

European Countries Reluctant To Challenge FATCA

By **Natalie Olivo**

Law360 (November 27, 2019, 1:17 PM EST) -- Critics of the U.S. Foreign Account Tax Compliance Act have accused European Union banks of violating privacy and anti-discrimination laws when they share customer information with the IRS, but EU countries aren't likely to upend the system anytime soon.

EU lawmakers at a committee hearing this month argued FATCA is causing harm and inconvenience to European citizens who have U.S. citizenship but lack substantial ties to the country. Financial institutions, they said, are violating customers' privacy by sharing their information with the U.S. government or discriminating against them by denying banking access out of compliance concerns.

But bilateral intergovernmental agreements, or IGAs, for member states and the U.S. to share information will likely remain intact for now. A potential path to renegotiation faces multiple roadblocks, including the Internal Revenue Code's citizenship-based taxation, a prior blessing from European data protection agencies — and more recently, a French court decision that struck down a challenge to France's IGA.

Even with these barriers, specialists say EU countries could eventually unite to bring the U.S. Department of the Treasury to the negotiating table, but only if they believe they're not getting as much information as they're giving in a larger cross-border effort against tax avoidance.

"It seems unlikely to me that EU countries would want to renegotiate these agreements unless they absolutely had to," said Atli Stannard, a senior policy adviser at Covington & Burling LLP in Brussels.

Claims of Banking Discrimination

Enacted in 2010, FATCA established a global reporting regime that gave the Internal Revenue Service access to financial information from around the globe. Aimed at ending bank secrecy and tax avoidance, the statute inspired the Organization for Economic Cooperation and Development to



In November 2018, the Association of Accidental Americans staged a demonstration in Paris as President Donald Trump was in France for the centenary of the World War I armistice. (Getty Images)

establish its common reporting standard for other countries to exchange and collect information.

Under FATCA, foreign financial institutions must disclose information on U.S. individuals' accounts to the IRS or face a 30% withholding tax on payments from the U.S. This threat of a withholding tax has raised concerns that banks are limiting or denying access to more than 100,000 Europeans with U.S. citizenship so they can avoid meeting those compliance requirements.

This behavior is in direct conflict with EU law, which requires banks to provide basic financial services to bloc residents, according to Peter Cotorceanu, of counsel to the Zurich office of Anaford AG. Treasury recognized this conflict in recent FAQ guidance, he said.

The guidance acknowledged the upcoming Dec. 31 expiration of “transition relief” for foreign banks that are unable to obtain a taxpayer identification number, or TIN. Thanks to the guidance, published in October, banks won't be required to immediately close or freeze accounts without a TIN beginning in January. In addition, the IRS said it “will not automatically conclude that the absence of a TIN leads to a determination of significant noncompliance.”

Cotorceanu saw this guidance as “kicking the can down the road” — and also as an admission by Treasury that a conflict exists between FATCA and EU law.

“They realize that they can't enforce this requirement, but it has to be addressed one way or the other,” he said.

However, the U.S. isn't expected to revoke FATCA. To do so would require the government to abandon citizenship-based taxation, said Pierre Ciric of the Ciric Law Firm PLLC, a French attorney based in New York.

Furthermore, Ciric said, a European solution exists in that the EU could order its member countries to enforce the bloc's nondiscrimination laws against banks.

This, he added, would leave “not a U.S. mess, but a European ... mess to resolve.”

Laurent Saint-Martin, a member of the French Parliament who spoke during the European Parliament committee hearing, told Law360 he believed governments and European institutions could take steps to change banks' behavior. For example, member countries could give more responsibilities to authorities that are tasked with monitoring banking institutions, such as the Prudential Supervision and Resolution Authority in France, he said.

These authorities could remind banks that the 30% withholding tax would be activated only as a last step by U.S. authorities, weakening the argument for preventive account closures or denial of services, Saint-Martin said.

On the other hand, the idea that European banks are discriminating against U.S. citizens in their attempts to comply with FATCA isn't universally accepted. When U.S. individuals can't provide a critical piece of information that banks need to remain compliant, “it would be a hard claim to say” that's discrimination, according to Paul Millen of Millen Tax & Legal GmbH in Zurich.

Treasury's guidance saying banks may be found compliant even without a TIN could give the discrimination claim legs, “but it still seems a little bit tricky to me,” he said.

Claims of Privacy Violations

In addition to arguments of banking discrimination, critics of FATCA have contended that information sharing violates blocwide privacy law, especially after the EU's General Data Protection Regulation, or GDPR, took effect in May 2018.

Such an argument was leveled by the France-based Association of Accidental Americans, an advocacy group for those born in the U.S. but who have little connection to the country otherwise. The association sued the French government over its IGA with the U.S., claiming FATCA's requirement for foreign banks to report the financial information of U.S. account holders to American revenue authorities violated EU privacy laws.

But the Council of State, France's highest administrative court, declined to refer the case to the European Court of Justice to interpret how EU privacy law applies. As part of its July ruling, the court pointed to an authorization for FATCA information exchanges issued in September 2015 from France's data protection agency, the Commission Nationale de l'Informatique et des Libertés, or CNIL.

Fabien Lehagre, president of the Association of Accidental Americans, told Law360 his group didn't file a complaint directly with CNIL because the agency deals only with individual cases "and we already knew [its] opinion since it had already been questioned by the French government."

The Council of State's decision was based "purely on political reasons," according to Régis Bismuth, a law professor at France's Sciences Po university who wrote a memorandum on FATCA for the association's case. The court "completely disregarded" reports pointing out problems with respect to FATCA and EU data protection regulations, he said.

Following the July ruling, the association asked the European Commission — the EU's executive arm — to refer the case to the European Court of Justice. If the commission declines, "that is the end of the story," Bismuth said.

Meanwhile, it may be a winning argument to contend that data exchanged under FATCA isn't proportionate with the measure's aim to counter tax avoidance, according to Millen. However, he said courts might hesitate to strike down a regulatory framework without defining a more proportional version.

Doing so "would cause so much upheaval and it would seem a little bit reckless on the part of the court," he said.

As an alternative to litigation, individuals could attempt to challenge IGAs directly through countries' data protection agencies. There has been at least one case at the national level: A U.S.-born British citizen has lodged a complaint with the U.K.'s Information Commissioner's Office.

Saint-Martin speculated that more complaints aren't filed with national data protection agencies because the GDPR is recent, "which means that many European citizens are not yet aware of the specific rights it gives them."

He added, "Knowledge of data protection agencies and the way they operate is often insufficient, which means that citizens seldom turn to them for help."

A Potential Push for Reciprocity

With challenges to IGAs based on privacy violations and banking discrimination currently lacking a clear path forward, EU countries may also fail to see any practical reasons for renegotiating the agreements.

“In the broader context, this is a problem that affects a limited number of people in Europe,” said Stannard at Covington. He added that in practical terms, the information that must be shared is similar to what banks are required to disclose under the OECD's common reporting standard and the EU's Directive on Administrative Cooperation, or DAC, in the field of taxation.

“This is all part of broader international action on tax avoidance,” Stannard said.

With this aim in mind, a desire for more reciprocity could be the factor — if any — that brings bloc countries together in seeking renegotiations.

“An EU decision to demand reciprocity” could get the U.S. Treasury to negotiate IGAs, according to Filippo Nosedà, a partner at Mishcon de Reya LLP who is representing the U.K. woman in her complaint with Britain's privacy agency

“The IGAs are a rare example of international treaties where one party gives without getting anything in return,” he said.

A template for an IGA agreement states that the U.S. government “acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange” with the other country involved.

This commitment has remained “a hollow one,” according to a report released in May by Saint-Martin and Marc Le Fur, also a member of the French Parliament.

The report took issue with a one-way flow of tax data, saying that while French banks are giving U.S. authorities information about U.S. citizens, American banks aren't reciprocating with information on French citizens.

EU countries would likely want to renegotiate IGAs to enhance the reciprocity obligation that U.S. financial institutions owe under the model language for an agreement, according to Millen.

“Currently there are some reciprocity requirements, but it pales in comparison to the amount of information that non-U.S. or the EU financial institutions need to provide to the IRS,” he said.

Saint-Martin told Law360 that while this lack of data from the U.S. about EU citizens living within American borders could lead to IGA renegotiations, member countries can't go about the process alone.

“Only through cooperation at a European scale,” he said, “can member states [weigh] enough to shift the balance of power between the EU and the U.S. Treasury Department in order to renegotiate the terms of IGAs.”

--Editing by Robert Rudinger and Neil Cohen.