

ARTICLE 29 Data Protection Working Party



Brussels, 01/10/2012
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Mr Heinz Zourek
Director General of Taxation and
Customs Union
European Commission
B-1049 Brussels

Dear Mr Zourek

Re: FATCA and Model II agreements

1.0 Introduction

1.1 Thank you for your letter dated 1 August 2012 regarding the Article 29 Working Party's analysis of the implementation of the US legislation FATCA (Foreign Account Tax Compliance Act) in relation to Directive 95/46/EC.

1.2 In your letter you outline three issues for follow up:

- factual inaccuracies in the Article 29 Working Party's letter dated 21 June 2012;
- the Article 29 Working Party's advice on safeguards for the exchange of personal data and further processing thereof; and
- the Article 29 Working Party's view of the Model II intergovernmental agreements are separate and different intergovernmental agreements concluded by Japan and Switzerland to facilitate the implementation of FATCA.

2.0 Factual inaccuracies

2.1 Thank you pointing out these factual inaccuracies. The Article 29 Working Party appreciates the clarifications given. However these clarifications do not alter the Working Party's analysis of the data protection issues in relation to FATCA, and therefore our position and advice remain unchanged.

3.0 Advice on safeguards for the exchange of personal data and further processing thereof

3.1 You request in your letter for clarification on whether safeguards contained in the double tax treaties, such as the UK/US double tax treaty sited in our letter of 21 June 2012, would "provide sufficient safeguards with respect to the data exchanged and is cited as an example of best practice".

3.2 You have also requested the Article 29 Working Party's advice to ensure the highest standards of data protection are offered by the bilateral agreements which Member States may conclude under the intergovernmental approach.

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

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 2/13.

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

3.3 I can advise that whilst (as stated in paragraph 14.3 of our letter dated 21 June 2012) “the tax treaties *might* already offer *some* data protection safeguards,” Member States and the Commission must fully appreciate how safeguards such as the purpose limitation principle for further processing of personal data as cited under Article 27(3) of the US/UK tax treaty is applied in practice to the personal data within the scope of FATCA. This means ensuring that the purpose limitation principle is complied with and safeguards are in place to mitigate and make redress to any breach of this principle.

3.4 The tax treaties are an important component of the Model I agreement. However, to achieve the highest standards of data protection one must ensure that compliance with the provisions in the Directive 95/46 is achievable in practice even when the personal data leaves the EU. This will require that sufficient and appropriate safeguards are in place within the tax treaties and any procedures derived from it. This may mean amending the tax treaties or adding to them with procedures and rules governing the exchange of personal data within the scope of FATCA but processed using the tax treaty as the legal basis.

3.5 Further examples of safeguards which the Article 29 Working Party are unable to see from either the tax treaties or the Model I agreement are:

- how data subjects whose personal data is within the scope of FATCA will be able to make a subject access request, to whom, how long that will take and the administrative burden for them to do so;
- how data subjects will be guaranteed any redress which may come of a breach of their data protection rights or the data protection principles enshrined in Directive 95/46/ EC, the Charter of Fundamental Rights or Convention 108; or
- how the agreements will be binding on both parties.

3.6 Whilst the provisions in the Model I agreement¹² on the manner of the exchange of information are welcome, the Article 29 Working Party is not in a position to advise the Commission on whether the provisions in the tax treaties or the Model I agreement is of the highest standard, best practice or even sufficient as the procedures and rules to be prescribed in Article 6(3) of the Model I agreement have yet to be concluded and it remains unclear to the Article 29 Working Party to what extent the tax treaty provisions in relation to FATCA are enforceable under US law.

4.0 Model II agreement and its compliance with EU data protection laws

4.1 The Article 29 Working Party understands from your letter that the Model II agreements are being negotiated between the US and Japan and Switzerland. In order to advise on the Model II agreements whilst the Working Party would be happy to be of assistance it would first need further information and, more

¹ “All information exchanged will be subject to the confidentiality and other protections provided for in the [Convention/TIEA], including the provisions limiting the use of the information exchanged.”

² Whereas, the Parties desire to conclude an agreement to improve international tax compliance and provide for the implementation of FATCA based on domestic reporting and reciprocal automatic exchange pursuant to the [Convention/TIEA] and subject to the confidentiality and 2 other protections provided for therein, including the provisions limiting the use of the information exchanged under the [Convention/TIEA]”

specifically, to see the agreements themselves.

5.0 I hope that this letter provides sufficient clarification and assurances regarding the points you have raised. If the Commission would nonetheless appreciate further input, please send a formal request accompanied with the relevant information.

Yours sincerely

On behalf of the Article 29 Working Part

Jacob Kohnstamm

Chairman of the Article 29 Working Party

Incl. Annex