

To: International Affairs & Reinsurance Committee, Taxation Committee, Public Affairs Group, Communications & PR Committee

Article 29 Working Party published letter on FATCA data protection issues

Latest developments

On 10 July, Article 29 Working Party (WP29) on data protection issues published a [letter](#) addressed to Mr Heinz Zourek, Director General of Taxation and Customs Union (DG TAXUD) regarding Foreign Account Tax Compliance Act (FATCA). Given the implementation of FATCA, which is set to enter into force on the 1 January 2013, the WP29 has chosen to present this letter as its initial analysis of this issue. An opinion could be developed when the process is further defined.

In a letter WP29 states that **currently there is no legal basis within EU or national law of a Member State to ensure lawful processing of the data within the scope of FATCA**. Without any such law to recognise the extraterritorial applicability of FATCA, and in the absence of any bilateral or multilateral agreements derived from the Intergovernmental Approach, EU/EEA data protection authorities may consider prohibiting the data processing in question.

WP29 underlines the fact that these data protection concerns cannot be addressed by Member States through a waiver being obtained from the data subjects. Such 'consent' is not a valid criterion for processing given the imbalance between the position of the data subject and the data controller, and the possibility that consent could be withdrawn at a later point. Furthermore given the threat of a 30% withholding tax or closure of their account should the account holder fail to comply with such a demand, consent would not be "freely given" as defined in Article 2(h) of the Directive on data protection.

WP29 also highlights that the law or (bilateral) arrangement governing the transfer must ensure that there is an adequate level of protection afforded to the data. The possibilities surrounding this are foreseen as follows:

1. Member State could impose a narrow legal obligation that Foreign Financial Institutions (FFIs) produce agreements which allow for the disclosure of the personal data required for the purposes of FATCA directly to the IRS. If such obligation was imposed, then WP29 urges that, where appropriate, guidance from the relevant national data protection authority should be sought to ensure that the best possible data protection safeguards are provided for in this mechanism.
2. Member States could sign up to the Intergovernmental Approach and oblige FFIs to disclose the required personal data to their own tax authority who would then subsequently disclose the personal data to the IRS. In this scenario the burden of compliance with the Directive on data protection could be either shifted to or shared by the tax authority.
3. Member State chooses to adopt neither of the above approaches and decides a third alternative approach depending on its own customs and rules. Again, whatever approach is developed, the data controller responsible for the processing of personal data within the scope of FATCA should be obliged to comply with the obligations set out in the Directive on data protection.

Next steps

The European Commission is planning to discuss the letter with Member States shortly and reply to the WP29 accordingly.

For more info

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