AUTORITÉ
DES MARCHÉS FINANCIERS

AMF Recommendation No. 2010-07 of 3 November 2010
Guide to preventing insider misconduct by executives of listed companies

Background legislation: Articles 622-1 and 622-2 of the AMF General Regulation

This guide comprises the complete report by the taskforce led by Bernard Esambert on preventing insider misconduct by persons discharging managerial responsibilities ("executives") in listed companies.

TABLE OF CONTENT

Introduction

(1) Recap of the rules on insider misconduct

Executives of listed companies who trade in their companies' shares are subject to numerous requirements aimed at preventing insider misconduct. The rules on insider misconduct are harmonised across Europe because they result from transposition of the Market Abuse Directive[1]. They require any person holding inside information, i.e. information of a precise nature that has not been made public and that, if made public, would be likely to have a significant effect on the share price of a listed company or on the prices of financial instruments, to refrain from using such information to trade in the securities to which that information relates. Such persons must also refrain from disclosing such information other than in the normal course of their duties, or from advising another person to trade in the securities in question.

(2) Executives may find these requirements difficult to manage

The abstention requirements apply to any person holding inside information by virtue of their membership of the administrative, executive, management or supervisory bodies of the company. Within this category, executives are treated as "quasi-permanent" insiders. As such, they have to comply with multiple black-out periods and make sure before entering into any transaction that they are not in an insider situation. Their task has been made more delicate because the Market Abuse Directive requires transparency on these trades and because, following a string of scandals, directors' dealings have come to be regarded with some suspicion – a situation exacerbated by the financial crisis. Companies themselves have a vested interest in preventing insider misconduct, to preserve their reputation and image.

(3) Consider long-term performance

Some think it would be best to simply impose an outright ban on all trading by executives in their company's shares while they are in office, or even for a limited period once they leave office. This ban would be intended not only to prevent breaches of insider misconduct rules but also to encourage executives to consider the long-run performance of the company. But such a ban would go too far. Senior managers may have a legitimate interest in buying or selling their company stock. However, to ensure that their interests are aligned with those of the company, executives should be subject to stringent holding requirements for bonus shares and shares received shares received by exercising options.

Granting stock options, subject to performance and holding requirements, may be an appropriate way to align interests[2]. To ensure this convergence, certain rules have to be followed, such as non-hedging of options and the requirement to hold a significant portion of the shares obtained through option exercises or grants. French law requires the board of directors or the supervisory board to set the number of shares that executives must hold until they leave office, the alternative being to place an outright ban on exercising stock options or selling bonus shares. Ideally, the obligation to hold bonus shares and option exercise shares should be sufficiently restrictive to ensure that the company's long-run performance is properly taken into account. An acceptable rule would be three times' annual fixed and variable compensation for the Chairman and Chief Executive Officer (CEO), and twice annual fixed and variable compensation for the Deputy CEO.

(4) Executives are expected to set an example

In all cases, in view of their duties and responsibilities, executives must act ethically and demonstrate the utmost rigour when managing their investments in the company's capital to avoid any "appearance of impropriety"[3] in their dealings. Put differently, the higher once goes in a company, the more one has to be above suspicion. Executives are thus expected to set an example.

[1] Directive 2003/06/EC of the European Parliament and of the Council of 28 January 2003 on insider misconduct and market manipulation.

[2] The Institut de l'entreprise has done significant work in this regard: "L'entreprise de l'après-crise / Favoriser une meilleure prise en compte du long terme", Les notes de l'Institut, January 2010: http://www.institut-entreprise.fr/fileadmin/Docs_PDF/travaux_reflexions/E2020/E2020_long_terme_201001.pdf (in French only).

[3] The US regulatory standard borrows from ethics rules for the US legal profession by requiring executives to avoid "any appearance of impropriety".

(5) Many companies have introduced preventive measures

Issuers cannot be passive when it comes to preventing insider misconduct. The first section of this guide therefore covers preventive measures, drawing *inter alia* on work done by industry groups and the recommendations issued recently by the UK Financial Services Authority (FSA). To prevent insider misconduct, companies have long used various measures designed, without prejudice to the applicable legal and regulatory provisions, to provide a framework to govern trading by their executives. France's industry groups, including Association française des entreprises privees (AFEP) and Association nationale des societes par actions (ANSA), have published recommendations in this area, including AFEP's January 2008 guide to preventing insider misconduct, and ANSA's guide for listed companies on drawing up insider lists and informing the persons in question, the first edition of which was published in May 2006. To cite some of the kinds of measures implemented, several listed companies have internal bylaws, a code of ethics or conduct of business rules setting out the rules that apply to executives and employees; many companies have also established "closed periods" when all trading is prohibited. Given the obligations placed upon companies and their executives, the taskforce feels that many more companies should implement similar measures.

(6) Public disclosure is still the most effective form of prevention

It is important however to reiterate that listed companies are required to promptly make public any inside information that concerns them directly[4]. Complying with this obligation is the primary means of prevention. That being said, a company may assume responsibility for deferring disclosure of inside information, provided that three criteria are satisfied: publication of the information would harm the company's legitimate interests; non-disclosure is unlikely to mislead the public; and the issuer must be in a position to ensure that the information is kept confidential. In this specific case, the AMF General Regulation expressly requires measures to be implemented to restrict access to the inside information and to inform people with access to the information about the legal penalties for unauthorised use or distribution of that information. If the company is unable to keep the information confidential, it could be charged with failing to meet its permanent reporting obligations.

(7) Create a guide that collates all existing measures

Once it had completed its work, the taskforce decided to prepare a guide that presented the results of its discussions with professionals, including listed companies, lawyers, bankers and shareholder representatives. The guide brings together all the main measures for preventing insider misconduct in a single document, including the recommendations issued by industry groups, the AMF and other regulators such as the FSA. The taskforce also considered whether to recommend specific measures for small and mid caps. Ultimately, it decided that it was not appropriate to draw a distinction between large caps and small and mid-sized companies, since the abstention requirements apply in the same way to executives in companies of all sizes.

Many of the measures described in the guide are common sense, and when it comes to preventing insider misconduct, common sense and regulation can work together. Applying these measures also enhances the governance of listed companies, particularly by providing a framework for trading by executives. It is important in this regard to stress the role of shareholders, who vote on resolutions authorising awards of shares and stock options, and of boards, which allocate the shares and options. Ideally, the way that shares and options are distributed should reflect performance and be balanced in terms of the awards made to different beneficiaries, so that no executive receives an excessive portion. AFEP and MEDEF state this principle in their governance code for listed companies: "the method of determining the compensation and award of stock options and performance shares must be balanced and take into

[4] Article 223-2 of the General Regulation: "I. - Every issuer must disclose to the public as soon as possible any privileged information, as defined in Article 621-1, that directly concerns that issuer.
II. - The issuer may assume responsibility for deferring disclosure of privileged information in order to protect his legitimate interests, provided such non-disclosure is unlikely to mislead the public and provided the issuer is in a position to ensure confidentiality by controlling access to that information, in particular by:
1° implementing effective security measures to prevent access to that information by persons other than those who require access in order to perform their duties within the issuer;
2° taking the necessary steps to ensure that every person granted access to that information is aware of the legal and regulatory obligations associated with such access and has been warned of the penalties imposed for unauthorised use or distribution of that information;
3° introducing the necessary procedures to disclose that information immediately in the event the issuer has been unable to ensure confidentiality, without prejudice to the provisions of the second point of Article 223-3. […]"

account at the same time the company's general interest, market practices and officer performance". The skills and know-how that are provided by non-executive employees and that are vital to the company's survival and growth could also be added to the list of factors to be taken into account.

(8) Change the statutory closed periods for disposal of bonus shares

Several people interviewed by the taskforce said that the black-out arrangements established by Article L.225-197-1 of the Commercial Code were inappropriate for broad award plans covering the entire workforce or a large number of employees, insofar as they do not draw a distinction between beneficiaries who might hold inside information and the rest[5]. It is recommended that amendments be made to this legislation, which is inappropriate for the employees of listed companies.

(9) Judgements by the Court of Justice of the European Union

The taskforce closely examined recent judgements relating to the punishment of insider misconduct. In particular, the Spector Judgement[6] by the Court of Justice of the European Union (CJEU) in December 2009 shed new light on abstention requirements. While the aim of the taskforce is not to perform a detailed analysis of the CJEU judgement, since others have already discussed it at length, several lessons may be drawn from the ruling. The CJEU upheld the principle of the objective nature of insider misconduct, which is based on the presumption that the executive has used insider information; however, the court also confirmed that this presumption is open to rebuttal, i.e. an executive may overturn the presumption by providing evidence that he did not use the information. Accordingly, all executives holding inside information who makes a transaction will not automatically fall foul of the ban on insider misconduct, since any undue use of that information has to be established by a thorough examination of the factual circumstances, bearing in mind the aims of the Market Abuse Directive (MAD)[7].

(10) Strict framework for trading plans

The measures implemented by companies and their executives to prevent insider misconduct and regulate trading may offer ways of demonstrating that an executive who entered into a trade did not breach the ban on insider misconduct. Setting up a trading plan is one means of proving that transactions carried out on behalf of an executive were entered into not on the basis of inside information but of instructions given at an earlier date, when the executive was not an insider. This idea of separating the possession of inside information from the decision to trade already exists in MAD, although analysing the process that brought about the legislation reveals that the purpose was not to capture all contract types, but just the unwinding of market transactions[8]. Even so, this fact supports the notion that an executive who sets up a plan with a third party may, provided the plan complies with strict restrictions and subject to a court assessment, be covered by a rebuttable presumption that he did not commit insider misconduct. Trading plans have existed for a long time in the United States and the UK and are included in market regulations.

However, such plans must be subject to a strict framework: while dealing is theoretically left to the sole discretion of the person in charge of executing the plan, several interviewees highlighted the risk that the executive could become involved, given the close and regular relations between an investment manager and his client and the balance of power between the two. For this reason, the taskforce recommends that trading plans be subject to strict and precise restrictions, which greatly mitigate this type of risk.

(11) Promoting trading plans within Europe

To the AMF's knowledge, no other European countries have issued a guide of this sort except the UK, where the FSA has published similar recommendations. Accordingly, the taskforce proposes that, as part of the MAD review, the AMF should support the proposal to recognise the principle of regulated trading

[5] The provisions of the Commercial Code establish black-out periods for employees who receive bonus shares, based on the black-out periods applicable to the governing bodies when stock options are awarded:

- a black-out period of ten stock-exchange trading days that precede or follow the date on which the consolidated accounts or annual accounts are published, applicable to all employees, even if they do not have inside information;
- a black-out period between when the governing bodies receive inside information and ten trading days following publication of that information, even though employees cannot know that the governing bodies hold inside information.

[6] CJEU Judgement of 23 December 2009 in Case C-45/08, Spector Photo Group NV, Chris Van Raemdonck/CBFA.

[7] Recital 30 of the Market Abuse Directive states: "Since the acquisition or disposal of financial instruments necessarily involves a prior decision to acquire or dispose taken by the person who undertakes one or other of these operations, the carrying out of this acquisition or disposal should not be deemed in itself to constitute the use of inside information."

[8] Article 2.3 of the Market Abuse Directive, transposed by Article 622-1 of the AMF General Regulation, stipulates that the ban on using inside information does not apply to "transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information."

plans on a Community-wide basis. Such recognition would entail amending the directive and would not be in conflict with the goals of the directive, which already excludes certain transactions from the scope of insider misconduct[9] and provides exemptions, although only in the area of price manipulation (share buybacks, stabilisation of financial instruments, market practices).

(12) Tougher sanctions for insider misconduct

It is important to emphasise that all these preventive measures are meaningless if they are not backed up by deterrent sanctions. Of all the offences punishable by the AMF, insider misconduct by an executive is one of the most egregious. The AMF therefore wishes to stress that the punishment should fit the crime. The principle of the proportionality of the sanction is not in conflict with, and must not exclude, its deterrent effect. In addition to the fine for insider misconduct that may be imposed by the AMF and that may not exceed €10 million or ten times the amount of any profit realised[10] (raised by the Banking and Financial Regulation Act to €100 million), the law also provides for criminal penalties for natural persons and legal entities that commit insider dealing offences[11]. These criminal penalties and fines should surely be strengthened[12].

(13) A guide that can serve as an inspiration to other market participants

In the course of their professional dealings, some third parties, including advisors, bankers, lawyers, investment services providers, consultants, analysts, and representatives of rating agencies, may have access to inside information on listed companies. If they are not already subject to strict conduct of business rules, such third parties could usefully draw on some of the measures proposed in this guide. In any event, the AMF is planning to hold additional discussions in this area that will address other market participants.

(14) Assess implementation of the guide

Application of the guide should be assessed after three years or so, and regularly thereafter, to make any necessary improvements and adjustments.

1. Scope

This guide is intended primarily for companies listed on Euronext and Alternext and for anyone referred to in Article L. 621-18-2 a) and b) of the Monetary and Financial Code, i.e.:

- **members of the board of directors, the executive board or the supervisory board, or the CEO, the sole CEO, the deputy CEO or the statutory manager;**
- **any other person who has the power to make management decisions within the company regarding its positioning and strategy and also has regular access to inside information that directly or indirectly concerns that company (people in this category are treated as "executive equivalents");**

During the transposition of MAD, it was not deemed appropriate for the AMF to define persons "equivalent" to executives. Listed companies are therefore required to identify these people and draw up a list, which is sent to the people in question and to the AMF[13]. This list is not made public and must not be confused with the insider list (cf. 2.1).

[9] Recital 29: "Having access to inside information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider misconduct".
[10] Article L.621-15-2 of the Monetary and Financial Code.
[11] Article L.465-1 of the Monetary and Financial Code: "Executives of a company referred to in Article L. 225-109 of the Commercial Code, or persons who, through the practice of their profession or the performance of their functions, obtain privileged information concerning the prospects or the situation of an issuer whose securities are admitted to trading on a regulated market or the likely performance of a financial instrument admitted to trading on a regulated market, and who carry out or facilitate, either directly or through an intermediary, one or more transactions before the public has knowledge of that information shall incur a penalty of two years' imprisonment and a fine of 1,500,000 euros, which amount may be increased to a figure representing up to ten times the amount of any profit realised and shall never be less than the amount of that same profit."
[12] Neighbouring countries impose sentences of between five and twelve years' imprisonment, compared with two in France.
[13] Article 223-24 of the General Regulation: "The issuer shall prepare, update and transmit simultaneously to the persons concerned and to the AMF a list of the persons referred to in Article L. 621-18-2 (b) of the Monetary and Financial Code."

This guide is also intended for anyone in the company who may have access to inside information. It is therefore essential for companies to precisely identify the persons in question, since a significant number of people may be involved in a large company.

2. Preventive measures

Most large listed companies have taken measures or introduced arrangements to prevent the use of inside information. These measures cover various areas, including management of inside information and restrictions on access to such information; information and training for people likely to hold inside information; and rules for dealing by such persons, especially executives.

The aim here is not to draw up an exhaustive list of these measures, but, after reviewing certain prevention-related obligations, to describe the measures that are most commonly used and that the AMF is recommending.

2.1. Review of certain obligations applicable to executives and listed companies

The legislation provides for several measures, stemming from the transposition of MAD, to prevent insider misconduct and market abuse generally. These measures apply to executives as well as to companies themselves and to other participants, such as investment services providers (ISPs). They include the requirement to report trading by executives; the requirement for listed companies and persons acting in their name or on their behalf to prepare insider lists; and the requirement to report suspicious transactions.

The principle that market participants must take steps to prevent abuse is set out in the recitals of the directive. Recital 24, for example, states that "Professional economic actors should contribute to market integrity by various means. Such measures could include, for instance, the creation of 'grey lists', the application of 'window trading' to sensitive categories of personnel, the application of internal codes of conduct and the establishment of 'Chinese walls'". On the question of executives, Recital 26 stresses that "Greater transparency of transactions conducted by persons discharging managerial responsibilities within issuers and, where applicable, persons closely associated with them, constitutes a preventive measure against market abuse [...]".

Thus, the law requires the executives of companies whose shares are listed on Euronext or Alternext to report to the AMF all acquisitions, disposals, subscriptions or exchanges of shares as well as all transactions in related instruments[14], if the total amount of the transactions exceeds €5,000 in a calendar year. The AMF publishes this information. Specifically, the reporting obligation applies to:

- members of the board of directors, the executive board or the supervisory board, or the CEO, the sole CEO, the deputy CEO or the statutory manager;
- any other person who has the power to make management decisions within the company regarding its positioning and strategy and also has regular access to inside information that directly or indirectly concerns that company (people in this category are treated as "executive equivalents");
- Anyone with close personal ties[15] to someone in one of the two abovementioned categories.

[14] Article L.621-18-2 of the Monetary and Financial Code.

[15] Article R. 621-43-1 of the Monetary and Financial Code: "The persons referred in c) of Article L. 621-18-2, who have close personal ties with one of the persons mentioned in a) or b) of the same Article, include:
1° The person's spouse or civil union partner;
2° Children over whom the person has parental authority or who live with the person ordinarily or on an alternating basis, or for whom the person has effective and permanent responsibility;
3° Any other relative who has been living in the person's home for a year or more as at the date of the transaction in question;
4° Any legal person or entity, other than the person referred to in the first paragraph of Article L. 621-18-2, established under French or foreign law, and:
a) That is run, administered or managed by one of the persons referred to in a) or b) of Article L. 621-18-2 or by one of the persons referred to in 1°, 2° or 3° and that is acting in the interest of one of these persons;
b) Or that is directly or indirectly controlled, within the meaning of Article L. 233-3 of the Commercial Code, by one of the persons referred to in a) or b) of Article L. 621-18-2 or by one of the persons referred to in 1°, 2° or 3°;
c) Or that was established for the benefit of one of the persons referred to in a) or b) of Article L. 621-18-2 or one of the persons referred to in 1°, 2° or 3°;
d) Or in which one of the persons referred to in a) or b) of Article L. 621-18-2 or one of the persons referred to in 1°, 2° or 3° enjoys at least the majority of the economic benefits.

Any company whose securities are listed on Euronext, or for which a listing request has been made, must also prepare, update, and make available to the AMF a list of persons working within the company who have access to inside information that directly or indirectly concerns the company, as well as third parties acting in its name or on its behalf who have access to such information in the course of their professional dealings with the company[16]. These third parties are subject to the same obligation.

These obligations have been the subject of much commentary and numerous publications since they came into force. Anyone affected by this issue may consult the guides prepared by industry groups and referred to in the introduction as well as the AMF's publications on reporting dealing by executives and on preparing insider lists:

- List of questions & answers on requirements to report transactions by executives, equivalent officers and persons closely associated with them, published by the AMF in May 2009;
- AMF Position of January 2006, amended in November 2007, on the preparation of insider lists by issuers of financial instruments

2.1.1. Take appropriate measures to protect information and limit the number of people who have access to it

- First and foremost, the AMF recommends that listed companies introduce measures that are appropriate to their size and organisational structure.

- These measures should be designed to:

  - **Restrict access to inside information.**
    Only people whose duties or responsibilities require it should have access to inside information. The FSA groups such measures under what it calls the "need to know policy" (cf. Market Watch, Issue 27 June 2008, FSA).
    These measures apply routinely and also in the lead-up to financial offerings or during sensitive periods, such as before financial statements are published. They include limiting the number of participants at meetings, always using a code name for offerings, and regularly checking IT access rights.

    In the event of an offering, several stages should be distinguished:
    - during the preparatory work, have the smallest possible team, given that the people involved will be subject to strict confidentiality requirements and be placed on the list of occasional insiders (cf. comments on insider lists above);
    - as the project advances, identify additional occasional insiders and extend the preventive measures to include outside advisors, with each such person signing a confidentiality agreement;
    - as soon as possible, establish a public disclosure timetable and inform the market about sensitive information involved in the project.

    On the specific question of data rooms, companies may refer to the recommendation published by the COB in 2003 on the introduction of data room procedures by listed companies.

  - **Establish confidentiality rules for holding and sharing inside information.** It is also important to make sure that when inside information is divulged to a third party, the party in question is aware of its obligations.

  - **Establish conduct of business rules for anyone likely to hold inside information.**

- The AMF recommends that measures be put in place to cover service providers, sub-contractors and all third parties working for the company, by having them sign confidentiality clauses.

- Companies should regularly review and update the measures that they put in place.

[16] Article L.621-18-4 of the Monetary and Financial Code.

2.1.2. Codify obligations

The AMF recommends that companies prepare a written document that formalises these measures and obligations. Such a document, which could take the form of a code of compliance or a code of business procedures, for example, could cover the measures taken and the obligations placed upon executives and any other persons who may have access to inside information. As regards executives, a distinction should be made between "permanent" measures, which could be covered in a specific section on preventing insider dealing contained in the internal bylaws or charter of the board of directors, executive board or supervisory board, from specific measures related to a financial offering, which could be set out in a special prevention procedure.

- The AMF recommends that in addition to setting out the measures introduced by the company, this document should review the definition of inside information[17], describe the legal and regulatory provisions in force, and provide information about penalties.

- These procedures and codes should be regularly updated and the company should assess their effectiveness and enforcement. It was noted that some companies publish the conduct of business rules applicable to directors in their registration document or on their website.

2.1.3. Inform and train people likely to be concerned

- It is vital to nurture sensitivity towards insider misconduct, or a culture of preventing it, that permeates the entire company and is shared by all employees. This can be achieved by informing and training affected employees.

- In some cases, information is required under the regulations. For example, when someone is included on the insider list, that person must be informed of this. Similarly, he or she must be informed of the rules applicable to holding, disclosing and using inside information, along with the applicable penalties[18].

2.1.4. Appoint a compliance officer

- Aside from banks, which are under the obligation to appoint a compliance officer, listed companies have the option of appointing a compliance officer to give an opinion on any transaction in the company's securities by a person on the insider list. The mechanism may be extended to cover all employees.

- **The compliance officer may only give a consultative opinion, since the person in question is solely responsible for the decision to deal (or not deal) in the company's securities.**

- The compliance officer may be the legal director, the corporate secretary or, where applicable, the chief financial officer. In all cases, it is recommended to appoint a person within the company who has the authority and skills needed to give an opinion. In its guide, AFEP suggests creating "a special committee comprising, for example, a representative of senior management, the chief financial officer, the legal director and a compliance officer". ANSA, meanwhile, suggests appointing the chairman of the ethics committee, the legal director, or any person reporting directly to the Chairman and CEO, or to the CEO in the event that the functions of Chairman and CEO have been separated.

- Companies are free to make such consultations mandatory or optional. Some companies require executives to consult with the compliance officer or the board before carrying out specific transactions involving derivatives or the securities of listed subsidiaries.

[17] Article 621-1 of the General Regulation. Cf. also key concepts in the AFEP guide to preventing insider misconduct.
[18] Article 223-30 of the General Regulation: "The issuer shall notify the persons concerned that they appear on the list and inform them about the rules applying to holding, communicating and using inside information, and the penalties for violations of these rules.
The third parties referred to in the second paragraph of Article 223-27 shall provide the same information to the persons appearing on the lists that they have drawn up."

- It is recommended that the Chairman and CEO, or the CEO, should, in addition to consulting with the compliance officer, provide prompt ex post disclosure to members of the company's board of directors or supervisory board. This should be done independently of transaction reporting published on the AMF website.

2.1.5. Establish "closed periods"

- **Abstention requirements apply as soon as the persons in question hold inside information, especially where access to accounting data makes it possible to gain a sufficiently clear picture of earnings ahead of the closed periods established by the company.**

- Market abuse legislation provides for various periods where it is mandatory to refrain from trading. The notion of "closed periods", defined in the AMF General Regulation, applies only to share buybacks. Article 631-6 of the General Regulation thus states that the company shall refrain from trading in its own securities:
  - "during the period between the date at which the company is cognisant of inside information and the date at which such information is made public";
  - "during the fifteen-day period[19] prior to the dates of publication of its annual consolidated financial statements or, failing this, its annual individual financial statements, as well as its interim financial statements (half-yearly and quarterly if any)."

- The law also requires black-out periods for the award of stock options or the disposal of bonus shares. In the latter case, Article L.225-197-1 of the Commercial Code states that when the compulsory holding period has expired, the shares may not be sold:
  - "during the period of ten trading days that precede or follow the date on which the consolidated accounts, or failing that the annual accounts, are published";
  - "during the period between the date on which the company's management structures have knowledge of information which, were it to be published, could have a significant impact on the price of the company's securities, and the date ten trading days after that on which the said information is published".

- In practice, many companies have brought in closed periods or black-out periods during which trading in their shares is prohibited. Among the SBF 120 companies that have done so, the average duration of the closed period is:

  - 26 days before publication of the annual financial statements;
  - 25 days before publication of the half-yearly financial statements;
  - 16 days before publication of the quarterly financial statements.

  By comparison, UK regulations establish a non-trading period ("close period") for persons discharging managerial responsibilities of 60 calendar days before the announcement of the annual results and 30 days before a quarterly results announcement if the company reports on a quarterly basis[20].

- **Companies are recommended to introduce the following closed periods for executives, executive equivalents and any persons having regular or occasional access to inside information:**

[19] Calendar days.
[20] Continuing obligations LR.9 Annex 1 Model Code:
"*prohibited period means: (i) any close period; or (ii) any period when there exists any matter which constitutes inside information in relation to the company*"
"*close period means: (i) the period of 60 days immediately preceding a preliminary announcement of the listed company's annual results or, if shorter, the period from the end of the relevant financial year up to and including the time of announcement; or (ii) the period of 60 days immediately preceding the publication of its annual financial report or if shorter the period from the end of the relevant financial year up to and including the time of such publication; and (iii) if the listed company reports on a half yearly basis the period from the end of the relevant financial period up to and including the time of such publication; and (iv) if the listed company reports on a quarterly basis the period of 30 days immediately preceding the announcement of the quarterly results or, if shorter, the period from the end of the relevant financial period up to and including the time of the announcement;*"

- **at least 30 calendar days before the release of annual and half-yearly financial statements and, where such is the case, full quarterly statements;**
- **at least 15 calendar days before quarterly announcements.**

Persons subject to these closed periods are not permitted to trade in the company's securities until the day after the information has been released.

- Closed periods should also apply to financial offerings that may have a significant effect on the share price or where inside information exists about the company's business.

2.1.6. Establish and publish a financial reporting schedule

- Companies should establish a financial reporting schedule and publish it on their website. The schedule should stipulate, among other things, the reporting dates for:
  - annual financial statements;
  - half-yearly financial statements;
  - quarterly announcements.

2.1.7. Prohibition or close supervision of some transactions

- The AMF has noted that some companies prohibit transactions considered to be speculative[21]. This includes margin buying and short selling, rolling over deferred settlement orders, round trip trading over short periods, trading in the securities of listed subsidiaries and transactions in commodities otherwise than for hedging purposes.

- On the subject of hedging, it should be remembered that the AFEP-MEDEF corporate governance code states that executive directors must not engage in risk hedging transactions[22]. The AMF recommends that executives should give a formal undertaking not to hedge the bonus shares or stock options they receive[23].

3. Programmed trading mandates

3.1. Regulated mandates offer a rebuttable presumption

The AMF notes that some French companies have introduced trading mandates that allow executives to arrange with an agent to dispose of their shares. In some cases, the mandates may also include the exercise of stock options followed by the sale of the underlying shares. A similar arrangement, known as a trading plan, already exists in the United States[24] and the UK[25], where it is included in market regulations.[26]

Executives are deemed likely to be holding inside information at all times. They have to comply with multiple black-out periods and make sure before entering into any transaction that they are not in an insider situation.

[21] See AFEP guide: "*Les règles concernant les opérations particulières: opérations spéculatives, de couverture, transactions sur produits dérivés*"
[22] Corporate Governance Code of Listed Corporations, AFEP/MEDEF, December 2008.
[23] Cf. 2010 AMF report on corporate governance and executive compensation, paragraph 2.2 "Recommendations and areas for consideration ": http://www.amf-france.org/documents/general/9524_1.pdf.
[24] § 240.10b5-1 Trading “on the basis of” material non public information in insider misconduct cases.
[25] Trading Plan Instrument amending the Model Code under the Financial Services and Markets Act 2000 (FSMA) pursuant to articles LR.9.2 et seq of the Listing Rules.
[26] The US Securities and Exchange Commission has created an "affirmative defense" whereby a manager can show that his dealings were not prompted by the possession of inside information but by a contractual arrangement entered into beforehand, when he was not in an insider situation. In the UK a trading plan, adopted in compliance with regulatory requirements, allows transactions to be executed on behalf of a manager during prohibited periods. In the British model, the trading plan is also a written agreement between the manager and an independent third party, and has the same characteristics as American trading plans. The manager notifies the issuer about the existence and signature date of the trading plan when it is first implemented and about every trade executed under it. The issuer publishes these notifications.

Recent European case law on sanctions for insider misconduct[27] upheld the principle of the objective nature of insider misconduct, which is based on the rebuttable presumption that the executive has used inside information. Accordingly, a person holding inside information who makes a transaction will not automatically fall foul of the ban on insider misconduct, since any undue use of that information has to be established by a thorough examination of the factual circumstances, bearing in mind the aims of MAD.

In view of the foregoing, when executives of listed companies arrange trading mandates, as described in this guide, the AMF's position is that they benefit from a rebuttable presumption of not having engaged in insider misconduct unless there is positive proof that the rules of the mandate have been breached, in which case they may incur legal action for undue use of inside information with regard to MAD.

Given the proximity or close relations that may exist between an executive and his agent, the mandate should in principle be governed by the precise, strict rules outlined below. The executive must not be in a position to influence in any way the decisions taken by his agent; and the following rules apply:

- the mandate shall be arranged in a period when the executive is not holding inside information;
- the mandate shall be made public when it is arranged, without disclosing its characteristics;
- the executive shall refrain from intervening in the execution of the mandate;
- the agent's transactions shall be governed by a precise and irrevocable instruction that is not executed until after a waiting period has elapsed.

3.2. Characteristics of the mandate

The AMF recommends that executives should set up a trading mandate with the characteristics described below. The ideal mandate is one that allows the intermediary to demonstrate at all times that it has acted on the basis of objective facts. However, as regards supervision of the agent's trades, executives are free to choose among the options proposed.

3.2.1. Nature of the mandate

The service provided by the agent is an investment service. The AMF considers that the mandate is a discretionary investment mandate and recommends that it be referred to as a *mandat de gestion programmée* or "programmed trading mandate".

3.2.2. Arranging the mandate

The programmed trading mandate is arranged on the initiative of the executive or, where appropriate, the company.

If the company is the arranger, it can make the mandate compulsory for its executives or for a wider constituency, in particular "executive equivalents ". In its procedures for granting stock options or bonus shares, it can stipulate that disposals must be made only through the mandate. In this case, the company appoints a corporate entity as the agent with which the mandate will be signed.

In any case, the AMF recommends that the agent should not be the person that manages the executive's personal and family assets.

The mandates arranged between the financial institution or management company and the executive(s) concerned must meet the following conditions:

- The mandate must be arranged for a fixed term. However, it specifies that the transactions are to be carried out in accordance with an instruction from the executive for a period of at least 12 months. The instruction may be carried out within a shorter timeframe if its characteristics make this possible and market conditions allow. Furthermore, if the instruction leaves the agent with little leeway

[27] CJEU judgment of 23 December 2009 in case C-45/08, Spector Photo Group NV, Chris Van Raemdonck/CBFA.

because it is based on a formula or an algorithm, its term may be shorter than 12 months but no less than 3 months.

- The executive informs the agent in writing on the day he issues the instruction, and each time he renews it, that he does not hold inside information that could have a significant effect on the company's share price.

- The mandate includes a statement of independence vis-à-vis the executive, issued by the legal entity acting as agent and indicating in particular that there are no family ties or business relationships pre-dating the signing of the mandate.

- The instruction starts to be executed at least three months after it has been given to the agent. If the real term of the instruction is 12 months, the executive can send the agent a new instruction three months before the first one expires. If the instruction is executed in a shorter timeframe, the executive can also send another instruction, which may not be executed until three months later.

- The executive must refrain from:
  - disposing of his shares otherwise than under the mandate[28] if the agent is to trade solely on the sell side,
  - buying the shares otherwise than under the mandate[29] if the agent is to trade solely on the buy side.

- The executive has a binding obligation not to intervene in the execution of the mandate or to contact the agent; a clause can be added to the agreement revoking it in the event of contacts between the executive and the agent.

- The executive's instruction is irrevocable except in the event of force majeure or the following special cases: (i) a personal event (e.g. death or disability of the principal); (ii) resignation or dismissal of the principal; (iii) serious negligence on the part of the agent; (iv) a market event (tender offer for the company or implementation of a delisting procedure, change of corporate control following a merger or spin-off); (v) departure of the executive or the management team.

In light of the nature and stringent requirements of the mandate, it may continue to be executed during the closed periods set by the company. The AMF has noted, however, that some companies choose to suspend execution during these periods, for reputational reasons.

3.2.3. Purpose of the mandate

The mandate's purpose must be precisely defined and may involve one or more of the following:

- exercise of options to subscribe new shares or purchase existing shares;
- sale of shares exercised for the executive, as well as acquired and allotted shares;
- subscription or purchase of shares.

3.2.4. Instruction to regulate transactions

Regarding the instruction that determines how the agent is to trade, several solutions are possible:

The instruction must apply only to the purchase or to the disposal of the shares. In other words, under a single instruction, the agent will trade on the buy side or on the sell side only, though simple option exercises are permitted at all times.

[28] The mandate covers sales only. Moreover, managers are entitled to acquire securities by purchasing them in the market or subscribing a capital increase, for example. Such transactions are not covered by a presumption and are subject to ordinary law..

[29] The mandate covers sales only. Moreover, managers are entitled to acquire securities by purchasing them in the market or subscribing a capital increase, for example. Such transactions are not covered by a presumption and are subject to ordinary law.

- The first solution consists in selecting a formula or an algorithm that sets the number, price and dates at which the agent can buy or sell the company's shares, or, more simply, in determining pre-programmed purchases and disposals. One variant of this solution is to allow the agent to sell a number of shares set by the executive during periods specified in the instruction, using the so-called VWAP technique, which establishes a selling price based on the volume-weighted average price of the shares in the central orderbook during a given period.

- The second solution is to determine the number and breakdown, over three-month periods, of the transactions to be executed during the term of the instruction, along with one or more reserve prices. In each period, the agent either buys or sells shares at the dates and in the volumes he deems appropriate, remaining within the limits of the executive's instruction.

In any case, the agent must be able to prove that he has complied with the instructions he has received, as well as the formula or algorithm. Accordingly, all his transactions must be traceable.

3.2.5. Trade reporting under the mandate

The executive or the company discloses the existence of the mandate when it is signed, giving details about the its purpose, the market side (buy or sell) covered by the instruction when it is issued and each time it is renewed, and the list of the executives concerned (where the mandate has been arranged by the company and applies to several people). The company posts this information on its website, and a copy of the mandate and the instruction is filed with the AMF[30].

All transactions made by the agent on behalf of executives in the context of the mandate must be reported in accordance with Article L. 621-18-2 of the Monetary and Financial Code[31]. Each trade must be reported to the AMF within five days of execution and is published on its website in a special format. The agent is permitted to report the trade on the executive's behalf. The report states clearly that the transaction was executed under the mandate.

* * *

References

- The Model Code (UK Listing rules LR 9 Annex 1).
- "Prévention des délits d'initiés", AFEP (July 2008).
- "Guide à l'intention des sociétés cotées pour l'établissement des listes d'initiés et l'information des personnes concernées", ANSA.
- "Thematic review of controls over inside information relating to public takeovers", Market Watch FSA, no 27, June 2008.

[30] The copy of the mandate may be filed electronically at listesmandatsdirigeants@amf-france.org , with "Implementation of a programmed trading mandate" in the subject line, or be sent by postal mail to Autorité des marchés financiers, Direction des Emetteurs, 17 Place de la Bourse 75082, Paris Cedex 2, France.

[31] This applies only to managers who are subject to the reporting requirement under Article L. 621-18-2 of the Monetary and Financial Code.

ANNEX

The taskforce chaired by Bernard Esambert heard from the following persons and organisations:

Industry groups
AFEP
ANSA
Medef
Middlenext

Law firms / Lawyers
Mr Cohen-Tanugi
Bredin Prat - Mr Assant
Cleary Gottlieb Steen & Hamilton LLP - Mr Chabert
Cotty Vivant Marchisio & Lauzeral – Mr Conchon
Simmons & Simmons - Mr Gontard
Allen & Overy - Ms Maison-Blanche, Mr de Martigny
Viguié Schmidt Peltier Juvigny - Mr Peltier
Herbert Smith - Mr Segain
Gide Loyrette Nouel - Mr de Tocqueville

Listed companies
ABC Arbitrage
Alstom
AXA
GDF Suez
France Telecom
Société Générale
Thalès
Véolia Environnement

Financial institutions
JP Morgan France
Lazard Frères Gestion
Rothschild & Cie Gestion
Neuflize OBC Investments
Neuflize Private Assets
SG29 Haussmann

Shareholder representatives
ADAM
Proxinvest

Academics
Alain Pietrancosta, law professor, consultant to the firm of Freshfields Bruckhaus Deringer

The hearings were also attended by:
B. de Juvigny, Managing Director, Corporate Finance Division, AMF
LQ. Tran Van, Deputy, Corporate Finance Division, AMF
D. Charrier-Blestel, Corporate Finance Division, AMF
A. Colas, Regulatory Policy and International Affairs Division, AMF

Two AMF consultative commissions, Disclosures & Corporate Finance, and Retail Investors, were also consulted.