

# Letters



Mr Emmanuel Moulin,  
Mr Philippe Léglise-Costa  
Council of the European Union

***Sent by e-mail only***

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Dear Sir,

This letter follows up on the adoption by the European Commission (“the EC”), of a legislative package of four legislative proposals (the “AML legislative proposals”) on 20 July 2021, aiming at strengthening the EU’s actions on anti-money laundering and countering the financing of terrorism (“AML/CFT”).

The legislative package includes a Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (“the Proposal for a Regulation applying to the private sector”)<sup>1</sup> and a Proposal for a Regulation of the European Parliament and of the Council establishing the European Authority for Countering Money Laundering and Financing of Terrorism (“the Proposal for a Regulation establishing AMLA”).<sup>2</sup>

The EDPB draws the attention of the European Institutions to the important data protection issues raised by the implementation of the AML/CFT obligations, as provided by the AML legislative proposals. Obligated entities are required to process personal data which allow to draw intimate inferences about individuals and which can notably lead to the exclusion of legal and natural persons from a right and/or a service (for instance, a banking service). It is therefore crucial that AML legislative proposals are in line with the General Data Protection Regulation (“the GDPR”).

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<sup>1</sup> COM(2021) 420 final.

<sup>2</sup> COM (2021) 421 final.

The AML legislative package also includes a Proposal for a Directive of the European Parliament and of the Council on the mechanisms for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing, and a Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets.

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The EDPB also underlines that ensuring a better consistency between the AML legislative proposals and GDPR principles, such as the accuracy principle or the data minimisation principle, would improve the efficiency of the implementation of the AML/CFT legal framework.

To better achieve this consistency, the EDPB calls on the EU institutions to involve the EDPB in the discussions on the AML legislative proposals and suggests some crucial modifications having regard in particular to the Proposal for a Regulation applying to the private sector and the Proposal for a Regulation establishing AMLA.

This letter partly reiterates concerns expressed by the EDPB in its Statement published in December 2020<sup>3</sup>, in a letter addressed to the EC in May 2021<sup>4</sup>, as well as in the EDPS Opinion.<sup>5</sup> Indeed, the AML legislative proposals only partially implement the recommendations issued by the EDPB in 2020 and 2021. For instance, the EDPB notes that the EC has included, as requested by the EDPB, specific provisions on the processing of special categories of data<sup>6</sup> as well as on the processing of personal data relating to criminal convictions and offences<sup>7</sup> in the AML legislative proposals. However, the EDPB considers that the AML legislative proposals should provide for additional safeguards in relation to the processing of these personal data to ensure in particular compatibility with Articles 9 and 10 GDPR. Moreover, the AML legislative proposals do not provide specific rules in relation to the sources to be used by obliged entities for gathering information, and in relation to information provided by data service providers of so-called “watchlists”.

Without further amendments, the EDPB is of the view that the AML legislative proposals would have a disproportionate negative impact to the rights and freedoms of individuals and would lead to significant legal uncertainty. The EDPB would therefore like to highlight the following safeguards to be included in the AML legislative proposals.

### **1. Consultation of the EDPB in the context of the drafting and adoption of regulatory technical standards, guidelines and recommendations.**

The EDPB notes that regulatory technical standards (RTS), guidelines and recommendations to be developed and adopted by AMLA or the EC would, in practice, provide the core of the standardized AML/CFT rules.<sup>8</sup>

Indeed, pursuant to the AML legislative proposals, the RTS shall specify, notably, the information to be collected for the purpose of performing standard, simplified and enhanced customer due diligence<sup>9</sup>. Moreover, AMLA shall issue guidelines on ongoing monitoring of a business relationship and on the monitoring of the transactions carried out in the context of such relationship<sup>10</sup>. In addition,

<sup>3</sup> EDPB Statement on the protection of personal data processed in relation with the prevention of money laundering and terrorist financing, 15 December 2020.

<sup>4</sup> EDPB letter to the European Commission on the protection of personal data in the AML-CFT legislative proposals, 19 May 2021.

<sup>5</sup> EDPS Opinion 12/2021 on the anti-money laundering and countering the financing of terrorism (AML/CFT) package of legislative proposals.

<sup>6</sup> Special categories of data are defined in Article 9 GDPR.

<sup>7</sup> Processing of personal data relating to criminal convictions and offences is regulated under Article 10 GDPR.

<sup>8</sup> The Proposal for a regulation establishing AMLA, under Article 38, lays down that AMLA develops draft regulatory technical standards (RTS) and submits them to the EC for adoption. The RTS shall be adopted by the EC by means of delegated acts pursuant to Article 290 TFEU.

<sup>9</sup> Article 22 of the Proposal for a Regulation applying to the private sector

<sup>10</sup> Article 21(4) of the Proposal for a Regulation applying to the private sector

the EC shall issue recommendations to Member States on specific rules and criteria to identify the beneficial owners of legal entities other than corporate entities.<sup>11</sup>

First of all, the EDPB considers that the categories of personal data to be processed by obliged entities and additional rules that might impact their processing should not be specified in the RTS, guidelines, and recommendations, but rather be identified directly in the AML legislative proposals.

Furthermore, in accordance with its duty to ensure a consistent application of the GDPR<sup>12</sup>, the EDPB considers that its involvement in the development of RTS, guidelines and recommendations is essential to reach a common understanding between the concerned national data protection authorities, the AMLA and the EC, to clarify the interplay of the AML CFT legal framework with the GDPR, and thus to provide legal certainty to obliged entities.

Against this background, the EDPB notes that, while Recital 58 of the Proposal for a Regulation establishing AMLA provides that the AMLA shall “closely cooperate” with the EDPB, when “developing any instruments” or “taking any decisions” having a “significant impact on the protection of personal data”, the legal text of the Proposal only includes this obligation to cooperate in relation to guidelines and recommendations, without referring to RTS<sup>13</sup>. The Proposal for a Regulation establishing AMLA also provides, under Article 84(1), that AMLA “may” invite “national data protection authorities” as “observers” when drafting such guidelines and recommendations.<sup>14</sup>

The EDPB considers that AMLA should closely cooperate with the EDPB when drafting guidelines or recommendations, as well as RTS. This cooperation should take place in all cases where guidelines, recommendations and RTS have “a significant impact on the protection of personal data”. In this regard, the EDPB notes that AMLA, according to Article 38 of the Proposal for Regulation establishing AMLA, shall submit the RTS to the EC for adoption by means of delegated acts pursuant to Article 290 TFEU. According to Article 42(2) of Regulation (EU) 2018/1725, the EC may consult the EDPB when preparing acts referred to in Article 42(1) (including delegated acts or implementing acts) of particular importance for the protection of individuals’ rights and freedoms with regard to the processing of personal data.

Given the potentially serious impact that RTS may have on the protection of personal data, the EDPB considers that it should be formally consulted by the EC before their adoption when they have significant impact for the protection of individuals’ rights and freedoms with regard to the processing of personal data. Furthermore, considering the impact on data protection of AMLA’s guidelines and recommendations, the EDPB calls on the legislators to assess the possibility for requiring AMLA to formally consult the EDPB before the adoption of these instruments, if they have a significant impact on the protection of personal data.

This is without prejudice to the fact that the EDPB considers that, in particular, the conditions and limits for the processing of special categories of personal data and of personal data relating to criminal

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<sup>11</sup> Article 42(4) of the Proposal for a Regulation applying to the private sector.

<sup>12</sup> Article 70 GDPR

<sup>13</sup> Article 77(2) of the Proposal for a Regulation establishing AMLA.

<sup>14</sup> Article 84(1) of the Proposal for a Regulation establishing AMLA.

convictions and offences should be considered as essential elements to be defined in the legislative proposals of the AML legislative package, rather than under RTS.<sup>15</sup>

## **2. The need to better specify the conditions and limits of the processing of special categories of data and of personal data relating to criminal convictions.**

### 2.1. Regarding the processing of special categories of personal data

Article 55(1) of the Proposal for a Regulation applying to the private sector lays down that obliged entities may process special categories of personal data referred to in Article 9(1) GDPR, to the extent that this processing is “strictly necessary for the purposes of preventing money laundering and terrorist financing”.

Article 55 does not specify the meaning of “strictly necessary”. Furthermore, the types of personal data falling under the special category of personal data that may be processed are not defined.

The EDPB points out that Article 55 might not be in line with data minimisation principle under Article 5(1)(c) GDPR and poses serious data protection concerns.<sup>16</sup> Indeed, the implementation of the provisions in Article 55 might lead obliged entities to process data falling under the scope of Article 9(1) GDPR which are not necessarily relevant for the purpose pursued, such as personal data revealing trade union membership, data concerning health, processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, and data concerning a natural person’s sex life or sexual orientation.

Therefore, the EDPB invites the co-legislators to reflect on the relevance of the processing of each special category of personal data and, following such assessment, to define explicitly under Article 55 the special categories of data that could be strictly necessary for the purpose of AML/CFT.

Furthermore, the EDPB recalls that Article 9 GDPR lays down specific rules regarding the processing of special categories of personal data according to which an exemption from the general prohibition of processing special categories of personal data is possible where the processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law. Such law allowing the processing of special categories of data shall be “proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject”.<sup>17</sup>

The EDPB considers that the specific measures to safeguard the fundamental rights and interests of the data subjects provided in Article 55 are not sufficient.

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<sup>15</sup> See EDPS opinion 12/2021, para 12.

<sup>16</sup> In the Netherlands, thousands of households were wrongly accused of fraud by the Dutch Tax authority, pushing many into serious financial problems, often triggered by ethnicity. This example shows how serious the impact of unlawful the processing of (special category of) personal data can be for EU citizens.

<sup>17</sup> See article 9(2)(g) GDPR.

Firstly, the EDPB considers that Article 55 should specify the specific purpose (preventing money laundering or terrorism financing) for which each category of personal data falling under Article 9 GDPR are likely to be processed<sup>18</sup>.

Moreover, the specific measures (identification, customer due diligence, reporting to FIU) for which these categories of personal data may be processed should also be identified by the AML legislative proposals.

In addition, for each of these categories of personal data, further specifications should be warranted in Article 55.

In order to avoid that decisions are made on a basis of discriminatory factors, it should be also specified that the assessment made by obliged entities shall not be solely based on the processing of special categories of personal data.

Furthermore, Article 55 should require the adoption by obliged entities of state-of-the-art security measures, such as access restrictions, obfuscation, encryption, pseudonymisation or disassociation.

Others safeguards could include the application of specific data minimisation techniques<sup>19</sup>, training of staff for handling special categories of personal data, as well as specific transparency and accountability provisions on the handling of special categories of personal data.

## 2.2. Regarding the processing of personal data relating to criminal convictions and offences

Article 55(3)(b) of the Proposal for a Regulation applying to the private sector lays down that obliged entities may process not only data relating to criminal convictions but also “allegations”.

The EDPB considers that the processing of such data presents a high level of risk, considering that the term “allegations” is not defined and that the sources from which information on allegations may be collected are not precisely mentioned. In addition, the EDPB notes that the impact on the person concerned could be significant (refusal for a bank to enter into a commercial relationship with the person to whom the allegation relates), whereas in some cases, the allegation could be not substantiated. Therefore, the EDPB considers that the term “allegation” should be specified in Article 55, or deleted.<sup>20</sup>

The EDPB also recalls that Article 10 GDPR lays down specific rules regarding the processing of personal data related to criminal convictions and offences. The processing of such data can be carried out when the processing is authorized by Union or Member State law providing for appropriate safeguards for the data subjects’ rights and freedoms. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

In this respect, the EDPB notes that Article 55(3)(b) provides, as specific safeguard, that obliged entities shall implement procedures that allow, when processing such data, to make the distinction

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<sup>18</sup> Some obliged entities are currently making a distinction between the processing carried out in order to prevent and detect money laundering and those carried out in order to prevent and detect terrorist financing.

<sup>19</sup> See EDPB guidelines on Data Protection by Design and by Default, page 21, paragraph 76

<sup>20</sup> See EDPS Opinion 12/2021. para 16.

between allegations, investigations, proceedings and convictions, taking into account the fundamental right to a fair trial, the right of defense and the presumption of innocence.

Nonetheless, the EDPB considers that the safeguards for the rights and freedoms of data subjects in Article 55 are not sufficient and therefore additional safeguards should be introduced. In particular, the EDPB recommends that Article 55 specifies that allegations or judicial proceedings should not have the same impact on the risk assessment of a person as a criminal conviction.

### **3. The need to provide additional provisions in relation to the sources of information**

#### **3.1. General considerations**

According to Article 55(2)(b) of the Proposal for a Regulation applying to the private sector, obliged entities may process special categories of data covered by Article 9 GDPR “provided that the data originate from reliable sources, are accurate and up-to-date”.

The EDPB considers that the obligation to use reliable, accurate and up-to-date sources should be extended to every information processed by obliged entities for the purpose of AML/CFT.

Moreover, since the processing of inaccurate and irrelevant data would result in a breach of the principles under Articles 5(1)(c) and 5(1)(d) GDPR, to ensure compliance with these “accuracy” and “minimisation” principles, as well as with the “accountability” principle stated in article 5(2) GDPR<sup>21</sup>, the EDPB strongly recommends adding specific safeguards regarding the sources to be used by obliged entities. In particular, the EDPB suggests to include an express reference to the obligation for obliged entities to use only accurate and reliable sources (as said, for any processing of personal data), and to add a specific obligation for obliged entities to document the assessment of the reliability and accuracy of each source of information used.

#### **3.2. The need to provide specific provisions for the processing of personal data by providers of so-called “watchlists”**

A vast majority of obliged entities currently makes use of service providers (providers of so-called “watchlists”) in the context of the performance of their activities pursuant to AML/CFT requirements.

The EDPB acknowledges the need for the obliged entities to rely on this kind of services in order to fulfill their AML/CFT obligations. Providers of “watchlists” offer an easier and faster access to information to the obliged entities. Consequently, these providers could contribute to the effective implementation of the AML/CFT obligations.

However, the processing of personal data performed by these “watchlists” raises important data protection issues. The providers of these “watchlists” are acting as data controllers, as defined in Article 4(7) GDPR. They are processing special categories of personal data and personal data relating to criminal convictions and offences, the processing of which shall comply with the specific rules under Article 9 and 10 GDPR.<sup>22</sup> Moreover, the legal basis (Article 6 GDPR) for the processing of personal data

<sup>21</sup> The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (‘accountability’)

<sup>22</sup> According to article 10 GDPR, processing of personal data relating to criminal convictions and offences shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Similarly, according to Article 9 GDPR, special categories of data may be processed only when it is necessary for reasons of substantial public interest, on the basis of Union or Member

by such providers is not clear, and the data processing at stake raise legitimate questions regarding the accuracy principle and the data minimisation principle laid down in Articles 5(1)(c) and (d) GDPR .

In light of the risks to the fundamental rights and freedoms for the data subjects and the need to provide legal certainty to these providers and to the obliged entities, the EDPB considers that specific rules might be included in the AML legislative proposals or via a dedicated EU legislative initiative.

These specific rules must be in line with GDPR requirements, and should allow, if necessary, the processing of special categories of data and of personal data relating to criminal convictions and offences under strict conditions defined in Articles 9 and 10 GDPR. The nature of personal data that can be processed by such providers according to the data minimisation principle (Article 5(1)(c) GDPR) should be specified. Strong and specific measures to safeguard the fundamental rights and the interests of the data subjects should be established too. As stated above, the EDPB considers that providing specific rules for these service providers would serve the purpose of fighting money laundering and countering terrorist financing.

In case where such rules are not provided, national supervisory authorities have the task to enforce data protection law in case of breaches by providers and obliged entities, notably regarding the processing of special categories of personal data and of personal data relating to criminal convictions and offences.

Finally, in case where specific rules would be provided for these providers, the EDPB also invites the co-legislators to include in the AML legislative proposals a reference to codes of conduct under Article 40 GDPR and to certifications under Article 42 GDPR for providers of “watchlists”, to be developed taking into account the specificities of this sector.<sup>23</sup>

Yours sincerely,



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State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

<sup>23</sup> See EDPS Opinion 12/2021, para 46.

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