

# The countdown begins: 12 months to implementation of a new market abuse regime

The current UK market abuse regime is derived from the EU Market Abuse Directive (MAD) which established an EU-wide framework for tackling market abuse and market manipulation. However, since MAD's adoption in 2003, the financial markets have seen both the creation of new forms of financial instruments and the emergence of new trading platforms. This has been coupled with a poor track record for the prevention and enforcement of market abuse in some Member States. Against this backdrop, the Market Abuse Regulation (MAR) was negotiated and is intended to update and strengthen the existing EU market abuse regime. Companies will need to start planning now to ensure they are ready for the implementation of MAR in July 2016.

## Structure of the new regime

MAR will have direct effect in Member States from 3 July 2016, and will be supplemented by supporting regulations (in the form of technical advice and standards) which are currently being prepared by the European Securities and Markets Authority (**ESMA**) for the European Commission. There is also likely to be further Q&A guidance issued by ESMA, and finally, national implementation via changes to the Financial Services and Markets Act 2000 and the Listing Rules and the Disclosure Rules. A FCA/HMT consultation paper on these changes is expected in late summer 2015.

MAR is complemented by the Directive on Criminal Sanctions for Market Abuse<sup>1</sup> (**CSMAD**), although the UK has chosen not to opt in to CSMAD on the basis that criminal sanctions for insider dealing and market manipulation already exist in the UK under the Criminal Justice Act 1993 and the Financial Services Act 2012.

Note however that, whilst the UK has not opted into CSMAD, there may well be further changes to the sanctions that apply to the criminal offences of insider dealing and market manipulation. On 10 June 2015, the Bank of England published its Fair and Effective Markets Review. The review recommends that the maximum sentence in the UK for both insider dealing and market manipulation be extended from seven years to ten years, in line with other fraud or bribery offences. It remains to be seen whether the government acts on this recommendation.

## Key changes being introduced by MAR

Until all of the regulatory changes referred to above are put in place it is not possible to fully understand the changes in detail, but key points to note include:

- MAR will apply to a wider range of securities and derivatives than the current regime e.g. it will also apply to financial instruments on other trading platforms including MTFs (multilateral trading facilities, such as AIM) and OTFs (organised trading facilities) and will cover the trading of emissions allowances.
- The definition of "inside information" and the insider dealing offence will be largely unchanged, although

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<sup>1</sup> EU Directive 2014/57/EU

there will be a new offence of cancelling or amending orders whilst in possession of inside information.

- An issuer will still be able to delay announcing inside information so as not to prejudice its legitimate interests, but if it does so there will be a new obligation on announcement to inform the regulator of its decision to delay and to explain in writing why it thinks the delay was permissible (note that the FCA has a discretion on implementation to require that such an explanation need only be provided if requested by the FCA).
- As a result of the wider scope of MAR, more issuers will be required to keep insider lists and issuers will be required to ensure insider lists follow a prescribed format, the detail of which is still under review.
- The introduction of a de minimis threshold for notification by persons discharging managerial responsibility (**PDMRs**) of transactions in the issuer's securities of €5,000 per calendar year (to be calculated by adding, without netting, all relevant transactions). The FCA has the power to raise this threshold to €20,000 if it so chooses.
- The time limit for notification of dealings by PDMRs will be reduced to three business days, although in practice the obligation is generally satisfied more quickly than this.
- New rules will cover market soundings which are undertaken to gauge investor interest in offerings of securities or in connection with proposed takeovers and mergers.

## Planning ahead

There are a number of issues that directors, in-house legal teams and company secretaries will need to think about in advance of MAR taking effect in July 2016.

### Record keeping

The introduction of a new requirement to notify the FCA of any decision to delay the announcement of any inside information at the same time as the information is announced to the market will require some thought. In particular, companies will need to consider the nature of the records that they will need to maintain during the period of the delay in order to demonstrate, if asked by the FCA to provide an explanation in writing, why they believed the delay was legitimate. This is likely to mean that a company will need to keep detailed records of the reasons why it initially believed it was legitimate to delay announcing inside information and, as the situation progressed, how it continued to satisfy itself that it remained legitimate not to announce such information. Companies will need to update their disclosure policies to reflect the new procedures for

delaying disclosure of inside information.

In addition, when providing a written explanation to the FCA, care will need to be taken to ensure that, where legal advice has been sought about the company's ability to delay announcing inside information, the substance of that advice is not disclosed in a manner which would result in legal privilege being waived.

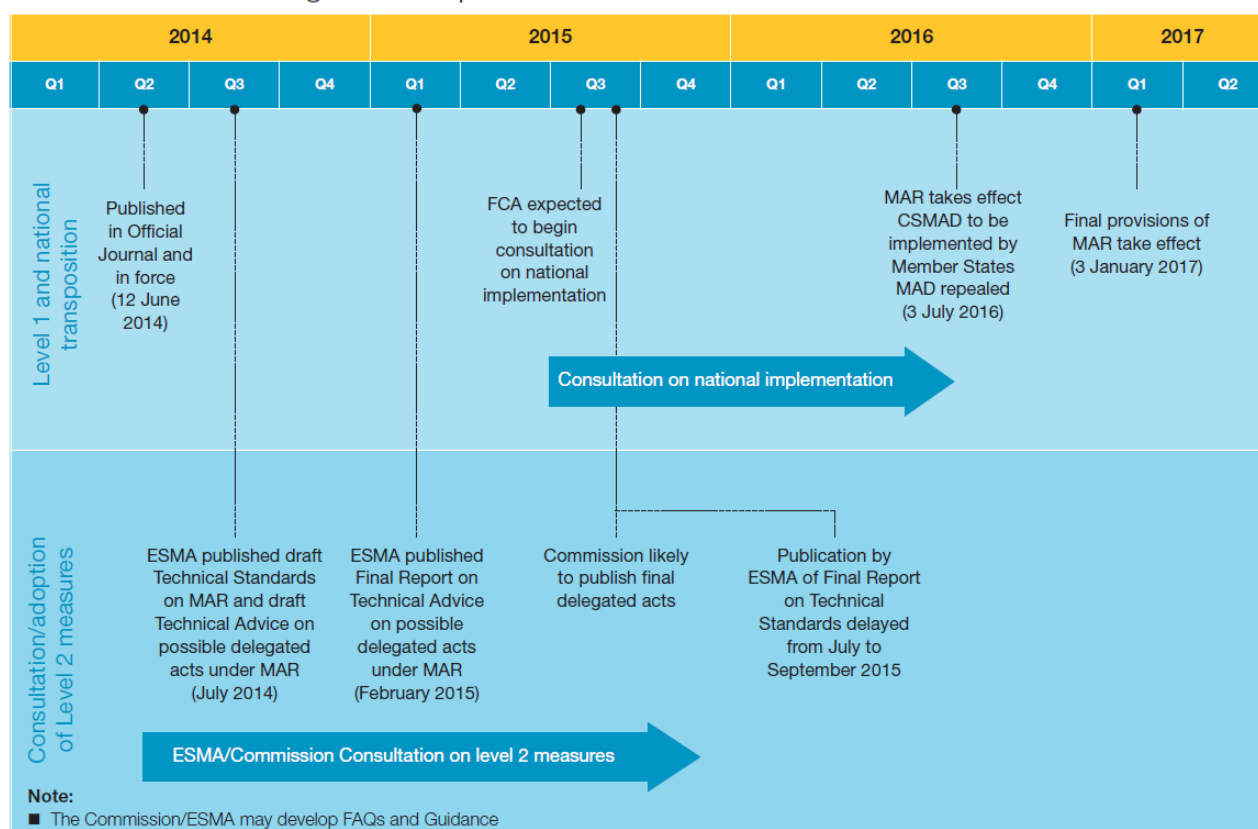
### Changes to share dealing code

Companies will also need to amend their share dealing code. The time limit for notification to the company of PDMR dealings is to be shortened to three business days (currently four business days under DTR 3) and a de minimis threshold is to be introduced meaning that, helpfully, fewer PDMR notifications are likely to be required. Relevant dealings should, in any event, be notified as soon as possible and the current four (and the new three) day deadline is, in effect, a long stop date.

In a change to the current position under MAD, MAR will prohibit trading by PDMRs in close period, a concept that already exists under the FCA's Model Code. However, under MAR the prohibition only applies during the 30 day period before the announcement of an interim financial report or a year-end report which the company *is obliged to make public* according to the rules of the trading venue on which the company's shares are admitted to trading or national law<sup>2</sup>. For companies admitted to trading on the main market of the London Stock Exchange, they are required pursuant to DTR 4 to publish half-year and full year results. They are not required, although they may choose, to publish a preliminary results announcement. Under the Model Code, there would currently be a close period prior to publication of a preliminary results announcement, but upon publication of the preliminary results announcements, the company would no longer be treated as being in a close period and PDMRs would not be prevented from dealing in the company's shares unless it or they were otherwise in possession of inside information. Under MAR, publication of a preliminary results announcement would not bring a close period to an end and the close period would continue to apply up to publication of the company's annual financial report. This could have the practical effect of significantly reducing the "open" period in which PDMRs can deal during the course of a year.

<sup>2</sup> Article 19(11) MAR

## EU Market Abuse Regulation Implementation Timeline



There are also differences between the circumstances in which the Model Code would currently permit dealings during close periods and those in which PDMRs would be permitted to deal during a close period under MAR. For example, MAR does not include exemptions for the acceptance of a takeover offer or the take up of entitlements pursuant to a rights issue during a close period. To reflect these changes, companies will need to issue revised versions of their dealing codes, as well as ensuring that their PDMRs receive training in advance of the new rules coming into effect in order to ensure they fully understand the changes and are able to ensure compliance with them.

#### Prescribed format for insider lists

MAR also prescribes a detailed format for insider lists. This has caused much debate since the format of the proposed insider list was published by ESMA. It is believed by many to be too detailed and requires, at best, superfluous information and, at worst, information that may put a company in breach of its data protection obligations.

ESMA's proposals in this regard have not yet been finalised and we are not expecting their final report on this issue until September 2015. In any event, companies will need to publish revised guidance on the maintenance of insider lists and ensure existing lists are amended to meet the prescribed format.

#### Comment

We are still waiting for ESMA to finalise its technical standards and we are not expecting the FCA and HM Treasury to begin consultation on the national implementation of MAR until late summer 2015. Until we have the complete picture, it is difficult to be definitive about the extent of the changes that companies will need to make. For now, companies should keep a watching brief and plan to make time during the coming year to consider and implement the changes that they will, inevitably, need to make in advance of July 2016. Ensuring that their management teams are fully aware of the new requirements should also be a key area of focus.

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