



European Securities and
Markets Authority

Final Report

Guidelines on MAR - information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives

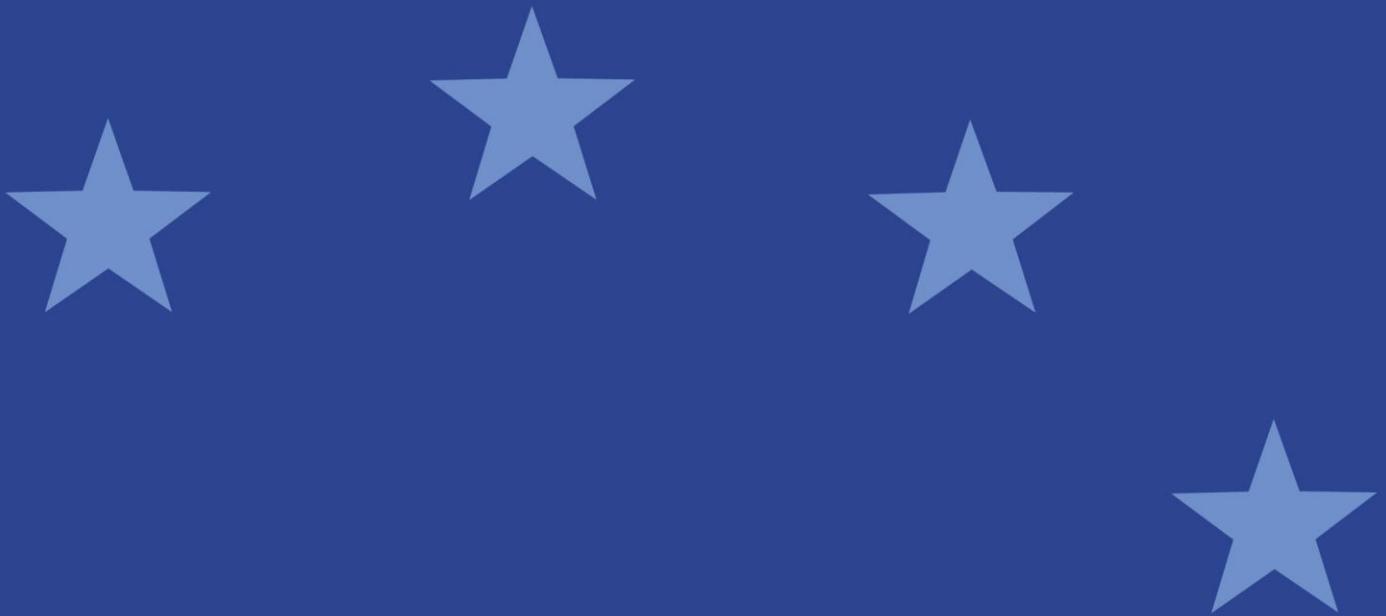




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Acronyms used

ACER	Agency for the Cooperation of Energy Regulators
CP	Consultation Paper on draft Guidelines on the Market Abuse Regulation (ESMA/2016/444); published on 30 March 2016
EEA	European Economic Area
ESMA	European Securities and Markets Authority
ETS	Emission Trading System
EU	European Union
MAD	Market Abuse Directive; Directive 2003/6/EC of the European Parliament and the Council on insider dealing and market manipulation (market abuse)
MAR	Market Abuse Regulation; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
MiFID I	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012
OJ	Official Journal of the European Union
REMIT	Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency

1 Executive Summary

Reasons for publication

Article 7(5) of MAR provides that the European Securities and Markets Authority (ESMA) shall issue guidelines to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in Article 7(1)(b) of MAR. This final report follows the Consultation Paper¹ (CP) issued on March 2016.

Contents

Section 2 contains information on the background and mandate, while Section 3 sets out ESMA's feedback to the CP responses in relation to the scope of the guidelines, the financial instruments and products covered by the examples of information relating directly and indirectly to commodity derivatives and information directly relating to a spot market contract. It also indicates whether and where ESMA has changed the guidelines following the consultation.

Annex I lists questions raised in the CP. Annex 2 provides the legislative mandate on the basis of which ESMA is issuing these guidelines. Annex 3 sets out ESMA's view on the costs and benefits associated with these guidelines. Annex 4 contains the text of the guidelines.

Next steps

The guidelines in Annex 4 will be translated into the official languages of the European Union and published on the ESMA's website. Within 2 months of the issuance of the translations, each national competent authority will have to confirm whether it complies or intends to comply with those guidelines. In the event that a national competent authority does not comply or does not intend to comply, it will have to inform ESMA, stating its reasons. ESMA will publish the fact that a national competent authority does not comply or does not intend to comply with those guidelines.

¹ Consultation Paper on draft Guidelines on the Market Abuse Regulation (ESMA/2016/162); <https://www.esma.europa.eu/sites/default/files/library/2016-162.pdf>.

2 Background and mandate

1. Article 7(1)(b) of MAR defines inside information in relation to commodity derivatives as *«information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets»*. Therefore, it is information that:
 - a) relates:
 - i. directly or indirectly to commodity derivatives as financial instruments admitted to trading or traded on a trading venue,
 - ii. directly to a spot commodity contract;
 - b) meets the three criteria laid down in MAR for defining inside information in relation to financial instruments:
 - i. being non-public,
 - ii. being precise, and
 - iii. being likely to have a significant price effect if it were made public on the commodity derivatives themselves or on the related spot commodity contract;and
 - c) is *“reasonably expected to be disclosed or required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets”*.
2. Article 7(5) of MAR requires ESMA to issue guidelines to establish a non-exhaustive indicative list of information which would fall under the above point c). In preparing these Guidelines, ESMA is required to *“duly take into account the specificities of those markets”* (i.e. the commodity derivatives markets and the spot markets).
3. On 30 March 2016, ESMA published a consultation paper containing draft guidelines on this matter (ESMA/2016/444) and provided an eight-week period for interested stakeholders to respond to the consultation.
4. ESMA sought the advice of the Securities and Markets Stakeholder Group’s on the guidelines proposed in the CP, which ultimately did not provide a formal opinion.



5. ESMA received 14 responses to the CP (including 11 non-confidential responses) from trading venues and exchanges, firms and industry associations.

3 Feed-back statement

3.1 Scope of the guidelines

6. As mentioned in the CP, the mandate for these guidelines refers to «*a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets*», which is only one of the criteria of the definition of inside information.
7. ESMA notes that the scope of these guidelines covers all the global, including non-EU, information that is reasonably expected or required to be disclosed and that could affect commodity derivatives admitted to trading or traded on EU/EEA venues.
8. Some respondents welcomed the statement made in the CP on the non-exhaustive indicative nature of the list of information and asked ESMA to clearly reiterate that in the final guidelines, stressing that the examples given do not automatically represent inside information in relation to commodity derivatives, unless the other criteria are met. ESMA has slightly modified the final guidelines to reinforce the fact that if a particular type of information does not appear on the list it does not mean that it cannot be considered inside information, nor does the fact that if a particular type of information is listed means that it will automatically be inside information.
9. Additional wording has also been introduced in the guidelines to clearly indicate that the guidelines are not to further specify the concepts of preciseness of the information nor its price sensitivity, recalling that these two criteria will also have to be taken into account when assessing on a case by case basis whether information is inside information. In this respect, ESMA has not introduced any materiality elements in the examples of information listed in these guidelines unlike suggested by some respondents to the CP in several instances. A suggestion was to specify in the guidelines that, in relation to information about stocks, the stocks movements has to be material.
10. Further to the requests for clarification received in response to the CP, ESMA has clarified in the final guidelines that their purpose is not to impose any additional information disclosure requirements. In that respect, ESMA stresses again that the concept of “required to be disclosed” refers to existing or future disclosure requirements (for instance, under national law), independently of and unrelated to the ESMA guidelines.
11. Furthermore, there was a call from some respondents to specify the concept of “*information reasonably expected to be disclosed*”, in order to assist market participants in their assessment on whether information is reasonably expected to be disclosed, noting that many market participants are not regulated firms and are not familiar with such a concept. ESMA has therefore introduced in the final guidelines a clarification of this concept on the basis of the accessibility of the information, the official nature of the communication

(whether made by public or private entities) and the exclusion of rumours or speculative statements.

3.2 Financial instruments and products covered

12. According to the MAR definition, inside information in relation to commodity derivatives must relate to either the commodity derivatives themselves or to the related spot commodity contracts. As acknowledged in the mandate (Article 7(5) of MAR), there is a wide variety of commodities markets and commodity derivatives markets which may require distinguishing between different types of information specific to those markets.
13. Therefore, further consideration is given in this section to the scope of the instruments or products concerned, taking into account the definitions contained in MiFID II and MiFIR, both texts already entered into force but not yet applicable. With regard to inside information in relation to commodity derivatives, MAR defines the following terms: “*commodity*”, “*spot commodity contract*”, “*spot market*” and “*commodity derivatives*”.
14. According to Article 3(1)(14) of MAR, “**Commodity**” means a commodity as defined in point (1) of Article 2 of Commission Regulation (EC) No 1287/2006² (MiFID I implementing regulation). That regulation defines commodity as “*any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity*”. In this vein, ESMA notes that the Commission Delegated Regulation supplementing MiFID II as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive adopted by the European Commission on 25 April 2016 contains the same definition of commodity.
15. According to Article 3(1)(15) of MAR, “**Spot commodity contract**” means “*a contract for the supply of a commodity traded on a spot market which is promptly delivered when the transaction is settled, and a contract for the supply of a commodity that is not a financial instrument, including a physically settled forward contract*”. This means in particular that wholesale energy products under REMIT are included in the second limb of this definition.
16. According to Article 3(1)(16) of MAR, “**Spot market**” means “*a commodity market in which commodities are sold for cash and promptly delivered when the transaction is settled, and other non-financial markets, such as forward markets for commodities*”.
17. According to Article 3(1)(24) of MAR, “**Commodity derivatives**” means commodity derivatives as defined in Article 2(1)(30) of MiFIR. According to MiFIR, they are “*those financial instruments defined in point (44)(c) of Article 4(1) of*” MiFID II; “*which relate to a commodity or an underlying referred to in Section C(10) of Annex I to*” MiFID II; *or in points (5), (6), (7) and (10) of Section C of Annex I thereto*”.

Point (44)(c) of Article 4(1) of MiFID II refers to “*any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement*”

² Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 1).



determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures”.

18. Therefore, commodity derivatives cover:
- a) securities giving the right to acquire or sell any transferable securities referred to in points (a) and (b) of Article 4(1)(44) of MiFID II or giving rise to a cash settlement determined by reference to commodities;
 - b) securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to an underlying referred to in Section C(10) of Annex I to MiFID II;
 - c) the derivative contracts referred to in points (5), (6) and (7) of Section C of Annex I to MiFID II that relate to commodities; and
 - d) the derivative contracts referred to in Section C(10) of Annex I to MiFID II.
19. The underlyings referred to in section C(10) of Annex 1 to MiFID II are:
- climatic variables
 - freight rates
 - inflation rates
 - other official economic statistics
 - assets, rights, obligations, indices and measures not otherwise mentioned in Section C of Annex I to MiFID II.
20. It should also be noted that Article 8 of the Commission Delegated Regulation supplementing MiFID II as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive adopted by the European Commission on 25 April 2016³ contains an additional non-exhaustive list of underlyings relevant for derivatives under Section C(10) of Annex I to MiFID II where they meet the conditions laid down in Article 7(3) of that Commission Delegated Regulation: telecommunications bandwidth; commodity storage capacity; transmission or transportation capacity relating to commodities; an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources; a geological, environmental or other physical variable; any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred; an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation; and an index or measure based on actuarial statistics.

³ This regulation has not been published in the Official Journal as of the date of publication of this report.



21. Under MiFID II, the scope of the underlyings of commodity derivatives will be wider than the mere “*commodities*” as defined in MAR by reference to the MiFID I Implementing Regulation mentioned above, as the underlyings are not necessarily “goods” that can be “delivered”, including, for example, inflation rates or official economic statistics.
22. This has an impact on what can be considered a spot commodity contract and whether a “*related spot market*” exists under MAR. In other words, there may not be any related spot market, within the scope of MAR, for certain types of “*commodity derivatives*”.
23. As a consequence, for certain types of commodity derivatives without a related spot commodity contract traded on a spot market, the focus of these guidelines should be put on the information reasonably expected or required to be disclosed on the relevant commodity derivative markets.
24. ESMA is of the view that the analysis developed in the CP to identify the commodity derivatives with a related spot market according to MAR and those without remains appropriate. Such a categorisation may be of assistance for the purpose of listing the information required or reasonably expected to be disclosed in relation to the commodity derivatives themselves or their related spot markets.

Commodity derivatives with a related spot market

25. It is assumed that, where the underlying of a commodity derivative is a commodity as defined in MAR, there is not only a commodity derivative market but also a related spot market, more or less organised, where spot commodity contracts are traded. Such markets exist not only in the EU/EEA but also in third countries.
26. Based on the MAR definition of commodity, immediate candidates are metals, agricultural products and energy (including oil and gas).
27. Note that for the purpose of defining data standards and formats for financial instrument reference data to be reported under Article 27 of MiFIR, the European Commission adopted on 14 July 2016 a Delegated Regulation supplementing MiFID II⁴ which contains a classification of commodities. Table 2 of that RTS not only includes the above mentioned categories but also lists other main categories of commodity derivatives for which the underlying commodity products could be considered as falling under the MiFID I implementing regulation definition (i.e. “*goods of a fungible nature that are capable of being delivered*”), such as fertilizer, industrial products, paper and polypropylene. That table, which should not be understood as a closed list, also identifies for each of the categories, sub-products.

⁴ Commission Delegated Regulation (EU) /.. of 14.7.2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities.

This regulation has not been published in the Official Journal as of the date of publication of this report.

28. Article 4(1)(59) of MiFID II further defines “*agricultural commodity derivatives*” as derivative contracts relating to products listed in Article 1 of, and Annex I, Parts I to XX and XXIV/1, to, Regulation (EU) No 1308/2013 of the European Parliament and of the Council⁵. Annex I of that regulation provides a very granular description of these agricultural products which are divided into sectors.

Commodity derivatives without a related spot market

29. MAR definitions of spot market and spot commodity contract make a direct reference to commodities. Under the MAR definition of commodity derivatives which is cross-referencing to MiFID II and MiFIR provisions, the underlyings listed under Section C(10) of Annex I to MiFID II and under Article 8 of Commission Delegated Regulation supplementing MiFID II as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive adopted by the European Commission on 25 April 2016 do not fall under the category of commodities.
30. Therefore, although there can be commodity derivatives having such underlyings, it has been considered that there is no related spot market for them for the purpose of the analysis conducted for producing these guidelines.

Exclusion of Emission allowances and derivatives on Emission allowances

31. In the CP, ESMA developed an analysis explaining why emission allowances and derivatives thereof are outside the scope of these guidelines. In short, that is due to the separate definition of inside information in relation to emission allowances or auctioned products based thereon in Article 7(1)(c) of MAR and the scope of the mandate for these guidelines which only refers to inside information on the relevant commodity derivatives or spot markets referred to in Article 7(1)(b) of MAR as well as the definition of commodity derivatives included in MiFID II.
32. ESMA confirms its position that emission allowances and derivatives thereof are not covered by these guidelines. Upon request of a couple of respondents to the CP, ESMA would also like to clarify that the particular contracts known as “*clean/spark spread*” and “*clean/dark spread*”⁶ are considered commodity derivatives and not derivatives on emission allowances, as the emission allowance component is only a minor part of those instruments.

⁵ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/200.

(<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1308>)

⁶ A spark spread is the difference between the price received by a generator for electricity produced and the cost of the natural gas needed to produce that electricity. It is typically calculated using daily spot prices for natural gas and power at various regional trading points. A clean spark spread is the spread equal to the regular (or ‘dirty’) spark spread minus the CO₂ emissions cost for gas-fired power plants. This spread then represents the net revenue on power sales after gas costs and emissions allowance costs. An analogous spread for coal-fired generation plants is typically referred to as a clean dark spread

3.3 Information considered in the Guidelines

33. According to the MAR definition, inside information in relation to commodity derivatives must relate to either the commodity derivatives themselves, directly or indirectly, or directly to the related spot commodity contract. Therefore, the guidelines distinguish between three categories of information reasonably expected or required to be disclosed:
- a) Information relating directly to a commodity derivative.
 - b) Information relating indirectly to a commodity derivative.
 - c) Information relating directly to a spot commodity contract.

3.3.1 Examples of information relating directly to commodity derivatives

34. In the CP, as an example of information required to be published under the legal provisions at Union level, ESMA proposed the weekly reports on the positions held by different categories of persons for the different commodity derivatives traded on a venue under Article 58(1)(a) of MiFID II⁷. ESMA maintained this example in the final guidelines and, in light of comments received to the CP, would like to highlight that the requirement to publish those reports under Article 58(1)(a) of MiFID II will apply to market operators and firms operating a trading venue once MiFID II applies.
35. The CP also provided examples of exceptional information that market participants would expect to receive in case of changes in the fundamental characteristics of a standardised commodity derivative or of the contract on which such a commodity derivative is based (e.g. change in the underlying commodity specifications, in the underlying index of commodities or in the periodic reshuffle of the underlying basket) or changes in the microstructure of the markets where such derivatives or contracts are traded. Those examples attracted the attention of almost all respondents. More specifically, the examples relating to the market microstructure were negatively received. Respondents argued about the absence of significant price effect of the changes in tick sizes, strike prices, in market maker schemes and requirements, including the fees structures, or in market makers/liquidity providers lists, although such changes may have an impact on volatility, volume or market structure. Another argument put forward by the respondents was the absence of reasonable expectation of disclosure of the information relating to the list of

⁷ According to Article 58(1)(a) of MiFID II:

«1. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission allowances or derivatives thereof:

(a) make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives thereof traded on their trading venue, specifying the number of long and short positions by such categories, changes thereto since the previous report, the percentage of the total open interest represented by each category and the number of persons holding a position in each category in accordance with paragraph 4 and communicate that report to the competent authority and to ESMA; ESMA shall proceed to a centralised publication of the information included in those reports».

According to Article 58(4), second sub-paragraph of MiFID II:

«The reports referred to in point (a) of paragraph 1 shall specify the number of long and short positions by category of persons, any changes thereto since the previous report, percent of total open interest represented by each category, and the number of persons in each category».

market makers/liquidity providers on commodity derivatives, mainly because without anonymity markets will cease to exist, or relating to the compensations included in agreement individually negotiated with each market maker or such agreements themselves. In addition, some respondents noted that the changes in the fundamental commodities specifications are normally addressed by exchanges, in order to avoid creating windfall profits or losses for existing open interests, through various arrangements such as creating new contracts or applying offsetting payments.

36. Taking into account the feed-back received and notwithstanding the fact that the guidelines are not meant to specify the concept of price sensitivity of information as already noted previously, ESMA has eventually reviewed the final guidelines. Some examples relating to the information affecting the market microstructure are no longer included for reasons of consistency, given that their relevance and potential price impact seems considerably smaller than the other examples contained in the guidelines. However, ESMA would like to remind that the list of information included in the guidelines remains non-exhaustive. Therefore, ESMA would like to stress that an eventual change in market microstructure that could be price sensitive, and that would be reasonably expected or required to be disclosed in the future, can perfectly amount to inside information, even if that particular change is not specified in the guidelines.
37. Another example of information directly relating to commodity derivatives was suggested in response to the CP. It concerns information held by brokers and trading venues about transactions executed and orders placed, modified or cancelled. ESMA considers that such a situation does not fall within the scope of these guidelines, as it is already covered in the definition of inside information under Article 7(1)(d) of MAR and has no link to any information reasonably expected or required to be disclosed

3.3.2 Examples of information relating indirectly to commodity derivatives (commodity derivatives without a related spot market)

38. This section contains examples of information indirectly relating to commodity derivatives which are not examples of information directly relating to a related spot commodity contract (dealt with in the following section). The examples relate to commodity derivatives without a related spot market, where indirect information could be considered the information concerning the underlying of the commodity derivatives for which there is not a relevant market.
39. In this respect, examples of indirect information reasonably expected to be disclosed are the official economic statistics to be published usually by public entities. This includes the economic forecasts such as on GDP and on balance of payments published by Eurostat, the ECB and national central banks. This would be also the case for inflation rates for example. In this context, it should be noted that Article 20(2) of MAR requires public institutions disseminating statistics or forecasts liable to have a significant effect on financial markets to disseminate them in an objective and transparent way. Taking into account the limited input received from the consultation, ESMA has only amended the final guidelines to confirm, on the one hand, that the examples given address “official” statistics published notably by national statistics offices or institutes and to clarify, on the other hand,

that public entities from non-EU countries, including international public organisation are also covered.

40. With regard to freights in the field of shipping, the CP referred to and contained a proposal of guidelines about information publicly made available in various forms by information providers, non-profit organisations and governmental entities. In the latter case, the information concerns statistics publicly made available on a regular basis (e.g. monthly)⁸. Information providers⁹ usually publish some general reports and news about the freight market; however to obtain more detailed information, such as real time shipping data, daily rates and benchmark price assessments, the users need to subscribe and pay for the information services or for membership. In light of the feed-back received in response to the CP, ESMA is maintaining the current example on freight in the guidelines, as it could also encompass information relating to the supply of shipping (i.e. the size of the current fleets of ship and new ships under construction).
41. In the CP, ESMA asked whether the “goods” subject to the freight contract or their conditions of carriage should be considered as information indirectly related to derivatives on freight rates, though without making any proposal in the guidelines.
42. Respondents to the CP opposed to having such information in the final guidelines, arguing the pieces of information listed in the CP, are:
 - a) if held by market participants, is unlikely to be precise enough to meet the test of inside information (e.g. weather conditions, strikes, bacterial infections or changes in tax rate);
 - b) is unlikely to have a price impact on freight rates, and hence freight derivatives, as the freight market is dependent on a greater number of factors than those affecting a particular commodity and as freight rates are priced on the basis of macro-categories (e.g. dry bulk carriers, tanker etc.);
 - c) represents for some of them (e.g. strike or weather blocking the port) a false example, as this information is usually public information and therefore fail to meet the non-public criterion to be considered as inside information.
43. Respondents also argued that the information that may affect the freight rates (notably regarding the volume of goods to be transported and the conditions affecting their transport, but there may be other examples than those listed in the CP) is not reasonably expected nor required to be disclosed in the relevant market. For instance, the volume of goods to be carried is often private information and is not reasonably expected to be disclosed by the persons shipping goods. Furthermore, there is no general forum for the publication of this type of information.

⁸ For instance, the Department for Transport in the UK publishes Freight statistics and some other maritime statistics, please see the link: <https://www.gov.uk/government/statistics/port-freight-statistics-april-to-june-2015>

⁹ E.g. Platts (<http://www.platts.com/commodity/shipping>) or the Baltic Exchange

44. Taking particularly into account the above argument relating to the doubt about the reasonable expectation of disclosure, ESMA is not proposing any specific guidelines on the information relating to “goods” subject to the freight contract nor on their conditions of carriage.
45. The respondents to the CP provided additional examples of information indirectly relating to commodity derivatives:
 - a) the weather forecasts (produced by government or private entities), as they can have an impact on the production of agricultural commodities and hence affect the prices of commodity derivatives;
 - b) in the context of metal commodities, information that can impact the price of the commodity derivatives relating to:
 - i. industrial actions or events (e.g. mine strikes) that could severely reduce the output;
 - ii. commercial decisions on production levels;
 - iii. costs relating to production (e.g. producer’s cost curve), to related inputs to production (e.g. energy prices) or to rental costs of warehouses (significant changes in the rent of a warehouse can affect movement of a commodity and its geographical availability);
 - iv. the impact of climatic variables on mine production;
 - c) political statements that may be the basis for new legislation or binding provisions, nationally or EU/EEA wide, such as capping/flooring market prices or future restrictions on production supply.
46. ESMA notes that these examples seem to be only provided by the respondents on the ground of the price impact they can have on the concerned commodity derivatives, and therefore has not considered them for inclusion in the final guidelines. ESMA would like to remind that these guidelines are about a list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets.

3.3.3 Examples of information directly relating to a spot commodity contract

47. As noted in the CP, with regards to information directly relating to a spot commodity contract, Recital 20 of MAR already identifies two examples of information which is required or reasonably expected to be disclosed:
 - a) in accordance with REMIT;
 - b) as part of the voluntary joint initiative of many countries through the Joint Organisations Database Initiative (JODI) database for oil.



Wholesale energy products (electricity and gas)

48. With regards to wholesale energy products (electricity and gas), the responses received to the CP are supportive of the examples proposed, which are considered as comprehensive.
49. Therefore, the final guidelines maintain the example relating to the existence, in some jurisdictions, of national requirements with regard to the energy markets for the disclosure of information relating to the auctions of spot markets (day auction, intraday auctions and balancing markets) within a certain delay (e.g. three months) after the day of delivery.
50. Similarly, as an example of information required to be disclosed in accordance with legal or regulatory provisions in Union law, ESMA maintains its approach referring to the information to be publicly disclosed under REMIT. Note that Article 2(1) of REMIT lists categories of information to be taken into account when considering the notion of inside information. ACER, in its guidance on the application of REMIT, has developed a section on the application of the definition of inside information under REMIT¹⁰. These examples apply to all wholesale energy products listed under Art 2(4) of REMIT.
51. With regard to information to disclose, REMIT refers to European Regulations (EC) No 714/2009 and No 715/2009 whereby there should be periodic and regular publication of data. REMIT information also relates to *“the capacity and use of facilities for production, storage, consumption or transportation or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities”*. This information includes the one referred to in the Commission Regulation (EU) No 543/2013, which amends the guidelines annexed to Regulation (EC) No 714/2009 and relates to submission and publication of data in electricity markets whereby information on the generation, load, transmission and balancing data should be published by the European Network of Transmission System Operators (ENTSO) for Electricity. Finally, Article 4(1) of REMIT requires market participants to disclose inside information in respect of business or facilities which the market participants concerned, or its parent undertaking or related undertaking, owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part.
52. Some respondents to the CP suggested that the following examples of information should be included in the guidelines:
 - a) decommissioning, dismantling or closing of transmission, production or consumption units;
 - b) expansion of existing or new transmission, production or consumption units;
 - c) special request from Transmission System Operators (TSOs) to hold back additional production or consumption from the market due to problems with peak load;

¹⁰ <http://www.acer.europa.eu/Media/Pages/3rd%20Edition%20ACER%20Guidance%20REMIT%20%282%29.pdf>



- d) allowance from TSOs to dispose of production or consumption units that normally are kept by TSOs as peak load reserves;
- e) coast-down of nuclear power plants;
- f) sealed in production;
- g) Special incidents – e.g. terror threats.

In this regards, ESMA is of the view that these guidelines should not be amended by including such granular examples of information, also noting that they are already covered by the requirements of REMIT and related texts.

53. A few respondents also called ESMA to address issues regarding the interaction and possible overlap in the application of REMIT and MAR by:

- a) acknowledging that the information disclosed under REMIT should no longer be considered as inside information under MAR and that there should not be any double disclosure under MAR channels;
- b) by specifying which definition should apply to those derivative contracts both covered under REMIT and MAR (i.e. derivative contracts that are not traded on an OTF and that can be physically settled as well as cash settled), noting that the definition of inside information under MAR and REMIT are not identical.

54. In this regard, ESMA would like to remind that these guidelines contain a list of information reasonably expected or required to be disclosed and not a list of inside information relating to commodity derivatives (for which the other criteria of the definition of inside information would need to be considered). Neither these guidelines are an attempt to define the concept of inside information under MAR, as the criteria in this respect are already set out in MAR. In addition, as previously stated, the purpose of these guidelines is not to impose additional disclosure requirements to market participants in relation to information on commodity derivatives. With regard to wholesale energy products, these guidelines take stock of the fact that under REMIT disclosure requirements apply, leading to certain information being made public, thus meeting the MAR criteria of “information required to be disclosed”. ESMA would also like to recall that the ways the disclosure obligations are achieved under MAR are addressed in the Commission Implementing Regulation (EU) 2016/1055 of 29 June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with MAR.

Oil related products and gas

55. In the CP, ESMA included as examples of information reasonably expected to be disclosed the statistical information made publicly available in the JODI database on oil and in the more recent JODI database for gas¹¹. These databases do not result from a legal or

¹¹ <https://www.jodidata.org/>, where more details on the scope of the information made public can be found.

regulatory requirement but from the permanent commitment of JODI's participants to provide on a regular basis monthly nationally validated data relating to production, imports, exports, stocks and demand, as well as refinery intake in the case of oil related products, for central publication in the databases. In this context, ESMA would like to clarify that these examples focus on the information that is made public and is not intended to create any disclosure obligation on market participants who may know about some constituent parts of this information.

56. In the CP, ESMA also included an example of information reasonably expected to be published relating to the news or press releases about the outcome of the conferences held by producing countries (e.g. OPEC), during which in particular production levels of the participating countries are discussed and agreed upon. To mitigate some concerns raised by a few responses, ESMA wishes to clarify that such example is focusing on the official communications from such conferences on the agreed production levels and not on any third party statement relating to such conferences.
57. Finally, ESMA notes that no additional examples of information in relation oil related products and gas, including information related to the infrastructures, storage facilities and transportation (e.g. pipeline) were provided in the responses to the CP.

Agricultural commodities

58. A concern has been raised in response to the CP about the unbalanced number of examples relating to agricultural commodities compared to other commodities, noting that some of these examples can actually apply to other commodities. Taking into consideration this feedback, ESMA has amended, for the sake of consistency across commodity types, the content of the final guidelines and has generalised certain examples of information. This concerns the following examples:
 - a) the information from private entities regarding changes in the conditions governing the storage (opening hours, fees, etc.), their load-in or load-out rate or their more generally their capacity to process the commodity for storage and delivery;
 - b) the statistics on commodities at national level published by public entities; ESMA also clarifies that such public entities also encompass non-EU entities such as the US Energy Information Agency;
 - c) information required to be published according to the practice of the relevant commodity markets, when the information concerns production, imports, exports and stored quantities (stocks) of commodities on which a commodity derivative is based as well as transaction information about the operations made on the spot market of those commodities.
59. In the CP, ESMA identified other examples that are recalled and commented below in light of the responses received from the public consultation.
60. In Europe there are trading venues where commodity derivative contracts based on indices on agricultural products are traded. The indices are calculated using recognised prices in

different geographical areas (countries or regions) for the agricultural products. The price of commodity derivative contracts can also be based on a reference price set at regular intervals by entities collecting information about the prices of contracts signed during a past period. An example of this can be found on the Italian derivative market for durum wheat (Agrex segment of the IDEM) where the underlying is based on the last settlement price calculated by the CCP (CC&G). In the final guidelines there is no specific example in this respect.

61. In respect of agricultural products on which commodity derivatives are directly or indirectly based, examples of ad hoc information reasonably expected to be published could relate to the existence of important diseases affecting the underlying commodities (e.g. plague for pork, fungus for grain) or changes in the subsidy policies relating to these products that result from decisions of public entities. As explained in section 3.1, ESMA has not found appropriate to include a materiality element in this example as suggested by a couple of respondents.
62. Another specific example of information that was included in the CP was slightly redrafted in the final guidelines to make it clearer. It concerns the activities undertaken and measures taken by the Commission, the Member States and other officially designated bodies) entrusted with the duty to manage agricultural markets under the Common Agricultural Policy (CAP) and fisheries under the Common Fisheries Policy (CFP) insofar as information is made public by them. Although Article 6(4) of MAR establishes an exemption from the scope of MAR for the activities of these public entities and the persons acting on their behalf when undertaken in pursuit of the CAP and the CFP, Recital 22 of MAR acknowledges that they have statutory obligations to operate in a way that ensures orderly, fair and non-discriminatory disclosure of any new decisions, developments and data that are price sensitive.
63. Similarly, the example relating to the Agricultural Market Information System (AMIS) has remained unchanged in the final guidelines. AMIS is an inter-agency platform to enhance food market transparency and encourage coordination of policy action in response to market uncertainty. AMIS focuses on four crops that are particularly important in international food markets: wheat, maize, rice and soybeans. It collects, analyses, and publishes data on production, trade, utilisation and stocks in AMIS participating countries (G20 plus several others). This database operates since 2011. More details on the scope of the information made public can be found on <http://www.amis-outlook.org/>.
64. Three additional and very specific examples of information directly relating to agricultural commodities derivatives were suggested in response to the CP:
 - a) the actual level of stocks or deliverable supply, and information on harvest forecasts that should be made public;
 - b) exceptionally, the insolvency of a market participant may be relevant;
 - c) the legislation on the use of pesticides or insecticides or their key chemical elements.



65. In this regards, ESMA is of the view that these guidelines should not be amended by including such very specific and granular examples of information in relation to agricultural products, to maintain the balance of the examples compared to the other commodities and noting that some are already covered in more general examples included in the list.

Metal commodities

66. In the CP, ESMA proposed to include an example of information required to be published according to the rules or the practice of the relevant metal commodities markets, when it concerns figures about the stocks or stock movements of metal commodities in warehouses and storage facilities.
67. Taking into account the comments received regarding the fact that such an example is relevant for all commodities and not only for metal commodities, ESMA has amended the final guidelines accordingly. Furthermore, noting that certain commodity derivatives exchanges publish this type of information according to their rules (e.g. the London Metal Exchange), the final guidelines specify this case through a particular example.
68. Finally, ESMA notes that no additional examples of information that is reasonably expected or required to be made public in relation to metal commodities have been provided in the responses to the CP.



ANNEX I – Summary of questions

- Q1: Do you agree with the examples provided? If not, please explain.**
- Q2: Can you think of other examples of information directly relating to commodity derivatives that should be considered in the Guidelines? Please explain.**
- Q3: Do you agree with the above examples? If not, please explain.**
- Q4: Can you think of other examples of information indirectly relating to commodity derivatives that should be considered in the Guidelines? Please explain.**
- Q5: Do you agree that information relating to the “goods” subject to the freight contract should be considered as information indirectly related to derivatives on freight rates? Please, explain.**
- Q6: Can you think of other examples of information expected/required to be disclosed in relation to commodity derivatives for which the underlying asset is not an actual commodity as per MAR definition? Please, specify.**
- Q7: Can you think of other examples of information related to the infrastructures, storage facilities and transportation (e.g. pipeline)? Please specify.**
- Q8: Can you think of other examples of information that are expected or required to be made public in relation to agricultural commodities? Please specify.**
- Q9: Can you think of other examples of information that are expected or required to be made public in relation to metal commodities? Please specify.**



ANNEX II - Legislative mandate to draft guidelines

Article 7(5) of MAR provides that «ESMA shall issue guidelines to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in point (b) of paragraph 1. ESMA shall duly take into account specificities of those markets».

ANNEX III - Cost-benefit analysis

Article 7 Article of Regulation (EU) No 596/2014 (MAR) contains the definition of inside information. In particular, Article 7(1)(b) of MAR provides a definition of inside information in relation to commodity derivatives, being «*information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets*».

Article 7(5) of MAR requires ESMA to issue guidelines to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in Article 7(1)(b) of MAR.

	Description
<i>Benefits</i>	<p>These guidelines are aimed at providing clarity by defining a list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets.</p> <p>Although such list should not be considered exhaustive and is meant to be indicative, it should assist investors, financial intermediaries, operators of trading venues and persons professionally arranging and executing transactions that deal in commodity derivatives to identify the information that directly or indirectly relates to a commodity derivative and directly relates to a spot commodity contract that is expected or required to be disclosed, for the purposes of complying with the market abuse regime, notably the prohibition of insider dealing. It should also assist the competent authorities for their monitoring and supervisory activities.</p> <p>Overall, the main benefit arising from these guidelines would be a clearer and more uniform application of the provisions on market abuse with reference to inside information in relation to commodity derivatives, even though these guidelines only address one of the criteria to be considered in the assessment of whether information is inside information.</p>

<p><i>Compliance costs</i></p> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>In principle, these guidelines will not burden the investors, financial intermediaries, operators of trading venues and persons professionally arranging and executing transactions that deal in commodity derivatives with any additional costs, as they do not directly set forth any additional requirement.</p> <p>It should be noted that for operators of trading venues and persons professionally arranging and executing transactions, there will be some elements of ongoing cost arising from the provisions on prevention and detection of market abuse, that also cover commodity derivatives. However, such costs are arising directly from the provisions laid down in MAR.</p> <p>The fact that ESMA is required to issue guidelines establishing a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed on the relevant commodity derivatives markets or spot markets should be read as an acknowledgement of existing information reasonably expected or required to be disclosed, and not as establishing categories of inside information.</p> <p>Therefore, the costs for operators of trading venues and persons professionally arranging and executing transactions as a result of the provisions on prevention and detection of market abuse are not stemming from the list that ESMA is required to establish, but from the mere existence of inside information in relation to commodity derivatives as defined under MAR.</p>
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ANNEX IV – Guidelines on Information on commodity derivatives markets or related spot markets

1. Scope

Who?

1. These guidelines apply to Competent Authorities and to investors, financial intermediaries, operators of trading venues and persons professionally arranging and executing transactions in commodity derivatives (together, “market participants”).

What?

2. In accordance with Article 7(5) of Regulation (EU) No 596/2014 of the European Parliament and of the Council, these guidelines provide a non-exhaustive and indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in point p of Article 7(1) of Regulation (EU) No 596/2014 of the European Parliament and of the Council.

When?

3. These guidelines apply from 2 months after publication of the translation into the official languages of the European Union.

2. References, abbreviations and definitions

ESMA	European Securities and Markets Authority
EU	European Union
MAR	Market Abuse Regulation; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC ¹²
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ¹³
OJ	Official Journal of the European Union

¹² OJ L 173, 12.6.2014, p. 1–61

¹³ OJ L 173, 12.6.2014, p. 349–496



REMIT

Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency¹⁴

¹⁴ OJ L 326, 8.12.2011, p. 1–16

3. Purpose

4. The purpose of these guidelines is to give indicative examples of information “which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets” as referred to in point (b) of Article 7(1) of MAR, which is one criteria of the definition of inside information relating to commodity derivatives under Article 7(1)(b) of MAR. These guidelines neither further specify the other criteria of the definition, (nor the concepts of preciseness of the information and its price sensitivity) nor do they impose additional requirements of information disclosure.

4. Compliance and reporting obligations

4.1. Status of the guidelines

5. This document contains guidelines issued under Article 7(5) of MAR. Competent authorities and market participants must make every effort to comply with guidelines and recommendations.

4.2. Reporting requirements

6. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA to [MARguidelinesGL1@esma.europa.eu]. A template for notifications is available in the ESMA website.
7. Market participants are not required to report whether they comply with these guidelines.

5. Guidelines on information which is reasonably expected or required to be disclosed on the relevant commodity derivatives markets or spot markets

8. In accordance with Article 7(5) of MAR, these guidelines aim to establish a non-exhaustive indicative list of information reasonably expected or required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in point (b) of Article 7(1) of MAR.
9. The fact that a particular type of information is not included in the list does not mean that it cannot be considered as inside information, nor does the inclusion of a type of information mean that it will automatically be inside information. The assessment as to whether the information is inside information will have to be conducted on a case by case basis against all of the criteria set out in Article 7(1)(b) of MAR.

10. For information to be considered “reasonably expected to be disclosed”, it should be (i) widely accessible in a non-discriminatory way after disclosure, (ii) contained in an official statement and not part of a private or personal opinion or analysis and (iii) not a rumour nor a speculative statement.
11. The following paragraphs set out examples of information that ESMA considers to be included in the non-exhaustive indicative list of information that is reasonably expected or required to be disclosed as referred to in Article 7(5) of MAR.

Examples of information relating directly to commodity derivatives

12. Information required to be published by trading venues in accordance with Article 58(1)(a) of MiFID II¹⁵ about the aggregate positions held by different categories of persons for the different commodity derivatives traded on their venue.
13. To the extent the commodity derivatives are standardised, market participants would reasonably expect to receive infrequent information about the circumstances affecting the fundamental characteristics of the commodity derivative or the contract on which such commodity derivative is based, such as a change of the underlying commodity specifications or of the underlying index of commodities, the periodic reshuffle of the underlying basket or a change of the delivery point.
14. Information about the stock levels or movements of commodities in warehouses and storage facilities required or reasonably expected to be published in accordance with the rules or practices of a commodity derivative market.

Examples of information relating indirectly to commodity derivatives without a related spot market

15. Information reasonably expected to be disclosed by public entities from the EU or outside the EU, such as Eurostat, the European Central Bank, National Central Banks or national

¹⁵ According to Article 58(1)(a) of MiFID II:

«1. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission allowances or derivatives thereof:

(a) make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives thereof traded on their trading venue, specifying the number of long and short positions by such categories, changes thereto since the previous report, the percentage of the total open interest represented by each category and the number of persons holding a position in each category in accordance with paragraph 4 and communicate that report to the competent authority and to ESMA; ESMA shall proceed to a centralised publication of the information included in those reports».

According to Article 58(4), second sub-paragraph of MiFID II:

«The reports referred to in point (a) of paragraph 1 shall specify the number of long and short positions by category of persons, any changes thereto since the previous report, percent of total open interest represented by each category, and the number of persons in each category».



statistical offices or institutes, in relation to official economic statistics and forecasts such as GDP, balance of payments data and inflation rates.

16. Information reasonably expected to be disclosed in a non-discriminatory way by information providers, non-profit organisations and governmental entities in relation to freight in the field of shipping.

Examples of information directly relating to a spot commodity contract

17. Information required to be publicly disclosed under REMIT for wholesale energy products (electricity and gas), including inside information as required under Article 4(1) of REMIT
18. Information about the auctions in the spot markets for energy commodity contracts (day auction, intraday auctions and balancing markets) issued after the day of delivery of power in accordance with legal or regulatory provisions under national law or the rules or practices of the spot market in energy commodities.
19. Statistical information made publicly available in the Joint Organisations Database Initiative (JODI) database about production, imports, exports, stocks, refinery intake and demand in relation to oil related products (e.g. crude oil, gasoline, kerosene) and in the JODI database for gas.
20. Official communications issued by conferences of oil producing countries when relating to decisions on production levels.
21. Information about the production, imports, exports and stocks of commodities on which a commodity derivative is based and transaction information about activity in the spot market of commodities reasonably expected to be disclosed in accordance with the practices of that spot market.
22. Statistical information reasonably expected to be disclosed by public entities from the EU or outside the EU, at national level in relation to commodities.
23. Information reasonably expected to be disclosed by inter-agency platforms aimed at enhancing food market transparency and encouraging coordination of policy action in response to market uncertainty, such as the Agricultural Market Information System (AMIS).
24. Information reasonably expected to be disclosed by private entities regarding changes in the conditions governing the storage of commodities (opening hours, fees, etc.), their load-in or load-out rate or more generally their capacity to process the commodity for storage and delivery, stock levels or movements of commodities in warehouses published in accordance with the practices of a spot commodity market.



25. Information reasonably expected to be disclosed in relation to the existence of an important disease affecting agricultural commodities or changes in the subsidy policies relating to these products that result from decisions of public entities.

26. Information concerning the activities undertaken and measures taken by the Commission, the Member States and other officially designated bodies entrusted with the duty to manage agricultural markets under the Common Agricultural Policy (CAP) and fisheries under the Common Fisheries Policy (CFP) insofar as this information is made public by them.