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A bird's eye view

Richard Small and Katherine Dillon provide an overview of the principal changes arising from the new MAR regime. This briefing covers the core elements of the current UK market abuse regime with commentary on the key areas of change at UK and EU level.

The UK civil market abuse regime, set out in Section 118 of the UK Financial Services and Markets Act 2000 (**FSMA**), was originally implemented in 2001. It was amended in 2005 in order to implement the current Market Abuse Directive (**MAD**)[1], although various super-equivalent requirements were preserved. On 3 July 2016, this regime will be largely superseded by the new EU Market Abuse Regulation (**MAR**)[2].

From 3 July 2016, the core components of the current UK regime will remain in place, but much of the detail will be replaced by the new and more extensive MAR regime, which is designed to reduce interpretative discrepancies across EU Member States, as well as updating the regime to take account of emerging market practices such as algorithmic and high frequency trading. While we do not expect to see a sea change in business practices as a result of MAR, the net effect will almost certainly be an increased compliance burden on firms (at least those that engage in significant trading activity) and their staff. This briefing gives a high level overview of the core elements of the current UK regime, with a brief indication of some key areas of change at UK and EU level.[3]

What is market abuse?	The concept of "market abuse" refers to one or more specified "abusive behaviours" in relation to "qualifying investments". Market abuse is a civil offence in the UK. There is a separate criminal regime as set out in Part V of the Criminal Justice Act 1993 and Sections 89-91 of the Financial Services Act 2012 (see further below).
The abusive behaviours	The various abusive behaviours or civil market abuse offences are set out in Section 118 of FSMA. The following types of behaviour will amount to market abuse where they occur in relation to "qualifying investments" (see below): • insider dealing; • improper disclosure of inside information; • manipulating transactions; • manipulating devices; • dissemination; and • misleading behaviour or market distortion (UK only – effectively a catch-all for misleading/distortive action not caught by those behaviours immediately above). *Under MAR, the abusive behaviours will be insider dealing, unlawful disclosure and market manipulation (including an express prohibition on attempted market manipulation). The latter offences are extremely broad and will capture most if not all manipulative or distortive behaviours prohibited by the current rules, as well as capturing new practices including high-frequency trading and social media activity.*
What is "inside information"?	"Inside information" means information of a precise nature which: • is not generally available; • relates directly or indirectly to one or more issuers of qualifying investments or to one or more qualifying investments themselves; and • would, if generally available, be likely to have a significant effect on the price of the qualifying investments (e.g., listed shares) or on the price of related investments (e.g., derivatives referencing such shares). *Under MAR, this definition is slightly expanded and is modified as necessary for information concerning commodities and emission allowances. The core elements of the test above are also defined in more detail, in an effort to minimise interpretative discrepancies across EU member states (which could affect the UK interpretation).* *Intermediate steps in a protracted process may also be deemed to be inside information under MAR. Consideration should therefore be given at each stage of a*

[1] Directive 2003/6/EC, text available here.
[2] Regulation EU/596/2014, text available here. MAR is accompanied by a Directive on Criminal Sanctions and Market Abuse; however, the UK has chosen not to implement this (as has Denmark).
[3] This Overview is not intended to be comprehensive. The legislation surrounding market abuse is highly complex and detailed and is further complicated by UK and EU case law and by pre-implementation uncertainties remaining regarding the application in practice of certain elements of MAR.

	transaction as to whether new inside information has arisen that should be disclosed. *It is worth noting that inside information is defined differently under MAD / MAR and Part V of the Criminal Justice Act.*
Presumptive use of inside information	MAR has effectively codified the European Court of Justice's decision in Spector Photo[4] by making it clear that there is a rebuttable presumption that where a person deals whilst in possession of inside information they have used that information. MAR does however, set out a number of circumstances in which legal persons are deemed not to have used the inside information in their possession when dealing.
Substantive scope of the market abuse regime: "qualifying investments"	The current MAD/FSMA regime captures securities admitted (or to be admitted) to trading on UK prescribed (and EEA regulated) markets. The insider dealing, improper disclosure and misleading behaviour/market distortion behaviours also capture derivatives referencing such securities and certain other instruments (e.g., UCITS, commodity derivatives). *The extended regime under MAR will also cover (to varying degrees) abusive behaviour in relation to:* • *all MiFID financial instruments traded on multilateral trading facilities (MTFs) or organised trading facilities (OTFs)[5];* • *emissions allowances;* • *certain commodity derivatives and spot commodities markets[6];* • *OTC derivatives-based activity with potential to affect traded instruments; and* • *benchmarks.* *The benchmark manipulation offences were introduced in response to the recent LIBOR and FX manipulation scandals in the UK and elsewhere. The UK already prohibits benchmark manipulation activity under Section 91 of the Financial Services Act 2012.*
Territorial scope of the regime	The UK regime applies where the abusive behaviour: • occurs in the UK; and/or • relates to qualifying investments admitted to trading on a UK prescribed market (and where relevant, related investments). The second limb has the potential to capture extra-territorial activity in connection with UK/EU traded instruments, consistent with the EU position. *The MAR restrictions will cover acts or omissions occurring anywhere in the world, provided that it relates to the extended expanded range of EEA-traded financial instruments and practices covered by the regime.*
FCA Code of Market Conduct	The Code of Market Conduct (**COMC**) published by the Financial Conduct Authority (**FCA**) sets out further detail on the core concepts of the market abuse regime and on how to identify each type of abusive behaviour, including examples of conduct that typically does not amount to market abuse. The FCA also publishes the "Market Watch" newsletter, which offers additional (non-official) guidance on market conduct issues, including market abuse. *The FCA anticipates maintaining the COMC post-implementation of MAR, insofar as legally compatible with the new requirements. The COMC will, however, no longer be legally binding and will be recast as guidance and much reduced in scope.*

[4] *Spector Photo Group & Van Raemdonck* (Approximation of laws) [2009] EUECJ C-45/08 (23 December 2009). A copy of the judgment can be found here.
[5] This is not applicable until MiFID II is implemented (originally scheduled for 3 January 2017; however, the Commission has announced the possibility of a 1-year delay, which would mean that the relevant provisions will not apply until early 2018).
[6] It is unclear in light of the delay to MiFID II (see above) whether firms should, until MiFID II is implemented, rely on the earlier MiFID I definitions in relation to commodity derivatives rather than the new MiFID II definitions.

Exemptions and safe harbours	Limited exceptions to the market abuse prohibition apply for behaviour that conforms to certain other regulatory requirements (relating to takeovers, for example), as well as for qualifying buy-back and stabilisation activity. *Under MAR, the above exemptions will continue to be valid. Certain other behaviours are also expressly designated, under MAR, as "legitimate" (and so not market abuse). In addition, the concept of "accepted market practices" that may be specified at national level[7] is preserved, but will become subject to detailed oversight by the European Securities and Markets Authority (ESMA).* *Significantly, however, the FCA has proposed to delete existing guidance in the COMC on certain behaviours that are presumed not to amount to insider dealing (relating to, for example, "trading information").*
Penalties	The FCA may impose fines on firms and individuals for the commission of market abuse, as well as for the related offence of encouraging another person to commit market abuse. Conduct may amount to market abuse even where the abusive behaviour is unintentional and/or no benefit is ultimately derived from the behaviour. The FCA has shown increasing willingness to impose multi-million pound fines in this area. Note that different standards and penalties apply under the criminal regime. *Under MAR, the civil "encouraging" offence will be removed in relation to market abuse offences other than insider dealing. The penalties regime is unlikely to change significantly under MAR as the UK has chosen to preserve its existing domestic civil sanctions regime (together with the separate criminal insider dealing regime).*
What else is changing under MAR?	**Cancellation or amendment of prior orders**: MAR clarifies that cancelling or amending existing orders following subsequent receipt of inside information will now potentially amount to market abuse. **Market soundings**: this refers to the scenario in which an issuer or its agents approach certain investors in order to gauge the likely success of a potential issue; formerly a grey area of the law, this practice will now be extensively regulated, increasing the burden on issuers and recipients of market soundings. **Insider lists:** will now be governed by specific rules on content, format and surrounding procedures. **Delaying disclosure**: the obligations set out in MAR in relation to delaying disclosure of inside information are broadly in line with the current regime under the Disclosure and Transparency Rules (**DTRs**). Delay by an issuer in announcing inside information on the basis of recognised legitimate interests will however, now require reasoned justification to be recorded and (if requested) notified to the FCA. **Management dealings:** the restrictions governing persons discharging management responsibility will be clarified the timeframe for reportable transactions will be reduced to three business days. National regulators also have the discretion to increase the *de minimis* limit of €5,000 (currently optional) to €20,000. **Dealing during "closed" periods**: management of an issuer will formally be prohibited from trading during the 30-day period preceding the publication of annual or interim financial results. Some existing exceptions in this area will be removed. The position in relation to preliminary results remains unclear. **The Model Code:** this will be deleted on the basis that it is not compatible with MAR. Some areas formerly covered by the Model Code will now be regulated by MAR (for example, dealing during closed periods). As the FCA has decided not to provide guidance on the elements of the Model Code not covered by MAR, it remains to be seen whether existing procedures will remain best practice.

[7] The FCA expressly acknowledges the concept of accepted market practices under the current FSMA/COMC regime but has not formally recognised any specific practices for this purpose.

Other related areas of UK law	**UK criminal regime for Insider Dealing** The UK also has a separate criminal regime for insider dealing under Part V of the Criminal Justice Act 1993. This is narrower than the civil market abuse regime and is based on slightly different definitions, although the two regimes will continue to overlap in relation to dealing and disclosure offences. The offence applies (broadly) where either the behaviour takes place in the UK or the instruments in question are traded on a UK market. The criminal regime is unlikely to be affected by the implementation of MAR. **False or misleading statements and impressions** Sections 89-91 of the Financial Services Act 2012 (which includes the offence formerly found in Section 397 of FSMA) also create distinct but related criminal offences in relation to false or misleading statements or impressions, which potentially overlap with the market abuse and insider dealing regimes, including in relation to benchmarks. This regime is also unlikely to be affected by the implementation of MAR. **Disclosure and Transparency Rules** The DTRs are made by the FCA under Part VI of FSMA and implement elements of both the MAD and the Transparency Directive, including the rules for issuers on disclosure and control of inside information. The DTR will be affected by MAR – several sections are being removed / rewritten.
The impact of Brexit?	Of the EU Member States, the UK has historically been at the forefront of regulating market abuse. It has strong public policy incentives to ensure that the City of London is perceived to be a "clean" marketplace where insider dealing and other forms of market abuse are not tolerated. It is therefore hard to see that the UK would not maintain a market abuse regime equivalent to or indeed stricter than that put forward by the EU in MAR following a potential Brexit.
What firms should be doing now?	Issuers and their advisors, as well as buy-side firms, should review their systems and controls around market abuse, particularly with respect to: • the maintenance of insider lists; • the disclosure of inside information (especially in relation to intermediate steps in a transaction); and • the conducting of market soundings. Personal account dealing and clearance procedures should also be updated to reflect the MAR requirements in this area.

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