STUDY

For the PETI committee

FATCA Legislation and its Application at International and EU Level

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Policy Department for Citizens' Rights and Constitutional Affairs

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FATCA Legislation and its Application at International and EU Level

STUDY

Abstract

This study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, analyzes FATCA legislation and its application at international and EU level: it first provides a global overview on exchange of tax information and of the FATCA mechanisms applied through intergovernmental agreements. The study then describes the extraterritorial nature and negative externalities of FATCA, in particular its impact on U.S. citizens abroad and the potential conflicts with EU law, with specific attention to the right of FATCA data protection under the GDPR. It concludes with suggestions for bilateral and unilateral EU-U.S. policies, with final remarks on a multilateral approach.

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ABBREVIATIONS

IRS	Internal Revenue Service
CRS	Common Reporting Sstandard
AEOI	Automatic Exchange of Information
DAC	Directive on Administrative Cooperation
FATCA	Foreign Account Tax Compliance Act
FFIs	Financial foreign intermediaries
CDPR	General Data Protection Regulation
ECtHR	European Court of Human Rights
ECHR	European Convention of Human Rights
PAD	Payment Account Directive
TIEA	Tax Information Exchange Agreement
IRC	Internal Revenue Code
FBAR	Foreign Bank and Financial Accounts
IGAs	Iintergovernmental Agreements

EXECUTIVE SUMMARY

This study was prompted by Petition No 1088/2016 by Mr J.R. (French) on the US' Foreign Account Tax Compliance Act's (FATCA) alleged infringement of EU rights and the extraterritorial effects of US laws in the EU and analyzes this egislation at international and EU level: it first provides a global overview on exchange of tax information (AEOI) and of the FATCA mechanisms applied through intergovernmental agreements and the it looks at FACTA problems and ways to address them.

In the context of emerging AEOI, in 2010 the U.S. introduced FATCA legislation unilaterally: foreign financial intermediaries, under the threat of a the withholding tax on all their U.S. sourced payments and revocation of their U.S. banking licences, must report to the U.S. I.R.S. holdings of their customers who are U.S. Persons. FATCA is implemented by a web of Intergovernmental Agreements ("IGAs") signed by the U.S. with certain EU Member States.

FATCA amounts to the unilateral exercise of extraterritorial legislative jurisdiction *in most cases not based on reciprocity*. These features create two types systemic negative externalities: (i) costs for the financial industry combined with a disincentive towards foreign investments in the U.S., and (ii) conflicts with national laws that are partially addressed by IGAs. FATCA also generates other idiosyncratic externalities that affect "*Accidental Americans*", i.e. individuals who are currently citizens and/or tax-residents of EU countries, but had automatically acquired U.S. citizenship at birth by being born on U.S. soil, and who retain no ties to the U.S. There are two main FATCA problems for these individuals: first they are denied banking services by financial institution in the EU because of FATCA-based costs; second, they are subject to U.S. onerous compliance which is not proportionate to their actual situation of EU law-abiding citizens.

As a consequence of its extraterritorial nature FATCA, also triggers systemic conflicts with different levels of EU law. There are two main instances of these conflicts: (i) FATCA Data that are retained and transmitted by FFIs create an issue of procedural safeguards and data protection, and (ii) data that are not acquired by FFIs who refuse to provide services, create an infringement of substantive rights of individuals.

In respect to case (i) the General Data Protection Regulation ("GDPR") that enters into force on May 25, 2018, fills the gap that grew in the last decade, when the powers of tax administrations increased through AEOI and FATCA and escalated driven by digital technologies, while at EU level data protection did not really follow suit. Now the GDPR systematizes these rights and establishes the fundamental *right to data protection*. In respect to case (ii) violations by FATCA can be alleged under Article 14 of ECHR (which focuses on discrimination), and Article 8 of the ECHR (which focuses on the fundamental right to respect for private and family). This Study analyzes in details the rights of EU individuals of FATCA data protection under the GDPR, as well as the safeguards of their substantive rights, and concludes with a set of policy suggestions.

Bilateral EU-U.S. policies

Under IGAs data transfer under FATCA to the U.S. is not given the level of protection imposed by the GDPR, so IGAs should amended to be in line with the GDPR. The EU should undertake a review and explore such amendments to IGAs because the violation of data protection rights may erode the legitimacy of the AEOI that occurs in FATCA.

Unilateral EU policies

Unilateral EU policies are instrumental in renegotiating IGAs with the U.S. in the direction of data protection under the GDPR. The U.S.'s failure to honour reciprocal information exchange could lead to an investigation into the possibility for the EU of enacting "*blocking legislation*" that would apply until such time as the reciprocity is re-established in relation to FATCA. In addition, blocking legislation could apply until such time as certain FATCA criticalities in respect European Accidental Americans and dual European/U.S. citizens are mitigated by the U.S. Moreover, until renegotiation is completed, the EU would allow *only* transfers of FATCA Data associated with U.S. Persons who are not EU residents, but *not* of data of EU citizens/residents. Finally the development of *judicial protection by national courts and by the ECHR* is expected for Accidental Americans under Article 8 and 14 of ECHR.

Unilateral U.S. policies

In addition the EU should use political and diplomatic communication channels to advocate legislation by the U.S. that would mitigate FATCA criticalities in the EU, with measures such as the exemption from FATCA reporting of low-risk accounts and the increase of the limit to $500,000 for FATCA reporting. The U.S. could also modify certain aspects of the U.S. citizenship-based taxation, which were exacerbated by the operation of the FATCA classification of potential U.S. citizens around the world, clearly an overreach. Citizenship-based taxation is under scrutiny in the U.S. and scholars have surmised that absolute birthright citizenship and automatic jus sanguinis citizenship are now problematic in imposing unreasonable obligations on citizens, such as Accidental Americans under FATCA, who have no ties to the U.S, while maintaining barriers to them for opting-out U.S. citizenship. So the EU could advocate the facilitation of exit from U.S. citizenship by Accidental Americans, or the elimination of FATCA obligations attached to the status of Accidental Americans.

Multilateral policies

AEOI and FATCA were established as multilateral measures in the direction of a global system of sharing of tax information among countries, and FATCA was presented as a facilitator of this cooperative process against global tax evasion. In AEOI and FATCA multilateralism can be viewed as the sum of many bilateral agreements *fully based on reciprocity*. Unfortunately the U.S. has developed bilateral IGAs in the EU which are *not* effectively operating on the basis of reciprocity, so that the multilateral system which was initially envisaged by the EU and the U.S. is collapsing. Moreover the U.S. does not intend to adhere to the Common Reporting Standard.

Multilateralism in tax AEOI should therefore revived at EU-U.S. level going back to the spirit of FATCA as an initiator of multilateralism. The U.S. could consider a multilateral instrument as a way to increase the chances of success of the FATCA system, instead of relying only on FFIs, with the risk that opposition to FATCA by other governments may grow. There are various reasons in favour of a multilateral instrument setting common standards for AEOI: (i) if other countries were willing to collect and exchange FATCA-like data, then the disincentive toward foreign investments in the U.S. capital market provoked by FATCA would be diluted; (ii) costs of FATCA's implementation could be reduced via cooperation between the U.S. and foreign governments, (iii) an alignment of data protection safeguards would reduce the conflicts of FATCA with EU and local laws, and (iv) U.S. expatriates would have the same reporting requirements as other countries' citizens.

1. FATCA AND EXCHANGE OF INFORMATION: A GLOBAL OVERVIEW

Exchange of information is interwoven with the worldwide income taxation principle. Residence-countries taxing their residents on income produced both domestically and abroad need the cooperation of source-countries to obtain information about income produced by their residents in those countries. By neutralising the more advantageous effect of no or low taxation in the foreign jurisdiction, a residence-country actually is in a position to claim to subject foreign income to control through exchange of information and administrative cooperation.

Residence taxation operates correctly as long as residence-countries are actually capable to acquire information from source-countries about income produced in those countries, and therefore one of the main concerns of the tax authorities of OECD countries is tax evasion realised by resident taxpayers by not reporting or underreporting their income produced abroad.

The interdependence of high-tax residence-countries and low-tax source-countries is the natural backdrop to understand the novel concepts of 'transparency' and 'exchange of information', that have become pivotal in the current international tax situation. The foundational rules of exchange of information are found in Article 26 of the OECD Model Convention (hereinafter 'Article 26'), which is reflected in the double tax treaties which are aimed at the prevention of tax evasion and tax avoidance.

The practical issues involved in these types of exchange of information have been addressed by the OECD Global Forum Working Group on Effective Exchange of Information, which started to work on a project of a Tax Information Exchange Agreement ('TIEA') with a view to promoting actual methods of international cooperation in tax matters through exchange of information. From 2001 onwards the Global Forum on Taxation was established and the OECD project began to focus on improving transparency and increasing effective access to exchange of information[1]. In April 2002 the OECD released a Model of Tax Information Exchange Agreement ('Model TIEA'), which is a non-binding instrument that serves as a model for assisting contracting States in their bilateral or multilateral negotiations aimed at finalizing actual TIEAs.

The U.S. at that time had already activated its own policies that essentially relied on the cooperation of financial institutions. Starting in 2001, foreign financial institutions could considered as Tax Information Exchange Agreement ('TIEA') upon entering specific agreements with the U.S. QIs agreed to determine the identity of their clients, but they did not have to report the identities of non-U.S. clients, including corporations, to the I.R.S. as long as QIs concluded that the proper amount of U.S. tax was withheld on U.S.-source payments to the non-U.S. clients. The operation of the QI system represents the first significant example of a system of "cross-border anonymous withholding regime", where financial institutions served as intermediaries required to directly obtain information on their clients.

In 2004 explicit relevance was then given by the OECD to the criteria of transparency and exchange of information for identifying the jurisdictions that were the purported recipients of its policies, and such jurisdictions were openly identified as 'un-cooperative jurisdictions'. The entire OECD campaign then

[1] See OECD, *OECD Pursues a Global Dialogue on International Taxation* (Paris: OECD, 01 October 2001).

shifted its focus from tax avoidance on geographically mobile activities to tax evasion on passive investment income[2] and this shift was endorsed by the G-20 Finance Ministers at the end of 2004[3].

The turmoil provoked by the 2008 financial crisis boosted the need of governments to raise revenues by curtailing international tax evasion, and thus un-cooperative jurisdictions became a very hot topic in the OECD political agenda[4]. Tax transparency was the focus of the G-20 Summits in Washington, London, Pittsburgh and Toronto. On April 2, 2009, at the time of the G-20 summit in London claiming for a list of tax havens, the OECD's Secretary-General issued a new Progress Report on jurisdictions surveyed by the OECD Global Forum in implementing the internationally agreed standards on transparency and exchange of information for tax purposes.

The game changer in the U.S. was in 2008-9 the case of Bradley Birkenfeld, a former UBS employee which revealed that UBS advised U.S. individuals to open offshore accounts connected to foreign entities which would receive payments with no withholding tax even though beneficial owners were U.S. residents. UBS agreed to pay a fine of $780 million, release (through the Swiss government) the names of 250 U.S. holders of offshore UBS accounts, and cease its illegal banking and brokerage activities in the U.S. Under a separate agreement, UBS also agreed to disclose the names of a vast number of U.S. holders of offshore accounts at UBS.

In 2009 under an offshore voluntary compliance program almost 15,000 U.S. taxpayers disclosed to the Internal Revenue Service ("I.R.S.") that they held funds in previously unreported offshore accounts and thereafter the U.S. moved to a system aimed at the compulsory disclosure of U.S. taxpayers. On March 18, 2010, the Obama Administration signed into law the "Hiring Incentives to Restore Employment Act" (the "HIRE Act"), which includes the "Foreign Account Tax Compliance Act" ("FATCA"). FATCA established a basic principle: a foreign financial institution is subject a 30-percent withholding tax on all its income deriving from the U.S. unless it complies with the FATCA reporting duties in respect to "U.S. Persons" (for a specific definition see § 4.3) who are account-holders of that institution. So FATCA imposes an extensive third-party monitoring and disclosure regime on foreign financial institutions wherever located outside the U.S. in an effort to expose their undeclared foreign assets to the U.S. I.R.S.

At the same time the OECD campaign focused on the standards of transparency and exchange of information with a view to achieving a thorough application of Article 26 and the Model TIEA[5]. As a result of that campaign, 'internationally agreed standards' emerged in the context of the OECD's Global Forum on Taxation[6]. In 2013, 16 EU Member States called for a ''new global standard for automatic

[2] Alex Easson, 'Harmful Tax Competition: An Evaluation of the OECD Initiative', *Tax Notes International* 10 (2004), 1038. In this sense, see also Charles E. McLure Jr., *Will the OECD Initiative on Harmful Tax Competition Help Developing and Transition Countries?*, Bulletin for International Fiscal Documentation, 59 (2005), pp. 90-98.

[3] G-20, Meeting of Finance Ministers and Central Bank Governors: Communiqué, 21 November 2004.

[4] See Jeffrey Owens, 'Moving Towards Better Transparency and Exchange of Information on Tax Matters, *Bulletin for International Taxation*, 63 (2009), pp. 557-558.

[5] Paragraph 13 of the OECD Report, *Promoting Transparency and Exchange of Information for Tax Purposes*, Paris, 3 September 2010.

[6] On the OECD campaign see: Xavier Oberson, 'The OECD Model Agreement on Exchange of Information – A Shift to the Applicant State', *Bulletin for International Taxation*, 57 (2003), pp.14-17; David Spencer, 'International tax cooperation: centrifugal vs. centripetal forces (part 1)', *Journal of international taxation*, 21 (2010), 38-51; David Spencer, 'International tax cooperation: centrifugal vs. centripetal forces (part 2)', *Journal of international taxation*, 22 (2010), pp. 46-60. See M. Stewart, Transnational Tax Information Exchange Networks: Steps Towards a Globalized, Legitimate Tax Administration, 4 World Tax J., p.161 (2012), Journals IBFD.

exchange of information to tackle tax evasion, based on the U.S. FATCA legislation,' and in 2014 the OECD released a global framework for the exchange of financial information based denominated as the "Common Reporting Standard" ("CRS"). The CRS established a multilateral framework for countries to exchange information automatically, and over seventy countries have pledged to adopt it. Under the technological framework of the CRS tax information is not only exchanged multilaterally, but also automatically, i. e. without the need of a specific request. This phenomenon is denominated "automatic exchange of information" ("AEOI").

The OECD describes the CRS as drawing ''extensively on the intergovernmental approach to implementing FATCA with a view maximizing efficiency and reducing cost for financial institutions.'' FATCA thus initially facilitated efforts at multilateral information exchange.[7] For example, the G-5 announced that they would have exchanged information multilaterally based on the U.S. model IGA. Likewise, official statements from the EU considered FATCA as providing a unique opportunity to move from a series of bilateral agreements to a multilateral system.

The EU has actively participated in the development of AEOI, being a precursor in its multilateral dimension. Already in 2001 the EU introduced the legal basis for tax information exchange between Member States with Directive 2011/16/EU on Administrative Cooperation (DAC1)[8] which superseded the Mutual Assistance Directive (77/799/EEC). DAC1 introduced AEOI as the standard of tax information exchange within the EU. In fact DAC1 provides three types of exchange of information: 1. on request: a requesting State requests specific information from a requested State in a specific case, Article 3(8); 2. automatic: a State is bound to systematically exchange predefined tax information (in bulk) with any other State at pre-established regular intervals, Article 3(9); and 3. spontaneous: a sending State exchanges information at any time and on a non-systematic basis with a recipient State without prior request, Article 3(10).

Directive 2014/107/EU (DAC2) amended Directive 2011/16/EU and committed Member States to automatic exchange of financial account information. Directive 2015/2376/EU (DAC3) further amended existing provisions and included advance cross-border rulings and advance pricing arrangements to the list of data subject to AEOI.[9] Finally the Council formally adopted DAC4 during the ECOFIN meeting of 25 May 2016 which extended AEOI to country-by-country reports in 2016. The EU developments described above have adopted AEOI as the standard by which Member States exchange tax information.

In conclusion three forces have contributed in the last decade to the development of standards of cooperation in tax AEOI: the OECD, the U.S. and the EU. The outcome is that the scope of exchange of information in tax matters has been notably widened, and exchange of information itself has become the minimum threshold of feasible cooperation required by high-tax countries vis-à-vis low tax jurisdictions. The international community of States now requires such a commitment to exchange

[7] J. Heiberg, "FATCA: Toward a Multilateral Automatic Information Reporting Regime", 69 Washington & Lee Law Review (2012), pp. 1685-1713; M. Stewart, "Transnational Tax Information Exchange Networks: Steps Towards A Globalized, Legitimate Tax Administration", World tax Journal (2012), pp. 152-179.

[8] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64/1 (DAC1).

[9] Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, [2015] OJ L 332/1 (DAC3).

information from 'un-cooperative tax havens', and bilateral or multilateral treaties define the scope and limits of the content of such an obligation, also establishing AEOI, FATCA being a typical example of it.

These emerging standards include (i) international conventions, either bilateral or multilateral, specifically regulating mutual assistance between contracting States and based on the Model TIEA, such as OECD instruments; (ii) provisions governing exchange of information embedded in bilateral double tax treaties (Article 26); (iii) rules regulating mutual assistance within regional contexts, such as the EU rules; (iv) unilateral instruments enacted by individual countries with extra-territorial effect, such as the U.S. FATCA rules. These emerging standards are based on four elements: (i) the existence of mechanisms for exchange of information upon request, where such information is 'foreseeably relevant' (ii) the absence of any kind of restrictions on such exchange, such as bank secrecy or other domestic tax interest requirements, (iii) the availability of reliable information (in particular bank, ownership, identity and accounting information) in response to a specific request in a timely manner; and (iv) the emergence of AEOI on a bilateral or multilateral basis.

2. THE FATCA MECHANISM

Every year, the U.S loses tax revenue as a result of tax evasion using offshore bank accounts.[10] Historically, these evasion strategies have been effective because of other jurisdictions' strong bank secrecy rules. To overcome lack of cooperation from other jurisdictions, the U.S. has undertaken a series of aggressive tax enforcement approaches that culminated in FATCA in 2010.
FATCA introduced unilaterally a complex mechanism of AEOI managed by financial intermediaries based on four components: 1) the identification of participating financial foreign intermediaries, 2) the requirement of reporting by such intermediaries on certain U.S. and non-U.S. account-holders, 3) the threat of a withholding tax on U.S. sourced payment in case of non compliance, and 4) the duty by U.S. Persons to specifically report to the I.R.S. their foreign financial assets

2.1. Financial foreign intermediaries

First, FATCA defines in very broad terms a class of institutions denominated "financial foreign intermediaries" ("FFIs"). Under Section 1471(d)(4) of the Internal Revenue Code ("I.R.C."), financial entities are to be considered "foreign" when they are not organized under the laws of the U.S.. Furthermore, according to Section 1471(d)(5), the "term 'financial institution' means any entity that: A. accepts deposits in the ordinary course of a banking or similar business; B. as a substantial portion of its business, holds financial assets for the account of others, or C. is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (...), partnership interests, commodities (...), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities."

2.2. Reporting by FFIs

Second, under FATCA, FFIs are required to report the name, address, and other identifying information for (i) U.S. account-holders and (ii) non-U.S. account-holders that are entities with substantial U.S. owners. According to Section 1471(c) of the I.R.C., each year, the following data must be provided regarding every such accounts: the name, address and Social Security Number, or alternatively the Taxpayer Identification Number ("TIN") of every account-holder that is a specified U.S. citizen; the name, address and Social Security Number, or alternatively the TIN of every substantial U.S. owner of any account-holder that is a foreign entity owned by a U.S. Person; the account number the account balance or value (determined in the times and manners provided by the Secretary); the gross receipts and withdrawals or payments made from the account (for the period and in the manner provided by the Secretary).[11] Participating FFIs must also obtain various documents from any account-holders that possess indicia of U.S. status (these data are hereinfter denominated as "FATCA Data").

[10] The U.S. government has estimated that the U.S. suffer a loss in tax revenue of approximately $345 billion each year as a consequence of offshore tax evasion See: U.S. Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Tax Haven Banks and U.S. Tax Compliance, Staff Report (Washington: U.S. Senate, 2008); U.S. Treasury Department, Update on Reducing the Federal Tax Gap and Improving Voluntary Compliance, (Washington: U.S. Treasury Department, 2009).
[11] See: I.R.C. § 1471(c)(1).

Under FATCA, FFIs must register with the I.R.S. – and thus formally become Participating FFIs - and commit to report information regarding their U.S. account-holders and non-U.S. account-holders that are entities with substantial U.S. interests.

Section 1471(c)(1)(A) of the I.R.C. requires the reporting "of any account-holder which is a United States owned foreign entity, and (...) each substantial United States owner of such entity". Then, Section 1473(2), provides that "the term 'substantial United States owner' means: i. with respect to any corporation, any specified United States person which owns, directly or indirectly, more than 10 percent of the stock of such corporation (by vote or value), ii. with respect to any partnership, any specified United States person which owns, directly or indirectly, more than 10 percent of the profits interests or capital interests in such partnership, and iii. in the case of a trust: a. any specified United States person treated as an owner of any portion of such trust under subpart E of part I of subchapter J of chapter 1, and b. to the extent provided by the Secretary in regulations or other guidance, any specified United States person which holds, directly or indirectly, more than 10 percent of the beneficial interests of such trust."

The FFI agreements require FFIs to submit an annual report including the abovementioned FATCA Data. The reporting duties do not concern only the U.S.-owned accounts held directly by the FFIs, but extends to each account kept at every other intermediary part of the same "expanded affiliated group" as such FFI.[12]

One of the main changes of FATCA when compared to the previous QI system is the fact that, with the new regime, FFIs must perform due diligence procedures to identify U.S. accounts and whether their account-holders are complying with the FATCA provisions. In particular, such procedures vary in case the accounts are pre-existing or new. FATCA provisions do not require any more information gathering for individual clients who are already properly certified as U.S. Persons in connection with withholding or other purposes and do not apply to pre-existing accounts whose aggregate value is, on the effective date of the FFI agreement, equal or inferior to $50,000.

By contrast, an "enhanced review" is required for "pre-existing individual accounts with aggregate values exceeding $1 million as of the effective date of the FFI agreement or at the end of any subsequent calendar year." If "U.S. indicia" emerge on a customer that claimed non-U.S. status, additional documentation "such as evidence of non-U.S. citizenship, birthplace, or mailing address" shall be obtained to definitively ascertain that a U.S. Person does not own the account.[13]

2.3 . Withholding tax

FFIs refusing to cooperate with the regime and which do not report the required information are subject to a 30 percent withholding tax on certain U.S.-source payments, including U.S.-source interest and dividends, and gross proceeds from the sale of assets that generate U.S. dividends and interest (see below). Section 1471(a) of the I.R.C. in fact establishes a 30 percent withholding on the gross sum of determined payments directed towards non-complying FFIs and deriving from the U.S.. Such payments include any "dividend, rent, salary, wage, premium, annuity, compensation, remuneration, emolument,

[12] See: I.R.C. § 1471(e)(2).
[13] See: Treas. Reg. § 1.1471-4(c): "Due diligence for the identification and documentation of account holders and payees".

other fixed or determinable annual or periodical gain, profit and income", as long as they originate from the U.S.. Moreover, the retention also pertains to "any gross proceeds from the sale or disposition of any property (...) which can produce interest or dividends from sources within the United States".

The Participating FFIs are required to withhold 30 percent on some payments to "recalcitrant account-holders" and other financial institutions that do not comply with FATCA. Recalcitrant account-holders are account-holders who (i) do not comply with "reasonable requests" for information required to ascertain the nationality of the account-holder; (ii) do not offer data on every substantial U.S. owner of a foreign entity; or (iii) do not have a waiver of any foreign law that prevents an FFI from being able to perform the required reporting.[14]

Under FATCA, it is the U.S. payor institutions' responsibility ("withholding agent") to establish whether an outbound payment is included among those to be withheld. Withholding agents will be required to cross reference the recipient institution of the payment with a list of FFIs provided by the I.R.S.: if the recipient is on the list the payment is made without the imposition of the withholding tax, if it is not, the agents is responsible for levying the withholding tax. According to the new rules, withholding agents are to be considered "all persons, in whatever capacity acting, having the control, receipt, custody, disposal or payment of any withholdable payment." Given this broad definition, every FFIs that may enter into an FFI agreement with the I.R.S. and every U.S. withholding agent could be liable for the collection of the withholding tax.

The handling of so called "passthrough payments" is one of the most problematic elements of the system. Passthrough payments are payments directed to recalcitrant account-holders or non-complying FFIs through conduit or intermediaries entities. Section 1471(d)(7) of the I.R.C. describes "passthrough payments" as "any withholdable payment or other payment to the extent attributable to a withholdable payment." According to the I.R.S. Notice 2010-60, the goal of the rule on passthrough payments is encouraging FFIs to comply with FATCA "if they hold investments that produce payments that are attributable to withholdable payments" despite the fact that their assets do not produce, directly, withholdable payments. This broad definition entails that passthrough payments are not only the common withholdable payments, but also the payments that somehow relate to such withholdable payments. Section 1471(b)(1)(D) imposes a requirement on complying FFIs to apply the 30 percent withholding tax on any such passthrough payment directed to recalcitrant account-holders or non-complying FFIs.

The withholding tax thus operates as a threat on non-complying FFIs. In fact, even though the new regime does not literally prohibit non-complying FFIs from accessing the U.S. financial market, the 30 percent withholding constitute an unsormountable restriction of an economic nature. Congressman Charlie Rangel and Senator Max Baucus have aptly described the FATCA withholding system as follows: "the bill offers foreign banks a simple choice – if you wish to access our capital markets, you have to report on U.S. account-holders.[15] Similarly the ABA has portrayed FATCA as "a club to force FFIs and others to disclose the identities of American taxpayers who bank and conduct other business overseas."[16]

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[14] See: I.R.S., Treasury Department, I.R.S. Notice 2010/60 (Washington, I.R.S.: 2010).
[15] See: C. Baucus, M. Rangel, J. Kerry, W. T. Neal, supra note 103.
[16] See: M. G. Pfeifer and O. Ojutiku, "An Overview of the Foreign Account Tax Compliance Act", A.B.A. Sec. Real Prop., Trust and Estate Law (2011), p. 2, available at:

2.4. Reporting of foreign financial assets

FATCA imposes a duty on taxpayers to disclose their foreign financial accounts with a form attached to their tax returns. The Report of “Foreign Bank and Financial Accounts” (“FBAR”) disclosure duties have been implemented, according to the dispositions of the Bank Secrecy Act in 1972. Under such regime, U.S. Persons are required to file a FBAR Form every year in which they have “a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country, unless the aggregate value of all the accounts did not exceed $10,000 during the year”. Under the new system, taxpayers have been required to disclose their foreign financial assets starting from 2011, through Form 8938, “Statement of Specified Foreign Financial Assets”. Form 8938 is dedicated to U.S. Persons that possess any financial interest in foreign assets. The list of assets that fall under the FATCA rule is the same as the one of the FBAR, however, under this new regime, the threshold above which the reporting is required is $50,000.

In conclusion, the goal of the FATCA legislation is to “clamp down on tax evasion and improve taxpayer compliance by giving the Internal Revenue Service new administrative tools to detect, deter and discourage offshore tax abuse.”[17] This goal is pursued by requiring U.S. Persons to disclose foreign financial holdings with a total value in excess of U.S.$50,000, and by requiring FFIs to collect information on financial assets held outside the U.S. by those U.S. Persons. In practice the I.R.S. receives information about the U.S. Persons from Participating FFIs and is capable of identifying U.S. Persons who do not report correctly. FATCA is implemented by a web of agreements (see § 3) signed by the U.S. with foreign governments, and forces FFIs under the threat of a the withholding tax on all their U.S. sourced payments and revocation of their U.S. banking licences, to report to the U.S. I.R.S. all holdings of their customers who are U.S. Persons.

http://www.capdale.com/files/4106_An%20Overview%20of%20the%20Foreign%20Account%20Tax%20Compliance%20Act.pdf

[17] See: C. Baucus, M. Rangel, J. Kerry, W. T. Neal, “Press Statement on Foreign Account Tax Compliance Act of 2009”, Press Release (2009), available at: http://www.financialtransparency.org/2009/10/27/baucus-rangel-kerry-neal-press-release-on-foreignaccount-tax-compliance-act-of-2009.

3. INTERGOVERNMENTAL AGREEMENTS

The I.R.S. issued the "Proposed Regulations to implement FATCA" in February 2012,[18] and it was apparent that FFIs would have encountered problems in directly implementing the required due diligence procedures, in particular considering constraints posed by local national laws. So the I.R.S. developed the idea that FATCA should be implemented through Intergovernmental Agreements ("IGAs"). On January 17, 2013, the I.R.S. issued the Final FATCA Regulations[19] (the "Final Regulations") which confirmed IGAs as the preferred mode towards the multilateral adoption of FATCA.

According to the preamble of the Final Regulations: "the Treasury Department and the I.R.S. believe that IGAs represent efficient and effective ways of implementing the requirements of FATCA and will continue to conclude bilateral agreements based on the two models with interested jurisdictions. In addition, the Treasury Department and the I.R.S. continue to receive comments strongly supporting the approach to FATCA implementation embodied in the IGAs. The Treasury Department and the I.R.S. remain committed to working cooperatively with foreign jurisdictions on multilateral efforts to improve transparency and information exchange on a global basis."

3.1. The two models of IGAs

On February 8, 2012, the U.S. government reported that it was negotiating with EU Member States a model through which IGAs would have been subsequently drafted, for an efficient implementation of FATCA (hereinafter "Joint Statement").[20] This Joint Statement was signed by France, Germany, Italy, Spain, the United Kingdom and the U.S., and its purpose was to "address (...) legal impediments to compliance, simplify practical implementation, and reduce FFI costs." Furthermore, the statement provided that the participating countries would facilitate the implementation of FATCA by amending their existing legislation, eliminating the barriers that opposed FFIs from properly complying with the due diligence requirements and from being unable to transfer the required data to the U.S." The framework that derived from the Joint Statement is denominated as the Model 1 Intergovernmental Agreement ("Model 1 IGA").

According to Model 1 IGA, financial entities willing to comply with FATCA report the required data to the country where they reside ("FATCA Partner") which has the duty to provide the data to the U.S. regarding "accounts held by U.S. Persons or by foreign entities controlled by U.S. Persons, including the U.S. taxpayer identification numbers of such persons, and payments made to non-participating FFIs". Moreover, according to the Joint Statement, the six participating countries agreed to: "a. Commit to develop a practical and effective alternative approach to achieve the policy objectives of passthrough payment withholding that minimizes burden; b. commit to working with other FATCA partners, the OECD, and where appropriate the EU, on adapting FATCA in the medium term to a common model for

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[18] See: REG-121647-10, 77 Fed. Reg. 9022 (15 February 2012), available at: http://www.irs.gov/pub/newsroom/reg-121647-10.pdf.

[19] TD 9610 (17 January 2013), 78 Fed. Reg. 7874 (28 January 2013), available at: http://www.irs.gov/PUP/businesses/corporations/TD9610.pdf.

[20] See: U.S. Treasury Department, "Joint Statement from the United States, France, Germany, Italy, Spain and The United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA", Press Release (Washington: U.S. Treasury Department, 2012), available at: http://www.treasury.gov/resource-center/taxpolicy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf.

automatic exchange of information, including the development of reporting and due diligence standards."

Under Model 1 IGAs, FFIs report the personal financial information required by FATCA to their national governments, rather than directly to the I.R.S. This and increases efficiency by use of one national IGA versus many IGAs with many same-country FFIs and prevents the problem of national FFIs reporting their clients' personal information directly to the U.S., a foreign government.

Under Model 1 IGA the enforcement of the IGA provisions is guaranteed by the FATCA Partner's own law, which essentially imposes that FFIs comply through the enforcement of sanctions. After a first warning, non-complying FFIs are given up to 18 months to solve the problem and abide to the IGA provisions. After that the I.R.S. may deem the FFI as noncompliant and list it among the non-participating financial entities.

Model 1 IGAs can be either reciprocal or non-reciprocal. Reciprocal Model 1 IGAs require a dual exchange of information between the FATCA Partner and the U.S. Under such agreement there is reciprocal automatic exchange of information because the U.S. administration is expected to obtain and share with the FATCA Partner the information equivalent to that required by the U.S. under FATCA..[21] This mutual exchange of financial information under reciprocal Model 1 IGAs went into effect October 2015. Non-reciprocal Model 1 IGAs do not contemplate this kind of reciprocity.

Reciprocal Model 1 IGAs are reserved to countries that have an existing TIEA or a tax treaty with the U.S., and for which the Treasury Department and the I.R.S. have determined the government has sufficient protections to ensure the information remains confidential and is used solely for tax purposes. France, Germany, Italy, Spain, and the United Kingdom and the European Commission cooperated with the U.S. to develop the Model 1 IGA.

FFIs located in Model 1 IGAs partner jurisdictions need not enter into separate FFI agreements with the U.S. in order to avoid the withholding tax. The U.S. entered into the first Model 1 IGA with the United Kingdom, and several more have followed. The U.S. is actively engaged in talks with 70 jurisdictions regarding FATCA.

On November 14, 2012, the Treasury Department issued a second model of IGA, referred to as Model 2 Intergovernmental Agreement ("Model 2 IGA").[22] Under such model, the FATCA Partner agrees to amend its laws so that FFIs willing to become participating FFIs are able to "register and comply with the requirements of an FFI Agreement, including due diligence, reporting, and withholding." Model 2 IGA does not entail information gathering and reporting by the FATCA Partner, but requires complying FFIs to stipulate reporting agreements directly with the I.R.S. Therefore, such system allows financial entities to enter into an an agreement directly with the I.R.S. to comply with the FATCA reporting, without the intervention of the FATCA Partner contemplated by the Model 1 IGA. This non-reciprocal IGA can be applied irrespectively from the fact that the relevant countries have an existing TIEA or a tax treaty with the U.S.

[21] See: U.S. Treasury Department, Reciprocal Model 1 IGA, available at: http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1AAgreement-Preexisting-TIEA-or-DTC-8-19-13.pdf.
[22] See: U.S. Department of Treasury, Model 2 IGA, available at: http://www.treasury.gov/resourcecenter/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-8-19-13.pdf.

The exchange of information under Model 2 IGA is more complex than the exchange under Model 1 IGA [23] essentially because an FFI must seek the consent of the account-holder or non-participating FFI to disclose the reportable information to the I.R.S. For persons that fail to provide their consent ('Non-consenting Persons'), the FFI is required to report aggregate account information. The I.R.S. can then make a group request about such Non-consenting Persons from the FATCA Partner under an income tax treaty or a TIEA. A FFI generally will be prohibited from opening a new account or entering into a new obligation with a Non-consenting Person.

Model 2 IGA provisions are enforced through direct cooperation between the I.R.S. and the FFI. Model 2 IGAs require agreements with each individual FFI, do not require reciprocal exchange of information like reciprocal Model 1 IGAs, and do not contemplate the handling of personal information by the FATCA Partner, i.e. the local governments. However if the I.R.S. needs additional information about a taxpayer, it can request that the FATCA Partner in question take action to enforce the reporting of this information and this lead to the rise of administrative costs. Moreover the I.R.S. reports the possible non-compliance of the FFI to the foreign country and then the FFI will be granted 12 months to rectify the reporting.

Model 1 and Model 2 IGA share common features. Both models have an Annex II, which is a list of financial institutions and products that are generally exempt from FATCA reporting because they represent a low risk of tax evasion for U.S. Persons. Under both IGAs Model 1 and 2, the due diligence procedures imposed on FFIs are indicated in the first Annex to the agreement. These annexes include detailed explanations on the procedures that financial institutions willing to comply with the reporting requirements imposed by FATCA need to perform. Under both types of agreements, FFIs may choose to submit to the due diligence requirements imposed by the Final Regulations issued by the Treasury Department instead of submitting to the requirements listed in Annex I and mentioned above. Finally under both models, FFIs that respect the withholding provisions of the IGA are exempted from the FATCA withholding on payments. An FFI that does not comply with the reporting requirements of the IGA can be subject to the withholding only if it has been comprised by the U.S. administration in a list of the non-complying financial entities.

3.2. The legal status of IGAs

A relevant issue is whether the IGAs truly are international agreements, because in such case, through implementation at national level they formally become part of the law of Member States and subject to EU law.

The IGAs are "executive agreements" which do not require in the U.S. the normal process of ratification for international agreements,[24] so once the domestic proceedings in each country have been accomplished a written notice replaces the exchange of ratifications. Under the IGAs the information

[23] See: P. M. Schmidt and M. W. Nydegger, "FATCA Intergovernmental Agreements – The Model 2 Agreement and Final Regulation", 30 Journal of Taxation of Investments 3 (2013), p. 25; R. J. Holst, J. Lee-Lim and W. Lu, "Intergovernmental Agreements Under FATCA: Comparing the Two Models", Latham and Watkins LLP (2013), available at: http://www.lw.com/thoughtLeadership/intergovernmental-agreements-under.

[24] Article II, section 2, clause 2 of the US Constitution provides: "He the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur …".

required by FATCA is provided from the FATCA Partner to the U.S. through the existing tax treaty (Article 26) or TIEA which provide the legal basis for the information exchange. This implies that the treaty limits to the exchange of information under these instruments must be respected (e.g., that the information is exchanged to the extent this is "foreseeable relevant" or the general prohibition to make fishing expeditions, and so on). Accordingly the position of the I.R.S. is that IGAs are not sole executive agreements but rather treaty-based agreements[25]

The U.S. characterization of IGAs is actually debated. There has been no official pronouncements by the U.S. Treasury Department about the nature of international agreements of these instruments. The constitutionality of FATCA IGAs was one of the issues of the case of Crawford v. U.S. (the other main issue being whether FATCA violated an individual's right to privacy). The case was dismissed because the Court found that several of the plaintiffs lacked standing and a preliminary injunction would be too harmful to FATCA's fight against tax evasion.[26]

As a general principle in the U.S. executive agreements are not technically treaties because they are not established with the advice and consent of the Senate (U.S. Const. Article II. § 2, cl. II) and should be used only when the President conducts administrative routine matters such enforcement of FATCA for administrative purposes.[27]

What in practice has occurred in the U.S. is that IGAs have been approved avoiding the first step in the normal treaty process in the U.S., which is the review by the Senate Foreign Relations Committee. This practice however does not necessarily imply that IGAs are not international agreements: in the U.S the power to "lay and collect taxes" is a power of Congress, not the President (U.S. Const. Article I, § 8), while the power to make treaties is a power of the President, but can only be validated by a two-thirds concurrence of the Senate (U.S. Const. Article II. § 2, cl. II). IGAs touch on both of these powers because facilitates the collection of taxes through the existing tax treaties and certainly exceed routine administrative matters, so IGAs cannot be sole executive agreements.

On the EU side the FATCA Partners recognize the IGAs as truly international agreements, as they predominantly have adopted them through normal formal proceedings of approval. This means that IGAs become part of the domestic laws of the Member States, that is they derogate conflicting domestic law, effective at the moment of their implementation.

A relevant question is whether FATCA provisions, which legally are statutory provisions of a non-EU sovereign State that are effectively applied within the EU by FFIs and their account-holders, are subject to EU law also when there is no IGA. Here one should note that even when there is no IGA the FFI located in the EU concludes with the I.R.S. an FFI agreement, pursuant to which the FFI registers with the I.R.S. and commits to report FATCA information regarding; such an agreement, in respect to

[25] Allison Christians, I.R.S. Brushes Aside the Constitution to Make Way for FATCA, (5 March 2013, 8:25 AM), http://www.lexisnexis.com/legalnewsroom/tax-law/b/fatcacentml/archive/2013/03/05/irs-brushes-aside-the-constitution-to-make-way-for-fatca.aspx.

[26] Crawford v. United States, No. 3:15-CV-00250 (S.D. Ohio 25 April, 2016). See U.S. Court Flatly Denies Claims of Injury Under FATCA, TAX-EXPATRIATION (Oct. 2, 2015), http://tax-expatriation.com/2015/10/01/u-s-district-court-flatly-denies-claims-of-injury-under-fatca-and-title-31-fbar-reporting-requirements-upholds-fatca-igas-and-the-fbar-requirements-to-encourge-tax-complianceand- combat-tax-eva/.

[27] For a full discussion on why IGAs cannot be considered treaty-based agreements, see Alison Christians, The Dubious Legal Pedigree of IGAs (And Why It Matters), 69 Tax Notes Int'l 565, 567 (2013).

relevant “public order” issues and fundamental rights such as data protection, is subject to the law of EU Member States and therefore to EU law as well, if relevant.

4. THE IMPACT OF FATCA

4.1. The extraterritorial nature of FACTA and the lack of reciprocity

FATCA is an instance of so the called "extraterritorial prescriptive/legislative jurisdiction". In very general terms "jurisdiction" is the power of a State to exercise authority over all persons and entities within its territory and is closely related to State sovereignty. A State can exercise it legislative powers, and in doing so a State has in theory unlimited prescriptive jurisdiction so that its legislative branch can create, amend or repeal legislation covering any subject or any person, irrespective of the person's nationality or location.

The ICJ stated that "In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty (para 47 of the Lotus case)." At the same time, international law does not allow a State to enforce its legislation outside its territory without an international agreement or a rule of customary international law permitting the State to do so.

So the legitimacy of extraterritorial prescriptive jurisdiction relies on a genuine link established by the State that exercises that jurisdiction which does not exceeds the "limits of international law", while effective enforcement requires cooperation by other States. In the case of FATCA the U.S., on the basis of its national interest, imposes obligations on foreign financial institutions (FFIs) around the world requiring them to report data for each account-holder that is a U.S. Person, and to withhold 30 percent on certain payments to recalcitrant account-holders and other financial institutions that do not comply with FATCA. So correctly the FATCA system has been referred to as "the most extensive extraterritorial reach of U.S. tax enforcement in history."[28]

In addition FATCA has a "*unilateral nature*" because it is the result of a strategy originally conceived by the U.S. and only subsequently reflected in bilateral IGAs between the U.S. and other countries. FATCA is a unilateral strategy because its main goal is to make available to the I.R.S. information about U.S. taxpayers, through third parties (FFIs), without the cost of offering them incentives as it occurred in the QI system, but simply relying on the threat of a withholding tax enforceable in the U.S. Under FATCA the U.S. administration is unilaterally demanding information from FFIs irrespectively from the operation of local laws and is placing the costs on them.[29] FATCA allows the U.S. to: 1. force foreign financial institutions to act as reporting agents for the U.S. I.R.S.; 2. obtain extensive financial and personal information in respect of non-U.S. resident taxpayers (including persons who have no tax payment obligations to the U.S.); 3. enforce the extraterritorial U.S. taxation of citizens on their worldwide income.

Finally FATCA is not effectively based on "*reciprocity*". FATCA is implemented through Model 1 or Model 2 IGAs. Model 2 IGAs are non-reciprocal because FFIs willing to comply with the FATCA are able to conclude directly with the I.R.S. an FFI Agreement to comply with the required reporting, without the

[28] See: S. D. Michel and H. D. Rosenbloom, "FATCA and Foreign Bank Accounts: Has the U.S Overreached?", 62 Tax Notes International (2011), p. 709.
[29] See: D. Mitchell and B. Garst, "Die Zwei Gesichter Amerikanischer Steuerpolitik", Schweizer Monat, (2013), available at: http://www.schweizermonat.ch/artikel/die-zwei-gesichter-amerikanischersteuerpolitik.

intervention of the FATCA Partner, while there is no equivalent obligation on the U.S.. Also Model 1 IGAs can be concluded in a non-reciprocal form. Finally, Model 1 IGAs even when are formally concluded in a reciprocal form are effectively non-reciprocal. A detailed analysis of text of the Model 1 Agreement in fact shows that the task imposed by the U.S. on the IGA Partner are not reciprocal because only in a few instances the flow of information goes both ways.[30]

Moreover, in certain cases IGAs include an Enabling Clause that forces the IGA Partner to enact a new law that allows its financial institutions to legally breach domestic laws (such as the banking secrecy principle) without encountering penalties, or an Inconsistency Clause that provides that the IGA provisions prevail on domestic laws the IGA Partner in case of conflicts. The Enabling Clause and Inconsistency Clause generally do not impose similar obligations (if applicable) on the U.S. and so represent an example of a lack of reciprocity. In practice IGA Partners get nothing in return for their concessions, other than relief of the threatened 30% withholding tax under FATCA. Finally the U.S. recently announced that it will not be joining the Common Reporting Standard, an instrument that acknowledges reciprocal AEOI on a multilateral basis.

This contingent non-reciprocal nature of IGAs conflicts with the initial position of the U.S.: when EU Member States negotiated their IGAs with the U.S. expressed concerns about extraterritorial overreach, and the U.S. promised to work towards reciprocal information sharing under FATCA.

So there are arguments to consider that the IGAs lack a serious level of reciprocity, imposing more liabilities for the IGA Partners than for the U.S. in the exchange of information, while IGAs should be genuinely based on reciprocity in ensuring that both contracting parties gain mutual benefits through cooperation. So in the absence of reciprocity, the U.S. can positions itself to gain from the very behavior (the resistance to share information with other countries) it seeks to eliminate in other jurisdictions.

4.2. FATCA's negative externalities

FATCA amounts to the unilateral exercise of extraterritorial legislative jurisdiction in most cases not based on reciprocity. These features tend to create systemic negative externalities which can be summarized under two main headings: (i) costs for the financial industry combined with a disincentive towards foreign investments in the U.S., and (ii) conflicts with local laws (analyzed in this § 4.2.). Other externalities are those that affect certain U.S. citizens (§ 4.3.).

KPMG estimated in the region of U.S.$ 30 billion the global cost to the financial industry, as a whole, of becoming FATCA compliant over the period 2012--2017.[31] Another estimate puts these costs at U.S.$ 8 billion *per annum* with a global implementation cost of U.S.$ 200 billion.[32] Given the size and international importance of European financial institutions it is safe to assume that at least a third, if not more, of these costs have been absorbed by European banks. That would mean amounts in excess of U.S.$10 billion for the first estimate and, for the second estimate, U.S.$2.6 billion per annum and U.S.$66.6 billion overall. According to other estimates average compliance cost is approximately $5-10

[30] Christians, Allison, What You Give and What You Get: Reciprocity Under a Model 1 Intergovernmental Agreement on FATCA (12 April 2013). Cayman Fin. Rev. April 2013, available at SSRN: https://ssrn.com/abstract=2292645

[31] http://economia.icaew.com/technical---update/tax/fatca---attack.
[32] http://www.forbes.com/sites/robertwood/2011/11/30/fatca---carries---fat---price---tag/#1de40925489a.

million per FFI, which if introduced by all FFIs might result in global cost of compliance near $1-2 trillion." If these compliance costs are compared with an expected annual tax income recovery of around $800 million, it clearly appears a cost-benefits disproportion.

Another hidden cost of FATCA for FFIs is the mere threat of being subject to the 30% FATCA withholding tax as a result of the alleged lack of compliance with FATCA reporting requirement. This threat may discourages FFIs to invest in the U.S. capital market .[33] In addition FATCA fragments the market among those who comply with FATCA and those who do not, so that investment managers will have to face a significant increase of the information costs.[34] According for example to the British Bankers' Association ("BBA"), the new regime "creates a systemic market risk, resulting in an unpredictable cascade effect that is contrary to international efforts to establish financial stability."[35] The Brazilian Federation of Banks also reported that it "will violate Brazilian laws and create banking instability throughout South America." [36]

The second FATCA negative externalities are the conflicts of FATCA provisions with local laws. The ABA noted, in a communiqué to the Treasury, that "FFIs and NFFEs may be constrained in their ability to identify and report U.S account-holders and U.S. investors by their local regulatory, privacy, information disclosure or other legal restraints, some of which may impose criminal sanctions for the disclosure of information relating to persons that are investing in or doing business with the reporting entity."

These conflicts are exemplified, outside the EU, by the case of Switzerland. Swiss privacy laws in the pre-FATCA era prevented the exchange of information. In particular, according to Article 47 of the "Swiss Federal Act on Banks and Saving Banks"[37] and Article 43 of the "Federal Act on Stock Exchanges and Securities Trading",[38] it would be a crime for Swiss FFIs to provide the I.R.S. (or any other subject) with information about its account-holders.[39] Such rule suffers an exception in case of criminal proceedings, however, evading tax was not considered a crime under Switzerland's law.[40]

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[33] See: G. Bock and W. D. Seymour, "FATCA and the Funds Industry: Defining the Path", KPMG (2011), available at: http://www.kpmg.com/global/en/issuesandinsights/articlespublications/pages/fatca-and-the-fundsindustry; N. Jensen, "How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland", 63 Vanderbilt Law Review (2010), p. 1851.

[34] See: Japanese Bankers Association, Letter from Japanese Bankers Association to Manal Corwin, Deputy Assistant Secretary (International Tax Affairs), U.S. Treasury Department (28 October 2011), available at http://bsmlegal.com/PDFs/FATCAJapaneseBankers.pdf; See also: European Banking Federation and Institute of International Bankers, Letter from Guido Ravoet, Sec'y Gen., European Banking Fed'n, & Sarah A. Miller, Inst. of Int'l Bankers, to Manal Corwin, Deputy Assistant Sec'y Tax Pol'y (Int'l), U.S. Dep't of Treasury (30 April 2012), available at http://www.cticompliance.com/assets/pdflEBFIIB% 20submission%20on%20FATCA%20proposed%20regulations %204-30-12.pdf; See also: Alternative Investment Management Association, Letter from Mary Richardson, Alt. Inv. Mgmt. Ass'n Ltd., to Internal Revenue Service (Nov. 1, 2010), available at http://bsmlegal.com/PDFs/FATCAAIMA.pdf.

[35] See: British Bankers Association, Letter from Sarah Wulff-Cochrane, British Bankers' Association, to Office of the International Tax Counsel, U.S. Dep't of the Treasury (2011), available at http://www.bba.org.uk/policy/article/bba-submission-to-the-us-treasury-and-irs-on-the-us-foreignaccount- tax-com/tax/; see also: British Bankers Association, Notice 2012-60 "Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding under Chapter 4 of the Code", British Bankers' Association (2010), www.bba.org.uk/download/6819.

[36] See: Federaçào Brasileira de Bancos, Letter from Murilo Portugal, Chairman, Federaçào Brasileira de Bancos, to Manal Corwin, Deputy Assistant Sec'y Tax Pol'y (Int'l), V.S. Dep't of Treasury, et al http://www.deloitte.comlassetslDcomUnitedStateslLocal%20Assets/DocumentslTaxlustaxc%C3%B3piada_carta original_enviada_ao_I.R.S._010112.pdf.

[37] See: Schweizerisches Bankengesetz [BankG], Nov. 8, 1934, SR 952.0, Article 47.

[38] See: Schweizerisches Borsengesetz [BEHG], March 24, 1995, SR 954.1, Article 43.

[39] On October 9, 2013, the Swiss Federal Council passed a law that will allow further exceptions to the banking secrecy rules, with effect from November 1, 2013.

[40] See: Swiss Banking, Bank-Client Confidentiality (2011), http://www.swissbanking.org/en/home/dossiers-

Until 2012, treaties between the U.S. and Switzerland have only partially softened the secrecy rules, for example an amendment of the double taxation convention stipulated in 2009 provided that: "in no case shall (...) a Contracting State (...) decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity(...)."[41] A relation following the Protocol stated that such provision "would effectively prevent a Contracting State from (...) arguing that its domestic bank secrecy laws (...) override its obligation to provide information." Therefore, if the U.S. demands "such information as may be relevant (...) to the administration or enforcement of the domestic tax laws", Swiss FFIs shall not cite Article 43 and 47 as an excuse not to comply[42] and FATCA provisions urge Swiss FFIs to obtain waivers of the duty of secrecy from their account-holders and require FFIs to close the recalcitrant account-holders' accounts.[43]

On February 14, 2013, the U.S. and Switzerland announced that they had stipulated an IGA for the implementation of FATCA based on Model 2 IGA and to solve the abovementioned legal conflicts (hereinafter "Swiss IGA").[44] Under such agreement, entered into effect on January 1, 2014, FFIs are required to ask their U.S. account-holders for the consent to share their personal financial information with the I.R.S. If such consent is granted, FFIs directly share the data with the U.S.; if not, FFIs will be required to share anonymous aggregate information with the I.R.S., but the U.S. can present group requests to the Swiss government demanding the release of the information about these recalcitrant U.S. account-holders.

The Swiss IGA presents a number of differences when compared to the standard Model 2 IGA: a) Switzerland guarantees that all of its financial institutions, with some exceptions, shall enter into an FFI agreement with the I.R.S.; this makes the adhesion to the FATCA regime not an optional choice made by each FFI but a legislative obligation under Swiss law; b) Switzerland is forced to enact a new law that allows its financial institutions to legally breach the banking secrecy principle without encountering penalties (the so-called Enabling Clause); c) the Swiss government shall cooperate with the I.R.S. and properly respond to group requests regarding the identification of recalcitrant U.S. account-holders; d) Swiss FFIs shall share the information of consenting U.S. Persons; e) the I.R.S. shall make group requests based on the data provided by Swiss FFIs and limited to the data that FFIs would have been compelled to share were they in possession of such information; f) the U.S. shall not impose any withholding tax on payments towards Swiss financial entities; g) every new account opened by U.S. Persons in a Swiss financial institution shall require the appropriate consent to the sharing of information; h) the Swiss institutions shall receive administrative benefits in connection with the implementation of the FATCA legislation.

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link/bankkundengeheimnis.html

[41] See: U.S. Department of Justice, Protocol Amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, (23 September 2009), S. Treaty Doc. No. 112-1 (2011).

[42] See: U.S. Treasury Department, "Technical Explanation of the Protocol Signed in Washington on Sept. 23, 2009 Amending the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income", Press Release (Washington: U.S. Treasury Department, 2009).

[43] A report conducted by Booz & Company expects Swiss financial institutions to lose CHF 47 billion. See: Booz & Co. "Tax Agreements Accelerate Consolidation in Swiss Private Banking", Press Release (2011), available at: http://www.booz.com/me/home.

[44] See: U.S. Treasury Department, IGA Between the U.S. and Switzerland, available at: http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf.

4.3. Negative impact of FATCA on U.S. citizens abroad

In addition to the systemic negative externalities discussed at § 4.2., FATCA generates other idiosyncratic externalities that affect certain U.S. citizens (analyzed in this § 4.3.).

The U.S. imposes income taxation on four groups of individuals:

1. individuals who reside in the territory on the basis of periods of physical presence (tax-residents);
2. individuals who are lawfully entitled to reside permanently in the territory (green card holders);
3. citizens; and
4. individuals who are not described above but who earn income from U.S. sources.

Together, individuals described in categories 1 through 3 are referred to as "U.S. Persons."

When such U.S. Persons are tax-resident in the U.S. (class 1 above) FATCA requirements are generally justified. However the U.S. is one of only two countries in the world (the other being Eritrea) that practices citizenship-based taxation, in which income tax is levied on worldwide income on the basis of citizenship, not residency. The result of citizenship-based taxation is that, in addition to individuals tax-residents, also individuals who are U.S. citizens are liable to U.S. taxes on their worldwide income and subject to FATCA. These individuals can be further divided in three classes: (i) American expatriates, (ii) dual European/American citizens, and (iii) so called “Accidental Americans”.

American expatriates are individuals who have U.S. citizenship, are not U.S. tax-residents and live permanently outside the U.S., often retaining no cultural, economic, political, family or other ties to the U.S. *Dual European/American citizens* are individuals who have both the U.S. and European citizenship and who might be in the same situation of American expatriates with no ties to the U.S. Finally “*Accidental Americans”* are individuals who automatically acquired U.S. citizenship at birth by being born on U.S. soil during a temporary stay by their parents and who left in early childhood.[45] Their U.S. citizenship results solely from their “accidental” birth in the U.S., while they in fact retain no cultural, economic, political, family or other ties to the U.S. and are citizens and/or tax-residents of EU countries. In practice an Accidental American is a person who lives most or all of her life in a country other than the U.S., often not possessing a U.S. passport and unaware that she is subject to U.S. income taxation solely because she is a U.S. citizen.

All these three classes of individuals are formally subject to FATCA requirements. These requirements are tenuously justified for American expatriates and dual European/American citizens when these individuals are not tax-resident in the U.S., and retain no cultural, economic, political, family or other ties to the U.S. FATCA requirements however are not justified for Accidental Americans who are never tax-residents in the U.S. and never retain such ties to the U.S.. So FATCA is problematic for Accidental Americans because they are fully invested of the FATCA requirement connected with citizenship.

[45] Individuals who are born abroad to a U.S. citizen parent, providing certain other requirements are met, and who remained for their entire life outside the U.S. can also be Accidental Americans.

Prior to FATCA, citizenship-based taxation represented a typical example of a non-enforced worldwide tax claim: the U.S. citizens who were not tax-residents in the U.S. were in most cases not officially identified by the U.S. and only some on them voluntarily complied. FATCA reversed this situation because the U.S. has introduced a reporting system through FFIs which is enforceable domestically via the imposition of the withholding tax, and also through the assistance of foreign governments. This system now identifies and controls the status of individuals that might be obligated to report their income in the U.S. on the basis of their U.S. citizenship.[46]

In practice FATCA pursues the identification of individuals who potentially are U.S. Persons subject to FATCA through a two-step classification system. The first step involves the collection by FFIs of a list of indicia, while the second step involves a self-certification process.

In the first step the FATCA mechanism requires foreign financial institutions to search for U.S. Persons by looking for "indicia" of status, such as : 1 evidence of tax- residency in the U.S.; 2. birthplace in the United States; 3. a U.S. telephone number; 4. a U.S. residence or mailing address; 5. standing instructions to transfer funds to a U.S. based account; 6. indications of a power of attorney over the account to a person with a U.S. address; or 7. a "care of' or hold mail address as the sole address. In this phase individuals are required to provide negative proof of their status as U.S. Person, i.e. they have to convince the FFI that they are not U.S. Persons.

In the second step (self-certification process) FATCA requires that FFIs make assumptions about U.S. Person status by using indicia or facts known to them. The problem here is that these indicia are not necessarily relevant to determining the status of the individual as a U.S. Person, so that there can be significant dis-alignments and individuals can be deemed by the FFIs to be U.S. Persons when they are not.

The practical outcome of this two-step process is that, depending on the circumstances, citizenship-based taxation, enforced by FATCA's system, may result in arbitrary exposure and punishment of some individuals who might in reality have no substantive connection to the U.S. So, whilst FATCA was purportedly targeted at U.S. resident taxpayers to prevent offshore tax evasion, in practice it includes a large cross-section of law-abiding individuals - American expatriates, dual European/American citizens, and Accidental Americans – who clearly are not perpetrating tax evasion but who are subject to unreasonable requests

There are two main FATCA problems for these categories of individuals: first they are denied banking services; second, they are subject to onerous compliance which is not proportionate to their actual situation of law-abiding citizens.

In respect to the first problem of *denial of banking services*, there is ample evidence that European financial institutions are systematically identifying customers whom they believe may be U.S. Persons for the purposes of FATCA denying them banking services for fear of being subject to FATCA reporting.[47] Any financial institution that may obtain a payment from the U.S. needs to apply to the

[46] Mason, R. (2015). Citizenship Taxation. *S. Cal. L. Rev.*, *89*, 169.
[47] See:http://www.ingdirect.fr/data/pdf/fonds/conditions---generales.pdf; https://www.binck.fr/_clients/binck_fr/data/pdf/clients/conditions---generales---binck.pdf; https://www.soon.fr/assets/pdf/soon---conditions---particulieres---07---2014.pdf and

I.R.S. to obtain an ID number that will end up in the I.R.S.'s lists of compliant or non-compliant FFIs that every withholdable agent must check.[48] Therefore, "foreign banks will either have to prevent non-nationals from having bank accounts in order to be treated by the I.R.S. as 'local banks', or identify foreign customers under FATCA. In practice financial institutions that wish to avoid the significant compliance costs and the potential withholding requirements imposed by FATCA may be interested in avoiding U.S. account-holders that are qualified as U.S. persons.[49] So local bank - in order to not undertaking the (costly) legal duty of complying with FATCA reporting - are in practice compelled to deny bank accounts to individuals who happen to be Accidental Americans

EU financial institutions whoch respond to FATCA in such a way do not accept customers presenting any U.S. nexus.[50] This simple fact makes it impossible for European citizens who are Accidental Americans to access basic financial services within the EU. Because of this, Accidental Americans may be prevented from retaining their bank accounts[51] or sign insurance policies and therefore become less employable.[52] For these reasons the implementation of FATCA has generated a relevant amount of objections among Accidental Americans in the EU.[53]

In respect to the second problem (*onerous compliance*), Accidental Americans to escape FATCA formalities applied by FFIs must either fully disclose to the U.S. authorities, or formally renounce the unwanted U.S. citizenship. To fully disclose, not only is costly, but also may expose Accidental Americans to full tax liabilities and sanctions in the U.S.
By contrast, to renounce the U.S. citizenship is very cumbersome. To do that an Accidental Americans must access the U.S. system by obtaining a U.S. social security number or a U.S. international tax identification number and provide the U.S. authorities with documentary evidence of their lives outside the U.S.. Second, Accidental Americans must comply with FBAR which requires disclosure of all financial assets if, in aggregate, at any time in any year there was U.S. $10,000 or more held outside the U.S. Finally they must file U.S. tax returns for the past 5 years if the Streamlined Disclosure Programme is available (otherwise for the entire period outside the U.S.), and provide to the U.S. I.R.S. details of their "foreign financial holdings" with a total value in excess of U.S. $50,000.

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https://www.carrefour-banque.fr/sites/default/files/_files/telechargement/epargne/Web---EA031---150916---0001---CSL.pdf; https://americansoverseas.org/app/uploads/2016/06/1---Survey---results---EN.pdf
https://www.hellobank.fr//rsc/contrib/document/pdf/PV18641_CG_cpteDepot_30.pdf.

[48] See: I.R.C. § 1471(b)(1)(B).

[49] See: D. J. Mitchell, "Why Obama's FATCA Law is a Threat to Business Growth", Forbes (2011), available at: http://www.forbes.com/sites/beltway/2011/06/20/why-obamas-fatca-law-is-a-threat-tobusiness- growth/: "Americans living overseas are one of the groups that will be severely penalized.

[50] See: B. Hinchberger, "European Banks Shut Americans out over U.S. Tax Rules, USA Today (2012), available at: http://www.usatoday.com/story/moneylbusiness/2012/09/27/american-expats/1594695/: citing: "Deutsche Bank, Commerzbank, HSBC, ING Group, Credit Suisse".

[51] See: "Reaction to U.S. Tax Law: European Banks Stop Serving American Customers", Spiegel Online (2011), available at: http://www.spiegel.de/international/business/reaction-to-us-tax-laweuropeanbanks- stop-serving-american-customers-a-803742.htmlrenunciation-not-about-taxes/.

[52] See: American Citizens Abroad, Why FATCA is Bad for America and Why it Should Be Repealed, (2012), available at: http://americansabroad.org/issues/fatca/fatca-is-bad-for-america-and-why-itshould- be-repealed/

[53] See: American Citizens Abroad, FATCA Destroys Lives and the US Economy, (2011), available at: http://americansabroad.org/issues/fatca/fatca-destroys-lives-and-the-us-economy/.

5. CONFLICTS WITH EU LAW

As the flow of information from EU financial institutions directly to the I.R.S. that is required by FATCA would violate a number of laws in the EU, the U.S. has requested changes to these laws and EU Member States sought to accommodate these requests in the form of a IGAs. Since IGAs are international agreements they become part of the domestic laws of the Member States, and indirectly are subject to EU law constraints. As a consequence, the extraterritorial nature of FATCA, in addition to conflict with local laws, also triggers systemic conflicts with different levels of EU law.

There are two main instances in which FATCA via IGAs conflicts with EU law: in the former case FATCA Data are retained and transmitted by FFIs and create an issue of procedural safeguards and data protection (§ 5.1), while in the latter case data are not acquired by FFIs who refuse to provide services, and in this situation the FATCA impact may directly infringe on substantive rights of individuals (§ 5.2).

5.1. The right of FATCA Data protection under the GDPR

5.1.1. FATCA and taxpayers' right to data protection

FATCA requirements overlap with two lines of international developments. On the one hand, the G20 has endorsed automatic exchange of information on tax matters (AEOI) in 2013,[2] and this led to the establishment of a global standard in AEOI, the Common Reporting Standard ("CRS"), so that within the EU, the Directive on Administrative Cooperation (DACI) has been amended several times in the context of AEOI and FATCA. DAC I had been amended for three times, which currently enables mandatory AEOI in a wide range of tax matters.

On the other hand, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation, the "GDPR") enters into force on May 25, 2018 repealing the pre-exisitng Data Protection Directive and provides that references to that repealed Directive will be construed as references to the GDPR once the latter comes into force[54]

The Data Protection Directive limited itself to set guidelines for national legislators of Member States in respect to data protection, while the GDPR contains legal binding rules and must be applied in its entirety across the EU. The GDPR establishes a consistent and equivalent level of protection for natural persons across the EU, overcoming the fragmentation in implementation of data protection and is an upgrade in comparison to the Data Protection Directive.

The GDPR fills the gap that grew in the last decade, when the powers of tax administrations increased through EU legislation concerning AEOI and IGAs and escalated driven by digital technologies, while at EU level data protection did not really follow suit.[55] Data protection rights in taxation matters remained insufficiently safeguarded in EU legislation on AEOI in taxation matters, as remarked by the

[54] Article 94 - Repeal of Directive 95/46/EC - 1. Directive 95/46/EC is repealed with effect from 25 May 2018. 2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC shall be construed as references to the European Data Protection Board established by this Regulation.
[55] See: M. Somare and V. Wöhrer, 'Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency', 43 Intertax (2015), pp. 804–815.

European Data Protection Supervisor (EDPS),[56] the Article 29 Working Party (WP29),[57] and the Commission Expert Group on automatic exchange of financial account information (AEFI Group)[58].

Now the GDPR systematizes these rights and establishes a fundamental right, separate and distinct from the right to privacy: the *right to data protection* which is enshrined in several EU legal sources. Article 16 of the Treaty on the Functioning of the European Union (TFEU)[25] grants 'the right to the protection of personal data in two paragraphs. While the first paragraph declares the right explicitly, the second requires that relevant EU institutions lay down specific rules in relation to protection of the right. The Data Protection Directive was adopted in accordance with this provision and the GDPR sets aside a dedicated chapter titled 'Rights of the data subject'.

The GDPR more specifically addresses the lack of detailed rules on right of taxpayers to the protection of their data vis-à-vis the expansion of the power of tax administrations by way of AEOI and FATCA. The insufficient guarantee of taxpayers' rights not only poses an imminent threat to the status of taxpayers under AEOI, but also potentially diminishes the validity of AEOI as an international standard.

Article 1 in fact provides that the GDPR lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data and protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The GDPR applies to FACTA Data as its material scope is “the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.”

The GDPR explicitly recognizes data protection as a right, while the Data Protection Directive mainly adopted 'the right to privacy' approach. So data in the case of tax AEOI and FATCA, the protection of taxpayers does no only includes the right to privacy, but also the right to data protection, another fundamental right, separate and distinct from the right to privacy. In particular Articles 12 to 22 and Article 34 provide a set of explicit rights of the data subject, while Article 5 of the GDPR provides a set of principles relating to processing of personal data under FATCA.

According to Article 5 such personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; (‘purpose limitation’);

[56] EDPS is an independent supervisory authority whose primary objective is to ensure that European institutions and bodies respect the right to privacy and data protection.

[57] The Article 29 Working Party is an advisory body made up of a representative from the data protection authority of each EU Member State, the European Data Protection Supervisor and the European Commission.

[58] The AEFI Group assists the Commission to ensure the effectiveness of EU legislation on the automatic exchange of financial account information for direct taxation purposes. This work also includes the alignment of existing EU legislation in AEOI with the OECD global standard on automatic exchange of information of financial account information.

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');
(d) accurate and, where necessary, ('accuracy');
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed ('storage limitation');
(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

Article 6 of the GDPR at letters (e) and (f) in particular mandates that processing of FATCA Data shall be lawful only if the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. In particular it is mandated by Article 6 that processing of FATCA Data is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

In conclusion data protection rules should play a significant role in taxpayer protection in AEOI and FATCA. Thanks to the improvements that the GDPR has made in comparison to the Data Protection Directive, the protection that the EU provides for taxpayers via the principle of proportionality should be complied with the FATCA procedures, including data collection, data transfer and data retention. In conclusion data transfer under FATCA to the U.S. requires an adequate level of protection through substantial provisions in IGAs.

5.1.2. Restrictions to the right of FATCA Data protection

Obviously there is a tension between the right of taxpayers to the protection of their FATCA Data and the need of tax authorities – including U.S. tax authorities – to have access to data to enforce their tax provisions, even with an extraterritorial reach. Article 23 of the GDPR lists a set of restrictions to the right of data protection and provides that Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in the GDPR *when such a restriction respects the essence of the fundamental rights and freedoms* and is a *necessary and proportionate measure in a democratic society to safeguard a* set of societal values. Among them, in respect to FATCA Data, Article 23, lett. (e), indicates "other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security.".

It follows that to prove that the restrictions imposed in relation to FATCA Data are justified under the GDPR, the following requirements must be met: (i) such restrictions must be introduced in Union or Member State law; (ii) such restrictions respect the essence of the fundamental rights and freedoms; and (iii) such restrictions are a necessary and proportionate measures in a democratic society.

Requirement (i) is met by IGAs in so far as they become part of EU domestic laws, while requirement (ii) implies a complex legal analysis about the essence of fundamental rights in the digital world which cannot be conducted here: it is well known that there are concerns that new surveillance technologies deployed by the public sector could have anti-democratic outcomes, while the expansive surveillance set up under FATCA is at the same time insufficient to catch tax evaders and disproportionate in respect to a vast array of law-abiding individuals.

So essentially the issue is about requirement (iii), i.e. whether FATCA restrictions operating within the EU through IGAs are *necessary and proportionate measures*. In this respect there are certain critical indicators of the lack of these requirements in current FATCA practice. First, U.S. expatriates generally do not use the EU financial system to engage in offshore tax evasion. Second, FATCA does not request the existence of indicia of unlawful behavior of taxpayers, so that it raises compliance costs for persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote, with tax evasion. Finally, most of the non-resident "U.S. Persons" falling under FATCA obligations do not effectively owe U.S. taxes so that FATCA just expose them to onerous fines and penalties for even inadvertent filing and reporting errors.

In conclusion, FATCA restrictions operating within the EU through IGAs at the current stage and under certain circumstances appear to be neither proportionate, nor necessary in so far they fail to narrow down the reporting obligations to individuals suspected of tax evasion. By contrast, these FATCA restrictions would constitute "necessary and proportionate measures" upon the condition that the U.S. provided, on a case-by-case basis, specific evidence that U.S. expatriates are using the EU financial system to engage in offshore tax evasion. Lacking such evidence FATCA restrictions appear to go beyond what is strictly necessary to achieve the goal of fighting against offshore tax evasion.

The remark that FATCA restrictions do not constitute "necessary and proportionate measures" were already advanced by the WP29 in a letter of 21 June 2012, in which it stated: "… FATCA must be mutually recognized as necessary from an EU perspective. This requires … a careful assessment of how FATCA's goals balance with that of … the right to a private and family life, i.e. by demonstrating necessity by proving that the required data are the minimum necessary in relation to the purpose A bulk transfer and the screening of all these data is not the best way to achieve such a goal".

Similarly, in a letter of 18 September 2014 on CRS, the WP29 underlined that: "… 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". It also observed that: "The practical roll-out of CRS in Europe based on existing FATCA solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposed to amend the Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. This Directive – which could be considered as transposition of the U.S. FATCA and CRS in EU law – so far falls short of data protection safeguards"

5.1.3. Transparency and access to FATCA personal data

Article 12-15 of the GDPR expressly protect the rights of the data subject in terms of transparency and access to personal data and clearly applies to FATCA. Article 12 of the GDPR imposes on the controller the duty to take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language. Article 13 defines the information to be provided where personal data – such as FATCA Data - are collected from the data subject and regulates access to personal data. Article 14 defines the information to be provided where personal data – such as FATCA Data - have not been obtained from the data subject. Finally Article 15 establishes the right of access by the data subject providing that the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data – such as FATCA Data - concerning him or her are being processed, and, where that is the case, access to the personal data and information about the data being used.

The IGAs bypass these data protections afforded by the GDPR as they do not contain provisions that would require a EU FFI to provide notice to its clients that are qualified under FATCA as U.S. Persons that information is being collected on for eventual sharing with U.S. tax authorities. The IGAs should incorporate such notice provisions to encourage transparency with respect to bank information collection practices. A client who objects to such collection practices would hence be able to choose another EU financial institution that is exempt from the IGAs. To comply with the GDPR EU financial institutions under the IGAs must collect and disclose details on the amounts on deposit and transactions relating to assets.

5.1.4 Transfers of FATCA Data to a third country

Under the IGAs, all account-holders who are U.S. Persons will have their account information transferred - directly or indirectly through domestic tax authorities - to U.S. tax authorities who will regularly collect information on EU citizens. So personal data under FATCA are transferred to a third country, the U.S. Chapter V of the GDPR introduces now special safeguards to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined when this occurs.

According to Article 44 transfers of personal data – such as FATCA Data - which are undergoing processing or are intended for processing after transfer to the U.S. shall take place only if the conditions laid down in Chapter V are complied with by the controller and processor, including for onward transfers of personal data from the U.S. to another third country. According to Article 45 a transfer of such personal data to the U.S. may take place without any specific authorisation if the Commission has decided that the U.S. ensures an adequate level of protection. This decision shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the U.S.

According to Article 46 in the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data such as FATCA Data to the U.S. only if the controller or processor has provided “appropriate safeguards”, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. These appropriate safeguards may be provided, in the case of FATCA Data, for by (a) a legally binding and enforceable instrument between public authorities or bodies, or by (c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93(2).

Neither the Commission’s authorization nor the “appropriate safeguards” are, at the current stage, in place, so Article 49 applies to FATCA Data. According to Article 49 in this case the transfer of FATCA Data to the U.S. shall take place only on one of the following conditions: (a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards; (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request; (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person; (d) the transfer is necessary for important reasons of public interest;

At the current stage - when the Commission's authorization nor the "appropriate safeguards" have been introduced - essentially the issue is whether the transfer of FATCA Data to the U.S. is necessary for "important reasons of public interest" (Article 49, lett. d), namely the prevention of tax evasion. As the IGAs are not reciprocal, in this context the public interest to the prevention of tax evasion is only of the U.S., but not of the EU. This a critical indicator that requires turning IGAs in genuine reciprocal instruments of bilateral exchange of information. In addition under the GDPR, businesses should develop systems to protect data against unauthorized outside scrutiny. The IGAs do not contain similar prescriptions, so a danger will arise when extensive bulk information on EU account-holders is held within a I.R.S. database, which could be accessed by third parties for illegal purposes.[59]

It is worth noting that Article 49 also requires that, when the Commission's authorization nor the "appropriate safeguards" nor the derogations listed above apply, a transfer of FATCA Data to the U.S. may take place *only if* the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

5.1.5. The right to rectify FATCA Data

Article 16 of the GDPR establishes a right to rectification that clearly applies to FATCA Data. So the subject has the right to obtain from the controller without undue delay the rectification of inaccurate FATCA Data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

The IGAs contain a version of this right although it is only available to the tax authorities of each country. The IGAs in fact may indicate that a tax authority shall notify the other authority when it has reason to believe that administrative errors or other minor errors may have led to incorrect or incomplete information reporting or resulted in other infringements of the IGAs. These IGAs then indicates that each tax authority must try to obtain the corrected information or to resolve other infringements of the IGAs. So under current IGAs there does appear to be any mechanism whereby a

[59] The U.S. I.R.S. suffers lapses in data security and was recently taken to task over this issue by the Government Accountability Office https://www.washingtonpost.com/news/powerpost/wp/2016/03/30/weak---irs---controls---leave--- taxpayer---data---vulnerable---report---says/ 1 September 2016.

EU bank client can have his or her personal information corrected through this procedure outside of lengthy and costly treaty dispute resolution processes.

5.1.6. Challenging compliance

Large amount of data of EU taxpayers are transferred under pursuant to the IGAs, and therefore errors can be made by U.S. tax authorities that could lead to improper audits and investigations, or by EU financial institutions that could lead to their legal liability for negligent transfer of incorrect information to U.S. tax authorities. Article 77 and 78 of the GDPR establish now the right to lodge a complaint with a supervisory authority and the tight to an effective judicial remedy against a supervisory authority, so essentially the GDPR declares that an individual may bring a challenge a failure of compliance. There are no similar provisions within the IGAs. At the current stage a EU taxpayer who protests that FATCA Data hava been improperly used, collected, or disclosed could only resort to the treaty mutual agreement procedure, which does not appear to be an expedite means when compared to simply filing a complaint for an alleged violation of GDPR with the supervisory authority.

5.2. FATCA Data and substantive safeguards

An important question is whether FATCA violates the right to privacy in requesting personal data for tax reasons based on interest in preventing tax evasion. It should be noted that the notion of privacy in tax law is not as broad as in other areas of law: taxpayers cannot claim the right to be let alone or be free from governmental intrusion because at stake, in tax matters in an overarching national interest . The European Court of Human Rights (ECtHR) in decisions about Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) has been recently raised in G.S.B v Switzerland which concerned the transmission to the U.S. tax authorities of the applicant's bank account details in connection with the mutual assistance agreement signed between Switzerland and the U.S. after the UBS scandal. The ECtHR held that there has been no violation of Article 8, since "only his bank account details, that is to say purely financial information, had been disclosed. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted".

So in the context of taxation and, in particular, within the process of international exchange of information, individuals have procedural rights that take the form of a right to data protection (see above § 5.1) such as the right to be informed of the information request, or right to participate to the investigations in the requested State, or the right to challenge the assessment decision in the requesting State. So the absence of a procedural right (notification, consultation or intervention) might constitute an infringement of the substantive right, i.e., the right to privacy because taxpayers are not be in the position to effectively protect this substantive right without any basic procedural right. This infringement on substantive rights can occur in respect Articles 14 and 8 of the ECHR (§ 5.2.1. and § 5.2.2.).

5.2.1. Compatibility of FATCA with Article 14 of ECHR

In respect to Accidental Americans, in addition to the right of data protection (see above § 5.1), the treatment of FATCA Data also may imply the infringement of substantive fundamental rights protected at the EU level because there is ample evidence that European financial institutions are systematically identifying customers whom they believe may be U.S. persons for the purposes of FATCA denying them banking services for fear of being subject to FATCA reporting. So the first substantial concern is discrimination: Article 14 of the ECHR prohibits any discrimination on "any grounds such as … national or social origin". In its decisions the ECtHR has applied a broad definition to discrimination as "treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations".[60] Similarly, Article 14 of Payment Account Directive ("PAD") enshrines the principle that banks must not discriminate against consumers legally resident in the EU when applying for a payment account for reasons connected to, among other matters, nationality. PAD also requires all Member States to ensure that consumers have access to a payment account with basic features .

The ECJ's perspective on disparity of treatment is aligned with the generally accepted view that (i) discrimination consists of acts, practices, or policies that impose a *relative disadvantage* on a *controlled group of persons* who belong to a distinct social group (the Accidental Americans), and (ii) such a disadvantage is to be determined in relation to an appropriate *benchmark comparison group* (all the other EU taxpayers). In the case at hand the controlled group is precluded from financial services (such as private pension schemes, mortgages, life insurance, access to financial products) necessary in order to work, live and plan for the future. The controlled group (the Accidental Americans) is treated unfavourably by comparison to the benchmark comparison group.

There is no justification for this discrimination because in the words of the ECtHR "a difference in the treatment of persons in relevantly similar situations is discriminatory if it has no objective and reasonable justification; in other words it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised"[61]

5.2.2. Compatibility of FATCA with Article 8 of ECHR

While Article 14 of the ECHR focuses on discrimination, Article 8 of the ECHR focuses directly on the fundamental right to respect for private and family and provides: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

So in respect to Accidental Americans also Article 8 of the ECHR is relevant because FATCA's aim to prevent tax evasion of U.S. Persons does not justify the widespread interference with the privacy rights of European citizens and European residents. According to the ECtHR the concept of "private life" must be construed extensively and in particular that the collection by a State of personal data, without the individual's consent, does concern "private life".[62] Examples of interferences on private life in the ECtHR case law include information obtained as part of a census, medical data, so it can be argued that, in

[60] Kiyutin v Russia – 2700/10 (March 2011); Luczak v Poland – 77782/01 (27 November 2012); Timishev v Russia – 55762 and 55974-00 (13 December 2005) 1 September 2016.
[61] Burden v United Kingdom – 13378/05 (29 April 2008).
[62] X v United Kingdom – 9072/82 (6 October 1982); Murray v United Kingdom (28 October 1994) and Leander v Sweden (26 March 1987) 1 September 2016 9 c.

certain circumstances, FATCA may amount to an illegitimate interference with “private life”. In these cases FATCA extraterritorial U.S. provisions that trigger such an interference with the European resident’s “private life” do not conform to European norms.
There are a number of exceptions under Article 8.2 pursuant to which a public authority may interfere with this right. The “interference” created by FATCA does not pursue a legitimate aim because FATCA does not promote, in the EU context, “the interests of national security”, nor do they protect “public safety”, “health and morals”, the “rights and freedoms of others” the “economic well-being of the country”. By contrast, because of IGAS lack of reciprocity (see above § 4.1), these goals are not pursued by both the U.S. and the EU in a cooperative manner, but it is only the U.S. that pursues its own national interests. For exactly the same reason this “interference” can be deemed to be aimed at preventing “disorder and crime”.

Is it not proportionate to infringe the “private life” of European citizens (whether “accidentals”, dual nationals or U.S. expatriates) in order for the U.S. prevent the tax evasion by of individuals who are U.S. tax-residents. Pursuant to ECtHR case law the extent to which Member States have been allowed to collect, store and use personal information belonging to an individual, without their consent, generally requires some threat (e.g. criminal or terrorist activities, etc.). FATCA on the other hand introduces a systematic identification by FFIs of all persons with U.S. indicia, regardless of any effective wrongdoing and with no judicial oversight.

6. CONCLUSIONS AND POLICY SUGGESTIONS

This study concludes with a set of policy suggestions that are divided in four classes:
1. bilateral EU-U.S. policies;
2. unilateral EU policies;
3. unilateral U.S.policies; and
4. multilateral policies.

6.1. Bilateral EU-U.S. policies

6.1.1. Modifications of IGAs to align with GDPR

At the time IGAs were concluded the GDPR was not in force yet, but now the GDPR establishes a fundamental *right to data protection* confirmed by Article 16 of the TFEU. IGAs appear to bypass rather than meet the data protections afforded by the GDPR. For instance, the IGAs harm taxpayer rights if personal information is not be used by the I.R.S. for the tax-based purpose for which it was collected. Moreover EU banks coerce their customers into providing personal information as a condition of access to banking services.

Before the GDPR, under Article 13 of the Data Protection Directive the assessment of the necessity and proportionality of such limitations was left to the discretion of the Member States. Now the GDPR eliminates these potential uncertainties for taxpayers in cross-border situations subjected to AEOI and FATCA. Data protection rules should play a significant role in taxpayer protection in AEOI and FATCA: the principle of proportionality under the GDPR in respect to the Data Protection Directive, should be complied with by FATCA procedures, including data collection, data transfer and data retention. In conclusion data transfer under FATCA to the U.S. requires an adequate level of protection through substantial provisions in IGAs.

IGAS therefore should be updated and supplemented by provisions in line with the GDPR which ensure that financial information transferred to the U.S. is afforded data protection. The EU should undertake a review and explore amendments to IGAs. The violation of data protection rights may erode the legitimacy of the AEOI that occurs in FATCA.

The GDPR provides a list of requirements that should be considered in amending IGAS:
- Article 5 of the GDPR provides a set of principles relating to processing of personal data under FATCA.
- Article 6 of the GDPR at letters (e) and (f) in particular mandates that processing of FATCA Data shall be lawful only if the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.
- Article 23 of the GDPR provides that Union or Member State law may restrict by way of a legislative measure the scope of the obligations and rights provided for in the GDPR *when such a restriction respects the essence of the fundamental rights and freedoms* and is a *necessary and proportionate measure in a democratic society to safeguard a* set of societal values. So IGAs should be modified to stipulate that FATCA restrictions constitute “necessary and proportionate measures” upon the condition that the U.S. provides, on a case-by-case basis, specific evidence that U.S. expatriates

are using the EU financial system to engage in offshore tax evasion. Lacking such evidence FATCA restrictions appear to go beyond what is strictly necessary to achieve the goal of fighting against offshore tax evasion.

- Article 12-15 of the GDPR expressly protect the rights of the data subject in terms of transparency and access to personal data, so IGAs should be supplemented by provisions that require an EU FFI to provide notice to its clients that are qualified under FATCA as U.S. Persons that information is being collected on for eventual sharing with U.S. tax authorities.
- Article 44-49 of the GDPR contain provisions about the transfer of FATCA Data to the U.S.: because the Commission's authorization nor the "appropriate safeguards" are yet in place, Article 49 applies to FATCA Data, so IGAs should provide systems to protect data against unauthorized outside scrutiny.
- Article 16 of the GDPR establishes a right to rectification that clearly applies to FATCA, so that IGAs should contain such right for taxpayers.
- Article 77 and 78 of the GDPR establish the right to lodge a complaint with a supervisory authority and the right to an effective judicial remedy against a supervisory authority, so IGAs should specifically contain clauses that subject FATCA Data flows to such safeguards.

6.1.2. Renegotiation of IGAs to make them truly reciprocal

There are arguments to consider that the IGAs lack a serious level of reciprocity, imposing more liabilities for the IGA Partners than for the U.S. in the exchange of information . The stance taken by the U.S. to refuse to fully reciprocate under IGAs constitutes solid grounds to renegotiate their IGAs to re-establish full reciprocity. The rationale of such renegotiation is that IGAs should be effectively based on reciprocity in ensuring that both contracting parties gain mutual benefits through cooperation

For Member States who concluded Model 1 IGAs with the U.S this renegotiation can occur at two levels: at the level of each individual Member State, and, in addition. collectively and with the support of the EU Commission.

6.2. Unilateral EU policies

In addition to bilateral policies that can be pursued by the EU with the agreement of the U.S., there is a set of unilateral EU policies, which are a second best choice, but which could be useful in reaching agreement with the U.S. about data protection and reciprocity.

Unilateral EU policies can be summarized as follows.

- The main guiding principle should be that the U.S.'s failure to honour reciprocal guiding information exchange could lead to an investigation into the possibility for the EU of enacting "*blocking legislation about reciprocity*" that would apply until such time as the reciprocity is re-established in relation to FATCA.

- An additional guiding principle should be that "*blocking legislation about selected items*" would apply until such time as certain FATCA criticalities in respect European Accidental Americans and dual European/U.S. citizens are mitigated by the U.S. If the EU were to block the application of FATCA (pending resolution of the outstanding issues surrounding FATCA) and, as a result, the U.S.

were to impose a 30% withholding on U.S. source payments to EU financial institutions, the EU could apply a mirroring withholding on EU source payments to U.S. financial institutions and their operations in the EU.

- Another unilateral action which could be pursued by the EU would be to *allow only transfers of FATCA Data associated with U.S. Persons who are not EU residents* until a predefined set of bilateral measures are adopted, for example: (a) renegotiation of IGAS to afford reciprocal treatment with respect to AEOI; and (b) establishment of safeguards to data protection under GDPR (see details below). This would imply that FATCA would continue to operate in respect to transfers of FATCA Data associated with U.S. persons who are not EU residents or citizens, but there would be standstill clause for transfers of FATCA Data associated with U.S. persons who are EU residents or citizens.

- The GDPR together with case law of the CJEU has exerted an influence over the legislative process in the data protection area, particularly in terms of its interpretation of the principle of proportionality. Accordingly, the protection of taxpayers enhanced in the form of higher standards for the imposition of legislative restrictions on taxpayers' rights should be introduced into the *Directive on Administrative Cooperation in line with Article 23 of the GDPR*.

- Article 35 of the GDPR introduces the duty for the controller of routinely conducting a *data protection impact assessment* which should be extended and applied to tax AEOI and to FATCA Data. So where a type of processing such a FATCA Data is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data.

- Finally, in a very broad sense, another unilateral EU policy is the development of *judicial protection by national courts and by the ECHR*. One should expect that, in addition to judicial enforcement of data protection rights under the GDPR (see above), also judicial enforcement of Article 14 of ECHR (which focuses on discrimination), and Article 8 of the ECHR (which focuses on the fundamental right to respect for private and family) should be protected by national courts and the ECHR as a result of claims by EU citizens who are Accidental Americans.

6.3. Unilateral U.S. policies

In addition to bilateral policies that can be pursued by the EU with the agreement of the U.S., there is also a set of policies that the U.S. could develop unilaterally, particularly in mitigating or repealing FATCA or in modifying certain aspects of the U.S. citizenship-based taxation which are particularly vexing for Accidental Americans. Of course in this respect the EU should use all available political and diplomatic communication channels with the U.S.

6.3.1. Mitigating FATCA

The following are suggestions for modifying certain aspects of FATCA which could certainly mitigate, at least, in part, the issues highlighted by this Paper.

- low-risk accounts as indicated by certain "red flags" could be exempted from FATCA reporting; this would mitigate the burden for Accidental Americans who clearly do not pursue tax evasion;
- the lower limit for FATCA reporting could be increased from $50,000 to $500,000; this would mitigate the burden for low income Accidental Americans.

6.3.2. Modifications of citizenship-based taxation

In addition to mitigating FATCA, the U.S. could unilaterally modify certain aspects of the U.S. citizenship-based taxation, which were exacerbated by the operation of the FATCA two-step classification system (collection by FFIs of a list of U.S. indicia and self-certification).

In a broad sense citizenship-based taxation is under scrutiny in the U.S. and scholars have surmised that the current U.S. jurisdictional claim is inconsistent with international law and that foreign lawmakers or courts are thus not obligated to enforce FATCA to the extent its effect is to subject their own residents to U.S. citizenship-based taxation.[63] More specifically, insisting upon foreign cooperation with the FATCA regime, under threat of serious economic penalties, is inconsistent with universally accepted norms regarding appropriate limits to the State's jurisdiction to tax, while also being normatively unjustified.[64]

In particular absolute birthright citizenship and automatic jus sanguinis citizenship are now problematic from a rights perspective to the extent the regime attributes citizenship to individuals – such as Accidental Americans under FATCA - with no social attachment to the U.S, while maintaining high barriers to opting-out U:S: citizenship. The attribution of citizenship coupled with significant attendant obligation even when actual tax liabilities are minimal, in the absence of a genuine link without the possibility of frictionless exit may infringe individual rights under international law

There are various proposal being advanced in the U.S., but for the purposes of FATCA problems in the EU, the following are potential changes that the EU could strongly express agreement to a U.S. legislation prodiving:

- exit from U.S. citizenship by Accidental Americans on a no fees, no penalties, no filing and no reporting basis (Accidental Americans and European/U.S. dual nationals should not be considered as potential significant tax evaders because their tax obligations are sufficiently minimal so as not to trigger concerns).
- elimination of FATCA obligations attached to the status Accidental Americans and European/U.S. dual nationals, maintaining U.S. citizenship for these individuals .

6.4. Multilateral policies

Tax AEOI and FATCA were established as multilateral measures in the fullest sense of the elimination of any kind of free rider to a global system of full sharing of tax information among countries. The 2009-2010 OECD campaign for transparency and the EU called for a "new global standard for automatic

[63] P. J. Spiro, (2016). Citizenship Overreach. *Mich. J. Int'l L.*, *38*, 167.
[64] A. Christians (2016). A Global Perspective on Citizenship-Based Taxation. *Mich. J. Int'l L.*, *38*, 193.

exchange of information to tackle tax evasion, based on the U.S. FATCA legislation,'' and the "Common Reporting Standard" established a truly multilateral framework for countries to exchange information automatically relying on the FATCA approach.

In tax AEOI multilateralism can be viewed as the sum of many bilateral agreements fully based on reciprocity. Unfortunately the U.S. has developed bilateral IGAs in the EU which are *not* effectively operating on the basis of reciprocity, so that the multilateral system which was initially envisaged by the EU and the U.S. is collapsing. Moreover the U.S. does not intend to adhere to the Common Reporting Standard.

Multilateralism in tax AEOI should therefore revived at EU-U.S. level going back to the spirit of FATCA as an initiator of multilateralism.[65] The U.S. could consider a multilateral approach as a way to increase the chances of success of the FATCA system.

If other countries through a multilateral instrument were willing to collect and exchange FATCA-like data, then the disincentive toward foreign investments in the U.S. capital market provoked by FATCA would be diluted. Moreover an alignment of data protection safeguards in a multilateral instrument would reduce the conflicts of FATCA with EU and local laws. Finally, U.S. expatriates could avoid suffering prejudices for their U.S. citizenship since, through multilateral cooperation, they would withstand the same reporting requirements as other countries' citizens. Finally, the costs of FATCA's implementation could be reduced via direct cooperation between the U.S. and foreign governments.

By contrast, if the U.S. maintains the current unilateral FATCA approach with all the criticalities described above, the success of FATCA will be determined exclusively by the behavior of FFIs and will be subject to their willingness to continue to bear the compliance cost and to keep their investment in the U.S. financial markets, while opposition by other governments may grow.

[65] I. Grinberg,, Beyond FATCA: An Evolutionary Moment for the International Tax System (27 January 2012), available at SSRN: https://ssrn.com/abstract=1996752 or http://dx.doi.org/10.2139/ssrn.1996752.

This study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, analyzes FATCA legislation and its application at international and EU level: it first provides a global overview on exchange of tax information and of the FATCA mechanisms applied through intergovernmental agreements. The study then describes the extraterritorial nature and negative externalities of FATCA, in particular its impact on U.S. citizens abroad and the potential conflicts with EU law, with specific attention to the right of FATCA data protection under the GDPR. It concludes with suggestions for bilateral and unilateral EU-U.S. policies, with final remarks on a multilateral approach.

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