GDPR AND FATCA

RULES FOR AUTOMATIC EXCHANGE OF INFORMATION; SCHREMS II IMPACT TO EU CANDIDATE COUNTRIES

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GDPR and FATCA
(and other administrative cooperation agreements)

Rules for automatic exchange of information; Schrems II impact to EU candidate countries

INTRODUCTION

The GDPR [1] , as one of the European Union legal acts with the widest range, practices of the European supervisory authorities, as well as the practice of the Court of Justice of the European Union (ECJ) draw a lot of attention both inside and outside of the European Union, especially in EU candidate countries such as the Republic of Serbia. In that fashion the Schrems II judgement [2] has brought a lot of attention, caused numerous texts and analysis and opened discussions on worldwide impact of this judgement to transfer of personal data.

On the other hand, it can be argued that in the last couple of years the taxation authorities of countries have given special attention to the automatic exchange of information related to taxation, with the aim to prevent the tax evasion and to increase the collection of taxes, both being the important interests of any country.

The automatic exchange of information in this regard should be understood as exchange that occurs in a continuous manner and in a procedure, which is agreed in advance by the competent bodies, without the necessity and requirement that one of the parties requests from the other the administrative assistance.

Purpose of this text is to analyse the application of the rules relevant for cross-border transfer of personal data, to the personal data exchanged by the countries pursuant to the international a greements (bilateral or multilateral) on exchange of information related to taxation, such as the Convention on Mutual Administrative Assistance in Tax Matters [3] (the Convention) or the FATCA Agreement [4] .

The emphasis in this text is given to the automatic exchange of information, which is the most sensitive manner of exchange from the point of data protection, but the importance of such exchange for taxation should increase in the future. The text deals with exchange of data that is used for the purpose of collecting the taxes and not further use thereof in potential criminal proceedings and it analyses the EU laws and practice of the ECJ from the perspective of the Republic of Serbia which, as the EU candidate country, is not directly obliged by the EU legal acts nor by the practice of the ECJ.

For the Republic of Serbia this issue is one of current concern. The FATCA Agreement has become effective at the beginning of 2020 and the competent bodies of the Republic of Serbia and the United States should enter into an agreement pursuant to the article 3, para 6 of the FATCA Agreement to regulate the automatic exchange in line with the FACTA Agreement.

The discussions on compliance of the FATCA regime with the EU data protection laws is ongoing in the European Union for several years [5] , and the automatic exchange of tax information has been subject to guidelines of the ARTICLE 29 Data Protection Working Party („Working Party").

DATA PROTECTION LAWS APPLY TO PROCESSING OF PERSONAL DATA FOR TAX PURPOSES

Before analysing the transfer regime, it should be confirmed that the GDPR i.e. DPL [6] is, undoubtedly, applicable to the processing of personal data by the tax authorities for the purpose of conducting activities falling within their competence [7].

This can be concluded from the formulation of the Article 2 of the GDPR i.e. the Article 3 of the DPL, which set out the scope of these legal acts, as well as from the Article 4, para 1, points 8) and 25) of the DPL.

Such conclusion is confirmed by the Convention, which in its preamble states as follows: „Convinced therefore that States should carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data".

Moreover in the Article 22, para 1: „Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law."

Finally, the DAC [8] in the Article 25 prescribes that „all exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. [9]" There is also a proposal [10] of the Directive which would amend the DAC. This proposal envisages partial amendment of the Article 25, whereby the new paragraphs 2 and 3 and added paragraph 5 shall refer to the GDPR. The preamble of the proposal states that „the European Data Protection Supervisor was consulted in accordance with Article 42 8 of Regulation (EU) 2018/1725 of the European Parliament and of the Council" and that „any processing of personal data carried out within the framework of this Directive must comply with Regulations (EU) 2016/679 and (EU) 2018/1725."

TRANSFER REGIMES

Taking into account that the GDPR (DPL) is applicable to the data processed by tax authorities, the next question is which transfer regime is applicable to transfer of such data as a part of the administrative assistance in tax matters.

From the wording of the Article 22, para 1 of the Convention it can be concluded that the transfer regime is the one set out by the laws of the country which transfers the personal data. As the main purpose of the Convention and the FATCA Agreement is collection of taxes and exchange of information for the purpose of collection of taxes, it can be concluded that the „general transfer regime" set out by the Article 63, para 1 and the Articles 64, 65 and 69 of the DPL is applicable to transfer of personal data from the Republic of Serbia. In other words, processing by the tax authorities is not processing by competent bodies „for the purpose of prevention, investigation and detection of criminal acts, prosecuting the perpetrators or enforcing the criminal sanctions, including prevention and protection from public and national security threats" („competent bodies" as a separate term defined by the DPL compared to „public authority"), so the articles of the DPL which regulate processing by the „competent bodies" are not applicable.

ADEQUATE LEVEL OF PROTECTION

Regarding the „general transfer regime", when there is a decision of a competent body that certain country ensures the adequate level of protection [11], personal data can be transferred taking into account existence of such decision (the Article 45 of the GDPR which matches the Article 64 of the DPL). In case of the EU the competent body is the European Commission and in case of the Republic of Serbia, the Government of the Republic of Serbia.

The Government of the Republic of Serbia has rendered the decision on list of countries ensuring the adequate level of protection. There are 54 countries on the list – signatory parties to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe [12] , and 9 countries, parts of their territories or one or more sectors of certain business activities and international organizations which are declared by the European Union as entities ensuring the adequate level of protection. United States (in relation to Privacy Shield Framework) are on the list of 9 entities declared by the EU as those which ensure adequate level of protection.

This Decision has been adopted before the Schrems II judgement was rendered, so the question arises whether the Government of the Republic of Serbia should, taking into account the Schrems II judgement which invalidates the EU decision on determining that the United States ensure adequate level of protection, reconsider its decision in relation to the United States [13].

Pursuant to the Constitution of the Republic of Serbia, EU legal acts or the ECJ practice do not represent the source of law. However, the Article 64, para 2 of the DPL regulates that it is by the law considered that the adequate level of protection is ensured in the countries and international organizations which are signatories to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe and in the countries, parts of their territories or one or more sectors of certain business activities and international organizations which are declared by the European Union as entities with the adequate level of protection. In that manner the Republic of Serbia has linked the adequate level of protection to the legislative of the European Union i.e. to the decision of the European Commission on determining the countries which ensure adequate level of protection, so the Republic of Serbia is obliged to change its decision whenever there is a change in the European Union.

In that regards the Commissioner for Information of Public Importance and Personal Data Protection of the Republic of Serbia („Serbian Supervisory Authority") has already sent the letter to the Government of the Republic of Serbia proposing to remove the United States from the list of countries ensuring adequate level of protection [14] .

Such action of the Serbian Supervisory Authority is also fully in line with the foreign policy priorities of the Republic of Serbia to access the European Union and to adopt the acquis communautaire. In that regards the National Assembly of the Republic of Serbia has, in the Article 151, para 4 of its rules of procedure [15], envisaged that a law proposal must be accompanied with (1) the declaration of the proposer that the proposal is harmonized with the EU laws or that the harmonization is not required or that it is not possible to harmonize the law with the EU Law, and with (2) the table of harmonization of the law proposal with the EU laws, whereby the Government of the Republic of Serbia has prescribed in its rules of procedure [16] that the draft of law or regulation or decision must be accompanied with the declaration of the proposer on the harmonization with the EU laws and the table of harmonization of respective act with the EU law, using the forms set out by the Government by a separate legal act.

APPLICABILITY OF IMPORTANT PUBLIC INTEREST REASONS?

On the other hand, the question is whether the exchange of tax information can be effectuated pursuant to the Article 49, para 1, point d of the GDPR i.e. the Article 69, para 1, point 4 of the DPL. This article of the DPL provides for the possibility to effectuate the transfer if that is necessary for effectuating important public interest envisaged by a law, under the condition that the transfer of certain personal data is not limited by the DPL. This is the exception from the applicability of the „general transfer regime" to the countries which do not ensure adequate level of protection, in which case the controllers are not required to ensure the adequate level of protection.

Without the intention to provide extensive reasoning that the exchange of tax information can be considered as important public interest of any country, as the exchange of information contributes to more efficient collection of taxes, it appears that this legal ground cannot be applied to automatic exchange of information, but only to the exchange of information on request pursuant to the Article 5 of the Convention or spontaneous exchange of information pursuant to the Article 7 of the Convention.

Namely, the European Data Protection Board in its Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 emphasizes, inter alia, the following: „Yet, this does not mean that data transfers on the basis of the important public interest derogation under Article 49 (1) (d) can take place on a large scale and in a systematic manner. Rather, the general principle needs to be respected according to which the derogations as set out in Article 49 shall not become "the rule" in practice but need to be restricted to specific situations and each data exporter needs to ensure that the transfer meets the strict necessity test. Where transfers are made in the usual course of business or practice, the EDPB strongly encourages all data exporters (in particular public bodies) to frame these by putting in place appropriate safeguards in accordance with Article 46 rather than relying on the derogation as per Article 49(1) (d)" [17].

APPROPRIATE SAFEGUARDS

Therefore, the automatic exchange of information with the United States under the FATCA Agreement, as well as any other potential automatic exchange of information with countries that are not on the list of countries ensuring adequate level of protection that would be performed in line with the Article 6 of the Convention, must be performed in line with the Article 46 of the GDPR i.e. the Article 65 of the DPL.

In relation to the above stated, the European Data Protection Board has, in its Statement 01/2019 on the US Foreign Account Tax Compliance Act (FATCA) [18] , stated that its „legal predecessor" - Working Party has issued the 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 [19] and that the European Data Protection Board shall review the existing data protection safeguards under the legislation authorising the transfer of personal data to the US IRS for the purposes of the US Foreign Account Tax Compliance Act. It also emphasizes that the European Data Protection Board has initiated work on the preparation of guidelines which will provide information on the minimum guarantees to be included in legally binding and enforceable instruments concluded between public authorities and bodies (46 (2) (a)) as well as for provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights (46 (3) (b)) of the GDPR and that these guidelines will be a useful tool also for the evaluation of intergovernmental agreements signed between Member States and the US government on FATCA to ensure their compliance with the GDPR.

As such guidelines have not yet been issued by the European Data Protection Board, we shall analyse the Working Party Guidelines WP 234. WP 234 Guidelines state, if the data is transferred to a country which does not provide adequate level of protection, the Member State shall ensure that the receiving country provides adequate protection to personal data, as well as that in consideration of the comprehensive and systematic nature of the data transfer concerned, the exceptions provided for in the Article 26 (1,d) of the Directive 95/46/CE (49 (1, d) GDPR) cannot be applied. Therefore, these Guidelines also indicate that the „general transfer regime" is applicable to the transfer of data to countries which do not ensure adequate level of protection and that the parties are obliged to implement the measures for the purpose of protecting the rights of persons whose data is transferred, in line with the laws of the country from which the data is transferred.

WP 234 Guidelines recommend the measures to be introduced in the agreement between the governmental bodies, whereby these recommendations do not represent an exhaustive list of the safeguards and the assessment of which safeguards should be included shall be made on a case-by-case basis, after assessing the context of the data exchange, the data protection rules already in place in the receiving country and the risks potentially involved in the exchange. Those measures are:

1. a third party beneficiary clause (to enable the data subject to enforce any breach of the data controller and recipient's obligations);
2. clarification of the controller and recipient's obligations (e.g. requirement to respond to enquiries, provide a copy of the clauses to the data subject, submission to reviewing, auditing, etc.);
3. a liability clause;
4. clarification of governing law;
5. power of the competent data protection authority to block or suspend the exchanges;
6. direct verification by authorities (e.g. joint inspections, audits by independent bodies, etc.) or by the controller (e.g. audits);
7. the obligation to designate an independent data protection officer; independent investigation of complaints (designation of contact points for enquiries);
8. dissuasive sanctions, appropriate redress and compliance with Court decisions;
9. an accountability clause (obligation to provide evidence of compliance to the competent data protection authority, either upon request or at regular intervals);
10. transparency of the safeguards (e.g. publication of the instruments on the internet); xi) termination of the agreement, arrangement, etc. in case of breach.

WP 234 Guidelines also recommend that competent tax authorities negotiating tax cooperation agreements with other countries consult the national supervisory authorities in order to ensure a coherent application of the data protection safeguards.

Regardless the fact that the guidelines of the European Data Protection Board are not binding for the Republic of Serbia, we emphasise the Serbian Supervisory Authority has already directed interested parties to the guidelines of this body e.g. in respect to information published on its website in relation to the data protection officer [20].

The Article 46 of the GDPR sets out the following. In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from a supervisory authority, by a legally binding and enforceable instrument between public authorities or bodies. The same is set out in the Article 65, para 1 and para 2 point 1 of the DPL.

The Article 6 of the Convention precisely envisages that the parties shall determine the procedures for automatic exchange of information by mutual agreement. Mutual agreement is envisaged also by the Article 3, para 6, point a) of the FACTA Agreement.

CONCLUSION

To sum up, reading congruently the Article 46 of the GDPR i.e. the Article 65 of the DPL, the Article 6 of the Convention, the Article 3 para 6 of the FATCA Agreement and guidelines of the EU regulatory bodies, it is clear that the legally binding document regulating the procedures for automatic exchange of information must also define and implement appropriate safeguards in respect to protection of personal data.

As reconfirmed by the Schrems II judgement, appropriate safeguards should be determined on a case-by-case basis and the parties to an agreement have the obligation to verify „that the level of protection set out by the laws of the country from which the data is transferred is respected in the country to which the data is transferred". The level of protection should specifically provide for adequate protection of rights of citizens corresponding to the level of protection prescribed by the EU legal acts. It is additionally required that the recipient of the data informs the exporter on any impossibility to adhere to the agreed safeguards. If the level of protection in a recipient country is not substantially equivalent to the laws of the exporter country, the body which transfers the data is obliged to stop the transfer or to terminate the agreement.

In other words, the agreement that competent bodies of the Republic of Serbia and the United States designated by the FATCA Agreement should execute for the purpose of establishing the procedures for automatic exchange of information is the legal act which should determine the appropriate safeguards, taking into account the principles emphasized in the Schrems II judgement.

The same will be valid also for any other future agreement that the Republic of Serbia or their governmental bodies execute with the countries which do not ensure adequate level of protection and that regulates automatic exchange of tax information.

REFERENCES

1 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 on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

2 Judgement of the Court of Justice of the European Union in case C-311/18

3 Official Gazette of the Republic of Serbia – International Agreements no. 8/2019

4 Agreement between the Government of the United States of America and the Government of the Republic of Serbia to Improve International Tax Compliance and to Implement FATCA (Official Gazette of the Republic of Serbia – International Agreements no. 16/2019)

5 Inter alia, during 2012 the Working Party and the Director General of Taxation and Customs Union have ex change several letters discussing this issue and in 2018 the European Parliament has adopted the resolution - European Parliament resolution of 5 July 2018 on the adverse effects of the US Foreign Account Tax Compliance Act (FATCA) on EU citizens and in particular 'accidental Americans'

6 Data Protection Law of the Republic of Serbia (Official Gazette of the Republic of Serbia no. 87/2018)

7 Pursuant to the article 3, para 2 of the Law on Ministries of the Republic of Serbia (Official Gazette of the Re public of Serbia no. 44/2014, 14/2015, 54/2015, 96/2015 – other law, 62/2017), Tax Administration of the Republic of Serbia, as an administrative body within the Ministry of Finance, performs expert tasks and state administration tasks related to: registration and keeping the unified registry of tax payers; determination of taxes; tax control; regular collection of taxes and collection by enforcement; de tection of tax crimes and perpetrators; application of international double taxation treaties; unified tax information system; tax accounting and other tasks prescribed by the laws

8 COUNCIL DIRECTIVE 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, as amended

9 GDPR has repealed the Directive 95/46/EC

10 COM (2020) 314 final

11 The Decision on the List of countries, parts of their territories or one or more sectors of certain business activities in such countries and international organization considered to provide the adequate level of protection of personal data (Official Gazette of the Republic of Serbia no. 55/2019)

12 Official Gazette of the FRY – International Agreements, no. 1/92, Official Gazette of the State Union of Serbia and Montenegro – International Agreements, no. 11/2005 – other law and Official Gazette of the Republic of Serbia – International Agreements no. 98/2008 – other law and 12/2010)

13 Regardless of fact whether the Privacy Shield Framework is at all applicable to the transfer of tax information

14 https://www.poverenik.rs/sr/саопштења/3382-утицај-одлуке-европског-суда-правде-на-пренос-података-у-сједињене-америчке-државе-на-основу-„privacy-shield".html

15 Official Gazette of the Republic of Serbia no. 20/2012 (clean version)

16 Official Gazette of the Republic of Serbia no.61/2006 (clean version), 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013, 76/2014, 8/2019 (other regulation)

17 https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf

18 https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-statement-012019-us-foreign-account-tax-compliance-act-fatca_en

19 https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp234_en.pdf

20 https://www.poverenik.rs/sr-yu/zaštita-podataka/лице-за-заштиту-података-о-личности.html

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