FAQ2018-06 FREQUENTLY ASK QUESTIONS

(as adopted by IRE Council on 20th December 2018
and revised on 21st January 2021)

THE EUROPEAN MARKET ABUSE REGULATION ("MAR")

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1. Purpose

The purpose of the present "Frequently Asked Questions" (FAQs) is to provide additional information on practical aspects of the market abuse regulation for the statutory auditors ("*réviseurs d'entreprises*") and the approved statutory auditors ("*réviseurs d'entreprises agréés*").

2. Limitations

The clarifications and interpretations of the legislation and the European regulation presented in this document summarise conclusions drawn from questions put to the IRE and are of a purely informative nature. They are not normative in nature and in no way bind the "*Institut des réviseurs d'entreprises*" (hereinafter "*IRE*"). The reader should always refer to national and European legislation, the International Code of Ethics for Professional Accountants, including International Independence Standards, issued by the International Ethics Standards Board for Accountants as adopted for Luxembourg by the "*Commission de Surveillance du Secteur Financier*" (hereinafter the "*CSSF*") and, if necessary, seek advice from a legal professional. The IRE, its Board and/or its Secretariat accept no responsibility for the content of this document and any damage resulting from its use and suffered by a party who has relied on this document in its decisions, actions or inactions.

3. Questions & Answers

3.1. What MAR means?

The Regulation (EU) N°596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuses (MAR or the "Regulation")[1]came into force on the 3 July 2016 and has a direct effect in all Member States[2] without any need of a local Bill of law to be adopted by the national parliaments[3]. The Luxembourg Law dated of 23 December 2016 has also been passed to implement in Luxembourg the EU sanctions regime in case of breach to MAR.

3.2. Is this something new?

This matter was previously known as "Insider Trading" and was already regulated. MAR principally aims to update and strengthen the existing legal framework set out in the Market Abuse Directive (Directive 2003/6/EC, the "*MAD*") to ensure market integrity and investor protection.

3.3. What is a "market abuse"?

MAR basically aims to outlaw 3 types of market abuse, namely:

- *market manipulation* (ex: artificially manipulating the price of a financial product by spreading false supply, demand or price information);
- *unlawful disclosure of non-public* ("inside") *information* (ex: the leaking of inside information to other market participants unless disclosure is the normal exercise of the profession); and
- *Insider dealing* through the use of inside information.

[1] See full text on http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN
[2] See CSSF website: http://www.cssf.lu/documentation/reglementation/lois-reglements-et-autres-textes/news-cat/152/#c7488
[3] See the Q&A issued by ESMA : https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf

3.4. What is "inside information"?

According to Article 7 of the MAR, the definition of inside information has remained broadly the same as under the MAD and covers information which:

- is precise;
- has not been made public;
- relates directly or indirectly to the company's shares or other financial instruments;
- if it were to be public, would be likely to have a significant effect on the price of such shares or other financial instruments, including derivatives instruments.

Regarding the last condition, MAR specifies that it contemplates information which a reasonable investor would be likely to use as part of the basis for investment decisions.

3.5. Which financial instruments fall under MAR?

The definition of financial instruments in MAR refers to the definition included in Directive 2014/65/EU (MIFID II), which is very broad. But MAR does not limit its scope of application to 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. MAR also covers financial instruments admitted to trading or traded on Multilateral Trading Facilities (MTF), financial instruments traded on an "*Organised Trading Facility*" (OTF) and emission allowances.

3.6. Who would qualify as an "insider"?

Article 8, paragraph 4 of the MAR specifies that an insider is any person who has access to inside information of the company and who is working for such company under a contract of employment or otherwise performing tasks through which they have access to inside information, notably *advisers, accountants or credit rating agencies*. Therefore, MAR will also impact Luxembourg auditors and audit firms. MAR also adds that for legal persons, Article 8 also applies to the natural persons who participate in the tasks carried out by such legal persons.

3.7. Is there any key obligation under MAR that directly affect auditors?

Yes. MAR's primary impact is on issuers of listed shares and bonds. Auditors are not issuers. However, the obligation to maintain an insider list is of direct relevance to auditors because they may qualify as insiders. Article 18 (subsection 1 to 7) of the MAR specifies that issuers *or any persons acting on their behalf or on their account* shall draw up a list of all persons who have access to inside information and who are working for them under a contract of employment or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies.

3.8. What kind of information must be included in such insiders list?

Article 18 of the MAR imposes rigorous requirements regarding the level of information and the format under which insider lists shall be established and maintained. The key change is that the level of information that the issuer will be required to provide will be more burdensome than under MAD. In this regard, the European Commission has adopted an implementing regulation (Commission Implementing Regulation (EU) 2016/347, the "CIR") to supplement MAR and specifying the precise electronic format of information details to communicate.

3.9. Will there be one single insider's list to be drawn up by the issuer?

No. There will be several lists. Insider lists are required to be prepared on an inside information basis – i.e. a dedicated insider list shall be established for each type of inside information, and shall be established, maintained and updated in the electronic format provided in the CIR.

3.10. What is the difference between "permanent insiders" (including the top management of the issuer) and an "occasional insider"?

Issuers are given the discretion to maintain a supplemental list of "permanent insiders" who, due to the nature of their function or legal status, may have access at all times to inside information (for example approved statutory auditors).

3.11. What kind of audit and related services would qualify for triggering "permanent insider" status?

In providing audit services, internal audit services and domiciliation services, auditors / audit firms usually have permanent access to sensitive information and qualify as "permanent insider".

3.12. What are the practical consequences of a "permanent insider" status?

Any issuer (audit client) will just have to create a sub-section "*permanent insider*" in their own MAR insider list and to mention the name and registered address of its auditor / audit firm in this sub-section. Any further MAR formality will then be fulfilled by the concerned auditor / audit firm.

3.13. What are the practical consequences for non-audit services?

For non-audit services (including tax, accounting, consulting, corporate finance, regulatory, etc.), each issuer (client) will have first to determine whether the assignment to be performed entails sharing any inside information with the auditors / audit firms' staff. If it does, the auditors / audit firms will act "*on account*" of the issuer *and will usually draw up and maintain its own insiders list as it is impractical for the Issuer to do so*. Any further MAR formality will then be fulfilled by the auditor / audit firm as explained above.

3.14. What are the insider's details to be included?

An insider list shall contain at the minimum:

- the identity of the person having access to inside information;
- the reason why such person is identified on the insider list;
- the date and the hour at which such person has had access to the inside information; and
- the date on which the insider list has been established.

3.15. But what about companies qualifying as an "insider"?

The CIR specifies that regarding natural persons, insider lists shall also provide:

- first name and surname, date of birth and national identification number, if any,
- name and address of the company which employs the natural person;
- the home address if the natural person;
- the professional and personal phone numbers of the natural persons;
- the job function of the natural person and the reason why they shall be considered as an insider;
- the dates and hours at which the natural person has had access to the inside information; and
- the dates and hours at which such natural person has ceased to have access to the inside information.

The CIR also establishes the specific electronic format that must be used when establishing, maintaining and updating insider lists.

3.16. Are there any additional requirements? For example, to update the insider list? And to provide the list to the CSSF?

Yes. In addition, Article 18 of the MAR also specifies that issuers or any other persons acting on their behalf or on their account shall also:

- update the insider list when required (for example, when an additional person accesses the inside information, or a person ceases to have such access);
- state the date and time when the change triggering the update occurred;
- provide the insider list to the relevant competent authority (for example, the Luxembourgish "CSSF", the French "*Autorité des Marchés Financiers*", the UK "*Financial Conduct Authority*" or the German "*BaFin*") as soon as possible upon their request;
- retain the insider list for a period of at least 5 years after it has been drawn up or updated; and
- take all reasonable steps to ensure that all those with access to inside information acknowledge their duties in this regard and are aware of the applicable sanctions relating to insider dealing and the unlawful disclosure of inside information.

3.17. What are the sanctions?

Under the Luxembourg Law dated of 23 December 2016, there are significant administrative and criminal sanctions foreseen in case of breach, including custodial sentence of maximum 4 years and a maximum fine of EUR 5,000,000 (for individuals) and EUR 15,000,000 (for legal entities).

3.18. How could an issuer possibly draft and maintain an insider list including potential insiders employed by its auditor?

Any issuer will face obvious practical difficulties just in drawing up and maintaining the list of their own insiders (board directors, executives, project teams, etc.) but that will become extremely burdensome to do for their accountants and advisers' staff.

Issuers will be faced with an almost impossible daily challenge to list the auditor / audit firm' staff who would qualify as "*insider*" and to keep this list updated as legally required. Therefore auditors / audit firms should act "for the account" of the issuers (audit clients) in drawing up and maintaining the required insider lists.

3.19. What is the solution for drafting and updating an insider list including the auditor' staff?

In compliance with above mentioned Article 18 of the MAR, auditors / audit firms will usually take care, on account *of their clients*, of the listing formalities imposed in MAR for their auditors / audit firms' staff and sub-contractors, if any.

3.20. What should auditors do?

Auditors / audit firms will draw up their own insider lists based on the template mentioned in applicable EU regulations and will share those lists with the CSSF upon its request. The only commitment expected from clients are:

- to confirm that auditors / audit firms are instructed to draw up and maintain insiders list on account of the clients and in full compliance with MAR, and
- to inform auditors / audit firms about any share, bond, warrant, option, depositary receipt, etc. especially if traded on an EEA stock exchange.

3.21. Will the issuer (audit client) have access to the insider list drawn up by the auditor?

Yes. Article 18.2 of the MAR stipulates that the Issuer will always retain a right of access to the Insider List(s).

End