

# Legal Alert

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BAKER & MCKENZIE

## Market Abuse Regulation: Have you completed your Checklist for 3 July 2016?

The EU Market Abuse Regulation or MAR takes effect from 3 July 2016. It updates the Market Abuse Directive (MAD), in force since July 2005, to reflect technological and market developments, it seeks to better align the market abuse regime with the Markets in Financial Instruments Directive (MiFID),<sup>[1]</sup> which has also been recast, and aims to better harmonise the regime across all EU Member States.

MAR therefore updates the civil offences of insider dealing and market manipulation. Although there is a Directive on Criminal Sanctions for insider dealing and market manipulation (CSMAD) this does not apply in the UK. The relevant criminal law continues to be set out in Part V of the Criminal Justice Act 1993 on insider dealing and remains unaffected. As does, Part 7 of the Financial Services Act 2012 on misleading statements and impressions.

There are a host of requirements that must be accounted for, and implemented, the importance of each depending on your business. Of course, a tick box approach to regulation is no longer sufficient but it can represent a starting point. As an aide to help your preparation, here is our non-exhaustive checklist of key items that you should consider:

### MAR Checklist

	Subject-matter	Issue	Action	Completed?
				<input checked="" type="checkbox"/>
1.	<b>Direct effect</b>	MAR is a regulation, and in contrast to the Market Abuse Directive, has direct effect in national law. In future, the civil market abuse offences will be found in this regulation and not, as currently in the UK, in the Financial Services and Markets Act 2000. MAR will be supplemented by technical standards and guidance published by the European Securities and Markets Authority.	<p>Make sure that you review ESMA's guidance and are familiar with their technical standards.</p> <p>Remember that the FCA's Disclosure &amp; Transparency Rules (DRT) become guidance that merely sign-post users to EU resources. Similarly, the Code of Market Conduct ceases to be formal guidance, although it still represents the FCA's view.</p>	<input type="checkbox"/>  <input type="checkbox"/>



		Regulators and the Courts are taking an increasingly tough approach over what information may be likely to be price sensitive (see <i>Markus Geltl v Daimler AG</i> (ECJ 2012) over the treatment of information about a company chairman's decision to resign).	Consider how to communicate this to staff, including training.	<input type="checkbox"/>
5.	<b>Commodities</b>	MAR creates a specific definition of inside information for emission allowances. It also modifies the existing definition for commodity derivatives to include information on spot commodity contracts, where that information is likely to have an effect on the price or value of derivatives or related spot commodity contracts. This is intended to close a loophole to potential manipulation in physical and derivative markets.	Review policies and procedures to check they incorporate the new definition.  Consider the implications for your business, if any, and how to communicate this to staff, including training.	<input type="checkbox"/>  <input type="checkbox"/>
6.	<b>Benchmarks</b>	Many financial instruments are priced by reference to benchmarks. MAR prohibits the manipulation of benchmarks.  A benchmark includes any rate, index or figure, made available to the public or published. It is not limited to those benchmarks specified under the UK Financial Services Act 2012.	Review policies and procedures to check they include this behaviour.  As the definition of benchmarks is wide, have you identified all those that might be relevant to your business?  Consider how to communicate this change to staff, including training.	<input type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>
7.	<b>Market soundings</b>	MAR provides new detailed rules governing market soundings, where market participants are sounded out about, and potentially wall-crossed, prior to an offer of securities to the market. These changes follow several high profile UK enforcement cases when significant penalties were imposed.  ESMA has drafted technical standards providing more detail on what is expected from market participants conducting market soundings. These include establishing standard sets of information to be disclosed when carrying out soundings.	Review policies and procedures to reflect the new regime.  Arrange training for relevant staff and ensure that procedures are in place for record keeping.  Ensure where relevant your procedures for conducting soundings meet ESMA's technical standards.	<input type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>
8.	<b>Insider lists</b>	Insider lists are not new but subject to new rules. These including a	Check against ESMA's technical	<input type="checkbox"/>

		template to facilitate greater consistency across Member States. Issuers must draw up lists disclosing all those having access to inside information, explaining why they are included, when they obtained inside information and the date the list was drawn up.	standards. Note the exemption for SME Growth Markets.  Liaise with other EU branches, if any, as the same approach should be adopted.	<input type="checkbox"/>
9.	<b>Investment research</b>	Investment recommendations (i.e., information recommending or suggesting an investment strategy) must be objectively presented and any conflicts of interest disclosed. ESMA has drafted technical standards on the requirements for those persons who prepare investment recommendations and for those who disseminate recommendations produced by others.	Ensure that any investment recommendations comply with the new technical standards.  Beware that ESMA's definition is very broad so that it may catch material which is not at first sight an investment recommendation. If you want to avoid making investment recommendations, provide training and establish controls to govern interactions and communications with third parties (to make sure you do not cross any lines).	<input type="checkbox"/>  <input type="checkbox"/>
10.	<b>STORs</b>	Firms must have effective systems and controls to detect and report market abuse (STORs). There are significant penalties. National regulators must have the power to impose penalties of up to at least €2.5 million or 2% of total annual turnover for firms which fail to comply.  Although there is no geographical limitation on the duty to make STORs, helpfully, the FCA has said it would generally not expect to receive a STOR from a third country (non-EEA) firm which has no connection to an EU or UK firm. That entity though should report locally. Remember, however, that ESMA and other national regulators may take a different approach.	Review systems and controls to ensure they are able to detect all relevant abusive behaviours and that this can be demonstrated to the FCA. Remember the scope of MAR is wider and includes attempted and cancelled trades.  Check that your monitoring of staff communications is adequate and their use of language is appropriate.	<input type="checkbox"/>  <input type="checkbox"/>
11.	<b>Dealings</b>	Managers of issuers (and Emission Allowance Market Participants) are subject to a new notification regime for dealings in securities (or allowances) to prevent market abuse. This will include a standard template for notifying dealings. The	If your business is an issuer, ensure there are policies and procedures governing directors and managers dealings reflecting	<input type="checkbox"/>

		UK Model Code for premium listed issuers will no longer apply and is to be replaced by guidance to help firms develop their own processes.	MAR and the technical standards.	
12.	<b>Enforcement and higher penalties</b>	The FCA remains responsible in the UK for supervision and enforcement. Until now financial penalties have been calculated in the UK according to a five step process based on a proportion of the revenue derived by a firm from the product or business area concerned. MAR introduces penalties under which national regulators must have the power to impose penalties of up to at least €15 million or 15% of total annual turnover on companies for market abuse. Fines have the potential to be significantly higher, particularly, in other EU Member States where they have to date been modest.	Ensure managers are aware of their responsibilities and the potential risks of enforcement action against the business and individuals.  Review where appropriate individual responsibilities in the context of the Senior Managers Regime (to be extended industry wide in 2018) and draw up and carry out a culture audit to aid compliance.	<input type="checkbox"/>  <input type="checkbox"/>
<i>I confirm that I have reviewed all the items in this checklist and am satisfied that this business is ready for MAR implementation.<sup>1</sup></i>				
<b>Declaration</b>		<b>Signature</b>	<b>Name &amp; Position</b>	<b>Date</b>

**Please feel free to contact us to discuss this checklist and any other issues in the context of your preparation for MAR. See contact details below.**

<sup>[1]</sup> MiFID II takes effect from 3 January 2018. Where provisions such as OTFs, SME Growth Markets and emission allowances (or auction based products) are dependent on MiFID II their implementation will be delayed until that measure is implemented. Please also note that until 3 January 2018, references in MAR to Directive 2014/65/EU and Regulation 600/2014 (together MiFID II) should be read in accordance with the correlation table set out in Annex IV to Directive 2014/65/EU, to the extent that table refers to Directive 2004/39/EC (or MiFID).

### For more information

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