

EEX, Nord Pool and Powernext

Comments to the
CESR Consultation Paper on
Market Abuse – Additional Level 2
Implementing Measures

June 2003

This paper follows the Position Paper transmitted by EEX, Nord Pool and Powernext to CESR after the *ad hoc* market experts meeting held in Paris on 3 March 2003. It comments the Consultation Paper published by CESR in April 2003 on Market Abuse – Additional Level 2 Implementing Measures¹.

General comments

EEX, Nord Pool and Powernext welcome again the opportunity to comment on the proposed CESR advice on Level 2 implementation measures on market abuse.

We are globally in line with the principles contained in the Consultation Paper. It is indeed important to foster the integrity of the financial commodities derivatives markets in a manner that takes into account the specificity of the commodity derivatives market.

The comments under will focus on specific issues and proposals aiming and precising and improving CESR advice. They were drafted with in mind both the electricity markets² and the consideration that they have to be valid for all commodity derivatives markets.

Accepted market practices

Question 1: Appropriateness of CESR approach

EEX, Nord Pool and Powernext are in line with the approach proposed by CESR. Focussing on the characteristics of particular market practices will enable the Competent Authorities to take into account the specificity of the commodities derivatives markets and in particular the energy markets.

Question 2: Principles, factors and procedures

We would suggest to add the following factor in the non-exhaustive list of §35:

“Consideration of the existence of the practice in comparable markets of other jurisdictions. The more the practice is established in a comparable market, the more it is likely to be accepted ;”

The proposed factor would reflect the CESR proposal that, when assessing whether a practice is acceptable, Competent Authorities should also consult other Competent Authorities “in other jurisdictions where comparable markets exist”³. The existence of

¹ Ref: CESR/03-102b available on the CESR website: <http://www.europefesco.org/v2/default.asp>.

² The fundamentals of the line based energy markets – where the energy is transferred through a grid – makes the gas and electricity specific and different from the other energy markets such as the oil market.

³ First bullet point of §36, p.12.

an accepted market practice in another jurisdiction where there is a comparable market is indeed a characteristic of the practice.

The proposed factor would be useful when considering new or emerging markets such as the energy market. The participants of emerging markets will be able to benchmark their practices to the accepted market practices of the most established comparable markets. It is expected that the practices observed in such mature markets such as Nord Pool be the reference for the other comparable emerging markets.

Question 3: Regulated vs OTC markets

As far as commodities derivatives markets are concerned, EEX, Nord Pool and Powernext are not in favour of any distinction between the regulated markets or MTFs and the OTC market.

In the commodities derivatives markets, exchanges play a key economical role as they provide reference prices. However, most transactions are made over-the-counter⁴ and exchanges are a way to trade amongst other. There is no difference of nature between the two other than the variety of available contracts and the existence of market rules on the exchanges.

Such a distinction:

- Would trigger a “flight to safe-harbour” in favour of the OTC market which will be perceived as a less regulated environment. This would diminish the overall integrity of the commodities derivatives markets and would eventually threaten the very existence of exchanges as they will suffer a regulatory disadvantage.
- Would be difficult to establish and justify. Why would a practice be accepted on the OTC market and not on the exchanges or vice-versa?

Question 5: Examples of accepted market practices

1) Market practices should be deemed to be acceptable when, amongst other:

- They bring transparency to the market, in particular in terms of access to the information relating to offer and demand that contribute to the formation of the price of the financial instruments. In that respect, a number of individuals and companies should be treated as insiders as they have access to non public information. The concerned persons are those who access this information because they belong to producers of electricity or they are state officials.
- They grant access to the market and equality of the participants in the market.

⁴ With the exception of certain markets such as Nord Pool.

- They reinforce the integrity of the market both in terms of market surveillance and control and in terms of market organisation.
- They foster liquidity.

EEA members should strive to harmonise their practices in order to implement the best ones, which CESR should encourage to adopt.

2) The market practices at the Nordic Power Exchange, Nord Pool, the longest established market can be taken as one example of accepted market practices in the electricity market. Please note that the specificity of the Nordic market is that most transactions in electricity are carried out on or are cleared through Nord Pool.

Historically, there has been a common interest among producers, retailers and traders (market participants) to create an efficient financial electricity market. In order to achieve this there has been acceptance from the market in setting up common disclosure rules at the exchange. Such rules have been developed in close dialogue with the market participants. The main principles have been to make the highest level of transparency and equal requirements for all market participants, and considering the high level of integration between the underlying physical electricity market and financial electricity market.

Disclosure rules

The disclosure rules apply for all market participants including all major producers domiciled in the Nordic countries. An important aspect to bear in mind is that all market participants are professional corporate entities.

Pursuant to the principle disclosure rule all participants are obliged to inform the exchange about matters that are likely to have an impact on market prices.

Notwithstanding the above principle disclosure rule market participants shall notify the following matters relevant to plants or facilities for production, consumption or transmission within or directly connected to the Nordic electricity exchange area. The following figures are given as a matter of implementation example:

- Maintenance plans concerning more than 200 MW for the next 6-week period to be notified as soon as decided
- Maintenance plans concerning more than 400 MW for the next 3-year period to be notified as soon as decided
- Failure or outage concerning more than 200 MW to be notified as soon as possible and not later than 1 hour after the event occurred

Disclosure agreements

Accepted practice has also been formalised in agreements with the Nordic transmission system operators in disclosing information about hourly actual production, consumption and transmission volumes for the relevant national geographical areas or transmission connections. Further, such disclosure also includes trading information from the

common Nordic balancing power market. In addition weekly updates on reservoir contents covering the same national geographical areas are also disclosed.

Transaction information and reporting

All exchange trading is executed electronically and simultaneously disclosed to the market through trading platform, real-time feed and web site.

Market acceptance has been reached with market participants in setting up rules for reporting of individual transactions in listed financial electricity products matched outside the exchange and to be cleared by Nord Pool Clearing. Such transactions are to be reported electronically within 15 minutes after the trades being executed and subsequently being published electronically via web site and trading platform.

Inside information in commodity derivatives markets

Question 6: Inside information for commodity derivatives

EEX, Nord Pool and Powernext welcome the reference to the underlying commodity markets. The link between the financial and the commodity markets are indeed very tight and financial markets should not be less fair and efficient than their relevant commodity markets. If an information is expected to be published or available on the commodity market, users of the financial markets should benefit from such information.

Question 7: Further information

EEX, Nord Pool and Powernext consider that the proposed advice encompasses all information that has to be disclosed provided that the definition includes information that has a significant impact on the prices of the relevant financial instruments. It is indeed because the information has an impact on future prices that it has to be disclosed.

Question 8: Information relating to underlying commodity markets

As CESR refers to the “legal or regulatory provisions, market rules, contracts or customs of the relevant underlying commodity market”⁵, We would considers that the appropriate references are made to the underlying markets. It should however be stressed that for this sentence to remain efficient, no change or cancellation should be made.

Question 9: Additional guidance

1) EEX, Nord Pool and Powernext note that CESR “should take full account of the key objectives of the Market Abuse Directive: the need to increase market integrity”⁶. In

⁵ §46 iii and §47 ii b page 15 of the Consultation Paper.

⁶ Cf. §13, second bullet point, p. 5 of the Consultation Paper.

light of this key objective, CESR should elaborate its advice so that it raises the integrity of the markets rather than simply taking note of current practices. In the case of commodity derivatives markets, there are little ways to improve their integrity because they mainly depend on practices observed on the commodity markets. CESR must however still take into account the overall objective of increasing integrity and thus market confidence.

This is why it can be proposed to add the following statement at the end of §47:

“Given that the information expected to be received on the commodity derivatives markets mainly depends on the observed practices on the relevant underlying commodity markets, best practices of information disclosure should, whenever possible, be encouraged at commodity markets level as they contribute to increase the integrity of the financial markets.”

Such a statement is the only way for CESR and the Competent Authorities to promote market integrity at commodity derivatives level as the commodity markets are out of their scope. The maximum possible is to indeed to state the importance of raising the standards on the commodity markets when possible, ie when these markets are within reach of the relevant European and Members States authorities.

EEX, Nord Pool and Powernext would also like to highlight that the use of inside information in the commodity derivatives markets can be made by those who have information on the offer or demand on the physical market. An inside information obtained on the physical market can lead to a transaction on the financial market.

Finally, such a statement would have the same value of the recitals of the Directives and be in line with the principle of not seeking “to produce a legal text”⁷ but formulating an advice on technical measures that enable the Market Abuse Directive to be really implemented.

⁷ Cf. §13, third bullet point, p. 5 of the Consultation Paper.