



THE MARKET ABUSE REGULATION THE FIRST FIVE YEARS

Hannah Brown, Nick Chapman, Clare Coppel, Sarah Hitchins, Tom Marsh and Jodi Norman of Allen & Overy LLP examine some of the key issues and areas of regulatory scrutiny that have emerged over the last five years during which the Market Abuse Regulation (596/2014/EU) has been in force, and discuss what the future might bring.

July 2021 marks five years since the Market Abuse Regulation (596/2014/EU) (EU MAR) came into force on 3 July 2016. Since then, a myriad of developments has supplemented practitioners' understanding and interpretation of EU MAR, which was recently retained into UK law following the expiry of the Brexit transition period.

This article looks back at some of the key issues and areas of regulatory scrutiny that have emerged over the last five years during which EU MAR has been in force from the perspectives of both financial services firms and listed issuers from all industries (see feature article "Market Abuse Regulation: ensuring compliance amidst uncertainty", www.practicallaw.com/6-629-5677). It also looks forward to the implications of the

increasing number of areas of divergence between EU MAR and the UK's retained version of it, as well as potential future market abuse issues and themes that may rise to prominence over the coming months and years.

ONSHORING OF EU MAR

Following the expiry of the Brexit transition period on 31 December 2020, the retained EU law version of EU MAR (UK MAR) was brought into effect in UK law from 1 January 2021 by the European Union (Withdrawal) Act 2018 (as amended), as supplemented by the Market Abuse (Amendment) (EU Exit) Regulations 2019 (SI 2019/310) (2019 Regulations). The explanatory memorandum to the 2019 Regulations explained that the

2019 Regulations were not intended to alter the policy approach of EU MAR but, rather, sought to maintain the status quo in terms of the effect on UK and EU market participants and issuers, and make only certain technical amendments as necessary to reflect the UK's new position outside the EU. The key changes relate to scope and notification requirements.

Scope

Following Brexit, the EU MAR framework no longer applies to instruments admitted to trading or traded on UK trading venues, whereas UK MAR covers financial instruments admitted to trading or traded on UK as well as EU trading venues. This means that issuers with financial instruments admitted to trading or traded on both UK and EU venues are within scope of both EU MAR and UK MAR.

Notification requirements

Under UK MAR, issuers with financial instruments admitted to trading or traded on UK venues must make certain notifications to the Financial Conduct Authority (FCA), including any delay in the disclosure of inside information, the provision of insider lists, and reporting managers' transactions. The practical effect of this is that issuers within the scope of both EU MAR and UK MAR must now make notifications to two regulatory authorities: the FCA and the relevant competent authority in an EU member state.

In addition, more material UK divergence from EU MAR is already starting to emerge. The SME Growth Market Regulation (2019/2115/EU) made various amendments to promote the use of SME growth markets, and included changes to EU MAR. As these changes were effective as at 1 January 2021, they were not automatically reflected in UK MAR and the UK is proposing to implement only some of them through the Financial Services Act 2021, which received Royal Assent on 29 April 2021 (see *News brief "Financial Services Act 2021: a suite of changes"*, www.practicallaw.com/w-031-0848).

As a result, although UK MAR is an offshoot of EU MAR, divergence between the two regimes is likely to continue widening over time and affected firms will need to be ever more vigilant in understanding their respective obligations, both in the UK and in the EU.

INITIAL SCOPING ISSUES

It has never been easy to define the universe of in-scope activity, or to apply EU MAR and now UK MAR provisions across all asset classes.

In-scope activities

EU MAR was considered to be the natural evolution to the Market Abuse Directive (2003/6/EC) (MAD), expanding the universe of in-scope instruments to include not only those financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made, but also the financial instruments traded or admitted to trading on a multilateral trading facility (MTF) and financial instruments traded on an organised trading facility (OTF). The fact that large numbers of financial instruments are listed for trading on MTFs and OTFs without issuer consent or knowledge means

UK MAR and substantive market abuse offences

The Market Abuse (Amendment) (EU Exit) Regulations 2019 (SI 2019/310) set out the legal framework for market abuse and include three substantive market abuse offences:

- Insider dealing.
- Unlawful disclosure of inside information.
- Market manipulation.

It is also an offence to:

- Attempt to engage in insider dealing or market manipulation.
- Recommend that another person engages in insider dealing or induce another person to do so.

that under EU MAR and UK MAR the working assumption is that all instruments should be deemed in scope for the purposes of the market abuse prohibitions unless they can be definitively proved to be out of scope (see *box "UK MAR and substantive market abuse offences"*). The European Securities and Markets Authority (ESMA) maintains a list of in-scope financial instruments, although with the caveat that firms cannot rely on its accuracy.

EU MAR and UK MAR do not only capture financial instruments trading on a trading venue but can also touch on financial instruments traded off venue where the price or value of those financial instruments depends on, or has an effect on, the price or value of financial instruments trading, or admitted to trading, on an in-scope trading venue. The opacity of this definition continues to cause problems for compliance departments that want to establish and maintain market abuse policies, again resulting in many taking an expansive approach to instruments deemed to be in scope of the legislation; for example, the ability to trade products based on indices or baskets where the firm is in possession of inside information relating to one of the constituent elements, no matter how small that constituent element is.

Asset classes

Fundamentally, the market abuse regime was designed to apply to the public equity markets and much of the market practice, guidance and jurisprudence derives from this asset class. As a result, firms and their compliance personnel have a better understanding of the

application of the regime to public equity than for other asset classes.

The FCA has raised its concern on numerous occasions about the low level of Suspicious Transaction and Order Reports (STORs) received in respect of fixed-income asset classes (see *"STORs" below*). In issue 56 of the FCA's Market Watch newsletter dated September 2018, the FCA stated that the submission of STORs to notify potentially abusive transactions and orders across all asset classes is inconsistent and that volumes are low in fixed-income products (www.practicallaw.com/w-017-1761). The FCA also noted that the analysis of red flags is often too narrow: analysts are not looking at broader trading behaviour beyond the initial alert, and market abuse in these circumstances may only be detected when reviewing activity in correlated markets. The takeaway lesson is that firms with business in these asset classes still have more work to do in detecting and reporting suspicious activity. It is likely that the FCA will focus its supervisory attention on these markets.

FCA MARKET MONITORING

Since the introduction of EU MAR, the FCA's market monitoring capabilities have evolved considerably. The FCA monitors and receives information about potentially abusive trading through a number of core processes.

STORs

Under Article 16 of EU MAR and UK MAR, UK trading venues and firms that professionally arrange and execute transactions are required to submit STORs if they reasonably suspect

that a transaction or an order may constitute actual or attempted market abuse. Under UK MAR, STORs must be submitted to the FCA. The term “reasonable suspicion” in this context is not defined and there is no case law relating to STORs that has considered this term, but the threshold for suspicion in this context is generally considered to be low. Importantly, the FCA has confirmed that trading venues and firms are not required to definitively conclude or prove that market abuse has actually taken place in order for them to meet the reasonable suspicion threshold (www.fca.org.uk/publication/newsletters/market-watch-50.pdf).

The FCA publishes annual statistics regarding the number of STORs that it receives. From 2016 to 2018, the number of STORs submitted increased year-on-year. However, in 2019 and 2020 the number of STORs decreased year-on-year by a total of 33% (www.fca.org.uk/news/news-stories/fca-publishes-numbers-stors-received-2019; www.fca.org.uk/markets/suspicious-transaction-and-order-reports/number-stors-received-2020). In a speech delivered in March 2021, Mark Steward, Executive Director of Enforcement and Market Oversight at the FCA, attributed the decrease in STORs in 2020 to the FCA's actions in limiting trading by certain actors whose trading prompted high numbers of STORs and to potential compliance challenges posed by the COVID-19 pandemic (www.fca.org.uk/news/speeches/locking-down-market-abuse).

In 2019, the FCA also introduced a market observation form, which enables firms to submit information about observed market activity in respect of which they may not be required to submit a STOR. Firms can use this market observation form to, for example, notify the FCA about potentially suspicious market activity that they were not involved in and therefore do not have complete information about.

Proactive market monitoring

The FCA also proactively monitors market activity, including by conducting algorithmic analysis on market data. As recently as May 2021, the FCA explained its ability to conduct proactive market monitoring using order book data provided by trading venues, over which it runs surveillance algorithms that are designed to identify potentially abusive trading activity (www.fca.org.uk/publications/newsletters/market-watch-67). The FCA identified the conduct that led to its first enforcement

FCA enforcement action for market manipulation

In December 2020, the Financial Conduct Authority (FCA) took enforcement action against Corrado Abbattista, a portfolio manager, for recklessly engaging in market manipulation contrary to the Market Abuse Regulation (596/2014/EU) (EU MAR) (www.practicallaw.com/w-028-0579). Between 20 January and 15 May 2017, Mr Abbattista placed large orders for contracts for difference referencing the shares of five listed issuers, which he did not intend to execute. He placed the misleading orders on the opposite side of the order book to existing smaller orders, which he did intend to execute. The FCA found that, by placing the misleading orders, Mr Abbattista falsely represented to the market an intention to buy or sell, when his true intention was the opposite. This, in turn, gave false and misleading signals as to demand and supply because Mr Abbattista did not place the misleading orders with a genuine intention that they would be executed.

In March 2021, the FCA took enforcement action against a second individual for recklessly engaging in market manipulation contrary to EU MAR (www.practicallaw.com/w-030-7186). Adrian Horn was a trader at a bank. In a period of ten months, Mr Horn executed 129 trades across 68 days in the shares of an issuer that was also a client of his bank. The FCA determined that these trades were wash trades and that Mr Horn placed them in order to ensure that a minimum number of the issuer's shares were traded each day in the mistaken belief that this was a requirement for the issuer to remain a member of the FTSE All Share Index. The FCA found that Mr Horn had engaged in market manipulation as defined by EU MAR because, by executing the wash trades, he gave false and misleading signals as to the supply of, and demand for, the issuer's shares. In executing the wash trades, Mr Horn signalled to the market that there was genuine volume being traded in the issuer's shares when, in fact, this was not the case as there had been no change in beneficial interest as a result of the wash trades.

action against an individual for committing one of the three substantive offences under EU MAR, market manipulation, through this type of surveillance (www.practicallaw.com/w-028-0579).

Over the life of EU MAR and now UK MAR, the FCA has also developed a portfolio of metrics to assist in the measurement and assessment of market cleanliness; that is, the level of market abuse activities. The portfolio includes: the market cleanliness statistic, which pre-dates MAR; the abnormal trading volume metric, introduced in 2019; and the potentially abnormal trading volume ratio, introduced in 2020. Each is intended to help the FCA to identify instances of potential market abuse.

The FCA also now monitors short positions. Under the Short Selling (Amendment) (EU Exit) Regulations 2018 (*SI 2018/1321*), market participants are required to disclose to the FCA, net short positions of a certain size, referable to a percentage of the issued share capital of the relevant company and changes to short positions where they pass through a certain threshold. The FCA has already taken

enforcement action against a non-UK based asset manager for failing to comply with these notification obligations (www.practicallaw.com/w-028-4478).

As regards listed issuer disclosure obligations, the FCA's Primary Markets Monitoring team monitors market activity; that is, price movements, media, regulatory information services and other forums, on a real-time basis.

MARKET ABUSE ENFORCEMENT

The FCA's enhanced market monitoring capabilities have resulted in a significant increase in its number of open market abuse investigations. Between 2015 and 2020, the number of open FCA enforcement investigations into market abuse increased by 72% and in 2020 market abuse investigations represented 18% of the FCA's open enforcement investigations. The FCA's enforcement caseload in this area is split approximately 60:40 between insider dealing and market manipulation, which represents quite a significant shift as, until relatively recently, the FCA's enforcement caseload in

this area was almost exclusively dedicated to suspected insider dealing.

However, only a very small proportion of FCA enforcement investigations into suspected market abuse have resulted in enforcement action. In the last five years, the FCA has taken enforcement action against 12 firms or individuals for substantive market abuse offences. Only two of these cases have concerned offences committed under EU MAR (see box "FCA enforcement action for market manipulation").

Notwithstanding the lack of enforcement action under EU or UK MAR to date, tackling market abuse remains a key priority for the FCA. Although undertaking investigations, especially those concerning more complex trading techniques, may continue to be challenging, it is unlikely that these challenges will dampen the FCA's appetite for investigating potentially suspicious market activity that it identifies (see box "Impact of the COVID-19 pandemic").

LISTED ISSUERS

From a listed issuer perspective, the FCA has shown particular interest in two areas over the past five years through its public statements and enforcement activity:

- Management of inside information; that is, identification, control and disclosure.
- Share dealing by persons discharging managerial responsibilities (PDMRs).

While issuers should, by now, be familiar with their obligations under UK MAR and, in particular, how UK MAR regulates their conduct in relation to the management of inside information, the FCA has, more recently, increased its focus on the management, or mismanagement, of inside information in the context of an issuer's obligations under the Listing Rules and the FCA's Disclosure Guidance and Transparency Rules (DTRs) (see box "MAR requirements for listed issuers").

The FCA has placed a particular focus on the following principles and requirements:

- Listing Principle 1, which provides that a listed company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations.

Impact of the COVID-19 pandemic

2020 was almost unprecedented in terms of how much focus the Financial Conduct Authority (FCA) placed on market abuse. For example, the FCA made a total of 44 references to market abuse across almost a quarter of all speeches that its senior leadership team made during 2020, many of which, although not all, were linked to the COVID-19 pandemic.

The COVID-19 pandemic has led to a shift in the relative prevalence of certain market abuse risks, as well as a change to the circumstances in which these risks may arise. As Julia Hoggett, FCA Director of Market Oversight, summarised in a speech delivered in October 2020: "whilst the fundamentals of the market abuse offences are constant, the ways in which the risk may manifest are not" (www.fca.org.uk/news/speeches/market-abuse-coronavirus). Factors that have contributed to this shift include volatile and rapidly changing markets, and concerns about the appropriate handling of inside information, especially in an environment where the majority of firms' employees continue to work from home and there have been growing reports of employees using personal devices to communicate for work purposes (see feature article "Whistleblowing and remote working: out of sight not out of mind", www.practicallaw.com/w-029-6537 and News brief "Hybrid working after COVID-19: home is where the work is", www.practicallaw.com/w-031-0840). The FCA has also observed a significant uptick in personal account trading since March 2020, which has given rise to concerns about the extent to which employees may be misusing inside information that they are privy to as part of their roles and whether they are complying with their firms' personal account dealing policies.

The FCA has also warned in another speech in June 2020 that financial pressures on firms caused by the COVID-19 pandemic could tempt them to cut corners when it comes to their systems and controls, thereby increasing the likelihood of market abuse and other forms of misconduct (www.fca.org.uk/news/speeches/fca-response-covid-19-and-expectations-2020).

- Premium Listing Principle 6, which provides that a listed company must communicate information to holders and potential holders of its premium-listed securities and its listed equity shares so as to avoid the creation or continuation of a false market in those premium-listed securities and listed equity shares.
- Listing Rule 1.3.3 and DTR 1A.3.2R, both of which provide that an issuer must take reasonable care to ensure that any information that it notifies to a regulatory information service or makes available through the FCA is not misleading, false or deceptive and does not omit anything likely to affect the import of the information.

It is important, therefore, that issuers are alive not only to their obligations under UK MAR, but also their broader obligations under the Listing Rules and DTRs to ensure that they have in place adequate procedures, systems and controls for the purposes of identifying, controlling and disclosing inside information, and that information disclosed to the market

is done so in a manner that is clear and not misleading.

INSIDE INFORMATION

The FCA has shown particular interest in the areas discussed below.

Adequate policies and procedures

A common theme in recent FCA feedback is the focus on the adequacy of issuers' policies and procedures to facilitate compliance with disclosure obligations and control information to prevent market abuse.

A key component in this area is ensuring that an issuer has in place systems to escalate, identify and disclose inside information in a timely manner. While an issuer's disclosure committee has an important role to play in this process, it is also fundamental for the overall proper functioning of these systems that employees who may encounter inside information understand and follow the issuer's procedures for escalation of information to those responsible for categorising it. To this end, issuers should be ensuring that regular

training is provided to their employees on its systems and procedures for escalating information (see box “Controlling access to inside information”).

Precise information

Article 7(1)(a) of UK MAR (Article 7(1)(a)) provides that inside information is, among other things, information of a precise nature. In determining when inside information crystallises, it is frequently believed that the trigger for whether information is precise, for the purposes of Article 7(1)(a), is the event to which the information relates being “more likely than not”. This analysis is incorrect.

While accepting that the circumstances in which information will be considered precise will always be fact specific and must be analysed on a case-by-case basis, issuers may find it useful, in consultation with their external advisers, to consider the question by reference to a set of indicators or milestones tailored to the particular transaction. By way of example only, in the context of a potential acquisition or disposal, issuers may wish to assess the preciseness of the information by reference to considerations including:

- The extent of board involvement to date and to follow.
- The amount of diligence that has been undertaken and would still need to be undertaken.
- The status of transaction terms and documents.
- The need to involve external stakeholders, and the nature of their involvement.

Delayed disclosure

Once it has been determined that inside information exists, an issuer must disclose to the public inside information that directly concerns it as soon as possible (Article 17(1), UK MAR). Where appropriate, however, the issuer may delay disclosure of inside information to the public, provided that all of the following conditions are met:

- Immediate disclosure is likely to prejudice the legitimate interests of the issuer.
- Delay of disclosure is not likely to mislead the public.

MAR requirements for listed issuers

Companies with financial instruments admitted to trading on a regulated market in the UK are required by the Market Abuse (Amendment) (EU Exit) Regulations 2019 (SI 2019/310), the Disclosure Guidance and Transparency Rules and the Listing Rules to, among other things:

- Manage inside information.
- Distribute guidance to persons discharging managerial responsibilities who wish to deal in shares in the company, and monitor and control the timings of these dealings.
- Where appropriate, notify a regulatory information service of inside information and other information required to be disclosed.
- Ensure that the information so notified is not misleading, whether by omission or otherwise.

- The issuer is able to ensure the confidentiality of that information (Article 17(4)).

Where an issuer has delayed the disclosure of inside information, it must inform the FCA of that delay immediately after disclosing the information to the market.

ESMA has provided a non-exhaustive list of legitimate reasons to delay (the ESMA guidelines), which include prejudice to negotiations (including mergers, acquisitions and disposals) and protecting intellectual property rights until registered. While the examples are non-exhaustive, as the FCA identified in its November 2020 review of delayed disclosure of inside information, issuers need to exercise caution when delaying the disclosure of information that falls outside of the ESMA guidelines (www.fca.org.uk/publication/primary-market/pmb-31-review-delayed-disclosure-inside-information.pdf). The FCA examined notifications of delay and observed, in particular, that it was surprised at:

- The length of delay for publishing unscheduled financial information, suggesting that issuers are either failing to recognise information as being insider information at a sufficiently early stage or are failing to comply with the notification requirements of UK MAR where disclosure is delayed.
- The low volume of notifications related to delayed disclosure of periodic

financial information, suggesting that many issuers may be unaware of the current notification requirements under UK MAR and potentially how to identify and handle inside information arising from periodic financial information.

- The number of delays for publishing information relating to director or board changes, given that it is not a specified legitimate interest under the ESMA guidelines.

The FCA has confirmed that delayed disclosure of unscheduled financial information and director or board changes will be areas of focus for future monitoring.

SHARE DEALING

The FCA has shown particular interest in the areas discussed below.

Procedures and controls

Under Article 19 of UK MAR, PDMRs, and persons closely associated (PCAs) with them, must notify the issuer and the FCA of their transactions in the issuer’s financial instruments, and the issuer must disclose that information to the market within three business days (see Briefing “Disclosing PDMR dealings: compliance challenges”, www.practicallaw.com/w-024-1677). For the purposes of UK MAR, a PDMR is defined as a person who is:

- A member of the administrative, management or supervisory body of the issuer.

- A senior executive who is not a member of those bodies, and has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity.

UK MAR provides that disclosure of PDMR and PCA transactions is only required where that person's transactions exceed €5,000 in value in a calendar year. While the de minimis threshold in relation to small transactions might ease the disclosure obligations, operating it arguably increases the administrative burden. Many issuers therefore prefer to ignore the threshold, at least for internal notifications, so as to better monitor transactions, and may continue to disclose to the market all PDMR and PCA transactions.

From 29 June 2021, owing to changes implemented under the Financial Services Act 2021, issuers will be required to disclose the details of a transaction by a PDMR or a PCA involving its financial instruments within two working days after receiving notification of the transaction from the PDMR or PCA. This change is expected to assist with difficulties currently faced by issuers in complying with their reporting obligations, which, under the current regime, are challenging when a PDMR or PCA notifies an issuer of a transaction on the third business day after the transaction, which is also the deadline for the issuer's own reporting obligations.

It is also important to note that the UK MAR dealing disclosure obligations run in parallel with an issuer's disclosure obligations under the DTRs where, if the relevant thresholds are met, disclosure is required within two business days of the increase or decrease in question.

Restrictions on dealing

Under UK MAR, PDMRs are prohibited from trading in the financial instruments of the issuer during closed periods; that is, the period of 30 days before the publication of preliminary, annual and half-yearly results. Issuers frequently adopt their own internal closed periods, in addition to those mandated by UK MAR.

In addition to preventing PDMR dealing during UK MAR closed periods, as part of the clearance process, issuers need to consider

Controlling access to inside information

Financial services firms and listed issuers must have adequate controls in place to manage inside information, once identified, including to ensure that access to that information is properly limited to those who require access for the proper execution of their duties.

For example, the Financial Conduct Authority (FCA) has highlighted the need for firms to limit access to inside information to employees who actually require access to it in order to perform their responsibilities and to ensure that those employees are included in relevant insider lists (www.fca.org.uk/publication/newsletters/market-watch-60.pdf). Firms that fail to do so increase the risk of inside information that they are privy to being misused or disclosed unlawfully to third parties and, in turn, expose themselves to the risk of being caught up in FCA investigations into suspected market abuse. These situations can also result in firms' own arrangements relating to the control of inside information being subjected to regulatory scrutiny and, in extreme cases, potentially also standalone enforcement action.

whether any proposed dealing constitutes insider dealing. Employees and directors must be aware that, to the extent that they have inside information with respect to any financial instruments, and they acquire, dispose of, or attempt to acquire or dispose of, those financial instruments, there is a rebuttable presumption under UK MAR that they have used that information to deal. While UK MAR sets out various legitimate behaviours, issuers should approach with caution any request to deal at a time when there exists inside information.

Given the risks associated with PDMR and PCA dealings, and for the purposes of ensuring that issuers have established and maintain adequate procedures, systems and controls, in accordance with Listing Principle 1, it is important that PDMRs are provided with regular training on their obligations and those of their PCAs in relation to dealings.

LISTED ISSUER ENFORCEMENT

The FCA has enjoyed only modest success in taking enforcement action against listed issuers and those who work for them when compared to the actions taken against firms and individuals for substantive market abuse offences (see *"Market abuse enforcement" above* and box *"FCA enforcement action relating to listed issuers"*).

However, the issues on which the FCA has taken enforcement action against listed issuers are similar; that is, the identification, control and disclosure of inside information, and dealings by PDMRs (see *"Inside information" and "Share dealing" above*).

The COVID-19 pandemic has had a significant impact on a number of issuers' financial performance, which has led to issuers releasing a significant number of profits warnings. It is anticipated that the FCA will be scrutinising the circumstances that led to a number of these profits warnings in order to ensure that issuers announced inside information to the market in a timely way in accordance with their obligations under EU MAR and, subsequently, UK MAR.

WHAT NEXT FOR UK MAR?

There has been no shortage of activity in relation to, and regulatory focus on, EU MAR over the last five years, and, more recently, as regards UK MAR. This level of activity and regulatory focus shows little sign of waning, with a number of developments on the horizon for UK MAR.

Cryptoassets

The impetus behind the introduction of EU MAR was to update and strengthen the framework under MAD by extending the scope of the market abuse regime to new markets and trading strategies. In the intervening period, innovation in the financial markets has continued and the emergence of new products continues to raise the question of whether these products should be subject to the provisions of MAR.

One example concerns cryptoassets, an area of focus that ESMA did not cover in its review of MAR published in September 2020 (www.practicallaw.com/w-028-0543; see box *"The Market Abuse Regulation review"*). The FCA considers there to be three types of

tokens: security tokens, e-money tokens and unregulated tokens. Of these, only some (and not all) security tokens would be in scope for EU MAR and UK MAR. Commodities under EU MAR and UK MAR do not include intangible items so cryptoassets cannot be considered to be a commodities contract subject to the market abuse prohibitions attaching to activity in spot commodities contracts.

As a result, many cryptoassets fall outside of the scope of EU MAR and UK MAR, even though they can be traded in a way that undermines market integrity and investor protection. However, it should be noted that UK-regulated financial institutions that deal in cryptoassets in a manner ancillary to their regulated activities could find those activities falling within the ambit of the FCA's Principles for Businesses, which, among other things, require firms to observe proper standards of market conduct and the FCA's Individual Conduct Rules, which impose the same obligation on individuals.

Operators of regulated markets, MTFs and OTFs are obliged to establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. However, many cryptoasset exchanges fall outside of the regulatory perimeter and are not subject to these requirements. Consequently, there is variability across cryptoasset platforms as to approach on market surveillance and taking steps to prevent abusive practices.

The potential for abuse is further exacerbated by the fact that certain cryptoasset markets are concentrated, and trading practices could result in the abuse of a dominant position. There is also a high incidence of automated trading, including through the use of automated bots and algorithmic trading strategies.

In terms of the future, individual states are consulting, or otherwise considering, bespoke national regimes. In the UK, in January 2021, the Treasury launched a consultation on the regulatory approach to cryptoassets and stablecoins which includes aspects relating to maintaining market integrity (www.gov.uk/government/consultations/uk-regulatory-approach-to-cryptoassets-and-stablecoins-consultation-and-call-for-evidence). The EU's legislative proposal on markets in cryptoassets, provides for a market abuse regime that mirrors the market abuse rules for financial services and activities (the

FCA enforcement action relating to listed issuers

In 2017, the Financial Conduct Authority (FCA) took its first enforcement action against a listed issuer under the Market Abuse Regulation (596/2014/EU) (MAR) (www.practicallaw.com/w-012-9084). It publicly censured and fined an AIM-listed company for late disclosure of inside information relating to a change in its investment in another company, which constituted inside information contrary to Article 17(1) of MAR.

The FCA took action against another issuer in 2019 for failures that led to a delay in it disclosing inside information to the market about its financial performance (www.practicallaw.com/w-021-3791). However, instead of taking enforcement action under MAR, the FCA found that it had breached certain of the Listing Principles, the Premium Listing Principles and the Disclosure Guidance and Transparency Rules. In particular, the FCA focused on the issuer's failure to maintain adequate procedures, systems and controls for monitoring its financial performance in a way that would allow it to identify inside information. The FCA also took enforcement action against the issuer's CEO and finance director for being knowingly concerned in the issuer's breaches.

In 2019, the FCA took action against an individual, Kevin Gorman, for breaching Article 19(1) of MAR (www.practicallaw.com/w-023-7599). Mr Gorman was a senior executive who worked for an issuer that is listed on the Main Market of the London Stock Exchange and, even though he did not sit on the issuer's board, he was classified by the issuer as a person discharging managerial responsibility for the purposes of MAR because, as a result of his role and seniority, he was considered as having, or being likely to have, regular access to inside information about the issuer. On three separate occasions, Mr Gorman sold shares in the issuer; the third sale occurred shortly before the issuer announced its financial performance to the market, which led to the issuer's shares falling in value by 20%. Mr Gorman had failed to notify the issuer or the FCA about these trades, which led to the FCA finding that he had breached Article 19(1) of MAR on three occasions.

proposed regulation) ([https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2020\)593&lang=EN](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2020)593&lang=EN)). The proposed regulation, which is also known as MiCA, imposes an authorisation requirement on cryptoasset services providers; that is, those that wish to provide services including custody, trading, exchange and brokerage. It also seeks to establish market abuse rules for cryptoasset markets.

Under the proposed regulation, cryptoassets that are admitted to trading on a cryptoasset trading platform operated by a cryptoasset service provider would be in scope. The proposed regulation provides for a disclosure of inside information regime, as well as prohibitions on insider dealing, unlawful disclosure of inside information and market manipulation. In contrast with the regime under EU MAR, member states are not obliged to impose criminal sanctions for violations of the market abuse rules, although they may do so if they choose, as they are only obliged to impose administrative sanctions and other administrative measures.

Retail trading

Against the backdrop of high-profile collective retail trading activity organised through social media in the US, the FCA has observed a significant increase in recent years, noticeably during periods of lockdown during 2020 related to the pandemic, in the number of active retail trading accounts in the UK.

This trend has prompted sharpened regulatory focus from the FCA on retail trading and the risk that employees of financial services firms and listed issuers may misuse inside information that they are privy to through their roles for personal benefit. As a result, firms have been put on notice as to the importance of them having adequate policies, procedures, training programmes and monitoring arrangements in place to mitigate the risk of misconduct in this area.

ESG-related disclosures

The FCA recognised in a technical note published in December 2020 that environmental, social and governance (ESG)-related disclosures may engage the

The Market Abuse Regulation review

In September 2020, the European Securities and Markets Authority (ESMA) published its review (the review) on the Market Abuse Regulation (596/2014/EU) (EU MAR).

The European Commission (the Commission) was obliged to submit a report (the report) to the European Parliament and to the Council by 3 July 2019 on the application of EU MAR, together with a legislative proposal to amend it if appropriate. The report was required to assess, among other things:

- The appropriateness of introducing common rules on the need for all EU member states to provide for administrative sanctions for insider dealing and market manipulation.
- Whether the definition of inside information is sufficient to cover all information relevant for competent authorities to effectively combat market abuse.
- The appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11) of EU MAR and whether there are any further circumstances under which the prohibition should apply.
- The possibility of establishing an EU-wide framework for cross-market order book surveillance in relation to market abuse, including recommendations for that framework.
- The scope of the application of the benchmark provisions in EU MAR.

The Commission did not submit the report by 3 July 2019 but instead formally requested technical advice from ESMA. ESMA consulted on all of the topics listed above, along with a number of additional items that were raised in the Commission's letter. The review concluded that, overall, EU MAR has worked well in practice and is fit for purpose. ESMA has nevertheless proposed certain targeted amendments to EU MAR, as outlined below. The Commission will consider the review as it prepares the report.

Scope. ESMA's final decision is to withhold from making any changes on whether spot foreign exchange should be in scope of EU MAR at the moment but to revisit this point at a later time, once the foreign exchange global code has been revised. It is expected that scoping issues will form a key area of focus for lobbying to the Commission by market participants.

Benchmarks. ESMA considered whether the EU MAR prohibition against manipulating the calculation of a benchmark is compatible with the Benchmarks Regulation (2016/1011/EU), which came into force after EU MAR. ESMA concluded that EU MAR and the Benchmarks Regulation are complementary regimes, although they address different concerns relating to benchmarks, and that there is sufficient alignment between the definitions of a benchmark in EU MAR and the Benchmarks Regulation as they both cover approximately the same universe of benchmarks.

ESMA also proposed that EU MAR should extend its sanctions to include manipulation by the administrators of benchmarks.

Buyback programmes. Currently, issuers are required to report each transaction to the competent authority of all trading venues of which the shares are admitted to trading or traded. ESMA has recommended relaxing this requirement and suggested that issuers should need to report a share buyback to one trading venue only, which would be the most relevant venue in terms of liquidity, in the case of multiple listings. ESMA also proposed reducing the amount of information that must be reported.

Inside information. ESMA concluded that the definition of inside information is sufficiently broad to combat market abuse, and that it would not be helpful to try to change it, except for one proposed amendment to Article 7(1)(d) of EU MAR relating to information conveyed by a client about their orders. As any material changes could have unintended consequences, ESMA took the view that guidance on specific scenarios may be more helpful to issuers, as it could enhance clarity on concrete and recurring issues they face.

Market soundings. ESMA recommended that Article 11 of EU MAR should be amended to: make it clear that the market soundings regime is compulsory for disclosing market participants; provide additional sanctions for violations of the market soundings requirements; and simplify certain aspects. The clarification by ESMA that the market soundings regime is mandatory is likely to be another key area of focus for lobbying to the Commission by market participants.

Insider lists. ESMA concluded that insider lists remain a key tool for investigating possible market abuse infringements, as well as providing other benefits such as being helpful for issuers to manage the flow and confidentiality of inside information. ESMA therefore proposed keeping the insider lists regime, with a number of minor amendments. For example, although ESMA still considers that insider lists should only include persons who have actually accessed information, it concludes that the list could include persons who, to the best of their knowledge, have effectively accessed a piece of information. Where anyone is in doubt about whether someone had effective access, ESMA considers the inclusion of persons who could potentially have accessed a piece of information in the insider lists as acceptable.

PDMRs. ESMA concluded that the exemptions set out in Article 19(12) of EU MAR that allow trading by persons discharging managerial responsibility (PDMRs) in a closed period should be extended to cover other situations. For example, ESMA recommends that the exempted employees' schemes should include those concerning financial instruments other than shares. ESMA has also suggested an exemption for corporate actions approved by the board or other relevant body and the shareholders, provided that PDMRs are not treated advantageously to other parties and there is no inside information about the relevant corporate action during the closed period.

Listing Rules, DTRs and UK MAR (www.practicallaw.com/w-029-3215; www.fca.org.uk/publication/primary-market/tn-801-1.pdf). In particular, the FCA has stated that:

- Climate-related risks and opportunities are widely understood to be financially material to the assets of many issuers.
- Other ESG-related risks and opportunities are also likely to be financially material to many issuers.
- Accordingly, issuers should consider ESG matters carefully when determining what should be disclosed, including on an ongoing basis, pursuant to the Listing Rules, DTRs and UK MAR:
 - in relation to announcements and financial reporting; and
 - on an event-driven basis, given that issuers must inform the public as soon as possible of inside information which directly concerns them.

The FCA suggests that issuers should consider developing specific systems, analytical instruments or organisational arrangements to collate and assess the information required to enable compliance with disclosure obligations (*see feature article "Managing ESG compliance: challenges for UK listed companies"*, www.practicallaw.com/w-025-9225). In addition, the FCA has queried whether there is a need for issuers to access and draw on specific data sources when disclosing climate-related and other ESG-related risks and opportunities.

While the impact of climate-related and other ESG-related risks and opportunities will be more pronounced for some issuers than others, the obligation to disclose and standards for disclosure of this information

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on a periodic and event-driven basis applies to issuers equally. As investors become increasingly focused on ESG issues and enhanced reporting requirements, it will also become increasingly important for listed companies to have systems in place and access to data sources to enable tracking of progress against stated objectives and goals and to analyse the impact of climate and ESG-related policies.

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