

EDPS comments on the European Securities and Markets Authority (ESMA) draft internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of ESMA

1. Introduction

- These comments refer to the draft European Securities and Markets Authority (ESMA) draft internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of ESMA (hereinafter ‘the draft internal rules’). Our comments refer to the document submitted on 30 April 2019.
- We give these comments in accordance with Article 41(2) of Regulation (EU) 2018/1725 (hereinafter ‘the Regulation’)¹.

2. General comments

- The EDPS takes note that the rules are written in a **clear and precise way**. We particularly welcome that ESMA differentiates between restrictions in the context of its administrative functioning and the exercise of its missions.
- Concerning the right to information, we take note that ESMA is going to publish data protection notices on its website and intranet informing all data subjects of the potential restrictions of their rights related to personal data processing.
- The EDPS also welcomes the fact that ESMA will perform a **necessity and proportionality test** on the need for the restriction of data subjects’ rights, according to several provisions of the internal rules.

3. EDPS recommendations

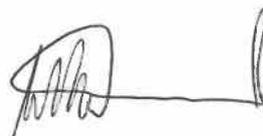
- The EDPS **calls for limiting the grounds for restriction listed in Article 3 of the draft internal rules**. These grounds **should only reflect the specific processing operations, as justifying the restrictions**. The reference to all grounds listed in Article 25 of the Regulation should be limited to those justified in the light of specific processing operations performed by ESMA, linking each specific purpose of processing with the applicable ground for restricting data subjects’ rights.
- The EDPS takes note that a necessity and proportionality test is provided in the draft internal rules. However, the wording of Article 3 (3) of the draft internal rules implies that such test assesses whether given restriction is proportionate to the risks to the rights and freedoms of data subject. The **EDPS underlines that the necessity and proportionality test will imply assessing the risks to the rights and freedoms of the data subjects, but is broader than that assessment: it is about assessing whether the risks caused by the restriction are justified and proportionate in the light of the right or interest that the restriction is intended to protect**. As such, the necessity and proportionality criterion aims at balancing the scope of the restriction of the fundamental right at stake. **Changing the**

¹ OJ L 295, 21.11.2018, p. 39.

sentence “Any restriction shall be necessary and proportionate to the risks to the rights and freedoms of data subjects” to “Any restriction shall be necessary and proportionate taking into account the risks to the rights and freedoms of data subjects [...]” would help to clarify this. This recommendation follows from the general principle that any limitation on the exercise of the fundamental rights protected by the Charter of Fundamental Rights of the European Union must be provided by law, respect the essence of the rights, genuinely meet objectives of general interest recognised by the Union or protect the rights and freedoms of others, be necessary and proportional.

- In relation to the necessity principle, the EDPS underlines that **restrictions should be temporary and be lifted when their causes no longer apply**. Therefore, the EDPS welcomes the fact that restrictions will be **reviewed every six months**, and reminds that in such cases a necessity/proportionality assessment should be conducted. Nevertheless, in some situations, ESMA will only assess the need to maintain a restriction on an annual basis, which appears to be too long. **Therefore, the EDPS urges ESMA to apply the six months review cycle in all situations.**
- Furthermore, reference to this review cycle should also be included in Article 6 (Right of access) and Article 7 (Right of rectification, erasure and restriction of processing) of the draft internal rules.
- According to the Article 4 of the draft internal rules, the DPO will be informed without undue delay of each restriction of the data subject’s rights applied pursuant to the internal rules and when the restriction has been lifted. The EDPS recommends ESMA to **document the involvement of the DPO** along all the procedures, and not only when applying or reviewing a restriction.

Brussels, 20 June 2019

A handwritten signature in black ink, consisting of a stylized, cursive name followed by a horizontal line.