

Mrs **Marie-Laure DENIS**

Chair of the French data protection authority (CNIL)
Paris

Mr **Richard Yung**

French Senator
Paris

Africa House
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FATCA

Dear Mr Yung

I have read the [response from the Chair of the French data protection authority \(CNIL\)](#) to your lettre concerning the [EDPB Statement 4/2021](#) concerning the transfer of personal data from the EU to third countries, notably in the context of automatic exchange of information.

The response from the Chair of the CNIL is, to put it mildly, unacceptable.

1. The response refers solely to the decision from the French *Conseil d'Etat* of [July 2019](#) concerning an appeal from the Association of Accidental Americans.
2. The Chair of the CNIL omitted to mention any relevant developments since that date.
 - 2.1 She omitted to mention the [judgment of 16 July 2020 by the CJUE](#) (the Court of Justice of the European Union) in the *Schrems II* case by which the Court declared the transfer of personal data from the EU to the US to be illegal because of the absence of an adequate level of data protection in the US and gaps in the legal protection of such data resulting from the interference from US intelligence services.
 - 2.2. She also ignored the [internal documents from the European Commission](#) that were presented before the European Parliament on 10 November 2020 in the presence of a representative of the CNIL.
 - 2.3 Those internal documents (which were not known to the *Conseil d'Etat* in 2019) show that – before the conclusion of the conclusion of the FATCA agreement between France and the US in 2013 – the European Commission raised 'worrying concerns' about the repercussions of FATCA for individuals' fundamental rights to privacy and data protection guaranteed under EU law.
 - 2.4 As regards the **"requirement for adequate safeguards in the receiving country to guarantee a protection essentially equivalent to that guaranteed within the European Union"** which is at the core of the *Schrems II* judgment, the internal documents from the European Commission include a note prepared by the tax department of the Commission (Taxud) on 28 November 2011 which came to the following conclusion:

"Our data protection experts, following their examination of the US reply, believe that the US data protection rules do not offer the same standard of protection as EU data protection laws".

- 2.5 La Chair of the CNIL also omitted to mention the [resolution adopted on 10 May 2021 by the European Parliament](#) which is openly critical of the European Commission and the national data protection authorities in relation to FATCA. As regards the national data protection authorities, the European Parliament said what follows:

"The European Parliament is concerned about the insufficient level of enforcement of the GDPR, particularly in the area of international transfers; expresses concerns at the lack of prioritisation and overall scrutiny by national supervisory authorities with regard to personal data transfers to third countries, despite the significant CJEU case law developments over the past five years; deplores the absence of meaningful decisions and corrective measures in this regard"

- 2.6 Turning to the European Commission, the European Parliament had this to say:

"The European Parliament deplores that the Commission put the relations with the US before the interests of EU citizens, and that the Commission thereby left the task of defending EU law to individual citizens."

3. By forgetting to mention these developments in her response to a Senator of the Republic, the Chair of the CNIL displayed the same level of political opportunism of the European Commission and an abject lack of independence towards the executive branch that concluded a FATCA agreement with the US notwithstanding and against the negative opinion expressed by the predecessor of the EDPB (the Article 29 Data Protection Working Party) in an [opinion dated 21 June 2012](#) to the Commission:

"FATCA doit être mutuellement reconnu comme nécessaire du point de vue de l'UE... Un transfert massif et le filtrage de toutes données n'est pas le meilleur moyen d'atteindre un tel objectif. Par conséquent, des mesures plus sélectives et moins larges devraient être envisagées afin de respecter la vie privée des citoyens respectueux de la loi."

"FATCA must be mutually recognised as necessary from an EU perspective... A bulk transfer and the screening of all these data is not the best way to achieve such a goal. Therefore more selective, less broad measures should be considered in order to respect the privacy of law-abiding citizens, particularly; an examination of alternative, less privacy-intrusive means must be carried out to demonstrate FATCA's necessity."

4. But it goes further than that. By her approach the current Chair of the CNIL seeks to demolish the courageous work of her predecessor, [Isabelle Falque-Pierrotin](#), who as Chair of the CNIL and the WP20 wrote a [letter dated 12 December 2016](#) to the European Commission that contained the following admonishing words:

"Significant and more recent case law from the European Court of Justice has made it even more urgent to ensure that transfers of data from the EU to third countries are accompanied by appropriate data protection safeguards and emphasized the role of data protection authorities in the supervision of such data transfers."

Against this background, the WP29 wishes to reiterate its strong concerns regarding the repercussions on fundamental rights of mechanisms entailing major data processing and exchange operations..."

5. As regards the powers of the CNIL, the [European Court of Justice confirmed last week](#) the power of national data protection authority to bring infringements of that regulation to the attention of the judicial authorities and, where appropriate, to initiate or engage otherwise in legal proceedings. The CJEU also stressed the requirement of independence of national data protection authorities in the first [judgment dated 6 October 2015](#) in the *Schrems* saga concerning the transfer of personal data to the US:

"The establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data.

To this end, the national supervisory authorities have a wide range of powers...in particular, investigative powers... and effective powers of intervention, such as that of imposing a temporary or definitive ban on processing of data, and the power to engage in legal proceedings."

Against this backdrop, I do hope that you will take up this matter with the Chair of the CNIL and ask her to clarify the reason for the omissions contained in her response to you and also remind her the need for the CNIL to discharge its duty of independence and exercise its supervisory powers in line with the existing case law.

For additional information concerning our data protection campaign, I would refer you to our correspondence with the CNIL, the EDPB and the European Parliament that is available [online](#).

Best regards,

Filippo Nosedà

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Annex: letter dated 16 June 2021 from Ms Marie-Laure Denis (CNIL Chair) to Senator Yung

La Présidente

Monsieur Richard Yung
Sénateur représentant les français établis hors de
France
Sénat
15 rue de Vaugirard
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Paris, le **16 JUIN 2021**

N/Réf. : MLD/TIT

Monsieur le Sénateur,

Votre lettre relative à la mise en œuvre de la loi américaine dite « FATCA » m'est bien parvenue. Je vous en remercie.

Vous attirez très justement mon attention sur la diffusion auprès des autorités compétentes de la récente déclaration du Comité européen de la protection des données (CEPD) du 13 avril 2021.

Au niveau européen, cette déclaration est le produit d'un travail collectif avec nos homologues réunis au sein du CEPD qui ont participé à l'élaboration et l'adoption de ce document. La Commission européenne, qui a un rôle important à jouer dans le dossier, était également présente aux discussions ayant présidé à son adoption et a donc par conséquent une connaissance précieuse de son contenu sur lequel il conviendra de s'appuyer.

S'agissant de ce dossier et, plus généralement, des échanges automatiques de données fiscales, nous avons déjà eu l'occasion d'aborder ces questions avec nos interlocuteurs en France et nous avons également porté à leur connaissance la déclaration précitée.

Au niveau national, ce dossier a fait l'objet d'une décision du 19 juillet 2019 du Conseil d'Etat qui a rejeté le recours de l'Association des Américains accidentels tendant à obtenir l'abrogation des actes réglementaires transposant, en droit interne, l'accord « FATCA ».

Le Conseil d'Etat a estimé tout d'abord que l'accord « FATCA » est bien appliqué par les États-Unis, de sorte qu'il peut bien produire des effets en droit interne. Il a ainsi jugé que les actes réglementaires pris pour son application ne se trouvaient pas dépourvus de base légale. Le Conseil d'Etat a considéré ensuite que la collecte et le transfert d'informations autorisés résultant de la mise en œuvre de l'accord « FATCA » ne méconnaissent ni le droit de la protection des données personnelles ni le droit au respect de la vie privée.

Refusant d'interroger la Cour de justice de l'Union européenne sur la compatibilité d'un tel mécanisme avec le droit européen, la Haute Juridiction a ainsi écarté l'argumentation de l'association dénonçant le caractère massif des échanges autorisés ainsi que l'absence de garanties suffisantes encadrant ces transferts.

Vous pouvez néanmoins compter sur l'implication constante de la CNIL dans ce dossier.

Je vous prie d'agréer, Monsieur le Sénateur, l'expression de ma considération distinguée.

Bien à vous,


Marie-Laure DENIS