

ARTICLE 29 Data Protection Working Party



Brussels, 7 July 2015

Ms Maria Teresa Fabregas-
Fernandez
Head of Unit
Securities Markets
DG FISMA

Subject: Possible delegated acts for the implementation of EU legislation on both markets in financial instruments (MIFID II) and on market abuse regulation (MAR).

Dear Ms Fabregas-Fernandez,

We are writing to you concerning possible delegated acts for the implementation of EU legislation on both markets in financial instruments (MiFID II)¹ and on market abuse regulation (MAR)².

The Article 29 Working Party (WP29) is the group of the European data protection authorities set up by the Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Following the mandate given by the European Commission, the European Securities and Markets Authority (ESMA) published its final technical advice on MiFID II on 19 December 2014³, and on MAR on 3 February 2015⁴.

During the WP29 Financial matters subgroup meeting of 20 April 2015, representatives of ESMA and WP29 delegations had an extensive discussion on these issues, in order to explain better each other's point of view and practical needs. This contact was very welcome and allowed for an instructive exchange.

Furthermore, a representative of the Commission (DG FISMA) recalled during this meeting that any further guidance from the Article 29 Working Party would be welcome in the context of the drafting of possible delegated acts related with these issues.

¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 repealing Directive 2004/39/EC; and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Regulation (EU) No 648/2012.

² 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; and Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse.

³ ESMA's technical advice to the Commission on MiFID II and MiFIR – Final report

⁴ ESMA's technical advice on possible delegated acts concerning the Market Abuse Regulation – Final report

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental rights and Union citizenship) of the European Commission, Directorate-General for Justice and Consumers, B-1049 Brussels, Belgium, Office No MO59 02/34

Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

We note, as stated in the European Commission's mandate request to ESMA, that the technical advice received from ESMA should not prejudice the Commission's final policy decision, meaning that ESMA's final technical advice is non-binding for the Commission.

The Working Party recognizes that the MIFID II and MAR regulations are also aimed at the protection of consumers. Nevertheless it is of importance that data protection rules are observed.

The Working Party would like to focus the Commission's attention upon the key data protection and privacy issues, identified as the main concerns regarding implementation measures proposed by ESMA.

These main areas of concerns are related to the following data protection rules and principles guaranteed by the directive 95/46/EC and their possible insufficient implementation in the context of MiFID and MAR EU regulations. In particular, it is crucial to examine how principles such as proportionality and necessity, data retention limitation, transparency are taken into account, as well as the future new data protection regulation.

Please find more detailed developments in the attached Appendix, that we hope you will find useful when drafting your final delegated acts.

The Working Party stands ready to advice the Commission and to explain further any particular question related with these issues.

Yours sincerely,
On behalf of the Article 29 Working Party,

Isabelle FALQUE-PIERROTIN
Chairwoman

Attached:
Appendix

Appendix:

Article 29 Working Party's comments on possible delegated acts relating to MiFID and MAR implementing measures

For the sake of clarity, the Working Party would like to distinguish between delegated acts concerning the MiFID regulations and delegated acts relating to the MAR regulations.

Possible delegated acts relating to MiFID regulations:

1. General remarks

The Directive 2014/65/EU⁵ and Regulation 600/2014⁶ both recognize that Member States should ensure the respect of the right to the protection of personal data in accordance with Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The implementing Directive of 2006⁷ also contains reference recalling firms that they should ensure compliance with national measures implementing the Data protection directive 95/46/EC where requirements to collect and maintain information relating to clients and services provided to clients involve the collection and processing of personal data⁸.

As it seems that data protection directive was not explicitly mentioned in the mandate given to ESMA by the Commission, ESMA's final technical advice do not refer explicitly nor propose specific wording aiming to take into account data protection rules and principles. The Working Party therefore feels the need to share with the Commission the following comments and wishes to recommend that possible delegated acts contain specific wording aiming to better implement the data protection principles within implementation legislation.

2. Record-keeping (other than recording of telephone conversations or other electronic communications)

This point refers to the obligation for investment firms laid out under Article 16(6) of Directive 2014/65/EU to keep records of all services, activities and transactions undertaken by them which shall be sufficient to enable the competent authority to fulfill its supervisory tasks and to perform enforcement actions.

ESMA's point of view is that the implementing regulation should be modified to introduce a non-exhaustive list of records (principally based on the 2007 CESR recommendations), with the ability for National competent authorities (NCAs) to set additional obligation for additional records.

As the proposed wording for Articles 7 (record keeping of client orders and decision to deal) and 8 (record keeping of transactions and order processing) of the MiFID implementation directive both require investment firms to record at least the name and designation of the client (as well as the name and designation of any relevant person acting on behalf of the client), it is clear that personal data are to be collected and processed.

⁵ See recitals 106, 152 and 166, as well as Articles 78 (supervisory powers) and 88 (transfers of personal data to a third country).

⁶ See recitals 24 and 36 (on exchange and transfer of personal data).

⁷ Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

⁸ See recital 16

The Working Party would like to draw the Commission's attention on the following points:

- A **non-exhaustive list of records** might be understandable from a financial supervisory authority point of view. However, from a data protection point of view, an « open table of records » with the possibility for NCAs to decide for additional records might not be in line with the proportionality and necessity data protection principles. Under these principles, only personal data which are necessary, adequate and non excessive can be collected in order to achieve a specific purpose.
- In order to balance these views, the working party would suggest to the Commission to consider opting for a **list of minimum records and inserting specific wording in the implementing legislation recalling that any decision taken by a NCA to add another record to the list can only be taken after a proper proportionality and necessity check**. In addition, the demonstration of the necessity and the proportionality should be documented by the NCA when adding records to the list.
- The working party notes that ESMA could adopt and update guidelines in order to specify the exact content and the timing for each record. The Working party suggest that the implementation legislation provides that the same **proportionality and necessity checks should be carried out before defining the exact content of records**.
- As regards proposals to amend the wording of Article 51(2) of the MiFID implementing directive concerning storage modalities, the Working Party would suggest to **add explicit wording about the obligation to keep personal data confidential, as well as the obligation for the data controller to ensure that proper security measures are put in place** in order to protect personal data. The Commission should also consider inserting strong provisions concerning the access to this data (e.g. strong wording limiting access only to the person responsible).

3. Recording of telephone conversations and electronic communications

This point refers to the obligation for investment firms laid out under Article 16(7) of Directive 2014/65/EU to record telephone conversations and electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders.

The Working Party reiterates the above remarks and the lack of specific data protection wording and would also like to recall that in the light of EUCJ decisions (xxx) on data retention directive, proportionality and necessity principles are all the more crucial principles to take into account.

- The Directive 2014/65/EU uses broad and open wording such as “at least” and does not define “electronic communications”. From a data protection point of view, this **possible lack of clarity of the exact scope of the recording obligation might well pose a serious problem as regards compliance with proportionality and necessity principles**.
- **The scope of the obligation to record telephone conversations or electronic communications must but very clear** to all stakeholders. In this regard, the working party welcomes ESMA's technical advice recommending that investment firms shall establish, implement and maintain an effective recording of telephone and electronic communications policy set out in writing, and appropriate to the size and organization of the firm, as well as the nature, scale and complexity of its business. ESMA proposal that those policy shall include identification of the telephone conversations as well as details on procedures to be followed are welcomed measures.

- **In this regard, the proportionality principle should be the first principle to be used to determine the appropriate scope of the recording obligation** (e.g. type of conversations and type of electronic devices to be recorded). Thus, specific wording referring the data protection principles, and in particular proportionality and necessity tests, could be added to the text of implementing legislation⁹.
- **Recording of telephone conversations, although carried out in a professional context and in order to comply with legal requirements must nevertheless comply with data protection principles and should be done along procedures offering full compliance with these principles.**
- In particular, the working party suggests, although Article 16.7 (3rd paragraph) refers to electronic communications “*made with, sent from or received by equipment the use of which by an employee or contractor has been accepted or permitted by the investment firm*”, that the Commission provides for wording in the implementation measures strongly recommending employers to **not** allow personal equipments to be used by employees or contractors (BYOD).
- **Increased level of surveillance upon employees can easily lead to risk of permanent recording of telephone conversations, thus breaching personal data protection and privacy principles.** The working Party recommends, especially when all telephone are equipped with recording devices (e.g. because this is required from employee’s role and tasks), that implementation measures contain specific wording in order to protect employees’ right to be able to make private phone calls by using dedicated lines or a dedicated space.
- **Clients and employees must be clearly informed** about the scope, procedure and potential consequences of recordings, especially as ESMA’s technical advice recommends internal calls to be captured as well. Under Articles 10 and 11 of the directive 95/46, the information has to be given on the purpose, recipients, and rights of the data subjects. The Working Party suggests to add specific wording in implementation measures
- **Data retention:** Article 16(7) of Directive 2014/65/EU provides that records shall be provided to the client involved upon request and shall be kept for a period of five years and, where requested by the competent authority, for a period of up to seven years. The WP29 understands that this provision already extended the previous 3 years minimal data retention period to a 5 years period, and added the possibility for NCAs to request a further extension up to 7 years.
- The Working Party understands that there might different practices among Member States and NCAs. However, in any case, such **decision to extend of the data retention period can only be taken on the basis of prior proportionality and necessity principles assessments, on a case by case basis and in specific circumstances.** The Working Party would like to suggest that the Commission inserts specific wording in implementing measures taking these principles into account.
- The Working Party welcomes the clarification provided by ESMA’s technical advice proposing that “*The period of time for the retention of a record begins to run from the*

⁹ The second sentence of the paragraph 4 in the technical advice proposed by ESMA (page 45) could therefore read as follows: “Firms must periodically re-evaluate the effectiveness of the firm’s measures and procedures and adopt any such alternative or additional measures and procedures as necessary and appropriate, **after assessment of the proportionality of such measures (new)** ”. More generally, recommendations to investment firms should include a reminder towards compliance with personal data principles laid out by the Directive 95/46/EC.

*date that the record is created*¹⁰. This would however require that the date of creation of each record is properly mentioned on/in the record itself, or available from the recording system.

- As already mentioned above for non telephone or electronic records, the Working Party suggests that implementing measures contain **explicit wording about the obligation of the data controller to keep personal data confidential and to ensure that proper security measures are put in place** in order to protect personal data.

4. Publication of sanctions

The Directive 2014/65/UE contains specific provisions referring to the publication of administrative sanctions taken by National competent authorities. The Working Party notes that data protection and the proportionality principle have been taken into account into the text¹¹.

Nevertheless, the Working Party would like to draw the Commission's attention upon the fact that some issues were not addressed, such as dereferencing from search engines and the risk that Member States national legislation are not compatible with the Directive's provisions. The Working party would therefore suggest that the Commission consider adding specific wording in the implementation measures to ensure that any publication of personal data has the appropriate legal basis in order to limit these risks.

The timing of the publication of the sanction might also be an issue. Article 71 provides that: "*Member States shall provide that competent authorities publish any decision imposing an administrative sanction or measure for infringements of Regulation (EU) No 600/2014 or of the national provisions adopted in the implementation of this Directive on their official websites without undue delay after the person on whom the sanction was imposed has been informed of that decision*".

However, the wording "*without undue delay*" might need further clarification. Generally, the proportionality principle requires that only definitive sanctions (i.e. sanctions that are definitive because they cannot be legally appealed anymore) should be published. Also, data subjects usually have the right to appeal administrative sanctions and in cases where such a right to appeal is exercised, the sanction should not be published before having been confirmed by the competent appeal jurisdiction.

Possible delegated acts relating to MAR regulations:

ESMA delivered its final technical advice on MAR on 3 February 2015. The Working Party would like to draw the Commission's attention upon the following issues.

1. Recording of telephone conversations

The Working Party would like to point out there it seems that there is no clear legal basis in the existing MAR regulation for recording telephone conversations on market soundings. IN any case, any extension of the recording obligation needs to demonstrate how the proportionality, necessity, data retention limitation principles have been taken into account and how rights of data subjects are safeguarded by appropriate measures.

¹⁰ See paragraph 14 "Retention" page 46.

¹¹ See in particular Recital 146 and Article 71.

2. Protection of reporting persons under the market abuse regime

The Working Party would like to recall its recommendations on whistleblowing in 2006¹² and suggest the Commission to take into account the lines and safeguards provided in this opinion when drafting its implementing measures.

3. Data retention period

The regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) contains several provisions concerning data retention period for personal data. As per market sounding reports (Art. 11.8), insider lists (Art. 18.5) and publication of sanctions decisions (Article 34.3), we find identical wording setting an obligation to keep or publish personal data “*for a period of at least five years*”.

However, this wording setting only a minimum data retention period is insufficient to be considered in line with the general data protection rule (Art. 6 of Directive 95/46/EC) requiring setting a maximum data retention period. To this end, it would be useful to put in place a monitoring mechanism to guarantee that the data are not kept longer than necessary. In this view, the working party recommends to the Commission to complement the wording of its implementing acts with additional specific wording in order to set the maximum data retention period (e.g. : “*and for no longer than ...*”).

4. Data subject rights

The Working Party recommends taking strongly into account the data subject rights, especially when data are transmitted (Art. 25 of Directive 95/46/EC). To this end, the working party suggest that the Commission adds specific wording on this issue in its implementing acts.

5. The need for consistent Data security provisions

As mentioned above, the Working Party recommends that the Commission consider adding specific wording in its implementing acts recalling obligations of data controller to ensure confidentiality and security of personal data by appropriate measures.

Finally, the Working Party would like to underline that the possible impact of the coming new data protection Regulation and Directive should be assessed and taken into account by the Commission when drafting its implementing measures.

¹² See Opinion WP 177 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crimes. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf