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**Statement of the WP29 on automatic inter-state exchanges of personal data
for tax purposes**

Adopted on 4 February 2015

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate-General for Justice and Consumers, B-1049 Brussels, Belgium, Office No MO-59 02/013.

Website: http://ec.europa.eu/justice/data-protection/index_en.htm

The data protection authorities of the European Union, which are represented in the Article 29 Working Party (WP29), are examining the new trends at European and international level which are intending to introduce mechanisms for the automatic inter-state exchanges of personal data for tax purposes and their impact on privacy and data protection.

Also the WP29 has been requested to provide additional guidance to the national tax authorities involved in the exchange of personal data as foreseen by the Directive 2011/16/EU on:

- administrative cooperation in the field of taxation, which has now been amended by Council Directive 2014/107/EU
- and the OECD Common Reporting Standard (CRS),

in order to introduce the additional safeguards needed to ensure the respect for the existing data protection standard in the bilateral/multilateral agreements and/or national laws through which the Directive on administrative cooperation and CRS will be implemented.

The exchange of information is regarded as an essential tool in the fight against tax evasion. It is necessary to ensure that the pre-conditions for a lawful and fair processing of data in this context, are complied with. The prevention of tax evasion is an objective of general public interest and at the same time an activity which impacts the private sphere of every citizens. States have to pursue such an objective with full respect for individuals' fundamental rights, in particular, the right to private life and the protection of personal data, as required by European and international legal instruments.

Previous findings of the WP29

In the last few years, the WP29 has dealt with the mechanisms for automatic inter-state exchanges of personal data for tax purposes and their impact on privacy and data protection.

The WP29 previously sent two letters to the European Commission concerning the US Foreign Account Tax Compliance Act (FATCA), on the 21st June 2012 and the 1st October 2012¹. In those letters, the WP29 raised concerns relating to the lack of appropriate data protection safeguards and the need for adequate legal basis for the transfer of personal data.

The WP29 has considered the “Standard for Automatic Exchange of Financial Account Information – Common Reporting Standard” (CRS) approved by the OECD Council on 15 July 2014. By a letter adopted on 18 September 2014² the WP29 set out an initial evaluation of CRS's impact on the protection of personal data.

The WP29 has now decided to publish the following statement to communicate a number of key messages on this issue.

This statement is primarily addressed to national governments and EU institutions involved in mechanisms of exchange of personal data for tax purposes in order to underline that the bilateral/multilateral agreements and European and national laws implementing such instruments need to ensure appropriate and consistent safeguards at data protection level.

¹ The letters are available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm

² The letter and the Annex are available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm

1. The automatic exchange of personal data for tax purposes should meet data protection requirements, namely the principles of purpose limitation and necessity

The WP29 understands that the introduction of common standard for the automatic exchange of information aims to avoid a proliferation of different standards which would increase costs for both governments and financial institutions, and that the introduction of automatic exchange is part of the strategy for more efficient and EU wide anti-evasion tax policies.

In order to ensure that the legitimate aim of preventing tax evasion, is carried out with due respect for fundamental rights, **any system of exchange of data, especially when it is based on automatic exchange of personal data related to a large number of individuals, should meet data protection standard, in particular the principles of purpose limitation and necessity.**

Following the recent ECJ decision on data retention (Decision of 8 April 2014 of the Grand Chamber³), the WP29 considers that in order not to violate the proportionality principle, it is necessary to demonstrably prove the necessity of the foreseen processing and that the required data are the minimum necessary for attaining the stated purpose and thus avoid, an indiscriminate, massive collection and transfer.

To this end it is of crucial importance that the scope of the automatic exchange is clearly defined.

For example any inter-state agreement should clearly identify the purposes for which data are collected and validly used, in order to avoid any onward transfers for different purposes without appropriate safeguards and legal basis in place. There should be a clear definition of “tax purposes” specifying what kinds of activities are included and the legal basis provided for by the national law.

2. Member States that roll out the model of automatic massive storage and then forward this data for tax purposes, should be aware that they may incur increased (security) risks and liability under EU data protection laws

Compared to targeted, on-demand and spontaneous data exchanges for tax purposes, the increased promotion of automatic, obligatory, massive tax data exchanges raises serious issues for the liability of and (security) risks for public authorities.

Member States should be aware that the introduction of the model of **automatic massive storage and forwarding this data for tax purposes implies bigger (security) risks and liability under EU data protection laws. Therefore, such model, must be carefully assessed under the abovementioned principles of necessity and proportionality, and has to be complemented by adequate measures to respond to the increased risks and responsibilities.**

Each Member State should consider implementing accompanying substantive measures in its national laws and bilateral/multilateral agreements to meet its basic obligations as data controller vis-à-vis the data subjects.

Depending on the national data protection laws and practices of the member states, a dialogue

³ Cases C-293/12 and C-594/12, Digital Rights Ireland, Seitlinger a.o., published on <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0293>

with the national Data Protection Authority, either informal or by means of a formal opinion of the DPA, is an important step to minimize the risks of the processing and ensure adequate remedies against possible violations of data protection rules.

3. The WP29 confirms its approach on providing additional guidance to increase data protection safeguards in this area

As mentioned before, the WP29 has been requested by the Commission to provide additional guidance so that the bilateral/multilateral agreements and/or national laws implementing the Directive on administrative cooperation in the field of taxation and CRS ensure additional and consistent safeguards at data protection level. The WP29 welcomes this request and is willing to engage in this process which may require additional inquiry. For example:

- through the sending out of questionnaires to the competent authorities through national DPAs to take stock of the availability of the existing legal frameworks, detect the current “data protection gaps” and/or major differences in the instruments at national level.
- Moreover, over a longer term, the WP29 would like to suggest that the possibility to obtain a uniform Privacy Impact Assessment (PIA) approach at EU level and/or recommendations from the European Commission could be also considered.

In the meanwhile, the WP29 refers to the principles of its letter about CRS which was adopted on the 18th September 2014 and its Annex, which already provide for significant criteria to be followed by governments while adopting bilateral/multilateral agreements and/or national laws implementing international and European standards in this field.

The WP29 was informed of the efforts of the Commission and the Council to increase the number of substantive data protection provisions in different recitals and articles in the revision process of Directive 2011/16/EU which led to the adoption of Directive 2014/107/EU.

The WP29 is convinced that a constructive dialogue with the EU institutions should be continued and be carried out from early stages of procedures. In particular, the WP29 confirms its openness to discuss with the Commission in the coming months the different techniques to obtain more consistency at EU level in order to limit the data protection liability risk of the member states tax authorities and to increase a more consistent approach on data protection within the EU.