The new EU market abuse regime
What listed companies need to know.

The new EU market abuse regime

From 3 July 2016, a new standardised EU-wide regime to prevent market abuse (market manipulation and insider dealing) will take effect, including new rules on disclosure of inside information, insider lists and restrictions on dealings by persons discharging managerial responsibilities and their associated persons.

Issuers within the scope of the new regime will need to review and update their policies and procedures and ensure that all relevant staff are made aware of their responsibilities and the consequences of non-compliance.

Some issuers that were not caught by the previous rules will have to comply with these rules for the first time.

See our quick reference guide at the end of this note for a summary of the key differences for issuers between the old and new rules.

What's it all about?

The purpose of market abuse regulation is to ensure the integrity of financial markets and to enhance investor protection and confidence when dealing in financial instruments. There have been significant technological developments since the original Market Abuse Directive (“MAD”) was adopted in 2003. In addition, the EU’s reaction to the 2007-8 financial crisis was to strengthen and increase supervision of the financial services industry as a whole and the European Commission launched a review of MAD in 2009. The resulting new legislation carries on the same broad principles that were in MAD, but expands the scope of the regime and is more prescriptive on matters such as record-keeping. This guide provides an overview of the rules relevant to listed companies.

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Where are the rules?

The primary legislation (known as Level 1 measures) is in two parts:

> the EU Market Abuse Regulation ("MAR") has direct effect, which means that it will apply automatically in all EU Member States. MAR will introduce a new harmonised EU-wide regime for market abuse (market manipulation and insider dealing) alongside new rules on disclosure of inside information, insider lists and restrictions on dealings by persons discharging managerial responsibilities ("PDMRs") and their associated persons; and

> the EU Criminal Sanctions Directive ("CSMAD"), which has to be implemented into national law separately in each EU Member State (other than Denmark and the UK) and introduces minimum requirements for criminal sanctions for market abuse.

MAR will be supplemented by further rules (known as Level 2 measures) which set out detailed technical provisions. These comprise so-called Delegated Acts and regulations known as regulatory and implementing technical standards ("TS") and will be made by the European Commission on the basis of drafts prepared by the European Securities and Markets Authority ("ESMA"). There will also be some ESMA guidelines (known as Level 3 measures) on how competent authorities (i.e. the market regulator in each state) should interpret certain aspects of MAR.

In addition, Member States may have their own national laws which complement MAR and there are a small number of provisions where Member States or national competent authorities have options or choices, so that there may be some variations between states.

When?

The revised legislation applies from July 2016 for the most part, although certain provisions concerning organised trading facilities, SME Growth Markets and emissions allowances will apply from a later date to coincide with MiFID II.

Who?

The scope of MAR is broader than the previous regime under MAD. This means that some issuers that have been outside the scope of the market abuse regime will find themselves subject to these rules for the first time.

> Issuers with financial instruments admitted to trading on an EU regulated market (or for which a request for admission has been made) should already be complying with the rules which implemented MAD in their own country or home state. For those issuers the introduction of MAR is likely to require some adjustments to existing policies and procedures and training to update relevant staff. In addition the new rules in MAR on restricting dealings by managers in certain periods will require fresh policies and compliance procedures to be put in place.
Issuers with financial instruments admitted to trading on a Multilateral Trading Facility ("MTF") (or for which a request for admission has been made) were not captured under the MAD regime but are captured by MAR. Issuers are also required to comply with MAR if their financial instruments are traded on an MTF or Organised Trading Facility ("OTF") with their approval. For these issuers, the introduction of MAR will have a greater impact. They will have to introduce entirely new policies and procedures and educate their staff to ensure compliance. Some MTFs will be able to register as an “SME Growth Market” once MiFID II has taken effect. In that case, issuers with financial instruments admitted to trading on such markets will be able to benefit from some exemptions in MAR which look to reduce the administrative burden on them.

MAR also applies to financial instruments traded on an organised trading facility, and financial instruments whose price or value depends on or has an effect on the price or value of a financial instrument referred to above, including credit default swaps and contracts for difference. MAR also captures certain behaviours relating to spot commodity contracts, emissions allowances and benchmarks.

This guide focuses on the rules relevant to listed companies.

**Inside information**

Various rules apply when an issuer has inside information, so it is important to understand what inside information is.

The definition of inside information is broadly the same as the one that existed under MAD, but with some changes to reflect recent decisions by the Court of Justice of the European Union. We are also expecting ESMA guidelines which will provide a non-exhaustive list of types of information which would usually be expected to constitute inside information.

Information is inside information if it:

- is of a precise nature;
- has not been made public;
- relates, directly or indirectly, to one or more issuers or to one or more financial instruments; and
- if it were to be made public would be likely to have a significant effect on the prices of those financial instruments or their related derivatives.

As before, information is precise if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivatives. MAR also clarifies that...
intermediate steps of a protracted process can be precise and that such steps can themselves be inside information if they meet all four criteria.

MAR confirms that information that would be likely to have a significant effect on price means information a reasonable investor would be likely to use as part of the basis of his or her investment decisions. The way this limb is set out is subtly different from MAD and there have previously been variations in the interpretation in different Member States. It is now clear that information which satisfies the so-called “reasonable investor test” constitutes information that would be likely to have a significant effect on price, and there is no need to separately consider how price-sensitive the information may be.

**Relevant rules:** Article 7 MAR; ESMA guidelines.

**Disclosing inside information to the market**

Under MAR, an issuer must inform the public as soon as possible of inside information which directly concerns that issuer, save in very limited circumstances when disclosure may be delayed.

**Obligation to announce**

The obligation to announce is supplemented by TS which specify the means by which disclosures must be made. These must ensure that announcements are clearly identified as containing inside information. We are also expecting ESMA guidelines for issuers on the disclosure of inside information.

Any inside information disclosed to the public must also be posted on the issuer’s website and kept there for at least five years (save in the case of an SME Growth Market issuer, who can post the information on the exchange’s website rather than its own). The TS set out various requirements for the website, including that there is a clearly identifiable section of the website for inside information and that it is arranged in chronological order.

**Ability to delay to protect legitimate interests**

An issuer may delay disclosure to the public if: (i) immediate disclosure is likely to prejudice its legitimate interests; (ii) the delay is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of that information. These are the same criteria as existed under MAD. MAR clarifies that where inside information arises from a protracted process, the issuer may delay disclosure as long as these three criteria are satisfied. We are also expecting ESMA guidelines on legitimate reasons for delaying disclosure.

If the confidentiality of the inside information can no longer be maintained, it must be announced as soon as possible. This will include a situation where rumours relating to the information of which disclosure has been delayed are sufficiently accurate to indicate that confidentiality is no longer ensured.

When disclosure to the public is ultimately made, the issuer must notify its competent authority that there was a delay and explain how these conditions were met.
notification that disclosure was delayed. These requirements mean that issuers will need to keep detailed records at the time inside information is identified and when decisions to delay disclosure are taken.

**Ability to delay to preserve the stability of the financial system**

MAR also provides that an issuer which is a credit or financial institution may delay the public disclosure of inside information in certain limited circumstances if it has the consent of its competent authority. The conditions are: (i) that the disclosure of the information would entail a risk of undermining the financial stability of the issuer and of the financial system; (ii) it is in the public interest to delay disclosure; and (iii) the confidentiality of the information can be ensured. The TS supplement this rule with requirements as to the communications between the issuer and the competent authority.

**Relevant rules:** Article 17 MAR; TS; ESMA guidelines.

**Insider lists**

Under MAR, issuers or any person acting on their behalf (e.g. advisers) must maintain a list of all those working for them in any capacity who have access to inside information. The purpose of the insider list is provide a tool to regulators when investigating possible market abuse, but it is also seen as useful to issuers in controlling the flow of inside information. The list must be kept up to date and be provided to the competent authority if requested (SME Growth Market issuers will not be obliged to maintain a list at all times but would be required to draw one up if requested by the competent authority). Issuers or persons acting on their behalf must take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information (see below).

The data to be included on an insider list is being harmonised across the EU and is specified in the TS, together with the format and structure for the insider list. For many issuers, the data to be recorded will be more extensive than that previously required in their Member State. Issuers will be able to maintain a separate “permanent insider” section of the list, so that those with access to all information, such as senior executives, will not have to be added to each event-based section of the list.

**Relevant rules:** Article 18 MAR; TS.

**Insider dealing**

It is unlawful for an insider to engage or attempt to engage in insider dealing or to recommend or induce another person to engage in insider dealing.

Insider dealing is where an insider is in possession of inside information and uses that information by acquiring or disposing of, directly or indirectly, financial instruments to which that information relates, whether or not the dealing is for its own account or the account of a third party. Where someone has placed an order relating to the financial instruments in question before
they have access to the inside information, it will also be insider dealing to cancel or amend that order.

Where a person possesses inside information and then deals or attempts to deal, it is presumed that they have used that information, although there are some circumstances when that presumption will not apply. These include:

- where effective information barriers are in place between different functions of the same legal person;
- where the dealing is to satisfy an obligation which arose before the relevant person had inside information;
- where the inside information is the person's own intention to deal and they carry out that intention;
- where a bidder in a takeover offer has obtained inside information in connection with that offer and uses it solely for the purposes of proceeding with the offer (as long as there is no undisclosed information at the point at which the shareholders approve the offer); and
- for market makers or the execution of client orders.

**Relevant rules:** Articles 8, 9 and 14 of MAR.

**Unlawful disclosure of inside information**

As before, it will be unlawful for an insider to disclose inside information to any other person unless that disclosure is made in the normal course of the exercise of an employment, profession or duties.

**Market Soundings**

Disclosures made in the course of a market sounding will be deemed to have been made in the normal exercise of a person’s employment, profession or duties (i.e. will not be unlawful) if certain strict requirements are met. A market sounding is a communication of information by an issuer, secondary offeror or someone acting on their behalf before a transaction to gauge the interest of potential investors, or a communication to shareholders by a bidder in a takeover offer.

In order to benefit from this safe harbour, the person making the disclosure, known as the disclosing market participant, must obtain the consent of the person receiving the market sounding to receiving inside information and inform them of the restrictions that would then be placed on that recipient in respect of that information. There are detailed requirements in relation to exactly what information may be disclosed, timing of disclosures, obtaining the recipient’s consent, record-keeping, information to be provided to potential investors as standard, procedures and controls, which are detailed in the TS. We are also expecting ESMA guidelines for the recipients of market soundings.

**Relevant rules:** Articles 10, 11 and 14 of MAR; TS; ESMA guidelines.
Managers’ transactions

MAR prohibits PDMRs from dealing in their issuer’s securities during closed periods. MAR also sets out a framework for public notification of transactions carried out by PDMRs and their associated persons.

Prohibition on dealing in closed periods

PDMRs are prohibited from conducting any transactions directly or indirectly relating to their issuer’s shares or debt securities or derivatives or other linked financial instruments, for their own account or on behalf of a third party, during the period of 30 calendar days before the publication of an annual or half year report that the issuer is obliged to make public (known as a closed period).

There are some narrow exceptions to this when the issuer may give permission to the PDMR to deal. The Delegated Acts specify certain criteria that would need to be met, such as that the PDMR is able to demonstrate that the transaction cannot be executed at another time. An example might be where a PDMR needs funds to satisfy a court order and cannot meet that commitment without selling the shares. Transactions may also be permitted in relation to an employee share or saving scheme, qualification shares, or where the beneficial interest in the relevant security does not change.

Notification of own account transactions

PDMRs and their closely associated persons must notify both the issuer and the competent authority of any dealings conducted on their own account in respect of that issuer’s shares or debt instruments, or derivatives or other linked financial instruments. The issuer then has to notify the market (although Member States can provide that it is the responsibility of the competent authority to make that information public instead). Both notifications have to be made within three business days of the transaction having taken place. There is a de minimis threshold so that notifications are only required if a total amount of €5,000 has been reached within a calendar year (national competent authorities can opt for an alternative threshold of €20,000).

The Delegated Acts contain a non-exhaustive list of the types of transactions that would trigger a notification, including pledging of shares to a lender, inheriting securities and gifts. The TS set out the format and template for notifications.

 Relevant rules: Article 19 MAR; Delegated Acts; TS.

Share buybacks

As before, share buy-backs carried out for certain permitted purposes will automatically not be market abuse if they are announced, are trade reported as being part of a buy-back programme and comply with certain price and volume limits. Buy-backs that do not fall within these parameters are not necessarily market abuse, but will not benefit from the safe harbour. The TS...
set out further requirements for disclosure and reporting, conditions for trading and restrictions to trading.

**Relevant rules:** Article 5 MAR; TS.

### Market manipulation

MAR prohibits market manipulation (manipulating transactions, manipulating devices and misleading dissemination) as MAD did, and also captures behaviour which manipulates the calculation of a benchmark. MAR also prohibits attempted market manipulation, such as where a transaction is clearly intended for abusive purposes but is not successfully placed or executed. Annex 1 to MAR sets out non-exhaustive indicators of market manipulation and this is supplemented by the Delegated Acts.

**Relevant rules:** Articles 12, 13 and 15 and Annex 1 MAR; Delegated Acts.

### Sanctions for breach

#### Administrative measures

Under MAR, competent authorities will continue to be responsible for enforcing breaches that occur in their territory or with respect to markets or facilities operating within their territory.

MAR requires Member States to ensure that competent authorities have certain minimum powers to impose administrative sanctions, including public censure, disgorgement of profits, cease and desist orders, suspension of authorisation for investment firms and their PDMRs and fines. Competent authorities must be empowered to issue fines of at least €15 million or 15% of consolidated annual turnover in the case of a legal entity which commits insider dealing, unlawful disclosure or market manipulation; and €5 million for an individual.

#### Criminal sanctions

Under CSMAD, Member States (other than Denmark and the UK, which have opted out) must impose criminal sanctions for insider dealing and market manipulation offences (including attempted insider dealing and attempted market manipulation). The criminal sanctions will apply only where the offence is committed with intent. There is also a requirement that inciting or aiding and abetting these offences is punishable as a criminal offence.

Member States will have to ensure that companies can be held liable for the criminal offences which have been committed for their benefit by any person who has a “leading position” in the company, or if a lack of supervision or control by such a person has made the commission of an offence possible.

This potential criminal liability for companies will increase the importance of having adequate training and procedures in place to prevent market abuse. CSMAD requires criminal penalties to be effective, proportionate and dissuasive. Member States must provide that insider dealing and market manipulation offences are punishable by a maximum prison term of at least
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four years; for unlawful disclosure of inside information the maximum prison term must be at least two years

Next steps

Issuers within the scope of MAR should ensure that their compliance procedures reflect the new rules and that relevant staff are adequately trained.

Click here to see the dedicated market abuse site on our client knowledge portal for links to further resources and guides and details of upcoming training we are hosting.

If you would like further assistance, please contact one of those named on the right or your usual contact at Linklaters.
Quick reference guide to key parts of the new regime

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<td><strong>Scope</strong></td>
<td>The scope is broader: the old market abuse regime only applied to issuers with financial instruments admitted to trading on an EU regulated market.</td>
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<td>MAR applies to issuers with financial instruments admitted to trading on an EU regulated market or multilateral trading facility (or for which a request for admission has been made). MAR also applies to financial instruments traded on an organised trading facility, and financial instruments whose price or value depends on or has an effect on the price or value of a financial instrument referred to above. MAR also captures certain behaviours relating to spot commodity contracts, emissions allowances and benchmarks.</td>
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<p>| <strong>Inside information</strong>     | An issuer must notify its competent authority if it has delayed disclosure of inside information. (This was previously required in some but not all Member States.) This has to be done after the information has been announced, but companies will need procedures in place to be sure they can explain to the authority in the prescribed format when the inside information arose and how the conditions for delaying disclosure to the market were satisfied. There will be new rules on the mechanics for disclosing inside information and website requirements. Inside information must be kept on an issuer’s website for five years (rather than the current one year). For SME Growth Market issuers, it may be possible to post the inside information on the trading venue’s website instead. There will be new procedures for disclosure of inside information as part of “market soundings” (communications to potential investors before announcement of a transaction). Strict procedures must be followed and, if they are, an offence of improper disclosure cannot be committed. |
| An issuer must disclose inside information directly concerning it to the market as soon as possible. Disclosure can be delayed in certain limited circumstances where it would prejudice the issuer’s legitimate interests (e.g. ongoing negotiations), so long as the confidentiality of the information can be preserved and the market is not misled. It is an offence for an insider to use inside information to deal or attempt to deal or to encourage another to deal in securities. It is also an offence to disclose inside information outside the normal exercise of one’s employment, profession or duties. Inside information is information of a precise nature, relating directly or indirectly to an issuer or securities, which has not been made public and which would be likely to have a significant effect on price if it was made available. Information would be likely to have a significant effect on price if it is information a reasonable investor would use as part of the basis of his investment decisions. |  |</p>
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**Insider lists**

Issuers and persons acting on their behalf must maintain records of all persons working for them with access to inside information. The insider list must be promptly updated after certain events happen. There is an exemption for issuers with securities trading on an SME Growth Market, in which case they just have to be able to provide an insider list upon request by the competent authority.

Issuers (including those quoted on an SME Growth Market) and persons acting on their behalf must take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information. Companies may have existing procedures for this, but should check that they are adequate. The format of the insider lists will be different: a lot more data will need to be recorded on each insider, including national identification number plus business and personal phone numbers and name at birth. Companies will need to have procedures in place to collect all the information required.

**PDMR dealings**

Persons discharging managerial responsibilities and persons closely associated with them must notify the competent authority, as well as the issuer, of any dealings in securities of the company. Issuers are obliged to notify the market of such dealings. No dealings can be made during closed periods, except in very limited circumstances.

The restrictions on dealing during closed periods were not in MAD, so are new although some Member States have existing restrictions in their national laws and some issuers have equivalent internal dealing codes. Currently PDMRs have four business days to notify the issuer and the issuer must then notify the market by the next business day. Under MAR, both of these notifications must be made within three business days of the dealing. Another new feature is that PDMR transactions below a certain amount do not have to be disclosed to the market. The threshold in MAR is €5,000 per year but the
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competent authority in each Member State may increase it to €20,000.

Issuers must notify PDMRs of their obligations in writing and draw up a list of PDMRs and persons associated with them. PDMRs must notify their associated persons in writing of their obligations and keep a copy of such notification.

**Share buybacks**

Share buy-backs will not be市场 abuse if they are announced, trade reported as part of a buy-back programme and comply with certain price and volume limits.

A new safe harbour for share buy-backs will exist under MAR, with slight differences from the existing one. Companies with ongoing long-term share buyback programmes which benefit from the current safe harbour will need to check that the programme will continue to fall within the safe harbour under MAR.

**Market manipulation**

There will continue to be offences of manipulating transactions, manipulating devices and misleading dissemination. There will be new offences of transmitting false or misleading information in relation to benchmarks and attempting to engage in market manipulation.

Attempted market manipulation and manipulating benchmarks are new offences. MAR also extends the scope of the market manipulation offences to different types of instrument. For companies, the main impact of the market manipulation offences moving to the new regime will be a need to update any market abuse manuals and training to reflect the language of the new rules.