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ENTRY INTO FORCE, ON 3 JULY 2016, OF THE NEW ADMINISTRATIVE REGIME ON MARKET ABUSE MAR REGULATION

1. In June 2014, Regulation 596/2014 on market abuse (the so-called **MAR Regulation**, hereinafter the **"Regulation"**) and Directive 2014/57/EU on criminal sanctions for market abuse (hereinafter the **"Directive"**) were published in the Official Journal of the European Union.

The Regulation repeals the former European framework, in particular Directive 2003/6 on insider dealing and market manipulation (market abuse).[1] The new Directive completes, for its part, the Regulation by requiring the Member States to provide for harmonized criminal sanctions regarding market abuses.

2. Certain provisions of the Regulation which were not entered into force yet are – directly – applicable as from **3 July 2016**[2] and the Directive should (in principle) have been implemented by the Member States on the same date.

In Belgium, Article 25*bis* of the law of 2 August 2002 as well as both of the Royal Decrees of 5 March 2006 that used to regulate the subject were repealed by the Law of 27 June 2016.

The FSMA has published on 18 May 2016 a circular containing "practical instructions" regarding the Regulation (Circular FSMA_2016_08).

We examine hereafter the main modifications brought by the Regulation.

[1] Art. 37.
[2] Art. 39.1 and 39.2 (see also Art. 39.4 that delays the entry into force of certain provisions – which are not discussed in this note – until 3 January 2017).

A. Extension of the Scope of Applicable Regulations

3. The Regulation extends the scope of the market abuse regime to new types of financial instruments[3] and to non-regulated markets, *i.e.* admitted to trading on multilateral trading facilities (MTFs) and on other types of organized trading facilities (OTFs).[4]

4. This extension to new markets is however to be tempered with regard to the obligations aiming at preventing market abuses (drawing up of insider lists, notifications by persons discharging managerial responsibilities and publication of inside information). Issuers subject to these obligations are those *"who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or on an OTF, issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State."* [5]

B. Modification of the Notion of Market Abuse

5. Unlawful disclosure of inside information constitutes now a specific type of market abuse. It arises where inside information is disclosed out of the normal exercise of someone's duties. It is therefore actually about punishing the disclosure of inside information, which was so far constitutive of insider trading.

C. Precisions Regarding the Notion of Inside Information

6. The European legislator has wished to enhance legal certainty by introducing a definition of two of the elements essential to the concept of inside information (the precise nature of the information and the significance of its potential effect on the prices of the financial instruments) inside the Regulation itself.[6] That wish is nonetheless but partly accomplished : the Regulation does not, indeed, modify the definition for what financial instruments are concerned, except that it clarifies that, in the case of a protracted process taking place in several steps, any of these intermediate steps can constitute inside information.[7]

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[3] As defined in MiFID II (Directive 2014/65). The Regulation aims among others at emission allowances.
[4] Art. 2.1.
[5] Art. 17.1, §3, Art. 18.7 and Art. 19.4, e).
[6] Par. 18 of the preamble. See the definitions thus far contained in Articles 1.1 and 1.2 of Directive 2003/124 and now transposed in Articles 7.2 and 7.4 : *"[I]nformation 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, 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 instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances. (…) ". "[I]nformation which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions."*
[7] Art. 7.2 and 7.3.

D. Preventive Measures

Public Disclosure of Inside Information

7. As previously, the issuers have the possibility to delay the public disclosure of inside information where such public disclosure is likely to prejudice their legitimate interests, provided that it is not likely to mislead the public and that the confidentiality of the inside information is ensured. [8]

Whereas Directive 2003/6 required, in such a case, that the issuers informed without delay the FSMA of their intention to delay the public disclosure of inside information, the Regulation provides that the relevant authority is to be informed immediately *after* the said information is disclosed to the public.[9] The *ex ante* information required by Directive 2003/6 is therefore turned into information that is given, in principle, *ex post*.

Notifications by Persons Discharging Managerial Responsibilities and Closed Periods

8. The Regulation modifies the requirement upon persons discharging managerial responsibilities within issuers (as well as upon persons closely associated with them) to notify the transactions conducted on their own account relating to the shares or debts instruments of these issuers or to derivates or other financial instruments linked thereto.

9. The Regulation now provides that, subject to certain reservations, the pledging or lending of financial instruments must be notified as well as transactions undertaken in the course of a mandate, including where discretion is exercised, and those made, as the case may be, under a life insurance policy.[10]

10. The concerned transactions must moreover be notified both to the FSMA and to the issuer[11] – which is new – no later than three business days after the date of the transaction[12] (instead of five business days).[13] The FSMA will continue to publish them on its website.[14]

11. The Regulation furthermore formalizes the “closed periods” during which the managers may not conduct transactions relating to the shares or debt instruments or to derivates of the issuer or to other financial instruments linked thereto, during a 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.[15]

E. Powers of the FSMA and Cooperation between Competent Authorities

12. The Regulation reinforces the investigation powers of the FSMA. It provides e.g. the possibility for the FSMA to enter the premises of natural and legal persons in order to seize documents and data in any form where a reasonable suspicion exists that documents or data relating to the subject matter of the inspection or investigation may be relevant to prove a case of insider dealing or market manipulation.[16]

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[8] Art. 17.4.
[9] Art. 17.4, last paragraph.
[10] Art. 19.7, a).
[11] Art. 19.1, par.1.
[12] Art. 19.1, par. 2.
[13] Art. 6.1. of Directive 2004/72.
[14] Ch., Doc. 54 1835/001, p. 7. See also the circular FSMA_2016_08 of 18 may 2016 (p.3).
[15] Art. 19.11. See also Art. 19.12.
[16] Art. 23.2, e).

13. The Regulation aims moreover at reinforcing the cooperation between the national competent authorities.[17] The ESMA, for its part, shall perform a facilitation role in relation to cooperation and will, for instance, coordinate cross-border investigations.

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[17] See Art. 23 and 24.