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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 2.7.2021 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards containing a template document for cooperation arrangements with third countries

Delegations will find attached document C(2021) 4786 final.

Encl.: C(2021) 4786 final



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COMMISSION DELEGATED REGULATION (EU) .../...

of 2.7.2021

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards containing a template document for cooperation arrangements with third countries

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 26(1) of Regulation (EU) No 596/2014 (MAR) states that competent authorities of Member States are required to, where necessary, conclude cooperation arrangements with supervisory authorities of third countries for the purpose of exchanging information with those authorities and the enforcement of obligations arising under MAR in third countries.

Second paragraph of Article 26(2) of MAR requires the European Securities and Markets Authority (ESMA) to develop draft regulatory technical standards (RTS) containing a template document for cooperation arrangements that are to be used by competent authorities of Member States where possible. The aim of this empowerment is to ensure consistent harmonisation of the framework of cooperation with third countries. Since the achievement of that aim depends, among others, on third country authorities operating within the constraints of their own legal systems agreeing on the use of such a template, the template is to be relied on by competent authorities of Member States to the extent possible.

ESMA was required to submit the draft RTS to the European Commission by 3 July 2015. However, ESMA delayed the delivery of the draft RTS to take into account the entry into application of the Regulation (EU) 2016/679 (GDPR), and its impact on the transfer of personal data between National Competent Authorities (NCAs) and their counterparts in third countries. The personal data safeguards provided in the RTS aim to align with the recently negotiated ESMA-IOSCO Administrative Arrangement to be entered into by NCAs in case of cooperation arrangements with third countries which are not covered by adequacy decisions taken by the Commission in accordance with the GDPR.

The Final report on the draft RTS was submitted to the Commission on 8 October 2019. In accordance with Articles 10 to 15 of Regulation (EU) No 1095/2010 establishing ESMA, the Commission is required to decide within three months of receipt of the draft regulatory technical standards whether to endorse them. The Commission may also endorse the draft RTS in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles. The Commission was delayed in endorsing the draft RTS because other COVID-related emergencies slowed down the regular collaborative process with ESMA aimed at securing consensus on the finer details of the draft RTS.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA published its Final report on the draft RTS on 8 October 2019. ESMA has not conducted a public consultation, having deemed that this would have been disproportionate in relation to the scope and impact of the RTS. Instead, ESMA conducted a targeted consultation with NCAs.

The report takes into account the opinion of the Securities and Markets Stakeholder Group (SMSG) set up in accordance with Articles 10(1) and 37(1) of Regulation (EU) No 1095/2010.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 requires NCAs to use, where possible, the template document developed in the Annex where they conclude cooperation agreements with supervisory authorities of third countries that concern the subject matter of the RTS.

Article 2 establishes how exchange of personal data should be handled in the context of cooperation arrangements entered into pursuant to this RTS. Specifically, where such data is transferred pursuant to administrative arrangements under Article 46(3) of Regulation (EU) 2016/679 (GDPR), those arrangements must be annexed to the cooperation arrangement in order to form a single body of rules governing cooperation between authorities.

Article 3 provides that the timeline for the entry into force of the Regulation.

The Annex contains a template for cooperation arrangements concerning the exchange of information between EU NCAs with authorities in third countries and the enforcement of obligations arising under MAR in third countries. The template contains different sections aimed to describe, inter alia: (i) the scope of the cooperation, (ii) the list of cases in which cooperation may be denied, (iii) the content of the assistance to be provided, (iv) description of the procedure for sending and processing requests for assistance, (v) permissible uses of information, (vi) description of the rules on confidentiality of the information disclosed.

COMMISSION DELEGATED REGULATION (EU) .../...

of 2.7.2021

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards containing a template document for cooperation arrangements with third countries

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC¹, and in particular the fourth subparagraph of Article 26(2) thereof,

Whereas:

- (1) Article 26(1) of Regulation (EU) No 596/2014 requires the competent authorities of Member States where necessary to conclude cooperation arrangements with supervisory authorities of third countries concerning the exchange of information and the enforcement of obligations arising under that Regulation in third countries. Cooperation arrangements on exchange of information can only be concluded if the information to be disclosed under them is subject to guarantees of professional secrecy at least equivalent to those set out in Article 27 of that Regulation, and such exchanges must be intended for the performance of the tasks of the competent authorities in question.
- (2) The third subparagraph of Article 25(8) of Regulation (EU) No 596/2014 requires competent authorities where possible to conclude cooperation arrangements with third-country regulatory authorities responsible for related spot markets in accordance with Article 26 of that Regulation.
- (3) In concluding new cooperation arrangements and updating existing cooperation arrangements with third-country authorities, the competent authorities where possible are to use the template document adopted pursuant to Article 26 of Regulation (EU) No 2014/596.

¹ OJ L 173, 12.6.2014, p. 1.

- (4) In order to ensure a level of protection of personal data that is in line with Regulation (EU) 2016/679², any transfer of personal data to third countries should be undertaken in full compliance with that regulation. One such way to exchange personal data between competent authorities and supervisory authorities of third countries is through administrative arrangements ensuring appropriate safeguards pursuant to Article 46(3) of Regulation (EU) 2016/679, which include enforceable and effective rights that natural persons have over their personal data. For the transfer of personal data between European Economic Area (“EEA”) financial supervisory authorities and non-EEA financial supervisory authorities, such an administrative arrangement has been drafted by the International Organization of Securities Commissions (IOSCO) and the European Securities and Markets Authority (ESMA)³, and received the positive opinion of the European Data Protection Board (EDPB)⁴. All EEA financial supervisory authorities and a number of non-EEA financial supervisory authorities have signed the ESMA-IOSCO administrative arrangement. In light of the broad institutional consensus around personal data safeguards provided in the ESMA-IOSCO administrative arrangement, it provides a model for future similar arrangements framing the transfer of personal data between competent authorities and supervisory authorities of third countries which are not parties to the ESMA-IOSCO Administrative Arrangement. However, authorities of Member States using the model ESMA-IOSCO Administrative Arrangement would still need to obtain authorisation by the data protection authority pursuant to Article 46(3) of Regulation (EU) 2016/679.
- (5) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (6) ESMA did not conduct open public consultations on the draft regulatory technical standards on which this Regulation is based, nor did it analyse the potential related costs and benefits of introducing such standards, as to have done so would have been disproportionate in relation to the scope and impact of those standards, taking into account the fact that the addressees of the standards would only be the competent authorities of the Member States and not market participants.
- (7) ESMA has requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁵,

² 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 (OJ L 119, 04.5.2016, p. 1).

³ Administrative arrangement for the transfer of personal data between Each of the European Economic Area (“EEA”) Authorities set out in Appendix A and Each of the non-EEA Authorities set out in Appendix B, available at https://www.esma.europa.eu/sites/default/files/administrative_arrangement_aa_for_the_transfer_of_personal_data_between_eea_and_non-eea_authorities.pdf

⁴ Opinion 4/2019 on the draft Administrative Arrangement for the transfer of personal data between European Economic Area (“EEA”) Financial Supervisory Authorities and non-EEA Financial Supervisory Authorities, available at https://edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-42019-draft-aa-between-eea-and-non-eea_en

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1
Cooperation arrangements

The template document to be used by competent authorities of Member States where possible for cooperation arrangements pursuant to Article 26(1) or the third subparagraph of Article 25(8) of Regulation (EU) No 596/2014 is set out in the Annex to this Regulation.

Article 2
Transfers of personal data

Where competent authorities require appropriate safeguards for the transfer of personal data to supervisory authorities of third countries in the form of an administrative arrangement pursuant to Article 46(3) of Regulation (EU) 2016/679, that arrangement shall be annexed to and constitute a part of the cooperation arrangement entered into in accordance with Article 26 of Regulation (EU) 596/2014.

Article 3
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 2.7.2021

For the Commission
The President
Ursula VON DER LEYEN