

From:
Nicholas Lee



To:
Belastingdienst
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cc: Autoriteit Persoonsgegevens

To whom it may concern,

I am writing to you to object to the continued processing & transfer of my personal data from the Belastingdienst / Finance Ministry in the Netherlands to the Internal Revenue Service / Treasury in the United States under the US-Netherlands FATCA Intergovernmental Agreement (FATCA-IGA), per Article 21 of the General Data Protection Regulation. This objection is on the following bases:

- The general recipient of the data, the United States government, has been previously ruled by the CJEU in the “Schrems II Ruling” (ECLI:EU:C:2020:559) to be generally non-compliant with the General Data Protection Regulation, offering inadequate safeguards with respect to rights enshrined in European law.
- The specific recipient of the data (the IRS / Treasury) is demonstrably non-compliant with basic provisions of the General Data Protection Regulation, namely those pertaining to data access. Non-compliance with access rights is a breach of GDPR in and of itself, but it also precludes the exercise of other necessary rights including the right to rectify errors, the right to object to automated processing, and the right to effective judicial redress.
- The Belastingdienst, having received a Subject Access Request and a Right to Rectify Errors request in a timely manner, delayed its processing of the request beyond the standard 30 days. After being reminded of the impending data transfer that imposes urgency, I was provided with a non-sequitur reply letter stating that my information is not located in a system wholly unrelated and nonresponsive to the Subject Access Request, further delaying a meaningful response.
- This delay related to the need to correct this error has resulted in the Right to Rectify request effectively being ignored, as the processing of my objection and the original request is now likely to occur *after* the transfer of data under the IGA. This processing delay eliminates any possible safeguards within EU jurisdiction prior to data being transferred to non-compliant entities.
- The Finance Ministry & Autoriteit Persoonsgegevens has been informed of the non-compliance of the data recipient and the associated IGA on numerous occasions, both within the context of the GDPR requests it has received from myself and in general by others. This complaint adds to the corpus of evidence that the data exchange is non-compliant.
- Having not received a copy of the personal data to be transferred by the Belastingdienst from my request dated 4 July 2021, it is not possible to verify that data minimization practices mandated by GDPR are adequately followed. In the absence of individual information, I refer to a recent letter to the Tweede Kamer indicating that data transfers to the United States are not adequately minimized and far exceed the scope of what is required under the FATCA-IGA.

The Dutch Government has previously taken the position that the data transfer program, in its entirety, is compliant with GDPR by virtue of legal necessity under an agreement that it concluded with the United States.

This position is invalid in that it ignores CJEU jurisprudence, requirements for safeguards under GDPR Chapter 5 for data transfers, the primacy of EU law superseding domestic law and agreements between EU Member States and Third Countries, and general requirements imposed by the GDPR.

Given the numerous, significant, and seemingly willful breaches of the General Data Protection Regulation, it is ultimately necessary to request that Belastingdienst and Finance Ministry cease all data processing that facilitates personal data transfers with the United States government under the FATCA-IGA, both with regards to my individual personal data and in general.

It is unfortunate that the Netherlands has entered into an agreement that it cannot legally fulfil under European Union law, but this cannot be the basis for systematic, recurring, and automated breaches of individual legal rights.

Having substantiated the request at a high level, I will elaborate on and evidence specific bases of the request to cease processing and data transfers relating to the FATCA-IGA.

The Demonstrable Non-Compliance of the IRS / Treasury

No existing adequacy decision or appropriate guarantees

The data transfer cannot be legitimised on the basis of an adequacy decision under Article 45 due there being no currently valid adequacy decision regarding the United States.

Similarly, the appropriate guarantees referenced in Article 46 also do not appear to be in place.

Non-Responsiveness to Subject Access Requests

The inadequacy of the Internal Revenue Service's data protection program can be demonstrated through its failure to respond to a GDPR request submitted to its data inquiry fax line and its failure to respond to a subsequent follow-up. The request sought the following information:

- A copy of all personal data received under applicable FATCA IGAs
- A copy of my foreign filed tax returns
- A copy of all personal data received or processed by third party entities

Delivery confirmation was received for the original request dated 4 July 2021 and the follow-up letter informing the IRS that over 30 days had passed without acknowledgement of the request and requesting timely processing.

On 1 September 2021, the IRS mailed a non-substantive response that was roughly 28 days past its statutory deadline for response to the Subject Access Request.

The response:

- Stated that the IRS is "unable" to respond to privacy inquiries concerning international data transfer
- Included instructions for how to request a copy of my tax returns but did not include the tax returns.¹
- Declined to discuss or to include a copy of data provided or processed by third parties.

¹ Note that the instructions they linked to reference a \$43 processing fee for all data requests, another breach of rights under the GDPR

Fundamentally, this demonstrates that there is no equivalent data protection provided by the United States government—without access to the data sent from the Netherlands, redress concerning decisions made based on incorrect data, or even knowing that there is incorrect data is impossible.

Attached to this objection to data processing are correspondence with the IRS, the fax delivery confirmations, and a copy of the webpage with the fax information line.

I will also note that when a GDPR request pertaining to other personal information held by the Internal Revenue Service was submitted in 2020, it was specifically rejected as not being necessary to provide under United States law. I am unfortunately no longer in possession of the letter containing this response.

Inadequate Judicial Redress and Right to Due Process

While the barriers to due process and judicial redress are numerous, complicated, and beyond my full comprehension, I find it necessary to inform the Belastingdienst of some known issues in the United States that further preclude protections equivalent to those that exist in the EU, something necessary for data transfers to be legal.

The Flora Rule: When the IRS assesses penalties against an individual, it is necessary for the individual to pay the full amount of taxes and penalties *prior* to being permitted to lodge an appeal in court. This applies even in cases where the assessment of the penalty was incorrect or where it exceeded the legal authority of the Internal Revenue Service.

Despite concerns raised by the IRS National Taxpayer Advocate², an internal watchdog, this rule remains in place and routinely utilized to create barriers to due process.

Penalties have limited due process protections: The IRS and Treasury have routinely asserted that any penalties that are imposed are *not fines* and are therefore not subject to any due process protections that prevent the assessment of excessive fines.³

In many cases, these penalties are assessed on non-willful, non-substantive information reporting errors and exceed the balance of any accounts involved in the error. Furthermore, the IRS has previously assessed incorrect \$10,000+ penalties in contradiction with its own rules, procedures, and publicly available instructions for filing.⁴

The IRS National Taxpayer Advocate has previously criticized IRS unwillingness to consider circumstances when assessing penalties.⁵

Applicability of laws to minors: The Treasury has publicly stated in its filing instructions that in international matters, minors are fully liable for the consequences of any non-compliance with tax rules⁶, though their parents *should* complete the filings for them in cases where the child is unable to.

Should the Belastingdienst transmit incorrect information to the United States Treasury that concerns a minor, they are potentially saddling a child under the age of 18 with tens to hundreds of thousands of dollars in financial penalties before they turn 18 and without adequate judicial redress.

² https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_LR_03_FixFlora.pdf

³ <https://www.kpatelloffice.com/court-rejects-eight-amendment-fbar-fines/>

⁴ <https://www.americanexpatfinance.com/news/item/287-victims-of-irs-forms-3520-and-3520-a-coming-forward>

⁵ https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_LR_07_ForeignAccount.pdf

⁶ <https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf> , page 3 & page 6

While I am not a minor, the information being exchanged surely includes the information of minors subject to additional protections under European law, and this point further illustrates the conflicts between European rights and US practices.

Delays at the Belastingdienst Interfere with Exercise of GDPR Rights

I have attached GDPR related correspondence the Belastingdienst concerning the implementation of the FATCA IGA. The facts that are relevant here:

1. The first request dated 4 July 2021 and concerning data transfers from the Netherlands to the United States was submitted in a timely manner, but its processing was delayed due to a “volume of requests”.
2. A later request dated 15 July 2021 concerning data transfers from the United States to the Netherlands was promptly processed and replied to on 9 August 2021, despite the “volume of requests” that precluded timely processing of the first request.
3. In a recent letter from Min. Hoekstra to the Tweede Kamer, it is noted that the Belastingdienst seeks to complete its data transfer to the United States “at latest by the end of September”.⁷
4. The Belastingdienst was made aware on 3 September 2021 of the problems related to the delay in request processing that it opted to make use of. A response was sought by 10 September 2021.
5. On September 9th, a wholly non-responsive reply to the Subject Access Request was provided, attempting to close the request with the statement that my data is not included in the now-defunct FSV system⁸. The FSV was not mentioned in the GDPR request I sent, nor is its relationship with the US-Netherlands FATCA-IGA publicly documented anywhere. A separate objection to that reply has been filed.

The Belastingdienst was informed in July that it was necessary for it to provide access to data being transferred to the United States and to provide an opportunity to rectify errors before transmission to the United States.

The delayed, erroneous, and out-of-order processing of requests—despite clear indications as to the necessity of timely processing and the potential individual consequences of a failure to do so, creates the appearance of an inconvenient request being intentionally delayed until all opportunities to exercise individual data rights have passed.

I sincerely hope that this is not the case.

Obligations to practice data minimization are not followed

Per the FATCA-IGA, there are several account types that do not require reporting and data transfer under the IGA.⁹ The most notable exemptions are retirement accounts (Annex II) and ordinary accounts with less than \$50,000 in balance and \$10 in interest (Page 28).

Despite these reporting exemptions, there is clear evidence in the form of the letter from Min. Hoekstra to the Tweede Kamer that information on such accounts is reported to the United States anyway, in excess of what is obligatory under the IGA¹⁰.

⁷ <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2021/09/03/kamerbrief-cijferrapportage-fatca/kamerbrief-cijferrapportage-fatca.pdf>

⁸ <https://www.belastingdienst.nl/wps/wcm/connect/nl/contact/content/het-systeem-fraude-signalering-voorziening-fsv>

⁹ <https://home.treasury.gov/system/files/131/FATCA-Agreement-Netherlands-12-18-2013.pdf>

¹⁰ <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2021/09/03/kamerbrief-cijferrapportage-fatca/kamerbrief-cijferrapportage-fatca.pdf>

Given the massive penalties on benign filing errors and due process concerns with regards to the United States, there may be severe personal consequences if excessive and/or incorrect data is provided to the United States.

I will note that I have personal accounts that are exempt from reporting under the IGA by virtue of their retirement account classifications under Dutch law and the bulk, if not all, of my accounts are exempt from reporting based on not having met the reporting threshold of \$50,000.

If the Belastingdienst is compliant with their obligations under Article 5.1.c of the GDPR, it will not provide information to the United States that exceeds the bare minimum that is obligatory under the FATCA-IGA.

Providing data in excess of that bare minimum is not in compliance with the General Data Protection Regulation, nor is it proportionate given that the Belastingdienst has confirmed in writing that it receives no information from the United States regarding my financial accounts—demonstrating that the United States has wholly failed to uphold its obligations under the IGA while the Netherlands exceeds its obligations. This also calls into question the legitimacy of any arguments based on Article 49 referring to the public interest¹¹.

Seeing that in general there is excessive reporting and having not been provided with the individual opportunity to see if my own reporting exempt data is included in the transfer, it is necessary to assume that data minimization has not occurred.

The Belastingdienst has been informed of possible problems in the past

The general legality of the data transfer discussed in this objection has been publicly questioned on numerous occasions by a¹² variety¹³ of¹⁴ individuals¹⁵ and¹⁶ groups¹⁷. Despite this, there has been a stubborn unwillingness to examine the legality of the data transfer to the United States, instead relying on unsubstantiated statements that adequate safeguards exist and that the implementation of the FATCA-IGA is compliant.

Given the abundance of evidence of GDPR violations both in substance (in the form of due process, privacy rights, etc.) and in procedure (in terms of non-responsiveness to requests, information reporting in excess of IGA obligations, etc.), the burden of evidence is on the Belastingdienst to demonstrate the legitimacy of the data processing and transfer, and to demonstrate that safeguards equivalent to those in the EU and satisfying the requirements described in the Schrems II ruling are implemented and followed.

The Belastingdienst is engaged in data transfers containing information that it fails to disclose, to an entity that refuses to disclose what information it has received, and which has been ruled by the CJEU to not provide adequate due process in the past.

¹¹ EDPB Guidelines 2/2018 and May 2018 further indicate that bulk data transfers such as those under the IGA cannot be considered to serve European public interests.

¹² https://www.mishcon.com/assets/managed/docs/downloads/doc_3320/FATCA%20Letter%20to%20Dutch%20AP.PDF

¹³ https://www.mishcon.com/assets/managed/docs/downloads/doc_3327/FATCA%20-%20Letter%20to%20AP%20re%20Latvian%20response.PDF

¹⁴ <http://tax.nickle.es/mirror/1630060399485.pdf>

¹⁵ <http://tax.nickle.es/mirror/belastingdienst%20klacht%20bij%20Data%20Protection%20Officer%20aug%202021.pdf>

¹⁶ <https://twitter.com/SophieintVeld/status/1398309429607608324/photo/1>

¹⁷ https://edpb.europa.eu/system/files/2021-04/edpb_statement042021_international_agreements_including_transfers_en.pdf

From the perspective of someone that has filed individual requests, it is inconceivable that any safeguards exist or are being respected by either the data transmitter or the data recipient. I invite the Data Protection Officer to prove otherwise.

The public appearance is of deliberate inaction and a willful disregard for the rule of law for reasons of political convenience, much as there was during the Toeslagenaffaire.

I hope that in consideration of clear evidence of direct breaches of the General Data Protection Regulation, data processing ceases immediately & work is undertaken to ensure that any resumed data exchanges fully comply with the requirements imposed by the GDPR and the interpretation set by the Schrems II ruling.

Attachments to this Objection

1. GDPR request letter to the Internal Revenue Service
2. Follow-up to GDPR request to Internal Revenue Service
3. Proof of delivery for attachments #1 & #2
4. Non-Responsive reply from Internal Revenue Service
5. Second follow up with Internal Revenue Service
6. Copy of webpage with fax line for personal information inquiries
7. Request to Belastingdienst concerning data sent to United States
8. Acknowledgement of request & invocation of 60 days additional processing time
9. Follow-up citing urgency of request, given imminent plans to transfer data to a non-compliant Internal Revenue Service
10. Non-Sequitur Reply from Belastingdienst referencing FSV
11. Objection to handling of SAR / Right to Rectify Request concerning data exchanges sent by NL
12. Request to Belastingdienst concerning data received from United States
13. Response from Belastingdienst concerning data received from United States
14. Copy of letter to Tweede Kamer from Min. Hoekstra evidencing non-minimization of data and the “by end of September” deadline for data transfer
15. Excerpts from the United States – Netherlands FATCA-IGA clearly describing the scope of data transfers required by the agreement

Per the General Data Protection Regulation, this objection to data processing should be processed in a timely manner within one month of receipt.

I will note that because this objection concerns an imminent data transfer, it would be appropriate for this objection to be processed with urgency prior to the intended transfer to ensure that the Belastingdienst is not facilitating continued breaches of the General Data Protection Regulation.

I sincerely hope that the Belastingdienst’s Data Protection Officer will properly act on the evidence that even basic aspects of the General Data Protection Regulation have not been adequately followed in the Netherlands or in the United States.

Thank you,

Signature

Date, Place