

15 November 2022

Circular on Article 16 of Regulation (EU) No 596/2014 of the European Parliament and of the Council on Market Abuse ('MAR/the 'Regulation')

This Circular is being addressed to all market participants, particularly investment services providers¹ which, as a result of the activities which they carry out, fall under the definition of persons professionally arranging or executing transactions, as contained in Article 3(1)(28) of Regulation (EU) No 596/2014 of the European Parliament and of the Council (hereinafter referred to as 'the Regulation'/'MAR').

This Circular should be read in conjunction with the Regulation, its Delegated and Implementing Regulations, ESMA's Question and Answers Document on MAR and previous Circulars issued by the Authority, as the case may be.

Regulatory Background

Pursuant to Article 3(1)(28) of MAR, a person professionally arranging or executing transactions is defined as a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions in, financial instruments. In turn, in accordance with Article 16 of MAR, specifically the second paragraph therein, any person professionally arranging or executing transactions is required to establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. Where such a person has a reasonable suspicion that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation, the person shall notify the MFSA without delay.

With regard to the obligation to prevent and detect market abuse stemming from Article 16(2) of MAR, in its [Question and Answers \('Q&As'\)](#) Document, specifically Q&A 6.1 therein, ESMA has clarified that the definition of "person professionally arranging or executing transactions" laid down in Article 3(1)(28) of MAR is activity based, hence it does not cross refer to the definitions contained in Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments ('MiFID II') and is independent from the

¹ For the purpose of this circular, the term investment services providers includes AIF Managers, Alternative Investment Funds, De Minimis AIF Managers, Investment Firms, Notified Alternative Investment Funds, Professional Investor Funds, Recognised Private Collective Investment Schemes, Retail – Maltese Non-UCITS Schemes, Retail – Maltese UCITS Schemes, Retail – Overseas Non-UCITS Schemes.

latter. It therefore follows that the scope of Article 16(2) of MAR is not only limited to firms or entities providing investment services under MiFID.

In this respect, ESMA considers that the obligation to prevent and detect market abuse or attempted market abuse pursuant to Article 16(2) of MAR applies broadly, and the term “person professionally arranging or executing transactions” thus includes buy side firms², such as investment management firms (AIFs and UCITS managers), as well as firms professionally engaged in trading on own account (proprietary traders).

Purpose

MAR came into force on 03 July 2016 with the objective of establishing a uniform and robust framework in order to preserve market integrity by prohibiting market abusive behaviors (insider dealing, unlawful disclosure of inside information and market manipulation), which prevent full and proper market transparency – a prerequisite for trading for all economic actors in integrated financial markets. In carrying out its duties as the national competent authority responsible for ensuring that market participants comply with MAR, the Malta Financial Services Authority (‘the Authority’/‘MFSA’) has taken several initiatives to effectively supervise persons professionally arranging or executing transactions in view of their obligation to prevent, detect and report market abuse.

In this respect, since 2018, the Authority had been holding a number of onsite compliance meetings relating to the requirements stemming from MAR with entities falling within the scope of MAR, particularly issuers and persons professionally arranging and executing transactions. As was explained in the previous section of this Circular, the term “person professionally arranging or executing transactions” captures various types of authorised persons including, but not limited to, certain investment firms, AIFs and UCITS managers.

On 04 June 2020, the MFSA had published its Supervisory Risk-Based Approach document which explains that to increase its supervisory effectiveness, the MFSA adopts a risk-based approach to supervision, which allows the MFSA to assess risks across and within the different sectors. In this respect, in carrying out its supervision of entities falling within the scope of Article 16, the Authority had primarily focused on investment firms which are actively involved in the arrangement of orders and/or execution of transactions in financial instruments admitted to listing and trading on Maltese and foreign trading venues. Having carried out a number of onsite compliance meetings between 2018 and 2020, the Authority proceeded to issue its [Circular](#) of 29 April 2020. Within this circular, the Authority referred to the main findings emanating from such compliance meetings and also put forward a number of recommended good practices for entities falling within the scope of Article 16 of MAR. Additionally, the Circular also clarified that since the Regulation had been into force since 2016, and taking into consideration the number of onsite compliance meetings held with market participants and the guidance provided to market participants through MFSA

² The term buy-side firms refers to those firms that purchase financial instruments for their own account, or on behalf of investors with the ultimate objective of generating a return. This would typically include insurance firms and pension funds.

circulars issued, firms were expected to be compliant with all the applicable requirements under MAR.

In turn, as a way forward, it was the Authority's intention to proceed with carrying out onsite inspections instead, whereby entities would be required and expected to prove proper and full adherence to the respective requirements emanating from MAR and its delegated and implementing regulations. In this respect, market participants were reminded that breaches of the requirements emanating from MAR would warrant regulatory action in terms of Article 22 of the Prevention of Financial Markets Abuse Act, Chapter 476 of the Laws of Malta.

Indeed, between 2020 and 2022 the Authority has continued to enhance its supervision of entities falling within the scope of Article 16 of MAR by carrying out several supervisory inspections with investment firms. Having covered the majority of the population of investment firms, in its continued efforts to ensure market integrity and high standards of compliance with the Regulation, it is now the Authority's intention to start carrying out supervisory inspections with other "persons professionally arranging or executing transactions" such as UCITs and AIFs managers.

Accordingly, in line with the Authority's approach to risk-based supervision, the Authority is requesting market participants, particularly investment services providers, to complete a Self-Assessment. Such Self-Assessment will be primarily aimed at gathering detailed information on the types of services provided by each investment services provider, with the ultimate aim of enhancing the information which the Authority has in hand and which will further assist the Authority in determining whether the activities carried out, fall within the scope of MAR. Market participants whose activities fall within scope of MAR will consequently be subject to the requirements to prevent, detect and report market abuse, as laid down in Article 16 of the Regulation.

The Self-Assessment

The Self-Assessment questionnaire contains three main sections, as follows:

- Section A – General Information: Covers the basic information in relation to the entity and the individual compiling the self-assessment questionnaire.
- Section B – Overview: Serves to provide the Authority with a list of financial instruments in which the licensed entity deals in; and
- Section C – Self-Assessment: Under this section, a set of questions is included in order to enable the compiler to determine whether the entity in question falls within the scope of Article 16 of MAR.³

³ Market Participants should note that replies will not be taken at face value. The Self-Assessments themselves will not determine whether the Authority will choose to carry out supervisory interactions with any particular investment services

Next Steps

Market participants are required to submit the response via this [link](#) by Friday, 16 December 2022.

A PDF version of the Questionnaire is available [here](#). Nevertheless, please note that only responses submitted by means of the online link shall be accepted.

Filling in this Questionnaire is mandatory and any omissions by the Company to provide the correct information within the stipulated deadline may be followed up by the Authority and taken into consideration when assessing the Company's level of compliance with Article 16 of MAR.

Contacts

Should you have queries on the content of the Questionnaire, please do not hesitate to contact the Authority on pfma@mfsa.mt.

provider in terms of Article 16 of MAR. As forementioned, the Self-Assessment is primarily intended to enhance the information which is available to the Authority and hence, it shall not replace the assessment which the Authority undoubtedly carries out prior to determining which investment services providers shall be subject to supervisory interactions.

MFSA Privacy Notice

The Malta Financial Services Authority ('MFSA') is committed to protect the privacy of individuals who participate in MFSA Surveys/Questionnaires. All personal data provided to the MFSA are processed in accordance with the Data Protection Act (Chapter 586 of the Laws of Malta – "the Act"), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – "the Regulation") and any other European Union ("EU") and national law in relation thereto.

Data Controller

The MFSA is the Data Controller of this study, whose premises are situated at Malta Financial Services Authority, Triq I-Imdina, Zone 1, Central Business District, Birkirkara, CBD 1010, Malta.

Information Collected and Purpose for Collection of Such Information

In the discharge of its function to *inter alia* monitor the working and enforcement of laws that directly or indirectly affect consumers of financial services in Malta, the MFSA is asking entities to fill out the Surveys/Questionnaires in order for the MFSA to gather information and better understand the applicability of the Market Abuse Regulation to certain Investment Services Providers.

Personal data provided by the data subject

The MFSA requests and collects your personal data only to the extent necessary in order to assess the implications on different entities.

Legal Basis

The study is being carried out by the MFSA to perform its functions underlined in the MFSA Act (Chapter 330 of the Laws of Malta) in particular, Article 4(1)(d) of the said Act.

Recipients

All the personal data you provide is accessible to the designated staff members of the MFSA and shall be used solely for the study specified above.

The MFSA does not forward the details collected from yourself as a participant to any third parties including Government Departments unless you give your consent thereto or unless required by law.

Retention Period of Personal Data

Your personal data may be kept for up to five years after completion of the study.

Rights as a Data Subject

In terms of the GDPR and the DPA, an individual may request from the MFSA access to and rectification of personal data, and, in certain circumstances, has:

The right for erasure of personal data;

The right for restriction of the processing;

The right to object to the processing of the personal data; and

The right to data portability.

Such requests may be made in writing to the MFSA's Data Protection Officer on any of the details indicated hereunder. In addition, an individual has a right to lodge a complaint with the Office of the Information and Data Protection Commissioner in Malta (www.idpc.gov.mt).

Security of Personal Data

As aforementioned, the MFSA processes your personal data in line with the requirements emanating from the Act, the Regulation and other EU and national law in relation thereto.

Furthermore, the MFSA takes all necessary safeguards, including information technology security support, to prevent unauthorised access.

Contact Details of the MFSA's Data Protection Officer

In case of queries on the processing of your personal data, you may contact the MFSA's Data Protection Officer at dpo@mfsa.mt.