

Privacy Challenges Against FATCA Face Uphill Battle

By **Natalie Olivo**

Law360 (April 27, 2020, 7:08 PM EDT) -- Recent European Union data protection laws arguably create a new avenue for disputing U.S. Foreign Account Tax Compliance Act requirements, but privacy-related litigation has thus far been unsuccessful, leaving the path to future challenges unclear.

Earlier this year, the European Data Protection Board adopted guidelines to help ensure that transfers of personal data between government authorities comply with the bloc's General Data Protection Regulation, or GDPR. While specialists have said FATCA could be at odds with the EU's landmark data protection law, so far, courts in multiple countries have rejected cases claiming that countries' information-sharing agreements violate privacy rights — including those covered by the GDPR.



The U.S. Foreign Account Tax Compliance Act may be at odds with the EU's landmark data protection law, specialists have said. (AP)

Meanwhile, FATCA's role in countering offshore tax evasion means that the U.S. isn't likely to upend its data sharing agreements any time soon. For opponents of the measure, arguments of privacy violations still may be their only avenue for seeking changes.

"The privacy angle is the only way out of this, both in Europe and in the U.S.," said Pierre Ciric of the Ciric Law Firm PLLC, a French attorney based in New York. "It's the only thing that legally has some legs."

Last month marked 10 years since the enactment of FATCA, the sweeping requirement that has given the Internal Revenue Service access to financial information from around the globe. Aimed at ending bank secrecy and tax evasion, the statute inspired the Organization for Economic Cooperation and Development to establish its common reporting standard for other countries to exchange and collect taxpayer data.

Under FATCA, countries exchange information with the U.S. through bilateral intergovernmental agreements, or IGAs. Foreign financial institutions must disclose information on U.S. citizens' accounts or face a 30% withholding tax on payments from the U.S. This threat of a withholding tax has prompted claims that foreign banks are violating customers' privacy by sharing their information with the U.S. government or discriminating against them by denying banking access.

Such concerns have been expressed by so-called accidental Americans — people who were born in the U.S., and thus are subject to citizenship-based taxation, but have little connection to the country otherwise. A number of European politicians have also raised privacy concerns, some of them after the GDPR took effect in May 2018.

In a letter sent to the EU's commissioner for taxation earlier this month, a Dutch member of the European Parliament asked whether the European Commission — the EU's executive arm — has studied the European Data Protection Board's guidelines for GDPR compliance. The member, Sophie in 't Veld, also sought agreement from the commission that “none of the intergovernmental agreements between the member states and the U.S. on FATCA is in line with these principles.”

A representative for the commission declined to comment on the letter.

Under the GDPR's minimization principle, personal data must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.”

This requirement makes for a strong argument against FATCA, according to Peter Cotorceanu, CEO of GATCA & Trusts Compliance Associates LLC. He noted that both FATCA and the OECD's common reporting standard were drafted with the aim of exchanging data for the limited purpose of catching tax evasion.

“Bank account information is clearly relevant to taxes in most jurisdictions,” he said. “But they cut too broadly.”

If data exchanges were truly limited to what's needed for tax purposes, then the information-sharing agreements would be narrowly crafted based on each country's tax regime, he said.

“But when you have a one-size-fits-all approach, every country gets the same data regardless of what their regime is,” Cotorceanu said. “To me, that is intuitively a violation of the minimization principle in the GDPR.”

Countries' IGAs have already been challenged under privacy-related litigation, both before and after the GDPR was enacted. But so far, none of these cases have been successful.

For example, an Ohio federal judge in September 2015 rejected arguments against FATCA's disclosure provisions brought by Sen. Rand Paul, R-Ky., and others. In denying an injunction against enforcement of the measure, U.S. District Judge Thomas M. Rose cited the Supreme Court's *U.S. v. Miller* decision in

1976. That ruling found that account holders voluntarily turned over their information to the bank and thus have no reasonable expectation of privacy for bank records.

There has been very little, if any, traction for cases against FATCA in the U.S., according to Michael Lloyd, who is of counsel at Covington & Burling LLP.

“Those cases went nowhere in the U.S.,” he said. “They didn’t survive and there has been no real challenge.”

Meanwhile, a Canadian judge in July concluded that information-sharing requirements under FATCA don’t breach the privacy rights of Americans living in Canada. That same month, France’s highest administrative court found that the country’s IGA doesn’t infringe on the right to the protection of personal data or privacy in a way that is disproportionate “with the purposes for which it was created.”

The French ruling also cited an authorization for FATCA information exchanges issued in September 2015 from France's data protection agency, the Commission Nationale de l'Informatique et des Libertés, or CNIL.

The Association of Accidental Americans, which is based in France, had brought the case. The court decided not to refer it to the European Court of Justice “for mainly political reasons,” according to Régis Bismuth, a law professor at France's Sciences Po university.

The association has since asked the European Commission to refer its case to the European Court of Justice, but “it is a pure discretionary decision and the commission does not have to justify its position,” Bismuth said.

Based on this pattern of unsuccessful litigation, courts in the U.S. and elsewhere aren’t likely to overturn FATCA, according to Paul Millen of Millen Tax & Legal GmbH in Zurich.

“It might be trimmed in a jurisdiction, but you're not going to see the end to the FATCA regime because someone has found a vulnerability ... that renders it null and void as a legal document,” he said.

With litigation as an apparent dead end, the only remaining path for challenging FATCA might exist through complaints with national data protection agencies.

European privacy regulators offered this suggestion in a February 2018 letter to accidental Americans. However, they noted that at the time, there hadn’t been an occasion where a country’s data protection authority prohibited personal data exchanges under FATCA.

Currently, there has been at least one case at the national level: A U.S.-born British citizen, referred to as Jenny, in November lodged a complaint with the U.K.'s Information Commissioner's Office alleging violations of the GDPR.

Filippo Nosedo, a partner at Mishcon de Reya LLP who is representing Jenny, said he filed the complaint “the day after my appearance before the European Parliament, because the European Commission refused to acknowledge the situation.”

National data protection agencies provide a primary and exclusive jurisdiction for individuals to challenge statutes or regulations on privacy grounds, according to Ciric of the Ciric Law Firm.

He gave the example of a prominent Austrian activist who had success using the Irish Data Protection Commissioner to challenge a widely used data transfer tool known as a safe harbor. In October 2015, the European Court of Justice invalidated the mechanism, finding it put the needs of U.S. law enforcement officials ahead of the citizens' rights by allowing the authorities unfettered access to the transferred data.

The activist, Max Schrems, filed a separate challenge against a data transfer mechanism used by Facebook and other companies in a dispute that is currently before the EU's top court.

Others aren't convinced that data protection agencies are the best routes for cases against FATCA.

Fabien Lehagre, president of the Association of Accidental Americans, said that if an individual lodges a complaint, “it is highly likely that CNIL will not follow up,” due to its September 2015 authorization of data exchanges under FATCA.

As for “direct assaults on FATCA” in general, those cases simply don't work right now, said Millen of Millen Tax & Legal.

“The U.S. is happy with the way FATCA works,” he said. “It's basically a cost-free way for them to cut off escape routes from the U.S. tax system.”

--Additional reporting by Ben Kochman and Allison Grande. Editing by Tim Ruel and Neil Cohen.