Insider dealing

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Dutch Authority for the Financial Markets

The AFM is committed to promoting fair and transparent financial markets.

As an independent market conduct authority, we contribute to a sustainable financial system and prosperity in the Netherlands.

The European Securities and Markets Authority (ESMA) regularly publishes Q&As with regard to the Market Abuse Regulation (MAR). Although the AFM processes this information in its brochures on a regular basis, it may occur that certain information in this document no longer applies. Therefore, we advise you to consult the ESMA website for the latest information on this subject. In case of any uncertainties with regard to interpretations set out in this brochure, you should also consult the Q&As of ESMA.

Click on the following link for a current overview of the latest Q&As:

https://www.esma.europa.eu/questions-and-answers

In this brochure the Q&As of ESMA have been processed up to and including the version of 6 July 2017.

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Introduction

The essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and investor' confidence.

Insider dealing is a serious offence. As such, it is prohibited. Insider dealing in financial instruments damages the trust in the proper operation of the financial markets, because those who practice it based on an information edge gain an unfair advantage, or act with this intention. To protect investor confidence, suitable legislation has been enacted to prevent insider dealing.

A person who possesses inside information has certain information available to him/her that is not publicly available. It might relate to an imminent takeover, or the payment problems of an issuer. A person can possess inside information through the exercise of employment, a profession or duties at an issuer (such as a director, legal or financial adviser, or employee). Unintentionally learning of inside information is also possible, for example, if someone overhears a neighbour or acquaintance who happens to be a director at an issuer engaging in conversation in the garden or on the train.

When inside information is made public, it can affect the price of the issuer's financial instruments. An issuer is under an obligation to publicly disclose information as soon as possible which directly concerns that issuer as soon as possible. The objective is for all investors to be aware of this public information and have an equal chance of obtaining a good return on investment.

If someone wants to take unfair advantage from inside information (and hence from the expected movement in for instance the shares) and decides to buy or sell the financial instruments concerned before the issuer publishes inside information, then this person is engaging in insider dealing. This is prohibited. What is also prohibited is disclosing inside information unlawfully to a third party, or inducing a third party to carry out transactions in the financial instruments that the inside information concerns.

The AFM takes its duty of supervising the prohibition on insider dealing very seriously. It actively monitors the behaviour, orders and transactions of investors in the market. If certain infringements of the prohibition take place, an administrative or criminal sanction follows. In other words, the AFM has the power to impose a fine or report offences to the Public Prosecution Service.

In this brochure[1], the AFM explains inter alia the uniform regulatory framework on insider dealing and the unlawful disclosure of inside information. The framework derives directly from the EU's

[1] The brochure has been prepared with the aim of providing a detailed picture of the rules applying to inside information and the related provisions. It also contains references to relevant legal and other documents, as well as to other sources of

market abuse regulation (MAR), number 596/2014. EU regulations apply directly, without having to be converted into national legislation. This brochure also explains the provisions linked to the prohibition of insider dealing, such as the exceptions to the prohibiting provision, the reporting rules and the insider lists. In addition, the brochure includes a practical guide on how reporting to the AFM has to be done.

MiFID II

Where reference in the provisions of the MAR is made to Organised Trading Facilities (OTFs), SME growth markets, emission allowances or auctioned products based on thereon, those provisions apply to them as soon as the national legislation implementing Directive 2014/65/EU (MiFID II) comes into force, Directive 2004/39/EC (MiFID) is repealed, and EU regulation 600/2014 (MiFIR) shall applied directly. Until then, references to MiFID II and MiFIR are to be read as references to MiFID.

The actual text of the EU's regulation on market abuse can be accessed through the website of the European Commission (http://ec.europa.eu/finance/securities/abuse/index_en.htm).

information. The purpose of this brochure is to provide information. As such, no rights may be derived from it, and no actions should be based solely on its contents. If the text deviates from the MAR, the wording of the MAR prevails.

1. Prohibition of insider dealing

1.1 Legal definitions

The prohibition

Pursuant to Section 14 of the MAR, there is a prohibition of insider dealing and on attempts to engage in insider dealing by carrying out or arranging a transaction in financial instruments. It is also prohibited to recommend another person to engage in insider dealing, or induce them to do so. Finally, it is prohibited to unlawfully disclose inside information.

What is meant by "inside information"?

Inside information is information of a precise nature, which has not been made public, and relates, directly or indirectly, to one or more issuers to one or more financial instruments, or concerns the trade in these 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. (Article 7(1)a of the MAR)

In addition, there is a separate definition of "inside information" in relation to commodity derivatives and emission allowances or auctioned products based on them.

Commodity derivatives

In relation to commodity derivatives, inside information concerns information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the European Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets. (Article 7(1)b of the MAR)

Emission allowances or auctioned products based thereon

In relation to emission allowances or auctioned products based thereon, inside information concerns information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments. (Article 7(1)c of the MAR)

What is meant by "inside information" in connection with trading?

For persons charged with the execution of orders concerning financial instruments, inside information also means information conveyed by a client and relating to the client's pending

orders in financial instruments, which is of a precise nature, 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, the price of related spot commodity contracts, or on the price of related derivative financial instruments. (Article 7(1)d of the MAR)

Information of a precise nature

The term "specific information" means information that concerns:

- a set of circumstances which exist 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 financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on emission allowances.

In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.

An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.

Significant effect

The information has to be such that, if it were made public, it would likely have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances. This is to be understood as information that a reasonable investor will be likely to use as part of the basis for his/her investment decisions.

Insider dealing

Insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which the information relates. The use of inside information by cancelling or amending an order (or a bid relating to the auctioning of emission allowances or products based on emission allowance) concerning a financial instrument to which the inside information relates, whereas the order was placed before the person concerned had access to the inside information, is also deemed to be insider dealing (Article 8(1) of the MAR).

1.2 Scope of the prohibition

In accordance with Article 2(1) of the MAR, the regulation's prohibition of insider dealing applies to the following instruments:

a. a. 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;
b. financial instruments traded on a Multilateral Trading Facility (MTF), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;
c. financial instruments traded on an Organised Trading Facility (OTF);
d. financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an impact on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

The prohibition also applies to behaviour or transactions, including bids, relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products based thereon, including when auctioned products are not financial instruments, pursuant to Regulation (EU) No 1031/2010.

De AFM is the competent authority for ensuring compliance with the prohibition on insider dealing in connection with:

- All actions carried out on the territory of the Netherlands; and
- actions carried out abroad relating to instruments admitted to trading on a regulated market, for which a request for admission to trading on such a market has been made, auctioned on an auction platform or which are traded on an MTF or an OTF, or for which a request for admission to trading on an MTF operating within the territory of the Netherlands has been made.

It is irrelevant whether or not the transaction in financial instruments in question is actually carried out through the systems of the market concerned. For example, transactions in bonds that have been admitted to trading on Euronext Amsterdam also come within the scope of the prohibition if such transactions are conducted OTC (over-the-counter), or via another platform's system.

In other words, insider dealing is forbidden whether it takes place in the Netherlands or originates in this country. The prohibition also applies in the case of financial instruments that are not admitted to trading on a regulated market in the Netherlands, but are admitted to trading on a European regulated market.

A transaction is said to take place *in* the Netherlands if it passes through the systems of a market in financial instruments in this country, irrespective of whether the person conducting or arranging the transaction is physically in the Netherlands or some other country. If only the

counterparty (to a private transaction) is physically located in the Netherlands, the transaction also qualifies as one conducted in this country.

For a transaction to be deemed as originating *from* the Netherlands, the initiator has to be physically located in the Netherlands when the transaction is carried out or arranged. In this case, the transaction passes through the systems of a market in financial instruments outside the Netherlands, or the counterparty is in another country (if the transaction arises from a contract for example). The location of the bank carrying out the transaction is irrelevant, all the more so because the prohibition applies to the person conducting the transaction, and not to the bank.

It is clear from the scope of the prohibition of insider dealing that it also applies to financial instruments traded on an MTF or an OTF.

1.3 Who is subject to the prohibition?

The prohibition of insider dealing applies to all persons, natural or legal, that possess inside information.[2] Article 8(4) of the MAR distinguishes two categories of persons who can have access to inside information: primary insiders and secondary insiders.

In summary, primary insiders are persons with a special relationship to the issuer. These are, for example, executive and supervisory directors of an issuer or emission allowance market participant, or persons having a holding in the capital of the issuer.

Any person having access to inside information through the exercise of an employment, profession or duties also qualifies as primary insiders. Persons who possess inside information as a result of being involved in criminal activities are also considered to be primary insiders.

It is actually irrelevant whether the persons designated as primary insiders know or ought to know they possess inside information. Based on the fact they hold a particular position or have a special relationship to the issuer, such persons are assumed to know whether the information they possess qualifies as inside information.

Secondary insiders are all persons other than primary insiders. Regarding secondary insiders, it has to be demonstrated that they know or ought to know that the information comment they possess is inside information within the meaning of the MAR. It is less obvious with secondary insiders that they realise that they possess inside information.

[2] Where a legal person is subject to the prohibition, Article 8 of the MAR also applies, in accordance with national law, to the natural persons who participate in the decision to carry out the acquisition, disposal, cancellation or amendment of an order for the account of the legal person concerned.

2. Exceptions to the prohibition of insider dealing

There are a number of exceptions to the prohibition of insider dealing. Transactions where one of the parties possesses (or might possess) inside information, but the nature of the transactions poses no threat to the integrity of the capital market or to the interests of parties active in that market, is not considered as insider dealing. These exceptions derive either from Articles 5 and 6 of the MAR or from Article 9 of the MAR.

The following conduct is exempt from the prohibition:

In the case of buy-back programmes and stabilisation (Article 5 of the MAR)

Transactions carried out as part of a buy-back programme or the stabilisation of financial instruments are exempt, provided they are in line with the applicable measures. These include the measures laid down by Articles 5(1) and 5(4), points a to d, of the MAR. As well as the above conditions, Article 5(2) of the MAR also specifies the sole purpose for a buy-back programme to be eligible for exemption. If the objectives and conditions are not met, the exemption cannot be invoked.

As part of the management activities relating to monetary policy, valuation policy or public debt, as well as for climate policy activities (Article 6 of the MAR).

Carried out by a legal person under strict conditions (Article 9(1) of the MAR)

The mere fact that a legal person is or has been in possession of inside information does not itself mean that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal, where that legal person:

a. has established, implemented and maintained adequate and effective internal arrangements and procedures that effectively ensure that neither the natural person who made the decision on its behalf to acquire or dispose of financial instruments to which the information relates, nor another natural person who may have had an influence on that decision, was in possession of the inside information; and
b. has not encouraged, made a recommendation to, induced or otherwise influenced the natural person who, on behalf of the legal person, acquired or disposed of financial instruments to which the information relates.

Behaviour by the market maker and the person authorised to act as a counterparty (Article 9(2) of the MAR)

The mere fact that a person is in possession of inside information will not in itself be deemed as person having used the information and having thus engaged in insider dealing on the basis of an acquisition or disposal where that person:

a. for the financial instrument to which that information relates, is a market maker or a person authorised to act as a counterparty, and the acquisition or disposal of financial instruments to which that information relates is made legitimately in the normal course of the exercise of its function as a market maker or as a counterparty for that financial instrument; or
b. is authorised to execute orders on behalf of third parties, and the acquisition or disposal of financial instruments to which the order relates, is made to carry out such an order legitimately in the normal course of the exercise of that person's employment, profession or duties.

Relating to the discharge of an obligation that has become due (Article 9(3) of the MAR)

The mere fact that a person is in possession of inside information does not automatically mean that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal where that person conducts a transaction to acquire or dispose of financial instruments and that transaction is carried out in the discharge of an obligation that has become due in good faith and not to circumvent the prohibition against insider dealing, and:

a. that obligation results from an order placed or an agreement concluded before the person concerned possessed inside information; or
b. that transaction is carried out to satisfy a legal or regulatory obligation that arose, before the person concerned possessed inside information.

As part of a merger or takeover bid (Article 9(4) of the MAR)

The mere fact that a person is in possession of inside information shall not be deemed that that person has used that information and has thus engaged in insider dealing, where such person has obtained that inside information in the conduct of a public takeover or merger with a company and uses that inside information solely for the purpose of proceeding with that merger or public takeover, provided that at the point of approval of the merger or acceptance of the offer by the shareholders of that company concerned, any inside information has been made public or has otherwise ceased to constitute inside information. This paragraph shall not apply to stake-building.

Own knowledge (Article 9(5) of the MAR)

The mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information.

Finally, regarding the behaviours referred to in Article 9 of the MAR, if the AFM establishes that there was an illegitimate reason for the orders to trade, transactions or behaviours concerned, an infringement of the ban on insider dealing as set out in Article 14 may still be deemed to have occurred.

3. Prohibition of unlawful disclosure of inside information (Article 10 of the MAR)

Unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of employment, profession or duties (Article 10(1) of the MAR). This is subject to the condition that the person receiving the information owes a duty of confidentiality (arising under Article 17(8), final sentence, of the MAR). See also the brochure on the public disclosure of inside information.

The onward disclosure of information as a recommendation or inducement to a third party to engage in insider trading amounts to unlawful disclosure of inside information where the person disclosing the recommendation or inducement knows or ought to know that it was based on inside information (Article 10(2) of the MAR).

4. Market sounding obligations (Article 11 of the MAR)

Under the MAR, far-reaching administrative obligations arise in connection with market soundings.

4.1 What is a market sounding?

A market sounding comprises the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors by:

a. an issuer;
b. a secondary offerer of a financial instrument, in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors;
c. an emission allowance market participant; or
d. a third party acting on behalf or on the account of a person referred to in point (a), (b) or (c).

Disclosure of inside information by a person intending to make a takeover bid for the securities of a company or to affect a merger with a company, to parties entitled to the securities, also constitutes a market sounding, provided that:

a. the information is necessary to enable the parties entitled to the securities to form an opinion on their willingness to offer their securities; and
b. the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger.

4.2 Conditions

A disclosing market participant shall, *prior* to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information. The disclosing market participant shall make a written record of its conclusion and the reasons therefor. It shall provide such written records to the AFM upon request. This obligation shall apply to each disclosure of information throughout the course of the market sounding. The disclosing market participant is to update these written records accordingly.

Before disclosing inside information, the marketing participant:

a. obtain the consent of the person receiving the market sounding to receive inside information;
b. inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information, by acquiring or disposing of, for his

own account or for the account of a third party, directly or indirectly, financial instruments relating to that information;

c. inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information, by cancelling or amending an order which has already been placed concerning a financial instrument to which the information relates; and
d. inform the person receiving the market sounding that by agreeing to receive the information he is obliged to keep the information confidential.

The disclosing market participant shall make and maintains a record of all information given to the person receiving the market sounding, including the information given in accordance with points (a) to (d) of the first sub-paragraph, and the identity of the potential investors to whom the information has been disclosed, including but not limited to the legal and natural persons acting on behalf of the potential investor, and the date and time of each disclosure.

The disclosing market participant shall provide that record to the AFM upon request.

Where the disclosing market participant fulfils the obligations of Articles 11(3) and 11(5) of the MAR, the disclosure of inside information shall be deemed to have been made in the normal exercise of a person's employment, profession or duties.

Where information that has been disclosed in the course of a market sounding ceases to be inside information according to the assessment of the disclosing market participant, the disclosing market participant shall inform the recipient accordingly as soon as possible. The disclosing market participant shall maintain a record of the information given in accordance with paragraph 6 and provides it to the AFM upon request.

The disclosing market participant keeps the records referred to in Article 11 of the MAR for a period of at least five years.

ESMA (European Securities and Markets Authority) is providing more details for the above conditions.

Notwithstanding the provisions of this Article, the person receiving the market sounding shall assess for itself whether it is in possession of inside information or when it ceases to be in possession of inside information. ESMA provides the guidelines for receivers of market soundings concerning:

a) the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;
b) the steps such persons are to take if inside information has been disclosed to them in order to comply with the prohibition of insider dealing and the prohibition of the unlawful disclosure of inside information; and

c) the records that such persons are to maintain in order to demonstrate that they have complied with the prohibition of insider dealing and the prohibition of unlawful disclosure of inside information.

5. Transaction reporting regulation for managers

Article 19 of the MAR includes rules applying to the obligation on persons discharging managerial responsibilities within issuers (hereinafter: Managers) and for persons closely associated with them to notify transactions in "the issuer itself". They shall notify both the AFM and the issuer about transactions conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto. This provides transparency concerning transactions conducted by Managers at issuers and, if applicable, by all persons closely associated with them. Notification of these transactions represents a valuable source of information for investors and helps prevent market abuse.

5.1 Who is required to notify?

The requirement to notify transactions conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto applies to Managers (and to persons closely associated with them) at an issuer, where the issuer is registered in the Netherlands and has requested or approved admission to trading on a regulated market or has approved trading on an MTF or OTF, or has requested admission to trading on an MTF. Both the issuer and the AFM need to be notified of such transactions.

Article 19 of the MAR also places an obligation on Managers (and persons closely associated with them) of an emission allowance market participant registered in the Netherlands to notify every transaction conducted on their own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto. These transactions must be notified to the AFM and the emission allowances market participant.

As a final point, the obligation to notify also applies to Managers at each auction platform, each auctioneer and the auction monitor involved in the auctions held under Regulation (EU) No. 1031/2010, as well as to persons closely associated with them insofar as their transactions involve emission allowances, derivatives of them, or auctioned products based on them. They must notify transactions involving emission allowances, derivatives of them or auctioned products based on them[3] to the auction platform concerned, the auctioneer and/or the auction monitor, as well as to the competent authority with whom the auction platform, auctioneer or auction monitor is registered.

The obligation to notify applies primarily to a Manager, i.e. a person at an issuer, an emission allowance market participant or an auction platform, or an auctioneer involved and/or an auction monitor who is:

a. a member of the administrative, management or supervisory body of that entity; or

[3]See comment in footnote 2.

b. a senior executive who is not a member of the bodies referred to in a., who has regular access to inside information relating directly or indirectly to that entity, and who has the power to take managerial decisions affecting the future developments and business prospects of that entity.

The notifying obligation also applies to parties closely related to the persons referred to in a. or b. specifically:

I. a spouse, or a partner considered to be equivalent to a spouse under Dutch law;
II. a dependent child according to Dutch law;
III. a relative who has shared the same household for at least one year on the date of the transaction concerned; or
IV. a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to in point (a), (b) or (c), which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.

5.2 What to notify?

The AFM must be informed about all transactions for own account relating to shares or debt instruments of the issuer, where the Manager is employed, or to derivatives or other financial instruments linked thereto. In respect of participants in emission allowance markets, this concerns transactions involving emission allowances, the auction products based on them or the derivatives relating to them. For an auction platform, auctioneer and/or auction monitor, this concerns transactions relating to emission allowances, derivatives thereof or auctioned products based thereon.

Article 19(7) of the MAR mentions a number of specific transactions that come within the scope of the notifying obligation. Among them is the pledging or lending of financial instruments by or on behalf of a person with a notifying obligation.

In addition, the European Commission has the power pursuant to Article 19(14) of the MAR to further specify the types of transactions that are subject to the notifying obligation of Article 19(1) of the MAR. On the proposal of the European Securities and Markets Authority (ESMA), the European Commission has accordingly defined a delegated regulation.[4] It contains a (non-exhaustive) list of the types of transactions (in addition to those referred to in Article 19(7) of the MAR) that are subject to the notifying obligation of Article 19(1) of the MAR. For this list, the AFM refers interested parties to the delegated actions.

[4] Delegated Regulation (EU) No. 2016/522 of 17 December 2015 supplementing Regulation (EU) No. 596/2014 of the European Parliament and of the Council 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.

A notification must contain the following details:

a. the name of the person subject to the notifying obligation;
b. the reason for the notification;
c. the name of the relevant issuer or emission allowance market participant, or of an auction platform, auctioneer and/or auction monitor involved;
d. a description and the identifier of the financial instrument;
e. the nature of the transaction(s) (e.g. acquisition or disposal), indicating whether it is linked to the exercise of share option programmes or to the specific examples set out in Article 19(7) of the MAR;
f. the date and place of the transaction(s); and
g. the price and volume of the transaction(s). In the case of a pledge whose terms provide for its value to change, this should be disclosed together with its value at the date of the pledge.

To ensure uniform application of the notifying obligation among EU member states, ESMA developed a template with uniform rules regarding how the information requested is to be notified and made public.[5] The AFM uses this template.

5.3 When to notify?

Persons under a notifying obligation must notify their (relevant) transactions promptly and no later than three business days after the transaction.

As explained above, the notification must be made to the AFM and the issuer, or to the emission allowance market participant, the auction platform, the auctioneer concerned and/or the auction monitor.

The notifying obligation shall apply to any subsequent transaction once a total amount of EUR 5,000 has been reached within a calendar year. The threshold of EUR 5,000 shall be calculated by adding, without netting, all transactions referred to in Article 19(1) of the MAR that are effected in a single calendar year by the party with the notifying obligation. The threshold of EUR 5,000 applies separately to each party with a notifying obligation. Notification is not necessary if the threshold is not reached in a calendar year by the party concerned.

A practical example is a CEO buying EUR 4,000 of equity and her spouse buying another EUR 2,000. In such a case, none of them has reached the 5,000 EUR threshold and thus a notification is not required.

[5]The form is part of "Commission Implementing Regulation (EU) No. 2016/523 of 10 March 2016 laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions in accordance with Regulation (EU) No. 596/2014 of the European Parliament and of the Council".

The calculation for the EUR 5,000 threshold must be based on the price of the financial instruments, which is either their buying or selling price, or the consideration for their acquisition or disposal. The value of financial instruments obtained for zero consideration also needs to be taken into consideration for the purpose of calculating the cumulated amount of the transactions of a PDMR or a person closely associated to a PDMR, to assess whether the threshold has been crossed.

For the purpose of the threshold calculation, the price to consider for **donations, gifts and inheritances** is the last published price for the financial instrument concerned in accordance with the post trade transparency requirements under MiFIR (Articles 6, 10, 20 and 21) on the date of acceptance of the donation, gift or inheritance (i.e. the date of the transaction), or where such price is not available that day, the last published price.

In the period before MiFIR becomes applicable, the price to use will be:

- for shares admitted to trading on regulated markets (RM), the last published price in accordance with the post trade transparency requirements under Articles 30 and 45 of Directive 2004/39/EC (MiFID) [6] on the date of acceptance of the donation, gift or inheritance or where such price is not available that day, the last published price.

- for shares admitted to trading or traded on MTFs only, bonds and derivatives or financial instrument linked thereto, the last traded price on the trading venue where the concerned financial instruments are traded, on the date of acceptance of the donation, gift or inheritance. Where such price is not available that day, the last traded price before the date of acceptance.

During the interim, in the case of shares being traded on several venues (RMs and/or MTFs), then the concept of “most relevant markets in terms of liquidity" under MiFID [7] should be used to determine the trading venue to consider when looking at the last traded price. For other instruments, the concept of trading venue of first admission should be used.

Furthermore, where debt instruments admitted to trading or traded on a RM or a MTF are only traded OTC (i.e. there is no trading on RM nor MTF), then the price to consider should be the last publicly available price for that debt instrument (whatever is the source)

For **options granted free of charge to managers or employees,** the price to consider for the received options should be based on the economic value assigned to the options by the issuer when granting them. If such an economic value is not known, the price to consider should be

[6] For the implementation of this provision, see Sections 4:91d and 5:32k of FSA.

[7] Specified in the Commission Regulation (EC) 1287/2006 implementing MiFID.

based on an option pricing model that is generally accepted in the reasonable opinion of the PDMR. This model determines the price of the granted option based on variables such as the current share price of the issuer, the exercise price of the option and time until expiry of the option. Other variables that can be used in the option pricing model are (risk-free) interest rates, future dividends and implied volatility. The variables used for the price determination of the granted option depend on which generally accepted option pricing model is used.

As soon as the threshold of EUR 5,000 has been reached, the transactions involving zero consideration and the other transactions must all be notified together. Note that the price field for options granted free of charge to managers or employees is expected to be populated with 0 (zero).

5.4 How to notify?

Notifications have to be made using the template specified by ESMA.[8] On the one hand, this reduces the administrative burden on persons under a notifying obligation; on the other, the obligation is harmonised throughout the EU.

The notification template can be accessed on the AFM's website by clicking this link.[9] After completion, the template can be emailed to melden@afm.nl.

5.5 Exceptions

The exception for transactions under a discretionary management is no longer recognised by Article 19 of the MAR.

5.6 Overlap of Article 19 of the MAR and Section 5:48 of the Financial Supervision Act

There can be an overlap of Article 19 of the MAR and Section 5:48 of the Financial Supervision Act (FSA) as regards the notifying obligation for executive and supervisory directors of public companies incorporated under Dutch law whose shares are admitted to trading on a regulated market. Section 5:48 of the FSA obligates these directors to notify every change in the shares or voting rights in their own or affiliated companies. (For more information see "Guideline for Issuing institutions, executive directors and supervisory directors").[10]

[8] This template is part of Implementation Regulation (EU) No. 2016/523.
[9] http://www.digitaal.loket.afm.nl/en-US/Diensten/Effectenuitgevende-ondernemingen/Pages/notification-form-mar19-managers-transactions.aspx?tab=1
[10] To avoid duplicate notifications, the Market Abuse Decree under the FSA included a provision whereby the notifying obligation pursuant to Section 5:60 of the FSA (the forerunner of Article 19 of the MAR) was fulfilled if the AFM had already received notification in accordance with Sections 5:38(1), 5.38(2), or 5:48(6) of the FSA. Owing to the direct effect of Article 19 of the MAR, there is no longer a provision to prevent duplicate notifications.

This means that executive and supervisory directors of a Dutch public company that is listed on an exchange in the EU can be obligated to issue two notifications, pursuant to Section 5:48 of the FSA and Article 19 of the MAR, respectively.

Temporary solution to prevent duplicate notifications

Notifications pursuant to Section 5:48 of the FSA must be submitted electronically via Loket AFM. (For more information, see "Guideline for Issuing institutions, executive directors and supervisory directors"). Notifications required by Article 19 of the MAR must be sent by email (see Article 6(5)). To limit the administrative burden of duplicate notifications, the AFM will deem notifications required by Section 5:48 of the FSA that are submitted by or on behalf of executive and supervisory directors of Dutch public companies listed on regulated markets as notifications pursuant to Article 19 of the MAR. Hence, where these directors have a double notifying obligation, one under Section 5:48 of the FSA and one under Article 19 of the MAR, they only have to submit one notification pursuant to Section 5:48 of the FSA via Loket AFM. In this way, they will also meet their obligation under Article 19 of the MAR. Naturally, this only applies in situations where Section 5:48 of the FSA and Article 19 of the MAR overlap. The AFM draws attention to the fact that this is a temporary solution. An integrated register is planned for making both notifications during a single online session.

5.7 AFM Register

The reported data is placed in the public register on the website of the AFM.

5.8 Closed period

Pursuant to Article 19(11) of the MAR, persons having managerial responsibilities shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or year-end report of the issuer. This Article does not apply to persons closely associated with Managers.

Article 19(12) of the MAR sets out exceptions whereby the issuer may allow a Manager to trade on its own account or for the account of a third party during the above-mentioned closed period. The European Commission has specified the circumstances under which trading during a closed period may be permitted by the issuer in a delegated regulation.[11]

[11] Delegated Regulation (EU) 2016/522.

A Manager within an issuer shall have the right to conduct trading during a closed period, provided the conditions of Article 7 of the delegated regulation are met, that is:

a. one of the circumstances referred to in Article 19(12) of the MAR is met; and
b. the Manager is able to demonstrate that the particular transaction cannot be executed at another moment in time than during the closed period.

The situations referred to in Article 19(12) of the MAR are:

- due to exceptional circumstances (to be assessed on a case-by-case basis), such as severe financial difficulty which require the immediate sale of shares; or
- due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

In the circumstances, prior to any trading during the closed period, a Manager shall provide a reasoned written request to the issuer for obtaining the issuer's permission to proceed with immediate sale of shares of that issuer during a closed period. The written request shall describe the envisaged transaction and provide an explanation of why the sale of shares is the only reasonable alternative to obtain the necessary financing.

In Articles 8 and 9 of the delegated regulation, the European Commission has spelled out what is to be understood by the expression "exceptional circumstances" and what the characteristics are of trading that is permitted during a closed period. The AFM refers to this delegated regulation for details[12].

[12] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0522

6. Insider lists

Article 18 of the MAR places an obligation on an issuer to draw up an insider list. The establishment by issuers or any person acting on their behalf or account, of lists of persons working for them under a contract of employment, or otherwise and having access to inside information relating, directly or indirectly, to the issuer is a valuable measure for protecting market integrity. Such lists may serve issuers or such persons to control the flow of inside information and thereby help their confidentiality duties.

6.1 The obligation

An issuer who has requested or approved admission of its financial instruments to trading on a regulated market in the Netherlands, or, in the case of an instrument only traded on an MTF or an OTF in the Netherlands, or for which a request for admission to such a facility has been submitted, or persons acting on behalf or for the account of the issuer, must draw up and update a list (an insider list) of all persons that have access to inside information. Examples of such insiders are persons who are working for an issuer 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. The list is provided as soon as possible to the AFM on its request.

Issuers or any persons acting on their behalf or on their account shall take all reasonable steps to ensure that every person on the insider list acknowledges in writing that they are aware of:

1. the legal and regulatory duties entailed by their activities, as well as of
2. the sanctions applicable to insider dealing and unlawful disclosure of inside information.

Where another person acting on behalf or on the account of the issuer assumes the task of drawing up and updating the insider list, the issuer remains fully responsible for complying with this obligation. The issuer shall always retain a right of access to the insider list.

6.2 List of contents

The list of persons includes at least the following information:

a. the identity of any person having access to inside information;
b. the reason for including that person on the insider list;
c. the date and time at which that person obtained access to inside information; and
d. the date on which the list was drawn up.

Implementing Regulation (EU) 2016/347[13] establishes implementing technical standards with regard to the precise format of insider lists.

[13] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0347

6.3 Updating and retaining the list

Issuers or any person acting on their behalf or on their account shall update the insider list promptly, including the date of the update, in the following circumstances:

a. Where there is a change in the reason for a person already on the insider list;
b. Where a new person has access to inside information;
c. Where a person ceases to have access to inside information.

Each update shall specify the date and time when the change triggering the update occurred. Issuers or any person acting on their behalf or on their account shall retain the insider list for a period of at least five years after it is drawn up or updated.

6.4 Exemption

Issuers whose financial instruments are admitted to trading on an SME growth market shall be exempt from drawing up an insider list, provided that the following conditions are met:

a. the issuer takes all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information; and
b. the issuer is able to provide the AFM, upon request, with an insider list.

7. Enforcement by the AFM

Insider dealing is a serious offence. As such, it is prohibited.

As stated in the introduction, the AFM proactively monitors behaviours, orders and transactions of investors in the market. If there is cause, the AFM conducts an investigation into the compliance with the prohibition of insider dealing. The proactive supervision by the AFM of compliance by issuers with their obligations, such as publishing inside information as soon as possible, functions here as an important means of detecting possible violations.

Price and/or volume movements observed prior to the publication of inside information could be possible signs of insider dealing. And, last but not least, professional market parties and private investors can also share their suspicions with the AFM regarding insider dealing. Many professional market parties are even legally obligated to do so. For more information on the notifying obligation, please refer to www.afm.nl and the brochure "Obligation to Notify Market Abuse".

The framework for supervising compliance with the regulation gives the AFM the power to obtain information from anyone that might reasonably be expected to possess information relevant for this supervision. If transactions or activities are conducted that contravene the insider dealing regulation, the consequence can be the imposition of an administrative or criminal sanction. In other words, the AFM has the authority to impose an administrative fine or refer the matter to the Public Prosecution Service.

As regards the supervision of compliance with the notifying regulation and the preparation and maintenance of the insider lists, the AFM has a raft of supervisory measures at its disposal, for example, the issuing of an instruction. It can also impose an order for incremental penalty payments or a fine, or report the matter to the Public Prosecution Service.

The measure to be applied will depend on the specifics of the situation.

8. Questions

More information on the insider dealing prohibition is available on the website of the European Commission (http://ec.europa.eu/finance/securities/abuse/index_en.htm).

The AFM is the contact point for questions on the proper handling of inside information. For questions and consultations, you should send an email to marketsupervision@afm.nl, or call the Monitoring team on +31 (0)20 797 3777.

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