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Herrn Frank Schäffler  
Member of the German Parliament  
Platz der Republik 1  
11011 Berlin

22 June 2021

cc. BfDI, EDPB, Europarl (PETI), Council of Europe (T-PD)

Dear Mr Schäffler

### **FATCA | German data protection commissioner's reply to your query**

I have seen the [response](#)<sup>1</sup> of the Federal Commissioner for Data Protection and Freedom of Information (**BfDI**) to your enquiry on the data protection aspects of the Foreign Account Tax Compliance Act (FATCA), namely the compatibility of FATCA with the General Data Protection Regulation (GDPR) in the light of [Statement 4/2021](#) from the European Data Protection Board (EDPB).

The core statement of the German data Protection Commissioner is as follows:

*"At the end of the day, the enforcement can only take place through international negotiations, because one has to consider the contractual obligations of the German Federal Republic under international agreements"*

*Ulrich Kelber"*

The reply from the German Data Protection Commissioner is unacceptable.

The BfDI forgets that according to settled case law from the Court of Justice of the European Union (**CJEU**) national data protection authorities have a right of direct intervention, see e.g. the recent judgment in the *Facebook case* which was handed down as recently as 15 June 2021 ([C-645/19](#)):

*"The Court recognises the **direct effect of the provision of the GDPR** under which national supervisory authorities are to have the power 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 Facebook judgment is merely a reiteration of the [Schrems principle](#) first enunciated in the first Schrems judgment of 6 October 2015:

<sup>1</sup> I am grateful to Fabien Lehagre, chairman of the Association of Accidental Americans, for bringing this correspondence to my attention

- <sup>41</sup> The establishment of independent supervisory authorities in Member States is an essential component of the protection of individuals with regard to the processing of personal data (see judgments in *Commission v Germany* and *Commission v Hungary*).
- <sup>43</sup> The national supervisory authorities have a wide range of powers for that purpose... 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.
- <sup>65</sup>...that authority must...be able to engage in legal proceedings. It is incumbent upon the national legislature to provide for legal remedies...to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity.

At the heart of the *Schrems* case lay an international agreement between the EU and the US. Regardless of this fact, the CJEU held that national data protection authorities had a direct right of intervention to bring legal proceedings to enforce individuals' fundamental rights.

The same must apply *mutatis mutandis* for an international agreement between a Member State of the EU and the US.

The clear impression that one has from the reply from the German Data Protection Commissioner to your query is that he does not wish to discharge his independence vis-à-vis the German government, which according to the case law from the CJEU represents an 'an essential component of the protection of individuals with regard to the processing of personal data'.

In this context, I should add that the European Parliament recently criticised the EDPB and national data protection authorities for their lack of initiative in its [latest FATCA resolution](#) that was adopted on 20 May 2021:

"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, and urges the EDPB and national supervisory authorities to include personal data transfers as part of their audit, compliance and enforcement strategies"

The European Parliament also criticised the European Commission as follows::

"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"

However, it is the duty of the German Data Protection Commissioner to enforce the provisions of the GDPR and the fundamental rights to privacy and data protection enshrined in the EU Charter of

fundamental rights, independently of any political considerations, in particular with regard to the principles of data minimisation<sup>2</sup> and necessity<sup>3</sup>.

As regards the principle of proportionality and necessity, the 20 May resolution from the European Parliament on FATCA states plainly as follows

*"... the bulk access by US public authorities to personal data transferred under the Privacy Shield fails to comply with the principles of necessity and proportionality".*

The European Parliament had already reached the same conclusion in a detailed [study on FATCA](#) published on 14 May 2018 (at pp 30 et seq):

*"According to Article 5 GDPR such personal data shall be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed ('data minimisation').*

*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...*

*So essentially the issue is about 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 behaviour of taxpayers so there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote, with tax evasion.*

*In conclusion, FATCA restrictions operating within the EU at the current stage appear to be neither proportionate, nor necessary in so far they fail to narrow down the reporting obligations to individuals suspected of tax evasion."*

Previously, the predecessor of the EDBP (the [Article-29-Working Party](#)), die [AEFI Group of experts](#) appointed by the European Commission as well as the Commission's own tax department ([Taxud](#)) reached the same conclusion. In particular, the Article-29-Working Party warned the Commission on the lack of proportionality in its very first opinion on FATCA over 9 years ago, [21 June 2012](#):

*"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 to be carried out to demonstrate FATCA's necessity."*

<sup>2</sup> Art. 5 GDPR: 'Personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (**'data minimisation'**)'

<sup>3</sup> Art. 52 Charter: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the **principle of proportionality**, limitations may be made only if they are **necessary** and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

And the European Commission's tax department (Taxud) said the following in an internal note dated 28. November 2011 that was presented before the European Parliament in the presence of a representative of the German Federal Data Protection Commissioner on 10 November 2020 (see [here](#) on page 5):

*"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"*

The lack of sufficient safeguards is particularly relevant in the aftermath of the [second Schrems-judgment](#) of 16 July 2020 on the illegality of the transfer of EU data to the US, where the CJEU held as follows:

*"The GDPR must be interpreted as meaning that... data subjects whose personal data are transferred to a third country... are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter."*

In the light of the above, it is extraordinary that the German Federal Data Protection Commissioner did not mention these developments in his reply to your query on Statement 4/2021, as that Statement contains the following message:

*"The EDPB invites the Member States to assess and, where necessary, review their international agreements that involve international transfers of personal data, such as those relating to taxation (e.g. to the automatic exchange of personal data for tax purposes)..."*

*The EDPB recommends that Member States take into account for this review the GDPR and LED themselves, the relevant EDPB guidelines applicable to international transfers, as well as the case-law of the European Court of Justice, including the [Schrems II](#) judgment of 16 July 2020"*

One is left with the clear impression that the German Federal Data Protection Commissioner does not want to discharge his powers for reasons that are based on political convenience (which in itself is contrary to the principle of independence of national data protection authorities), because the German government was one of the first supporters of FATCA, as is evidenced by this [official statement issued on 11 December 2014](#): "On 9 April 2013, Pierre Moscovici — the French Minister of Finance at the time — and his British, German, Spanish and Italian counterparts sent a letter to the commissioner responsible for taxation in which they jointly requested that a European FATCA be established."

Against this backdrop I would hope that you will ask Prof. Kleber to provide you with a complete answer, in particular taking into account the "Schrems-principle" (independence and right to bring proceedings, even against the Commission) and the "Facebook-principle" (direct application of the GDPR enforcement mechanism).

For additional information on our data protection campaign in this area, I would refer you to our correspondence with the EU, which is available [online](#).

Best regards,

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