The Review of the EU-Market Abuse Regime at the Start of the Trialogues

Deutsches Aktieninstitut's[1] comment on the state of negotiations

30 January, 2013

Summary

Rules on market abuse are without doubt a pre-condition for the investors' and issuers' confidence in the capital markets and as such they are of key importance for market efficiency. The market abuse regime will determine both the level of investor protection and compliance duties and costs for issuers and other market participants.

From the Deutsches Aktieninstitut's point of view rules on market abuse need to be carefully balanced in order to reach both investor protection and attractiveness of organised capital markets for listed companies. In this spirit Deutsches Aktieninstitut has commented the several stages of the debate on the review of the EU-Market Abuse Directive/Regulation since the EU Commission has published the revision proposal in October 2011.

In the meantime the Committee of Economic and Monetary Affairs (ECON) has decided on its report in October 2012 and the Council of the European Union (the "Council") has agreed on the General Approach in December 2012, so that the trialogues will start soon.

Deutsches Aktieninstitut would therefore like to take the opportunity to compare the existing proposals in order to clarify our remaining concerns from the perspective of listed companies. These concerns are based on two interconnected observances: First, we are of the opinion that the existing MAD has by-and-large worked properly, so that we are concerned that well-established principles and market practices may be abandoned without any

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additional benefit for investors but with huge negative impacts on listed companies. Second, we are concerned that some of the proposals under discussion could be regarded as rather technical in nature and thus be treated with too little attention, although they also will make the life of listed companies much more complicated without providing benefits to investors and/or serving market integrity.

In order of decreasing relevance our main requirements with regard to the Market Abuse Regulation are as follows:

1. **Deutsches Aktieninstitut opposes the widening of the scope of "inside information" to the so-called "inside information light" (Art. 6.1.(e) in the original EU-COM's proposal and the ECON's report):** We are instead fully in line with the Council's deletion of this amendment as well as with other clarifications of Art. 6. proposed by the Council.

2. **Deutsches Aktieninstitut calls for keeping the core principles of the duty to publish inside information as they are:** We fully support the original EU-COM's proposal on Art. 12.1 and 12.4 which rightly leaves the status quo unchanged. We are, in contrast, seriously concerned about the ECON's amendment to Art. 12.4 which reads as if the possibility to delay the publication of inside information under the issuer´s own responsibility shall be replaced by an authority's approval for the delay of disclosure. In the same way, we fear the Council's amendment to Art. 12.4a could force issuers to publish inside information in reaction to market rumours. This would be a clear break with the current well established market practice, which allows a "no comment"-policy in such occasions. The Council approach would open the door for abusive rumour spreading.

3. **Deutsches Aktieninstitut regards at least a four-day-period to publish Directors' Dealings (Art. 14.1) as appropriate:** Issuers' currently check their manager's notifications before they are published, in order to avoid factual errors. This process needs some time – at least within large international companies whose directors' work in Non-EU-Countries. Therefore we oppose both the two-day-period in the EU COM's proposal and the ECON's report as well as the three-day-period in the Council's General Approach as being unreasonable short.

4. **Deutsches Aktieninstitut calls for continuing the existing core principles of the notification regime for directors' dealings**: This would, firstly, mean not to introduce a duty to compile a list of associated persons as proposed in the Council's compromise amendment to Art. 14.2 because such a duty would, inter alia, raise data protection issues. Secondly, there should be no implementation of harmonised "trading" windows as the ECON's report appears to suggest.

5. **Deutsches Aktieninstitut is of the opinion that the sanctioning regime should at least be better balanced:** Though Deutsches Aktieninstitut is still of the opinion that the harmonisation of sanctions on the Euro-

pean level is not justified given the variety of legal traditions in Europe, sanctions should at least be balanced carefully in any case. We are highly concerned about the level of administrative sanctions that might be imposed on market participants. This particularly holds true for sanctions that are linked to the annual turnover of a market participant or could result in a multitude of the profits gained. Also, we are still concerned that elements of the US legal tradition like “whistleblowing”- and “name and shame”-regimes will be implemented to European legislation without convincing arguments.

6. **Deutsches Aktieninstitut is worried that insider lists could be overloaded with information:** Deutsches Aktieninstitut therefore does not support the Council’s amendment to Art. 13.3 not only to record the date, but also the time on which a person has got and lost access to inside information. The date of access is sufficient.

7. **Deutsches Aktieninstitut opposes that persons on insider lists will have to notify suspicious dealings to authorities as proposed by Art. 11.2b the ECON's report** because such a duty would create a climate of mistrust in sensitive transactions.

8. A number of rather **technical issues need to be resolved.** In particular, level 2-measures need to be appropriately consulted and adjusted to existing market practices before entering into force. Also, it is of utmost importance to clarify what will happen to the already existing level 2-measures at the time of entering into force of new MAR.

The remainder of this position paper is organised along the line of material issues. It summarises first our main position before – where appropriate – explaining details of our position.

Definition of inside information (Art. 6)

Deutsches Aktieninstitut's position:

Deutsches Aktieninstitut fully supports the Council's conclusion to delete Art. 6.1.(e) and to clarify under which circumstances an intermediate step of a protracted process might by itself be regarded as inside information (Art. 6.2a).

The scope of inside information is wide enough in the current regime. In this regard one should return to mind that the term "inside information" has been widened in 2003 by the existing MAD extensively. As a recent ruling by the European Court of Justice (ECJ) shows it is also perfectly possible under the current regime to harmonise differences in national interpretations (if any) without amending the existing MAD.

EU Commission's proposal:

Deutsches Aktieninstitut **objects the proposed extension to the scope of inside information according to Art. 6.1.(e)**.

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 (Art. 6.1.(a)-(d) in conjunction with Art. 6.2. and 6.3.).

Art. 6.1.(e) of the MAR, however, extends the term „inside information" substantially to an information that could be called "inside information light". In Art. 6.1.(e) such "an inside information light" is described as an information, "which is not generally available to the public, but which, if it were available to a <u>reasonable investor</u>, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person <u>as relevant</u> when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected."

This definition does not include the defining elements of "preciseness" and "significant effect on the price". In contrast, the "reasonable investor" test as the only criterion for inside information is much too vague and unspecific. As a result, it is very difficult to comply with by investors and issuers. It is also highly questionable whether the definition of inside information as widened by the new para. (e) is specific enough as a basis for administrative or even criminal sanctions.

By introducing Art. 6.1.(e), an issuer has to carry out a very complex two step evaluation process. The issuer needs to decide whether and when the "imprecise" information reaches the status of being certain. Once this level of certainty is reached, disclosure must be made forthwith. We fear that this definition could cause the tendency in the market to disclose for the sake of simplicity even “inside information light” in order to avoid this very complex analysis and as a consequence thereof market participants could be confronted with the disclosure of information containing no real material information or being only a mere possibility. As this result will only cause major confusion in the market, the approach of introducing a twofold approach shall be abandoned.

If Art. 6.1.(e) of the MAR was included, administrative measures for issuers like insider lists and compliance measures would have to be met earlier. This would mean additional burden for stock listed companies. Also, it will lead to additional practical problems and legal uncertainties for listed companies. It may, for example, force issuers to earlier delay the publication of (inside) information under its own responsibility according to Art. 12.4. in order to avoid compliance risks. Also, interference with stock-based incentive programmes is likely to occur. These programmes regularly form a part of the remuneration of managers or high-level employees of listed companies. However, the period of time to buy shares under those programmes has already been shortened due to the current market abuse regime in 2003. A lot of stock listed companies have e.g. close periods of non-dealings during three or four weeks before financial reports are published for high-level representatives. 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. Insofar it needs to be avoided that even more restrictions according to the proposed Art. 6.1.(e) will be implemented without hereby providing any obvious merits.

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, it needs to be noted that the ECJ decision in re: Geltl ./. Daimler has recently clarified some very important elements of the understanding of the current regime. The newly extended definition contained in Art. 6.1.(e) will put into question the actual practice again and, thus, will make the existing difficulties even worse.

ECON’s Report:

Deutsches Aktieninstitut acknowledges that the ECON’s report attempts to redraft the EU Commission’s proposal on the definition of the term “inside information” in Art. 6.1.(e). According to the amendment 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. Instead it creates 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.

Besides this the ECON's report also widens the scope of "inside information" with respect to derivatives on commodities which would substantially result in the same consequences as mentioned above. According to Art. 6.1.(b) 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. This amendment relates to and is already covered by the issue of market manipulation and is therefore at least misplaced in Art. 6.1.(b).

Council's General Approach:

The Council definitely draws the right conclusion from the huge legal uncertainties and compliance problems that would result from Art. 6.1.(e). By deleting Art. 6.1.(e) the Council basically maintains the status quo which has recently also been clarified by a ruling of the European Court of Justice (ECJ).

The Council is also absolutely right in clarifying the conditions under which an intermediate step in a protracted process might be regarded as inside information in Art. 6.2. and Art. 6.2a. It is important to underline that an intermediate step by itself has to satisfy the criteria of inside information set out in Art. 6, which would at least mean that the information in question has to be precise and a significant effect on the price

Legitimate behaviour (Art. 7a)

Deutsches Aktieninstitut position (Note: Reference is made only the Council's General Approach):

Deutsches Aktieninstitut supports the concept in the Council's General Approach to define at the level of the MAR certain behaviours that have been accepted under the current legal regime and that should clearly be deemed legitimate and, accordingly, not constitute insider dealing.

However, the wording should also include a statement (that was deleted from para. 3a in a previous draft) that

"Dealings between persons holding the same inside information, shall not be considered in itself insider dealing."

It is an accepted principle that so-called face-to-face transactions should not be prohibited. This is because the "essential characteristic of insider dealing" as specified in Recital 16c of draft MAR are not affected by such transactions. If both parties have the same inside information, none of them has an unfair advantage from such inside information over the other. Hence, by such face-to-face transaction in itself, the integrity of financial markets and investor confidence is not affected. Moreover, these transactions play an important role, for example in the context of business combinations among listed companies or, even more important, in the preparation of capital raisings by distressed companies where obtaining a backstop undertaking from an institutional investor or core shareholder is crucial for such capital raining to be implemented.

Publication of inside information (Art. 12)

Deutsches Aktieninstitut's position:

The disclosure of inside information is a very sensitive issue for listed companies. Therefore, issuers are interested that the disclosure requirements both provide legal certainty and cover the right circumstances.

Deutsches Aktieninstitut basically supports the wording of Art. 12.1, 12.3 and 12.4 in the EU-Commission's original proposal, because it rightly leaves at least the material issues and the core principles of the current regime unchanged.

In contrast, the ECON's amendments as well as of the Council's General Approach will touch upon some core elements of the current regime and thus would create serious compliance issues within listed companies:

- We are seriously concerned about the ECON's amendment to Art. 12.4 which reads as if the possibility to delay the publication of inside information under own responsibility shall be replaced by an authority's approval of delays.

- We fear that the Council's amendment to Art. 12.4a could force issuers to publish inside information in reaction to market rumours. This would be a clear break with the well-established market practice, which allows a "no comment"-policy in such occasions. The proposed amendment would open the door for abusive rumour spreading.

As laid down in several previous position papers, we are also concerned with regard to the extension of the scope of the duty to disclose inside information to issuers on MTFs (and OTFs) as this would rise compliance duties and costs for the respective issuers and runs perfectly counter the aim of the EU Commission to ease SMEs the access to organised capital markets. Indeed, the widening the scope of the MAR's duties to issuers on MTFs can be regarded as a fundamental flaw of the current revision of the MAR.

EU Commission's Proposal:

Except for the extension of the term inside information (see above), the original EU Commission's proposal leaves the material issues of the current disclosure regime mainly untouched. This ensures legal certainty for issuers and allows that current compliance procedures and market practices with regard to the publication of inside information can be maintained.

Therefore, Deutsches Aktieninstitut supports the wording of Art. 12.1, Art. 12.3 and Art. 12.4 of the EU Commission's proposal which in our understanding clarifies the following:

- The extended definition of inside information (if it was introduced at all, see our concerns raised above) does not apply to the duty of public disclosure of inside information because Art. 12.3 exempts explicitly Art. 6.1.(e) from application and therefore only refers to Art. 6.1.(a) to (d).
- Art. 12.4 still allows issuers to delay the publication of inside information under their own responsibility if the conditions laid down in Art. 12.4 are met. This regime has proven its value and should not be altered. However, the criterion to "ensure the confidentiality" could be changed into "the issuer's duty to take reasonable organisational measure to prevent the respective information from being divulged from the sphere of the issuer".

ECON's Report

While we support that the ECON follows the EU-Commission in limiting the scope of the duty to publish inside information to information described in Art. 6.1.(a) to (d), we strictly oppose the ECON's amendment to 12.4.

The ECON's amendment to Article 12.4 dramatically alters the current practice in two respects:

- First, it replaces the possibility to delay the publication of inside information under the issuer's own responsibility by an authority's approval of delays as it reads "where an issuer of a financial instrument ... intends to delay the disclosure of inside information ... it shall inform the competent authority of that intention and provide sufficient information to justify the necessity". If issuers were forced to discuss any potentially situation that might result in the publication of inside information with competent authorities in order to be on the safe side serious compliance issues will arise.
- Second, the wording of the ECON's amendment combines the conditions for a delay laid down in Art. 12.4 and the conditions laid down in Art. 12.5 for the specific systemic risk case, because in Art. 12.4. reference is made as follows "....according to the criteria set out in paragraph 5. In the event that the competent authority does not permit the delay in accordance with paragraph 5, the information shall be disclosed".

Overall, an approval of the competent authorities may only be justified in the very specific case of Art. 12.5. which covers events of systemic importance. However, it is not justified for "normal" situations where a delay may be in the legitimate interest of a listed company provided that certain conditions are met. It has to be made clear that the conditions of Art. 12.5 will not apply for "normal" delays, because this would de facto leave the option to delay without any practical scope.

Deutsches Aktieninstitut is also perturbed that ESMA's role in formulating conditions for delaying the disclosure of inside information and for "appropriate disclosure" might narrow down current practices. In particular, Deutsches Aktieninstitut fears that elements of Art. 6.1.(e) (inside information light) will find their way into the disclosure obligation through the back door (even if they will be deleted on the regulation level), which Deutsches Aktieninstitut would strictly oppose.

The ECON's amendment to Art. 12.4 should be deleted for this reason.

Council's General Approach:

From Deutsches Aktieninstitut's point of view the Council's agreement will change the current practice in one important regard to the detrimental of listed companies.

Art. 12.4a provides that under certain circumstances an issuer will have to react on rumours that relate to "a piece of information" which has not been disclosed yet by making this information public. This amendment to Art. 12 conflicts with the current understanding according to which, the issuer has the option not to react on rumours at all (no-comment-policy). This no-comment-option limits the incentive to spread rumours without any concrete indication in order to force listed companies to make public a piece of inside information not yet disclosed. The no-comment option should therefore remain in place. At least, it should be clarified that an issuer has only to make public a piece of information previously delayed if there is an information leakage in the responsibility sphere of the issuer. Otherwise the restriction to delay disclosure would create an incentive for the abusive spreading of rumours by interested parties.

Also it is worth discussing the amendment to Art. 12.3 with respect to protracted processes. In particular, the condition for a delay that the "omission would not be likely to mislead the public" could newly give raise to compliance risks for listed companies as it is far from being clear how this condition will be administered and interpreted across Europe in the future. In order to avoid that market participants will have differing views on this condition, the respective paragraph should therefore be drafted as follows: "In the case of a protracted process which occurs in stages, intended to bring about or which results in a particular circumstance or a particular event, an issuer may under his own responsibility delay the public disclosure of inside information relating to this process, provided that the issuer is able to ensure the confidentitality of the information and that the delay is necessary to protect the issuer's legitimate interests."

Insider Lists (Art. 13)

Deutsche Aktieninstitut's position:

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 (or is reasonably likely to have contact) with inside information.

As with regard to the duty to publish inside information, Deutsches Aktieninstitut strongly opposes amendments to Art. 13 that would lead to additional bureaucratic burden or would ignite other compliance problems for issuers without creating additional value in terms of investor protection.

Namely:

Deutsches Aktieninstitut opposes the Council's idea to record not only the date but also the time at which a person has obtains or ceases access to inside information (Art. 13.2.(c) and (d)). Recording the time would tremendously increase compliance costs and risks for issuers without providing any additional benefit for investors or competent authorities. It also runs counter recital (27) which underlines the intention to reduce costs for preparing insider lists.

Deutsches Aktieninstitut also strictly opposes the ECON's proposal (placed in Art. 11.2b) according to which "any person included on an insider list that becomes aware of activities that might constitute insider dealing, market manipulation or an attempt to engage in market manipulation or insider dealing shall report such information". This approach would go far beyond the historic justification of the duty to prepare insider lists. The duty has been introduced to ease investigations of potential insider dealings once authorities have come to an concrete initial suspicion. It has definitely not been introduced to create suspicions. Secondly, such a duty would lead to severe tensions and a climate of mistrust in highly sensitive proceedings like M&A-transactions.

As with the duty to publish inside information we also do not understand why the scope of this duty is to be widened to issuers on MTFs (OTFs), which is included with some minor differences in all of three existing proposals.

Managers' Transactions (Art. 14)

Deutsche Aktieninstitut's position:

In our understanding the duty to notify manager's transactions has once been introduced to prevent insider dealings from managers, to inform the market and to help competent authorities in identifying suspicious transactions.

While we fully agree with these justifications Deutsches Aktieninstitut's has always argued for a level of transparency that really serves these objectives. Deutsches Aktieninstitut has therefore always argued in favour of higher thresholds so that Deutsches Aktieninstitut supports the 20.000 Euro of the EU Commission's proposal as a step into the right direction. Whether this will also be true for the Council's proposal will depend on if and how a competent will define such thresholds.

Also we have argued that compliance should be made as easy as possible from a practical perspective.

Against this background, any of the proposals contain problematic elements that should be altered or even deleted in the final text. Our priorities are:

- The period of time in which managers' transactions have to be notified should be lengthened to at least four days (any proposal) in order to allow compliance in practice (Art 14.1).
- The Council's idea to compile a list of associated persons should not be introduced as this would raise data protection issues and might create sensitive situations in companies (Art. 14.2).
- The ECON's idea to allow manager's transactions only within trading windows harmonised on EU level should not be introduced (Art. 14.4a) as such a harmonised approach will not be able to take into account the specifics prevailing on the level of individual listed companies and firm-specific situations.
- Deutsches Aktieninstitut does not understand the reason why the pledging of securities should by itself regarded as a manager's transaction according to any of the proposals.

Finally, we lack of understanding why the scope of this duty is to be widened to issuers on MTFs (OTFs), even without making any difference if the issuer is listed on a SME growth market or not.

Any of the proposals

Any of the proposals will shorten the notification period for manager's transactions. The EU Commission as well as the ECON proposes a shortening from 5 to 2 days, the Council from 5 to 3 days (with a s (Art. 14.1).

From our perspective, the implementation of these proposals will not be feasible 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. At the most a 4-day-period might be feasible for issuers to comply with.

We also struggle to understand why all proposals consider the pledging of securities as a manager's transaction, which according to rec. 28 of the Council's General Approach has only been included in order to inform the market on "significant future change in share ownership". From our point of view this would mix up the objectives of the MAR and the Transparency Directive currently also under revision and therefore should be deleted.

EU Commission' Proposal

No additional detailed comments.

ECON's Report

The ECON-Report would change the core elements of the existing regime of manager's transaction reporting as it prohibits those transactions, unless they are conducted within a trading window (Art. 14.4a) that shall be defined by the Commission, after advice from ESMA (Art. 14.6.(c)).

Deutsches Aktieninstitut opposes this proposal. Issuers have developed their own compliance mechanisms to ensure that managers' transactions are reported properly and do not constitute insider dealing. These compliance mechanisms are carefully designed in order to reflect the specifics prevailing at the level of the respective issuer and the situation in question. If authorities determine in a generic approach the term "trading windows" the interference with existing practices will be highly likely. We therefore prefer to leave it to the issuers to ensure compliance with the MAR under their own responsibility. This include the definition of "trading windows" by the issuer in order to carefully comply with the provisions of the existing or amended MAR. Compliance might, however, also be ensured without defining firm specific "trading windows", but on a case-by-case basis.

Council's General Approach

First of all, the Council appears to change the way notifications have to be made public. According to the proposal managers shall notify the issuer as well as the competent authority and the issuer is then obliged to notify the market (Art 14.1.). Deutsches Aktieninstitut accepts this change, though we think that it is not necessary to determine the way notification by manager's are "brought to the market" on the EU level.

Notwithstanding this rather minor remark, we are concerned about another amendment of the Council to the original EU Commission's proposal. According to Art. 14.2. the issuer shall draw up a list of all persons discharging managerial responsibilities and their closely associated persons. This duty would create massive additional compliance duties, data protection issues and last but not least cause difficult interpersonal or intercultural situations as normally the relatives of persons discharging managerial responsibilities are not known to the issuer and will rightly be regarded as private by the relevant person.

Sanctions (Art. 25ff.)

Deutsche Aktieninstitut's position:

Deutsches Aktieninstitut is still in favour of maintaining the present sanctioning system which delegates the task of defining appropriate sanctions to the member states and, thus, does not set concrete minimum stands for sanctions on the EU level.

If, however, the trialogues conclude on certain minimum standards, the variety of legal and cultural traditions in the European Union should be appropriately taken into account. This, in particular, means that member states should not be forced to implement sanctioning standards that go far beyond what would be regarded as adequate according to their specific legal traditions.

Against this background, Deutsches Aktieninstitut is highly concerned about both the instruments and the level of sanctions proposed. In particular we oppose:

- any form of double sanctioning (administrative sanctions and criminal sanctions)
- sanctions that are linked to the annual turnover of a legal person
- unlimited or very high administrative pecuniary sanctions
- sanctions that do not differentiate according to the provision breached

Deutsches Aktieninstitut is also alarmed that elements of the US legal traditions could be integrated in the European law without providing convincing arguments and without thoroughly analysing beforehand the effects that might be initiated by such a development. This particularly holds true for the duty of member states to establish a whistleblowing system which can even grant financial incentives to whistleblowers and for general publications of violations (name and shame).

Our concerns do not relate to any of the proposals to the same extent. In particular, we feel that the Council's General Approach at least reflects some of the problems arising from the harmonisation efforts as it opens some options for member states, deletes some of the administrative measures proposed and differentiates between the provisions breached.

EU Commission's Proposal

Art. 25 and 26 of MAR define **administrative measures and sanctions** that may be taken by competent authorities in cases of offences against the MAR. Especially Art. 26.1.(k)-(m) has the potential to severely interfere with the existing sanctioning regime in the member states (the same is true for the sanctions defined in the EU Commission's proposals for the revision of the transparency directive and the MIFID/MIFIR). For example, legal persons might face administrative pecuniary sanctions of up to 10 percent of the total annual turnover. Linking sanctions to the turnover of a company is conceptually wrong as other than in the competition law there are no gains for the issuer resulting from or arising out of such a breach of Market Abuse Rules that could be valuated in Euro terms or that would result in additional yields and/or turnover. Also, high-volume fines may severely damage the company taken as a whole – even if the breach is only the result of the misbehaviour of one or several individuals within the issuer. As a result, such a sanction would also punish employees unrelated to the misbehaviour who could lose their employment in extreme scenarios.

Furthermore, Art. 26.3.(d) introduces a public statement on the nature of the breach of the MAR and the person responsible therefore; a concept which is at least unknown in the German securities law. This is not only questionable in light of 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 (meaning that the offence is recognised as res judicata) and shall then be limited time wise

Art. 29 of the MAR foresees the introduction of 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. 29.2). This would introduce an instrument originating from the US Securities law that is yet unknown at least in German Securities 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 rather sceptical about the tendency to implement US regulation in the European Law without carrying out an intensive evaluation beforehand and without providing 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.

ECON's Report

First of all, all our reservations against the original EU Commission's proposal also apply to the ECON's report.

Even worse, the ECON's report appears to make the sanctions even stricter than in the original proposal. Concretely:

- Art. 26.1.(k) calls for a ten times amount of the profits gained or losses avoided (instead of two times as in the EU Commission's proposal)
- Art. 26.1.(l) even calls for unlimited administrative measures
- Art. 26.1.(m) calls for administrative pecuniary sanctions of up to 20 % of its total annual turnover of a legal person on group level (instead of 10%)

Council's General Approach

Deutsches Aktieninstitut acknowledges that the Council approach reflects at least some of the concerns brought up with regard to sanctions.

Deutsches Aktieninstitut supports the following decisions taken by the General Approach

- We support Art. 26.1 sub. 2 according to which Member States may decide not to lay down rules for administrative sanctions where those breaches are already subject to criminal sanctions in their national law. This gives at least some levy to recognise national legal traditions with respect to market abuse rules.
- We support that Art. 26.1.(j) differentiates the level of administrative sanction according to the provision breached.

However, also the Council maintains problematic sanctions and measures. In particular:

- The possibility of administrative pecuniary sanctions linked to the annual turnover.
- A general duty to publish decisions with regard to sanctions (Art. 30a) which would introduce an element of US legal practice into European law.
- The option for member states to grant financial incentives to whistleblowers (Art. 29.2.)

Delegated Acts / Transition Period / Legal Certainty

Deutsches Aktieninstitut's position:

As the MAR contains a number of terms that need to be interpreted by all market participants in a consistent way, we are strongly interested in getting additional guidance in this respect 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 proposals by now. In 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.

As a consequence, a number of legal uncertainties may arise for issuers. For example, it is unclear what exactly will be covered by the safe harbour rule for share buy backs provided for in Art. 3. It is important to ensure that the current practice will be continued and maintained: According to this practice it is defined by law, which elements qualify a share buyback programme for a safe harbour in any case. However, share buy back programmes not meeting these criteria can in principle also fall under the scope of the safe harbour rule 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. In any case it has to be ensured that there is enough time to develop and to consult complementing sources of law before the existing MAD (2003/6/EC) is repealed. A 24 month-transition period should therefore be the minimum time period.