# THE MOST COMMON PITFALLS OF MAR COMPLIANCE

InsiderLog
A EURONEXT COMPANY

# Introduction

The EU Market Abuse Regulation (MAR) has been in effect for a couple of years now, so we've had time to observe the effect it has had, how companies have reacted and what the biggest pitfalls and misconceptions are.

On a practical level, some of the biggest changes that companies have had to adjust to are related to the handling of inside information and insider lists.

These tasks can be tedious and sometimes seem unimportant, falling to the bottom of the to-do list, but MAR compliance mistakes are expensive mistakes. Companies that don't fully understand the regulation and their obligations risk hefty fines and other disciplinary action.

And it seems like that may be the case for... most companies.

We've been collecting responses to a short survey about insider list management, and after analysing the results of over 400 respondents we were surprised to find that:

Less than 17% of companies were fully compliant in all aspects of insider list management, and about 6% of companies aren't even creating insider lists at all.

Reflecting on our own experience from advising companies these past few years, as well as the feedback gathered through our survey, there were some clear themes emerging regarding the challenges and pitfalls of complying with MAR.

We also consulted with legal experts across Europe, asking how their clients had adapted to the changes, what questions and doubts people came to them with and what advice they had for issuers that are new to MAR.

The result is this ebook, which will highlight the 6 most common pitfalls when it comes to complying with MAR and share advice on how to ensure that your company is not at risk.

## *Survey Insights*

# #1 Understanding when to create an insider list

The goal for any company should always be to publish all price sensitive information as soon as possible (article 17 of MAR). With all the information out in the open, investors can make fully informed investment decisions, and there's less risk of unfair advantages and insider trading.

**Not disclosing inside information is a serious breach. For example, at the end of 2017, the Financial Conduct Authority (FCA) in the UK fined Tejoori Limited £70,000 for failing to inform the market of inside information relating to the sale of a subsidiary.**

## IDENTIFYING INSIDE INFORMATION

In order to properly disclose the information, one must of course first understand what constitutes inside information in the first place. Inside information is any information of a precise nature which has not been made public and which, if it were made public, would be likely to have a significant effect on the price of an issuer's shares or other financial instruments.

But it's not always easy to determine what information would actually have an impact and the phrase "significant effect on price" does not imply that there's a certain percentage threshold. So how do you identify inside information?

MAR states that the information is assumed to have a significant effect on the price if a "reasonable investor" would be likely to take it into account as part of an investment decision. Would the information be interesting to someone when deciding whether to buy or sell shares?

This is a bit theoretical so we instead suggest that you ask yourself: "Given the information that I have right now as an insider, if insider trading wasn't wrong, would I act on this information?" If you wouldn't, then chances are that the information doesn't qualify as inside information just yet. Because not even you, knowing everything there is to know right now, are confident enough to act on it.

## WHEN DID IT ARISE?

The second, maybe even more problematic, element is pinpointing the exact moment when an event became inside information.

MAR assumes you will be able to document this to the minute. That's difficult. Especially in the common case of a prolonged process. It might concern a deal that you are only thinking about at this point and is not yet likely enough to count as inside information.

At some point, however, it becomes likely that the deal will go through and you must be able to identify the concrete point in time when that shift happened and you started treating it as inside information (and created an insider list).

# #1 Understanding when to create an insider list

**WHAT CAN HAPPEN - IF YOU DON'T ACT ON TIME.**
In January of 2017, the CEO of Swedish bank SEB formally resigned her position. The first discussion about her resignation had occurred on December 13th, 2016. So that would be the first moment an insider list could have been created.

Two weeks later, key members of the communication team were informed and on Friday January 13th an extraordinary board meeting was convened for that following Sunday. However, the company didn't create an insider list until right after the CEO formally announced her resignation during the board meeting on January 15th and published the information the morning after.

The disciplinary committee found that SEB should have created an insider list and gone through the formal procedure to "delay public disclosure" at least on the 13th when the board meeting was convened. Due to their failure to follow the proper procedure, SEB was fined in excess of €300,000. You can read more about the fine here.

*KEY TAKEAWAY*
**Identifying inside information and taking the required action at the right time is one of the most difficult and important parts of MAR compliance. Set up formalised procedures for documenting decisions and when in doubt about the status of new information, ask yourself: "If it were legal, would I act on this information as an investor?" That should give you some guidance on what you need to do.**

## *Survey Insights:*

About **30%** said they do not create a new separate list for each insider event.

*Don't forget that each individual event or piece of information calls for a new and separate section in the insider list. e.g. you must have one list for the big contract negotiation and another for the recruitment of a new CFO (even if the exact same group of people are considered insiders in both events).*

# #2 Knowing when and how public disclosure can be delayed

The main rule is that inside information should always be disclosed as soon as possible. Sometimes you might want to wait for the right moment to share good or bad news, but a delayed disclosure is only permitted if you can show that all three of the conditions below are met:

1. **Immediate disclosure is likely to prejudice the legitimate interests of the issuer.** *For example, you're in the middle of ongoing negotiations or filing of a patent application for a new invention.*
2. **Delayed disclosure is not likely to mislead the public.** *Mainly, you can't wait to disclose something that contradicts information that the company has previously announced.*
3. **You are able to ensure the confidentiality of the information.** *The information needs to be kept within a small group of people, who are all subject to confidentiality obligations.*

When a company identifies that something should be treated as inside information, it may be a very short conversation or even one individual's thought process that leads them to a decision to delay public disclosure. But this assessment must be formalised, documented and saved in case the supervisory authority requests it later. You must record when the decision was made, the person responsible for the decision and evidence proving that the three conditions were met.

Remember that bad timing is never a reason to delay. People are sometimes tempted to wait a couple of days for a better opportunity to announce some bad news. That will never count as an acceptable justification and puts you at a much bigger risk.

*Survey Insights:*

Only **54%** of the respondents in our research were sure that they always go through the correct assessment and documentation process when delaying disclosure.

# #2 Knowing when and how public disclosure can be delayed

**WHAT CAN HAPPEN - WHEN YOU NO LONGER MEET THE CRITERIA TO DELAY**

On October 26th, 2016, the CEO of Sweden based technology group Hexagon was arrested under suspicion of insider trading in another company listed in Norway. When Hexagon was first made aware of the arrest, it decided to delay public disclosure claiming that it only had limited access to information regarding what had occurred and that a premature disclosure could mislead the public. The public disclosure was not made until October 31st.

However, Hexagon had received the prosecutor's application for a detention on October 27th and it became public knowledge after the court's decision on the 29th. The disciplinary committee found that on the 27th Hexagon should have been able to communicate clear information without risk of misleading and on the 29th there was no longer any legitimate interest that could be prejudiced by the disclosure. It was also questioned whether the company could really ensure that the information remained confidential after the 27th, when Swedish and Norwegian police had conducted a search of the CEO's office at the company's premises.

So all three criteria were challenged and as a result, the company received a €600,000 fine. It didn't matter that the CEO was later found innocent of insider trading, the fine was issued to the company because it failed to inform the market of what was going on. Read more about the fine here.

**KEY TAKEAWAY**

**You generally cannot sit on inside information. The strict conditions to delay were created for exceptional cases because a delay is the exception, not the rule. Even when you do meet those exceptional conditions, you must ensure that they continue to be met throughout the delay and be able to provide documentation of your assessment and decision-making process.**

**ASK THE EXPERTS**

## *Are companies compliant?*

DLA PIPER

*"In general, we believe that issuers are well versed in MAR, but the understanding of the rules and compliance still varies significantly between issuers on main markets as compared to MTFs."*

**– Richard Folke, DLA Piper**

Baker McKenzie.

*"In general, yes. However we see that there are certain areas where improvement is needed. We also note that the issuers who are not fully compliant range from SME's to large cap companies."*

**– Joakim Falkner & Stefan Balazs, Baker McKenzie**

# #3 Relying on permanent insider lists

As you all know by now, companies are required to create and maintain a new event-based insider list for each new piece of inside information. The list must include every person who is aware of this information and at what point in time they became aware.

This can be a tedious task and something you don't want to deal with during those times when big things are happening in the business. So sometimes, companies are tempted to simply treat a wide group of people as "permanent insiders" and believe that this takes care of things. This is not a good idea and causes more problems than it solves:

**ALWAYS IN THE KNOW – NO EXCEPTION**

First, a permanent insider is assumed to always have access to and be aware of all inside information from the very moment it arises. Essentially, by adding someone to a permanent insider list, you're saying "this person knows everything all the time" — if that's not always the case, you risk incriminating someone who didn't actually know about a certain project or event but was still included on your list.

**YOU STILL NEED TO MAKE A NEW LIST**

Second, if you have included your entire management team on a permanent list and they are the only ones who know about a new piece of inside information, you may think the permanent list will serve as a universal insider list. It does not. In this case, you would still have to open a new event based insider list that specifies the details of the information, at what point it became inside information and how you determined that delaying public disclosure was permitted. You need a record of the information, not just the insiders, because otherwise there's no indication of what they are assumed to have known about at different points in time.

**KEEP IT EXCLUSIVE**

If you choose to use the permanent list, it should really just include your CEO and maybe your CFO. Think practically about how information moves around your company, where the CEO typically has the information for days before it reaches e.g. the board. If you're not confident saying "this person knows everything all the time" – do not include them.

Your permanent insider list is not a back-up or a catch-all. It's not even necessary. Permanent insider lists are optional under MAR. We, and several other leading advisers within this field, recommend issuers not to use them. It's a lot easier to just add these few persons to the respective event based lists, if and when they get access to that specific information.

This view is shared by the UK Financial Conduct Authority (FCA) which in December 2018 stated that it expects market participants to ensure that the number of people on a permanent list "*is not disproportionately large and remains restricted to employees who have access at all times to all insider information*".

**KEY TAKEAWAY**

**Adding people to your permanent insider list causes more problems than it solves. If you choose to use the permanent list at all — keep it exclusive. A permanent insider list is never a substitute for a new list outlining each new piece of inside information and when it came into existence.**

ASK THE EXPERTS

## *What are recurring questions and challenges?*

*"We still receive a fair amount of questions pertaining to reporting requirements for PDMRs and transactions with related parties."*

**– Richard Folke, DLA Piper**

*"Documentation in general needs improvement, but particularly when it comes to determining if all criteria are met to delay the public disclosure of inside information."*

**– Joakim Falkner & Stefan Balazs, Baker McKenzie**

*"First, being able to track on a real time basis the exact time when employees or advisers become aware of inside information. This is very burdensome and requires that persons managing inside information track on a real time basis when the info is dispatched within an issuer, to advisers etc.*

*Second, the administrative burden of constantly updating the insiders' list and notifying insiders of the fact that they are placed on the lists.*

*And third, finding high level personnel and executives willing to take ownership of the issues created by MAR. Some large companies have set up disclosure committees or a permanent team of executives (including the CFO, the GC and IR executives) overseeing these questions. For smaller companies it is much more challenging to cope with these requirements."*

**– Thierry Schoen, Clifford Chance**

# #4 Confusing PDMRs with (permanent) insiders

There are a couple of different groups of people mentioned in MAR that tend to cause confusion. Mainly, we find that many issuers are not always able to distinguish Persons Discharging Managerial Responsibilities (PDMRs) from permanent insiders.

We have already covered the concept of permanent insiders and how it can be confusing in itself, so what is a PDMR?

The CEO, board of directors (both executive and supervisory) as well as deputies are always included. The definition also covers other senior executives that have regular access to inside information and power to make decisions that affect the company's future. Note that this second group is limited and might not even include the entire management team, since e.g. a legal counsel is more of an adviser than someone who makes their own independent decisions. An assistant in the finance department is not a PDMR, even if he or she often has access to inside information.

There are a unique set of rules when it comes to being a PDMR (article 19) that are separate from the rules around inside information and insider lists (article 17 and 18).

A PDMR must report its transactions in the issuer's instruments to the regulator and refrain from trading during the closed period before financial reports, even if they don't have access to any inside information. The company needs to keep a list of all PDMRs (and their closely associated persons), but this is separate and has nothing to do with the company's insider lists. The PDMR-list is much more static and does not change in relation to different events.

While PDMRs are not automatically assumed to be insiders, they very well could be from time to time. In such a case, the rules for an insider kick in on top of the PDMR rules from the moment they got access to the specific information in question. The PDMR would then have to be added to the relevant insider list and can of course not trade, even if it's outside of the closed period.



**KEY TAKEAWAY**

**PDMRs abide by their own unique set of rules that apply all the time. They are not necessarily insiders, but if and when they do have access to inside information, those rules apply in addition. The more static list that the company must maintain for PDMRs is completely separate from the insider lists that must be created for each new piece of inside information.**

# #5 The manual burden of meeting the requirements in practice

We have shown how MAR can involve complicated assessments and confusing legal terminology. But even if you are a MAR-genius and know exactly what you need to do – you still need to actually do it.

The biggest challenge that companies across Europe face is without doubt the manual overhead that goes into meeting all the requirements of MAR. This is not rocket science in any way, quite the opposite. The tasks themselves are often simple, repetitive and mundane. But because of the sensitive nature of the information and the fines for non-compliance, the tasks are often performed by over-qualified persons like CFOs and General Counsels who really should be focusing on something more value creating.

It is also clear that the authors of MAR didn't really think about how companies should manage these requirements using their standard office tools like the Microsoft Office suite.

**FOR EXAMPLE:**

The implementing regulation of MAR states that issuers must be able to retrieve previous versions of the insider list. The purpose behind the requirement is likely to create an audit trail and prevent manipulation of the list by ensuring that it can always be compared with previous versions. For someone managing a list in Excel, that becomes tedious and a lot of issuers tell us that they are pressing "Save as" to store new and separate files for each little change in the list.

MAR does not only require that issuers inform insiders about their obligations and the legal sanctions for violating them, but also that they collect a written confirmation from each insider that they have understood. The rules dictate that a company must "take all reasonable steps" to get that confirmation, which for many is a huge administrative burden when chasing people with regular emails.

## *Survey Insights:*

***52%** of respondents are not able to create an audit trail and retrieve previous versions of their insider lists.*

The majority (69%) are using Excel and another 12% are using Word, which means its a very manual process of copying and pasting information.

**KEY TAKEAWAY**

**Knowing the requirements is one thing, taking all the practical steps to comply with them is another. The workflows of putting together lists and documenting decisions are not very sophisticated or complex, but they are still burdensome and standard office tools are poorly adapted. This means that a lot of manual work is required, which is inefficient and increases the risk for human error.**

**ASK THE EXPERTS**

## *What is the #1 tip for issuers that are new to MAR compliance?*

DLA PIPER

*"Acquire professional help and get the organisation in order with at least one person being allocated to handling the information and MAR aspects of the company – and then set the routines and work out standard documentation that can be easily adapted to specific situations with short notice."*

**– Peder Grandinson, DLA Piper**

CLIFFORD CHANCE

*"It is important that certain executives take ownership of the management of inside information and the new requirements under MAR. Also in-house seminars concerning MAR can be helpful so that the concerned personnel becomes aware of these requirements."*

**– Thierry Schoen, Clifford Chance**

Baker McKenzie.

*"Education for board members and the management is crucial to get a complete understanding of the rationale of MAR which will also help the issuers to streamline their internal routines when handling MAR-issues. We always recommend issuers use a MAR-software such as InsiderLog."*

**– Joakim Falkner & Stefan Balazs, Baker McKenzie**

# #6 Not bothering at all with compliance since few fines are issued

If no one is getting caught – why should we even care? This is one of the excuses we sometimes hear from issuers that are still not compliant with MAR. Apart from being against the law, we believe it gives them a false sense of security.

We have presented some cases where issuers have been fined for non-compliance, but it is true that given the number of issuers that are affected by MAR, we have seen relatively few fines and sanctions in these first couple of years. This might be about to change though.

The European Securities and Markets Authority (ESMA) has published its priorities and areas of focus for 2019. These show that ESMA will spend considerable resources to ensure that MAR is consistently implemented in the EU. The idea is that the supervisory authorities in different member states will share their practical supervisory experiences and discuss real cases to come up with a uniform interpretation and approach.

This is likely to spur more activity from these authorities, since they won't have anything to discuss if they never do any audits or issue any sanctions.

Indeed, on 29 November 2018 the French Autorité des marchés financiers (AMF) announced that they will start issuing press releases about all sanction decisions handed down by their Enforcement Committee. The AMF writes that "the purpose of this publication is to improve information on the Committee's decisions by providing the public, both in France and abroad, and in particular professionals and investors, with the key points of these decisions".

**KEY TAKEAWAY**

**While the first years with MAR have generated relatively few sanctions from the authorities, we expect to see increased activity in 2019 as ESMA starts putting pressure on local regulators. Assuming that it will be to continue breaking the law could be a costly mistake.**

## A summary of the take aways

**#1 Understanding when to create an insider list**
Identifying inside information and taking the required action at the right time is one of the most difficult and important parts of MAR compliance. Set up formalised procedures for documenting decisions and when in doubt about the status of new information, ask yourself: "If it were legal, would I act on this information as an investor?" That should give you some guidance on what you need to do.

**#2 Knowing when and how public disclosure can be delayed**
You generally cannot sit on inside information. The strict conditions to delay were created for exceptional cases because a delay is the exception, not the rule. Even when you do meet those exceptional conditions, you must ensure that they continue to be met throughout the delay and be able to provide documentation of your assessment and decision-making process.

**#3 Relying on permanent insider lists**
Adding people to your permanent insider list causes more problems than it solves. If you choose to use the permanent list at all — keep it exclusive. A permanent insider list is never a substitute for a new list outlining each new piece of inside information and when it came into existence.

**#4 Confusing PDMRs with (permanent) insiders**
PDMRs abide by their own unique set of rules that apply all the time. They are not necessarily insiders, but if and when they do have access to inside information, those rules apply in addition. The more static list that the company must maintain for PDMRs is completely separate from the insider lists that must be created for each new piece of inside information.

**#5 The manual burden of meeting the requirements in practice**
Knowing the requirements is one thing, taking all the practical steps to comply with them is another. The workflows of putting together lists and documenting decisions are not very sophisticated or complex, but they are still burdensome and standard office tools are poorly adapted. This means that a lot of manual work is required, which is inefficient and increases the risk for human error.

**#6 Not bothering at all with compliance since few fines are issued**
While the first years with MAR have generated relatively few sanctions from the authorities, we expect to see increased activity in 2019 as ESMA starts putting pressure on local regulators. Assuming that it will be okay to continue breaking the law could be a costly mistake.