

European Commission Adopts Delegated Regulation Relating to Conditions for Buy-back Programmes and Stabilisation Measures under MAR

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Financial Services and Regulation

On March 8, 2016, the European Commission adopted a [Delegated Regulation](#) supplementing the Market Abuse Regulation (Regulation 596/2014) (“MAR”) with regard to regulatory technical standards (“RTS”) relating to the conditions applicable to buy-back programmes and stabilisation measures (the “Delegated Regulation”).

Background and Context

Article 5(1) of MAR states that the prohibition of insider dealing and market manipulation does not apply to trading in own shares in buy-back programmes, when the programme fulfils the requirements set out in Article 5(1) of MAR. The conditions are that:

- the full details of the programme must be disclosed prior to the start of trading;
- trades must be reported as being part of the buy-back programme to the competent authority of the trading venue and then subsequently disclosed to the public;
- adequate limits with regard to price and volume must be complied with; and
- the trading in own shares in buy-back programmes must be carried out with the objectives of reducing the capital of an issuer; of meeting obligations arising from debt financial instruments that are exchangeable into equity instruments; or to meet obligations arising from share option programmes, or other allocations of shares, to employees or to members of the administrative, management, or supervisory bodies of the issuer or an associate. In addition, the trading must be carried out in accordance with the conditions of Article 5 of MAR and RTS developed by ESMA specifying the conditions that buy-back programmes and stabilisation measures must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations and price conditions (Article 5(6) of MAR).

ESMA submitted the RTS to the European Commission on September 28, 2015. Following that, the European Commission had three months in which to decide whether or not to endorse them. On March 8, 2016, the European Commission adopted the Delegated Regulation.

The Delegated Regulation

Key matters covered by the Delegated Regulation include the following.

Disclosure and Reporting Obligations (Article 2)

Article 2 of the Delegated Regulation sets out certain disclosure obligations which must be met prior to the start of trading in a buy-back programme. Accordingly, the issuer must ensure adequate public disclosure of the following information:

- the purpose of the programme;
- the maximum pecuniary amount allocated to the programme;
- the maximum number of shares to be acquired;
- the period for which authorisation for the programme has been given (the “duration of the programme”).

The issuer is required to have in place mechanisms for fulfilling reporting obligations to the relevant competent authority and to record each transaction related to a buy-back programme. The issuer is required to report to the competent authority of each trading venue on which the shares are admitted to trading. Such reports must be made no later than by the end of the seventh daily market session following the date of the execution of the transaction.

The issuer is required to ensure “adequate public disclosure” of 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 is also required to post on its website details of the transactions disclosed. That information must be made available to the public for at least five years from the date of “adequate public disclosure”.

Conditions for Trading - Article 3

Article 3 contains conditions which must be met by transactions relating to buy-back programmes, in order to benefit from the exemption. These are as follows.

- the shares must be purchased by the issuer on a trading venue where the shares are admitted to trading or are traded;
- where shares are traded continuously on a trading venue, the orders must not be placed during an auction phase and the orders placed before the start of the auction phase must not be modified during that phase; and
- where shares are traded solely on a trading venue via auctions, those orders must be placed and modified by the issuer during the auction provided that other market participants are allowed sufficient time in order to react to them.

Other conditions include that issuers must not purchase shares at a higher price 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. This includes the case where the shares are traded on different trading venues. In addition, issuers must not purchase more than 25 percent of the average daily volume of the shares on the trading venue on which the purchase is carried out on any trading day.

Trading Restrictions - Article 4

In order to benefit from the exemption set out in Article 5(1) of MAR, the issuer must not (for the duration of the buy-back programme) engage in selling its own shares, except in cases where the issuer is an investment firm or credit institution and has established, implemented, and maintains adequate and effective internal arrangements and procedures, which are appropriately supervised by a regulator, for the prevention of the unlawful disclosure of inside information by those having access to inside information.

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In addition, the issuer must not trade during the closed period; or trade where it has decided to delay the public disclosure of inside information. Again, this will not apply if the issuer is an investment firm or credit institution which has established, implemented, and maintains adequate and effective internal arrangements and procedures, which are adequately supervised by a regulator, to prevent unlawful disclosure of inside information by persons having access to that inside information concerning the issuer, including acquisition decisions under the buy-back programme, to persons responsible for trading of own shares on behalf of clients, when trading in own shares on behalf of those clients.

Conditions Regarding the Stabilisation Period - Article 5

Article 5 of the Delegated Regulation sets out the timing requirements for the stabilisation period.

Disclosure and Reporting Obligations - Article 6

Article 6 contains a list of items in respect of which adequate public disclosure must have taken place, both before the start of the initial or secondary offer of the securities, during the stabilisation period, and within one week of the end of the stabilisation period.

Price Conditions - Article 7

In the case of an offer of shares or other securities equivalent to shares, stabilisation of securities may not be carried out above the offering price in any circumstances. In the case of an offer of securitised debt convertible or exchangeable into shares or into other securities equivalent to shares, stabilisation of such debt instruments may not be carried out in any circumstances above the market price of those instruments at the time of the public disclosure of the final terms of the new offer.

Conditions for Ancillary Stabilisation - Article 8

Article 8 lists the conditions for ancillary stabilisation.

Next Steps

The Council of the European Union and the European Parliament must now consider the Delegated Regulation. If there is no objection from either of them, the Delegated Regulation will enter into force on the day after its publication in the Official Journal of the European Union. Accordingly, it will apply from July, 3 2016.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services and Regulation practice group:

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