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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	8 March 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2016) 1357 final
Subject:	COMMISSION DELEGATED REGULATION (EU) …/... of 8.3.2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures

Delegations will find attached document C(2016) 1357 final.

Encl.: C(2016) 1357 final

EUROPEAN
COMMISSION

Brussels, 8.3.2016
C(2016) 1357 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 8.3.2016

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 5(1) of Regulation (EU) No 596/2014 (MAR) states that the prohibition of insider dealing and market manipulation do not apply to trading in own shares in buy-back programmes when the programme fulfils the requirements defined in the Article 5(1) of MAR. Article 5(4) of MAR further exempts from the above prohibitions trading in securities or associated instruments for the stabilisation of securities, provided they fulfil the conditions of Article 5(4).

According to Article 5(6) of MAR, the European Securities and Markets Authority (ESMA) should develop draft regulatory technical standards "to specify 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."

The draft regulatory technical standards were submitted to the Commission on 28 September 2015. In accordance with Articles 10 to 14 of Regulation No (EU) 1095/2010 establishing ESMA, the Commission shall decide within three months of receipt of the draft regulatory technical standards whether to endorse them. The Commission may also endorse the draft regulatory technical standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA published its Final Report on draft technical standards on MAR and submitted it to the Commission on 28 September 2015.[1] The report takes into account the views expressed by stakeholders during the public consultation on the draft regulatory technical standards and the views of the Securities and Markets Stakeholder Group (SMSG) set up in accordance with Article 37 of Regulation (EU) No 1095/2010.

The ESMA final report sets out the feedback statement to the Consultation Paper which provided an analysis of responses to the consultation, described any material changes (or confirmed that there have been no material changes as respondents broadly agreed with ESMA's suggested approach), and explained the reasons for this in the light of feedback received.

ESMA received a generally positive feedback as regards the idea to preserve the rules of Regulation (EU) No 2273/2003 to the extent this is coherent with the MAR framework. In replying to the consultation, many respondents covered a wide range of topics.

Together with the draft regulatory technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted an Impact Assessment, including analysis of the costs and benefits related to the draft technical standards submitted to the Commission.

[1] The Final Report is available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Buy-back programmes and stabilisations can contribute to greater confidence of investors and issuers in the financial markets, but also give false or misleading signals to the market and/or secure an artificial price level. Therefore it is necessary that such activities are carried out under certain conditions on transparency, price and volume limitations.

The estimated costs of the draft regulatory technical standards have been established in an impact assessment report by ESMA, pointing out that in the context of the operational scale of the affected firms, the direct compliance costs attributable to the technical standards are not large. On the requirement that market participants report transparency disclosures to each competent authority feedback from stakeholders was mixed, but pointed to a rather minimal impact.

Chapter I (Article 1). Article 1, in addition to the definitions in MAR, contains definitions which apply for the purposes of this Delegated Regulation.

Chapter II (Articles 2 to 4). Article 2 enumerates the documentation and information concerning a buy-back programme which must be publicly disclosed by the issuer prior to the start of trading. It further specifies requirements as to reporting obligations to the competent authority, recording transaction related to buy-back programmes, timelines and on-line publication. Article 3 lays down a list of conditions whose fulfilment transactions relating to buy-back programmes within the meaning of Article 5(1) MAR benefit from the exemption granted by the same provision, i.e. the disapplication of Articles 14 and 15 MAR. It further includes price conditions and limits of average daily volumes. Article 4 sets out activities which the issuer may not engage during its participation in a buy-back programme. It also defines conditions under which the trading restrictions do not apply.

Chapter III (Articles 5 to 8). Article 5 covers the limited period during which stabilisation may be carried out for the purpose of Article 5(4) MAR in respect of shares and other securities equivalent to shares and bonds and other forms of securitised debt, including securitised debt convertible or exchangeable into shares or into other securities equivalent to shares. Article 6 itemizes elements of adequate public disclosure before the opening of the offer period of the securities and during the stabilisation period. It also requires an appointment of a central point from among an offeror and any entity undertaking the stabilisation and the persons acting on their behalf as well as obligations of that central point. Article 7 lays down the price conditions under which the stabilisation may in no circumstances be carried out. Article 8 enumerates the conditions for ancillary stabilisation.

COMMISSION DELEGATED REGULATION (EU) …/...

of 8.3.2016

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[2], and in particular the third subparagraph of Article 5(6) thereof,

Whereas:

(1) To benefit from the exemption from the prohibitions on market abuse, trading in own shares in buy-back programmes and trading in securities or associated instruments for the stabilisation of securities should comply with the requirements and conditions set out in Regulation (EU) No 596/2014 and in this Regulation.

(2) Although Regulation (EU) No 596/2014 allows stabilisation through associated instruments, the exemption for transactions relating to buy-back programmes should be limited to actual trading in the own shares of the issuer and should not apply to transactions in financial derivatives.

(3) As transparency is a prerequisite for the prevention of market abuse, it is important to ensure that adequate information is disclosed or reported prior to, during and after the trading in own shares in buy-back programmes and trading for the stabilisation of securities.

(4) In order to prevent market abuse, it is appropriate to set conditions regarding the purchase price and permitted daily volume of trading in own shares in buy-back programmes. To avoid circumvention of such conditions, the buy-back transactions should be carried out on a trading venue where the shares of the issuer are admitted to trading or traded. However, negotiated transactions that do not contribute to price

[2] OJ L 173, 12.6.2014, p. 1.

formation could be used for the purpose of a buy-back programme and benefit from the exemption, provided that all the conditions referred to in Regulation (EU) No 596/2014 and this Regulation are met.

(5) To avoid the risk of abusing the exemption for trading in own shares in buy-back programmes, it is important that this Regulation sets out restrictions with regard to the type of transactions an issuer can carry out during a buy-back programme and the timing of the trading in its own shares. Those restrictions should therefore prevent the selling of own shares by the issuer during the duration of a buy-back programme and take into account the possible existence of temporary prohibitions to trade within the issuer and the fact that an issuer may have legitimate reasons to delay public disclosure of inside information.

(6) Stabilisation of securities is intended to provide support for the price of an initial or secondary offering of securities during a limited time period if the securities come under selling pressure, thus alleviating sales pressure generated by short term investors and maintaining an orderly market in those securities. It thus contributes to greater confidence of investors and issuers in the financial markets. Therefore, in the interest of investors having subscribed or purchased the securities in the context of a significant distribution, and in the interest of the issuer, block trades that are strictly private transactions should not be considered a significant distribution of securities.

(7) In the context of initial public offers, certain Member States allow for trading prior to the commencement of official trading on a regulated market. This is commonly referred to as 'when issued trading'. Therefore, it should be possible for the purposes of the exemption for the stabilisation of securities that the stabilisation period starts before the beginning of the official trading provided that certain transparency and trading conditions are met.

(8) Market integrity requires the adequate public disclosure of stabilisation measures. Reporting of the stabilisation transactions is also necessary to allow competent authorities to supervise stabilisation measures. In order to ensure investor protection, preserve the integrity of markets and deter market abuse, it is also important that competent authorities in the performance of their supervisory activities become aware of all stabilisation transactions, irrespective of whether they take place in or outside a trading venue. Furthermore, it is appropriate to clarify in advance the division of responsibilities between the issuers, the offerors or the entities undertaking the stabilisation as regards fulfilment of applicable reporting and transparency requirements. Such division of responsibilities should take into account who is in possession of the relevant information. The appointed entity should be also responsible to respond to any request from the competent authority in each Member State concerned. To ensure easy access for any investor or market participant, the information to be disclosed prior to the start of the initial or secondary offer of the securities to be stabilised under Commission Regulation (EC) No 809/2004[3], is without prejudice to disclosure requirements under Article 6 of this Regulation.

[3] Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004, p. 1).

(9) There should be adequate coordination in place between all investment firms and credit institutions undertaking stabilisation. During stabilisation, one investment firm or credit institution should act as a central point of inquiry for any regulatory intervention by the competent authorities of the Member States concerned.

(10) To provide resources and hedging for the stabilisation activity, ancillary stabilisation in the form of exercising overallotment facilities or greenshoe options should be allowed. However, it is important to set out conditions regarding the transparency of such ancillary stabilisation and the manner in which it is exercised, including the period during which it can be carried out. Moreover, particular attention should be paid to the exercise of an overallotment facility by an investment firm or a credit institution for the purpose of stabilisation when it results in a position that is not covered by the greenshoe option.

(11) In order to avoid confusion, stabilisation should be carried out in a manner that takes into account the market conditions and the offering price of the securities. Transactions to liquidate positions that were established as a result of stabilisation measures should be undertaken to minimise market impact, having due regard to prevailing market conditions. As the purpose of stabilisation is to support the price, selling securities that have been acquired through stabilising purchases, including selling in order to facilitate subsequent stabilising activity, should not be deemed to be for the purpose of price support. Neither those sales nor the subsequent purchases should be considered abusive in themselves even though they do not benefit from the exemption provided for under Regulation (EU) No 596/2014.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(13) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council[4].

(14) In order to ensure the smooth functioning of the financial markets, it is necessary that this Regulation enters into force as a matter of urgency and that the provisions laid down in this Regulation apply from the same date as those laid down in Regulation (EU) No 596/2014,

[4] 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:

CHAPTER 1
GENERAL PROVISIONS

Article 1

For the purposes of this Regulation, the following definitions shall apply:

(a) 'time-scheduled buy-back programme' means 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;

(b) '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) …/…[5] 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[6];

(c) 'offeror' means the prior holder of, or the entity issuing, the securities;

(d) 'allotment' means the process or processes by which the number of securities to be received by investors who have previously subscribed or applied for them is determined;

(e) 'ancillary stabilisation' means the exercise of an overallotment facility or of a greenshoe option by investment firms or credit institutions, in the context of a significant distribution of securities, exclusively for facilitating stabilisation activity;

(f) 'overallotment facility' means a clause in the underwriting agreement or lead management agreement which permits acceptance of subscriptions or offers to purchase a greater number of securities than originally offered;

(g) 'greenshoe option' means an option granted by the offeror in favour of the investment firm(s) or credit institution(s) involved in the offer for the purpose of covering overallotments, under the terms of which such firm(s) or institution(s) is allowed to purchase up to a certain amount in securities at the offer price for a certain period of time after the offer of the securities.

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5 Commission Implementing Regulation (EU) …/… laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with Regulation (EU) No 596/2014 (OJ L …, …2016, p. …).

6 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

CHAPTER II
BUY-BACK PROGRAMMES

Article 2
Disclosure and reporting obligations

1. In order to benefit from the exemption laid down in Article 5(1) of Regulation (EU) No 596/2014, prior to the start of trading in a buy-back programme permitted in accordance with Article 21(1) of Directive 2012/30/EU of the European Parliament and of the Council[7], the issuer shall ensure adequate public disclosure of the following information:

   (a) the purpose of the programme as referred to in Article 5(2) of Regulation (EU) No 596/2014;

   (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 (hereafter: "duration of the programme").

The issuer shall ensure adequate public disclosure of subsequent changes to the programme and to the information already published in accordance with the first subparagraph.

2. The issuer shall have in place mechanisms that allow it to fulfil reporting obligations to the competent authority and to record each transaction related to a buy-back programme including the information specified in Article 5(3) of Regulation (EU) No 596/2014. The issuer shall report to the competent authority of each trading venue on which the shares are admitted to trading or are 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.

3. The issuer shall ensure adequate public disclosure of the information on the transactions relating to buy-back programmes referred to in paragraph 2 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 five year period from the date of adequate public disclosure.

Article 3
Conditions for trading

1. In order to benefit from the exemption laid down in Article 5(1) of Regulation (EU) No 596/2014, transactions relating to buy-back programmes shall meet the following conditions:

(a) the shares shall be purchased by the issuer on a trading venue where the shares are admitted to trading or traded;

(b) 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 phase shall not be modified during that phase;

(c) for 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.

2. In order to benefit from the exemption laid down in Article 5(1) of Regulation (EU) No 596/2014, issuers shall not, when executing transactions under a buy-back programme, 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.

3. In order to benefit from the exemption laid down in Article 5(1) of Regulation (EU) No 596/2014, issuers shall not, when executing transactions under a buy-back programme, purchase on any trading day more than 25 % of the average daily volume of the shares on the trading venue on which the purchase is carried out.

For the purposes of the first subparagraph, 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 apply 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.

Article 4
Trading restrictions

1. In order to benefit from the exemption laid down in Article 5(1) of Regulation (EU) No 596/2014, the issuer shall not, for the duration of the buy-back programme, engage in the following activities:

(a) selling of own shares;

(b) trading during the closed period referred to in Article 19(11) of Regulation (EU) No 596/2014;

(c) trading where the issuer has decided to delay the public disclosure of inside information in accordance with Article 17(4) or (5) of Regulation (EU) No 596/2014.

2. Paragraph 1 shall not apply where:

(a) the issuer has in place a time-scheduled buy-back programme; or

(b) the buy-back programme is lead-managed by an 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.

3. Point (a) of paragraph 1 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 to persons responsible for any decision relating to the trading of own shares, when trading in own shares on the basis of such decision.

4. Points (b) and (c) of paragraph 1 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.

CHAPTER III
STABILISATION MEASURES

Article 5
Conditions regarding the stabilisation period

1. In respect of shares and other securities equivalent to shares, the limited period referred to in Article 5(4)(a) of Regulation (EU) No 596/2014 (hereafter "stabilisation period") shall:

(a) in the case of a significant distribution in the form of an initial offer publicly announced, start on the date of commencement of trading of the securities on the trading venue concerned and end no later than 30 calendar days thereafter.

(b) in the case of a significant distribution in the form of a secondary offer, start on the date of adequate public disclosure of the final price of the securities and end no later than 30 calendar days after the date of allotment.

2. For the purposes of point (a) of paragraph 1, where the initial offer publicly announced takes place in a Member State that permits trading prior to the commencement of trading on a trading venue, the stabilisation period shall start on the date of adequate public disclosure of the final price of the securities and last no longer than 30 calendar days thereafter. Such trading shall be carried out in compliance with the applicable rules of the trading venue on which the securities are to be admitted to trading, including any rules concerning public disclosure and trade reporting.

3. In respect of bonds and other forms of securitised debt, including securitised debt convertible or exchangeable into shares or into other securities equivalent to shares,

the stabilisation period shall start on the date of adequate public disclosure of the terms of the offer of the securities and end either no later than 30 calendar days after the date on which the issuer of the instruments received the proceeds of the issue, or no later than 60 calendar days after the date of allotment of the securities, whichever is earlier.

Article 6
Disclosure and reporting obligations

1. Before the start of the initial or secondary offer of the securities, the person appointed in accordance with paragraph 5 shall ensure adequate public disclosure of the following information:

   (a) the fact that stabilisation may not necessarily occur and that it may cease at any time;

   (b) the fact that stabilisation transactions aim at supporting the market price of the securities during the stabilisation period;

   (c) the beginning and the end of the stabilisation period, during which stabilisation may be carried out;

   (d) the identity of the entity undertaking the stabilisation, unless unknown at the time of disclosure, in which case it shall be subject to adequate public disclosure before the stabilisation begins;

   (e) the existence of any overallotment facility or greenshoe option and the maximum number of securities covered by that facility or option, the period during which the greenshoe option may be exercised and any conditions for the use of the overallotment facility or exercise of the greenshoe option; and

   (f) the place where the stabilisation may be undertaken including, where relevant, the name of the trading venue(s).

2. During the stabilisation period, the persons appointed according to paragraph 5 shall ensure adequate public disclosure of the details of all stabilisation transactions no later than the end of the seventh daily market session following the date of execution of such transactions.

3. Within one week of the end of the stabilisation period, the person appointed in accordance with paragraph 5 shall ensure adequate public disclosure of the following information:

   (a) whether or not the stabilisation was undertaken;

   (b) the date on which stabilisation started;

   (c) the date on which stabilisation last occurred;

   (d) the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out;

(e) the trading venue(s) on which the stabilisation transactions were carried out, where applicable.

4. For the purpose of complying with the notification requirement set out in Article 5(5) of Regulation (EU) No 596/2014, the entities undertaking the stabilisation, whether or not they act on behalf of the issuer or the offeror, shall record each stabilisation order or transaction in securities and associated instruments pursuant to Article 25(1) and Article 26(1), (2) and (3) of Regulation (EU) No 600/2014. The entities undertaking the stabilisation, whether or not acting on behalf of the issuer or the offeror, shall notify all stabilisation transactions in securities and associated instruments carried out to:

(a) the competent authority of each trading venue on which the securities under the stabilisation are admitted to trading or are traded;

(b) the competent authority of each trading venue where transactions in associated instruments for the stabilisation of securities are carried out.

5. The issuer, the offeror and any entity undertaking the stabilisation, as well as the persons acting on their behalf, shall appoint one among them to act as central point responsible:

(a) for the public disclosure requirements referred to in paragraphs 1, 2 and 3; and

(b) for handling any request from any of the competent authorities referred to in paragraph 4.

Article 7
Price conditions

1. In the case of an offer of shares or other securities equivalent to shares, stabilisation of the securities shall not in any circumstances be carried out above the offering price.

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

Article 8
Conditions for ancillary stabilisation

Ancillary stabilisation shall be undertaken in accordance with Articles 6 and 7 and comply with the following conditions:

(a) securities shall be overallotted only during the subscription period and at the offer price;

(b) a position resulting from the exercise of an overallotment facility by an investment firm or credit institution which is not covered by the greenshoe option shall not exceed 5% of the original offer;

(c) the greenshoe option shall be exercised by the beneficiaries of such an option only where the securities have been overallotted;

(d) the greenshoe option shall not amount to more than 15% of the original offer;

(e) the period during which the greenshoe option may be exercised shall be the same as the stabilisation period pursuant to Article 5;

(f) the exercise of the greenshoe option shall be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise of the option and the number and nature of securities involved.

CHAPTER IV
FINAL PROVISION

Article 9
Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 3 July 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 8.3.2016

For the Commission
The President
Jean-Claude JUNCKER