EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data protection authority

22 September 2021

Opinion 12/2021

on the anti-money laundering and countering the financing of terrorism (AML/CFT) package of legislative proposals

edps.europa.eu

The European Data Protection Supervisor (EDPS) is an independent EU authority, responsible under Article 52(2) of Regulation (EU) No 2018/1725 '[w]ith respect to the processing of personal data… for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies', and under Article 52(3) thereof '…for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'. Under Article 58(3)(c) of Regulation 2018/1725, the EDPS shall have the power 'to issue on his or her own initiative or on request, opinions to Union institutions and bodies and to the public on any issue related to the protection of personal data'.

Wojciech Wiewiorówski was appointed as Supervisor on 5 December 2019 for a term of five years.

Under ***Article 42(1)*** *of Regulation (EU) No 2018/1725, the Commission shall 'following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data' and under Article 57(1)(g), the EDPS shall 'advise on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data'.*

This Opinion relates to the EDPS' mission to advise the EU institutions on coherently and consistently applying the EU data protection principles. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of Regulation (EU) 2018/1725.

Executive Summary

The European Commission adopted on 20 July 2021 a package of legislative proposals aiming to strengthen the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) rules (the "AML legislative package"), consisting of: 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; 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 Directive (EU) 2015/849; 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, amending Regulations (EU) No 1093/2010, (EU) 1094/2010 and (EU) 1095/2010; and a **Proposal for a Regulation** of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets.

The EDPS welcomes the objectives pursued by the AML legislative package, namely to **increase the effectiveness of anti-money laundering and countering the financing of terrorism** in particular via **greater harmonization** of the applicable rules and **enhanced supervision** at the EU level (including the establishment of the European Authority for Countering Money Laundering and Financing of Terrorism, "AMLA").

The EDPS highlights that **the risk-based approach** to the monitoring of the use of the financial system for money laundering, which is at the core of the AML legislative package, while welcome, needs further specifications and clarifications.

Against this background, to ensure compliance with the principles of **necessity and proportionality**, as well as to **enhance legal certainty** for obliged entities on their duties, the EDPS makes a number of remarks and recommendations, in particular:

The AML legislative package should **identify the categories of personal data** to be processed by the obliged entities to fulfil the AML/CFT obligations, instead of systematically leaving this specification to regulatory technical standards, as well as better describe **conditions and limits for the processing of special categories of personal data and of personal data relating to criminal convictions and offences**.

The AML legislative package should specify in particular **which types of special categories of personal data** should be processed by the obliged entities, taking into account the necessity and proportionality principles, having regard to the different activities and measures to be taken (identification, customer due diligence, reporting to FIUs), and to the **specific purpose** pursued (namely anti-money laundering or countering the financing of terrorism). **In particular, the EDPS considers that the processing of personal data related to sexual orientation or ethnic origin should not be allowed.**

Concerning **beneficial ownership registers**, the EDPS:

- welcomes the obligation for Member States to notify the Commission the **closed list of competent authorities and self-regulatory bodies and of the categories of obliged entities** that are granted access to the beneficial ownership registers. However, the EDPS invites the legislator to specify that access to beneficial ownership registers, by tax authorities as well as by self-regulatory bodies, should be limited to the purpose of the fight against money-laundering and financing of terrorism and thus authorized only for this purpose;

- in relation to access by "*any member of the general public*" to the beneficial ownership registers, the EDPS reiterates his earlier position that the necessity and proportionality of such generalised access for the purposes of prevention of money laundering and terrorism financing has not been clearly established so far. In principle, **such access should be limited to competent authorities who are in charge of enforcing the law and to obliged entities when taking customer due diligence measures.** The EDPS is of the view that access to beneficial ownership information motivated by other objectives of general interest (such as enhancing transparency) should rather be considered **as right to obtain information**. Such public access would require a separate **necessity and proportionality assessment**, and be subject to a **separate set of rules laying down the necessary safeguards**. Hence, the EDPS recommends the legislator to **assess the necessity and proportionality of such a 'general access'** and, on the basis of this assessment, if considered appropriate, to **lay down a specific legal framework** in this regard, **distinct** from the one related to access by competent authorities;

Moreover, the EDPS strongly recommends adding, among the risks to be considered by Member States when establishing the criteria for granting exemptions to access to beneficial ownership information, an express reference to **the risks to the protection of the personal data** of the individuals concerned.

The EDPS also recommends providing in the AML legislative package for **a reporting mechanism** on the use of the beneficial ownership registers in the fight against money laundering and the financing of terrorism, in order to gather fact-based evidence as to the effectiveness of the system, as well as support possible future legislative initiatives.

Moreover, the EDPS notes **the extensive access powers conferred to FIUs** and invites the legislator to **reassess the necessity and proportionality of these access rights,** in relation in particular to the "law enforcement information" listed under Article 18(1)(c) of the Proposal for a Directive.Having regard to the system for the exchange of information between FIUs, the **FIU.net**, the EDPS recommends that **the Proposal for a Regulation establishing AMLA is amended to clearly define the roles of all involved stakeholders** (AMLA, FIUs) **from a data protection perspective in relation to this communication channel**, as this impacts on the applicable data protection framework and has implications for the supervision model.

Having regard to **sources of information** for CDD, including "watch lists", the AML legislative package should clarify in particular in which cases obliged entities should have recourse to such lists. In this respect, the EDPS invites the legislator to consider whether such access should only take place in case of high risk of money laundering or financing of terrorism.

Furthermore, in order to foster the adoption of codes of conducts and certifications to be adhered to by providers of databases and watch lists used for AML/CTF purposes, the EDPS invites the legislator to include in the AML legislative package a reference to codes of conduct under Article 40 GDPR and to certifications under Article 42 GDPR, to be developed taking into account the specific needs in this sector.

Table of Contents

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the General Data Protection Regulation)[1],

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data[2], and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1 Background

1. The European Commission adopted on 20 July 2021 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")[3]; 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 Directive (EU) 2015/849 ("the ¨Proposal for a Directive")[4]; 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, amending Regulations (EU) No 1093/2010 (EU) 1094/2010 and (EU) 1095/2010 ("the Proposal for a Regulation establishing AMLA")[5]; and a **Proposal for a Regulation** of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets ("the Proposal for a Regulation on crypto-assets")[6]. Hereinafter, we also refer to the four draft Proposals as "the AML legislative package".

2. The AML legislative package is proposed pursuant to the **Action Plan** for a comprehensive Union policy on preventing money laundering and terrorism financing of 7 May 2020[7]. The EDPS has issued the **Opinion on the Action Plan** on 23 July 2020.[8]

3. The **objectives of the Action Plan**, as referred to in particular in the Regulation[9], are:

   - ensuring effective implementation of the existing EU AML/CFT framework;

   - establishing an EU single rulebook on AML/CFT;

   - bringing about EU-level AML/CFT supervision;

   - establishing a support and cooperation mechanism for FIUs;

   - enforcing EU-level criminal law provisions and information exchange;

- strengthening the international dimension of the EU AML/CFT framework.

4. The AML legislative package, including the Proposal for a Regulation incorporating elements (provisions) of Directive (EU) 2018/843[10], is an ambitious legislative initiative aiming at **increasing the effectiveness** of the fight against money laundering. It aims to do so in particular through the **centralisation of enforcement**, including **the newly established** European Authority for Countering Money Laundering and Financing of Terrorism ("AMLA"), a **standardisation of the obligations** for obliged entities, streamlining a supra-national and national **risk-based approach**, as well as laying down **rules on cooperation between competent oversight authorities and on relevant databases and infrastructure for the exchange of information**, notably **FIU.net**, to be hosted and managed by AMLA.

5. On 21 July 2021, the European Commission requested the EDPS to issue an opinion on the Proposal, in accordance with Article 42(1) of Regulation (EU) 2018/1725. These comments are limited to the provisions of the Proposal that are most relevant from a data protection perspective.

2 General comments

6. The EDPS **supports** the objectives of the AML legislative package and welcomes, in particular, **the risk-based approach** that inspires the pursuit of an **as effective as possible and as less intrusive as possible** fight against money laundering and terrorists' financing. Moreover, as is the case for all legislative initiatives having an impact on the fundamental rights to privacy and to the protection of personal data, the AML legislative package should take into account the principle of **proportionality**[11]. Against this background, the EDPS wishes to highlight in particular **the following points** of particular importance.

3 Specific comments

3.1 Aspects of the data processing which, according to the AML legislative package, shall be specified by regulatory technical standards (RTS) and by guidelines and recommendations to be developed by AMLA

7. Having regard in particular to the Proposal for a Regulation, the EDPS observes that RTS and guidelines, to be developed by AMLA and concerning aspects of the AML legislative package that are relevant from a data protection perspective, would in practice provide the core of the standardised AML/CFT rules.

8. This is the case, in particular, of **RTS** and **guidelines** to be developed by AMLA pursuant to the following articles of the Proposal for a Regulation: Article 15(5) on RTS on the application of the **customer due diligence**; the guidelines on the **risk variables and risk factors** under Article 16(3); the guidelines on **monitoring of business relationships** under Article 21; the RTS on the information necessary for the performance of **customer due diligence** under Article 22; the guidelines on the definition of trends, risks and methods related to money laundering and terrorist financing involving geographical areas **outside the Union** under Article 26; the guidelines regarding **politically exposed persons** under Article 32(3); the guidelines on **third parties' performance** of customer due diligence under Article 41; the RTS and guidance on **reporting of suspicious transactions** pursuant to Article 50(3). Moreover, RTS shall be developed by AMLA, as laid down in the Proposal for a Directive, also having regard to central contact points for electronic money issuers, payment and crypto-

assets service providers under Article 5(2); setting out the benchmarks and methodology for assessing and classifying the risk profile of obliged entities pursuant to Article 31(2); defining the indicators to classify the level of gravity of breaches and criteria for the level of sanction under Article 39(7).

9. The EDPS notes that RTS, implementing technical standards, guidelines and recommendations, and opinions by AMLA are regulated, having regard to the procedure for adoption, under **Articles 38-44**, Section 7, *Common instruments*, of Chapter II, *Tasks and powers of the Authority*, of the Proposal for a Regulation establishing AMLA.

10. Pursuant to Articles 38, "*Regulatory technical standards shall be technical,* ***shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based***". In the same sense, Article 42 provides that "*[i]mplementing technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be to determine the conditions of application of those acts.*"

11. Concerning the RTS on the **information necessary for the performance of customer due diligence** (CDD) under **Article 22 of the Proposal for a Regulation**[12], the EDPS considers that **the Proposal for a Regulation should already identify the categories of personal data that shall be processed to fulfil the AML/CFT obligations**.

12. In particular, the conditions and limits for the processing **of special categories of personal data** and of **personal data relating to criminal 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.

13. Having regard to the procedure for the adoption of **guidelines and recommendations**, the EDPS notes that the Proposal for a **Regulation establishing AMLA** provides in Article 84(1), second sentence: "*When drafting* ***guidelines and recommendations*** *in accordance with Article 43, having a significant impact on the protection of personal data, the Authority shall, after being authorized by the Commission, consult the European Data Protection Supervisor established by Regulation (EU) 2018/1725. The Authority may also invite national data protection authorities as observers in the process of drafting such guidelines and recommendations.*"; and under Article 77(2) provides: "*When drafting* ***guidelines and recommendations*** *in accordance with Article 43, having a significant impact on the protection of personal data, the Authority shall closely cooperate with the European Data Protection Board established by Regulation (EU) 2016/679 to avoid duplication, inconsistencies and legal uncertainty in the sphere of data protection.*"

14. The EDPS welcomes the requirement for AMLA, established in the Proposal for a Regulation establishing AMLA, to **consult and cooperate with the EDPS and the EDPB**. However, the EDPS would suggest deleting the wording under Article 84(1), second sentence, "*after being authorized by the Commission*", as it is unclear why such a step should be referred to in the legislative provisions on consultations.

3.2 Processing of special categories of data and of personal data relating to criminal convictions and offences

15. The EDPS considers that **Article 55(1) and (2)** of the Proposal for a Regulation, and **Article 53(1)** of the Proposal for a Directive, regarding special categories of personal data; as well as Article **55(1) and (3)** of the Proposal for a Regulation, and Article **53(1) and (2)** of the Proposal for a Directive, regarding personal data relating to criminal convictions and offences, are **not sufficiently detailed to precisely delimit the scope of the data processing by obliged**

entities to the extent that it is necessary and proportionate for the purposes of preventing money laundering and terrorist financing.

16. In order to provide rules which are sufficiently clear in this respect, the Proposals should be amended to specify in particular **which types of data** (within the broader category of special categories of personal data under Article 9 of the GDPR) should be processed by the obliged entities, **for which activities or measures to be taken** (e.g. identification; CDD; conveying the suspicious transactions reports/reporting to FIUs, etc.) for the purposes of anti-money laundering or fight against terrorism financing, taking into account the necessity and proportionality principle. **In particular, the EDPS considers that the processing of personal data related to sexual orientation or ethnic origin should not be allowed.** Having regard to the processing of personal data relating to criminal convictions and offences, the EDPS considers that the reference to "*allegations*" (in addition to "*investigations*", "*proceedings*" and "*convictions*") in Article 55(3)(b) of the Regulation is vague and should therefore be deleted or precisely defined.

3.3 Beneficial ownership registers

17. The EDPS notes that the Proposal for a Directive would keep in place the obligation for member States to set up registers of beneficial ownership of legal entities and legal arrangements contained under Directive (EU) 2015/849, as amended by Directive (EU) 2018/843. Section I of Chapter II of the Proposal for a Directive contains provisions on the information to be included in the beneficial ownership register; on how to ensure that this information is adequate, accurate and up-to-date; on the interconnection of beneficial ownership registers (Article 10); on access to beneficial ownership registers by competent authorities, self-regulatory bodies and obliged entities (Article 11); on specific access rules to beneficial ownership registers for the public (Article 12); on exceptions to the access rules (Article 13).

- *Information to be included in the beneficial ownership registers*

18. In his Opinion of 4 July 2013[13], the EDPS pointed out to the need to specify the beneficial owners' **information to be collected**[14]. Article 10(1) of the Proposal for a Directive, referring to the information listed under Article 44[15] and 47[16] of the Proposal for a Regulation, would lay down the information to be contained in the beneficial ownership register. The EDPS welcomes this specification, as well as the requirement in Article 44 that beneficial ownership information should be **adequate, accurate and updated**. At the same time, the EDPS recommends clarifying that the list of information under Article 44 is an **exhaustive** list.

- *Access by competent authorities*

19. In his Opinion 1/2017[17], the EDPS recommended to ensure a proper assessment of the proportionality of the policy measures proposed in relation to the purposes sought, particularly with regard to the application of the risk-based approach, the access to information on financial transactions by FIUs, and the broadening of the access to beneficial ownership information to competent authorities and to the public.

20. Having regard to the **access** to beneficial ownership registers by competent authorities, the EDPS welcomes the obligation, laid down in Article 11(4) of the Proposal for a Directive, for Member States to notify the Commission the closed list of competent authorities and self-regulatory bodies and of the categories of obliged entities that are granted access to the registers, as well as the obligation to notify the type of information available to obliged entities. This obligation aims at further specifying and identifying the authorities and bodies who can

have access to beneficial ownership registers listed under Article 11(2), which includes "*tax authorities and authorities that have the function of investigating and prosecuting money laundering*".

21. In this regard, the EDPS invites the legislator to specify that access to beneficial ownership registers, by tax authorities as well as by self-regulatory bodies, should be limited to the purposes of the fight against money-laundering and financing of terrorism, which is **the objective of the AML legislative package** (see, in this regard, Article 1 of the Proposal for a Directive; Article 1 of the Proposal for a Regulation).

- *Access **by the public***

22. Article 12 of the Proposal for a Directive (*"Specific access rules to beneficial ownership registers for the public"*) incorporates the provision, already included in the Directive (EU) 2015/849, as amended by Directive (EU) 2018/843[18], according to which "*any member of the general public*" has access to the beneficial ownership registers.

23. The EDPS wishes to reiterate that beneficial ownership information should only be accessible for the purpose of identification and prevention of money-laundering and terrorist financing to competent authorities who are in charge of enforcing the law and to obliged entities when taking customer due diligence measures[19].

24. The EDPS recalls that both under Directive (EU) 2015/849, as amended by Directive (EU) 2018/843, and pursuant to the proposed AML legislative package **the investigation and enforcement** of money laundering and financing of terrorism remains the prerogative of public competent authorities, prompted by well-specified obliged entities requested to perform customer due diligence and to provide information to the competent authorities as required by the legislation.

25. The EDPS acknowledges that NGOs working on financial crimes and abuses, as well as the press and investigative journalism *de facto* contribute to drawing attention of the general public to phenomena that might be relevant for AML/CFT enforcement. However, the EDPS is of the view that access to beneficial ownership information motivated by objectives of general interest other than the investigation and enforcement of money laundering and terrorism financing, such as enhancing transparency, should rather be considered **as a different right to obtain information**. Such public access would require a separate **necessity and proportionality[20] assessment**, and be subject to a **separate set of rules laying down appropriate safeguards**. Hence, the EDPS recommends the legislator to assess the necessity and proportionality of such a 'general access' and, on the basis of this assessment, if appropriate, to lay down a specific legal framework in this regard, **distinct** from the one related to access by competent authorities.

26. By contrast, the Proposal for a Directive refers for instance in the context of **exceptions to the access rules** under Article 13[21], to both access by obliged entities in the context of customer due diligence measures and to the access by the public.

27. Having regard to this Article, the EDPS strongly recommends adding, among the risks to be considered by Member States when granting exemptions to access to beneficial ownership information, an express reference to **the risks to the protection of the personal data** of the individual whose data would be accessed. The EDPS also recommends deleting the term '*exceptional*' in the first and in the second sentence of Article 13.

- *Reporting on the effectiveness of the use of the beneficial ownership registers*

28. The EDPS also recommends providing in the AML legislative package for a mechanism for a **reporting mechanism on the effectiveness** of the use of the beneficial ownership registers in the fight against money laundering and the financing of terrorism, with the aim of performing an evidence-based review of the proportionality of personal information held in the beneficial ownership registers and of the access rules in the light of the evidence gathered in this respect.

3.4 Access to and exchange of information by FIUs

29. The EDPS notes that, pursuant to **Article 17(3)** of the Proposal for a Directive, AMLA would issue **guidelines addressed to FIUs** on "*the nature, features and objectives of operational and strategic analysis*". In this regard, we recall the importance of an early consultation of the EDPS pursuant to Article 57(1)(g) of Regulation (EU) 2018/1725.

30. The EDPS observes that **Article 18** of the Proposal for a Directive establishes rules on **access to information by FIUs**. Such access should be **limited to that which is strictly necessary and functionally linked to the performance of the operational and strategic analysis' tasks** entrusted to FIUs.

31. The EDPS considers that the "*minimum categories of information to which FIUs must have access*"[22] pursuant to Article 18 of the Proposal for a Directive raise concerns, since the list of information to be accessed is quite extensive, not exhaustive, and includes "*direct or indirect access to the following law enforcement information*" under point (c) of paragraph 1:

    "(i) any type of information or data which is already held by competent authorities in the context of preventing, detecting, investigating or prosecuting criminal offences;

    (ii) any type of information or data which is held by public authorities or by private entities in the context of preventing, detecting, investigating or prosecuting criminal offences and which is available to competent authorities without the taking of coercive measures under national law. The information referred to in point (c) may include criminal records, information on investigations, information on the freezing or seizure of assets or on other investigative or provisional measures and information on convictions and on confiscations."

    Moreover, according to Article 18(2), last sentence: "*Where the information referred to in point (c) is not stored in databases or registers, Member States shall take the necessary measures to ensure that FIUs can obtain that information by other means.*"

32. The EDPS points out to the fact that **such extensive access power** might be at the same time: (i) in conflict with the administrative (as opposed to criminal investigation) nature of FIUs in some (if not most) Member States; (ii) not in line with the principle of proportionality.

33. The EDPS therefore invites the legislator to **reassess the necessity and proportionality of the proposed access rights,** in particular as laid down in Article 18(1)(c) of the Proposal for a Directive. In the same vein, the EDPS recommends to clearly spell out the **categories of personal data** to which FIUs may have access to in the context of this provision and to delete the words "at least" under point (a), related to access to "financial information", and under point (b), related to "administrative information", of Article 18(1) of the Proposal for a Directive.

34. Having regard to Article 27 of the Proposal for a Directive, 'Consent to further dissemination of information exchanged between FIUs', the EDPS recommends adding to the second sentence of paragraph 2 ("*The requested FIU shall not refuse its consent to such dissemination*

unless this would fall beyond the scope of application of its AML/CFT provisions or could lead to impairment of an investigation, or would otherwise not be in accordance with fundamental principles of national law of that Member State"), at the end, the wording "*and with the applicable data protection legislation*".

3.5 FIU.net and the central AML/CFT database

35. Having regard to **FIU.net**, to be hosted, managed, maintained and developed by AMLA pursuant to Article 37 of the Proposal for a Regulation establishing AMLA[23], as well as pursuant to Article 23(1) of the Proposal for a Directive, the EDPS welcomes the express reference, among the tasks falling under AMLA's responsibility, under Article 37(3), letter (a), to ensuring "[...] *the required level of security of the system, including the implementation of the appropriate technical and organizational measures to address and mitigate data protection risks*".

36. However, the EDPS recommends that the Proposal for a Regulation establishing AMLA, or otherwise at least an implementing technical standard to be adopted by the Commission pursuant to Article 24(3) of the Proposal for a Directive, clearly provides for the roles of all involved stakeholders (AMLA, FIUs) from a data protection perspective in relation to the communication channel FIU.net, as this impacts on the applicable data protection framework and on the supervision model. Such a qualification in the legislative instrument must reflect the actual responsibilities of the actors involved[24].

37. The EDPS notes the reference, under **recital 51** of the Proposal for a Directive, to functionalities of the **FIU.net** allowing "*FIUs to match their data with data of other FIUs in an anonymous way with the aim of detecting subjects of the FIU's interests in other Member States and identifying their proceeds and funds, whilst ensuring full protection of personal data.*" In this regard, the EDPS reiterates, as already indicated in the Opinion 1/2017 and in the Opinion on the Action Plan, that he considers more in line with the principles of proportionality and purpose limitation a legal configuration of **the powers of FIUs as 'investigation-based' rather than 'intelligence-based'**. The latter approach would be more similar to data mining than to a targeted investigation, thus further impacting data protection. The specification under recital 51, not mirrored by the way by a corresponding provision in the operative part of the Proposal for a Directive, seems to refer indeed to a *data mining* technique for the identification of subjects of (merely) *potential* interest. Hence, the EDPS recommends deleting the aforementioned wording in recital 51 of the Proposal for a Directive.

38. In addition, to avoid misunderstanding on the application of Article 24(8) of the Proposal for a Directive[25], we recommend adding a recital specifying that "*the processing of personal data related to the **exchange of information between FIUs** should take place in compliance with Regulation (EU) 2016/679*". We note that the same consideration applies to Article 45 on AML/CFT cooperation, in relation to which we also recommend adding a recital to the Proposal for a Directive specifying that "*the processing of personal data related to the **cooperation between competent authorities** for the purposes of this Directive should take place in compliance with Regulation (EU) 2016/679.*"

39. Having regard to the **central AML/CFT database**, to be established by AMLA pursuant to Article 11 of the Proposal for a Regulation establishing AMLA, the EDPS recommends **laying down a storage limitation period** in this article. This is necessary in particular having regard to Article 11(2)(f), which, differently from other points in Article 11(2), refers to data, to be collected and transmitted to the central AML/CFT database, clearly relating to **identified or identifiable natural persons**, namely "*results from supervisory inspections of files concerning Politically Exposed Persons, their family members and their associates*".

3.6 Sources of information to be used by obliged entities for customer due diligence (CDD)

40. The EDPS recommends that the AML legislative package contains the specification - for each AML/CFT obligation - of whether the obliged entity should only collect data from the customer **or also from other** (public/non-public) **sources**.

41. Obliged entities should inform their customers that they process data collected from (which) external sources, as well as whether they outsource certain processing activities in the context of CDD. The AML legislative package should expressly refer to these obligations.

42. As broader observation, the EDPS considers that the AML legislative package should further adapt **the CDD process to the risk-based approach**. This means for example that the amount and categories of data to be collected, and the number of typologies of sources/databases to be consulted, to perform a CDD in relation to normal customers should differ (be more limited) from the CDD performed for Politically Exposed Persons (representing, as a rule, a higher risk of money laundering).

43. Moreover, there should be **a clear differentiation between the CDD process, on the one hand; and the Know Your Customer (KYC) process, on the other hand**. The latter aims at the offering of financial products and services according to the clients' profile, hence requires information, and consultation of sources, that are different from the information to be processed for the purposes of anti-money laundering and countering the financing of terrorism.

44. Having regard to **sources of information** for CDD, including "watch lists", the AML legislative package should clarify in particular in which cases obliged entities should have recourse to such sources and lists. In this respect, the EDPS invites the legislator to consider whether access to watch lists should only take place in case of high risk of money laundering or financing of terrorism.

45. Moreover, a recital could specify that obliged entities should duly verify information from watch lists, having regard to their accuracy and reliability. This requirement, stemming from the data protection principle of **accuracy** under Article 5(1)(d) of the GDPR[26], is particularly relevant, due to the risks to the rights and freedoms of the persons concerned

46. Furthermore, in order to foster the adoption of codes of conducts and certifications to be adhered to by providers of databases and watch lists used for AML/CTF purposes, the EDPS invites the legislator to include in the AML legislative package a reference to codes of conduct under Article 40 GDPR and to certifications under Article 42 GDPR, to be developed taking into account the specific needs in this sector.

3.7 On processing of data related to politically exposed persons (PEPs)

47. The EDPS notes that Article 2 of the Proposal for a Regulation contains the definition of '*politically exposed person*' (hence, "PEPs"), referring at point (25) to PEPs in a Member State (letter (a)); in an international organization (letter (b)); at Union level (letter (c)); and in a third Country (letter (d)). The Proposal for a Regulation also provides a definition of '*family members*', at point (26), and of '*persons known to be close associate*', at point 27.

48. Article 32(3) of the Proposal for a Regulation provides that AMLA shall issue **guidelines** on the criteria for the identification of persons falling under the definition of **persons known to be a close associate** (as well as on the **level of risk** associated with a particular category of politically exposed person, their family members or persons known to be close associates)[27].

49. In this regard, the EDPS welcomes guidance by AMLA. However, also to enhance legal certainty, he considers that the category of '*persons known to be close associate*' should be specified in the Proposal for a Regulation itself, rather than only by AMLA's guidance.

3.8 On 'employees' screening'

50. The EDPS recommends **specifying the categories of employees** falling under the 'integrity screening' required pursuant to Article 11 of the Proposal for a Regulation[28], referring, in its current wording, to "***any employee*** *of an obliged entity entrusted with the tasks related to the obliged entity's compliance*".

3.9 On the publication of administrative sanctions and measures

51. The EDPS notes that Article 42 of the Proposal for a Directive allows the AML supervisors to adopt, in certain cases, alternative measures to the publication of the identity and personal data of the natural and legal persons on which it imposes an administrative sanction, including **to delay** its publication until the moment where all reasons for non-publication cease to exist (Article 42(1)(a)); to **publish it on an anonymous basis**, in accordance with national law (Article 42(1)(b)); or **refrain from publishing** it, where the aforesaid two options are deemed either insufficient to guarantee a lack of any danger for the stability of financial markets, or where such a publication would not be proportional with the leniency of the imposed sanction (Article 42(1)(c)).

52. These alternative measures may be taken in the cases where the competent authority, following a case-by-case assessment, considers that "*the publication of the identity of the persons responsible as referred to in the first subparagraph or the personal data of such persons is considered by the supervisors to be disproportionate following a case-by-case assessment, or where publication jeopardises the stability of financial markets or an on-going investigation*". The EDPS recommends including, in a more explicit way, **among the criteria for consideration of the competent authority, the risks to the protection of the personal data** of the individuals concerned.

3.10 Further specific drafting suggestions

53. As far as the Proposal for a Regulation is concerned:

The EDPS welcomes the reference to the applicability of GDPR and data protection law in recitals 85[29], 86[30] and 90[31], as well as to Articles 7 and 8 of the Charter of Fundamental Rights ('the Charter') in recital 99[32]. However, we recommend reformulating recital 90 as follows [words added are in bold]: "*The rights of access to data by the data subject are applicable to the personal data processed for the purpose of this Regulation. However, access by the data subject to any information related to a suspicious transaction report would seriously undermine the effectiveness of the fight against money laundering and terrorist financing. Exceptions to and*

restrictions of that right in accordance with Article 23 of Regulation (EU) 2016/679 may therefore be justified. ***The legislative measure referred to in Article 23(1) of Regulation (EU) 2016/679 should specify the elements listed as points (a)-(h) of Article 23(2).*** *The data subject has the right to request that a supervisory authority referred to in Article 51 of Regulation (EU) 2016/679 checks the lawfulness of the processing* ***and has the right to an effective judicial remedy against the supervisory authority pursuant to Article 78 of Regulation (EU) 2016/679****, as well as* ***the right*** *to seek a judicial remedy* ***against a controller or processor pursuant to*** *Article 79 of that Regulation. The supervisory authority may also act on an ex-officio basis. Without prejudice to the restrictions to the right to access, the supervisory authority should be able to inform the data subject that all necessary verifications by the supervisory authority have taken place, and of the result as regards the lawfulness of the processing in question.*"

54. As far as the Proposal for a Directive is concerned:

    The EDPS welcomes the reference to the applicability of the GDPR and of the EUDPR in recital 85[33], as well as the specification, in the same recital, that in specific cases the Directive (EU) 2016/680 might be applicable. We also welcome the reference to data protection law under recitals 86[34] and 87[35], as well as to Articles 7 and 8 of the Charter under recital 92[36]. However, we point out to the need to correct recital 87 in line with the drafting recommendations provided in this Opinion regarding recital 90 of the Regulation.

55. As far as the Proposal for a Regulation establishing AMLA is concerned:

    The EDPS welcomes the reference to the applicability of the GDPR and of the EUDPR in recital 58[37]. However, we recommend a few improvements, for the sake of legal certainty, to be mirrored in the legal text under Article 77.

56. The EDPS recommends to reformulate recital 58 as follows: "*The processing of personal data on the basis of this Regulation for the purposes of the prevention of money laundering and terrorist financing should be considered lawful* ***in particular*** *to the extent it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the Authority under Article 5****(1)(a)*** *of Regulation (EU) 2018/1725 or Article 6****(1)(e)*** *of Regulation 2016/679 of the European Parliament and of the Council,* ***or when it is necessary for compliance with a legal obligation to which the controller is subject pursuant to Article 5(1)(b) of Regulation (EU) 2018/1725 or Article 6(1)(c) of Regulation 2016/679 of the European Parliament and of the Council****. When developing any instruments or taking any decisions that may have an impact of the protection of personal data, the Authority should* ***consult the European Data Protection Supervisor established by Regulation (EU) 2018/1725****. The Authority should adopt internal rules* ***in accordance with Article 25 of Regulation (EU) 2018/1725*** *which may restrict the application of the rights of the data subjects,* ***when such restrictions are necessary for the performance of the tasks****.*"

57. Moreover, we suggest **adding the following recital**, thus aligning the Proposal for a Regulation establishing AMLA to the Proposal for a Regulation and to the Proposal for a Directive: "*Regulation (EU) 2016/679 of the European Parliament and of the Council applies to the processing of personal data for the purposes of this Regulation. Regulation (EU) 2018/1725 of the European Parliament and of the Council applies to the processing of personal data by the Union institutions and bodies for the purposes of this Regulation.*"

4 Conclusions

In light of the above, the EDPS:

- welcomes the AML legislative package's aims to **increase the effectiveness** of anti-money laundering and countering the financing of terrorism in particular via **greater harmonization** of the applicable rules and enhanced supervision at the EU level (including the establishment of the European Authority for Countering Money Laundering and Financing of Terrorism, AMLA);
- and welcomes the **risk-based approach** followed to prevent the use of the financial system for money laundering, which is at the core of the AML legislative package;

However, to ensure compliance with the data protection principles of necessity and proportionality, as well as with applicable Union and Member State data protection law, the EDPS observes and recommends in particular the following:

- the AML legislative package (notably, the Proposal for a Regulation) should **identify the categories of personal data** to be processed by the obliged entities to fulfil the AML/CFT obligations;

- in particular, the Proposal for a Regulation should provide **clear indications on conditions and limits for the processing of special categories of personal data and of personal data relating to criminal convictions and offences**;

- concerning **special categories of personal data**, the AML legislative package should specify in particular **which type of data** (within the broader category of **special categories of personal data under Article 9 of the GDPR**) should be processed by the obliged entities, and at what exact stage of the process, for the purpose of anti-money laundering and countering the financing of terrorism. In this regard, the EDPS considers that the processing of personal data related to **sexual orientation or ethnic origin should not be allowed**;

- concerning **beneficial ownership registers**, the EDPS:

  - welcomes the specification of beneficial ownership information to be held in the beneficial ownership registers. However, the EDPS recommends specifying that the list of information under Article 44 of the Proposal for a Regulation is an exhaustive list;

  - welcomes the obligation for Member States to notify the Commission the list of competent authorities and self-regulatory bodies and of the categories of obliged entities that are granted access to the registers. However, the EDPS invites the legislator to specify that access to beneficial ownership registers, by tax authorities as well as by self-regulatory bodies, should be limited to the purpose of the fight against money-laundering and financing of terrorism and thus authorized only for this purpose;

  - observes that Article 12 of the Proposal for a Directive incorporates provisions, already included in the Directive (EU) 2015/849, as amended by Directive (EU) 2018/843, according to which "*any member of the general public*" has access to the beneficial ownership registers. The EDPS thus reiterates his position expressed in the EDPS Opinion 1/2017 on such generalised access, namely that beneficial ownership information shall be accessed - for the purpose of identification and prevention of money-laundering and terrorist financing - **only by competent authorities who are in charge of enforcing the law and by obliged entities when taking customer due diligence measures**[38]. The EDPS remarks that the access to beneficial ownership information (for instance, by NGOs) would come into play

as, different, right to obtain and to provide information. Such public access, responding to a **different function/purpose**, should be subject to a **different test of necessity and proportionality**, and to a **separate, different set of rules**. Hence, the EDPS recommends the legislator to assess the necessity and proportionality of such a 'general access' and, on the basis of this assessment, if appropriate, to lay down a specific legal framework in this regard, **distinct** from the one related to access by competent authorities;

- moreover, the EDPS strongly recommends adding, among the risks to be considered by Member States when establishing criteria for providing exemptions to access to beneficial ownership information, an express reference to **the risks to the protection of the personal data** of the individuals concerned. The EDPS also recommends deleting the term '*exceptional*' in the first and in the second sentence of Article 13;

- finally, the EDPS would recommend inserting a provision in the AML legislative package establishing a mechanism for **reporting on the effectiveness of** the use of the beneficial ownership registers in the fight against money laundering and the financing of terrorism;

- having regard to the processing of **personal data relating to criminal convictions and offences**, the reference to "*allegations*" (in addition to "*investigations*", "*proceedings*" and "*convictions*") in Article 55(3)(b) of the Proposal for a Regulation is vague and should therefore be deleted or specified;

- remarks **the extensive access powers conferred to FIUs** under Article 18 of the Proposal for a Directive, and hence invites the legislator to **reassess the necessity and proportionality of these access rights,** in relation in particular to the "law enforcement information" listed under Article 18(1)(c). In the same vein, the EDPS recommends to clearly and exhaustively delineate the **categories of personal data** to which FIUs may have access pursuant to Article 18(1)(a) ("financial information") and Article 18(1)(b) ("administrative information");

- reiterates that a legal configuration of the powers and activities of FIUs as 'investigation-based', rather than 'intelligence-based', would be more in line with the data protection principles of proportionality and purpose limitation, and thus recommends deleting wording in recital 51 of the Directive related to the detection of 'subjects of interest';

- having regard to **FIU.net**, recommends that the Proposal for a Regulation establishing AMLA, or at least an implementing technical standard to be adopted by the Commission pursuant to Article 24(3) of the Proposal for a Directive, clearly provides for the roles of all involved stakeholders (AMLA, FIUs) from a data protection perspective, as this impacts on the applicable data protection framework and on the supervision model;

- having regard to the **central AML/CFT database**, the EDPS recommends **specifying a storage limitation period for the personal data contained therein,** in particular due to the collection by FIUs and transmission to the central AML/CFT database of "*results from supervisory inspections of files concerning Politically Exposed Persons their family members and associates*";

- having regard to the **sources of information** for CDD, including "**watch lists**", the AML legislative package should clarify in particular in which cases obliged entities should have recourse to such lists. In this respect, the EDPS invites the legislator to consider whether such access should only take place in case of high risk of money laundering or financing of terrorism. Moreover, a recital could specify that obliged entities should duly verify information from watch lists, having regard in particular to their reliability and accuracy.

- furthermore, in order to foster the adoption of codes of conducts and certifications to be adhered to by providers of databases and watch lists used for AML/CTF purposes, the EDPS invites the legislator to include in the AML legislative package a reference to codes of conduct under Article 40 GDPR and to certifications under Article 42 GDPR, to be developed taking into account the specific needs in this sector;

- Article 32(3) of the Proposal for a Regulation provides that AMLA shall issue **guidelines** on the criteria for the identification of persons falling under the definition of **persons known to be a close associate** [of '*politically exposed person*']. In this regard, the EDPS considers that the category of '*persons known to be close associate*' should be specified in the Proposal for a Regulation itself, rather than (only) by AMLA's guidance;

- the EDPS recommends **specifying the categories of employees** falling under the 'integrity screening' required under Article 11 of the Proposal for a Regulation;

- the EDPS recommends including, in a more explicit way, **among the criteria for consideration of the competent authority when publishing administrative sanctions and measures, the risks to the protection of the personal data** of the individuals concerned;

- finally, the EDPS recommends some changes (additions and deletions) to the wording of articles and recitals of the AML legislative package referring to the GDPR and the EUDPR.

Brussels, 22 September 2021

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

Notes

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119, 4.5.2016.
[2] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, L 295, 21.11.2018
[3] COM(2021) 420 final.
[4] COM (2021) 423 final.
[5] COM(2021) 421 final.
[6] COM(421) 422 final. The EDPS notes in this regard that the Proposal for Regulation expands to crypto-assets traceability requirements for the purpose of AML/CFT; the obligation for the crypto-asset service provider to provide the information under Articles 14-18; the inclusion of crypto-asset service providers under Article 20, Data protection, and 21, Record retention. The EDPS has recently issued his Opinion on crypto-assets, *EDPS Opinion on the Proposal for a Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*, on 24 June 2021.
The Opinion is available at: https://edps.europa.eu/data-protection/our-work/publications/opinions/edps-opinion-proposal-regulation-markets-crypto_en
[7] Communication on an action plan for a comprehensive Union policy on preventing money laundering and terrorism financing (C(2020)2800 final).
[8] Opinion 5/2020 on the European Commission's action plan for a comprehensive Union policy on preventing money laundering and terrorism financing, available at:
https://edps.europa.eu/sites/default/files/publication/20-07-23_edps_aml_opinion_en.pdf
[9] See at page 1 of the Explanatory Memorandum.
[10] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, L 156, 19.6.2018.
[11] See EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data, available at:
https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines2_en.pdf
[12] *Regulatory technical standards on the information necessary for the performance of customer due diligence*
1. By [2 years after the entry into force of this Regulation] AMLA shall develop draft regulatory technical standards and submit them to the Commission for adoption. Those draft regulatory technical standards shall specify:
(a) the requirements that apply to obliged entities pursuant to Article 16 and the information to be collected for the purpose of performing standard, simplified and enhanced customer due diligence pursuant to Articles 18 and 20 and Articles 27(1) and 28(4), including minimum requirements in situations of lower risk;
(b) the type of simplified due diligence measures which obliged entities may apply in situations of lower risk pursuant to Article 27(1), including measures applicable to specific categories of obliged entities and products or services, having regard to the results of the supra-national risk assessment drawn up by the Commission pursuant to Article 7 of [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final];
(c) the reliable and independent sources of information that may be used to verify the identification data of natural or legal persons for the purposes of Article 18(4);
(d) the list of attributes which electronic identification means and relevant trust services referred to in Article 18(4), point (b), must feature in order to fulfil the requirements of Article 16, points (a), (b) and (c) in case of standard, simplified and enhanced customer diligence.
2. The requirements and measures referred to in paragraph 1, points (a) and (b), shall be based on the following criteria:
(a) the inherent risk involved in the service provided;
(b) the nature, amount and recurrence of the transaction;
(c) the channels used for conducting the business relationship or the occasional transaction.
3. AMLA shall review regularly the regulatory technical standards and, if necessary, prepare and submit to the Commission the draft for updating those standards in order, inter alia, to take account of innovation and technological developments.
4. The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in paragraphs 1 and 3 of this Article in accordance with Articles 38 to 41 of Regulation [please insert reference – proposal for establishment of an Anti-Money Laundering Authority - COM/2021/421 final]."
[13] 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, available at:
https://edps.europa.eu/sites/default/files/publication/13-07-04_money_laundering_en.pdf

[14] "The EDPS therefore recommends listing in a substantive provision of the proposed Directive which identification data should be collected on the beneficial owner, also when no trust is involved or, at the very least, introducing an obligation for the Member States to issue precise rules as to which data should or should not be collected by the obliged entities on the beneficial owner."
[15] "For the purpose of this Regulation, **beneficial ownership information** shall be adequate, accurate, and current and include the following:
(a) the first name and surname, full place and date of birth, residential address, country of residence and nationality or nationalities of the beneficial owner, national identification number and source of it, such as passport or national identity document, and, where applicable, the tax identification number or other equivalent number assigned to the person by his or her country of usual residence;
(b) the nature and extent of the beneficial interest held in the legal entity or legal arrangement, whether through ownership interest or control via other means, as well as the date of acquisition of the beneficial interest held;
(c) information on the legal entity or legal arrangement of which the natural person is the beneficial owner in accordance with Article 16(1) point (b), as well as the description of the control and ownership structure.
2. Beneficial ownership information shall be obtained within 14 calendar days from the creation of legal entities or legal arrangements. It shall be updated promptly, and in any case no later than 14 calendar days following any change of the beneficial owner(s), and on an annual basis."
[16] "Nominee shareholders and nominee directors of a corporate or other legal entities shall maintain adequate, accurate and current information on the identity of their nominator and the nominator's beneficial owner(s) and disclose them, as well as their status, to the corporate or other legal entities. Corporate or other legal entities shall report this information to the registers set up pursuant to Article 10 of Directive."
[17] Opinion 1/2017, EDPS Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC, available at:
https://edps.europa.eu/sites/default/files/publication/17-02-02_opinion_aml_en.pdf
[18] Article 30(5): "*Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:*
(a) competent authorities and FIUs, without any restriction;
(b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;
(c) ***any member of the general public****.*" [emphasis added].
[19] See paragraphs 61 and 62 of the EDPS Opinion 1/2017: "*As seen in the introduction to this Opinion, the AML Directive reserves the investigation and enforcement of criminal activities to the public competent authorities. In this respect, private parties active in the financial markets are merely requested to provide information to the competent authorities in charge. Under no circumstance, a private subject or entity is, either formally or informally, directly or indirectly, entrusted with an enforcement role." 62. "It can be acknowledged that NGOs working on financial crimes and abuses, the press and investigative journalism de facto contribute to drawing attention of the authorities to phenomena that may be relevant for criminal enforcement. If this is the case, however, the legislator should conceive the access to beneficiary information as a component of the right to obtain and to provide information, by citizens and the press respectively. This would assign a new purpose to public access, with the consequence that the proportionality of such rule would be assessed against that right and not against policy purposes (e.g. fight against terrorism or tax evasion) that cannot be associated to private action.*"
We also recall, on this point, the jurisprudence of the Court of Justice in the case *Österreichischer Rundfunk*, where the Court held that it was necessary to examine whether the policy objective served by publicity "could not have been attained equally effectively by transmitting the information as to names **to the monitoring bodies alone**" [para. 88, emphasis added, Judgment of the Court of 20 May 2003. *Rechnungshof* (C-465/00) *v Österreichischer Rundfunk and Others and Christa Neukomm* (C-138/01) *and Joseph Lauermann* (C-139/01) *v Österreichischer Rundfunk,* ECLI:EU:C:2003:294]. This question should be carefully considered when assessing the proportionality of measures consisting of public access to personal information.
[20] For guidance, see EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data, available at:
https://edps.europa.eu/sites/default/files/publication/19-12-19_edps_proportionality_guidelines2_en.pdf
[21] Article 13 of the Proposal for a Directive lays down: "*In exceptional circumstances to be laid down in national law, where the access referred to in Articles 11(3) and 12(1) would expose the beneficial owner to disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable, Member States may provide for an exemption from such access to all or part of the personal information on the beneficial owner on a case-by-case basis.*"
[22] See at page 9 of the Explanatory Memorandum.
[23] This article of the Regulation establishing AMLA is specified by recital 35: "*The Authority should manage, host, and maintain FIU.net, the dedicated IT system allowing FIUs to cooperate and exchange information amongst each other and, where appropriate, with their counterparts from third countries and third parties. The Authority should, in cooperation with Member States, keep the system up-to-date. To this end, the Authority should ensure that at all times the most advanced available state-of-the-art technology is used for the development of the FIU.net, subject to a cost-benefit analysis.*"
[24] In this regard, see the EDPB Guidelines 07/2020 on the concepts of controller and processor in the GDPR, Version 2.0 Adopted on 07 July 2021, available at:
https://edpb.europa.eu/system/files/2021-07/eppb_guidelines_202007_controllerprocessor_final_en.pdf
and the EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725, 7 November 2019, available at:

https://edps.europa.eu/sites/edp/files/publication/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf

[25] Article 24(8) of the Proposal for a Directive lays down: "*An FIU may refuse to exchange information only in exceptional circumstances where the exchange could be contrary to fundamental principles of its national law. Those exceptional circumstances shall be specified in a way which prevents misuse of, and undue limitations on, the free exchange of information for analytical purposes.*"

[27] "*By [3 years from the date of entry into force of this Regulation], AMLA shall issue guidelines on the following matters:*
(a) the criteria for the identification of persons falling under the definition of persons known to be a close associate;
(b) the level of risk associated with a particular category of politically exposed person, their family members or persons known to be close associates, including guidance on how such risks are to be assessed after the person no longer holds a prominent public function for the purposes of Article 35."

[28] "*1. Any employee of an obliged entity entrusted with tasks related to the obliged entity's compliance with this Regulation and Regulation [please insert reference – proposal for a recast of Regulation (EU) 2015/847 - COM/2021/422 final] shall undergo an assessment approved by the compliance officer of:*
(a) individual skills, knowledge and expertise to carry out their functions effectively;
(b) good repute, honesty and integrity.
2. Employees entrusted with tasks related to the obliged entity's compliance with this Regulation shall inform the compliance officer of any close private or professional relationship established with the obliged entity's customers or prospective customers and shall be prevented from undertaking any tasks related to the obliged entity's compliance in relation to those customers."

[29] "*Regulation (EU) 2016/679 of the European Parliament and of the Council applies to the processing of personal data for the purposes of this Regulation. The fight against money laundering and terrorist financing is recognised as an important public interest ground by all Member States.*"

[30] "*It is essential that the alignment of the AML/CFT framework with the revised FATF Recommendations is carried out in full compliance with Union law, in particular as regards Union data protection law and the protection of fundamental rights as enshrined in the Charter. Certain aspects of the implementation of the AML/CFT framework involve the collection, analysis, storage and sharing of data. Such processing of personal data should be permitted, while fully respecting fundamental rights, only for the purposes laid down in this Regulation, and for carrying out customer due diligence, ongoing monitoring, analysis and reporting of unusual and suspicious transactions, identification of the beneficial owner of a legal person or legal arrangement, identification of a politically exposed person and sharing of information by credit institutions and financial institutions and other obliged entities. The collection and subsequent processing of personal data by obliged entities should be limited to what is necessary for the purpose of complying with AML/CFT requirements and personal data should not be further processed in a way that is incompatible with that purpose. In particular, further processing of personal data for commercial purposes should be strictly prohibited.*"

[31] "*The rights of access to data by the data subject are applicable to the personal data processed for the purpose of this Regulation. However, access by the data subject to any information related to a suspicious transaction report would seriously undermine the effectiveness of the fight against money laundering and terrorist financing. Exceptions to and restrictions of that right in accordance with Article 23 of Regulation (EU) 2016/679 may therefore be justified. The data subject has the right to request that a supervisory authority referred to in Article 51 of Regulation (EU) 2016/679 checks the lawfulness of the processing and has the right to seek a judicial remedy referred to in Article 79 of that Regulation. The supervisory authority may also act on an ex-officio basis. Without prejudice to the restrictions to the right to access, the supervisory authority should be able to inform the data subject that all necessary verifications by the supervisory authority have taken place, and of the result as regards the lawfulness of the processing in question.*"

[32] "*This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the right to respect for private and family life (Article 7 of the Charter), the right to the protection of personal data (Article 8 of the Charter) and the freedom to conduct a business (Article 16 of the Charter).*"

[33] "*Regulation (EU) 2016/679 of the European Parliament and of the Council applies to the processing of personal data for the purposes of this Directive. Regulation (EU) 2018/1725 of the European Parliament and of the Council applies to the processing of personal data by the Union institutions and bodies for the purposes of this Directive. The fight against money laundering and terrorist financing is recognised as an important public interest ground by all Member States. However, competent authorities responsible for investigating or prosecuting money laundering, its predicate offences or terrorist financing, or those which have the function of tracing, seizing or freezing and confiscating criminal assets should respect the rules pertaining to the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, including Directive (EU) 2016/680 of the European Parliament and of the Council.*"

[34] "*It is essential that the alignment of this Directive with the revised FATF Recommendations is carried out in full compliance with Union law, in particular as regards Union data protection law, including rules on data transfers, as well as the protection of fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union (the 'Charter'). Certain aspects of the implementation of this Directive involve the collection, analysis, storage and sharing of data within the Union and with third countries. Such processing of personal data should be permitted, while fully respecting fundamental rights, only for the purposes laid down in this Directive, and for the activities required under this Directive, such as the exchange of information among competent authorities.*"

[35] "*The rights of access to data by the data subject are applicable to the personal data processed for the purpose of this Directive. However, access by the data subject to any information related to a suspicious transaction report would seriously undermine the effectiveness of the fight against money laundering and terrorist financing. Exceptions to and restrictions of that right in accordance with Article 49 of Regulation (EU) 2016/679 and, where relevant, Article 25 of Regulation (EU) 2018/1725, may therefore be justified. The data subject has the right to request that a supervisory authority referred to in Article 23 of Regulation (EU) 2016/679 or, where applicable, the European Data Protection Supervisor, check the lawfulness of the processing and has the right to seek a judicial remedy referred to in Article 79 of that Regulation. The supervisory authority referred to in Article 51 of Regulation (EU) 2016/679 may also act on an ex-officio basis. Without prejudice to the restrictions to the right to access, the supervisory authority should be able to inform the data subject that all necessary verifications by the supervisory authority have taken place, and of the result as regards the lawfulness of the processing in question.*"

[36] "*This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the right to respect for private and family life (Article 7 of the Charter), the right to the protection of personal data (Article 8 of the Charter) and the freedom to conduct a business (Article 16 of the Charter).*"

[37] "*Without prejudice to the obligations of the Member States and their authorities, the processing of personal data on the basis of this Regulation for the purposes of the prevention of money laundering and terrorist financing should be considered necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the Authority under Article 5 of Regulation (EU) 2018/1725 and Article 6 of Regulation 2016/679 of the European Parliament and of the Council. When developing any instruments or taking any decisions that may have a significant impact on the protection of personal data, the Authority should closely cooperate, where relevant, with the European Data Protection Board established by Regulation (EU) 2016/679 and with the European Data Protection Supervisor established by Regulation (EU) 2018/1725 to avoid duplication.*"

[38] See paragraphs 61 and 62 of the EDPS Opinion 1/2017: "*As seen in the introduction to this Opinion, the AML Directive reserves the investigation and enforcement of criminal activities to the public competent authorities. In this respect, private parties active in the financial markets are merely requested to provide information to the competent authorities in charge. Under no circumstance, a private subject or entity is, either formally or informally, directly or indirectly, entrusted with an enforcement role." 62. "It can be acknowledged that NGOs working on financial crimes and abuses, the press and investigative journalism de facto contribute to drawing attention of the authorities to phenomena that may be relevant for criminal enforcement. If this is the case, however, the legislator should conceive the access to beneficiary information as a component of the right to obtain and to provide information, by citizens and the press respectively. This would assign a new purpose to public access, with the consequence that the proportionality of such rule would be assessed against that right and not against policy purposes (e.g. fight against terrorism or tax evasion) that cannot be associated to private action.*"
We also recall, on this point, the jurisprudence of the Court of Justice in the case *Österreichischer Rundfunk*, where the Court held that it was necessary to examine whether the policy objective served by publicity "could not have been attained equally effectively by transmitting the information as to names **to the monitoring bodies alone**" [para. 88, emphasis added, Judgment of the Court of 20 May 2003. *Rechnungshof* (C-465/00) *v Österreichischer Rundfunk and Others and Christa Neukomm* (C-138/01) *and Joseph Lauermann* (C-139/01) *v Österreichischer Rundfunk,* ECLI:EU:C:2003:294]. This question should be carefully considered when assessing the proportionality of measures consisting of public access to personal information.