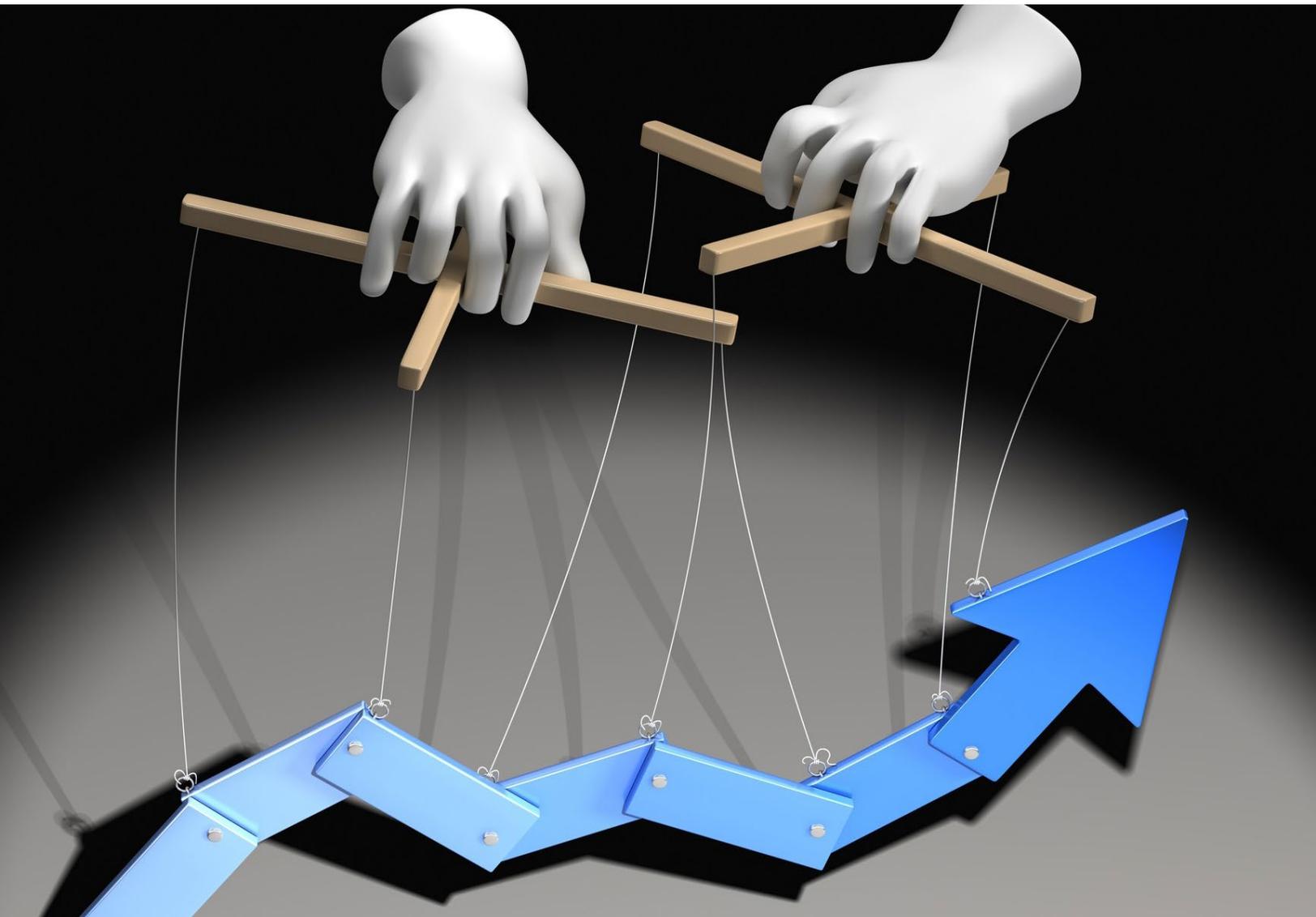


**WHAT WE HAVE LEARNED:**

# Two Years Into The EU Market Abuse Regulation

*Written by: Ronald Gould*



## Introduction

Nearly two years since the start of Market Abuse Regulation (MAR) and related rules, it is useful to review the Regulation itself as well as to consider what has happened in the aftermath of its implementation.

In an overview of the MAR published in April of 2016, the Financial Conduct Authority (FCA) stated:

*“ MAR will strengthen the existing UK market abuse framework by extending its scope to new markets, new platforms and new behaviours. It contains expanded prohibitions for insider dealing and market manipulation, as well as related prevention and detection provisions. ”*

In part, this paper will consider evidence of MAR's success to date.

### First, a brief reminder of what it is all about.

- MAR, along with ESMA technical standards, regulators guidance and the Criminal Sanctions for Market Abuse Directive (CSMAD), replaced the 2003 Market Abuse Directive (MAD I) across the EU.
- In the UK, which has opted out of CSMAD in favour of its own criminal sanctions, little practical change was expected.
- MAR and the criminal sanctions laws were developed in coordination with other post-financial crisis measures – such as the Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation (MiFIR) – to regulate markets and financial instruments and to work alongside other national and internationally coordinated initiatives to tackle misconduct and encourage market confidence.

The impact these efforts have had on market behaviours has been the subject of much discussion but most indicators confirm that regulators have significantly stepped up their work with a dramatic increase in the number of investigations into areas, like:

- Insider trading
- Market manipulation
- Conflicts of interest
- Listed company transactions

Investigations don't always lead to enforcement actions but the correlation is strong. There is a degree of interdependence between MAR and MiFID II, with MAR being particularly reliant on definitions contained within MiFID II. Both sets of provisions extend the reach of the European regulatory regime to capture a wider range of markets and instruments and include specific provisions to address the proliferation of technology-driven trading practices.

## Background

It will come as no surprise that most countries in Europe have had rules about market abuse in place for many years, but it is also true that these rules varied a good deal from place to place. Even more important, financial markets have evolved greatly over the past 20 years with a far greater number of financial instrument types, a far wider range of market venues (Multilateral Trading Facilities, Organised Trading Facilities, etc.) and many new trading techniques that possess the potential for market abuse or market manipulation (i.e., certain types of HFT strategies and market gaming algorithms).

To keep pace with these ever-changing market realities, a series of legislative and regulatory initiatives have been introduced over the years. For example, the UK produced major markets legislation in 2000 (Financial Services & Markets Act 2000- FSMA), while the EU created the Market Abuse Directive (MAD I) in 2003. Since their introductions, FSMA has been amended heavily several times and MAD I has been entirely superseded by the new EU Market Abuse Regulation rules. Within this context:

- Financial markets have now transitioned from a set of transposed, directive-driven rules to a new EU-wide set of regulations.
- Going forward, there will be no minor local differences (although local laws will continue to be added) and the EU's highest court will be the final arbiter in the event of any challenge.
- The Market Abuse Directive (MAD I) has been replaced and the subsequent MAD II rules are being transposed to provide for specific criminal penalties in all EU jurisdictions.

We should also bear in mind that when the UK leaves the EU, all rules that have not been adopted locally (transposed) will no longer apply. The UK currently expects to adopt EU regulations into UK law but this is a fluid situation. For now, the working assumption is that all current EU regulations will continue to apply.

## Market Abuse Regulation Explained

In order to ensure uniform market conditions among trading venues and facilities subject to this regulation, all operators of regulated markets, Multilateral Trading Facilities (MTFs) and Organised Trading Facilities (OTFs) are required to establish effective systems, controls and procedures aimed at preventing and detecting market manipulation and abusive practices. The London Stock Exchange Group is clearly subject to this requirement, as are the many systematic internalisers and alternative trading venues.

Manipulation or attempted manipulation of financial instruments may involve placing orders which have not been executed. Furthermore, a financial instrument may be manipulated through behaviour that occurs outside a trading venue. Thus, MAR rules require persons professionally arranging or executing transactions to establish effective systems and controls in order to detect and report suspicious transactions and orders. The spreading of false or misleading information, including rumours and false or misleading news, is also an infringement of the Market Abuse Regulation.

### Key Takeaway

*MAR rules require persons professionally arranging or executing transactions to establish effective systems and controls in order to detect and report suspicious transactions and orders.*

### Manipulation or attempted manipulation includes:



Placing orders which have not been executed



Behaviour that occurs outside a trading venue



Spreading false or misleading information (rumours, misleading news)

## Insider Lists and New Structure

After considering industry feedback, the European Securities and Markets Authority (ESMA) recognised that trade-offs exist when considering:

- Data protection/privacy
- Administrative burden concerns on one side
- The ability of competent authorities to effectively investigate possible abuses

Accordingly, ESMA has revised its content template for insider lists and ComplySci has changed its restricted list structure to take account of these new requirements.

In addition, there is a greater need for professional advisors and issuers to coordinate their insider lists, to ensure they are in a MAR compliant format, and that all transaction participants are covered by appropriate controls. This includes prospective investors who have been wall crossed in order to assess demand. These areas have been seen as relatively weak in the past.

### Person Discharging Managerial Responsibility (PDMR) Transactions

Article 19 of MAR defines transaction notification requirements for persons discharging managerial responsibilities for the issuer of a financial instrument, as well as for their Closely Associated Persons (CAPs). This obligation, which aims to improve the transparency of financial markets, was already included in MAD but has been modified by MAR in a number of key areas, the scope being most notable. The reporting requirements are generally repeated in the UK Disclosure and Transparency Rules (DTR's) that implement the various EU transparency directives.

Most firms have decided to adopt a share dealing code as a result of MAR rules for PDMR's, often voluntarily extending the 30 day closed period and requiring that PDMR's use their best endeavours to prevent persons closely associated with them from dealing in a closed period. Controls over PDMR's are now expected to be more comprehensive and robust, a key strength of the ComplySci platform.

### Financial Instruments Coverage

MAR has generally extended the scope of covered financial instruments to those instruments admitted to trading, or those for which a request has been made to trade on Recognised Market (RM), an MTF or an OTF.

## How Does MAR Interact With MiFID II and MiFIR?

MAR makes multiple references to MiFID II and the latter contains important definitions that relate to market abuse. Thus, the two should be linked as you consider how to manage market abuse issues.

MiFIR is a body of EU regulation that parallels and supplements MiFID II. MiFIR requires transaction reporting so that regulators can monitor for market abuse and ensure orderly markets. It captures both cash instruments and derivatives and requires a detailed set of information that includes the names and dates of birth of the traders and individual beneficiaries.

MiFIR extends the scope of reportable products to all financial instruments admitted to trading or traded on an RM, MTF or OTF. This range represents a very significant increase in the number of financial instruments for which transactions will become reportable. Not least, it will add all foreign exchange, commodity and interest rate derivatives that were previously excluded from MiFID I reporting requirements but captured under MiFID II. Also, a large number of North American and Asian instruments traded on EU-based MTFs, such as BATS/Chi-X and Turquoise, will now become reportable – irrespective of the venue on which they actually trade.

### Reportable Data Fields

Previously, MiFID transaction reporting required up to 24 fields to be populated in a transaction notification. MiFIR has now significantly increased the requirements to more than 60 data fields. Some of the additional fields relate to completely new requirements, such as flags to indicate whether the transaction was part of a short sale or was made under a waiver.

This expansion will result in considerable data protection concerns, as the reports will need to contain the personal data of individuals (i.e., name, date of birth and national identification number).

## Conclusion - What have we learned so far? How are firms responding?

The introduction of MAR has caused many firms to re-consider the way they manage and monitor inside information, control conflicts, monitor for market manipulation as well as their overall systems and controls structure. While investment firms are among the most obvious to be impacted, some of the biggest changes may have been for issuers of securities. New requirements around earnings announcements, notification of the regulator about delays in announcing insider information as well as the need to maintain a “disclosure record” about who knew what and when have raised the stakes for issuers on their ability to monitor and evidence what they have done. The use of technology to monitor and control these exposures at listed firms is now more critical and ComplySci provides efficient answers to many of these new needs.

The requirements of MAR and MiFIR/ MiFID II place huge new demands on a firm's compliance department and systems to ensure they do not fall foul with the regulator. Unless firms embrace technology as a base for managing the vast amounts of data and reporting for which they will be responsible, they face an insurmountable task.

Automation of surveillance and reporting will dramatically reduce risk exposure for firms if they use technology that captures appropriate evidence in a form that regulators are confident meets their look-back requirements. Whether they are tackling the management of compliance certifications, training, employee disclosures, personal account dealing or restricted list requirements, the use of technology will play a critical role in helping firms and senior executives ensure that they can demonstrate adequate supervision.

Regulators has made it clear that they expect firms to significantly improve their control over how their people behave and what employees do with the information they can access. Importantly, regulators expectations are that firms are able to demonstrate how they are accomplishing the control and oversight process. That will simply not be possible unless firms are able to rely on purpose-built technology that dramatically increases transparency, efficiency and effectiveness across the compliance function.

And the behaviour of regulators shows that they are serious. Across Europe, national regulators have substantially increased their scrutiny of firms, increased the number of suspicious incidents that they investigate and supervisory requirements for change, including enforcement actions.

### Key Takeaway

*Whether they are tackling the management of compliance certifications, training, employee disclosures, personal account dealing or restricted list requirements, the use of technology will play a critical role in helping firms and senior executives ensure that they can demonstrate adequate supervision.*

## ABOUT COMPLYSCI

ComplySci is a leading provider of technology solutions that help compliance organizations identify, monitor, manage and report on conflicts of interest arising from employee activities, including personal trading, gifts and entertainment, political contributions, outside business affiliations, and other code of ethics violations. Founded in 2003 by early pioneers in the development of automated compliance management solutions, ComplySci is now trusted by over 1,000 customers, including some of the world's largest financial institutions. Compliance Officers rely on ComplySci's scalable and sophisticated platform to stay ahead of risk.

[complysci.com](https://complysci.com)

## Appendix

### The Financial Conduct Authority's Take on MAR

It is worth looking specifically at how the Financial Conduct Authority describes MAR's implications for the financial market and its participants.

*“ MAR seeks to increase market integrity and investor protection while ensuring a single rulebook and level playing field across the EU. ”*

#### What is the objective of MAR?

MAR seeks to increase market integrity and investor protection while ensuring a single rulebook and level playing field across the EU, thus, increasing the attractiveness of securities markets for capital raising.

#### What does MAR apply to?

MAR prohibitions against insider dealing, unlawful disclosure of inside information and market manipulation apply to:

- a) Financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made.
- b) Financial instruments traded on a MTF, admitted to trading on an MTF, or for which a request for admission to trading on an MTF has been made.
- c) Financial instruments traded on an OTF.
- d) Financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

Financial instruments are defined in Annex 1, Section C of the Markets in Financial Instruments Directive (MiFID II) published on 12.6.2014.

MAR also applies to both Emission Allowances and Emission Allowance Market Participants (EAMPs). Additionally, spot commodities are applicable in certain situations.

## What are the key requirements of MAR?

**Inside Information and Disclosure** - The definition of inside information is broadly unchanged, but it has been widened to capture inside information for spot commodity contracts. The obligation to disclose inside information has been extended to some EAMPs. Issuers and EAMPs must notify their regulator after delaying disclosure of inside information, and financial institutions must seek consent from the regulator prior to delaying disclosure because of financial stability concerns.

**Insider Dealing and Unlawful Disclosure** - MAR makes it clear that the use of inside information to amend or cancel an order will be considered insider dealing. In addition, recommending or inducing another person to transact on the basis of inside information is deemed an unlawful disclosure of inside information.

**Market Manipulation** - MAR extends the manipulation offence to include attempted manipulation. Benchmarks, and in some situations spot commodities, are now defined as market manipulation. Other examples of manipulative behaviours and activities include collaborating to secure a dominant position over the supply or demand of a financial instrument and conducting certain algorithmic trading strategies which disrupt the functioning of a trading venue.

**Market Soundings** - This provision introduces a framework enabling persons to make legitimate disclosures of inside information in the course of market soundings.

**Buy-back Programmes and Stabilisation Measures** - The existing framework is revised to allow for conducting buy-back programmes and stabilisation measures.

**Accepted Market Practices (AMPs)** - Regulators may continue to establish an accepted market practice that is subject to certain criteria and conditions.

**Insider Lists** - Issuers and EAMPs are now obligated to develop and maintain a list of all persons in their employ who have access to inside information. (Issuers on SME growth markets will be required to draw up such a list only when requested by the regulator.)

**Suspicious Transaction and Order Reports (STORs)** - The existing obligation to report suspicious transactions is now extended to include suspicious orders, too. Trading venues are also bound by the obligation to submit STORs.

**Managers' Transactions** - Persons discharging managerial responsibilities (PDMRs) within issuers, and persons closely associated with them, must notify the issuer and the regulator of relevant personal transactions they undertake involving the issuer's financial instruments. The issuer, in turn, must make that information public within three business days.

**Investment Recommendations** - Persons producing or disseminating investment recommendations must continue to ensure information is objectively presented, and to disclose any conflicts of interest.

**Whistleblowing** - Regulators and firms are required to have capabilities in place to receive whistleblowing notifications and to protect whistle blowers from coercion.

## Additional References

### Financial Conduct Authority

What is MAR?

<https://www.fca.org.uk/markets/market-abuse/regulation>

Suspicious Transactions and Order Regime

<https://www.fca.org.uk/markets/market-abuse/suspicious-transaction-order-reports/stor-supervisory-priorities>

Code of Conduct in respect of MAR

<https://www.fca.org.uk/markets/market-abuse>

### ESMA

Market Abuse and Accepted Market Practices

<https://www.esma.europa.eu/regulation/trading/market-abuse>

Q&A on the Market Abuse Directive

[https://www.esma.europa.eu/sites/default/files/library/esma70-145-111\\_qa\\_on\\_mar.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf)

Q&A on the Common Operation of the Market Abuse Directive

[https://www.esma.europa.eu/sites/default/files/library/2016-419\\_qa\\_market\\_abuse\\_directive.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-419_qa_market_abuse_directive.pdf)

## About the Author

### Ronald Gould, Chairman, ComplySci™ Ltd. Europe

Ronald Gould joined ComplySci in September 2015 as Chairman, ComplySci Ltd. Europe. Mr. Gould has extensive experience leading financial companies through periods of rapid global growth in complex regulatory and compliance environments. He has also served as a Senior Advisor to the UK regulator and other Government regulators in both Europe and Asia, lending his expertise to advise on a wide range of policy and regulatory matters.

Prior to joining ComplySci, he also held senior executive management positions at Barclays Asset Management, including Vice Chairman, CEO Barclays Stockbrokers and CEO Barclays Trust Japan. He was responsible for the first international operations of Barclays' asset management business and creation of its business strategy and development.

Additionally, Mr. Gould has served as CEO of Chi-X Asia Pacific, CEO of ABG Sundal Collier ASA, Managing Director of AXA Investment Managers and Managing Director Asia, Promontory Financial Group. Mr. Gould currently serves as a board member, partner and advisor to a number of established financial companies including One Re Insurance, J.P Morgan Asian Investment Trust PLC, ThinkAlliance Consulting, and Warfleet Partners.