FATCA FROM THE EUROPEAN UNION PERSPECTIVE

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Abstract

The Foreign Account Tax Compliance Act requires foreign financial institutions to report to the US Internal Revenue Service the information about financial accounts held by US taxpayers, or by foreign entities in which US taxpayers hold a substantial ownership interest. This aim of FATCA, which is to increase the ability of the Amrican tax authorities to combat cross-border tax evasion by US persons, is reasonable. However, it imposes burdensome due-diligence, information reporting and withholding obligations on all foreign (non-US) financial institutions. It also raises legal concerns – notably data protection issues. The article analyses the main issues connected with FATCA, presents the pro and contra opinions, and looks at the reaction of EU Member States at the announcement of American provisions.

Keywords: FATCA, International Financial Institutions, Tax Evasion, Automatic Exchange of Information

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1 Introduction

The Foreign Account Tax Compliance Act (FATCA) was enacted in 2010 by the US Congress as a part of the Hiring Incentives to Restore Employment (HIRE) Act. It was aimed to serve as an administrative tool to prevent and detect US tax evasion and improve taxpayers' compliance. The background of such solution was the financial crisis of 2008-2010 with its effects of the growing unemployment and rapidly rising US public debt (which currently exceeds more than 16 trillion USD). The US authorities, in order to counteract the worsening economic conditions and stimulate the market, have implemented a number of monetary instruments (such as quantitative easing), the macro-economic and fiscal incentives to restore employment (HIRE), and FATCA – a tool, introduced to target those who evade paying US taxes by hiding assets in undisclosed foreign bank accounts (Strzelecki, 2013).

The Foreign Account Tax Compliance Act requires that international financial institutions (FFIs) regularly report to the US tax authorities the detailed information on foreign accounts of US taxpayers. The provision also provides for severe penalties for those institutions that do not agree on participating in FATCA or do not implement its provisions. In such a case the 30% withholding tax levied on certain US-source income is projected, to be borne by non-participating FFIs and account holders who are unwilling to provide the required information. The provision is complemented by the mechanism of "passthru-payments", which ensures that even if the financial institution does not enter into FATCA, does not have a direct investment in US assets and does not carry accounts of American owners, it would reach the 30% withholding tax. Also the accounts' holders, who would obstruct the verification and identification of its tax status of the United States, will meet the 30% tax, or even the account closure.

FATCA have caused many controversies among third countries, touched by the "internal" rule of the US tax code. Also in the European Union the announcement of American provisions resulted in strong discussions. Next to the issues of the compliance costs there is a case of infringement of national laws by the FATCA, as the American Act does not comply with the provisions on banking secrecy and data protection of many EU Member States.

Moreover, FATCA will have a significant impact on investment companies located in Europe. FFIs will be subject to FATCA regardless of whether they have a single US taxpayer as a client or investor, although the burdens imposed on FFIs may differ depending on their ability to prove that they have no US clients or investors. In order to avoid this punitive withholding tax, European companies will need to comply with FATCA and, in many cases, provide a significant amount of information to the US tax authorities (Eckl and Sambur, 2012).

2 The Foreign Account Tax Compliance Act in brief

The Foreign Account Tax Compliance Act affects the whole value chain as it requires completely new and extended information and reporting systems. The new

US law is aimed at foreign financial institutions and other financial intermediaries – like banks, stock brokers, hedge funds, pension funds, insurance companies, trusts – to prevent tax evasion by US citizens and residents through the use of offshore accounts. FATCA will require FFIs to provide annual reports to the Internal Revenue Service (IRS) on the name and address of each US client, as well as the largest account balance in the year and total debits and credits of any account owned by a US person. In addition, FATCA requires any foreign company not listed on a stock exchange or any foreign partnership which has 10% US ownership, to report to the IRS the names and tax identification number (TIN) of any US owner.

FATCA also requires US citizens and green card holders who have foreign financial assets in excess of 50 000 USD, to report to IRS all foreign financial account assets. Under the scope of this provision fall not only bank accounts, but also securities accounts, annuity contracts, rental properties, insurance contracts, pension plans, trusts and private investments in companies and partnerships. This requirement goes in addition to the reporting of foreign financial accounts, which is already required by the US Department of the Treasury (ACA, 2011).

For pre-existing accounts held by individuals whose balance is between 50 000 USD and 1 million USD, FATCA would require FFIs to search only automated files for US indicia in order to ascertain whether the account refers to a US person or not. Accounts with a balance that exceed 1 million USD must be subjected to a review of their automated and manual files for US indicia. For new individual accounts, the FFIs would be required to review the information provided at the opening of the account, including identification and any documentation collected under the “know your customer” rules and anti-money laundering procedure.

With respect to entity accounts, foreign financial institutions are essentially required to focus on passive entities with a view to identifying substantial US owners. For pre-existing accounts, FFIs may rely on information collected under the “know your customer” rules and/or anti-money laundering procedure or, alternatively, may have to obtain information regarding all substantial US owners (depending on whether the account balance exceeds 1 000 000 USD or not). For new entity accounts, the FFIs are required to determine whether the entity has any substantial US owners upon opening a new account, by obtaining a certification from the account holder (Article 29 Data Protection Working Party, 2012).

If the foreign financial institution does not comply with FATCA and does not enter into an agreement with the IRS, all relevant US-sourced payments, such as dividends and interest paid by US corporations, will be subject to a 30% withholding tax. Withholding tax imposed at a rate of 30% applies to all “withholdable payments” and “passthru payments” received by an FFI. The term “withholdable payments” is defined to mean any payments of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, and other fixed or determinable annual or periodical gains, profits and income, if such payment is from sources within the United States. Thus, withholdable payments generally include all types of US-source income. Unlike other types of income generally subject to US withholding tax, the term “withholdable payment” also includes any gross proceeds from the sale of property that give rise to dividend or interest income, generally US stocks and US debt instruments. A “passthru payment” is any withholdable payment or any payment attributable to a withholdable payment (Eckl and Sambur, 2012).

3 The costs of FATCA

While Americans have estimated the benefits of introduction of the FATCA at the 800 million USD of tax revenue per year, the financial environment quickly pointed out that the expenditures necessary for the adaptation of the global financial system will result in much higher numbers (Szmulikowski, 2012). As the law requires FFIs picking out customers who are likely to be the American taxpayers, it means the necessity of a detailed review process of their clients in this regard. The reporting duties will require the capture and reporting of information that may not now be tracked and accessible (KPMG, Are you ready for FATCA?, 2012).

During the XVIII Conference “IT in financial institutions” which was held in March 2013 in Poland, there was a debate about the threats for financial sector posed by the requirements of FATCA. The representatives of major banks operating in Poland and companies providing solutions for financial institutions pointed out that the implementation of the new law will result not only with significant costs, but will also require a number of major organisational changes in the financial institutions. IT systems will have to be equipped with additional functions related to the identification and acquisition of information about customers or transactions with US customers. The participants stressed that the implementation of FATCA will incur costs, not connected with creating additional value for their customers (Uryniuk, 2013). For participating FFIs, investments will be needed in three key areas:

1) Documentation (capturing process changes and analysing the customer base);

2) Withholding (building functionality for withholding on recalcitrant account holders);

3) Reporting (building and sustaining an annual reporting model for all US individuals to cover account balances and gross payments).

The analyses of tax experts confirm the big financial burden which FFIs will face. The Deloitte Report (2012) estimated that the costs of implementing FATCA in global financial institutions may be as high as 200 million EUR. European institutions may take into account the implementation costs of 15 million EUR. According to Deloitte the majority of the sum will have to be spent within 2-3 years (Deloitte, 2012).

4 The implementation of FATCA into the legal system of other countries

FATCA provisions state that the American law can be implemented into other countries, also those in Europe. Americans see two options of introducing the law – through individual agreements between international financial institutions and IRS or through the intergovernmental agreements. The EU Member States' opinion is different – FATCA requires for foreign financial institutions reporting obligations that are incompatible with the their national laws, as the requirements of the Act and FFIs Agreements do not comply with the provisions of banking secrecy and data protection. Therefore, the measure other than the signing individual agreements between FFIs and IRS is needed. Such a solution could be the international agreement. The IRS proposed three types of such consensus:

1) Under the first type of agreement, foreign financial institutions based in the country that has signed the intergovernmental agreement, will not have to sign the additional agreement with the US tax authorities (they will only register with the IRS, not enter into an FFI agreement). FFIs will provide the required information to the national tax office, which next will forward it to the IRS on the basis of an intergovernmental agreement. On a reciprocal basis, US banks will be required to provide the same information to the IRS, which next will forward the data to the tax authorities of countries, which concluded such international agreements. The agreement of the first type, involving the reciprocity of US institutions, caused a strong discussion in the United States. It would force US banks to bear the costs similar to those which FFIs will have to pay in order to cope with the requirements of FATCA. Nevertheless, from the perspective of EU countries the reciprocity and perspectives of creating the effective system of exchange the information seemed to be the only reasonable motive to accept the requirements of the new US law.

2) The second type of agreement would operate in the same way, but without reciprocity on the part of the United States relative to other countries. It seems there are no perspectives of accepting such a solution by any of EU Member States.

3) The agreement of the third type would authorise the FFI to send the information directly to the IRS without the intermediation of national tax authorities and without violating the national laws of their country. It is very doubtful that such an agreement was acceptable for the Member States of the European Union (Święcicki, 2013).

5 The FATCA dilemmas

The announcement of FATCA provisions has caused significant controversies and resulted in discussions among politicians and professionals. Supporters raised both the national issues (like protecting the US tax base), and international reasons (like fighting with tax evasion and strengthening transparency of international financial flows). Opponents pointed out that while FATCA's goals of full tax compliance and transparency are justified and worthy, the whole concept of FACTA is an economic nonsense.

Swiss-American Chamber of Commerce' Report (2011) gave some numbers concerning the costs and benefits of the new US law. Implementation costs – if all Foreign Financial Institutions were to participate – were estimated at 500-1 000 billion USD worldwide. Running costs (if all participate) were assessed at 10-30 billion USD worldwide. The report compared the costs with projected benefits of FATCA: additional tax revenues of 8.5 billion USD over 10 years gave the global rate of return of FATCA of 1%. The simple commentary of professionals' environment sounded: "Ask the world to pay 100 USD for the US to get less than 1 USD" (Swiss-American Chamber of Commerce, 2011).

Opponents also stated that FATCA could bring some negative consequences against the US interests, such as (1) reduced investment activities in the US markets; (2) discrimination of US nationals worldwide; (3) creation of strong bad will against the US in many countries.

Decrease in investment activities in the US market could be caused by FFIs unable or unwilling to comply with FATCA rules and by institutional investors fearing the reduced demand and – as a consequence – thus reduced prices and margins. There is also a risk of funds withdrawal from the US bank deposits held by non-resident aliens. In addition to investments in securities, foreigners hold over 1 trillion USD on bank deposit in the United States, benefitting from tax exemption provided by US for this kind of money. The US Congress had previously established such a policy to attract foreign funds in order to strengthen the US economy, which resulted in US being a safe haven for the bank savings of non-resident aliens. But if a 30% withholding tax may potentially be applied upon a transfer of those deposits to overseas accounts, the attractiveness of United States banking services disappears (ACA, 2011).

The discrimination of US nationals worldwide may result in reduced services for overseas Americans in FFIs. As a consequence also shunning of US co-investors in international projects and barring US

citizens from holding positions with valid signature over corporate accounts can happen.

However, one of the most serious negative consequences of FATCA is the creation of strong bad will against the US in many countries. Feeling of unfair extraterritorial application of US rules, conflicts with national legal rules (e.g. data privacy, espionage etc.) are serious issues which should not be omitted. Also the tax revenue losses for national governments around the world, caused by the huge amount of tax-deductible implementation cost and the latter running costs are a difficult issue.

6 FATCA and the position of the European Union

The FATCA issues have been widely discussed at the European level. This aim of FATCA legislation, which is to increase the ability of the US tax authorities to combat cross-border tax evasion by US persons, is reasonable. However, it will impose burdensome due-diligence, information reporting and withholding obligations on all foreign (non-US) financial institutions (FFIs). It also raises legal concerns – notably data protection issues.

The European data protection authorities, assembled in the Article 29 Working Party[1], in the letter to the European Commission, dated on 21.06.2012 expressed the opinion, that it is understandable that the US government has introduced FATCA to tackle the issue of US persons putting their money in offshore accounts to avoid their US tax obligations. However, FATCA must be mutually recognised as necessary from an EU perspective. This requires ensuring that there is a lawful basis for the processing through careful assessment of how FATCA's goals balance with that of the EU's fundamental right enshrined in Article 8 of the Charter of Fundamental Rights – the right to a private and family life. It means demonstrating the necessity by proving that the required data are the minimum level necessary in relation to the purpose. It should not mean the bulk transfer and the automatic screening of all these data. Therefore more selective, less broad measures should be considered in order to respect the privacy of citizens (Article 29 Data Protection Working Party, 2012).

In addition, the experts pointed out that the European Data Protection Directive (95/46/EC) applies to any individual whose data are processed at the territory of the European Union. This means that Americans and their personal information are subject to the same protection as the data of EU citizens. What is more, the US authorities do not meet the EU requirements in this field. As a consequence the data transmission required by FATCA means regular transfers of large data sets to a country that has not been recognised as providing an adequate level of data protection. Additionally, the US does not belong to the special program of the Safe Harbour (Strzelecki, 2013).

European politicians, tax advisors and lawyers were aware of difficult aspects connected with the new American law. At the level of European Union Council and the European Parliament, there was a debate going on about the shape of the new EU regulation on the protection of personal data, which would also take into account the legal aspects of FATCA. Adoption of such regulation should be of great help in the application of FATCA, as regulations apply directly to each EU Member State without the necessity of their transposition into national legal systems.

The experts also shared the concerns of financial associations and financial institutions, expressed in relation to dual compliance with FATCA and the European Data Protection Directive. Since the EU and national data protection laws do not allow for FFIs to process the personal data required under FATCA and transmit them to the US, a new solution is required that would provide a legal basis for the processing and subsequent transfer from the EU to the US, whilst avoiding legal uncertainty for data controllers (Article 29 Data Protection Working Party, 2012).

As an answer to the all above mentioned doubts, the European Commission proposed the coordinated political action at the EU level, aimed at persuading the US to implement FATCA in a more proportionate way, in particular by utilising existing channels of cooperation at the governmental level. The main objective of these discussions has been to explore whether and how FATCA could be implemented by cooperation between EU and US tax authorities rather than by way of direct reporting arrangements between EU financial intermediaries and the US tax authorities (The European Commission, The US Foreign Account Tax Compliance Act…, 2012).

7 Further perspectives

In 2012, after complaints from the global financial industry about costs and legal issues, the US Treasury announced a new multilateral approach to implementing the Foreign Account Tax Compliance Act. The Treasury proposed the "new government-to-government framework" which would allow create means to collect the information from FFIs and to send the data to the United States without the necessity to enter into separate data disclosure agreements with the IRS. The US Treasury said it would allow foreign financial institutions to rely on information they have already collected under anti-money laundering and "know your customer" rules to determine whether they have US taxpayers as clients

[1] Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data is an independent advisory body on data protection and privacy, set up under Article 29 of the Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995.

and thus must collect and disclose information about them under FATCA (Browning, (2012).

The European Commission welcomed the US' acceptance of the government-to-government approach to tackling tax evaders and implementing FATCA provisions. The Commission stated that through a government-to-government approach to tax information exchange, the administrative burden, compliance costs and legal difficulties which EU financial institutions would otherwise face in applying the FATCA provisions should be greatly reduced. Further, the Commission pointed that any EU Member State which wants to, should now be able to adopt this government-to-government approach to information exchange through coordinated bilateral agreements with the USA. This would benefit Member States' tax administrations by ensuring reciprocal information provision by the US. What is more, it could be the basis for broader cooperation between the EU and the US on information exchange at a later stage. The Commission also announced to continue the work in order to ensure that the EU and national data protection legislation are fully respected in the implementation of the FATCA provisions (The European Commission, Commission welcomes US move…, 2012).

In the meantime some of the Member States started to negotiate with the US the possibility of implementing the Intergovernmental Approach. In February 2012 the governments of Germany, France, Spain, Italy and the UK agreed to collect the clients' account information from financial institutions located at their territories and then pass it on to the US tax authorities on the behalf of FFIs. They may also have to amend their own data protection laws. FFIs in these five countries, that agreed to check for American beneficial ownership of assets and to supply this information to their tax authorities, will be treated by the US as "compliant with FATCA". They will not have to sign an agreement with the IRS and they will not be subject to the 30% withholding tax imposed by the IRS on non-FATCA-compliant banks. Nor will they be required to block payments to "reluctant" individuals, or collect US withholding taxes from other banks in the jurisdiction.

By entering the intergovernmental agreement the US has committed itself to collect the information on US bank accounts operated by European residents and automatically pass it to the national tax authority of the country which concluded the agreement. This reciprocity arrangement would be based on the countries' existing bilateral tax treaties (Europe's big five will help USA enforce FATCA…, 2013).

Such a significant change in EU Member States' position regarding FATCA, visible from the beginning of 2012, was caused not only by the modification of the US approach. Looking at the common European perception of American regulations, the emphasis was moved from the "tax diktat" of the big US power and problems with compatibility of US and EU law, to the opportunity of using the US experience in the creation of the common system of tax information exchange.

As regards the issues of enhancing the transparency of financial flows and strengthening the worldwide system of tax information exchange, the European Union aims at future implementing the automatic exchange of information as a standard in its whole territory (and further, in relation with third countries). At present the automatic information exchange within the European Union (and some third countries)[2] is based on the Savings Directive (2003/48/EC) and takes place in case of interest payments paid by paying agents to EU individual residents, keeping their savings in other Member States (with the exception of Austria and Luxembourg, which are eligible to the transitional period and use the 35% withholding tax instead of automatic reporting of information). Additionally, from 2015 the automatic exchange of information on 5 categories of income and capital (income from employment, director's fees, life insurance products (not covered by other Directives), pensions and the income from immovable property) will be introduced, based on the Mutual Assistance Directive (2010/24/EU).

Taking into account the above mentioned motives, the European Union took the position that the cooperation with the US regarding FATCA should greatly help in advancing the EU's efforts to promote the global application of automatic exchange of information for tax purposes. It could also contribute to promote a single approach at a global level to reporting arrangements on financial institutions. Such a position of EU Member States had its further consequences.

On 12 April 2013, at the meeting of the European Union's finance ministers in Dublin, six major EU Member States: France, Britain, Italy, Poland, Spain and Germany presented a new initiative against tax evasion and tax avoidance. They announced their intention to exchange FATCA type information amongst themselves in addition to exchanging information with the United States. In the future, the six countries plan to automatically exchange all relevant data on capital income with each other. That will enable fiscal authorities to collect taxes more easily from taxpayers who invest money in the EU (O'Donnell and Strupczewski, 2013).

During the Dublin meeting the ministers stated: "Following the passage of the US Foreign Account Tax Compliance Act we have all been in joint discussions with the US as to the most effective way of concluding intergovernmental agreements to provide for automatic information exchange. These discussions have resulted in a model agreement which

[2] There are also third countries special agreements signed, which provide for the exchange of information at the same level as the European Savings Directive. They have been concluded with the dependent territories of the Netherlands and the UK and also with Switzerland, Andorra, Monaco and Liechtenstein.

minimises burdens on business while ensuring effective and efficient reciprocal exchange of information. We believe that these agreements represent a step change in tax transparency, enabling us to clamp down further on tax evasion. We will be looking to promote these agreements as the new international standard, including through the various international fora, with the ultimate aim of agreeing a multilateral framework."

The statement had its further consequences, as on April 13th Belgium, the Czech Republic, the Netherlands, and Romania also expressed interest in this approach (OECD, 2013).

8 Summary

According to the US IRS, the Foreign Account Tax Compliance Act is not focused on collecting withholding taxes, but is designed to compel foreign financial institutions and other foreign institutions to disclose information about their US account holders and owners. Through this mechanism the IRS will compel US persons abroad to fulfil their tax obligations (KPMG, FATCA Requirements…2012). Nevertheless, the FATCA legislation has attracted worldwide criticism, partly because of the compliance costs and partly because it would require banks to break the law in some jurisdictions. The criticism of the global financial industry about costs and legal issues caused that the US Treasury announced some shift in the approach to implementing the Foreign Account Tax Compliance Act.

On 8 February 2012, the new guidelines on the regulation of FATCA have been published. They envisaged minimising some of the obligations imposed on foreign financial institutions, such as the simplification of due diligence in respect of some individuals. Other important changes included the postponement of the starting date for the procedure of identifying new customers (from January to the end of June 2013) and postponing of the date of entering to force the 30% withholding tax (from January 2015 to January 2017). Additionally, on 17 January 2013, the US Department of the Treasury and the Internal Revenue Service issued comprehensive final regulations implementing the information reporting and withholding tax provisions (IRS, 2013). The final regulations address many of the major issues requiring further clarification following the proposed regulations issued in February 2012.

Apart from the amendments in the US Act there are still difficult issues which have to be taken into account. According to the Fitch Ratings, the forthcoming US Foreign Account Tax Compliance Act could have wide-ranging implications for global structured finance transactions. Although the Act is not intended to be retrospective, and as such it is not expected to result widespread negative rating actions, but the breadth of the US Law and its complex practical implications mean there could be possible cash-flow disruptions and rating implications in individual transactions. Fitch Ratings points at the need of monitoring developments and expects that global structured finance transactions and counterparties will address any uncertainties (Fitch, 2012).

From the perspective of the European Union it looks like the recent developments at the international level as regards FATCA open new perspectives for strengthening the automatic information exchange between EU Member States and third countries, thus improving transparency at a global level. Finally, the cooperation with other international organisations should be improved with a view to promoting common interests, avoiding overlaps and creating synergies for the benefit of financial institutions and tax administrations. In the future, the EU Member States could be able to use a single set of tools and instruments both within the EU and in their relations with third countries with this regard (The European Commission, Communication from the Commission…, 2012).

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