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From:	European Data Protection Board
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To:	Presidency
Subject:	AML Regulation: Data sharing for AML/CFT purposes in light of the Council's mandate for negotiations

Delegations will find attached a letter regarding the subject mentioned above.

Encl.



E-MAIL

EDPB letter to the European Parliament, the Council, and the European Commission on data sharing for AML/CFT purposes in light of the Council's mandate for negotiations

Ms Elisabeth Svantesson
Minister of Finance

IM 005805 2023
15-05-2023

Mr Lars Danielsson
Permanent Representative to the EU

Sent by e-mail only

Brussels, 28 March 2023
Ref: OUT2023-0018

Dear Ms Svantesson,
Dear Mr Danielsson,

On 20 July 2021, the European Commission has adopted a package of four legislative proposals aiming to strengthen the EU's anti-money laundering and countering the financing of terrorism[1]. This package includes a new Regulation on AML/CFT (hereinafter "Proposal for a Regulation on AML/CFT")[2] including directly-applicable rules on, inter alia, the performance of customer due diligence by obliged entities and the reporting of suspicious activity or transactions, primarily to Financial Intelligence Units (FIUs).

[1] European Commission, Anti-money laundering and countering the financing of terrorism legislative package, 20 July 2021, available at :https://finance.ec.europa.eu/publications/anti-money-laundering-and-countering-financing-terrorism-legislative-package_en. The EDPS has expressed its Opinion on this AML/CFT legislative package on 22 September 2021. The Opinion is available at: https://edps.europa.eu/system/files/2021-09/21-09-22_edps-opinion-aml_en.pdf.

[2] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, 20 July 2021, COM/2021/420 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0420.

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On 5 December 2022, the Council of the European Union (Council) adopted its position on the Commission's Proposal for a Regulation on AML/CFT (hereinafter "Council's mandate")[3]. The Council's mandate introduces provisions that would allow, under certain conditions, obliged entities, or where applicable public authorities, that are party to the "partnership for information sharing"[4], to share with each other information concerning "suspicious transactions" which is being, will be or has been reported, primarily to FIUs (**Article 54(3a)**), as well as personal data collected in the course of performing their customer due diligence obligations (**Article 55(7)**).

In addition, the Council's mandate would allow obliged entities to share between each other personal data collected in the course of performing their customer due diligence obligations, provided notably that these personal data involve "abnormalities or unusual circumstances indicating money laundering or terrorist financing" (**Article 55(5)**).

The EDPB acknowledges that the fight against money laundering and terrorism is an important public interest whose achievement deserves appropriate policies and measures. However, it reiterates the importance to strike a fair balance between this legislative objective and the interests underlying the fundamental rights to privacy and to the protection of personal data.

Any measure adopted by Member States or EU institutions in the field of AML/CFT must be compatible with Articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union (Charter), the GDPR, and the relevant case law. In particular, the EDPB recalls that, according to Article 52(1) of the Charter, to be lawful, any limitation to the exercise of the fundamental rights to privacy and to the protection of personal data must, inter alia, be provided for by law, necessary and proportionate[5].

With this letter, the EDPB draws your attention to the significant risks posed by Articles 54(3a), 55(5), 55(7) as amended by the Council's mandate to the fundamental rights to privacy and to the protection of personal data. In particular, the EDPB expresses its serious concerns as to the lawfulness, necessity, and proportionality of the above-mentioned provisions, and recommends the co-legislators not to include them in the final text of the Proposal for a Regulation on AML/CFT.

1. **Concerns related to the proportionality of Articles 54(3a), 55(5), and 55(7) of the Council's mandate.**

Pursuant to Article 52(1) of the Charter, legislative measures that limit the fundamental rights to privacy and to the protection of personal data should not constitute a disproportionate interference to the exercise of these rights.

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[3] Council of European Union, Mandate for negotiations with the European Parliament on the Proposal for a Regulation on AML/CFT, 15517/22, 5 December 2022, available at: https://data.consilium.europa.eu/doc/document/ST-15517-2022-INIT/en/pdf

[4] In accordance with definition (42), Article 2, of the Council's proposal for amendments, "*partnership for information sharing in AML/CFT field*' refers to a "*formal cooperation established under national law between obliged entities, and where applicable, public authorities, with the purpose of supplementing compliance with this Regulation through cooperation and by sharing and processing data, in particular through the use of new technologies and artificial intelligence*".

[5] Pursuant to Article 52(1) of the Charter, limitation to fundamental rights may be imposed as long as it is provided for by law and respect the essence of this right. Subject to the principle of proportionality, this limitation must be necessary and genuinely meet objective of general interest recognised by the Union or the need to protect the rights and freedoms of others.

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The EDPB considers that the impact of Articles 54(3a), 55(5), 55(7) of the Council's mandate on the fundamental rights to privacy and to the protection of personal data would be particularly high.

The setting up of public-private partnerships ("PPPs") aiming to allow private parties (i.e. the obliged entities) to monitor subjects (i.e. their customers), on the basis of operational information provided by law enforcement authorities, and possibly related to ongoing law enforcement investigations, would entail significant risks from a data protection perspective.[6] In particular, the EDPB recalls that the combatting of crime is in essence a public task and that the allocation of the said task to private enterprises or PPP's should be strictly limited and thoroughly scrutinized. From a privacy and data protection perspective, limiting the flow of information from obliged entities to public authorities constitutes a safeguard for individuals. Therefore, the processing operation concerning information on possible offences arising from the reported suspicious transactions should be, in principle, limited to public authorities, given their sensitive nature and their impact on the fundamental rights of the concerned individuals.

Furthermore, the EDPB notes that the provisions proposed by the Council would allow data sharing (or data pooling) between obliged entities (without the involvement of public authorities). The data resulting from the data sharing/pooling will be used by each obliged entity to implement their AML/CFT obligations, i.e., customer due diligence obligations and reporting of suspicious transactions, if any. This implies very large scale processing, resulting in mass surveillance by private entities, the proportionality of which is highly questionable.

Lastly, the EDPB points out to the warning expressed by the Financial Action Task Force (FATF) that such data sharing may exacerbate the practice of de-risking[7], which could ultimately increase the risk of undue exclusion from banking services[8]. Therefore, in practice, the impact of the data sharing/pooling could have serious legal consequences for the person concerned, such as difficulties in opening or accessing a current account, in using means of payment, obtaining credit, etc.

The significant risks and impacts that the Council's mandate entails, as well as the lack of studies attesting to the effectiveness of these provisions[9], leads the EDPB to consider that the envisaged measures are not proportionate to the aims pursued.

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[6] See EDPS, Opinion 5/2020 on the European Commission's action plan for a comprehensive Union policy on preventing money laundering and terrorism financing, 23 July 2020, paragraph 43, available at: https://edps.europa.eu/sites/edp/files/publication/20-07-23_edps_aml_opinion_en.pdf.

[7] De-risking in AML/CFT is commonly defined as *"the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk in line with the FATF's risk-based approach."* See at: https://www.coe.int/en/web/moneyval/implementation/de-risking.

[8] The FATF also states that *"termination of account relationships may force entities and individuals to use less regulated or unregulated channels"*. FATF, Partnering in the Fight Against Financial Crime: Data protection, technology, and private sector information sharing, July 2022, paragraphs 45 and 63, available at: https://www.fatf-gafi.org/en/publications/Digitaltransformation/Partnering-in-the-fight-against-financial-crime.html

[9] See, in this respect, point 2 of this letter

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2. **Concerns related to the necessity of Articles 54(3a), 55(5), and 55(7) of the Council's mandate.**

Pursuant to Article 52(1) of the Charter, legislative measures that limit the fundamental rights to privacy and data protection must be necessary.

In order to ensure that the processing of personal data is carried out with due respect of the notion of necessity, one should first review the effectiveness of the proposed measures in comparison with existing or alternative less intrusive measures.

Against this background, the EDPB notes that no impact assessment was made to demonstrate the real benefit of the sharing of personal data as proposed in the Council's mandate on the fight against money laundering and terrorist financing.[10]

In this respect, the EDPB recalls that the necessity test implies the need for a combined, rigorous, multidisciplinary and fact-based assessment of the effectiveness of the measure for the objective pursued. Given the public interest purpose of AML/CFT, public authorities competent in AML/CFT, including at least the FIUs, should be involved in this assessment. The EDPB also recommends that the impact of data pooling on the practice of "de-risking" and the quality of suspicious transaction reports be rigorously assessed, and that this be done in conjunction with the FIUs.

Finally, the necessity test implies an assessment of whether alternative, less intrusive measures could be comparably effective for achieving the same objective.

3. **Concerns related to the quality of legal provisions limiting the fundamental rights to privacy and to the protection of personal data.**

The EDPB recalls that, pursuant to Article 52(1) of the Charter, every limitation to the fundamental rights to privacy and to the protection of personal data must be "provided for by law". This means that limitations must be based on legal provisions that are adequately accessible and foreseeable as to their effect and formulated with sufficient precision to enable any individuals to regulate their conduct accordingly.

First, it must be examined whether the law that provides for a limitation is accessible and foreseeable. The EDPB highlights that, in presence of a law providing legal grounds for the processing of personal data, the mere existence of a law introducing (intrusive) sharing of personal data is not sufficient *per se*. Any law providing for a limitation on the fundamental rights to privacy and to the protection of personal data must fulfil specific quality requirements, namely be sufficiently detailed to ensure legal certainty and foreseeability, and provide appropriate safeguards to guarantee a fair balance between the public interest concerned, on the one hand, and the rights and freedoms of the data subjects, on the other hand. The Council's mandate, and notably Article 54(3a) thereof, while aiming at pursuing an important public interest, introduces intrusive personal data processing without adequately specifying under which conditions this processing is justified, thereby lacking the foreseeability and

[10] As the measures in the Council's mandate were not part of the initial Commission's Proposal, no such assessment was included in the Commission's impact assessment.

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the legal certainty that the law should provide to all concerned natural -i.e. citizens- and legal persons, including for obliged entities that will process these personal data for AML/CFT purposes.

In addition, the EDPB considers that the provisions on data sharing in the Council's mandate do not provide adequate safeguards for data subjects. This is of special concern in the context of AML/CFT, where, as mentioned above, the provisions envisaged in the Council's mandate could result in significant impacts for individuals, such as black-listing and exclusion from financial services, in particular banking services, as well as the initiation of criminal investigations and prosecutions.

Finally, it is worth noting that the data sharing provisions in the Council's mandate might include the processing of special categories of personal data (such as personal data revealing religious belief and political opinions), the processing of which is limited to the application of strict exemptions under Article 9(2) GDPR. In this regard, it is important to note that the exemption pursuant to Article 9(2)(g) GDPR, lifting the prohibition on processing of special categories of personal data under Article 9(1) GDPR, only applies where such processing is necessary for reasons of substantial public interest on the basis of EU or Member State law is "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".

However, the EDPB considers that, given the significant risks to the fundamental rights posed by the data sharing provisions as envisaged in the Council's mandate, in particular those relating to discrimination (e.g., on the basis of religious belief or political opinion)[11], as well as the lack of appropriate safeguards to mitigate them, the processing of sensitive data that would be performed in the context of these provisions cannot rely on Article 9(2)(g) GDPR.

For all these reasons, the EDPB urges the co-legislators not to include Articles 54 (3a), 55(5), 55(7) of the Council's mandate in the final text of the AML/CFT Regulation.

The EDPB stands ready to provide advice to the co-legislators to ensure that the policy objectives of AML/CFT are pursued in full compliance with the fundamental rights to privacy and to the protection of personal data.

Yours sincerely,

Andrea Jelinek

[11] Processing of personal data for AML purpose is likely to trigger processing of personal data on politically exposed persons, hence on political opinions

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