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Commission Implementing Regulation (EU) 2018/292 of 26 February 2018 laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (Text with EEA relevance)

COMMISSION IMPLEMENTING REGULATION (EU) 2018/292

of 26 February 2018

laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse

(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/EC[(1)], and in particular Article 25(9) thereof,

Whereas:

(1) In order to ensure that authorities designated as competent authorities under Regulation (EU) No 596/2014 are able to cooperate and exchange information in an efficient and timely manner and provide each other full mutual assistance for the purposes of that Regulation, it is appropriate to set out common procedures and forms to be used by competent authorities for exchange of information and assistance, including for the submission of requests for assistance, acknowledgments of receipts and replies to such requests.

(2) The exchange of written information should assist a competent authority in fulfilling its duties. Oral communication may take place, where appropriate, including before a written request is sent, to provide information about an upcoming request for assistance and to discuss any issues that may impede the assistance being provided. In urgent cases, a request for assistance should also be permitted to be communicated orally, where the urgency is not due to late action by the requesting party.

(3) Regulation (EU) No 596/2014 establishes that competent authorities are to exchange information and provide assistance. However, requests for assistance should, to the extent possible, include the taking of a statement or carrying out an on-site inspection or an investigation, only in cases where a simple request for exchange of information would not be sufficient. Prior to filing a request for assistance to a competent authority of another Member State, a competent authority is expected to have undertaken all actions

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reasonably practicable in its own jurisdiction, noting though it may not be reasonably feasible for this authority to have exhausted all the methods of enquiry prior to the request.

(4) Unsolicited assistance should be provided in accordance with Regulation (EU) No 596/2014, including on a voluntary basis when the competent authority of a Member State considers that information in its possession may be of use for another competent authority.

(5) A request for assistance pursuant to Regulation (EU) No 596/2014 should provide sufficient information about the subject matter of the request, including the reason for the request and its context, to enable the requested authority to process the request efficiently and expediently. Indicating the facts giving rise to the suspicion should not be considered as a precondition for a requesting authority to receive assistance where the requested information is necessary for the authority to fulfil its duties.

(6) Beyond the use of forms for requesting and replying to a request for assistance, the procedures for cooperation should allow and facilitate the communication, consultation and interaction between the requesting authority and the requested authority, throughout the process, to ensure an efficient processing of a request for information or assistance. These procedures should also allow competent authorities to provide each other with feedback on the usefulness of the information or assistance received, on the outcome of the case in relation to which the assistance was sought and on any problems encountered in providing such information or assistance.

(7) The procedures and forms for the exchange of information and assistance should ensure the confidentiality of the information exchanged or transmitted and compliance with the rules on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

(8) This Regulation is based on the draft implementing technical standards submitted by ESMA to the Commission.

(9) ESMA did not conduct open public consultations on the draft implementing technical standards on which this Regulation is based, nor did it analyse the potential related costs and benefits of introducing the procedures and forms to be used by the relevant competent authorities, as this would have been disproportionate in relation to the scope and impact of those standards, taking into account that their addressees would only be the national competent authorities of the Member States and not market participants.

(10) 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 Council[(2)].

(11) To ensure the smooth functioning of the financial markets and considering that Regulation (EU) No 596/2014 is already in application, it is necessary for this Regulation to enter into force and apply immediately,

HAS ADOPTED THIS REGULATION:

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Article 1

Definition

For the purposes of this Regulation, 'secure electronic means' are means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio, optical technologies, or any other electromagnetic means that ensure that completeness, integrity and confidentiality of the information are maintained during the transmission.

Article 2

Contact points

1 Competent authorities shall designate contact points for the purposes of this Regulation.

2 Competent authorities shall communicate the details of the contact points to the European Securities and Markets Authority (ESMA) within 30 days of this Regulation entering into force. They shall provide updated information to ESMA as necessary.

3 ESMA shall maintain a list of the contact points designated by competent authorities pursuant to paragraph 1 and update that list as necessary for the use of the competent authorities.

Article 3

Request for assistance

1 A requesting authority shall make a request for assistance in writing by post, fax or by secure electronic means. It shall address the request to the contact point designated by the requested authority pursuant to Article 2.

2 When requesting assistance, a competent authority shall use the form set out in Annex I and shall:

a specify the details of the relevant information that the requesting authority is seeking from the requested authority;

b identify, where appropriate, issues relating to the confidentiality of the information that may be obtained.

3 The requesting authority may attach to the request any document or supporting material deemed necessary to support the request.

4 In urgent cases, the requesting authority may make a request for assistance verbally. Unless the requested authority agrees otherwise, that oral request shall subsequently be confirmed in writing without undue delay by using the means referred to in paragraph 1.

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Article 4

Acknowledgment of receipt

Within 10 working days of receipt of a written request for assistance, a requested authority shall send an acknowledgement of receipt by post, fax or secure electronic means to the contact point designated pursuant to Article 2, unless otherwise specified in the request. This acknowledgement of receipt shall be made by using the form set out in Annex II and shall include, where possible, the indication of an estimated date of response.

Article 5

Reply to a request for assistance

1 The requested authority shall reply to a request for assistance in writing by post, fax or secure electronic means. The reply shall be addressed to the contact point designated pursuant to Article 2, unless otherwise specified in the request.

2 The requested authority shall reply to the request for assistance using the form set out in Annex III and shall:

a request further clarifications in any form and as soon as possible where it has any doubt in relation to the precise information requested;

b take all reasonable steps within the scope of its powers to provide the assistance requested;

c execute requests for assistance without delay and in a manner which ensures that any necessary regulatory action proceeds expediently, taking into account the complexity of the request and the necessity to involve third parties or another competent authority.

3 Where the requested authority refuses to act, in full or in part, upon a request for assistance, it shall inform the requesting authority as soon as possible of its decision, verbally or in writing. The requested authority shall also provide a written reply made in accordance with paragraph 1 that indicates which of the exceptions under Article 25(2) of Regulation (EU) No 596/2014 it has relied upon for its refusal.

Article 6

Procedures for sending and processing a request for assistance

1 The requesting authority and the requested authority shall communicate in relation to a request for assistance and its reply by the most expedient means, taking due account of confidentiality considerations, correspondence times, the volume of material to be communicated and the ease of access to the information by the requesting authority. In particular, the requesting authority shall respond promptly to any clarifications requested by the requested authority.

2 When the requested authority becomes aware of circumstances that may lead to a delay in its estimated date of response of more than 10 working days, it shall notify the requesting authority without undue delay.

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3 Where appropriate, the requested authority shall provide regular feedback regarding progress of the pending request, including revised estimates of the targeted date of reply to the requesting authority.

4 Where the request has been qualified by the requesting authority as urgent, competent authorities shall consult each other on the frequency with which the requested authority will update the requesting authority.

5 The requested authority and the requesting authority shall cooperate in order to resolve any difficulties that may arise in executing a request.

Article 7

Procedure for requests for taking a statement from a person

1 Where the requesting authority includes within its request the taking of a statement of any person in the context of an investigation or an inspection, the requested authority and the requesting authority shall, subject to existing legal limitations or constraints and any differences in procedural requirements, assess and take into account the following:

a the rights of the persons from whom the statements will be taken including, where applicable, any self-incrimination issues;

b the nature of the participation of the requesting authority's staff (observer or active participant);

c the role of the staff of the requested authority and the requesting authority in the taking of the statement;

d whether the person from whom the statement is to be taken has the right to be assisted by a legal representative and, if so, the scope of the representative's assistance during the taking of the statement including in relation to any records or report of the statement;

e whether the statement is to be taken on a voluntary or compelled basis, where that distinction exists;

f whether, based on the information available at the time of the request, the person from whom the statement is to be taken is a witness or a suspect where that distinction exists;

g whether, based on the information available at the time of the request, the statement could be or is intended to be used in criminal proceedings;

h the admissibility of the statement in the requesting authority's jurisdiction;

i the recording of the statement and the applicable procedures, including whether it will be contemporaneous or summarised written minutes or an audio or audiovisual recording;

j procedures on the certification or confirmation of the statement by the persons providing the statement, including whether that takes place after the statement is taken; and

k the procedure for transmitting the statement by the requested authority to the requesting authority, including the format and timing.

2 The requested authority and the requesting authority shall ensure that arrangements are in place for their staff to proceed efficiently, including arrangements to enable their staff to agree on any additional information that may be necessary, including the following:

a planning of dates;

b the list of questions to be asked to the person from whom the statement is to be taken;

c travelling arrangements, including ensuring that the requested authority and the requesting authority are able to meet to discuss the matter prior to the taking of the statement; and