The Market Abuse Regulation 2016: A Summary

Key Facts

The EU Market Abuse Regulation (MAR) comes into force on 3 July 2016 and replaces in entirety the current Market Abuse Directive. The aim of MAR is to expand and develop the existing market abuse regulations and establish a more uniform regime across all member states to reduce complexity and offer greater legal certainty.

Whilst much of the content under MAR remains the same, or very similar to current requirements, MAR extends its scope in terms of markets and products, and introduces more stringent procedural regulations.

The core objectives of MAR, and the Market Abuse Directive before it, are to outlaw actions that prevent full and proper market transparency that are the bedrock of the operation of sound financial markets.

The scope of MAR

MAR applies to financial instruments admitted to trading on EU regulated markets, multilateral trading facilities, organised trading facilities and other financial instruments such as credit default swaps or contracts for difference. This means that companies listed on the London Stock Exchange are subject to MAR. In addition, AIM falls within the definition of a multilateral trading facility and therefore, for the first time, AIM companies, are subject to the disclosure requirements of MAR.

What is market abuse?

MAR defines market abuse as encompassing insider dealing, unlawful disclosure of inside information and market manipulation.

How is MAR being introduced?

As MAR is an EU regulation, rather than a directive, it does not need UK legislation. The European Securities and Markets Authority (ESMA) drafts implementing measures which then have to be approved and adopted by the European Commission (EC). EC approval of the implementation of the regulations is still awaited however it is very unlikely that any changes will be made at this stage to the proposals as drafted.

The Financial Conduct Authority (FCA) will need to amend the Listing, Prospectus and Disclosure and Transparency Rules to comply with MAR and it has consulted on how this will be done. The FCA proposals include replacing certain rules with links directly to the MAR provisions rather than setting them out in full.
The Main Changes

Whilst much of the MAR regime is similar to that under the Market Abuse Directive, there are many changes being introduced some of which are small or subtle but which, nevertheless, will have an impact. The main areas to consider are set out below.

Inside Information

Under MAR the definition of inside information remains the same – i.e. it is information which:

  i) is precise;
  ii) has not been made public;
  iii) relates directly or indirectly to the company’s shares or other financial instruments;
  iv) if it were to be made public would be likely to have a significant effect on the price.

However, MAR now expressly states that information which is likely to have a significant effect on price means information which a reasonable investor would be likely to use as part of the basis of investment decisions. This could potentially bring more rather than less information into the definition of inside information in future.

Disclosure of Inside Information

The requirement to announce inside information as soon as possible, except under certain limited circumstances, remains the same under MAR. What has changed is the introduction of more extensive record keeping if a decision has been taken to delay such a disclosure. This includes when the inside information first existed, evidence that the conditions to delay a disclosure have been met and a record of the persons responsible for the decision to delay. The company must also disclose to the FCA, once the information has been released, the fact that the company delayed disclosure. Although still to be finalised, the FCA’s consultation paper requires an explanation for the delay to be provided to the FCA if requested.

Insider Lists

Companies will still need to keep and maintain insider lists of people working for them and of advisors who have access to inside information. Whilst advisors may take on the task of drawing up and updating their own insider lists, the company remains fully responsible for complying with this provision. The information to be included on the insider list has been extended to include additional information on national identification numbers, personal telephone numbers and the precise time at which the person acquired the information. Companies may keep separate permanent and project insider lists but if the individual is on the permanent insider list they cannot also be on the project list as they are deemed to have knowledge of all inside information at all times.
Dealing in Company Securities

The Model Code, which until now has been set out in the Listing Rules as the basis for a company’s policy on the dealing in shares by their persons discharging managerial responsibilities (PDMRs), will be removed from the Listing Rules. Instead the FCA has indicated that it would support a share dealing code or statement of best practice drafted by an industry body. A significant change is that PDMRs will be required to directly notify the FCA of dealings in addition to notifying the company. The time limit for a PDMR to notify any dealings has been reduced from four days to three days and the company must announce the transaction within the same three-day period. A de minimus threshold of €5,000 per calendar year in aggregate will apply although many companies will prefer to announce all PDMR transactions. These new requirements will require careful explanation to and training of PDMRs. As is the current practice the restrictions on dealing apply to ‘persons closely associated’ (PCAs) with the PDMR such as a spouse or dependent child. This would be a prudent time to ensure that PCAs have been correctly identified and consideration will need to be given to how to communicate the new rules to these individuals.

Closed periods

Mandatory closed periods under MAR will be the thirty days prior to the announcement of an interim or year-end report. During this time all PDMR dealings are prohibited with very limited exceptions. The FCA guidance gives a strong indication that companies will need to consider other periods outside of this definition during which clearance to deal will not be given. Clarification is still awaited as to whether the release of a preliminary announcement will fulfil the requirements for the release of a year-end report.

Market Soundings

MAR provides a safe harbour from the offence of improper disclosure of inside information for market soundings. These are communications made prior to the announcement of a transaction in order to gauge the interest of potential investors. Certain conditions must be adhered to in order to meet the safe harbour requirements.
Planning for MAR

What do I need to do?

Planning is key to ensure a successful adoption of the new MAR provisions within your company. Some of the main items that you need to address are set out below.

Planning

- Ensure that you are fully briefed on the final changes being introduced by MAR
- Put together a team of key people who will need to be involved or aware of the changes such as finance, investor relations, HR

Policies and Procedures

- Review which company policies and procedures need amending - this will include share dealing and disclosure policies
- Review your PDMRs and their ‘persons closely associated’ (PCAs) list
- Prepare the new format for insider lists
- Ensure that the additional information for insider lists will be available
- Consider what clearance to deal procedures will be needed to replace the Model Code
- Consider whether to introduce other periods that may be considered as closed periods in addition to that under MAR
- Introduce new mandatory template for making PDMR announcements

Training and Communication

- Consider who will need to be informed about the changes or trained on them and how this will be carried out (don’t forget communications/training of PCAs)
- Roll out a training programme and circulate new policies and procedures as appropriate
- Closely monitor trading by PDMRs under the new policies to ensure that they have been understood and implemented – extend training if required
- Ensure announcements are kept on the company’s website for 5 years (extended from 1 year)

Board Review/approvals

- Brief the Board on the changes and what needs to be done
- Obtain Board approval for amended policies and procedures
AIM

As MAR will apply to financial instruments admitted to all multilateral trading facilities as well as regulated markets the disclosure obligations will apply to AIM companies. The London Stock Exchange has published an Inside AIM article for AIM companies and is currently consulting on the application of MAR to AIM companies (AIM Notice 44). It is likely that AIM will qualify as a SME growth Market under MAR which are exempt from the requirement to draw up an insiders list if the issuer takes all reasonable steps to ensure that any person with access to inside information acknowledges its legal and regulatory duties, is aware of the sanctions that apply to insider dealing and unlawful disclosure of inside information and the issuer is able to provide an insider list to the competent authority on request. It should be noted that until the AIM consultation is finalised there are several details that are still to be clarified.

Further Updates

Please note that consultations are still ongoing and final approvals awaited for some of the provisions under MAR. Therefore the information set out in this Prism Briefing is correct as at 12 May 2016. The Prism team will update its Briefings on Disclosure Policies, Inside Information and Insider Lists and Share Dealing Policies over the coming weeks as the new requirements are finalised. If you would like to be notified as they are updated, please contact enquiries@prismcosec.com.

Useful Sources

FCA Consultation Paper on MAR CP15/35
EU Market Abuse Regulation: EU 596/2014
Inside AIM Market abuse regulation Oct 2015
AIM Notice 44

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May 2016