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EU Listing Act must use the opportunity to deliver clear improvements for listed companies

Envisage a new regime for the disclosure of inside information for the sake of less bureaucracy and compliance risks

Position paper of Deutsches Aktieninstitut on the amendments to the EU Market Abuse Regulation under the proposal for an EU Listing Act, 28 February 2023

Table of Contents

Summary and key issues

Deutsches Aktieninstitut welcomes the draft of the EU Listing Act of December 7th, 2022, regarding the Market Abuse Regulation (MAR). We support the European Commission in its intention to reduce the bureaucratic burden, improve legal certainty and reach real improvement for the practice of listed companies. This objective is fully shared by us and should be implemented with consequence and consistency.

The key issues are:

- We very much welcome the intention underlying the amendments of Art. 17 (1) MAR to separate the prohibition of insider dealings from the obligation to publish inside information in protracted processes. We are convinced that such a two-step general concept could lead to a more balanced inside information disclosure regime. However, we note that the wording of the proposal allows for a variety of interpretations, which creates new uncertainties and could even lead to new compliance risks and costs for issuers. Thus, the general concept should be implemented consistently and consequently so that it becomes clear from the wording that in a protracted process only the final event shall be disclosed immediately after it has actually occurred.

- The issuer's obligation to ensure confidentiality of inside information not yet due for disclosure according to Art. 17 (1b) of the MAR proposal reflects the general requirements for the treatment of inside information as set out in Art. 10 (1) MAR and is undisputed. However, the related requirement to disclose such information early if confidentiality is no longer ensured adds complexity to the proposal and creates new risks for issuers. For example, the issuer will still have to prepare and update "shadow disclosures" in order to be prepared for such a premature disclosure just in case it could be required on short notice. It is thus absolutely necessary to abolish the obligation provided in Art. 17 (1b) sentence 2 of the MAR proposal to disclose intermediate steps early in case of a leakage.

- We also oppose the obligation to inform the competent authorities about a decision to delay disclosure immediately after that decision has been taken (or, even earlier, of its "intention to delay"). This requirement would add bureaucracy in situations with limited time and personal resources. Under the current regime, competent authorities are informed after the inside information is published. This has proven to be efficient and sufficient for purposes of market integrity.

- We support the proposal to only require permanent insider lists. However, the volume of personal data to be provided with respect to the persons on the lists should also be reduced.

- We support the proposed amendments to the Managers' Transactions regime but suggest abolishing the duty to notify transactions with no active investment decision at all (e.g. inheritances and gifts). Likewise, these transactions should generally be exempt from the prohibition to be executed during a closed period rather than just permitting the issuer to allow them on a case-by-case basis. Also, the obligation to prepare a list of associated persons should be reconsidered as it creates an unnecessary administrative burden for issuers.

- We recognize the intention of the Commission to make sanctions more proportionate. However, as drafted now, the proposal would most likely impose higher maximum sanctions on large issuers. We strictly oppose this and assume this was not intended and should therefore be corrected.

1 New Regime for the Disclosure of Inside Information, Art. 17 (1) MAR

The EU Commission tries to narrow down the scope of the obligation to disclose inside information in Art. 17 (1) MAR by setting out that issuers shall "disclose only the information relating to the event that is intended to complete a protracted process" (p. 23 of the explanatory memorandum). In order to clarify this general principle, the EU Commission is empowered to adopt a delegated act with a non-exhaustive list of relevant information together with the indication (for each piece of information) of the moment when disclosure is expected (Art. 17 (1a)).

However, irrespective of the later publication of the final event of a protracted process, the draft obliges the issuer to ensure the confidentiality of (any) inside information until the moment of disclosure. Where confidentiality is no longer ensured for whatever reason, the issuer will be obliged to disclose the inside information (i.e. also intermediate steps constituting inside information) to the public, as laid down in Art. 17 (1b) MAR. The explanatory memorandum mentions a „leakage" as an event the occurrence of which indicates that confidentiality is no longer ensured.

1.1 Disclosure obligation regarding intermediate steps, Art. 17 (1) MAR and recital (58)

! Art. 17 (1) MAR and recital (58) should be reworded to make sure that inside information relating to a protracted process only has to be disclosed when a final event has actually occurred.

We support the general intention and direction of the proposal, because it has the potential to avoid premature disclosures in protracted processes, may improve legal certainty and thus will help issuers to avoid strategically problematic situations.

We understand the idea of the proposal in the sense that a final event of a protracted process only has to be published immediately after it has occurred. With some amendments (as proposed herein) we expect it would reduce compliance cost and necessary documentation with regard to the delay of the publication of inside information which may be required even in very early stages of protracted processes under the current regime. In contrast, disclosure should not already be required when the final event is reasonably expected to occur. Otherwise the degree of improvement for issuers would be limited to only a small subset of intermediate steps and thus hardly achieve the objective of the proposed reform.

To avoid any misinterpretation and to achieve a real improvement in practice the new wording of Art. 17 (1) MAR should clearly exclude all intermediate steps from the disclosure requirement and thus introduce a real finality concept regarding protracted processes.

This could for example be done by clarifying Art. 17 (1) MAR accordingly. The following proposal could serve as an idea for the direction a rephrasing could take:

> That requirement shall not apply to intermediate steps in a protracted process as referred to in Article 7.2 and 7.3. ~~***where those steps are connected with bringing about a set of circumstances or an event***~~. **In a protracted process only the final event shall be disclosed as soon as possible after it has occurred.**

In that context, also the wording of recital (58) EU Listing Act appears to be misleading: "In that case, the issuer should only disclose the information related to the event that this protracted process intends to bring about, at the moment when such information is sufficiently precise, such as when the management board has taken the relevant decision to bring about that event".

According to the definition of inside information in Art. 7 (1) MAR any inside information has to be of a precise nature (hence, “precise”). Therefore, “preciseness” is not suitable as a criterion for the narrower definition of a disclosable final event of a protracted process. We therefore recommend rephrasing this recital. The wording should clarify that the trigger event for the disclosure obligation should be the definitive decision to implement the final event completing a protracted process (see also p. 23 of the explanatory memorandum). Furthermore, the wording should better capture the variety of corporate governance systems in the EU. Referring only to “management decisions” as currently mentioned in recital 58 creates uncertainty whether decision processes in a two-tier board system are also understood as protracted processes.

This could be clarified. Also here, the following proposal could serve as an idea for the direction a rephrasing could take:

> (58) The prohibition of insider dealing has the objective to prevent any possible exploitation of inside information and should apply as soon as that information is available. … In a protracted process, given the different iterations information has still to go through, the information related to intermediate steps is not sufficiently mature and hence should not be disclosed. In that case, the issuer should only disclose the information related to the event that this protracted process intends to bring about, at the moment **when the final event has occurred** ~~***such information is sufficiently precise***~~, such as when such as when the ~~***management board***~~ **competent corporate body** of the issuer has taken the relevant final decision to bring about that event**.** ~~***In the case of non-protracted***~~

~~***processes related to one-off events, notably when the occurrence of those events does not depend on the issuer, the disclosure should take place as soon as the issuer becomes aware of that event***~~.

As proposed above, the element of "awareness" should not be introduced as it may be interpreted quite differently across member states and, as a result, would bring about further legal uncertainty and less consistency across the EU.

Overall, the clarifications outlined above are, from our perspective, of high importance to achieve the proposal's objective to provide more certainty and reduce compliance costs in relation to the disclosure of inside information. It is worth noting, that this would not come at the expense of market integrity as this will be maintained particularly by Art. 8, 14, 10 etc. MAR. If, in contrast, disclosure was still required when an event may only reasonably be expected to come into existence the relief under Art. 17 (1) MAR would likely be rather minor. In particular, issuers will still have to rely in a high number of cases on the possibility to delay disclosure to avoid premature disclosures and protect their interests. However, the delay regime itself would, in accordance with the proposal, potentially be substantially more burdensome (see comments below).

1.2 List of relevant information, Art. 17 (1a) MAR

! The list of relevant infomation according to Art. 17 (1a) MAR should be indicative.

We would generally welcome if a list of information relevant for publication was prepared according to Art. 17 (1a) MAR as it will most likely provide more legal clarity. We also support that this list is indicative only, as we believe it will be impossible to cover all possible situations and circumstances issuers have to handle in practice.

Even if we assume that the list covers typical protracted processes at risk in the case of early publication under the current regime (e.g. M&A transactions, personnel decisions, corporate actions and restructurings, share buy-backs), it will be important that according to individual circumstances deviations from the list are possible if justified.

From our point of view, the list also provides an opportunity to clarify that disclosure of regularly published financial information or key line items derived therefrom should only be required if they materially deviate from the issuer's own previous announcements. Otherwise disclosure in the final regular annual and interim financial statements at the dates set out in the issuer's financial calendar should be sufficient.

Given the complexity and criticality of the indicative list, we encourage the co-legislators to entertain a – possibly expedited – market consultation on the content of the indicative list.

1.3 Confidentiality provision, Art. 17 (1b) MAR

> There should be no obligation to disclose information which is excluded from disclosure according to Art. 17 (1) MAR.

A key issue for listed companies is the obligation to keep the inside information confidential even if there is not yet an obligation to publish the information. Based on the draft wording of Art 17 (1b) MAR, it is unclear what constitutes a breach of confidentiality and how to deal with it during the protracted process before the final event has occurred. It appears that the issuer will need to have a "shadow disclosure notice" at hand at all times during the protracted process. If that was the case, the only improvement of the proposal would be that no decision to delay in accordance with Art. 17 (4) MAR has to be documented in a protracted process, but every other applicable compliance duty would still be relevant.

To provide a significant improvement in terms of compliance duties (and related cost) Art. 17 (1b) sentence 2 MAR should be deleted completely. As it is inherent to the new system not to have the obligation to publish inside information before the final event of a protracted process occurs, a forced disclosure in case of leakages contradicts the logic of the revision. The deletion of Art. 17 (1b) sentence 2 MAR would also be in line with the fact that unlawful disclosures of inside information (Art. 14 lit. c MAR) typically involve personal misconduct by individuals. Supervisory authorities have all means at hand to pursue individual misbehaviour and to hold offenders liable.

As a second-best solution, Art. 17 (1b) MAR should at least be qualified in order to protect an issuer that undertakes all reasonable efforts to ensure confidentiality within his own sphere (and is able to reasonably document these steps). As long as the issuer has undertaken the appropriate steps, he should be able to apply a "no comment policy" when rumours come up.

2 New Regime for Delays, Art. 17 (4) MAR and Art. 17 (7) MAR

2.1 Notification of the competent authorities, Art. 17 (4) MAR

We oppose the obligation to inform the competent authorities about a decision to delay disclosure immediately after that decision has been taken as this adds complexy and bureaucracy.

Deutsches Aktieninstitut generally welcomes the fact that issuers can still delay the publication of inside information at their own responsibility when immediate disclosure is likely to prejudice the legitimate interest of the issuer.

However, we oppose the draft wording of Art. 17 (4) MAR according to which an issuer shall inform the competent authority of its intention to delay the disclosure of inside information and shall provide a written explanation of how the conditions set out in Art. 17 (4) MAR were met, immediately after the decision to delay is taken.

The trigger event for such notification requirements is unclear since reference is made both to an "intention to delay" and a "decision to delay". Even in the latter case, the obligation to notify the competent authority immediately and (simultaneously?) providing a written explanation on the decision and the process how the conditions are met is burdensome at the moment the decision is made. The time of the decision on the delay will certainly be accompanied by tight time constraints. This is due to the fact that the disclosure obligation arises "as soon as possible" after inside information comes into existence. This will often be unexpected or at least on very short notice. It would then be very challenging, if not impossible, to provide in writing a comprehensive justification for the delay on short notice. The issuer's available resources (which need to be limited for confidentiality reasons) have to focus with priority on the preparation and the accuracy of the ad hoc disclosure.

We do not understand why the information about compliance with the conditions for the delay is required at this point in time. It has been good practice to inform the competent authorities after the information was ultimately disclosed to the public (see current Art. 17(4) MAR). From our perspective, this proven practice has not led to concerns about market integrity. In addition, the competent authorities would be informed about situations and cases in which ultimately no inside information will ever be made public as the given project has for example failed and the inside information has collapsed. We fail to see how this approach will improve the market integrity.

2.2 Delay and rumours, Art. 17 (7) MAR

Though we generally support the proposed clarifications, we propose to allow issuers a no comment policy in case of market rumours.

The draft Listing Act slightly modifies the presumption in Art. 17 (7) sub-para. 2 MAR that during a delay according to Art. 17 (4) MAR the confidentiality of the delayed information is no longer ensured where a rumour arises that explicitly relates to that inside information provided the rumour is sufficiently accurate. The draft proposes to add that a relevant rumour has in addition to be "reliable" to trigger the indication that confidentiality is no longer ensured. It appears that the change is meant to help issuers to continue a delay when a rumour could just be based on speculation. This approach is generally welcome. However, it is unclear how the "reliability" of a rumour should be assessed with sufficient certainty, particularly as often the source of such a rumour is unclear.

We propose, therefore, to at least specify the term "reliable" by adding that a rumour is (only) deemed reliable if it contains the most significant details of the delayed inside information and does not contain wrong or misleading information. An even better solution would be that issuers are entitled to use a "no comment" strategy (instead of prematurely publishing the delayed inside information) in the case of rumours.

3 Insider Lists, Art. 18 MAR

We support to only require permanent insider lists. However, the volume of personal data to be provided with respect to the persons on the lists should also be reduced.

The proposed revision of Art. 18 (1) MAR extends the existing simplified regime for insider lists as it currently applies to issuers of financial instruments on SME growth markets to all issuers. Going forward the obligation to draw up an insider list will be limited to maintain a less burdensome list of "permanent insiders". However, in Art. 18 (1b) MAR of the draft also provides for an opt-out option for Member States to require the drawing up and maintenance of a "full insider list" (as under the existing MAR regime) where justified by market integrity concerns for issuers whose securities have been admitted to trading on a regulated market for at least the last 5 years.

For any person such as service providers that are acting on the issuer's behalf or on the issuer's account and which have access to inside information that directly concern the issuer, the proposed Art. 18 (1a) MAR continues to provide the obligation to prepare "full insider lists" on an ad hoc basis.

Comment

Deutsches Aktieninstitut welcomes the introduction of a permanent insider list. We see the intention of the EU Commission in the view to make the handling of these lists less burdensome. These lists should, however, be designed in way that they can be handled with less effort by issuers.

Therefore, we oppose the proposed opt out option for Member States that – if the option is chosen – would not reduce the burden for bigger issuers. Furthermore, there is the risk that different regimes are created throughout the EU – which would be contrary to the desirable level playing field for listed issuers across the EU.

However, the major problem for all issuers (not just SME) is the amount of personal data that is requested for each person on the list. Therefore, the requested data on an insider list should be reduced with regard to personal data (such as private email addresses, private mobile numbers, secondary residences etc.). It is also still burdensome for issuers to gather this data even for a permanent insider list. We see no point in collecting private data such as the private mobile number and the private email address. In the case of an investigation, it is easy for the competent authority, especially criminal prosecution authorities, to get this data for the investigated person.

We also want to point out, that this is also a result of the stakeholder consultation cited in the explanatory memorandum on page 14: “There was also consensus among respondents that the requirements on insider list need to be simplified for all issuers to ensure that only the most essential information for identification purposes is included.” This result should be taken more seriously.

We also suggest an amendment to the newly proposed Art. 18 (1a) MAR stating that affiliates of an issuer should also be allowed to maintain a permanent insider list when acting on the issuer’s behalf or on the issuer’s account in case their employees are not already listed on the permanent insider list of the issuer pursuant to Art. 18 (1). In many cases, intra-group services (e.g. for accounting services) are provided for issuers by subsidiaries. It would not make sense for these subsidiaries to have to prepare “full insider lists” on an ad hoc basis, even though they only act for the issuer, which itself is exempt from this burden.

4 Managers' Transactions, Art. 19 MAR

We support the proposed amendments to the Managers' Transactions regime but suggest abolishing the duty to notify transactions with no active investment decision at all. Furthermore, the duty to prepare a list of associaed persons should be abolished in order to reduce bureaucracy.

In Art. 19 (8) MAR, the threshold for the total annual volume of managers' transactions to trigger a disclosure requirement under MAR is raised from EUR 5,000 to EUR 20,000; a competent authority may raise this threshold up to EUR 50,000 (Art. 19 para 9). Also, while trading during a so-called "closed period" is in principle prohibited, exemptions exist for certain transactions. Now, an issuer may allow a limited number of additional transactions to be executed during the closed period; such as the transactions in certain employee schemes or where no active investment decisions are taken by the person discharging managerial responsibilities (Art. 19 para 12).

Comment

Generally, we welcome the direction reflected in the amendments the Commission proposes to the Managers' Transaction regime, such as the higher notification threshold and the extension of the exemptions for transactions during closed periods.

However, the proposal appears to be inconsequent in certain respects, so that alleviation from bureaucratic burden will be smaller than possible. We therefore suggest the following:

- Regarding the additional transactions that the draft permits to be allowed by the issuer during the closed period, no explicit approval by the issuer should be required as this appears to be a mere formality and, hence, unnecessary and costly.

- In addition, we believe that the EU Commission should have gone one step further and abolished the duty to notify transactions with no active investment decision at all. When there is no active investment decision there cannot be any relevant signal for the market participants. This especially counts for the acceptance of gifts, donations and inheritances as also mentioned in Recital 67 of the EU Listing Act – as an example for a transaction without an active investment decision during the closed period.

- We also suggest abolishing the requirement of keeping a list of closely associated persons (see Art. 19 (5)). To keep up this list is also burdensome for issuers especially if the members of its boards are domiciled in several different jurisdictions and have different family backgrounds. This also seems a good example for the kind of requirement which is deterrent for companies to be listed as it imposes significant bureaucratic burden on issuers. Even more, it does not encourage companies to have an internationally diverse board as it is even more complex to gather this kind of information from all over the world.

5 Sanctions, Art. 30 MAR and Art. 31 MAR

We recognize the intention of the Commission to make sanctions more proportionate. However, as drafted now, the proposal would most likely impose higher maximum sanctions on large issuers. We oppose this and assume this was not intended and should therefore be corrected.

Changes are made to Articles 30 and 31 MAR to make administrative sanctions for infringements of disclosure requirements more proportionate. For SMEs, by default, sanctions are determined based on the total annual turnover of the company. Lower absolute amounts of the minimum of the maximum pecuniary sanctions for SMEs are introduced.

Comment

The EU Commission explains that the amendments of Art. 30 (2) (j) and (4) MAR have the intention to make administrative sanctions for infringements of disclosure requirements more proportionate to the size of the issuer. We aknowledge the effort of the EU Commission to make the sanctions more proportionate especially for SMEs. We however fear that the amendments may in fact raise the sanctions for bigger issuers. Thus, Art. 30 should be revised so that member states still have the possibility to define a fixed maximum sanction as a cap for all issuers.

Art. 30 (2) (j), (3) current MAR: in respect of legal persons, maximum administrative pecuniary sanctions of at least:	**Art. 30 (2) (j), (3) proposal:** in respect of legal persons, maximum administrative pecuniary sanctions of at least:
(ii) for infringements of Articles 16 and 17, EUR 2 500 000 or 2 % of its total annual turnover according to the last available accounts approved by the management body, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and	(iii) for infringements of Article 17, 2 % of its total annual turnover according to the last available accounts approved by the management body. Instead of the minimum amount based on the total annual turnover, competent authorities may exceptionally impose administrative sanctions of at least EUR 2 500 000, or, where the legal person is an SME, EUR 1 000 000, or in the Member States whose currency is not the euro, the corresponding values in the national currency on 2 July 2014 if they deem that the amount for the administrative sanction based on the

	total annual turnover would be disproportionately low with respect to the circumstances referred to in Article 31(1), points (a), (b), (d), (e), (f), (g) and (h);
(iii) for infringements of Articles 18, 19 and 20, EUR 1 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014.	iv) for infringements of Articles 18 and 19, 0,8 % of its total annual turnover according to the last available accounts approved by the management body. Instead of the minimum amount based on the total annual turnover, competent authorities may exceptionally impose administrative sanctions of at least EUR 1 000 000, or where the legal person is an SME, EUR 400 000, or in the Member States whose currency is not the euro, the corresponding values in the national currency on 2 July 2014 if they deem that the amount for the administrative sanction based on the total annual turnover would be disproportionately low with respect to the circumstances referred to in Article 31(1), points (a), (b), (d), (e), (f), (g) and (h);
3. Member States may provide that competent authorities have powers in addition to those referred to in paragraph 2 and may provide for higher levels of sanctions than those established in that paragraph.	No amendment

According to the proposal, member states will have to impose a maximum sanction based on the turnover for infringements of Art. 17 MAR, whereas under the current regime they have the choice to impose either a fixed maximum or a turnover based maximum. For bigger issuers, a turnover-based maximum results in dramatically high and disproportionate potential sanctions which can easily be higher than 2.500.000 Euro.

We also have concerns about the new Art. 30 (2) (j) (iv). For infringement of Art. 18 and 19 the competent authority could raise a sanction of 0,8 % of the company's

total annual turnover according to the last available accounts approved by the management body which can be easily higher than 1.000.000 Euro as it is set in current Art. 30 (2) (j) (iv). In the current regime, there is no turnover-related sanction at all for the infringement of Art. 18 and 19. Due to the fact that maintaining insider lists and publishing managers' transactions that mainly have an administrative character and most of the time infringement will occur accidently, we believe this new regulation is way out of proportion. This goes absolutely in the wrong direction of taking away burden from listed companies.

The proposal also amends **Art 31** to ensure that competent authorities, when determining the type and level of administrative sanctions, take into account, among other relevant circumstances, the duplication of criminal and administrative proceedings and penalties for the same breach. If the idea is that the contemplation of this duplication should lead to a lowering of sanctions, we will agree.

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