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COMPLIANCE OFFICER BULLETIN

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MARKET ABUSE

Introduction

Maintaining confidence in markets and the financial system and preventing and reducing financial crime form the primary objectives of financial regulators globally. The detection and prevention of insider dealing, market manipulation and other forms of market abuse[1] forms a major component of regulatory monitoring, investigation and enforcement activities globally and is expected to remain a central focus.

During 2013, 45 per cent of FCA/FSA fines (by number of enforcement final notices) imposed on individuals and 73 per cent on firms related to market abuse and the equivalent number for the SFC in Hong Kong was 96 per cent and 53 per cent respectively.[2] In the US, enforcement actions relating to market abuse (insider trading, market manipulation and financial fraud/issuer disclosure) accounted for 24 per cent of the total number of actions taken by the SEC in fiscal year 2013. Market abuse also accounted for one of the largest proportions of investigations of any category in both the UK and Hong Kong.[3] Further FCA enforcement data and policy considerations are set out in section 3 of this *Bulletin*.

One of the three operational objectives of the FCA is to protect and enhance the integrity of the UK financial system. The FCA has explained its proposed general approach to advancing its objectives in a July 2013 guidance paper.[4] This approach has been subsequently ratified in the FCA's 2014/2015 Business Plan. In relation to its market integrity objective, the FCA will be concerned with the soundness, stability and resilience of the financial markets, the transparency of the price information process in those markets, combating market abuse, the orderly operation of the financial markets and reducing financial crime in the UK financial system.

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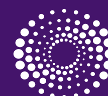

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The FCA will look at a wide range of behaviour that damages trust in the integrity of markets or threatens consumer protection. The FCA's core markets regulatory activities focus on supervising the infrastructures that support the trading of financial instruments, supervising the issuing of securities including acting as the UK Listing Authority ("UKLA") and maintaining a broad oversight of both on-exchange and over the counter markets and detailed monitoring to prevent, detect and pursue market abuse.

The FCA's UKLA role is to ensure that listed companies make the disclosures required so that investors can make informed decisions about whether to invest. The FCA's supervisory role over sponsor firms is also featured in the guidance, which states that the FCA's policy focuses on ensuring that the rules and guidance for sponsors are fit for purpose, operating an approval process for sponsors and operating a specialist supervisory process for sponsor performance.

One of the FCA's key recent market integrity themes has been tackling LIBOR and benchmark abuse. Following the Wheatley Review,[5] the FCA introduced two controlled functions for the key individuals working at the administrator of LIBOR and banks that submit rates to LIBOR. Further recommendations from the Wheatley Review helped create a criminal offence, under the Financial Services Act 2012 ("FS Act"), for making false or misleading statements or impressions in relation to specified benchmarks, such as LIBOR.

Delivering clean markets and tackling market abuse generally is expressed to be a high priority for the FCA, and it issues and periodically updates the Code of Market Conduct to give guidance for determining whether or not behaviour amounts to market abuse, which specifies descriptions of behaviours that do or do not amount to market abuse, factors that are to be taken into account in determining whether or not behaviour amounts to market abuse and descriptions of behaviours that are accepted and unaccepted market practices in relation to one or more markets.

The FCA is also the UK authority under the EU Short Selling Regulation and is responsible for ensuring that the requirements of this regulation are met.

In response to recent widespread instances of abuse and misconduct in the wholesale markets (including benchmark and currency manipulation), on June 12, 2014, George Osborne, the UK Chancellor of the Exchequer, announced the launch of a major review of wholesale markets. The objectives of the review[6] are to reinforce confidence in the fairness and effectiveness of wholesale financial market activity conducted in the United Kingdom and to influence the international debate on trading practices, including highlighting issues that can only be addressed through coordinated international action. The review will focus on those wholesale markets, both regulated and unregulated, where most of the recent concerns about misconduct have arisen: fixed-income, currency and commodity markets, including associated derivatives and benchmarks.

The current UK regime for market abuse is both criminal and regulatory/administrative in nature and has been significantly influenced by the first Market Abuse Directive ("MAD").[7]

The depth and severity of the 2008 financial crisis and the ensuing recession have led European legislators to undertake a major root and branch review and overhaul of the legislative framework within which financial markets operate. One aspect of this is the EU's first major review and overhaul of MAD and the European market abuse framework. The publication in the Official Journal of the European Union of the forthcoming Market Abuse Regulation[8] ("MAR") and its related directive setting out criminal sanctions for market abuse ("CSMAD") on June 12, 2014 demonstrates this review is bearing legislative fruit.

This *Bulletin* sets out the basic framework of the existing UK market abuse regime, examines the proposed changes to be brought in by MAR and then focuses on enforcement and what can be expected in 2014/15. There is also a section on REMIT (EU Regulation 1227/2011 on Wholesale Energy Market Integrity and Transparency, which effectively extends to the wholesale energy products the market abuse regime already applicable to securities markets) and its enforcement. Finally, this *Bulletin* sets out some practical issues, cross-over and related issues and scenarios for compliance officers.

1. The existing UK regime

1.1. Introduction

The laws and rules that govern market abuse in the UK derive from multiple pieces of legislation. The various regimes are overlapping and in many cases contain similar but not identical provisions and definitions. This section seeks to provide a high-level overview of the criminal, civil and administrative regimes. The offences under the regulatory and administrative regimes are broader, more comprehensive and due to their nature, bear a lower burden of proof, and this *Bulletin* will focus primarily on these. It should be noted, however, that the criminal offences, though harder to prove, carry harsher penalties which include imprisonment as well as fines, whereas the regulatory and administrative offences carry fines and/or public censure.

1.2 The current criminal regime

The criminal offences include insider dealing under Part V of the Criminal Justice Act 1993 ("CJA"), making false or misleading statements under s.89 of the FS Act, creating false or misleading impressions under s.90 of the FS Act and making false or misleading statements or creating a false or misleading impression in relation to specified benchmarks under s.91 of the FS Act. These offences generally require the prosecutor to prove a high degree of knowledge or intention on the part of the defendant. There are other offences under the general criminal law which may also be relevant in cases of market misconduct such as the Fraud Act 2006.

1.2.1 Insider dealing

Insider dealing has been a criminal offence in the UK since 1980.[9] The current statutory provisions are in the CJA (which also implemented the EU Insider Dealing Directive).[10] The criminal offence of insider dealing may only be committed by an individual and not a firm or corporate entity.

Under s.52 of the CJA, an offence is committed if an insider deals in, or encourages another to deal in, price-affected securities when in possession of inside information (the "dealing/encouraging offences"), or an insider discloses inside information otherwise than in the proper performance of his employment, office or profession (the "disclosing offence").

An insider holds information as an insider if it is, and he knows that it is, inside information and he has it, and knows that he has it, from an inside source. For example, if an individual has access to the information by virtue of his employment then he is a primary insider. If an individual acquires the information from a primary insider (e.g. a spouse of an employee who acquires inside information from that employee), then he would be classified as a secondary insider.

The definition of inside information for the purposes of the criminal offence can be found in the CJA. It is defined as information which relates to particular securities or to a particular issuer (not to securities or issuers of securities generally), is specific or precise, has not been made public, and if it were made public would be likely to have a significant effect on the price of any securities. There is no definition or further guidance on what "specific or precise" means, or what will amount to a "significant effect on the price of securities".

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In a criminal prosecution for insider dealing, if it can be shown that there is inside information from an inside source, that the defendant knew both of those facts and that there has been dealing, encouraging and/or improper disclosure, the onus of proof will shift to the defendant who must establish one of a number of defences if he is to escape conviction.

There are a number of general defences set out in s.53 of the CJA which demonstrate the high level of knowledge or intention required for a successful prosecution. As an example, it is a defence if the individual accused of insider dealing can show that he did not expect to profit from his trading or if he can show that he would have acted as he did even if he had not had that information. If the defendant can show that he believed the information had been sufficiently widely disclosed to ensure that no-one taking part in the dealing would be prejudiced by not having the information then that is also a defence. It does not matter whether the individual's expectations or intentions were reasonable or not if they are genuinely held. In practice, these defences can be difficult to establish.

If an individual is found guilty of insider dealing he will be liable to unlimited fines and/or imprisonment for up to seven years. The relevant transaction is unaffected however and the contract is not voided.

1.2.2 Misleading statements and market manipulation

Prior to April 1, 2013, the Financial Services and Markets Act 2000 ("FSMA") contained both criminal and civil provisions relating to the making of misleading statements and engaging in market manipulation. Part VII of the FS Act repealed the criminal offences under the previous FSMA regime and introduced the new criminal offences under ss.89–91 of the FS Act.

These offences also require proof of intent. Unlike the criminal offence of insider dealing these offences may be committed by legal entities as well as individuals.

In order for the offence of making false or misleading statements under s.89 of the FS Act to be proven it must be shown that the person concerned either "knew" the statement was false or misleading in a material way, or that he was "reckless" as to whether it was, or that he "dishonestly" concealed a material fact. It is also necessary to show that the person intends to mislead "for the purpose of" inducing (or being reckless as to whether it may induce) others to invest, to refrain from investing, to sell, to retain or to exercise or refrain from exercising other rights conferred by investments.

The offence of creating false or misleading impressions under s.90 of the FS Act requires proof that the person intended to mislead "for the purpose of": (a) inducing (as for s.89 of the FS Act); or (b) making a gain or causing a loss, knowing that the impression is false or misleading, or being reckless as to whether it is. It must also be shown that the person concerned purposely created the impression in the market. It is a defence for him to show that he had a reasonable belief that the impression was not false or misleading.

The offence of making false or misleading statements or creating a false or misleading impression in relation to specified benchmarks under s.91 of the FS Act currently only applies to one benchmark. This is the London Interbank Offered Rate ("LIBOR"), as specified in the Misleading Statements Order.

1.3 The current regulatory/administrative regime

When the FSMA came into force, the Financial Services Authority ("FSA") assumed responsibility for dealing with market abuse in the UK. The FCA took over from the FSA on April 1, 2013 following amendments to the FSMA. The FSMA as originally enacted identified three types of market abuse: misuse of non-public material information, the creation of false or misleading market impressions and market distortion. The FSA supplemented these statutory provisions by creating the Code of Market Conduct ("the Code") which is set out in the Market Conduct Handbook. The Code sets out guidance and examples of specific "behaviours" which, in the FSA's opinion, constitute market abuse and the associated penalties. The provisions, guidance and examples contained in the Code are not conclusive, nor are they exhaustive, but market participants have accepted the Code as a quasi-rule book.

1.3.1 European dimension

The first MAD[11] was implemented in the UK on July 1, 2005 whereby significant amendments were made to the market abuse regime, both under the FSMA[12] and FSA rules.[13] These changes extended the regime

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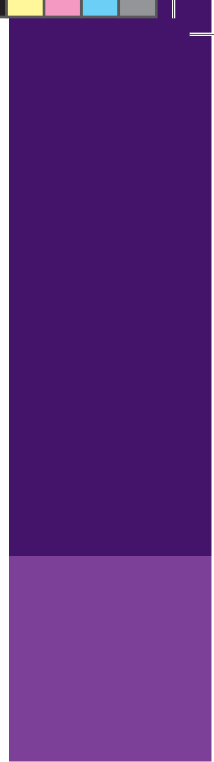

to new areas with the inclusion of rules governing the disclosure of price-sensitive information by issuers of securities and the preparation of investment research.

The UK's existing regime under the FSMA was quite far reaching and it already complied with the requirements of MAD in many respects. The decision of the UK government to implement the MAD requirements whilst retaining certain existing provisions (where the existing provisions had a wider scope than the Directive requirements) has led to a certain level of duplication in the legislation. For example, there are now two sets of provisions that address insider dealing (in addition to the criminal law which remains unchanged), and it can be difficult to determine whether a behaviour falls within the scope of the provisions of the Directive as opposed to the retained provisions. There are material differences between the two regimes and this has proven to be confusing. There is a sunset clause, which was inserted into the FSMA when MAD was implemented which would mean the removal of the super-equivalent provisions after a fixed term (being ss.118(4) and (8) of the FSMA). This date is currently set as the December 31, 2014.[14]

In order to ensure harmonisation throughout Member States in the area of stabilisation, the EU also implemented a Stabilisation and Share Buy-Back Regulation (2273/2003/EC) which would have direct effect throughout the EU and have also been included in the Code, which sets out "safe harbours" for buy-backs and stabilisation activities which conform with certain requirements. Behaviour which is in conformity with the FSA's stabilisation and buyback safe harbours does not amount to market abuse and (in the case of stabilisation) is also exempted from the criminal provisions of the CJA.

Another area where the EU has ensured that there is harmonisation is in the area of short selling. On November 1, 2012 the Short Selling Regulation (Regulation 236/2012) took direct effect in the UK. Previously the FSA had to rely on s.118(8) of the FSMA (one of the super-equivalent provisions to MAD) to prohibit short selling of financial stocks. Short selling is now being addressed directly in the Regulation, which has direct applicability.

1.3.2 Market abuse categories

Under s.118(1)(a) of the FSMA, market abuse is committed when a person engages in any one or more of the seven behaviours listed in s.118 in relation to certain types of qualifying investments. The behaviour needs only to "relate to" the qualifying investment: it is not necessary that there is any dealing with respect to those investments. A person may commit market abuse without having any intention to abuse the market or otherwise being reckless or negligent as to doing so.[15] The seven types of behaviour that constitute market abuse under Part VIII of the FSMA are as detailed below.

In addition to the primary offence of market abuse, the FSMA creates a secondary offence of taking, or refraining from taking, action which requires or encourages another person to engage in behaviour which would be market abuse if the encourager had carried out the behaviour.[16]

1.3.2.1 Insider trading

Under s.118(2) of the FSMA, insider dealing occurs when an insider deals or attempts to deal in a qualifying or related investment on the basis of inside information relating to the investment in question. This prohibition uses the definition of "inside information" provided by MAD (this differs from the definition used in the criminal regime in certain respects). Under the FSMA, inside information is information:

- of a precise nature;
- which is not generally available;
- which relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments; and
- which would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.[17]

Information is "precise" if it indicates circumstances that exist or may reasonably be expected to occur and is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of the qualifying investments or related investments.[18] For the fourth limb of the

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definition, information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

The FSMA defines inside information differently in relation to commodity derivatives.

The Code lists four main kinds of behaviour which amount to insider dealing:

- dealing on the basis of inside information which is not trading information;
- front running (also known as pre-positioning—this is carrying out a transaction ahead of an order which a person is to carry out with or for another) where knowledge of the order is inside information thereby taking advantage of the anticipated impact of the order on the market price;[19]
- in the context of a takeover, a (potential) bidder entering into a transaction in a qualifying investment, on the basis of inside information concerning the proposed bid, that provides merely an economic exposure to movements in the price of the target company's shares (e.g. a spread bet on the target company's share price);[20] and
- in the context of a takeover, a person who acts for the (potential) bidder dealing for his own benefit in qualifying investments or related investments on the basis of information concerning the proposed bid which is inside information.[21]

1.3.2.2 Improper disclosure

Under s.118(3) it is market abuse for an insider to disclose inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duty (commonly known as "tipping off"). The wording of the improper disclosure definition is similar, but not identical, to the "disclosing offence" under Part V of the criminal insider dealing regime in the CJA. The Code gives two examples of behaviour amounting to improper disclosure:

- a director of a company who discloses inside information to someone else in a social context; and
- directors or senior managers selectively briefing analysts.[22]

There are a couple of safe harbours under the Code whereby disclosure of inside information does not amount to improper disclosure. These are relevant when a disclosure is made:

- to a government department, the Bank of England, the Competition and Markets Authority, the Takeover Panel or any other regulatory body or authority (including the FCA) for the purposes of fulfilling a legal or regulatory obligation;[23] or
- pursuant to the Disclosure Rules or the Listing Rules (or any similar regulatory obligation).[24]

1.3.2.3 Misuse of information

This offence under s.118(4) of the FSMA was retained from the pre-existing regime under the FSMA. It only applies if the behaviour does not fall within the MAD-derived insider dealing offence at s.118(2) of the FSMA. In practice, this means that it is only likely to be at issue in two situations:

- where there is a possible abusive behaviour which is other than a dealing in investments; or
- where the information on which behaviour is based is price sensitive but arguably not "inside information" as defined in the FSMA. This super-equivalent provision uses the potentially broader concept of "relevant information" which is not generally available. Relevant information is defined as information that a "regular user" of the market would or would be likely to, regard as relevant in deciding the terms of the transaction.

1.3.2.4 Manipulating transactions

This offence under s.118(5) of the FSMA derives from MAD. It consists of effecting transactions or orders to trade which give or are likely to give a false or misleading impression of the market (as to the supply of, demand for or price of one or more qualifying investments), or to secure prices at an abnormal or artificial level. In effect this creates two separate offences under the two limbs; false or misleading transactions and price positioning.

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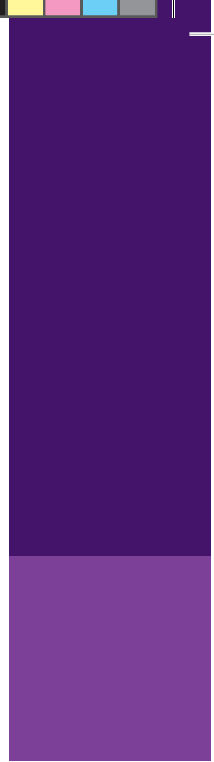

There is a carve-out however for transactions or orders that were for "legitimate reasons and in conformity with accepted market practices on the relevant market". Some examples of how this can operate are given in the Code. One indication that the behaviour is for legitimate reasons, for example, is where the transaction is pursuant to a prior legal or regulatory obligation owed to a third party.

The Code sets out some illustrations of manipulating transactions,[25] a couple of which are set out below:

- A trader holds an option over a certain investment, the settlement value of which is related to the price of the investment. The trader simultaneously buys and sells the same investment (i.e. he trades with himself) at a price outside the normal trading range for that investment. His purpose is to position the price of the investment at a false, misleading, abnormal or artificial level, making him a profit or a loss from the option.
- A fund manager's quarterly performance will improve if the valuation of his portfolio at the end of the relevant quarter is higher. Just before closing he places a large order to buy relatively illiquid shares (which are also components of his portfolio). His purpose is to position the price of the shares at a false, misleading, abnormal or artificial level, thereby boosting the valuation of his portfolio.

In 2009 the FSA expressed concerns about order book conduct and intentional patterns of behaviour (referred to as "layering" and "spoofing") at firms who offer clients direct market access ("DMA").[26]

The FSA had seen evidence of this behaviour and believed that it could constitute market abuse under s.118(5) (manipulating transactions) or s.118(8) (dissemination) of the FSMA because it may give a false or misleading impression about the supply and demand for securities. Order book transactions are monitored by trading platforms, and where circumstances suggest that abusive conduct has taken place in the order book, the FSA indicated that it would consider taking supervisory or enforcement action against the individual or firm involved in the trading. The FCA has indicated that it will take the same approach.[27] This follows the FCA's Final Notice dated January 24, 2014 in relation to Swift Trade Inc, as described in *Compliance Officer Bulletin*, Issue 116, published in May 2014, a case which involved spoofing, layering and collusion. The FCA expects all DMA providers to have procedures in place to identify and prevent layering and spoofing from taking place.

1.3.2.5 Manipulating devices

This offence under s.118(6) of the FSMA derives from MAD. It was modified by the RAP Regulations 2011 to include behaviour on auction platforms. Behaviour will be caught by this provision if it consists of effecting transactions, bids or orders to trade which employ fictitious devices or any other form of deception or contrivance.

The Code lists some behaviour which amounts to market abuse by manipulating devices including:[28]

- using the media to voice an opinion about a certain investment (or about its issuer) whilst having previously taken an undisclosed position on, or submitted undisclosed bids in relation to, that investment and profiting subsequently from the market's reaction to the opinion;
- "pump and dump"—buying an investment, disseminating misleading positive information about it with a view to increasing its price and selling when the price rises; and
- "trash and cash"—selling an investment, disseminating misleading negative information about it with a view to driving down its price and then buying at a lower price.

Further guidance in the form of general factors which indicate that behaviour amounts to manipulating devices is also given in the Code.

1.3.2.6 Dissemination

This offence under s.118(7) of the FSMA derives from MAD. Behaviour will be caught by this provision if it consists of the dissemination of information by any means which gives, or is likely to give, a false or misleading impression as to a qualifying investment by a person who knew or could reasonably be expected to have known that the information was false or misleading.

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The dissemination of information by a journalist is to be assessed taking into account the codes governing his profession unless he derives, directly or indirectly, any advantage or profits from the dissemination of information.[29]

The following types of behaviour are some of the examples listed in the Code as constituting an offence under this provision:

- posting information on an internet bulletin board or chat room which contains false or misleading statements about the takeover of a company; and
- recklessly submitting information to a regulatory information service which is false and misleading when that person is responsible for the content of the information submitted to that service.

1.3.2.7 Misleading behaviour and distortion

The offence under s.118(8) of the FSMA is a retained provision from the original FSMA market abuse regime which was modified on the implementation of MAD. It is subject to a sunset clause under the FSMA and (like s.118(4) of the FSMA) is due to expire on December 31, 2014.[30]

Behaviour is caught by this provision only if it is not caught by the Directive provisions relating to manipulating transactions, manipulating devices or dissemination of false or misleading information. The RAP Regulations 2011 modified this provision to apply it to auction platforms. It is an offence where the behaviour (not falling within the three behaviours above) either:

- is likely to give a regular user of the market a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments; or
- would be, or would be likely to be, regarded by a regular user of the market as behaviour that would distort, or would be likely to distort, the market in such an investment,

and the behaviour is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.[31]

The Code gives two examples of behaviours that would be considered as offending behaviours:

- the movement of physical commodity stocks, which might create a misleading impression as to the supply of, or demand for, or price or value of, a commodity subject to a commodity futures contract; and
- the movement of an empty cargo ship, which might create a similar false or misleading impression.

1.3.3 Statutory exceptions

There are a number of statutory exceptions to the market abuse scheme pursuant to s.118A(5) of the FSMA that are detailed in the Code at MAR 1.10. These exceptions are:

- behaviour which conforms with the Stabilisation and Buy-back Regulation (2273/2003/EC) which has direct effect throughout the EU (as referred to above);
- behaviour which conforms with an FCA rule which includes a provision to the effect that the behaviour conforming with the rule does not amount to market abuse. An example of this is the control of information rule (SYSC 10.2.2R/SYSC 10.2.3G) which provides that the use of a Chinese wall in conformity with the FCA rule on such measures does not amount to market abuse; and
- behaviour that conforms with any of the rules in the Takeover Code about the timing, dissemination or availability, content and standard of care applicable to a disclosure, announcement, communication or release of information if it complies with the specifications set out in MAR 1.10.4C or those set out in MAR 1.10.6C.

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Table 1: Summary of the civil market abuse offences under FSMA s.118

Offence	*UK offence or introduced by Market Abuse Directive?*	*Any offence specific safe havens or exceptions?*	*Behaviour in UK in relation to other EEA-regulated markets covered?*
Insider dealing (FSMA s.118(2)) Occurs when an insider deals or attempts to deal in a qualifying investment on the basis of inside information	Introduced by MAD Overlaps with UK offence of misuse of information	Those listed in MAR 1.3.6C, 1.3.7C/1.3.8G, 1.3.12C/1.3.13G and 1.3.17C	Yes
Improper disclosure (FSMA s.118(3)) Insider discloses inside information to another person otherwise than in the proper performance of his employment, profession or duties.	Introduced by MAD Overlaps with UK offence of misuse of information	Disclosure made to government or a regulatory body (MAR 1.4.3C and 1.4.4C)	Yes
Misuse of information (FSMA s.118(4)) Based on relevant information which is not generally available to those using the market	UK offence Sunset clause (FSMA s.118(9)—due to expire December 31, 2014	Equivalent safe harbours as for insider dealing (above)	No
Manipulating transactions (FSMA s.118(5)) Transactions or orders to trade that: (a) give (or likely to give) a false or misleading impression of the market; or (b) secure the price of an investment	Introduced by MAD Overlaps with UK offence of misleading behaviour	"otherwise for legitimate reasons and in conformity with accepted market practices on the relevant market"	Yes
Manipulating devices (FSMA s.118(6)) Transactions or orders to trade which employ fictitious devices	Introduced by MAD Overlaps with UK offence of misleading behaviour		Yes
Dissemination (FSMA s.118(7)) Dissemination of information by any means which gives, or is likely to give, a false or misleading impression by a person who knew or should have known information was false or misleading	Introduced by MAD Overlaps with UK offence of misleading behaviour		Yes

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Misleading behaviour and market distortion (FSMA s.118(8)) Behaviour likely to: (a) give a false or misleading as to supply/demand/price/value; (b) or which is likely to be regarded by the regular users as likely to distort the market Sunset clause (FSMA s.118(9))—due to expire December 31, 2014	UK offence		No

2. MAR and CSMAD

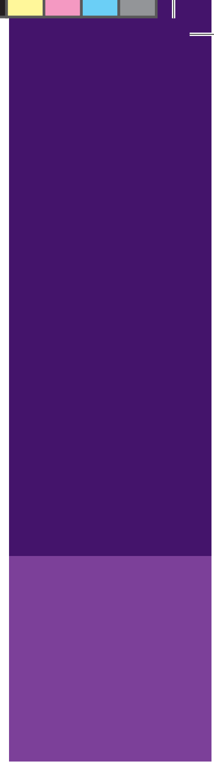
2.1 Introduction

MAR and CSMAD were published in the Official Journal of the European Union on June 12, 2014 and entered into force on July 2, 2014. The majority of MAR's provisions will not, however, become law until 24 months after MAR's entry into force. MAR constitutes a major overhaul of MAD and the law on market abuse and, as a Regulation, will create rules directly applicable in the UK and other Member States. At this stage, the UK government has decided not to opt in to CSMAD. In November 2013, the European Securities and Markets Agency ("ESMA") published a discussion paper on its policy orientations on possible Level 2 implementing measures for MAR. The European Commission has also requested ESMA's technical assistance on two occasions. First, on October 21, 2013, the European Commission requested ESMA's technical advice on the interpretation of a number of key provisions within MAR, including indicators of market manipulation. Then on June 2, 2014, ESMA published a request for technical advice from the European Commission on implementing acts relating to MAR, including on the specification of procedures to enable reporting of actual or potential infringements of MAR to competent authorities, which also provides guidance on certain information the technical advice should take into account. ESMA is requested to deliver the advice within eight months of MAR entering into force. An indicative timetable in the second request for advice states that the implementing acts should apply within 24 months of MAR entering into force. Following input from interested parties on the November 2012 discussion paper and the two requests for assistance from the European Commission, ESMA published two consultation papers in July 2014. These consultation papers are considered briefly at paragraph 2.13.

In this section, we will look briefly at MAR in its legislative and economic context, before going on to discuss some of the key areas in which MAR diverges from its predecessor, MAD. CSMAD will only be referred to very briefly, since there are currently no plans for it to become law in the UK. MAR's impact on the market in trading emissions allowances is also outside the scope of this issue.

2.2 The new market abuse regime in context

The announcement of the adoption of MAR and CSMAD on April 14, 2014 came only one day after the European Parliament adopted the Markets in Financial Instruments Regulation[32] ("MiFIR") and its related directive, the Markets in Financial Instruments Directive II[33] ("MiFID II"). The convergence in the timing of the adoption of the new market abuse legislation and the new financial instruments legislation should not come as a surprise: not only is there a degree of interdependence between them, with MAR being particularly reliant on definitions contained within MiFID II, but they also reflect the same policy preoccupations of European legislators. These policy preoccupations include the extension of the reach of the European regulatory regime to capture a wider range of markets and instruments and the inclusion of specific provisions to tackle the proliferation of technology-driven trading practices.



The emergence of the new market abuse regime and the new regime for regulating financial instruments will eventually result in MAD and the Markets in Financial Instruments Directive ("MiFID"), two cornerstones of the of the European regulation of financial markets over the last decade, being swept away. This wholesale reform arguably constitutes a tacit acknowledgment that MAD and MiFID were inadequate: indeed, the extensive recitals to MAR cite the "legislative, market and technological developments" and "changes to the financial landscape" that have occurred since MAD was initially enacted in 2003 as reasons for its replacement.

Whereas MAD and MiFID were directives that Member States were required to implement domestically using national legislation, both MAR and MiFIR are regulations that will automatically apply across Europe without needing further action from Member States. This change appears to reflect a concern among European legislators that the harmonising effect of previous European financial services legislation was somewhat diluted by allowing Member States to implement their own interpretations of European directives. One of the stated aims of MAR is therefore to "establish a more uniform interpretation of the Union market abuse framework" and to avoid "potential regulatory arbitrage".

Despite these concerns regarding harmonisation, CSMAD, which sets out the new criminal sanctions for market abuse, is a Directive that *will* require Member States to pass implementing legislation at the national level. On February 22, 2012, the UK government announced that it would not be opting in to CSMAD. At the time this decision was taken, there was still considerable uncertainty about the direction of the reforms to MAD and MiFID and the UK decision not to opt in must be viewed in this context. It is possible that the UK government will decide to opt in to CSMAD in the future, although any such decision would necessitate a review of the UK criminal law on market abuse.[34]

2.3 Beyond "regulated markets"

Whereas the scope of its predecessor MAD was limited to financial instruments traded on a regulated market, MAR casts a far wider regulatory net. As well as covering financial instruments[35] traded on a regulated market, MAR applies to any financial instrument that is traded, or admitted for trading, on a multilateral trading facility ("MTF") or on an organised trading facility ("OTF").[36]

When read in conjunction with the definitions of MTF and OTF contained within the adopted text of MiFID II (reproduced in Table 2), it is clear that MAR's extension to MTFs and OTFs represents a significant expansion of the scope of the European market abuse regime.

Table 2: Definitions of MTF and OTF

	Definition within MiFID II[37]
MTF	A multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments—in the system and in accordance with non-discretionary rules—in a way that results in a contract in accordance with Title II of MiFID II
OTF	A multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of MiFID II

The draft of MAR published on October 20, 2011 also contained a provision which sought to capture any financial instrument traded over the counter ("OTC"), to the extent that such instrument could have an "effect" on instruments traded on a regulated market, MTF or OTF. This provision has evolved during the legislative process, such that the equivalent provision within the final version of MAR now refers to: "financial instruments the price or value of which depends on or has an effect on the price or value of a financial instrument traded on a regulated market, MTF or OTF".[38]

The broad scope of the October 20, 2011 draft drew some observations at the time that it would be difficult, if not impossible, for market participants to know whether a given financial instrument was,

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or was not, subject to the new market abuse regime. The removal of the reference to OTC-traded instruments does not appear to have resolved this issue.

Although MAR includes a requirement for the ESMA to maintain an up-to-date list of financial instruments that have applied for or been admitted to trading on a regulated market, MTF or OTF, it requires that this list "shall not limit the scope" of MAR.[39] In other words, the absence of a financial instrument from the ESMA list will not allow market participants to conclude that the market abuse regime has not been engaged in respect of that financial instrument.

The difficulty in determining whether a financial instrument is or is not subject to MAR requirements may lead those responsible for compliance with the market abuse regime within their organisations to err on the side of caution and to assume, in the absence of compelling evidence to the contrary, that any financial instrument is potentially subject to MAR.

2.4 Commodity contracts and benchmarks

As discussed, MAR increases the ambit of the European market abuse regime substantially by taking a very broad approach to defining which markets and trading venues are covered. However, in respect of arts12 and 15 (the market manipulation provisions), the scope of MAR is extended further still.

In simplified terms, the market manipulation provisions of MAR apply to: any spot commodity contract that has, is likely to have, or is intended to have an effect on the price or value of a financial instrument;[40] and any type of financial instrument that has or is likely to have an effect on the price or value of a spot commodity contract whose price or value depends on the relevant financial instrument.

Through these provisions, the European legislators appear to be attempting to plug a hole in the existing MAD regime: namely, the lack of oversight and visibility of the underlying commodity contracts by which the value of certain derivative financial instruments are referenced.[41] This would appear to create inconsistencies between the regulation of those commodity markets that may have an effect on the price or value of a financial instrument and those which do not.

As the recitals to MAR point out, "spot markets and related derivative markets are highly interconnected and global" and "the prohibition of market manipulation should capture these inter-linkages".[42] What is less clear is how European regulators will bring their influence to bear on underlying commodity markets. By MAR's own admission, it is not "practicable to extend the scope of this Regulation to behaviour that does not involve financial instruments".[43]

Although conduct in the commodity markets that creates an abusive effect on a corresponding derivative transaction would probably already fall within the scope of MAD, MAR's attempt indirectly to regulate behaviour in a market for which it is not responsible may create problems for European regulators attempting to administer the MAR regime.[44] As with MAR's approach to the markets and trading venues covered, it may also be difficult for compliance-orientated commodity traders to know whether their commodity contracts are, or are not, caught by MAR.

In light of the recent LIBOR and EURIBOR manipulation scandals, it is perhaps unsurprising that the market manipulation provisions in MAR (arts 12 and 15) also extend to "behaviour in relation to benchmarks". Indeed, one might have expected the issue of benchmarks to have featured more prominently within MAR, since the initial European Parliament text anticipated that the insider dealing element of the new market abuse regime would also apply to benchmarks. As mentioned, the UK has already introduced a criminal offence relating specifically to the manipulation of benchmarks.

2.5 Extra-territoriality

The final version of MAR reinforces the geographical breadth of the existing European market abuse regime. The enforcement action taken in August 2006 by the FSA against Philippe Jabre demonstrated that the UK's implementation of MAD extended to the conduct of a Switzerland-based hedge fund in connection with shares traded on the Tokyo Stock Exchange, on the sole basis that the relevant shares were also quoted on the London Stock Exchange's SEAQ International System.

This approach to geographical scope has been maintained by MAR and is exemplified by arts 2(3) and 2(4), which provide that MAR shall apply:

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- to any transaction, order or behaviour concerning any relevant financial instrument, irrespective of whether or not such transaction, or behaviour takes place on a trading venue; and
- to actions and omissions in the EU or a third country, concerning the relevant instruments.

These "sweeper" provisions further underscore the significance and impact of the extremely broad provisions governing which financial instruments are covered by MAR (arts 2(1) and (2)). This effectively appears to give MAR almost unlimited geographical scope, since the only connection that a financial instrument must have in order to engage MAR is to be traded on a European regulated market, MTF or OTF or to depend on or affect the value of a financial instrument traded on a European regulated market, MTF or OTF.

Neither the issuer of the relevant financial instrument, nor its counterparty, nor indeed the prospective market abuser, need have any connection whatsoever to the EU. Again, the issue arises as to how, for example, an investor in Singapore could possibly know whether a bond issued by an Indian corporate is also traded on an OTF in a European Member State. This creates potential compliance difficulties not only for organisations within the EU, but also for any individual or business that deals in financial instruments which might conceivably either be traded in Europe or might affect the value of an instrument traded in Europe.[45]

2.6 The basic definition of inside information: Echoes of MAD?

Perhaps surprisingly given the extent of the changes elsewhere, the key elements of the definition of inside information under MAR are similar to the corresponding provisions within MAD. Indeed, the first limb of the definition of inside information within MAR[46] is reproduced almost word for word. In essence, inside information is defined as precise, non-public information relating to one or more issuers of financial instruments or to one or more financial instruments that, if made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[47]

In relation to commodity derivatives, MAR consolidates the drafting within MAD and its implementing legislation[48] by referring to information that is "reasonably expected" to be disclosed or is "required to be disclosed in accordance with legal or regulatory provisions at the Union or national rules, market rules, contract, practice or custom, on the relevant commodity derivative markets or spot markets".[49] The absence of disclosure rules within many underlying spot markets is a conceptual problem with this definition, but this is something that MAR inherited from MAD.

2.7 Interpreting the definition of inside information: From MAD to worse?

After the main definition of inside information set out in art.7(1) of the MAR a number of provisions are included that are intended to aid understanding of the scope of the main definition. It remains to be seen whether these clarifying provisions will "enhance legal certainty for market participants" as the legislators intend, or whether they serve only to raise further questions about what constitutes inside information.

2.7.1 "Of a precise nature"

MAR retains the requirement that information must be "of a precise nature" in order to qualify as inside information and explains that "of a precise nature" should be understood to mean information that:

> "indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the price [of the relevant financial instrument or commodity contract]."[50]

The provision goes on to explain that an "intermediate step" in a "protracted process" that is intended to bring about a "particular event" may also give rise to information that is sufficiently precise to be inside information.

2.7.2 "Intermediate steps"

Article 7(3) states that an "intermediate step" in a protracted process "shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article".[51] This rather circular drafting is not likely to provide much assistance to those faced with making a judgement as

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to whether, for example, the completion of a particular milestone in a major IT infrastructure project could constitute inside information.

However, the recitals to MAR do set out a list of possible "intermediate steps", which may be more helpful as an indication of the intention of those drafting MAR. The list includes the state of contractual negotiations or the provisional agreement of contractual terms, the possibility of the placement financial instruments or the conditions or the provisional agreement of terms for the placement and the consideration of the inclusion of financial instrument in a major index.

2.7.3 A "significant effect" on price

Faced with the challenge of creating a definition of inside information that is both wide enough to allow the authorities to enforce good market conduct and yet precise enough to allow market participants to know what kinds of information fall within the market abuse regime, legislators have in the past tended to rely heavily on whether or not the information in question would have a "significant effect" on the price of the relevant financial instrument if such information were disclosed.

This qualification serves as an effective *de minimis* threshold preventing the market abuse net from being cast too widely. According to this "traditional" formulation, privately held information might be interesting, indeed it might even be relevant to investors, but unless publication of the information would have a "significant effect" on the price of the relevant financial instruments, it would not be considered inside information.

More recently, the "significant effect" test has been supplemented by a "reasonable investor" gloss. For example, s.118(6) of the FSMA defines inside information as information that "would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions".

2.7.4 The rise of the reasonable investor?

The reasonable investor test also makes an appearance in MAR. In art.7(4), the legislators attempt to clarify the meaning of "significant effect", as referred to in the main definition of inside information set out in art.7(1), by stating that:

> "information which, it if it were to be made public, would be likely to have a significant effect on the prices of financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of his or her investment decisions."[52]

The relationship between the reasonable investor test and the significant effect test was the one of the issues in dispute in the case of *David Massey v The Financial Services Authority*.[53] In the *Massey* case, the FSA (somewhat surprisingly) succeeded in its argument that the reasonable investor limb of the definition of inside information should be given primacy over the "significant effect" limb. Although the *Massey* decision was widely criticised, the re-appearance of the reasonable investor test in MAR adds weight to the importance of the reasonable investor test relative to the significant effect test.

Until further clarification is provided (either through the courts or through Level 2 legislation), market participants are likely to need to consider both the reasonable investor test and the significant effect test when attempting to determine whether information is inside information or not.

2.7.5 Relevant information not generally available

The draft of MAR published on October 20, 2011 had included an additional category of inside information relating to relevant information not generally available to the public (or "RINGA"). The European Commission had proposed this change on the basis that information can be abused before an issuer is under an obligation to disclose it. This is likely to have been a symptom of the same concern that led those drafting MAR to set out a list of "intermediate steps" that could potentially give rise to inside information.

The inclusion of RINGA within the previous draft of MAR led to criticism regarding the potential scope of the concept. Commentators and practitioners are therefore likely to be pleased that RINGA does not appear in the final version of MAR.

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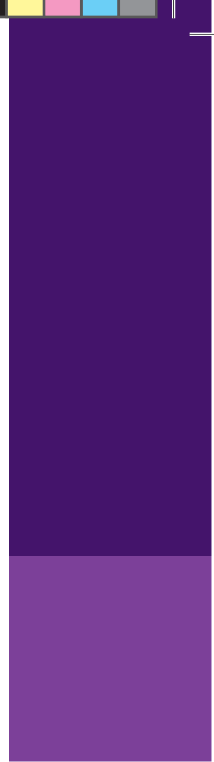

2.7.6 Towards a more holistic view of inside information?

Even though the concept of RINGA did not survive the drafting process, MAR seems to be encouraging market participants to consider relevant facts "in the round" when assessing whether the market abuse regime is engaged. Unless a court confirms the primacy of the significant effect test, it would seem foolhardy for market participants to judge whether information is inside information solely by reference to the potential impact that the information would have on price, if it were disclosed.

2.8 Insider dealing

The core definition of insider dealing is set out in art.8(1) of MAR. This provides that insider dealing occurs where a person possesses inside information and:

> "... uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates."

This new definition of insider dealing is very similar to the equivalent definition of insider dealing within MAD. As with MAD, the practice of insider dealing under MAR is limited, in essence, to:

- people who possess the relevant information by virtue of a professional position or through their involvement in criminal activities;
- people who have a holding in the capital of the issuer; and
- any other person who possesses inside information and knows, or ought to know, that the relevant information is inside information.

MAR does, however, extend the definition of insider dealing in two important ways. First, art.8(1) prohibits the use of inside information by cancelling or amending an order concerning a financial instrument where the order was placed before the person possessed inside information. This addition is intended to ensure that the practice of withdrawing from or cancelling an existing trade in light of inside information subsequently received also constitutes insider dealing.

Second, whereas the concept of "trying" to acquire or dispose of financial instruments was embedded with the definition of insider dealing within MAD, art.14 of MAR creates a separate provision making it clear that "attempting" to engage in insider dealing is also prohibited. In other words, even an unsuccessful attempt to trade on inside information could constitute insider dealing.

2.9 Market manipulation

Many key aspects of MAD's definition of market manipulation have been retained within art.12(1) of MAR. As with MAD, any behaviour which:

- gives or is likely to give false or misleading signals as to the supply of, demand for, or price of a financial instrument; or
- secures or is likely to secure the price of one or several financial instruments at an abnormal or artificial level,

is prohibited, unless the behaviour is carried out for legitimate reasons and conforms with accepted marked practices.[54]

Similarly, the employment of "fictitious devices" or other forms of "deception or contrivance" remains prohibited, as does the dissemination of information that gives false or misleading signals as to the supply of, demand for, or price of a financial instrument.

MAR goes into far greater detail in providing examples of manipulative behaviour, which the legislators hope will assist market participants to apply the definition of market manipulation. Article 12(2) sets out a list of behaviours that will be considered to be market manipulation. Some of these examples have been carried over from MAD (such as collaborating with other market participants in order to fix the price of a financial instrument), while others are entirely new.

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The new examples of market manipulation provided reflect an increased focus on the use of algorithmic and high frequency trading ("HFT"). MAR's list of examples of market manipulation includes the creation of an abusive effect (i.e. one of the effects set out in art.12(1)) through the placing of orders to a trading venue where the orders:

- disrupt or delay the functioning of the trading system of the trading venue or are likely to disrupt or delay its functioning;
- make it more difficult for others to identify genuine orders on the trading system of the trading venue are likely to make this more difficult (e.g. by overloading or destabilising the order book); or
- create or are likely to create a false or misleading signal about the supply of, or demand for, or price of a financial instrument (e.g. by entering orders to initiate or exacerbate a trend).

As with insider dealing, art.15 of MAR also specifically prohibits attempting to engage in market manipulation. This constitutes a step change from the existing MAD regime, because under MAD the definition of market manipulation only extended to transactions or ordered that had already been placed.[55]

Annex 1 of MAR also helpfully sets out a number of indicators to be taken into account when considering whether an order or transaction might constitute market manipulation for the purposes of art.12(1) and (2) (see Table 3).

Table 3: Indicators of market manipulation

	Annex IA: Indicators of market manipulative under art.12(1)
1	Transactions or orders to trade that represent a significant proportion of the daily volume of transactions in the relevant financial instrument or related spot commodity contract
2	Transactions or orders to trade that are undertaken by persons with significant buying or selling positions in the relevant financial instrument or related spot commodity contract
3	Transactions that do not lead to a change in beneficial ownership in the financial instrument or related spot commodity contract
4	Transactions or orders to trade that include position reversals in a short period and might be associated with significant changes in the price of the relevant financial instrument or related spot commodity contract
5	Transactions or orders to trade that are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed
6	Orders to trade that change the representation of the best bid or offer prices and are removed before being executed
7	Orders to trade that occur at or around a specific time when reference prices, settlement prices or valuations are calculated and lead to price changes that have an effect on such prices and valuations
	Annex IB: Indicators of deception or contrivance under art.12(2)
1	Orders to trade or transactions that are preceded or followed by the dissemination of false or misleading information by the same person or persons linked to them
2	Orders to trade or transactions that are placed before or after the same persons or persons linked to them produce or disseminate investment recommendations which are erroneous, biased or demonstrably influenced by material interest

2.10 Disclosure requirements

Like MAD, art.17 of MAR obliges issuers to inform the public of inside information directly concerning the issuer.[56] In addition, MAR provides that the disclosure must be made in such a manner as to allow "fast access and complete, correct and timely assessment of the information by the public".[57]

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The application of the provisions relating to disclosure is limited to issuers who have requested or approved the trading of their financial instruments on a regulated market in a Member State or, in the case of financial instruments only traded on an MTF or OTF, to issuers who:

- have approved trading of their financial instruments on an MTF or OTF; or
- have requested admission to trading of their financial instruments on an MTF in a Member State.

This is likely to mean issuers will need to give some thought to the challenge of tracking the status of their financial instruments, including the status of requests for their financial instruments to be traded on a regulated market or an MTF. It may also mean that issuers will need to implement additional controls in relation to the process by which "approval" is given by the issuer to the trading of their financial instruments on an MTF or OTF.

MAR retains the obligation for issuers to make complete and effective public disclosure when it discloses inside information to any third party, unless the recipient of the inside information owes a duty of confidentiality to the issuer.[58]

MAR also entitles issuers to delay public disclosure of inside information in certain circumstances. However, in comparison to MAD, MAR takes a stricter approach to the circumstances in which disclosure may be delayed. MAD permits disclosure to be delayed "*such as* not to prejudice his legitimate interests" [emphasis added], provided that such omission would not be likely to mislead the public and that the information would be kept confidential.

MAR makes it clear that disclosure may only be delayed in circumstances where *all* these conditions are met: in other words, in order to delay disclosure, the issuer must be satisfied that immediate disclosure is likely to prejudice the legitimate interests of the issuer, the delay is not likely to mislead the public and the issuer is able to ensure the confidentiality of the information. ESMA will be tasked with issuing a list of indicators of what might satisfy the "legitimate interests" test.

Where disclosure is delayed, MAR provides that the issuer must inform the competent authority that disclosure of the information was delayed and provide a written explanation of how these conditions were met, as soon as the relevant inside information is disclosed to the public. The obligation to provide a written explanation justifying the delayed disclosure is new and is likely to increase the pressure on issuers to ensure that the conditions for delaying disclosure have indeed been satisfied. In the context of the drive towards harmonisation, it is perhaps odd that MAR also gives Member States the right to "downgrade" this obligation by limiting it to circumstances in which a written explanation is actually requested by the relevant competent authority.

Unlike MAD, MAR also provides a mechanism for credit institutions or financial institutions to delay the disclosure of inside information in order to "preserve the stability of the financial system", provided that certain conditions are met. This provision appears to have been included in order to pre-empt problems that could arise in the event of another period of extreme instability comparable to the 2008 financial crisis.

2.11 Insider lists and managers' transactions

In addition to the conceptual challenges caused by the increasing breadth and scope of the new market abuse regime, those responsible for interpreting and applying the new legislation within their own organisations are likely to be particularly interested in the changes that MAR will necessitate in relation to the maintenance of insider lists and the reporting of managers' transactions.

The insider list requirement and the managers' transactions requirement only apply to the issuers who are covered by the disclosure requirements.[59]

Article 18 of MAR obliges issuers and people acting on the behalf of issuers to maintain a list of all people who have access to inside information and to provide the list to the competent authority on request. Issuers are obliged to take steps to ensure that anyone on the insider list acknowledges their legal and regulatory duties in writing. Each insider list must include certain data fields (see Table 4).[60]

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Table 4: Required data fields for insider lists

1	The identity of anyone who has access to inside information
2	The reason for including each person on the list
3	The date and time that each person obtained access to inside information
4	The date on which the insider list was created

Interestingly, any issuer whose financial instruments are traded on an SME growth market (e.g., the AIM market) need not maintain an insider list, provided it can fulfil certain conditions. This exemption was included after smaller firms criticised the administrative burden that the maintenance of insider lists creates. AIM-listed firms shall be required to produce an insider list if requested by their competent authority. Indeed, ESMA has confirmed its opinion that it remains advisable for such firms to record this information, so that it is available in the event that an insider list if requested. Further detail on the precise format of the insider lists will be provided in ESMA's technical standards.

Article 19 of MAR governs the requirement for the reporting of managers' transactions. It requires "persons discharging managerial responsibilities, as well as persons closely associated with them" to notify the issuer and the competent authority of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or any derivatives or other financial instruments linked to such shares or debt instruments, within three days of the date on which the relevant transaction takes place.

The information must also be made public within three days of the date on which the transaction takes place, rather than the five working days stipulated in the current MAD regime.[61] MAR prescribes the data fields required for the purposes of providing the notification of managers' transactions (see Table 5).[62]

Table 5: Required data fields for managers' transactions

1	The name of the person
2	The reason for the notification
3	The name of the relevant issuer
4	A description and an identifier of the financial instrument
5	The nature of the transaction
6	The date and place of the transaction.
7	The price and volume of the transactions.

As with the existing MAD regime,[63] the obligation to report transactions is only triggered once a threshold of €5,000 has been reached within a calendar year.[64] In the draft of MAR published on October 20, 2011, this limit had been set to €20,000 in the hope of driving uniformity across European markets, but this increased threshold did not survive the legislative process.

Issuers are required to draw up lists of people who discharge managerial responsibilities and persons closely associated with them. Issuers are obliged to notify those discharging managerial responsibilities and those managers are obliged to notify those to whom they are closely associated.

2.12 Enforcement and sanctions

MAR expects market participants to take responsibility for assisting with preventing market abuse. Indeed, art.16 of MAR contains a positive obligation on "market operators and investment firms that operate a trading venue" to establish and maintain effective arrangements, systems and procedures designed to prevent and detect insider dealing and market manipulation.

In addition, anyone "professionally arranging or executing transactions" is also obliged to establish systems and procedures for detecting suspicious orders and transactions and reporting them "without delay" to the competent authorities. The threshold for notifying competent authorities is that there must be "reasonable suspicion" that the relevant transaction or order *could* [emphasis added] constitute insider

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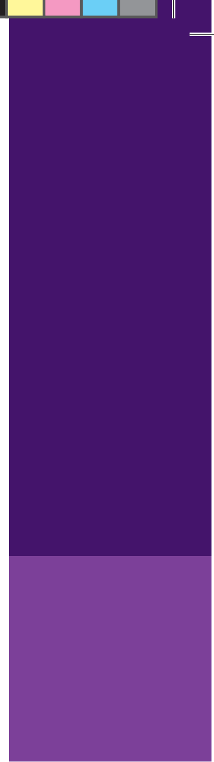

dealing or market manipulation. This obligation reinforces the existing obligation under MAD for anyone "professionally arranging transactions" to notify the competent authorities "without delay" if there are "reasonable grounds" for suspecting that a transaction *involves* [emphasis added] insider dealing or market manipulation.[65]

As we have already seen, one of the primary motivations behind MAR was the desire to increase the degree of uniformity of the market abuse regime across the EU. With this in mind, it should come as no surprise that MAR contains detailed minimum standards in relation to sanctions.

Member States are required to ensure that they have powers that meet or exceed those listed in MAR art.30. The powers that Member States are required to have include the power to force those culpable of market abuse to disgorge any profits resulting from their abusive behaviour, the power to withdraw or suspend the authorisation of a firm and impose bans on those performing management functions.

Member States are obliged to ensure that they have the power to impose maximum pecuniary sanctions *at least* as severe as the sanctions set out in Tables 6 and 7.

Table 6: Maximum pecuniary sanctions for individuals

Provision	*Sanction*
Any	Three times the amount of profits gains or losses avoided
Articles 14 (*Insider dealing or unlawful disclosure of inside information*) and 15 (*Market manipulation*)	€5,000,000
Articles 16 (*Prevention and detection of market abuse*) and 17 (*Disclosure requirements*)	€1,000,000

Table 7: Maximum pecuniary sanctions for firms

Provision	*Sanction*
Any	Three times the amount of profits, gains or losses avoided
Articles 14 (*Insider dealing or unlawful disclosure of inside information*) and 15 (*Market manipulation*)	€15,000,000 or 15% of total annual turnover
Articles 16 (*Prevention and detection of market abuse*) and 17 (*Disclosure requirements*)	€2,500,000 or 2% of annual turnover
Articles 18 (*Insider lists*), 19 (*Managers' transaction*) and 20 (*Investment recommendations and statistics*)	€1,000,000

In addition to the sanctions described in art.30, MAR art.23 also confers very extensive powers on competent authorities for the purposes of investigating potential market abuse infringements. These powers include the right to "access any document and data in any form", to "require information from any person" and to request the freezing of assets or the suspension of trading of a financial instrument.

Competent authorities are also to be granted authorisation to "carry out on-site inspections and investigations" of companies and firms and to "enter the premises of natural and legal persons in order to seize data and documents". The right to enter premises to seize documents only applies if there is a "reasonable suspicion" that documents or data relating to the subject matter of the investigation "may be relevant to proving a case of insider dealing or market manipulation".

Finally, MAR art.32(3) provides that Member States must require employers who carry out regulated financial services to have in place "appropriate internal procedures" for their employees to report infringements of MAR.

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2.13 Next steps

As noted previously, the European Commission has asked ESMA to produce technical advice and technical standards in relation to a number of areas of MAR. On July 11, 2014, ESMA published a consultation paper containing technical advice on:

- the specification of the indicators of market manipulation;
- the determination of the competent authority for notification of delays in disclosure of inside information;
- managers' transactions; and
- the reporting of infringements.

On July 15, 2014, ESMA published a second consultation paper setting out draft technical standards. The areas covered by ESMA's draft technical standards include:

- buy-back programmes and stabilisation measures (see MAR Article 5(6));
- market sounding (see MAR Articles 11(9–10));
- the procedure for establishing an accepted market practice (see MAR Article 13(7));
- systems and procedures for preventing, detecting and reporting market abuse (see MAR Article 16(5));
- technical means for disclosing inside information and for delaying such disclosure (see MAR Article 17(10));
- the format for insider lists and the notification of managers' transactions (see MAR Articles 18(9) and 19(15)); and
- technical arrangements for presenting investment recommendations (see MAR Article 20(3)).

There will now be a consultation period (currently scheduled to close on October 15, 2014) during which market participants and other interested parties may wish to provide feedback to ESMA on the draft technical advice and draft technical standards. ESMA is due to hold an "open hearing" on these issues, which is currently scheduled to take place in Paris on October 8, 2014. Once the consultation period is complete, ESMA will produce further drafts of the technical standards and the technical advice, which will be sent to the European Commission for review and approval. Once finalised, the technical advice and standards will be incorporated into "implementing acts" and will become law.

It is to be hoped that ESMA will help to resolve some of the concerns that commentators have already identified with the adopted text of MAR itself. In the meantime, market participants should begin the process of assessing whether their existing policies and procedures will need to be updated in light of the impending overhaul of the market abuse regime.

Table 8: Current timetable

June 12, 2014	The adopted text of MAR published in the Official Journal
July 3, 2014	MAR entered into force, although only a limited number of the provisions have taken effect
March 2015	ESMA is due to publish its technical standards on the issues that it has been asked to advise on
December 2015	Implementing acts will be prepared and adopted reflecting ESMA's technical standards
June 2016	Publication of implementing acts in the Official Journal
July 2016	The remaining provisions of MAR, including the new regime of insider trading and market manipulation, will enter into force. Implementing acts also enter into force (20 days after publication in the Official Journal)

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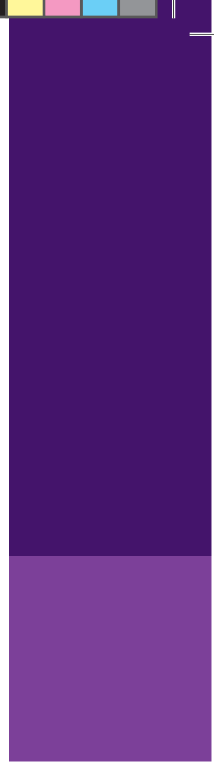

3. Market abuse and enforcement: What can be expected in 2014/15

3.1 The FCA's 2014/2015 business plan

It is clear that the FCA has spent a lot of time and resources evaluating the risks and threats posed to the financial services sector and how those risks can be minimised going forward. Looking back at the FCA's activities over the past year and its plans for the year to come, there is a clear shift away from dealing with problems after they have occurred, towards a culture of proactive problem avoidance and cultural change.

In March 2014, the FCA published its business plan for the year 2014/15 and its 2014 risk outlook.[66] Its stated strategic objective is to "ensure that the relevant markets function well"[67] which it aims to achieve through key objectives of: (a) protecting consumers; (b) protecting and enhancing the UK's financial system; and (c) promoting competition.

The following activities, planned for the next year, are particularly relevant to tackling market abuse:

- Supervising LIBOR and continuing to engage in the International Benchmark Reform. In particular, the FCA envisages involvement in the FX benchmark and international interest rate benchmark reform activities.
- Reviewing market abuse controls in place at asset management firms.
- Monitoring firms' suspicious transaction reports.
- Monitoring trading venues' surveillance systems and enhancing the FCA's surveillance systems.
- Taking a tough stance on enforcement.

The FCA's "credible deterrence agenda" remains squarely on the table for the year ahead. Those that are penalised face heavier sanctions in order to set an example and to ensure greater compliance going forward.[68] According to its business plan, the FCA anticipates that its enforcement case costs for the year 2014/2015 will be £11 million, compared with £16.3 million in 2013/2014. While we have previously seen a consistent decrease in the total number of enforcement cases opened during the period 2009–2013 (from over 150 to over 50)[69] the FCA's 2013–2014 Annual Report, published on July 10, 2014, shows that this number is again on the rise with 109 cases opened during last year, which also coincides with an increase in the breadth of FCA's regulatory remit to include consumer credit, LIBOR oversight and competition matters. The total value of fines has also increased during the last year to £425 million—an increase from £33.6 million during 2009/2010.

Over the past year, the FCA has[70] taken both criminal and regulatory action for market abuse resulting in convictions, fines and prohibitions. The FCA's Annual Report states that, as at March 31, 2014, there were 60 open cases in relation to market abuse under investigation compared with 52 open market abuse cases on April 1, 2013.[71]

One area in which market abuse conduct has received particularly high levels of FCA penalties (in 2012/2013) is that of LIBOR benchmark manipulation. In this respect, the FCA's CEO, Martin Wheatley, noted his surprise during his speech at City Week 2014 that, despite the ongoing LIBOR cases, new benchmark allegations are still emerging.[72] In that speech, Wheatley stressed that the key is prevention—this is in line with the theme away from enforcement activity to a more collaborative or preventative role being taken by the FCA. In Martin Wheatley's words:

> "The key issue here is one of prevention. So, over the medium to long run, moving away from a climate of multi-billion dollar enforcement suits to one where potential challenges, including benchmark challenges, are dealt with proactively by firms and regulators alike ... this is a new environment, with more regulatory interest in ethics over rules, more focus on prevention rather than low-value clean up, and more focus on key issues like competition."[73]

It is clear that the FCA expects firms to have learned from the LIBOR affair and to have put in place adequate internal controls to prevent future benchmark manipulation from occurring. Increased reliance on deterrence means that the FCA will be able to put in place a cost-effective method of monitoring compliance alongside selective enforcement action in playing its part in ensuring a market that "functions well".

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Over the past year, the FCA has received a total of 1,308 suspicious transaction reports—89 per cent (or 1,164) of these reports related to insider dealing and misuse of information.[74] The number of suspicious transaction reports has increased dramatically in recent years—certainly a response to the FCA's threats to monitor firms' compliance with their reporting obligations and the announcement to impose heavy fines for non-compliance. It is clear from the most recent business plan that the FCA will continue to monitor compliance in this respect over the next year.

Although the FCA's fines are not used to incentivise and encourage whistle-blowers, there was a 60 per cent increase in information received from such sources since 2012.[75] This trend has led the FCA to invest in their resources in this respect and during 2014/2015 the FCA will establish an outreach programme directed at sectors where little or no whistle-blowing activity takes place to encourage such action.

Lessons to be learned

- Consider the culture, ethics and behaviour of your firm/staff and whether it is compatible with the FCA's principles and vision for a market that "functions well".
- Expect a more collaborative approach from the FCA; if something does go wrong, ensure that it is reported promptly to the FCA or risk substantial penalties should the FCA decide to pursue an enforcement action.
- Compliance officers are at risk of being fined by the FCA where they are "aware of sufficient information to constitute clear warning signals and failed to take preventative steps" to prevent market abuse.[76]

3.2 Focus on individual accountability

There has been a clear shift in emphasis from enforcement action solely against large corporate offenders, to ensuring compliance amongst senior members in the industry. By way of example, while the fines imposed in 2013 on individuals amounted to £4.9 million, those imposed against firms totalled £460 million.[77] Nearly half of the total number of cases brought (20 cases), were against individuals. Of those 20 cases against individuals, only two involved market abuse, but the fines imposed in those two cases account for nearly half of the fines imposed on individuals in total.[78] 2014 has already seen a fine imposed on Mark Stevenson[79] (£662,700) and a prohibition on David Hobbs for market abuse.[80]

The FCA's business plan for 2014/2015 states that it:

> "will continue to focus on the accountability of boards and senior people that carry out Significant Influence Functions (SIF) ... [and will] devote resources to tackling those who abuse the market, including through criminal prosecutions." [81]

This increased focus on individual accountability can also be clearly seen in two initiatives. The first is the FCA's increased use of attestation letters. More colloquially known as "Dear CEO letters", these require senior managers and boards to vouch for regulatory compliance of specific business areas following consideration of the letter at board level and the assessment and confirmation of compliance with internal procedures. Originally finding use in the asset management sector last year, the FCA has made increasing use of such letters across the wider financial services industry.

The second is the Financial Services (Banking Reform) Act, which came into force in December 2013 and which sets out a number of changes that seek to place responsibility (and liability) for any problems on the individuals involved rather than the company as a whole. The Act includes a requirement for the regulatory approval of individuals before their appointment to any senior management position or significant changes are made to senior managers' responsibilities. The intention is that assigning key managerial responsibilities to specific people should then make it easier to take enforcement action against those individuals and their companies when things go wrong. A new criminal offence of "reckless mismanagement"—which is the taking of a decision which causes a financial institution to fail—has also been introduced, punishable on conviction by imprisonment.

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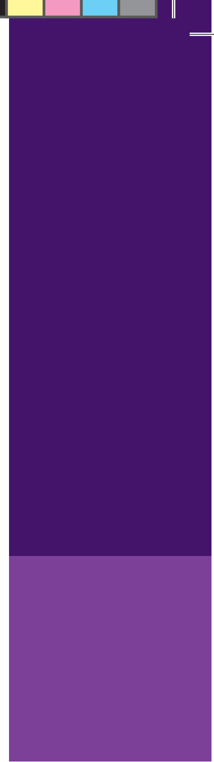

The publication of warning notices was also introduced in 2014. This is said to be the "first step" in the FCA's enforcement process. This comes as part of the FCA's objective of providing greater transparency in its dealings with industry and consumers. A published warning notice will usually set out a brief summary of the relevant facts to allow consumers, firms and the industry to understand the basis for the FCA's concerns, and will be issued before the FCA's investigation is concluded. Originally, the intention was for the notice also to identify the specific firm or individual who was to be the subject of the warning notice. However, concerns were raised during the consultation process that such identification risked causing greater harm to those identified (for instance if the allegations subsequently transpired to be unfounded, or of a less serious nature than those alleged) than the benefits gained through early transparency. The policy statement now clarifies that under normal circumstances when the details of a warning notice are made public, it will include the name of the firm under investigation, but will not name an individual. The policy statement also recognises that flexibility in the FCA's approach is required, and provides for consultation with the subject of the notice before any details are published, to allow representations to be made as to whether publication would be unfair.

The policy has already seen some early use with nine warning notice statements being issued since the start of 2014 in relation to a range of offences from alleged manipulation of interest rate benchmarks to the failure to act with due skill, care and diligence when handling client money. All but one warning notice published thus far have been in respect of individuals rather than companies and have not identified the persons involved, the firm at which an individual being investigated is employed, or the firm investigated. Only one warning notice has been addressed to a company and it did not publish the company's name. It remains to be seen whether the same approach will be used in the future.

Lessons to be learned

- The FCA's Market Watch newsletter is a useful way of keeping up-to-date with the FCA's enforcement activities and the areas under focus.
- If a Dear CEO letter is received, do not ignore it. Even if you respond to attestation letters in a timely and positive manner, the FCA may conduct a follow-up visit.
- The FCA is increasingly willing to go against individuals and to use publicity to achieve its objectives; we may see greater use of publicity going forwards.

3.3 Consultation of FCA and PRA enforcement process

On May 6, 2014, the Chancellor of the Exchequer launched a Treasury review on the FCA and PRA enforcement process reviewing the "fairness, transparency, speed and efficiency of the institutional arrangements and processes for enforcement decision making at the FCA and PRA".[82] The review is part of the government's "focus on strengthening accountability in the financial services sector",[83] in other words, the review is part of a wider increased focus by the government on the financial services industry as a whole rather than a response to a specific problem or concern.

The consultation asks that responses to the questions raised are submitted by July 4, 2014 and it is expected that a report will be published in autumn 2014. In particular, the Chancellor will consider:[84]

- processes in place to commence enforcement;
- coordination of enforcement activity between FCA and PRA;
- operation of early settlement;
- disciplinary decision making;
- ability to make representations to the regulator where enforcement action was commenced; and
- process of referrals to Upper Tribunal.

On March 28, 2014, it was reported that the FCA's announcement in respect of its plans to investigate the life insurance closed book policies wiped £2.4 billion off the value of the UK's biggest insurers.[85]

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The consultation responses may present an interesting snapshot of how the FCA's and PRA's enforcement activities are perceived by the industry in the light of this announcement.

3.4 Increasing international enforcement collaboration

There has also been an increase in international cooperation in respect of enforcement activity and it is expected that this will further increase in the years to come. Examples of such global enforcement activity include:

- the Greenlight case, where a US hedge fund manager was pursued and fined by the then FSA for insider dealing;[86]
- the Tiger Asia Management LLC case, where the SFC pursued a US hedge fund for insider dealing and false trading in China although the entity did not have a presence in China;[87] and
- the Blue Index case, where for the first time a concurrent investigation and prosecution for insider dealing was conducted by the then FSA, FBI and SEC.[88]

It can be expected that the FCA will continue to engage in cross-border enforcement actions when the need or opportunity arises.

As set out above, the MAR will harmonise the rules applicable to insider dealing and market manipulation. It will also include provisions relating to international collaboration in respect of enforcement. As a result of the harmonisation of enforcement against market abuse at EU level, it is likely to become increasingly difficult for market abuse activity to take place in one country in preference over another, as greater cooperation on a European level can be expected.

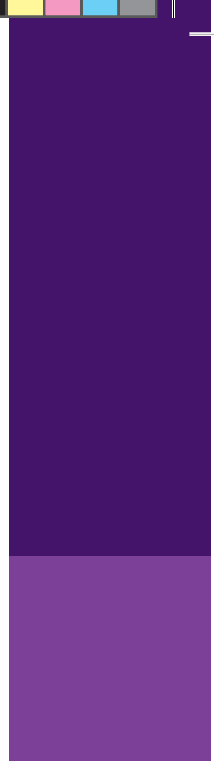
The complexities of international enforcement cases and the tensions where they include both civil and criminal elements are demonstrated in the Javier Martín-Artajo case.[89] Javier Martín-Artajo was a former trader at JPMorgan and also headed up the Chief Investment Office at the time the bank made extensive trading losses (commonly referred to as the London Whale derivatives trading scandal). The bank was fined by US regulators and the FCA in 2013.[90] Subsequently, both criminal and civil charges have been brought by the US authorities against Javier Martín-Artajo.[91] One particular point of tension relates to the use of evidence and whether disclosure of evidence in the civil case should be delayed until the criminal proceedings have been closed. It is understood that Javier Martín-Artajo has now filed a complaint against the FCA. Although exact details are not publicly available, it has been reported that the complaint relates to the FCA's disclosure of evidence, based on interviews conducted by the regulator, to the US authorities.[92] An application hearing in this case was listed for June 16, 2014 in the Upper Tribunal (Financial Services) and it will be interesting to see what the decision brings for future international collaboration.

3.5 Increasing investment in technology: NASDAQ OMX SMARTS

Increased investment in technology is enabling the FCA and other regulators to extend their enforcement activity into areas such as HFT, or algorithmic trading. In July 2013, the FCA issued a final warning against Michael Coscia and imposed a fine of around £764,000, reduced by 30 per cent for early settlement[93] (compared to a fine of £1.4 million imposed by the Commodities and Futures Trading Commission ("CFTC") and the Chicago Mercantile Exchange ("CME") in the US). This was the first market abuse case brought against a high frequency trader.

Although a crackdown or focus on HFT is not expressly referred to in the FCA's business plan for 2014/15, the regulator is clearly alert to the risks posed by HFT.[94] There has been recent activity in the US in respect of market abuse investigations of HFT following the publication of Michael Lewis's book *Flash Boys: A Wall Street Revolt* where it is alleged that HFT traders rigged the US stock market. The allegations in the book have sparked quite a reaction and have even led HFT Virtu Financial to delay its IPO.[95] US authorities are now investigating these allegations. It remains to be seen whether the FCA's enforcement activities will be triggered by any subsequent findings or actions taken by the US authorities.

The FCA is clearly equipped to take on further enforcement in this area; in May 2013 the FCA's market surveillance platform (NASDAQ OMX SMARTS) went live adding to the regulator's ability to monitor and detect market abuse across the financial markets more effectively.[96]



Interestingly however, countries' responses to HFT risks have varied, ranging from the view that no regulation in this area is necessary (i.e. HFT poses no market abuse risk), to putting in place regulation (in the case of Germany), or rules on taxation (in the case of Italy) due to the perceived risk of market abuse in HFT. Going forward however, at least on a European level through MIFID II, there will be some level of harmonisation of regulation of HFT when the rules enter into force in 2016.

Lessons to be learned

- HFT raises particular compliance concerns as the impact of a trade only becomes visible after the event—monitoring these can be a time consuming and expensive exercise.
- Consider if your systems are fit to deal with upcoming changes due to MAR and MiFID II.
- Put in place a consistent methodology to evaluate and monitor HFT reports that enable you to spot potential problems at an early stage so that far-reaching problems can be avoided.
- Consider if your information barriers need to be overhauled and ensure that adequate senior staff oversee the trading activities.
- Consider putting in place "quick guide compliance checklists"—especially in an HFT environment compliance decisions may need to be made very quickly and a comprehensive but simple to use reference guide distributed to staff may prove invaluable.

3.6 Enforcement: Case updates

Compliance Officer Bulletin, Issue 116, published in May 2014, already includes a comprehensive summary of enforcement cases commenced and/or concluded in past years. However, since the May issue there are a few further interesting case developments to which we wish to draw the reader's attention.

3.6.1 Ian Hannam

In May 2014, the Upper Tribunal (Tax and Chancery Chamber) upheld the FCA's decision that Ian Hannam engaged in two instances of the market abuse offence of improper disclosure. The FSA (as it then was) had fined Hannam (who at the time was Chairman of Capital Markets at JPMorgan and Global Co-Head of UK Capital Markets at JPMorgan Cazenove) £450,000 for sending two emails disclosing market-sensitive information about his client to a Kurdish government official. The decision received criticism from those in the industry as unfairly penalising "what everyone else does", despite the practice being illegal in the US for some time. Nevertheless, the Tribunal found that Hannam had completely failed to "give confidentiality a thought", had not acted in the proper course of the exercise of his employment and could not have reasonably believed his actions did not amount to market abuse. The Tribunal also provided a general comment on the standard of behaviour it expects of professional advisers when handling inside information, and confirmed that the standard of proof in cases involving market abuse is the civil standard. Although the Tribunal originally deferred making a decision on the level of the appropriate penalty pending the Tribunal's receipt of further submissions from both parties, Hannam agreed not to contest the financial penalty. Accordingly, the FCA published its final notice on July 17 imposing a financial penalty to the original level of £450.000. Hannam has until August 7, 2014 to pay the fine.

Hannam's case came as part of the FCA's broader "anti-leak" campaign, aimed at reducing the level of suspicious trading in advance of UK deals. It is worth noting that since its launch, abnormal deal-related trading has been cut by half, and unusual price spikes now occur before less than 15 per cent of deals, the lowest level since 2003.[97]

3.6.2 Barclays

May 2014 also saw Barclays being handed a £26 million fine after the FCA found that one of the bank's traders had manipulated the London gold fix, the global financial benchmark used to value billions of dollars of derivatives every year. In June 2012 former trader and Director on the Precious Metals Desk Daniel Plunkett took advantage of what the FCA referred to as "a lack of control" in the system, allowing

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him to drive the price of gold down. As a result, Barclays avoided having to pay a customer nearly US$4 million (although the bank did subsequently compensate the customer in full) and Plunkett had the benefit of a US$1.75 million boost to his trading book. The FCA considered the offence to be particularly serious as Plunkett had preferred his own interests over those of the customer, and his actions had the potential to adversely affect the Gold Fixing as well as the UK and international financial markets. Plunkett was fined £95,600 and has been banned from performing any regulated activity and related functions. Both the bank and Mr Plunkett agreed to settle early and benefited from a 30 per cent reduction in their respective fines (the reduced figures are those quoted).[98]

3.6.3 Société Générale

Another case involving the manipulation of a key financial benchmark also made the headlines in May as, in an unprecedented move, French bank Société Générale filed a court challenge to the €446 million fine imposed on it by the European Commission. The bank had entered into a settlement agreement with the Commission (permitting a five per cent reduction in its fine) for its involvement in two separate cartels related to the manipulation of LIBOR's European counterpart EURIBOR. Royal Bank of Scotland, Deutsche Bank and Citigroup also entered into settlement agreements and received a combined fine of €1.7 billion. Société Générale, however, has argued that the Commission failed to sufficiently explain how it calculated the value of sales—used as the basis for assessing a fine—and that its calculation method does not "reflect the respective positions of the banks".[99] According to the bank that has meant the Commission infringed the principles of equal treatment and its duty of diligence, and it has asked the EU court either to reduce or annul the fine. It remains to be seen how the Court and the Commission will react. The three other alleged cartelists—HSBC, Credit Agricole and JPMorgan Chase—have now been formally charged by the Commission and, if found culpable, could face fines of up to 10 per cent of their global turnover.

3.6.4 Operation Tabernula

Another one to watch in the coming months is Operation Tabernula. Dubbed the FCA's "largest and most complex insider dealing"[100] investigation, March 2014 saw the operation achieve its second conviction in the form of a suspended two-year sentence and a £588,000 confiscation order being handed to Graeme Shelley.[101] Shelley, a former trader at London-based stockbroker Novum Securities, pleaded guilty to participating in a "front running" scheme with his associate Paul Milsom, who at the time was a senior equities trader at Legal & General Group Plc. Using unregistered mobile phones Milsom would pass price-sensitive information to Shelley shortly before Legal & General executed its own block trades, allowing Shelley to buy shares and then capitalise on the movement in the market caused by the subsequent purchase. The two-year arrangement involved tips in relation to stocks in 14 different companies including Tui Travel and Invensys and is reported to have earned the pair a profit of around £400,000. Milsom pleaded guilty during his trial last year and has been serving a two-year sentence since January 2013.

Operation Tabernula started in March 2010 when a series of coordinated dawn raids by SOCA and the FSA resulted in the arrest of six men, including Shelley, working at a variety of investment banks, brokers and hedge funds. Further arrests followed shortly thereafter taking the total headcount up to 10. It is not yet clear the extent to which Milsom and Shelley's convictions will implicate the other alleged members, but the FCA will likely hope that Shelley's case provides an incentive for others to cooperate.[102]

3.6.5 Benchmark manipulation

In February 2014, 10 banks voluntarily provided information to the FCA in relation to its industry-wide probe into the manipulation of the FX market. No specific banks have yet been identified as the FCA is still at the investigatory stage, but the FCA's chief executive Martin Wheatley told a parliamentary hearing in February that the allegations against traders colluding to rig prices in the FX market were "every bit as bad as they have been with LIBOR".[103]

The investigation into the LIBOR scandal, which has seen significant fines being imposed on banks such as Barclays, UBS, RBS and Rabobank since 2012, has also continued in 2014 with Martin Brokers UK (known as "RP Martin") receiving a £3.6 million fine in May. Although the brokerage firm are not panel banks—and therefore not responsible for LIBOR submissions—the FCA considered them to be implicated

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in attempting to influence submissions as they acted as key intermediaries between the various investment banks involved. The FCA subsequently reduced the fine from £3.6 million to £630,000 on the basis that the firm would not have been able to continue trading after paying the larger fine. The Serious Fraud Office has also brought criminal charges for conspiracy to defraud against two of the firm's brokers. They are due to stand trial in September 2015.

3.6.6 Damian Clarke

On Wednesday June 25, 2014 the FCA charged former Schroders' equities trader Damian Clarke with nine counts of insider trading relating to equities and spread bets placed between October 2003 and November 2012. Clarke, who has been bailed to appear before a magistrates' court for sentencing, was originally arrested in January 2013 along with four others. The investigation into the other suspects was later dropped by the FCA. The FCA's investigation was not related to any other FCA investigation, and Schroders released a statement confirming that the FCA's investigation was related "entirely to this individual's personal actions" and not that of the firm.

3.7 Focus on LIBOR manipulation

This summer marks the second anniversary of the LIBOR scandal first hitting the headlines in the UK. Many of the major banks implicated in the scandal were fined by UK and US regulators in the first 12 months (Barclays, £290 million; UBS, £940 million; RBS, £390 million), although the end of 2013 also saw significant fines being handed to ICAP (£55 million) and Rabobank (£662 million) for their involvement in the manipulation of the interbank interest rate benchmark. Now, with the most recent fine being handed to Martin Brokers Ltd—an intermediary broker rather than a bank responsible for submissions (see the section 3.6 above for more details)—it seems that the attention of the FCA may be starting to turn to other, more pressing areas. In particular, the FX rigging investigation currently getting under way is likely to warrant some reallocation of resources.

That said, the scandal is by no means over. A number of criminal hearings in relation to LIBOR manipulation are expected in 2015, with criminal charges being brought by the SFO against 12 people for conspiracy to defraud. A further 22 have been notified that they are under investigation. The FCA is also empowered to issue civil fines against individuals, and may choose to do so now that the major banks and brokers appear to have been dealt with. Of the nine warning notice statements issued since the start of 2014, two are in relation to "significant failings in relation with an interest rate benchmark" with a further one specifically referring to an "interbank interest rate benchmark".

The FCA also continues to be involved in the discussions around the composition of the LIBOR currency panels in an effort to better regulate the submissions procedure and avoid further manipulation scandals. Two FCA representatives provided an update to the LIBOR Oversight Committee in April 2014 on the process for broadening the composition of the panels, and agreed that the criteria for becoming a panel bank be defined and objectively measurable.

US regulators have also thus far avoided issuing fines to any of the US banks implicated in the scandal. It is not clear when these will be imposed, but media speculation anticipates the fines to be at least equal to, if not more than, those of the FCA. It is also notable that the FCA has not confirmed that it has concluded its investigations into other banks and brokers either; on that basis the possibility of further fines should not be ruled out.

3.8 Focus on Forex manipulation

Following on from the LIBOR manipulation scandal, the largest global foreign exchange dealers, together with individual traders and other market participants are currently being investigated over alleged manipulation and conspiracy to manipulate foreign exchange rates.

The global forex market has a daily trading volume of around $5 trillion, dominated by 10 banks, with the largest four accounting for around 50 per cent of the market share. Given the size, fluidity and breadth of this market, there are no natural universal pricing reference points. Therefore, various benchmarks have been developed and adopted for portfolio valuation purposes. One such benchmark is the WM/Reuters fix, which sets rates based on the median of all trades in a one-minute window at 4pm. Portfolio

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managers frequently instruct bank dealing desks to make transactions at the fix time and price. This advance information may create potential for abuse.

The alleged abusive activities include front running client orders and short selling currencies to drive down prices prior to client orders being executed during the window, then buying back from the clients, thereby netting a profit. Collusion between banks in relation such activities is also alleged.

Various US pension funds and other institutional clients have commenced legal proceedings against various banks. Fund investor claims are also anticipated. Regulatory investigations have also been commenced by FCA, the Bank of England, the SEC, the CFTC, the Federal Reserve, FINMA (Switzerland), and WEKO (the Swiss competition Regulator). The EU competition commissioner has also stated that DG COMP will be looking into this.

4. Enforcing REMIT

4.1 Background

REMIT, EU Regulation 1227/2011 on Wholesale Energy Market Integrity and Transparency, prohibits market abuse (insider trading and market manipulation) in physical and over-the-counter financial transactions in wholesale energy products, and provides for monitoring of wholesale energy markets. It also applies to transactions entered into by very large end-users of gas and electricity. It effectively extends to transactions in wholesale energy products the market abuse regime already applicable to transactions in securities, by virtue of MAD.

4.2 Insider trading

REMIT prohibits those who possess inside information in relation to a wholesale energy product from three types of activity:

- using it by acquiring or disposing of wholesale energy products to which the information relates;
- disclosing it to any other person, unless such disclosure is made in the normal course of the exercise of their employment, profession or duties; and
- recommending or inducing another person, on the basis of the inside information, to acquire or dispose of wholesale energy products to which it relates.

There are a number of exemptions from the prohibition. An important one is the "hedging exemption", for transactions entered into by producers, or operators of gas storage or LNG import facilities, the sole purpose of which is to cover the immediate physical loss resulting from unplanned outages. Certain conditions apply.

4.3 Publication of inside information

Market participants are required to publish "in an effective and timely manner" inside information which they possess in respect of businesses or facilities which they or their group companies own or control or for which they are responsible. Disclosure must include information relevant to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned and unplanned outages. A market participant may delay the publication of inside information in certain limited circumstances, but must promptly report the delay and the reasons to the EU Agency for the Coordination of Energy Regulators ("ACER") and its national energy regulator.

4.4 Prohibition of market manipulation

REMIT also prohibits market manipulation, and attempted market manipulation, in relation to wholesale energy products. Market manipulation means entering into any transaction or issuing any order to trade in wholesale products which:

- gives or is likely to give false or misleading signals as to the supply of, demand for or price of wholesale energy products;

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- secures or attempts to secure the price of wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or
- employs or attempts to employ a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products.

4.5 Market monitoring and reporting

ACER will monitor trading activity in order to detect insider trading and market manipulation, collecting data relating to wholesale energy market transactions in order to do so. National regulatory authorities ("NRAs") will cooperate at a regional level and with ACER in monitoring energy markets, and will have access to information held by ACER in order to do so. Any person professionally arranging transactions in wholesale energy products must establish effective procedures to identify breaches of the prohibitions on insider trading or market manipulation, and must notify the relevant NRA of any reasonable suspicion that a transaction might breach either prohibition.

4.6 Registration

Market participants will be required to register with the NRA in the Member State in which they are established or resident, or if they are not established or resident within the EU, in a Member State in which they are active. They are required to register with one NRA only.

The requirements relating to data collection and registration will not enter fully into force until six months after the Commission has issued implementing rules on the data collection requirements. The Commission is expected to issue these rules towards the end of 2014.

4.7 Enforcement by NRAs

Responsibility for enforcing the prohibitions on insider trading and market manipulation lies with NRAs. Member States were required to give their NRAs the relevant powers by June 29, 2013. Ofgem, in respect of England, Wales and Scotland, was one of the few authorities to have powers in place by the deadline.

4.8 Powers of investigation

Ofgem has powers to:

- request information and documents;
- conduct an on-site investigation, subject to obtaining a warrant from a magistrate. This power is not available in the case of an investigation into a suspected failure to retain records;
- require a regulated person (a market participant or person professionally arranging transactions) to prepare, or to appoint a "skilled person" to prepare, a report; and
- conduct both voluntary and compulsory interviews (subject to certain restrictions on the use that may be made of information provided in compulsory interviews).

Failure to comply with requirements imposed in the exercise of these powers of investigation can be penalised as a contempt of court (i.e. by up to two years' imprisonment). Destruction, concealment or falsification of documents is a criminal offence, which may be penalised by up to two years' imprisonment or an unlimited fine. Obstructing an on-site investigation is a criminal offence which may be penalised by up to three months' imprisonment or a fine of up to (currently) £5,000.

4.9 Enforcement and penalties

The GB regulations define a number of "REMIT requirements". These are the substantive requirement imposed by the prohibitions on insider trading and market manipulation, the requirement to publish inside information and the obligations on persons professionally arranging transactions to take steps to monitor and report

suspicious transactions. In the event of a breach of a REMIT requirement, Ofgem may impose a penalty and/or impose a restitution order, and/or may take proceedings before the High Court or (in Scotland) the Court of Session to seek an injunction to compel compliance, or to seek a restitution order. Ofgem may also apply to the court for an injunction prohibiting or remedying failure to comply with a REMIT requirement, or prohibiting a person from disposing of assets. Ofgem published procedural guidelines on November 8, 2013: *https://www.ofgem.gov.uk/ofgem-publications/84347/remitproceduralguidelines8november.pdf* [Accessed July 10, 2014].

Ofgem has the power to impose unlimited penalties for breach of a REMIT requirement, or breach of the requirement to retain records. It has issued a statement of its policy on penalties, outlining the criteria that it will consider when deciding whether to impose a penalty at all, and the criteria that it will take into account in setting the level of a penalty: *https://www.ofgem.gov.uk/ofgem-publications/84346/remitpenaltiesstatement8november2013.pdf*. Ofgem explains that it may give a discount for early settlement, and also where the infringer offers restitution for consumers.

If Ofgem brings proceedings before the courts for an injunction or a restitution order, it may at the same time request the court to consider whether to impose a penalty.

In the case of restitution, Ofgem explains in its procedural guidelines that it will first consider using its own powers to order restitution, but may apply to the court for a restitution order when it is also taking other court action, for example applying for an injunction or freezing order.

In the government's annual Energy Statement on October 31, 2013, the Energy Secretary announced that the government would be consulting on the introduction of criminal sanctions for manipulation of energy markets.

4.10 Rights of defence

Within nine months of opening an investigation, if it intends to continue with the investigation, Ofgem will give a Statement of Case to the person being investigated, or update the person being investigated of the expected timescale. A Statement of Case will explain Ofgem's initial findings. In response to a Statement of Case, the person under investigation may make written and/or oral representations.

Before imposing a penalty, or ordering restitution, Ofgem must give a "warning notice" to the person concerned. A warning notice must state the amount of the proposed penalty or restitution amount concerned, and give reasons. The alleged infringer will then have a period of time in which to make representations. Ofgem will also give access to its file, including both material on which it relies and also potentially exculpatory material, subject to certain exceptions. After considering any representations received in response to a warning notice, Ofgem may issue a decision notice, or close the file. The warning notice is not generally a public document, although Ofgem may publish some information about it, subject to certain conditions.

4.11 Appeal

A person upon whom Ofgem imposes a penalty or restitution order may refer the matter to the Upper Tribunal, which may consider all evidence, whether or not it was available to Ofgem.

4.12 Private enforcement

The prohibitions of insider trading and market manipulation give rise to rights that individual and legal persons can enforce against each other, even in the absence of investigation by NRAs.

5. Spotlight on Specific Areas and Compliance

With the continuing evolution and increase in breadth of the market abuse regime, together with the movement away from reliance on accepted market practices, it is impossible to set out every area and scenario where market abuse issues are likely to arise. In this section we list some of the broad areas and scenarios where market abuse issues may arise, together with some of the related regulatory issues which may need to be considered, as well as compliance measures to be considered.

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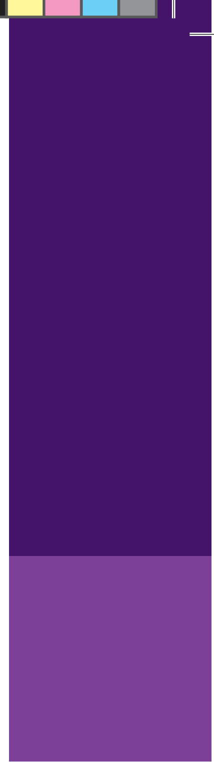

5.1 Primary markets

There are multiple and complex market abuse issues which arise in the context of both new issues and secondary block trades. Section 118 of the FSMA and the Code apply to behaviour in relation to securities in respect of which an application for admission to trading has been made and related investments (e.g. "grey market" or "when issued" trading), whereas the CJA applies only to securities already listed on certain prescribed markets.

In relation to activities which take place prior to an application for admission having been made (e.g. pre-sounding or pre-marketing), the principal applicable market abuse provision will be false and misleading statements under s.89 of the FS Act (as described in section 1), as well as potentially "insiding" a prospective investor with information which does not subsequently become disclosed in a prospectus, thereby putting that investor off limits to invest or trade in the security concerned.

Where there is an add-on offering in relation to issuers with securities already admitted to trading, or a rights issue, under the Disclosure and Transparency Rules ("DTRs") inside information is required to be notified to the market as soon as possible. There is, however, an exception under DTR 2.5, which permits a delay in such disclosure so as not to prejudice the legitimate interests of the issuer, provided that:

(a) the omission will not be likely to mislead the public;

(b) any person receiving the information owes the issuer a duty of confidentiality; and

(c) the issuer is able to ensure confidentiality of that information.

These provisions should operate to allow an offering not to be disclosed until its launch. There are also specific carve-outs under the DTRs to allow controlled and reasonable disclosure of the plan for an offering to selected persons, including advisers, underwriters/prospective investors and major shareholders.

In relation to undocumented secondary block trades (bookbuilt, bought deal or otherwise), care must be taken not to disclose inside information to the purchaser(s) over and above "trading information". If any further information is to be disclosed, this may need to be made public via an announcement.

Once a transaction is complete and secondary market trading has commenced, price support activities may constitute market abuse unless conducted in accordance with the detailed requirements of the stabilisation safe harbour.

By analogy, any secondary market purchases by a company of its own publicly traded securities may constitute market abuse unless conducted in accordance with the buybacks safe harbour.

There has been considerable recent enforcement action and case law concerning wall-crossings and selective insidings, both in relation to equity and debt issuances. As a result, detailed compliance policies and procedures have been implemented by investment banks to address the associated market abuse risks.

5.2 Secondary markets

The principal insider dealing risks in secondary markets trading relate to private side information leakage over the wall. The "dutiful carrying out of a client order" defence in MAR 1.3.14E and the market maker defence in MAR 1.3.7C may be available if the trader's actions are unimpacted by such information. Insider dealing and manipulation risks may arise in the context of "pre-hedging" and "icing" of stock borrows (e.g. to facilitate offering stockloans as hedges to hedge funds subscribers to convertible bonds to enable them to go short the underlying equity and/or simultaneously offering credit default derivative protection linked to the issuer).

There are numerous potential forms of market manipulation in secondary markets, including wash trades for clients in the context of dividend-influenced trading, derivatives manipulation of underlying securities prices, spoofing and layering in electronic trading. ESMA has also published Guidelines on Systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities (February 24, 2012; ESMA/2012/122), which sets out detailed measures to be taken by all market participants and infrastructure providers to maintain controls in an electronic trading

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environment. MiFID II/MiFIR also contains many measures to address the risks and maintain controls, transparency and fairness in electronic and platform trading.

In secondary markets trading there may also be associated breaches of FCA rules and principles (including front running, customer order priority, best execution, treating customers fairly, systems and controls etc). The European rules on short selling impact equity and credit markets, are also complex and detailed and necessitate significant disclosures, reporting, monitoring and controls, although equities traders are generally allowed to take advantage of the marketmakers exemption. Secondary markets compliance, monitoring, reporting and record-keeping procedures continue to evolve accordingly.

5.3 Research

The market abuse risks associated with investment research generally concern analysts inadvertently gaining access to inside information from companies, the contents or research reports or the views of analysts being inside information and false or misleading research being issued to benefit corporate clients of the investment bank concerned. Following various high profile cases and enforcements in the US, the UK and other jurisdictions, all of these issues are addressed within banks by detailed compliance procedures and disclosures.

5.4 Mergers and acquisitions and stakebuilding

The principal market abuse issues around M&A concern being in possession of inside information and permitted trading activities, as well as improper disclosure. The Takeover Code contains detailed provisions concerning trading and reporting, among other things, to prevent market abuse in the context of a takeover, compliance with which constitutes a safe harbour to the Code. Insider lists and other procedures are required to be maintained by listed companies in M&A and other contexts and such lists include principal contacts at the companies' advisers.

The Takeover Code permits stakebuilding of shares constituting up to 30 per cent of the voting rights in the target company. Stakebuilding to facilitate the M&A transaction itself is a defence to insider dealing. A further question arises in relation to economic stakes built up via the use of contracts for differences or other derivatives. Such scenarios have created market abuse issues (as shown by SFA's Northern Electric enforcement in 1995), however, these concerns should be reduced now that such derivatives positions are disclosable under the DTRs. Trading is also disclosable to the Takeover Panel if a potential M&A is on the Panel list.

5.5 Commodities

There are several well-known types of abuse in the commodities markets using involving either a "squeeze" or cornering the market or an abusive interplay between the physical commodity and the related exchange-traded derivative. Some of the measures brought in by MAR to address market abuse in the commodity markets have been set out in section 2. Article 12 (Market Manipulation) concerns the use of a "dominant position" over the supply of, or demand for, a given financial instrument or related commodity. In addition, the indicators of potentially manipulative behaviour set out in Annex 1 include: (a) the extent to which a trade represents a significant proportion of the daily volume of transactions in the relevant financial instrument or commodity contract; and (b) the extent to which a trade is undertaken by someone with a "significant buying or selling position" in a financial instrument or related spot commodity contract. Article 23 (2) (c) also allows competent authorities to request information from market participants on related spot markets. The various derivatives exchanges have also recently brought in new rules concerning commodities derivatives position limits and position management.

5.6 International dimension

Due to the interconnectedness of global markets, the connection of a financial instrument to several potential jurisdictions and the extraterritoriality of some foreign laws and regulations, market abuse issues are not solely contained into the UK. Even across the EU, MAD has been implemented in different ways so there is no pan-European system of application and enforcement. MAR/CSMAD represents an attempt to address this, but until all Member States opt into CSMAD, there will no universal system of

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enforcement, just ever closer harmonisation of rules. Compliance officers require the tools to be able to spot international market abuse issues and to draw on the required resources and advice accordingly. London-based trading businesses or platforms may be required to implement "substituted compliance" requirements in certain circumstances in order to gain certain US exemptions.

5.7 Compliance

The full array of compliance policies, processes and tools need to be utilised to tackle market abuse, including:

- Market abuse policy, including STR obligations.
- Chinese wall, wall-crossing procedures, insider lists and above the wall considerations.
- Training.
- Audit trails.
- Dealing and execution policy.
- Short selling policies reporting and surveillance.
- Conflicts policy.
- Surveillance and testing.
- Risk Assessments—assessing the risks associated with monitoring and surveillance.
- Compliance Monitoring—monitoring, surveillance and approval systems.
- Management Analysis—aggregation and analysis of Compliance MI.
- Management Action—follow-up activity carried out as a result of Management Analysis.
- Electronic trading and platform-related flags, filters and controls.
- Front office monitoring as well as automated systems.

Notes

1 2013 FCA Final Notices.

2 SFC Enforcement News 2013.

3 2013 FCA Final Notices and SFC Annual Report FY 2012/13.

4 The FCA's approach to advancing its objectives, July 2013.

5 HM Treasury's 2012 public consultation on the regulation of the London Interbank Offered Rate ("LIBOR").

6 Fair and Effective Markets Review: terms of reference. HM Treasury, June 12, 2014.

7 Market Abuse Directive (2003/6/EC).

8 EU Regulation No.596/2014 of April 16, 2014 on market abuse.

9 The Company Securities (Insider Dealing) Act 1980 made insider dealing a criminal offence.

10 EU Insider Dealing Directive (89/592/EEC).

11 MAD (2003/6/EC).

12 In accordance with the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005.

13 In accordance with the FSA's Market Abuse Directive Instrument.

14 SI 2011/2928.

15 *Winterflood Securities Ltd v FSA* [2010] EWCA Civ 423, where the Court of Appeal decided that

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a person could commit market abuse by entering into artificial transactions or price positioning without an "actuating purpose" to mislead or distort the market.

16 FSMA s.123(1)(b).

17 FSMA s.118C(2).

18 FSMA s.118C(5).

19 MAR 1.3.2E(2).

20 MAR 1.3.2E(3).

21 MAR 1.3.2E(4).

22 MAR 1.4.2E.

23 MAR 1.4.3C.

24 MAR 1.4.4C.

25 MAR 1.6.13.

26 In issue 33 of Market Watch, published in August 2009.

27 In issue 44 of Market Watch, published in August 2013.

28 MAR 1.7.2.

29 FSMA s.118A(4).

30 FSMA 2000 (Market Abuse) Regulations 2011/2928, reg.2(2).

31 MAR 1.9.1A.

32 The adopted text of MiFIR dated April 29, 2014 can be found at: *http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2022%202014%20INIT* [Accessed July 10 2014].

33 The adopted text of MiFID II dated April 29, 2014 can be found at: *http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2023%202014%20INIT* [Accessed July 10 2014].

34 The UK law criminalising market abuse is currently spread across a number of pieces of legislation, including the Criminal Justice Act 1993 and ss.89–91 of the Financial Services Act 2012.

35 The definition of "financial instruments" is set out in Section C of Appendix 1 of the text of MiFID II adopted on April 15, 2014. The definition is too long to reproduce here but, needless to say, it is extremely broad.

36 MAR art.2(1)(a)–(c).

37 These definitions are set out on page 104 of the adopted text of MiFID II. The references to "Title II" are to the section MiFID II that deals with the requirements for MTFs and OTF (see p.119).

38 MAR art.2(1)(d).

39 MAR art.4(1)–(2).

40 Broadly speaking, any financial instrument traded on a regulated exchange, MTF or OTF and any financial instrument that depends on or affects the value of a financial instrument traded on a regulated market, MTF or OTF.

41 For example, the value of a derivative contract giving one party a hypothetical right to acquire a thousand ounces of gold from another party at a future date and at a pre-agreed price would probably be affected by the completion of an underlying contract between a sovereign state and an investor to transfer ownership of five tons of gold.

42 Recitals to MAR, see para.(20).

43 Recitals to MAR, see para.(20).

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44 Regulators will presumably be required to monitor the commodity markets in order to determine whether the derivative instruments for which they are responsible would be likely to have an effect on the underlying commodities.

45 Indeed, parties trading in commodities that are the subject of European derivative transactions would face similar problems. For example, an organisation outside the EU buying or selling copper to another organisation outside the EU could engage MAR if the transaction would be likely to have an effect on a copper derivative contract traded on a regulated exchange, OTF or MTF in any European Member State.

46 MAR art.7(1)(a).

47 See MAD (2003/6/EC), art.1 and MAR art.7(1)(a).

48 2004/72/EC.

49 MAR art.7(b).

50 MAR art.7(2).

51 MAR art.7(3).

52 MAR art.7(4).

53 [2011] UKUT 49 (TCC) Upper Tribunal reference FIN/2009/0024.

54 MAR art.13 sets out a mechanism by which Member States can apply to ESMA for the establishment of "accepted marked practices". The ESMA will provide technical guidance on the information that a competent authority would need to provide in order to make such an application.

55 See MAR art.1(2).

56 MAR art.17(1).

57 Issuers whose financial instruments are only admitted to trading on an SME growth market (such as AIM) may arrange for their inside information to be published on the relevant trading venue, rather on their own website. See MAR art.17(9).

58 MAR art.17(8).

59 See section 2 above.

60 MAR art.18(3). The requirement to include the date and time that each person obtained access to the inside information is a departure from MAD—see of art.5(2) of 2004/72/EC.

61 See art.6(1) of 2004/72/EC.

62 See MAR art.19(6). These requirements are the same as those set out in art.6(3) of 2004/72/EC.

63 See MAR art.19(6).

64 Article 19(9) provides that a competent authority may increase this threshold to €20,000, provided it can justify the reason for the increase to the ESMA.

65 Article 7 of 2004/72/EC.

66 See *http://www.fca.org.uk/news/about-us/business-plan-2014-15* and *http://www.fca.org.uk/news/about-us/risk-outlook-2014* [Accessed July 10, 2014].

67 See *http://www.fca.org.uk/news/about-us/business-plan-2014-15, executive summary* [Accessed July 10, 2014].

68 Global enforcement review 2014, Kinetic Partners, April 1, 2014, available at *http://www.kinetic-partners.com/enforcement/* [Accessed July 10, 2014], p.11.

69 Global enforcement review 2014, Kinetic Partners, April 1, 2014, available at *http://www.kinetic-partners.com/enforcement/* [Accessed July 10, 2014], p.11. (The fines referred to have been converted for the purposes of this *Bulletin* for an indicative value using an exchange rate of 1US$: £0.594504.)

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70 See *http://www.fca.org.uk/news/leadership-and-conduct* [Accessed July 10, 2014].

71 FCA Annual Report 2013/2014; Appendix 2—Enforcement activity, available at *http://www.fca.org.uk/static/documents/corporate/appendix-2-enforcement-activity-13-14.pdf*.

72 See *http://www.fca.org.uk/news/leadership-and-conduct*, *Benchmarks: governance of trading activity and conflicts of interest, conclusion* [Accessed July 10, 2014].

73 See *http://www.fca.org.uk/news/leadership-and-conduct*, Benchmarks: governance of trading activity and conflicts of interest, conclusion [Accessed July 10, 2014].

74 See *http://www.fca.org.uk/your-fca/documents/newsletters/market-watch-45* [Accessed July 10, 2014].

75 See *http://www.fca.org.uk/news/about-us/business-plan-2014-15, Enhancing market integrity* [Accessed July 10, 2014].

76 See *http://www.fca.org.uk/news/fca-fines-compliance-officer-and-broker* [Accessed July 10, 2014].

77 Global enforcement review 2014, Kinetic Partners, April 1, 2014, available at *http://www.kinetic-partners.com/enforcement* [Accessed July 10, 2014], page 14. (The fines referred to have been converted for purposes of this issue for an indicative value using an exchange rate of US$1: £0.594504.)

78 Global enforcement review 2014, Kinetic Partners, April 1, 2014, available at *http://www.kinetic-partners.com/enforcement* [Accessed July 10, 2014], page 17. (The fines referred to have been converted for purposes of this *Bulletin* for an indicative value using an exchange rate of 1US$: £0.594504.)

79 *http://www.fca.org.uk/news/press-releases/fca-bans-and-fines-trader-660k-for-manipulating-gilt-price-during-qe*.

80 *http://www.fca.org.uk/news/tribunal-bans-former-trader-for-lying-to-the-fca-and-the-tribunal*.

81 See *http://www.fca.org.uk/news/about-us/business-plan-2014-15*, Chapter 1—Achieving our objectives [Accessed July 10, 2014].

82 See *https://www.gov.uk/government/consultations/review-of-enforcement-decision-making-at-the-financial-services-regulators-call-for-evidence/review-of-enforcement-decision-making-at-the-financial-services-regulators-call-for-evidence* [Accessed July 10, 2014], Introduction .

83 See *https://www.gov.uk/government/consultations/review-of-enforcement-decision-making-at-the-financial-services-regulators-call-for-evidence/review-of-enforcement-decision-making-at-the-financial-services-regulators-call-for-evidence* [Accessed July 10, 2014], Introduction.

84 Open consultation, Review of enforcement decision-making at the financial services regulators: call for evidence, available at *https://www.gov.uk/government/consultations/review-of-enforcement-decision-making-at-the-financial-services-regulators-call-for-evidence/review-of-enforcement-decision-making-at-the-financial-services-regulators-call-for-evidence* [Accessed July 10, 2014].

85 See *http://www.telegraph.co.uk/finance/personalfinance/insurance/10730789/Insurance-shares-hit-by-FCA-review.html* [Accessed July 10, 2014].

86 See *http://www.fsa.gov.uk/library/communication/pr/2012/005.shtml* [Accessed July 10, 2014].

87 See *https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/?searchByName=1&targetEntity=TIGER%20ASIA%20MANAGEMENT,%20LLC* [Accessed July 10, 2014].

88 See *http://www.fsa.gov.uk/library/communication/pr/2012/067.shtml* [Accessed July 10, 2014].

89 FS/2012/0006.

90 See *http://www.fca.org.uk/news/jpmorgan-chase-bank-na-fined* [Accessed July 10, 2014].

91 See *http://www.sec.gov/litigation/complaints/2013/comp-pr2013-154.pdf [Accessed July 10, 2014] and http://www.justice.gov/usao/nys/pressreleases/August13/MartinArtajoandGroutComplaints/U.S.%20v.%20Javier%20Martin-Artajo%20Complaint.pdf* [Accessed July 10, 2014].

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92 See *http://www.ft.com/cms/s/0/7d02bb0e-b030-11e3-8efc-00144feab7de.html#axzz33U3Ujljf* [Accessed July 10, 2014].

93 See *http://www.fca.org.uk/static/documents/final-notices/coscia.pdf* [Accessed July 10, 2014].

94 See *http://www.fca.org.uk/news/about-us/risk-outlook-2014* [Accessed July 10, 2014], p.25.

95 See *http://www.ft.com/cms/s/0/3df910cc-ba06-11e3-a3ef-00144feabdc0.html?siteedition=uk#axzz33U3Ujljf* [Accessed July 10, 2014].

96 See *http://ir.nasdaqomx.com/releasedetail.cfm?ReleaseID=764555* [Accessed July 10, 2014].

97 FCA Annual Report 2012/13, page 37 (see *http://www.fca.gov.uk/news/firms/fsa-annual-report-2012-13*) [Accessed July 10, 2014].

98 See *http://www.fca.org.uk/news/barclays-fined-26m-for-failings-surrounding-the-london-gold-fixing* [Accessed July 10, 2014].

99 See *http://www.reuters.com/article/2014/05/12/socgen-euribor-idUSL6N0NY3EZ20140512* [Accessed July 10, 2014].

100 See *http://www.bloomberg.com/news/2012-12-21/fifth-person-charged-in-u-k-tabernula-insider-trading-case-1-.html* [Accessed July 10, 2014].

101 See *http://www.bloomberg.com/news/2014-03-27/ex-novum-securities-trader-avoids-jail-in-insider-trading-probe.html* [Accessed July 10, 2014].

102 See *http://www.ft.com/cms/s/0/7a644326-daa2-11e3-a448-00144feabdc0.html#axzz33h6v75iA* [Accessed July 10, 2014].

103 See *http://www.ft.com/cms/s/0/6d2f697a-8da8-11e3-bbe7-00144feab7de.html#axzz33h6v75iA* [Accessed July 10, 2014].

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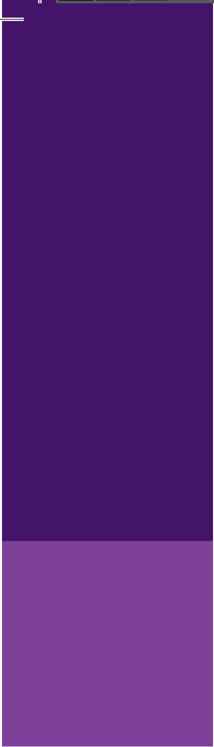

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Issue 119—How the FCA makes Enforcement Decisions

Author: Tony Woodcock, Partner, Stephenson Harwood LLP

Coverage:

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COMPLIANCE OFFICER BULLETIN

COMPLIANCE OFFICER BULLETIN

The regulatory environment in which financial institutions operate has been one of constant change and evolution in recent years, not only as a result of the UK regulators' own initiatives, but also as a direct consequence of the need to implement European directives within the United Kingdom, and domestic and international responses to the credit crisis.

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