

(To be filled out in the EDPS' office)
REGISTER NUMBER: 1344

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NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 24-11-2015

CASE NUMBER: 2015-1040

INSTITUTION: EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA)

LEGAL BASIS: ARTICLE 27-5 OF THE REGULATION CE N° 45/2001¹

INFORMATION TO BE GIVEN²

1/ NAME AND ADDRESS OF THE CONTROLLER

EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA).

103, RUE DE GRENELLE, 75007, PARIS

2/ ORGANISATIONAL PARTS OF THE INSTITUTION OR BODY ENTRUSTED WITH THE PROCESSING OF PERSONAL DATA

Human Resources (HR). Mr Andrea Lorenzet, HR Team Leader.

3/ NAME OF THE PROCESSING

Selection of confidential counsellors and informal procedure for cases of alleged harassment in ESMA

¹ OJ L 8, 12.01.2001.

² Please attach all necessary backup documents

4/ PURPOSE OR PURPOSES OF THE PROCESSING

Individuals considering themselves as victim of physiological and/or sexual harassment may request for assistance by contacting a confidential counsellor or HR. Confidential counsellor will guide and accompany the alleged victim examining with him/her the various options and structures that will help find a satisfactory solution to the problem.

In this respect personal data are processed during **two different phases**:

- 1) In the context of the selection procedure of the confidential counsellors in accordance with the ESMA Policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment as adopted by the Management Board on 18 June 2012 (ESMA/2012/MB/43). This policy is attached to this notification (Annex 1).
- 2) In the context of processes of cases of alleged harassment by the network of confidential counsellors under the informal procedure. Moreover in some cases, HR can deal directly with an alleged victim if, for example, he/she does not wish to be referred to a confidential counsellor.

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

With respect to the selection of confidential counsellors: ESMA Staff (Temporary/Contract Agent) and authorised facilitator for training the confidential counsellors.

As regards the informal procedure: ESMA Staff (Temporary/Contract Agent), Seconded National Experts (SNEs), Trainees, Consultant and Interim Staff.

Furthermore personal data are also processed by authorised persons within HR Team responsible for monitoring the implementation of the anti-harassment policy.

6/ DESCRIPTION OF THE DATA OR CATEGORIES OF DATA (*including, if applicable, special categories of data (Article 10) and/or origin of data*).

During the selection of the confidential counsellors the collection of personal data is aimed at best evaluating their aptitude and competences regarding their specific tasks to conduct informal

procedures in case of harassment. In particular the following categories of personal data can be processed:

Selection of the confidential counsellors:

- 1) **General personal data:** first name and surname, Job title, ESMA email address, phone number, employment details, education and training details.
- 2) **Special categories:** Usually special categories of data are not processed by ESMA in the context of the selection of confidential counsellors. However in case of spontaneous communication of sensitive it should be noted that candidates have given their express consent to the collection of these data and to their further processing (e.g. special categories of personal data included in the motivation letter).

Informal procedure:

Concerning the informal procedure it should be noted that there are two different categories of data to be processed:

- 1) **Objective data:** data qualified as objective, i.e. administrative and identification data, usually collected directly from the data subjects (by means of opening and closing forms). The opening form and the closing form are attached to this notification (Annexes 6 and 7). The collection of these data aims at the identification of the person, the management of historical records and most importantly at the identification of recurrent and multiple cases. To this effect the confidential counsellors complete an anonymous statistical record which is stored by the authorised persons in the HR Team in charge of dealing with this particular processing operation. The anonymous statistical record is attached to this notification (Annex 8).
- 2) **Subjective data:** data qualified as subjective, i.e. allegation and declaration based upon the subjective perceptions of data subjects, are usually collected by means of the personal notes of the counsellors. The general analysis of the collected personal data is always conducted on a case by case basis by the confidential counsellors in order to ensure that the relevant processing is adequate and relevant and not excessive in relation to the purpose.

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

In order to comply with the relevant obligations set out in Articles 11 and 12 of Regulation (EC) No 45/2001, ESMA provides the data subjects with a privacy statement including all the information outlined in the Articles referred to above.

In particular:

- 1) **Selection of the confidential counsellors:** in order for data subjects to submit their applications, they should first read a privacy statement (provided through a devoted link) recalling the content of Articles 11 and 12, and declare that they have read and understood it.

- 2) **Informal procedure:** alleged victims can have access to a specific privacy statement appearing on the web page informing on the network of confidential counsellors and their contact details. In addition during the initial meeting with the confidential counsellors, the privacy statement is also given to the relevant data subjects. The alleged harasser is also informed by the confidential counsellors, with the prior consent of the victim, of the existence of an informal procedure relating to him/her and provided with the relevant privacy statement. In some cases (for example in case the victim does not give his/her consent) relevant exemptions laid down in Article 20 of Regulation (EC) No 45/2001 (in particular point (c) of Article 20(1) and Article 20(5)) might apply. The assessment on whether an exemption is applicable is conducted on a case by case basis.

Both the relevant privacy statements referred to above are attached to this notification (Annexes 2 and 3).

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS

(Rights of access, to rectify, to block, to erase, to object)

Data subjects can exercise their rights under Articles 13, 14, 15 and 16 of Regulation (EC) No 45/2001 in the following way:

- 1) **Access and rectification:** the exercise of the rights of access and rectification is granted by the possibility of contacting by means of an email address accessible only to authorised persons within the HR Team in charge of the procedure (HR.Helpdesk@esma.europa.eu). As regards rectification the data subjects, in the context of the informal procedure, may request that further information is added to his/her individual file. Detailed procedure on how to exercise such rights is envisaged in Articles 10 and 11 of the Decision of the Management Board of ESMA on “*Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (as amended)* (ESMA/2011/MB/57)”.
- 2) **Blocking, erasure and objection:** the exercise of the rights to block, erase and object is granted by the possibility of contacting by means of an email address accessible only to authorised persons within the HR Team in charge of the procedure (HR.Helpdesk@esma.europa.eu). In particular Articles 12, 13 and 15 of the Decision of the Management Board of ESMA on “*Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (as amended)* (ESMA/2011/MB/57)” apply.

Possible restrictions as laid down in Article 20 of Regulation (EC) No 45/2001 can apply, based on an assessment conducted on a case by case analysis, in particular where it is necessary to safeguard the rights of the data subjects and/or the rights and freedom of others.

Decision of the Management Board of ESMA on “*Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with*

regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (as amended) (ESMA/2011/MB/57)" is attached to this notification (Annex 4).

9/ AUTOMATED / MANUAL PROCESSING OPERATION

ESMA collects and stores the personal data in automated and manual means.

In particular:

- 1) **Selection of the confidential counsellors:** all the applications of the candidates are collected and stored on papers and in electronic form. In particular applications forms are stored on a secure environment protected by a password. Access to it is limited to authorised persons in the HR Team in charge of dealing with the recruitment of the confidential counsellors. Access can be also provided to an authorised facilitator responsible for training the confidential counsellors. Application forms are also stored in locked cupboards and access to them is only granted to authorised persons in the HR Team in charge of dealing with the recruitment of the confidential counsellors.
- 2) **Informal procedure:** Objective and subjective data collected by the confidential counsellors during the informal procedure are collected and stored on papers and in electronic form. In particular a specific folder is created to store the forms and any other relevant document prepared by the confidential counsellors. Access to this folder will be granted only to the confidential counsellors. Forms and any other relevant document can be also stored in a locked cupboard accessible to the confidential counsellors only.

10/ STORAGE MEDIA OF DATA

Personal data are processed through automated and manual means. In particular:

- 1) Paper documents.
- 2) Electronic documents (files stored on devoted and restricted folder on in a secure environment protected by a password).

11/ LEGAL BASIS AND LAWFULNESS OF THE PROCESSING OPERATION

As regards the selection of confidential counsellors and their prerogatives to conduct the informal procedure: Article 12 (a) of the Staff Regulations and Article 11 of the Conditions of Employment of Other Servants.

In addition, Articles 1 and 31(1) of the EU Charter of Fundamental Rights complement the legal basis. The Charter states that every worker has the right to working conditions which respect his or her dignity.

ESMA Policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment as adopted by the Management Board on 18 June 2012 (ESMA/2012/MB/43). This policy is attached to this notification (Annex 1).

Moreover in submitting their applications for the selection of the confidential counsellors, data subjects provide their unambiguous consent to the processing of personal data (as stated in point (d) of Article 5 of Regulation (EC) No 45/2001.

12/ THE RECIPIENTS OR CATEGORIES OF RECIPIENT TO WHOM THE DATA MIGHT BE DISCLOSED

In the context of the processing operation at stake, personal data may be disclosed to different recipients and categories.

In particular:

- 1) **Selection of the confidential counsellors:** during the recruitment the data are disclosed to the following categories of persons: - members of the selection panel; - authorised members of the HR Team in charge of dealing with the recruitment of the confidential counsellors; - Appointing Authority of ESMA; - authorised facilitator responsible for training the confidential counsellors.
- 2) **Informal procedure:** data are disclosed to the following categories of recipients: - confidential counsellors; - alleged victim; - alleged harasser; authorised members of the HR Team in charge of dealing with the informal procedure in the cases where the alleged victim does not wish to be referred to a confidential counsellor. Furthermore, HR and the confidential counsellors may have to share some information with third parties (e.g. Medical Advisor or Security Officer). This transmission will be restricted to the information necessary for those persons to carry out their tasks.

Recipients outside ESMA, if requested (European Union institutional bodies):

- OLAF.
- Court of Justice of the European Union.
- European Ombudsman.
- Legal representative of the alleged victim or harasser.

- Data Protection Officer and the European Data Protection Supervisors if questions falling within their scope of action arise.

13/ RETENTION POLICY OF (CATEGORIES OF) PERSONAL DATA

ESMA applies the following retention periods:

- 1) **Selection of the confidential counsellors:** application forms of the appointed confidential counsellors are kept for the duration of their mandate. Application forms of the unsuccessful applicants are destroyed one year after the appointment decision.
- 2) **Informal procedure:** The confidential counsellors do not keep any personal data beyond the time limit necessary for them to accomplish their tasks (i.e. two months). A historical record of all cases dealt with under the informal procedure will be kept by authorised HR team members for a maximum period of 5 years from the date of the end of the informal procedure. Data might be stored for a further period of 5 years if judicial or administrative procedure requiring this documentation is still ongoing when the first term expires.

If the alleged victim does not give the consent to inform the alleged harasser about the existence of an informal procedure, no personal data (i.e. objective and subjective data) are kept by the confidential counsellors or the HR Team.

13 A/ TIME LIMIT TO BLOCK/ERASE ON JUSTIFIED LEGITIMATE REQUEST FROM THE DATA SUBJECTS

With particular reference to this point ESMA follows the procedures laid down in Article 12 and Article 13 the Decision of the Management Board of ESMA on “*Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (as amended)* (ESMA/2011/MB/57)”.

Decision of the Management Board of ESMA on “*Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (as amended)* (ESMA/2011/MB/57)” is attached to this notification (Annex 4).

(Please, specify the time limits for every category, if applicable)

14/ HISTORICAL, STATISTICAL OR SCIENTIFIC PURPOSES

If you store data for longer periods than mentioned above, please specify, if applicable, why the data must be kept under a form which permits identification.

Data for statistical purposes are kept for an unlimited term after being rendered anonymous.

15/ PROPOSED TRANSFERS OF DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

N/A

16/ THE PROCESSING OPERATION PRESENTS SPECIFIC RISK WHICH JUSTIFIES PRIOR CHECKING (Please describe):

The processing operation at stake falls within the scope of points (a) and (b) of Article 27(2) of Regulation (EC) No 45/2001.

In particular:

- 1) for the ***selection of confidential counsellors***, an evaluation of the applicants' ability to perform the function, and possibly processing operations related to health;
- 2) for the ***informal procedure***, an evaluation of the data subjects' conduct and possibly processing operations related to their health.

AS FORESEEN IN:

Article 27.2.(a)

Processing of data relating to health and to suspected offences, offences, criminal convictions or security measures,

1 Article 27.2.(b)

Processing operations intended to evaluate personal aspects relating to the data subject,

17/ COMMENTS

N/A

18/ MEASURES TO ENSURE SECURITY OF PROCESSING³ :

PLACE AND DATE:

(ACTING) DATA PROTECTION OFFICER:

Ms. SOPHIE VUARLOT-DIGNAC.

INSTITUTION OR BODY: EUROPEAN SECURITIES AND MARKETS AUTHORITIES (ESMA).

ANNEXES

1. Policy on protecting the dignity of the persons and preventing physiological harassment and sexual harassment (ESMA/2012/MB/43).
2. Privacy statement for the selection of the confidential counsellors
3. Privacy statement for the informal procedure.
4. Decision of the Management Board of ESMA on “*Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (as amended)*” (ESMA/2011/MB/57”).
5. Classified documents handling procedure (ESMA/2014/INT/168)
6. Opening form
7. Closing form
8. Anonymous statistical record

³ Not to be published in the EDPS' Register (Art. 27(5) of Regulation (EC) N°: 45/2001)

9.

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EDPS OPINION

OF DATE:

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FOLLOW UP (in case of acting measures to be taken)