

Europe's New Market Abuse Rules For Issuers of Debt Securities

European Market Abuse Regulation 2016 imposes new obligations for issuers of debt securities traded on multilateral trading facilities.

The European Parliament and the Council of the European Union have adopted a new regulation on market abuse (the Market Abuse Regulation or MAR).¹ Most of the rules of the Market Abuse Regulation will become effective as of July 3, 2016.²

The Market Abuse Regulation provides crucial changes to the ongoing reporting obligations of issuers with debt securities traded on a multilateral trading facility in a member state of the European Union (an MTF), or who have applied for admission to trading of their debt securities on MTFs (MTF Issuers). Examples of MTFs include the Euro MTF in Luxembourg; Global Exchange Market in Ireland; Professional Securities Market in the United Kingdom; Open Market of the Frankfurt Stock Exchange; and similar exchange-regulated markets. The most important new ongoing reporting obligations extend to MTF Issuers those obligations that have been applicable for some time to issuers with debt securities admitted to trading on a regulated market.

The Market Abuse Regulation imposes on MTF Issuers, *inter alia*, an obligation to:³

- Ensure the disclosure of inside information (see “**1. Ad-hoc Disclosure**”)
- Prepare a list of all persons who have access to inside information (see “**2. Insider Lists**”)
- Ensure that persons discharging managerial responsibilities (PDMRs), or persons closely associated with them, notify the MTF Issuer of every transaction conducted for such PDMRs or persons closely associated with them for their own account relating to the MTF Issuer's financial instruments (see “**3. Managers' Transactions**”)

Prior to the effectiveness of the Market Abuse Regulation, MTF Issuers have generally not been subject to any such requirements, even though some MTFs did provide for some shorter and less well-defined obligation to disclose material information to the market. In contrast, issuers with debt securities traded on a regulated market have already been subject to these requirements for some time. Accordingly, MTF Issuers must familiarize themselves with the new requirements and implement necessary procedures to ensure compliance from the date the new rules become effective.

If an MTF Issuer violates the Market Abuse Regulation, the MTF Issuer may be subject to administrative sanctions, *e.g.*, an order to cease and desist, a disgorgement of profits or a public warning, as well as monetary fines, *e.g.*, maximum pecuniary sanctions of up to €2.5 million or 2% of the issuer's total revenue for an infringement of the ad-hoc disclosure obligations.

1. Ad-hoc Disclosure

From July 3, 2016, MTF Issuers will be obligated to inform the public as soon as possible of inside information that directly concerns the MTF Issuer.⁴

- **What constitutes inside information that must be disclosed?**
 - The Market Abuse Regulation provides that:
 - “Inside information” is, *inter alia*, information of a precise nature that has not been publicly disclosed, relating, directly or indirectly, to the MTF Issuer or to one or more financial instruments, and which, if made public, would be likely to have a significant effect on the price of those financial instruments or the price of related derivative financial instruments
 - A “significant effect” on the price of financial instruments means information that a reasonable investor would likely use as part of the basis of its investment decision⁵
 - An intermediate step in a multi-step process may also constitute inside information if, by itself, the intermediate step satisfies the criteria set out above⁶
 - Unlike for shares traded on an MTF, clearly inside information regarding debt securities will be defined more restrictively. The following events or circumstances, *inter alia*, will likely constitute inside information in relation to MTF Issuers:
 - In general, any circumstances that may impact the MTF Issuer's ability to meet its obligations under the relevant debt securities (*e.g.*, the repayment of principal or the payment of interest)
 - A significant improvement in the MTF Issuer's financial situation that reduces the issuer's risk of default (*e.g.*, an injection of capital through a capital increase)
 - Agreements and transactions that may have an impact on the MTF Issuer's creditworthiness (*e.g.*, a majority shareholder's withdrawal of liquidity or an injection of capital, or a change-of-control provision being triggered in the debt securities' terms)
 - Refinancing measures if those measures impact the debt securities or the securities' ranking
 - An unscheduled redemption of the debt securities
 - Default by a significant customer of the MTF Issuer
 - The non-exhaustive list of criteria above is merely intended to provide guidance to MTF Issuers. What constitutes inside information must be carefully determined on a case-by-case basis. Any information that may have an impact on the default risk that is factored

into the debt securities and, as a result, might influence their trading price may constitute inside information. In general, information used by rating agencies to assign their ratings is likely to constitute inside information.

- In the first half of 2016, the European Securities and Markets Authority (ESMA) is expected to issue final guidelines to establish a non-exhaustive indicative list of information that is reasonably expected to constitute inside information or is required to be disclosed.⁷

- **How must the information be disclosed?**

- Inside information must be publicly disclosed in a manner enabling the public's fast access to and complete, correct and timely assessment of the information.
- MTF Issuers must disclose and maintain all inside information required for public disclosure on their websites for at least five years. Inside information must be made public before being posted on the MTF Issuer's website. MTF Issuers should use professional service providers to disclose and disseminate inside information to ensure timely and consistent disclosure at all times.
- ESMA will develop implementing technical standards to determine the technical means for appropriate public disclosure of inside information.

- **Is it possible to delay the disclosure of inside information to the public?**⁸

- Under certain restrictive conditions MTF Issuers may, at their own responsibility, delay disclosing inside information.⁹ A delay generally requires, *inter alia*, that the MTF Issuer has legitimate interests immediate disclosure would prejudice, that the delay will likely not mislead the public, and that the MTF Issuer can ensure the information's confidentiality.¹⁰
- A decision by the competent bodies of an MTF Issuer to delay disclosure of inside information should be properly documented. ESMA is expected to publish implementing technical standards providing for specific documentation requirements and forms.
- In any event, an MTF Issuer must disclose inside information to the public as soon as possible if the issuer can no longer ensure the information's confidentiality, e.g., if rumors with sufficiently concrete information are spreading.

2. Insider Lists

From July 3, 2016, MTF Issuers will be required to prepare a list of all persons who have access to inside information, and promptly update the list and provide the list to the competent authority upon request. Even if another person acting on the MTF Issuer's behalf or account assumes the task of preparing and updating the insider list, the MTF Issuer remains fully responsible for complying with the Market Abuse Regulation.¹¹ Accordingly, the MTF Issuer should always retain a right of access to the insider list.

- **What is an insider?**

- An insider is any person who has access to inside information and is working for an MTF Issuer under an employment contract, or otherwise performing tasks through which he or

she has access to inside information, such as advisors, accountants or rating agencies.¹²

- **What information must be included in an insider list?**

- An insider list must include, *inter alia*, the identity of any person with access to inside information; the reason for including that person in the insider list; the date and time of day that person obtained access to inside information; and the date the insider list was prepared.
- An insider list should be updated (including the date of the update) if there is a change in the reason for including a person already on the list; a new person has access to inside information and needs to be added to the list; or a person ceases to have access to inside information.
- ESMA will develop draft implementing technical standards to determine the precise format of insider lists.

- **Are there further obligations with respect to the insider lists?**

- MTF Issuers must retain the insider lists for at least five years after the lists have been prepared or updated.
- MTF Issuers must take all reasonable steps to ensure any person on the insider list acknowledges in writing the legal and regulatory obligations involved and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.¹³

- **Are there any exceptions?**

- An issuer whose financial instruments are admitted to trading on an “SME growth market”¹⁴ will be exempt from preparing an insider list if the issuer (i) takes all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory obligations involved and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information; and (ii) can provide the competent authority, upon request, with a copy of an insider list.¹⁵

3. Managers’ Transactions

From July 3, 2016, MTF Issuers must ensure that transactions by PDMRs and persons closely associated with them¹⁶ (Managers’ Transactions) are publicly disclosed promptly and no later than three business days after the transaction.

- **What is a Manager’s Transaction?**

- The PDMR or associated person must notify the MTF Issuer and the competent authority of every transaction conducted for their own account relating to that MTF Issuer’s debt securities or any financial instruments linked to the securities.
- Relevant Managers’ Transactions also include, *inter alia*, pledging or lending the debt securities or financial instruments.¹⁷

- **What are the MTF Issuer’s obligations?**

- MTF Issuers must ensure that any PDMR notification of a Manager’s Transaction is publicly disclosed promptly, and no later than three business days after the transaction, in a manner enabling fast access to this information on a non-discriminatory basis in accordance with the implementing technical standards the ESMA will soon develop.¹⁸
- MTF Issuers must notify the PDMRs of their obligations in writing. In addition, MTF Issuers must prepare a list of all PDMRs and persons closely associated with them.¹⁹
- **Are there any *de minimis* rules?**
 - The obligation to disclose a Manager’s Transaction only applies once the PDMR’s transactions have reached a cumulative €5,000 within a calendar year (with no netting).²⁰
- **What information must the notification contain?**
 - A PDMR’s notification of a Manager’s Transaction should include, *inter alia*, the person’s name; the reason for the notification; the issuer’s name; a description and the identifier of the financial instrument; and the nature, date and place of the transaction.²¹
- **Introduction of a so-called “Closed Period”**
 - During a period of 30 calendar days before the publication of an interim financial report or a year-end report, which the issuer is, legally or by the trading venue’s rules, required to make public (Closed Period), a PDMR within the MTF Issuer must conduct no transactions for its own or a third party’s account, directly or indirectly, relating to that MTF Issuer’s debt securities or to derivatives or other financial instruments linked to the debt securities.²²
 - An MTF Issuer may allow such Managers’ Transactions during a Closed Period on a case-by-case basis if exceptional circumstances exist, such as an individual PDMR’s severe financial difficulties.

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Endnotes

- ¹ Regulation (EU) No. 596/2014 of the European Parliament and of the Council of April 16, 2014, *Official Journal of the European Union* L 173, June 12, 2014, p. 1.
- ² Pursuant to Article 39 para. 2 MAR, certain provisions of the MAR became effective on July 2, 2014. In addition, certain provisions, in particular with respect to OTFs, SME growth markets, emission allowances or auctioned products based thereon, will not apply until January 3, 2017 (Article 39 para. 4 subpara. 2 MAR).
- ³ Only addresses changes with respect to debt securities that are traded on “multilateral trading facilities” within the meaning of point (22) of Article 4(1) of Directive 2014/65/EU, namely a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of the Directive. The Market Abuse Regulation also provides for regulations with respect to regulated markets and organized trading facilities, which are not covered herein.
- ⁴ Article 17 para. 1 subpara. 1-3 MAR.
- ⁵ Article 7 para. 4 subpara. 1 MAR.
- ⁶ Article 7 para. 3 MAR.
- ⁷ Article 7 para. 5 MAR.
- ⁸ Different rules may apply to credit or financial institutions under Article 17 para. 5 MAR.
- ⁹ Article 17 para. 4 MAR.
- ¹⁰ Article 17 para. 4 MAR.
- ¹¹ Article 18 para. 2 subpara. 2 MAR.
- ¹² Article 18 para. 1 lit. a) MAR.
- ¹³ Article 18 para. 2 subpara. 1 MAR.
- ¹⁴ “SME growth market” means SME growth market as defined in point (12) of Article 4(1) of Directive 2014/65/EU: Thus, “SME growth market” means an MTF that is registered as an SME growth market in accordance with Article 33 of Directive 2014/65/EU.
- ¹⁵ Article 18 para. 6 MAR.
- ¹⁶ Article 19 para. 1 MAR.
- ¹⁷ Article 19 para. 7 MAR.
- ¹⁸ Article 19 para. 3 MAR.
- ¹⁹ Article 19 para. 5 MAR.
- ²⁰ Article 19 para. 8 MAR. Pursuant to Article 18 para. 8 MAR, a competent authority may decide to increase the threshold to €20,000.
- ²¹ Article 19 para. 6 MAR.
- ²² Article 19 para. 11 MAR.