



European Securities and  
Markets Authority

# Questions and Answers

**On the common operation of the Market Abuse Directive**



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# 1 Background

1. The Market Abuse Directive (2003/6/EC, “MAD”), which is a key directive of the Financial Services Action Plan (FSAP) was set up to achieve a harmonized legal environment for all financial markets within the European Economic Area and came into effect on 12 October 2004. The implementation of the MAD results in an EU-wide market abuse regime.
2. As part of the Lamfalussy procedure, ESMA’s predecessor (CESR) provided the European Commission with Technical Level 2 Advice on technical measures. On the basis of this advice the Commission adopted in 2003 and 2004 the following three Commission directives and one regulation:
  - Commission Directive 2003/124/EC implementing MAD as regards the definition and public disclosure of inside information and the definition of market manipulation.
  - Commission Directive 2003/125/EC implementing MAD as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.
  - Commission Directive 2004/72/EC implementing MAD as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers’ transactions and the notification of suspicious transactions.
  - Commission Regulation (EC) No 2273/2003 implementing MAD as regards exemptions for buy-back programmes and stabilisation of financial instruments.
3. CESR published three sets of Level 3 guidelines aiming at providing guidance to the market on the application of MAD and ensuring that a common approach to the operation of the market abuse regime takes place throughout the EU amongst supervisors:
  - First set of CESR guidance and information on the common operation of the Directive (Ref. CESR/04-505b; May 2005);
  - Second set of CESR guidance and information on the common operation of MAD” (Ref. CESR/06-562b; July 2007);
  - Third set of CESR guidance and information on the common operation of the Directive to the market (Ref. CESR/09-219; 15 May 2009).
4. ESMA is required to play an active role in building a common supervisory culture by promoting common supervisory approaches and practices. In this regard, ESMA has adopted this Q&A

## 2 Purpose

5. The purpose of this document is to promote convergent implementation and application of the market abuse regime by providing responses to specific issues raised by the general public, market participants or competent authorities.
6. The content of this document is aimed at competent authorities to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA and at helping issuers, investors and other market participants by providing clarity on existing market abuse requirements, rather than creating an extra layer of requirements.

## 3 Status

7. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation<sup>1</sup>.
8. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committee's Consultative Working Group or, where specific expertise is needed, with other external parties.
9. ESMA will review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

## 4 Questions and answers

10. This document may be updated where relevant as and when new questions or issues arise. The date on which each question was last amended is included after each question for ease of reference.
11. Questions on the practical application and the operation of the market abuse regime in Europe may be sent to the following email address at ESMA:

[info@esma.europa.eu](mailto:info@esma.europa.eu)

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<sup>1</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

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## Question 1 - Disclosure of inside information related to dividend policy

Date last updated: **January 2012**

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**Question:** With respect to the disclosure of information on their dividend policy and change in this policy, what is expected from issuers of shares which are used as underlying of listed derivative contracts?

**Answer:** The definition of inside information in Article 1 of the Market Abuse Directive (MAD) expressly includes information relating to an issuer of financial instruments that would be likely to have a significant effect on the prices of related derivative financial instruments. ESMA is aware of the influence that information on expected dividends has on the price of futures and other derivatives. It also acknowledges the effect that changes in dividend policies and payment patterns have on the price formation of equity derivatives, including futures. ESMA would like to draw attention to this issue.

CESR (predecessor of ESMA) emphasised this fact already in July 2007, when it included ex-dividend date, changes in dividend payment date, amount of the dividend and changes in dividend policy in the list of events directly concerning issuers which might constitute inside information (paragraph 1.15 of the Second set of CESR guidance and information on the common operation of the Directive to market (Ref. CESR/06-562b)).

A number of episodes of late or incomplete disclosure of the full details of dividend payment announcements that may have caused undue effects on equity derivatives prices have recently come to ESMA's attention.

ESMA reminds issuers that they should consider any relevant information related to dividend payments and policies as inside information, should this information be likely to have a significant effect on the prices of either the issuer's shares or related derivatives or both.

Like any inside information, it should be disclosed as soon as possible, according to Article 6 of MAD, and in a manner which enables fast access and complete, correct and timely assessment of the information by the public, according to Article 2(1) of the implementing Directive 2003/124/EC. These provisions affect various aspects of dividend policies and payments that might have a significant effect on the prices of derivative instruments, such as ex-date, provisional and final amounts, nature of the payment (ordinary or special dividend), any changes on previously announced information, and changes in dividend payment patterns. For instance, the issuer's decision to change the ex-dividend date compared to preceding year's date should be disclosed in a timely manner so that the information is incorporated into the pricing models used on the derivative markets.

The disclosure of this type of information should be done promptly, even when the proposals for any change on dividend policy, including dates and nature of the dividend, are still subject to further consideration or approval by the general shareholders meeting.

Investor relations units should take special care when replying to questions posed by investors or firms so as to ensure that only the information that was previously disclosed by the issuer under the MAD obligations is provided in those answers and that selective or unintended disclosures regarding the issuers' dividend policy are avoided.

ESMA therefore calls on issuers, especially those whose shares are included in reference indices and are the underlying in listed derivatives contracts, to pay special attention to this issue in order to ensure an effective and harmonised application of MAD.

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## Question 2 - Disclosure of inside information related to Pillar II requirements

Date last updated: **November 2015**

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**Question:** Are credit institutions required under MAD to publish systematically the results of the Pillar II assessment?

**Answer:** A main objective of the Market Abuse Directive (MAD) is to enhance market integrity. This is notably achieved through a prompt and fair disclosure of information to the public.

This objective has been translated into the requirement under Article 6 of MAD that issuers of financial instruments admitted to trading on a Regulated Market<sup>2</sup>, or for which a request for admission to trading on such a market has been made, must inform the public as soon as possible of any inside information relating directly to them. According to Article 1 of MAD, inside information is such information that is:

- non-public,
- precise, and
- if it were made public would be likely to have a significant effect on the price of the issuer's financial instrument or related financial instruments.

MAD offers, by way of exception to the immediate disclosure of inside information, the possibility on a case-by-case basis to delay such disclosure. An issuer may thus delay, under its own responsibility, the public disclosure of inside information such as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public and the issuer is able to ensure the confidentiality of the information. However, it is not feasible to define ex-ante, in a general manner, how those conditions should be met and the concerned issuer needs to assess the particular circumstances before deciding to delay the disclosure of inside information.

Under MAD, an issuer can also be liable for market manipulation in case of dissemination of false and misleading information, including failure to properly disclose inside information to the public.

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<sup>2</sup> The list of the Regulated Markets in the EU is available on the ESMA website at <http://www.esma.europa.eu/page/Registries-and-Databases>.

Many credit institutions across the European Union are issuers of financial instruments admitted to trading on a Regulated Market and thus subject to the regime established under the Market Abuse Directive, when at the same time they are also subject to the prudential supervision of the banking regulators.

Consequently, in the context of the Supervisory Review and Evaluation Process (SREP) to be conducted in accordance with Article 97 of Directive 2013/36/EU (CRD IV), whenever a credit institution subject to the market abuse regime is made aware of information, notably the results of the exercise, it is expected to evaluate whether that information meets the criteria of inside information. If these criteria are met, the MAD provisions, as transposed into the national law of the Member States, apply with respect to the relevant disclosure requirements. Such a credit institution would have then to publicly disclose the inside information unless it has delayed such a disclosure after having assessed that all the conditions for delaying apply.

ESMA recalls that, in line with the Third Set of CESR Guidance on the common operation of the MAD, if and when a publication (e.g. an article published in the press or internet postings) which is not resulting from the issuer's initiative in relation to its disclosure obligations or a rumour in the market relates explicitly to (a piece of) information that is inside information within the issuer, the latter is expected to react and respond to the relevant publication or rumour if that (piece of) information is sufficiently accurate to indicate that a leak of information has occurred and, thus, that the confidentiality of this inside information is no longer ensured. In such circumstances, which should be the exception rather than the rule and should be examined by the issuer on a case by case basis, a policy of staying silent or of "no comment" by the issuer would not be acceptable. The issuer's reaction or response should be made publicly available in the same conditions and using the same mechanisms as those used for the communication of inside information, so that an ad hoc announcement has to be published without undue delay.

Finally, it is noted that the disclosure of inside information is a matter of national supervision and enforcement of MAD, solely under the competence of the national competent authorities designated to that effect in accordance with Article 11 of MAD and whose heads are members of the Board of Supervisors of ESMA.

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## Question 3 - Investment recommendation (New)

Date last updated: March 2016

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**Question:** Does material intended for distribution channels or for the public concerning one or several financial instruments that contains statements indicating that the concerned financial instruments are “undervalued”, “fairly valued” or “overvalued” fall within the definition of “recommendation” contained in Article 1(3) of Commission Directive 2003/125/EC?

**Answer:** Such material made public or intended for distribution channels which concerns one or several financial instruments admitted to trading on a regulated market, or for which a request for admission to trading on such a market has been made,<sup>3</sup> is considered as an implicit recommendation or a research or other information which implicitly suggests an investment strategy pursuant to Article 1(3) and (4) of Commission Directive 2003/125/EC implementing MAD, insofar as it contains a valuation statement as to the price of the concerned financial instruments.

Furthermore, material containing an estimated value such as a “quantitative fair value estimate” that is providing a projected price level or “price target”, or any other elements of opinion on the value of the financial instruments, is also considered to be an implicit recommendation or a research or other information which implicitly suggests an investment strategy pursuant to Article 1(3) and (4) of Commission Directive 2003/125/EC.

As the material referred to above are recommendations pursuant to Article 1(3) and (4) of Commission Directive 2003/125/EC, they need to comply with the relevant obligations and standards set out in Commission Directive 2003/125/EC concerning the fair presentation of recommendations and the disclosure of interests and conflicts of interest by producers of recommendations. In addition, a third party that disseminates such material is considered as a disseminator of recommendations and therefore needs to comply with the relevant obligations and standards set out in Commission Directive 2003/125/EC.

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<sup>3</sup> This Q&A relates to financial instruments admitted to trading on regulated markets or for which a request for admission to trading on such markets has been made. However, according to national law, a Member State may have extended to financial instruments admitted to trading on other trading venues than regulated markets the provisions of MAD relating to fair presentation of recommendations and disclosure of interests and conflicts of interests.