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Market Abuse Regulation



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Introduction

The Market Abuse Regulation [596/2014] (MAR) establishes a new, common regulatory framework on market abuse, as well as measures to prevent market abuse, to ensure the integrity of the EU financial markets and enhance investor protection and confidence in those markets. Its aim is to strengthen the existing market abuse framework by extending its scope to new markets, new platforms and new behaviours and introducing a wider range of tougher sanctions, while ensuring a level playing field across the EU.

MAR is complemented by the Directive on Criminal Sanctions for Market Abuse (CSMAD) and MAR and CSMAD are together known as 'MAD II'.

MAR will repeal and replace the existing Market Abuse Directive [2003/6/EC] and its implementing legislation with effect from 3 July 2016.

As MAR is a regulation, it will have direct effect in all Member States. CSMAD, as a directive, will need to be transposed into national law by each Member State. The UK, along with Denmark, has decided not to opt in to CSMAD at the present time, but will introduce new UK criminal offences instead.

What is market abuse?

Market abuse comprises the following:

- Insider dealing
- Unlawful disclosure of inside information
- Market manipulation

Insider dealing

Insider dealing can generally be summarised as the following:

- (i) using inside information to deal in financial instruments to which that information relates; or

- (ii) disclosing inside information to any other person otherwise than in the proper performance of one's employment, office or profession; or
- (iii) recommending or inducing another person to deal in financial instruments on the basis of inside information.

Inside information

Inside information is defined as information which is:

- (i) of a precise nature;
- (ii) has not been made public;
- (iii) relates, directly or indirectly, to one or more financial instruments or issuers of financial instruments; and
- (iv) if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price related derivative financial instruments.

Market manipulation

Market manipulation generally means:

- (i) (subject to certain exemptions) transactions or orders to trade which either: (a) give, or are likely to give, false or misleading signals as to the supply, demand or price of financial instruments; or (b) secure the price of one or several financial instruments at an abnormal or artificial level; or
- (ii) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance; or
- (iii) dissemination of information through the media (including the internet), or by any other means, which gives or is likely to give false or misleading signals as to financial instruments, including the dissemination of rumours or false or misleading news, where the person knew, or ought to have known, that the information was false or misleading.



Scope of MAR

MAR extends the scope of the market abuse framework, such that the prohibitions of insider dealing, unlawful disclosure of inside information and market manipulation apply to the following:

- (a) financial instruments admitted to trading on an EU regulated market or for which a request for admission to trading has been made;
- (b) financial instruments traded on a multilateral trading facility (MTF), admitted to trading on an MTF or for which a request for admission to trading has been made;
- (c) financial instruments traded on an organised trading facility (OTF);
- (d) financial instruments not covered by (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in (a), (b) or (c), including (but not limited to) CDSs and CFDs;
- (e) emission allowances and emission allowance market participants;
- (f) spot commodity contracts in certain circumstances (i.e. relating to the definition of inside information and market manipulation); and
- (g) benchmarks in certain circumstances (i.e. relating to market manipulation).

'Financial instruments' are those defined in Annex 1 of MiFID II.

Key provisions of MAR

Insider dealing

The insider trading prohibition has been extended to cover attempted breaches and cancellation of orders.

Inside information

The definition of inside information remains broadly unchanged, but has been widened to capture inside information for spot commodity contracts.

Unlawful disclosure of inside information

MAR clarifies that recommending or inducing another person to transact on the basis of inside information amounts to unlawful disclosure of inside information.

Disclosure of inside information

MAR requires issuers to publish insider information that directly concerns that issuer as soon as possible and this has been extended to some emission allowance market participants (EAMP). An issuer or EAMP is permitted to delay the disclosure of inside information provided that all of the following conditions are met:

- (a) immediate disclosure is likely to prejudice the legitimate interests (i.e. the financial stability) of the issuer or EAMP; and
- (b) delay of disclosure is unlikely to mislead the public; and
- (c) the issuer or EAMP is able to ensure the confidentiality of that information,

and it informs the appropriate regulator and provides a written explanation of how the conditions set out in (a) to (c) above are met.

Market soundings

MAR introduces a framework for persons to make legitimate disclosures of inside information in the course of market soundings, provided it complies with certain specified conditions, namely:

- (a) to specifically assess whether the market sounding will involve the disclosure of inside information and, if so, make a written record of its conclusion and the reasons for reaching it (and provide such written record to the regulator upon request);
- (b) prior to disclosure, obtain the consent of the person receiving the market sounding to receive inside information;
- (c) inform the recipient that he is prohibited from using, or attempting to use, that information; and
- (d) place the recipient under an obligation of confidentiality.



A market sounding is defined as the communication of information, prior to the announcement of a transaction, to gauge the interest of potential investors in a potential transaction or its potential size or pricing.

Once the market sounding is over, the recipient must be informed that the information disclosed has ceased to be inside information.

Market manipulation

MAR extends the definition of market manipulation to capture attempted manipulation. This should be distinguished from behaviour that is likely to result in market manipulation. Attempts may include situations where the activity is commenced, but not completed, as a result of failed technology or an instruction to trade that is not acted upon, for example.

Benchmarks and spot commodity contracts in certain situations are now in scope of MAR, along with certain other types of behaviour, such as the conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument and certain algorithmic and HFT strategies which disrupt the functioning of a trading venue or make it more difficult to identify genuine orders on the trading system.

Insider lists

MAR requires issuers and EAMPs to draw up a list of all those persons working for them who have access to inside information and to promptly update the insider list in the following circumstances:

- (a) where there is a change in the reason for including a person already on the list;
- (b) to add a new person with access; and
- (c) to delete a person who ceases to have access.

ESMA is required to develop appropriate ITS to determine the format of the insider list and the format for updating the list. The list must be made available to the relevant regulatory authority upon demand.

Issuers trading on an SME growth market are exempt from this requirement, subject to satisfying certain conditions.

Manager transactions

MAR requires those persons discharging managerial responsibilities (PDMR), as well as persons closely associated with them, to notify the issuer and the relevant regulator of every personal transaction undertaken in that issuer's financial instruments.

The notification requirement is triggered once the relevant threshold, currently specified as €5,000 (albeit that a higher threshold of €20,000 may be set by a Member State), is exceeded in any calendar year. Notifications must be made no later than three business days after the relevant transaction date.

A PDMR is generally defined as a member of the managing body of the issuer or a senior executive, not being a managing member, but having regular access to inside information relating to that issuer.

Suspicious transactions and whistleblowing

MAR aims to ensure a level playing field among all trading venues and facilities within its scope by requiring any person who operates a regulated market, MTF or OTF to adopt and maintain effective arrangements and procedures to prevent and detect insider dealing, market manipulation and attempted insider dealing and market manipulation. This requires investment professionals to report suspicious transactions, including any cancellations or modifications, to the competent authority of the trading venue and the obligation has been extended to cover suspicious orders as well.

Further, MAR places an obligation upon regulatory authorities to put in place effective mechanisms to receive whistleblowing notifications in respect of actual or potential breaches of MAR. Regulated firms in turn must have in place appropriate internal procedures through which their employees can report such breaches.



Relationship with MiFID II

Although MAR will be applicable from 3 July 2016, it was initially intended that the provisions in MAR relating to OTFs, SMEs, growth markets and emission allowances would apply from 3 January 2017, i.e. the original application date of MiFID II. However, following the European Commission's proposed one year extension to the MiFID II application date, these provisions of MAR will not now apply until the new MiFID II application date i.e. 3 January 2018.

Next Steps

If you have any questions on the above or would like to discuss this further, please contact Claire Cummings at:

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May 2016



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