

Response from NASDAQ OMX Commodities to CESR and ERGEG's draft advice to the European Commission in the context of the Third Energy Package – record-keeping, transparency and exchange of information (Ref: CESR/08-753 and C08-FIS-07-03)

NASDAQ OMX Commodities offers international derivatives products, clearing operations and consulting services for energy related derivatives designed for banks, brokers, hedge funds and other financial institutions, as well as power utilities, industry, manufacturing and oil companies. The NASDAQ OMX Commodities offering is based on the Nord Pool International suite of products, including Dutch and German power derivatives, and Nordic carbon emissions instruments. The products are traded at Nord Pool ASA, the largest and most liquid energy exchange in Europe. NASDAQ OMX Commodities also includes a clearing house for all products traded at the Nord Pool energy exchange, making it a world leader in cleared power volumes.

Well-functioning wholesale energy markets are an essential part of efficient energy markets. We believe confidence in energy markets need to be strengthened and support the European Commissions work in this direction. We welcome the initiative to gather advice to the European Commission in the context of the Third Energy Package and the opportunity to comment on the draft response to Questions D.4 to D.6 – record keeping, Questions E.11 to E.18 and E. 19 – transparency and Questions D.7 to D.10 – exchange of information with the prospect of enhancing today's European legislation on these issues.

In our response we give general comments related to the three sections of the draft advice, rather than answers to specific questions.

Section I: Record keeping

Scope of supply undertakings

It is essential that the effects of the regulatory gap resulting from firms being exempt from MiFID and also not treated as supply undertakings under the Third Energy Package, is marginal, as referred to in paragraph 33 of the draft advice. However, we are not in a position to confirm the conclusion of the draft advice that the effect of the regulatory gap can be expected to be marginal. More evidence is needed to support this conclusion and we agree that an assessment of this should be done.

Content of record-keeping requirements

We support the view taken by ESME, referred to in the draft advice in paragraph 75, for a principles-based approach in the content of record-keeping. In addition to the minimum content, guidelines could be developed by CESR/ERGEG in cooperation with the industry, allowing the guidelines to take into account the development over time in the commodities market. As stated in the draft advice under paragraph 77, the transaction characteristics vary, but it is essential to also take into account the characteristics of the many types of contracts. For instance, for gross bidding specific information may be needed in order to avoid a perception of double reporting and point out connections between certain transactions.

The contents of the record-keeping requirements would in any case need to be explained in further detail, as has been done for the similar requirements under MiFID. For instance, for the electricity wholesale market (physical) on Nord Pool Spot AS, Nord Pool Spot acts as central counterparty and interposes itself between the buyer and the seller. For the market participant, the counterparty will consequently be unknown. On this market, the field "Counterparty Identification" will not be very informative as it will designate Nord Pool Spot as a direct counterparty, but may nevertheless need to be recorded.

We also share the concerns by one of the respondents to the Call for Evidence, mentioned in paragraph 72, that the specificities of the auction based spot markets have to be taken into account.

Methods and arrangements for record-keeping

We believe an electronic format for record-keeping would probably be manageable or even preferable for most of the undertakings subject to the record-keeping requirements. However, estimates of costs related to electronic record-keeping need to be gathered from the undertakings concerned. Also, other prescriptions regarding the format should be avoided, in order to take into account the quick pace of IT development and in order to avoid that the requirements to invest in IT systems become too burdensome.

Section II: Transparency

Summary

Pre and post trade transactions data must be close to real time and can therefore not be aggregated. Publishing data real time is most efficiently facilitated via a market place or an information hub. Fundamental information (and not transaction data as such) is also extremely important to the market participants. In our experience this greatly influences the prices of the commodities (including commodity derivatives) traded on the Nord Pool exchange. Yet we recognize that development of a transparent and liquid market evolves gradually and requires a long time horizon.

Below we shall explain our views in more detail.

Initial comments

As CESR and ERGEG most probably are aware of, Nord Pool has its primary focus on electricity and has mainly gathered experience in the electricity market and less in the gas market. Our comments might be influenced by this, however we assume that the overall principles regarding transparency will coincide for the electricity and gas markets.

We welcome the initiative to improve the overall transparency in the market and in relation to the forthcoming legislative processes support the obligatory publication of both fundamental and data and, as through this initiative, transaction related data. In our opinion, most markets in Europe must mature considerably before market participants have equal and non-discriminatory access to necessary market information.

The survey only focuses on the transparency in relation to trading data, and the survey paper is not always clear as to whether pre- or post trade transparency is discussed. For sake of clarity, we would like to specify that by pre-trade information we mean the information being given before a trade is concluded (i.e. current bids/offers and other information relevant to price discovery etc). By post-trade information we mean the data about a transaction actually having taken place (i.e. transaction time, volume, product etc).

In relation to transaction data only we share the views expressed in the draft advice that post-trade information should be the main focus.

Today, Nord Pool is Europe's largest and most liquid market places for physical and financial electricity contracts, and among the largest exchanges within trading of European Union emission allowances (EUAs) and global certified emission reductions. In the process of establishing such a marketplace, Nord Pool has had to work through many steps to mature the market. The Nord Pool experience shows that when the Regulated Market (RM) and the authorities in cooperation prepare grounds for the market to developed also into a financial market, the financial market's regulations proved to be very effective, especially as regards transparency of transactions. In a mature financial market, we are of the opinion that the pre- and post-trade transparency requirements in the equity and commodities markets should in principal be as similar as possible, with due considerations of the individual characteristics of each market.

Draft response to question E.11

Our opinion on the draft response to question E.11 is that the gathering and publication of transaction data through the regulators might be a step in the right direction; however we are not convinced that the proposed initiative will prove to be efficient and offer sufficient results, taking the costs and benefits of such an operation into consideration.

The publication of aggregated market data plays a very important role for the creation of statistics, for the investigations of possible misuse of a dominant position, for keeping track of the total size of the market and knowing what products have the highest turnover, etc. Although this is useful information to the market participants and helps build transparency, it is our view however, that if the goal is to achieve increased transparency and liquidity in the market, the initiatives described in the consultation paper and which mainly entail a significant time lag to publication is not sufficient.

It is our opinion that the market participants need real time transaction data to really benefit from the information in the daily operations. The published data can therefore not be of an aggregated nature.

The concerns about revealing counterparty information are baseless. There will always be speculations regarding the participants' positioning in the market. Increased transparency and liquidity will eventually attract new entries with different interests in the market, i.e traders, power producers etc., making it impossible to filter out the positioning of single participants.

One should also note that post-trade information becomes pre-trade information to other participants, and this interdependency on pre- and post-trade information is likely to become increasingly important and useful to the participants the closer to "real time" publication takes place.

For the same reason we are of the opinion that leading the information flow through a regulator will not serve the market in an efficient manner, as the time lag undoubtedly will be too long for the trading participants to benefit from the information.

In our experience, one should aim at publishing the information via an “information hub” much closer to the market than the regulator. The “information hub” may be an information provider, a RM, a MTF or any other trading platforms as i.e. an OTC-broker. Preferably, the market participants can gather their interests around one platform publishing both the fundamental and the transaction data, acknowledging the predictability of receiving all the necessary information gathered from one publishing source. This would also be more in line with the information sources common in the equity markets.

Apart from being an exchange (Regulated Market or “RM”) Nord Pool also functions as such an “information hub” as described above for both fundamental and transaction related market information. In addition to the exchange transactions, all OTC trades which are submitted for clearing through the clearing house, Nord Pool Clearing ASA, are also reported and published by Nord Pool¹. Market participants must within 15 minutes report OTC transactions to the clearing house specifying the contract time, price, product and volume. The data are published on the web pages of Nord Pool, and other participants use the transaction data to analyse the market. In our view, even a time lag of 15 minutes is too long in the most liquid products, since the market price may move a lot within 15 minutes. Being able to offer better IT applications in the future, and with participants growing more accustomed to reporting, it is likely that even shorter time limit for the reporting of OTC transactions will be imposed; i.e. 5 minutes and more in line with what is common on the equity markets.

A further very important aspect of publishing data closer to real time is the possibilities of an efficient market surveillance. An efficient market surveillance based on correct and reliable information is together with trading regulations and transparency a cornerstone in creating an efficient and trustworthy market for all participants. Also, a longer time lag from the trade takes place until reporting takes place opens up for greater possibilities of data manipulation and less risk of market abuse being discovered, since data can be disguised and may not be easily verified. Market participants often informs Nord Pool market surveillance about possible cases of market misuse, however in a scenario where the time between trades and publications is significantly delayed or even slightly delayed, this is in our view less likely to happen.

We believe that one should focus on creating a well functioning regime for multilateral trading, such as on RMs and MTFs, and thereby pave the way for transparent trading of standardized wholesale products on such platforms, instead of trying to “force” the whole European bilateral market into a transparency regime that may never be efficient enough for the purpose of bilateral trade.

The Nord Pool experience prove that a transparent and liquid trading platform in itself generates more liquidity and attracts new entries, also from participants with a pure trading perspective.

Draft response to question E.18

We believe that distortion of competition may result from unequal access to or lack of transaction information, and that lack of and/or discriminatory access to transactions data may result in a less well functioning market. Access to real time transaction data is important for price discovery, and gives indications as to what is a fair price at the moment of trade. If such information is unevenly

¹ It is a condition for clearing that the OTC-contracts are standardized and have the same properties as the instruments traded on the Nord Pool exchange, even though they are not matched on the exchange.

distributed, the market participants with the better information access may pick off other participants. This in turn may result in some participants withdrawing from the market, and can represent a barrier to entry for new participants. Nord Pool experience indicates that post-trade transaction data is valuable to the market participants, and any error in the published data immediately causes reactions from market participants.

In our view, the most important issue regarding access to information is whether the information is accessible to all participants on an equal and non-discriminatory basis. Whether the information is available free of charge or not is of less importance, as long as it does not exclude groups of participants and is offered on reasonable commercial terms (i.e. that the pricing structure is not tailored to suit e.g. only the biggest participants or participants having specific other characteristics).

In our view, publication of trade data with a time lag of one day or more will not remedy this problem. The price data will then be outdated, and of little value for participants.

Based on the above, we support the initiative to make trading data available to the market. However, we suggest focusing on information or trading platforms where the data can be published more efficiently and close to real time.

Draft response to question E.19

We support the initiative to specify key principles for trade transparency with respect to publishing some kind of market information in those countries where trading via MTFs or RMs are limited. As stated above however, we believe that the key to a well functioning market is to focus on creating efficient market places for multilateral trading and thereby pave the way for transparent trading of standardized wholesale products on these platforms, instead of trying to “force” the whole European bilateral market into a transparency regime that may never be efficient enough for the purpose of bilateral trade.

Based on the current lack of transparency and trading infrastructure in some national markets, we support the initiative from the regulators to improve the situation and introduce a key principle approach, particularly for post-trade transparency, to other platforms that might be available in such markets.

Applying satisfactory transparency regulation to bilateral trading, being published via the regulator, will in our opinion be costly, and the data are likely not to be published in time for traders to really benefit from the data. For such information to be useful, the following characteristics must be published.

- The Product Series
- The transaction volume
- The contract price (and currency)
- The trading time

Information published to the regulators should also be available to market places (MTFs or RMs), and in this respect we would like to point out the importance of having the data in a format making it useful for further analysis and publication across technical platforms, markets and country borders. The technical aspects of such data exchange should be subject to separate evaluation.

Further, in cases where the contract is an “off-market transaction” this must be indicated. Examples of such trades may be combinations of different products where the price of each individual product

deviates from the market price at the time of the trades, or transactions arising from an option exercise.

Finally, we will again stress the importance of publishing trade information with the smallest possible time lag. This also implies that the data cannot be aggregated, however only trades in standardised contracts should be published.

Section III: Exchange of information

We welcome provisions on extensive exchange of information. Efficient and relevant exchange of information will enable efficient supervision from regulators, thereby contributing to enhancing confidence in the markets. An efficient system for exchange of information will also reduce the risk for firms being subject to double reporting to different authorities, thereby reducing the administrative burden for the firms. A 'single point of contact' approach would be preferable.

However, we also wish to emphasize the need for provisions and arrangements to ensure the confidentiality of information reported to regulators and exchanged among them and that the information is used only for the relevant purposes. In an anonymous market, the publication of counterparty information, may distort the market.

Should you have questions or wish to discuss the content of this response further, please do not hesitate to contact Elina Yrgård, tel. +46 8 405 68 14 or email elina.yrgard@nasdaqomx.com.