



# Insider Dealing and Market Abuse under Luxembourg Law

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● **NautaDutilh**

International Law Firm | Amsterdam · Brussels · London · Luxembourg · New York · Rotterdam



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## Introduction

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The Luxembourg rules on market abuse can be found in:

- i. Regulation (EU) No 596/2014 on market abuse or "**MAR**", which has been directly applicable in Luxembourg since 3 July 2016; and
- ii. the Luxembourg Act of 23 December 2016 on market abuse (the "Market Abuse Act"), as amended (together with MAR, the "**Market Abuse Legislation**").

In addition, circulars published by the Luxembourg Financial Services Authority ("**CSSF**") (i. e. Circulars 16/646, 17/648 and 17/653) and interpretative documents issued by the European Securities and Markets Authority ("**ESMA**") provide guidance on requirements under the Market Abuse Legislation.

## Scope of the Market Abuse Legislation

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### Financial instruments

All financial instruments listed at Annex I, Section C of Directive 2014/65/EU on markets in financial instruments ("**MIFID II**") are covered by the Market Abuse Legislation. These include, without limitation, transferable securities, units in collective investment undertakings, money market instruments, financial futures contracts, forward interest rate agreements and options to acquire or dispose of any instruments falling into these categories, as well as derivatives on commodities.

### Trading venues

All financial instruments referred to above that are traded or admitted to trading on the regulated market of the Luxembourg Stock Exchange ("**LuxSE**") or its exchange-regulated market ("**Euro MTF**") fall within the scope of the Market Abuse Legislation. In addition, transactions in over-the-counter (OTC) derivatives traded on organised trading facilities such as broker-crossing networks, inter-dealer broker systems, systems trading and clearing eligible derivatives ("**OTFs**") as well as transactions (including bids) relating to the auctioning on a platform authorised as a regulated market of emission allowances (or other auctioned products based thereon) are covered.

## Exemptions

### ✔ Buy-back programmes and stabilisation measures

Prohibitions on insider dealing and market manipulation do not apply to issuers trading their own shares in buy-back programmes or trading securities or associated instruments for stabilisation purposes, provided such trading is carried out as set out in Article 5 MAR. All relevant information regarding stabilisation or buy-back programmes should be properly disclosed.

### ✔ Market soundings

MAR introduces a detailed framework for “market soundings”, creating a defence to the disclosure of inside information which could otherwise be considered unlawful. Disclosure in the context of market soundings is deemed to be made in the normal course of employment, profession or duty, and does not constitute market abuse.

A "market sounding" is a communication of information, prior to the announcement of a transaction, to gauge the interest of potential investors in a possible transaction and the conditions relating to it (such as its size or pricing).

Prior to and during any market sounding, an issuer, an emission allowance market participant or a third party acting on its behalf shall specifically consider whether the market sounding will involve the disclosure of inside information and document its conclusions for purposes of regulatory inspection. ESMA has provided further guidance on technical standards for the corresponding arrangements, systems and procedures (Commission Delegated Regulation (EU) 2016/960). In addition, CSSF Circular 17/648 implements ESMA guidelines on the factors, steps and records that persons receiving market soundings must consider and implement.

## Territorial scope

The Market Abuse Legislation applies to all actions performed in Luxembourg and those carried out abroad relating to financial instruments admitted to trading on the LuxSE, auctioned on an auction platform or traded on the Euro MTF or an OTF, or for which a request for admission to trading has been made.

TERRITORIAL SCOPE OF THE MARKET ABUSE LEGISLATION		
Trading Venue	Actions carried out in Luxembourg	Actions carried out abroad
LuxSE	MAA MAR	MAA MAR
Euro MTF	MAA MAR	MAA MAR
EU regulated markets/MTFs/OTFs	MAA MAR	Non-Luxembourg law MAR

*MAA: Market Abuse Act*

## Prohibitions under the Market Abuse Legislation

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Under the Market Abuse Legislation, persons shall not:

- i. engage or attempt to engage in insider dealing;
- ii. recommend that another person engage in insider dealing or induce another person to engage in insider dealing;
- iii. unlawfully disclose inside information; or
- iv. engage in or attempt to engage in market manipulation.

## Insider dealing

### ✔ Definition of inside information

Inside information is precise in nature, has not been made public and relates directly or indirectly to a financial instrument or an issuer. If the information were made public, it would be likely to have a significant effect on the price of the financial instruments or their derivatives.

Precise (specific) information is not necessarily detailed or comprehensive. Information will be considered precise if there is an awareness that it is specific enough to enable conclusions to be drawn as to its possible effects on the price of a financial instrument or any related derivative. Rumours and conjectures not backed up by actual knowledge do not constitute precise information. Based on ESMA guidelines and national case law from most European countries, information is considered "precise" if a reasonable investor can assess with confidence how the information, once publicly known, would affect the price. The European Court of Justice has clarified that "precise" information covers not only information which makes it possible to determine the likely direction of a change in price. Rather, it is sufficient that a reasonable investor could base its investment decision on the information which need not necessarily make it possible to determine price movements. In the event of a process in stages resulting in particular circumstances or events, these future circumstances or events (as well as any related intermediate steps) may constitute precise information.

## ✔ **Persons possessing inside information**

Any person possessing inside information as a result of his or her position (such as a member of the administrative, management or supervisory body or a shareholder of the issuer or emission allowance market participant or through his or her employment, profession or duties or involvement in criminal activities) and knows or ought to know that the relevant information qualifies as inside information must abstain from prohibited dealings.

## ✔ **Prohibited dealings**

Persons possessing inside information are prohibited from using such information directly or indirectly to their benefit by acquiring or disposing of, or by trying to acquire or dispose of, for their own behalf or on behalf of a third party, financial instruments to which the information relates, unless disclosure is made in the normal course of employment, profession or duty (lawyers, auditors, etc.). It is not allowed to recommend any purchases or trades or give inside information to a third party for the purpose of acquiring or disposing of the financial instruments to which the information relates, regardless of whether or not the holder or beneficiary of the inside information has actually benefited from it. There is a rebuttable presumption that a person in possession of inside information uses this information when dealing. Firms that have put effective market abuse policies procedures and information barriers in place benefit from a less restrictive presumption. MAR also sets out defences for market makers, agreements made before possessing inside information, information about an intention to deal, stabilisation measures and activities relating to monetary and public debt management and climate policy activities.



## ✔ Disclosure of inside information

Holders of inside information must swiftly communicate such information to the market. Disclosure must be made in accordance with the principles of transparency and equal treatment of investors. The issuer shall take reasonable care to ensure that disclosure to the public is synchronised as closely as possible between all categories of investors in Luxembourg, all other Member States and third countries in which the issuer has requested or approved an admission to trading. Inside information must be posted and maintained on the issuer's website for a period of at least five (5) years. Any significant change shall be disclosed as promptly as possible after such change occurs. Issuers must not combine the disclosure of inside information with marketing activities. Issuers whose financial instruments are admitted to trading on an SME growth market can publish inside information on the website of the trading venue instead of on their own website, where such trading venue provides for it.

An issuer or emission allowance market participant may delay disclosure of inside information when:

- i. disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
- ii. the delay is not likely to mislead the public; and
- iii. it is able to ensure confidentiality.

The concept of "legitimate interest" is not defined by law, and it is thus up to the issuer to determine whether, in its specific case, disclosure of the inside information can be delayed.

ESMA has issued an indicative list of legitimate interests that are likely to be prejudiced by immediate disclosure and situations in which delaying disclosure is likely to mislead the public.<sup>1</sup>

Persons with access to inside information must be duly informed of their obligations and potential sanctions. If the issuer becomes unable to preserve confidentiality, it is obliged to disclose the relevant information as soon as possible. Issuers must establish a list of all persons who have access directly or indirectly to inside information, including employees and persons performing other tasks, such as advisors, accountants and credit rating agencies. However, they must transmit this list to the CSSF only at the latter's request. The list must include precise information on each person (i.e. identity and the reason for access to information) and indicate the date on which it was created and last updated.

### **Market manipulation**

Market manipulation refers to practices that jeopardize the integrity of a market. Such practices may consist of, but are not limited to, entering into a transaction, placing an order to trade or any other behaviour which gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract or secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level. Transmitting false or misleading information or providing false or misleading input in relation to a benchmark or any other behaviour which manipulates the calculation of a specified financial benchmark (i.e. LIBOR or EURIBOR) constitutes market manipulation under the Market Abuse Legislation.

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<sup>1</sup> MAR Guidelines - Delay in the Disclosure of Inside Information ESMA/2016/1478, implemented by CSSF Circular 16/646 of 20 December 2016.

Certain practices listed in MAR do not constitute market manipulation if the relevant person had legitimate reasons for engaging in these practices and if the transaction or trading order conforms to accepted practices. A market participant that intends to apply for an exemption must submit to the CSSF a request for clearance and a detailed description of the market practice. The CSSF will then notify ESMA in order to assess the compatibility of the accepted market practice with the relevant regulatory technical standard. If the CSSF decides to allow a market practice in opposition to ESMA, it must publish its reasons for doing so. A market practice that has been accepted by a competent authority for a particular market is not considered accepted on other markets unless the competent authorities have also accepted the practice.

## Obligations applicable to market participants

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Market participants are required to take the necessary measures in order to prevent and detect market abuse. This implies that their structural organisation must be adequate to identify suspicious transactions and notify such activities to the authorities.

### Internal procedures

In addition to insider lists (see Section d above), all market participants shall adopt internal procedures that allow the detection of suspicious transactions in financial instruments that qualify as insider dealing and/or market manipulation.

For transparency purposes, the operator of LuxSE, Euro MTF or an OTF must notify the CSSF of details of the relevant financial instruments. A second notification must be made when an instrument ceases to be admitted to trading. The CSSF forwards these notifications to ESMA for publication. MAR applies to financial instruments regardless of whether or not they are published by ESMA.

Furthermore, adequate arrangements must be put in place to enable whistleblowers to alert competent authorities of possible violations and to protect them from retaliation. More details on the arrangements regarding whistleblowing are provided in the Commission's Implementing Directive 2015/2392 of 17 December 2015 on MAR as regards reporting to competent authorities of actual or potential infringements of MAR, implemented in Luxembourg by the Market Abuse Act.

## Notifications to the regulator

### ✔ Suspicious transactions

A market participant must have adequate systems to monitor transactions in financial instruments undertaken by it in order to identify breaches of rules, irregular trading or conduct. It must notify the CSSF without delay if it detects an offence or reasonably suspects that a transaction may constitute insider dealing or market manipulation. The CSSF investigates and prosecutes offences on a case-by-case basis. In order to ensure consistency across the EU, ESMA has developed technical standards on the reporting of suspicious transactions. A market participant that notifies a suspicious transaction shall refrain from informing any third parties thereof, including the persons on whose behalf the transactions have been carried out or parties related to those persons. ESMA recently released frequently asked questions on MAR, which emphasise, amongst other points, that the obligation to detect and notify suspicious orders and transactions is not limited to investment firms within the meaning of MiFID II but also applies to buy-side firms.<sup>2</sup>

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<sup>2</sup> See <https://www.esma.europa.eu/search/site/buy-side%20firms>

The forms to be used to notify the CSSF of suspicious transactions, order reports (STORs) and managers' transactions are available on the CSSF's website.<sup>3</sup> Templates for insider lists and updates to insider lists can also be found on this site.<sup>4</sup>

### ✔ **Manager transactions**

A person discharging managerial responsibilities, as well as any persons closely associated with this person, must notify both the issuer (or the emission allowances market participant) and the CSSF of any transaction relating to financial instruments of the issuer (or emission allowances market participant) conducted on his or her own behalf.

The venue or place where the transaction is conducted is irrelevant in this context. In other words, any transaction on a regulated market, an MTF or an OTF, by a systematic internaliser or outside a trading venue (OTC) should be notified. The notification must be made no later than three (3) business days after the date of the transaction.

Managers and persons treated as such may not conduct any transactions in securities issued by their company for their own behalf during a closed period of thirty (30) calendar days prior to the announcement of an interim financial report or a year-end report. The issuer shall ensure public access to information related to managers' transactions. This report must be readily available in French, German or English, at least on the website of the issuer or emission market participant.<sup>5</sup>

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<sup>3</sup> See <http://www.cssf.lu/fr/surveillance/marches-dactifs-financiers/abus-de-marche/formulaires/>

<sup>4</sup> See <http://www.cssf.lu/fr/surveillance/marches-dactifs-financiers/abus-de-marche/insider-lists/>

<sup>5</sup> For more information, please refer to Commission Delegated Regulation (EU) 2016/522 supplementing MAR as regards an exemption for certain third countries public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notifications of delays, the permission for trading during closed periods and types of notifiable managers' transactions.

## Penalties

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Insider dealing and market abuse are punishable by both criminal and administrative sanctions.

Persons that violate the Market Abuse Legislation may incur fines or be imprisoned. Attempts are also punishable. Criminal and administrative sanctions are not cumulative. However, a person may be subject to both a criminal sanction (fine) and a prison term.

The CSSF shall post its decisions imposing administrative sanctions and measures on its website immediately after informing the person concerned ("naming and shaming"). However, if publication would cause disproportionate harm to the persons involved or jeopardise the stability of financial markets, the CSSF can delay publication or publish the decision on an anonymous (no name) basis. This publication is available on the CSSF website for five (5) years, with the exception of personal information (i.e. the sanctioned party's name) which need be posted for one year only.

PENALTIES				
	Insider Dealing	Recommending or encouraging another person to engage in insider dealing	Market Abuse	Unlawful disclosure of inside information
Fines	<p>Administrative Fines</p> <p><i>Natural persons:</i></p> <p>≤ EUR 5,000,000</p> <p><i>Legal persons:</i></p> <p>≤ EUR 15,000,000</p> <p>or 15% of the entity's annual turnover</p>			
Criminal Sanctions	<p>Natural persons:</p> <p><i>Prison term of ≤ 4 years</i></p> <p>and/or</p> <p><i>penalties of</i></p> <p>≤ EUR 5,000,000</p> <p><i>Legal persons:</i></p> <p>≤ EUR 15,000,000</p> <p><u>Attempts:</u></p> <p>The same penalties apply.</p>		<p>Natural persons:</p> <p><i>Prison term of ≤ 2 years</i></p> <p>and/or</p> <p><i>penalties of</i></p> <p>≤ EUR 500,000</p> <p><i>Legal persons:</i></p> <p>≤ EUR 15,000,000</p> <p><u>Attempts:</u></p> <p>The same penalties apply.</p>	

# Contacts

We hope you found this publication useful and welcome the opportunity to answer any questions you might have about its content.



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