



Formal comments of the EDPS on the Commission delegated Regulation 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

1. Introduction and background

- The draft Commission delegated Regulation 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 ('the draft delegated regulation') is based on Article 26(2) of Regulation (EU) No 596/2014 (Market Abuse Regulation, hence 'MAR')¹, which 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 for the purpose of exchanging information with the competent authorities of third countries for the enforcement of MAR.
- The draft delegated regulation is accompanied by an annex (Annex I), containing the "template document for cooperation arrangements concerning the exchange of information between competent authorities of Member States and authorities in third countries and the enforcement of obligations arising under Regulation (EU) No 596/2014 in third countries".
- These comments are provided in reply to the request for legislative consultation on the draft delegated regulation and its annex by the Commission of 12 April 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')². We limited our comments below to the provisions of the draft delegated regulation that are relevant from a data protection perspective.
- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related implementing or delegated acts, pursuant to MAR. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR.

¹ 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/EC, OJ L 173, 12.6.2014, p. 1.

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 (Text with EEA relevance), OJ L 295, 21.11.2018, p. 39–98.

2. Comments

- The EDPS welcomes that Article 2 of the draft delegated regulation provides that (emphasis added): “Where **competent authorities** avail themselves of the option to provide 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.”
- Recital 4 specifies the aforesaid Article 2, stating that (emphasis added): “In order to ensure a high level of protection of personal data as established by Regulation (EU) 2016/679, 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 data subject rights**. 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), and received the positive opinion of the European Data Protection Board (EDPB)**. 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.”
- In view of the above, the EDPS understands that the ESMA-IOSCO administrative arrangement³, to which reference is made in the EDPB 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 Authorities⁴, **will serve as a model for the administrative**

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 EDPB 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:

arrangement that will be annexed to and constitute part of the cooperation arrangement.

- In this respect, the EDPS recommends specifying in a recital of the draft delegated regulation that **authorities using the ESMA-IOSCO administrative agreement as a model for the administrative arrangement annexed to the cooperation agreement will nevertheless not be exempted from the procedure established by Article 46(3)(b) GDPR⁵**, i.e. that the appropriate safeguards provided by the administrative arrangement will in any case be subject to the authorisation from the competent supervisory authority.
- The EDPS also recommends clarifying in a recital of the draft delegated regulation that **the administrative arrangements annexed to the cooperation agreement will be reviewed in light of the specific circumstances of the transfer at hand.** In this respect, it should be recalled that the ESMA-IOSCO administrative agreement was approved having due regard to the specific circumstances of the case. Therefore, using the ESMA-IOSCO administrative arrangement as a model for administrative arrangements to be annexed to the cooperation agreement will not automatically guarantee that these administrative arrangements will be approved by the competent supervisory authority as the circumstances of the transfer at hand might differ, although it should logically facilitate the review.

Brussels, 25 May 2021

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(e-signed)

https://edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-42019-draft-aa-between-eea-and-non-eea_en

The aforesaid EDPB Opinion states *inter alia*, at page 7, para 8., that (bold added): “Each competent SA will **monitor the AA and its practical application especially in relation to sections III (5), (6), (8) and IV relating to data subject rights, onward transfers, redress and oversight mechanisms** to ensure that data subjects are provided with effective and enforceable data subject rights, appropriate redress and that compliance with the AA is effectively supervised.”

⁵ 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) (Text with EEA relevance), L 119, 4.5.2016, p. 1–88