

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (MARKET ABUSE)
REGULATIONS 2016

2016 No. 680

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations amend UK law to ensure it is compatible with Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)¹ (“MAR”). The Regulations also make changes to UK law to give effect to those parts of the market abuse regulation which require implementing legislation by the member states and to ensure the market abuse regulation is fully effective and enforceable in the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These Regulations are laid on 29 June and enter into force on 3 July. HM Treasury is therefore in this instance allowing less than the minimum 21 day period applying by convention between the laying of a statutory instrument subject to the negative resolution procedure in Parliament and its coming into force. The Regulations were ready for making and laying before Parliament only very shortly before the 21 day period began. As the economy and role of financial services have been high profile topics in the debate about the UK’s membership of the European Union, following careful consideration it was deemed inappropriate to publish these Regulations during the period of purdah before the referendum. In light of HM Treasury’s legal obligation to both take the necessary measures to implement MAR in the UK by 3 July (the date it comes into effect) and ensure that the Financial Conduct Authority has the necessary powers to effectively supervise and enforce the civil market abuse regime under MAR in the UK it was not feasible to delay the coming into force date to comply with the 21 day rule. HM Treasury apologises for the inconvenience caused by reducing the time available to the Committee to consider the Regulations.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

¹ OJ no L 173, 12.6.2014, p.1-61.

4. Legislative Context

4.1 These Regulations amend UK law for the purposes of MAR, which:

- repeals and replaces the existing EU regime on market abuse under Directive 2003/6/EC on insider dealing and market manipulation (market abuse)² (“MAD”);
- creates new directly applicable prohibitions on insider dealing and market manipulation alongside new directly applicable regulatory requirements relating to market abuse;
- requires member states to provide its designated competent authority with a suite of supervisory, investigative and enforcement powers in relation to the market abuse regulation and sets out arrangements for cooperation between different competent authorities in the EU.

4.2 In order to make UK law compatible with MAR, make MAR fully effective and enforceable in the UK, and implement those parts of MAR requiring domestic legislation, these regulations:

- designate the FCA as the competent authority in the UK for the purposes of MAR;
- repeal the provisions in the Financial Services and Markets Act 2000 (“FSMA 2000”) implementing MAD, which are mostly found in Part 6 (official listing) and 8 (penalties for market abuse) of that Act;
- amend FSMA 2000 and other UK legislation to both create the new supervisory, investigative and sanctioning powers required by the MAR and ensure UK legislation is compatible with the regulation;
- confer new duties on the FCA with regard to the reporting of contraventions of MAR for the purposes of Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation³ (the “supplementary directive on reporting infringements of MAR”)

4.3 These Regulations also update the specific market abuse regime in relation to auction platforms under the Regulated Auction Platform Regulations 2011⁴ (“the 2011 Regulations”). This is to take account of changes to the EU legislation underpinning the 2011 Regulations⁵ connected with the replacement of the market abuse directive by MAR.

4.4 Explanatory Memorandum 13023/12 relating to the Market Abuse Regulation was sent to both Parliament European scrutiny committees on 5 September 2012. The House of Commons EU Economic and Financial Affairs and International Trade Sub-Committee declared the file legally and politically important and cleared it from scrutiny on 12 September 2012. It was cleared by the House of Lords EU Economic and Financial Affairs and International Trade Sub-Committee on 28 November 2012.

² OJ no L 96, 12.4.2003, p. 16-25.

³ Made under Article 32 MAR.

⁴ S.I. 2011/2699.

⁵ See Chapter 10 of Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ L 302, 18.11.2011 p.1).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the provisions of the Financial Services and Markets Act Market Abuse Regulations 2016 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The current EU framework for tackling market abuse and market manipulation was first introduced in 2005 in MAD. Since then, the financial markets have seen the creation of new forms of financial instruments and the emergence of new trading platforms and venues. In order to ensure that the conduct regulation keeps pace with market developments, the European Commission began consultation on a proposal for a Regulation on insider dealing and market manipulation in 2011, which became MAR. Agreement was reached in 2014, and MAR will come into effect on 3 July 2016.
- 7.2 MAR now directly prohibits insider dealing (along with other linked activities) and market manipulation. Articles 8.1 and 12.5 MAR set out broad primary definitions of the behaviour that constitutes insider dealing and market manipulation, and apply equally to behaviour by legal and natural persons (regardless of who the person acts for, and regardless of who benefits from the behaviour). Where a legal person’s conduct falls within the primary definitions, the primary definitions of insider dealing and market manipulation also extend under Articles 8.5 and 12.4 to any individuals who participate in the decision by the legal person to engage in that conduct. Such individuals may also be caught by the primary definitions if they themselves directly engage in insider dealing and market manipulation.
- 7.3 The key changes introduced by MAR include:
 - extending the market abuse regime to apply not only to financial instruments admitted to trading on a regulated market but to financial instruments on other trading platforms such as multilateral trading facilities and organised trading facilities and related financial instruments;
 - extending the market abuse rules to cover EU emissions allowances (though some allowances were already caught by MAD, and others by the bespoke regime under the emissions allowance auctioning regulation);
 - bringing the manipulation of benchmarks expressly within the market manipulation offence;
 - the introduction of a new prohibition on attempted market manipulation;
 - the introduction of a specific format for insider lists;
 - a new requirement to notify the regulator on announcement of inside information where the issuer has delayed the announcement of that information;

- the introduction of a specific regime for the disclosure of inside information in the course of market soundings; and
- the extension of the Suspicious Transaction Reporting (STR) regime to cover suspicious orders.

7.4 The significant changes made by the legislation are as follows:

- The FCA is designated as the UK competent authority for the purposes of the market abuse regulation ;
- Rules are put in place governing when issuers must provide the FCA with an explanation of a delay in disclosing inside information
- A procedure is put in place for applications under the market abuse regulation.
- The UK’s domestic regime on disclosure rules in respect of financial instruments and civil penalties for market abuse is repealed;
- The FCA is given powers to
 - require information from issuers and other persons;
 - compel the publication of information by issuers,
 - compel the publication of corrective statements by issuers and other persons;
 - suspend trading in financial instruments;
 - impose penalties, prohibitions and suspensions or restrictions for contraventions of the market abuse regulation,
- The meaning of the term ‘person closely associated’ in the market abuse regulation is defined;
- A provision will be added to FSMA 2000 setting out how Article 8.4 and 12.5 of the regulation, which deal with individual liability for decisions by legal persons to participate in market abuse are to be interpreted in the UK;
- FSMA 2000 and other primary and secondary legislation are amended to make them compatible with the market abuse regulation and take account of the other changes the regulations are making to FSMA 2000.
- The current market abuse regime for certain types of emission allowances is updated to ensure the FCA has similar powers under that regime as they do under the market abuse regime (to take account of changes to the governing EU legislation due to replacement of the market abuse directive by the market abuse regulation.
- The FCA is given a number of duties in connection with the reporting of contraventions of MAR, in order to implement the supplementary directive on reporting infringements of MAR.

Consolidation

7.5 No consolidation concerns arise.

8. Consultation outcome

8.1 MAR is a directly applicable European regulation, and as such there is very little scope for the UK to consider options for its implementation. As a result of the extremely limited optionality, HM Treasury concluded that a full public consultation was unnecessary in this instance.

- 8.2 However, between November 2015 and February 2016, HM Treasury made a draft version of the Regulations available to the public on request for comment. The Treasury received one response of substance. The response welcomed the Government's commitment to periodically to review the operation of the UK market abuse regime in light of the other Member States' practices. It also contained a number of relatively minor amendments to the provisions, which the Government has considered individually and taken on board as appropriate.
- 8.3 MAR includes two minor areas in which Member States are given optionality in the way in which MAR is implemented. This optionality will be reflected in changes to the FCA's rules, rather than changes to statute, following the FCA's standard rule-making procedure. The FCA has consulted extensively on these proposed changes and are in the process of amending their rulebook. The FCA is also making a number of other changes to its handbook in response to MAR.

9. Guidance

- 9.1 The Treasury is not planning to issue any further guidance on these Regulations. The FCA will issue a policy statement in order to set out detailed rules on the implementation of MAR.

10. Impact

- 10.1 MAR applies to all individuals, and therefore has a direct impact on business, charities or voluntary bodies. MAR includes a number of monitoring and reporting requirements that firms trading in the financial instruments captured by the regime must comply with. These largely build on existing requirements introduced through the implementation of MAD.
- 10.2 There are no foreseeable impacts on the public sector. However, we assume that, in order to adequately supervise the compliance with MAR, we estimate that the Financial Conduct Authority (FCA) assumes that this would require up to 3 Full Time Equivalents.
- 10.3 A validation Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 The scope of the legislation is based on financial instruments, rather than financial market participants. Therefore, where small businesses trade in these instruments, they will be within scope of the Regulation.
- 11.3 A number of requirements on small businesses are already in place and the requirements on businesses, including small- and medium-sized enterprises (SMEs), are not significantly amended by this legislation. In contrast, SME firms have an explicit exemption from the requirement to produce and maintain a list of insiders who have access to privileged information.

12. Monitoring & review

- 12.1 The Government will review this legislation and publish a report with conclusions by July 2021.

13. Contact

- 13.1 Katie Dunn at the Treasury Telephone: 020 7270 1986 or email: Katie.dunn@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.