

LEGAL



Neuntes Hamburger Forum zum
Unternehmens- und Kapitalmarktrecht

Single Rulebook for Market Abuse

Managers' transactions – disclosure obligations and closed period under MAR

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Passion to Perform





■ Overview

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- De Minimis **Exemption**
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■ Rules for Managers' Transactions at a Glance

- Disclosure of transactions executed by managers (or persons closely related to them) of a listed issuer in securities of that issuer
- A similar disclosure requirement already exists under MAD
- MAR extends scope – obligation applies to
 - Transactions relating to shares or debt instruments or to derivatives or other financial instruments linked to them
 - Emission allowances or related derivatives (not the focus of this presentation)
 - Issuers of financial instruments (to be)
 - admitted to trading on a regulated market or MTF or
 - traded on an OTF (if requested or approved by the issuer)
- MAR introduces trading restrictions during closed periods
- Authorisation to Commission for delegated acts specifying scope and content
 - ESMA issued final report: technical advice on possible delegated acts



■ Definition of Manager and Managers' Transactions

- Managers (Art. 3 para. 1 (25) MAR)
 - person discharging managerial responsibilities (“Manager”) – as under MAD
 - person within an issuer or an emission allowance market participant / auction platform / auctioneer / auction monitor who is
 - member of the administrative, management or supervisory body of that entity; or
 - senior executive (and not a member of the foregoing bodies) who has
 - ✓ regular **access to inside information** relating to that entity and
 - ✓ power to take **managerial decisions** affecting the future developments and business prospects of that entity
 - Current BaFin practice: only persons participating in „strategic“ decision (*Emittentenleitfaden V.1.2.1*)
- Managers' Transactions (Art. 19 para. 1 MAR)
 - in respect of issuers of financial instruments
 - transaction conducted on the **manager’s own account**
 - relating to the **shares** or **debt instruments** of that issuer or
 - to derivatives or other financial instruments linked thereto
 - *in respect of emission allowance market participants*
 - *transaction conducted on the manager’s own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto*



■ Rationale of the Disclosure Obligation

- Why need managers' transactions be disclosed (Rec. 58 et.seq. MAR)
 - Greater **transparency** of transactions
 - preventive measure against market abuse, particularly insider dealing.
 - prerequisite for the confidence of market actors and, in particular, the confidence of a company's shareholders.
 - source of **information to investors**
 - additional means for competent authorities to **supervise** markets.
- Underlying assumptions
 - Managers have **privileged knowledge** about the issuer
 - *Assumed risk of insider dealing?*
 - esp. given wide interpretation of inside information in ECJ rulings re: **Geltl ./.** **Daimler** and **Lafonta**
 - Managers' transactions give an indication of (expected) price development of the securities of the issuer
 - *BUT motivation may also be a purely personal, unrelated to the issuer, e.g.*
 - *Other investment opportunities or private interests*
 - *Liquidity needs (e.g. to cover personal losses)*



■ Details and Scope of the Disclosure Obligation

- **Notification** to Issuer and National Competent Authority (NCA)
 - NCA where the issuer is registered
 - Notification **within 3 trading days** after execution of the transaction
 - **Public Disclosure** (Art. 19 para. 3 MAR)
 - Generally by the Issuer, unless national law provides for disclosure by NCA
 - **Within 3 trading days** after execution(!) of the transaction
 - *Timely publication may be factually impossible if notification only at the end of the notification period*
 - *ESMA's final advice: does not have the power to correct it as it is expressly stipulated in MAR*
 - Notification and disclosure obligation applies if **issuer** (Art. 19 para. 4 MAR)
 - **requested** or **approved** admission of their financial instruments to trading on a regulated market or
 - in the case of an instrument only traded on an MTF or an OTF,
 - **approved** trading of their financial instruments on an MTF or an OTF or
 - **requested** admission to trading of their financial instruments on an MTF
- **In a nutshell: no notification** if trading was initiated **without the issuer's consent**



■ Details and Scope of the Disclosure Obligation (II)

- Disclosure obligation applies to **own account transactions** by
 - The Manager or
 - A person **‘closely associated’ with a Manager** (Art. 3 para. 1 (26) MAR)
 - (a) spouse, or partner considered equivalent to a spouse
 - (b) dependent child
 - (c) relative sharing the same household for ≥ 1 year on the date of the transaction
 - (d) legal person, trust or partnership
 - ✓ the **managerial responsibilities** of which are discharged by a Manager or 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
- *Issuer’s own transactions?*
 - Currently BaFin: not in scope (*Emittentenleitfaden V.1.2.4*)
- *Trading activities by financial institutions if its board members are members of the supervisory board of a listed issuer*
 - Currently BaFin (*Emittentenleitfaden V.1.2.6*)
 - ✓ Only if Manager **significantly benefits** from that legal person (i.e. holds an economic interest of $\geq 50\%$ or is entitled to $\geq 50\%$ of the profits)

■ Information and Documentation Duties (Art. 19 para. 5 MAR)



- Issuers to
 - notify the **Managers** of notification obligation re. own account transactions in writing
 - draw up a list of Managers and persons closely associated with them
- Manager to
 - notify the **persons closely associated with them** of their disclosure obligations in writing and
 - keep a copy of this notification.



■ Transactions to be notified (Art. 19 para. 7 MAR)

- Transactions to be notified shall also include:
 - **Pledge or loan** of financial instruments
 - × *Except for a pledge, or a similar security interest in connection with the depositing of the financial instruments in a custody account*
 - × *e.g. standard pledge under banks' general T&Cs "AGB Pfandrecht"*
 - ✓ Unless it is (or becomes) designated to secure a specific credit facility
 - Transactions undertaken by persons **professionally arranging or executing transactions** or by another person on behalf of a Manager or a person closely associated with a Manager,
 - ✓ including where discretion is exercised;
 - Transactions under a **life insurance policy** defined in accordance with Directive 2009/138/EC ("Solvency II"), where:
 - ✓ the policyholder is Manager or a person closely associated with a Manager
 - ✓ the investment risk is borne by the policyholder, and
 - ✓ the policyholder has the **power or discretion**
 - ✓ to make investment decisions regarding specific instruments or
 - ✓ to execute transactions regarding specific instrumentsfor that life insurance policy.
 - ☒ *No obligation to notify is incumbent on the insurance company.*



■ Transactions to be notified (ESMA's final advice)

- ESMA proposes to clarify in a delegated act that transactions to be notified shall also include:
 - Purchases and sales, including short sales
 - Acceptance and the exercise of stock-options as well as the sale of shares stemming therefrom
 - Equity swaps
 - Transactions related to derivatives products settled in cash and contracts for difference
 - **Acquisition, sale or exercise of rights**, put and call options or warrants
 - **Subscription** to a capital increase or of a debt instrument issuance
 - Transactions on derivatives/financial instruments linked to a debt instrument, including credit default swaps
 - Conditional trades if the condition that is now met
 - **Conversion** of a financial instrument into another financial instrument, e.g. exchange of convertible bonds to shares (**even if automatic**)
 - **Gifts** and **donations** made or received, and **inheritance** received
 - Transactions in index-related products, baskets and derivatives based thereto linked to the issuer's shares or debt instruments.



■ Transactions to be notified (ESMA's final advice)

- ESMA proposes to clarify in a delegated act that transactions to be notified shall also include (contd.):
 - Transaction in **shares/units of investment funds** (AIF and UCITS) where
 - the clients of the fund know, or **could have knowledge** of, the investment composition of the fund, and
 - which are **linked** to the issuer's shares or debt instruments
 - Transactions executed by managers of an AIF in which the Manager has invested, where the manager of the AIF does not have full discretion
 - Transactions executed by a third party under an **individual portfolio or asset management mandate** for the benefit of the Manager
 - Borrowing of shares or debt instruments of the issuer or other financial instruments linked thereto.

Index-related products, baskets and or shares/units of investment funds shall be deemed as linked to the issuer's shares or debt instruments when

- ✓ the financial instruments' **weight** therein is $\geq 20\%$ of the total composition of such product at the time of the transaction
- In Germany, currently a weight of 50% is required (see *Emittentenleitfaden V.2.1*)



■ Transactions to be notified (ESMA's final advice)

- Objectives of ESMA's clarifications :
 - Achievement of full transparency of Managers' transactions
 - Avoidance of circumventions
- Observations/Comments
 - *Some types of transactions to be notified are **not based on an investment decision by the Manager** or any of its closely related persons, e.g. receipt of gifts, inheritance or donation, receipt of stock options*
 - *Their disclosure does not provide any added value to market participants*
 - *Rather, it might even be misleading*
 - *Interpretation de-coupled from the purpose of MAR and the disclosure of Manager's transactions (see Rec. 58, 59 MAR) - useful?*
 - *Employee schemes: some guidance re. the issuer's ability to grant an exemption - but why not a general exemption if no investment decision by the Manager?*
 - *The threshold for the weight of the issuer's financial instrument in structured products of $\geq 20\%$ appears too low*
 - *80% of the exposure in the product results from other underlyings!*

■ Content of Notification (Art. 19 para. 6 MAR)

- Name of the (notifying) person
- Reason for the notification
- Name of the issuer or emission allowance market participant
- Description and the identifier (ISIN?) of the financial instrument
- 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 of Art. 19 para. 7 MAR
- Date and place of the transaction(s); and
- Price and volume of the transaction(s)
 - in the case of a pledge
 - if terms provide for its value to change
 - this should be disclosed together with its value at the date of the pledge



■ De Minimis Exemption (Art. 19 para. 8, 9 MAR)

- Notification duty (only) applies
 - Once an aggregate amount of **EUR 5,000** has been reached within a calendar year
 - To transactions subsequent to crossing the threshold
 - Aggregation of transactions by or on behalf of a Manager and the persons closely associated with him? (probably yes – ESMA “cumulatively”)
 - In Germany, BaFin currently requires aggregation (see *Emittentenleitfaden V.2.3*)
- Calculation
 - Addition of all transactions triggering notification without netting
- A competent authority
 - may increase the *de minimis* threshold to *EUR 20,000* and
 - shall inform ESMA of such decision and its justification
 - with specific reference to market conditions, to adopt the higher threshold prior to its application.

ESMA shall publish on its website the list of thresholds and the justifications provided by competent authorities

- *Contradiction to single market?*
- *Level Playing field?*



■ Closed Periods (Art. 19 para. 11, 12 MAR) (II)

- Prohibition for a Manager to
 - conduct any transactions
 - on its own account or for the account of a third party
 - relating to
 - shares or debt instruments of the issuer or
 - 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 a year-end report which the issuer is obliged to make public according to:
 - rules of the trading venue where the issuer's shares are admitted to trading, or
 - national law.
 - *The (scheduled) publication of „preliminary“ financials is irrelevant for the determination of the closed period*
- Prohibition does **NOT** apply to **closely related persons**
 - confirmed by ESMA
 - Securities Markets Stakeholder Group (SMSG) expressed concerns of circumvention
- Periods while the disclosure of inside information is delayed acc. to Art. 17 para. 4 or 5 MAR do not count as closed periods
 - But general prohibitions of insider dealing and market manipulation (Art. 14, 15 MAR) do apply (of course)

* In the German version „Ankündigung“ appears misleading – should probably mean „Veröffentlichung“



■ Closed Periods (Art. 19 para. 11, 12 MAR) (II)

- Issuer may **allow** a Manager to trade on its own account or for the account of a third party during a closed period:
 - on a case-by-case basis due to
 - ✓ **exceptional circumstances**, such as severe financial difficulty
 - ESMA's final advice: **extremely urgent, unforeseen and compelling**, and their **cause is external to the Manager** who has no control over them, e.g. enforceable financial commitment or tax liability (provided no other means are available to fund such liability)
 - ✓ requiring the immediate **sale** of shares
 - due to the **characteristics** of the trading involved for transactions
 - ✓ relating to an **employee share or saving scheme**, qualification or entitlement of shares
 - ESMA's final advice: inter alia if Manager informs issuer of his/her decision 4 months in advance, i.e. **OUTSIDE** closed period (!)
 - ✓ transactions where the beneficial interest in the relevant security does not change
- General prohibitions of insider dealing and market manipulation (Art. 14, 15 MAR) continue to apply (of course)
 - Irrespective of the issuer's consent
 - **Can the relevant Manager participate in that decision? Probably not**



■ Closed Periods (Art. 19 para. 11, 12 MAR) (II)

- Relevance for securities issuances by the Issuer?
 - Is the issuer itself also a “**third party**”?
 - Does the issuance of new securities qualify as a “**transaction**” acc. to Art. 19 para. 1 MAR
 - ✓ “*every transaction relating to the shares or debt instruments of that issuer*” also if yet unissued at the time of sale?
 - + wide formulation and purpose of the rule
 - + ESMA deems „subscriptions of new shares“ as being in scope
 - How can frequent issuers (e.g. FIs issuing on a daily basis) avoid their ongoing issuances becoming affected?
 - Managers should not participate in an issuance during a Closed Period
 - would be in line with rationale expressed in Art. 9 para. 1: effective Chinese walls rebut presumption that inside information has been used
 - If Managers’ involvement necessary (e.g. for corporate law reasons):
 - fundamental decision to effect a transaction and authorisation to execution team to be taken prior to start of closed period



■ Closed Periods (Art. 19 para. 11, 12 MAR) (III)

- Relevance for securities issuances by the Issuer? (contd.)
 - Should an exemption apply for “**Face-to-Face**” transactions ?
 - e.g. „rescue“ capital increases or strategic share-for-share deals
 - If counterparty is made aware of preliminary financials?
 - See Rec. 23, 24: purpose of insider dealing rules is prohibition of unfair advantages
 - Clarification by regulator (ESMA, NCA) would be helpful
 - Can the issuer grant an exemption acc. to para. 12 for an issuance of own securities?
 - Transactions conducted for the account of third parties expressly mentioned
 - Who should decide – if management board and supervisory board involved in decision to execute transaction (e.g. for a capital increase)?