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EU Market Abuse Regulation – Implications for non-European Debt Issuers

The Market Abuse Regulation (596/2014/EU) (MAR) came into force July 3, 2016 and is directly applicable in all EU Member States. MAR replaced the market abuse directive previously implemented (with many variations) in the national laws of each EU Member State.

MAR, amongst other changes, extends the prohibition on insider dealing, unlawful disclosure of inside information and market manipulation, and the procedural requirements for controlling inside information, to issuers whose securities have been admitted to trading on multilateral trading facilities (MTF), such as the Luxembourg Stock Exchange's Euro MTF, the London Stock Exchange's Professional Securities Market and the Irish Stock Exchange's Global Exchange Market (GEM); EU organised trading facilities (OTF); as well as to financial instruments whose price or value depends on or has an effect on securities traded on an EU regulated market, an EU MTF or an EU OTF (financial instruments traded on OTFs will only be covered once MiFID II, the new EU Markets in Financial Instruments Directive, comes into effect, currently expected to be 3 January 2018).

As a result of the introduction of MAR, non-EEA issuers such as Latin American and U.S. issuers with securities admitted to trading on an EU MTF are now subject to the requirements of this inside information regime that did not previously apply to them. Issuers with securities admitted to trading on an EU regulated market, such as the London Stock Exchange's Main Market, should already be familiar with the principal concepts and requirements contained in MAR.

The obligations to disclose inside information, to control inside information, and to maintain insider lists and the rules on dealings by PDMRs only apply to issuers who have approved the admission to trading of their securities on an EU trading venue. However, the offences of insider dealing and unlawful disclosure and market manipulation apply regardless of whether the issuer approved and/or knew of its instruments being admitted to trading on an EU trading venue. This is relevant in certain jurisdictions such as Germany, where it may be possible for brokers to admit certain securities to trading on an MTF market (such as the Open Market segment of the Frankfurt Stock Exchange, the Freiverkehr) without the issuer's involvement. From January 2018, ESMA will be required to maintain a list of MAR in-scope financial instruments based on information received from national regulators who will receive the information from market operators. However, this list will not be definitive under MAR and may not be up to date at all times. Monitoring this list once it is available and checking whether debt securities have been listed on an MTF by third parties, particularly at times of any proposed issuance of securities, liability management transactions, and buy-backs, may help avoid inadvertently breaching the MAR prohibitions of insider dealing and unlawful disclosure and market manipulation.

Issuers with listings in their home market should also consider whether disclosures under MAR will trigger simultaneous disclosure obligations in their home market.

Disclosure Obligations regarding Inside Information

> *Disclosure of Inside Information—MAR Articles 7 and 17*

“Inside information” is defined under MAR Article 7 as 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 those financial instruments or on the price of related derivative financial instruments. Information is deemed to be sufficiently precise 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, that 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 financial instruments or related derivative financial instruments. Information will have a “significant effect” on the price of such instruments only if a reasonable investor would be likely to use such information as part of the basis for an investment decision.

MAR does not specify which types of information constitute inside information, but for issuers of debt securities, this may include events that impact the issuer's ability to meet its financial obligations under the debt documentation or material impairment of contracts or relationships with customers, suppliers, or other third parties. Where a European finance subsidiary is used to issue debt securities which are guaranteed by a non-EU parent company, events at the parent level that could have an impact on the listed securities may also be considered. The determination of what information needs to be disclosed needs to be made in each individual case based on the circumstances at the time.

Under MAR Article 17, inside information must be disclosed as soon as possible through an officially appointed mechanism (OAM), such as the Regulatory News Service of either the London Stock Exchange or Irish Stock Exchange, or the Financial News Service of the Luxembourg Stock Exchange, and in a manner which allows a complete and correct assessment of the information by the public.

> *Delay in Disclosure—MAR Article 17(4)*

Delay in disclosure of inside information is permitted if: (i) the issuer has legitimate interests which would be prejudiced by immediate disclosure; (ii) the delay is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of the information.

The European Securities and Markets Authority (ESMA) issued guidelines regarding the legitimate interests that would be prejudiced by disclosure and the situations in which delay would be likely to mislead the public. This guidance is not intended to be exhaustive and issuers are required to assess each situation on a case-by-case basis.

MAR requires issuers to maintain a record for five years of the basis on which the decision was made to delay disclosure. Issuers are also required to notify the relevant national regulator of the decision to delay disclosure *promptly following public disclosure of the information*.

> *Maintaining Insider Lists—MAR Article 18*

Issuers must maintain an insider list detailing all employees, agents, contractors, and other advisers who have access to the issuer's inside information, and promptly update the list whenever there is a change. Issuers must also provide the list to the national regulator upon request.

ESMA has developed technical standards establishing the precise format of insider lists and the format for updating insider lists. Currently, insider lists must include the following minimum information about insiders: (i) name; (ii) company name and address; (iii) work direct line and mobile telephone numbers; (iv) job function and reason for being an insider; (v) date and time at which the insider obtained inside information; (vi) date and time at which the insider ceased to have access to inside information; (vii) date of birth; (viii) "National Identification Number" (where applicable); (ix) personal home and mobile telephone numbers; and (x) personal full address.

An issuer must also take all reasonable steps to ensure any person on the insider list acknowledges in writing the legal and regulatory duties involved and is aware of any applicable sanctions.

Disclosure Obligations of Persons Discharging Managerial Responsibility (PDMRs)—MAR Article 19

PDMRs and persons closely associated with them (such as a spouse or dependent child) must promptly disclose to the issuer and national regulator personal transactions in the issuer's financial instruments, including debt securities. MAR also introduced a *de minimis* threshold for transactions of €5,000/year (or alternatively, the higher threshold set by a Member State up to €20,000/year). ESMA clarified that for purposes of calculating these thresholds transactions carried out by a PDMR and by closely associated persons to that PDMR do not need to be aggregated.¹ The time limit for notifications has been reduced to three business days. Notifications must also be published on the issuer's website. In addition, MAR prohibits PDMRs from dealing when in possession of inside information or during a "closed period" (*i.e.*, 30 days before an announcement of interim or annual results).

An issuer is required to notify PDMRs of their obligations in writing and to draw up a list of all PDMRs and persons closely associated with them. PDMRs must also notify the persons closely associated with them of their obligations in writing, and keep a copy of this.

Market Soundings—MAR Article 11

MAR introduces new rules regulating the disclosure of inside information to potential investors in connection with gauging interest in a possible transaction. In order to undertake such "market soundings", the issuer must: (i) determine whether the information to be disclosed constitutes inside information and keep a written record of its conclusion and the reasons therefore; (ii) prior to disclosure of the inside information, obtain the consent of the intended recipient to

¹ ESMA, Questions and Answers on the Market Abuse Regulation, updated 20 December 2016, ESMA/2016/1644.

receive such information and their agreement to keep such information confidential; (iii) inform the intended recipient that they are prohibited from undertaking transactions in financial instruments relating to the inside information; (iv) maintain a record of all information disclosed and the identity of the potential investors to whom information is disclosed (including the legal and natural persons acting on behalf of the potential investor and the date and time of each disclosure); and (v) inform the recipients as soon as possible once such information ceases to be inside information.

Issuers and Potential Issuers Subject to MAR

- > *Issuers with securities admitted to trading on an MTF or other exchange-regulated exchange*

Issuers with securities already admitted to trading on an MTF or other exchange-regulated exchange or contemplating a listing on an EU securities market are now subject to the requirements of MAR and will need to ensure they have adopted appropriate policies to be in compliance.

- > *Issuers with securities admitted to trading on an EU Regulated Market*

Issuers with securities already admitted to trading on an EU regulated market are likely to have many of the policies and procedures required under MAR in place already as a result of their previous obligation to comply with the regulations implementing the now repealed market abuse directive. However, such issuers need to ensure their procedures have been updated to comply with the new provisions of the regulation.

Conclusion

MAR affects different types of issuers in different ways:

- > Issuers with Debt Securities listed on MTFs or OTFs are brought within the market abuse regime.
 - > Issuers that have financial instruments admitted to trading on the Euro MTF, the Irish Stock Exchange's Global Exchange Market, or another exchange-regulated exchange, will need to ensure they are complying with the new rules applicable to them and have all the internal policies and procedures required in place.
- > Issuers with Debt Securities listed on an EU-regulated market (such as the Luxembourg Stock Exchange) will need to ensure their internal policies and procedures have been updated in order to comply with MAR's new requirements including:
 - > New record keeping requirements in connection with the requirement for the issuer to make an ex post notification to the regulator when the announcement of inside information is delayed.
 - > Insider lists require the inclusion of more detailed personal information and issuers have to take all reasonable steps to ensure that any person on the list acknowledges in writing the duties that this entails.
 - > Issuers and their advisers are required to keep detailed records of all market soundings.
- > New issuers that are considering listing debt securities on an EU-regulated market or an MTF or OTF have to consider whether their disclosure and record keeping burdens would increase as a result of MAR in comparison to the disclosure and other obligations they may already have or will have in other markets where they have listed securities.

- > Issuers with listings in their home and/or other non-EU markets may consider whether disclosures under MAR will trigger simultaneous disclosure obligations in their other markets.

Consider consulting with counsel to institute appropriate policies and procedures tailored to your individual circumstances and needs to come into compliance with MAR.

This *GT Alert* was prepared by **Dorothee Fischer-Appelt** in Greenberg Traurig's London office. Questions about this Alert can be directed to:

- > [Dorothee Fischer-Appelt](mailto:fischerappeltd@gtlaw.com) | + 44 (0) 203 349 8862 | fischerappeltd@gtlaw.com
- > [Wietse de Jong](mailto:dejongw@eu.gtlaw.com) | +31 (0) 20 301 7355 | dejongw@eu.gtlaw.com
- > [Rafał Sieński](mailto:sienskir@gtlaw.com) | +48 22 690 6186 | sienskir@gtlaw.com
- > [Dr. Josef Hofschroer](mailto:josef.hofschroer@gtlaw.com) | +49 (0) 700 171 181 | josef.hofschroer@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

For more information:

Greenberg Traurig, LLP
The Shard, Level 8
32 London Bridge Street
London SE1 9SG

T +44 (0) 20 3349 8700

F +44 (0) 20 7900 3632

www.gtlaw.com

Amsterdam +31 20 301 7300	Denver +1 303.572.6500	Northern Virginia +1 703.749.1300	Tallahassee +1 850.222.6891
Atlanta +1 678.553.2100	Fort Lauderdale +1 954.765.0500	Orange County +1 949.732.6500	Tampa +1 813.318.5700
Austin +1 512.320.7200	Houston +1 713.374.3500	Orlando +1 407.420.1000	Tel Aviv[^] +03.636.6000
Berlin⁻ +49 (0) 30 700 171 100	Las Vegas +1 702.792.3773	Philadelphia +1 215.988.7800	Tokyo[⌘] +81 (0)3 4510 2200
Berlin-GT Restructuring⁻ +49 (0) 30 700 171 100	London[*] +44 (0)203 349 8700	Phoenix +1 602.445.8000	Warsaw[~] +48 22 690 6100
Boca Raton +1 561.955.7600	Los Angeles +1 310.586.7700	Sacramento +1 916.442.1111	Washington, D.C. +1 202.331.3100
Boston +1 617.310.6000	Mexico City⁺ +52 55 5029.0000	San Francisco +1 415.655.1300	Westchester County +1 914.286.2900
Chicago +1 312.456.8400	Miami +1 305.579.0500	Seoul[∞] +82 (0) 2.369.1000	West Palm Beach +1 561.650.7900
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