



European Securities and
Markets Authority

Consultation Paper

**ESMA's guidelines on information expected or required to be disclosed
on commodity derivatives markets or related spot markets under MAR**



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **20 May 2016**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

The collection of confidential responses is without prejudice to the scope of Regulation (EC) No 1049/2001¹. Possible requests for access to documents will be dealt in compliance with the requirements and obligations laid down in Regulation (EC) No 1049/2001.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43–48,

Who should read this paper

This paper may be specifically of interest to investors, financial intermediaries, operators of trading venues and persons professionally arranging and executing transactions in commodity derivatives.



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Acronyms used

ACER	Agency for the Cooperation of Energy Regulators
CP	Consultation Paper on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation (ESMA/2014/808) published on 15 July 2014
DP	Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649), published on 14 November 2013
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 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	The 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 Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (MAR)² 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 Article 7(1)(b) of Regulation (EU) No 596/2014.

Contents

Section 2 contains information on the background and mandate, while Section 3, in addition to the scope of the guidelines and the financial instruments and products covered, provides examples of information relating directly and indirectly to commodity derivatives and information directly relating to a spot market contract. Section 3 also contains a proposal of guidelines.

Annex I sets out a summary of the questions contained in this paper and Annex II includes a cost-benefit analysis for the guidelines.

Next Steps

ESMA will consider the feedback it will receive to this consultation with a view to finalising the guidelines and publishing a final report by late Q3 2016.

² 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; (OJ L 173, 12.6.2014, p. 1)

2 Background and mandate

1. Article 7(1)(b) of Regulation (EU) No 596/2014³ (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, of the relevant commodity derivatives markets or spot markets”*.
2. MAR requires ESMA to issue guidelines to establish a non-exhaustive indicative list of information which would fall under point c) above (Article 7(5) of MAR). 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 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; (OJ L 173, 12.6.2014, p. 1)



3. The ESMA's Discussion Paper published in November 2013 (ESMA/2013/1649) did not deal with this topic.

3 Analysis

3.1 Scope of the guidelines

4. The mandate for the Guidelines required under MAR 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.
5. Therefore, the purpose of these guidelines is not to specify further the concepts of preciseness of the information or the likelihood of its significant impact on the price in these guidelines, noting that these two criteria need to be assessed on a case by case basis.
6. The Guidelines should establish a non-exhaustive indicative list of information. So the fact that a particular type of information does not appear on the list does not mean that it cannot be considered as inside information, nor does the fact the type of information is listed means that it will automatically be inside information.
7. 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 contract. 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 types of information specific to these markets. Therefore, further consideration is given to the scope of the instruments or products concerned.

3.2 Financial instruments and products covered

8. With regard to inside information in relation to commodity derivatives, the following terms are defined under MAR:
 - a) Commodity, in Article 3(1)(14);
 - b) Spot commodity contract, in Article 3(1)(15);
 - c) Spot market, in Article 3(1)(16);
 - d) Commodity derivatives, in Article 3(1)(24).

9. “**Commodity**” means a commodity as defined in point (1) of Article 2 of Commission Regulation (EC) No 1287/2006⁴ (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*” and is to be fully applied in the context of MAR.
 10. “**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.
 11. “**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.
 12. “**Commodity derivatives**” means commodity derivatives as defined in point (30) of Article 2(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council⁵ (MiFIR). According to MiFIR, they are “*those financial instruments defined in point (44)(c) of Article 4(1) of Directive 2014/65/EU; which relate to a commodity or an underlying referred to in Section C(10) of Annex I to Directive 2014/65/EU; or in points (5), (6), (7) and (10) of Section C of Annex I thereto*”.
- Article 4(1)(44)(c) of Directive 2014/65/EU⁶ (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 determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures*”.
13. The derivative contracts referred to in points (5), (6) and (7) of Section C of Annex I of MiFID II should relate to commodities, noting though that directive does not provide a definition of commodities.
 14. Furthermore, the underlyings referred to in section C(10) of Annex 1 of MiFID II are:
 - climatic variables,
 - freight rates,
 - inflation rates, or

⁴ 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).

⁵ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014. on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

⁶ 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 2011/67/EU (OJ L 173, 12.6.2014, p. 349).



- other official economic statistics.

But it should be noted that the second part of section C(10) of MiFID II Annex I also mentions other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in Section C of Annex I.

15. Under MiFID II, the scope of the underlyings of commodity derivatives will be wider than the mere “commodities” as defined in 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.
16. 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, falling under the MAR scope, for certain types of “commodity derivatives”.
17. As a consequence, for certain types of commodity derivatives without related spot commodity contract traded on a spot market, the focus of the guidelines should be put on the information expected or required to be disclosed on the relevant commodity derivative markets.
18. Below is an initial analysis identifying those commodity derivatives with a related spot market and those without it. This could be of assistance for the purpose of listing the information required or expected to be disclosed in relation to the commodity derivatives themselves or their related spot markets.

Commodity derivatives with a related spot market:

19. It is assumed that, where the underlying of a commodity derivative is a commodity as defined in MiFID I implementing regulation, 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.
20. Based on MiFID I implementing regulation definition of commodities, immediate candidates as main categories of commodity products are metals, agricultural products, and energy.
21. For the purpose of defining data standards and formats for financial instrument reference data to be reported under Article 27 of MiFIR, ESMA has developed a classification of commodity derivatives in a RTS submitted to the European Commission on 28 September 2015⁷. Table 2 of this 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

⁷ Draft regulatory technical standards on supply of RTS 23: financial instruments reference data under Article 27 of MiFIR. See RTS 23 in Annex of the final report on Regulatory technical and implementing standards under MiFID and MiFIR (http://www.esma.europa.eu/system/files/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf)

regulation definition (i.e. “*goods of a fungible nature that are capable of being delivered*”), such as fertilizer, industrial products, paper and polypropylene.

22. That table, which should not be understood as a closed list, also identifies for each of the categories, sub-products as follows:

- For Agricultural commodities: Grains Oil Seeds, Softs, Olive oil, Dairy, Forestry, Seafood, Livestock, Grain.
- For Metal commodities: Non precious and Precious.
- For Energy commodities: Electricity, Natural gas, Oil, Coal, Inter Energy, Renewable energy, Light ends, Distillates.
- For Fertilizer: Ammonia, DAP/Diammonium Phosphate, Potash, Sulphur, Urea, UAN/urea and ammonium nitrate.
- For Industrial products: Construction, Manufacturing.
- For Paper: Containerboard, Newsprint, Pulp, Recovered paper.
- For Polypropylene: Plastic.

23. 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 Council⁸. Annex I of that regulation provides a very granular description of these agricultural products which are divided into the following sectors:

- cereals, Part I;
- rice, Part II;
- sugar, Part III;
- dried fodder, Part IV;
- seeds, Part V;
- hops, Part VI;

⁸ 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>)



- olive oil and table olives, Part VII;
- flax and hemp, Part VIII;
- fruit and vegetables, Part IX;
- processed fruit and vegetable products, Part X;
- bananas, Part XI;
- wine, Part XII;
- live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, Part XIII;
- tobacco, Part XIV;
- beef and veal, Part XV;
- milk and milk products, Part XVI;
- pig meat, Part XVII;
- sheep meat and goat meat, Part XVIII;
- eggs, Part XIX;
- poultry meat, Part XX;
- other products, Part XXIV but only limited to section 1 of Annex I.

Commodity derivatives without related spot market:

24. In the MAR definitions of spot market and spot commodity contract, “delivery” is a core/key element. The following underlyings should not be considered as being “goods of a fungible nature that are capable of being delivered”:
- climatic variables,
 - freight rates,
 - inflation rates,
 - other official economic statistics, and
 - assets, rights, obligations, indices and measures not otherwise mentioned in Section C of Annex I of MiFID II

25. So, although there can be commodity derivatives having such underlyings, it could be concluded that there is no related spot market for them.

Exclusion of Emission allowances and derivatives on Emission allowances

26. MAR specifies separately the definition of inside information in relation to emission allowances or auctioned products based thereon in Article 7(1)(c) of MAR. In addition, MiFID II establishes emission allowances as a particular category of financial instruments under point (11) of Section C of Annex I of that directive, and lists derivatives of emission allowances under point (4) of Section C of the same Annex.
27. It should be noted that the definition of commodity derivatives does not include derivatives of emission allowances, as point (4) of Section C of Annex I of MiFID II is not cross-referred to in the definition of commodity derivatives. It should also be noted that Article 7(5) of MAR, on the basis of which these draft guidelines are being established, mandates ESMA to establish guidelines for inside information in relevant commodity derivatives or spot markets referred to in Article 7(1)(b) of MAR, whereas inside information in relation to emission allowances or auctioned products based thereon is covered by Article 7(1)(c) of MAR.
28. Therefore, emission allowances and derivatives thereof are outside the scope of these draft Guidelines and are not further covered.

3.3 Information considered in the Guidelines

29. 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 could potentially distinguish between three categories of information 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,

30. Article 58(1)(a) MiFID II⁹ requires, subject to thresholds of minimum size and number of participants, the publication of weekly reports by operators of trading venues on the

⁹ Article 58 of MiFID II
Position reporting by categories of position holders



aggregate positions held by different categories of persons (investment firms or credit institutions; investment funds; other financial institutions; commercial undertakings) for the different commodity derivatives traded on their venue. Additionally, ESMA is required to proceed to a centralised publication of the weekly reports it must receive from the operators of the trading venues.

31. To the extent that the commodity derivatives are standardised, some examples of information that market participants would expect to receive are:
- a) Information about exceptional circumstances that change the fundamental characteristics of a standardised commodity derivative or the contract on which such a commodity derivative is based, such as a change in the underlying commodity specifications or of the underlying index of commodities or the periodic reshuffle of the underlying basket.
 - b) Other exceptional circumstances can relate to the market microstructure where the commodity derivative is traded, such as:
 - i. a change of tick sizes, strike prices, delivery points;
 - ii. a change of the requirements that market makers on the concerned commodity derivatives have to comply with in accordance to the rules of the trading venues. This includes for instance changes in the fee structures, including execution fees, ancillary fees, rebates, incentives and disincentives, established by the trading venue for market making activities;
 - iii. a change in the members of the trading venue entitled by the operator of the that trading venue to act as market makers or liquidity provider on commodity derivatives.

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.

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; 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.



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

32. With regard to commodity derivatives without a related spot market, indirect information could be considered as information concerning the underlying of the commodity derivatives.
33. An example of indirect information expected to be disclosed are the official economic statistics to be published usually by public entities. This can include for instances the economic forecasts (GDP, balance of payments published by Eurostat, the ECB and national central banks. This would be 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.

Questions:

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.

34. With regard to freight in the field of shipping, information is made available publicly in various forms by information providers, non-profit organisations and governmental entities. In the latter case, the information concerns statistics made publicly available on a regular basis (e.g. monthly)¹⁰. Information providers¹¹ 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. At least one known association¹² is offering to its paying subscribers a unified system of establishing rates in the tanker market.
35. As suggested in the section on “Establishing when an activity is to be considered ancillary to the main business” of the final report in MiFID II/MiFIR technical standards (Section 6.1.1; Ref: 2015/ESMA/1464)¹³, there can be a relationship between freight rates and the specific “goods” to which the freight contracts relate. Thus, information about the concerned “goods”, in particular about the volumes to be carried, may have an influence on the freight rate derivatives.

Question:

¹⁰ For instance, the Department for Transport in the UK publishes Freight statistics and some other maritime statistics, please see the link below: <https://www.gov.uk/government/statistics/port-freight-statistics-april-to-june-2015>

¹¹ E.g. Platts (<http://www.platts.com/commodity/shipping>) or the Baltic Exchange

¹² The WorldScale Association.

¹³ https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_-_final_report_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf



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.

36. The conditions affecting the transport of goods can have a major impact on derivative prices. This can take the form of the regulation or rules surrounding transport or events that can occur. These can affect the loading, the unloading or the transport itself. The causes can be many including a strike or weather conditions blocking the port, sanitary conditions such as bacteria found in the vehicles (train, boats, trucks) transporting the goods or in the storage areas. Other factors such as changes in taxes on the goods or in the rules of different players (for example, a change in opening hours of the silo) can also affect the transport process and thus the prices of the derivatives.

Question:

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.

3.3.3 Examples of information directly relating to a spot commodity contract

37. With regards to information directly relating to a spot commodity contract, Recital 20 of MAR identifies two examples for which information is required/expected to be disclosed:
- a) in accordance with a European Regulation, namely Regulation (EU) No 1227/2011 (REMIT)¹⁴ for wholesale energy products (electricity and gas);
 - 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)

38. With regards to wholesale energy products (electricity and gas), Article 2(1) of REMIT lists categories of information to be considered 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 REMIT¹⁵.
39. With regard to information, REMIT refers to other European Regulations (No 714/2009 and No 715/2009) whereby there should be periodic and regular publication of data. REMIT information also relates to 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. Finally, Article 4(1) of REMIT requires market participants to disclose inside

¹⁴ Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and Transparency (OJ L 326, 8.12.2011, p. 1).

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1227>

¹⁵ <http://www.acer.europa.eu/Media/Pages/3rd%20Edition%20ACER%20Guidance%20REMIT%20%282%29.pdf>



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.

40. As a matter of example, in relation to the spot electricity market, it can also be referred to Regulation (EU) No 543/2013 on submission and publication of data in electricity markets whereby information on the generation, load, transmission and balancing data shall be published by the European Network of Transmission System Operators (ENTSO) for Electricity.
41. In some jurisdictions, there exist 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 of power.

Oil related products and gas

42. The JODI database on oil makes publicly available statistical information about production, imports, exports, stocks, refinery intake and demand in relation to a 7 oil related products (e.g. crude oil, gasoline, kerosene). This database does not result from a legal or regulatory requirement but from the permanent commitment of JODI's participants, nearly 100 countries members of one of the 6 JODI partners organisations (APEC, EUROSTAT, GECF, IEA, OLADE, OPEC and UNSD), to provide on a regular basis monthly nationally validated data for central publication in the database. This database has operated since 2002. More details on the scope of the information made public can be found on <https://www.jodidata.org/oil/>.
43. It should be noted that JODI¹⁶ has recently launched a similar initiative for gas, the JODI database for gas. A permanent database is operating since May 2014, to which the members, 77 countries representing nearly 90% of the global natural gas supply and demand, commit to provide officially validated data on natural gas production, imports, exports, stocks and demand on a monthly basis. The JODI database for Gas was not in place when the MAR text was finalised. ESMA proposes to include it as another example of information expected to be disclosed.
44. ESMA also included in the proposed draft guidelines an additional example of information reasonably expected to be published. It relates to the news or press releases about the outcome of the conferences held by producing countries (e.g. OPEC) during which in particular production quantities by participating countries are discussed and agreed upon.

Question:

Q7: Can you think of other examples of information related to the infrastructures, storage facilities and transportation (e.g. pipeline)? Please specify.

¹⁶ <https://www.jodidata.org/>

Agricultural commodities

45. There exists in Europe 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 (Agregex segment of the IDEM) where the underlying is based on the last settlement price calculated by the CCP (CC&G)..
46. 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 bodies.
47. Another example of information concerns the activities undertaken and measures taken by the public bodies (e.g. the Commission, the Member States and other officially designated bodies) aiming 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 bodies, or 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.
48. Governmental entities or departments also publish statistical information in relation to agricultural commodities. They are usually statistics at national level. By way of example, in the UK the Department for Environment, Food & Rural Affairs, publicly disclosed monthly or weekly statistics on the prices of some commodities as well as policy related decisions¹⁷.
49. Private entities such as the operators of the storage firms may also have information that can have a significant impact of the pricing of agricultural commodities. This can include a change in the rules 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 (for instance, the appearance of bacteria or disease that can ruin or destroy the goods)

¹⁷ <https://www.gov.uk/government/statistical-data-sets/commodity-prices>



50. The Agricultural Market Information System (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 has operated since 2011. More details on the scope of the information made public can be found on <http://www.amis-outlook.org/>.

Question:

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.

51. In the past, there has been an example of disclosure practices in relation to an olive oil derivative market which is no longer operating as a trading venue. However, from past operations, that market was disclosing the following types of information:
- a) monthly figures on production, imports, exports, domestic market and stock (and eventual breakdowns of stock) for the last 5 yearly seasons;
 - b) information on the last operations traded in the spot market on olive oil, being this data provided by a pool system, managed by a non-profit entity including different private and public (European, national and regional) institutions. This system is a procedure for the capture, storing, assessment and instant publishing of data regarding prices, quantities and other features (date of trading, province of origin of olive oil, destination –internal market or exports-) of trading operations of olive oil in bulk.
52. A European venue where derivatives on agricultural commodities are traded is currently publishing on its website, as a good practice, daily reports about the stock figures concerning soft commodities (cocoa¹⁸; robusta coffee¹⁹).
53. ESMA also included in a generic form an example of information required to be published according to the rules or the practice of the relevant agricultural commodity derivatives markets, when the information concerns production, imports, exports and stored quantities (stocks) of agricultural commodities on which a commodity derivative is based as well as transaction information about the operations made on the spot market of those commodities.

Metal commodities

¹⁸ <https://www.theice.com/FuturesUSReportCenter.shtml>

¹⁹ <https://www.theice.com/marketdata/reports/173>



54. A European venue where metal commodities are traded is currently publishing on a daily basis reports about the stock figures in the approved warehouses. Such stocks provides information about:
- a) Daily opening and closing stock totals
 - b) Daily movement of stocks delivered in and delivered out of warehouses
 - c) Open tonnage and cancelled tonnage
 - d) Stocks totals per warehouse location
 - e) Stocks totals per metal grade (where relevant)
 - f) Reported metric tonnage
55. On the basis above, ESMA is considering including in a generic form 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 stocks movements of metal commodities in warehouses and storage facilities.

Question:

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.

3.4 Proposal of guidelines

ESMA guidelines on 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 under Regulation (EU) No 596/214

1. In accordance with Article 7(5) of Regulation (EU) No 596/214, 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, of the relevant commodity derivatives markets or spot markets.
2. The fact that a particular type of information does not appear on the list does not mean that it cannot be considered as inside information, nor does the fact the type of information is listed means that it will automatically be inside information, if the other criteria set out in Article 7(1)(b) of Regulation (EU) No 596/214 are met or not met.

Examples of information relating directly to commodity derivatives

3. Information required to be published by trading venues in accordance with Article 58(1)(a) of Directive 2014/65/EU²⁰ about the aggregate positions held by different categories of persons for the different commodity derivatives traded on their venue, subject to threshold of minimum size and number of participants.
4. To the extent that the commodity derivatives are standardised, below are presented some examples of exceptional information that market participants would expect to receive:
 - a) Information about the circumstances affecting the fundamental characteristics of the standardised commodity derivative or the contract on which such commodity

²⁰ 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 ("MiFID II").

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».

derivative is based, such as a change of the underlying commodity specifications or of the underlying index of commodities or the periodic reshuffle of the underlying basket; or

- b) Information about the circumstances affecting the market microstructure where the those commodity derivatives are traded, such as a change of tick sizes, strike prices, the delivery points, or a change of the requirements applicable to the market participants entitled to act as market makers according to the trading venue rules or a change in the market participants entitled to act as market makers or liquidity providers.

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

5. Information expected to be disclosed by public entities, such as Eurostat, the ECB and national central banks and statistic offices in relation to official economic statistics and forecasts such as GDP, balance of payments data and inflation rates.
6. Information expected to be disclosed in various forms 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

7. Information required to be publicly disclosed under Regulation (EU) No 1227/2011 (REMIT)²¹ for wholesale energy products (electricity and gas), including inside information as required under Article 4(1) of REMIT
8. 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.
9. 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 seven oil related products (e.g. crude oil, gasoline, kerosene) and in the Joint Organisations Database Initiative (JODI) database for gas.
10. Official communications issued by conferences of oil related products producing

²¹ Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and Transparency (OJ L 326, 8.12.2011, p. 1).

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1227>

countries when relating to decisions on production levels.

11. Information about the production, imports, exports and stocks of agricultural commodities on which a commodity derivative is based and transaction information about the operations made on the spot market of agricultural commodities disclosed in accordance with the rules or practices of that spot market.
12. Statistical information in relation to agricultural commodities disclosed by Governmental entities at national level.
13. Information disclosed by inter-agency platform 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).
14. Information concerning the activities undertaken and measures taken by the public bodies (i.e. the Commission, the Member States and other officially designated bodies) aiming 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.
15. Information disclosed by private entities regarding changes in the rules governing the storage of agricultural 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.
16. Information reasonably expected to be disclosed in relation to the existence of an important disease affecting the agricultural products or changes in the subsidy policies relating to these products that result from decisions of public entities.
17. Information about the stocks or stocks movements of metal commodities in warehouses and storage facilities published in accordance with the rules or practices of a spot commodity market.



56.

4 Annexes

4.1 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.**

4.2 Annex II – Preliminary high level 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>The 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 the 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.</p>
<i>Compliance costs</i> - <i>One-off</i> - <i>On-going</i>	<p>In principle, the 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</p>

any additional requirement.

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.

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.

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.