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UK Market Abuse Regime Extends Its Reach: Implications for Issuers

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Companies trading on either the ***London Stock Exchange***'s Main Market or AIM should ensure that their systems and procedures reflect changes to their disclosure and other obligations arising from the implementation of the new regime.

The *European Union*'s ***Market Abuse Regulation (MAR)*** has replaced the previous regime under the Market Abuse Directive (MAD). MAR aims to ensure market integrity and investor protection by harmonising the disclosure requirements that apply to issuers across European markets. It has been effective since 3 July 2016.

The new regime extends to issuers that trade on the London Stock Exchange's (LSE's) Main Market as well as those that trade on a multilateral trading facility, including financial instruments for which an admission to trading on either market has been made. This means that companies traded on AIM are now caught directly by MAR and, unlike under MAD, the United Kingdom does not need to "gold plate" the regulation to specifically include AIM.

Elements of MAR that are particularly relevant to issuers and their managers include the following:

- New rules on disclosure and protection of inside information
- Obligations to maintain insider lists
- Changes to the dealing restrictions that apply to persons discharging managerial responsibilities (PDMRs) and persons closely associated with them (PCAs)
- Formalisation of market soundings provisions
- Provisions on share buy-backs and stabilisations

Dual Regimes

Under MAR, listed issuers and their managers are subject to dual regulation within the United Kingdom: Main Market issuers will continue to comply with their obligations under the Financial Conduct Authority's (FCA's) Listing Rules, and AIM companies will remain subject to the AIM Rules for Companies (AIM Rules) as regulated by the LSE. Both Main Market issuers and AIM companies are also subject to obligations under MAR (which are regulated by the FCA). The LSE has emphasised that although there is overlap between the two obligations, MAR and AIM regulatory regimes must be treated separately. Advising on MAR is not the Nominated Adviser's responsibility, and it will not be a defence to breaching the AIM Rules that legal advice on compliance with MAR was obtained. Given MAR's wide applicability, issuers and managers located both within and outside the European Union must consider their obligations under MAR: any financial instruments admitted to trading on an EU trading venue will be caught, regardless of the issuer's location.

Disclosure of Inside Information

The definition of "inside information" and an issuer's obligation to publicly disclose it remain largely the same as under the previous regime. Delaying disclosure continues to be possible under MAR, but the new regime brings more onerous requirements for an issuer to effect these provisions. The following conditions for delay must be met:

- Immediate disclosure is likely to prejudice the issuer's legitimate interests
- Delay of disclosure is not likely to mislead the public
- Confidentiality can be ensured

The European Securities and Markets Authority (ESMA) provides a nonexhaustive list of circumstances in which legitimate interests may exist (including, e.g., ongoing negotiations) and also provides examples of where delay would likely mislead the public. The issuer must inform the FCA of the delay and keep a written record of the delay's circumstances (and, on the FCA's request, provide an explanation in writing about how the issuer met the conditions set out in MAR). Disclosure may no longer be delayed if any rumour arises that threatens the information's confidentiality. Issuers should prepare a holding announcement where any disclosure is delayed. If there is a threat of a leak of information and an issuer is unable to make a holding announcement, the FCA has the discretion to suspend the issuer's securities from trading.

PDMR Dealing

The Model Code in the Annex to Listing Rule 9 has been removed, and much of Disclosure and Transparency Rule 3 has been deleted and replaced by hyperlinks to the relevant MAR provisions. The provision on notification of directors' dealings under AIM Rule 17 has been deleted, and under AIM Rule 21, AIM companies are now required to have a reasonable and effective dealing policy from admission. As a result of these changes, AIM companies now appear to be subject to more onerous obligations than those listed on the Main Market.

Definition of PDMR/PCA

MAR provides that PDMRs and PCAs must notify the issuer and the competent authority of every transaction conducted on their own account (whether by themselves, or, e.g., by a portfolio manager). The definition of PDMR remains largely the same as the definition previously set out in the Model Code, however, PDMRs and issuers should confirm whether any new persons will be caught by the PCA definition.

Notification

PDMR and PCA dealing notifications must be made no later than three business days after the transaction date. This is more restrictive than the four-day period under the previous regime. The period for PDMR and issuer notification run concurrently, therefore share dealing codes should be adapted to give the issuer sufficient time to notify the market once the PDMR's initial notification is received.

De Minimis Provision

A de minimis threshold of €5,000 per calendar year has also been introduced to the PDMR/PCA dealing provisions, subject to an optional increase of up to €20,000 by the relevant authority. The FCA has indicated that it does not intend to adopt a higher threshold at present. Issuers should consider the best mechanism for monitoring dealings and whether to notify all dealings, including those that fall below this level.

MAR Closed Periods

MAR prohibits a PDMR from conducting any transactions on its own account or for a third-party account, directly or indirectly, during a closed period of 30 calendar days before announcing an interim financial report or a year-end report (which the issuer is obliged to make public under national law or the rules of the relevant exchange). Limited exemptions apply, including certain transactions relating to employee share schemes and transactions conducted in exceptional circumstances, such as severe financial difficulty, but these are not as extensive as those that applied under the Model Code. ESMA has confirmed that issuers will not be subject to two sets of closed periods (i.e., issuers will not be subject to a closed period ending on the publication of annual reports and accounts in addition to the closed period ending on the publication of preliminary results). This approach means that, in line with UK common practice, publication of preliminary results will end the closed period under MAR, provided that the year-end reports do not include any new key information.

Issuers should bear in mind that even if dealing does not fall within a closed period restriction, they must still consider other obligations under MAR.

Insider Lists

Article 18 of MAR requires issuers or any person acting on their behalf to provide to the FCA on its request a list of all persons who have access to inside information (with the rationale for including each person and the time when he or she obtained access to inside information). "Access to inside information" is not defined in MAR, and the provision therefore has a potentially wide application. Adequate procedures will be needed to identify potential individuals with access to inside information. Issuers may wish to consider creating a list of those with permanent access to inside information and a list for those with access on a case-by-case basis.

Regardless of who is charged with creating and maintaining the lists, the issuer or its manager remains responsible for taking all reasonable steps to ensure that those on the lists acknowledge in writing their legal and regulatory duties. Data protection legislation should be considered when creating lists, given that personal details, such as name, address, and national insurance number (where applicable), are required. Issuers whose financial instruments are admitted to trading on a small- and medium-sized enterprise (SME) growth market are exempt from this requirement, subject to conditions set out in the legislation. AIM companies may therefore have a potential exemption under the Markets in Financial Instruments Directive once it takes effect (should AIM be granted SME growth market status). At present, however, AIM companies will need to continue to maintain appropriate lists.

Market Soundings

MAR formalises the concept of market soundings and also sets out safe harbours for legitimate behaviour. A market sounding is the communication of information prior to announcing a transaction in order to gauge potential investors' interest. The communication may be by an issuer or a third party acting on its behalf. Such communication will include a takeover situation if the information is necessary to enable the parties entitled to the securities to form an opinion on the offer, and the parties' willingness to accept the offer is reasonably required for the decision to make the takeover or bid. Issuers should note that stake building will not fall under these provisions.

Before engaging in market soundings, issuers must keep written records of their assessments that specify whether the sounding will involve disclosure of inside information. The issuer will need to demonstrate that the recipient was informed that inside information was being given (and that therefore the recipient would be constrained by MAR from trading or acting on that information) and that the recipient consented to this. The issuer must inform the recipient as soon as the information ceases to be inside information. Evidence of compliance must be provided to the FCA on request, and records of the procedural steps taken must be kept for five years.

Share Buy-Backs and Stabilisations

Share buy-backs will fall within a MAR safe harbour, provided that 1) full details of the programme are disclosed prior to the start of trading, 2) trades are reported and disclosed, 3) limits and regulatory technical standards are complied with, and 4) any buy-back is carried out in accordance with the objectives set out in MAR. Stabilisations are also permitted subject to similar requirements, with the addition of a condition that the stabilisation is carried out for a limited period. The issuer must notify the trading venue's competent authority of all stabilisation transactions' details no later than the end of the seventh daily market session following the transactions. Buy-backs and stabilisations carried out outside these exemptions will not automatically constitute market abuse; however, any safe harbour will only apply if the issuer fulfils the conditions set out under MAR.

A Word of Warning

As discussed in our previous LawFlash, the United Kingdom's previous market abuse regime was super-equivalent to the MAD obligations, and such super-equivalence was largely retained in its implementation of MAD, including the UK "gold plating" the regulation to extend it to AIM. Therefore we are of the view that Brexit is unlikely to result in any significant change in the current regime. Issuers should familiarise themselves with their dual regulatory obligations and inform relevant individuals of these. The obligations are separate, and compliance with one regulation will not excuse

failure to comply with the other. For example, AIM companies should note that their obligations under AIM Rule 11 are in fact narrower than those under MAR.

Action Plan

Issuers should ensure that they have up-to-date policies on disclosure of inside information and PDMR dealings. Share dealing codes should be updated (and for AIM companies, these must be compliant with both MAR and AIM Rule 21). Insider lists should be updated and prepared in accordance with ESMA standards and in compliance with data protection legislation. Insiders and PDMRs should confirm in writing that they understand their obligations under MAR. PDMRs should identify PCAs and pass on relevant information. Responsible individuals should be identified or committees established to ensure disclosure compliance, and adequate record-keeping procedures should be put in place to ensure that disclosed inside information (to be kept on the issuer's website), insider lists, and market soundings records are kept for at least five years. The issuer will also need to comply with ESMA technical standards. Crucially, issuers must remember that even if a safe harbour under MAR does apply, they will still need to comply with their obligations under the FCA Handbook and/or AIM Rules at all times.

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