

Market Abuse Regulation Extends the Scope and Application of the Market Abuse Regime

Introduction

The Market Abuse Regulation (2014/596/EU) (“**MAR**”) has replaced the Market Abuse Directive (2003/6/EC) (“**MAD**”) and has been implemented to strengthen the market abuse regime to improve market confidence and guarantee investor protection.

MAR has made a series of changes to the market abuse regime, including but not limited to new rules on insider lists, disclosure of inside information and obligations on persons discharging managerial responsibilities (“**PDMR**”). In addition, the scope of application of the market abuse regime has also been extended under MAR, such that the new rules apply to issuers admitted to trading on regulated markets, as well to companies listed on AIM.

When did MAR come into force?

MAR was implemented in the United Kingdom (“**UK**”) via the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 and, as a result, amends the Financial Services and Markets Act 2000 and the Financial Conduct Authority Handbook. As an EU regulation, MAR has direct effect resulting in automatic application in EU member states (including the UK) and became effective on 3 July 2016.

What constitutes Market Abuse?

MAR aims to prevent market abuse which it defines as “*unlawful behaviour in the financial markets*” and consists of the following:

- (a) Insider dealing;
- (b) Unlawful disclosure of inside information; and
- (c) Market manipulation.

Insider Dealing

In a snapshot, insider dealing occurs where a person has inside information and uses that information by engaging, attempting to engage, or by recommending or inducing another to acquire or dispose of financial instruments to which the inside information

relates. It also concerns the cancelling or amending of an order relating to a financial instrument to which the inside information relates, where the order was made prior to such person possessing the inside information. Likewise, a person acting from a recommendation or inducement will be insider dealing if they know or ought to know that it is based on inside information.

Unlawful Disclosure of Inside Information

For the purposes of MAR, inside information is defined in Article 7(1)(a) as *“information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.”*

Unlawful disclosure of inside information occurs if a person possesses inside information and discloses that information to any other person. It is not unlawful if however, the disclosure is made in the normal exercise of an employment or professional duty.

Market Manipulation

MAR provides an extensive list of behaviours that could be considered as market manipulation including but not limited to where a person is involved with:

- entering into a transaction, placing an order or behaving in such a way that is likely to give false or misleading signals relating to the supply, demand for or price of a financial instrument;
- entering into a transaction, placing an order or behaving in a way which affects or is likely to affect the price of financial instruments;
- disseminating information through the media or other means which gives or is likely to give false or misleading signals as to the supply, demand for or price of a financial instrument or is likely to secure the price at an abnormal level, including situations where the person who made the dissemination knew or ought to have known that the information was false or misleading;
- transmitting false or misleading information in relation to a benchmark where the person who made the transmission knew or ought to have known that the information was false or misleading.

What are the Key Developments of MAR?

As mentioned above, MAR is wider in scope than MAD and an overview of some of the key developments (including the developments that affect AIM companies) are reflected below.

I. Financial Instruments and Trading Venues

In addition to financial instruments admitted to trading on an EU regulated market such as the London Stock Exchange, MAR applies to a broader range of financial instruments than MAD, which include those:

- (a) traded on a multilateral trading facility (“**MTF**”), admitted to trading on an MTF, or where a request for admission has been made;
- (b) traded on an organised trading facility (“**OTF**”) (applicable as of 3 January 2018); and
- (c) not covered by the above, although the price or value has an effect on the price or value of the financial instrument.

II. Insider Lists

Although issuers are already required to provide insider lists to the relevant regulator (which in the United Kingdom is the Financial Conduct Authority), MAR extends the obligation in Article 18, such that an insider list must include the identity of any person with access to the inside information, the reason for such person being included on the insider list, the date and time said person gained access to the insider information and the date the insider list was prepared.

III. Delay to Disclosure of Information

Similarly to MAD, Article 12(1) of MAR stipulates that issuers must inform the public as soon as possible about inside information that directly concerns them. This was also an obligation under MAD. Specifically, an issuer must ensure that inside information must be complete and is transmitted in a correct and timely manner. In addition, public disclosure of inside information must not be combined with the marketing of its own activities. Further, any disclosed information must be posted on an issuer’s website and maintained for a period of five years.

However, Article 17 of MAR goes further to permit the delay of disclosing inside information to the public if all of the following circumstances apply: (1) immediate disclosure is likely to prejudice the issuer’s legitimate interests; (2) delay of disclosure is not likely to mislead the public; and (3) the issuer is able to ensure the confidentiality of

the information. If information is delayed, the regulator must be notified and provided with an explanation as to the cause of delay.

IV. Buy-back Programmes and Stabilisation

Provided certain criteria are met, share buy-backs and stabilisation measures are permissible under Article 5 of MAR and will fall outside of the market abuse prohibitions. In relation to buy-backs, for the exemption to apply, an issuer must provide: (a) full details of the programme prior to the start of trading; (b) confirm to the regulator the trading venue; and (c) subsequently disclose such details to the public. Trades must also be in accordance with the limitations of price and volume as determined by MAR.

In addition, any buy-back must be carried out with the objective of reducing capital of an issuer, meeting obligations arising from debt financial instruments, and meeting obligations arising from share option programmes to employees or other members of the issuer or an associate company.

For stabilisation, defined as an “...offer to purchase securities ... undertaken by a credit institution or investment firm ... exclusively for supporting the market price of such securities for a predetermined period of time, due to a selling pressure in such securities”, the stabilisation must be carried out for a specified period, relevant information relating to the stabilisation must be disclosed to the regulator, and the price must be within certain limits defined by MAR. Finally, all trading must be compliant with the conditions for stabilisations as determined by the European Securities Markets Authority.

V. Market Soundings

Unlawful disclosure of inside information is prohibited by MAR. However, Article 11 introduces the concept of disclosure of information by way of market sounding. A market sounding is defined as a communication of information to potential investors, made prior to the announcement of a transaction in order to assess the interest of potential investors and the conditions attached to it, such as its potential size or pricing.

A market sounding is only permitted to be disclosed if it is made by an issuer, a secondary offeror of a financial instrument, or a third party on behalf of the above (the “**Permitted Persons**”). Further, and among other requirements, prior to a market sounding, Permitted Persons are required to assess whether inside information shall be disclosed, record their findings and conclusions relating to the inside information, obtain a recipient’s consent to them being made an insider and remind them of their obligations of confidentiality with regards to the information.

VI. Market Manipulation

In addition to the market manipulation criterion in MAD, MAR has extended the manipulation offence to include attempted manipulation. It is said in MAR that the actual or attempted manipulation of benchmarks, including interbank offer rates, can have a serious impact on market confidence and may result in significant losses to investors or misrepresent the state of the economy. Therefore, specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that the regulator can enforce a clear prohibition of the manipulation of benchmarks.

VII. Managers' Transactions

PDMRs and those persons closely associated to them, who have access to inside information, are obligated under Article 19 of MAR to promptly notify the issuer and the regulator of each transaction relating to shares or debt instruments of the issuer or derivatives connected to them. Although this obligation is not a new concept, under MAR, PDMRs are now required to make notifications for transactions reaching EUR 5,000 per calendar year, and such notification must take place within three business days as opposed to four under MAD.

Summary

Although the requirements set by MAR are largely similar to the previous market abuse obligations under MAD, the scope of application of MAR is much broader and therefore encompasses a wider range of financial instruments admitted to trading including financial instruments admitted to trading (or for which a request for admission has been made) on an MTF, or financial instruments admitted to trading on an OTF.

In light of MAR's wider application and given its more onerous reporting obligations such as the obligation to report any delay of disclosure of information, listed companies, including companies admitted to AIM, must ensure they understand and fully comply with the new market abuse regime, as provided for under MAR. Importantly, all companies affected by MAR must ensure they have adequate procedures and systems in place to identify and reduce the risk of market abuse within their organisation and also to fulfil MAR's disclosure requirements.