

# Tax Transparency and Data Privacy – Which Wins?

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As tax authorities embrace new digital technologies, the issue of safeguarding citizens' data privacy rights steps to the fore. Since the implementation of the EU General Data Protection Regulation (GDPR) in 2018, there has been a greater focus on data privacy from both the public and organisations. At the same time, the cooperative international effort to combat offshore tax evasion has been steadily increasing. Several information-sharing regimes have been conceived to allow tax authorities to share information globally relating to financial accounts and investments under Automatic Exchange of Information Agreements.

In *J Webster v HMRC [2024] EWHC 530 (KB)*, Ms. Webster, a US citizen, brought a case against His Majesty's Revenue and Customs (HMRC) regarding information sharing under the Foreign Account Tax Compliance Act. At the centre of this case stands the question of which wins – tax transparency or data privacy?

## Automatic Exchange of Information (AEOI)

The United Kingdom shares information with foreign tax authorities under two specific regimes:

1. **Foreign Account Tax Compliance Act (FATCA):** The FATCA regime is US-specific. Financial institutions outside of the United States are required to provide the US tax authorities with information relating to the foreign financial accounts of US individuals. Information includes, for example, the individual's name and address, account balance and amount of interest accrued.
2. **Common Reporting Standard (CRS):** Nicknamed "global FATCA" by commentators at its inception, the CRS requires the automatic exchange of financial account information between tax authorities globally. The information shared is largely the same as that under FATCA, with the addition of the date and individuals' places of birth (in some cases).

In practice, financial institutions in the United Kingdom supply the required data to HMRC, which then provides it to the relevant tax authorities on an annual and automatic basis.

## The GDPR

Data privacy in the United Kingdom is regulated by the UK GDPR (the retained version of the EU GDPR) and the Data Protection Act 2018. Under Article 4(1) of the UK GDPR, personal data means any information relating to an identified or identifiable natural person. There are seven key principles for processing personal data (found in Article 5, UK GDPR). Broadly, these require that personal data is: (i) processed lawfully, fairly and transparently, (ii) collected for specified, explicit and legitimate purposes only, (iii) limited to what is necessary for the purposes (minimisation), (iv) accurate, (v) not stored longer than necessary, and (vi) processed in a manner that ensures appropriate security of the data. Finally, the data controller must be responsible for and able to demonstrate compliance with the preceding six principles.

Importantly, personal data must only be transferred outside of the United Kingdom if the receiving countries have adequate levels of protection for data subjects in place or appropriate safeguards for the transfer of personal data (Article 46, UK GDPR).

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## So, Which Wins?

Ms. Webster argued that information sharing between tax authorities under the FATCA regime breached her data privacy and human rights. In summary, she claimed that there were no appropriate safeguards in place for the transfers by HMRC and that US law failed to provide adequate levels of protection. Additionally, the data transfers allegedly fell foul of the principle of proportionality, as bulk processing did not account for Ms. Webster's personal circumstances – specifically, that Ms. Webster had no US tax obligations (having modest income in the United Kingdom and owning no assets or income in the United States).

Unfortunately, the central question of “which wins?” remains unanswered. The judgment focused more on questions of procedure than substance – for example, as argued by HMRC, whether the claim should have been brought via judicial review and was, therefore, an abuse of process.

However, it is not difficult to see some merit in Ms. Webster's claim. The aims of FATCA and the CRS are clearly worthy, and tax transparency is important. However, since personal data is processed automatically and whether an individual poses any real risk of tax evasion is immaterial to that processing, it is unconvincing that the principles of proportionality and data minimisation are comfortably being met.

Information-sharing regimes have been challenged in other countries as well. For example, the Belgian Data Protection Authority has argued (in a decision that has since been annulled) that data exchanges under FATCA violate the EU GDPR since more information than necessary is shared and the purposes for the data transfers are insufficiently defined. The Slovakian Data Protection Authority also challenged FATCA on the grounds that the AEOI Agreement under which data transfers took place did not contain the necessary safeguards to transfer personal data to third countries.

It is widely agreed that the GDPR is far more comprehensive than US privacy laws – some might remember the highly publicised “Schrems II” case from 2020<sup>1</sup> where the Court of Justice of the European Union declared that the US privacy laws fail to ensure an adequate level of protection. Recent news about the US Treasury being hacked also inevitably raises concerns about the security of the personal data transferred, and with President Donald Trump's firing of Democratic members of the Privacy and Civil Liberties Oversight Board since the beginning of his second term, more widespread privacy concerns now linger.

We will have to wait and see how the tension between tax transparency and data privacy culminates. A judgment that focuses on the merits of Ms. Webster's concerns would bring us some much-needed answers. However, what is clear is that there is pressure on tax authorities to address concerns relating to the data privacy of individuals, which are not subsiding.

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<sup>1</sup> Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems and intervening parties, Case C-311/18.

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