

23 June 2022

Circular on the Market Abuse Regulation (EU) 596/2014 ('MAR' or 'the Regulation') – Buy-Back Programmes

This circular is being addressed to issuers whose financial instruments are admitted to trading on a trading venue, or for which a request for admission to trading on a trading venue has been made.

1. What is a Buy-Back?

A buy-back allows an issuer to invest in its own financial instruments. Where an issuer has shares admitted to listing and trading, it may decide to carry out a share buy-back for several reasons, one of the most common being to increase the value of remaining shares available by buying its own shares, thereby reducing the number of shares available on the open market. Another common reason why an issuer may buy-back is for the purpose of compensating its employees and management with stock rewards and stock options¹.

A buy-back is not restricted to equity instruments but can also be carried out in respect of bonds, commonly referred to as bond repurchase or bond buy-back. Such repurchases are advantageous for issuers that wish to reduce their outstanding indebtedness.

2. General Observations in Relation to Buy-Backs Locally

Since the coming into force of MAR, there has been a considerable number of buy-backs taking place in locally listed securities. In the majority of cases, the buy-backs were carried out in bonds, with only a small number of buy-back programmes taking place in equities. This in turn implies that most buy-back programmes did not benefit from the safe harbour afforded by Article 5 of MAR. Indeed, even where issuers carried out buy-back programmes in relation to equity instruments, it appears that such issuers have nonetheless opted to conduct such buy-backs without complying with the requirements contained in Article 5 of MAR and Commission Delegated Regulation (EU) 2016/1052 (the 'Delegated Regulation'), hence choosing not to benefit from the exceptions to the prohibitions contained in Article 14 and 15 of MAR.

Although non-compliance with the exemption requirements of Article 5 does not automatically mean a breach of Article 14 or 15 of MAR, such buy-back must be examined independently in accordance with Article 14 and 15 to ensure that no such breach of the

¹ The main difference between a stock reward and a stock option is that in the case of a stock reward, the issuer's employee is granted the issuer's stocks as compensation, which based on the type of stock there might be a vesting period before the employee can fully own the stocks. On the other hand, a stock option gives the employee the right to buy the company's stocks in the future and at a certain price.

prohibition has taken place. The Authority is mindful that the requirements laid out in Article 5 of MAR and the Delegated Regulation may be difficult to fully comply with, and that within the local context the majority of the cases where issuers opt to carry out a buy-back program would still be outside the scope of Article 5 of MAR (e.g. bond buy-back). Nevertheless, the Authority urges market participants to comply with the conditions in relation to buy-back programmes stemming from the respective provisions to the extent possible in order to be in a better position to prove that no breach of MAR has taken place.

Accordingly, Section 3 of this circular is meant to provide market participants with an overview of the requirements which issuers have to follow to benefit from the safe harbour afforded by Article 5 of MAR. Issuers opting not to conduct a buy-back which fulfils the conditions contained in Article 5 and the Delegated Regulation, or buy-backs which do not fall within the scope of Article 5 of MAR are nonetheless encouraged to (where possible) comply with the relevant requirements in order to ensure market integrity and transparency across the local market.

3. Issuers' Obligations under MAR vis-à-vis Buy-Back Programmes

Buy-backs of own shares and price stabilisation measures may fall within the rules on the prohibition against market manipulation, insider dealing and unlawful disclosure of inside information. For such transactions, Article 5 of MAR sets out exceptions to these prohibitions provided that the conditions set out in the Article and as further specified in the Delegated Regulation are met. It is important to note that in the case of a buy-back programme, the exemption from insider dealing applies only to inside information related to the buy-back programme itself, and that insider dealing is generally not permitted through such transactions. Article 5 of MAR is a "safe-harbour" which means that buy-back of shares made outside the MAR framework must be assessed on a case-by-case basis in terms of the rules on prohibition of insider dealing, unlawful disclosure of inside information and market manipulation pursuant to Articles 14 and 15.

On a general level, the Malta Financial Services Authority (hereinafter referred to as 'the Authority' or 'MFSA') recommends a high degree of transparency, even if an issuer is considering deviations from the requirements of the Delegated Regulation.

3.1. Purpose of the Buy-Back Programme

Pursuant to Article 5(2) of MAR, in order for a buy-back programme to fall within the scope of the Regulation, the sole purpose of the buy-back programme must be:

- (a) To reduce the capital of an issuer;
- (b) To meet obligations arising from debt financial instruments that are exchangeable into equity instruments; or
- (c) To meet obligations arising from the share option programmes, or other allocation of shares, to employees or to members of the administrative, management or supervisory bodies of the issuer or of an associate company.

3.2. Trading Restrictions Applicable Whilst Conducting a Buy-Back Programme

It is important to note that Article 5 (1) and (3) of MAR, as well as Article 3(1)(17) of MAR use the term “shares” when referring to buy-back programmes. “Associated instruments” are only mentioned in the context of stabilisation measures (Article 5(4) and Article 3(2)(d) of MAR). Accordingly, buy-backs with associated instruments such as derivatives do not fall under the safe harbour afforded by Article 5 of MAR. Similarly, although bond buy-backs can take place, without leading to the automatic conclusion that market manipulation or inside dealing has been committed, such buy-backs would not fall within the scope of Article 5, thereby not qualifying for the safe-harbour afforded therein.

Furthermore, for the buy-back to be exempt from the prohibitions of Articles 14 and 15 of MAR, buy-back transactions have to take place on-exchange. Accordingly, please note that transactions relating to buy-backs carried out over the counter (‘OTC’) are not covered by the safe harbour afforded by Article 5 of MAR. Therefore, if a share buy-back is carried out OTC, it cannot benefit from the exemption contained in Article 5 of MAR. To this effect, paragraph 28 of ESMA’s Final Report on draft technical standards on the Market Abuse Regulation (hereinafter referred to as “ESMA’s Final Report”) specifically states that only the buy-back transactions carried out on a trading venue where the shares are admitted to trading or are traded should benefit from the “safe harbour”.

On this point, it must be noted that although MAR does not contain a provision which prohibits buy-back programmes from being conducted OTC, albeit not benefitting from the safe harbour, MAR applies to any transaction, order or behaviour concerning financial instruments, irrespective of whether or not such transaction, order or behaviour takes place on a trading venue.

In view of the above, market participants are reminded that a buy-back which does not fall within the scope of Article 5 or respects the conditions of the safe harbour will have to be examined in light of the entirety of MAR to consider whether a breach of the provisions of MAR took place.

It follows from Article 4(1) of the Delegated Regulation that in order to benefit from the exemption laid down in Article 5(1) of MAR, the issuer **shall not**, for the duration of the buy-back programme, engage in the selling of own shares. The issuer shall also not engage in trading during the closed period referred to in Article 19(11) of MAR, or trading where the issuer has decided to delay the public disclosure of inside information in accordance with Article 17(4) or (5) of MAR.

Notwithstanding the above trading restrictions, paragraph 2 outlines that the trading restrictions contained in Article 4(1) of MAR shall not apply where the issuer has in place a time-scheduled buy-back programme², or the buy-back programme is lead-managed by an

² According to Article 1(a) of Commission Delegated Regulation (EU) 2016/1052, a ‘time-scheduled buy-back programme’ refers to a buy-back programme where the dates and volume of shares to be traded during the time period of the programme are set out at the time of the public disclosure of the buy-back programme.

investment firm or a credit institution which makes its trading decisions concerning the timing of the purchases of the issuer's shares independently of the issuer.

Furthermore, the trading restriction relating to the selling of own shares contained in Article 4(1)(a) of the Delegated Regulation shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective internal arrangements and procedures, subject to the supervision of the MFSA (*qua* competent authority), to prevent unlawful disclosure of inside information by persons having access to inside information concerning, directly or indirectly, the issuer to persons responsible for any decision relating to the trading of own shares, when trading in own shares on the basis of such decision.

On the other hand, the trading restrictions contained in Article 4(1)(b) and (c) of the Delegated Regulation relating to trading during closed periods and trading where the issuer has decided to delay the public disclosure of inside information shall not apply if the issuer is an investment firm or credit institution and has established, implemented and maintains adequate and effective internal arrangements and procedures, subject to the supervision of the competent authority, to prevent unlawful disclosure of inside information by persons having access to inside information concerning, directly or indirectly, the issuer, including acquisition decisions under the buy-back programme, to persons responsible for the trading of own shares on behalf of clients, when trading in own shares on behalf of those clients.

3.3. Disclosure and Reporting Obligations

In order to benefit from the exemption laid out in Article 5(1) of MAR, prior to the start of trading in a buy-back programme, the issuer is under the obligation to ensure adequate public disclosure³ of the following information:

- (a) The purpose of the programme as referred to in Article 5(2) of MAR;
- (b) The maximum pecuniary amount allocated to the programme;
- (c) The maximum number of shares to be acquired;
- (d) The period for which authorisation for the programme has been given.

Thereafter, the issuer shall ensure that any changes to the programme and to the information already published in accordance with Article 2(1) of MAR is adequately publicly disclosed.

The issuer is also required to have mechanisms in place that allow it to fulfil its reporting obligations to the MFSA and to record each transaction related to a buy-back programme, including the information specified in Article 5(3) of MAR. The issuer shall report to the competent authority of each trading venue on which the shares are admitted to trading or are

³ Pursuant to Article 1(b) of Commission Delegated Regulation (EU) 2016/1052, 'adequate public disclosure' means making information public in a manner which enables fast access and complete, correct and timely assessment of the information by the public in accordance with Commission Implementing Regulation (EU) 2015/1055 and, where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and of the Council.

traded no later than by the end of the seventh daily market session following the date of the execution of the transaction, all the transactions relating to the buy-back programme, in a detailed form and in an aggregated form. The aggregated form shall indicate the aggregated volume and the weighted average price per day and per trading venue.

Apart from the relevant reporting obligations outlined above, emanating from paragraph 2, Article 2(3) of the Delegated Regulation also requires issuers to ensure adequate public disclosure of the information on the transactions relating to buy-back programmes no later than by the end of the seventh daily market session following the date of execution of such transactions. The issuer shall also post on its website the transactions disclosed and keep that information available to the public for at least a 5-year period from the date of adequate public disclosure.

Good Practice Recommendation: It is important that the information disclosed to the public is readable and understandable. The information on the transactions carried out should be disclosed not only on a transaction per transaction basis, but also on an aggregated basis. This may make the information more comprehensible for investors.

Both the competent authority and the public should be provided with the same type of information regarding the transactions carried out during the buy-back. Although no specific deadline for the disclosure towards competent authorities is set out in MAR, it would be practical to use the same deadline stipulated in relation to the public disclosure i.e. no later than the end of the seventh daily market session following the date of execution of such transactions.

3.4. Conditions for Trading

Article 3 of the Delegated Regulation sets out the conditions of how the trading of shares is to be carried out by the issuer during a buy-back programme. Primarily, in order to benefit from the exemption contained in Article 5(1) of MAR, the shares shall be purchased by the issuer on a trading venue where the shares are admitted to trading or traded. In this regard, Article 3(1) of the Delegated Regulation clarifies that for shares traded continuously on a trading venue, the orders shall not be placed during an auction phase and the orders placed before the start of the auction must not be modified during such phase. Furthermore, in the case of shares traded solely on a trading venue through auctions, the orders shall be placed and modified by the issuer during the auction, provided that other market participants have sufficient time to react to them.

Other important trading conditions to be followed during the course of a buy-back programme to ensure that issuers benefit from the exemption laid down in Article 5(1) of the Market Abuse Regulation, include:-

- When executing transactions under a buy-back programme, pursuant to Article 3(2) of the Delegated Regulation, issuers shall not purchase shares at a price higher than the higher of the price of the last independent trade and the highest current independent purchase bid on the trading venue where the purchase is carried out, including when the shares are traded on different trading venues.

- When executing transactions under a buy-back programme, in accordance with Article 3(3) of the Delegated Regulation, issuers shall also not purchase on any trading day more than 25% of the average daily volume⁴ of the shares on the trading venue on which the purchase is carried out. As expressed in paragraph 31 of ESMA's Final Report, the requirement of 25% of the average daily volume applies even in cases of extreme low liquidity.

Consequently, to benefit from the safe harbour, buy-back transactions should not exceed the 25% volume limit. However, not respecting this limit in view of extreme low liquidity will not lead automatically to the conclusion that market manipulation has been committed.

4. Concluding Remarks

Where issuers carry out share buy-backs, they are encouraged to fully comply with the requirements stemming from Article 5 of MAR and Commission Delegated Regulation (EU) 2016/1052 to benefit from the safe harbour afforded by Article 5(1) of MAR.

Nevertheless, the Authority understands that it is possible to conduct a buy-back which does not fall within the scope of the safe-harbour contained in Article 5 of MAR (e.g. a bond buy-back). In such a case, however, there would be no presumption of legality. Accordingly, the issuer would have to be able to prove that no activity in breach of the prohibitions laid out by Articles 14 and 15 of MAR took place.

As a general principle, where a buy-back does not fall within the scope of Article 5 of MAR, the Authority is of the view that issuers should nonetheless seek to comply (to the extent possible) with the requirements laid out in Article 5 and Commission Delegated Regulation (EU) 2016/1052, as this would allow issuers to be in a better position to prove that there was no market manipulation or insider dealing carried out.

The MFSA's primary objective as competent authority for the supervision of market participants in the context of MAR is that of ensuring integrated, efficient and transparent financial markets which ultimately require market integrity. The regime applicable to buy-back programmes appeared to be generally viewed as difficult to fully adhere to and hence, those issuers who carry out a buy-back programme generally do so without following the requirements of buy-back programmes, which practice may at times deter transparency across the Maltese financial markets, apart from there possibly being other implications relating to market integrity

In view of the above, as a way forward, issuers are expected to comply with the requirements of MAR and its regulatory technical standards, especially where public disclosure and price conditions are involved. Where market participants carry out buy-back

⁴ The average daily volume shall be based on the average daily volume traded during either of the following periods:

- (a) The month preceding the month of the disclosure required under Article 2(1); such a fixed volume shall be referred to in the buy-back programme and applied for the duration of that programme.
- (b) The 20 trading days preceding the date of purchase, where the programme makes no reference to that volume.

programmes or stabilisation measures, it is the Authority's intention to proceed with engaging with the relevant persons subject to the obligations contained in MAR. Consequently, such persons will be requested and expected to explain and substantiate with documents, full and proper adherence to MAR in its entirety; prior, during and following the buy-back programme.

5. Contact

Should you have any queries in relation to the above, kindly contact the Authority on pfma@mfsa.mt.