

## EDPS Demands More Than Lip Service for AML/ATF Proposals



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*Data protection should therefore not be perceived as an obstacle to combat money laundering but as a basic requirement necessary to achieve this purpose.*

- EDPS

On July 4, 2013, the European Data Protection Supervisor (“EDPS”) issued an opinion on the European Commission’s (the “EC”) draft proposals on anti-money laundering and anti-terrorist financing (“AML” and “ATF”, respectively).<sup>1</sup> The EDPS’s Opinion acknowledges the legitimacy in the pursuit of transparency in payments, deposits and transfer to fight terrorism, money laundering. Nevertheless, it calls for the need to include real protections for personal data in the proposed legislation, as the current drafts do not include substantial provisions on data protection. This article outlines first a brief introduction into the EU’s AML and ATF legislation, followed by a summary of the Opinion’s general comments. This article concludes with some highlights of the concrete recommendations from the EDPS’ Opinion.

### 1. Background of EU AML and ATF Legislation

The proposed legislation<sup>2</sup>, comprised of a Directive and Regulation, seek to strengthen AML and ATF provisions within the EU single market. The EC has generally called for the establishment of

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<sup>1</sup> Opinion of the European Data Protection Supervisor on a Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, and a Proposal for a Regulation of the European Parliament and of the Council on Information on the Payer Accompanying Transfers of Funds, July 4, 2013, available at [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2013/13-07-04\\_Money\\_laundering\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2013/13-07-04_Money_laundering_EN.pdf) (“Opinion”). On November 8, 2013, the EU Article 29 Working Party Chairman, Jacob Kohnstamm sent a formal letter in support of the Opinion to Juan Fernando Lopez Aguilar of the Committee on Civil Liberties, Justice and Home Affairs. This letter also highlighted the need for stronger cooperation and dialog between EU and national legislators. Full text of the letter available at [ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20131108\\_2nd\\_letter\\_aml\\_cft\\_directive\\_regulation\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20131108_2nd_letter_aml_cft_directive_regulation_en.pdf).

<sup>2</sup> Please see “Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing”, COM(2013) 45 final, and “Regulation on Information on the Payer Accompanying Transfers of Funds”, COM(2013) 44 final, both February 5, 2013 (“Directive” and “Regulation”, respectively).

reporting mechanism for AML and ATF, driven in part by the commitments established in its Stockholm Program.<sup>3</sup> Similarly, following the September 11, 2001 attacks, AML legislation grew and was mark by a rapidly changing regulatory environment for controls on financial transactions. The Financial Action Task Force (“FATF”), an inter-governmental organization, issued recommendations on AML and ATF. These were taken into account for the EU Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (as amended), which the draft Directive aims to revise.<sup>4</sup>

## 2. Need to Include Data Protection Provisions

The EDPS finds that the Commission AML and ATF proposals fall short on the protection of personal data and calls for the inclusion of specific safeguarding mechanisms. At the same time, the Opinion recognizes “these proposals are in principle a legitimate exercise in combating specific illegal activities in which the collection and analysis of personal information is a crucial instrument.”<sup>5</sup> However, the collection of information and reporting should incorporate data protection concerns. One particular point that the Opinion notes is that the legitimate basis for processing would be the necessity to comply with a legal obligation on the relevant entities and authorities (and not an important public interest ground as noted in recital 32). The EDPS recommends that this is clarified in the recitals to the Directive by clearly specifying that Article 7(c) of Directive 95/46/EC applies to these activities.

The Opinion notes that both proposals influence the relationship between service providers and clients. Pointing out that the data collection for AML/ATF compliance occurs at the same moment as the collection for commercial purposes, the EDPS notes this could lead to confusion from the client side. Therefore, service providers should be transparent when collecting the information on the exact purposes and circumstances of processing (e.g. via notice). Otherwise, the collection could lead to mistakes that have significant implications on the concerned individuals (i.e. those suspected of money laundering) with little means of recourse.

## 3. Cross-Border Transfers

The Opinion voices particular concern regarding the transfer of personal data of clients and potential clients. Their personal data will sometimes be transferred to other organizations and entities in countries outside the EEA, where data protection laws are not deemed to be equivalent as in the EEA (e.g. the United States). Further particular care should be taken as the transfers of personal data are “repeated, mass and structural”. Therefore, the EDPS recommends including specific provisions in both proposals on transfers of personal data. These provisions would – importantly – “provide for an appropriate legal basis of the intra-group/PSP to PSP transfers which would respect the text and the interpretation of Article 26 of Directive 95/46/EC” (i.e. the provisions in the Data Protection

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<sup>3</sup> This program serves as a guideline of policy plans for justice and home affairs for European Union from 2010 through 2014 and includes both anti-corruption and AML commitments. For more information, see [http://europa.eu/legislation\\_summaries/human\\_rights/fundamental\\_rights\\_within\\_european\\_union/jl0034\\_en.htm](http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/jl0034_en.htm).

<sup>4</sup> Unofficial consolidated version of Directive 2005/60/EC (as amended) is available at [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005L0060:20110104:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005L0060:20110104:EN:PDF).

<sup>5</sup> Press Release, EDPS/2013/07, Brussels, July 4, 2013 “EDPS Finds Major Deficiencies in Anti-Money Laundering Proposals”.

Directive that lay out the exemptions from the prohibition on international transfers of personal data outside of the EEA).

#### 4. Publication of Sanctions

Another issue that the EDPS highlights is the proposals' requirement for automatic publication of administrative sanctions. Both draft proposals include requirements on for the publication of the sanction or measures imposed for breaches of certain rules (such as documentation requirements, customer due diligence rules, internal controls, etc.). These publications also include the name of the person responsible for the breach. The EDPS reiterates that the current drafts fall short of EU data protection rules. The Opinion recommends drafting these publication requirements in a more proportional manner; for example, by including the possibility to assess on a case by case basis, the need to publish based on certain criteria (level of severity, type of violation). Moreover, the Directive should articulate: (1) the purposes for maintaining the publications, (2) the personal data to be included in the publication, (3) the right of data subjects to be informed (together with a right to appeal) prior to the publication, and (4) the data subjects' right to object on compelling legitimate grounds (as provided in Article 14 of the Data Protection Directive).

#### 5. Summary of Recommendations

The Opinion analyzes both the proposed Regulation and the Directive on AML/ATF. Some of the more critical recommendations from the Opinion are:

1. More explicit references to applicability of data protection rules, such as the legitimate basis for processing.
2. Purpose limitation principle be strictly respected and that additional guidance be provided to professionals in the field of AML, to ensure that the personal data is not further processed for incompatible purposes and data retention periods need to be implemented and respected.
3. Further develop protections for the rights of individuals and raise awareness of data protection in the industry and amongst customers.
4. Issue with third country transfers – as there will be mass, structural transfers of personal data outside of EEA, including sensitive data. Therefore, need to include substantive provisions on the transfer of personal data (EDPS suggests the proportionality test) to ensure proper protections.
5. Individuals (clients and potential clients) should be clearly informed of the circumstances of processing of their personal data (analysis and possible transfer to third countries), particularly in light of the “potentially highly instructive nature of the anti-money laundering obligations”
6. Finally, any interference with fundamental rights should be “fully justified” and be subject to specific safeguards and conditions.