

ESMA's response to the Article 29 Working Party consultation on Draft Guidelines on Article 49 of Regulation 2016/679

1. ESMA welcomes the Article 29 Working Party (WP29) draft Guidelines on Article 49 of Regulation 2016/679 (draft Guidelines) and takes the opportunity of this consultation to share with WP29 its views on this important guidance with a focus on the so called “Public Interest Derogation”, which is applicable to international transfers of personal data necessary for important reasons of public interest under Article 49 (1) (d) of the General Data Protection Regulation (GDPR).

1 Introduction

2. Achieving efficient international cooperation between EU and non-EU financial supervisory authorities is essential to achieve effective financial supervision in the context of global financial markets and is thus part of financial supervisors' legal statutes, missions or objectives. Moreover the duty to cooperate with other financial supervisors is enshrined in Union law applicable to EU financial supervisors and is framed by the IOSCO Memorandum of Understanding¹(MMOU) at global level. The MMOU is a key cooperation tool, subject to pre-screening and ongoing monitoring processes, currently signed by 117 securities markets authorities². For example, such a framework for cooperation was used by several authorities around the globe for the exchanges of information in the context of the LIBOR investigation³. To the extent that such cooperation gives rise to transfers of personal data, these international transfers are important for public interest purposes as explicitly recognized in Recital (112) of the GDPR.
3. As only 10 securities markets authorities⁴ are currently covered by an adequacy decision within the meaning of Article 45(3) of the GDPR, clarity on the scope of derogations is essential in order to enable EU financial supervisory authorities to fulfil their missions whilst ensuring compliance with the applicable EU data protection rules, in particular in the absence of comparable legal requirements in the relevant third-country.

¹ <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>

² <http://www.iosco.org/about/?subSection=mmou&subSection1=signatories>

³ http://www.csrc.gov.cn/pub/csrc_en/affairs/AffairsIOSCO/201303/P020130304363712182665.pdf (please refer to p.2)

⁴ Andorra, Argentina, Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay.

2 International transfers of personal data necessary for important reasons of public interest – Article 49 1(d)

2.1 Application not limited to occasional and not repetitive transfers

4. Recital 112 of the GDPR states that the transfers required and necessary for important reasons of public interest (Public Interest Derogation) should apply to data transfers between financial supervisory authorities. Furthermore, Article 49 setting out the “derogations for specific situations”, including the Public Interest Derogation under Article 49 (1) (d), specifically states that such derogations apply in the absence of adequacy decision or of appropriate safeguards without making reference to any further conditions, such as “occasional” and “not repetitive” transfers.
5. ESMA welcomes the explicit recognition by the draft Guidelines of the fact that the use of the Public Interest Derogation is not subject to the conditions of international transfers being “occasional”. While appreciating that the draft Guidelines cover a broad scope and aim at addressing many diverse situations, ESMA would see merit in making equally explicit the fact that the “not repetitive” condition does not apply to the Public Interest Derogation.
6. The draft Guidelines note that the condition that transfers be not repetitive apply in the context of “the compelling legitimate interest” under Article 49 (1) second subparagraph. This second subparagraph applies to transfers of personal data which cannot be based on an adequacy decision, on appropriate safeguards or on any of the derogations listed in Article 49(1). Under these circumstances, specific conditions are set out so that a transfer may still occur: a transfer may take place if it is not repetitive, concerns only a limited number of data subjects and if the data controller has provided suitable safeguards. In this context, ESMA believes that the application of the Public Interest Derogation is available to financial supervisory authorities and is not limited to transfers that are not repetitive, only concern a limited number of data subjects and for which suitable safeguards are provided (such limits only being provided for in relation to the derogation “*for the purposes of compelling legitimate interests*” set out in Article 49(1) second subparagraph). This interpretation is supported by the fact that Article 49(3) of the GDPR explicitly sets out that the provisions under Article 49(1) second paragraph do not apply to “activities carried out by public authorities in the exercise of their public powers”.

Recognition of the fact that the “not repetitive” condition does not apply to the Public Interest Derogation in the final Guidelines would provide a useful clarification.
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2.2 General principles for transfers (Article 44)

7. While ESMA recognizes that the scope of derogations should always be interpreted in a restrictive manner and only as far as is explicitly provided for in GDPR itself, it is ESMA’s understanding that derogations cannot be expected to apply only when the general requirements, including those relating to the protection of natural persons, can be complied

with by the receiving third country authorities: Article 49 is drafted precisely to cover situations “in the absence of” an adequacy decision or of appropriate safeguards. However, such an interpretation could be derived from the opening statement made in the draft Guidelines (Part I “General”): “when applying Article 49 one must bear in mind that according to Article 44 any transfer of personal data to third countries or international organizations must also meet the conditions of the other provisions of the GDPR.”

8. ESMA duly acknowledges the fact that the general principles for transfers set out in Article 44 are “subject to the other provisions of this Regulation”. A similar reference is made in Recital 101 of GDPR. ESMA understands that the legislator’s intention as reflected in the wording used (“compliance”) as such is explicitly required in recital 101 and Article 44 only as regards the provisions relating to the transfer of personal data to third countries while compliance with the other provisions is required as regards the processing of personal data by the transferring EU authority, prior to any transfer of personal data to a third country authority in accordance with the specific conditions set out in Article 44, and more generally in Chapter V of GDPR.

Further clarification on the fact that, in the context of derogations (such as the Public Interest Derogation), the compliance with other provisions of the GDPR only applies to transferring Authorities would be helpful.

9. The draft Guidelines further indicate that recourse to the derogations of Article 49 should never lead to a situation where fundamental rights might be breached (p. 3, paragraph 4). ESMA certainly supports the objectives set out in this statement and believes that it could serve as an effective test to assess whether a given transfer of personal data may occur under the Public Interest Derogation or not. It is ESMA’s understanding that in practice financial supervisory authorities should abstain from transferring personal data to third country authorities where there are serious indications of facts liable to constitute breaches of fundamental rights under Union law.

From a practical perspective it would be important to clarify that EU authorities should abstain from transferring personal data to third country authorities where serious indications of facts liable to constitute breaches of fundamental rights under Union law exist.

2.3 The need for a case-by-case assessment

10. ESMA would also like to express its support as regards the clarification of WP29 in accordance with principles inherent in European law on the application of a case-by case approach in applying the public interest derogation (as derogations and limitations on the protection of personal data should only apply in so far as strictly necessary).

11. ESMA would like to note that this case-by-case assessment is already enshrined in financial supervisory authorities' practices, as information is exchanged only on the basis of a specific request relating to a particular case with specific facts and circumstances. In this context, it is important to recall that requests for assistance between financial supervisory authorities are usually made under the auspices of a multilateral or bilateral memorandum of understanding (MoU). Financial supervisory authorities may in this context also rely on more general multilateral MoUs (MMoUs). The framework of cooperation with third countries is currently provided by the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("IOSCO MMoU") of May 2002. The MMoU is providing for specific elements that requests for assistance should contain, such as content and format requirements, thus embedding a case-by-case analysis prior to any information exchange, which may give rise to a transfer of personal data⁵.
12. Furthermore, having regard to the fact that financial supervisory authorities are entrusted with a public interest mandate in carrying out their missions and duties, such as inter alia fostering market integrity and confidence in the securities and derivatives markets, it is ESMA's understanding that the case-by-case analysis, particularly as regards market abuse cases, would lead to a positive assessment on the application of the public interest derogation in the absence of an adequacy decision within the meaning of Article 45(3), or of an appropriate safeguard pursuant to Article 46, as referred to in Article 49 (1) of the GDPR.

2.4 Legal basis and Spirit of reciprocity in international cooperation

13. As previously noted, efficient international cooperation, which may include transfers of personal data, is necessary in order for financial supervisory authorities to act in accordance with their public mandates and to carry out their duties, which include in particular the supervision of entities that operate in multiple jurisdictions across the world and the prosecution of violations of financial regulation in a cross-border environment.
14. Furthermore, taking account of the increasing interconnectedness of financial markets, the duty for EU financial supervisory authorities to cooperate with third country authorities is enshrined in EU financial sectoral legislation (*i.e.* exchanges are not voluntary or discretionary). As such, the exchange of information, including personal data as the case may be, is thus part of their legal mandate. This provides for a clear legal basis for the

⁵ According to the MMoU, the requests for assistance contain several elements, such as the description of the subject matter of the request, the purpose for which the assistance is sought, facts underlying the investigation which form the basis of the request and explanation for its helpfulness, any information which might help the requested authority to identify the persons who might possess the requested information or documents, as appropriate, any particular precautions that should be taken in the gathering of the information in question including the sensitivity of the information contained in the request and any special precautions that should be taken in collecting the information due to investigatory considerations, a clear reference to the rules and/or laws that may have been breached for each case. In this context, the requests for assistance may contain data of a personal nature if needed to identify a natural person (name, date of birth, electronic address or telephone numbers) as well as information relating to the transactions executed or orders given relating to financial instruments including information relating to the person's bank or brokerage accounts or his professional activities.

transfers of personal data and ESMA believes that there is no need for an explicit reference to the Public Interest as the one recently introduced in the Anti-Money Laundering Directive⁶ (Cf Article 43⁷).

15. In light of the foregoing and to the extent that the entire framework of exchanges of information, including personal data, is essentially based on the principle of reciprocity, ESMA certainly welcomes WP29's draft Guidelines on derogations, which clarify that in the context of international cooperation public interest has to be looked at taking into account the spirit of reciprocity. Indeed while transfers of personal data from EU authorities to third country authorities would be important for public interest purposes in the third country, such transfers also indirectly serve the public interest in the EU as EU authorities would only be able to receive data from third country authorities as long as they transfer data, in application of the reciprocity principle which underpins international cooperation.

2.5 Appropriate safeguards where transfers are made in the usual course of business or practice

16. The draft Guidelines indicate that "*where transfers are made in the usual course of business or practice, the WP29 strongly encourages all data exporters (in particular public bodies) to frame these by putting in place appropriate safeguards [...]*". In this context, the draft Guidelines explicitly refers to exchanges of data in the context of international transfers between financial supervisory authorities for administrative cooperation purposes. ESMA would like to confirm its support to this WP29 recommendation, which certainly constitute a desirable objective.
17. In this respect, it is important to note that the mere existence of a MoU between financial supervisory authorities does not imply that in practice there will be transfers of personal data taking place in the usual course of business or practice. In fact, financial supervisory activities focus mostly on markets and legal entities (rather than natural persons), and that exchanges necessary in the context of investigations are by nature strictly delineated and specific to the specific circumstances of the case under investigation. Furthermore, in cases where the conclusion of cooperation arrangements is provided for by EU financial Regulation or where the cooperation is based on a multilateral MoU such as the IOSCO MMoU, it has to be considered that in practice there may be no or very little exchanges of

⁶ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJEU 5 June 2015 L 141 p. 73

⁷ In accordance with Article 43 "The processing of personal data on the basis of this Directive for the purposes of the prevention of money laundering and terrorist financing as referred to in Article 1 shall be considered to be a matter of public interest under Directive 95/46/EC."

information taking place between a given pair of financial supervisory authorities having signed up to the relevant MMoU⁸.

18. In line with the above WP29's recommendation, and through their dialogue with WP29, IOSCO and ESMA have developed a draft administrative arrangement (AA) for the transfer of personal data between EU and non-EU securities markets regulators. The draft AA's objective is to provide a careful balance by requiring appropriate safeguards in accordance with Article 46(3) of the GDPR by ensuring consistency with data protection rules whilst allowing for continuity in international cooperation and exchanges of information, including transfers of personal data. The draft AA has been submitted for WP29's consideration on 26 February 2018, in view of the forthcoming application date of the GDPR on 25 May 2018.
19. ESMA would also like to note that it is currently not uncommon for EU financial supervisory authorities to rely on the use of the public interest derogation based on authorizations granted by national Data Protection Authorities provided that the application of the derogation is situation-specific and follows a thorough case-by-case assessment prior to a transfer of personal data to a Third Country Authority.
20. To the extent that WP29's strong recommendation is to have safeguards in place where international transfers of personal data occur as a usual practice, and while the proposed administrative arrangement is being examined by WP29, it is ESMA's understanding that the financial supervisory authorities are able to continue to rely on the application of the public interest derogation in specific situations subject to a case by case assessment given the continuity in level 1 provisions in this area.

⁸ In the context of the IOSCO MMoU, it must e.g. be considered that financial supervisory authorities participating in the works of IOSCO are strongly encouraged to become signatories to the MMoU. Being so to say an ancillary effect of the IOSCO membership, the fact that two financial supervisory authorities are signatories of the MMoU does by no means imply that there will necessarily be exchanges of information between them. In fact, the existence of an (M)MoU between a given pair of financial supervisors is generally a precondition for any exchange of information (including personal data) with TCAs to take place, i.e. an exchange of information and thus a transfer of personal data is only liable to occur if there is actually a MoU in place.