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Market Abuse Regulation: Implications for Issuers of Debt Securities

The Market Abuse Regulation (“MAR”)¹ will take effect on 3 July 2016. MAR contains rules on insider dealing, unlawful disclosure of inside information and market manipulation that will apply in the European Economic Area (“EEA”). It will repeal and replace the existing Market Abuse Directive (“MAD”).² It updates the existing market abuse regime, adding a great deal more detail and widening the scope to cover financial instruments (including debt) traded on venues other than the main EEA exchanges. MAR, as a Regulation, will apply directly to all EU member states without the need for transposition at member state level. This Alert discusses the impact of MAR on issuers of debt securities.

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The original MAD covered financial instruments (including equities and bonds) traded on a “regulated market” in the EEA. Debt instruments traded on markets other than “regulated markets” in the EEA have been outside its scope. MAR, however, also applies to issuers whose debt securities are admitted to trading on listing and trading venues in the EEA which are not regulated markets, many of which now fall under the Markets in Financial Instruments Directive (“MiFID”) as multilateral trading facilities (“MTFs”).³ Examples of MTFs are exchange regulated markets such as the Irish Global Exchange Market, Luxembourg EuroMTF and the UK Professional Securities Market.⁴

MAR covers any financial instrument admitted to trading on an MTF (and instruments for which a request for admission to trading has been made) and any transaction, order or behavior concerning any such financial instrument, irrespective of whether it takes place on a trading venue. In addition, MAR covers instruments (whether listed or traded in any form, including over-the-counter (OTC) instruments) whose price or value depends on, or has an effect on, the price or value of a financial instrument, including OTC derivatives where the reference assets are “in-scope” shares or bonds, such as index derivatives and credit default swaps.

This means that issuers of debt securities that are admitted to trading on an MTF, which were not previously subject to the original MAD, will be required to comply with the new rules and regulations imposed by MAR. In addition, issuers of debt securities that are admitted to trading on a regulated market (such as the Main Securities Market of the Irish Stock Exchange) will be subject to enhanced obligations under MAR.

Disclosure Obligations for Issuers

Fast, complete, correct and timely assessment of information by the public. MAR requires issuers of debt securities that are admitted to trading on a regulated market or MTF (and so are within scope) to inform the public of “inside information” that directly concerns the issuer as soon as possible.⁵ “Inside information” is information of a precise nature which has not been made public, relating directly or indirectly to one or more issuers or financial

¹ Regulation No 596/2014 on Market Abuse.

² Directive 2003/6/EC on Market Abuse.

³ An MTF is a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract.

⁴ EMA maintains a list of MTFs [here](#).

⁵ Article 17(1), MAR.

instruments, which, if made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivatives and financial instruments.⁶ Information likely to have a significant effect means information that a reasonable investor would likely use as part of the basis of his or her investment decision.

MAR does not specify the types of information that constitute inside information. Accordingly, issuers will need to consider what information will need to be disclosed, both upfront (as a matter of policy) and on a case-by-case basis. For an issuer of debt securities, the following circumstances and events, among other things, may constitute inside information:

- Events that have an impact on the issuer's ability to meet its financial obligations under the debt documentation or may have an impact on its credit rating.
- Material impairment of contracts or relationships with customers, suppliers or other third parties.
- Changes in the regulatory landscape that have a material impact on the issuer's business.
- A change in the issuer's capital structure (including a refinancing or the occurrence of additional indebtedness) that materially impacts the issuer's existing debt securities.
- Significant transactions, such as mergers or material asset dispositions, that may impact the issuer's creditworthiness.
- Changes in senior management.
- Significant legal disputes.

The above list is not exhaustive, and issuers will need to carefully evaluate their disclosure obligations on a case-by-case basis.

MAR requires inside information to be announced without delay and in a manner which allows fast access and a complete, correct and timely assessment of the information by the public. Issuers of debt securities that are admitted to trading on a regulated market will already be making these disclosures in accordance with the requirements of the relevant market and its competent authority. Issuers of debt securities that are admitted to trading on an MTF will now need to check the relevant market's requirements for making these notices; in practice, it is likely that issuers that are within scope will be required to make the disclosures to the market either through a service operated by the market itself or through an authorised regulatory information service provider.⁷

In addition, issuers must also post and keep on their website for at least five years all inside information that they are required to disclose publicly. There are further rules on the manner in which information is posted and made available on the website.⁸ Note that disclosure only on a website does not in itself satisfy the requirement to disseminate the information to the public.

Delay in disclosure of inside information to the public. Issuers may delay disclosing inside information, provided that: (i) immediate disclosure is likely to prejudice the issuer's legitimate interests; and (ii) the delay is not likely to

⁶ Article 17(1)(a), MAR.

⁷ In the UK, authorized regulatory information service providers include Business Wire, PR Newswire Disclose, FirstSight by Romeike and Announce by Hugin ASA.

⁸ See the Commission Implementing Regulation (to be finalized) with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information.

mislead the public; and (iii) the issuer is able to ensure that the information remains confidential.⁹ All these conditions must be fulfilled for an issuer to delay disclosure. Issuers should therefore take advice on the appropriate timing for announcements of key events and developments. ESMA has indicated that it takes a narrow interpretation of the rules to delay disclosure, although it has not yet finalised its guidelines on this subject.¹⁰ An issuer that delays public disclosure must inform the relevant competent authority immediately after the announcement that the disclosure was delayed and provide a written explanation of how it met the three conditions for delaying information. All competent authorities will require notification of any delay in disclosure. The UK Financial Conduct Authority (“FCA”) has confirmed that it will only require the separate written explanation on request - issuers will need to check the approach taken by other competent authorities.¹¹ An issuer must also retain specified information relating to any decision to delay disclosure, including dates and times, the identity of the individual responsible for deciding on the delay and evidence of fulfilment of the conditions.¹² If the issuer can no longer retain the information confidentially, it must disclose the information as soon as possible, particularly if it is the subject of a market rumour based on sufficiently accurate information.¹³

Obligation to prepare and maintain insider lists. Issuers must prepare a list of all individuals who have access to inside information, including the issuer’s own employees, as well as employees of the issuer’s advisers (such as lawyers and accountants).¹⁴ An issuer may request its advisers to maintain a list of the relevant employees of the adviser. All insider lists must include: the identity of any person with access to inside information; the reason for including that person on the list; the date and time the person obtained access to the information; and the date the list was compiled.¹⁵ An Implementing Regulation sets out the precise format of the list and the personal data required (including personal home address and telephone numbers).¹⁶ The list must be kept up to date and retained for at least five years after it is first compiled or updated.¹⁷ Issuers or persons acting on their behalf must take all reasonable steps to ensure that each individual on the list confirms to the issuer in writing his or her own legal and regulatory duties in respect of inside information, and that the individual is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.¹⁸

Requirements for managers to disclose their transactions. Issuers must ensure that transactions by persons discharging managerial responsibility (“PDMR”), and persons closely associated with them (such as family members) are disclosed promptly and no later than three business days after the transaction.¹⁹ A disclosable transaction is a transaction made on the individual’s own account relating to the securities of the issuer (or linked derivatives or other linked financial instruments). Relevant transactions include the pledging or lending of financial instruments. The obligation to disclose only applies once the individual’s transactions have reached a total of EUR 5,000 in any calendar year (without applying any netting). The notification must include the individual’s name, the reason for the notification, the issuer’s name, the description and identifier of the relevant instrument, the nature, date and place of the transaction and the price and volume of the transaction. An Implementing Regulation sets out the

⁹ Article 17(4), MAR.

¹⁰ ESMA will publish guidelines on what constitutes the legitimate interests of an issuer. See Draft Guidelines on the Market Abuse Regulation published by ESMA (ESMA/2016/162).

¹¹ An issuer must determine its relevant competent authority for this purpose. Commission Delegated Regulation (EU) 2016/522 contains the relevant criteria.

¹² There is a Commission Implementing Regulation (to be finalized) with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information.

¹³ Article 17(7), MAR.

¹⁴ Article 18(1), MAR.

¹⁵ Article 18(3), MAR.

¹⁶ Implementing Regulation on precise format and updating of insider lists under MAR (2016/347).

¹⁷ Article 18(1), MAR.

¹⁸ Article 18(2), MAR.

¹⁹ Article 19(1), MAR.

format and template for the notification.²⁰ In practice, disclosures of managers' transactions will be made in the same manner as disclosures of inside information. Issuers must notify PDMRs of their obligations in writing and draw up a list of all relevant PDMRs and persons closely associated with them.

During a period of 30 calendar days before the publication of an interim financial report or a year-end report (which the issuer is obliged to make public) (a "Closed Period"), a PDMR may not conduct any transaction on his or her own account or on a third party's account, directly or indirectly, relating to the issuer's securities or debt instruments (or linked derivatives or other linked financial instruments). An issuer may allow transactions during a Closed Period if exceptional circumstances exist and the transaction cannot be executed at another time, such as severe financial difficulties. A Delegated Regulation sets out further the circumstances in which trading is allowed during a Closed Period.²¹

Note that, under the original MAD, the obligation to notify transactions by PDMRs only extended to transactions in the issuer's equity (or linked derivatives), and not to transactions in debt securities.

Market soundings

MAR introduces new rules for "market soundings". A market sounding is the communication of information prior to the announcement of a transaction, in order to gauge the interest of potential investors in the transaction.²² This typically involves a communication to "sound out" the market prior to a transaction by the sell-side to the buy-side, potentially involving disclosure of inside information. For a market sounding to be a lawful disclosure of inside information, MAR introduces new conditions, including obtaining the consent of the person receiving the market sounding, informing the person receiving the market sounding that he or she is prohibited from using the information, and record keeping requirements.²³ The disclosing party must make and maintain a record of all information given to the person receiving the market sounding, including the identity of the potential investors to whom the information has been disclosed and the date and time of the disclosure.

Disclosing parties will need to amend procedures, systems, and controls (including record keeping procedures) in order to meet the new rules on market soundings. Issuers must also identify situations where market soundings may be made (for example, when a sell-side firm has been in discussions with an issuer about a potential transaction, and the issuer intends to announce the issuance of debt or additional equity securities).

Key actions for issuers newly subject to MAR

Issuers that are newly subject to MAR will need to adopt appropriate policies and procedures to cover:

- Publication of inside information (including engagement of a regulatory information services provider and a review of how information is displayed and retained on the issuer's website) and a log of inside information published.
- Procedures to allow the delay of the publication of inside information, including specifying the information required to be retained in relation to any delay, ensuring the confidentiality of the information and making the related notification to the competent authority.
- Identification of relevant insiders and the creation and maintenance of insider lists.

²⁰ Implementing Regulation on the format and template for notification and public disclosure of managers' transactions under MAR (2016/523).

²¹ Commission Delegated Regulation (EU) 2016/522.

²² Article 11(1), MAR.

²³ There is a Commission Delegated Regulation (to be finalized) with appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings. ESMA has published draft guidelines for persons receiving market soundings.

- Reporting of transactions by relevant individuals with management responsibility (and persons closely associated with them) within the appropriate timeframe.
- Dealing restrictions on relevant individuals with management responsibility when in possession of inside information and during Closed Periods.
- Provision of training to directors, other PDMRs, insiders and other relevant employees of their obligations under the new regime.
- The new market sounding procedures, to the extent the issuer is or may be involved in market soundings.

Key actions for issuers already subject to existing MAD

Issuers that are already subject to the existing market abuse regime will need to update their procedures to comply with the requirements of MAR summarized above, including to:

- Take into account the additional requirements on the publication of inside information (or any delay in publication).
- Create insider lists in accordance with the new requirements and the new templates.
- Provide notice of transactions by relevant individuals with management responsibility (and persons closely associated with them) in accordance with the new reporting template.

Impact of UK referendum result

The result of the UK referendum on the UK's membership of the EU, announced on 24 June 2016, will not, for the time being, have any impact on the application of MAR in the UK. The FCA has confirmed that all EU law with direct effect in the UK for the time being remains applicable, and that UK firms should continue their implementation plans.