

# Final Report

Review of the ITS on cooperation in supervisory activities under MiFID II

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## 1 Executive Summary

### Reasons for publication

Articles 80 and 81 of Directive 2014/65/EU set out obligations for competent authorities to cooperate in supervisory activities, on-site verifications, inspections and in exchanging information.

In order to ensure that competent authorities are able to cooperate and exchange information in an efficient and timely manner for the purposes of Directive 2014/65/EU and provide each other full mutual assistance, it is appropriate to lay down procedures as well as templates and forms to be used by competent authorities for such cooperation and exchanges of information, including for the submission of requests for cooperation or exchange of information, acknowledgements of receipt and replies to such requests.

On 7 June 2017, the European Commission published the implementing regulation (EU) 2017/980 laying down implementing technical standards regarding standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities in accordance with Directive 2014/65/EU of the European Parliament and of the Council (hereafter, the “ITS”).

ESMA has worked on ensuring the consistent application of MiFID II and its implementing measures, including the ITS. The practical implementation of the freedom to provide services under Article 34 of MiFID II (FPS) combined with the development of the single market and the digitalisation of financial services showed some shortcomings and highlighted instances where improvements could usefully be made to the ITS to better help national competent authorities (NCAs) to fulfil their supervisory objectives through cooperation.

### Contents

This final report consists of two chapters, covering: (i) the background information on ESMA’s legal mandate to develop the draft ITS and (ii) the analysis of the proposal for the draft ITS. The final report also includes in the annexes the full text of the amended draft ITS.

### Next Steps

In accordance with Article 15 of the ESMA Regulation<sup>1</sup>, ESMA did not conduct open public consultations on the draft ITS, nor did it analyse the potential related costs and benefits of amending the existing ITS, as this would be highly disproportionate in relation to the scope

of those standards, taking into account that their addressees are solely the competent authorities of the Member States and not market participants, and their limited financial impact.

The amended draft implementing technical standards will be submitted to the European Commission. The Commission has three months to decide whether to endorse the implementing technical standards. The Commission may extend that period by one month.

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<sup>1</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

## 2 Background

1. In monitoring the provision of investment services across the EU to retail clients, ESMA and NCAs have noted the continued increase in cross-border activities. This increase results from several factors, including the development of the single market and the digitalisation of financial services, which further facilitates firms to provide services across borders. The pandemic has also created conditions that contributed to an increase in retail investors' exposure to securities markets, including cross-border.
2. The increase in cross-border services has clear benefits for consumers and investment firms, as it fosters competition, expands the offer available to consumers and the market for firms. This is a welcome development, consistent with the objective to develop the single market for financial services in the EU. At the same time, these developments clearly require NCAs to increase their focus on the supervision of cross-border activities and on cooperation. A development of cross-border activities which is not accompanied by increased cooperation between NCAs and supervisory focus risks undermining investors' trust and backfiring on the achievement of the single market.
3. The changes introduced to the ITS aim at facilitating a more expeditious exchange among competent authorities. To that end, the revised technical standards introduce clear deadlines for responses both to urgent and non-urgent requests for information.

## 3 Analysis

4. The existing ITS does not set specific procedures for and to reply to urgent and non-urgent requests for cooperation or exchange of information. Only limited differences are made in the existing ITS between non-urgent and urgent requests.
5. For non-urgent requests, the requesting authority indicates an indicative date for the reply. For urgent requests, the requesting authority indicates a deadline (see Annex I (*Form for a request for cooperation or exchange of information*) of the existing ITS).
6. Article 4(2) provides that all requests (urgent and non-urgent) shall be executed so that any necessary regulatory action shall proceed without undue delay. However, Article 2(2) of the existing ITS acknowledges that, in urgent cases, the requesting NCA may make the request for cooperation or exchange of information verbally, provided that subsequent confirmation of the request is made in writing within a reasonable timeframe (unless the requested authority agrees otherwise).
7. The revised ITS distinguish between urgent and non-urgent requests and introduces clear deadlines to respond to each.

*Non-urgent requests for cooperation or exchange of information*

8. Article 4 of the existing ITS sets forth the procedures to respond to all requests for cooperation or exchange of information. The key change introduced is that Article 4 will now only deal with non-urgent requests as a new Article 5a is being introduced regarding the procedures relating to urgent requests.
9. Article 4(1) now sets forth a clear deadline for responses, namely two months from the receipt of the request.
10. Consequently, Article 4(2) of the existing ITS has been replaced with a new Article 4(2) to the effect that the response provided within the 2 months period shall be precise and comprehensive in substance. This is to encourage requested NCAs to provide meaningful responses within the new deadline provided in the revised ITS.
11. However, ESMA acknowledges that a requested authority may, in certain instances, be unable to respond within the set timeframe for reasons out of its control such as legal limitations or because it is awaiting an answer from another authority (for instance, a judicial authority). Thus, new paragraph 3 of Article 4 provides for the requested authority faced with the impossibility to respond to a request for cooperation or exchange of information within 2 months to immediately notify the requesting authority of the anticipated delay and of the estimated date of its response, together with an explanation of the delay.

*Urgent requests for cooperation or exchange of information*

12. New Article 5a of the ITS sets forth the procedures to be followed for urgent requests and to respond to urgent requests for cooperation or exchange of information:
13. Article 5a(1) specifies the circumstances where a requesting authority is justified in making an urgent request for cooperation or exchange of information: where a response is needed promptly to stop or prevent significant harm or potential significant harm to investors or the stability of or trust in the financial system. Some examples of what types of scenarios this may cover are provided in the recitals to the draft Commission implementing regulation amending the existing ITS.
14. To avoid requests being characterised as urgent frivolously, Article 5a(2) provides that the reasons for the urgency be explained, in a clear and demonstrable manner, in the request itself.
15. Paragraphs 3 and 4 of Article 5a then relate to the means of communication between NCAs in relation to an urgent request and how to respond to it, giving NCAs the possibility

to provide the request as well as its response verbally. Subsequent written confirmation must however be made within a certain period (5 working days for the request under Article 5a(3) and 20 working days for the response under Article 5a(4)).

16. Article 5a(5) sets the specific deadline to respond to urgent requests for cooperation or exchange of information: as soon as possible and, in any event, within 7 working days from the date of the receipt of the request.
17. However, Article 5a(6) acknowledges that there may be circumstances preventing the requested NCA from providing a precise and comprehensive answer to an urgent request within 7 working days. There may be legal restrictions, or the requested information may need to be obtained from a different authority. In such cases, the requested authority shall explain the reasons for its impossibility to comply with the deadline and shall, nonetheless, deliver all other requested information which transmission is not subject to legal restrictions or other impediment within the period otherwise set forth in Article 5a(5). In addition, a requested authority may need to further substantiate information provided within the deadline set forth in Article 5a(5). In such case, the requested authority shall back up, correct or complement the preliminary response within 20 working days from the original request.
18. In Article 6, some changes have been introduced to allow requested and requesting NCAs to prepare more efficiently in case of a request for taking a statement from a person: Article 6(2)(c) also refers to teleconferences (not only to travelling arrangements) and Article 6(2)(d) now refers to “language arrangements”, which is broader than “translation arrangements” used in the existing ITS.
19. Annexes I and II of the ITS have been amended to reflect the changes made to the procedures.

*ESMA binding mediation in accordance with Article 82 of MiFID II*

20. Lastly, it is worth mentioning that i) where requesting and requested NCAs do not agree on whether a request for cooperation or exchange of information should be characterised as urgent or ii) where a request (urgent or non-urgent) is not acted upon within the applicable deadline, ESMA binding mediation in accordance with Article 82 of MiFID II may be called upon.

## 4 Annexes

### 4.1 Annex I

#### **Legislative mandate to develop implementing technical standards**

##### Article 80(4)

ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for competent authorities to cooperate in supervisory activities, on-site verifications, and investigations.

##### Article 81(4)

ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the exchange of information.



## 4.2 Annex II

**Draft implementing technical standards with regard to standard forms, templates and procedures for cooperation in supervisory activities, on-site verifications, and investigations and exchange of information between competent authorities in accordance with Directive 2014/65/EU of the European Parliament and of the Council**

**COMMISSION IMPLEMENTING REGULATION (EU) .../...**

**of [•]**

**amending Implementing Regulation (EU) 2017/980 of 7 June 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities in accordance with Directive 2014/65/EU of the European Parliament and of the Council**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU<sup>2</sup>, and in particular the third subparagraph of Articles 80(4) and 81(4) thereof,

Whereas:

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<sup>2</sup> OJ L 173, 12.6.2014, p. 349.

- (1) Commission Implementing Regulation (EU) 2017/980<sup>3</sup> provides for the common standard forms, templates and procedures for the cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities.
- (2) Since the adoption of Implementing Regulation (EU) 2017/980, cross-border services have increased due in part to market conditions resulting from the COVID-19 pandemic and the trend towards the digitalisation of financial services. The increased volume of cross-border services has given competent authorities additional experience of the cooperation between home and host authorities.
- (3) In view of this experience, to ensure a smooth, expeditious and meaningful provision of assistance and exchange of information among national competent authorities, it is necessary to further specify certain particulars of the process relating to the cooperation and exchange of information referred to in Articles 80 and 81 of Directive 2014/65/EU.
- (4) In particular, it is appropriate to include different procedures and deadlines in respect of non-urgent and urgent requests for cooperation or exchange of information to ensure that competent authorities receive the assistance or information that they need within a reasonable time, failing which the European Securities and Markets Authority (ESMA) may be requested to carry out binding mediation in accordance with Article 82 of Directive 2014/65/EU.
- (5) Urgent requests for cooperation or exchange of information may be sent where a response is needed promptly to permit the requesting authority to take action to stop or prevent significant harm or potential significant harm to investors or the stability of or trust in the financial system. This would cover cases where, for instance, the competent authority of a host Member State recently obtained evidence showing that a firm authorised in another Member State is aggressively marketing highly complex and/or risky products which are not suitable for retail clients. Urgent requests shall also cover cases where a competent authority of a host member state has received many complaints relating to a firm authorised in another Member State or where a competent authority has reasons to believe that a firm authorised in another Member State, but operating in its jurisdiction, is at risk of insolvency, which may affect investors in its jurisdiction or the stability of financial markets.

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<sup>3</sup> *Commission Implementing Regulation (EU) 2017/980 of 7 June 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities in accordance with Directive 2014/65/EU of the European Parliament and of the Council (OJ L 148, 10.06.2017, p. 3).*

- (6) Urgent requests, like the aforementioned examples, should be limited to situations where the requesting authority urgently requires the cooperation of the requested authority or the exchange of information in order to adopt the appropriate measures, including to alert another authority.
- (7) To improve supervision and further the effective enforcement of Directive 2014/65/EU, closer cooperation between requesting and requested authorities may be warranted in certain cases . This would cover cases where, for instance, a firm has the majority of its clients in a host Member State or has outsourced critical or important operational functions to a Member State that is not its Member State of establishment.
- (8) Implementing Regulation (EU) 2017/980 should therefore be amended accordingly.
- (9) This Regulation is based on the draft implementing technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (10) ESMA did not conduct open public consultations on the draft implementing technical standards on which this Regulation is based and did not analyse the potential related costs and benefits of introducing the standard forms, templates and procedures to be used by the relevant competent authorities, as this would have been highly disproportionate in relation to the scope of those standards, taking into account that their addressees would only be competent authorities and would not affect financial market participants, and their limited financial impact.
- (11) ESMA has requested the advice 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<sup>4</sup>,

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<sup>4</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

*Article 1*

**Amendments to Implementing Regulation (EU) 2017/980**

Implementing Regulation (EU) 2017/980 is amended as follows:

- (1) in Article 1(1), the second sentence is deleted;
- (2) in Article 2, paragraph 2 is deleted;
- (3) Article 4 is replaced by the following:

‘Article 4

Reply to a request for cooperation or exchange of information

1. The requested authority shall execute requests for cooperation or exchange of information in a manner which ensures any necessary regulatory action shall proceed without undue delay and, at the latest, within two months from the date of receipt of the request. The response to a request for cooperation or exchange of information shall be done by electronic means or in paper form, using the form set out in Annex III. Unless otherwise specified by the requesting authority, the reply shall be addressed to the contact point of the requesting authority.

2. The requested authority’s response shall be precise and comprehensive.

3. Where the requested authority is not capable of providing the requesting authority with a precise and comprehensive answer within the two-month period mentioned in paragraph 1, the requested authority shall immediately notify the requesting authority of the reasons for the delay and of the estimated date of its response, using the form set out in Annex II.’;

- (4) Article 5 is amended as follows:

- i) the following sentence is added at the end of paragraph 1:

‘Where the requesting authority attaches to the request for cooperation or exchange of information any document or supporting material in accordance with Article 2(3) and where such document or supporting material is not in any of the official languages of the Member State of the requested authority, the requesting authority shall also provide with the request a translation of such document or

supporting material, or a summary of such document or supporting material, in a language that is customary in the sphere of international finance.

ii) paragraph 2 is replaced by the following:

‘2. Where the request justifies closer cooperation between the requesting and the requested authority, the requested authority and the requesting authority shall agree on the frequency with which the requested authority will update the requesting authority on its handling of the request. Closer cooperation may take the form of regular calls, teleconferences or updates in writing, or be achieved by any other means agreed between the requesting and the requested authority to further the effective enforcement of Directive 2014/65/EU. The requested authority also endeavours to provide the requesting authority, as soon as practicable, with any meaningful updates gathered prior to the end of the period provided in paragraph 1 of Article 4.’;

iii) Paragraph 3 is deleted;

(5) The following article is inserted:

*‘Article 5a*

**Urgent requests for cooperation or exchange of information**

1. By way of derogation from Articles 2 to 5, the procedure in this Article shall apply to urgent requests for cooperation or exchange of information. Urgent requests are such requests where a response is needed promptly to enable the requesting authority to take action to stop or prevent significant harm or potential significant harm to investors or the stability of or trust in the financial system.

2. The requesting authority shall set forth, in a clear and demonstrable manner, the reasons for the urgency of the request, using the form set out in Annex I. If the requested authority disagrees with the urgency of the request, it shall set forth its reasons, in a clear and demonstrable manner, within 3 working days of the receipt of the request, using the form set out in Annex II.

3. In urgent requests, the requesting authority may make the request for cooperation or exchange of information in any form, including verbally, provided that subsequent confirmation of the request is made by electronic means or in paper form by the requesting authority, using the form set out in Annex I and no later than 5 working days from the receipt of the request, unless the requested authority agrees otherwise.

4. The requested authority may provide the response in any form, including verbally, provided that subsequent confirmation of the response is made in paper form or by

electronic means, using the form set out in Annex III and no later than 20 working days from the receipt of the request, unless the requesting authority agrees otherwise.

5. Urgent requests shall be responded to as soon as possible and, in any event, within seven working days from the date of the receipt of the request, using the form set out in Annex III.

6. Responses to urgent requests shall be precise and comprehensive. By way of derogation from the obligation referred to in paragraph 5:

(a) where the requested authority is unable to provide the requesting authority with a precise or comprehensive reply due to the need to further substantiate the information provided in the reply made in accordance with the time period referred to in that paragraph, the requested authority shall deliver that information within 20 working days from the date of the receipt of the original request, using the form set out in Annex III;

(b) where the requested authority is unable to provide the requesting authority with a precise or comprehensive reply due to data protection laws, confidentiality obligations, other legal restrictions or where the requested information must be obtained from a different authority, the requested authority shall:

(i) immediately notify the requesting authority of the reasons of the delay and of the estimated date of its precise and comprehensive response, using the form set out in Annex II;

(ii) provide the requesting authority with all other requested information that is not subject to those restrictions within the time periods referred to in paragraph 5 and, where applicable, point (a) of this paragraph, using the form set out in Annex III;

(6) in Article 6, points (c) and (d) of paragraph 2 are replaced with the following:

‘(c) dates and times for teleconferences or, where needed, 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;

(d) language arrangements.’

(7) Annex I of Implementing Regulation (EU) 2017/980 is replaced with Annex I of this Regulation;

(8) Annex II of Implementing Regulation (EU) 2017/980 is replaced with Annex II of this Regulation.

*Article 2*

**Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

[For the Commission

The President]

[On behalf of the President]

**ANNEX I**

**Form for a request for cooperation or exchange of information**

Request for cooperation or exchange for Information

Reference number:

Date:

**General Information**

FROM:

Member State:

Requesting Authority:

Address:

(Contact details of the contact point)

Name:

Telephone:

Email:

TO:

Member State:

Requested Authority:

Address:



(Contact details of the contact point)

Name:

Telephone:

Email:

Dear [*insert appropriate name*]

In accordance with Article(s) [80/81 <sup>(5)</sup>] of Directive 2014/65/EU your input is sought in relation to the matter(s) set out in further detail below.

I would be grateful to receive a response to the above request within [two months (non-urgent requests) or seven working days (urgent requests)] from the receipt of this request.

#### **Type of Request**

Please tick the appropriate box(es)

Supervisory Activities (provision of information, taking of a statement, other)

Investigation

On-site verification

#### **Urgency of Request**

Please tick the appropriate box

Non-urgent request

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<sup>5</sup> Please insert relevant Article of Directive 2014/64/EU.

Urgent request

The [requesting authority] requests the [requested authority] to consider this request as urgent for the following reasons:

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.....  
.....  
.....  
.....

*[please provide, in a clear and demonstrable manner, the reasons underlying the urgency of the request, including if the request was initially made verbally]*

**Reasons for the Request**

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.....  
.....  
.....  
.....

*[insert provision(s) of the sectoral legislation i) under which the requesting authority is competent to deal with the matter and ii) those which may potentially be infringed.]*

The request concerns cooperation or exchange of information on

.....  
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.....  
.....  
.....  
.....  
.....  
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.....

*[insert the description of the subject matter of the request, the purpose for which the cooperation or exchange of information is sought, facts underlying the investigation which form the basis of the request and explanation for its helpfulness]*

Further to

.....  
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.....  
.....  
.....  
.....

*[if applicable, insert details of the previous request in order to enable it to be identified]*

**Supervisory Activities (provision of information, taking of a statement)**

Please provide a detailed description of the specific information sought with reasons why that information will be of assistance and, if known, a list of the persons considered possessing the information sought or the places where such information may be obtained.

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If the request concerns information relating to a transaction or order in a specific financial instrument, please provide the following information.

Product

ID:

.....  
.....

*[insert precise description of the financial instrument, including the ISIN code]*

Person

ID:

.....  
.....

[insert the identity of any person connected with the transaction or order, including a person dealing in the financial instrument or on whose behalf the dealing is considered to have taken place]

Dates:

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.....

[insert the dates between which transactions or orders in those financial instruments took place including in the case of a significant period of time, reasons why the entirety of the time period is beneficial]

If the request concerns information relating to the business or activities of a person, please provide information as precise as possible to enable that person to be identified.

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If there are special considerations on the sensitivity of the information sought, please provide an indication of the sensitivity of the information contained in the request and any special precautions that have to be taken in collecting the information due to investigatory considerations. Please also specify whether the requested authority may reveal the identity of the requesting authority.

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Please provide any additional information.

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[Whether the requesting authority has been or will be in contact with any other authority or law enforcement agency in our Member State in relation to the subject matter of the request or any other authority which the requesting authority is aware that has an active interest in the subject matter of the request]

**Taking of statement**

Please indicate:

a) Statement under: oath  /affirmation / in writing

b) Need and purpose of the taking of a statement and, where applicable, for requiring a statement under oath or affirmation:

.....  
.....  
.....  
.....

c) Name of person(s) from whom the statement is to be obtained:

.....  
.....  
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.....  
.....

[insert details of the persons from which the statement will be taken to enable the requested authority to begin summoning process where applicable]

d) Detailed description of the information sought, including a preliminary list of questions (if available at the time of the request).

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e) Any additional information which may be useful:

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[Whether the requesting authority's staff is requesting participation in the taking of the statement, details of the participating officials of the requesting authority, where appropriate, description of any legal and procedural requirements that must be complied with to ensure the admissibility of statements made in the interview in the jurisdiction of the requesting authority]

**On-site verification or investigation**

If the request concerns an on-site verification or investigation on behalf of the requesting authority, please provide information to enable the requested authority to assess whether it may have an interest in entering into a joint investigation, including the requesting authority's proposal for the verification or investigation, its reasoning and the benefits to the requested authority.

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*[including all relevant information required by the requested authority to enable the latter to provide the necessary assistance, as appropriate]*

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.....

*[Insert any necessary confidentiality warnings or any necessary restrictions on the permissible uses of information (in compliance with Union law)]*

Yours sincerely,

[signature]

## ANNEX II

### Form for the acknowledgement of receipt

#### Acknowledgement of receipt

Reference number:

Date:

FROM:

Member State:

Requested Authority:

Address:

(Contact details of the contact point)

Name:

Telephone:

Email:

TO:

Member State:

Requesting Authority:

Address:



(Contact details of the contact point)

Name:

Telephone:

Email:

Dear *[insert appropriate name]*

Following your request *[insert reference to request]* we hereby acknowledge receipt of your request for cooperation or request for information on *[insert date]*.

The *[requested authority]* will not be capable of responding within the deadlines set forth in *[Article 4(1)/5a(5)]* of Commission Implementing Regulation (EU) 2017/980 for the following reasons *[please, specify which exception/s is/are applicable in your situation (Article 4(3) or 5a(6)(a or b))]*:

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.....

*[In case the requested authority is not capable of responding within the deadlines set forth in Articles 4(1) and 5a(5) of Commission Implementing Regulation (EU) 2017/980, please provide reasons and the estimated date of response]*

The *[requested authority]* denies that the request received by the *[requesting authority]* on *[insert date]* should be considered as urgent for the following reasons:

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.....  
.....  
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.....  
.....

*[In case the requested authority disagrees with the urgency of the request, please provide reasons within the deadline set forth in Article 5a(2)]*

Yours sincerely,

[signature]