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New market abuse regime

### New market abuse regime

#### Background and the implications for Danish law

With effect from 3 July 2016 the current regulation of market abuse laid down in the Danish Securities Trading, etc Act (the "Securities Trading Act") will be replaced by a new Market Abuse Regulation, No 596/2014 (the "[Market Abuse Regulation](#)"), which has direct effect in all EU Member States. It is expected that the rules will also be implemented in the EEA (Norway, Iceland and Lichtenstein).

The Market Abuse Regulation entails a number of changes in terms of both contents and statute. As a consequence of the Market Abuse Regulation coming into force extensive changes will have to be made in the Securities Trading Act (primarily parts 7 and 10) and the relating statutory orders. The implementation of MiFID II will also require significant changes in, among others, current Danish securities regulation.

As a result, the Danish FSA has initiated an extensive revision of the Securities Trading Act which is expected to be replaced by a new "Capital Markets Act" as of January 2017. On 16 November 2015 the Danish FSA published a public consultation process concerning the relevant draft bills. According to [the Danish Government's legislative programme 2015/16](#), it is expected that the bill will be tabled in February 2016.

The intention is that a temporary transitional act is to apply from July 2016, when the Market Abuse Regulation comes into force, till January 2017 when the majority of the non-implemented parts of MiFID II must be implemented and the new Capital Markets Act is expected to enter into force.

The Market Abuse Regulation contains general rules and principles applying to market abuse regulation whereas a number of more detailed new rules (technical standards) will be regulated by so-called "level 2" regulations which are comparable with Danish executive orders.

In addition the European regulatory authority ESMA will issue guidelines and a Q&A document to ease the understanding of the rules ("level 3" regulation). The final level 2 and level 3 regulations are not yet available, but ESMA has drafted recommended level 2 rules to be implemented by the European Commission.

#### The Market Abuse Regulation - the most important changes

The most important changes in Danish securities law and capital market law caused by the Market Abuse Regulation are treated below.

##### *Extended scope of application*

Compared to the current rules, the Market Abuse Regulation's scope of application has been extended to also include the following in addition to securities traded on regulated markets:

- (i) securities traded on a multilateral trading facility (for instance Nasdaq First North) or an organised trading facility (a new type of trading platform introduced by MiFID II);
- (ii) financial instruments whose price or value depends on securities traded on a regulated market or one of the securities described in (i);
- (iii) emission allowances and other auctioned products.

The Market Abuse Regulation also governs market manipulation of spot commodity contracts, certain derivatives and benchmarks (for instance LIBOR).

Moreover, the Market Abuse Regulation has an extraterritorial effect and consequently applies regardless of whether (i) the act or the omission takes place in or outside the EU and (ii) the trading is made on a trading venue.

##### *The definition of "inside information"*

To a great extent the Market Abuse Regulation maintains the current definition of inside information laid down in [the Market Abuse Directive](#), No 6/2003, which has been implemented into the Securities Trading Act. However, it has been clarified on the basis of the ECJ's judgment in [Markus Gelti v Daimler AG](#) that each individual intermediary step during a process can by itself be inside information.

At this point in time there is uncertainty with regard to the part of the definition of inside information requiring that the inside information must have a "significant effect" as this concept has been subject to different interpretations in the individual Member States. It is expected that in its

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level 3 guidelines the ESMA will define the interpretation of the concept.

Plesner will revert with an update when a clearer understanding has become available.

### *Disclosure of inside information*

It is possible that there will be a significant change in respect of disclosure of inside information. The final version of the Market Abuse Regulation will perhaps break with the reality principle (in Danish: realitetsgrundsætningen) which is currently in force in Danish law and according to which information can be inside information before being required to be disclosed.

According to the reality principle, inside information about for instance a course of events is only to be disclosed when negotiations lead to an actual result. However, this will no longer be possible under the Market Abuse Regulation according to which all information about the individual issuer must generally be disclosed when it qualifies as inside information. At this point in time the Danish FSA has not publicly taken a position on the issue.

According to the Market Abuse Regulation, disclosure of inside information, which is not a reality and which one does not wish to be disclosed, must be delayed in future according to the right of delay that will apply under the Market Abuse Regulation. However, it is expected that the right to delay the disclosure of inside information under the Market Abuse Regulation will be more comprehensive than the current delay rules.

In compliance with established precedent, it is clarified in the Market Abuse Regulation that potentially there can be an independent obligation to disclose inside information in connection with each intermediary step in a process. In this connection it is clarified in the Market Abuse Regulation that the disclosure of inside information about each individual step in such a process may be delayed.

The general rule of the Market Abuse Regulation is that in the future when the right to a delay has been exercised issuers must submit a report to the Danish FSA containing (i) a notification that disclosure of inside information has been delayed and (ii) a written account with information about the actual delay and the reason for the delay.

However, the Market Abuse Regulation permits the Danish FSA to implement the rules so that a report on the delay must be submitted only if the Danish FSA requests such in-

formation (ii), but a report must always be submitted if there has been a delay and the account must also be prepared in such a manner that it can be forwarded to the Danish FSA if FSA so requires.

It is still uncertain whether the Danish FSA will implement the rules in this manner as is the intention in Great Britain for example. If the bill, which has been launched for consultation, is passed without any changes, the detailed rules on delay of disclosure of inside information will be laid down in an executive order.

### *Insider lists and managers' transactions*

As a consequence of the Market Abuse Regulation's extension of the rules' scope of application, more persons and enterprises will be subject to the requirement to keep insider lists, the rules on managers' reporting of transactions and new rules on trading windows for managers.

#### *Insider lists*

To a great extent the fundamental principles applying to the rules on keeping insider lists are maintained without any changes. However, a number of technical changes will take place which in practice will mean that enterprises subject to the requirement will have to change their internal rules and procedures. The most important change is the introduction of new common European standard forms to be used when preparing insider lists. The new lists must contain additional information compared to what is required today.

#### *Reporting managers' transactions*

Certain changes will be made to the rules on reporting managers' transactions.

Henceforth, a manager must send a notification to the company and at the same time report the transaction to the Danish FSA. The company is then required to publish a notification about the contents of the report. However, the Market Abuse Regulation makes it possible for the Danish FSA to disclose the information. Apparently, the Danish FSA has chosen the latter solution as it appears from the act, which have been sent out for consultation, that it is expected that also after the Market Abuse Regulation enters into force the notification of managers' transactions will be made electronically by using a digital signature (NemID) to the Danish FSA's database for company announcements and that powers of attorneys can be used, as is also the case under the current rules.

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The reporting deadline is extended from two to three business days. It will be possible to report several transactions in the same notification within the deadline.

The Danish FSA has prepared the ground for Denmark to utilize the option under the Market Abuse Regulation to raise the lower threshold for managers' notification from EUR 5,000 to EUR 20,000.

### *Rules covering managers' trade in the company's securities*

As something new, manager will not be allowed to trade in the company's securities for a period of four weeks up to the publication of a preliminary announcement of financial statements are introduced. Such trading windows are already known from Nasdaq Copenhagen's rules, but the new thing is that they will be evident directly from legislation. Moreover, the requirement to draw up internal rules regarding trading in the issuer's securities will be repealed as they were Danish special rules that were not based on rules in the current Market Abuse Directive.

### *Insider dealing/disclosure of inside information*

In the future, it will be prohibited to delete and change trading orders as such action will be deemed to be insider dealing. This is new. It will also be codified that inside information must be used before the prohibition against insider dealing has been violated. The possibility of a Chinese walls defence is also introduced. A Chinese walls defence will ensure that there are adequate and effective internal arrangements and procedures with the result that trading can take place without it being insider dealing.

### *Market manipulation*

The market manipulation rules carry on the current regime, but in the future they will also include the new types of financial instruments and trading platforms as mentioned above. As a consequence of the technological development, special rules have also been established for algorithmic and high-frequency trading strategies and it has been clarified when such trading is market manipulation. ESMA must prepare and update a list of examples of market manipulation.

### *Market soundings*

The Market Abuse Regulation introduces a completely new safe harbour system for how inside information is to be disclosed in connection with soundings in respect of securities transactions subject to the Market Abuse Regulation (for

instance in connection with takeover bids, mergers, block deals etc.) for the purpose of assessing potential investors' interest in a possible transaction and the terms and conditions applying to such transactions.

The Market Abuse Regulations and the underlying legislative acts stipulate the detailed terms and conditions applying to market soundings. The final details are not yet known but market participants fear that the rules will be inflexible.

A requirement to keep a list of the individuals who have been sounded and the individuals who have stated they never want to be sounded is introduced as a part of the new set of rules. In practice, participants that are currently keeping insider lists in connection with transactions will also be ordered to keep so-called sounding lists. It should be noted that the formal requirements will apply even if information that is not inside information is provided.

These new rules will have great practical importance in the market and Plesner will follow up on the implementation of such new rules.

### *Stabilisation and buy-back programmes*

The contents of the safe harbour rules in the Market Abuse Regulation regarding stabilisation of shares and buy-back programmes will very much be a continuation of the current rules. However, minor clarifications and changes have been made, for example that disclosure of all transactions can take place on a daily basis and the introduction of clearer rules for calculating the market price.

### *Investment analyses*

The fundamental principles applying to the regulation of the preparation and dissemination of investment analyses will not be changed. However, the group of persons subject to the rules will be extended. In the future, professional investors and other individuals having certain analytical or investment experience and who recommend investments on for instance social media will also be subject to the new set of rules.

As for investment analyses, a number of new requirements as to the contents will be introduced, for example the time of day when an investment analysis is made public must be recorded in the analysis. New stricter rules applying to the disclosure of position holdings in the issuer of the securities that are the subject-matter of the investment analysis will also be introduced. The rules will follow the system known

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from the disclosure of positions under the short-selling regulation.

### *New rules on authorities' powers, administrative powers and sanctions*

The national authorities' powers (in Denmark: the Danish FSA) will be extended and tightened as a result of the Market Abuse Regulation, including for instance in respect of the surrender of information and the right to demand access to premises.

A [directive on criminal sanctions for market abuse](#), No 57/2014, has been adopted in connection with the Market Abuse Regulation. Compared to the current Danish rules, the directive will primarily raise the maximum penalty for unlawful disclosure of inside information from one and a half years' imprisonment to two years' imprisonment. The directive is expected to be implemented into Danish law.

The relevant authorities will also be given the right to impose a number of administrative sanctions, including heavy fines, in respect of (negligent) violations of the prohibitions against insider dealing, unlawful disclosure of inside information and market manipulation. However, the individual countries may decide to impose criminal sanctions instead. It is expected that any violation of the regulation under Danish law will be sanctioned under criminal law.

It is noted in that connection that the Market Abuse Regulation contains a requirement of maximum administrative pecuniary sanctions of a completely different magnitude than the amounts under Danish established precedent. As the administrative sanctions will not be directly in force in Denmark, the effect of the amounts on Danish law is still uncertain, but there is no doubt that in future it must be expected that the criminal sanctions for violating the Market Abuse Regulation will be more severe than what has been the case in respect of violations of the corresponding rules laid down in the Securities Trading Act.

### *Whistleblower scheme requirement*

The Member States will be under an obligation to establish whistleblower schemes for enterprises subject to financial regulation. In addition, it will be possible to offer whistleblowers incentives to come forward. The Danish FSA has prepared the ground for such implementation by adjusting the existing whistleblower rules laid down in the Securities Trading Act.

### *Additional information*

All listed companies will have to review their internal procedures and internal rules. Other players coming into contact with the Market Abuse Regulation will also have to adapt to the new rules. We will follow and provide information about the developments as the final contents of the rules become available in more detail.

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