

ARTICLE 29 Data Protection Working Party



Brussels, 8 November 2013

Juan Fernando López Aguilar
Committee on Civil Liberties,
Justice and Home Affairs
European Parliament
Rue Wiertz 60
B-1047 Brussels
Belgium

Dear Mr López Aguilar,

I refer to the contributions that the Article 29 Working Party (WP29) has made since 2011 on processing of personal data for the purpose of the fight against money laundering and terrorism.

As you know, our recent work covered both the current Directive 2005/60/EC of 26 October 2005¹, the proposal for a new Anti-Money Laundering/Counter Terrorist Financing (AML/CFT) Directive, and the separate proposal for a Regulation on information accompanying transfers of funds, COM (2013) 44/2².

In the past few months, WP29 has conducted a second review of the proposals and two meetings with a representative of the LIBE committee have also been had. Information was also collected from representatives of the financial institutions represented in the European Banking Federation.

During these meetings, WP29 found clear support for our earlier concerns that the current proposals fail to offer adequate data protection.

The WP 29 detects, more than ever, **a need for stronger and intensified dialogue and cooperation with the legislators at EU and national level** (see point 5 hereafter). It repeats that it remains available to provide useful assistance in discussing possible amendments that should deal with the deficiencies with the proposals that were established so far. This to prevent future actions in the long run at national level for reason of non-compliance with data protection law, that might harm the effectiveness and legal certainty of the future legal framework on Anti-Money Laundering/Counter Terrorist Financing (AML/CFT).

WP29 fully supports the recent opinion and press release of the EDPS of 4 July 2013 that concluded that the current anti-money laundering proposals contain major deficiencies from a data protection point of view.

¹ Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, published on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF>

² http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm#overview

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No LX-46 01/190.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

It is our intention that this letter concisely summarizes the clear, yet **unresolved legislative challenges to deal with five concerns the WP29 has already voiced in its Opinion of 13 June 2011**. For a more detailed analysis of how the current AML/CFT Directive and the above proposal will impact privacy and data protection, please refer to opinions of the WP29 and the EDPS³.

Despite the clear efforts of the European Commission by adding references to data protection, the overall finding of WP29 is that **the fourth AML Directive (“AMLD4”)**, as currently drafted, **offers less safeguards in respect of privacy and data protection than is the case under the current third AML/CFT Directive**.

In accordance with Article 30 of the Directive 95/46/EC, the WP29 recalls that the Commission has to inform the WP29 of the action taken in response to its last opinion (WP29 letter of 4 April 2013).

The **five concerns** that have already been noted by WP29 are:

1. the current proposals **are not specific enough to be considered as providing a clear legal basis** (at least not according to the law within the meaning of article 8 ECHR).

The lack of specifications⁴ of the European AML/CFT obligations means that there is a clear risk of arbitrary interpretation by the stakeholders, limiting the effectiveness of the measures. Also, it appears that FATF recommendations are simply transposed, not addressing fundamental rights issues under EU law requiring to protect privacy and personal data. A notable example of such lack of clarity is the limitation on the right of access⁵ for AML data processing via the gold plating of the secrecy provision. As explained by the WP 29 in its letter of 4 April 2013⁶, this is an arbitrary limitation.

2. The new proposals are **less balanced** than the current third AML/CFT Directive, as they contain new measures that do not take into account privacy and data protection.

Amongst the new measures, the list of predicate offences to money laundering is expanded and the explanatory memorandum creates the impression that the current framework should be used in the near future to fight against tax crime, ignoring the purpose limitation principle. Besides, the safeguards (specific modalities for access rights, right of rectification in AML/CFT context,...) that should protect data subjects are not concretely developed in a substantive provision. Furthermore, the necessity of processing of sensitive data, for instance related to political or religious opinions is not demonstrated. It should be noted that the latest FATF guidance on PEP's⁷ even call for the processing of personal data to include sexual

³ WP 29, Opinion 14/2011 on data protection issues related to the prevention of money laundering and terrorist financing, published on http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp186_en.pdf and http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp186_en_annex.pdf

WP 29, Letter of 4 April 2013 regarding the proposal for a new Anti-Money Laundering / Counter Terrorist Financing (AML/CFT) Directive, published on http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2013/20130404_aml_letter_to_ep_en.pdf

EDPS, Opinion of 4 July 2013 and EDPS press release “EDPS finds major deficiencies in anti-money laundering proposals, published on https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2013/13-07-04_Money_laundering_EN.pdf and https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2013/EDPS-2013-07_AML_EN.pdf

⁴ The extent to which the individuals’ (clients including Politically Exposed Persons (PEPs), bank employees, and so on) who are within the scope of the AMLD4 and how their private lives will be intruded upon is not clear in the current drafting. No law can be legitimate or applied effectively if it is not clear to the stakeholders that have to apply its core obligations how those obligations do apply - obligations such as authentication of identification (know your customer or “KYC” procedures), client profiling (different forms of Customer Due Diligence in Article 9 – 23 of the proposed directive.), data retention, the prohibition of tipping off.

⁵ Recital 34 of the proposed Directive.

⁶ See point 2.1 of this letter (pages 3-4)

⁷ <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf>

relationships of PEP's ("close associates"). We regret that the proportionality of such extreme recommendations is not assessed by the EU legislator and recommend that clear guidance is given by the legislator at EU and national level.

Finally, both the WP29 and EDPS have highlighted proportionality issues that need to be addressed: data retention mechanisms or periods, the mandatory and automatic publication of sanctions vis-à-vis (a.o.) employees of obliged entities in addition to existing administrative sanctions⁸, the "gold plating"⁹ of AML/CFT obligations over and above data protection rules, including but not limited to a blanket interpretation of the prohibition of tipping off.

Finally, the article 10 (e) of the proposed Directive create a possibility, via the "risk based approach", for member states to install a general obligation of identification of all EU users of micro electronic money ("e-money") transactions¹⁰), without any ground for reasonable suspicion.

The manifest disproportionality of both the interdiction on anonymous shopping and of the massive increase of the data collection for all micro-transactions of all EU citizens without any grounds for reasonable suspicion has not been taken into account, and is already considered unconstitutional¹¹ in some member states. The new risks¹² that are created by the increased data collection in new environments that are often unfamiliar with basic online security measures are also ignored. As a minimal measure, the existing thresholds for transactions should be kept, instead of going for a full risk based approach for all e-money transactions, which leaves the most risk for arbitrary assessment by the institutions.

3. The proposals **fail to develop data protection in a positive way.**

Similar as at EU level where the Commission has performed a privacy impact assessment for their proposals, all national AML/CFT authorities should be made accountable for the privacy and data protection impact of their proposals, by carrying out an obligatory privacy impact assessment of their proposals. Too often, current legislative proposals are mainly inspired on the FATF recommendations, ignore the impact on privacy and data protection and fail to provide a good balance between AML/CFT and the data protection concerns that have been voiced by the Commission, the LIBE committee, and the EDPS.

While WP29 does not request a full repetition of the provisions of the Directive 95/46/EC in the AML/CFT Directive, it fully supports the finding of the EDPS¹³ that a simple reference to the Directive 95/46/EC alone or some provisions in recitals are not enough. Instead, a single, substantive data protection article should be added and limitations on data protection rights more clearly explained/defined

For instance, to legitimise the transfer of personal data to third countries by obliged entities for AML/CFT purposes the Commission refers to the "public interest grounds" derogation. The WP 29 has repeatedly stated that this exception is not available for massive, frequent or structural data transfers to countries without adequate data protection safeguards. Instead of

⁸ Article 57 of the proposed Directive

⁹ differences in Member States

¹⁰ E-money is defined in article 2 of the Electronic Money Directive. It includes money that is typically stored on a card which is linked to the user's account and can be used to pay for goods and services. This includes gift cards, travel money cards, cards at petrol stations,

¹¹ See

<http://www.bfdi.bund.de/SharedDocs/Publikationen/EN/NationaleDSK/Entschlie%C3%9Fung82KonfAnonymousElectronicPayment.html?n=410160>

¹² increase in risks for function creep and data breaches, i.e. creating of opportunities for illegal forms for profiling and direct marketing by the e-money sector hacking by third parties,...)

¹³ See § 19 of the EDPS Opinion

referring to the (questionable) use of this exception, EU or national law should address this issue, providing clear safeguards for data subjects, including clients and bank employees.

4. The proposals **do not offer real, effective data protection**.

Besides, the protection that the proposals offer in recitals¹⁴ against the risk of the re-use of available data for commercial purposes is not supported by a substantive provision¹⁵.

No clarification is given about how the supervision mechanism via financial authorities and/or data protection authorities (article 28 of Directive 95/46/EC) could work in order to control the processing of personal data that falls under the prohibition of disclosure¹⁶. Measures such as profiling of clients under the customer due diligence obligations should be based on a clear legal basis with data protection safeguards that provide external accountability of compliance with privacy protection and data protection rules.

5. The **cooperation with and the role of data protection authorities** is ignored.

Although the current draft contains several articles on national and European cooperation with Financial Intelligence Units (FIUs), financial supervisory authorities and other competent authorities involved in AML and CFT, it is unclear why relevant cooperation and engagement should not also apply to data protection authorities.

For example, provisions within article 28 of Directive 95/46/EC are not referred to sufficiently. National cases have showed these provisions to be under continuous scrutiny and discussion with FIUs, financial supervisory authorities or obliged entities. The current draft should formally recognize the role of data protection authorities, whose findings can support the legitimacy and efficiency of the processing operations for AML/CFT purposes.

The WP29 has voiced many times previously, its willingness to continue to cooperate with the different EU stakeholders (Commission, Parliament, Council) in order to achieve both effective data protection and effective countermeasures against money laundering and terrorism.

We re-iterate this willingness here and call on all those involved in drafting AMLD4 to take on board our concerns to ensure the right balance between the aims of AMLD4 and data protection and privacy provisions is struck.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman

¹⁴ Via the wording “should be strictly prohibited”

¹⁵ Recital 31 of the proposed Directive and recital 7 of the proposed regulation

¹⁶ Article 38 of the proposed Directive.

cc: Ambassador Raimundas Karoblis, Permanent Representative
Ms Jurgita Trakimavičienė, Attaché (home affairs - visas, immigration, asylum, borders)
Ms Sharon Bowles, Chair of the Committee on Economic and Monetary Affairs, European Parliament
Mr Uwe Corsepius, Secretary-General, General Secretariat of the Council of the European Union
Mr Jonathan Faull, Director General for "Internal Market and Services", European Commission