



EUROPEAN COMMISSION

WORKING DOCUMENT

**FOR THE ATTENTION OF MEMBERS OF
THE
TAXATION POLICY GROUP**

Monday, 6 February 2012

**THE US FOREIGN ACCOUNT TAX COMPLIANCE ACT
(FATCA) – State of Play**

1. Introduction

At the TPG meeting on 19 January 2011, the Commission advised the participants of the main problems that the new United States "Foreign Account Tax Compliance Act" (FATCA) will create for EU financial institutions and Member States and of ongoing discussions with the US to tackle these problems. This aim of this legislation, which is to increase the ability of the US tax authorities to combat cross-border tax evasion by US persons, is reasonable. However, it will impose burdensome due-diligence, information reporting and withholding obligations on all foreign (non-US) financial institutions (FFIs). It also raises legal concerns - notably data protection issues. On the occasion of that last meeting, the Commission proposed coordinated political action at EU level aimed at persuading the US to implement FATCA in a more proportionate way, in particular by utilising existing channels of cooperation at governmental level. You agreed with the Commission that FATCA would raise significant issues and supported the Commission's proposal for action.

2. Actions taken by the Commission

On the basis of your support and after further discussions at the Council High Level Working Party, the Hungarian Presidency and Commissioner Šemeta wrote to the US Treasury and the IRS on 6 April 2011 requesting a dialogue on how to implement FATCA in a way that is cost-effective, business-friendly and compatible with EU and Member States' laws. The US tax authorities agreed to this and during the last year several meetings have taken place between the US Treasury and the Commission, most recently with the involvement of those Member States that expressed an interest in participating in the discussions.

The main objective of these discussions has been to explore whether and how FATCA could be implemented by cooperation between EU and US tax authorities rather than by way of direct reporting arrangements between EU financial intermediaries and the US tax authorities. Initially the focus was on the EU Savings Directive and whether the Directive, if extended to the US, could assist the US in obtaining a result comparable to FATCA. The US Treasury believes the scope of information and financial intermediaries covered by the Savings Directive to be too narrow but appears interested in the reporting channel used in that Directive i.e. that financial intermediaries would pass information on US clients to their own tax administrations which would in turn report the information to the US. The issue of how this system would be put in place remains open. It could be on the basis of an EU agreement with the US. Alternatively, some Member States may consider their existing bilateral double tax treaties with the US as being sufficiently broad to enable them to collect and pass on to the US the information required under FATCA. However, others may need to amend their treaties with the US to achieve this result.

Irrespective of how the use of administrative cooperation channels is actually implemented, such an approach might eliminate many of the current difficulties with FATCA. It might overcome the legal impediments to complying with FATCA that EU financial institutions face, it could reduce financial institutions' compliance costs, it would mean that they would not have to enter into contracts with the US tax administration and it would help them to avoid the punitive withholding tax that FATCA would impose in cases of deemed non-compliance.

The discussions with the US have also focused on the possibility of reducing the scope of FATCA by exempting or deeming compliant certain institutions/entities/products that present a very low risk of tax evasion and on alternative solutions to the "passthru" payments rule, which is considered as particularly burdensome and even unworkable by financial institutions.

Separately, the Commission has been working on the data protection concerns raised by FATCA. The Taxation and Customs Union Directorate General has been cooperating with data protection experts in the Justice Directorate General with a view to assessing the compatibility of FATCA with EU data protection rules and to finding possible solutions to the problems raised. The Commission wrote to the US Treasury last year in order to have a clearer picture of the data protection standards applicable in the US on personal information held by the US tax authorities. Following the response of the US Treasury, the Commission wrote a second letter to ask for further clarification and is still waiting for an answer. In addition, the Commission has put FATCA on the agenda of the Working Party of Member States' Data Protection Supervisors (the Article 29 Working Party) with a view to examining the interaction of the US legislation and EU data protection laws.

3. State of play

The Commission has regularly updated Member States on developments in this area at meetings of the Council High Level Working Party. The most recent discussions with the US took place at the end of last year, at a meeting between Commissioner Šemeta and the US Treasury Deputy Secretary Wolin in Washington on 28 November 2011 and at a follow-up meeting of officials that the French Ministry of Finance hosted in Paris on 13 December 2011. As far as data protection issues are concerned, Member States' data protection supervisors discussed FATCA at the last meeting of the Article 29 Data Protection Working Party on 7 December 2011 and again on 18 January 2012.

Meeting in Washington on 28 November 2011

The Commissioner's meeting with Mr. Wolin was very constructive. The Deputy Secretary acknowledged that the implementation of FATCA will be a major undertaking for foreign financial institutions and said that the US Treasury intends to reduce this burden. He expressed a clear openness to work with the EU on a tax administration to tax administration approach although he did not want to commit to any specific modalities for implementing this arrangement. The US Treasury also showed some openness on the issue of reciprocity raised by Commissioner Šemeta and considered this a legitimate request given the challenges that FATCA presents for EU Member States. In this respect, he referred to the draft interest reporting regulations that were published by the Treasury/IRS in January 2011 with the aim of providing guidance on information reporting by US financial institutions on interest paid to non-resident individuals. He confirmed that, despite the negative reactions of business to these draft regulations, the US Treasury is still committed to them. Finally the Deputy Secretary expressed the willingness of the US Treasury to work with the EU on identifying low risk financial institutions/entities/products in the EU that could benefit from exemptions or deemed compliant status as well as on data protection issues.

Meeting in Paris on 13 December 2011

Following the meeting in Washington, a technical meeting took place in Paris between the US Treasury, representatives of the Member States that had expressed an interest in participating, the Commission and officials from the OECD Secretariat. At the meeting the US confirmed its willingness to engage in a tax administration to tax administration approach. The main elements of such an approach, as discussed at the meeting, would be as follows:

- a) Foreign Financial Institutions (FFIs) established in countries that agree to this approach (participating countries) would not have to enter into a separate comprehensive FFI agreement directly with the IRS, provided that each FFI registers with the IRS or is exempted from registration pursuant to the agreement or to IRS guidance.
- b) FFIs established in participating countries would comply with their reporting obligations under FATCA by reporting the necessary information to the government of the country where they are established, instead of reporting it directly to the IRS. The tax administrations of those countries would, in turn, send the information received to the IRS, on an automatic basis.
- c) No US withholding under FATCA would be applied on payments to FFIs established in participating countries (i.e. all FFIs in those countries will be identified as participating FFIs or deemed compliant FFIs). Compliance of FFIs with their due diligence and reporting obligations would be ensured by the country where they are established (presumably by means of domestic law).
- d) FFIs established in participating countries would be exempted from the FATCA obligations to impose "passthru" payments withholding both on payments made to other FFIs established in participating countries and on payments made to recalcitrant account holders. However, the application of the "passthru" payment rule to non-participating FFIs in non-participating countries remains to be resolved.
- e) FFIs established in participating countries would be exempted from the FATCA obligations to terminate the accounts of recalcitrant account holders.

The US also indicated the possibility of providing that certain categories of FFI specific to a participating country would be treated as deemed compliant or presenting low risk of tax evasion, in consistency with IRS guidelines. More general carve-outs for other institutions/entities/products that are not peculiar to one single country will be provided in the implementing FATCA regulations.

The US confirmed its willingness to include reciprocity in these arrangements. It aims to finalise its draft regulations that require US banks to report to the IRS bank deposit interest paid to all non-resident accounts so that it will be able to provide its FATCA partners with this information. Moreover, the US accepted that this could be a stepping stone towards a more global approach to automatic exchange of information between tax administrations. It agreed on the need to avoid the application of different reporting standards by different countries.

The US confirmed that - provided that discussions with the EU progress satisfactorily- it will indicate the acceptability of the administration to administration approach in the guidance (draft final regulations) on FATCA which it is likely to publish very soon.

Meeting of Article 29 Data Protection Working Party

On 7 December 2011, FATCA was discussed at the plenary meeting of the Article 29 Working Party. This Working Party, which is made up of a representative of the data protection authority of each EU Member State, the European Data Protection Supervisor and the EU Commission, seeks to harmonise the application of data protection rules throughout the EU and publishes opinions and recommendations on various data protection topics. It also advises the EU Commission on the adequacy of data protection standards in non-EU countries. Many of the participants were already aware of FATCA, due to complaints lodged by business associations in their countries. They confirmed that FATCA raises several data protection issues and agreed on the need to find a solution at EU level. FATCA was discussed in detail at the meeting of the Financial Matters subgroup of the Article 29 Working Party on 18 January 2012. The subgroup will prepare a report for discussion at the plenary meeting of the Article 29 Working Party that will take place on 1-2 February 2012 with a view to allowing the Working Party to produce an assessment of the situation before Easter.

4. Next steps

Discussions with the US will continue with a view to:

- Further developing and refining the elements of the tax administration to tax administration approach and establishing a "framework agreement" to be used in this context.
- Developing a practical and less burdensome approach to the "passthru" payments rules with respect to payments made to non-participating FFIs in non-participating countries.
- Defining how the US will ensure reciprocity with respect to collecting and reporting, on an automatic basis, information on US accounts of residents of countries that sign up to the administration to administration approach.

The Commission will continue to keep all Member States informed on developments in this area and will be happy to share with all of you the "framework agreement" for implementing an administration to administration approach to FATCA once it has been completed.

A solution focused on a reciprocal exchange of information between EU Member States and the US of a sufficient level to resolve the problem created by FATCA must be the objective in the short term.

In the longer term, however, we believe that we should aim for automatic exchange of information between tax administrations at a global level in line with our objectives within the EU.

1. *What are the delegates' views on the administration to administration approach under discussion with the US Treasury?*

2. *What options do you believe exist for implementing such an approach – an EU-wide agreement or coordinated bilateral approaches? If the latter will your double taxation agreement with the United States need to be amended?*

3. *Do delegates agree that, in the longer term, a more ambitious model for automatic exchange of information should be developed?*