

FINANCIAL REGULATORY QUICK START GUIDE

MARKET ABUSE REGULATION: OVERVIEW

OVERVIEW

The Market Abuse Regulation (MAR) replaces the previous Market Abuse Directive, and establishes a strengthened civil market abuse regime across the EU. MAR includes measures to prevent market abuse, to ensure the integrity of EU financial markets, and to enhance investor protection and confidence in those markets. MAR is implemented in the UK through the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, and by way of changes to the FCA Handbook. MAR was introduced alongside a new harmonised regime for criminal market abuse sanctions (the Directive on Criminal Sanctions for Market Abuse (CSMAD)), however, the UK did not opt into this regime and the pre-existing national criminal sanctions for market abuse continue to apply.

TIMINGS

MAR came into effect on 3 July 2016. However, its legal provisions which relate to OTFs, small and medium-sized enterprises growth markets, emissions allowances or auctioned products based on those allowances only applied from 3 January 2018, when the second Markets in Financial

Instruments Directive (MiFID II) and its related regulation (MiFIR) came into effect.

CORE MARKET ABUSE OFFENCES

- **Insider Dealing** – using inside information to deal (or attempt to deal), or to amend or cancel an existing order, or to recommend or induce another to deal on the basis of that information.
- **Unlawful disclosure of inside information** – disclosure of inside information where such a disclosure is not otherwise legitimate (for example, under the market soundings regime).
- **Market manipulation** – manipulation of the market, including attempted manipulation, and manipulation of benchmarks and (in certain circumstances) spot commodity contracts.

GEOGRAPHICAL SCOPE

The geographical scope of MAR is global: “*The prohibitions and requirements in [MAR] shall apply to actions and omissions, in the Union and in a third country, concerning [financial instruments within the scope of MAR]*” (Article 2(4)).

The focus of MAR is on whether the instrument is in scope; not on where the person acting in respect of such instrument is based. While MAR clearly applies globally in respect of the “core offences” (e.g. market manipulation and insider dealing), in practice, EU regulators may be unlikely to utilise their enforcement resources in relation to breaches by non-EU persons of the “conduct” elements of MAR. This is even less likely where the investment is only in scope through an involuntary listing, because an MTF has admitted a security to trading without the issuer’s knowledge.

SAFE HARBOURS

MAR contains a number of safe harbours which, provided that specified conditions are met, allow for certain acts to be exempt from the prohibitions against market abuse. Under MAR, safe harbours exist in respect of:

- **Buy-back programmes and stabilisation measures** – trading in securities or associated instruments for the stabilisation of securities, or trading in own shares under a buy-back programme, will be exempt from the prohibitions against market abuse where the conditions set out under MAR are met.
- **Accepted market practices (AMPs)** – a regulator can establish an AMP (subject to certain conditions), that is accepted in the relevant jurisdiction by that regulator (which is then only applicable to that market unless and until other regulators adopt the same AMP). In the UK, the FCA has not, for now, established any AMPs.

Application

MAR applies to:

1. Financial instruments admitted to trading on a regulated market, or for which a request for admission to trading on a regulated market has been made;
2. Financial instruments traded on a multilateral trading facility (MTF) or organised trading facility (OTF); and
3. Financial instruments not covered by (1) and (2) above, the price or value of which depends on, or has an effect on, the price or value of a financial instrument referred to in those points. This will include, but is not limited to, credit default swaps and contracts for difference.

DISCLOSURES UNDER MAR

MAR sets out a number of disclosures which must be made (to the regulator, market, or the relevant listed issuer, as required). For example:

- **Disclosure of inside information** – issuers must publicly disclose inside information that directly or indirectly concerns them as soon as possible.
- **Delay of disclosure of inside information** – issuers must notify the regulator if they have delayed disclosure of insider information (after disclosure has been made).
- **Insider Lists** – MAR requires that issuers (and all those acting for them, or on their behalf) maintain an insider list, setting out everyone who has access to inside information at any given time. This list must be provided to the regulator on request.
- **Suspicious transaction and order reports** – certain market participants are required to monitor, detect and report suspicious transactions and orders, and report any such transactions to the regulator.
- **Investment Recommendations** – where a communication meets the MAR definition of an investment recommendation (broadly, a communication suggesting or recommending a particular investment strategy), MAR requires that the information is objectively presented, and that extensive disclosures in relation to conflicts are contained in the communication.

- **Transactions by persons discharging managerial responsibility (PDMRs) within issuers, and persons closely associated with them (as defined in MAR)** – MAR requires that transactions (the definition of “transactions” for these purposes is very broad) undertaken in the issuer’s shares, debt instruments, derivatives or other linked financial instruments are disclosed by such persons to: (a) the issuer itself; and (b) the regulator, within 3 business days, once a certain threshold has been reached.
- **Whistleblowing** – MAR places certain requirements on regulators in respect of whistleblowing notifications.

RECORD KEEPING

The importance of keeping appropriate records, as required by MAR cannot be underestimated. Generally, records must be kept for a minimum period of 5 years. Further, under MAR the regulators have the power to require existing recordings of telephone conversations, electronic communications or data traffic record held by issuers.

SANCTIONS

In the UK, the FCA will likely take enforcement action against anyone who had committed market abuse, whether a legal person or individual. For breaches of MAR, EU regulators can (amongst other things) impose significant fines (in the UK, the FCA has the power to impose unlimited fines), order injunctions, prohibit regulated firms, publicly censure firms or individuals, or ban individuals. The powers of regulators in such instances are wide.

In the UK, there are also severe sanctions for breaches of the domestic criminal market abuse regime. For example, in respect of insider dealing and market manipulation in the UK, the FCA can impose custodial sentences of up to 7 years, and unlimited fines.

Under CSMAD, the penalties can include imprisonment, fines, and other possible sanctions such as (for legal persons): temporary or permanent disqualification from the practice of commercial activities, judicial winding-up, temporary or permanent closure, and placing under judicial supervision.

Legislation and Guidance

The EU MAR framework comprises a number of materials, which should all be considered when assessing obligations under MAR:

- Level 1 – the Market Abuse Regulation
- Level 2 – delegated acts, technical standards
- Level 3 – ESMA guidelines, ESMA Q&A

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