

# MACFARLANES ON MAR

THE FIRST ANNIVERSARY: 3 JULY 2017

The Market Abuse Regulation ([Regulation 596/2014](#)) (MAR) came into force across the EU on 3 July 2016. It introduced significant changes to the regulation of many aspects of trading in financial instruments. 12 months on, we have looked at what MAR has and (has not) changed in some key areas - and considered what the future might hold.

KEY AREAS	SCOPE OF FINANCIAL INSTRUMENTS WITHIN MAR	DISCLOSURE AND CONTROL OF INSIDE INFORMATION BY ISSUERS	PDMR TRANSACTIONS	MARKET SOUNDINGS	MARKET ABUSE AND INSIDER DEALING	INVESTMENT RECOMMENDATIONS	INSIDER LISTS
MAR REF	Article 2	Articles 7 and 17	Article 19	Article 11	Articles 8, 9, 12, 14, 15	Article 20	Article 18
WHAT KEY FEATURES DID MAR INTRODUCE?	<ul style="list-style-type: none"> <li>Extended to:                             <ul style="list-style-type: none"> <li>financial instruments traded (or applied for trading) on a regulated market or MTF;</li> <li>derivatives and CDS traded over-the-counter; and</li> <li>financial instruments whose price or value depends / has an effect on the financial instruments described above.</li> </ul> </li> <li>Has extraterritorial impact.</li> </ul>	<ul style="list-style-type: none"> <li>Required the deletion and modification of the previous DTR 2 requirements.</li> <li>New requirement on issuers to notify the FCA if they have delayed the disclosure of inside information.</li> <li>FCA can request a written explanation for delaying disclosure.</li> <li>Codified that an intermediate step in a protracted process can itself be inside information.</li> </ul>	<ul style="list-style-type: none"> <li>MAR required removal of the Model Code from the Listing Rules.</li> <li>Trading during "closed periods" now governed directly by MAR.</li> <li>Prescribed content for notifications from PDMRs and issuers.</li> <li>New responsibility for issuers to notify PDMRs, and PDMRs to notify their "persons closely associated", of MAR obligations.</li> </ul>	<ul style="list-style-type: none"> <li>Entirely new, highly prescriptive regime.</li> <li>Requirement for recipient firms to train staff on MAR and internal procedures.</li> <li>Provides a safe harbour to the Article 14 prohibition on the unlawful disclosure of financial information.</li> </ul>	<ul style="list-style-type: none"> <li>Deletion of the Code of Market Conduct.</li> <li>Creation of a single "market manipulation" offence.</li> <li>Introduced a safe harbour in relation to a person having "adequate procedures" to ensure not in possession of inside information.</li> <li>Clarified that amending or cancelling an existing order can constitute insider dealing.</li> </ul>	<ul style="list-style-type: none"> <li>Deletion and modification of COBS 12.4.</li> <li>New requirements for all persons producing or disseminating "investment recommendations" or "other information recommending or suggesting an investment strategy". This applies to buy-side and sell-side.</li> <li>Onerous disclosure requirements requiring detailed information to be included with all in-scope communications.</li> </ul>	<ul style="list-style-type: none"> <li>Prescribed form of insider list on a mandatory template.</li> <li>Issuers required to ensure that each person on insider list acknowledges their legal and regulatory duties in writing.</li> <li>Requires that time and date of person becoming aware of inside information is included in the insider list.</li> <li>Possible to include "permanent insiders".</li> </ul>
WHAT KEY DEVELOPMENTS HAVE WE SEEN IN THIS AREA OVER THE LAST 12 MONTHS?	<ul style="list-style-type: none"> <li>Practitioners have adjusted to MAR applying to a broader range of financial instruments than the previous regime.</li> <li>However, applying MAR to other instruments "whose price or value depends on or has an effect on" MAR instruments continues to be problematic (especially in relation to extraterritorial impact).</li> <li>The Financial Markets Law Committee <a href="#">has noted the uncertainty</a> in the scope of financial instruments to which MAR applies.</li> <li>They have requested that this is clarified with further Q&amp;A from ESMA.</li> </ul>	<ul style="list-style-type: none"> <li>MAR constituted an evolution of the existing UK regime in relation to the disclosure and control of inside information.</li> <li>ESMA issued guidelines (in <a href="#">July</a> and <a href="#">October</a>) on permitted delays for disclosure of inside information.</li> <li>The FCA <a href="#">introduced changes to DTR 2.5</a> to ensure compliance with this ESMA guidance.</li> <li>The City of London Law Society <a href="#">has provided Q&amp;A</a> which includes its views in respect of the identification of inside information in public announcements (and combination with non-inside information).</li> <li>Issuers preparing explanations for the FCA in respect of any delay in disclosure in advance.</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">ESMA issued Q&amp;A</a> confirming that the announcement of preliminary financial results constitutes the announcement marking the end of the closed period under MAR.</li> <li>The <a href="#">ICSA, GC100 and QCA share dealing code</a> has become the "market standard" template share dealing code for both large and small listed companies.</li> <li>Most issuers notify all transactions on a voluntary basis, whether or not the £5k threshold has been met.</li> <li>General practice of issuers submitting notification of PDMR transactions to the FCA on behalf of the PDMR.</li> <li>City of London Law Society issued <a href="#">Q&amp;A guidance</a> covering PDMR transactions.</li> </ul>	<ul style="list-style-type: none"> <li>ESMA has <a href="#">issued final guidelines</a> on steps to be taken by recipients of market soundings.</li> <li><a href="#">These guidelines confirm that</a> internal procedures for recipients of market soundings should be appropriate and proportionate to the scale, size and nature of their business activity.</li> <li><a href="#">FCA has expressed the view</a> that all transactions of an issuer are capable of falling in scope of Article 11 (see 4.22).</li> <li>City of London Law Society made suggestions in relation to the market soundings regime and takeovers in <a href="#">Q&amp;A guidance</a>.</li> <li>Financial Markets Law Committee <a href="#">has reported on questions</a> on the market sounding regime and seeks further clarification on certain points.</li> </ul>	<ul style="list-style-type: none"> <li>Practitioner concerns in this area have focused on:                             <ul style="list-style-type: none"> <li>the inclusion of trading by electronic means, such as algorithmic and high frequency trading strategies in Article 12 of MAR as potentially constituting market manipulation; and</li> <li>removal of reference to what a "regular user" of the market would consider to be a failure to observe reasonable standards of behaviour.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>The Investment Association (IA) <a href="#">issued a paper</a> setting out the FCA's views on "investment recommendations".</li> <li>Latest <a href="#">ESMA Q&amp;A issued in December 2016</a> (and IA paper revised in light of ESMA Q&amp;A updates).</li> <li>The ESMA Q&amp;A confirms it is the substance of the communication which must be assessed irrespective of its name, label, form or medium of delivery.</li> <li>ESMA also clarified that:                             <ul style="list-style-type: none"> <li>a communication which doesn't also refer to a financial instrument or issuer should not amount to an "investment recommendation"; and</li> <li>MAR obligations apply irrespective of whether it is the firm's main business to produce investment recommendations.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Developing practice as issuers and advisers have become familiar with insider list regime:                             <ul style="list-style-type: none"> <li>issuers typically requiring advisers to maintain MAR-compliant insider lists, with "real time" accessibility; and</li> <li>issuers and advisers responsive to FCA requests to inspect insider lists at short notice.</li> </ul> </li> <li>City of London Law Society <a href="#">provided Q&amp;A guidance</a> on their views as to who and what should be included on the insider list.</li> <li>Organisations under the insider list regime are updating their general employment terms to make it clear that sensitive personal data may be included in insider lists.</li> </ul>
WHAT MIGHT WE SEE IN THE NEXT 12 MONTHS?	<ul style="list-style-type: none"> <li>A financial instrument traded on an OTF will come within the scope of MAR when MiFID II comes into force on 3 January 2018.</li> </ul>	<ul style="list-style-type: none"> <li>Issuers will continue to develop practice on classifying what is / is not inside information in their public announcements.</li> </ul>	<ul style="list-style-type: none"> <li>A hope that the FCA will respond to requests for guidance on application of Article 19 in certain areas.</li> </ul>	<ul style="list-style-type: none"> <li>ESMA intends to address scope of the market sounding regime in revised Q&amp;A.</li> </ul>	<ul style="list-style-type: none"> <li>Practitioners await the first final notice of a UK enforcement action under MAR.</li> </ul>	<ul style="list-style-type: none"> <li>Await possible response from the FCA to requests to clarify certain aspects of Article 20.</li> </ul>	<ul style="list-style-type: none"> <li>Clarification on the position of AIM companies under the insider list regime when MiFID II comes into force.</li> </ul>

MAR has had a varied impact on UK market regulation: significant in some areas and more evolutionary in others. Although it may seem attractive to modify some of MAR's more prescriptive elements in the future, we think that MAR (or at least something equivalent to MAR) is here to stay - whatever the post-Brexit world looks like. The reality is that the UK has been at the forefront of developing the EU market abuse regime for many years, and there is nothing to indicate that UK regulators are now looking to move away from this strict regulation of the market. Therefore, absent any highly interventionist UK government applying pressure on UK regulators to introduce fundamental changes, we believe that UK market participants will continue to operate within MAR (or its equivalent) for the foreseeable future.