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Practice Pointers on EU Market Abuse Regulation: Requirements for U.S. Issuers

Background

The EU Regulation on Market Abuse ("MAR") came into effect on 3 July 2016, replacing the previously existing Market Abuse Directive and expanding the application of the EU's market abuse regime. In addition to detailing various offences, MAR imposes a number of requirements for information disclosure, insider lists and dealings by senior managers of issuers. For U.S. and other non-EU issuers of securities, MAR brings about a key change by expanding the scope of the market abuse regime to apply to securities listed on multilateral trading facilities and other trading venues in the EU (e.g., Luxembourg's Euro MTF and Ireland's Global Exchange Market).

This guidance note summarises some key requirements that U.S. and other non-EU securities issuers should be aware of, but it is intended only as a high-level overview of the MAR regime and we recommend that you consult suitably qualified legal counsel where you consider that MAR may be relevant to your situation.

Scope of MAR

MAR applies to financial instruments:[1]

(a) admitted to trading or for which a request for such admission has been made, on a regulated market in an EU Member State;
(b) traded, admitted to trading or for which a request for such admission has been made, on a multilateral trading facility ("MTF");
(c) traded on an organised traded facility ("OTF");[2] or
(d) the price or value of which depends on or has an effect on the price of a financial instrument referred to in (a), (b) or (c), including derivative instruments.

MAR also applies to behaviour or transactions relating to emissions allowances, as well as to market manipulation related to spot commodity contracts, commodity derivatives and benchmarks. However, these topics are outside the scope of this guidance note.

MAR applies to actions and omissions in the EU and in a third country, so an issuer of securities that meet any of the definitions above, whether an EU issuer or a non-EU issuer (an "Issuer"), will be within the scope of MAR. Note that MAR applies to any transaction, order or behaviour referred to in the following section, whether or not such transaction, order or behaviour takes place on a trading venue.

Where a non-EU Issuer's financial instruments are admitted to trading in the EU only on an MTF or an OTF and the Issuer has not approved or consented to such admission to trading, the Issuer obligations in MAR (i.e. disclosure of inside information, control of inside information and insider lists and dealings by PDMRs) will not apply. However, the insider dealing, unlawful disclosure and market manipulation offences will still apply in relation to those instruments.

The MAR Offences and Accepted Market Practices

MAR prohibits:

(a) insider dealing (Article 14(1)(a));
(b) attempted insider dealing (Article 14(1)(b));
(c) recommending or inducing another to engage in insider dealing (Article 14(b));
(d) unlawful disclosure of inside information (Article 14(c));
(e) market manipulation (Article 15);
(f) attempted market manipulation (Article 15); and
(g) dealing by a person discharging managerial responsibilities during a closed period (Article 19(ii)).

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[1] For the purposes of MAR, the definition of "financial instruments" is found in Section C, Annex I to Directive 2014/65/EU ("MiFID II"). This is wide enough to cover most securities.

[2] Note that such instruments will only be captured by MAR from the date on which the MiFID II legislative package takes effect, currently scheduled to be 3 January 2018.

1. Insider dealing offences

Engaging in insider dealing, attempting insider dealing or recommending or inducing another to engage in insider dealing are offences under Article 14 MAR.

Insider dealing is where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.

The definition also applies to the use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates, where the order was placed before the person concerned possessed the inside information.

Inside Information

Inside information means 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 any of those financial instruments or on the price of related derivative financial instruments.

Although this definition seems to have expanded compared to MAD, the FCA in the UK has indicated that there will not be a significant change in the way it interprets the definition of inside information.

In contrast to the US, there is no requirement that there be a fiduciary or fiduciary-like relationship or a duty of trust or confidence between the source of inside information and the recipient. It is therefore possible that activity that is permissible under US laws relating to insider trading will be prohibited under MAR.

Information shall be deemed to be "**of a precise nature**" if it indicates:

- a set of circumstances which exists or which may reasonably be expected to come into existence, or
- an event which has occurred or which may reasonably be expected to occur,

in each case where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instrument or the related derivative financial instrument.

Information "**likely to have a significant effect**" if it were made public means information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

Article 9 of MAR provides for various examples of behaviour that is considered legitimate behaviour in the context of the insider dealing offences, as well as the market manipulation offences. These include situations where:

- the legal person in possession of inside information has taken steps to ensure that the natural person who made the decision to acquire or dispose of the relevant financial instrument is not in possession of the inside information, and has not influenced that natural person;
- the person in possession of inside information is a market maker acting legitimately in the normal course of the exercise of such function;
- the person in possession of inside information is authorised to execute orders on behalf of third parties and acts legitimately in the normal course of the exercise of that person's employment, profession or duties;
- the person in possession of inside information acquires or disposes of financial instruments in discharge of a pre-existing obligation that has become due, in good faith; and
- the person in possession of inside information obtained such information in the course of conducting a public takeover or merger with a company and uses the information solely for proceeding with that merger or public takeover (and not for stake-building), so long as that information has ceased to be inside information at the time of approval of the merger or acceptance of the offer by the shareholders of that company.

2. Unlawful disclosure of inside information

Under Article 10 MAR, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

Market soundings

A disclosure of inside information made in the course of a market sounding is deemed to be made in the normal exercise of a person's employment, profession or duties where the disclosing market participant complies with certain specified conditions. A market sounding is the communication of information, usually by a dealer or manager on behalf of an Issuer, about a potential new issuance, in order to gauge the interest of potential investors of a potential transaction and related conditions. Certain detailed requirements have to be satisfied by the disclosing party, which are discussed in further detail in the guidance note "Market Soundings Safe Harbour: Compliance and Record Requirements."

3. Required disclosure of inside information

MAR requires an Issuer to inform the public as soon as possible of inside information which directly concerns the Issuer. The disclosure needs to be made in a manner which enables "fast access and complete, correct and timely assessment of the information by the public" and on the European Electronic Access Point, when this is established by the European Securities and Markets Authority. The Issuer cannot combine the disclosure with the marketing of its activities. All inside information must be posted and maintained on the Issuer's website for at least five years.

An Issuer may only delay disclosure if, and for so long as:

- the Issuer's legitimate interests are likely to be prejudiced by immediate disclosure;[3] and
- the delay of disclosure is not likely to mislead the public; and
- the Issuer is able to ensure the confidentiality of that information.

If such disclosure is delayed, the Issuer must notify the competent authority that disclosure of the information was delayed, immediately after the information is disclosed. Competent authorities may require a written explanation of how the conditions set out above were met to be given on request, or to be provided with the notification.

ESMA's Final Report on MAR (published 13 July 2016) has set out a non-exhaustive, indicative list of situations when it will be in an Issuer's legitimate interests to delay disclosure, including where:

- the Issuer is conducting negotiations, the outcome of which would likely be jeopardised by immediate public disclosure of that information;
- the financial viability of the Issuer is in grave and imminent danger, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, by jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the Issuer;
- the inside information relates to decisions taken or contracts entered into by the management body of an Issuer which need the approval of another body of the Issuer (other than shareholders) in order to become effective and immediate disclosure would jeopardise the correct assessment of the information by the public, provided that the Issuer has arranged for the other body to take its decision as soon as possible;
- the Issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the Issuer;
- the Issuer is planning to buy or sell a major holding in another entity and disclosure may jeopardise the deal;
- a UK deal or transaction that has been previously announced is subject to a public authority's approval and the approval is subject to conditions and disclosure of those conditions is likely to affect the Issuer's ability to meet the conditions.

[3] Guidance on when it will be in an Issuer's legitimate interests to delay disclosure is set out in the ESMA guidelines on MAR (https://www.esma.europa.eu/sites/default/files/library/2016-1130_final_report_on_mar_guidelines.pdf).

ESMA's Final Report on MAR also sets out three (non-exhaustive) examples when the delay in the disclosure is likely to mislead the public and where immediate and appropriate disclosure is always necessary and mandatory:

- the inside information is materially different from a previous public announcement of the Issuer on the matter to which the inside information relates; or
- the inside information relates to the fact that the Issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or
- the inside information contrasts with the market's expectations, where such expectations are based on signals that the Issuer has previously sent to the market, such as interviews, roadshows or any other type of communication organized by the Issuer or with its approval.

In assessing the market's expectations, the Issuer should take into account the market sentiment, for instance considering the consensus among financial analysts.

In order to preserve the stability of the financial system, an Issuer that is a credit or financial institution may delay the public disclosure of inside information (Article 17(5)). This includes information relating to a temporary liquidity problem and the need to receive temporary liquidity assistance from a central bank or lender of a last resort, if all of the below are satisfied:

- the disclosure of insider information entails a risk of undermining the financial stability of the Issuer and of the financial system;
- it is in the public interest to delay the disclosure;
- the confidentiality of that information can be ensured; and
- the relevant competent authority has consented to delay on the basis that the above conditions are met.

4. Creation and maintenance of insider lists

MAR requires that Issuers or persons acting on their behalf shall maintain a list of all persons who have access to inside information and who are working for or under them, or otherwise have access to inside information.

This list must be kept updated and made available to the competent authority on request.

These lists must adhere to the prescribed format.[4]

5. Dealings by PDMRs

Persons discharging managerial responsibilities ("PDMRs"), as well as persons closely associated with them, must notify the Issuer and the competent authority of certain transactions[5] relating to the shares or debt instruments of that Issuer or to derivatives or other financial instruments linked to them.

A person closely associated with a PDMR includes:

- a spouse, or a partner considered to be equivalent to a spouse in accordance with national law;
- a dependent child, in accordance with national law;
- a relative who has shared the same household for at least one year on the date of the transaction concerned; or
- a legal person, trust or partnership, the managerial responsibilities of which are discharged by a PDMR or a person referred to above, which is directly or indirectly controlled by a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.

Such notification must contain certain information[6] and must be made to the competent authority within three working days of the transaction date.

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[4] Detailed in Commission Implementing Regulation (EU) 2016/347.

[5] These are detailed in MAR Article 19(1) and (7) and include selling, purchasing, pledging, and lending and can also include some transactions undertaken on behalf of PDMRs, even where discretion is exercised.

[6] Listed in MAR Article 19(6).

The notification requirement is subject to a *de minimis* threshold of €5,000 (or a higher threshold, not exceeding €20,000, set by a Member State).

PDMRs are also prohibited from trading any securities of the Issuer, or derivatives or other financial instruments linked to them, during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the Issuer is obliged to make public under either its national laws or the rules of the trading venue where the Issuer's shares are admitted to trading.

6. Investment Recommendations

MAR requires persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy to take reasonable care to:

- ensure that such information is objectively presented; and
- to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.

An "investment recommendation" means information:

- recommending or suggesting an investment strategy;
- explicitly or implicitly concerning one or several financial instruments or the Issuers;
- including any opinion as to the present or future value or price of such instruments;
- intended for distribution channels or for the public.

In the ESMA Final Report of September 2015, ESMA took the view that:

> "an investment recommendation is intended for distribution channels or for the public … when it is intended or expected to be distributed to clients or to a specific segment of clients, whatever their number, as a non-personal recommendation… ESMA considers that a too narrow definition of 'investment recommendation intended for distribution channels or for the public' would entail the risk of leaving some investment recommendations provided to investors unregulated, without investors being in a position to know that the recommendation received is not regulated."

ICMA has interpreted the ESMA report in their Q&A in March 2016 as meaning "…that investment recommendations are in scope of MAR where they are disseminated to more than one client." This issue is currently under review in the UK by the FCA.

7. Market manipulation offences

The following is a list of activities which would fall within the market manipulation offence:

(a) entering into a transaction, placing an order to trade or any other behaviour which:

(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for or price of a financial instrument; or

(ii) secures, or is likely to secure, the price of one or several financial instruments at an abnormal or artificial level,

unless the relevant person establishes that such transaction, order or behaviour has been carried out for legitimate reasons and conforms with an accepted market practice (see "Legitimate reasons and accepted market practice" below);

(b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments which employs a fictitious device or any other form of deception or contrivance;

(c) disseminating information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for or price of a financial instrument or secures, or is likely to secure, the price of one or several financial instruments at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading; and

(d) transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark.

MAR provides (in Article 12(2) and Annex 1) a non-exhaustive list of conduct that will be considered as market manipulation and indicators of the employment of a fictitious device or deception, and indicators relating to false/misleading signals and to "price securing".

Legitimate reasons and accepted market practice

Under Article 13 MAR, the actions specified in paragraph (a) of the foregoing section will not constitute market manipulation (or attempted market manipulation) under Article 15 MAR where they conform with an "accepted market practice" and have been carried out for "legitimate reasons."[7]

Accepted market practice

A competent authority may establish an accepted market practice ("AMP," or in plural "AMPs"). They will need to take into account the following criteria in doing so, as set out in Article 13(2) of MAR:

(a) whether the market practice provides for a substantial level of transparency to the market;

(b) whether the market practice ensures a high degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand;

(c) whether the market practice has a positive impact on market liquidity and efficiency;

(d) whether the market practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice;

(e) whether the market practice does not create risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the EU;

(f) the outcome of any investigation of the relevant market practice by any competent authority or by another authority; and

(g) the structural characteristics of the relevant market.

Note that a market practice that has been established by a competent authority as an AMP in a particular market shall not be considered to be applicable to other markets, unless the competent authorities of those other markets have accepted that practice under Article 13 MAR.

At the time of writing this guidance note, no AMPs had been established by any of the FCA in the UK, the CBI in Ireland or the CSSF in Luxembourg.

[7] Note that under MAR Recital 42, an infringement could still be deemed to have occurred if the relevant competent authority determines that there was an illegitimate reason behind the relevant action.

However, the European Commission has adopted some criteria (in Commission Delegated Regulation (EU) 2016/908) for individual competent authorities to establish AMPs. Please see the below extract from Article 3 for more information:

> "1. In determining whether a market practice can be established as an AMP and whether it fulfils the criterion set out in point (a) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall examine whether the market practice ensures that the following information will be disclosed to the public:
>
> (a) Before a market practice is performed as an AMP:
> (i) the identities of the beneficiaries and the persons who will perform it and the one among them that is responsible for fulfilling the transparency requirements under points (b) and (c) of this paragraph;
> (ii) the identification of the financial instruments in relation to which the AMP will apply;
> (iii) the period during which the AMP will be performed and situations or conditions leading to the temporary interruption, suspension or termination of its performance;
> (iv) the identification of the trading venues on which the AMP will be carried out, and, where applicable, indication of the possibility to execute transactions outside a trading venue;
> (v) reference to the maximum amounts of cash and of the number of financial instruments allocated to the performance of the AMP, if applicable.
> (b) Once the market practice is performed as an AMP:
> (i) on a periodic basis, details of the trading activity relating to the performance of the AMP such as the number of transactions executed, volume traded, average size of the transactions and average spreads quoted, prices of executed transactions;
> (ii) any changes to previously disclosed information on the AMP, including changes relating to available resources in terms of cash and financial instruments, changes to the identity of persons performing the AMP, and any change in the allocation of cash or financial instruments in the accounts of the beneficiary and the persons performing the AMP.
> (c) When the market practice ceases to be performed as an AMP on the initiative of the person who has been performing it, of the beneficiary or of both:
> (i) the fact that the performance of the AMP has ceased;
> (ii) a description of how the AMP has been performed;
> (iii) the reasons or causes for ceasing the performance of the AMP.
>
> For the purposes of point (b)(i), where multiple transactions in a single trading session are performed, daily aggregated figures may be acceptable in relation to the appropriate categories of information.
>
> 2. In determining whether a market practice can be established as an AMP and whether it fulfils the criterion set out in point (a) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall examine whether the market practice ensures that the following information will be disclosed to them:
>
> (a) Before a market practice is performed as an AMP, the arrangements or contracts between the identified beneficiaries and the persons who will perform the market practice once established as an AMP where such arrangements or contracts are needed for its performance;
> ***(b)*** Once the market practice is performed as an AMP, periodic report to the competent authority providing details about the transactions executed and about the operations of any arrangement or contract between the beneficiary and the persons performing the AMP."

Overview of U.S. Issuer Actions

An Issuer with a class of debt securities which are subject to MAR should assess what actions need to be taken immediately to ensure that it is in compliance. These actions may include:

- training for key personnel on the regime and its implications;
- creating policies or procedures on the disclosure of inside information;
- instituting a log for inside information and for recording delayed disclosures (and the follow up notifications);
- creating and maintaining insider lists;
- preparing a list of PDMRs (later defined) and closely associated persons; and
- establishing policies for PDMRs providing notification to regulators.

Additionally, an Issuer will need to consider the effect of MAR if the Issuer intends to redeem a class of in-scope securities (or a portion of a class) or engage in a repurchase of some or all of its securities in open market transactions.

Buy-backs of Securities

An Issuer intending to conduct a buy-back of some or all of its in-scope securities needs to bear in mind that there may be a risk of the buy-back constituting insider dealing or market manipulation (as outlined above).

MAR provides an express exemption from those offences for any share buy-back program that meets the specific requirements set out in Article 5 of MAR. However, there is no express exemption provided for buy-backs of debt securities.

Therefore, whether the proposed buy-back of debt securities is intended to be conducted by way of open market transactions or by individual negotiations, and whether by way of a programme or an opportunistic transaction, the Issuer will need to consider the exemptions generally available from the insider dealing and market manipulation prohibitions.

In terms of insider dealing, there can be no insider dealing if there is no unpublished inside information. Therefore, the Issuer must consider whether it is in possession of inside information, as defined earlier. However, it is likely to be only in rare instances that information would constitute inside information in relation to debt securities, as compared to equity securities. However, if those rare circumstances exist, an Issuer should generally consider delaying any buy-back until after the inside information has been made public, or otherwise has ceased to be inside information.

In terms of possible market manipulation, the Issuer will need to be as certain as possible that the buy-back is carried out for legitimate reasons and in accordance with an accepted market practice, as outlined above. In the absence of an Accepted Market Practice established by the competent authority for the relevant jurisdiction of listing/trading, it would be prudent to follow as closely as possible the principles outlined above by the European Commission for the establishment of Accepted Market Practices by EU competent authorities.

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