct impact on the adequacy system under Art. 46 GDPR (transfers to third countries subject to appropriate safeguards), in respect of which EU institutions already have an opinion from Prof. Michael Hatfield (discussed here at p. 2).

In relation to the CRS, additional concerns for the Human Rights implications of transferring personal data to third countries have been raised by 47 German MPs, as well as British MPs.

2. Documents and information requested

Our request relates to all documents considering:

(a) the compatibility of AEOI with EU and Member States data protection laws and fundamental rights;

(b) the data protection implications of AEOI, in particular with regards to the transfer of personal data to third countries (adequate safeguards, data security, etc.);

(c) the impact of CJEU case law on the above.

Our request extends to proposals, impact assessments, communications, trialogue documents, working party documents, legal opinions, position papers, agendas, interinstitutional correspondence, information notes and minutes of meetings held by the Commission, the Council, the European Parliament and the EDPB.

[7] Case 201/2022/JK and Joint cases 509/2022/JK and 1698/2022/FA.

[8] "*After significant deliberation, taking into account…the not insignificant anecdotal evidence regarding the difficulties many U.S. nationals residing abroad are encountering at least in part because of FATCA, the Department has made a policy decision to [reduce the fee for] requesting a Certificate of Loss of Nationality of the United States (CLN), from $2,350 to $450.*"

Excluded from our request are documents that have already been released in 2015 to Sophie in 't Veld MEP following her successful complaint before the EU Ombudsman[9]; and documents released since then to any EU FATCA Petitioners and other individuals. However, documents since released in a redacted form (beyond mere redactions aimed at protecting the personal data of officials (such as names and email addresses) are covered by this request[10].

3. Overriding public interest for disclosure

Art. 4 of the Access to Documents Regulation provides several exceptions to the disclosure of information. However, such exceptions do not apply where there is an overriding public interest in disclosure.

The case law from the GCEU and the CJEU[11] has consistently confirmed:

(a) the overriding objective of the Access to Documents Regulation, notably the transparency of the work carried out by EU institutions and their accountability to the public; and that, accordingly
(b) the exceptions contained in Art. 4 must be applied restrictively.

In relation to AEOI, EU institutions have repeatedly sought to frustrate access to information, through outright refusals or disclosures so heavily redacted to make them useless.

In the case in hand, there is an overriding public interest in the disclosure of the documents relating to the data protection implications of AEOI due to:

1. the fundamental nature of the rights to privacy and data protection;

2. the evidence of an inconsistent approach by the European Commission throughout the years, with possible instances of misleading statements from current commissioners to suppress the concerns raised by Commission services and previous commissioners;

3. the strength of the concerns raised by previous Commissioners according to documents released to an MEP in 2015 and the European Parliament in relation to FATCA (some of the documents released to Sophie in 't Veld MEP are reproduced here, here, here, and here);

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[9] Decision in case 1398/2013/ANA on the European Commission's refusal to give access to documents relating to the US Foreign Account Tax Compliance Act ('FATCA').
[10] See e.g. this request from Elodie Lamer (a journalist) in respect of the work carried out under the Belgian Presidency, which led to a heavily redacted disclosure, so heavily redacted to be useless (see here at pp. 2-7). The same applies to the various requests from Nicholas Lee, one of the EU Petitioners (Petition 0394/2021). All documents identified as a result of those requests which have been disclosed in a redacted form are covered by this Access Request.
[11] *Pech v Council* (C-408/21 and T-252/19); *De Capitani v European Parliament* (T-540/15); and *In 't Veld v Commission* (C-350/12 and T-529/09). The implications of the In t' Veld case were discussed by the General Secretariat of the Council in an Information Note (11788/14). However, the Pech case suggests that EU institutions might have failed to pay heed to case law.

4. the evidence of a politically charged debate in relation to the GDPR implications of AEOI, which following a steady stream of CJEU judgments in the area of data protection [12] should represent a quintessentially legal issue affecting fundamental rights, with current EU institutions consistently ignoring the advice of EU data protection services (WP29, AEFI Group), CJEU judgments as well as the findings of previous Commissioners;

5. the introduction of the GDPR since then, coupled with a string of CJEU judgments relating to the transfer of data to third countries, including *Schrems I*, *Schrems II*, and the *EU/Canada case*, which confirm the concerns raised by the Commission under the leadership of Algirdas Šemeta.

   The impact of *Schrems II* for data transfers to the US was highlighted in a report published by the European Parliament [13] which concluded *inter alia* that *"US federal or state privacy law is likely to provide 'essentially equivalent' protection compared to the EU GDPR in the foreseeable future. Indeed, there are serious and in practice insurmountable US constitutional and institutional as well as practical/political obstacles to the adoption of such laws"* . The recent actions by US president Donald Trump are a point in case; and yet, EU institutions continue to stick their institutional heads in the sand when it comes to the GDPR consequences of massive systems of bulk collection, processing and transfer of sensitive personal data.

6. the "long standing nature" of the issue, coupled with evidence of an endless institutional 'ping pong'[14] aimed at frustrating any progress in this area;

7. the obstinate refusal, by EU institutions, notably the European Commission, the Council and the EDPB, to actively engage with data protection advocates and EU petitioners, as evidenced in our substantive correspondence (see e.g. here, here, here). It took the European Commission over 4 years to acknowledge formal complaints in this area, and previous requests for information have been met by a barrage of institutional obstructionism that required the involvement of the EU Ombudsman at every turn and has been described as 'Kafkaesque' by MEPs during a public hearing[15] , with the European

[12] E.g. *Digital Rights Ireland Ltd*, (C-293/12); *Maximillian Schrems v Data Protection Commissioner* (C-362/14); *Tele2 Sverige AB et Watson*, (C-203/15 and C-698/15); EU/Canada PNR Agreement (Opinion 1/15); *Privacy International*, (C-623/17); *Spacenet* (C-793/19); *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit* (C-645/19); *Valsts ieņēmumu dienests - Processing of personal data for tax purposes* (C-175/20); *Mousse* (C-394/23); and *Bindl v European Commission* (T-354/220. See also *L.B. v Hungary* (ECtHR, 36345/16); Luxembourg Court of Appeal (Arrêt N° 67/20) and Belgian DPA (Decision 61/2023).

[13] "Exchanges of Personal Data After the Schrems II Judgment" (PE 694.678)

[14] Referred to euphemistically as 'institutional forbearance' / 'institutional deference' in a recent study published by the European Parliament in September 2022 (PE 734.765), following a groundbreaking study published shortly after the introduction of the GDPR (PE 604.967).

[15] See here, and forward to 12:16:05

Parliament formally 'deploring' the behaviour of the Commission and openly criticising the 'absence of meaningful corrective measures' by the EDPB in a formal resolution issued almost four years ago, without any change of approach since then, notwithstanding a formal decision by the Belgian DPA in 2024 in relation to FATCA.

8. a finding of maladministration against the EDPB, raising fresh concerns about its role in enforcing the GDPR;

9. the lack of any actual and specific prejudice in international relations between the EU and the US in respect of FATCA, given the wealth of information already in the public domain in relation to (a) the scope and extent of previous negotiations between the US and the EU (which, viewed objectively, have not achieved anything, as otherwise the issue would not be 'long standing'); (b) the impact assessment carried out by US agencies (GAO, TIGTA, IRS, US State Department)[16]; (c) the existence of congressional criticism concerning the disproportionate effects of FATCA; and (d) direct evidence that the US abandoned a domestic version of FATCA due to data protection and data security concerns.

10. the lack of any actual and specific prejudice in international relations with EU Member States and other third countries in respect of the CRS, which could trump the public interest to disclosure. In a formal decision issued on 3 July 2020 in relation to a specific data protection complaint, the OECD Secretary-General held that the OECD does not owe any data protection obligations under AEOI. Coupled with the OECD's refusal to the WP29's offer of an "*active dialogue with the OECD competent bodies, in a joint effort to identify methods to pursue the legitimate aim of fighting tax evasion through efficient mechanisms that do not expose individuals' rights to disproportionate interference*", this approach shows the lack of any vested interest in protecting individuals' fundamental rights under EU law. The word 'data protection' was not mentioned once in the OECD's recent report to the G20, nor the latest peer review published in November 2023. In the absence of any real progress to speak for, the mere existence of endless discussions cannot be used to deny full access to documents to ensure public scrutiny and accountability of the work carried out by EU institutions to uphold EU fundamental rights.

Please let me know if you have any question in relation to this access request.

Best regards,

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Partner

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[16] See page 3 above.