



Investing in Europe: What do Europe's new market abuse rules mean for investors?
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If you have investments in European listed companies, you should be aware of the EU's new Market Abuse Regulation and how it may impact you, wherever in the world you are based.

From 3 July 2016, a new standardised EU-wide regime to prevent market abuse (market manipulation and insider dealing) takes effect, including new rules on disclosure of inside information, insider lists and restrictions on dealings by persons discharging managerial responsibilities. The new regime is similar to the old one, but with some important changes, including a broader scope and a new framework for market soundings. **Investors outside of Europe who have European investments should consider whether their compliance procedures and training need to be refreshed to account for these new rules.** Otherwise they may face the risk of committing an offence inadvertently. They should also be prepared for differences in the way they receive any market soundings relating to European companies.

Do I need to worry about MAR if I'm not in Europe?

MAR applies in relation to financial instruments admitted to trading (or for which an application has been made) on a European regulated market or multilateral trading facility (MTF). This covers a broad range of markets and is wider than the pre-existing market abuse rules.

If an unlawful action occurs in relation to financial instruments that are subject to MAR, that can amount to an offence, regardless of where that action was conducted. For example, if an investor in Asia or the Middle East has inside information about a UK-listed company and deals in that company's securities, it could commit an offence of insider dealing in the UK.

How can I avoid committing an offence?

Although most countries have rules preventing the abuse of inside information, there are differences in way those rules apply across the globe. Behaviour that is perfectly acceptable in one region may breach the law when carried out in relation to European investments. For that reason it is important to understand the key features of the European market abuse rules.

Insider dealing

Under MAR, it is unlawful for an insider to engage or attempt to engage in insider dealing or to recommend or induce another person to engage in insider dealing.

Insider dealing is where an insider is in possession of inside information and uses that information by acquiring or disposing of, directly or indirectly, financial instruments to which that information relates, whether or not the dealing is for its own account or the account of a third party. Where someone has placed an order relating to the financial instruments in question before they have access to the inside information, it will also be insider dealing to cancel or amend that order.

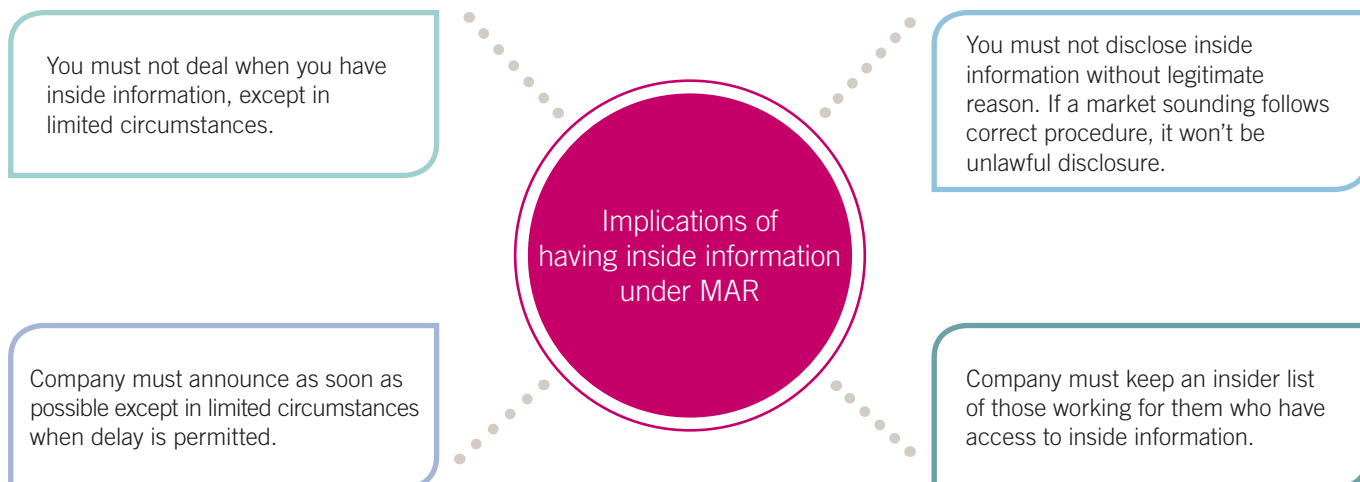
Where a person possesses inside information and then deals or attempts to deal, under MAR it is presumed that they have used that information, although there are some circumstances when that presumption will not apply. These include where effective information barriers are in place between different functions of the same legal person or where the dealing is to satisfy an obligation which arose before the relevant person had inside information.

The golden rule should be, unless you clearly fall within one of these exemptions, **if you possess inside information about a European listed company, or think that you may possess such information, you should not deal in that company's securities** until you are cleansed (see below). It does not matter if you have other reasons to trade, or if you don't have any intention to profit from the trade. Unless you can clearly prove that you didn't use that inside information at all, you should not deal.

What is inside information?

Inside Information is information of a precise nature relating to a company or its financial instruments which is not public, but which, if made public, would be "likely to have a significant effect on the price of the company's financial instruments". Information is likely to have a significant effect on price if a reasonable investor would be likely to use it as part of the basis for their investment decisions.

Determining whether something is inside information can be a process requiring difficult judgements to be made and there have been recent cases in Europe which determine relatively low standards for when something is "precise". Something can be precise even at an early stage of a protracted process and separate pieces of information may combine together to be inside information.



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Unlawful disclosure

If you are in possession of inside information, it is also an offence to pass that information on to anyone else unless you do so in the normal course of your employment, profession or duties.

Disclosures made in the course of a market sounding will be deemed to have been made in the normal exercise of a person's employment, profession or duties (i.e. will not be unlawful) if certain strict requirements are met. A market sounding is a communication of information by an issuer, secondary offeror or someone acting on their behalf before a transaction to gauge the interest of potential investors, or a communication to target shareholders by a bidder in a takeover offer.

In order to benefit from this safe harbour, the person making the disclosure, known as the disclosing market participant or "DMP", must follow detailed procedures. **Investors, known as the market sounding recipient or "MSR", should therefore expect some new formalities if they are sounded out in relation to a transaction in an EU-listed company.** There are also steps that investors are recommended to take to minimise the risk of them inadvertently committing market abuse following a market sounding.

Scripts and consents

A pre-determined standard set of information has to be given to all MSRs. There are mandatory contents, which vary depending on whether or not inside information will be disclosed. Investors should therefore expect certain scripts to be followed at the beginning of any market sounding. These will include a request for confirmation that the individual contacted is authorised to receive the sounding on behalf of the potential investor and, if applicable, a request for consent to receiving inside information.

If inside information is disclosed, DMPs have to provide an estimate of when the MSR will be cleansed and how they will be informed (which must be in writing). This will either be when the transaction is announced or when it falls away and the DMP determines it is no longer inside information. **Once an investor has been advised that they have been cleansed and also satisfied themselves that they no longer have any inside information, they will be free to deal in that company's securities again.**

Record keeping requirements – impact on investors

Detailed records of any market sounding have to be kept for five years. Where recorded lines are available, they will be used and the DMP has to ask for consent to the conversation being recorded. For physical meetings or unrecorded phone calls, written minutes have to be drawn up by the DMP. Investors should then expect to be asked to sign a copy of those minutes to confirm that they reflect the conversation. If you don't agree with the contents you can draw up your own minutes and the DMP will have to keep both versions.

Guidance for investors

You should also consider guidance from the European Securities and Markets Authority on how you can best avoid committing market abuse following a market sounding. Key elements of this guidance include:

- > **only authorised persons may receive market soundings** – the DMP will be required to ask whether the individual in question is authorised to receive a market sounding on your behalf. Employees will need to clear who is and who is not so authorised
- > **own assessment of inside information** – the DMP will be required to tell the MSR whether it believes the information proposed to be disclosed is inside information and, if it is, to ask for the MSR's consent to receiving it. Regardless of which view is expressed, the MSR must make its own assessment of whether it has been given inside information. If either the DMP or the MSR believes inside information has been shared, best practice would be for the MSR's group to treat that information as inside information. If it is inside information but you have been told that it is not, that will not save you from offences of insider dealing or unlawful disclosure
- > **record keeping** – although not a technical requirement of MAR, investors should keep their own records for five years so they have evidence that they followed the right procedures if an investigation is ever launched

Sanctions

Committing an offence of insider dealing or unlawful disclosure of inside information under European law could result in a civil sanction, such as a public censure or fine, or a criminal sanction including imprisonment. There is a European Directive that sets out minimum criminal sanctions for these offences.

What to do next

If you invest in Europe, consider whether you should update your internal processes. In particular, consider whether you should agree to be wall-crossed on market soundings out of Europe and, if so, how you will then ensure no dealing will take place until cleansing has happened. You may even consider that you don't want to be sounded at all, even on a non-wall crossed basis, because of the risk that the information you receive is judged in hindsight by the regulator to have been inside information. Identify staff who will be authorised to receive market soundings and provide them with training on what to expect.

Please speak to your usual Linklaters contact or any of those listed below if you would like any further information. Please also see the Linklaters Knowledge Portal, including a dedicated section for the new Market Abuse Regulation.

Key contacts.



Sebastián Albella
Senior Partner, Madrid
Tel: +34 91 399 6160
sebastian.albella@linklaters.com



Jan Willem de Boer
Partner, Amsterdam
Tel: +31 20 799 6348
janwillem.deboer@linklaters.com



Lucy Fergusson
Partner, London
Tel: +44 20 7456 3386
lucy.fergusson@linklaters.com



Nicki Kayser
Partner, Luxembourg
Tel: +352 2608 8235
nicki.kayser@linklaters.com



Thierry L'Homme
Counsel, Brussels
Tel: +32 2 501 91 86
thierry.lhomme@linklaters.com



Fredrik Lindqvist
Managing Partner, Stockholm
Tel: +46 8 665 66 21
fredrik.lindqvist@linklaters.com



Adam Lurie
Partner, Washington
Tel: +1 202 654 9227
adam.lurie@linklaters.com



David Martin
Partner, Abu Dhabi
Tel: +971 2 659 2113
david.martin@linklaters.com



Matthew Middleditch
Partner, Hong Kong
Tel: +852 2901 5352
matthew.middleditch@linklaters.com



Stephan Oppenhoff
Partner, Frankfurt
Tel: +49 69 710 03 445
stephan.oppenhoff@linklaters.com



Marc Perrone
Partner, Paris
Tel: +33 1 56 43 58 67
marc.perrone@linklaters.com



Tom Shropshire
Partner, London
Tel: +44 20 7456 3223
tom.shropshire@linklaters.com

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