

Market Abuse Regulation

for Main Market companies and corporate financiers

November 2016

Part 3: Restrictions on dealings and disclosure of PDMR dealings

What is MAR?

The EU Market Abuse Regulation (MAR)¹ replaced the Market Abuse Directive (MAD) with effect from 03 July 2016. As MAR is a regulation it has direct effect in the UK. MAR is supplemented by additional rules which are set out in EU Implementing Regulations and Delegated Regulations and ESMA Guidance.

The EU Commission has also adopted a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation but the UK has opted out of this Directive, and it has not therefore been implemented in the UK.

From 03 July 2016, companies have to refer to MAR and the supplemental EU legislation for the specific rules as they are no longer set out in UK legislation or the FCA Handbook. The amended FCA Handbook has signposts to the relevant EU provisions only and does not replicate the MAR text; the Disclosure Rules provide guidance only instead of being specific rules and the Model Code has been deleted.

Companies had to:

- Review their share dealing policies to ensure they were MAR compliant and reflect the deletion of the Model Code.
- Provide training to persons discharging managerial responsibilities (PDMRs) (which includes directors) and other relevant employees on the new rules.

See our "[Market Abuse Regulation Knowledge Centre](#)" for more information on MAR.

¹ [Regulation \(EU\) No. 596/2014](#)

Persons discharging managerial responsibilities (PDMR) (Article 19)

1. Requirement to notify transactions

PDMRs and persons closely associated with them have to notify the company and the competent authority of all transactions conducted on their own account relating to shares or debt instruments of the issuer or to related derivatives or other financial instruments.

This is wider than the pre-03 July UK requirements in DTR 3 as MAR extends the disclosure obligation to include transactions relating to debt instruments (and related derivatives or financial instruments) whereas DTR 3 only applied to shares (and related derivatives/financial instruments).

The definition of a PDMR has not changed and is still a director or any other senior executive who has regular access to inside information, relating directly or indirectly, to the company and the power to take managerial decisions affecting the company's future developments and business prospects.

A 'person closely associated' is broadly the same as a connected person and includes: a spouse or civil partner; children under 18; a relative who has lived in the same household for a year; and a legal person, trust or partnership that is connected.

2. Transactions that have to be notified

MAR includes a non-exhaustive list of transactions that must be notified, such as:

- pledging or lending of a financial instrument by or on behalf of a PDMR or person closely associated,
- transactions on behalf of the PDMR or person closely associated, including where the third party has full discretion; and
- transactions under a life insurance policy.

A delegated regulation² includes a much longer, non-exhaustive list of transactions that have to be notified.

MAR extends the disclosure obligation to include transactions executed by a third party exercising discretion, including where there is no instruction from the PDMR or person closely associated. For example, a transaction conducted by a discretionary portfolio manager, subject to certain exceptions related to securities held in collective investment undertakings.

MAR also extends the notification obligation to other transactions where no action is required by the PDMR. For example gifts, donations, and inheritance received, automatic conversion of financial instruments; and the automatic vesting of share awards.

² [Commission Delegated Regulation \(EU\) 2016/522 of 17 December 2015.](#)

3. Information to be disclosed

MAR specifies the information that has to be included in the notification from the PDMR or person closely associated.

An implementing regulation³ includes the template for the notification that has to be used. This has to be sent electronically.

This information is virtually identical to that already required under DTR 3.1.3

If the FCA is the company's competent authority, the notification by the PDMR or person closely associated has to be made using an online form which is available on the FCA's website.⁴

4. Timing of notification

The notification by the PDMR (and persons closely associated) must be made promptly and no later than three business days after the date of the transaction.

The issuer has to publish that information within the same three business days.

This has reduced the time period for disclosure by PDMRs (and persons closely associated) as, in the UK, pre-03 July 2016 the PDMR (and any connected person) had to notify the issuer within four business days of the day when the transaction occurred.

It has also changed the notification period for the company as it now runs concurrently with the PDMR's notification period. (Pre-03 July 2016 the company only had to make a notification by the end of the business day following the receipt of the PDMR's notification.) Most companies are therefore requiring PDMRs to notify their transactions to the company within one or two business days of the transaction to allow the company sufficient time to meet its obligations.

5. Minimum threshold before disclosure is required

MAR introduces an annual financial threshold of €5,000 per year for all transactions which has to be reached before any notification is required. Every subsequent transaction then has to be disclosed regardless of the amount. Member States can increase this threshold up to €20,000.

ESMA Guidance provides that where the currency of a transaction is not Euros the exchange rate to be used to determine whether the threshold has been reached is the applicable official daily spot foreign exchange rate at the end of the business day when the transaction is conducted.⁵

This is a new exemption. The FCA has set an annual threshold of €5,000. Issuers can, however, disclose transactions voluntarily if they want and some companies are choosing to ignore the threshold and require disclosure of all transactions.

6. PDMR list and notification

Companies must:

- inform PDMRs in writing about their obligations; and
- keep a list of all PDMRs and persons closely associated with them.

PDMRs themselves have to provide written notice to persons closely associated with them of their obligations and keep a copy of this notification.

This is a new requirement which should be included in the company's share dealing policy and procedures.

³ [Commission Implementing Regulation \(EU\) 2016/523 of 10 March 2016.](#)

⁴ [Copy of FCA notification.](#)

⁵ [ESMA Q&As \(26 October 2016\).](#)

7. Restrictions on dealings

PDMRs are restricted from carrying out any transactions on their own account or for the account of a third party, directly or indirectly, relating to shares or debt instruments of the issuer or to related derivatives or other financial instruments during a 'closed period' unless an exception applies.

The MAR closed period is 30 days before the announcement of an interim or year-end financial report (which includes quarterly and half yearly reports) which the company has to make public under the rules of the trading venue where the company's shares are admitted to trading or under national law.

Where a transaction does not fall within a MAR closed period or is exempt PDMRs still have to consider whether it would constitute insider dealing and is not permitted.

The Model Code restricted a, PDMR from dealing during a "prohibited period" which included both:

- a close period before financial statements are published; and
- any period where there is any inside information in relation to the company concerned,

unless exceptional circumstances applied.⁶

PDMRs also had to seek clearance for any dealing, not just a dealing during a prohibited period.

The FCA have however deleted the Model Code,⁷ and, from 03 July 2016, PDMRs are only restricted from dealing during a MAR closed period subject to certain exceptions.

ESMA have clarified that publishing a preliminary announcement of results ends a MAR closed period if the announcement includes all key information relating to the financial figures expected to be included in the year-end report. If the information changes, it will not trigger another closed period but will need to be addressed in accordance with Article 17 (disclosure of information).⁸

There is no MAR equivalent to the Model Code requirement to obtain clearance to deal but most companies are still requiring clearance to deal and the pro forma share dealing code published by ICASA, the Quoted Companies Alliance and the GC 100 envisages that clearance to deal will still to be obtained.

There is also no MAR equivalent to the Model Code requirement for PDMRs to seek to prohibit dealings by their persons closely associated during a prohibited period but again some companies are still requiring this in their share dealing codes.

⁶ Chapter 9 of the Listing Rules (pre-03 July 2016)

⁷ [FCA PS 16/13](#) The FCA concluded that their original proposal to continue to require PDMRs to obtain clearance to deal at all times (whether or not in a MAR closed period), by requiring premium listed companies to maintain effective systems and controls that require PDMRs to obtain clearance to deal, which would have resulted in premium listed companies having to comply with two dealing codes, would be unnecessarily onerous for both issuers and PDMRs.

⁸ ESMA Q&As (26 October 2016).

9. Is the definition of 'transactions' which are restricted in a MAR closed period the same as for notifications?

MAR only has one definition of transaction and therefore it is. This does not, however, mean that a transaction that has to be notified by a PDMR or person closely associated is restricted and vice versa.

MAR provides that transactions which are prohibited during a MAR closed period must have been "conducted" by the PDMR in that period. It is therefore arguable that some action is required by the PDMR, whereas all transactions have to be notified, including ones where no action is required by a PDMR.

Transactions by discretionary investment managers may therefore not be caught but this has yet to be clarified.

As a result of the uncertainty about this there are also various concerns about the extent to which PDMRs can participate in trading plans and dividend reinvestment plans during a MAR closed period. There are also concerns about continuing to deal in shares in connection with share or saving schemes in a MAR closed period⁹.

9. What are the exceptions to the 'closed period'?

The exceptions include:

- on a case by case basis, there are exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or
- certain transactions made under or relating to an employee share or saving scheme or qualification or entitlement of shares; or
- transactions where the beneficial interest of the securities does not change, and

the PDMR can demonstrate that the particular transaction can only be executed during the closed period and not at any other time¹⁰.

10. Exceptional circumstances

The delegated regulation¹¹ provides that, where a PDMR is relying on the first exception - exceptional circumstances which requires the immediate sale of shares - he/she will have to provide a reasoned written request to the issuer asking for permission to sell during the closed period.

The written request has to describe the proposed transaction and provide an explanation of why the sale of the shares is the only reasonable alternative to obtain the necessary financing.

The issuer has to decide each case individually. Circumstances are considered to be exceptional if they are extremely urgent, unforeseen and compelling and their cause is external to the PDMR who has no control over them.

⁹ See MAR Q&A published by the City of London Law Society and Law Society Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code.

¹⁰ Commission Delegated Regulation (EU) 2016/522 of 17 December 2015.

¹¹ Commission Delegated Regulation (EU) 2016/522 of 17 December 2015.

MAR

The issuer must take into account the following non-exhaustive indicators:

- the extent to which the PDMR is facing a legally enforceable financial commitment or claim; and
 - the extent to which the PDMR has to fulfil or is in a situation entered into before the start of the closed period and which now requires a sum be paid to a third party, including a tax liability, and cannot reasonably satisfy a financial commitment or claim by means other than the immediate sale of shares.
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