MFSA MALTA FINANCIAL SERVICES AUTHORITY

Circular

16 March 2020

Circular on Regulation (EU) No 596/2014 (the 'Market Abuse Regulation'/'MAR')

– Onsite Compliance Meetings with Issuers: General Findings & Way Forward

Executive Summary

Overview

Since 2018, the Malta Financial Services Authority ('MFSA') has been holding a number of onsite compliance meetings relating to Regulation (EU) Nº 596/2014, with issuers whose financial instruments are traded on a Maltese trading venue.

The purpose of the onsite compliance meetings was for the MFSA to verify the extent of implementation of the Regulation by issuers, falling within the scope of MAR.

This circular presents the MFSA's findings relating to how issuers adhere to the requirements emanating from MAR. Without prejudice, the circular also provides recommendations of what are considered to be good practices for issuers to seek to adhere to their legal obligations. Please note that such recommendations are only aimed to provide guidance and should not be in any way construed as legal advice and/or interpretation. The obligation to ensure that the companies satisfy the requirements of the applicable laws and that their policies and procedures are kept up-to-date, rests solely with the directors of the companies. Furthermore, **this circular provides the MFSA's position as at the date of publication and is subject to any** clarifications which ESMA might issue from time to time.

This circular presents the findings of a thematic review of how issuers have sought to apply the requirements emanating from MAR and abide to their obligations under the Regulation. The review assessed the way and to what extent issuers control the risk of insider dealing, unlawful disclosure of inside information and market manipulation.

Key Findings

The Authority's overall finding was that issuers had put in place relatively good measures in order to mitigate their susceptibility to market abuse. Having said that, such measures were not comprehensive and consequently issuers were provided with various recommendations to ensure adherence to high compliance standards in the context of MAR and its Implementing and Delegated Acts. In particular, issuers needed to improve the effectiveness of communication to insiders and persons discharging managerial responsibilities[1] in order to improve compliance to the respective obligations under MAR.

An effective framework to prevent and detect market abuse

Our review focused on requirements considered to be key in preventing and detecting market abuse, including *inter alia*:-

- Having proper policies and procedures in place for conducting a market sounding;
- Having effective controls in place to monitor dealings carried out by employees;
- Immediate disclosure of inside information and proper controls to ensure the confidentiality of inside information where the issuers decide to delay disclosure of inside information;
- Drawing up and keeping updated at all times the Insiders' List and List of Persons Discharging Managerial Responsibilities ('PDMRs') and persons closely associated ('PCAs') with them; and
- Notifying insiders and PDMRs of their obligations under MAR.

[1] Article 3(1)(25) of MAR defines a 'person discharging managerial responsibilities' as a person within an issuer who is:
(a) A member of the administrative, management or supervisory body of that entity; or
(b) A senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity

The following section lists the common issues identified by MFSA officials, along with a brief description of the recommended action in each case.

Findings

Market Soundings

Under Article 11 of MAR, an issuer may conduct a market sounding which comprises of the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. Issuers who decide to conduct a market sounding must comply with the requirements emanating from Article 11 of MAR, Commission Implementing Regulation (EU) 2016/959 and Commission Delegated Regulation (EU) 2016/960.

Generally, issuers stated that they had never conducted a market sounding. Some issuers confirmed that whereas they had never conducted a market sounding, they had drawn up policies and procedures should the need to carry out a market sounding arise.

On the other hand, some of the issuers who stated that they had carried out market soundings, appeared not to have fully and comprehensively adhered to the market sounding regime contained in MAR, during the course of the market sounding.

Pursuant to Article 2 of Commission Delegated Regulation (EU) 2016/960, disclosing market participants[2] ('DMP'), who in terms of MAR may be the issuer itself, are required to establish procedures describing the manner in which market soundings are conducted.

The Authority was concerned that issuers who had conducted a market sounding, had rudimentary documentation in place which did not specify the procedures that the issuer was meant to follow in the event of a market sounding.

[2] Article 3(1)(32) of MAR defines a 'disclosing market participant' as a person who falls into any of the categories set out in points (a) to (d) of Article 11(1) or of Article 11(2), and discloses information in the course of a market sounding. This includes issuers; a secondary offeror of a financial instrument; an emission allowance market participant; or a third party acting on their behalf.

The Market Sounding regime, requires that during the course of a market sounding, issuers (*qua* DMP) draw up of specific communications, lists and documentation, which are required to be retained for a period of at least five years. The issuer who had carried out a market sounding failed to properly hold record of all the documentation required in terms of MAR and its delegated and implementing regulations. As a bare minimum, issuers are expected to adhere to all the requirements in terms of Article 11 of MAR and the respective implementing and delegated regulation.

The following is a non-exhaustive list of issuers' requirements under MAR relating to market soundings:-

- Establish procedures describing the manner in which market soundings are conducted;
- Where market soundings are conducted by telephone, the issuer must ensure that recorded telephone lines are used and that recordings of the telephone conversations are retained;
- An issuer must ensure that the same level of information is equally communicated to each person receiving the same market sounding, in terms of Article 3(5) of Commission Delegated Regulation 2016/960;
- For each market sounding conducted, in accordance with Article 4(1) of Commission Delegated Regulation 2016/960, the issuer is required to draw up a list which includes:
    (a) The names of all natural and legal persons to whom the information has been disclosed in the course of the market sounding
    (b) The date and time of each communication of information which has taken place in the course of or following the market sounding; and
    (c) The contact details of the persons receiving the market sounding used for the purposes of the market sounding.
- In terms of Article 4(2) of Commission Delegated Regulation 2016/960, an issuer is also required to draw up a list of any potential investors that have informed the issuer that they do not wish to receive the market soundings;
- Where information disclosed during the market sounding ceases to be inside information according to the issuer's assessment, the issuer is required to inform the recipient accordingly, as soon as possible. In this respect, the requirements set out in Article 5 of Commission Delegated Regulation (EU) 2016/960 must be adhered to;

- During the course of the market sounding, the issuer must ensure that the records set out in Article 6 of Commission Delegated Regulation 2016/960 are kept on a durable medium that ensures accessibility and readability over the 5-year retention period; and
- The issuer is also under the obligation to draw up written minutes or notes (as referred to in Article 6(2) of Commission Delegated Regulation 2016/960) using the templates laid out in Commission Implementing Regulation 2016/959.

Please not that whilst the above summarises the main requirements relating to market sounding under the MAR regime, the list is non-exhaustive.

Publication of Inside Information and Delayed Disclosure of Inside Information

Publication of Inside Information

Article 7 of MAR defines inside information as information of a precise nature, which has not been made public, relating directly or indirectly, to one or more issuers or to one or more financial instruments, and which if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Under Article 17 of MAR, issuers are required to inform the public as soon as possible of inside information which directly concerns that issuer. The issuer is required to ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public, and where applicable, in the officially appointed mechanism.

Furthermore, the issuer is required to post and maintain on its website for a period of at least five years, all inside information it is required to disclose publicly. Article 3 of Commission Implementing Regulation (EU) 2016/1055, lays down the technical arrangements for the posting of inside information on a website. It particularly states that when posting inside information, the following requirements must be adhered to:-

(a) Issuer allows users to access the inside information posted on the website in a non-discriminatory basis and free of charge;
(b) Issuer allows users to locate the inside information in an easily identifiable section of the website; and
(c) Issuer ensures that the disclosed inside information clearly indicates date and time of disclosure and that the information is organised in a chronological order.

Generally, issuers complied with the requirements set out in Article 3 of Commission Implementing Regulation (EU) 2016/1055 when posting inside information on a website. Nevertheless, during the onsite meetings, MFSA officials noted that some issuers were not posting company announcements on their website, as required by the respective implementing regulation.

Recommended Good Practice
Although the majority of issuers posted inside information disclosed through company announcements on their website, there might be some issuers that to date do not have such arrangements in place. It is recommended that issuers which as at the date of this circular are not compliant to the requirements emanating from Article 17(1) of MAR and Article 3 of Commission Implementing Regulation (EU) 2016/1055 take the necessary action to ensure adherence to the requirements under this Article. During the onsite meetings, a number of issuers have expressed their concern that at times it is difficult to determine whether particular information is inside information or otherwise. In this respect, it is important that issuers keep detailed minutes relating to decisions as to whether information amounts to inside information or otherwise. The minutes should contain adequate justifications as to why information was or was not considered to amount to inside information. Such reasonings and justifications should be made available to the MFSA if and when requested. With respect to the posting of inside information on the website, a number of issuers had a dedicated section on their website set up, where all investor related information would be maintained. This appears to be an effective way of ensuring that the requirements emanating from Article 3 of the implementing regulation are adhered to.

Delayed Disclosure of Inside Information

The MAR regime, specifically Article 17 thereto, offers an exception to the requirement of immediate disclosure of inside information. On a case-by-case basis, issuers have the possibility to delay such disclosure provided certain conditions are met. In terms of Article 17(4), issuers may at their own discretion, delay disclosure of inside information to the public provided that the requirements laid out in this sub-article are met. Following the public disclosure of inside information to the public, the issuer would have an obligation to notify the MFSA that disclosure of inside information was delayed, together with an assessment of how the conditions set out in Article 17(4) were satisfied.

Issuers, who are also credit institutions may also, on their own responsibility delay the immediate disclosure of inside information in order to preserve the stability of the financial system, in accordance with Article 17(5) of MAR. Although in this case, the Authority needs to be made aware of the intention to delay disclosure beforehand, in order to provide its consent or otherwise to the delay in disclosure.

During the onsite meetings conducted only one issuer confirmed that it had resorted to the possibility to delay disclosure of inside information under Article 17(4). In this case, the issuer had confidentiality agreements in place to prevent the unlawful disclosure of information. Additionally, all individuals privy to the inside information were added to the issuer's insiders' list. The issuer also had a copy of the resolution of the board of directors, whereby they approved the delay in disclosure of inside information, together with detailed minutes of board meetings outlining what led to the delay disclosure of inside information.

Recommended Good Practice
It is recommended that when assessing whether the issuer should resort to delay disclosure of inside information or otherwise, the MAR guidelines relating to delay in the disclosure of inside information published by ESMA are referred to. For ease of reference, the guidelines may be accessed through the following link. Furthermore, issuers would be required to maintain proper documentation in order to substantiate compliance with the requirements emanating from Article 17 of MAR and Commission Implementing Regulation (EU) 2016/1055.

Insiders' List

Article 18(1) of MAR requires issuers or any persons acting on their behalf or on their account to draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information such as advisers, accountants, etc. The list of insiders must also be promptly updated and provided to the Authority upon request.

During the onsite compliance meetings, most issuers confirmed that they held the temporary List of Insiders ('LOI') as well as the supplementary permanent LOI. Some other issuers had not drawn up the temporary LOI but held the supplementary permanent LOI.

The Authority would like to once again remind issuers that the drawing up and updating of a temporary LOI is mandatory. This temporary LOI should be drawn up by the issuer on a deal-specific, project-specific or event-specific basis, where each section would list all the individuals who have or have had access to the same specific piece of inside information. On the other hand, Implementing Regulation (EU) 2016/347 gives discretion to the issuer as to whether to draw up a Permanent LOI or otherwise. Typically, an issuer would draw up the Permanent LOI, in order to avoid having multiple entries relating to the same individual under different sections of the Temporary LOI. In this respect, although it is at the issuer's discretion whether to hold a permanent LOI or otherwise, the drawing of permanent LOIs is strongly recommended by the Authority.

The MFSA would also like to remind issuers that although Article 18 of MAR requires the Company to submit the LOIs upon the Authority's request, voluntary submissions of the LOIs by the issuers are encouraged and appreciated. Such submissions would assist the Authority's in detecting financial market abuse. Furthermore, in order to facilitate the Authority's data processing, the LOIs should be drawn up according to the templates found on the MFSA's website, which templates could be accessed through this Link.

During the onsite compliance meetings, a number of issuers expressed their concern that at times, persons acting on their behalf or on their account would object to them being added to the issuers' LOI, mainly for data protection reasons. Please note that where the service provider is not a natural

person, it shall be sufficient to provide the identity of a contact person within the Service Provider. All of the information prescribed by Annex 1 of Commission Implementing Regulation (EU) 2016/347 must be provided for such contact person in the issuer's LOI. The Service Provider would then however be obliged to draw up and keep updated an LOI containing details of employees who are privy to inside information relating to issuer(s) whose securities are admitted to trading on a trading venue or which have requested admission to trading.

Article 2(4) of Commission Implementing Regulation (EU) 2016/347, requires access to the LOI to be restricted to clearly identified persons from within the issuer, who require access to such information due to the nature of their function or position. In this respect, most issuers confirmed that access to the LOIs was restricted to clearly identified persons. Throughout their onsite meetings, MFSA officials were informed that certain issuers had not restricted the access to their LOIs. In this case, such issuers were required to restrict access to persons who need that access due to the nature of their functions or position.

Pursuant to Article 18(2) of MAR, issuers are required to take all reasonable steps to ensure that any person on the LOIs acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information. The Authority was concerned to note that only few of the issuers properly notified insiders of their obligations under MAR. A common practice was adopted amongst these issuers whereby a letter addressed to the insider would be sent by the issuer informing the insider that due to their role or function they are considered privy to inside information thus they have been included in the LOI. The letter would also contain the definition of inside information, explaining what insider dealing and unlawful disclosure of inside information entails, and outlining the sanctions applicable therein. Following the issuing of the letter, these issuers would ensure that a copy of the acknowledgement submitted by each insider is kept on record.

With respect to some other issuers, whereas they did notify the insiders that they had been included in the insider list, they failed to fully outline their obligations and the applicable sanctions under MAR. Therefore, the notification did not suffice the requirements contained in Article 18(2) of MAR.

There were other issuers which stated that they had communicated the inclusion to the list of insiders to its employees and their respective obligations by word of mouth, whereas a few other issuers simply did not inform insiders of their obligations at all.

Recommended Good Practice
It is recommended that all issuers that to date have not informed their insiders of their obligations under MAR, take remedial action straight away to ensure adherence to Article 18(2) of MAR. The written notification needs to clearly outline the legal and regulatory duties which the insider must observe and that they are aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information. Issuers must also ensure that the insiders' acknowledgements are retained on record.

With respect to the issuer's obligation to maintain the insider list for a period of at least five years after it is drawn up or updated in terms of Article 18(5) of MAR, all issuers confirmed that their retention period is of at least five years. MFSA officials would like to generally remind issuers that their lists of insiders should not be overwritten every time the list is updated.

Managers' Transactions

During onsite compliance meetings, MFSA officials explained that in terms of Article 19(1) of MAR, PDMRs as well as persons closely associated with them are required to notify the issuer and the MFSA of every transaction conducted on their own account relating to the shares or debt instruments of that issuer. Such notifications are required to be made promptly and no later than three business days after the date of the transaction for any subsequent transaction once a total amount of €5,000 has been reached within a calendar year.

Following the PDMR notifications made to the issuer and pursuant to Article 19(3) of MAR, the issuer needs to ensure that the information that is notified in accordance with Article 19(1) of MAR is made public promptly and no later than three business days after the transaction, in a manner which enables fast access to this information on a non-discriminatory basis. Overall, MFSA officials noted that issuers whose PDMRs traded in their securities had made public the information relating to the PDMR notifications on their website.

In terms of Article 19(5) of MAR, issuers are required to notify PDMRs of their obligations. Generally, the Authority noticed that a number of issuers had provided a detailed letter to their PDMRs explaining the requirements of Article 19 and the related sanctions applicable.

Some issuers had provided their employees with a link to the MFSA Circular relating to PDMR Notifications issued on 28 June 2019, and deemed that it was a sufficient way of informing PDMRs of their obligations in terms of MAR. Employees had to assess the information and determine whether they fall within the definition of PDMR. This practice would appear not to sufficiently satisfy the requirement which the issuer has in terms of Article 19(5) of MAR. Hence such issuers were requested to ensure that proper notification of their obligations and applicable sanctions is made to identified PDMRs.

Some other issuers, had altogether not informed their PDMRs of their obligations under Article 19 and of the sanctions applicable therein. Although, the obligation to notify the Authority and the issuer rests with the PDMRs and their PCAs, the obligation to notify PDMRs of this obligation rests on the issuer. Hence failure by PDMRs to notify transactions could potentially imply that PDMRs were not made aware of their obligations under MAR. Similarly, failure by a person closely associated ('PCA') to a PDMR to notify a transaction could imply that the PCA was not made aware of their obligations by the respective PDMR (as required by Article 19(5) of MAR). Therefore, the Authority recommends that when informing PDMRs of their obligations, issuers specifically notify that PDMRs have in turn an obligation to inform PCAs of their obligations under MAR.

Apart from the obligation to notify PDMRs of their obligations under MAR and the relevant sanctions, Article 19(5) also requires issuers to draw up a list of all PDMRs and persons closely associated with them. The Authority was concerned to note that, from the sample of issuers included in this review, the wide majority had not drawn up the list of PDMRs and PCAs. It is important that issuers have at least the name, surname and identification number to identify the individuals contained in list of PDMRs, whilst in case of PCAs they should also include the PDMR to whom they are connected and their respective relationship.

Staff Dealing

The Authority considers staff dealing controls to be an essential tool for the control of inside information, specifically, for the prevention and detection of insider dealing and unlawful disclosure of inside information. During the onsite compliance meetings, all issuers had a staff dealing policy in place in order to regulate the trading executed by insiders in the issuer's shares.

Generally, issuers besides holding a staff dealing policy which outlines insiders' obligations in terms of MAR, also have in place a notification requirement. The Authority noted that whereas some issuers requested all employees to notify a designated person within the issuer of transactions carried out on trading venues, others required that employees be prohibited from carrying out transactions without the prior approval of the issuer. Most issuers have also explained that on a frequent basis they would assess the trades in order to monitor trades executed by issuers' employees.

Concluding Remarks

The findings and 'good practice' recommendations put forward in this circular, reflect the feedback which the Authority has provided to all issuers included in the thematic review, following the respective compliance meetings.

Given that the Regulation has been into force since 2016, and taking into consideration the number of onsite compliance meetings held with market participants and the MFSA circulars issued to the industry, the Authority now expects issuers to be compliant with all the applicable requirements under MAR.

As a way forward, it is now the Authority's intention to proceed with carrying out onsite inspections (rather than onsite compliance meetings), 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.

Please note that, depending on circumstances, the MFSA can also require that inspections be carried out via conference call or video conferencing.

A breach of the requirements emanating from MAR would warrant regulatory action in terms of Article 22 of the Prevention of Financial Market Abuse Act, Chapter 476 of the Laws of Malta.