

EU/US - Union sums up grievances on FATCA

By Tanguy Verhoosel | Wednesday 06 April 2011

The European Commission and the Hungarian EU Presidency officially requested, on 5 April, the opening of discussions with the United States on the US Foreign Account Tax Compliance Act (FATCA), which will impose transparency requirements on non-American financial institutions. Brussels considers the cost of implementing the measures – and of any non-compliance – prohibitive.

Hungary's National Economy Minister György Matolcsy and Taxation Commissioner Algirdas Semeta presented their grievances in a joint letter addressed to US Treasury Secretary Timothy Geithner and to Internal Revenue Service (IRS) Commissioner Douglas Shulman.

“SEVERE IMPACT” IN TERMS OF COST

“We strongly support the main objective of the FATCA, which is to tackle tax evasion” by US taxpayers, they write. The letter nevertheless stresses the need to “explore solutions that would enable the United States to attain its objectives in a way that would minimise costs for the EU financial industry”. The European financial sector has already complained about the measure's “severe impact” in terms of costs (particularly for information technology) of compliance and penalties in case of non-compliance.

The Foreign Account Tax Compliance Act was adopted in March 2010 by the US Congress and is set to come into force from 2013 (see *Europolitics* 4166).

It aims to impose on thousands of non-US financial institutions (banks, clearing houses, trusts, investment funds, insurance companies, etc) an obligation of total transparency on the foreign assets hold directly or indirectly – through corporations or partnerships – by “American taxpayers,” the definition of which is broad: US citizens, even dual nationals, persons born on US territory or holders of a green card, who must declare their earnings to the IRS.

The system will subject financial institutions to the obligation of identifying precisely all American taxpayers and transmitting automatically to the US tax authorities all information concerning them: name, address, account number and balance, etc.

A penalty system is included to convince financial operators to play by the new rules.

Washington will withhold 30% at the source on a large category of payments and income from US sources (interest, dividends, proceeds of sales, etc) collected by “uncooperative or unsuccessful” banks and/or by their clients.

A variation is foreseen for financial institutions that agree to comply with the American requirements but that are confronted with account holders who refuse to authorise the disclosure of information concerning them to the United States: the banks will then have to withhold 30% on payments from US sources to their “recalcitrant” clients. The same scheme will apply to transactions with voluntarily “uncooperative” financial institutions.

In a document attached to their letter, Semeta and Matolcsy describe the concerns of European financial institutions. They will be “seriously penalised” compared to their American competitors. Application of the sanctions contained in the FATCA could even “affect the economic viability” of some of them.

A study in the Swiss publication *Revue fiscale* points out that, to avoid sanctions, banks that refuse to comply with the new measure will have no choice but to close all accounts held directly or indirectly by American taxpayers or to pull out of the American market completely.

Many other problems of a practical (administrative burden, etc) or political nature are also raised.

CONFLICT WITH DATA PROTECTION

The FATCA “may conflict with national and European data protection legislation, particularly because the information will be transmitted to US authorities without observing the rules of the country of establishment of the financial institutions”. The obligations resulting from the American law “might not comply with the high level of data protection to be expected” when transferred outside the EU.

EXCLUDING INVESTMENT FUNDS

In this context, the Commission and the Hungarian Presidency ask the Americans not only to exclude European investment funds, “which present a very low risk of tax evasion,” from the scope of the FATCA and to give EU financial institutions more time (until 2014?) to adapt gradually to the new system, but also to review their model in the light of EU rules on the taxation of savings income.

“In fact, the FATCA aims to achieve what the European Union is putting in place through the directive on taxation of savings income, which is being revised, and the accompanying agreements with countries and territories outside the Union,” state the European officials in their letter.

“Considering the similarities between the FATCA and the directive on taxation of savings income as it will emerge from its revision, which is at an advanced stage, we would like to explore with you the possibility of taking advantage of potential synergistic effects of our approaches in order to achieve our common objectives” in a less costly way, they continue.

The problem is that revision of the EU regulation is not all that advanced: Luxembourg and Austria are blocking it and demanding to be placed on an equal footing with Switzerland. They consequently refuse to switch from a withholding system to the automatic exchange of information between tax administrations.

This issue will be reviewed again by member state experts, on 28 April, but apparently without much conviction. In any case, the Hungarian Presidency no longer seems to have the ambition of getting the green light, on 17 May, from the 27 finance ministers for a renegotiation – on a very vague basis – of the Union’s agreements on taxation of savings income with Switzerland, Liechtenstein, Andorra, San Marino and Monaco.

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