



European Securities and
Markets Authority

Final report

Draft Regulatory Technical Standards on cooperation arrangements under Regulation (EU) No 596/2014 on market abuse





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Acronyms

ESMA	European Securities and Markets Authority
GDPR	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” or “GDPR”)
MAR	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
IOSCO	International Organization of Securities Commissions
RTS	Regulatory Technical Standards

I. Background

1. Article 26 of MAR mandates ESMA to develop draft RTS containing a template document for cooperation arrangements that are to be used by competent authorities of Member States where possible for the cooperation with the supervisory authorities of third countries.
2. ESMA was required to submit the draft RTS to the European Commission by 3 July 2015. However, it was conveyed to the European Commission that it was necessary to delay the delivery of the draft RTS to take into account the entry into application of the GDPR, and its impact on the transfer of personal data between NCAs and their counterparts in third countries, with particular reference to the need to apply appropriate safeguards.
3. ESMA has not conducted a public consultation, but a targeted one with the NCAs. The reason of not having a public consultation is that such a consultation would have been disproportionate in relation to the scope and impact of these draft RTS, taking into account that the addressees of the RTS would only be the NCAs.
4. ESMA has requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Articles 10(1) and 37(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.
5. Annex I recalls the legislative mandate to develop draft RTS and Annex II sets out the full text of the draft RTS and its annexes.

II. Approach

6. Article 26 of MAR states that competent authorities should conclude cooperation arrangements with their counterparts of third countries for the purpose of efficiently exchanging information and enforcing the obligations arising from MAR in third countries. Article 26 of MAR also specifies that such cooperation arrangements are to be concluded where necessary.
7. Furthermore, a competent authority proposing to enter into such cooperation arrangements with a third-country supervisory authority should inform ESMA and its European counterparts with a view for ESMA to potentially play a role of facilitation and coordination of the development of such arrangements.
8. The international community of securities regulators looks back on a long experience of cooperation in the realm of market abuse that goes back decades. And, unlike in other areas of financial regulation (e.g. AIFMD), it has been developing over time instruments to ensure an efficient cooperation among them. ESMA acknowledges the existence of a multilateral instrument for cooperation and exchange of information developed by the International Organisation of Securities Commissions (IOSCO) for the purpose of regulatory enforcement regarding securities markets. Competent authorities of the Member States of the European Union are all signatories to the Multilateral Memorandum of Understanding of IOSCO (IOSCO MMoU) which

covers in particular the cooperation and exchange of information in the context of market abuse.

9. These internationally recognised arrangements are based on robust international standards. They have been used for many years already and proven helpful to ensure an efficient cooperation with third country supervisory authorities. Besides, these arrangements are widely accepted throughout the community of securities regulators.
10. Regarding the template document for cooperation arrangements to be used by NCAs where possible, ESMA is therefore proposing a flexible approach that can be qualified as “modular”. In particular, the underlying rationale is based on the wording of Article 26(1) of MAR “*The competent authorities of Member States shall, where necessary, conclude cooperation arrangements ...*” (emphasis added) to allow NCAs to take just any part of the template document they deem necessary to comply with MAR. For example, the template does not require amendments to existing multilateral agreements, as the IOSCO MMoU, and NCAs would be able to execute complementary cooperation arrangements covering those parts of the template document, if any, which are not currently included in the IOSCO MMoU (or other relevant cooperation arrangements).
11. The draft RTS also includes a template document for an administrative arrangement between NCAs and supervisory authority of third countries for the transfer of personal data. The template administrative arrangement is in line with the ESMA-IOSCO 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 B¹ (the AA), on which on 12 February 2019 the European Data Protection Board (EDPB) issued a positive opinion. In particular, the Opinion 4/2019 of the EDPB (the Opinion) considers that the AA ensures appropriate safeguards for the transfer of personal data to public bodies in third countries not covered by a European Commission adequacy decision². As of the date of this Report, ESMA and fourteen EEA Authorities have signed the AA, following receipt of the relevant authorisation by the national data protection Authority pursuant to Article 46(3)(b) of GDPR. The IOSCO website contains the list of the signatories of the AA³.
12. The NCAs that have signed the AA and that conclude or have concluded cooperation agreements with third country authorities that are also party to the AA do not need to use the template administrative arrangement contained in the draft RTS. On the other hand, where NCAs cannot avail themselves of the AA, the template administrative arrangement should form the

¹ See <https://www.esma.europa.eu/data-protection>.

² The Opinion by the EDPS is available at this link https://edpb.europa.eu/sites/edpb/files/files/file1/2019-02-12-opinion_2019-4_art.60_esma_en.pdf.

³ https://www.iosco.org/about/?subsection=administrative_arrangement&subsection2=signatories.

basis to be used by NCAs to conclude administrative arrangements with third country authorities that would allow them to apply appropriate safeguards when making transfers of personal data in the usual course of business.

13. It should be noted that, in the absence of any decision from the Commission taken in accordance with the GDPR on the adequacy of the personal data protection regime of a third country, appropriate safeguards for the transfers of personal data should be provided in accordance with Article 46 of the GDPR⁴ unless a derogation foreseen in the GDPR would be applicable. In particular, the EDPB clarified in the Opinion⁵ that the same safeguards of the AA are envisaged for cases of sharing of personal data with a third party in the same country of the receiving authority unless, in exceptional cases, such third party cannot provide the aforementioned assurances. In this case, the transfer may take place only if the sharing is “*for important reasons of public interest*”.

⁴ Such appropriate safeguards may be provided by provisions to be inserted into administrative arrangements between public authorities pursuant to Article 46(3)(b) of the GDPR.

⁵ See page 6 of the Opinion.

Annex I: Legislative mandate

1. Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority empowers ESMA to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU.
2. Article 26 (2) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse provides that:

“In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards containing a template document for cooperation arrangements that are to be used by competent authorities of Member States where possible.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”



Annex II: Draft regulatory technical standards on cooperation arrangements with third countries authorities to be used by competent authorities



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[...]

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards on the template document for cooperation arrangements with third countries to be used by competent authorities of Member States

(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/EC⁶, and in particular the third subparagraph of Article 26(2) thereof,

Whereas:

- (1) It is appropriate to have a common template document to be used where possible by the competent authorities designated under Regulation (EU) No 596/2014 for concluding cooperation arrangements with the relevant supervisory authorities of third countries and third-country regulatory authorities responsible for the related spot markets (third-country authorities) in order to ensure consistent harmonization of cooperation as referred to in Article 26 and the last subparagraph of Article 25(8) of that Regulation (EU) No 596/2014.
- (2) The whole template document for cooperation arrangements set out in this Regulation is to be taken into consideration as a basis for the development of any new cooperation arrangements to be concluded with third-country authorities. Where possible it could also

⁶ OJ L 173, 12.6.2014, p. 1

be used in part to develop complementary arrangements to existing cooperation arrangements already entered into by competent authorities in order to ensure an efficient cooperation under Regulation (EU) No 596/2014.

- (3) This Regulation also includes a template document for administrative arrangement for the transfer of personal data between competent authorities and third-country authorities to be used where necessary for ensuring that any such transfer will operate in compliance with data protection rules pursuant to Article 29 of Regulation (EU) No 596/2014. Such template document is consistent with the ESMA-IOSCO 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, with reference to which the European Data Protection Board adopted on 12 February 2019 the “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”.
- (4) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (5) ESMA did not conduct open public consultations on the draft regulatory technical standards on which this Regulation is based, nor did it analyse potential related costs and benefits of introducing such standards, as this would have been disproportionate in relation to their scope and impact, taking into account that their addressees would only be the national competent authorities of the Member States and not market participants.
- (6) ESMA has requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁷.
- (7) To ensure the smooth functioning of the financial markets and considering that Regulation (EU) No 596/2014 is already into application, it is necessary for this Regulation to enter into force and apply immediately.

HAS ADOPTED THIS REGULATION:

⁷ OJ L 331, 15.12.2010, p. 84.

Article 1

Cooperation arrangements

For the purpose of entering into a cooperation arrangement in accordance with Article 26(1) of Regulation (EU) No 596/2014, competent authorities shall use the template document set out in Annex I or any relevant parts thereof, where possible.

Article 2

Data protection arrangement

In the absence of a decision from the Commission finding that a third country ensures an adequate level of protection of the personal data in accordance with Article 45(3) of Regulation (EU) 2016/679⁸, competent authorities shall ensure that appropriate safeguards concerning transfer of personal data are in place, where the transfer of personal data takes place in the usual course of business or practice, unless a derogation foreseen in Regulation (EU) 2016/679 would be applicable.

Competent authorities shall use the template document set out in Annex II where, for the purposes of Article 29 of Regulation (EU) No 596/2014, they need to enter into an administrative arrangement pursuant to Article 46(3)(b) of Regulation (EU) 2016/679.

Article 3

Entry into force and application

This Regulation shall enter into force on the 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,

For the Commission
The President

⁸ 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 L119/1, 04/05/2016; 61



On behalf of the President

[Position]

ANNEX I

Template document for cooperation arrangements concerning the exchange of information between EU competent authorities with authorities in third countries and the enforcement of obligations arising under Regulation (EU) No 596/2014 in third countries

1. Scope

Description of the competent authority's relevant legal basis for the effective exchange of information in order for them to carry out their duties as regards to their laws and regulations relating to market abuse.

Acknowledgement that the competent authorities can provide each other mutual assistance on a reciprocal basis.

2. Definitions

An appropriate list of definitions covering the terms used in the arrangement, including the following:

"EU-competent authority" means an authority as defined in Article 3(1)(12) of Regulation (EU) No 596/2014;

"non-EU competent authority" means the regulatory authority in a third country responsible for the related spot markets as referred to in Article 25(8) of Regulation (EU) No 596/2014 and the supervisory authority in a third country as referred to in Article 26 of Regulation (EU) No 596/2014;

"competent authority" means indistinctly the "EU-competent authority" and the "non-EU competent authority" signing the arrangement.

3. General provisions – denial of assistance

List of the cases in which cooperation may be denied such as:

- a) the request is not made in compliance with the arrangement;
- b) the request would require the competent authority receiving the request to act in a manner that would violate domestic law;
- c) communication of relevant information could adversely affect the security of the jurisdiction addressed, in particular the fight against terrorism and other serious crimes;

- d) complying with the request is likely to adversely affect its own investigation, enforcement activities or, where applicable, a criminal investigation;
- e) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the relevant authorities of the jurisdiction addressed;
- f) a final judgment has already been delivered in relation to such persons for the same actions in the jurisdiction addressed.

Assistance will not be denied based on the fact that the type of conduct under investigation would not be a violation of the laws and regulations relating to market abuse of the competent authority receiving the request.

4. Content of the assistance to be provided

Description of the type of assistance to be provided in line with Article 23 of Regulation (EU) No 596/2014 such as:

- a) information held in the files of the competent authority receiving the request;
- b) obtaining statements or information from any person;
- c) obtaining documents from persons and entities including through the performance of on-site inspections;
- d) obtaining data traffic records, insofar as permitted by national law and as the case may be with the assistance of the appropriate judicial authority depending on the implementation of Article 23(2)(h) of Regulation (EU) No 596/2014;
- e) obtaining or assisting in obtaining the freezing of assets in line with Article 23(2)(i) of Regulation (EU) No 596/2014;
- f) obtaining or assisting in obtaining the temporary cessation of any practice contrary to the laws and regulations relating to market abuse in line with Article 23(2)(k) of Regulation (EU) No 596/2014.

5. Sending and processing requests for assistance

Description of the procedure for sending and processing requests for assistance.

6. Permissible uses of information

Description of the rules on the permissible use of the information in line with Article 26(3) of the Regulation (EU) No 596/2014 and namely that the information provided must be intended for the performance of the tasks of the competent authorities to ensure compliance with and enforce the laws and regulations relating to market abuse. The exchanged information shall be used solely for the purposes set forth in the request for assistance.

If a competent authority making the request intends to use information furnished under the arrangement for any purpose other than those stated in this section, it must obtain the prior consent of the competent authority receiving the request.

7. Confidentiality restrictions

Description of the rules on confidentiality of any information disclosed, received, exchanged or transmitted pursuant to this arrangement in line with the provisions set forth in Article 27 of Regulation (EU) No 596/2014, including the fact that such information is subject to conditions of professional secrecy in the relevant third country at least equivalent to the conditions laid down in Article 27 of Regulation (EU) No 596/2014. The exchanged information shall not be disclosed to any other authority or entity unless there is a prior agreement of the competent authority who originally provided it.

8. General provisions – identification of a contact point

To facilitate cooperation under the arrangement, designation of contact points by the competent authorities.

9. General provisions – revision clause

Periodical review by the competent authorities of the functioning and effectiveness of the cooperation arrangements between them with a view, inter alia, to expanding or altering the scope or operation of the arrangement should that be judged necessary.

10. Other provisions – Miscellaneous

ANNEX II

Template document for administrative arrangements for the transfer of personal data between [EU competent authority] and [non-EU authority]

Preamble, notably recalling the relevant provisions governing the transfer of personal data to third country under 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” or “GDPR”), including, where applicable, relevant domestic legal framework.

I. Purpose and scope

Specification that the administrative arrangement is limited to the transfer of personal data between the signatory authorities in the exercise of their respective regulatory mandates and responsibilities.

II. Definitions

An appropriate list of definitions covering the terms used in the arrangement, including definitions covering:

- i. **“onward transfer”**, transfer of personal data by a receiving authority to a third party in another country who is not an authority participating in the arrangement and when that transfer is not covered by an adequacy decision from the European Commission;
- ii. **“personal data”**, any information relating to an identified or identifiable natural person, where an identifiable natural person is one who can be identified, directly or indirectly, on the basis of an identifier, including a name, an identification number;
- iii. **“processing”**, any operation or set of operations performed on personal data, whether or not by automated means, including collection, recording, adaptation or alteration, retrieval, consultation, use, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
- iv. **“profiling”**, automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person;
- v. **“personal data breach”** means a breach of data security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;
- vi. **“Data Subject Rights”** as set forth in GDPR, including the right not to be subject to automated decisions, including profiling, the rights of access, of erasure, of information, of objection, of rectification, of restriction of processing.
- vii. **“sharing of personal data”**, sharing of personal data by a receiving authority with a third party in its country.

III. Personal data protection safeguards

Description of the safeguards to be provided in the arrangement to ensure the protection of the personal data to be transferred, including the following:

1. Purpose limitation:

Personal data are transferred between the signatories to support their regulatory responsibilities, and are not transferred for other purposes such as for marketing and commercial reasons. The transferring authority will transfer personal data only for the legitimate and specific purpose of assisting the receiving authority to fulfil its regulatory mandate and responsibilities. Personal data cannot be further processed by the receiving authority in a manner that is incompatible with these purposes, or for a purpose that is incompatible with the one for which they were requested.

2. Data quality and proportionality:

Acknowledgement of the principle that the personal data transferred will be adequate, relevant and limited to what is necessary, accurate and up to date in relation to the purposes for which they are transferred and further processed.

3. Transparency:

Description of the content of the general notice that each authority will provide to data subjects, including how and why an authority may process and transfer personal data, the type of entities to which personal data may be transferred, the data subject's rights and information on delays or restrictions to such rights, contact details to submit disputes or claims.

Commitment by each Authority to make publicly available the general notice.

4. Security and confidentiality:

Commitment of the receiving authority to have in place appropriate technical and organisational measures to protect personal data transferred to it against accidental or unlawful access, destruction, loss, alteration, or unauthorised disclosure, and, in case the receiving authority becomes aware of a personal data breach, to use reasonable and appropriate means to remedy personal data breach and minimise the potential adverse effects.

5. Safeguards relating to Data Subject Rights:

Description of the safeguards in place, at each signatory authority, to allow the data subjects to request the exercise his/her rights, including in case of misuse of personal data. In particular, each authority commits to address in a reasonable and timely manner a request from a data subject concerning the exercise of his/her rights, unless such request is manifestly unfounded or excessive. These safeguards may be restricted to prevent prejudice or harm to supervisory and enforcement functions of the authorities. The restrictions should be necessary and provided by law, and will continue only for as long as the reason for the restriction continues to exist.

6. Onward transfer and sharing of personal data:

Description of the conditions applicable to the onward transfer by the receiving authority of personal data to a third party in another third country and to the sharing of personal data with a third party within the receiving authority's jurisdiction.

7. Limited data retention period:

Retention period to be based on necessity and appropriateness for the purpose for which the data are processed.

8. Redress:

Description of available legally binding and soft law mechanisms available to data subjects in view of resolving a dispute or a claim. Such mechanisms must include a cooperation duty between the authorities to resolve disputes or claims, and, if unsuccessful, non-binding mediation or other alternative dispute resolution mechanism upon request by a data subject or another signatory concerned, unless the data subject's requests are manifestly unfounded or excessive. If the issue is still not resolved and the transferring authority is of the view that the receiving authority has not complied with the safeguards, the transferring authority will stop any further transfers to the receiving one until the matter is solved. The data subject is informed accordingly.

IV. Oversight, revision and discontinuation

Periodic reviews by the signatory authorities, through an independent function, of the implementation of the safeguards set out in the arrangement and related remedial actions. Where the assessment indicates that the safeguards are not effectively implemented, or when a transferring authority is of the view that the receiving authority has not acted consistent with the safeguards, the transferring authority will stop any further transfers to the receiving authority until the matter is solved.

Conditions attached to the revision of the terms of the arrangement and its discontinuation.