

## Capital markets law updates – Market abuse

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On 20 October 2016, the European Securities and Markets Authority (the **ESMA**) has published a translated version of the MAR Guidelines on delay in the disclosure of inside information (the **Guidelines**) [1] in accordance with Regulation 596/2014 of the European Parliament and of the Council of the European Union (the **MAR**) repealing and replacing Directive 2003/6/EC on Market Abuse. The Guidelines will enter into force on 20 December 2016 [2].

We would like to use the opportunity of this publication to shortly summarize the changes in Luxembourg applying to Issuers under the new MAR and briefly describe the contribution made by the aforementioned Guidelines.

One of the major change introduced in Luxembourg by the MAR is the end of the disclosure requirements exemption which applied to the Euro MTF issuers. In other words, the scope of the market abuse regime, which previously only applied to issuers with debt securities admitted to trading on a regulated market, has been extended to issuers with debt securities traded on a multilateral trading facility in an European Union member state, or who have applied for admission to trading of their debt securities on a MTF, including the Euro MTF. However, this statement shall be nuanced. Indeed, the listing requirements for the Euro MTF (prior to the introduction of MAR), already included rules for issuers to disclose inside information as soon as it became available especially former articles 1001 and 1004 of rules and regulations of the Luxembourg Stock Exchange (LuxSE Rules & Regulations). Therefore, although the impact on the issuers listing on the Euro MTF regarding disclosure of inside information can be qualified as rather limited, Euro MTF issuers nevertheless need to comply with the new requirements and especially implement the necessary intern procedures to ensure monitoring and compliance.

Key obligations imposed by the MAR on issuers of debt securities admitted to trading on both, the regulated market and the Euro MTF, operated by Luxembourg Stock Exchange (LuxSE) together the **Issuers**) include:

- the disclosure of inside information;
- the maintenance of insider lists; and
- the disclosure of managers' transactions.

## 1. Disclosure of inside information

### i. Disclosure obligation

According to article 17 of the MAR, an Issuer shall inform the public as soon as possible of inside information which directly concerns that Issuer.

“Inside information” means any information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more Issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Issuers shall therefore assess on a case by case basis whether the information at hand is likely to have a significant impact on the financial instruments and therefore qualify as an inside information.

It is commonly assumed that Issuers have all resources and capacities to be able to carry out the assessment on their own whether an information should qualify as inside information, the practice shows however that Issuers face some difficulties.

In this context, it might be helpful mentioning here that information in connection with the following events would qualify as insider information:

1. the Issuer's ability to repay the principal amounts or the payment of interest, of the relevant debt securities;
2. any significant changes in the Issuer's credit rating or credit worthiness that increase or reduce the risk of default;
3. any redemption of debt securities before the due date;
4. any decision which triggers bankruptcy, insolvency or cessation of payments affecting the debt securities.

### ii Inside information dissemination

Issuers shall ensure that the inside information is made public in a manner which enable fast access and complete, correct and timely assessment of the information by the public.

An Issuer is required to make such disclosure of inside information as soon as possible through

an officially appointed mechanism (OAM) on the exchange where the debt securities are admitted to trading. Such OAMs include the Financial News Service (FNS) of the LuxSE.

Inside information shall be made public in a manner which enables fast access and complete, correct, timely assessment of the information by the public and, where applicable, in OAM. In addition, the information must be made available on the Issuer's website for a period of 5 years.

For Issuers listing on "Bourse de Luxembourg" Regulated Market, the LuxSE provides the storage of this data through its OAM service and can assist with its FNS services for dissemination. For Issuers listing on the Euro MTF, LuxSE FNS services may also be used.

### iii Delay in the disclosure of inside information

The public disclosure of inside information by an Issuer is essential to avoid insider dealing and ensure investors' protection. However this disclosure obligation may, in specific circumstances, prejudice the legitimate interest of the Issuers. Therefore, the MAR sets forth the possibility to delay the disclosure provided that particular conditions mentioned in article 17 (4) MAR are met.

According to the Guidelines, the following events would justify a delayed disclosure of inside information:

- The Issuer is conducting negotiations where the outcome would likely be jeopardized by an immediate public disclosure;
- The financial viability of the Issuer is in grave and imminent danger and immediate public disclosure would prejudice the interests of existing or potential shareholders by jeopardising the conclusion of the negotiations designed to endure the financial recovery of the Issuer;
- The inside information related to decisions taken by the management body of the Issuer which require the approval of another body of the Issuer provided that immediate public disclosure would jeopardise the correct assessment of the information before such a definitive decision would jeopardise the correct assessment of the information by the public and the Issuer arranged for the definitive decision to be taken as soon as possible;
- The intellectual property rights of the Issuer is likely to be jeopardise;
- The envisaged acquisition or selling of a major holding in another entity and the disclosure of such inside information would likely jeopardise the implementation of such project;
- A transaction previously announced which is subject to a public authority's approval and such approval is conditional upon additional requirements will likely affect the ability for the Issuer to meet them.

In case an Issuer has delayed the disclosure of inside information, it shall inform without delay the *Commission de Surveillance du Secteur Financier (CSSF)* and provide evidence that the

conditions are met.

## **2. Insider lists**

Insider lists are an important tool for regulators when investigating possible market abuse. Such list shall be provided at any time to the CSSF upon request. The requirement stemming from article 18 of the MAR to keep and constantly update insider lists imposes administrative burdens especially on Euro MTF Issuers which are mostly small or medium sized companies.

## **3. Managers transaction**

As soon as a certain threshold set by the competent authority is reached, persons discharging managerial responsibilities (as defined in article 3 (25) of the MAR) or by a person closely associated (as defined in article 3 (26) of the MAR) with them, are expected to notify the Issuer and the CSSF of each transaction conducted on their own account relating to shares or debt instruments of that Issuer or to derivatives or other financial instruments linked thereto.

The notification requirement set forth in article 19 paragraph 1 of the MAR applies to any transaction once a total amount of EUR 5,000 has been reached within a calendar year. Such notification shall be made promptly and not later than three business days after the date of transaction.

## **4. The choice of the Channel Islands Securities Exchange**

New EU market abuse regime does not apply to listings on Channel Islands Securities Exchange.

Such specialist debt issuers who are concerned by the burdens and obligations which will be imposed upon them by MAR may wish to consider listing those debt securities to The Channel Islands Securities Exchange Authority Limited (the **CISEA**) under Chapter 8 of the CISEA Listing Rules.

Unlike EU exchanges, the CISEA is not bound by or subject to any EU directives or regulations and therefore is considerably more flexible in its approach. Importantly, the rules and continuing obligations regime applicable to debt securities listings on the CISEA under Chapter 8 are less onerous in comparison to the continuing obligations regimes on many EU-based exchanges and, most notably, do not currently (although this may be reviewed) contain any of the same ongoing administrative obligations imposed under the MAR. It should be noted however that the issuer will still be subject to any other relevant local market abuse and insider dealing legislation.

For more information, please find below the internet link to the Jersey client briefing:

<https://www.ogier.com/publications/new-eu-market-abuse-regime-and-listing-debt-securities-on-cise>

If you would like further information about markets, listing processes and the services in both jurisdictions, Luxembourg and Jersey, that we are able to provide, please feel free to get in touch with any of the contacts listed in connection with this briefing.

Ogier's Capital Market team can keep you posted about any further developments in this area, and in particular about any new information issued by the CSSF or ESMA in this respect. We are also more than happy to assist you in the review or setting-up of internal policies in line with the new regime requirements. You may contact us via our dedicated email address, [info@ogier.com](mailto:info@ogier.com) should you need any further information on this topic.

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[1] <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-official-translations-mar-guidelines>

[2] Regarding the legal effect and binding force of Guidelines, it is important to note that according to article 16 of regulation N°1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European supervisory authority (**Regulation 1095/2010**), the ESMA shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial market participants. The competent authorities and financial market participants shall make every effort to comply with those guidelines and recommendations. Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the ESMA, stating its reasons.

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