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Comments by NasdaqOMX Commodities and Nord Pool Spot

to the

Proposal for a Regulation of the European Parliament and the Council on Energy Market Integrity and Transparency

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Nord Pool Spot and NasdaqOMX Commodities has been given the opportunity to comment on the proposal for the regulation on energy market integrity and transparency dated 8 December 2010. Below are the joint comments from Nord Pool Spot and NasdaqOMX Commodities. The comments are to a large extent based on our experiences with developing and enforcing similar rules in the Nordic market over a period of more than 10 years.

General Comments

In general it is important that the rules regarding insider trading and market manipulation are harmonized between REMIT and the Market Abuse Directive (MAD). It appears that there are deviations in the definitions both regarding insider trading and market manipulation. We cannot rule out that there might be conflicts when enforcing market abuse sanctions where both REMIT and MAD are used as reference. Thus, there might be situations where information is deemed to be classified as insider information according to either REMIT or MAD, but not the other. It would therefore be a great advantage if these definitions are harmonized as much as possible.

Article 2 - Definition of inside information.

Under the definition of inside information it is stated:

> *"inside information" means precise information which has not been made public, relating directly or indirectly to one or more wholesale energy products and which, if it were made public, could significantly affect prices of such wholesale energy products;"*

We suggest that the term "could" in the above is replaced by "would be likely to" as this is more precise, and is also in line with the definition in the Market Abuse Directive.

The definition of inside information should not include information relating to the participant's own trading strategies. If such an exception is not in place, it appears that having information regarding your own plans for trading will be inside information if the plans are of a nature so that they are likely to affect prices significantly if made public. We therefore suggest the following definition of inside information:

> ***"inside information" means precise information which has not been made public, relating directly or indirectly to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect prices of such wholesale energy products.***
>
> ***The definition above shall not include information regarding market participants' own strategies for trading in wholesale energy products"***

Article 2 - Definition of Market Manipulation

Under the definition of market manipulation it is stated:

> *Market manipulation means:*
> *(a) entering into transactions or the issuing of orders to trade in wholesale energy products, which:*

– give, or are likely to give, false or misleading signals as to the supply of, demand for or price of wholesale energy products;
or
– secure or attempt to secure, by a person or by persons acting in collaboration, the price of one or several wholesale energy products at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for doing so are legitimate and that these transactions or orders to trade conform to accepted market practices on the wholesale energy market concerned; or
– employ or attempt to employ fictitious devices or any other form of deception or contrivance;

The introduction of the word "attempt" deviates from the definition of MAD. And in section 3 the notion of "attempt to manipulate the market" is further described as actions which have the **intention of:**
– giving false or misleading signals as to the supply of, demand for or price of wholesale energy products;
– securing the price of one or several wholesale energy products at an abnormal or artificial level; or
– employing a fictitious device or any other form of deception or connivance relating to a wholesale energy product
– disseminating information through the media, including the Internet, or any other means with the intention of giving false or misleading signals as to wholesale energy products.

We recommend removing the word "attempt" as this only adds situations where the attempt to manipulate has failed, i.e. there has not been any effect on the market, and there was not likely to be any effect on the market.
We therefore suggest the following text:

Market manipulation means:
(a) entering into transactions or the issuing of orders to trade in wholesale energy products, which:

– give, or are likely to give, false or misleading signals as to the supply of, demand for or price of wholesale energy products;

or

– secure, or are likely to secure, by a person or by persons acting in collaboration, the price of one or several wholesale energy products at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for doing so are legitimate and that these transactions or orders to trade conform to accepted market practices on the wholesale energy market concerned;

or

– employ fictitious devices or any other form of deception or contrivance;

Further, we suggest removing Article 2, section 3

As an example of what will be considered market manipulation, it is stated:

> *"By way of example, making it appear that the availability of electricity generation capacity or gas availability, or the availability of transmission capacity is other that the capacity which is actually physically available constitutes market manipulation."*

We believe that this is very strict, and it may be unfortunate. Our interpretation of this is that an error in the data published on a transparency platform will by definition be market manipulation. We believe that there must be room for subjective elements when determining whether sending such signals constitutes market manipulation. For example, if such signals are sent from a person not acting negligently or intentionally, it may appear unreasonable that this should be deemed to be market manipulation. Similarly, if the information is not likely to have a significant impact on the market, it may seem unreasonable to classify it as market manipulation. We therefore suggest changing this paragraph as follows:

> ***"By way of example, making it appear that the availability of electricity generation capacity or gas availability, or the availability of transmission capacity is other that the capacity which is actually physically available may constitute market manipulation."***

Article 2 – Definition of "wholesale energy product"

Regarding the definition of contracts for electricity it is unclear whether these include intraday and balancing contracts. As argued under the discussion of Article 3, we believe it is unfortunate if the intraday market and the balancing market are subject to the prohibition of insider trading. However, the prohibition on market manipulation seems to be beneficial also for these markets.

With regards to derivatives relating to electricity it is unclear whether it includes derivatives with both financial settlement and physical delivery.

Article 2, section 5 – Definition of "wholesale energy market"

We cannot see that this definition is not used in the document. In the definition it is referred to any marketplace within the Union on which wholesale energy products are traded. If this definition is to be used, the term "marketplace" should be further specified, as it is unclear what is classified as a marketplace. Will for example a broker be classified as a marketplace? Does it include trading contracts between two bilateral parties that will be subject for clearing?

Article 3, section 1

Section 1, letter a states that persons who possess inside information shall be prohibited from "using that information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates"

It is unclear whether this implies an absolute prohibition of trading, or if trading is only prohibited if the information is used in the trading. We therefore suggest removing the phrase "using that information by". However, it is very important that the regulation does not give unintended results. In particular, it is problematic if market participants holding inside information are excluded from taking part in the spot market. For example, if a large producer is in possession of inside information

at the time for gate closure in the spot market, it must be possible for that producer to take part in the auction in order to avoid the potentially very unfortunate impact on the market if the producer is prohibited from participating.

With respect to the intraday market and the balancing market we believe the benefits from introducing a prohibition of insider trading are very limited, while the costs may be considerable. For example, it may be very unfortunate if a participant may not offer its resources in the balancing market when having inside information. Large companies may be in insider position relatively often, and the risk of being sanctioned for insider trading may induce the company not to place orders in the balancing market and intraday market. A worst case scenario would be if the TSOs have a large need in the balancing market that cannot be met because the largest participants are prohibited from participating in the market because they possess inside information at the time. Especially in smaller areas with one dominating producer this may be a considerable risk.

Persons who possess inside information are prohibited from trading. However, it appears that a person can be a physical person, or a corporate body. In cases where a corporate body possesses inside information, it will be unfortunate if this corporate body is prohibited from all trading. We therefore suggest that the regulation allows for such corporate bodies to continue trading even if the corporate body possesses inside information provided that they have implemented so called "Chinese walls" hindering the persons performing trading to access the inside information.
Based on the above we suggest that the following exceptions are introduced in the rules relating to insider trading:

- When trading in the day-ahead auction, provided that the inside information is not taken into consideration
- When trading in the intraday market or the balancing market.
- If a company holds inside information, provided that there has been implemented "Chinese walls" ensuring that the employees performing trading cannot access such inside information.

Article 3, Section 1, letter b states that persons holding inside information shall be prohibited from disclosing that information unless such disclosure is made in the normal course of the exercise of their employment, profession or duties. We believe that this should be inverted, so that persons holding inside information shall be obliged to immediately disclose inside information unless this regulation opens for keeping the information confidential. This will clarify that disclosing such information shall be the main rule. It may be persons holding inside information should only be obliged to publish information relating to their own business or facilities for production, consumption or transmission where the person holding the inside information has the balance responsibility for. Prohibiting someone from publishing insider information if the information is not confidential is in any case very problematic as it will entail restrictions on trading for the person holding the information, potentially over a long time period. Prohibiting disclosure simply because disclosing such information is not "made in the normal course of exercise of their employment, profession or duties" seems to be unreasonable.

Article 3, Section 4, states that the market participant may delay disclosure provided that this would not be likely to mislead the public. We cannot see how price sensitive information can be withheld without misleading the public, and would like to have a further specification of what is meant in this paragraph.

Section 4, second paragraph opens for delaying the disclosure of information provided that the market participant "does not make decisions relating to trading in wholesale energy products based upon this information". This indicates that it will not be prohibited to trade, but that it is prohibited to make decisions about trading based upon the information. Such an interpretation will make it very difficult to establish that there has been conducted insider trading.
We suggest that this paragraph is removed, alternatively changed so that it only regulates the delay of publication. With respect to insider trading, the rules set out in section 1 should apply in the same way here as for all other cases.

Article 5 - Giving the Commission the powers to adopt delegated acts
Article 5 gives the Commission the right to adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, specifying the definitions set out in Article 2(1) to (5). However, the process leading to the adoption of such acts is not described. It is essential that stakeholders are given the opportunity to give input in the process etc. In order to understand the implications of Article 5, it is necessary that the process of adopting delegated acts is described.

Article 9, section 2
Article 9, section 2 states:

> *"The Agency may decide to make publicly available parts of the information which it holds provided that commercially sensitive information on individual market participants or individual transactions is not released."*

In the event of a breach of the regulations set out in this document that is sanctioned, it should be possible to publish the foundation for the sanction, even if the sanction is based on information that is commercially sensitive.

Article 11
Article 11, section 2 gives an obligation to the national regulatory authorities to report to the Agency if they have reasonable grounds to suspect that acts contrary to the provisions in this Regulation, are being, or have been carried out either in that Member State or in another Member State.
Nord Pool Spot have had similar regulations to those described in this regulation in place for a number of years. It is our experience that we have a number of breaches taking place every year, especially in relation to publication of insider information, but also relating to insider trading. Most of these cases are caused by internal breaches of routines, and are not intentional. Further, the financial gain from the breaches is often very limited, and may also be negative. It should therefore be considered whether or not it is beneficial to report all cases, or if the reporting to the Agency should be limited to significant breaches and breaches that also involve activities or companies from other member states.

We suggest the following:

> ***"National regulatory authorities shall inform the Agency in as specific a manner as possible where they have reasonable grounds to suspect that <u>significant</u> acts contrary to the provisions of this Regulation, are being, or have been, carried out either in that Member State or in another Member State."***