NEWSLETTER

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THOMMESSEN

From MAD to MAR - implications of the new EU Market Abuse Regulation for Norwegian issuers and investment firms

The EU Market Abuse Regulation ("MAR") came into effect on July 3RD 2016 and replaced the 2003 Market Abuse Directive ("MAD"). MAR has still not been implemented in Norwegian law, but the regulation has extraterritorial effect and covers actions taken both within and outside the EU if the relevant financial instrument is inside MAR's scope. Consequently, MAR already imposes a number of obligations on Norwegian market actors, such as issuers and investment firms.

This newsletter and the upcoming breakfast seminar held by Thommessen on September 8th highlights some of these obligations.

Introduction

Norwegian market actors should be aware that certain of their current actions are within the extraterritorial scope of MAR, even though MAR is not yet incorporated into the EEA-agreement or Norwegian law. For example, MAR will apply where a Norwegian investment firm provides investment services to Norwegian clients in relation to shares issued by a Norwegian company listed on Oslo Børs and the trades take place on Oslo Børs, provided the issuer's shares are *also* admitted to trading on a regulated market place (such as an MTF) in for example Sweden or UK.

It should be noted that most of the shares admitted to trading on Oslo Børs, are also admitted to trading on a European MTF (with or without the consent of the issuer) and such shares are consequently within the scope of MAR.

The scope and extraterritorial effect of MAR[1]

MAR has a significantly wider scope than MAD and the current Norwegian regime, as set out in the Securities Trading Act and the Norwegian Securities Trading Regulation (together, the "**NST**"). While the NST mainly focuses on instruments admitted to trading on a Norwegian regulated

[1] MAR article 2.

market, MAR applies to financial instruments that are either (i) admitted to trading on a regulated market ("**RM**") or for which a request for admission has been made, (ii) traded on a multilateral trading facility ("**MTF**"), admitted to trading on an MTF or for which a request for admission to trading has been made, (iii) traded on an organized trading facility ("**OTF**"), or (iv) traded over the counter ("**OTC**") and either depend on or have an effect on the price or value of a financial instrument referred to in (i)-(iii) above.

In short, MAR applies to any transaction, order or behaviour concerning any financial instrument referred to above, irrespective of whether or not such actions take place on a trading venue or not. The extraterritorial reach of MAR is explicitly set out in article 2 (4), stating that MAR applies to every action and omission carried out in the EU or outside the EU, as long as the instruments are in scope.

Definition of inside information[2]

A key aspect for a number of the applicable prohibitions and requirements in MAR, is that the relevant piece of information constitutes *inside information*. The information must be assessed in light of the definition of inside information set out in MAR article 7. At first glance, the definition seems wider than the definition currently set out in the NST and MAD. This is however only due to the codification of the ruling by the ECJ in case C-19/11 (*Daimler*). Consequently, market actors may assume that the current definition of inside information in MAD and the NST is continued unchanged in MAR.

Insider trading and unlawful disclosure of inside information[3]

The prohibitions against insider dealing and unlawful disclosure of inside information is broadly continued unchanged. The prohibitions applies to any person and any transaction which includes a financial instrument falling within the scope of MAR, irrespective of whether the concrete transaction is performed on a trading venue or not.

> *Example: The prohibitions in MAR will in principle apply for Norwegian persons that trade in a share or debt instrument listed on Oslo Børs, irrespective of where the trade is executed, provided the instrument in question is also traded on a RM or MTF in a EU Member State. However, a breach of MAR can currently only be sanctioned in EU Member States, since it is not yet incorporated into Norwegian law.*

Compared to MAD, the prohibition against insider dealing in MAR is expanded by covering both (i) attempts and (ii) the use of inside information by cancelling or amending an order to which the information relates, where the order was placed before the person came into possession of inside information. The expansion to include attempts is broadly in line with current Norwegian law. The second expansion in MAR is however of greater importance for Norwegian market actors, as it seems to contravene established Norwegian law relating to the duty to cancel an order after coming into possession of inside information.

Norwegian market actors must make sure they are not contravening the prohibition of insider dealing and unlawful disclosure of inside information in connection with any instrument falling within the scope of MAR, which is, as mentioned above, significantly broader than the current scope of the prohibitions in MAD and the NST.

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[2] MAR article 7.

[3] MAR article 8, 10 and 14.

Prevention and detection of market abuse[4]

The requirement to prevent and report suspicious transactions is imposed on any person professionally arranging or executing transactions, including inter alia investment firms, credit institutions and buy side firms, such as investment management firms (AIFs and UCITS managers), as well as any other firm professionally engaged in trading on its own account (proprietary traders).

In short, the subjects mentioned above must (i) establish and maintain effective systems and procedures to detect and report suspicious transactions, and (ii) notify the competent authority where there is reasonable suspicion of market abuse. Regulation 2016/957 sets out detailed requirements with respect to both appropriate arrangements, systems and procedures as well as harmonised notification templates.

The competent authority is defined as the authority in the Member State in which they are registered or have their head office, or in the case of a branch, the Member State where the branch is situated.

> *Example: A branch of a Norwegian investment firm situated in a EU Member State must comply with the obligations set out in MAR on prevention and detection of market abuse, and notify the competent authority in the Member State where the branch is situated.*

To what extent Norwegian institutions in other situations are subject to the same obligations is unclear, as no competent authority has been designated for the purpose of MAR in Norway. All institutions professionally arranging or executing transactions, including inter alia, buy side firms, such as investment management firms (AIFs and UCITS managers) may want to consider using the arrangements and templates required in MAR before these are implemented into Norwegian law, as these will be required in respect of all operations performed by such institutions as soon as MAR is implemented in Norwegian law.

Disclosure of inside information[5]

MAR requires that issuers with securities within MAR's scope disclose inside information directly concerning the issuer to the public as soon as possible. It is important to note that such "issuer obligations" in MAR only apply to Norwegian issuers listed on Oslo Børs, if the issuer has financial instruments listed on a European RM, MTF or OTF and the issuer has requested or approved such trading on such EU market places. If a Norwegian issuer is subject to unsolicited listing on a European MTF, the issuer will not have any disclosure obligations towards the MTF.

> *Example: A Norwegian issuer is listed on Oslo Børs, and the shares is also traded on Nasdaq First North (a Swedish MTF). If the issuer has not requested or approved such trading on the MTF, the issuer is not subject to the disclosure obligations in MAR. If the issuer has requested or approved such trading, MAR will apply.*

There are only minor amendments to the disclosure obligation compared to the current obligation in MAD. Most notable is the obligation to maintain the published inside information on their website for a period of at least five years, the changes in the technical means for appropriate public disclosure set out in regulation 1016/1055, and that issuers are obligated to disclose inside information as soon as possible if the disclosure has been delayed and the confidentiality is no longer ensured. This includes, inter alia, where a rumour explicitly relates to delayed inside

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4 MAR article 16 and regulation 2016/957.

5 MAR article 17, and regulation 2016/522 and 2016/1055.

information, and where that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured.

Delayed disclosure of inside information[6]

As MAD, MAR acknowledges that issuers must be able to delay disclosure of inside information in certain circumstances. While the requirements to delay is continued unchanged, the *procedure* on how to delay disclosure is changed.

The current regime set out in the NST requires the issuer to inform the RM, orally or in writing, immediately after the decision to delay disclosure is taken. According to MAR, an issuer must inform the competent authority that disclosure of the information was delayed and provide a written explanation of how the conditions for delay were met, immediately after the information is disclosed to the public.

Consequently, MAR is more stringent in one way by requiring the issuers to provide a *written* explanation, but at the same time more relaxing by only require the explanation *after* the information is disclosed to the public. Each Member State may provide that the written explanation is only to be provided upon the request of the competent authority, but may not, in our view, change the fact that the explanation is to be provided (either immediately or upon request, depending on the decision by the member state) *after* the information is disclosed to the public.

A key issue for Norwegian issuers with securities within the scope of MAR is who they need to send the written explanation to, more specifically who the "competent authority" is. The technical standards of MAR has detailed rules on the designation of a competent authority for issuers registered in a third country (as Norway currently is).

MAR recognises that credit institutions or financial institutions in certain situations should be able to delay the disclosure of inside information in order to preserve financial stability. Such institutions are therefore able to delay disclosure of inside information, including information which is related to temporary liquidity problem and, in particular, the need to receive temporary liquidity assistance from a central bank or lender of last resort, provided certain conditions are met.

Market soundings[7]

Although wall-crossing of investors already is widely practised and there is a general understanding of the process both in Norway and in the EU, MAR sets out a more specific regime for market soundings. MAR defines "market soundings" as communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to such as its potential size or pricing, to one or more potential investors by inter alia (i) an issuer, (ii) a secondary offeror of a financial instrument or (iii) a third party acting on behalf or on the account of a person referred to in (i) or (ii) above.

> *Example: The market sounding regime applies to any person performing "market sounding" in relation to in-scope instruments. For example, the regime applies in principle to market sounding performed by a Norwegian investment firm on behalf of a Norwegian issuer in Norway, provided the instruments in question are also traded on an EU MTF.*

The regime introduces a "safe harbour" to the offence of unlawful disclosure of inside information in a market sounding, provided that certain disclosure and record-keeping conditions are met. More specifically, before conducting a market sounding, the issuer or other disclosing market participants

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6 MAR article 17, and regulation 2016/522 and 2016/1055.
7 MAR article 11, regulation 2016/960 and 2016/959.

must consider whether the market sounding will involve the disclosure of inside information. The participants must make written records of the assessments, and provide the record to the competent authority upon request. In our view, the reasons can be quite short if it's unequivocal whether the information constitutes inside information or not, while more intricate assessments requires more detailed reasons. Prior to any wall-crossings, the disclosing market participant must in sequence (i) obtain the consent of the investor to receive inside information, (ii) inform the investor that he is prohibited from using or attempting to use the information, and (iii) inform the investor that he is obligated to keep the inside information confidential.

The disclosing market participant must further make and maintain detailed records of all information given to potential investors receiving a market sounding, and keep the records for a period of at least five years and be able to provide the regulator with the records upon request. Finally, the potential investor must be notified as soon as the information ceases to be inside information, and the disclosing market participant is obligated to maintain records of such notifications.

The Commission has adopted detailed rules on both the appropriate arrangements, systems and procedures when conducting market soundings in regulation 2016/959, and in respect of the systems and notification templates to be used by disclosing market participants and the format of the records in regulation 596/2014. ESMA has in addition published guidelines addressing market soundings. In short, the supplementing rules and guidelines prescribes in significant detail the procedures and templates to be used when conducting market soundings.

Insider lists[8]

While the existing requirement in MAD and the NST to maintain an insider list of persons with access to inside information is continued in MAR, MAR and it's supplementing regulations sets out detailed rules on the precise format of insider lists. In MAR, it's possible to divide the list between a list for permanent insiders and an information-specific lists. MAR requires that the information-specific insider list must be divided into separate sections relating to different pieces of inside information, and that new sections must be added to the insider list upon the identification of new inside information. The list must be kept updated at all times in an electronic format, as set out in accordance with the harmonised templates.

> *Example: Norwegian and EU-issuers and persons acting on their behalf (such as investment firms and lawyers) must comply with a detailed set of rules on insider lists, including the use of uniform templates, if the instruments of the issuer is within the scope of MAR.*

The template requires detailed information of each person on the list, including, inter alia: name, telephone numbers, company name, function, the date and time at which the person obtained or ceased to have access to inside information, date of birth, national identification number and home address. MAR further requires that the issuers or any person acting on their behalf or on their account, take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information. In order to make the obligation less burdensome on the person responsible for updating the insider list, the person responsible can request each person on the list in an generic email to revert with their acknowledgment and personal information.

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[8] MAR article 18 and regulation 2016/347.

Managers' transactions[9]

MAR requires that any "persons discharging managerial responsibilities" ("**PDMRs**") and persons closely associated with them must notify the issuer and the competent national authority promptly, or in any event within three business days, of every transaction conducted on their own account relating to a financial instrument of that issuer if the transactions reaches certain thresholds.

Where the issuer is not registered in a Member State, which is currently the case for Norwegian issuers, the notification shall be made to the competent authority in the Member State in which the issuer is required to file their annual information in accordance with the Prospectus Directive.

A new addition in MAR is that PDMRs within an issuer are prohibited to conduct any transactions relating to instruments of the issuer 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 according to either the rules of the trading venue where the issuer's shares are admitted to trading or by national law. There are however exemptions to the "closed period" rule, including inter alia transactions relating to employee share schemes and where there are certain exceptional circumstances that require the immediate sale of shares.

The Commission has adopted regulation 2016/523 about the format and template for notification and public disclosure of manager's transactions, and regulation 2016/522 about, inter alia, the permission for trading during closed periods and types of notifiable managers' transactions.

Investment recommendations[10]

MAR requires those who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy relating to "in-scope" instruments to take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflict of interest concerning the financial instruments to which the information relates.

The definition of "investment recommendations" is wide, and it includes all information recommending or suggesting an investment strategy, concerning a financial instrument or an issuer, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public. In their final report, ESMA takes the view that an recommendation is "*intended for distribution channels or for the public*" not only when it is intended to be made available to the public in general, but also when it is intended to be distributed to clients or to a specific segment of clients, whatever their number, as a non-personal recommendation, i.e. without the provision of the investment service of investment advice. This would amount to a significant extension of the current rules on investment recommendations, which is generally deemed to be limited to traditional equity market "buy/hold/sell" recommendations.

> *Example: The new regime for investment recommendations – interpreted by ESMA – implies a potentially significant extension of the current investment recommendation regime. It may in principle apply to an e-mail sent from a Norwegian broker to a small group of Norwegian clients in which the broker has a view on the market, provided the share in question is traded on an EU MTF.*

Recommendations falling within the definitions above must comply with the detailed rules in regulation 2016/958 with regard to technical arrangements for objective presentation of

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[9] MAR article 19 and regulation 2016/523 and 2016/522.

[10] MAR article 20, regulation 2016/958 and ESMA/2015/1455.

investment recommendations or other information recommending or suggesting an investment strategy. The regulation, inter alia, sets out certain requirements with respect to the publication of the identity of producers of recommendations, general obligations in relation to objective presentation of recommendations, general obligations in relation to disclosure of interests or of conflict of interest, and dissemination of recommendations by the producer or recommendations produced by third parties.

Sanctions

It should be noted that the public law sanction regime for breaching the extraterritorial rules in MAR in various EU member states remains somewhat unclear. It is expected that ESMA will provide further guidance on the matter. We note that current Norwegian law does not provide a legal basis to impose public sanctions due to a breach of MAR, as MAR is not implemented into Norwegian law.

What's next?

The Norwegian Ministry of Finance has mandated a group of experts to deliver their report on the implementation of MAR by January 2017. The report will then be sent on a public hearing, and an educated guess would be that legislation implementing MAR in full into Norwegian law will enter into law 1 January 2018.

In the meantime, Norwegian market actors must be aware of the current extraterritorial effect of MAR.

Thommessen will arrange a breakfast seminar on the transition from MAD to MAR, and the current extraterritorial effect for Norwegian actors in the financial markets on September 8th. The seminar will be held in our offices in Haakon VIIs gate 10, 0116 Oslo, from 8.30-10.00 a.m. You may participate by registering free of charge on www.thommessen.no by September 5th.

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