

Primary Market Technical Note

Share buy-backs with mix and match facilities

The information in this note is designed to help issuers and practitioners interpret our UK Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules, and related legislation. The guidance notes provide answers to the most common queries we receive and represent FCA guidance as defined in section 139A FSMA

Rules

UKLR 9.45.130R; UKLR 115.4.181R; MAR

Not all buy-back programmes fall within the exemption provided under Article 5 of the Market Abuse Regulation (MAR). Trading in own shares in a buy-back programme is exempted from the prohibitions of insider dealing and unlawful disclosure of inside information, as well as from the prohibition of market manipulation, only when issuers satisfy the criteria set out in Article 5 MAR and in the UK version of Commission Delegated Regulation (EU) 2016/1052 Buy-back and Stabilisation Regulation. Buy-back programmes which do not meet those criteria cannot benefit from the exemption stated in Article 5 MAR.

When an issuer undertakes a tender offer via an intermediary and the shares bought by the intermediary are automatically cancelled or held as treasury shares by the company under a pre-existing binding contract, we look through the intermediary to the company itself. As a consequence, the 'sale' of the buy-back shares by the intermediary to the issuer would not constitute a related party transaction even if the

intermediary initially acquired over 20~~10~~% of the issuer's share capital in its own right.

Occasionally the structure detailed above is altered to include a mix and match facility. Under such a facility, after buying the shares from the shareholders under the tender offer, the intermediary will offer the same shares to certain new and/or existing shareholders before the eventual sale back to the issuer.

As noted above, the rationale for not viewing the ultimate sale to the issuer as a related party transaction is that the buy-back is effectively being undertaken by the company itself. So, following that logic, any shares that the intermediary buys under the tender offer should, in this instance, be treated as treasury shares for the purpose of the UK Listing Rules. Hence, any offer for selling these shares under the mix and match facility should be conducted in line with rules UKLR 9.~~4~~5.130R and UKLR 11~~5~~.4.181R (where relevant) in terms of the limitations on the price at which the shares may be sold, and any other rules applicable to the sale of treasury shares.

When we have made this point, some have responded that the intermediary is simply standing in the market selling shares and thus is unrelated to the company. Such an argument is, however, inconsistent with the look-through approach we take to these transactions. This is because it would suggest that the intermediary has been acting as principal in the buy-back and hence require us to treat the sale of shares to the listed company by the intermediary as a related party transaction.