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THE EU MARKET ABUSE REGULATION - THREE MONTHS AND COUNTING

An overview of the new regime for companies

The EU Market Abuse Regulation – three months and counting

The EU Market Abuse Regulation ([2014/596/EU](#)) (**MAR**) seeks to enhance market integrity and investor protection and, as a Regulation which has direct effect without the need for implementing legislation in each Member State, harmonises the regimes as regards market abuse across the EU. It comes into force on 3 July 2016 and will drive significant changes in practice for many market participants, including listed and AIM-quoted issuers, brokers and Nomads, particularly in relation to the systems and procedures needed to comply with the regime.

This briefing focuses on the impact of MAR on issuers. While there remain significant questions to be answered about how aspects of the new regime will work in practice, to the extent preparations for certain aspects of it have not yet started, they should do so now.

We will, of course, provide further updates, particularly when the Financial Conduct Authority (**FCA**), which has been designated as the "competent authority" for MAR in the UK, provides its response to its MAR-related consultation ([CP 15/35](#)).

Executive summary

The key changes made by MAR include:

- ▶ A truly harmonised market abuse regime across the EU.
 - ▶ Extending the trading venues and range of financial instruments covered by the regime, including bringing AIM more widely into the market abuse regime.
 - ▶ Fundamental amendment to the FCA's Code of Market Conduct (**COMC**), Disclosure Rules and Transparency Rules (**DTRs**), and the deletion of the Model Code of directors' dealings (**Model Code**) in the Annex to Chapter 9 of the Listing Rules. HM Treasury is also consulting on significant changes to Parts VI and VII of the Financial Services and Markets Act 2000 (**FSMA**).
 - ▶ The need for issuers to state in any relevant announcement that it contains inside information.
 - ▶ The requirement for issuers to inform the FCA to the extent they have delayed the announcement of inside information and, subject to the outcome of the FCA's current consultation, provide prescribed information to the FCA as regards circumstances relating to the delay either in all circumstances or on request by the FCA.
 - ▶ The complete revision of the Model Code regime for dealings by persons discharging managerial responsibility (**PDMRs**) which will alter the length and timing of close periods and reduce the types of transactions that fall outside of the prohibition of PDMR "transactions" in close periods.
 - ▶ Revised notification obligations for PDMRs and those "persons closely associated" (**PCAs**) (currently: "connected persons") with them who have undertaken transactions in relevant securities. These include an obligation for PDMRs / PCAs to discharge their notification obligations only once a certain threshold of aggregated transactions is exceeded, an increase in the information which must be disclosed, a prescribed format for such notifications, the need for PDMRs / PCAs to notify the FCA as well as the relevant issuer of transactions and a revised timeframe within which PDMR / PCAs and companies must issue their notifications.
 - ▶ The creation of a formal market soundings regime, under which the disclosure of inside information to third parties in certain circumstances will benefit from a "safe harbour" defence, but also including significant prescription as regards the manner and contents of such soundings and record keeping when undertaking them, whether or not the market sounding relates to inside information.
 - ▶ Considerably increased content requirements, and a prescribed format, for insider lists (including for AIM companies).
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The FCA's approach to the implementation of MAR

MAR will result in significant amendment to several key FCA rulebooks and require a fundamental change to the way in which the rules are reviewed and interpreted. The FCA's handbook will no longer be as comprehensive a reference point as it is now. Rules and guidance replaced by MAR and the Implementing Technical Standards (**ITS**) (produced by the European Securities and Markets Authority (**ESMA**)) will need to be referred to in addition to the FCA's rules. While the FCA will "signpost" the location of the rules which MAR will replace, crucially it is not proposing currently to copy out the relevant provisions of MAR or any ITS, nor will it signpost the existence of any new rules.

The Code of Market Conduct (CoMC)

The Treasury is to remove the requirement in FSMA on the FCA to publish a code that assists market participants in determining if behaviour is abusive. The FCA proposes, however, to retain as much of CoMC that is compatible with MAR as possible. What remains would no longer have the status of formal guidance but, it is said, will help firms to understand the regulator's views and expectations in greater depth – and, of course, it will still be the FCA which is responsible for enforcement. While the intention may be laudable, it is also arguable that this may leave a degree of unhelpful ambiguity as to what behaviours are compliant.

The Disclosure Rules and Transparency Rules (DTRs)

On the basis that all of the substantive rules in Chapters 2 and 3 of the DTRs will be replaced by MAR, the rulebook will be renamed the "Disclosure Guidance and Transparency Rules". What remains will be those elements of guidance which the FCA believes remain compatible with the new regime with "signposts" to where in MAR rules which replace those in the current regime can be found. As noted above, there will no signposting of any new rules.

The Listing Rules

The Model Code will be deleted as the FCA considers that its provisions are incompatible with MAR particularly as regards permissible exemptions from the prohibition on dealings in a close period. Thus, there are considerable knock on implications for a PDMR's share dealing (see below). The FCA is currently proposing to replace the Model Code with, among other obligations (see below), guidance on how PDMRs should seek clearance to deal and what factors the issuer should take into account when giving such clearance. The factors to be taken into account will depend on whether it is proposed that the dealing will take place outside of or within the limited circumstances in which trading is permissible during a close period (referred to as "closed" periods under MAR).

The disclosure of "inside information" under MAR

The definition of "inside information"

The definition of "inside information" in Article 7 of MAR is, in effect, broadly the same as it is now - aspects of Article 7 underline various concepts encapsulated in recent FCA Tribunal¹ and ECJ judgments² but do not significantly alter the status quo. The draft ESMA ITS suggests that where an issuer makes an announcement which contains inside information, that must be clearly indicated on the face of the announcement. Of course, this may be problematic in practice if the exact status of the contents of an announcement is uncertain.

Delaying disclosure

MAR maintains the ability for an issuer to delay the disclosure of inside information so as not to prejudice its legitimate interests provided certain conditions are met. What is new is that once an announcement of inside information is finally made, the issuer must notify the FCA that it delayed the announcement and, on making that notification, provide various details including when precisely the decision was made to delay, the name of the person who made the notification and those responsible for the decision to delay its announcement.

The FCA has a choice, and consulted³ on, whether to mandate the provision by issuers of further information in all circumstances of delay or only on request, the latter being the approach it favours. In any event, the list⁴ of information which may be requested is significant and will require issuers to keep detailed records at the inception, and throughout the lifetime of, delayed inside information (and subsequently) in anticipation of such a request potentially being made.

As is the case currently, under MAR an issuer must have a "legitimate interest" to be able to delay announcing inside information. The FCA has consulted⁵ on the removal of guidance in DTR 2.5.5G which, in effect, limits those legitimate

¹ See, in particular the decision of the Upper Tribunal in *Jan Hannam v FCA* [2014] UKUT 0233 (TCC) and *David Massey v FSA* [2011] UKUT 49 (TCC). For a brief overview of recent developments in, and the current FCA view of the meaning of, the definition of inside information, please see the FCA consultation ([CP 15/38](#)) published in November 2015.

² See *Jean-Bernard Lafonta –v- Autorité des Marchés Financiers* ([Case C-628/13](#)).

³ The FCA consultation ([CP 15/35](#)) closed on 4 February 2016. A response is yet to be issued.

⁴ See ESMA's "[Draft technical standards on the Market Abuse Regulation](#)", 28 September 2015, Annex XII, page 297. These are yet to be issued in final form.

⁵ See FCA consultation [CP 15/38](#).

interests to matters in the course of negotiation and impending developments. ESMA also recently consulted ⁶ on the introduction of a longer, non-exhaustive list of those events and circumstances which it considers are (and, indeed, are not) legitimate in this context. Thus, the FCA's proposal paves the way for ESMA's guidance to sit alongside MAR, and not be contradicted by, what is currently in the DTRs.

Whether issuers have formally constituted Disclosure Committees or not, disclosure policies and related briefing documentation will need to be updated and far more formality introduced to enable issuers to monitor and track the existence of inside information. Systems and procedures as regards the creation and maintenance of insider lists (see below) will also need to tie in with this part of the new record-keeping regime.

Controlling inside information

The requirement for issuers to create and maintain insider lists remains under MAR. The main change is that the format of such lists is prescribed - [click here](#) - and requires significantly more information to be recorded for each person on the list than is currently the case (including full names, dates of birth, "national identification numbers", work, mobile and personal telephone numbers and home addresses). HR teams may have a part to play in ensuring that the required information is available and whether terms of employment allow the provision of such information to the FCA if required.

The ability for issuers to create segmented lists of permanent and project specific insider lists remains. However, to be included on a permanent insider list, an individual must have "access at all times to all inside information" ⁷ which, for many issuers, is likely to materially reduce the number of those included in that segment. This may impact on the usefulness of permanent insider lists as the basis for an issuer to regulate share dealing.

While the FCA is currently proposing to delete the provisions allowing issuers to enter into arrangements with their advisers, which currently enable advisers to maintain lists on their client's behalf of those with access to the client's inside information within their organisations, it is believed that the FCA will allow this practice to continue.

MAR also requires that issuers, and those acting on their behalf, ensure that those on insider lists acknowledge *in writing* the legal and regulatory duties entailed and are made aware of the sanctions applicable to the relevant offences of market abuse.

The insider list regime is a potentially significant change for AIM quoted companies, since MAR will apply to AIM companies and require compliance with this strict record keeping regime, where such companies may not have been voluntarily complying in the past. It may be that certain dispensations become available to AIM companies in relation to insider lists (if the market itself is granted "SME Growth Market" status) but these dispensations would, in any event, not be significant and would still require significant details on insiders to be provided by AIM companies to the FCA, were the FCA to ask for such information.

Disclosure of dealings under MAR

The principle of PDMRs and PCAs disclosing transactions in an issuer's securities and other financial instruments to the market remains under MAR. Those caught by the regime, i.e. those falling within the definitions above, appear to be broadly similar although it is hoped that the FCA will bring some clarity to the interpretation of some aspects of the definition of a PCA in due course.

MAR requires companies to keep a list of PDMRs and their PCAs and to inform *in writing* PDMRs of their obligations as regards transaction disclosure and the rules relating to conducting transactions in a closed period. In turn, PDMRs must inform *in writing* their PCAs of their transaction disclosure obligations and keep a copy of such notifications. Those notifications will need to consider the "non-exhaustive" list of notifiable transactions which are set out in Article 19 of MAR and the corresponding [Delegated Regulation](#) ⁸.

Not only must a PDMR / PCA disclose dealings to the issuer concerned as under the current regime, but he / she will also be required to notify the FCA in each case within three business days of a transaction taking place (currently, four business days). The deadline by which the issuer must inform the market has also changed to require notification within three business days of the transaction having taken place. In all cases, notifications must be made in a new [prescribed format](#). Thus, to make the regime workable, issuers may need to consider imposing a shorter notification requirement on their PDMRs to enable the issuer itself to discharge its own disclosure obligations. As with insider lists, more information is required to be disclosed than is currently the case and issuers will need to alert their PDMRs to that fact.

⁶ ESMA's consultation ([ESMA/2016/162](#)) closed on 31 March 2016. A response is yet to be issued.

⁷ See Commission Implementing Regulation (EU) [2016/347](#), Recital (4)

⁸ See MAR, Article 10.

MAR introduces a de minimis threshold of €5,000 per calendar year below which aggregated PDMR / PCA transactions need not be disclosed. The FCA has discretion to increase this threshold to €20,000, although it seems unlikely that this will happen. Whether market practice develops such that all transactions are disclosed and the de minimis threshold ignored and whether the FCA agrees to that practice remains to be seen.

Share dealing under MAR

This is arguably the area of greatest change and uncertainty at present. The headline changes are:

► *A new definition of "closed period"*

Closed periods under MAR (as opposed to "close periods" under the current regime) are defined as the period of 30 calendar days before the announcement of an interim financial report or a year-end report which the company is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted to trading or according to national law. Given that definition, it is a matter of significant debate with the FCA as to whether preliminary results announcements will end a closed period. If they do not, it is likely to further erode the existence of open periods in which PDMRs can deal and effectively lead to two closed periods – a "non-MAR closed period" prior to the announcement of prelims and a "MAR closed period" prior to the publication of the annual report. The FCA has therefore been asked to confirm that, if preliminary results announcements do end a closed period, there is not a further closed period in any event before the publication of final results / annual reports.

► *Tighter control on permitted "dealing" during closed periods*

MAR prohibits dealing by a PDMR on her/his own account or for the account of a third party, directly or indirectly, in closed periods other than in "exceptional circumstances" (see Article 8 of the [Delegated Regulation](#) for further guidance of what constitutes exceptional circumstances for the purposes of MAR) or in respect of a limited range of dealings in connection with employee share plans, transfers between two accounts of a PDMR or the acquisition of qualification or entitlement shares (see Article 9 of the [Delegated Regulation](#) for further guidance on what dealings are allowed under these exemptions). It is worth noting that the circumstances in which dealing is permitted in a closed period under MAR are (or would appear to be) more restrictive than those currently allowed under the Model Code.

► *Tighter control on permitted "dealing" outside of a closed period?*

The FCA consultation proposes guidance to the effect that, notwithstanding that a dealing is to take place outside of a MAR closed period, "the FCA would expect a company to give due consideration as to whether there are circumstances in which it would not be appropriate to give clearance [to deal]". The consultation goes on to provide a list of factors that a company may wish to consider when giving clearance in these circumstances. These factors may be set out in a new Annex to the Listing Rules, following the deletion of the Model Code (see further below), and include:

- (i) where inside information exists in relation to the company;
- (ii) where no inside information exists, but nonetheless there are timeframes during the year where the perception of shareholders or the market would be that inside information may exist;
- (iii) where the request is based on considerations of a short-term nature; and
- (iv) whether, due to the specific nature of the dealing or the specific circumstances facing the PDMR, it merits exceptional treatment.

This super-equivalent FCA proposal in respect of clearance to deal outside of a MAR closed period has been met with widespread opposition and a great deal of concern that it will result in two different mandatory closed periods regimes – one for MAR closed periods and another for non-MAR closed periods – with different rules around what constitutes a dealing and what exemptions are available. At this stage, the expectation is that the FCA will revise its proposal and delete this additional requirement entirely, however we can only wait and see.

► *The demise of the Model Code*

The FCA has stated that the Model Code is not compatible with MAR and is therefore proposing to replace it with a requirement for premium listed issuers to implement systems and controls to require PDMR to obtain clearance to deal. As stated above, this has not been a popular development given the uncertainty it has created. It remains to be seen whether the FCA will respond to feedback and produce a revised share dealing code (which seems unlikely) or whether an industry

body such as the GC 100 does so. It may be that issuers will, under any revised code of dealings produced, subject their PDMRs to "voluntary" additional closed periods, particularly having regard to the outcome of the above consultations and deliberations.

All of this leaves issuers in a state of flux with the implementation of MAR moving ever closer. It may be prudent to hold off making wholesale changes to codes of share dealing until, at the very least, the FCA has completed its consultation process and, in the meantime, ensure that those subject to the regime understand the need for them to engage with the secretariat in relation to all dealings caught by it. Secretariats should also work through the mechanics for share plans and other incentives schemes such as Share Incentive Plans and Dividend Re-Investment Plans to ensure that they will continue to work in a compliant manner.

Market soundings under MAR

It is an offence under MAR (as it is now) for inside information to be unlawfully disclosed. MAR establishes a safe harbour from that offence for MAR compliant "market soundings" which are defined as "a 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 it such as its potential size or pricing, to one or more investors"⁹. The safe harbour also applies in certain circumstances to bidders investigating the potential support of target shareholders for a takeover bid or merger. The provisions apply equally to issuers as well as to those acting on their behalf, such as their corporate brokers, both known for this purpose as a "disclosing market participant" (**DMPs**).

MAR is highly prescriptive in relation to undertaking market soundings and demands significant formality and record keeping for all DMPs:

- ▶ Prior to conducting a market sounding, a DMP must consider whether a market sounding will involve the disclosure of inside information and create and maintain a written record of its conclusions and reasons – these may need to be produced to the FCA on request;
- ▶ Procedures will need to be established as to the way in which market soundings will be conducted including obtaining the consent of the "Market Sounding Recipient" or "MSR" and reminding them of their obligations as regards that information, including keeping it confidential;
- ▶ As part of the market soundings regime, prescribed information must be provided in a certain order, thus on a quasi-scripted basis. Records (and / or recordings) of market soundings must be created and kept for five years; and
- ▶ MSRs must be told as soon as possible once the information disclosed ceases, in the opinion to the DMP, to be inside information. This may create significant issues to the extent that the subject matter of a market sounding does not culminate in a public announcement.

The market soundings regime also applies to the extent that the information disclosed does not constitute inside information and, indeed, there could be some dispute between a DMP and an MSR as to whether a sounding does or does not, in their own opinions, include inside information.

AIM

As indicated above, MAR will apply in respect of behaviour relating to AIM quoted companies. It is still unclear, however, as to whether the London Stock Exchange is intending to revise the AIM Rules for Companies, before or after 3 July 2016, in order that those rules sit more neatly against the provisions of MAR. In particular, Rules 11 (General disclosure of price sensitive information), 17 (Disclosure of miscellaneous information) and 21 (Restriction on deals) may need particular scrutiny. Currently, there are questions as regards whether separate and different AIM Rule and MAR standards will apply to the same market related issues, how AIM Regulation will work alongside the FCA in relation to policing such issues following the implementation of MAR and the extent to which Nomads will also be expected to help ensure their AIM clients' compliance with the new regime.

⁹ See MAR, Article 11.

Next steps

Governance teams can begin to prepare regarding certain aspects of the new regime, particularly in relation to disclosure policies and related record keeping requirements and insider lists. Other aspects of the regime may remain in a state of flux at least until the FCA provides its consultation response. When that is published, we will publish a further update. We will also be holding Company Secretaries' Forums on this topic in May – invites will be issued shortly and, to the extent that you do not normally receive invites to those events and would like one, please let us know.

If you have any other questions on the regime, please do not hesitate to get in touch with your usual contact or any of the following:



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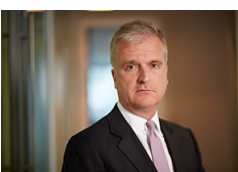
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