

The EU Market Abuse Regulation, where does it leave us?

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Introduction

Most of the Market Abuse Regulation (“the Regulation”) came into force from 3rd July 2016, whilst in the rest of the EU the European Directive on Criminal Sanctions for Market Abuse also came into effect. In the UK the latter has not been adopted as the area was already covered by a range of criminal laws such the existing insider dealing laws, sections 89 – 91 Financial Services Act 2012, the Fraud Act 2006 and the offence of conspiracy to defraud². The purpose of the new Regulation was to create a level playing field across the EU and thus avoid regulatory arbitrage whilst continuing with the aim of protecting the integrity of the financial markets and to enhance investor confidence based on the assurance that investors will be placed on an equal footing and be protected from the misuse of inside information by those who possess it.³

The Regulation itself⁴ makes a number of predications, not all of them necessarily consistent, stating that the purpose of the Regulation is to preserve market integrity, avoid potential regulatory arbitrage, ensure legal accountability, provide for more legal certainty and less regulatory complexity for market participants. It also provides for a widening of the law to cover trading facilities which previously operated outside the law and benchmarks. These are multilateral trading facilities (MTFs)⁵ and organised trading facilities (OTFs)⁶ which are discussed below. In addition, OTC⁷ contracts which are only traded privately are also

intended to be included where market abuse could impact on the contract. The time at which the law can have an impact is brought forward and now activates at the point at which an application to trade is made.⁸

This article seeks to analyse the issues arising from the new Regulation and the uncertainty left by both parts of the wording and the unwillingness of ESMA⁹ and the FCA to provide clearer guidance. This will be done by examining the wording of the relevant parts of the Regulation and the limited guidance that has been provided on it. The impact on research, managers' disclosure requirements, chinese walls and investment advice are all considered to the extent necessary to illuminate the position under the new Regulation. Those cases and enforcement actions that assist in interpretation are also considered and this article thus considers the content and effects of the Regulation and the impact which it has on those operating in the market place.

The new law is based on the definition of "*financial instrument*" in the Markets in Financial Instruments Directive II (MiFID II)¹⁰ which is wider than its predecessor (see below),¹¹ and there are also revisions to the stabilisation¹² and buy back regulations¹³. Stabilisation must involve the price being kept between certain limits and must only be carried out for a limited period of time, with disclosure of relevant information. Buy backs must involve full details being disclosed prior to the start of trading, reports being made to the relevant authority and with subsequent disclosure to the public. In addition, certain types of high frequency trading and abusive algorithms are banned because of their potential for abusing markets.

In terms of its content the Regulation replaces¹⁴ the pre-existing market abuse regime in the UK which consisted of s. 118 and s.123 (1) Financial Services and Markets Act 2000 (FSMA) with the criminal offences of insider dealing¹⁵, unlawful disclosure¹⁶ and market manipulation¹⁷ with regard to a "*financial instrument*". As mentioned, in some respects the

definition has a wider meaning than under the preceding law and also has a wider scope, but on the other hand the ‘misleading statements’ and ‘market distortion’ elements of the preceding law appear to have been repealed. This will be discussed later. The existing criminal laws relating to insider dealing¹⁸ are still in place in the UK but in addition the connected FCA rules have been replaced and changes made to the FCA rules at Chapters 2 and 3 together with the Disclosure and Transparency Rules and the amended Code of Market Conduct (MAR).¹⁹ It should be added that issuers whose securities have been admitted to trading on an MTF, but no other market in the EU, without their consent are still subject to the EU market abuse, insider dealing and market manipulation laws but not to the disclosure, insider lists and the directors’ and senior officers’ transaction rules. Matters become more complex if such an issuer then engages in own account dealing in relation to the investments as the insider dealing laws will potentially import.

The Regulation covers financial instruments that are traded or for which a request to trade has been made on an MTF, an OTF or a derivative where the price depends on one of the above. Essentially it extends the scope of the law in this area to new markets and platforms and extends the range of behaviour caught by the law. In particular it has resulted in significant new disclosure and compliance requirements. The Regulation also expands the reach of some of the EU rules to markets that previously operated outside the EU’s market abuse regime, such as the Irish Stock Exchange’s exchange-regulated section, those of the Luxembourg Stock Exchange Euro MTF Market and London’s AIM.²⁰ The reason that this matters is that they have been heavily used by non EU residents such as those in the United States and Latin America for cross border debt listings.²¹

ESMA has issued a series of non-exhaustive guidelines in relation to the Regulation dealing with the definition of inside information on commodity derivatives in relation to commodity derivative markets and related spot markets. There are guidelines on the legitimate interests

of issuers and the situations where inside information cannot have its disclosure delayed because of the risk of misleading the public. Finally, there are guidelines on market soundings,²² setting out the factors and steps that must be taken into account as well as the relevant record keeping rules that apply where information is disclosed as part of an information sounding regime. It is unfortunate that these do not go into greater depth and clarity.

Types of the offence

Insider dealing

This occurs where a person who is in possession of inside information uses that information to buy or sell financial instruments to which the information relates. This will encompass using the information to change or cancel an order. Under the FCA's Market Abuse Regulations it includes information that an offeror or potential offeror is going to make for a target and information that either party may obtain through due diligence.

Unfortunately, rather than engage in a clear set of legal definitions regarding the meaning of the categories of market abuse, the Regulation provides a rather slight one. The FCA has tried to compensate for this by providing a range of practical examples of varying degrees of quality and usefulness. It might have been more helpful to indicate the extent to which the pre-existing enforcement actions and cases would still be regarded as offences under the new regime.

Examples that the FCA indicates as determining whether or not insider dealing is taking place include the following²³: a director of a company tells a friend socially that he has received a takeover offer at a premium to the current share price and the person he has told then enters into a spread bet by reference to that price; an employee discovers that his firm have lost a

major contract and before this is made public he sells his shares in the company. It covers a dealer on a firm's trading desk accepting a very large order from a client buying an oil futures deliverable at a stated time. Before doing this the trader takes a long position (buys) on both the firm's and his own behalf expecting to profit from the client's trade. Both would be insider dealing. It would also be insider dealing where someone trades on inside information on equities in a company or in a commodity futures based on information disclosed to them under the rules of the market.

Other examples given by the FCA of insider dealing are: front running,²⁴ an offeror in a takeover entering into a transaction on the basis of inside information that provides a purely economic exposure to movements in the price of the target company's shares, eg, spread betting on them. Finally, it covers an offeror trading for personal benefit in a financial instrument affected by the inside information. Thus there is no real movement from the pre-existing UK law on insider dealing and in any event in the past the enforcement actions and prosecutions have tended to be for straightforward equities trading on the basis of inside information.

Inside information

“Inside information” is defined in the Regulation at Art 7.2 and the definition²⁵ is very similar to the old law. The information must be of a precise nature, not have been made public, relate to one or more issuers or instruments and if it were made public it should have a significant effect on prices or related derivatives. It does not seem to be relevant that it is not possible to tell which way the market will move. In this respect the law seems to have overruled **Jean-Bernard Lafonta v Autorité des marchés financiers** (2015)²⁶ where it was held that the direction of a price movement following the release of inside information to the

market should be predictable for the offence to take place. This is no longer the case. The most obvious change is that the law now catches inside information for spot commodity contracts and the use of inside information to vary or terminate an existing order. It also stops those possessing inside information from utilising it when dealing in financial instruments, or attempting to do so, or recommending or inducing someone else to enter into contracts of the basis of it.

If a reasonable person would or should have realised that it was inside information then the regulations treat it as though it was. What exactly this will amount to was dealt with in the **Hannam** case (2014)²⁷ and on this point the analysis in the case still seems pertinent to the current law regarding whether the inside information is likely to affect market prices. As far as “likely” is concerned “We²⁸ agree.....that this passage says no more than the unremarkable proposition that ‘likely’ means something between 5% probable and 95% probable.” The Tribunal continued “the litmus test is whether a reasonable investor would be likely to take the information (we add: information which, of course, must be capable of having an effect on price) into account in deciding what to do....The information must be sufficiently material that it may have an effect on his decisions. That is the sort of information which must be made public in a transparent market and which must not be disclosed to a limited group of people without good reason.”²⁹ They added that “an insider cannot do what the issuer itself could not do: ie, cannot....validly claim to be able to disclose inside information without a duty of confidentiality being imposed on the recipient.”³⁰

Some decisions that could impact on the price of investments involve protracted steps and these can be ‘precise’ within the meaning of the Regulation provided that the information concerned is specific enough to cause those who have heard it to draw conclusions regarding the potential price of an investment. The matter was discussed by the European Court of Justice in **Markus Geltl v Daimler AG** (2012)³¹ The Advocate General, Megozzi said with

regard to this case³² that the value of investments is not necessarily affected by one factor but by a series of events which may take place over a period of time. In any particular case the court or tribunal will need to decide at which stage the facts should have been publicly known. Unfortunately, the Court did not give specific guidance on the key issue of when public announcements should have been made although in many cases this will be determined by the rules of the exchange on which the investment is traded. In the case of OTC contracts the matter is less clear and will depend on the exact facts.

Art 7.4 of the Regulation introduces the “*reasonable investor*” test which was already part of the previous UK law.³³ Recital 14 assumes that such a person makes decisions on the basis of the information that is available to them. Elements that are taken into account in determining this include the likely impact, the information he will have on the issuer’s activities, how reliable that information is and any relevant market variables.

Turning to the question of what inside information is; under the new Regulation one example given by the FCA³⁴ is that before the publication of LME stock levels a metal trader discovers from an insider that aluminium stocks have significantly reduced. The trader then buys a significant number of aluminium futures. Another FCA example relates to commodity derivatives³⁵ is that of information of a precise nature which has not yet been made public, relating to such derivatives or related spot prices where it is reasonably expected that it would be released or is required to be. This may be because of the rules of a market, contractual practice or custom. Another example is given in relation to emission allowances or auctioned products it is information of a precise nature which has not been made public, relating to such instruments and which if it were made public would be likely to have a significant effect on their prices or those of related derivatives. There are exceptions³⁶ for political bodies acting in pursuit of monetary, exchange rate or public debt management.

Unlawful disclosure

If someone possesses inside information and unlawfully discloses it to anyone else then it is an offence unless the release is part of the normal exercise of a professional duty. The general disclosure obligation requires issuers to notify the public as soon as possible concerning inside information that affects them³⁷ in a way that enables it to be quickly accessed by the public for accurate, complete and timely assessment. In cases where the instrument is limited to trading on a regulated market the issuer must make sure that the information is made available in the prescribed way to the official storage system and post it on their website and update it for a minimum of five years displaying the disclosable inside information.

Disclosure must be made if it becomes subject to market rumour. This prompt disclosure principle brings the law into line with many overseas countries. Both the NYSE and NASDAQ have such requirements as do many Latin American countries.³⁸

There may be circumstances where the issuer cannot make the information publicly available straight away. Reasons for this that are acceptable are³⁹: where it is likely to prejudice the issuer's legitimate interests, where the delay is not intended to mislead the public and it is kept confidential. There are processes in ESMA's implementing technical statements⁴⁰ that must be followed, including retaining the dates and times when the inside information first existed and when the decision to delay was made. Plus, there is a notification requirement to the FCA.⁴¹

ESMA's draft guidelines give further examples illustrating when it is acceptable not to release information because it might be against a party's interests to publish immediately. These are: where there are ongoing negotiations regarding a deal, where approaches are required from third parties outside the firm and new inventions where patents are awaited. If an issuer wishes to rely on such a provision it must have procedures and systems in place to

make sure it can satisfy the announcement to market requirement including any required release of records to the FCA⁴², they must maintain insider lists and engage in record keeping.

There are three situations however where information requires immediate release: where inside information is materially different to an earlier public pronouncement on the same matter, or it contrasts with market expectations based on previous information provided by the issuer. In addition, there is a requirement to publish information where the issuer has previously announced that financial obligations are unlikely to be met. Issuers are also required to inform the FCA where disclosure is delayed if the FCA (or equivalent body elsewhere in the EU) requires it. The issuer must also explain how the requirements have been met.

Thus a failure to disclose inside information which is reportable as soon as possible amounts to market abuse. In **Tejoori Ltd** (2017)⁴³ the company concerned⁴⁴ held two significant investments, one of which was a shareholding in a second company, Bekon UK Ld which it valued in its financial statements at US \$ 3.35m. On 12th July 2016 it was notified by that company that it was being taken over on terms which meant that Tejoori would get no initial consideration and with only the possibility of deferred consideration, and that at a considerably lower level than Tejoori's published estimation. Tejootri was required to disclose this information as soon as possible but none was made until 10th August 2016 when Bekon and the company buying it did so, but in the process made no reference to Tejoori. Following speculation on the internet Tejoori's share price rose sharply and the London Stock Exchange then contacted Tejoori's nominated adviser asking for details. Tejoori finally made an announcement on 24th August 2016. This was determined by the FCA to be a breach of Art 17(1) MAR. The FCA's Mark Steward⁴⁵ said:

“Tejoori’s failure to promptly disclose inside information misled the market in Tejoori’s shares and prevented investors from making fully informed investment decisions.” They were fined £70,000 after a 30% deduction for co-operating.

Part of the importance on this case is that there is no defence in making an honest mistake as to the position of releasing inside information. The case also clarified the meaning of ‘inside information’⁴⁶ as *“Information that is likely to have a significant effect on the prices of financial instruments or derivative financial instruments, if it were to be made public, (it) means information a reasonable investor would be likely to use as part of the basis of their investment decisions.”*

Regrettably the FCA did not use this first action under the new Regulation to spell out more widely how they plan to interpret the wording of the new law. There has since been one more enforcement action, namely that of **Interactive Brokers (UK) Ltd** (2018)⁴⁷ who were fined for poor market abuse controls. They had failed to adequately train staff and had farmed out their compliance function to a third party on an unsatisfactory basis. They were fined £1,049,412. Again no wider guidance on the new law was given.

Relevant Takeover Code Provisions

If behavior is in line with the Takeover Code then it will normally be legal. The Code has a number of provisions relating to information. There are specific requirements relating to the disclosure of information that is not generally available to the public. Offerors (or their advisers) must notify a firm or its advisers when there is an intention to make an offer⁴⁸ and *“....all persons privy to confidential information; and particularly price sensitive information....must treat that information as secret and not only pass it to another person if it is safe to do so and that person is made aware of the need for secrecy.”*⁴⁹ Other requirements

cover what must be done when a statement is to be set aside⁵⁰, the timing of public announcements⁵¹, the announcement of the number of securities in an issue⁵², information published before the ending of an offer period⁵³, the need for equality of information for shareholders⁵⁴, requirements regarding meetings and telephone calls⁵⁵, videos⁵⁶ and assumptions and bases of relief regarding profit forecasts.⁵⁷

There are also requirements in the Code regarding the standards of care to be applied in takeovers. These cover issues such as the requirement that someone making a statement that they are not going to make a takeover offer should do so in language that is as clear and unambiguous as possible,⁵⁸ and in determining the acceptability of statements the Takeover Panel will consider not only the statement itself but also the manner and any subsequent reporting of it.⁵⁹ The requirements as to standards include *“Each document, announcement or other information published, or statement made, during the course of an offer must be prepared with the highest standards of care and accuracy. The language used must clearly and concisely reflect the position being described and the information given must be adequately and fairly presented.”*⁶⁰ Post offer undertakings must state that it is such, specify the time period and prominently state any qualifications or conditions.⁶¹ There are detailed general obligations as to information⁶², a requirement that shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits and demerits of an offer⁶³, together with requirements regarding profit forecasts and quantified financial benefits statements.⁶⁴

In addition there are requirements regarding the timing of announcements with regard to documentation and dealing. An announcement is required when there is a firm intention to make an offer, immediately sufficient shares have been bought to lead to a requirement to

make an offer, when there has been an approach to take over and there is rumour or “*untoward share price movement*” or where this occurs prior to making an offer. In addition where negotiations concerning an offer are about to extend beyond a very narrow group of people or a purchaser is sought for 30% or more of the voting rights of a company and there is rumour or “*untoward share price movement*”.⁶⁵ A subsequent announcement by an offeree company relating to a new offer also faces requirements on the timing and nature of the release of information⁶⁶, as do acquisitions from a single shareholder making an offer⁶⁷, immediately following a revised offer⁶⁸, the requirement for an immediate announcement if an offer has been amended⁶⁹, the revision of a cash offer⁷⁰, the timing and contents of an offer⁷¹, inducement fees and related arrangements⁷², the distribution of documents in an offer⁷³ and regarding the final day rule, fulfilment of acceptance conditions, timing and announcements.⁷⁴ They also exist regarding offeree announcements after day 39 of a takeover⁷⁵ and timing and revision of offers.⁷⁶

The content of announcements faces some rules in the Code as well regarding the timing of announcements and any subsequent announcement of a new offer⁷⁷ together with a requirement not to be misleading or to create uncertainty.⁷⁸ Behaviour concerned⁷⁹ in relation to restrictions on dealings by offerors and concert parties, is unlikely to amount to market abuse if it is expressly required or permitted by the rule and it conforms to any General Principle in Section B of the Takeover Code that is relevant.

Market Manipulation

It is a criminal offence if someone enters into a transaction which: gives misleading signals as to the supply or demand or price of a financial instrument, emission allowance or a spot commodity contract; or engages in behaviour which is likely to affect the price of one of

these financial or related instruments. Examples given by the FCA⁸⁰ include collaborating to ensure a dominant market position over the supply or demand for an investment or creating unfair trading practices. It is also a criminal offence if they disseminate information which is likely to give a false or misleading impression as to the supply, demand or price of such a contract where the person disseminating the information knew or ought to have known that it was misleading; or transmits false or misleading information or provides false inputs in relation to a benchmark where the person making the statement or input knew or ought to have known that it was false or misleading and where it is likely to affect the price of investments.⁸¹

The main problem here is that it potentially differs from the pre-existing law but no explanation has been given to provide clarification. What then is the difference? The old law also contained the categories of market abuse of: failing to observe proper standards of market behaviour,⁸² giving a false or misleading impression of the supply, demand or price of an investment,⁸³ using fictitious devices;⁸⁴ market distortion⁸⁵ and encouraging others.⁸⁶ To what extent are these types of behaviour caught by the new definition of market abuse?

Giving ‘misleading signals as to the supply or demand or price of a financial instrument’ would certainly seem to cover the ground of ‘giving a false impression’ above. Market distortion would also seem to be within the parameters of the new definition. Questions remain however concerning the other two categories from the previous law. Let us then turn to them⁸⁷. The “failure to observe proper standards of behaviour” used to be defined as: where the behaviour concerned was “...based on information which is not generally available to those using the market but which, if available to a regular user of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected, and...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.”⁸⁸ The other category which remains uncertain is that of utilising “fictitious devices” which consisted of carrying out transactions which employ fictitious devices or deception.⁸⁹ Clearly if the utilisation of either approach was to give misleading signals as to the price of a financial instrument it would fall within the remit of the existing law. However, it is fair to add that none of the enforcement cases brought so far by the FSA/ FCA or the cases that went to full hearing were specifically on these two areas. It may therefore be that in the process of drafting the new law there was a belief that any behaviour within such areas was either likely not to occur or that any such behaviour could be caught within the new definitions. Whether or not that is the case there may be infrequent instances where slimming down the definition may lead to cases slipping through the net. Maintaining the previous definitions, or something reasonably close to them may have been safer.

If the new law is intended to include the remainder of these areas then why does it not say so? If ESMA and the FCA regard such activities as still being caught under the Regulation, why do they not say so? In the absence of either there remains the distinct possibility that the law on market abuse is slightly narrower than the preceding law. That said it would be highly risky for anyone in the market place to carry on business on that assumption.

Issues arising

In this context it is necessary to consider what “financial instrument” and “benchmark” both mean. In addition, it is necessary to determine what is the permitted behaviour in these areas when a person may lawfully engage in these activities. “Financial instruments” is defined as meaning:⁹⁰ (i) transferable securities; (ii) money market instruments; (iii) units in collective

investment schemes; (iv) derivatives such as futures, options, forward rate agreements and any other derivative, eg, a contract for differences relating to securities, interest rates, yields, emission allowances, indices or other financial measures; (v) other derivatives relating to commodities that can be settled in cash; (vi) derivatives relating to commodities that can be settled on a regulated market, an MTF or an OTF other than wholesale energy markets that must be settled physically; (vii) derivatives relating to commodities that can be physically settled; (viii) derivatives relating to credit risk; (ix) financial contracts for differences; (x) derivatives relating to climate variables, freight prices or economic predictions (eg, inflation rates) which can be settled in cash; and (xi) emission allowances. “Benchmark” means⁹¹ any rate, index or figure which is released to the public to determine a price or estimated price.

Insider lists

Insider lists showing those with potential access to inside information must be and constantly kept up to date by firms that are in possession of inside information in a prescribed form detailing those in possession of the relevant information and the list must be retained for a minimum of five years.⁹² There must be two lists: one relating to each specific deal or activity, and the second listing the permanent insiders. The responsibility for the list lies with the issuer. Anyone on the list must be aware of their legal or regulatory duties with regard to disclosing or misusing inside information and they must confirm this to the issuer. The minimum requirement is for the names of those who have access to the information to be listed, why they are listed, the date and time they accessed inside information and the date of the list’s compilation. The list should include as a minimum: surnames including birth surnames where they have changed since, forenames, date of birth, national insurance number and both home and mobile home numbers. This was previously regarded as an area

where there was too much national divergence.⁹³ Solicitors, investment bankers, accountants and any other professional advisers receiving such information must also be on the list.⁹⁴ The key issue that arises here is, who else needs adding? Unfortunately, there is a lack of clarity as, at the date of writing⁹⁵ the FCA have not produced a definition. One area of uncertainty is whether it covers those acting as agent of an agent, eg, solicitors acting for underwriters or a custody bank acting for a Global Depository Receipt facility. The general view appears to be that it only catches those acting on behalf of the issuer; but this appears to be debateable. Certainly employees of accountants, investment banks and solicitors whose firms are acting on a transaction would need to be included. What is unsatisfactory is the FCA leaving the matter in a state of uncertainty. As would be expected the list must be provided to the FCA at their request.⁹⁶

The definition of “order” again has been left without a statutory definition, and the FCA’s approach likewise has been to leave it out of their glossary. Their general approach in the handbook seems to make most sense primarily in terms of the equity markets although they have not explained how they will apply it to bespoke trading such as the OTC markets. They seem to regard any information entering or leaving the firm as relevant, but if that is the case then the regime is impossible to police. The FCA do require “*appropriate, proportionate (and) effective*”⁹⁷ controls but have not yet provided suitable parameters to facilitate firms knowing how definition this will be applied. They have however said that they will be influenced by the European regulators.

Directors and senior officers’ dealings in securities traded in the EU must be reported by that individual to their national regulator and the issuer, and in the case of the latter they must then be on-reported by them to the market.

What is market manipulation in practice?

There appears to be no intention of significantly changing the previous English law regarding what market abuse is but unfortunately it is again not clear to precisely what extent this is true. The main aim appears to be to extend its definition and develop some of the associated regulatory requirements.

The main impact of the new definition is that there are dealing restrictions when the party concerned is in possession of inside information and prompt disclosure requirements coupled with, as discussed above, insider lists (already found in the UK) and limitations on directors and senior officers' dealings regardless of whether the party concerned was in possession of inside information. The disclosure requirements involve not only promptness but due procedure must be followed.⁹⁸

The current FCA Market Abuse Handbook

As the FCA make clear⁹⁹ this handbook “*does not exhaustively describe all the factors to be taken into account in determining whether behaviour amounts to market abuse*” and cross refers to the relatively brief summary in the Market Abuse Regulation. Unhelpfully, their position is that the absence of a factor being mentioned does not in itself amount to a contrary intention. There are two key factors either of which would be sufficient: that the person concerned has failed to discharge a legal or regulatory obligation, such as making a disclosure and that the person had created a reasonable expectation which gave rise to a duty to inform those to whom he gave that impression of that the state of affairs no longer exists and he has not done so¹⁰⁰.

The MAR¹⁰¹ “*provides that in determining whether someone knows or ought to know that they possess inside information... (they will) if a normal and reasonable person.... would*

know or should have known that the person from whom they received it was an insider...and (they were) in the position of the person who has inside information would know or should have known that it is inside information.”

It adds that ‘front running’¹⁰² will be regarded as taking place where a party enters into a transaction for an investment which will provide the investor with a purely financial exposure to a target company’s share price and acting for an offeror using inside information on an own account basis in the context of a takeover.¹⁰³

The factors that determine whether or not information has been made public are¹⁰⁴: whether the information has been disclosed to a prescribed market, a prescribed platform through a regulatory information service; whether the information is contained in records that are open to inspection by the public; whether the information is otherwise generally available through publication, available on the internet or can be derived from those. It makes no difference if a fee has to be paid to access it and whether the information can be obtained by observation by the public without breach of privacy or confidentiality laws. In these contexts it makes no difference that the information is only available outside the UK, or that it can only be accessed by someone with above average financial resources or skill.¹⁰⁵ One example given¹⁰⁶ (and it seems a fairly obvious one) is of a situation that will not amount to market abuse is “*if a passenger on a train passing a burning factory calls his broker and tells him to sell shares in the factory’s owner.*” This is regarded as legitimately accessing information by public means. Thus the situation here remains as it was under the previous UK law.¹⁰⁷

In determining whether there is a pending order for a client it is relevant that the person has been approached by another and the transaction is not immediately executed on an arm’s length basis in response to a price they have just quoted him or the person has taken on a legal or regulatory obligation in relation to the timing of the execution.¹⁰⁸

Recommending or inducing

The following examples of behavior which the FCA regard as falling within the category of “recommending or inducing” include a director in possession of inside information who instructs an employee to sell a financial instrument covered by that information; and someone who recommends a friend to engage in behavior which would be market abuse if he carried it out himself.¹⁰⁹

Engaging in legitimate business activities does not amount to market abuse.¹¹⁰ Factors which determine whether or not it is a legitimate activity are: the extent to which the trading is carried out to hedge a risk and the extent to which the activity achieves that; the reason that the information is inside information is that in the case of a transaction carried out on the basis of inside information there is no legal or regulatory reason for it to be published; whether the trading is connected with a client transaction and has no impact on the price of the investment concerned or the client was informed of the trade and did not object; and the extent to which the person’s behaviour was reasonable by the proper standards of the market concerned.¹¹¹

This raises the issue of what behavior in executing an order on behalf of another is carried out legitimately. Key issues are any of the following: whether they have complied with the relevant part of the FCA Conduct of Business Sourcebook¹¹²; whether the person has agreed with its client that it will act in a particular way when carrying out the order; whether their behavior was with a view to carrying out the order effectively and the extent to which the behaviour was reasonable by the standards of the market or auction platform concerned. In

addition, whether if the trading or bidding is connected with a transaction entered into with a client, the trading has no impact on the price, or the bid was disclosed to the client and they did not object.¹¹³

The following are not regarded by the FCA as indicating insider dealing in the context of takeovers and mergers¹¹⁴: the use of inside information solely for proceeding with a takeover or merger when seeking irrevocable undertakings or expressions of support to accept an offer to buy securities; making arrangements in connection with an issue of securities that are to be issued as consideration in a takeover or merger, including underwriting or placing the securities where these activities are proportionate to the risks assumed; and making arrangements to offer cash as consideration for a takeover as an alternative to offering securities.

A range of fairly obvious examples can be read in the FCA's Code of Market Abuse.¹¹⁵ They include a director telling a friend in a social environment that his company had received a takeover bid at a higher share price than the current trading value, and the recipient of that information entering into a spread bet to profit from any increase in the target company's share price.¹¹⁶ This is a rather strange example. Not only is the situation too obvious an example to need spelling out, but it would also be an offence if the recipient had entered into any other relevant investment to profit from a share price increase.

A second example the FCA provides is that of an employee choosing to sell his shares in the company which employs him, having discovered by an internal communication, (and presumably before there has been a public announcement, though unfortunately the example does not say this) that his company has lost a major contract.¹¹⁷ A third example that is

provided is of an employee on a trading desk at a firm dealing in oil derivatives who enters into trades both on his own account and the firm's account following the receipt of a large client account order to enter into a large long position (to buy) in oil derivatives, to profit from the resulting price move. Again the example is slightly odd in that a single long position would be highly unlikely to move the entire oil derivatives market.¹¹⁸

The most obvious example follows, namely a person trading in equities on the basis of inside information¹¹⁹. It is followed by the example of someone dealing in commodity futures on a trading venue on the basis of inside information and reasonably expecting it to be disclosed in accordance with national or EU market rules, contract, practice or customary rules.¹²⁰ The **Malins** decision (2005)¹²¹ suggests that such a person should check that the information has been properly released before trading.

An "unlawful disclosure" is indicated by¹²² the disclosure of inside information in a social context and managers selectively disclosing briefings to analysts. It would not however amount to this if the disclosure is to a government department, the Bank of England, the Takeover Commission or any other regulator to satisfy a legal or regulatory requirement in the normal exercise of their duties.¹²³ Nor is it wrong to disclose inside information where this is required under the Stock Exchange Rules. It is also acceptable where disclosure is made by a broker to a potential buyer in the course of their duties in a sale where the disclosure is made to sell the investment, to maintain liquidity without which the transaction could not be completed or to avoid creating a disorderly market.¹²⁴

An "unlawful disclosure" is that which takes place outside the proper scope of someone's employment, profession or duties. Critical factors here will be whether or not the disclosure

is permitted by the FCA, the Takeover Code, a trading venue or an auction platform and whether when this was done the information was subject to the imposition of a disclosure requirement on the person to whom the information was released. Likewise, whether it was reasonable to release the information in the proper performance of someone's duties, whether it was for the purpose of seeking or receiving advice regarding a takeover bid or was reasonable for the purpose of facilitating an investment, commercial or underwriting transaction or was to get a commitment regarding the Takeover Code or any other legal obligation.¹²⁵

Factors determining whether or not behavior is legitimate in relation to Art 12 (1) (a) of the Regulation include whether the person has an actuating purpose behind the transaction, or an illegitimate one, or if it was executed in a way which created a false or misleading impression.¹²⁶ Factors that will determine whether there are legitimate reasons are whether the transaction is carried out pursuant to a prior legal or regulatory requirement, whether it is executed in a way that is necessary for a market platform to operate fairly and efficiently and the extent to which it opens a new position creating a market risk rather than closing it out. Also, whether the transaction complied with the rules of a relevant trading venue concerning how transactions should be executed.¹²⁷

On the other hand it is very unlikely to amount to manipulation simply because the user of a trading venue is dealing at times and in sizes of investments that are most profitable to them¹²⁸. Likewise, the mere fact that prices are trading outside their normal range does not necessarily indicate that someone is trying to position prices outside their normal level.¹²⁹

As far as giving a false or misleading impression is concerned it is necessary to consider

whether an abnormal price has been created and the extent to which the person's behavior was responsible for that, the extent to which they had an interest in that price and the extent to which the price or volatility was outside its normal range. Relevant behavior here would be whether the person has repeatedly increased or decreased his bid to achieve that end.¹³⁰

Where 'abusive squeezes'¹³¹ are concerned key elements will be the extent to which the person is willing to relax his control to help maintain an orderly market and the price at which he is willing to do so. It is unlikely to be an abusive squeeze if they are willing to lend the investment. The more likely the behavior is to cause a multilateral settlement default, the more likely it is that there has been an abusive squeeze. Other factors will be the extent to which prices under the delivery mechanisms diverge from the price for them outside those mechanisms. The wider the divergence, the more likely it is that an abusive squeeze has taken place. Also, if, following the impact of the contract the spot price is substantially different from the forward market price it is more likely that there has been an abusive squeeze.¹³² Not all squeezes are abusive though, it can occur when the market is tight and smaller transactions can move prices more. In addition, having a significant influence over the supply of, or demand for, or delivery mechanisms for an investment, for example, through ownership, borrowing or reserving the investment in question, is not of itself likely to be abusive.¹³³ Where a trader holds a short position that will make a profit if a price will fall out of an index, and this will occur if the price falls below a certain level at the close of the market and if at that time he places a large sell order just before the close of trading to achieve this it will amount to market abuse.¹³⁴ Another example would be a fund manager placing a large order to buy illiquid shares just before the close to achieve an artificially high price and thus inflate the value of his fund.¹³⁵ Another would be where a trader with a long bond position buys or borrows a large amount of the cheapest bonds to deliver them and

either refuses to re-lend these bonds or will only lend them to parties he believes will not re-lend to the market. His purpose will presumably be to position the price at which those with short positions have to deliver to satisfy their obligations at a materially higher level, making him a profit from his original position.¹³⁶

Dissemination of inside information will be held to have occurred where a normal and reasonable person ought to have known that the information was misleading.¹³⁷ Examples of dissemination would include someone posting information on an internet bulletin board or chat room knowing them to be false or misleading statements about a corporate takeover.¹³⁸ There will be a defence to a charge of breaching a Chinese wall is if the only way they could have acquired the relevant knowledge would have been to acquire it from the other side of the wall and there is no evidence that they were able to breach it.¹³⁹

Research

Conduct of Business rule at COBS 12 applies to all types of investment research. The FCA recognises the reality that if research is being carried out for a firm's internal use there is little danger of conflicts of interest arising.¹⁴⁰ However, it is clear that the FCA think it inappropriate for internal research papers to be used for the firm's own advantage and then to be given to clients where it is reasonable to suppose it might influence their decisions. There is clearly a potential conflict of interest between those carrying out the research on one hand and corporate finance and sales personnel on the other.¹⁴¹ Where conflicts of interest arise there is senior management responsibility for resolving the matter.¹⁴² For this reason there are normally internal compliance rules on the point. A firm's conflict of interest policy must provide for its investment research to be only distributed through its normal research channels. It must also provide that analysts cannot communicate the substance of

the research in any other way.

The firm must see that its research is impartial and it should at least consider adding to its conflict of interest policy regarding the timing of the release of the research, eg, around the time of a public offering.¹⁴³ Research intended initially for internal use should not be used internally and then forwarded to clients where it might materially influence their decisions.¹⁴⁴ If a firm produces non independent research it must be clearly identified as such, contain a clear statement if orally provided, saying in either case that it has not been prepared in accordance with the necessary legal requirements for independent research, but it is not subject to any prohibition.¹⁴⁵ Conflicts of interest must also be avoided.¹⁴⁶

One consequence of the Regulation is that written or electronic correspondence involving recommendations for investment is treated as an intention to solicit. The person and institution responsible face a reverse burden of proof in showing that the analysis communicated is objective and that any conflict of interest has been disclosed. It should be noted that MiFID II sets out further requirements relating to circulating research but the details go beyond the parameters of this article.

Managers' disclosure requirements

Managers have an obligation to disclose to both the issuer and the FCA their own account dealings in investments where the transaction reaches € 5,000.¹⁴⁷ “Investments” in this context includes shares, debt instruments and related derivatives,¹⁴⁸ although it does not extend to equity dealings outside Europe. In this context “managers” covers directors and those carrying out managerial responsibilities whose job gives them access to inside

information. It is extended to the managers' "closely associated persons". Issuers must make public the reports from their managers within three business days.

There are closed periods where the managers¹⁴⁹ and closely associated persons cannot deal. This is determined to be thirty calendar days¹⁵⁰ before interim financial report announcements or publicly reportable end of year reports. This ties in with the FCA's own past research which showed that such situations appeared to be preceded by insider dealing in 28.9% of takeover announcements and 21.7% of trading announcements.¹⁵¹ Some exceptions allow trading, eg, severe financial difficulty and employee share or savings schemes. Some issuers do not permit directors and senior officers to trade in securities. If this is the case the systems and controls to regulate it internally will not be needed.

Sovereign issuers are exempt from the laws and in this context market designated bodies will be central banks and a limited range of other public bodies¹⁵² in so far as they are engaging in debt management or exchange rate policy.

There is a requirement for greater transparency. The preamble to the Regulation states:

*“Greater transparency of transactions conducted by persons discharging managerial responsibilities at the issuer level and, where applicable, persons closely associated with them, constitutes a preventative measure against market abuse, particularly insider dealing. The publication of those transactions on at least an individual basis can also be a highly valuable source of information to investors.”*¹⁵³

The obligation to publish individual transactions is extended and also incorporates pledging and lending financial instruments as these can have a significant impact on the share price in the event of their sudden disposal.

Chinese walls

Chinese walls are a critical factor in maintaining confidentiality of inside information.

Hedge funds face something of a problem here as the relevant divisions found in investment banks and stockbrokers do not exist within their organisations. Thus, if anyone in the organisation receives inside information it affects the entire hedge fund.

In those institutions with chinese walls, wall crossings are permitted when sounding out the market even where the market soundings take place outside the EU. To satisfy this the transaction needs to be relatively immaterial to the price of the investments. It is permitted to cross the wall where appropriate. *“Wall crossing is a process whereby a company can legitimately provide inside information to a third party. A company may wall cross a variety of third parties ranging from large industrial shareholders to small shareholders or completely unrelated parties.”*¹⁵⁴ There are a number of reasons for wall crossing *“a common reason is to give the third party inside information about a proposed transaction by a company that is publicly listed (for example, a merger or acquisition, or fundraising transactions including equity issuances)” ...to discuss the third party’s views.”* A suitable example would be the directors of a company seeking the views regarding a takeover they are making from major shareholders. As would be expected, the recipient is then excluded from trading unless a public announcement has been made. If it is then decided that the transaction is not going ahead an announcement to that effect should be made and is referred to as a ‘cleansing statement’.

Market soundings are often needed to determine whether potential investors would be prepared to take up a market offer prior to launching it. This is a vital approach to the effective operation of the markets; even more so when prices are volatile. Thus the Regulation permits it. Confidentiality is a key issue here and MAR 1.4.5 E (2) refers to

disclosure “*accompanied by the imposition of confidentiality requirements.*” This is relevant to internal wall crossing in an organisation and the release of information externally accompanied by notification that it renders the recipient an insider, which is in line with the comment in **Grøngørd and Bang** (2005)¹⁵⁵ that disclosure can only be made of confidential information when necessary and in such cases the recipient must be placed under a duty of confidentiality unless it is clear that the person concerned already appreciates this. “*Once confidential information is passed on, control is lost over that information: the provider therefore needs to ensure that steps are taken with a view to preserving confidentiality.*”¹⁵⁶

In the event of suspicions of a client or counterparty there are conflict of interest issues which the law does not address.

Investment advice

The Regulation¹⁵⁷ requires those, including public institutions producing or disseminating research or investment recommendations to do so in a way which presents the information objectively with any conflict of interest, or other interest relating to the investments being disclosed. To maintain a harmonious approach across Europe, ESMA is required to draft regulatory technical standards for those involved in disseminating research and recommendations.

Now that MiFID II is in place the regime will be broader in accordance with the effect of its provisions in that both independent and non-independent advice is treated as customised for each recipient. In addition to the Regulation’s requirement that the advice be transparent, objective and that due disclosure should take place, MiFID II imposes a higher burden of proof on the firm and requires documented evidence of the suitability and appropriateness of

that advice for the investor concerned.

In one firm alone between the law coming into effect on 3rd July 2016 and early November 2016 they sent 30,000 recommendations to 13,000 clients and potential clients and 500,000 disclosure emails. 70 conflicts of interest were reported. In practical terms this type of arrangement will be very difficult to police.¹⁵⁸

Safe harbours

There are safe harbours and these extend further than under the preceding regime. There is an exemption from the market abuse regime for share buy backs¹⁵⁹ which are permitted if they are carried out to reduce the issuer's share capital, to exercise convertibles or as part of employee share option schemes of the issuer or an associated company. If this is done the issuer must disclose the details to the FCA and the public before trading. Share and bond stabilisation programmes are exempt if carried out for a limited period and within certain price limits. Again, a report must be made to the FCA and also in this case to the trading venue. Pre-transactional discussions with potential investors ("wall crossings") which may need to involve inside information, eg, financing a takeover, are permitted. These must follow a predetermined procedure and records kept for three years. The information must also be issued to the market as soon as possible and apply accepted market practices.

Jurisdiction

The Regulation also expands the reach of some of the EU rules to markets that previously operated outside the EU's market abuse regime because the application of the Regulation to MTFs have drawn into the area controlled the London Stock Exchange's AIM, the Irish Stock Exchange's Global Exchange Market and the Luxembourg Stock Exchange Euro MTF market for the reasons discussed earlier.¹⁶⁰

The existing EU regulated markets are also affected because the record keeping requirements and applicable procedural approaches have been extended. It remains to be seen whether a consequence of this is that some of those with paper currently issued on an EU exchange decide to move to an exchange outside the EU where such onerous rules will not apply.

In addition, the rules apply to trading outside the EU and as far as insider dealing is concerned there does not need to be proof of an intention for the insider to benefit, which is a change from the preceding English law. Any relevant contract traded in the EU will of course be caught and as will ghost quotes where no trade results.

Global banks are going to be particularly affected by the jurisdictional effects. Depositary receipts are the most extreme example where the bank issuing the receipts could be doing so to parties in almost every state on earth. In some cases insider lists will need to be held outside the EU. There may then prove to be conflicts between the requirement from a regulator or court in the EU that such information be provided and privacy or data protection laws in a third state that preclude doing so, or may require information to be redacted first.

New market developments

One key area is the application of the market abuse laws to new market activities. A key area here are dark pools, ie, private exchanges where institutional investors can trade very large volumes without public knowledge of their trading intentions prior to execution. They raise the key problems of a lack of transparency, potential conflicts of interest and the capacity the arrangements offer for market abuse. Whilst these have yet to prove a basis for civil enforcement or criminal action in this country, cases have been brought overseas. In

the US both Barclays and Credit Suisse were fined for making false and misleading statements and failing to disclose material adverse facts concerning its dark pool operations. The New York District Attorney believed that the banks gave high speed traders an unfair advantage.¹⁶¹ This remains an area where greater clarity in the law would be welcome.

Conclusions

The uncertainties discussed above remain a problem for participants in the financial markets. It is not helped by the predisposition of the FCA to operate without the presence of key definitions in their rules and in practice with the benefit of hindsight. They have discretionary powers, especially in interpreting the FCA Principles and there remains an absence of clarity.

Any information entering or leaving a firm is potentially caught by the new Regulation, which, as seen, is going to be a problem operationally. There remains uncertainty concerning the position after the UK has left the European Union. The FCA has indicated that they will be influenced by the European regulators and there will be obvious reasons for doing so after the UK has left the EU in terms of maintaining a pan European level playing field for large firms in the City, but there may though be no legal requirement to do so. However, this does open up the possibility of a migration away from existing enforcement action decisions on an unpredictable basis.

Hannam (2014)¹⁶² has shown that the interpretation of what is inside information may be wider than was supposed and that potentially carries over to the new law. The Regulation causes more information to be kept by companies than was previously the case. The current legal position will sometimes result in a market participant having more of a judgement call to make in determining what is, and is not relevant to a reasonable investor. There may also

prove to be problems in the future as a result of the law having been drafted to make sense in terms of the exchange traded equity markets. It may mean there will be a lack of predictability in advance of any enforcement actions or cases in the area in applying the law to bespoke OTC trades. Thus, the key conclusion is that the Regulation and its interpretation by the regulators have left the law in an unacceptably vague state.

In addition, there may be conflict of interest issues between the reporting party and their client in blowing the whistle through making a report to the FCA or in some circumstances the Stock Exchange on a client or counterparty. There is no evidence of this having been considered. There are certainly a large number. In the ten months to October 2017 there were 3,730 suspicious transaction reports to the FCA with many of them being related to insider dealing.¹⁶³

The current plan is for the Regulation is to be reviewed by the European Commission within four years of its coming into effect. Any problems that do arise at least have the potential to be dealt with fairly quickly.

¹ Professor of Law, University of Wolverhampton and Senior Visiting Research Fellow, Institute of Advanced Legal Studies, University of London

² S.1 Criminal Law Act 1977. See also s.12 Criminal Justice Act 1987 and R v Remington and R v Goldstein (2005) UKHL 63 per Lord Bingham

³ See for example Spector Photo Group and van Raemdonck. Case C-45/08 [2009] ECRI-12073 paras 37, 47, 61 and 62

⁴ OJ C I 173 p 2 at (4)

⁵ These are self regulating financial trading venues which were introduced by Art 4 (15) MiFID. They are effectively a type of stock exchange with a low cost base which carry our high frequency trading. In the United States they are called ‘alternative trading systems’.

⁶ These are another type of stock exchange, in this case introduced by MiFID II. Unlike MTFs there is a discretionary element to their activities. They provide a market for third parties trading in bonds, derivatives, structured finance and emission allowances.

⁷ “Over the Counter” derivative contracts, ie, those not traded on an exchange.

⁸ Pinsent Masons. (2016) *The Market Abuse Regime*. p2 are both laws and regulations governing the requirements and these are more onerous for listed companies.

⁹ The European Securities and Markets Authority

¹⁰ Directive 596/2014 EU

¹¹ Bringing in emission allowances and trading on OTFs

¹² This is the process of legitimately stabilising the price of an investment. See FCA, MAR 2.5

¹³ These are arrangements for a company to buy back its own shares. There

¹⁴ Art 1, EU Regulation 2014/596

¹⁵ OJ C I 193 at Arts 8 and 9,

¹⁶ OJ C I 193 at Arts 10 and 11

¹⁷ OJ C I 193 at Arts 12 and 13,

¹⁸ Sections 52 - 64 Criminal Justice Act 1993

¹⁹ As a result of this the Model Code on Share Dealing has been deleted by the London Stock Exchange/ FCA from its Listing Rules. AIM rule 21 has also been amended to bring it in line with MAR by requiring listed companies to have reasonable and effective dealing policies.

²⁰ The London Stock Exchange has stated that it is aware of potential problems with AIM listed companies having to satisfy both the rules of AIM and the Regulation. It suggests that any disclosure should first be discussed with AIM who, in turn, will co-operate with the FCA.

²¹ See Shearman & Sterling, (2016) *Capital Markets*, 23 June 2016

²² This is the process of sounding out market participants to see if they are interested in buying a particular future issue. There are detailed regulatory procedures to stop market abuse in such situations.

²³ MAR 1.3.20 G

²⁴ Ie, trading to benefit from a client order or insider knowledge in advance of others because the inside information that provides fore-knowledge of the potential rise or fall in the price of the investment concerned.

²⁵ See also MAR, Annex *Disclosure Requirements – Inside Information*.

²⁶ (case C-628/13) effectively over-riding the test in *Hannam v Financial Conduct Authority* [2014] UKUT 0233 (TCC) where it was said “(t)he information does not need to be such as to enable an investor to know with confidence that the price will move if the information is made public but only that it might move, and if it does, the movement will be in a known direction.” At p 25- 26.

²⁷ [2014] UKUT 0233 (TCC)

²⁸ The judges in *Jean-Bernard Lafonta v Aurorité des marches financiers* Case C-628/13

²⁹ [2014] UKUT 0233 (TCC) at p 27

³⁰ [2014] UKUT 0233 (TCC) at p 32, para 132

³¹ C-19/11 (2012)

³² See para 39 *ibid*

³³ S.118 C Financial Services and Markets Act 2000

³⁴ MAR 1.3.22 G

³⁵ MAR 1.3 applying Art 7 MiFID II

³⁶ OJ C I 173 at Art 6

³⁷ OJ C I 173, Art 17.1

³⁸ Shearman & Sterling. (2016) *EU Market Abuse Regulation – Implications for non EU Issuers with Securities Traded on an EU Market*. P4

³⁹ OJ C I 173, Art 17.4

⁴⁰ 28/9/2015

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- ⁴¹ ESMA Guidelines at 17 (11), MAR 2.5.2 (1) and (2), 2.5.4 and 2.5.5. This does not extend to an issuer delaying the release of inside information because it would indicate that it is in financial difficulties.
- ⁴² MAR, Sch at 5
- ⁴³ FCA Enforcement Action, 13th December 2017
- ⁴⁴ A closed ended investment company focusing on ethical investments.
- ⁴⁵ FCA Executive Director of Enforcement and Market Oversight.
- ⁴⁶ At 5.5
- ⁴⁷ FCA Enforcement Action, 25th January 2018
- ⁴⁸ The Takeover Code at 1(a)
- ⁴⁹ The Takeover Code 2.1
- ⁵⁰ The Takeover Code 2.5
- ⁵¹ The Takeover Code 2.6
- ⁵² The Takeover Code 2.9
- ⁵³ The Takeover Code 19.7
- ⁵⁴ The Takeover Code 20.1
- ⁵⁵ The Takeover Code 20.2
- ⁵⁶ The Takeover Code 20.3
- ⁵⁷ The Takeover Code 28.4
- ⁵⁸ The Takeover Code 2.8
- ⁵⁹ The Takeover Code 2.8 and note 4
- ⁶⁰ The Takeover Code 19.1
- ⁶¹ The Takeover Code 19.5
- ⁶² The Takeover Code 23
- ⁶³ The Takeover Code 23.1
- ⁶⁴ The Takeover Code 28.1
- ⁶⁵ The Takeover Code 2.2
- ⁶⁶ The Takeover Code 2.4 (b)
- ⁶⁷ The Takeover Code 5.4
- ⁶⁸ The Takeover Code 6.2 (b)
- ⁶⁹ The Takeover Code 7.1
- ⁷⁰ The Takeover Code 11.1 and Note 6
- ⁷¹ The Takeover Code 17.2
- ⁷² The Takeover Code 21.2
- ⁷³ The Takeover Code 30
- ⁷⁴ The Takeover Code 31.6 (c)
- ⁷⁵ The Takeover Code 31.9
- ⁷⁶ The Takeover Code 33
- ⁷⁷ The Takeover Code 2.4(a) and (b)
- ⁷⁸ The Takeover Code 19.3
- ⁷⁹ See the Takeover Code 4.2 and MAR 1.10.6 G
- ⁸⁰ MAR 1.3
- ⁸¹ Art 12
- ⁸² S.118(4)(a) and (b) Financial Services and Markets Act 2000
- ⁸³ S.118(5)(a) and (b) *ibid*
- ⁸⁴ S.118(6) *ibid*
- ⁸⁵ S.118(7) *ibid*
- ⁸⁶ S.123(1) *ibid*
- ⁸⁷ Haynes A. “Market Abuse, an Analysis of its Nature and Regulation.” The Company Law yer. 2007, vol 28, No 11, p 323
- ⁸⁸ s.118(4)(a) and (b) *ibid*
- ⁸⁹ s.118(6)
- ⁹⁰ Art 4(1) (15) Directive 2014/65/EU MiFID II
- ⁹¹ Art 3 (29) EU Regulation 2014/596 EU
- ⁹² Art 18 *ibid*
- ⁹³ OJ CI 173 at p 11, (56)
- ⁹⁴ Art 18,OJ C I 173
- ⁹⁵ 5th July 2018
- ⁹⁶ A parallel exists here with the extension of the suspicious transaction reporting regime to orders.
- ⁹⁷ EG2, 2.1.2(2) The FCA’s approval to enforcement.

⁹⁸ See Annex “Disclosure Requirements – Under the Circumstances where Disclosure may be Delayed”.

⁹⁹ MAR 1.1.7 G

¹⁰⁰ MAR 1.2.6 G

¹⁰¹ At MAR 1.2.8 G (1) and (2)

¹⁰² Ie, trading to benefit from a client order or insider knowledge in advance of others because the inside information that provides fore-knowledge of the potential rise or fall in the price of the investment concerned.

¹⁰³ MAR 1.3.2 G 1 to 3

¹⁰⁴ MAR 1.1.12 G

¹⁰⁵ MAR 1.2.13 G

¹⁰⁶ MAR 1.2.16 G

¹⁰⁷ This appears to be contrary to the US approach where the passenger would arguably need to wait until the news of the fire was made public and the share price had adjusted accordingly.

¹⁰⁸ With regard to Art 7 (1) (d) of the Market Abuse Regulation

¹⁰⁹ MAR 1.3

¹¹⁰ MAR 1.3.7 G

¹¹¹ MAR 1.3.10 G

¹¹² Especially COBS 2 and 12

¹¹³ MAR 1.3.15 G

¹¹⁴ MAR 1.3.17 G

¹¹⁵ MAR 1.3.2 G to MAR 1.3.23 G

¹¹⁶ MAR 1.2.30 G 1 (1)

¹¹⁷ MAR 1.3.21 G

¹¹⁸ MAR 1.3.22 G

¹¹⁹ MAR 1.3.23 G

¹²⁰ MAR 1.3.22 G at (2)

¹²¹ FSA Enforcement Action, 20th December 2005. Although this predates the Regulation is would still seem relevant on this point.

¹²² MAR 1.4.2 G

¹²³ MAR 1.4.3 G

¹²⁴ MAR 1.4.4A G

¹²⁵ MAR 1.4.5 G

¹²⁶ MAR 1.6.5 G

¹²⁷ MAR 1.6.6 G

¹²⁸ MAR 1.6.7 G

¹²⁹ MAR 1.6.8 G

¹³⁰ MAR 1.6.10 G

¹³¹ This occurs where someone takes sufficient control over the supply and demand of an investment and uses that situation to distort the price.

¹³² MAR 1.6.11 G

¹³³ MAR 1 6 12 G

¹³⁴ MAR 1 6 15 G

¹³⁵ MAR 1 6 16 G

¹³⁶ MAR 1.6.16 G

¹³⁷ MAR 1.8.4 G

¹³⁸ MAR 1.8.6 G

¹³⁹ MAR 1.8.5 G

¹⁴⁰ COBS 12.2.2 R

¹⁴¹ COBS 12.2.4 R

¹⁴² SYSC 10.1.11 and COBS 12.2.3 R

¹⁴³ COBS 12.2.12 G

¹⁴⁴ MAR 12.2.13 G

¹⁴⁵ MAR 12.3.2 R and art 24(2) MiFID

¹⁴⁶ COBS 12.3.4 G

¹⁴⁷ OJ CI 173, Art 19

¹⁴⁸ FCA Policy Statement on MAD (PS16/13) and DTR 3.1 which previously did not mention debt instruments.

¹⁴⁹ Defined as a person who is a director of a listed company or who is a member of its administrative, managerial or supervisory body or any other senior executives who have regular access to inside information relating to the company.

¹⁵⁰ OJ CI 173, Art 19.11 – 19.13

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- ¹⁵¹ Dubow W and Moneiro N “FSA publishes report of the scale of market abuse.” March 2000, FSA
- ¹⁵² The designated bodies are situated in Australia, Brazil, Canada, China, Hong Kong, India, Japan, Mexico, Singapore, South Korea, Switzerland, Turkey and the United States.
- ¹⁵³ OJ C I 173 at p 11 (58)
- ¹⁵⁴ FSA Decision Notice Einhorn, 12th January 2012 at 3.8 and 3.9
- ¹⁵⁵ Case C-384/02
- ¹⁵⁶ Hannam v FCA *Ibid* p 125 at para 526
- ¹⁵⁷ See Art 20, OJ C I 173
- ¹⁵⁸ Taylor R at Conference “Recent Developments in the Market Abuse Regime.” Hallam Conference Centre, London 10th November 2016
- ¹⁵⁹ Art 5, OJ C I 173
- ¹⁶⁰ See Shearman & Sterling (2016) *Capital Markets*, 23 June
- ¹⁶¹ See for example In the Matter of UBS Securities (SEC January 15th 2015) and ITG Inc and Alernet Securities Inc (SEC, August 12th 2015).
- ¹⁶² [2014] UKUT 0233 (TCC)
- ¹⁶³ www.Out-Law.com/en/articles/2017/october/suspicious-transaction-reports. Accessed on the 11th February 2018.