

Non-FATCA Cases Bolster EU Privacy Challenges to IRS Data Demands

by William Hoke

While many EU countries have become enthusiastic proponents of privacy rights, there is increasing concern that their conviction wanes considerably when the United States demands banking details on a large subset of European residents.

Under the U.S. Foreign Account Tax Compliance Act, which was passed in 2010, foreign financial institutions are required to identify all of their account holders considered to be “U.S. persons” and to report details about those accounts to the Treasury Department. The United States is one of apparently only two countries — the other being Eritrea — that require nonresident individuals to report their incomes on a worldwide basis for tax purposes. If a foreign financial institution fails to comply with FATCA, the law generally requires that 30 percent be withheld from any U.S.-source payments of interest and dividends it receives, as well as from any gross proceeds from the sale or other disposition of property that produces such income.

In September 2019 a U.K. citizen who was born in the United States started a crowdfunding campaign to finance a legal challenge to HM Revenue & Customs’ attempt to share her personal and financial information with the Treasury Department under FATCA. The woman, who identified herself as “Jenny,” claimed that providing information to U.S. authorities would violate her rights to privacy and data protection, breach the EU’s General Data Protection Regulation (GDPR), and expose her to hackers. She also said FATCA makes it difficult for British citizens born in the United States to open and maintain bank accounts in the United Kingdom.

On May 29 the U.K.’s Information Commissioner’s Office (ICO) dismissed Jenny’s complaint. An ICO official declined to provide *Tax Notes* with a copy of its response to the complaint, saying, “It wasn’t a decision as such; it was our response to a complaint, so the details don’t appear on our website. We [sent] a letter to the complainant. As it’s a personal letter, we wouldn’t make that public.”

Jenny's attorney, Filippo Noseda of the Mishcon de Reya law firm in London, also declined to release a copy of the ICO's response, but provided quotes from the letter. Addressing the compatibility of FATCA itself with the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, Noseda quoted the ICO as saying, "HMRC is not obliged to consider the lawfulness of the FATCA legal framework itself, and so that particular issue falls outside the scope of the ICO's consideration of the complaint."

Noseda said he had access to internal documents indicating that the European Commission in the past had "worrying" data protection concerns about providing information to the U.S. Treasury and the IRS. "The commission even requested an opinion from the European data protection working party, which materialized on June 21, 2012," he said in an email. "However, by that time, the U.K. had decided to jump the gun, and when the U.K. signed the first [intergovernmental agreement] on September 12, 2012, the official party line became 'level playing field.' Thus, all EU member states were encouraged to sign up to the IGAs for reasons of political convenience and ignoring the commission's own concern."

In February 2019 the European Data Protection Board (EDPB), an independent body responsible for the consistent application of data protection rules within the EU, published guidelines on the minimum guarantees that it said would be "a useful tool . . . for the evaluation of intergovernmental agreements between member states and the U.S. government on FATCA, to ensure their compliance with the GDPR."

The minimum safeguards included recommendations that any data transferred must be "limited to what is necessary in relation to the purposes for which they are transmitted and further processed," that information regarding redress mechanisms and details for submitting a dispute or claim be made available, and that "independent supervision mechanisms" be provided.

On April 7 EU Commissioner for Economy Paolo Gentiloni told the European Parliament that bilateral agreements between member states and

the United States implementing FATCA are not within the commission's remit unless they breach EU law. "To date, there is no evidence of any such breach," he said. "Nationality ties, even when acquired by 'accident,' come together with the existence of reciprocal rights and duties, including paying taxes in the United States for U.S. citizens."

'The impact of FATCA on individuals and financial institutions and the lack of full reciprocity have been raised with the U.S. authorities by members of the commission and their competent services on a number of occasions,' Gentiloni said.

Addressing the issue of the GDPR's compatibility with HMRC's practice of sharing personal data with U.S. authorities, Noseda said the ICO referred to a French decision in a case brought by the Paris-based Accidental Americans Association. In July 2019 the French Administrative Supreme Court rejected the association's challenge of a decree implementing the FATCA IGA between France and the United States. The Court also declined to refer the matter to the Court of Justice of the European Union.

Noseda said that in its decision on Jenny's complaint, the ICO noted that the French court had determined that there were adequate safeguards in France's FATCA agreement with the United States. "While the FATCA legal framework does not rise to the gold standard set out in the EDPB guidelines, we are of the opinion that it does fall on the spectrum of compliance provided for by those guidelines," the ICO said, according to Noseda. "Although HMRC may not have complied with all of its data protection obligations, having taken into account the circumstances of this case, we do not consider that it is necessary and proportionate to take any further regulatory action."

Fabien Lehagre, president of the Accidental Americans Association, told *Tax Notes* that "fear of losing sovereignty over tax issues" kept member states from giving the commission a mandate to negotiate FATCA with the United States. "FATCA allowed the emergence of the common reporting standard," he said. "The

United States promised reciprocity . . . to EU member states, [which was] never implemented.”

“The impact of FATCA on individuals and financial institutions and the lack of full reciprocity have been raised with the U.S. authorities by members of the commission and their competent services on a number of occasions,” Gentiloni said in his April 7 letter to the EP.

Jeffrey Neiman, a tax lawyer with Marcus, Neiman, Rashbaum & Pineiro LLP in Florida and a former assistant U.S. attorney, said FATCA is ripe for challenge in Europe. “A lot of countries signed up thinking it would be a two-way street, that the U.S. would provide them with information,” he said. “With FATCA, when foreign banks provide info to the U.S., it’s automatic. To get information from the U.S., it has to be a specific request. And they value privacy a lot more in Europe than we think we do in the U.S.”

Standing Up to Uncle Sam

Laura Snyder, a Paris-based attorney who is on the board of directors of the Association of Americans Resident Overseas and is the international member of the Taxpayer Advocacy Panel, a federal advisory committee to the IRS, gave what she described as her “educated guess” as to why EU member states haven’t resisted FATCA more enthusiastically. “The United States is a formidable country to do battle with on economic issues,” she said. “Standing up to the United States is a risky thing to do because the U.S. does not hesitate to use the full weight of its enormous economic power against any country that dares to defy it. Seen from this context, I have to imagine that the relevant authorities in the member states and the EU feel they must pick their battles.”

Snyder said there is little general visibility or public awareness of FATCA, and that the issues arising from the law are difficult to understand. “U.S. citizens living overseas are stereotyped as ‘fat ca[t]’ tax cheats,” she said in an email. “The name ‘FATCA’ is not a coincidence. This means they are perceived as villains, not victims, and this makes FATCA appear like a legitimate and necessary reaction to their misdeeds and wrong intentions. While this stereotyping is strongest in

the United States, it is by no means challenged by EU officials or officials in the member states. To the contrary, they give every appearance of accepting it as fact.”

No EU or member state officials appear willing to challenge the United States’ right to tax EU residents on the basis of income earned in the trade bloc, Snyder said. “If they did finally challenge this, then a challenge to FATCA would logically have to follow, as FATCA’s overreach would become that much more obvious,” she said. “As far as I can tell, very few EU or member state officials truly do understand FATCA or its implications for their citizens and residents. Further, they do not really care.”

Régis Bismuth, a professor of public law at the Sciences Po Law School in Paris, had a different read as to why European countries are less enthusiastic about using the GDPR to challenge FATCA. “Given that FATCA is, for EU member states, based on intergovernmental agreements duly concluded with the U.S. government, it would now be contradictory — not to say a disavowal — for them to say that they do not comply with the GDPR,” he said. “In my view, it is just about saving face.”

Lehagre said that while the GDPR doesn’t specifically authorize the sharing of financial data with other countries, the regulation requires that the transfer of personal data be possible only if the receiving country ensures an adequate level of protection. “This is not the case for the United States,” he said, citing hacks of IRS information.

In 2015 hackers using personal identifying information from outside sources to access the IRS’s online Get Transcript application gained unauthorized access to about 104,000 taxpayer accounts. The fraudsters apparently had access not only to basic identity information such as names, addresses, and Social Security numbers, but also to individuals’ answers to “out-of-wallet” questions the IRS uses to authenticate online requests for Get Transcript accounts, then-IRS Commissioner John Koskinen said, adding that much of the out-of-wallet information might have come from taxpayers’ social media accounts.

The following year the IRS said identity thieves used approximately 101,000 Social Security numbers to access electronic filing personal identification numbers in its databases.

No personal taxpayer data was compromised or disclosed by IRS systems, the agency said.

Luxembourg Targeted

Despite its loss before the French Administrative Supreme Court, Lehagre said the Accidental Americans Association hasn't given up the fight. "We hope that the supervisory authorities in other member states will be more inclined to defend the fundamental rights of citizens," he said. "All it takes is one decision to bring down the edifice. We are considering taking up the judicial fight in several member states. Luxembourg is one of the states we are targeting."

Lehagre cited a recent decision by the Luxembourg Court of Appeal in a legal challenge brought by an unidentified client of the domestic subsidiary of Bank Hapoalim B.M., Israel's largest bank. In 2015 Hapoalim started responding to requests for information and documents made by the U.S. Justice Department, the New York Department of Financial Services, and the Federal Reserve. In 2017 Bank Hapoalim Switzerland signed an agreement to sell its portfolio of international private banking customers with accounts at its Swiss and Luxembourg branches to Safra Bank. On April 30 the Department of Justice said Hapoalim agreed to pay \$874 million as part of a deferred prosecution agreement to settle a long-running investigation by U.S. authorities into the bank's role in helping clients evade federal taxes. As part of the agreement, Hapoalim promised to fully cooperate with investigations into the undisclosed bank accounts of past and present customers.

Mathieu Richard, a partner with B&F Avocats in Luxembourg, said his client objected to Hapoalim's plans to transfer information to U.S. authorities in compliance with its deferred prosecution agreement. In an as-yet-unpublished opinion, the Court of Appeal on July 15 blocked the transfer of information. "The decision was based mainly on the GDPR, but also on the privacy protection provisions of EU treaties and on [the] EU's Charter of Fundamental Rights," Richard said. "The decision was issued in summary proceedings, [which] means that the judgment has only a provisory character. Therefore, the interdiction is not absolute, but the

bank will have to prove its right to transfer the data in a proceeding on the merit[s]."

Richard said that in a proceeding on the merits, Hapoalim will have to demonstrate that providing the information to U.S. authorities is allowed under the exceptions to the GDPR's restrictions on the transfer of data to third countries. "In my opinion, there is no chance for the bank to appeal this decision, since the Supreme Court does not [decide on] the facts . . . but only [on] the good or bad application of the law," he said.

Even if Hapoalim loses a possible appeal, the United States could still try to get the information by making a request directly to the Luxembourg government under an information sharing agreement between the two countries, Richard said. "The U.S. could always try to get information through the legal, official way; however, the information collected through the non-prosecution agreement is considered illegal fishing under Europe's GDPR," he said.

FATCA Proportionality Under GDPR

Daniel Blum, a postdoctoral research associate at the Vienna University of Economics and Business, said that while FATCA predates the GDPR, which was implemented in 2018, the collection and transfer of information to the IRS is "prima facie" justified. "But the question is proportionality," he said. "For example, in an effort to counter terrorism, is it proportional to collect data on millions and millions of Europeans if that would give a government insights into their sexual or political orientation, or should it be more fine-tuned? The same question can be asked about taxation. Do you transfer information just because someone has a bank account?"

Blum said any privacy-based challenge to FATCA data exchanges would likely have a better chance of success if the claim is a violation of EU fundamental treaty rights, rather than a violation of the GDPR. "The GDPR is secondary EU legislation," he said. "While there is nothing specific in the GDPR that allows the sharing of financial data with other countries, there is a general clause allowing the exchange of data if there is a legitimate public interest in doing that."

Aiding tax enforcement is a legitimate reason, Blum said. "The clause requires an adequate level

of protection, but I doubt this applies because I assume the U.S. has rules on tax secrecy, although it could be an argument used to challenge sharing information," he said.

Any privacy-based challenge to FATCA data exchanges would likely have a better chance of success if the claim is a violation of EU fundamental treaty rights, rather than a violation of the GDPR, Blum said.

Blum said a party bringing a challenge under the GDPR has no right to appeal directly to the CJEU and is instead limited to seeking redress in the courts of his or her member state. "If a domestic supreme court has doubts, it must ask the CJEU for a preliminary ruling," he said. "But if a lower court in the U.K., for example, believes there is no doubt about an issue, it won't ask for a ruling. There's not much case law on this. It could be a question of legal culture. Lower courts in France rarely ask, while some others, like Germany, continuously do it."

Facebook Privacy Shield Ruling

In a July 23 letter to the ICO's general counsel questioning the organization's independence in handling Jenny's complaint, Nosedá referred to legal actions brought by Austrian citizen Max Schrems, who objected to an arrangement governing data transfers between companies in the EU and the United States. In 2000 the commission determined that U.S. companies could voluntarily take advantage of a safe harbor arrangement for cross-border data transfers based on a process of self-assessment and self-certification. Schrems asked the Irish courts to block the transfers by a Facebook subsidiary based in Ireland to servers located in the United States on grounds that the information was not effectively protected from surveillance by the U.S. government. When Ireland's High Court referred the question to the CJEU, the European court said in 2015 that the safe harbor arrangement was invalid because of the inadequate protection (*Maximillian Schrems v. Data Protection Commissioner* (C-362/14)).

The commission then adopted the EU-U.S. Privacy Shield, which was designed to make it possible for U.S. companies to satisfy EU privacy protection requirements. In another legal challenge by Schrems involving Facebook, the CJEU on July 16 upheld the validity of EU standard contractual clauses for the transfer of personal data to companies outside the trade bloc, but said a "controller" in the EU must verify whether the levels of protection required under EU law are respected in the country receiving the data before transfer. The Court also invalidated a decision on the adequacy of privacy protection under the privacy shield, finding that the U.S. government's surveillance authority under the Foreign Intelligence Surveillance Act does not provide the necessary limitations and safeguards required under article 45(1) of the GDPR, "read in the light of articles 7, 8, and 47 of the Charter of Fundamental Rights" (*Data Protection Commissioner v. Facebook Ireland Ltd. and Maximillian Schrems* (C-311/18)).

"The CJEU's ruling now abruptly stops all transfers of data relying on the privacy shield, and even though it doesn't invalidate [standard contractual clauses], the decision still throws shade on the propriety of intergovernmental data sharing agreements under the U.S. Foreign Account Tax Compliance Act and the OECD common reporting standard," Capital Trustees, a Swiss-based firm providing trustee, private client, and other services, said in a July 20 client note.

Jenny's Appeal

"Following the decision . . . from the U.K.'s Information Commissioner's Office dismissing her GDPR complaint against HMRC for transferring her data to the IRS under FATCA, Jenny is actively considering bringing her case before the high court," Nosedá said in the email.

Nosedá said EU law requires an individual to seek redress from a national court and then ask the court to refer the matter to the CJEU for a preliminary decision. "My reading of the Brexit agreement [is that] any claim that is received by the CJEU by 11 p.m. on December 31, 2020 (i.e., the end of the transitional period), would continue to be handled after that day," he said.

Although it lost its challenge of France's FATCA IGA before the Administrative Supreme Court in 2019, the Accidental Americans Association filed a second lawsuit in July alleging that its members are being discriminated against because of the difficulty they have in opening or maintaining French bank accounts. ■