



**FCA CONSULTS ON UK IMPLEMENTATION
OF THE MARKET ABUSE REGULATION**

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INTRODUCTION

On 5 November 2015, the Financial Conduct Authority ("**FCA**") published a [consultation paper CP15/35: Policy proposals and Handbook changes related to the implementation of the Market Abuse Regulation \(2014/596/EU\)](#) ("**Consultation Paper**"), which sets out proposed changes to FCA rules governing the UK civil market abuse regime, in order to align the UK regime with the provisions of the EU Market Abuse Regulation (2014/596/EU) ("**MAR**"), which takes effect, for the most part, on 3 July 2016.

This alert sets out a high-level overview of MAR and the changes proposed in the FCA Consultation Paper.

MAR OVERVIEW

MAR will repeal and replace the existing EU Market Abuse Directive (2003/6/EC) ("**MAD**"), which currently governs the existing EU-wide civil market abuse regime. MAD established a minimum standard market abuse framework across the EU, in order to protect the integrity of the financial markets by preventing market abuse and ensuring receipt of relevant information to market participants and the wider public.

MAR became law on 2 July 2014 and will update the EU market abuse framework. One of the key purposes of MAR is to widen the scope of the EU market abuse regime and to align it with the scope of the second Markets in Financial Instruments Directive ("**MiFID II**"), both in terms of the trading venues and financial instruments to which the regime will apply. Unlike MAD, which only applied to activities in relation to trading carried out on regulated markets, the scope of MAR will be wider in that it will also apply to activities in relation to financial instruments traded on multilateral trading facilities ("**MTFs**") and organised trading facilities ("**OTFs**"). Furthermore, the scope of MAR will cover any other conduct or action which can have an effect on financial instruments, irrespective of whether it takes place on a trading venue. MAR will also widen the range of financial instruments that fall within scope of the EU market abuse regime, again aligning this with the scope of MiFID.

The majority of the provisions of MAR take direct effect in each EU Member State on 3 July 2016. However, the widening of the scope of the market abuse regime to cover MTFs and OTFs is set to be delayed until 3 January 2017, which is the current implementation date for MiFID II. Given the European Commission's announcement earlier this month that it is considering proposing a one-year delay on the implementation of

MiFID II (a move which is supported by ESMA), it is not inconceivable that the implementation date for these MAR provisions will also be delayed (although for now, it should be assumed that the current implementation timetable will remain unchanged so firms must prepare accordingly).

The changes to the EU civil market abuse regime will be made under the "Lamfalussy process" for financial services regulation, which involves implementation of the new regime across three levels: MAR has been established as the Level 1 text; Level 2 implementing or delegated measures will also be adopted by the European Commission (subject to a right of the European Parliament and Council of Europe to object to these measures); and Level 3 guidelines will be produced by the European Securities and Markets Authority ("**ESMA**"). Drafts of the Level 2 texts are available, but final measures have yet to be adopted, and the Level 3 ESMA guidelines have not yet been published in draft or final form.

PROPOSED CHANGES TO THE EXISTING UK MARKET ABUSE REGIME

As a Directive, MAD has indirect effect on the laws of each Member State and, as such, each Member State had to incorporate the provisions of the Directive into its own domestic legislation when it came into force. As a Regulation, MAR, which will repeal and replace MAD, has direct effect on the laws of each Member State and, as such, no transposition of its provisions into domestic law will be necessary before implementation in July 2016.

Therefore, in terms of the UK implementation of the new regime under MAR, no new legislation will be required. However, certain legislative provisions and FCA Handbook rules and guidance will need to be amended or repealed so that the UK market abuse framework becomes compliant with the provisions of MAR.

The Consultation Paper sets out proposed changes to the Handbook which the FCA considers will be necessary in order to comply with and complement the new MAR regime. As a general point, the FCA intends to retain the structure and content of the Handbook where there is no conflict with MAR. Nevertheless, significant changes will be necessary in order to align the regime with MAR. In particular, existing rules in the Handbook relating to matters that will be directly governed by MAR will need to be deleted and, where appropriate, replaced with guidance signposting the reader to the relevant MAR provisions.

The FCA's proposed approach to the implementation of MAR will result in four layers of regulatory provisions and guidance forming the new UK market abuse framework: Levels 1-3 of EU regulation and ESMA guidance as set out above, with a further level of UK-only guidance provided by the FCA.

The Consultation Paper highlights the more significant changes to the Handbook proposed by the FCA, which are summarised below.

DISCLOSURE RULES AND TRANSPARENCY RULES

The Treasury intends to amend the Financial Services and Markets Act 2000 ("**FSMA**") in order to remove the FCA's powers to make the Disclosure Rules. As such, the Consultation Paper contains a proposal to change the Disclosure Rules and Transparency Rules ("**DTRs**") into disclosure guidance, which will signpost the reader to relevant MAR provisions.

MODEL CODE

The Model Code currently forms part of the Listing Rules. In its Consultation Paper, the FCA recognises that the Model Code is partially incompatible with MAR in relation to close periods (the periods of time before regular results announcements of traded companies during which *persons discharging managerial responsibilities* ("**PDMRs**") may not deal in company shares). The Model Code will be replaced with new guidance for use by firms when developing processes to allow PDMRs to apply for clearance to deal in company shares.

CODE OF MARKET CONDUCT

Section 119 FSMA currently requires the FCA to create a Code of Market Conduct, which forms part of the Handbook. The Code offers guidance for determining whether or not behaviour amounts to market abuse, along with evidential provisions. The Treasury intends to ask Parliament to remove section 119 FSMA, which will change the legal status of the Code. The FCA has reviewed the Code in order to determine which provisions should be reinstated as guidance under the FCA's general guidance powers, and which are incompatible with MAR and therefore should be removed.

MAR IMPLEMENTATION OPTIONS

The Consultation Paper also sets out the FCA's current proposals in respect of two areas of MAR which offer different implementation options to Member States.

ARTICLE 17 MAR: PUBLIC DISCLOSURE OF INSIDE INFORMATION

Article 17 MAR requires issuers to inform the public of inside information which directly concerns the issuer. This is a protection designed to prevent insider dealing and the misleading of investors.

As is the case under the existing MAD regime, issuers may delay the disclosure of such inside information where:

Immediate disclosure is likely to prejudice the legitimate interests of the issuer

Delay of disclosure is not likely to mislead the public

The issuer is able to ensure the confidentiality of that information

MAR prescribes that where an issuer delays disclosure, it must inform the competent authority (which in the UK is the FCA) about the delay as soon as the disclosure is eventually made to the public. MAR also prescribes that an issuer must provide a written explanation of how the above conditions are met in certain circumstances; it is for each Member State to determine whether such explanation should be provided automatically when the competent authority is notified of a disclosure delay, or only when the competent authority requests such an explanation. The Consultation Paper states that the FCA is currently inclined to require an explanation to be given only where the FCA requests it, which would be in line with current market practice, and will minimise implementation costs.

ARTICLE 19: MANAGERS' TRANSACTIONS

MAR will require PDMRs within an issuer and their close associates to notify the issuer of all transactions in specified instruments, including shares and debt securities of the issuer, once they have carried out gross transactions over a threshold of €5000 per calendar year. MAR allows competent authorities to increase this threshold to €20,000. However, in order to do this, competent authorities must first notify ESMA of their decision, giving reasons that must specifically reference market conditions.

The FCA states that it is not currently aware of any market conditions that justify setting the higher threshold, and therefore it currently proposes to adopt the lower, default threshold prescribed by MAR. The FCA seeks quantitative information on the number of transactions that would have to be notified under each threshold, in order to inform its final decision.

NEXT STEPS

The FCA consultation will be open until 4 February 2016.

Alongside the changes to be made by the FCA, HM Treasury will take the lead role in amending the existing UK market abuse legal framework, as amendments are required to primary and secondary legislation before the implementation of MAR to align UK domestic law with the provisions of MAR.

The FCA intends to open another consultation on the modification of current guidance in the DTRs in respect of delaying disclosures of inside information. Furthermore, the FCA intends to propose changes to its Decision Procedures and Penalties ("**DEPP**") and Enforcement Guide ("**EG**") sourcebooks once HM Treasury has published details of its own statutory instrument to amend UK legislation in order to comply with MAR.

The existing FSMA market abuse regime and relevant Handbook provisions will continue in force until 3 July 2016 when most of the final amendments will be implemented

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