Litigation Chamber

Decision on the merits 61/2023 of 24 May 2023

An action for suspension and annulment of this decision was brought by the

defendant before the Court of Markets

File number: DOS-2021-00068

Subject: Complaint relating to the transfer by the Federal Public Service (FPS) Finances of

personal data to the US tax authorities in execution of the agreement

“FATCA”

The Litigation Chamber of the Data Protection Authority, made up of Mr. Hielke

Hijmans, chairman, and Messrs. Yves Poullet and Christophe Boeraeve, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the

protection of natural persons with regard to the processing of personal data and

to the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the

data protection), hereinafter "GDPR";

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority (hereinafter

ACL);

Having regard to the Law of 30 July 2018 relating to the protection of natural persons with regard to

processing of personal data (hereinafter LTD);

Having regard to the internal regulations as approved by the House of Representatives on 20

December 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

Made the following decision regarding:

The Complainants:

Mr X,

Hereinafter “the first plaintiff”;

The non-profit organization Accidental Americans Association of Belgium (AAAB), whose

registered office is established at clos Albert Crommelynck, 4 bte 7 at 1160 Brussels,

Hereinafter “the second plaintiff”;

Hereinafter referred to together as "the plaintiffs";

Having both as counsel Maître Vincent Wellens, lawyer, whose

firm is established at chaussée de la Hulpe, 120 at 1000 Brussels.

The defendant:

The Federal Public Service Finance (SPF Finances) whose head office is established

boulevard du Roi Albert II, 33, 1030 Brussels,

Hereinafter “the defendant”;

Having as counsel Maître Jean-Marc Van Gyseghem, lawyer, whose firm

is established at boulevard de Waterloo, 34 at 1000 Brussels.

Contents

I. FACTS and PROCEDURAL FEEDBACK

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1. On December 22, 2020, the complainants lodged a complaint with the Authority of

data protection (APD) against the defendant. The complaint denounces the illegality of the transfer

of personal data relating to the first complainant as well as relating to the Americans

Belgian accident victims (whose interests the second plaintiff defends) by the defendant towards

authorities

US tax in

the context of

the application of

the agreement

intergovernmental "FATCA" concluded between the Belgian State and the United States as well as other

breaches of the GDPR attributable to the defendant in this context.

2. The facts giving rise to the complaint are detailed below in points 3 to 23 and are followed by

retroactions of the procedure leading to this decision (points 24 to 111).

I.A. Relevant facts

3. The first complainant resides in Belgium and has dual Belgian and American nationality.

With regard to the latter nationality, the first complainant describes himself as a

Accidental American because he only has American citizenship by virtue of his birth at Stanford

on the territory of the United States without having retained any significant connection with this country by the

following. The complainant resides in Belgium.

4. The second plaintiff is a non-profit association under Belgian law (ASBL) whose purpose is

object of defending and representing the interests of persons of Belgian-American nationality

- such as the first plaintiff - who reside outside the United States. The purpose of the association is

described as follows in article 4 of its constitutive act of September 28, 2019:

“The purpose of the association is to defend the interests of natural persons of nationality

American residing outside the United States, versus

bad character effects

extraterritorial US law.

The association pursues the achievement of its object by all means of action and

in particular by:

- interest representation actions with the Belgian and American public authorities

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-

and with the European institutions

the production of communication media

the organization of events

collaboration with law professors with a view to making available

legal information for members

-

legal action for the defense of the interests of persons of Belgian nationality

american

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The means listed above are indicative and not limiting.

5. By virtue of his American nationality, the first plaintiff is considered to be subject to the

control of the American tax authorities with regard to the American tax legal regime. This

system is in fact based on the principle of taxation based on nationality and aims
the accidental American like any other taxpayer established on American soil or having
activities in relation to this country, the fact that his residence is not established in the United States
United being indifferent. Only certain exceptions apply to non-residents on the ground
American.

6. In order to facilitate the collection of relevant information by the US tax authorities (Internal Revenue
Service – hereinafter IRS) for possible taxation of Americans residing abroad
(including accidental Americans such as the first plaintiff), the government
American has concluded intergovernmental agreements with different states of the world. These
agreements provide for the communication of data relating to these Americans residing in
abroad by national financial institutions (such as banks) to the administration
national tax authority (such as the defendant), the latter then being required to transfer these
data to the IRS.

7. It is in this context that the “Agreement between the Government of the Kingdom
of Belgium and the Government of the United States of America to improve International tax
compliance and to implement Fatca”, signed by the representatives of the governments of
Kingdom of Belgium and the United States of America on April 23, 2014. This agreement is
commonly and hereinafter referred to as the “FATCA agreement”1. He indeed executes the Foreign
US Account Tax Compliance Act from which the acronym “FATCA” is derived. A deal
Comparable bilateral intergovernmental agreement has also been signed with various states in the
world, including the member states of the European Union (hereinafter EU).

8. The Belgian Law of 16 December 2015 regulating the communication of information relating to
financial accounts by the Belgian financial institutions and the FPS Finances, within the framework of a
automatic exchange of information at international level and for tax purposes (hereinafter
the Law of December 16, 2015) invoked by the defendants in several respects, falls within
as for it in the more general context of the exchange of tax data between States, in this

included but also beyond the only exchanges with the American IRS in execution of the agreement

"FATCA" above.

9. The purpose of this legislation, defined in its Article 1, is thus to regulate the obligations of

Belgian financial institutions and the defendant with regard to the information

which must be communicated to a competent authority of another jurisdiction within the framework

1 This “FATCA” intergovernmental agreement signed with Belgium was the subject of an assent law of 22 December 2016.

automatic exchange of financial account information, exchange

organized in accordance with the commitments made by the Belgian State and resulting from the following texts:

- Council Directive 2014/107/EU of 9 December 2014 amending Directive

2011/16/EU as regards the automatic and mandatory exchange of information

in the field of taxation2;

- The Joint OECD/Council of Europe Convention of 25 January 1988 concerning

mutual assistance in tax matters

(the Multilateral Convention or “the

Agreement”);

- A bilateral convention for the prevention of double taxation with respect to taxes on

income;

- A bilateral treaty on the exchange of tax information (such as the agreement

“FATCA”).

10. The Law of 16 December 2015 entered into force on 10 January 2016 with regard to

information for the United States (section 20)3.

11. On April 22, 2020, the first complainant received a letter from bank Z with which he

has bank accounts. This letter mentions in subject: “Confirmation of your status

as a US person under the Fatca agreement and for other regulatory purposes”. He is there

asked the complainant to confirm that he is neither a U.S. citizen nor a resident of the
United States for purposes of enforcing the obligations incumbent upon Bank Z in
execution of the regulations applicable to the automatic exchange of data. THE
complainant is invited to complete a specific form issued by the American authorities at
this effect. The letter explains that the objectives pursued by the American legislation are of a
identify all accounts held by US citizens and/or residents with
of non-American financial institutions as well as, on the other hand, to exercise better control
on income and valuables held by Americans. The letter states that
failure to return the signed and completed document, the law obliges the bank to consider the
first complainant as a "US Person" by default: consequently, his contact details
as well as information on its assets, income and gross proceeds will continue to be
communicated to the relevant tax authorities. Finally, the said letter specifies that if the first
plaintiff has American nationality or if he resides in the United States, he will have to go to
agency for the purpose of carrying out the necessary formalities.

2 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the exchange
automatic and compulsory information in the tax field, JO 2014, L 359/1.

3 The Law of 16 December 2015 was published in the Belgian Official Gazette on 31 December 2015. In its article 20, the law
provides that it
will be effective 10 days after posting for information destined for the United States.

12. On May 12, 2020, the first complainant was informed by Bank Z that since he had
several bank accounts in Belgium in 2019, these are subject to the obligation to
declaration to the defendant in execution of the legal obligations incumbent on the
banking institutions with which tax residents of a country other than Belgium
have, as is the case, one or more bank accounts.

13. In this second letter, Bank Z thus indicates to the first complainant that it is required to

declare to the defendant the following data: the name, the address, the jurisdiction whose person is a resident, the tax identification number (TIN) or the date of birth of each person to be reported, account number(s), balance of the account or its value on December 31 (special case: if the account is closed, an amount null is disclosed), interest, dividends, proceeds of sale, redemption or reimbursement of financial audits and other income generated by financial assets held on the account.

14. Bank Z appends to this letter the data of the first complainant which will be concretely communicated to the defendant in execution of this obligation to statement.

15. This letter of May 12, 2020 makes no reference to the “FATCA” agreement. Besides the list of data cited above and information on the principle of the automatic exchange of financial information to which Bank Z claims to be subject, the first complainant is, for any question, referred to the defendant in these terms: "For further information on the automatic exchange of financial information, you can consult the website of the FPS Finances or the OECD. You can also call us at XXX”.

16. In a third letter dated May 18, 2020, Bank Z again contacted the first complainant and (a) explains this time in general terms the principle of the “FATCA” agreement, (b) lists the data to be communicated in this context and (c) indicates that when the complainant had one or more accounts subject to the reporting obligation in 2019, it is required communicate them to the competent tax authorities. bank Z mentions that for further information on the “FATCA” agreement, the first complainant can call his bank at the telephone number provided.

17. On December 22, 2020, the same day he filed a complaint with the APD with the second complainant (complaint n°1 - point 1), the first plaintiff asks the defendant to erase the data

of a personal nature that it has obtained from banks in application of the “FATCA” agreement and this, pursuant to Article 17.1.d) of the GDPR. The first complainant also requests that the defendant takes the necessary steps to obtain this erasure from the IRS or failing that, the limitation of their processing in execution of Article 18.1.b) of the GDPR. In all

In any case, the first complainant calls for the immediate cessation of exchanges of information between the defendant and the IRS taking place each year on the basis of the “FATCA” Agreement: this transfer involving personal data concerning him would in fact disregard, according to him, several key principles of the right to the protection of personal data as applicable in Belgium and more generally within the EU. The second complainant makes the same request in her name for the benefit, in accordance with its statutory object, of accidental Belgian Americans.

18. More specifically, the Complainants support their claim on the following grounds: the wrongfulness of the transfer of personal data to the IRS under the “FATCA” agreement (in violation of Articles 45, 46 and 49 of the GDPR); non-compliance with the principles of limitation of purposes (article 5.1.b) of the GDPR), proportionality and minimization of data (article 5.1.c) of the GDPR) and limited storage (article 5.1.e) of the GDPR); failure to respect the principle of transparency (Articles 12 to 14 of the GDPR) and a breach of the obligation to carry out a impact analysis relating to data protection (DPIA - article 35 of the GDPR). Said mail details each of the alleged grievances. These also being the basis of the complaint lodged with the DPA, they will be explained below when the Litigation Chamber debates the point of respective views of the parties, including that of the complainants (paragraphs 54 et seq.).

19. In its response letter of March 30, 2021, the defendant refuses to grant the request plaintiffs arguing that the alleged wrongfulness has no foundation. There defendant thus explains that the legal basis of the transfer it operates lies in the agreement “FATCA” as well as in the Law of December 16, 2015. The defendant also invokes Article 96 of the GDPR and concludes in support of it that, failing the plaintiffs to demonstrate in

that the FATCA agreement would violate EU law before May 24, 2016, their claims do not

have no basis. The defendant also refutes all the other complaints which it

are opposed.

20. For a good understanding of the decision, the Litigation Chamber cites here from the outset the article

96 of the GDPR entitled “Relationship with international agreements” which provides that:

“International agreements involving the transfer of personal data to

third countries or international organizations which have been concluded by the States

members before 24 May 2016 and which comply with Union law as applicable

before that date shall remain in effect until modified, replaced or

revocation”.

21. Following this response from the defendant, only the first plaintiff renews its request

on July 9, 2021, pointing out that said transfers of data from the defendant to the IRS are

also illegal under Directive 95/46/EC.4

4 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of persons

with regard to the processing of personal data and on the free movement of such data, OJ L 281/31.

22. By a decision of October 4, 2021, the defendant refuses to grant the requests of the

first plaintiff dismissing

the arguments developed by the latter with regard to the

reported breaches of both the GDPR and

Directive 95/46/EC. For

the maid

understanding of the outcome of its decision, the Litigation Chamber specifies that

there

defendant also considers under the terms of this decision “that in the present case, the condition

a basis based on an important reason of public interest - within the meaning of Article 49.1.d) of the

GDPR5 or Article 26.1.d)6 of Directive 95/46/EC] - is properly fulfilled when the database

lawfulness of the disputed processing is based on an international agreement [i.e. the “FATCA” agreement] and the law of 16 December 2015”.

23. An action for annulment before the Council of State (EC) has been brought against this decision administration of the defendant. According to their conclusions and during the hearing which was held before the Litigation Chamber, the parties indicated that this appeal was always hanging. They specified that the defendant had pleaded in particular that the Works Council awaits the outcome of the procedure before the DPA before deciding. The complainant, for his part, requested that preliminary questions be put by the CE to the Court of Justice of the Union European Union (hereinafter CJEU) as to the legal basis of the transfers made in execution of the “FATCA” agreement, as to the admissibility of the mobilization of article 49.1. d) of the GDPR or the where applicable of its equivalent in Directive 95/46/EC in the event of application of article 96 of the GDPR as well as with respect to the principles of transparency, finality, minimization and limited conservation as enshrined in the relevant articles of the GDPR or their equivalents in Directive 95/46/EC if the application of Article 96 of the GDPR were to be detention.

I.B. The retroacts of the procedure

24. As mentioned in point 1 above, the complainants lodged their complaint with the DPA on 22 December 2020 (complaint no. 1).

I.B.1. Admissibility of the complaint

25. On March 22, 2021, Complaint No. 1 in that it was introduced by the first complainant was declared admissible by the First Line Service (SPL) of the DPA on the basis of articles 58

5 Section 49.1. d) GDPR: "In the absence of an adequacy decision pursuant to Article 45(3) or safeguards appropriate under Article 46, including binding corporate rules, a transfer or set of transfers of personal data to a third country or to an international organization can only take place one of the following conditions: (…) (d) the transfer is necessary for important reasons of public interest”.

6 Section 26.1. d) (Derogations) of Directive 95/46/EC: “Notwithstanding Article 25 and subject to provisions
contrary to their national law governing particular cases , Member States shall provide that a transfer of data to
personal character to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2
)
may be made, provided that: (…) d) the transfer is necessary or legally obligatory for the safeguarding
of important public interest”.
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and 60 of the Law of 3 December 2017 establishing the Data Protection Authority
(hereinafter LCA) and the complaint is forwarded to the Litigation Chamber under Article 62, §
1st in the ACL.
26. Complaint No. 1, insofar as it is introduced by the second complainant, is declared
inadmissible on February 12, 2021 by the SPL of the APD on the grounds that the second complainant
does not meet the conditions set out in section 220.2. 3° and 4° of the Law of 30 July 2018 relating
the protection of natural persons with regard to the processing of personal data
staff (hereinafter LTD)7.
27. The Litigation Chamber specifies here from the outset that on July 9, 2021, the second complainant
file a new complaint (complaint no. 2). This consists of a reformulation of his complaint
n°1 of December 22, 2020. The second complainant further explains her interest in acting. She
thus exposes that it acts in its name, in accordance with its statutory object, and not in the
name and on behalf of one or more accidental Belgian Americans. The second plaintiff
therefore indicates that it does not intervene in representation within the meaning of article 80.1. of the GDPR8. THE
conditions of application of this article as executed by article 220.2. 3° and 4° LTD
should therefore, in its view, not be met. The second plaintiff relies in
contrast to Article 58 of the LCA which stipulates that “any person may lodge a complaint or
a written, dated and signed request to the Data Protection Authority”. There
second defendant considers itself entitled to lodge a complaint with the DPA on this

basis, especially since the aim pursued by his complaint is in line with its statutory object. She

also invokes that in its decision-making practice, the DPA has, in support of Decision 30/2020

of the Litigation Chamber for example, recognized that the interest in acting is broad and that the

7 Article 220 of the LTD: § 1. The data subject has the right to mandate a body, organization or association

not-for-profit organization, so that it lodges a complaint in its name and exercises in its name administrative or

jurisdictional either with the competent supervisory authority or with the judiciary as provided for by law

particulars, the Judicial Code and the Code of Criminal Instruction.

§ 2. In the disputes provided for in paragraph 1, a non-profit body, organization or association must:

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1° be validly incorporated in accordance with Belgian law;

2° to have legal personality;

3° have statutory objectives of public interest;

4° to be active in the field of the protection of the rights and freedoms of data subjects within the framework of the

protection of personal data for at least three years.

§ 3. The non-profit body, organization or association provides proof, by presenting its activity reports

or any other document, that its activity has been effective for at least three years, that it corresponds to its corporate purpose

and that

this activity is related to the protection of personal data.

8 Section 80.1. of the GDPR “Representation of data subjects”: The data subject has the right to appoint a

non-profit body, organization or association, which has been validly constituted in accordance with the law

of a Member State, whose statutory objectives are in the public interest and is active in the field of the protection of rights

and freedoms of data subjects in the context of the protection of personal data concerning them,

for him to lodge a complaint in his name, to exercise in his name the rights referred to in Articles 77, 78 and 79 and to exercise

in

his name the right to obtain compensation referred to in Article 82 where the law of a Member State so provides.

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possibility of filing a complaint is not reserved for the natural persons concerned and

that a complaint can be lodged by associations by virtue of their specific corporate purpose9.

28. On October 5, 2021, this complaint n°2 will be declared admissible by the SPL of the APD on the basis

Articles 58 and 60 of the LCA. This complaint will be transmitted to the Litigation Chamber in

pursuant to Article 62, § 1 of the LCA.

29. In view of the foregoing, the Litigation Chamber specifies that under the terms of this

decision, the use of the terms “the complaint” refers to the two complaints filed (No. 1 and No. 2)

which will also be joined by the Litigation Division (see point 47).

I.B.2. The subject of the complaint

30. The complaint lodged by the complainants aims, primarily, to obtain, pursuant to Article

58.2.f) and j) of the GDPR the prohibition, or even the suspension of the transfer of data (those of the

first plaintiff and beyond, those of all accidental Belgian Americans whose second

plaintiff defends the interests) by the defendant to the IRS in application of the “FATCA” agreement.

31. In their submissions in reply (points 54 et seq. below), the complainants will add

that they request, in the alternative, that the Litigation Chamber orders in application of

section 58.2. f) and j) of the GDPR that the transfer of data relating to account balances by the

defendant to the IRS in the context of the application of the “FATCA” agreement is prohibited, or even

suspended, with respect to both the first plaintiff and the accidental Belgian Americans

whose interests the second plaintiff defends.

32. During the hearing held before the Litigation Chamber10, the complainants

clarify that the use of the terms “prohibition or even suspension” is based on the

exact wording of Article 58.2. f) and j) of the GDPR and does not imply a request for

temporary suspension of transfers but their pure and simple cessation for the future.

I.B.3. The investigation by the Inspection Service

33. On April 20, 2021, the Litigation Chamber decided to request an investigation from the Service d'Inspection (hereinafter SI), pursuant to Articles 63, 2° and 94, 1° of the LCA. On the same date, in accordance with article 96, § 1 of the LCA, the request of the Litigation Division to proceed to a survey is sent to the IS.

9 The Litigation Chamber refers in this regard to the note it adopted on the complainant's position https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la-position-du-plaignant-dans-la-procedure-au-sein-de-la-chambre-contentieuse.pdf, in particular at point B. (in fine) page 2. It also refers to its decision 24/2022 and the references cited therein.

10 See. point B of the minutes of the hearing of January 10, 2023.

34. On May 26, 2021, the IS investigation is closed, the report is attached to the file and the file is forwarded by the Inspector General to the President of the Litigation Division (art. 91, § 1 and § 2 of the ACL).

35. According to this report, the IS concludes that there is, in its terms, “no apparent violation GDPR” (page 5 of the report).

36. The IS bases its conclusion on the fact that the basis for lawfulness of bank data transfers of American nationals (including the first plaintiff) is based on the “FATCA” agreement and on the Law of 16 December 2015. The IS also notes the applicability of Article 96 of the GDPR already quoted (point 20).

37. According to its examination of the compliance of the “FATCA” agreement with the regulatory framework in data protection applicable before May 24, 2016, either according to its terms, to Directive 95/46/EC as transposed under the terms of the Law of 8 December 1992 relating to the protection of privacy with regard to the processing of personal data (hereafter after LVP), the IS notes the following elements:

- On December 17, 2014, the Commission for the Protection of Privacy11 (hereinafter CPVP)

issued a favorable opinion 61/2014 subject to strict conditions precedent on
the first draft of the future Law of 16 December 2015. The CPVP then
pronounced favorably in its opinion 28/2015 of July 1, 2015 on the second draft
of law which implemented the remarks and conditions issued in its opinion 61/2014.
- Pursuant to its deliberation AF 52/2016 of December 15, 2016, the Sector Committee
for the Federal Authority12 (hereinafter CSAF) of the CPVP authorized the defendant to
transmit to the IRS the financial information of the reportable accounts of
U.S. taxpayers forwarded to it by financial institutions in the
framework of the “FATCA” agreement. The IS emphasizes that the CSAF, on this occasion, appreciated
the admissibility of the tax purposes of the processing as well as the proportionality of the
data and processing security. The CSAF has, in application of the principle of
transparency, moreover enjoins the defendant to inform the citizen by means of a
accessible and understandable text on its website as to the circumstances in
which his personal data (including financial) can be
forwarded to the IRS. The IS notes in this regard that a web page dedicated to “FATCA” is
11 The Privacy Commission (CPVP) was the Belgian data protection authority within the meaning of Article
28 of Directive 95/46/EC. The Data Protection Authority (APD) succeeded it on May 25, 2018 in execution
of Article 3 of the LCA.
12 Article 36bis of the LVP provided that any electronic communication of personal data by a public service
federal government or by a public body with legal personality that comes under federal authority requires an authorization from
principle of the CSAF unless the communication has already been authorized in principle by another committee
sector created within the CPVP. The mission of the CSAF is to check whether the communication complies with the provisions
legal and regulatory.

available on the defendant's website. Finally, the IS recalls that in application of
article 111 of the LCA13, the authorizations granted by the sectoral committees of the

OPC (such as the CSAF) before the entry into force of this law retain in principle their
legal validity14.

38. Finally, the SI dismisses the applicability of the Schrems II judgment15 of the CJEU. He points out that this judgment invalidates
the Privacy Shield which related to the transfer of personal data to the United States for
commercial purposes (and not for tax purposes including the fight against fraud and the evasion
taxes as in the present case). The IS also refers to article 1716 of the Law of 16 December
2015 which refers both to the FATCA agreement and to the agreements to which the latter itself refers,
or to the Convention of the OECD and the Council of Europe already mentioned.

39. At the end of its investigation, the IS considers that in view of these considerations and in accordance with
Article 64.2 of the LCA, it is not appropriate to pursue his investigation further and that there is,
as already mentioned (point 35), no apparent violation of the GDPR.

I.B.4. Additional investigation by the Inspection Service

40. On June 24, 2021, the Litigation Chamber makes a request pursuant to Article 96.2. of the ACL
that an additional investigation be carried out by the IS.

41. Upon examination of the report of May 26, 2021 (points 33 et seq.), the Litigation Chamber has indeed
observed a lack of information regarding certain elements raised by the complainants
the support of their complaint, including:

13 Article 111 of the LCA: Without prejudice to the supervisory powers of the Data Protection Authority, the authorizations granted by the sectoral committees of the Commission for the protection of privacy before the entry into force of this law retain their legal validity. After the entry into force of this law, adherence to a general authorization granted by deliberation of a sectoral committee is only possible if the applicant sends a written and signed commitment to the Authority of
data protection, in which he confirms that he adheres to the conditions of the deliberation in question, without prejudice to the supervisory powers that the Data Protection Authority may exercise after receipt of this commitment. Except
other legal provisions, current authorization requests submitted before the entry into force of the law are processed

by the data protection officer of the institutions involved in the data exchange.

14 The Litigation Division will not rule generally on the validity of these authorisations. She will examine the relevance of the recourse to that invoked by the defendant in the specific context of the complaint leading to the present decision.

15 Judgment of the CJEU of 16 July 2020, C-311/18, Facebook Ireland and Schrems (Schrems II), ECLI:EU:C:2020:559.

16 Article 17 of the Law of 16 December 2015: § 1. Information Transferred to a Reportable Jurisdiction are subject to the obligations of confidentiality and other protective measures provided for by the tax treaty which allows the automatic exchange of information between Belgium and this jurisdiction and by the administrative agreement which organizes this exchange, including the provisions limiting the use of the information exchanged. § 2. However, notwithstanding the provisions of a tax treaty, the competent Belgian authority: - may authorize, in a manner general and subject to reciprocity, a jurisdiction to which the information is transferred to use it as means of proof in criminal courts when this information contributes to the opening of proceedings tax evasion criminal proceedings; - subject to the first indent, may not authorize a court to which the information is transferred to use it for purposes other than the establishment or collection of taxes mentioned in the Treaty, proceedings or suits relating to such taxes, decisions on appeals relating to such taxes or the control of the above; and - may not authorize a jurisdiction to which the information is transferred to communicate to a third jurisdiction.

- Whether or not there are appropriate safeguards in place with respect to the transfers to the United States?
- The existence or not of subsequent processing(s) for other purposes? And the existence or not guarantees where applicable?
- The data retention period taking into account any subsequent processing existing if any?
- The data precisely communicated and the volume of this data per person

concerned as well as the number of persons concerned in Belgium?

- The existence or not of a reciprocity clause and, if applicable, its implementation

concrete in practice?

- The question of whether a DPIA within the meaning of Article 35 of the GDPR has been carried out (or will be

carried out), in what form and on what date?

- The question of whether the first complainant has brought other actions having the same

object or a similar object before other bodies (judicial, administrative) since

filing his complaint? And what, if any, was the outcome?

42. On July 9, 2021, during the investigation, the complainants asked the IS to suspend

temporarily the transfer of data from the “FATCA” reporting for the year 2020 to

the IRS as an interim measure taken on the basis of the ACL until the Chamber

Litigation has taken a final decision and at least until September 30, 2021.

plaintiffs argue that the transfers denounced, from the moment they take place, risk

cause serious, immediate and difficult to repair damage on their part.

43. On August 10, 2021, the IS replied to the complainants that taking provisional measures was one of the

investigative powers conferred by the LCA on the IS and that this is not an obligation but rather

of a possibility left to its discretion in complete autonomy. The SI also recalls that in

application of article 64.2 of the LCA, he ensures that the useful and appropriate means are

used for the purposes of the investigation. He adds that he has no instructions to receive from anyone on the

investigative measures to be implemented, thereby rejecting the complainants' request.

44. On September 14, 2021, the SI's additional investigation is closed, the report is attached to the

file and this is forwarded by the Inspector General to the President of the Chamber

Litigation (art. 91.1 and 91.2 of the LCA).

45. According to its additional report, the IS finds that there is no evidence indicating

a lack of guarantees regarding the protection of the transferred data or a non-

reciprocity of exchanges. The IS indicates that it can only observe the legal framework sufficiently

robust framework that regulates the transfer of tax data of American nationals by the
defendant to the IRS. He refers in this regard to the description of the guarantees surrounding the said
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transfers made by the data protection officer (hereinafter DPO) of the defendant,
to the parliamentary work of the law of assent to the “FATCA” agreement as well as to articles 3.717
and 3.818 of said agreement. The SI also refers to the judgment of July 19, 2019 of the Council of State
French seized by the French sister association of the second complainant, judgment according to which
the plea alleging breach of Article 46 of the GDPR was notably rejected19. THE
report of the IS also includes in its report the elements provided by the defendant
to justify the absence of an impact assessment (point 95).

I.B.5. Substantive examination by the Litigation Chamber

46. On January 20, 2022, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and
Article 98 of the LCA, that complaints n°1 and n°2 can be dealt with on the merits.

47. On the same date, the parties are informed by registered letter of the provisions such as
included in article 95, § 2 as well as in article 98 of the LCA. The Litigation Chamber decides on
terms of this letter to join complaints n°1 and n°2 which relate to the same processing
of personal data (data relating to the same facts), are both
lodged against the defendant and raise the same complaints against the latter. There
Litigation Chamber therefore considers them to be linked by such a close relationship that there is
interest in educating them and making a decision about them at the same time in order to guarantee the
consistency of its decisions.

48. In the same letter, the Litigation Division grants the parties the following deadlines for
conclude: March 17 and May 16, 2022 for the defendant and April 15, 2022 for the plaintiffs.

49. In support of the complaint and the IS reports, the Litigation Chamber also identifies the
grievances on which it invites the parties to present their arguments:

17 Section 3.7. of the “FATCA” agreement: “All information exchanged shall be subject to the confidentiality and other

protections

provided for in the Convention, including the provisions limiting the use of the information exchanged". "Convention" is refers to the Convention on Mutual Administrative Assistance in Tax matters of January 25, 1988.

18 Section 3.8. of the "FATCA" agreement: "Following the entry int force of this Agreement, each Competent Authority shall provide written notification to the other Competent Authority when it is satisfied that the jurisdiction of the other Competent Authority has in place (i) appropriate safeguards to ensure that the information received pursuant to this Agreement shall remain confidential and be used solely for tax purposes, and (ii) the infrastructure for an effective exchange relationship (including established processes for ensuring timely, accurate, and confidential information exchanges, effective and reliable communications and demonstrated capabilities to promptly resolve questions and concerns about exchanges or requests for exchanges and to administer the provisions of Article 5 of this Agreement). The Competent Authority shall endeavor in good faith to meet, prior to September 2015, to establish that each jurisdiction has such safeguards and infrastructure in place.

19 The French Council of State had been seized by the French Association of Accidental Americans with a request for annulment for abuse of power of the decisions by which a refusal was opposed to its requests for the repeal of a decree and its ministerial order organizing the collection and transfer of personal data to the authorities Americans. In its judgment, the French Council of State concludes that with regard to the specific guarantees whose agreement

"FATCA" of November 14, 2013 (agreement concluded with France) surrounds the disputed processing and the level of protection

ensured by the legislation applicable in the United States in terms of personal data making it possible to establish the situation taxation of taxpayers (the French CE refers to the United States Federal Data Protection Act of 1974

and the Federal Tax Code), the plea alleging disregard of Article 46 of the GDPR as well as the

Articles 7 and 8 of the EU Charter of Fundamental Rights must be set aside (points 23 et seq. of the judgment).

- The unlawfulness of the transfers of data to the IRS by the defendant with regard to articles

45 and 49 GDPR and the lack of a legal basis;

- Non-compliance with the principles of purpose limitation, proportionality and

minimization of data (article 5. 1 b) and c) of the GDPR) as well as a breach of the

principle of limitation of data retention (article 5.1. e) of the GDPR);

- Non-compliance with the principle of transparency and the obligation to inform (articles 5.1.

a), 12 and 14 GDPR);

- The breach of Article 16 of the GDPR (right of rectification) in that the procedures

of the defendant do not provide for the possibility for the persons concerned

to obtain a correction of their status with regard to the “FATCA” legislation;

- Failure to perform a DPIA within the meaning of Article 35 of the GDPR;

- Failure to comply with articles 5.2. and 24 of the GDPR coupled with the breaches cited above

above ;

- Non-compliance with article 20 of the Law of July 30, 2018 (LTD).

50. The Litigation Chamber also invites the parties to conclude on Article 96 of the GDPR

invoked by the defendant in its letter of October 4, 2021 (point 22).

51. The Litigation Chamber specifies here from the outset that on March 30, 2022, it sent a

additional request to the parties. According to this request,

bedroom

Litigation indicates that it learned from the press that the second plaintiff would have, in

December 2021, lodged an appeal with the CE (Belgian) with regard to the issue of

accidental American data transfers to the United States. Without prejudice to

respective competences of both the Works Council and the DPA, the Litigation Chamber asks the

second plaintiff to kindly enlighten it in its future submissions in reply or in

a separate document at the choice of the latter, on the subject of this appeal to the Works Council and if possible,

as to the timetable relating thereto. The Litigation Chamber specifies that this information

aims to enable it to assess whether (the outcome of) this appeal is likely to have an impact on the

procedure in progress before the DPA and/or on its future decision. Indeed, under the

complaint form, the complainant is asked to inform the DPA of the existence of the complaint(s) possibly filed with other bodies. This appeal to the Works Council not being still introduced at the time of filing the complaint with the DPA, the second plaintiff to enlighten the Litigation Chamber on this. Bedroom Contentious refers in this respect to the information provided in point 23 above.

52. On January 31 and February 8, 2022, the defendant requested a copy of the file (art. 95, §2, 3° LCA), which was sent to him on February 9, 2022.

I.B.6. The arguments of the parties

53. On March 16, 2022, the Litigation Chamber receives the submissions in response from the defendant. The defendant having also filed additional conclusions and synthesis in a second step (hereafter the synthesis conclusions), a summary of its complete argument will be detailed in points 79 and s. .

I.B.6.1. Position of complainants

54. On April 15, 2022, the Litigation Chamber received the complainants' submissions in reply.

55. The arguments of the complainants may, grievance by grievance, be summarized as follows.

 Regarding article 96 of the GDPR

56. As a preliminary point, the complainants state that Article 96 of the GDPR does not apply since the condition that it lays down that the international agreement must, in order to continue to take effect, comply with EU law as applicable before May 24, 2016 is not satisfied. Indeed, the plaintiffs consider that the “FATCA” agreement is neither in conformity with the Directive 95/46/EC (applicable before May 25, 2016) or otherwise compliant with the GDPR. THE complainants also specify that in any event, the aspects which are not resolved or imposed by or under the “FATCA” agreement, such as the obligation to inform persons concerned (Title II.E.2) are subject to the GDPR without any interference from its article 96.

 As regards compliance with the rules governing cross-border flows

57. As for the transfer to the IRS, the plaintiffs note that before its conclusions in response of 16 March 2022 in which it states that it relies on Article 46.2.a) of the GDPR (point 82 et seq.), the defendant seemed, as evidenced by its administrative decision of October 4, 2021 (point 22), rely on article 49.1.d) of the GDPR (or on article 26.1.d) of the Directive 95/46/EC) or on the “important ground of public interest”, the basis for the lawfulness of the transfer resting according to her on the “FATCA” agreement and on the Law of December 16, 2015.

58. For the sake of completeness, the Complainants argue that the lack of reciprocity equivalent and the systematic nature of the transfers denounced constitute obstacles the recourse by the defendant to Article 49.1.d) of the GDPR, even if since its conclusions in response, the latter waived reliance on this provision.

- As for the absence of reciprocity, the plaintiffs cite several letters from authorities European and other American positions that attest to this lack of reciprocity;

- As to the systematic nature, the complainants rely on the Guidelines 02/2018 of the European Data Protection Board (hereinafter EDPS) relating

the derogations provided for in Article 49 of EU Regulation 679/2016 20 which state that the use of Article 49.1.d) of the GDPR cannot be invoked for transfers recurrent, systematic or having place on a large scale:

derogations –

of restrictive interpretation – provided for in article 49 “must not become “the rule” in practice, but be limited to particular situations (…)”.

59. The Complainants further point out that Article 49.1. d) of the GDPR provides for one of the derogations possible to the prohibition of international transfers when, according to the cascading system set up by Chapter V of the GDPR and before it by Articles 25 and 2621 of the Directive

95/46/EC, no adequacy decision pursuant to Article 45.3. of the GDPR has not been
adopted for the country concerned or in the absence of appropriate safeguards under Article
46 GDPR. By mobilizing Article 26.1. d) of Directive 95/46/EC as specified in Article
16.2. of the Law of 16 December 201522, the legislator therefore recognized, according to the plaintiffs, that it
there were no appropriate safeguards in place. It is therefore in vain that the defendant relies
on Opinions 61/2014 and 28/2015 of the CPVP to conclude that the "FATCA" agreement is compliant
to EU law (including the rules relating to the transfer) on the date of 24 May 2016. These
opinions related to the said text of Belgian law and did not examine the existence of guarantees
appropriate present in the “FATCA” agreement itself.
60. Complainants point out that such “appropriate safeguards” must be apparent from the agreement
"FATCA" itself to bind the parties thereto. These warranties are those identified by the
EDPS in its Guidelines 02/2020 relating to Article 46(2)(a) and
paragraph 3, point b), of the GDPR for transfers of personal data between
public authorities and bodies established in the EEA and those established outside the EEA (hereinafter the
Guidelines 02/2020)23. The complainants mention that the “FATCA” agreement provides
20 European Data Protection Board (EDPB), Guidelines 02/2018 of 25 May 2018 relating to the
derogations provided for in article 49 of EU regulation 679/2016:
https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf
21 Section 26.1. of Directive 95/46/EC indeed states that it applies by way of derogation from Article 25 (devoted to the
principle
adequacy) in the event that the third country does not ensure an adequate level of protection within the meaning of Article
25.2. of the
guideline. Article 26.2 provides that “Without prejudice to paragraph 1, a Member State may authorize a transfer, or a
set of transfers of personal data to a third country that does not ensure a level of protection
adequate within the meaning of Article 25(2), when the controller offers sufficient guarantees with regard to
the protection of privacy and the fundamental rights and freedoms of individuals, as well as with regard to the exercise of

corresponding rights; these guarantees may in particular result from appropriate contractual clauses".

22 Section 16.2. of the Law of 16 December 2015: "§ 2. Insofar as these transfers are part of a reciprocal exchange information for tax purposes and condition the obtaining by Belgium of comparable information making it possible to improve compliance with the tax obligations to which taxpayers subject to tax are subject by Belgium, these transfers are necessary to safeguard an important public interest of Belgium. In this extent, these transfers are made in accordance with Article 22, § 1, first paragraph, of the aforementioned law of 8 December 1992 when they are made to a non-European Union jurisdiction which is not considered in a way generally as providing an adequate level of protection. It is the Litigation Chamber which underlines.

23 European Data Protection Board (EDPB), Guidelines 02/2020 of 15 December 2020 on the Article 46(2)(a) and (3)(b) of Regulation (EU)2016/679 for data transfers to personal character between public authorities and bodies established in the EEA and those established outside the EEA: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22020-articles-46-2-and-46-3-b-regulation_en

admittedly a meager reference to the "confidentiality and other protections of other treaties on the exchange of data in tax matters" (article 3.7. of the agreement). However, it contains nothing in terms of "appropriate safeguards" apart from some vague objectives and a list of data that does not respect the principles of necessity and minimization (see below).

61. More specifically, the Complainants consider that the Respondent did not assess the level of protection offered by the United States or at least not motivated the "adequacy" character of the any guarantees and measures put in place on either side as it was his responsibility to to do in execution of the Schrems II judgment of the CJEU and of the Guidelines 02/22020 of the EDPS in order to be able to validly rely on Article 46.2. a) of the GDPR which it now invokes.

62. Complainants point out that the following required safeguards are lacking: (a) the specification of the types of processing, (b) the principle of purpose limitation, (c) the principle of minimization of

data, (d) the principle of limitation of the conservation, (e) the statement of the security measures in including a mechanism for mutual information of data breach, (f) the rights of data subjects: (i) information and transparency, (ii) access, rectification, erasure, Limitation and Opposition: Complainants state that if the US Privacy Act to which the consent "FATCA" refers appears to provide similar rights, these rights are not apparent from the agreement. The IRS does not communicate on these rights of which the persons concerned would have, (iii) Prohibition of automated decisions: according to the complainants, it is not excluded that an automated decision takes place after the transfer to the IRS given the objective prosecuted by the American authorities, as specified in the bill that led to the Act of 16 December 2015 in these terms: "This information will enable this other State to have increased means to improve compliance with tax obligations by its residents (and by its citizens in the case of the United States) and to make the best use of the information provided through automatic cross-checking with national intelligence and automated analysis data".

63. In conclusion, the plaintiffs are of the opinion that, failing to comply with the prescriptions of Chapter V of the GDPR, the data transfers denounced by the defendant to the IRS are unlawful.

 As for the principles of finality, necessity and minimization

64. As to the principle of purpose, the complainants consider that the purposes pursued by the agreement "FATCA" are not sufficiently determined in that they aim too vaguely and broad (a) improving compliance with international tax rules and (b) implementing obligations resulting from the American "FATCA" legislation aimed at combating fraud taxation of US nationals (see in particular the introductory recitals of agreement). The plaintiffs also denounce that the data exchanged can also

24 It is the Litigation Chamber which underlines.

through other instruments be used for purposes other than tax, in particular for

purposes such as the fight against the financing of terrorism where applicable under the conditions

of article 17 of the Law of 16 December 201525.

65. As to the principles of necessity and minimization, the complainants denounce the nature

aggressive data processing set up by the “FATCA” agreement under which

an automatic data exchange takes place and not (no longer) a data communication

following an ad hoc request. This model raises important questions of

necessity and minimization: the complainants are of the opinion that the collection of data in the

framework of the "FATCA" agreement is not necessary and does not respect the principle of minimization

Datas. In support of both the relevant work of the Article 29 Group (hereafter

29) than the EDPS and the judgments of the CJEU (points 66 et seq. below), the complainants are of the opinion

that in the absence of specific criteria justifying the processing, collection and transfer of

data concerned to the IRS are disproportionate, contrary to the principle of minimization

enshrined both in Article 5.1.c) of the GDPR and in Article 6.1.c) of Directive 95/46/EC already.

They also recall Article 52 of the Charter of Fundamental Rights of the Union (hereinafter

the Charter) under which "Any limitation on the exercise of the rights and freedoms recognized by

this Charter must be provided for by law and respect the essential content of the said rights and

freedoms. In compliance with the principle of proportionality, limitations may not be

provided only if they are necessary and effectively meet the objectives of interest

generally recognized by the Union or where necessary to protect the rights and freedoms of others. (…)”26.

66. The complainants particularly point to the judgment of 8 April 2014 of the CJEU27 which annuls the

Directive 2006/24/EC on the retention of data generated or processed in the context of the

provision of publicly available electronic communications services or networks

means of communication in that this directive “applies (…) even to persons

for which there is no indication of such a nature as to suggest that their behavior may

have a link, even indirect or remote, with serious crimes”. They also cite the judgment

of the CJEU of 24 February 202228 which prohibits the generalized and undifferentiated collection of data

of a personal nature for the purpose of combating tax evasion. The plaintiffs believe that

collection and transfer under the “FATCA” agreement operate in the same way

generalized and undifferentiated and must be prohibited in view of the cited case law. THE

plaintiffs still point, in the same logic, to opinion 122/2020 of the APD29. In view of the

25 See. note 16 above.

26 It is the Litigation Chamber which underlines.

27 CJEU, judgment of 8 April 2014, joined cases C-293/12 and C-594/12 Digital Rights Ireland, ECLI: EU:C:2014:238, point 58.

28 CJEU, judgment of February 24, 2022, aff. C-175/20, ECLI:EU:C:2022:124, points 74 to 76.

29 Data Protection Authority, Opinion 122/2020 relating to Chapter 5 of Title 2 of the preliminary draft of the program law – articles 22 to 26 inclusive: https://www.autoriteprotectiondonnees.be/publications/avis-n-122-2020.pdf Voy. item 25.

specific situation of accidental Belgian Americans, the plaintiffs specify that they do not

do not seek to say that before each exchange of information under the “FATCA” agreement,

the defendant should carry out an ex ante check on the basis of its own criteria in order to

to determine whether or not a particular account holder represents a low risk or

high tax evasion. On the other hand, they specify that with regard to the notion of tax evasion as

than defined in US law by 26 US Code, section 7201, it is not understandable that the

defendant does not, for example, take into account the income threshold below which

U.S. citizens who live abroad for 330 days (including U.S.

accidental) can apply to the IRS for the exclusion of income earned abroad and this via the

clause in Annex II of the agreement which allows other categories of accounts to be excluded from the

“FATCA” declaration, even after signing it.

 Regarding information and transparency

67. The complainants address this aspect both as a guarantee to be included in the agreement

“FATCA” in execution of article 46.2. a) of the GDPR (point 62) only as an independent grievance

(Title II.E.2).

68. They denounce that contrary to what is requested by the EDPS under the terms of its Guidelines
Guidelines 02/2020, neither the "FATCA" agreement nor the international conventions to which
the agreement refers to do not contain provisions on transparency and the provision
information under “appropriate guarantees” in execution of Article 46.2.a) of the GDPR
mobilized by the defendant.

69. The Complainants also point out that the Respondent does not even seek to rule
as to the existence of and compliance with such an obligation of transparency on the part of the IRS
however, as required by Article 16.3. of the Law of December 16, 201530. At most the IRS
would it be required to comply with the principle of transparency applicable to it by virtue of its
internal legislation which does not result in an obligation equivalent to what is required in
application of Article 14 of the GDPR.

70. The complainants add that point 2.4.1. of the EDPS Guidelines 02/2020 sets out
clearly that "the public body transferring the data should inform the persons
individually concerned in accordance with the notification requirements laid down
in Articles 13 and 14 of the GDPR” and concludes that “a general information note on the site
Internet of the public body in question will not be sufficient”. The plaintiffs judge on this

30 Section 16.3. of the Law of 16 December 2015: “Notwithstanding the other provisions of the law, the application of the law is postponed
or suspended with respect to a jurisdiction that is not a member of the European Union if it is established that this jurisdiction has not
put in place an infrastructure that ensures that financial institutions established in its territory and its tax administration
sufficiently inform residents of Belgium of the information concerning them that will be
communicated by this jurisdiction within the framework of an automatic exchange of information relating to accounts
financial. (…)”.

respect that the defendant's website does not present the required information and that the reference to some pages of this site does not constitute an active form of communication31.

71. The plaintiffs further allege that since the defendant states that it is relying on "appropriate safeguards" within the meaning of Article 46 of the GDPR, it was particularly required to comply with Article 14.1. f) of the GDPR and to indicate "the reference to the appropriate safeguards or adapted and how to obtain a copy or where they have been made available".

72. Finally, the Complainants consider that the Respondent could not32 rely on Article 14.5. c) of the GDPR provided that the appropriate measures required to be able to use this exception are not provided for by Belgian law.

 As to the absence of DPIA

73. The Complainants consider that the Respondent was required to carry out a DPIA even before the entry into force of the GDPR. According to them, this obligation derives implicitly from Article 22.2. of the LVP and of article 26.2. of Directive 95/46/EC and more generally of Article 16.4. of the LVP transposing article 17.1. of Directive 95/46/EC. Complainants cite also the Guidelines of December 16, 2015 of the Group 29 which already recommended EU Member States to carry out a DPIA in the context of automatic exchanges data for tax purposes.

74. Finally, the Complainants consider that in any case, Article 35 of the GDPR introduces this obligation for processing operations presenting a high risk, which is, according to them, the case of denounced treatment. In support of several criteria taken from the EDPS Guidelines regarding the Data Protection Impact Assessment (DPIA) and how to determine whether the processing is "likely to create a high risk" for the purposes of the Regulation (EU) 2016/679 (hereinafter the EDPS Guidelines on DPIA)34, the complainants come to the conclusion that a DPIA was necessary in the present case. Complainants retain the following criteria: systematic monitoring, sensitive data or data to be highly personal character, data processed on a large scale, crossing or

combination of datasets, data concerning vulnerable persons, as well as

31 Article 29 Group, Guidelines on transparency within the meaning of Regulation (EU) 679/2016 (WP 260): https://www.cnil.fr/sites/default/files/atoms/files/wp260_guidelines-transparence-fr.pdf These guidelines have been endorsed by the EDPS during its inaugural meeting on 25 May 2018.

32 The plaintiffs anticipate a possible argument from the defendant that the latter will not rely on.

33 Article 29 Group, Guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of automatic exchanges of personal data for tax purposes, WP 234 of 16 December 2015: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp230_en.pdf

34 Article 29 Group, Guidelines on Data Protection Impact Assessment (DPIA) and Data Protection how to determine whether the processing is “likely to create a high risk” for the purposes of Regulation (EU) 2016/679 (WP file:///C:/Users/win-verbvale/Downloads/20171013_wp248_rev_01_en_D7D5A266-FAE9-3CA1-65B7371E82EE1891_47711-1.pdf These Guidelines were endorsed by the EDPS during his meeting inaugural on May 25, 2018.

that, to a certain extent, processing "which prevents the exercise of a right or benefit from a service or a contract”.

75. Failing to have carried out a DPIA within the meaning of Article 35 of the GDPR, the defendant, according to plaintiffs, found guilty of a breach of this provision.

 Regarding accountability

76. The Complainants recall that the principle of responsibility (accountability) requires controller that he complies with the GDPR but also that he is able to demonstrate this compliance at all times. The Complainants consider that no Member State of the EU is not in a position to demonstrate this at present, including the Belgian State.

 As to Article 20 of the LTD (obligation to conclude a protocol)

77. In their complaint, the complainants finally denounce a breach of Article 20 of the LTD which provides that “unless otherwise provided in specific laws, in execution of article 6.2 of the Regulation [read GDPR], the federal public authority transferring data to personal character on the basis of Article 6.1.c) and e), of the Regulation [read the GDPR] to any other public authority or private organization, formalizes this transmission for each type of treatment by a protocol between the person in charge of the initial treatment and the person in charge of the recipient processing of the data (§1)”. Consequently, the defendant was according to the plaintiffs, required to enter into a protocol within the meaning of Article 20 of the LTD with the IRS.

78. According to their submissions in reply, the complainants nevertheless indicate that they waive their argument based on a breach of this provision.

I.B.6.2. Defendant's position

79. On May 16, 2022, the Litigation Chamber receives the summary conclusions of the defendant.

80. The defendant's arguments can be summarized, grievance by grievance, as follows.

 As regards compliance with the rules governing cross-border flows and as regards Article 96 GDPR

81. The defendant does not deny that before its submissions (in its decision of October 4, 2021 – point 22), she argued that s. 49.1. d) of the GDPR allowed him to base the transfer of reported data to the IRS. She adds that in fact, Article 49.1. d) GDPR cannot find to apply in this case since this transfer is not occasional.

82. As already mentioned, the defendant claims to rely on Article 46.2. a) from GDPR35 since the transfer of data to the IRS is based, according to it, on an "instrument

35 Article 46 of the GDPR: 1. In the absence of a decision pursuant to Article 45(3), the controller or the subcontractor cannot transfer personal data to a third country or to an international organization only if it has provided appropriate safeguards and on condition that the persons concerned have enforceable rights and

legally binding and enforceable between public authorities or bodies that do not require
no authorization from the national supervisory authority" within the meaning of this provision. There
defendant specifies in this regard that the binding legal instrument is on the one hand
the "FATCA" agreement and on the other hand the Law of 16 December 2015 and that these are instruments both
national and international legally binding and enforceable on which it has no
not taken and which are also part of a global international framework mentioned in point 9.

83. The defendant also invokes Article 96 of the GDPR already cited. She pleads in support of her
application that the "FATCA" agreement complied with EU law at the time it was concluded and
that this undoubtedly emerges, as noted by the IS in the terms of its investigation elsewhere
(points 37 et seq.):

- Opinions 61/2014 and 28/2015 of the CPVP on the draft Law of 16 December 2015;
- Deliberation 52/2016 of the CSAF of the CPVP of 15 December 2016 which authorizes the
defendant to transmit to the IRS the financial information of the accounts
statements of US taxpayers transmitted to it by the institutions
as part of the "FATCA" agreement, this deliberation still leaving its
effects under section 111 of the ACL;
- Of the decision of the Constitutional Court of March 9, 2017 which states the conformity of the Law
of December 16, 2015 to the LVP through article 22 of the Constitution and article
8 of the European Convention on Human Rights (ECHR).

84. In conclusion, the defendant defends in support of these elements that the "FATCA" agreement is
at least in accordance with EU law applicable before May 24, 2016. The conditions of
Article 96 of the GDPR being met, there was no reason for the defendant not to
apply the Law of December 16, 2015. It adds that it cannot be blamed for not having
carried out another exercise to assess this conformity when the legislator had done so himself.
even by seeking the opinion of the CPP and integrating the latter's remarks.

85. The defendant further adds that the reliance on the Schrems II judgment of the CJEU by the complainants is not relevant and that the latter give this decision a scope that it does not therefore that the judgment concerned the transfer of personal data for the purposes commercial transactions, which is not the case here, in the case of a transfer between authorities public for the purposes of taxation and the fight against fraud and tax evasion without scope commercial. Moreover, according to the defendant, there is no question here of data collection. of a personal nature en masse within the meaning of this judgment.

effective legal remedies. 2. The appropriate guarantees referred to in paragraph 1 may be provided, without this requires specific authorization from a supervisory authority, by a) a legally binding instrument and enforceable between public authorities or bodies (…).

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86. As to the existence of appropriate safeguards within the meaning of Article 46.2. a) GDPR, the defendant considers that the essential principles of the GDPR are independently of Article 96 of the GDPR, in any case respected (see below). The defendant refers in this respect to notification of the data protection measures and infrastructure required by Article 3.8. of the “FATCA” agreement already cited36 which certifies that it has indeed carried out this analysis of the existence of sufficient guarantees.

87. As to the automated decisions, the defendant argues that there is no doubt that the processing that it carries out within the framework of the “FATCA” agreement does not fall within the scope application of Article 22 of the GDPR when it is not a question of “neither processing producing legal effects concerning the data subject” nor “significantly affecting him or her similar way”. The defendant insists on its exclusively logistical role in this regard. AT even assuming that the processing would fall, quod non according to the defendant, within the scope application of Article 22 of the GDPR, the latter would consider that it is in one of the following cases of exception. More specifically, Article 22.2. b) of the GDPR would apply in support of the recital 71 which explicitly mentions that "decision-making based on such

processing [referred to in Article 22.1.] (…) should be permitted where authorized by law of the EU or the law of a Member State to which the controller is subject, including for the purpose of controlling and preventing fraud (…)"37.

88. Finally, with regard to the retention period, the defendant specifies that the answer is given by section 12.4. of the Law of 16 December 2015 which provides that "financial institutions declaring parties retain the computerized databases that they have communicated to the competent Belgian authority for seven years from 1 January of the following calendar year the calendar year during which they communicated them to that authority. The banks of data are erased at the end of this period" as well as by article 15.3. of the same law which sets the same duration of 7 years for the retention by the defendant of the banks of data communicated to the competent authority of another jurisdiction, i.e. to the IRS in this case. The defendant denounces in this respect the position of the complainants which artificially tends to separate the "FATCA" agreement from the Law of December 16, 2015 (with regard to the principle of limited conservation discussed here in particular) and more generally other rules in terms of automatic exchange of information in tax matters to which the defendant is outfit.

36 See note 18 above.

37 It is the Litigation Chamber which underlines.

 As for the principles of finality, necessity and minimization

89. As to the purpose limitation, the defendant refers to Article 3.8. of the "FATCA" agreement as well as Article 17 of the Law of 16 December 201538. It also refers to the opinions and aforementioned authorization from the CPP (point 83).

90. As to the principles of necessity and minimization: the defendant emphasizes the elements following which, in its view, reflect compliance with the aforementioned principles: (1) in compliance with the "FATCA" agreement, only data concerning American citizens subject to the

U.S. tax laws are forwarded to the IRS; (2) banks do not have
the obligation to consider as declarable bank accounts whose balance or value
does not exceed a certain amount (focus of the FATCA agreement on high balances); (3) only the
data listed in article 2.2. of the “FATCA” agreement are communicated and these data are
necessary for the identification of taxpayers and the performance of its duties by the IRS in
enforcement of Articles 4 and 22 of the 1988 Multilateral Convention. The defendant relies
here again on the authorization of the CSAF and on the judgment of the Constitutional Court of March 9, 2017
already mentioned which would have validated the proportionality of the data processed. The defendant judges by
elsewhere that the complainants' reference to the judgment of 8 April 2014 of the CJEU is devoid of
relevance since in the present case, unlike the situation referred to in this judgment, there is no
generalized and undifferentiated collection. The defendant recalls that the collection does not relate to
effect only on a specific category of persons (of American nationality) and establishes a threshold
below which the declaration is not required. There would therefore exist precise criteria justifying the
collection.

 Regarding information and transparency

91. The defendant indicates that its website provides exhaustive information combining
more theoretical explanations, news, links to relevant documents and a
FAQs.

92. It adds that under the terms of Article 14 of the Law of 16 December 2015 “each institution
reporting financial institution informs each natural person concerned that data to be
personal character concerning it will be communicated to the competent Belgian authority” and
that it is therefore in any case up to the banks to inform the persons concerned such as the
first plaintiff and the accidental Belgian Americans. These data are as follows:

- The purposes of the communications of personal data (a);
- The ultimate recipient(s) of the personal data (b);
- Declarable accounts for which the personal data is

communicated (c);

38 See note 16 above.

- The existence of a right to obtain, on request, communication of specific data

that will be or have been disclosed regarding a Reportable Account and the

procedures for exercising this right (d);

- The existence of a right to rectify personal data concerning him

and the procedures for exercising this right (e).

93. The defendant also indicates that this information was provided to the first complainant

by its bank Z on May 18, 2020 (point 16). During the hearing, the defendant clarified

that it could therefore rely on the exemption from information provided for in Article 14.5. a) GDPR.

 As to the absence of DPIA

94. Referring to Article 35 of the GDPR, the defendant mentions that its DPO specified in a

letter of June 30, 2021 addressed to the Inspector General that "according to the working methodology

retained by the SPF Finances [read the defendant], and developed by the Security Service

Information and Privacy Protection (SSIPV), a pre-impact analysis had been

carried out".

95. On the basis of this pre-impact analysis, the Respondent's DPO indicates that it was concluded

that a DPIA was not necessary therefore:

- That the Law of 16 December 2015 incorporated the remarks made by the CPVP into

its two opinions 61/2014 and 28/2015 already cited;

- That the CSAF had issued a deliberation authorizing the transmission of data to

the IRS and that the conditions of this deliberation have been implemented;

- That

the treatment respects

the requirements of

the AEOI standard for

confidentiality and data protection, as well as the security policies of

information from the defendant based on the ISO 27001 standard;

- That the American authorities are also required to provide the measures of

necessary security so that the information remains confidential and is

stored in a secure environment, as provided by the FATCA Data safeguard

workbook.

96. The defendant adds that the content of this letter was reproduced in extenso in the report

supplementary investigation of the IS (point 40).

97. The defendant also considers that the plaintiffs in no way demonstrate the elements

that would justify a DPIA. It is of the opinion that the criteria set out in the Guidelines for the

EDPS relating to the DPIA are not encountered in the context of the processing it operates. She

emphasizes again that it does not analyze the data but only prepares for them.

direct transmission to the IRS.

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 Regarding accountability

98. The defendant considers that in view of the elements reported with regard to the preceding points,

it sufficiently demonstrates that it complies with Article 5.1. of the GDPR.

 As to Article 20 of the LTD (obligation to conclude a protocol)

99. The defendant points out that if the plaintiffs raised a breach of this article

terms of their complaint, they dropped it in their reply submissions. The defendant

believes for its part that it is clear from the preparatory works of the LTD that the obligation

to conclude such a protocol does not apply in the event of data transfers to

or third countries within the meaning of the GDPR. The denounced transfer taking place towards the United States, no

breach cannot therefore be blamed on him.

I.B.6.3. Additional conclusions on the judgment of the Constitutional Court of March 9

2017

100. On August 17, 2022, exceptionally, the Litigation Chamber authorizes the parties to conclude additionally on the reference to the judgment of March 9, 2017 of the Constitutional Court that the defendant in its aforementioned summary submissions.

101. On August 31, 2022, the Litigation Chamber received the complainants' additional submissions. The latter insist above all on the fact that the judgment dating from 2017, the Constitutional Court could not take into account the evolution of the relevant case law to assess the compliance of the “FATCA” agreement with data protection rules, in particular the lack of proportionality in the collection of personal data of individuals concerned and their subsequent transfer. In 2017, the CJEU had already initiated its case law as to the principles to be taken into account in the analysis of the proportionality of a measure legislation under Article 8 of the ECHR and Articles 7, 8 and 52 of the Charter. Stop C-175/20 of February 24 already mentioned (point 66) leaves, according to the plaintiffs, no longer any doubt as to the unlawfulness of a generalized collection of data in the specific context of the fight against tax evasion. The plaintiffs insist in this regard on the fact that the CJEU rejects in this judgment the distinction suggested by the Advocate General between, on the one hand, research and ex-ante detection for which the proportionality requirement could be assessed from more flexible way according to him on the one hand and ex post verification in a concrete case to be assessed more strictly according to him on the other hand. The data listed in the agreement as well as the thresholds40 provided for by the agreement (below which the account is not declarable) do not constitute according to the plaintiffs not criteria within the meaning of the case law of the CJEU; there is in fact no analysis of the risk of tax evasion or evasion by persons whose data

39 See. CJEU, case. C-175/20 – Opinion of Advocate General Michal Bobek of 2 September 2021, points 70 et seq.

40 The complainants cite in this regard judgment C-184/20, Vyriausioji tarnybinės etikos komisija, ECLI:EU:C:2022:601, of the CJEU.

are processed. Finally, the plaintiffs point out that the Constitutional Court could not hold account of the May 2018 study commissioned by the European Parliament41 which states that FATCA reporting obligations are not sufficiently limited with regard to the risk of tax evasion.

102. On September 21, 2022, the Litigation Chamber receives the additional conclusions of the defendant on the same judgment. The defendant principally requests that the Chamber Litigation dismisses aspects of the Complainants' additional submissions that go beyond the request made by the Litigation Chamber. According to the defendant, the plaintiffs will indeed beyond the invitation of the Litigation Chamber by developing again a argumentation regarding data minimization/proportionality.

103. For the remainder, the defendant also invokes Article 96 of the GDPR with regard to the grievance of violation of the principle of minimization invoked by the plaintiffs42.

104. With regard to the judgment of the Constitutional Court itself, the defendant insists that it had done so in its summary conclusions on the fact that the judgment has the character of truth legal/constitutional. It adds that after a precise and complete analysis, the Court Constitutional Court considered that the Law of 16 December 2015 and, therefore, the "FATCA" agreement, were contrary neither to Article 22 of the Constitution, nor to the LVP, nor to Directive 95/46/EC in including the condition of proportionality. So there was no reason for her to refuse to apply the Law of December 16, 2016.

105. Finally, the defendant indicates that if, by impossibility, the Litigation Division considered it necessary analyze the case law of the CJEU cited by the complainants - quod non -, it would be appropriate to find that the plaintiffs draw erroneous conclusions. Thus, the defendant pleads that in judgment C-175/20 of February 24, 2022 invoked by the plaintiffs, the CJEU asks the referring court to verify whether the Latvian administration would be able to target the ads using specific criteria. The defendant considers in this respect that the Court Belgian constitutional law qualifying the collection of data – listed by law – in execution

the “FATCA” agreement and the Law of December 16, 2015 of proportionate, it is answered to the

concern of the CJEU.

I.B.7. The hearing of the parties

41 See. https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU(2018)604967_FR.pdf

42 The Litigation Chamber indeed notes that in its summary conclusions, given the structuring of the titles

used, the defendant seemed to invoke Article 96 of the GDPR only with regard to the appropriate safeguards that should

surround

the transfer of data to the IRS.

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106. By emails of August 17 and September 8, 2022, the parties are informed that the hearing will

September 13, 2022. This hearing was then postponed to November 7, 2022 and then to

January 10, 2023.

107. On September 23, 2022, the plaintiffs transmitted to the Litigation Chamber 2 documents

which they qualify as “new parts” of the file. This is more particularly an opinion of 23

August 2022 from the Slovak Data Protection Authority relating to the “FATCA” agreement and its

compliance with the GDPR (and its unofficial French translation) as well as the report

updated “FATCA legislation and its application at international and EU level – an update” from

September 2022 of the 2018 report commissioned by the European Parliament.

108. There followed an exchange of letters between the parties regarding the admissibility of these documents.

transmitted outside the deadlines set for the filing of their respective conclusions and documents.

109. On October 3, 2022, the Litigation Chamber informs the parties that it will give them the

opportunity to comment on these documents at the start of the hearing.

110. On January 10, 2023, the parties are heard by the Litigation Chamber. During the hearing,

and as reflected in the minutes, the Litigation Chamber indicates that it is

authorized to examine all relevant documents. No piece is discarded

of the procedure provided that the exercise of the rights of defense in their regard is made

possible, whether during the hearing or if necessary after it. The parts don't come back

more on this point.

111. On January 27, 2023, the minutes of the hearing are submitted to the parties. Bedroom

Contentious does not receive any comments from the latter on these minutes.

II. MOTIVATION

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II.A. Regarding the competence of the Litigation Chamber of the APD

112. The GDPR has in particular entrusted data protection authorities (“supervisory authorities”)

of the EU to deal with complaints submitted to them (Article 57.1.f) of the GDPR). These

authorities must examine these complaints with all due diligence43.

113. In the exercise of their missions, including when they deal with complaints, the authorities of

data protection must contribute to the consistent application of the GDPR throughout

of the EU. To this end, they cooperate with each other in accordance with Chapter VII of the GDPR (Article

51.2. GDPR).

43Judgment of 16 July 2020, C-311/18 - Facebook Ireland and Schrems (“Schrems II”), ECLI:EU:C:2020:559, paragraph 109.

114. In this case, the complaint submitted for examination by the Litigation Division relates to the

communication (transfer) (i.e. processing within the meaning of article 4.2 of the GDPR) of data

(within the meaning of article 4.1. of the GDPR) by a Belgian public authority (the

defendant) to a foreign public authority (the IRS) in execution of the “FATCA” agreement and

of the Belgian Law of 16 December 2015. The one-stop-shop mechanism provided for in article 56 of

GDPR does not apply in view of article 55.2. of the GDPR which provides that “2.

When the processing is carried out by public authorities or private bodies

acting on the basis of Article 6(1)(c) or (e)44, the State supervisory authority

member concerned is competent. In this case, article 56 is not applicable”. ODA

is none the less indisputably competent to deal with it in execution of Article 55

of the GDPR and Article 4 of the LCA.

115. As this transfer took place in execution of an admittedly bilateral intergovernmental agreement between the Belgium and the United States but similar in content to other bilateral agreements signed by the United States with other EU member states, compliance with the GDPR of the transfer based on this agreement, even bilateral (and supplemented by national legislation), must be assessed with, as much as possible, the same consistency in the different States EU members.

116. To this end, the Litigation Chamber will take particular account of the Guidelines relevant to the present case issued by both the 2945 Group and the EDPS 46 as well as relevant judgments of the CJEU.

II.B. As for the sovereign assessment of the Litigation Chamber

117. As explained in the retroactive proceedings, the defendant puts several highlighted in its conclusions that the inspection reports did not find any failure on its part and that the arguments it provided in the context of the investigation are the basis for the conclusion of the IS reports.

44 The defendant processes the data pursuant to an international agreement and Belgian legislation.

45 Article 30.1 a) of Directive 95/46/EC entrusted the Article 29 Group (Group 29) with the task of examining any question relating to the implementation of the national provisions adopted pursuant to this Directive, with a view to contribute to their homogeneous implementation. Pursuant to Article 30.1. b), Group 29 was responsible for advising the the European Commission on the level of protection in third countries.

46 As set out in recital 139 of the GDPR, the EDPS is established for the purpose of promoting the consistent application of the GDPR in the EU through its various activities. It is clear both from recital 139 and from the tasks assigned to it entrusted under Article 70 of the GDPR, that the EDPS has an essential role to play with regard to the consistent application of the rules that the GDPR lays down with regard to cross-border data flows. See. in this respect, in addition to the reference to its

mission

advice to the European Commission regarding the level of protection in third countries, letters c), i), j) and s)

of Article 70 as well as Article 64 e) and f) of the GDPR which all relate specifically to the role of the EDPS with regard to such

flows.

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118. As it had already done in its decision 81/2020, the Litigation Chamber specifies that the

recourse to the Inspection is not systematically required by the LCA. It is indeed at the

Litigation Chamber to determine whether, following the filing of a complaint, an investigation is

necessary or not (article 63, 2° LCA – art. 94, 1° LCA). The Litigation Chamber can thus

decide to deal with the complaint without entering the IS (art. 94, 3° LCA).

119. When referred to it, the findings of the IS certainly enlighten the Litigation Chamber on the

factual elements of the complaint and on the qualification of these facts with regard to the regulations

in terms of data protection. As such, they can come to support one or the other.

breach ultimately accepted by the Litigation Chamber in its decision. However, the

Litigation Chamber remains free, in support of all the documents produced during the

procedure, including the arguments developed in the context of the contradictory debate which

follows its decision to deal with the case on the merits (article 98 LCA), to conclude in a manner

motivated to the existence of shortcomings that would not, if necessary, have been raised by the

inspection report(s).

II.C. As to the defendant's status as data controller

120. The Litigation Chamber notes that the defendant claims the quality of responsible for

treatment47 in support of Article 13.2 of the Law of 16 December 2015 which qualifies it

explicitly as such, both in its conclusions and during the hearing48.

121. Section 13.2. thus provides that “§ 2. For the application of the law of December 8, 1992, each

Reporting financial institution and the FPS Finances [read the defendant] are considered

as a "controller" of "personal data" in respect of

concerns the information covered by this law which relates to persons

physical49".

122. The defendant is therefore expressly qualified as data controller under the terms of

the Law of December 16, 2015. This law certainly refers to the LVP repealed by the LTD (article 280

of the LTD). However, the definition of "controller" in Article 1.4. of the Privacy Policy and

that retained in Article 4.7. of the GDPR are identical.

123. Section 4.7. of the GDPR thus states that the data controller is "the natural person or

legal entity, public authority, service or other body which, alone or jointly with

others, determines the purposes and means of the processing". Section 4.7. adds that "when

47 See. for example page 3 of the minutes of the hearing of January 10, 2023.

48 As the Litigation Chamber will point out in point 208, the FATCA agreement does not provide for any qualification or definition

in terms of data protection.

49 It is the Litigation Chamber which underlines.

the purposes and means of this processing are determined by Union law or the law

of a Member State, the controller may be designated or the specific criteria

applicable to its designation may be provided for by Union law or by the law of a State

member »50. This is the case of the defendant under Article 13.2 of the Law of 16

December 2015 cited above.

124. In its Guidelines on the notions of controller and data processor

processing in the GDPR51, the EDPS considers that when the controller is

specifically identified by law, this designation is decisive in defining who acts in

as controller. This indeed presupposes that the legislator has designated

as controller the entity which is genuinely able to exercise the

control.

125. On several occasions in its submissions and during the hearing (see the minutes
hearing), the defendant also demonstrated that it did not have access to the content
of the “bundle” of data that it received from financial institutions (here from bank Z) with a view to
the transfer of this data to the IRS as an organizational measure aimed at
ensure data security and integrity. As already mentioned, the defendant
does not, however, deny its status as data controller (point 120).
126. As far as necessary, the Litigation Chamber wishes to recall that the fact that the
defendant does not have access to the data communicated is indifferent. Indeed, this
circumstance has no consequence on his quality of data controller as well as the
CJEU clarified this in its Google Spain and Google judgment of May 13, 2014.53
processing and subcontracting in
50 It is the Litigation Chamber which underlines.
51 European Data Protection Board (EDPB), Guidelines 07/2020 concerning the concepts of
responsible for
GDPR, https://edpb.europa.eu/system/files/2022-
02/eppb_guidelines_202007_controllerprocessor_final_fr.pdf (point 23).
52 See. the minutes of the hearing: respondent's response to the question posed by Mr. C. Boeraeve as to the
technical and organizational measures put in place.
53 Judgment of the CJEU of 13 May 2014, C-131/12, Google Spain and Google, ECLI:EU:C:2014:317, points 22 – 41, and all
particularly points 22 and 34:
According to Google Spain and Google Inc., the activity of search engines cannot be considered as a
“22.
processing of data that appears on third-party web pages displayed in the list of search results,
given that these engines process the information accessible on the Internet as a whole without sorting between the
personal data and other information. Moreover, even supposing that this activity should be qualified
of “data processing”, the operator of a search engine cannot be considered as “responsible” for this

processing, since he has no knowledge of the said data and does not exercise control over them".

"34. Furthermore, it should be noted that it would be contrary not only to the clear wording but also to the objective of this provision, consisting in ensuring, by a broad definition of the concept of "responsible", effective and of the data subjects, to exclude from it the operator of a search engine on the grounds that it does not exercise control over the personal data published on the web pages of third parties. »

See also CJEU judgment C-25/17, Jehovan Todistajat, EU:C:2018:551, point 69 and CJEU judgment C-210/16, Wirtschaftsakademie Schleswig-Holstein, C□210/16, EU:C:2018:388, point 38, as well as Guidelines 7/2020 of the EDPS already mentioned regarding the notions of controller and processor in the GDPR, point 45.

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127. In conclusion, and in support of the combined reading of Article 4.7 of the GDPR and Article 13.2. of the Law of December 16, 2015, the Litigation Chamber retains the qualification of responsible of processing on the part of the defendant with regard to the processing of data cause by the plaintiffs, i.e. the communication (transfer) of data to the IRS.

128. As for the financial institutions (in this case the bank the bank Z with which the first complainant held bank accounts), they were deliberately not put to the case by the plaintiffs54. Nevertheless, they play an important role in the supply chain. data processing that takes place within the framework of the execution of the "FATCA" agreement and the Law of December 16, 2015. Indeed, it is they who initially ensure the status of the account holders concerned by the obligation to communicate data to the defendant. They are the ones who collect the data required pursuant to Article 2.2. of the "FATCA" agreement and article 5 of the Law of 16 December 2015 and forward them to the defendant who in turn operates the transfer to the IRS. As such, financial institutions are also qualified as data controller by the Belgian legislator for the requirements of the Law of 16 December 201555.

II.D. Regarding Article 96 of the GDPR

129. As set out in paragraph 83, the defendant, relying on Article 96 of the GDPR,

supports (given favorable opinions from the CPVP, a transfer authorization from the CSAF
of the CPVP and the judgment of the Constitutional Court of March 9, 2017) that the “FATCA” agreement read
in combination with the Law of 16 December 2015 complies with EU law as applicable
to May 24, 2016. The defendant therefore considers itself authorized to base the transfer of data from the
first complainant in particular, on the basis of these texts.

130. The Litigation Division considers it necessary, in view of this argument, to clarify the scope of
GDPR Article 96. She does this in the following paragraphs.

131. By opting for a regulation that will replace Directive 95/46/EC, the co-legislators
Europeans have chosen to strengthen the harmonization of data protection rules at
personal character in the EU. The regulation is directly applicable in the legal order

54 See. the record of the hearing on this point.

55 As mentioned in point 121, Article 13.2. states that “§ 2. For the application of the law of December 8, 1992,
each Reporting Financial Institution and the FPS Finances [read the defendant] are considered to be
"controller" of "personal data" with regard to the information covered by the
this law which relate to natural persons”. It is the Litigation Chamber which underlines.

The Litigation Chamber will not examine in the context of this decision the question of whether the institutions
and the defendant should or should not be qualified as joint data controllers within the meaning of Article
4.7. of the GDPR and therefore whether or not the conditions of Article 26 of the GDPR should have been complied with. In
view of the grievances
opposed to the defendant, a possible qualification as co-responsible is in fact not likely to lead to
a different decision of the Litigation Chamber.

of each Member State and whether it contains a number of references to the legislator
national level, these references do not call into question the objective of strong harmonization pursued.

132. By providing for the entry into application of the GDPR two years after its entry into force, i.e.
May 25, 2018 (Article 99 of the GDPR), the European co-legislators not only granted a

two-year compliance period for the new GDPR obligations but
also clearly indicated that on this same date of May 25, 2018, the processing of
current data as of May 24, 2016, should comply with all the provisions of the
GDPR.

133. Recital 171 of the GDPR provides in this regard that “the processing operations already in progress on the date
application of the regulation should be brought into conformity with it within two
years after its entry into force”.

134. This compliance is in fact essential to the achievement of the objective
strong harmonization pursued by the regulation. In the absence of compliance of
processing in progress before the entry into application of the GDPR with it, two regimes of
protection would coexist. This would, in essence, be contrary to the very nature of the regulation and
a fortiori, to that of a fundamental right enshrined in the Charter (Article 8).

135. It is in the light of this ratio legis of the transitional provisions of the GDPR that it is necessary
understand and apply Article 96, both in its material scope (rationae
materiae) than in its temporal scope (rationae temporis).

136. Article 96 of the GDPR does not exempt data controllers who carry out data processing
data in execution of international agreements concluded before May 24, 2016 neither totally nor
indefinitely to the material and temporal scope of the GDPR. Section 96
titled "Relation with international agreements concluded previously" provides for a regime
transitional subject to conditions, the objective pursued by article 96 of the GDPR being “to ensure a
comprehensive and consistent protection of personal data in the Union” and
to avoid any legal vacuum 56.

II.D.1. As to the material scope of Article 96 of the GDPR

137. Only the content of the international agreement concluded by the Member State is covered by Article 96 of the
GDPR whose wording unequivocally targets “international agreements involving the

56 This objective is expressly explained in recital 95 of Directive 2016/680/EU, with regard to Article 61 of this

Directive, which is identical to Article 96 of the GDPR. Recital 95 thus provides that “in order to ensure protection comprehensive and consistent collection of personal data in the Union, international agreements which have concluded by the Member States before the date of entry into force of this Directive and which respect the relevant provisions of Union law applicable before that date, remain in force until they are amended, replaced or revoked. (Emphasis added by the Litigation Chamber).

transfer of personal data to third countries”. The scope material of Article 96 must be interpreted strictly in accordance with this wording.

138. The Litigation Chamber notes here from the outset that Article 96 of the GDPR is not invoked by the defendant that with regard to (1) the grievance alleging non-compliance with the framework for the transfer of data to the US IRS57 as well as with regard to (2) the grievance based on the violation of the principles of purpose, necessity and minimization. It does not appear to the Litigation Chamber that the defendant would invoke this Article 96 of the GDPR with regard to all the obligations in data protection matters for which it is responsible. Article 96 of the GDPR is thus, according to the examination of the Litigation Chamber, not invoked by the defendant with regard to the grievance a breach of the obligation to inform which is opposed to it by the complainants for example, nor is it with regard to the applicability, where applicable, of Article 35 of the GDPR.

139. The Litigation Chamber agrees with this analysis. Indeed, the “FATCA” agreement does not provide for specific provision concerning the obligation to inform, for example, this is excluded of the scope of Article 96 of the GDPR. The application of Articles 12 and 14 of the GDPR by the defendant is therefore in no doubt (see Title II. E.2 below).

140. In addition, the new obligations arising from the GDPR will fully apply: they are in fact non-existent in Directive 95/46/EC and therefore a fortiori not regulated in the “FATCA” agreement of 2014. To assert the contrary would amount, for example, to admitting that a data leak on the part of the defendant should not be notified in respect the conditions set out in Article 33 of the GDPR or that the transfers denounced by the complaint do not

should not be covered by the defendant's register of processing activities (Article 30 GDPR). This cannot be the case. The application of Article 96 of the GDPR is limited to the content of the agreement alone. The letter of article 96 is clear on this point and this reading is moreover in accordance with the ratio legis of article 96 which, as well as the Litigation Chamber will set out below (point 143), aims to preserve the rights acquired by third countries to terms of such agreements.

141. The Litigation Division will thus assess whether or not the defendant was required to carry out a DPIA in the light of Article 35 of the GDPR without interference from Article 96 of the GDPR (see Title II. E.3 below). The Litigation Chamber emphasizes that the obligation of accountability is also applies. Its compliance by the defendant will be examined by the Litigation Chamber in the light of only articles 5.2. and 24 of the GDPR read together, without interference from article 96 of the GDPR (see Title II. E.4 below). Finally, the Litigation Chamber will assess the respect by the defendant of Article 20 of the LTD under the same conditions (see Title II. E.5. infra).

II.D.2. Regarding the temporal scope of Article 96 of the GDPR

57 Item 6.2. of its summary conclusions and point 103 above.

142. Article 96 of the GDPR provides for the continued application of international agreements involving transfers of personal data to third countries "until they are modified, replacement or repeal. Although no concrete deadline is set for this modification, replacement or repeal, their mention constitutes a limitation temporal in itself. By these terms, the co-legislators mean that maintaining such international agreements is inherently time-limited. This reading is also the only one which, according to the Litigation Chamber, reconciles the objective of harmonizing the GDPR (points 131 et seq. above), the preservation of the rights of third countries with which a international agreement is concluded (point 143) and the duty of loyal cooperation of States members of the Union (point 144).

143. Article 96 of the GDPR indeed aims to preserve the rights of third countries. It's obvious that
negotiating an international agreement takes time and that the rights acquired by a third party
to an international agreement cannot be purely and simply immediately withdrawn
due to the entry into force of new legislation while this agreement was in conformity
EU law at the time of its conclusion.

144. Without prejudice to what has just been explained, the Member States of the EU are nevertheless
required to comply with EU law. This obligation results from art 4.3 of the
Treaty of the European Union (TEU) which enshrines in particular the principle of cooperation
loyalty of the Member States58. Art 4.3 of the TEU is binding on them, including their authorities
independent data protection authorities with tasks based on European law
applicable (Article 8.3 of the Charter and Articles 51 et seq. of the GDPR).59

145. Article 96 of the GDPR is in this respect in line with Article 351 of the Treaty on the
Functioning of the EU (TFEU)60 with regard to which the CJEU has already ruled that:

- On the one hand, “the rights and
the obligations resulting from an agreement entered into
prior to the date of accession of a Member State between the latter and a third State
are not affected by the provisions of the Treaty. This provision [read article 351
of the TFEU] is intended to specify, in accordance with the principles of international law,
that the application of the Treaty does not affect the commitment of the Member State concerned to

58 Section 4.3. TEU: By virtue of the principle of sincere cooperation, the Union and the Member States respect and assist
each other
mutually in the performance of tasks arising from the Treaties. Member States shall take all measures
general or specific to ensure the performance of obligations arising from treaties or resulting from the acts of
institutions of the Union. Member States shall facilitate the performance by the Union of its mission and shall refrain from any
measure likely to jeopardize the achievement of the Union's objectives.

59 See in this sense: Judgment of the CJEU of June 15, 2021, Facebook Ireland e.a. c. Gegevensbeschermingsautoriteit,

C-645/19,

ECLI:EU:C:2021:483, para 60.

60 Article 351 of the TFEU: The rights and obligations resulting from agreements concluded before 1 January 1958 or, for acceding States, prior to the date of their accession, between one or more Member States, on the one hand, and a or more third States, on the other hand, are not affected by the provisions of the Treaties. To the extent that these conventions are not compatible with the Treaties, the Member State(s) in question shall use all appropriate means to eliminate any incompatibilities found.

to respect the rights of third States resulting from a previous convention and to observe its obligations.

- On the other hand, the practices must be brought into compliance with European law "unless this practice is necessary to ensure the execution by the Member State concerned of obligations towards third States resulting from an agreement concluded previously62".

146. Thus, the Litigation Chamber shares the view that it follows from this position of the CJEU that "the meaning of the two paragraphs have been reconciled, and it is now safe to affirms that art. 351(1) TFEU provides temporary protection to allow the Member States not to incur international responsibility while the ultimate goal established by art. 351(2) TFEU (that is, the removal of all incompatibilities) is achieved in a sustainable (for the Member State involved) and lawful (from an international law perspective) manner 63".

147. The Litigation Division cannot therefore subscribe to an interpretation according to which Article 96 of the GDPR would authorize, without any time limit, the maintenance in application of agreements agreements entered into before May 24, 2016 - even if they comply with the Directive 95/46/EC and EU law on the same date - without further compliance with the GDPR.

Following such an interpretation, the co-legislators would have allowed, in defiance of the European case law cited above, that coexist, without time limit,

international agreements in accordance with the state of Union law as of 24 May 2016 (including
to Directive 95/46/EC also repealed on May 24, 2018) on the one hand and agreements
agreements concluded after this date must comply with the GDPR on the other hand.
148. This reading of Article 96 of the GDPR would also imply that data protection authorities
of data assess the compliance of these international agreements with the rule of law
May 24, 2016 many years after this date, in particular in the light of a directive
95/46/EC repealed for a number of years which will only increase with time and without
take no account of developments in the case law of the CJEU with regard to concepts-
data protection keys, where applicable, common to Directive 95/46/EC and the GDPR
or under the Charter.
61 CJEU, Judgment of 3 March 2009, C-205/06, ECLI:EU:C:2009:118, Commission / Austria, para 33. This judgment relates to Article
307, second paragraph, of the Treaty establishing the European Community (repealed by Article 351 TFEU). Article 307: “The rights and obligations resulting from agreements entered into prior to January 1, 1958 or, for acceding States, prior to the date of their accession, between one or more Member States, on the one hand, and one or more third States, on the other hand, are not affected by the provisions of this Treaty. To the extent that these agreements are not compatible with this Treaty, the Member State or States concerned shall use all appropriate means to eliminate incompatibilities noted.
62 CJEU, Judgment of 28 March 1995, C-324/93 The Queen / Secretary of State for the Home Department, ex parte Evans Medical
and Macfarlan Smith, ECLI:EU:C:1995:84, p 33.
63 It is the Litigation Chamber which underlines: https://www.europeanpapers.eu/es/europeanforum/court-of-justice-finally-rules-on-analogical-application-art-351-tfeu

149. The Litigation Division is, on the contrary, of the opinion that the fact of not providing for a defined limit
in time in Article 96 of the GDPR (by reference to a deadline or by reference to a

number of years elapsed, for example) does not exempt either EU Member States64 or controllers, nor the data protection authorities of their obligations respective.

150. With regard to EU Member States, Article 96 of the GDPR does not exempt them well from contrary to (re)negotiate, in execution of their duty of loyalty, an agreement in accordance with GDPR. The more time passes, the less acceptable is the inertia of States in this respect. Already in 2021, the data protection authorities - including the DPA - have thus invited the EU Member States to review their international agreements in the light of the GDPR.65

151. The Litigation Chamber specifies here that it is of the opinion that it is up to the Belgian State to negotiate an agreement in accordance with the GDPR, in execution of its duty of sincere cooperation (article 4.3 TEU – item 144). It emphasizes that on the date of the adoption of this decision, 7 years have passed. elapsed since the entry into force of the GDPR. The Litigation Chamber notes in this regard that no sign of the will of the Belgian government to ask for the revision of the agreement "FATCA" was brought to its attention in the context of this case.

152. The role of the Belgian State (like that of any other Member State signatory to a “FATCA” agreement comparable to that signed by the Belgian State) does not, however, exempt the person responsible from processing which, like the defendant, intends to rely on Article 96 of the GDPR, to examine, if the conditions for recourse to Article 96 are met. Indeed, regardless of the obligation of accountability (Title II.E.4), recourse to Article 96 of the GDPR implies intrinsically, by the condition it sets (i.e. compliance of the agreement with EU law as applicable on the date of May 24, 2016), that the data controller performs this assessment.

153. As for the data protection authorities, the Litigation Chamber is also of the opinion that the more time passes, the less acceptable it is that they are limited in the exercise of the mission entrusted to them by the GDPR since May 25, 2018, a mission which consists precisely as pointed out in points 113 et seq. to contribute to the effective application

the agreements

international, including

64 Nor more generally the States subject to the GDPR.

65 Statement 04/2021 of 13 April 2021 on

https://edpb.europa.eu/system/files/202205/edpb_statement042021_international_agreements_including_transfers_en.

pdf The EDPB (EDPB) considers therein “that, so that the level of protection of natural persons guaranteed by the GDPR (…)

does not

not be compromised when personal data is transferred outside the Union, care should be taken

taking into account the objective of bringing these agreements into compliance with the requirements of the GDPR (…)

applicable to

data transfers when this is not yet the case. The EDPB therefore invites Member States to assess and, where

where appropriate, to review their international agreements involving international transfers of personal data

personal data, such as those relating to taxation (for example the automatic exchange of personal data to

tax purposes), (….) that were entered into before May 24, 2016 (for GDPR-relevant agreements).(…). The EDPB

recommends that Member States take into account, for this review, the GDPR (…), the relevant guidelines of

the EDPB applicable to international transfers [the EDPD cites its Guidelines , as well as the case law of the Court

of justice, in particular the Schrems II judgment of July 16, 2020”.

transfers:

THE

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and GDPR uniform. In its judgment Schrems II already quoted, the CJEU emphasizes in this respect what

follows with regard to the competence of the supervisory authorities as enshrined in Articles

8.3. of the Charter and 57.1. a) GDPR:

-

“(…) Therefore, each of them [read the supervisory authorities] is invested with the

competence to verify whether a transfer of personal data from the State

member to which it belongs to a third country complies with the requirements of this
regulation. (…) The exercise of this mission is of particular importance in the
context of a transfer of personal data to a third country, when
that, as is clear from the very wording of recital 116 of that regulation, “when
of personal data cross the external borders of the Union,
this may increase the risk that natural persons will not be able to exercise their
rights related to data protection, in particular to protect against the use or
of the unlawful disclosure of this information” (points 107 and 108 of the judgment).

154. The Litigation Chamber will also take particular account of the following elements:

- The CJEU imposes very strict conditions on international agreements having a
impact on the exercise of the rights to privacy and the protection of personal data
personnel enshrined in Articles 7 and 8 of the Charter. More specifically, it follows
of the opinion 1/15 of the CJEU rendered on the draft PNR agreement between Canada and the EU (as well as
judgment C-817/19 of June 21, 202266) and the Schrems II judgment67 that “the
communication of personal data to a third party, such as an authority
public, constitutes an interference with the fundamental rights enshrined in the
Articles 7 and 8 of the Charter, regardless of the subsequent use of the information
communicated. The same applies to the retention of personal data.
as well as access to said data for use by the authorities
public. In this respect, it does not matter whether the information relating to the private life
concerned are or are not of a sensitive nature or whether or not the interested parties have
suffered any inconvenience as a result of that interference” (paragraph 124)68.

- Any limitation to the fundamental rights enshrined in the Charter (including the right
fundamental to the protection of data of article 8) must satisfy the conditions of
section 52.1. of the Charter already quoted which states that "Any limitation on the exercise of
rights and freedoms recognized by this Charter must be provided for by law and respect

the essential content of those rights and freedoms. In accordance with the principle of

66 CJEU, judgment C-817/19 of 21 June 2022, Human Rights League, ECLI:EU:C:2022:491.

67 See. note 43 above.

68 Opinion of the CJEU of 26 July 2017 (EU-Canada PNR Agreement), ECLI:EU:C:2017:592, paras 123 and 124.

proportionality,

limitations can only be made if they are

necessary and effectively meet objectives of general interest recognized by

the Union or where necessary to protect the rights and freedoms of others".

155. It follows from all of the foregoing elements, i.e. both (1) the ratio legis of Article 96

of the GDPR, that (2) the obligation of sincere cooperation imposed on Member States and by

repercussions, to the supervisory authorities such as the DPA (of which the Litigation Chamber is the

of administrative litigation), that (3) of the necessary restrictive interpretation of article 96

of the GDPR required by the CJEU when the effects of this article are likely to limit

the exercise of fundamental rights, in particular the rights to privacy and to the protection of

data respectively enshrined in Articles 7 and 8 of the Charter, that the effect of

“standstill” of article 96 of the GDPR must be read and interpreted in a restrictive way and

proportionate.

156. The Litigation Chamber is thus of the opinion that the text of Article 96 of the GDPR does not

not to the interpretation according to which its "standstill" effect diminishes over time and

with the evolution of the interpretation of EU law, a fortiori with regard to principles already

enshrined in Directive 95/46/EC and included as such in the GDPR.

In his

assessment of the use of Article 96 of the GDPR, the Litigation Chamber will thus verify whether

its application is necessary to preserve the acquired rights of the United States with regard to

of the specific situation of the first plaintiff and the accidental Belgian Americans that

defends the second defendant In support of the obligation of loyal cooperation which weighs on
it by repercussion, it will balance the interests of the United States with the rights of these
the latter and could, if necessary, set aside article 96 of the GDPR if the application of the latter
was to have a disproportionate effect on those rights. In this weighting exercise, the
Litigation Chamber will authorize itself, if necessary, to take into account the developments
case law since May 24, 2016.

II.E. As to the grievances invoked

157. In accordance with Article 44 of the GDPR, the data exporter who, like the defendant,
transfers personal data to a third country must, in addition to respecting the
Chapter V of the GDPR, also fulfill the conditions of the other provisions of the GDPR. All
processing must comply with the GDPR as a whole.

158. The Litigation Chamber will thus first examine the compliance
the transfer of data to the IRS (Title II.E.1).

159. This review will involve the analysis of compliance with the principles of purpose, necessity and
proportionality of the transfer by the defendant to the IRS in terms of the principles of finality,
of necessity and proportionality/minimization enshrined in both Article 6 §.1.b) and c) of the
Directive 95/46/EC taking into account the invoked applicability of article 96 on these aspects that
by section 5.1. b) and c) of the GDPR (Title II.E.1.1).

160. This review will also include the analysis of compliance with the specific framework of the
transfer to the United States as a third country required by Chapter V of the GDPR (and its
equivalent under Directive 95/46/EC applied in combination with Article 96 of the GDPR
also) (Title II.E.1.2).

161. Finally, the Litigation Chamber will examine the defendant's obligations
information (Title II.E.2), possible performance of a DPIA (Title II.E.3) and accountability
(Title II.E.4) before concluding its analysis by examining compliance with article 20 of the LTD (Title

II.E.5).

II.E.1. As for the compliance of data transfer to the IRS

II.E.1.1. As to the breach of the principles of purpose, necessity and minimization

II.E.1.1.1. As to the principle of purpose limitation

162. The principle of finality as enshrined in Article 5.1.b) of the GDPR - as it was in Article 6.1.b) of Directive 95/46/EC - requires data to be collected for purposes determined, explicit and legitimate and are not further processed in a way incompatible with these purposes. On the sufficiently determined character of the finality depends the possibility to analyze whether and to conclude that the data processed is actually necessary to the achievement of the purpose. Objectives that are too broadly defined thus leave too much latitude to the data controller and do not allow effective application of the principle of purpose, an essential principle of the regulations on the protection of data.

163. The Litigation Chamber notes that the purposes pursued by the “FATCA” agreement such as specified in the introduction to the agreement aim to (a) improve international tax rules and (b) the implementation of the obligations resulting from the American “FATCA” law aimed at combating tax evasion by US nationals.

69 See. the following recitals: “While the government of the Kingdom of Belgium and the Government of the United States of America (…) desire to conclude an agreement to improve international tax compliance through mutual assistance in tax matters based on an effective infrastructure for the automatic exchange of information” and “Whereas, the Parties desire to conclude an agreement to improve tax compliance and provide for the implementation of FATCA based on domestic reporting and reciprocal automatic exchange pursuant to the Convention [read the Convention on mutual administrative assistance in tax matters done in Strasburg on January, 25, 1988](…)”.

164. As early as 2015, the Article 29 Group specified in its document WP 234 specifically devoted to data protection requirements in the context of the exchange

data processing that “any international agreement should clearly identify the purposes for which the data is collected and validly used. The wording of the purpose (“tax evasion / improvement of tax compliance”) for example, can seem vague and insufficiently clear, leaving too much leeway to competent authority”. The CJEU confirmed this requirement in its Opinion 1/15 (PNR EU-Canada) already quoted and in which it considered that an international agreement should be formulated very precise manner.

165. In light of the foregoing, the Litigation Division is of the opinion that the purposes expressed in the “FATCA” agreement are not sufficiently determined in that they do not allow not to assess how the data processed is necessary for the achievement of the purposes expressed. Such formulations do not allow data subjects or the DPA to discern the exact objectives and above all, the data processing that may result from it, even if the data processed have been listed (article 2.2. of the “FATCA” agreement and 5 of the Law of 16 December 2015).

II.E.1.1.2. As to the principles of necessity and minimization/proportionality

166. As pointed out by the complainants, the transfer of data to the IRS in the context of execution of the “FATCA” agreement is a system of automatic and annual transfer of data on the basis of the criterion of American nationality and declarable bank accounts (Articles 2 of the “FATCA” agreement and 5 of the Law of December 16, 2015) without indication that a any tax law would have been violated and not a data transfer system on a ad hoc basis at the request of the US authorities given the presence of evidence requiring the said transfer of data taking into account the purposes pursued.

167. In this regard, the Litigation Chamber recalls the principle of proportionality (according to the terminology retained by article 6.1. c) of Directive 95/46/EC) or, alternatively, the principle of minimization (according to the terminology used in article 5.1. c) of the GDPR) in application of which the data processing must be strictly necessary for the realization

of finality.

168. As early as 2015, the data protection authorities gathered within the Group 29 insisted on the necessary compliance with this principle in the context of "FATCA" and in these terms: "while that this case concerned the necessity and proportionality of certain measures to combat against terrorism, the Article 29 Group is of the opinion that the balancing exercise prescribed by the Court of Justice applies to any public policy implemented (in particular the

70 See. H. Hijmans, PNR Agreement EU-Canada Scrutinized: CJEU Gives Very Precise Guidance to Negotiators, European Data Protection Law Review, 2017/3.

cooperation policies in tax matters) affecting the rights to protection personal data. It is therefore imperative, in the cooperation agreements in tax matters, to demonstrate that the planned exchange of data is necessary and that it relates to the minimum amount of data required to achieve the objective pursued”71.

169. This position taken by Group 29 in its WP 234 followed the cancellation of the directive 2006/24/EC by the CJEU in a judgment of April 8, 2014 for reasons related to the non-compliance with the principle of proportionality. The Court had thus deemed disproportionate the retention of data generated or processed in the context of the provision of services of publicly available communication or public communication networks in that this obligation applied “even to persons for whom there is no indication of such as to lead one to believe that their behavior may have a link, even indirect or remote, with grave breaches”72.

170. The Litigation Chamber subscribes to the point of view expressed by Group 29 at the time according to which there is in fact no reason to limit this consideration to the measures adopted in the context of the fight against terrorism. Other public policy measures aimed at to pursue distinct objectives, in particular through the collection of personal data are also subject to the same respect for the principle of proportionality of Article 6.1.c) of

Directive 95/46/EC then applicable and today in article 5.1. c) GDPR. It's the case
data collection imposed in execution of agreements organizing exchanges
automatic tax data such as the “FATCA” agreement. For this reason, the analogy
with the positions of both the G29 and the EDPS, but especially the CJEU, are
particularly relevant.

171. Group 29 also specified, still in 2015 already, that “consequently, the agreements of
cooperation in tax matters should include provisions and criteria linking
explicitly the exchange of information and, in particular, the communication of data to
personal nature concerning financial accounts to possible tax evasion and which
exempts low-risk accounts from reporting requirements. In this regard, these criteria
should be applicable ex ante to determine the accounts (and the information) that
should be declared”.

172. In 2017, the EDPS did not say anything else when it insisted in its guide on the evaluation of the
necessity of measures limiting the fundamental right to data protection on the fact that
“measures that might prove useful for the purpose of the given objective are not all

71 Group 29, Guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of the automatic exchange of personal data for tax purposes, WP 234 of 16 December 2015. This is the Chamber Litigation that stresses.

72 CJEU, judgment of 8 April 2014 C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and others, ECLI:EU:C:2014:238, pt 58.

desirable or not all of them can be considered a necessary measure in a
democratic society. It is not enough that the measure is merely convenient or cost-effective”.

173. The EDPS also indicated that the annual nature of the communication in execution of
the “FATCA” agreement demonstrated as such that the communication was not based on
indications of fraud but was done systematically.

174. Finally, in 2018, a study commissioned by the European Parliament stated that the requirements of reporting provided for by the “FATCA” agreement are not sufficiently limited with regard to the risk of tax evasion. The study in question thus states “that in conclusion, the limitations introduced by FATCA within the European Union through IGAs [read the intergovernmental agreements] seem at the present stage and in certain circumstances, be neither necessary nor proportionate, insofar as they do not restrict the reporting obligations to individuals suspected of tax evasion. On the other hand, these restrictions introduced by FATCA would constitute "necessary and necessary measures proportionate” on the condition that the United States provide, on a case-by-case basis, elements proving that American expats use the union finance system to engage in overseas tax evasion. In the absence of such evidence, the limitations of FATCA seem go beyond what is strictly necessary to achieve the objective of the fight against overseas tax evasion. The updated version of this study concludes along the same lines73.

175. All these elements therefore already existed on 24 May 2016. They had to be taken into account from 2014, well before the entry into force of the GDPR. They were repeated and reinforced in the following years, including after May 24, 2016, which the defendant could not completely ignore.

176. More recently,74 on 24 February 2022, the CJEU issued a judgment in which it sets out expressly that a generalized and undifferentiated collection of personal data for the purpose of combating tax evasion by a tax administration was not permitted. The administration concerned must refrain from collecting data that is not strictly necessary for the purposes of the processing (point 74 of the stop).

The administration should also consider whether its requests cannot be more targeted to

based on more specific criteria. The CJEU expressed these considerations with regard to the application
made by the Latvian tax administration to an economic operator to provide it each month
73 See. https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734765/IPOL_IDA(2022)734765_EN.pdf
74 CJEU, Judgment of 24 February 2022, C-175/20, Valsts ieņēmumu dienests (Processing of personal data for purposes
taxes), ECLI:EU:C:2022:124. See. also judgment C-817/19, League of Human Rights (PNR), already cited, of June 21, 2022:
“115. With regard to the principle of proportionality, the protection of the fundamental right to respect for private life at the level
of
the Union requires, in accordance with the settled case-law of the Court, that the derogations from the protection of data
personal nature and the limitations thereof operate within the limits of what is strictly necessary. In addition, a general objective
cannot be pursued without taking into account the fact that it must be reconciled with the fundamental rights concerned by the
extent, by carrying out a balanced weighting between, on the one hand, the general objective and, on the other hand, the
rights in question”.
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data relating to advertisements for the sale of passenger cars published on its site
Internet the previous month. Even in the exercise of the mission of public interest of which it was
invested, the data controller cannot, according to the CJEU, proceed in a generalized and
undifferentiated to data collection and must consider the possibility of targeting more,
or in this case to target certain advertisements using specific criteria.
177. It follows from this judgment that the recipient of the data request has the obligation to examine
the merits of it and to check whether he is legally authorized to respond to it. Otherwise, the
recipient of the request risks violating its own obligations under the GDPR.
178. The Litigation Division is in this respect of the opinion that the sole nationality of the first plaintiff and
more generally accidental Belgian Americans defended by the second plaintiff is
an insufficient criterion with regard to the purpose pursued. The circumstance that a list of data
concerning them has been adopted does not constitute a relevant and sufficient targeting criterion. There
communication of personal data relating to all accidental Belgian Americans –

admittedly, except for those whose account balances are below the declarable threshold – without other indication of fraud or tax evasion is disproportionate, a fortiori with regard to those who would not be subject to taxation in the United States in view of the exemptions authorized on where applicable by US law as pointed out by the plaintiffs 75.

II.E.1.1.3. Conclusion as to the breach of the principles of purpose limitation, necessity and minimization

179. The case law cited with regard to the principles of necessity and minimization is certainly for the part subsequent to May 24, 201676. However, it confirms the position adopted by the CJEU in 2014 and on which, as has just been recalled, the authorities of data protection alerted as early as 2015 and have not stopped doing so since. Toward reduction of the standstill effect of Article 96 of the GDPR, the defendant could not not not take it into account in its assessment of the use of Article 96 of the GDPR and the continuation of treatments on this basis. In the opinion of the Litigation Chamber, the argument of a possible compromise of the rights acquired by the United States could not be invoked here since before May 24, 2016, compliance with the principles of necessity and minimization/proportionality of the “FATCA” agreement was already tainted. Certainly the CJEU does not had not commented on the “FATCA” agreement as such, but the interpretation it had

75 It should be noted in this context that the complainant's bank had specified in its letter of 22 April 2020 that the objective of the US legislation was to identify ALL accounts held by US citizens or residents, which to everyone less attests to the difficulty in understanding the purpose (too broad see below) of the agreement.

76 By citing this judgment in support of its reasoning, the Litigation Chamber neither upholds nor rejects the argument of the plaintiffs as requested by the defendant in its additional conclusions relating to the judgment of the Court of March 9, 2017 (point 102). The Litigation Chamber is free to invoke it on its own like any other case law that it deems relevant in the context of the exercise of its decision-making jurisdiction.

given to the principles of necessity and minimization in a comparable context was necessary

therefore both with regard to the “FATCA” agreement and the Law of December 15, 2016. This is a fortiori the

cases after the recent judgments of the CJEU in the same vein. The same conclusion applies to

with regard to the failure observed with regard to the purpose limitation principle, the main principle

data protection before the GDPR, which is not respected (see above).

180. In support of the foregoing, the Litigation Division therefore notes that on the date of 24 May

2016 already, the compliance of data transfers provided for by the "FATCA" agreement and the Law

of

16

December

2015

to

principles

of

purpose,

need

And

of

proportionality/minimization could be seriously questioned. If any doubts

on this conformity must then remain in the eyes of some, quod non according to the Chamber

Litigation, these doubts are completely dispelled in 2023 given the evolution of

the case law of the CJEU77.

181. In conclusion, the Litigation Chamber is of the opinion that neither the FATCA agreement nor the Law of 16

december 2015 no

respect

the principle of

purpose, necessity and

minimization/proportionality. The Litigation Chamber concludes that the defendant does not

can neither rely on Article 6.1. e) nor 6.1. c) of the GDPR which contain this condition of

necessity, which is not satisfied, to operate the denounced transfers.

II.E.1.2. Regarding compliance with the rules relating to the supervision of the transfer to the IRS

II.E.1.2.1. Reminder of the principles

182. Chapter V of the GDPR deals with the transfer of personal data to third countries

or international organizations. By third country, we mean any country which is not

member of the European Economic Area (EEA). The transfer of personal data from

first complainant by the defendant to the IRS is a transfer to a third country within the meaning of

GDPR.

183. As the parties point out in their respective pleadings (points 53 et seq.), Chapter

V of the GDPR organizes a cascading system between different instruments that can be

mobilized by a data controller or a subcontractor to transfer data

personal data to a third country.78 This system is in line with the transfer regime

of data provided for by Directive 95/46.79 Thus, in the absence of an adequacy decision within the meaning of

77 The Litigation Chamber recalls here again the judgment of the CJEU of October 6, 2020 which emphasizes that limitations

on

the exercise of the rights enshrined in Articles 7 and 8 of the Charter are only permitted, "provided that these limitations are

provided for by law, that they respect the essential content of said rights and that, in compliance with the principle of

proportionality, they are necessary and actually meet objectives of general interest recognized by the Union

[…]. Judgment of the CJEU, Joined cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and others,

ECLI:EU:C:2020:791, pts

120 and 121.

78 See. Kuner, in Kuner a.o. The EU General Data Protection Regulation: A Commentary, OUP 2020, p. 846.

79 For a comparison between Directive 95/46/EC and the GDPR, Kuner, in Kuner a.o. The EU General Data Protection

Regulation: A Commentary, OUP 2020, p. 758.

Article 45 of the GDPR, the data controller or the processor may not transfer data
personal data to a third country only if it has provided appropriate safeguards and at the
provided that the persons concerned have enforceable rights and legal remedies
effective within the meaning of Article 46 of the GDPR. These appropriate safeguards may take
different shapes such as
instrument
legally binding rules
of binding companies (or Binding Corporate Rules - BCR), standard clauses of
data protection or even a code of conduct or a certification mechanism for
conditions laid down by Articles 46 and 47 (with regard to the BCRs) of the GDPR. Finally, in
the absence of an adequacy decision and appropriate safeguards, a transfer of data to
a third country can only take place if one of the derogations listed in Article 49 of the GDPR is
application.

184. Failing to meet the requirements of Articles 45 to 49 of the GDPR, the transfer of data
personal data to a country outside the EEA is prohibited.

185. It is undisputed that there is no adequacy decision covering the transfer of the
data from the first plaintiff (and more broadly from accidental Belgian Americans whose
second plaintiff defends the interests) to the IRS in the United States, since the decision
“Privacy Shield”80 – moreover invalidated by the CJEU in the judgment “Schrems II already cited” – does not
does not apply to such transfers.

186. In other words, the transfer of data by an authority in the EU such as the defendant
towards, as in the present case, an authority in a third country that does not provide protection
adequate, can only take place if the data controller, i.e. the defendant, has
provided for appropriate safeguards and provided that the persons concerned have

enforceable rights and effective remedies either by “a legally binding instrument
binding and enforceable between public authorities or bodies” (Article 46.2.a) of the
GDPR); either by “provisions to be incorporated into the administrative arrangements between the
public authorities or public bodies that provide enforceable and effective rights
for data subjects” within the meaning of Article 46.3. b) GDPR.

187. It has already been mentioned that the defendant relies in this case on Article 46.2. a) GDPR,
in combination with Art. 96 GDPR as well as independently (items 82 et seq.).

188. It follows from the very text of Article 46.2. a) of the GDPR (as well as Article 46.3. b) elsewhere)
that appropriate safeguards should be included in the legally binding instrument (or
in the relevant administrative arrangement).81 Article 46.2. a) is indeed worded as follows:

80 Commission Implementing Decision (EU) 2016/1250 of 12 July 2016, in accordance with Directive 95/46/EC of European Parliament and of the Council on the adequacy of the protection provided by the Privacy Shield EU-US, OJ 2016, L 207/1.

81 See. also the EDPS Guidelines 02/2020 already cited, p.21 s.

“appropriate safeguards (…) may be provided (…) by a legally binding instrument
binding and enforceable between public authorities or bodies.

189. Recital 102 of the GDPR, which relates to Article 96 of the GDPR, specifies in the same sense
that “These Regulations are without prejudice to international agreements concluded between
the Union and third countries with a view to regulating the transfer of personal data,
including appropriate safeguards for the benefit of data subjects.

190. Although the French wording of this recital is not the clearest, reading the versions
English84 and Dutch85 clarifies that these agreements must contain the appropriate safeguards
for the benefit of the persons concerned. Indeed, where the French version retains the wording
“the agreements (…) including the appropriate safeguards”, the English and Dutch versions
explicitly link said agreements to guarantees providing that these must be included

in these agreements. The English version thus indicates “agreements (…) including appropriate safeguards for data subjects [international agreements including appropriate safeguards for data subjects]” and the Dutch version, the most explicit, mentions “international overeenkomsten waarin [in which] passende waarborgen zijn opgenomen [appropriate safeguards are included]”.

191. In other words, pursuant to Article 46.2.a) of the GDPR, whether applied in whether or not in combination with Article 96 of the GDPR as interpreted and applied as the Dispute Chamber explained it in points 129 et seq., these guarantees must appear in the international agreement itself.

192. Why this requirement? Since the international agreement constitutes the legal basis for transfers of data that it provides for, it must contain the appropriate guarantees in terms of data protection required. It is only if these guarantees are included IN the agreement that they will be enforceable against the non-EU state with which the agreement is concluded. Bedroom Contentitieuse recalls, as it did above, that we find ourselves in a situation where it there is no adequacy decision for the benefit of the third country. Respect for the rules data protection rules to which EU member states are bound therefore requires, when the choice is made as in the present case, to conclude an international agreement, that this agreement complies with these rules. This conformity requires the inclusion in the agreement

82 It is the Litigation Chamber which underlines.

83 It is the Litigation Chamber which underlines.

84 Recital 102 (English version): This Regulation is without prejudice to international agreements concluded between the Union and third countries regulating the transfer of personal data including appropriate safeguards for the data subjects.

85 Recital 102 (Dutch version): Deze verordening doet geen afbreuk aan internationale overeenkomsten die de United in derde landen met elkaar hebben gesloten om de doorgifte van persoonsgegevens te regelen en waarin passende waarborgen voor de betrokkenen zijn opgenomen.

guarantees which, as will be explained below, reflect the European requirements
minimum data protection standards that will be applied to the transferred data. Otherwise
end up in the agreement (by or under it), these guarantees will not be
enforceable against the third State. In its Guidelines 02/2020, the EDPS emphasizes that
“international agreements must expressly state that both parties are bound
guarantee the essential principles of data protection” (point 17). In
consequence, moreover, the fact that these guarantees would result, as the defendant
underlines with regard to some of the said guarantees (see below), the Belgian Law of 16 December
2015 is in this respect insufficient since this legislation does not bind the third state.

193. Given that the defendant relies on Article 96 of the GDPR with regard to the complaint based on
the illegality of the transfer to the United States, the Litigation Chamber specifies that in its
document WP 234 of December 16, 2015 already, Group 29 listed the guarantees which, without
prejudice to additional ad hoc guarantees, must always be present in the database
legal basis (whether legislation or international agreement) in the context of
automatic exchange of data for tax purposes.

194. In its Guidelines 02/2020, the EDPS also lists, in support of Article 44 of the GDPR
and the case law of the CJEU, in particular the Schrems II judgment already cited, the guarantees
minimum requirements that must be found in the binding legal instrument in order not to take
than the case of Article 46.2.a) of the GDPR invoked by the defendant in this case. these
reinforce those already explained by Group 29 in its document WP 234 cited above.
More than recommendations, these are indeed minimum guarantees that must be found
in the international agreement. These guarantees are in fact intended, as has just been recalled, to
ensure that the level of protection of natural persons under the GDPR is not
compromised when their personal data is transferred outside the EEA
and that the persons concerned benefit from a level of protection substantially
equivalent to that guaranteed within the EU.

195. These minimum guarantees include the following requirements, which are

found both in document WP 234 of the above-mentioned Group 29 - albeit implicitly - that

in the most recent EDPS Guidelines 02/2020.

 As for the key concepts – of data protection:

196. International agreements must contain definitions of the concepts and rights

basic personal data that is relevant for the agreement in

question. The EDPS Guidelines 02/202086 indicate that if they refer to these

concepts, international agreements must provide definitions of important concepts

86 Point 16 of the EDPS Guidelines 02/2020.

following: “personal data”, “processing of personal data”,

“controller”, “subcontractor”, “recipient” and “sensitive data”.

197. The Litigation Chamber observes that if document WP 234 of Group 29 does not

did not explicitly mention, it is no less essential, that we place ourselves under the regime

of Directive 95/46/EC or of the GDPR, that the parties to an international agreement agree on

the definition of the key concepts of the data processing provided for by the agreement – a fortiori

when the object of the agreement is based on this processing, as in the present case - and these notions

are defined there. Failing this, the effectiveness of any other guarantee in terms of protection of

mentioned data could be compromised. The said definitions are, with exceptions

limited87, otherwise identical in Directive 95/46/EC and in the GDPR.

 As for the principles of data protection:

198. Principle of

purpose limitation88:

the agreement

international must delimit its field

of application and must specify the purposes for which the personal data

are processed (transferred), including compatible purposes for further processing

and ensure that the data will not be subject to further processing for purposes

incompatible.

199. Principle of minimization89: the international agreement must specify that the data transferred and

further processed must be adequate, relevant and limited to what is necessary

with regard to the purposes for which they are transmitted and subsequently processed.

200. Principle of limitation of storage90: the international agreement must contain a clause

relating to data retention. This clause must in particular specify that the data

personal information is only kept in a form that allows the identification of the persons

data subjects only for the time necessary for the purposes for which they were transferred and

processed later. When a maximum retention period is not set in the

national legislation, a maximum period should be set in the text of the agreement.

 As regards the rights of data subjects:91

201. The international agreement must guarantee enforceable and effective rights for the person

concerned, as provided for in Article 46.1. of the GDPR and recital 108. The rights which

benefit the persons concerned, including the specific commitments made by the

87 The notion of processing in the GDPR (article 4.7.) is supplemented by a reference to the structuring and the list of

Article 9 sensitive data includes new data.

88 See. page 6 of WP 234 and point 18 of EDPS Guidelines 02/2020.

89 See. page 6 of WP 234 and points 21 et seq. of the EDPS Guidelines 02/2020.

90 See. pages 6 and 7 of WP 234 and point 24 of EDPS Guidelines 02/2020.

91 See. page 7 of WP 234 and title 2.4. (points 27 et seq.) of the EDPS Guidelines 02/2020.

parties to guarantee these rights, must be mentioned in the agreement. For these rights to be

effective, the international agreement must provide for mechanisms that guarantee their application.

in practice. In addition, any violation of the data subject's rights must be accompanied by a

appropriate remedy.

202. As such:

- The international agreement must clearly describe the obligations of the parties in terms of transparency.

- The agreement must guarantee the data subject the right to obtain information about all personal data that is processed and have access to them.

- In principle, the agreement should include a clause indicating that the recipient organization will not take automated individual decision-making, including profiling, producing legal effects concerning the person in question or affecting him in a significant exclusively on the basis of automated processing within the meaning of Article 22 GDPR. When the purpose of the transfer includes the possibility for the organization addressee to take such decisions, the conditions for such decision-making must be defined in the agreement and comply with article 22. 2-4 of the GDPR.

 With regard to recourse mechanisms:

203. In order to guarantee the enforceable and effective rights of data subjects, the agreement international organization must provide a system that allows data subjects to continue to benefit from redress mechanisms after their data has been transferred to a country outside the EEA. These recourse mechanisms must enable data subjects whose rights have been violated to lodge a complaint and have it decided.

204. The Litigation Division does not reproduce here the complete list of the minimum guarantees required pursuant to Article 46.2. a) GDPR. It limits itself to stating those which it will proceed to the exam. Indeed, the absence of one or the other guarantee in the agreement is sufficient to conclude that the illegality of transfers made on the basis of it, where applicable, whether one places oneself under section 46.2. a) of the GDPR applied in combination or not with article 96 of the GDPR from when these guarantees were required both before May 24, 2016 and after this date.

205. In the absence of appropriate safeguards within the meaning of Article 46 of the GDPR, the only possibility is to

based on Article 49 of the GDPR. In its Guidelines 2/2018 on exemptions

provided for in Article 49 of Regulation (EU) 2016/67992 the EDPS clarified that it cannot be relied on

on Article 49 of the GDPR for repetitive and/or structural processing. Article 49 of the GDPR

92 European Data Protection Board, Guidelines 2/2018 on derogations under Article

49 of Regulation (EU) 2016/679

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf, p.5.

is therefore excluded in this case (which the defendant admits) since the communication of

given by the defendant to the IRS is automatic and annual.

II.E.1.2.2. In this case

206. The Litigation Division considers, like the parties (points 57-59 and 81), that Article

49.1. d) of the aforementioned GDPR cannot be invoked. Indeed, as noted, this

exception cannot be invoked in the case of recurring and systematic transfers

as is the case with the reported data transfers.

207. On the other hand, the Chamber will examine below whether the “FATCA” agreement provides the guarantees

appropriate as required by Article 46.2. a) GDPR – applied both in combination with

Article 96 of the GDPR invoked by the defendant but also independently from

when the defendant defends the point of view that in any event, even supposing that

the Litigation Chamber does not retain article 96 of the GDPR, the appropriate guarantees

requirements exist.

 As for the key concepts – of data protection:

208. With regard to the definitions of data protection concepts as essential as those

of “personal data”, “processing” or “controller”, the

Litigation Chamber finds that the "FATCA" agreement does not contain any. If article 1 of

the agreement is exclusively dedicated to the definitions (1 litera a) to z) + litera aa) to mm), none have

relates to the notions of data protection whereas if the very principle of the agreement is based

on a sequence of processing of personal data.

 Principle of retention limitation:

209. The Litigation Chamber notes that the “FATCA” agreement does not contain any commitment as to to the limited retention of the data processed and transferred in execution of the agreement. Certainly, as the defendant points out (point 88), the Law of December 16, 2015 provides for a duration conservation of 7 years in its head. This period provided for by national legislation does not bind than the defendant. This does not demonstrate that the IRS would be bound by a retention period. limited data transferred also.

 Rights of data subjects:

210. With regard to the rights of the persons concerned, the Litigation Chamber notes that the “FATCA” agreement does not contain any mention of the rights of the data subject such as recalled for some in point 201 above. The defendant argues in this regard that it informs the persons concerned via its website in a section dedicated to the agreement “FATCA”. Even assuming that this information is provided in a compliant manner, quod non (see Title II.E.2 below), such information does not amount to the consecration of the rights of data subjects (which include many other rights than the right to transparency

and information) required in the agreement itself. The rights of data subjects not covered by the "FATCA" agreement - nor by the texts to which the agreement refers (the rights enshrined in the Privacy Act being limited and without equivalence with those provided for by the GDPR - this guarantee is lacking. With particular regard to the reference to Article 22 of the GDPR, the defendant pleads that it does not carry out processing falling under this arrangement. This circumstance, if verified (see Title II.E.4 relating to the DPIA) is indifferent. Indeed, what is requested as a guarantee in the agreement is the commitment of the parties, including the recipient of the data (i.e. the IRS), not to proceed especially to this type of treatment. This warranty is not provided by or under

the agreement.

211. The Litigation Division finds that here too the defendant has failed to demonstrate that this appropriate guarantee enshrining the “rights of data subjects” binds the parties to the agreement.

 With regard to recourse mechanisms:

212. The Litigation Division can only note on this point that the defendant does not demonstrate not that such an appeal mechanism would exist for the benefit of the first plaintiff and more generally for the benefit of the persons concerned by the processing complained of once the transferred data, including accidental Belgian Americans.

213. The Litigation Chamber concludes in support of the foregoing that the Slovak authority of data protection did before it93, that the defendant does not demonstrate that the appropriate safeguards required by Article 46.2. a) of the GDPR that it mobilizes, applied the case applicable in combination with Article 96 of the GDPR, are provided for by or under the agreement “FATCA”. Consequently, the Litigation Division finds a violation of Article 46.2. a) of the GDPR (and more broadly of Chapter V of the GDPR) combined with articles 5.1. and 24 of the GDPR (accountability – see infra Title II. E.4) on the part of the defendant.

II.E.1.3. Conclusion as to the compliance of the transfer of data to the IRS

214. As has already been explained (paragraphs 129 et seq.), the defendant could not rely on Article 96 of the GDPR only on the condition of having assessed the conformity of the "FATCA" agreement and to have concluded that it is compliant with respect to the useful reading of Article 96.

93 Opinion of the Office for Personal Data Protection of the Slovak Republic of 23 August 2022 addressed to the Ministry Finance of the Slovak Republic (unofficial translation into French). This opinion is made following the request assessment of compliance with the GDPR of international agreements on the exchange of tax information formed by the EDPS in his statement 04/2021. The Slovak DPA concludes in this respect that with regard to the transfer to the US authorities, the conditions of Chapter V of the GDPR are not met. Appropriate safeguards such as set by the EDPS in his Guidelines 02/2020 are not provided for in the FATCA agreement as required by Article

46.2.a) GDPR.

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This evaluation obligation results from the very text of

GDPR Article 96 and

overwhelmingly of the defendant's accountability obligation as of May 24, 2018, which

also required the defendant to carry out this review on an ongoing basis (Title II.E.4

below).

215. To certify both its assessment and this compliance, the defendant states that it relies

on documents emanating from the CPP, which the DPA succeeded. Two of these documents

consist, as already mentioned, in opinions (61/2014 and 28/2015) issued by the CPP

on the successive versions of the bill which will result in the Law of 15 December 2016 (point

83).

216. The Litigation Chamber notes that it is undisputed that these opinions relate to the bill

which will result in the future Law of 16 December 2015 and not on the content of the “FATCA” agreement in

as such, which the CPP also regrets in its opinion. The same is true for the

deliberation 56/2015 of the CSAF. Moreover, since this legislation was based on

the equivalent of section 49.1. d) of the GDPR, the existence of appropriate safeguards within the meaning of Article

46.1. a) of the GDPR has not been examined there.

217. As for the judgment of the Constitutional Court of 9 March 2017 also invoked by the

defendant, the Litigation Chamber considers that for the reasons derived from the application of the

cited case law of the CJEU with regard to the principles of necessity and minimization, its

conclusions on

proportionality/minimization in particular, could not establish

there

conviction of the defendant that the “FATCA” agreement was in conformity.

218. In conclusion, in view of the foregoing and in support of its conclusions in subtitles II.E.1.1.

and II.E.1.2., the Litigation Division is of the opinion that the arguments put forward by the
defendant in support of the compliance of the agreement with Directive 95/46/EC and the right of
the Union on May 24, 2016 did not allow it to conclude that it could continue to
transfer the data to the IRS based on article 96 of the GDPR. It results by
elsewhere of these same conclusions, that the "FATCA" agreement is not to date more compliant
to the GDPR than it was to EU law before May 24, 2016.

II.E.2. Regarding the alleged breach of the obligation to inform

219. In its capacity as data controller, the defendant is bound by Articles 13 and 14,
combined with the requirements of Article 12 of the GDPR with regard to the processing of data that it
operates.

220. In this case, the first plaintiff therefore had to be informed by the defendant about the
transfer of personal data to the IRS. With regard to the processing of data that it
had not obtained directly from the first complainant (this data having been

transferred in this case by bank Z), the defendant had to comply with Article 14 of the
GDPR, combined with the requirements of Article 12 of the GDPR.

221. Article 14 of the GDPR indeed requires that where the personal data have not been
collected from the data subject as in this case, the data controller
provide it with all the information listed below. The data protection authorities
data have agreed to consider that all information in Article 14 of the GDPR,
whether required by its §1 or its §2, must be communicated to the person
concerned94. This information is as follows:

- The identity and contact details of the data controller and, where applicable, of his
representative (Article 14.1. a));
- If applicable, the contact details of the Data Protection Officer (DPO) (Article
14.1.b));

- The purposes of the processing for which the personal data are intended

as well as the legal basis of the processing (Article 14.1.c));

- The categories of personal data concerned (Article 14.1.d));

- Where applicable, the recipients or categories of recipients of data to be

personal character (Article 14.1.e));

- Where applicable, the fact that the controller intends to carry out a

transfer of personal data to a recipient in a third country or a

international organization, and the existence or absence of an adequacy decision

issued by the [European] Commission or in the case of transfers referred to in Article 46

or 47, or in Article 49(1), second subparagraph, the reference to guarantees

appropriate or suitable and how to obtain a copy or where to obtain it.

been made available (Article 14.1.f));

- The duration for which the personal data will be kept or

when this is not possible, the criteria used to determine this duration (article

14.2.a));

- When the processing is based on Article 6.1.f), the legitimate interests pursued by the

controller or by a third party (Article 14.2.b));

- The existence of the right to ask the data controller for access to the data to be

personal nature, the rectification or erasure of these or a limitation of the

94 Group 29, Guidelines on transparency within the meaning of EU Regulation 2016/679, WP 260 (point 23):

https://ec.europa.eu/newsroom/article29/items/622227 These Guidelines have been endorsed by the Committee

Data Protection European Union at its inaugural session on 25 May 2018.

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processing relating to the data subject, as well as the right to oppose the processing

and the right to data portability (Article 14.2.c));

- When the processing is based on Article 6.1.a) or on Article 9.2.a), the existence of the

right to withdraw consent at any time, without affecting the legality of the

processing based on consent given before its withdrawal (Article

14.2.d));

- The right to lodge a complaint with a supervisory authority (Article 14.2.e));

- The source from which the personal data comes and, if applicable, a

mention indicating that they come or not from sources accessible to the public (article

14.2.f));

- The existence of automated decision-making, including profiling, referred to in Article

22.1 and 4 and, at least in such cases, useful information concerning the underlying logic.

underlying data, as well as the significance and expected consequences of this processing for the

data subject (Article 14.2.g)).

222. The defendant does not dispute the applicability of Article 14 of the GDPR (as already pointed out,

it does not invoke Article 96 of the GDPR with regard to this information obligation – point 138)

but defends that it can rely on the exception of Article 14.5 a) of the GDPR (point 93) which

provides that the information elements of article 14.1-2 must not be provided to the

data subject “when and insofar as the latter already has this information”.

223. The Litigation Chamber recalls here that the defendant considered in terms of

conclusions and during the hearing that it was the responsibility of the banks to inform the first complainant and

that bank Z would have informed the latter. The defendant thus invokes section 14.1 of the Act

of December 16, 2015 which requires reporting financial institutions (i.e. banks)

to inform the persons concerned “that the information covered by the law will be

communicated to the competent Belgian authority”95. The Litigation Chamber points here from the outset

that this information obligation aims to inform that data will be communicated to the

defendant and not to the IRS.

224. The Litigation Chamber is of the opinion that the obligation of information on the part of banks

leaves intact the obligation to inform the defendant with regard to the treatment it

operates in turn in its capacity as data controller, in particular the transfer of

data to the IRS. Indeed, even if it were legally required to inform the first

Complainant, Bank Z (and reporting financial institutions generally), does not

should not, however, provide all the elements that the defendant must for its part

communicate with regard to their own treatment. There is no perfect identity

95 It is the Litigation Chamber which underlines.

information with regard to the processing of one and the other, each person responsible for

processing being required to inform with regard to the processing it operates. The argument of

defendant that it was up to the banks to inform the plaintiff (even if in

execution of the law) cannot therefore be accepted. In this regard, the fact that the defendant

did not have access to the data communicated is irrelevant. Indeed, this circumstance is

without consequence on its quality of data controller as well as the Chamber

Litigation has already clarified this (point 126). This circumstance - apart from being the result of a choice

of

the defendant not to access the contents of the bale as guarantees

organizational as she explained during the hearing96 - is in any case not of a nature

to prevent the communication of at least certain items of information listed below

above specific to “its” processing such as, for example, the guarantees governing the flow to

the United States (article 14.1. f)), the rights of the persons concerned or the time limit for

preservation, to name but a few.

225. The information exemption of Article 14.5. a) of the GDPR must also apply in the

strict text limits. In this sense, it may relate only to some of the elements

information listed above. This is what results from the unequivocal use of the terms

"to the extent that" 97..

226. In this regard, the Litigation Chamber first notes that Article 14.1 of the Law of 16

December 2015 does not in any event provide for all the elements required by article 14.1-2 of the GDPR. Furthermore, it goes without saying that Article 14.5.a) of the GDPR can only be invoked if the information has already been provided in relation to the processing concerned

227. In support of the documents disclosed, the Litigation Division observed that some information had actually been provided to the complainant (paragraphs 11-16). However, for be able to rely as it thinks it can on Article 14.5.a) of the GDPR, the defendant had to examine whether all the information elements of article 14.1-2 of the GDPR mentioned above had been communicated by bank Z with regard to the processing which falls its own responsibility (and not that of bank Z), i.e. the transfer to the IRS. This has not been the case. It does not in fact follow from the documents provided by the parties that the first complainant would have been informed by bank Z of all the information required by the Articles 14.1 and 14.2 of the GDPR with regard to the processing carried out by the defendant (points 11-16) but only some of them as required by the Law of December 16, 2015 (item 226).

96 See. footnote 52 referring to the record of the hearing.

97 Group 29, Guidelines on transparency within the meaning of EU Regulation 2016/679, WP 260 (point 56): https://ec.europa.eu/newsroom/article29/items/622227 These Guidelines have been endorsed by the Committee Data Protection European Union at its inaugural session on 25 May 2018.

228. Article 14.5.c) of the GDPR (the applicability of which the complainants deny without this being invoked by the defendant) also provides that the items of information listed in paragraphs 1 and 2 should not be provided to the data subject when “obtaining or the communication of information is expressly provided for by Union law or the law of the Member State to which the controller is subject and which provides for appropriate measures to protect the legitimate interests of the data subject”.

229. The Litigation Chamber notes a difference in language between the French version and, for

example, the Dutch version of this provision. Indeed, while the French version of

Article 14.5.c) mentions “when and insofar as the obtaining or the communication of the

information98 is expressly provided for by Union or Member State law”, the

Dutch versions of the text use the following terms respectively: “wanneer en voor

zover het verkrijgen of verstrekken van de gegevens99 uitdrukkelijk is voorgeschreven bij

Unierecht of lidstaatelijk recht”.

230. The Litigation Chamber

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communication of data which must be provided for by national law (and not that of

information listed in article 14.1-2) and this notwithstanding the terms of the French version of

Article 14.5.c) of the GDPR.

231. The Litigation Chamber is of the opinion that Article 14.5. c) of the GDPR does not apply

in this case, the conditions for its application not being met, even if the treatment provided for

by the “FATCA” agreement and the Law of December 16, 2015. This exception cannot be

invoked only if appropriate measures to protect the legitimate interests of

data subjects are provided for by said regulations, which is not demonstrated by the

defendant.

232. Since no exemption from information applies, the Litigation Chamber will examine

the extent to which the defendant fully discharges its obligation to inform

recalled above (article 14.1-2 of the GDPR) as it claims elsewhere. Bedroom

Litigation adds that in accordance with Article 12.1. of the GDPR, this information must be

concise, transparent, understandable and easily accessible, formulated in clear terms

and simple.

233. The Litigation Division finds that the defendant admittedly informs the persons

concerned on its website via, as it indicates in its conclusions, “explanations

more theoretical, news, links to relevant documents and an FAQ” (point 91).

234. The Litigation Division was thus able to observe the following:

98 It is the Litigation Chamber which underlines.

99 It is the Litigation Chamber which emphasizes

235. https://finances.belgium.be/fr/E-services/fatca100: this is a general page that describes the

principle of the “FATCA” agreement in general terms as below and which includes

also a certain number of news of a technical nature:

236. https://financien.belgium.be/fr/E-services/fatca/creation_de_fichiers_xml_fatca101: this is

the “creation of Fatca XML files” page which details how FATCA XML files

must be formatted according to the XSD schema defined by the tax authorities

American (IRS). The page is therefore aimed at financial institutions (banks) and refers to

various user guides and IRS pages exclusively in English. Only the note

relating to the correction process and the note for use exist in French for example.

237. https://financien.belgium.be/fr/E-services/fatca/envoi_de_fichiers_fatca_xml102: this is the

page which describes the process of sending files to the defendant and which is therefore addressed here

also to financial institutions.

100 Consultation of the website by the Litigation Chamber on May 23, 2023.

101 Same

102 Same

238. https://financien.belgium.be/fr/E-services/fatca/faq_et_documentation104: the “FAQ and documentation” contains a list of many links to various documents relevant in the context of transfer or taxation by foreign tax authorities, mostly in English.

239. https://financien.belgium.be/fr/E-services/fatca/faq_et_documentation/faq/generalites105: A By way of example, the General FAQ refers to a certain number of questions (cited in submissions by the defendant, as participating in the materialization of its obligation of information).

103 Same

104 Same

105 Same

240. The Litigation Chamber notes in support of the foregoing that the elements of the website of the defendant certainly provide information on the FATCA agreement, on the obligations which weigh on Belgian banks and on the way in which they should provide the data to the defendant who, in turn, forwards it to the IRS. This information is both general and technical and is addressed for a substantial part to the financial institutions and not directly to the potentially affected citizen. Number documents are only available in English.

241. In support of the preceding paragraphs, the Litigation Chamber notes that this information does not, however, correspond to that which must be actively provided to persons concerned under the terms of Article 14.1-2 of the GDPR.

242. Furthermore, the various items of information, whether contained in one or the other document, quod non, are neither easily accessible and even less comprehensible for the persons concerned as required by article 12.1. of the GDPR.

243. These findings of the Litigation Chamber are consistent with those formulated by the CSAF in its deliberation 52/2016 which, already in 2016, expressed the following:

244. In conclusion of the foregoing, the Litigation Chamber finds a breach of Article 14.1. and 14.2., combined with Article 12.1. of the GDPR on the part of the defendant.

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II.E.3. As regards the alleged breach of the obligation to carry out a DPIA

245. The Litigation Chamber recalls that Article 35.1. of the GDPR provides that “where a type of processing, in particular through the use of new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to cause a high risk for the rights and freedoms of natural persons, the controller performs, before the processing, an analysis of the impact of the planned processing operations on the protection of personal data. One and the same analysis can carry on a set of similar processing operations that present high risks similar”. This obligation for the data controller to carry out a DPIA in certain situations must be understood in the context of its general obligation to manage appropriately the risks of processing personal data.

246. The Litigation Division also recalls that if the data controller operates one of the processing listed in Article 35.3. of the GDPR106, he is required to carry out this AIPD. It is about even when the treatment envisaged is included in the list of treatments requiring AIPD adopted by the DPA in execution of article 35.4 of the GDPR107. The processing covered by the complaint are not covered by these provisions.

247. As it has already specified (point 141), the Litigation Chamber is of the opinion that the obligation to carrying out a DPIA is not covered by the scope of Article 96 of the GDPR

248. As for the application of the obligation to carry out a DPIA over time, the authorities of data protection (including the DPA) have agreed that a DPIA is not necessary in particular when the processing was authorized before May 24, 2018 by an authority of

control in accordance with Article 20 of Directive 95/46/EC108 and that the implementation of this

treatment has not changed since this prior check.

249. Irrespective of whether or not the CSAF's deliberation is qualified as "authorization"

within the meaning of Article 20 of Directive 95/46/EC, the Litigation Chamber considers that

the authorization of the CSAF cannot, in any case, be used as a basis for the exemption

106 Article 35.3 of the GDPR provides that a DPIA is required in the following 3 cases: (a) the systematic evaluation and examination of personal aspects relating to natural persons, which is based on automated processing, including including profiling, and on the basis of which decisions are taken producing legal effects with regard to a natural person or significantly affecting him in a similar way, (b) the large-scale processing of special categories of data referred to in Article 9.1 or personal data relating to convictions offenses and offenses referred to in Article 10, or (c) large-scale systematic surveillance of an accessible area to the public.

107 The list of processing operations which, according to the DPA, require a DPIA pursuant to Article 35.4. GDPR can be found here:

https://www.autoriteprotectiondonnees.be/publications/decision-n-01-2019-du-16-janvier-2019.pdf

108 Article 20.1 of Directive 95/46/EC: Member States shall specify the processing likely to present particular risks with regard to the rights and freedoms of the persons concerned and ensure that this processing is reviewed prior to implementation.

to perform a DPIA. The CSAF's analysis did not in fact cover the existence or otherwise of

appropriate safeguards within the meaning of Article 46.2. a) GDPR or its equivalent under

Directive 95/46/EC. The Litigation Chamber also considers that it is not possible

no longer consider that the implementation of the treatment (transfer) has not changed since this

authorization dated December 15, 2016. The analysis of the evolution of the risks likely to

challenging the exemption necessarily includes changing circumstances – including

legal - in which this processing takes place. In this respect, as already mentioned

in Title II.E.1 above, several conditions of the transfers which must be examined in
the framework of the DPIA (see article 35.7 of the GDPR which lists the required elements109) such as the
minimization (proportionality) have been reinforced since the entry into force of the GDPR,
in accordance with the case law of the CJEU in particular.

250. Accordingly, the Litigation Chamber considers that the defendant was not in a
situation in which it could invoke a possible “rationae temporis” exception to
his duty. It therefore had to, as part of its accountability obligation, examine whether the
transfer to the IRS required that it carry out a DPIA or not, as of May 25, 2018 and
then continuously.

251. The Litigation Chamber explained that for its defence, the defendant specified that questioned
as for this by the SI on June 30, 2021, its DPO replied that on the basis of a pre-analysis
impact assessment, it was concluded that an impact assessment was not necessary given the fact
(Item 46):

- That the law had integrated the remarks made by the CPVP in the two opinions issued on
The law project ;
- That the CSAF had issued a deliberation authorizing the transmission of data to
the US tax administration and that the conditions of this deliberation have been
implemented ;
- That
the treatment respects
the requirements of
the AEOI standard for
confidentiality and data protection, as well as the security policies of
defendant's information based on the ISO27001 standard: the transmission of
information is doubly protected, at the level of encrypted and signed files and
at the level of the channel through which the information is communicated (platform

109 Section 35.7. of the GDPR requires that the DPIA contain at least: (a) a systematic description of the processing operations
processing envisaged and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller
processing operations, (b) an assessment of the necessity and proportionality of the processing operations with regard to the purposes, (c) an assessment of the risks to the rights and freedoms of data subjects, (d) the measures envisaged
to deal with the risks, including safeguards, measures and security mechanisms aimed at ensuring the protection of personal data and to provide proof of compliance with this Regulation, taking into account the rights and interests
legitimate interests of data subjects and other affected persons.

secure MyMinfin for the transmission of data by Belgian banks and
IDES secure platform for transmission to the IRS);
- That the American authorities are also required to provide the measures of
necessary security so that the information remains confidential and is
stored in a secure environment, as provided by the “FATCA” Data
safeguard workbook.

252. The Litigation Chamber notes that the defendant's DPO does not specify the date to which this pre-analysis was carried out. While the IS explicitly requested that this
analysis is communicated to it, the defendant refrained from doing so. This pre-analysis
not in the file.

253. The Litigation Division also argues that the defendant's arguments do not
can be followed for the following reasons.

254. The Litigation Chamber recalls here Article 35.10 of the GDPR: “when the processing carried out pursuant to Article(1)(c) or (e), has a legal basis in the law of
the Union or under the law of the Member State to which the controller is subject, that
this right regulates the specific processing operation or the set of processing operations

processing in question and that a data protection impact assessment has already

was carried out as part of a general impact assessment carried out as part of

adoption of the legal basis in question, paragraphs 1 to 7 do not apply, unless

that Member States consider it necessary to carry out such an analysis before the

processing activities.

255. The Belgian legislator considered under article 23 of the LTD that even if an analysis

of impact was made within the framework of the adoption of the legal basis which establishes the lawfulness of the

treatment (article 6.1. c) or article 6.1. e) of the GDPR), the data controller is not

exempted from carrying out a DPIA within the meaning of Article 35.1. of the GDPR when its terms

of application are met.

256. Thus,

even assuming that they were relevant, quod non like the Chamber

Litigation demonstrated above, the opinions rendered by the CPVP could not exempt the

defendant to carry out a DPIA. These positions could not establish the

conclusion of the defendant that a DPIA was not necessary.

257. Indeed, if the Belgian legislator has taken the trouble to provide that the DPIA carried out within the framework of the

parliamentary work does not exempt the data controller from carrying out a DPIA at the

meaning of Article 35 of the GDPR before the operationalization of the processing concerned, it would be

contrary to this option to admit that a pre-analysis can be based on the existence of such

opinion to conclude that the data controller is not required to carry out a DPIA.

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258. The defendant's DPO also claims that the pre-analysis was based on the existence

other standards. However, these standards alone were not enough, as will be

demonstrated below, to exempt the defendant.

259. The Litigation Division is indeed of the opinion that the transfer of data to the IRS is a

processing likely to create a high risk for the rights and freedoms of individuals

physical within the meaning of Article 35.1. of the GDPR.

260. Several criteria cited under recital 75 of the GDPR as well as in the Guidelines

EDPS guidelines relating to the DPIA 110 are indeed present in this case.

261. Thus, the Litigation Chamber holds:

- “Systematic monitoring”111 in that the data concerned are, except

exception linked to the “declarable” threshold for bank accounts, systematically

annually transferred to the IRS whether or not there is an indication of fraud or tax evasion

(see Part II.E.1.1.);

- The data communicated is financial data that falls within the scope of

category of “highly personal data”112 within the meaning of the Guidelines

aforementioned guidelines;

- The data is processed “on a large scale”113 insofar as it concerns, a priori, except

limited exception, the data of all persons of American nationality

with bank accounts in Belgium. The scope of the obligation and its recurrence,

even annual, play a role here in the appreciation of the “large-scale” character

110 Article 29 Group, Guidelines on Data Protection Impact Assessment (DPIA) and Data Protection

how to determine whether the processing is “likely to create a high risk” for the purposes of Regulation (EU) 2016/679,

WP 248: https://ec.europa.eu/newsroom/article29/items/611236. The European Data Protection Board

(EDPS) adopted these guidelines on its own on 25 May 2018 under the terms of the decision which you will find here:

https://edpb.europa.eu/sites/default/files/files/news/endorsement_of_wp29_documents.pdf

111 In its Guidelines on Data Protection Impact Assessment (DPIA) and how to

determine whether the processing is “likely to create a high risk” for the purposes of Regulation (EU) 2016/679, WP 248, the

Group 29/EDPS defines as subject to surveillance the processing of data used to observe, monitor or

control the data subjects, including the collection of data via networks for example. “Monitoring” is not

therefore not limited to surveillance by cameras for example. Also understood as “systematic”, any monitoring

which fulfills one or more of the following criteria: the monitoring takes place according to a system; she is prepared, organized

or methodical; it takes place within the framework of a general collection plan; it is carried out within the framework of a strategy.

112 In its Guidelines on Data Protection Impact Assessment (DPIA) and how to determine whether the processing is “likely to create a high risk” for the purposes of Regulation (EU) 2016/679, WP 248, the Group 29/EDPS specifies that beyond Articles 9 and 10 of the GDPR, certain categories of data may be considered as increasing the possible risk to the rights and freedoms of individuals. They are considered as "sensitive" in the common sense of the term. Financial data is part of it, a fortiori when their communication is intended to fight against offenses which could be attributed to the persons concerned.

113 To determine whether a processing takes place “on a large scale”, the Group 29/EDPS recommends in the Guidelines relating to the DPIA cited in note 110 above, to take particular account of the following factors: the number of data subjects, the volume of data and/or the range of different data elements processed; the duration or permanence of the processing activity; the geographic scope of the processing activity.

processing, alongside the number of data subjects and the volume of data transferred;

- The persons concerned can be qualified as “vulnerable persons” (recital 75) since an imbalance in their relationship with the defendant can be identified and more with the IRS. This imbalance is not only the result the fact that this transfer is imposed on the persons concerned without them being able to oppose but above all the complexity of the legal framework, including the existence of possible remedies for the exercise of their rights (see below the finding with regard to the absence of this guarantee – point 212).

-

the purpose pursued and the subsequent processing likely to be carried out on the United States carries, according to the Litigation Chamber, a potential "crossing or combination of data sets”, another criterion of the guidelines already cited

as mentioned in the preparatory works of the Law of December 16, 2015 cited

by the complainant (point 62).

262. Finally, without this being one of the 9 criteria listed by the EDPS, the transfer takes place to a

countries outside the EEA whose level of data protection is not considered adequate

and subject to permanent controversy for many years. The defendant could not

ignoring it and this situation, required according to the Litigation Chamber, attention and

particularly rigorous risk assessment.

263. The Litigation Division recalls that the EDPS is of the opinion that in most cases, the

data controller may consider that a processing that meets 2 of the 9 criteria

listed in its Guidelines requires a DPIA. In general, the EDPS considers

that the more the treatment “meets the criteria”, the more it is likely to present a high risk

for the rights and freedoms of the data subjects and therefore to require a

DPIA, regardless of the measures that the controller plans to adopt.

264. Combined with each other, the presence of the 5 criteria identified in point 261 – and whose

respective weight may vary – reflects a high level of risk of the denounced transfer to

the IRS. This high level of risk justified, according to the Litigation Chamber, that a DPIA within the meaning

of section 35.1. be carried out by the defendant. This analysis does not, by the very admission of this

last, not carried out for reasons that the Litigation Division rejected under the terms

of the preceding paragraphs.

265. Accordingly, the Litigation Chamber finds a breach of Article 35.1. GDPR in

the head of the defendant.

II.E.4. As to the alleged breach of accountability

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266. In application of the principle of responsibility or “accountability” to resume

there

commonly used English terminology, the defendant was bound (point 141), into account

taking into account the nature, scope, context and purposes of the processing as well as the risks,
with varying degrees of likelihood and severity, for the rights and freedoms of individuals
physical, to implement appropriate technical and organizational measures
to both ensure that the processing is carried out in accordance with the GDPR as well as to be in
able to demonstrate it.

267. As such, any failure, for example occasional or resulting from human error,
does not necessarily imply a breach of Articles 5.2. and 24 GDPR. Such is not
however not here the situation.

268. In the present case, the nature of the processing, its scope and its purpose, i.e. in this case (1) a transfer of
personal data to a third country in the EEA with respect to which no adequacy decision
does not exist, (2) operated for the purposes of possible taxation and the fight against evasion and fraud
tax – either for the purpose of determining a possible violation of a law
foreign, (3) even though the persons concerned have no other connection with the state of which
question that his nationality and (4) that no indication of an offense has been established, presented
certainly risks for the rights and freedoms of the persons concerned (as well as the
Litigation Chamber demonstrated this in Title II.E.3 above).

269. Admittedly, in the context of the complaint leading to the present decision, the defendant
claim to have relied on favorable opinions and authorizations from the CPVP prior to the entry
in force of the GDPR in particular, invoking Article 96 of the GDPR, the scope and
The exact consequences do not follow, it is true, with evidence on first reading.

270. At the same time, the defendant could not ignore the repeated appeals (and for
some subsequent to these notices and authorizations) in particular from the data protection authorities
data gathered within the Group 29 and then the EDPS (including DPA) to assess an agreement
international agreement such as the “FATCA” agreement in the light of the GDPR. If some of these political calls
aimed directly at the Belgian State, others more technical in the form of Lines
guidelines cited in this decision, for example, were addressed directly to

controllers like the defendant.

271. The Litigation Division has also demonstrated that the aforementioned opinions and other authorization of the CPVP did not in fact exempt the defendant from carrying out this assessment taking into account both (1) its obligation of accountability, (2) its obligation to proceed to a DPIA within the meaning of Article 35 of the GDPR and (3) of Article 96 of the GDPR itself. Section 96 intrinsically requires, as already noted, that this assessment be made to bring out its effects taking into account in particular the strengthening of the case law of the CJEU relating to the principles of necessity and minimization/proportionality, compliance with which had already

in question under Directive 95/46/EC with regard to data processing comparable.

272. The Litigation Division finds that the defendant did not take the exact measure of the risks for the rights and freedoms of the first plaintiffs and the accidental Belgian Americans whose the interests are defended by the second plaintiff, nor adopted the appropriate measures to these risks. The defendant remains, as is apparent from the findings of the Chamber Litigation with regard to the various shortcomings identified (titles II.E.1, II.E.2. and II.E.3), failing to demonstrate that it has put in place the appropriate measures to guarantee the GDPR compliance with them.

273. Without prejudice to the foregoing, the Litigation Chamber is aware that the defendant intended to implement an international agreement and Belgian legislation under which it has pleaded to have little or no influence, these texts also being part of a context wider international.

274. This circumstance is not, however, such as to remove any breach on its part. given its status as data controller. Indeed, the objective of the principle of accountability is to make data controllers responsible - whether authorities, public bodies or private companies -, and to allow the authorities to

control such as the APD (and through it, to the IS and the Litigation Chamber) to verify the effectiveness of the measures taken in execution thereof. This principle would be widely undermined, even emptied of its substance, if it were enough for a data controller to invoke, once confronted with a complaint brought before the supervisory authority, the fact that a legal obligation or the exercise of a mission of public interest would not allow it to comply with the GDPR.

275. Pursuant to its obligation of accountability, the defendant allegedly, at the end of its assessment, thus being able to at least alert the relevant authorities as to the door situation false in which the execution of the "FATCA" agreement placed it in relation to its obligations arising from the right to data protection. The Litigation Chamber cannot in this regard totally depart from the idea that if the defendant had carried out the DPIA in question in Title II.E.3, she would have quickly realized that notwithstanding the measures she would have could hang, admittedly limited in the legal context in which this transfer takes place, it continued to face a high residual risk. Prior consultation of the DPA within the meaning of Article 36 of the GDPR could thus have prevailed.

276. Taking into account all the above elements, the Litigation Chamber concludes that the defendant violated Articles 5.2. and 24 GDPR.

II.E.5. As to the alleged breach of Article 20 of the LTD

277. As the Litigation Division explained in point 77, the complainants indicate in their submissions in reply that they renounce to invoke a violation of article 20 of the LTD by the defendant.

278. The Litigation Division nevertheless remains competent to examine whether this provision had to be complied with in this case and, if so, whether this was the case.

279. Indeed, once seized, the Litigation Chamber is competent to control in all independence compliance with the GDPR and its national implementing laws such as the LTD and ensuring their effective application notwithstanding, as in the present case, the waiver in the course of

procedure to one or the other grievance initially raised.

280. This abandonment of grievance is indeed not likely to remove any previous breach

possible on the part of the defendant or on the other hand, of such a nature as to deprive, in principle, the

Litigation Chamber of the exercise of its powers with regard to it. Effective control

that the DPA must exercise in this case pursuant to Articles 51 and s. GDPR and Article 4.1

of the ACL, is indisputably opposed to it. In view of the subject of the complaint, the Litigation Chamber

intends to examine any potential violation114.

281. This control must nevertheless be exercised with due respect for the rights of the defence. Bedroom

Litigation notes in this respect that the defendant defended itself with regard to the grievance

of the violation of article 20 of the LTD in its conclusions in response of March 16, 2022115

before

the plaintiffs do not indicate that they waive it in

their rebuttal conclusions

of April 15, 2022 as well as in its summary conclusions.

282. Article 20 of the LTD thus provides, as has already been mentioned, that “the federal public authority

who transfers personal data on the basis of article 6.1.c) and e), of the

Regulation [read GDPR] to any other public authority or private organization, formalizes

this transmission for each type of processing by a protocol between the person in charge of the

initial processing and the data controller receiving the data”.

283. The travaux préparatoires116 of this article indicate that the obligation to conclude a protocol

to formalize communications of data from public authorities

federal taxes cannot be imposed for flows abroad.

114 See. also decision 41/2020 of the Litigation Chamber. In its classification policy note without follow-up, the

Litigation Chamber states in the same sense that in the event of withdrawal of the complaint, it will close it without further

action except

special circumstances https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-

of-the-litigation-chamber.pdf

115 Title 6.2. dots 16-17. See. also the defendant's summary conclusions of May 16, 2022 (heading 6.3. points 23-24).

116 Draft law on the protection of individuals with regard to the processing of personal data, Doc., Ch 54K3126, p. 44.

284. These preparatory works justify this exclusion by referring to Article 1 of the GDPR, which provides that "the free movement of personal data within the Union is neither limited nor prohibited for reasons related to the protection of individuals with regard to the processing of personal data".

285. In the recommendation117 which it devoted to this obligation, the DPA specifies on this base118 that communications (transfers) of data to EEA countries cannot be subject to the conclusion of a protocol between the initial processing manager and the data recipients. The fact remains, concludes the recommendation, that the data controllers involved in a communication of personal data staff must ensure that this communication complies with all applicable regulations. force, in particular the GDPR.

286. With regard to data flows outside the EEA as in the present case, recommendation mentions that Chapter V of the GDPR must be respected and that in the event of application of article 46 of the GDPR - mobilized in this case by the defendant -, the federal public authorities will have to provide appropriate guarantees for the supervision of these flows. This framework has been reviewed in Part II.E.1. above.

287. In line with this interpretation, the DPA has developed a model protocol from which it it is clear that the communication of data covered by the obligation to conclude a protocol within the meaning of article 20 of the LTD intervenes between a federal public authority of a on the one hand and a recipient "residing" in Belgium on the other hand 119.

288. In support of the foregoing, the Litigation Chamber concludes that the obligation to conclude a protocol within the meaning of Article 20 of the LTD is only valid for transfers between authorities federal public authorities and does not apply to transfers of data to or from third countries within the meaning of the GDPR. This protocol obligation therefore does not apply to the defendant with respect to the transfer to the IRS of the data covered by the complaint and no breach of this fact cannot therefore be blamed on him.

II.F. Corrective measures and sanctions

289. Under Article 100 of the LCA, the Litigation Chamber has the power to:

117 https://www.autoriteprotectiondonnees.be/publications/recommandation-n-02-2020.pdf

118 The Litigation Chamber subscribes to the analysis of the legislator taking into account the provisions cross-border data transfer rules provided for in Chapter V of the GDPR and that the LTD is an implementing law of the GDPR at least with regard to its article 20. The Litigation Chamber is nonetheless of the opinion that mentioning this derogation in the actual text of the LTD would have been clearer and more predictable.

119 See. https://www.autoriteprotectiondonnees.be/professionnel/premiere-aide/toolbox which provides a model of protocol for the communication of data pursuant to article 20 of the LTD.

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order a suspension of the pronouncement;

4° propose a transaction;

(5) issue warnings or reprimands;

6° order to comply with requests from the data subject to exercise his or her rights;

7° order that the person concerned be informed of the security problem;

8° order the freezing, limitation or temporary or permanent prohibition of processing;

9° order the processing to be brought into conformity;

10° order the rectification, restriction or erasure of the data and the notification of

these to the recipients of the data;

11° order the withdrawal of accreditation from certification bodies;

12° to issue periodic penalty payments;

13° to impose administrative fines;

14° order the suspension of cross-border data flows to another State or a

international body;

15° forward the file to the public prosecutor's office in Brussels, which informs it of the

follow-up given to the file;

16° decide on a case-by-case basis to publish its decisions on the website of the Authority of

Data protection.

290. On the basis of the documents in the file and following its analysis, the Litigation Chamber concludes,

as it mentioned in the conclusion of Title II.E.1., to the unlawfulness of data processing

of the first plaintiff by the defendant, including their transfer to the IRS,

when such processing occurs in violation of the principles of purpose, necessity and

minimization/proportionality and the rules of Chapter V of the GDPR. Bedroom

Litigation has demonstrated that this illegality affects not only the processing of data

the complainant's personal data but also more generally, that of personal data

personnel of Belgian accidental Americans.

291. In view of this unlawfulness, the Litigation Chamber decides to order the prohibition of

data processing of the first plaintiff and the accidental Belgian Americans operated in

execution of the “FATCA” agreement and the Law of 16 December 2015, in application both

of Article 100.8 of the LCA and of Article 58.2 f) and j) of the GDPR. The Litigation Chamber

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considers that this corrective measure is the only one capable of putting an end to the unlawfulness

noted, each category of breach taken in isolation (whether breaches of

principles of finality and minimization on the one hand (Title II.E. 1.1.) or the breach of the rules

of Chapter V of the GDPR on the other hand (Title II.E.1.2.) justifying this prohibition. This prohibition entails the suspension of the flow of said data to the IRS in execution of article 100.14 of the ACL.

292. In accordance with the Schrems II judgment of the CJEU of 16 July 2020 already cited, the Chamber Contentieux adds that it is also required to pronounce this prohibition. THE operative part of that judgment indeed states that “Article 58(2)(f) and (j) of the Rules 2016/679 should be interpreted as meaning that, unless there is an adequacy decision validly adopted by the European Commission, the competent supervisory authority is obliged to suspend or prohibit a transfer of data to a third country based on standard data protection clauses adopted by the Commission, where that authority control considers, in the light of all the circumstances specific to this transfer, that these clauses are not or cannot be respected in this third country and that the protection of the transferred data required by Union law, in particular by the articles 45 and 46 of this regulation and by the charter of fundamental rights, cannot be ensured by other means, failing which for the controller or its processor established in the Union to have itself suspended the transfer or to have terminated it” (point 121 of the judgment)120.

293. The fact that the CJEU requires in this judgment that standard contractual clauses be excluded is not such as to exclude the obligation for the Litigation Chamber to prohibit data transfers to be carried out under an international agreement such as the “FATCA” agreement.

294. Indeed, the operative part and paragraphs 119-121 of the judgment establish more generally what is expected of data protection authorities in the exercise of their powers with regard to cross-border data flows that would occur in violation of the GDPR, in particular in violation of Articles 45 and 46 as in the present case.

295. In the light of all the circumstances specific to the impugned transfers and the findings of violations of the Litigation Chamber, the protection of the transferred data required by the

EU law can only be ensured by the prohibition pronounced by the Chamber

Litigation, the defendant having by its decision of October 4, 2021 refused to suspend

120 The Litigation Chamber also refers to points 111 and 112 of the judgment which mention the following:

“111. Where such an authority considers, at the end of its investigation, that the data subject whose personal data

personnel have been transferred to a third country does not benefit from an adequate level of protection there, it is

required, pursuant to Union law, to react appropriately in order to remedy the insufficiency observed and this

regardless of the cause of this deficiency. To this end, article 58.2 of this regulation lists the different

corrective measures that the supervisory authority can adopt. 112. Although the choice of the appropriate and necessary

means is a matter

of the supervisory authority e that the latter must make this choice taking into consideration all the circumstances of the

transfer of personal data in question, this authority is nonetheless required to fulfill with all the

due diligence of its mission to ensure full compliance with the GDPR”.

the transfer of this data and defended in the context of this procedure that it was

authorized to pursue them.

296. The Litigation Chamber finds that the defendant was also guilty

of a violation of Article 14.1-2 combined with Article 12.1 of the GDPR in that the defendant

did not sufficiently inform the first complainant and does not adequately inform

sufficient accidental Belgian Americans and more generally the persons concerned

by the processing of data carried out in execution of the “FATCA” agreement (Title II. E.2).

297. For this breach, the Litigation Division issues a reprimand to the defendant on

the basis of article 100, 5° of the LCA accompanied by a compliance order on the basis of

Article 100, 9° of the LCA aimed at providing complete, clear and accessible information as to

the transfer of data to the IRS on its website.

298. The Litigation Chamber finds that the defendant was also guilty

a breach of section 35.1. of the GDPR in that the defendant did not carry out a DPIA

(Title II.E.3).

299. For this breach, the Litigation Division issues a reprimand to the defendant on the basis of article 100.5° of the LCA accompanied by a compliance order on the basis of Article 100.9° of the LCA aimed at carrying out an impact analysis relating to the protection of data in accordance with Article 35 of the GDPR. The Litigation Chamber is of the opinion that notwithstanding the ban on processing, carrying out such an analysis retains his utility. A rigorous DPIA should contribute to the establishment of a future framework GDPR compliant.

300. Finally, the Litigation Division finds that the defendant was also guilty a violation of Articles 5.2. and 24 of the GDPR in that the defendant breached its obligation of responsibility (accountability) (title II.E.4).

301. For this breach, the Litigation Division issues a reprimand to the defendant on the basis of article 100. 5° of the LCA accompanied by a compliance order consisting of alert the competent legislator to the breaches observed under this decision and the ban on processing pronounced.

III. PUBLICATION AND TRANSPARENCY

302. Given the importance of transparency with regard to the decision-making process and the decisions of the Litigation Chamber, this decision will be published on the website of ODA. The Litigation Chamber has so far generally decided to publish its decisions subject to the deletion of the direct identification data of the complainant(s) and of the Decision on the merits 61/2023 75/77 persons cited, whether natural or legal, as well as those of the defendants.

303. In this case, the Litigation Chamber decides to publish this decision with identification of the parties excluding the first plaintiff.

304. The Litigation Chamber specifies that this publication, with identification of both the second

plaintiff than that of the defendant pursues several objectives.

305. As far as the defendant is concerned, it pursues an objective of general interest, because this decision addresses the question of the responsibility of a federal public service (the defendant) subject to obligations arising from an international agreement ("FATCA") concluded with a country third parties to the EU, which obligations are deemed to be contrary to the GDPR under the terms of this decision.

306. The identification of the defendant is also necessary for a proper understanding of the decision and therefore to the materialization of the objective of transparency pursued by the policy of publication of the decisions of the Litigation Chamber.

307. With regard to the second complainant, the useful reading of the decision also requires that her identity is disclosed when it defends a category of persons concerned by the processing of data deemed contrary to the GDPR and that the examination of the grievances and means of defense of the parties is based in particular on the specificities of this category of persons.

308. Furthermore, without this being a preponderant argument, the Litigation Chamber is aware not that the complaint lodged by the second plaintiff against the defendant was relayed by the press on the initiative of his council and therefore made public.

309. Finally, the publication of the identity of the second plaintiff and the defendant also contributes the objective of consistency and harmonized application of the GDPR. As explained in point 114, the complaint was not to be dealt with under the one-stop-shop mechanism but the problematic "FATCA" is felt well beyond the Belgian borders and it is not excluded that other EU data protection authorities have to deal with similar complaints in the future ; complaints for the examination of which this decision may be useful, each supervisory authority exercising its powers otherwise completely independently.

FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation:

- Under Article 100.8. of the LCA, to prohibit the processing by the defendant of the data of the first plaintiff and the accidental Belgian Americans in application of the FATCA agreement and the Law of 16 December 2015 regulating the communication of information relating to financial accounts by Belgian financial institutions and the FPS Finances, within the framework of an automatic exchange of information at internationally and for tax purposes.

- Under Article 100.5. of the ACL, to issue a reprimand with regard to the defendant with regard to the violation of Article 14.1-2 combined with Article 12.1 of the GDPR accompanied by a compliance order on the basis of Article 100.9. of the LCA consisting of providing GDPR-compliant information on its website;

- Under Article 100.5. of the ACL, to issue a reprimand with regard to the defendant with regard to the violation of Article 35.1 of the GDPR accompanied by a compliance order based on Article 100.9. of the ACL consisting of the carrying out a DPIA within the meaning of Article 35 of the GDPR;

- The supporting documents attesting to the ordered compliance are to be contact the Litigation Chamber at litigationchamber@apd-gba.be within 3 months of notification of this decision;

- Under Article 100.5. of the ACL, to issue a reprimand with regard to the defendant with respect to the violation of Articles 5.2. and 24 GDPR.

In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged, within thirty days of its notification, to the Court of Markets (court d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the information listed in article 1034ter of the Judicial Code121. The interlocutory motion must

121 The motion contains on pain of nullity:

the indication of the day, month and year;

1°

2° the surname, first name, domicile of the applicant, as well as, where applicable, his qualities and his national register number or

Business Number;

3° the surname, first name, domicile and, where applicable, the capacity of the person to be summoned;

(4) the object and summary statement of the means of the request;

(5) the indication of the judge who is seized of the application;

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be filed with the registry of the Court of Markets in accordance with article 1034quinquies of the C. jud.122, or via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

(se). Hielke Hijmans

President of the Litigation Chamber

6° the signature of the applicant or his lawyer.

122 The request, accompanied by its appendix, is sent, in as many copies as there are parties involved, by letter recommended to the court clerk or filed with the court office.