Deutsches Aktieninstitut's comment on the ECON's draft report on the proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)

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Deutsches Aktieninstitut e.V.[1] would like to take the opportunity to comment on the ECON's draft report on the proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (COM (2011) 651, hereinafter: MAR).

Without doubt, the ECON's rapporteur, MEP Arlene McCarthy, had to deal with a number of complex issues in a short period of time. Against this background the draft report brings up a several ideas that are worth discussing.

However, listed companies' concerns with the existing MAD/MAR as well as the EU Commission's proposals are not yet reflected appropriately in the ECON's draft report from our point of view. Rather to the contrary: With regard to a number of relevant aspects the draft report is even stricter than the EU Commission's proposal.

In particular, Deutsches Aktieninstitut is concerned

- that the market abuse regime will be transformed from a directive in a regulation without providing convincing arguments justifying this transformation,
- that notwithstanding the draft report's amendments to Art. 6 para. 1 (e), the term "inside information" will still be defined much wider than under the current regime which will cause massive compliance problems and legal uncertainties,
- that neither the EU Commission's proposal nor the draft report tackle the existing legal uncertainties with regard to the publication of inside information,
- that according to the draft report even more issuers will have to prepare insider lists than under the EU Commission's proposal,
- that all manager's transactions will have to be reported irrespective of their volume within the still too short notification period of two days and that transactions shall only be allowed in a "trading window" which needs to be defined by competent authorities,

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- that the scope of the MAR will be too wide with respect to issuers' duties
- that transitional provisions are still inconsistent and
- that issuers still miss clarity on the nature of future delegated acts and possible changes to existing delegated acts

Please find below our detailed comments that are organised along the main issues of the MAR revision. Although incorporating some of our arguments previously provided in our position paper to the original EU Commission's proposal[2], the comments should be read together with this paper.

Structure of the Proposal: Transforming the Market Abuse Directive into Regulation is not appropriate

Deutsches Aktieninstitut does not share the view of the EU Commission that it is appropriate to transform the Market Abuse Directive (MAD) into a Market Abuse Regulation (MAR), in order to fully harmonise the rules regarding market abuse.

The basic idea of the European internal financial market is to ease the cross-border transfer of capital and to avoid discrimination of the financial markets participants from other EU member states. The free transfer of capital is also possible without fully harmonised provisions on market abuse. To avoid regulatory arbitrage respectively negative external effects resulting from such an arbitrage, a Directive would be sufficient. Also, the Market Abuse Directive as well as the implementing Directives and Regulation have already reduced possible regulatory arbitrage significantly and have constituted a more or less identical regulatory environment for the secondary markets.

Besides this, the arguments brought forward in Recital 3 and 4 are not convincing. Since the Market Abuse Directive came into force in 2003 there might have been developments in technology, market and regulation that make it necessary to adjust the text of the Directive. However, the wish for a "single rulebook" does not justify a Regulation. What could be considered instead is to integrate the existing implementing measures into one directive that defines minimum standards. This also results in more or less uniform rules in the member states, consistent implementation and transparency for application purposes.

Against the background above, Deutsches Aktieninstitut does not see a need to transform the provisions of the Market Abuse Directive into a Regulation. This applies the more as the European Court of Justice (ECJ) as a judicial instance also helps to materially harmonise the application of the market abuse rules if the interpretation is not clear for the member state.

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[2] See Deutsches Aktieninstitut's comment on the proposals for a Regulation on insider dealing and market manipulation (market abuse), and for a Directive on criminal sanctions for insider dealing and market manipulation, 16 January 2012

Definition of inside information (Art. 6 para. 1(e), amendment no. 18 as well as Art. 6. para. 1(b), amendment no. 17)

Deutsches Aktieninstitut acknowledges that the draft report attempts to redraft the EU Commission's proposal on the definition of the term "inside information" in Art. 6 para. 1(e). According to amendment no. 18 an "inside information" only emerges where "any type of conduct upon such information is likely to be regarded by a reasonable investor who regularly deals on the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in such position in relation to that market."

Unfortunately, this amendment would not improve the situation. It appears to create a circular argument, because whether an inside information will emerge would depend on how the information is used and what kind of behaviour could be expected by the person in question. The amendment therefore rather seems to relate to Art. 9 which defines what kind of behaviour will be prohibited. However, from an issuer's point of view, the amendment would not bring any benefit in terms of limiting existing or newly emerging legal uncertainties and compliance problems.

Though acknowledging the efforts to improve the definition of inside information, Deutsches Aktieninstitut strongly suggests to **delete the proposed Art. 6 para 1(e) completely**. The amendment could read:

Article 6 Inside information	
(e): Information not falling within § (a), (b), (c) or (d) relating to one or more issuers of financial instruments or to one or more financial instruments, which is not generally available to the public, but which, if it were available to a reasonable investor, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected.	(e): **deleted**
Justification In order to give legal certainty to market participants inside information should be an information of precise, not public and price-sensitive character (Art. 6 para 1 point a) b) c) and d). On the contrary, article 6 para. 1(e), eliminating the requirement of being "precise" and "price sensitive", would introduce a grey area and raise serious uncertainty as to what has to be considered "inside information". This point e) would potentially include a huge amount of information, creating massive compliance problems and refraining other market participants to trade in the market and reducing liquidity. Also the EU Commission is not able to present convincing evidence and arguments for the new definition.	

Our suggestion is based on the following considerations: Currently, inside information has four constituting elements. The inside information (a) has to be precise, (b) it must deal with non public circumstances, (c) it must apply to the issuer or its financial instruments, and (d) it must be likely to have a significant effect on the price if it were made public. These elements will also be included in the EU Commission's proposal.

In Art. 6 para.1 (e) of the EU-Commission's proposal it is neither asked for "precise" information nor for a potential effect on the price of the financial instruments. In Art. 6 para. 1 (e) inside information is described as information, "which is not generally available to the public, but which, if it were available to a reasonable investor, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected." It is not clear whether a "non-precise" information and/or an information which will have no effect on the price of a financial instrument can also be qualified as an inside information.

This extension would not only mean an additional burden for listed companies but also lead to additional practical problems and legal uncertainties. For example managers or employees of listed companies may be obliged to buy shares of the respective company according to an incentive programme. The period of time to meet these contractual obligations duty has already been shortened due to the existing market abuse regime. A lot of listed companies have e.g. close periods of non-dealings during three or four weeks before financial reports are published. Furthermore, there are often strategically important long term-projects, where companies decide to delay the public disclosure of inside information on their own responsibility as foreseen by law. During these delays managers also have to refrain from dealing with shares of the own company. Even more restrictions as proposed now be the EU Commission without any obvious merits have to be objected.

At present, it can already be difficult to identify an inside information without doubt. However, a quite consistent common understanding has been developed in practice (also thanks to the „Issuer Guidance" of the German Financial Supervision Authority (BaFin), for example). The newly extented definition will put into question the actual practice again and, thus, will make the existing difficulties even worse. Furthermore, it is not absolutely clear which cases should be covered by Art. 6 para. 1(e) from the EU Commission's point of view.

Overall, we miss both empirical evidence and convincing arguments for redefining the term "inside information". To our knowledge neither investors nor competent authorities have complained about the status quo. We therefore wonder why the EU Commission has proposed the new Art. 6. para. 1(e) at all. *The ECON should not follow the EU Commission in this point.*

Besides the central issue of the definition of inside information in Art. 6 para. 1(e) **amendment 17 of the draft report** aims at a widening of the definition of inside information with respect to derivatives on commodities which would

substantially result in the same consequences as mentioned above. According to amendment 17 a "distortive effect on the market" shall be a sufficient requirement for an inside information and as such would result in prohibition of insider dealings. Deutsches Aktieninstitut feels that this amendment rather relates to the issue of market manipulation issues and is therefore **at least misplaced** in Art. 6 para. 1(b).

Market Manipulation (amendments 19, 20 as well as Art. 10 of the EU Commission's proposal)

Concerning market manipulation (amendments 19 and 20), a similar problem arises as the widening of the definition of market manipulation towards any conduct with a distorting effect on market functioning would not result in a legal simplification but would make the identification of cases of market-abuse even more complicated.

Rather than introducing even more legal uncertainty to the issue of market manipulation the ECON should better oppose the EU Commission's orginal proposal that introduces sanctions for attempts of market manipulation.

This will create a new difficult and complex grey zone between an attempt or an already fully committed market manipulation and, thus, can lead to consequences regarding the sanctioning of the offence. Furthermore, for sanctioning an attempt, the main focus lies in the subjective area. To proof intention in a case of completed market manipulation is already difficult today. To decide, if a specific behaviour is still a non-criminal preparation of or if a person already started a (concrete) attempt of market manipulation will not be possible in a lot of cases.

Public Disclosure of Inside Information (Art. 12)

The disclosure of inside information is a very sensible issue for listed companies. Therefore issuers are interested that the disclosure requirements do both offering legal certainty and covering the right circumstances. Though a market practice has been developed for many typical situations there are still a number of uncertainties regarding the current disclosure regime. Some examples are given below.

At least of one of these circumstances has been brought before the European Court of Justice. Deutsches Aktieninstitut awaits with great concern the judgment of the European Court of Justice the so-called Geltl./.Daimler Case *(Case C 19-11)*. If the line of argumentation provided by Advocate General Mengozzi in his general opinion delivered on 21 March 2012 in the hearing of the European Court of Justice is followed the court's upcoming decision, this will seriously interfere with the existing market practice and market expectations.

The opinion of the Advocate General reads as follows:

"(1) Point 1 of Article 1 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse Directive) and Article 1(1) of Commission Direc-

tive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation should be interpreted as meaning that, in the case of a process which is intended, over the course of a number of intermediate steps, to bring about a particular set of circumstances or to give rise to a particular event ('a protracted process'), even information concerning facts – current or past – which relate to the intermediate steps and which are connected with bringing about the future set of circumstances or future event may be regarded as precise information and, accordingly, as inside information, provided that all the other preconditions laid down in those directives are also satisfied;

(2) (a) reasonable expectation for the purposes of Article 1(1) of Directive 2003/124 does not require that the probability of the set of circumstances or event in question occurring be assessed as preponderant or significant;

(b) the system introduced by Directives 2003/6 and 2003/124 merely requires that, neither of the two factors mentioned in Article 1(1) of Directive 2003/124 being completely absent, there should be precise information, on the basis of an ex ante evaluation carried out by reference to the anticipated impact of the information in the light of the totality of the related issuer's activity, the reliability of the source of the information and the other market variables which might, in the circumstances, affect trading in the financial instrument in question or in the related derivative financial instrument;

(c) where the potential of the information for affecting share prices is significant, it is sufficient that the occurrence of the future set of circumstances or event, albeit uncertain, be not impossible or improbable;

(d) the consequences for the issuer will be of relevance inasmuch as that will form part of the information available ex ante, while ex post information may also be used in order to check the presumption that the ex ante information was price sensitive."[3]

This interpretation of the existing provisions of Art. 12 MAD would lead to a very early assumption of a duty to disclose "inside information" which is not at all in line with the current interpretation in Germany e.g. As a matter of fact, very insecure and questionable ideas would have to be disclosed in a stage very far from a final judgement only because the idea might be very price sensitive. As a consequence, such an ECJ-judgement would also lead to a massive changes in the current interpretation of Art. 12 and thus in market practices.

That the Advocate General follows this line of argumentation makes however also clear that the current definition is not free of legal uncertainties that need to be tackled by the MAR revision.

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[3] OPINION OF ADVOCATE GENERAL MENGOZZI delivered on 21 March 2012 (1) Case C- 19/11 Markus Geltl v Daimler AG, download: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db5b851190d5c74da899a8be7910d106db.e34KaxiLc3qMb40Rch0SaxuKaNf0?text=&docid=120661&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1158286

There are indeed a number of circumstances that regularly create serious application problems to issuers. Deutsches Aktieninstitut is therefore disappointed that neither the EU Commission nor the draft report takes any steps to reduce the legal uncertainties for issuers up to now.

Certain clarifications/exceptions would be desirable:

(1) It could be clarified what exactly leads to the duty to disclose an inside information. Art. 1 of Commission's directive 2003/124/EC provides only the vague term "may reasonably be expected to come into existence" which is not very precise, in particular in connection with decision processes that may or may not lead to a obligation of public disclosure and/or need the involvement of both the management board and the supervisory board. The German Federal Court of Justice has recently even brought an action to the European Court of Justice to clarify whether a high or only slightly above 50-percent probability is the pre-condition for public disclosure. This is one of the problems being discussed before the ECJ. Also, the European Court of Justice has been asked to decide on the relevance of interim steps in long-term decision processes for public disclosure (see above and Court order of the German Federal Court (*Bundesgerichtshof)*, 22, November 2010 - II ZB 7/09).

(2) Additionally, information should generally be excluded from the duty to disclose if it relates to periodical, returning events such as the publication of financial reports and outlooks, and the respective date of publication is very close.

(3) Another situation that causes remarkable problems for issuers is related to ongoing legal proceedings. At least according to German administrative practice issuers are in fact obliged to anticipate the outcome of important legal proceedings. If they "reasonably expect" a negative outcome with significant impact on the market price they are obliged to disclose this as inside information unless the preconditions for a delay are met. The issuer may even be obliged to disclose the establishment of accruals for the possible negative outcome of such disputes. Thus, administrative practice does both, prejudicing independent courts and weakening issuers arguments in legal proceedings and/or settlement efforts. Therefore, it would be welcome to exclude information relating to ongoing legal proceedings from being disclosed under insider law.

In addition to not addressing the existing legal uncertainties the EU Commission's proposal is even creating new uncertainties. This is due to the fact that the Commission's proposal neither refers to the existing implementing Commission Directive 2003/124/EC which gives some hints under which circumstances the publication of inside information may be delayed under own responsibility nor does it provide for the preparation of a delegated act for this very important issue. Given the possible extension of the term "inside information" Deutsches Aktieninstitut is therefore seriously concerned that the existing complementing sources of law will be disregarded by courts in decisions to come which has to be avoided in any case.

Overall, Deutsches Aktieninstitut is of the opinion the current revision of the MAR rather goes in the wrong direction. Instead of increasing legal certainty for the publication of inside information by narrowing/clarifying this obliga-

tion at least in some respects, the EU Commission will create new application problems. Also the upcoming ECJ ruling may dramatically widen the current interpretation of the duty to disclose inside information – a fact that should not be neglected when reviewing Art. 12 and 6.

Insider Lists (Amendments 26 and 27, Art. 13)

Drawing up insider lists is a bureaucratic burden for issuers without an adequate benefit as insider lists hardly play a role in authorities' investigations of suspicious transactions. According to the Federal German Government's answer to a parliamentary request from 27 July 2007, insider lists have been used only in ten percent of German regulator's insider investigations between November 2004 and July 2007 (see BT-Drs. 16/1602).

Though it still might be preferable to delete the duty, issuers have by-and-large arranged with it. From an issuer's point of view the administration of insider lists should be as easy as possible. For example the group of persons to be listed should be reduced and the data to be presented should be limited to name, company address. the reason for the inclusion of the respective person and the period of time when the respective person had contact with inside information.

Unfortunately the draft report goes into the opposite direction (amendments 26 and 27). It not only deletes the exemption provided to issuers on SME growth markets but also the exemption granted to issuers not having requested or approved admission of their financial instruments to trading on a regulated market or trading on an MTF or OTF in case the respective financial instruments are solely traded on such platforms.

As a consequence, any issuer will have to prepare insider lists irrespective of size and listing venue chosen and also if the issue has not requested or approved a listing. This will lower the attractiveness of European capital markets.

Directors' Dealings (Amendments 29, 30, 31, Art. 14):

As laid down in our response to the EU Commission's proposal Deutsches Aktieninstitut appreciates that the EU Commission aims at increasing the notification threshold for manager's transaction to EUR 20.000 p.a., although we believe that even this threshold is still very low. Such low-volume transactions of managers of larger listed companies will not be regarded as relevant by investors. To avoid spreading of information with little or no value for investors Deutsches Aktieninstitut would therefore prefer to raise the threshold to at least to EUR 50.000 or even better EUR 100.000.

Against this background we also oppose that the draft report proposes to delete completely the threshold which even falls behind the existing minimum threshold of EUR 5.000 p.a. As a consequence every manager's transaction will need to be reported which will result in a detrimental effect for efficient investor information and bureaucratic burden for issuers at the same time.

Furthermore, directors' dealings shall only be conducted within trading-windows that shall be defined by the European Commission, respectively ESMA according to **amendments 30 and 31** of the draft report. We oppose this proposal. Issuers have developed own compliance mechanisms to ensure that manager's transactions are reported and do not constitute an insider dealing. These compliance mechanisms are carefully designed to ensure that the specifics of the issuer and the situation in question. If authorities determine uniform "trading windows" it will be highly likely that this would interfere with existing practices. We would therefore prefer to leave it to the issuers to define ensure compliance on their own responsibility.

Even more important than the definition of the threshold will be the shortening of the **notification period** from five to two days. This is unfeasible and could well prove to be incompliable in practice as notifications usually are based on account statements provided by banks which are not obtainable with immediate effect. Furthermore, issuers typically notify transactions on behalf of the managers in order to prevent wrong or incomplete notifications so that additional time is needed to comply with the obligation. Therefore, the current 5-day-notification-period should not be altered.

Overall, Deutsches Aktieninstitut recommends to amend Art. 14 as follows.

Article 14(1) Manager's transactions	
1. Such persons shall ensure that the information is **made public** within **two** business days after the day on which the transaction occurred.	1. Such persons shall ensure that the information is ***made public*** within ***five*** business days after the day on which the transaction occurred
Justification The proposal reduces the deadline to disclose information from five to two days: this will create difficulties because (i) in many case issuers notify transactions on behalf of managers and (ii) the notification is based on bank accounts that need to be prepared. Therefore, the MAD/MAR should remain unchanged in this point.	

Article 14(3) Manager's transactions	
3. Paragraph 1 shall not apply to transactions totalling under EUR 20,000 over the period of a calendar year	3. Paragraph 1 shall not apply to transactions totalling under **EUR 50,000** over the period of a calendar year.

Justification

In order to avoid insignificant notifications to the regulator, the threshold should be raised to 50.000 Euros at least.

Sanctions (Amendments 44, 46, 47)

Deutsches Aktieninstitut still favours to **retain the present sanctioning system which delegates the task of defining appropriate sanctions to the member states and, thus, does not set any concrete minimum stands for sanctions on the EU level**.

Furthermore, the scope of sanctions remains crucial. For example, legal persons might face administrative pecuniary sanctions of up to 10 percent of the total annual turnover. Furthermore, Art. 26 para. 3(d) introduces a public statement on the nature of the breach of the MAR and the person responsible which is unknown at least in the German securities law. This is not only questionable against data protection regulations. Additionally, even marginal offences under the MAR may be followed by a public statement to be published on the competent authority's website. If at all, a public statement should only be considered in the case of serious offences, a publication should be limited in time and – in any case – a public statement should only be possible when the offence is recognised as res judicata.

Art. 29 of the MAR foresees a whistleblowing system for private persons. In the Commission's draft financial incentives may be granted to persons who offer information on potential breaches of the MAR (Art. 29 para. 2). This would introduce an instrument of the US Securities law that is yet unknown at least in German law. Deutsches Aktieninstitut strongly opposes this as this might induce persons to report violation only for their financial advantage and gives room for abuse of this instrument. In general, Deutsches Aktieninstitut is sceptic with regard to the tendency to transfer US regulation to the European market without an intensive evaluation and without clear evidence for serious deficits in the EU capital markets law.

Granting incentives is also far reaching from a rather practical perspective. Such a regulation could promote a "culture of mistrust" within listed companies and could result in situations that are very difficult to handle. Offences against the prohibition of insider dealing can already be sanctioned under current law with daunting imprisonment of up to 5 years. Also, competent authorities are equipped with far-reaching investigation powers under insider law. These might be two reasons, why only few offences against the prohibition of insider dealing and market manipulation have finally been ruled by the courts.

By **amendment 47** the rapporteur now demands in Art. 29 para.1a) that issuers shall establish an own "whistleblowing system" which would enable employees to report breaches of the regulation internally. Deutsches Aktieninstitut also refuses this amendment. Though internal whistleblowing systems are

not uncommon for listed companies, it shall be up to an initiative based on the free decision of a company. The implementation of such a system means a significant amount of costs especially for smaller issuers. Should it be mandatory it could serve as a deterrent for those companies considering an IPO as an alternative to increasingly cumbersome bank finance in times of a tightening of capital requirements in the banking sector.

Art. 29 could read as follows:

Article 29 Reporting of Violation	
2. Financial incentives to persons who offer salient information about potential breaches of this Regulation may be granted in conformity with national law where such persons do not have a pre-existing legal or contractual duty to report such information, that the information is new, and it results in the imposition of an administrative sanction or measure or a criminal sanction for a breach of this Regulation.	2. **deleted**
Justification The tendency to transfer US regulation to the European market without an intensive evaluation and without clear evidence for serious deficits in the EU capital markets law is regarded sceptically. Granting financial incentives for a report of violation might induce persons to report only for financial reasons and gives room for abuse of this instrument (such as blackmailing a company for not reporting its violation).	

Scope of application (Art. 2 para. 1 (b) as well as amendments 12, 22, 33)

Deutsches Aktieninstitut has the impression that the EU Commission's proposal has two conflicting aims at the same time. On the one hand the EU aims at improving the access to capital markets for small and medium sized enterprises (SMEs). On the other hand the EU Commission's proposal is extending the scope of the MAD/MAR to multilateral trading facilities (MTFs) and organised trading facilities (OTFs) which will limit small and medium sized companies' ability to use equity and bond market as a source of finance

Under the current regime the exchange regulated open market (Freiverkehr) as well as its premium segments (such as the Entry Standard of the Deutsche Börse or the AIM of the London Stock Exchange) are classified as MTFs. The current regime correctly applies the prohibition of insider dealing and market manipulation only to MTFs while the issuers' duties (public disclosure, insider lists and mangers' transactions) are not applied. Consequently, the compliance costs for issuers are lower, so that the specific SME-segments of the Freiverkehr are attractive for issuers.

The EU Commission's proposal excludes issuers listed on a MTF or OTF from the duty to disclose inside information and to draw insider lists if they "have not requested or approved trading of their financial instruments on a MTF or

OTF" (Art. 12 Abs. 8, Art. 13 Abs. 3). Issuers that have requested or approved trading have therefore to comply with the regime of the MAR.

With regard to managers' transactions (Art. 14) there is no exemption for MTFs and OTFs at all, which is also highly critical when it comes to the costs of compliance.

We fear that the revised MAR will make it less attractive for smaller and medium sized issuers to use the organised capital market as a source of finance. Thus, the current regime of the exchange regulated markets should remain untouched, so that issuers duties are not applied to these segments.

It is clearly more important not to change the regulatory regime of the open market (Freiverkehr) and its specific SME-segments than allowing for a different disclosure mechanism for inside information in "SME growth markets" and lowering the administrative burden with respect to insider lists as it is foreseen in Art. 12 para. 7 and Art. 13 para. 2. The concept of „SME growth markets" as such appears to be unbalanced since it would de facto rise the regulatory costs for issuers in the existing SME segments (see Deutsches Aktieninstitut's response to MiFID/MiFIR).

Unfortunately, the draft report does not pick up these arguments and, thus, misses an opportunity to improve access to capital markets for smaller listed companies. As already mentioned it even extents the obligation to prepare insider lists to issuers on MTF and OTFs without any exemption.

The ECON should therefore better aim at preventing the existing legal situation from changes, i.e. applying the issuers' duties of MAD/MAR only to regulated markets and leaving it to the member states to what extent they will apply issuers' duties to companies listed on MTFs and OTFs.

Also the draft report extents the scope of the MAR/MAD to OTC trades (amendment 12, 22, 33) while at the same time deleting all references made to the OTF category under MiFID/MiFIR. Deutsches Aktieninstitut is reluctant in particular with respect to the first aspect. Non-financial companies regularly use the OTC derivative market for hedging business and treasury risks. It has to be avoided that the MAR/MAD regime unintentionally interferes with the risk management of companies by making it much more expensive or limiting it. An impact study should therefore be undertaken before the MAD/MAR is extended in haste.

Delegated Acts (general remarks on the EU Commission's proposal, amendments 54, 55, 59)

As the MAD/MAR contains a number of terms that need to be interpreted all market participants are strongly interested in getting additional guidance so that legal certainty will be improved.

Deutsches Aktieninstitut wonders whether or to what extent the existing implementing measures to the MAD (Directive 2004/72/EC, Directive 2003/124/EC, Directive 2003/125/EC, Regulation No. 2273/2003) will remain in force. These complementary sources of law are only partly integrated in the proposal by now (e.g. basic clarifications with regard the safe harbour on

share buy backs und stabilisation in Art. 3 and indications for market manipulation in the annex). On the contrast, other elements of the implementing measures – e.g. the important indications what would justify the delay of publication of insider information on own responsibility – are completely missing (see above).

As a consequence, a number of legal uncertainties may arise for issuers. For example, it is unclear what exactly will be included in the safe harbour for share buy backs in Art. 3. It is important that the current practice will be continued: According to this practice it is defined by law, which elements qualify a share buy back programme for a safe harbour in any case. However, share buy back programmes not meeting these criteria are also possible in principle without violating the provisions of the Market Abuse Directive. This should also be possible under the revised MAR.

Overall, it has to be made clearer whether and how the EU Commission plans to revise the implementing measures. The same applies to the existing CESR's (now ESMA's) level 3-measures. As long as clarity on this important issue is missing, listed companies will be confronted with an enormous legal uncertainty.

This problem will be made worse if the transitional provision were drafted inappropriately. For example, the rapporteur's suggestions on delegated acts would lead to regulatory inconsistencies. According to amendment 54, a deadline for the adoption of delegated acts is set 18 month after the regulation's entry into force with respect to the provisions on exemptions for buyback programmes and stabilisation, definitions, public disclosure of insideinformation on emission allowances, insider-lists, manager's transactions and the reporting of violations. As we read the draft-report, this may not comply with the point of time when the regulation is supposed to enter into force according to Art. 36.