

Client Update

EU Market Abuse Regulation Imposes Significant New Obligations on ADR/GDR and Eurobond Issuers on EU-Regulated Markets and on Unregulated Exchanges

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A new Market Abuse Regulation¹ (“MAR”) will apply throughout the European Union as of 3 July 2016. The Regulation imposes new obligations on share, debt and depositary receipts (ADR and GDR) issuers listed on the London Stock Exchange (“LSE”) or another EU-regulated market, and also those with securities trading on unregulated exchanges (such as LSE’s AIM or Ireland’s GEM, a popular venue for Eurobonds) and those that trade on an unlisted basis (for example, on the LSE’s ATT-Only platform).

Once MAR becomes effective, issuers with a Standard listing of shares and debt (and potentially, as explained below, ADRs/GDRs) on the LSE will be required to implement senior manager reporting obligations and trading restrictions that currently apply only to companies with a Premium listing.

In addition, issuers with securities trading on the LSE’s ATT-Only platform and Eurobond issuers on a multilateral trading facility, which were previously not subject to the European market abuse regime, will need to adopt appropriate internal policies by July 3, 2016 in order to comply with the new obligations.

OVERVIEW

Unlike the Market Abuse Directive (“MAD”), which it replaces, MAR is directly applicable in EU Member States without needing to be transposed into national law, although Member States are required to amend their national law if

¹ Regulation (EU) No. 596/2014 of April 16, 2014 on market abuse.

necessary in order to align it with the provisions of MAR. The Financial Conduct Authority (“FCA”) in the United Kingdom has issued a consultation paper that sets out its proposed changes to the FCA Handbook in order to comply with MAR.² Many of the provisions of MAR are very similar to the requirements applicable to Premium-listed companies currently found in the UK Disclosure and Transparency Rules (“DTRs”) and UK Listing Rules. Where existing provisions are not incompatible with the new MAR provisions, the FCA is proposing to retain some of them by way of guidance and signposts to MAR.

MAR covers market abuse (insider dealing and market manipulation) in relation to “financial instruments”:

- that are admitted to trading on an EU-regulated market or for which a request for admission to trading on a regulated market has been made (for instance, the main markets of the LSE and Euronext);
- that are admitted to trading on a multilateral trading facility (“MTF”) or for which a request for admission to trading on an MTF has been made (for instance, the LSE’s ATT-Only platform and AIM market, the Irish Stock Exchange’s Global Exchange Market (“GEM”) and the Luxembourg Stock Exchange’s Euro MTF Market);
- that are traded on an organised trading facility (“OTF”) (although financial instruments traded on an OTF will not be covered until MiFID II, the EU directive and regulation that will replace the current Markets in Financial Instruments Directive, comes into effect, which is currently expected to be in January 2018); or
- whose price or value depends on or has an effect on the value of any of the above financial instruments (for instance, credit default swaps and contracts for differences).

The list of “financial instruments” subject to MAR remains largely unchanged from those covered by current regulations and includes transferable securities, money-market instruments, units in collective investment undertakings (i.e., fund interests) and derivative contracts. Transferable securities include shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of those shares; bonds or other forms of securitised debt, including depositary receipts in respect of such securities; and any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference

² Policy proposals and Handbook changes related to the implementation of the Market Abuse Regulation (2014/596/EU), November 2015, CP 15/35.

to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

IMPACT ON ISSUERS

Premium and Standard Listings of Shares and GDRs

Control and Disclosure of “Inside Information”

MAR contains many of the same requirements for control and disclosure of inside information as were set out in MAD, but, since it is mandatorily applicable to all EU Member States, it will replace the requirements currently found in DTR 2. Similarly to the current DTR 2.2, it requires issuers to inform the public as soon as possible of “inside information” which directly concerns the issuer. In addition, similarly to the current DTR 2.5, it allows companies to delay the disclosure of inside information where it is necessary to protect an issuer’s “legitimate interests,” so long as the confidentiality of the information can be maintained. While DTR 2 will be replaced, the FCA has proposed keeping, as guidance, its views currently set out in DTR 2.5 on what constitutes an issuer’s legitimate interests for the purposes of delaying disclosure, such as negotiations of M&A transactions where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure.³ Importantly, MAR requires issuers to inform the applicable regulator (the FCA, in the case of companies with securities listed on the LSE) of any such delay after the inside information is disclosed, and provide, at the regulator’s request, a written explanation of the reasons for the delay (MAR allows regulators to require that this written explanation be given after every delay, but the FCA has proposed requiring it only upon its request, although notifications will still need to be given immediately after any delay). This reporting obligation is a new requirement that may potentially give regulators a useful tool in monitoring instances when disclosures are delayed, and commence investigations when they believe that the conditions for delaying disclosure have not been met. Issuers with LSE-listed securities will need to make sure that a record is kept of the relevant decision that can be provided to the FCA, if requested.

Under MAR, issuers (and any persons acting on their behalf or on their account) are also required to draw up an insider list. This is a similar obligation to the obligation currently contained in DTR 2.8, which it replaces.

³ The FCA has also published a consultation paper that set out its views generally on delaying disclosure of inside information. Provisions to delay disclosure of inside information within the FCA’s Disclosure and Transparency Rules, November 2015, CP 15/38.

Managers' Transactions

MAR imposes trading notification requirements and trading restrictions on senior managers of issuers with shares (whether Premium- or Standard-listed) or debt instruments or derivatives or other financial instruments linked to those securities, in each case which are listed on a regulated market (or for which a listing is applied for).⁴ While we believe that the new requirements were not intended to be extended to ADRs/GDRs listed on the LSE or on another EU-regulated exchange (where the underlying shares are not listed), there is some ambiguity in the new rules and this will need to be clarified by the FCA or ESMA, the European Securities and Markets Authority.

MAR places obligations and restrictions on “persons discharging managerial responsibilities” (“PDMRs”) as well as persons closely associated with PDMRs. A PDMR is defined as someone who is a member of the administrative, management or supervisory body of the issuer, or a senior executive with regular access to inside information relating directly or indirectly to the issuer and power to take managerial decisions affecting the future developments and business prospects of the issuer. A person “closely associated” with the PDMR includes a spouse, civil partner, dependent child, relative living with the PDMR, or a legal person, trust or partnership which is managed or controlled by, or set up for the benefit of, a PDMR or someone closely associated with them.

MAR requires PDMRs and persons closely associated with them to notify the issuer and the relevant regulator of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto, over and above a EUR 5,000 annual threshold. Transactions to be notified include the pledging or lending of financial instruments by or on behalf of a PDMR or a person closely associated with them. The notification must include details, such as the price and volume of the transaction, and the issuer must make such information public within three business days of the date of the transaction.⁵

⁴ MAR's trading notification requirements and trading restrictions also apply to senior managers of issuers which have “approved” trading of their securities on an MTF or OTF (or requested admission to trading on such a facility) or requested admission to trading on such a facility. As the rules apply to issuers which have “approved” trading of their securities on an MTF or an OTF or requested admission to trading on such a facility, they should not apply to issuers with securities traded on an over-the-counter market where they have not taken any action to approve trading on that market.

⁵ The deadline for notification of the relevant transaction by the PDMR to the issuer is also three business days following the date of the transaction, which may present some practical difficulties for the issuer if the PDMR only notifies the issuer shortly before the deadline.

Issuers are required to draw up a list of all of their PDMRs and persons closely associated with them and must notify all of their PDMRs, in writing, of their obligations. PDMRs are then required to pass on such notification to all persons closely associated with them.

MAR also contains a prohibition on PDMRs conducting any transaction on their own account or for the account of a third party relating, directly or indirectly, in the shares or debt instruments of the issuer or in 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 (subject to certain narrow exceptions which will be set out in subsequent guidance).

As the new rules contain similar requirements applicable to Premium-listed companies contained in the DTR 3 and the UK Listing Rules (under the Model Code), those rules will be replaced by the comparable MAR requirements.

Market Manipulation

MAR contains exemptions for share buy-backs and stabilisation activities similar to those currently set out in the Buyback and Stabilisation Regulation (which are replaced by MAR). It also contains specific rules for market-sounding activities, which should be of particular interest for companies considering major M&A or other transactions.

Eurobond Issuers and Companies with Securities Traded on ATT-Only or Other MTF Markets

From 3 July 2016, when MAR becomes effective, issuers with Eurobonds trading on an unregulated exchange (such as the ISE's GEM or Luxembourg Euro MTF market), and companies with ADRs/GDRs or shares traded on an MTF, such as on the LSE's ATT-Only platform or AIM market, will be subject to many of the same requirements currently applicable only to listed companies. As a result, they will need to engage a Regulatory Information Service ("RIS") provider and disclose information as soon as possible through the RIS, keep insider lists, and (depending on the securities listed or traded) require their senior managers to comply with the trading reporting requirements and trading restrictions.

In addition, companies with Eurobonds listed on a regulated exchange, such as the ISE's Main Market, will now be subject to senior manager trading reporting requirements and trading restrictions, which did not previously apply, and will need to establish procedures to ensure compliance with these new rules.

NEXT STEPS FOR ISSUERS

MAR is one of the most significant new regulations to apply to companies with securities listed and traded in the European Union. Companies that previously were not subject to the European market abuse regime, such as Eurobond issuers listed on an MTF or ADR/GDR issuers listed on an ATT-Only basis, will need to adopt appropriate internal systems and policies by 3 July 2016, the effective date of MAR, to comply with these new obligations. Issuers previously subject to the market abuse regime will need to review their current systems and policies and implement any required changes to ensure that they comply with MAR.

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Please do not hesitate to contact us with any questions.