

The 3rd International Compliance Forum:

Orchestrating a Culture of Values

FATCA/CRS/EU Anti-Money Laundering Legislation: Transparency and Beyond...

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SEARCHING FOR GUIDANCE

'The Working Party would find it regrettable that a multinational company or a public authority would plan to make significant transfers of data to a third country without providing an appropriate framework for the transfer, when it has the practical means of providing such protection (e.g. a contract, BCR [Binding Corporate Rules], a convention).'

Article 29 Data Protection Working Party Letter 21/06/2012 to the Director General of Taxation and Customs Union European Commission Ref. Ares (2012)746461 following a request for assistance by DG TAXUD to evaluate the compatibility of the obligations under US Foreign Account Tax Compliance Act (FATCA) and Directive 95/46/EC (Paragraph 13.9, pages 9-10).

Article 29 Data Protection Working Party Working document on a common interpretation of Article 26(1) of Directive 95/46/EC 24/10/1995 (2093/05/EN WP 114) (Paragraph 3, page 9).

Directive 95/46/EC – Article 26.1 (d)

Article 26.1 (d) provides that, by way of derogation from Article 25, and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), *may take place on condition that the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims.*

Article 29 Data Protection Working Party Letter 21/06/2012

'Therefore, and provided that an EU/national law is adopted, given the nature of FATCA as systematic bulk transfer, use of Article 26.1 (d), because it derogates from the general regime, can only be used if an important public interest is clearly defined and it is shown that it overrides the data subject's right to privacy. Even if using it safeguards aimed to ensure that those rights and freedoms of the data subjects are upheld are strongly advisable.' (Paragraph 13.1)

'WP114 also highlights that "Recital 58 of Directive 95/46 refers, with regard to this provision, to cases in which international exchanges of data might be necessary "between tax or customs administrations in different countries" or "between services competent for social security matters". This specification, which appears to relate only to investigations of particular cases, explains the fact that this exception can only be used if the transfer is of interest to the authorities of an EU Member State themselves, and not only to one or more public authorities in the third country.'" (Paragraph 13.9)

Article 29 Data Protection Working Party Letter 21/06/2012 to the Director General of Taxation and Customs Union European Commission Ref. Ares (2012)746461 following a request for assistance by DG TAXUD to evaluate the compatibility of the obligations under US Foreign Account Tax Compliance Act (FATCA) and Directive 95/46/EC (page 10).

The Digital Rights Ireland Legal Milestone

Joined Cases C-293/12 and C-594/12 Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and others dated 8th April 2014

***Annulment* of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC**

The said Directive applied **“even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime** (paragraph 58)

CRS related Data Protection Concerns

WP29 OECD Common Reporting Standard Letter Ref. Ares(2014)3066381 dated 19th September 2014

- Follow – up to a letter received by a member of the European Commission’s Expert Group on Taxation of Savings and a letter received from the European Banking Federation, both raising data protection concerns in relation to the Common Reporting Standard (CRS) , as approved by OECD Council on 15th July 2014 (Preamble, paragraph 1)
- Aiming to make some preliminary remarks on a number of critical data protection issues raised by CRS (Point 1, paragraph 1)
- Making reference to Digital Rights Ireland CJEU Judgement (Point 4, paragraph 5)
- The mere act of adopting a national law and/or a European law under Directive 2011/16/EU regarding on administrative cooperation in the field of taxation, or international tax agreements providing for the possibility to use an automatic exchange of personal data under systems such as FATCA or CRS, would not alone be enough to ensure adequate data protection (Point, 4 paragraph 4)
- On the contrary, it is necessary to provide in such laws for substantive provisions that put in place adequate data protection safeguards (Point 4, paragraph 4)

CRS related Data Protection Concerns

WP29 Statement on Automatic Inter – State Exchanges of Personal Data for Tax Purposes 14/EN WP230 dated 4th February 2015

- Focusing on CRS's impact on the protection of personal data (Page 2)
- Addressed to national governments and EU institutions involved in mechanisms of exchange of personal data for tax purposes in order to underline that the bilateral/multilateral agreements and European and national laws implementing such instruments need to ensure appropriate and consistent safeguards at data protection level (Page 2)
- Citing the **Digital Rights Ireland Judgement**, WP29 considered that in order not to violate the proportionality principle, it is necessary to demonstrably prove the necessity of the foreseen processing and that the required data are the minimum necessary for attaining the stated purpose and thus avoid, an indiscriminate, massive collection and transfer (Page 3, point 1)
- For example any inter-state agreement should clearly identify the purposes for which data are collected and validly used, in order to avoid any onward transfers for different purposes without appropriate safeguards and legal basis in place. There should be a clear definition of "tax purposes" specifying what kinds of activities are included and the legal basis provided for by the national law (Page 3 point 1)
- Further, Member States that roll out the model of automatic massive storage and then forward this data for tax purposes, should be aware that they may incur increased security risks and liability under EU data protection laws (Page 3, point 2)

CJEU invalidating Safe Harbour Decision

Case C-362/14 Maximillian Schrems v. Data Protection Commissioner dated 6th October 2015

Decision 2000/520 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce was **invalidated** by CJEU – Paragraphs 93 – 94:

- Legislation **is not limited to what is strictly necessary** where it authorises, on a generalised basis, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail.
- In particular, legislation permitting the public authorities to have access **on a generalised basis** to the content of electronic communications must be regarded as **compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter [of Fundamental Rights of the European Union]**.

The Tele2Sverige AB CJEU Judgment

CJEU Judgment dated 21st December 2016 in Joined Cases C-203/15 and C-698/15 Tele2 Sverige AB (C-203/15) v Post- och telestyrelsen, and Secretary of State for the Home Department (C-698/15) v Tom Watson, et al

Article 15(1) of Directive 2002/58/EC, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as:

- precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.
- precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, ***where access is not subject to prior review by a court or an independent administrative authority***, and where there is no requirement that the data concerned should be retained within the European Union.

Proposal for a 5th EU AML Directive

**Skandalis, Marios 'The new era of anti-financial crime compliance',
Journal of Financial Compliance, Volume 1 Number 1**

European Parliament Report no. A8-0056/2017 dated 9th March 2017 on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (COM(2016)0450 – C8-0265/2016 – 2016/0208(COD)) – suggested establishment of a publicly accessible registry of Ultimate Beneficial Owners (UBOs) at each EU Member State (Proposal 10e)

Republic of Cyprus Legal Jurisprudence

Supreme Court of Cyprus Opinion dated 29th May 2017 concerning Reference no. 10/2016

Article 15 of the Constitution of the Republic of Cyprus

EDPS Opinion on proposed 5th EU AML Directive

European Data Protection Supervisor (EDPS) Opinion 1/2017 on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC - Access to beneficial ownership information and data protection implications dated 2nd February 2017

- The amendments significantly broaden access to beneficial ownership information by both competent authorities and the public, as a policy tool to facilitate and optimise enforcement of tax obligations. We see, **in the way such solution is implemented, a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection** (Page 3, paragraph 7)
- EDPS suggests that the proposed 5th EU AML Directive designs access to beneficial ownership information in compliance with the principle of proportionality, inter alia, ensuring access only to entities who are in charge of enforcing the law (Page 15, Point 4, paragraph 66)

Potential Challenges on a Republic of Cyprus level

Legal Challenge as to the legitimacy of such legislative initiative, *if and when enacted firstly at EU level and then, via transposition, in the Republic of Cyprus*, via a Judicial Review Application before the Administrative Court of Cyprus and a Preliminary Reference to the CJEU, from a data subject legal point of view

Suggestions – A Way Forward

- ✓ Take note of the comments and suggestions of WP29 and EDPS
- ✓ Sending out of questionnaires to the competent authorities through national Data Protection Authorities to take stock of the availability of the existing legal frameworks, detect the current “data protection gaps” and/or major differences in the instruments at national level (WP 29 Statement 14/EN WP 230 dated 4th February 2015 page 4, point 3)
- ✓ On a longer term basis, obtain a uniform Privacy Impact Assessment (PIA) approach at EU level and/or considering recommendations from the European Commission (WP 29 Statement 14/EN WP 230 dated 4th February 2015 page 4, point 3)
- ✓ EU and National Authorities working close with stakeholders such as professional regulators prior to enacting EU wide and national legislation.

Suggestions – A Way Forward

All the above steps are necessary, as in the event that processing of personal data without the consent of the data subject and firm legal basis takes place, any such person that has illegally processed data, could face apart of administrative fines, a civil action as well as criminal liability ensuing a sentence of imprisonment as per Sections 2, 5(1) and 26(1)(e) of The Processing of Personal Data (Protection of Individuals) Laws 2001 to 2012 (Law 138(I)/2001 as amended).

Suggestions – A Way Forward

'Regulatory Environment Has More Impact on Business Than the Economy, Say U.S. CEOs', by Kasia Moreno, Forbes

'We owe the intensity of the current regulatory environment to misdeeds in the financial system, which led to the near collapse of the financial system and an acute economic downturn six years ago. The regulations were meant as a cure and a preventive measure, and intended to change how business is done. They have definitely accomplished the latter.'

<https://www.forbes.com/sites/forbesinsights/2014/08/12/regulatory-environment-has-more-impact-on-business-than-the-economy-say-u-s-ceos/#18fec675684d>

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