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Brussels, 25 July 2012  
GB/PDL/et/D(2012) 1590 C 2012-0598  
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Dear Sir,  
Dear Madam,

I am writing to you in response to the European Securities and Market Authority's (ESMA) *Consultation Paper on Draft Technical Standards for the Regulation of OTC Derivatives, CCPs and Trade Repositories*.

The objective of the consultation is to gather the views of stakeholders to inform the development of the regulatory technical standards ("RTS") required by the Regulation of the European Parliament and the Council on OTC derivative transactions, central counterparties and trade repositories ("EMIR"). We note that these standards have been drafted by ESMA and will be submitted for adoption to the European Commission as of end September.

We welcome the early consultation of the European Data Protection Supervisor (EDPS). As a preliminary analysis, we have identified the following points we would like to discuss with you in more detail:

**(1) Reporting obligation:** Article 9 of EMIR, Section V.1 and Annex V of the Consultation paper: RTS on the minimum details of the data to be reported to trade repositories

Under Article 9 of EMIR, financial counterparties and non financial counterparties shall ensure that details of any derivative contracts they have concluded as well, as any modification or termination are reported to a trade repository.

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In the event that one of the parties to a derivative contract subject to the above reporting obligations is a natural person, information about this person may constitute personal data under Article 2(a) of Directive 95/46/EC. The fulfilment of the above obligations therefore constitutes processing of personal data under Article 2(b) of Directive 95/46/EC. Even in cases where the parties of the transaction are not natural persons, personal data may still be processed, such as the names and contact details of the directors of the companies. The provisions of Directive 95/46/EC (or Regulation 45/2001 as relevant) would therefore be applicable to the present operations. In consequence, the purpose(s) of the reporting, as well as the categories of data reported and the period of their conservation are of particular importance.

**(2) Record keeping:** Article 29 of EMIR, Annex III, Chapter V of the Consultation paper and Annex IV: RTS and implementing technical standards on requirements for central counterparties.

Under Article 29 of EMIR, ESMA is required to draft RTS specifying the details of the records and information to be retained by CCPs and implementing standards specifying the format of these records and information. As already stressed above, personal data may be processed where the party to a transaction is either a natural person or, where there is a legal person, a natural person is identifiable. Technical standards implementing EU law should also comply with data protection legislation, including:

- adequate security requirements, such as access controls, a security plan and a privacy impact assessment (including a risk assessment), together with periodical audits on compliance with data protection legislation and data security.
- privacy by design: data protection should be embedded in the design of the medium of storage of information from the very early design stage, including tools enabling users to better protect personal data (e.g., authentication and encryption);
- access limitation: the data should only be available to specific staff on a need-to-know basis;
- data minimisation: only the data which are strictly necessary should be processed.

**(3) Transparency and data availability:** Article 81 of EMIR, Section V.III, Annex V: RTS on the minimum details of the data to be reported to trade repositories and RTS on data to be published and made available by trade repositories of the Consultation paper.

Pursuant to Article 81 of EMIR, a trade repository shall make the necessary information available to a number of entities. There are cases where the trade repository will process personal data under Article 2(a) of Directive 95/46/EC, for example, where a natural person is a party to a derivative contract. In such cases, the categories of data processed by the trade repositories as well as the circumstances and the conditions under which access can be given must be carefully considered in the light of the principles of proportionality and necessity. According to these principles, only the data necessary for a legitimate purpose may be recorded and accessed, by entities which require such access for the discharge of their legal duties.

(4) In addition to these points, we would also like to discuss the **investigating powers of ESMA**, in particular with regard to the power of requesting records of telephone and data traffic (Article 62 of EMIR).

Further to the discussion we had with Mr Jan Ceyssens on 20 July 2012, we will come back to you at the end of August or the beginning of September to further discuss the issues mentioned above as well as any other issues that regardless the content of this letter may have an impact on the protection of personal data.

Yours sincerely,

Giovanni BUTTARELLI

A handwritten signature in black ink, appearing to read 'Giovanni Buttarelli', written over a vertical line.

Cc: Mr Jan Ceyssens, Administrator, EU Commission, DG internal markets and services

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