



EUROPEAN COMMISSION
DG Competition

Case M.11241 - EEX / NASDAQ POWER

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 22
Date: 18/8/2023



EUROPEAN COMMISSION

Brussels, 18.8.2023
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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Konkurrensverket (the Swedish
Competition Authority)
Ringvägen 100
103 85 Stockholm
Sweden

Subject: **Case M.11241 – EEX / NASDAQ POWER**
Request for referral by the Swedish Competition Authority to the
Commission pursuant to Article 22(1) of Council Regulation (EC) No.
139/2004¹ and Article 57 of the Agreement on the European Economic
Area²

Ref.: Letter of the Danish Competition and Consumer Authority of 17 July 2023,
Letter of the Finnish Competition and Consumer Authority of 17 July 2023,
Letter of the Swedish Competition Authority of 4 August 2023, and
Letter of the Norwegian Competition Authority of 8 August 2023

Dear Sir or Madam,

1. INTRODUCTION

- (1) With the above-mentioned letters of 17 July 2023 in application of Article 22(1) of the Merger Regulation, the Danish Competition and Consumer Authority (the “Danish NCA”) and the Finnish Competition and Consumer Authority (the “Finnish NCA”) formally request the Commission to examine the concentration whereby European Energy Exchange AG (“EEX”, Germany), a solely controlled subsidiary

¹ OJ L 24, 29.1.2004, p. 1 (the ‘Merger Regulation’). With effect from 1 December 2009, the Treaty on the Functioning of the European Union (‘TFEU’) has introduced certain changes, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p.3 (the ‘EEA Agreement’).

of Deutsche Börse AG (Germany), intends to acquire the European power trading and clearing business of Nasdaq, Inc. (“Nasdaq Power”) (the “Transaction”). EEX together with Nasdaq Power are referred to as the “Parties”.

- (2) With the above-mentioned letter of 4 August 2023, the Swedish Competition Authority (the “Swedish NCA”) requests to join the requests submitted by the Danish and Finnish NCAs.
- (3) With the above-mentioned letter of 8 August 2023, the Norwegian Competition Authority (the “Norwegian NCA”) requests to join the requests submitted by the Danish and Finnish NCAs.
- (4) Denmark, Finland, Norway, and Sweden are referred to hereinafter as the “Referring Countries”.
- (5) Pursuant to Article 22(1) of the Merger Regulation, one or more Member States may request the Commission to examine any concentration as defined in Article 3 of the Merger Regulation that does not have a Union dimension within the meaning of Article 1 of the Merger Regulation but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request must be made within 15 working days of the date of the notification of the concentration, or if notification is not required, otherwise made known to the Member State.
- (6) Pursuant to Article 22(2) of the Merger Regulation, any other Member State may join the initial request within a period of 15 working days of being informed by the Commission of the initial request. Pursuant to Article 6(3) of Protocol 24 to the EEA Agreement, any EFTA State may join the request within a period of 15 working days from the day on which the Commission informed the EFTA Surveillance Authority of the initial request. The Commission shall decide whether to examine the concentration within 10 working days after the expiry of the 15 working days period during which the other Member States have the right to join the initial request.
- (7) It follows from the wording, legislative history, and purpose of Article 22 of the Merger Regulation that the provision is applicable to all concentrations as defined in Article 3 of the Merger Regulation and not only those that meet the jurisdictional criteria of the national merger control laws of the Member States. This has been confirmed by the General Court in the *Illumina* case.³
- (8) In the present case, the Parties have not notified the Transaction in Denmark, Finland, Sweden, Norway or any other Member State. EEX confirmed that the Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation and does not meet the notification requirements in any Member State.⁴
- (9) On 26 June 2023, the Danish NCA and the Finnish NCA received a submission from a market participant (the “Complainant”), outlining why it considers that the Transaction would have a negative impact on competition (the “Complaint”).⁵ On the same day, the Complainant also shared the Complaint with the Commission and

³ Judgment of the General Court of 13 July 2022 *Illumina v Commission*, T-227/21, EU:T:2022:447.

⁴ EEX’s response of 3 July 2023 to the Commission’s request for information dated 28 June 2023.

⁵ The Danish NCA and Finnish NCA confirm that they did not have any knowledge of the Transaction prior to receiving the Complaint.

the national competition authorities (“NCAs”) of Germany, Norway and Sweden. The Commission held calls with the Complainant and the Complainant’s counsel, as well as with market participants, in order to better understand the Complaint, and gather information on whether the legal requirements for a referral pursuant to Article 22 of the Merger Regulation are met and whether such a referral would be appropriate.⁶

- (10) The Commission sent a request for information (“RFI”) to the Parties on 28 June 2023 (“RFI 1”), to which EEX responded on 3 July 2023 and 5 July 2023, and Nasdaq Power responded on 5 July 2023. The Commission sent further requests for information on 4 July 2023, 6 July 2023, 26 July 2023, 27 July 2023 and 7 August 2023 (“RFI 2”, “RFI 3”, “RFI 4”, “RFI 5” and “RFI 6” respectively), to which EEX responded on 5 July 2023, 10 July 2023, 28 July 2023, 31 July 2023, and 9 August 2023. The Commission held calls with the representatives of the Parties on 12 July 2023, 20 July 2023 and 10 August 2023.
- (11) The Commission received the referral requests made by Denmark and Finland pursuant to Article 22(1) of the Merger Regulation on 17 July 2023 (the “Referral Requests”).
- (12) On 18 July 2023, in accordance with Article 22(2) first indent of the Merger Regulation, the Commission informed the competent authorities of the other Member States and the EFTA Surveillance Authority of the Referral Requests.
- (13) The Commission also informed the Parties on 18 July 2023 of the Referral Requests by letter summarising the contents of the Referral Requests and inviting the Parties to submit their observations. On 2 August 2023, EEX and Nasdaq Power each made a submission to the Commission laying out their arguments against a referral of the Transaction to the Commission (the “EEX Response” and the “Nasdaq Power Response” respectively).
- (14) Within the time limit of 15 working days after being informed by the Commission, as foreseen by Article 22(2), second indent, of the Merger Regulation, the following Member States and EFTA States joined the Referral Requests: Sweden (on 4 August 2023) and Norway (on 8 August, 2023). On 10 August 2023, the Commission informed the Parties that these Member States and EFTA States had joined the Referral Requests. On 14 August 2023, the Parties submitted a joint submission to the Commission laying out their arguments in view of the requests by Sweden and Norway (the “Parties’ Joint Response”).

2. THE PARTIES AND THE OPERATION

- (15) **EEX**, solely controlled by Deutsche Börse AG (“DBAG”), is the leading energy exchange in Europe. It develops, operates and connects markets for energy and commodity products, connecting more than 800 trading participants worldwide. In particular, it provides trading and clearing services for various commodities, including power commodities in various Member States such as Germany, France, the Netherlands, Luxembourg, and the Nordics (Denmark, Norway, Sweden and Finland).⁷ EEX’s clearing services are provided through its clearinghouse, European

⁶ In addition, two other market participants contacted the Commission to share their preliminary views on the Transaction on 14 and 19 July 2023.

⁷ References to the “Nordic(s)” in this decision shall include Denmark, Finland, Norway and Sweden.

Commodity Clearing (“ECC”). In 2022, DBAG achieved a turnover of EUR [...] worldwide of which EUR [...] were achieved in the EEA. EEX alone achieved a turnover of EUR [...] worldwide including EUR [...] in the EEA.

- (16) **Nasdaq Power**, currently solely controlled by Nasdaq, Inc., provides a regulated marketplace offering trading and clearing of Nordic, French and German power futures contracts, as well as of futures contracts for EU emission allowances (i.e. futures contracts to hedge the risk of price fluctuation in the rights to emit carbon dioxide or carbon-equivalent gas). Nasdaq Power is active mainly in Denmark, Finland, Germany, Norway, the Netherlands and Sweden. In 2022, it achieved a turnover of EUR [...] worldwide, including EUR [...] in the EEA.⁸
- (17) The Transaction consists in the acquisition of sole control by EEX over Nasdaq Power. Specifically, EEX will acquire the assets that comprise the Nasdaq Power business, namely, customer contracts for the open positions for Nordic, German and French power derivatives and certain European Emission Allowances⁹ (so-called EU carbon European Union Allowance (“EUA”) futures), [...].¹⁰ Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
- (18) The Transaction does not have Union dimension within the meaning of Article 1 of the Merger Regulation, according to the information provided by the Parties, as the relevant turnover thresholds are not met.¹¹

3. ASSESSMENT OF THE REFERRAL REQUEST

- (19) In order for a referral to be made by a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 22(1) of the Merger Regulation.
- (20) As to the procedural condition, Article 22(1) requires that: *“the referral shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned”*.
- (21) As to the substantive conditions, Article 22(1) requires that the concentration must: (i) *“affect trade between Member States”*; and (ii) *“threaten to significantly affect competition within the territory of the Member State or States making the request”*.
- (22) Once these conditions are fulfilled, the Commission has discretion whether to accept or reject the referral request. The Commission shall exercise its discretion based on the guidance of its relevant Notice on Case Referral in respect of concentrations (the

⁸ Parties’ response to RFI 3.

⁹ European Emission Allowances set the volume of greenhouse gases that can be emitted by power plants, industry factories and aviation sector covered by the EU Emissions Trading System (EU ETS) in order to achieve climate neutrality by 2050.

¹⁰ EEX’s response of 3 July 2023 to RFI 1, question 4.2. For the avoidance of doubt, the clearing infrastructure does not form part of Nasdaq Power (as sold to EEX) and will be retained by Nasdaq, Inc.. Nevertheless, as also submitted by the Parties, Nasdaq Power constitutes part of an undertaking as it is a business unit with its own market presence to which a turnover can be attributed.

¹¹ The Parties’ turnover does not meet the thresholds of Article 1 of the Merger Regulation because Nasdaq Power’s Union-wide turnover in 2022 was c. EUR [...], i.e., below EUR 250 million (Article 1(2)) and EUR 100 million (Article 1(3) of the Merger Regulation) (EEX’s response of 3 July 2023 to RFI 1, Annex 1).

“Referral Notice”)¹² and the Guidance on the Application of Article 22 (the “Article 22 Guidance”).¹³

- (23) Article 6(3) of Protocol 24 to the EEA Agreement provides for the same conditions for one or more EFTA States to join a referral made by a Member State pursuant to Article 22 of the Merger Regulation.¹⁴

3.1. Procedural condition

- (24) As set out in the Referral Notice, the notion of ‘*made known*’ should be interpreted as implying the transmission of ‘*sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22*’.¹⁵
- (25) The Commission recalls that, according to the jurisprudence of the Court, a concentration is ‘made known’ when sufficient information is actively transmitted to the Member State enabling it to assess, in a preliminary manner, whether the conditions for a referral request under Article 22(1) of the Merger Regulation have been satisfied. Consequently, where prior notification of the concentration is not required, the period of 15 working days laid down in Article 22(1) of the Merger Regulation starts to run from the time when that information was transmitted to the relevant Member State.¹⁶
- (26) While the Transaction was announced on 20 June 2023,¹⁷ the Danish and Finnish NCAs explain that they received the Complaint on 26 June 2023.¹⁸ Both NCAs confirm that they had no knowledge of the Transaction prior to receiving the Complaint.¹⁹
- (27) EEX submits that it does not have the information necessary to be able to either confirm or challenge whether the Referral Requests are admissible by reference to the procedural requirements stipulated in Article 22 of the Merger Regulation.²⁰
- (28) The Commission notes that the Danish NCA and the Finnish NCA received the Complaint on 26 June 2023. The Danish NCA and Finnish NCA subsequently received²¹ a copy of the Parties’ responses to the Commission’s requests for information providing important additional information regarding the Transaction, as well as the Parties’ views regarding the Transaction’s suitability for referral pursuant to Article 22 of the Merger Regulation, neither of which was previously known to

¹² Commission Notice on Case Referral in respect of Concentrations (the “Referral Notice”), paragraphs 42-44 (OJ C 56, 5.3.2005, p.2).

¹³ Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021, COM(2021)1959 (“Article 22 Guidance”).

¹⁴ Throughout this decision, references to Article 22 of the Merger Regulation shall be read to include references to Article 6(3) of Protocol 24 to the EEA Agreement, where Norway is concerned.

¹⁵ Referral Notice, footnote 43.

¹⁶ Judgment of the General Court of 13 July 2022 *Illumina v Commission*, T-227/21, EU:T:2022:447, paragraphs 204 and 211.

¹⁷ Page 1 of the Danish Referral Request.

¹⁸ Page 1 of the Finnish Referral Request and page 1 of the Danish Referral Request.

¹⁹ Emails from Danish NCA to DG COMP on 3 August 2023 and from the Finnish NCA to DG COMP on 4 August 2023.

²⁰ Paragraph 2 of the EEX Response.

²¹ The Commission shared EEX’s responses to RFIs 1-3 with the Danish and Finnish NCAs on 5 and 12 July 2023.

the Danish or Finnish NCAs.²² The Referral Requests relied on a combination of the information contained in the Complaint and the Parties' responses to the Commission's RFIs.

- (29) In view of the factual elements set out in paragraph (28), and irrespective of whether the Transaction is considered to be made known to the Danish NCA and the Finnish NCA on the date of their receipt of the Complaint or of the additional information provided by the Commission, the Commission considers that the Referral Requests sent on 17 July 2023 were made within the 15 working days deadline.
- (30) In view of the foregoing, the Commission finds that the Referral Requests were made within the deadline of Article 22(1), second indent, of the Merger Regulation and accordingly the procedural condition for the application of Article 22(1) of the Merger Regulation is fulfilled.

3.2. Substantive conditions

- (31) This Section will first discuss the relevant markets concerned by the Transaction. It will then assess whether for those markets the substantive conditions for a referral as set out in paragraph (21) above are met with respect to the Referring Countries, based on a *prima facie* assessment.

3.2.1. Relevant markets

- (32) The Transaction primarily relates to the combination of the Parties' activities consisting in the provision of services for the financial trading and clearing of electricity contracts (for the purposes of this decision, the terms "electricity" and "power" contracts and derivatives will be referred to interchangeably).²³
- (33) Electricity trading can be subdivided into short-term trading (known as "spot" trading) and longer-term trading (known as "financial" or "derivative" trading). Spot trading covers contracts which foresee delivery of electricity on the same day or the next day, whereas financial contracts foresee delivery later than the next day and have a longer duration, typically measured in months, quarters or years.
- (34) The main purpose of spot trading of electricity is to enable market participants to refine their contract positions close to real-time in light of current market circumstances, including supply and demand conditions and their specific needs in the immediate future. They can thereby ensure that their physical positions (in terms

²² In particular, the Parties' responses to the Commission's RFIs provided information on (i) the Parties' turnover at worldwide, EEA and national level (including in Denmark, Finland, Norway and Sweden), (ii) whether the Transaction is notifiable under the Merger Regulation or the national laws of any Member States (including Denmark, Finland and Sweden), (iii) the composition of Nasdaq Power in terms of the type of assets that would be acquired by EEX, (iv) the value of the Transaction, (v) the reasons for the valuation ascribed to Nasdaq Power, and (vi) the rationale for the Transaction. These responses also provided the Parties' views on (i) whether the Transaction constitutes a concentration within the meaning of Article 3 of the Merger Regulation, (ii) the areas of overlap of the Parties' activities, (iii) the relevant market definition for these overlapping areas, and (iv) the impact of the Transaction in the relevant markets.

²³ For completeness, the Transaction also involves an overlap with respect to the provision of services to facilitate the trading of futures contracts for EU emission allowances, where EEX submits that the Parties are only small players with a combined market share of c. [0-5]%. This overlap is not assessed further for the purposes of this decision but may be further assessed as part of the Commission's investigation of the concentration.

of volumes generated or consumed) match their contracted positions (in terms of volumes sold or procured) by agreeing to buy or sell a given volume of electricity at a particular time for an agreed price in the near term. Given that electricity generation and consumption volumes vary significantly throughout the day, an effective short-term market requires the ability to trade electricity for single hours or parts of the day (blocks of hours). The spot trading of electricity is also known as the “physical” trading of electricity, as it typically involves the physical settlement of the contract through the delivery of a volume of electricity.

- (35) The financial trading of electricity serves mainly as a means of hedging price risks, given that energy prices can fluctuate significantly over time based on factors affecting supply and demand. Financial trading allows buyers and sellers to use financial instruments (namely derivatives)²⁴ to guarantee the price for electricity for a certain volume over a given period in order to secure an agreed price for the future. This allows energy generators to hedge their future income, and energy consumers to have their future costs of electricity managed to an acceptable level. As financial trading essentially relates to the trading of risk, rather than electricity as such, it does not result in the physical delivery of electricity and is instead settled financially via payment. For this reason, the financial trading of electricity can also be used for speculation. The payment due for a power derivative is calculated by comparing the derivative’s strike price to the reference market price of electricity in the contract period; if the realised reference price is lower than the derivative’s strike price, the buyer pays the difference to the seller and *vice versa*.
- (36) The financial trading of electricity is either done via regulated exchanges, such as the Parties’ trading platforms (where such exchange traded derivatives are referred to as “ETDs”), or on an over-the-counter (“OTC”)²⁵ bilateral basis, which is mainly organised by broker firms.
- (37) Financial trades can be cleared, the main purpose of which is to ensure that the obligations resulting from the trade are honoured by the transaction parties. Clearing refers to all activities occurring between the time of trading (i.e. when a trade has been agreed between the buyer and seller) and the moment when the commitments are fulfilled or settled (i.e. the seller has delivered the rights to the financial asset to the buyer and the buyer has paid the agreed amount to the seller). In essence, the role of clearing is to manage counterparty risk, i.e. the risk that one of the parties to the trade defaults on its commitment. If the clearing service is performed by a neutral third party, this third party is referred to as a central counterparty (“CCP”) or clearing house and the activity is referred to as central clearing.
- (38) In the present case, the Commission observes that the Parties primarily overlap in the provision of services to facilitate the trading of Nordic power derivatives (as well as, to a lesser extent, German and French power derivatives).²⁶ Nordic power

²⁴ Derivatives are financial contracts which derive their value from another asset (known as the underlying), which could for instance be a commodity, equity or fixed income instrument or an equity index.

²⁵ OTC trading refers to trading that takes place bilaterally and away from a regulated trading venue.

²⁶ The Parties’ overlap with respect to the provision of trading services for French and German power derivatives will not be assessed further in the context of this decision, as it is not relevant to the Member State making the referral request addressed by this decision and, as is clear from Section 3.2.3.3, the Transaction threatens to significantly affect competition within the territory of that Member State irrespective of any consideration of the provision of trading services for French and German power derivatives.

derivatives involve the possibility of trading either derivatives linked to the “Nordic system price”, which is a reference price intended to ensure a common benchmark for the Nordics that is calculated as if Denmark, Finland, Norway and Sweden were one bidding zone without any congestion restrictions,²⁷ or Electricity Price Area Differentials (“EPADs”). The latter are products hedging the realised bidding area²⁸ price against the Nordic system price, therefore allowing market participants to hedge against the price risk caused by transmission interconnection constraints.²⁹ Most standard financial contracts traded in the Nordic region use the Nordic system price as their reference price, while EPADs as mentioned are used to hedge the difference between the Nordic system price and the price in a particular bidding zone.³⁰ Both Parties facilitate the trading and clearing of derivative products linked to the Nordic system price, while only Nasdaq Power offers the possibility to trade and clear EPADs.

- (39) In addition, both Parties are active in the clearing of Nordic, French and German power derivatives.³¹
- (40) While the Parties provide services to facilitate the trading and clearing of power contracts through the operation of their exchanges and clearing houses, they do not trade electricity or electricity contracts themselves.

3.2.1.1. Services to facilitate the financial trading of electricity

(a) Relevant product market

- (41) In its previous decisions regarding the operation of trading platforms, the Commission has considered that the trading of derivatives contracts can be distinguished based on underlying asset classes (and within that based on different underlying assets),³² execution environment (namely whether the trade is executed on-exchange, on a trading venue or OTC), and types of contract.^{33 34} In some cases, it has assessed the impact on the markets for trading and clearing derivatives together,³⁵ but in other more recent decisions has considered them separately.³⁶

²⁷ Nordic System Price Methodology for Calculation, Nord Pool, <https://www.nordpoolgroup.com/49b878/globalassets/download-center/day-ahead/methodology-for-calculating-nordic-system-price---may-2022-.pdf>

²⁸ Finland constitutes its own bidding zone (FI), while there are multiple bidding zones in Denmark (namely, DK1 and DK2), Norway (namely, NO1, NO2, NO3, NO4 and NO5) and Sweden (namely, SE1, SE2, SE3 and SE4).

²⁹ Case M.8660 - *Fortum/Uniper*, Commission decision of 15 June 2018, paragraph 40.

³⁰ <https://www.nordpoolgroup.com/en/trading/Day-ahead-trading/Price-calculation/>

³¹ The Parties’ overlap with respect to the provision of clearing services for French and German power derivatives will not be assessed further in the context of this decision, as it is not relevant to the Member State making the referral request addressed by this decision and, as is clear from Section 3.2.3.3, the Transaction threatens to significantly affect competition within the territory of that Member State irrespective of any consideration of the provision of clearing services for French and German power derivatives.

³² Namely, the Commission considered distinguishing between the following asset classes: equity derivatives (single stock or index based), interest rate derivatives, currency derivatives, different types of commodity derivatives, credit derivatives, and foreign exchange (FX) derivatives.

³³ For example options, futures, forwards and swaps.

³⁴ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraphs 727ff.

³⁵ Case M.6166 - *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph 444.

- (42) As regards commodity derivatives, the Commission considered a distinction between trading services provided for soft and hard commodity derivatives, as well as even narrower definitions based on the underlying asset such as cocoa derivatives, coffee derivatives or sugar derivatives.³⁷ It has not previously assessed how this would apply to power derivatives.
- (43) In previous decisions specifically relating to the operation of trading platforms for power derivatives, the Commission has found that services facilitating the spot (i.e. short-term, physical) trading of electricity is a separate product market, distinct from services facilitating the financial (i.e. long-term, derivative) trading of electricity.³⁸
- (44) Regarding execution environment, the Commission has not assessed in detail the scope of the relevant product market for services facilitating the financial trading of electricity, though it noted that brokers' activities (i.e. OTC bilateral trades) could potentially be included in this market, while leaving this question open.^{39 40}
- (45) Regarding type of contract, in its previous decisions relating to the operation of trading platforms for power derivatives, the Commission has not previously considered whether the relevant product market should be segmented by type of contract. However, it has considered this question while assessing the trading (by customers of the platforms such as energy generators or traders) of power derivatives in the Nordics. In this context, the Commission found that different electricity derivatives contracts such as options, futures, forwards or swaps form part of the same market, except that EPADs constitute a separate product market based on their limited substitutability with other electricity derivatives given that their purpose is to hedge the remaining area specific price risk.⁴¹
- (46) EEX submits that the relevant product markets comprise the provision of multilateral and bilateral trading and associated clearing services for Nordic power derivatives (as distinct, for example, from German power derivatives and EUA futures). It argues that Nordic power derivatives should be distinguished from other derivative

³⁶ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraph 747ff; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 300-307.

³⁷ Case M.6873 - *Intercontinental Exchange/NYSE Euronext*, Commission decision of 24 June 2013, paragraphs 21ff. Soft commodities are typically considered to be agricultural products or livestock that are grown (such as coffee, sugar or cocoa), while hard commodities are typically considered to be natural products that are mined or extracted (such as gold, rubber, oil or certain energy resources).

³⁸ Case AT.39984 - *Romanian Power Exchange/OPCOM*, Commission decision of 5 March 2014, paragraphs 84 and 92.

³⁹ Case AT.39984 - *Romanian Power Exchange/OPCOM*, Commission decision of 5 March 2014, paragraph 91.

⁴⁰ By way of background, in the context of cases assessing the trading (by customers) of power derivatives, the Commission drew a distinction between the financial trading of electricity and the generation and wholesale supply of electricity. It has considered in this context that it is not appropriate to draw a distinction between on-exchange and OTC financial trading of electricity. Case M.8660 - *Fortum/Uniper*, Commission decision of 15 June 2018, paragraphs 44 and 47; COMP/M.3268 - *Sydkraft/Graninge*, Commission decision of 29 September 2003, paragraphs 65-66.

⁴¹ Case M.8660 - *Fortum/Uniper*, Commission decision of 15 June 2018, paragraph 46; Case M.3868 - *DONG/Elsam/Energi E2*, Commission decision of 14 March 2006, paragraphs 241-246. Electricity Price Area Differentials ("EPAD") are instruments used in the Nordic countries involved with the operation of the virtual hubs in the electricity markets. A virtual hub is not a trading venue as such, but rather an aggregation of bidding zones characterised by a reference price. A hub has a reference system price, against which market participants can hedge their price exposure. The system price is an unconstrained market clearing reference price for the Nordic region. It is calculated without any congestion restrictions by setting capacities to infinity.

types given the lack of demand-side substitutability and the fact that each power market will generate its own index/benchmark price against which the corresponding derivatives are designed to provide a hedge. With regard to including multilateral trading and bilateral trading in the same market, EEX argues that the types of products offered OTC or on-exchange share similar features and are thus substitutable to a major extent. It submits that in practice, major customers for power derivatives substitute hedging via ETDs and OTC derivatives.⁴² EEX further explains that within ETD trading the following two categories need to be distinguished: (i) “order book trading”, whereby transactions are arranged on-exchange by matching corresponding buy and sell orders in the trading system of the exchange; and (ii) “trade registration” or “block trading”, whereby transactions that were pre-arranged off-exchange (usually but not necessarily by brokers) are concluded and executed at the exchange by two participants simultaneously entering trade information (the respective counterparty, product, price, volume, etc.). EEX submits that the characteristics and conditions of these “block” or registered trades are, and need to be, 100% identical to the derivatives offered by the exchanges (as part of the order book trading activities) in order to be accepted as exchange transactions and cleared on the CCP, such that they are fully substitutable with the order book trades. In other words, the terms of the underlying derivative contracts are not bespoke, i.e. the contracting parties cannot tailor the terms to their needs as the contracts are executed and cleared on-exchange and the terms of the contract are therefore standardised.⁴³ In contrast, EEX submits that OTC trading refers to purely bilateral trading, whereby two market participants execute a trade directly, sometimes with the help of a broker. This activity is also referred to as “OTC bilateral”. Bilateral OTC transactions take place completely off-exchange.⁴⁴

- (47) In its response, Nasdaq Power describes the features of and trends in the Nordic power trading market.⁴⁵ In its joint response with EEX, Nasdaq Power supported (without providing reasoning) EEX’s views on market definition with respect to ETDs and OTC bilateral trades⁴⁶.
- (48) For the purposes of this decision, as regards the underlying asset class, the Commission will focus on power derivatives as it is the area in which both Parties are active. In line with EEX’s submissions,⁴⁷ and in light of the preliminary information gathered by the Commission,⁴⁸ this decision will distinguish between power derivatives based on the underlying electricity market to which they relate (e.g. Nordic power derivatives, which are derivatives that relate to electricity on the interconnected electricity network of Denmark, Finland, Norway and Sweden). This is because the primary purpose of power derivative trading is to allow customers to

⁴² EEX’s Response, Section 3.2; Parties’ response to the Information Letter of the Commission of 10 August 2023, 14 August, 2023 paragraph 10.

⁴³ Parties’ Joint Response to RFI 6, para. 3.

⁴⁴ Parties’ Joint Response to RFI 6, para. 3.

⁴⁵ Nasdaq’s Response, Section 2.

⁴⁶ Parties’ Joint Response, paragraph 10.

⁴⁷ See paragraph (46) above.

⁴⁸ Minutes of a call with the Complainant on 29 June 2023 at 15:30; Minutes of a call with a market participant on 5 July at 13:00; Minutes of a call with a market participant on 5 July 2023 at 14:00; Minutes of a call with a market participant on 7 July 2023 at 16:00; Minutes of a call with a market participant on 7 July 2023 at 15:00. These market participants all referred to the specific characteristics of the Nordics as regards the trading of power derivatives, pointing for instance to the specific purpose of the trading of these derivatives as being to hedge against price volatility in electricity prices in the Nordics, as well as to the market structure for the Nordics where Nasdaq Power is the incumbent platform (which is not the case anywhere else in the EEA).

hedge against the risk of price variations that would affect their production or consumption of electricity in a particular electricity market (e.g. in the Nordics), and power derivatives linked to other markets (e.g. Germany or France) are unlikely to be substitutable for them for hedging purposes.

- (49) In relation to EEX’s categorisation of “trade registration” and “block trading” as ETD trading, while only trading that is purely bilateral (i.e. completely off-exchange) are considered to be OTC, the Commission notes that it has examined this distinction in its previous decisions. In *London Stock Exchange Group/Refinitiv*, the Commission observed that “[b]ecause the concept of OTC trading traditionally referred to trades executed bilaterally and away from a trading venue, the industry sometimes continues to refer to OTC as a synonym of “voice/bilateral”. This is, however, legally inaccurate as, based on the current applicable law, “OTC” trading can be electronic trading on an MTF [multilateral trading facility] (for derivatives)”.⁴⁹ In that case, the Commission found in the context of interest rate derivatives that the provision of trading services can be distinguished between ETDs and OTC derivatives. ETDs were defined as trades executed on a regulated market, while it considered that OTC trades can be distinguished between trades that are executed “on-venue” (that is, electronic trades that are pre-negotiated bilaterally but where execution takes place on a multilateral trading facility) and “off-venue” (known as voice trades, which are negotiated and executed on a bilateral basis away from any trading venue, often involving a broker). It left open whether the provision of trading services for on-venue and off-venue OTC would be part of the same or a separate product market.⁵⁰ In this context, it appears that EEX’s categorisation departs from the Commission’s previous approach, in that what EEX refers to as block trading (and treats as ETD trading) has been considered by the Commission as on-venue OTC trading, distinct from ETD trading. For the purposes of this decision, the Commission will follow the approach in its previous cases (the Commission notes that while EEX put forward an alternative market definition, it did so without providing reasons or evidence why the Commission’s approach in previous cases would not be applicable).⁵¹ In any event, the precise categorisation of block trading as a form of ETD trading (as proposed by EEX) or OTC trading (in line with the Commission’s previous assessments) does not affect the conclusions in this decision.
- (50) In light of the foregoing and without prejudice to the outcome of its investigation, the Commission considers that the relevant market for the purposes of this decision is the provision of services to facilitate the financial trading of electricity, potentially segmented according to: (i) underlying asset class, that is Nordic power derivatives; (ii) execution environment, that is on a regulated exchange as ETD or OTC (and within OTC potentially between on-venue and off-venue trades); and (iii) type of

⁴⁹ Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, footnote 15.

⁵⁰ Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, recitals 110 and 123, and 142-167.

⁵¹ The Complainant and the market participants contacted by the Commission appear to use the same approach as in the Commission’s previous cases, as they referred to the possibility of clearing OTC trades, implying that they use ‘OTC’ to refer to both on- and off-venue OTC trades. Minutes of a call with the Complainant on 29 June 2023 at 15:30; Minutes of a call with a market participant on 5 July at 13:00; Minutes of a call with a market participant on 5 July 2023 at 14:00; Minutes of a call with a market participant on 7 July 2023 at 16:00; Minutes of a call with a market participant on 7 July 2023 at 15:00.

contract, that is futures based on the system price or EPADs.⁵² For the purposes of this decision, the Commission will focus its *prima facie* assessment of the impact of the Transaction on the most relevant segmentations⁵³, namely the provision of services to facilitate the trading of Nordic power derivatives either: (i) via a regulated exchange; or (ii) via regulated exchange and OTC.⁵⁴

(b) Relevant geographic market

- (51) The Commission has not previously considered the relevant geographic scope of the markets for services facilitating financial trading of electricity.⁵⁵
- (52) With regard to the operation of derivative trading platforms, the Commission has previously noted that the geographic market may be influenced by the geographic scope of the contracts traded because trading tends to be focussed in the same geographic area as the underlying asset irrespective of the fact that customers could be located globally.⁵⁶ Ultimately, however, it left open whether the relevant geographic market is worldwide or limited to the EEA.⁵⁷
- (53) For context, when assessing trading (rather than the operation of trading platforms) of Nordic power derivatives, the Commission has previously considered with respect to financial trading of electricity that the market could be global or at least EEA-wide but in order to take a conservative approach it carried out its assessment on a regional basis (Nord Pool-wide).⁵⁸
- (54) EEX submits that the geographic scope of the relevant markets is likely to be worldwide (or at least EEA-wide). It notes that while the underlying instruments (Nordic power derivatives) may be regional, national or local, customers from all

⁵² For the purposes of this decision, to avoid duplication, the Commission's assessment of a potential combined market encompassing the facilitation of both trading and clearing services is set out in the Sections relating to the provision of clearing services, namely Sections 3.2.1.2 and 3.2.3.3(b).

⁵³ The Commission considers on the basis of the information available that the segmentations referred to in paragraph (50) are the most relevant segmentations for the purposes of this decision, as they represent the main areas of overlap between the Parties and therefore where *prima facie* the effects of the Transaction is likely to be most pronounced. For completeness, the Parties do not overlap in the narrower plausible segments of the facilitation of off-venue OTC Nordic power derivative trades (as neither is active) nor in the facilitation of the trading of EPADs (as only Nasdaq Power is active), accordingly a narrower segmentation limited to these segments is less relevant for the purposes of this decision. Moreover, while both Parties are active in the narrower plausible segments of the facilitation of on-venue Nordic power derivative trades and the facilitation of the trading of Nordic system price derivatives, as they are the only players active, the competitive dynamics can be expected to be comparable to the market for the provision of services to facilitate the trading of Nordic power derivatives.

⁵⁴ While EEX is active in the provision of services to facilitate the spot trading of electricity, Nasdaq Power is not, therefore this market is not assessed further in this decision.

⁵⁵ For completeness, the Commission has previously found that the market for services facilitating spot electricity trading is national in scope given the specifics of the regulatory framework and competitive dynamics of the Member State assessed in the case (Romania). Case AT.39984 - *Romanian Power Exchange/OPCOM*, Commission decision of 5 March 2014, paragraphs 94-104.

⁵⁶ M.6166 - *Deutsche Boerse/NYSE Euronext*, Commission decision of 1 February 2012, paragraphs 448 and 452 with regard to European interest rate derivatives.

⁵⁷ M.6166 - *Deutsche Boerse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph 458.

⁵⁸ As for the market for the financial trading of EPADs, in the context of trading (not the operation of trading platforms), the Commission previously considered that the relevant market could comprise each particular bidding zone. Case M.8660 - *Fortum/Uniper*, Commission decision of 15 June 2018, paragraphs 51-52; Case M.6166 - *Deutsche Boerse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph 444, M.3868 - *DONG/Elsam/Energi E2*, Commission decision of 14 March 2006, paragraph 268.

over the world are able to trade the derivatives offered by the Parties. In fact, EEX generates around [notable share]% of its worldwide revenues related to Nordic power derivatives outside the EEA.⁵⁹ EEX however notes that for the purposes of assessing the referral requests of Denmark and Finland, the Commission should focus on the impact of the Transaction in these Member States.

- (55) In its response, Nasdaq Power describes the features of and trends in the Nordic power trading market.⁶⁰ In its joint response with EEX⁶¹, Nasdaq Power supported (without providing reasoning) EEX's views on market definition.
- (56) In light of the foregoing, for the purposes of this decision and without prejudice to the outcome of its investigation, the Commission considers the geographic scope of the provision of services to facilitate the trading of Nordic power derivatives (whether via a regulated exchange or OTC) to encompass at least the Nordics, if it is not EEA-wide or global. In any event, the geographic market definition can be left open for the purposes of this decision, as the conclusions in this decision would be the same under any of these market definitions.⁶²

3.2.1.2. The provision of clearing services for power derivatives

(a) Relevant product market

- (57) In some cases, the Commission has assessed the impact on the markets for services to facilitate trading and clearing derivatives together⁶³ but in other more recent decisions has considered them separately.⁶⁴
- (58) In its decisions regarding the provision of clearing services, the Commission concluded that the clearing of OTC traded derivatives is a separate product market from the clearing of ETDs.⁶⁵ For the separate market of clearing of ETDs, the Commission has considered a segmentation by asset class (distinguishing between e.g. equity derivatives, interest rate derivatives, commodity derivatives, credit derivatives and foreign exchange derivatives).⁶⁶ For the market of clearing of OTC traded derivatives, the Commission has considered a similar segmentation by asset

⁵⁹ EEX Response, footnote 13.

⁶⁰ Nasdaq Power Response, Section 2.

⁶¹ Parties' Joint Response, paragraph 9.

⁶² This is because, as outlined in Section 3.2.3.3(a), EEX and Nasdaq Power appear to be the only two providers of services to facilitate the trading of exchange traded Nordic power derivatives worldwide (with the exception of ICE Endex, which has no market share), and even if the facilitation of OTC Nordic power trading were considered part of the relevant market their shares would remain significant under any geographic market definition.

⁶³ Case M.6166 - *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph 243.

⁶⁴ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraph 747ff; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 300-307.

⁶⁵ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraph 748, 750; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 243ff.

⁶⁶ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraph 744-746ff; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 300-307.

class.⁶⁷ Moreover, the Commission has previously defined separate product markets for the clearing of derivatives by type of customer (i.e. customers that can only trade ETDs or customers that can trade both ETDs and OTCs) and type of contract (defining clearing of swaps as separate from clearing of futures and options, while leaving open whether clearing of futures and clearing of options constitute separate markets).⁶⁸

- (59) Within commodity derivatives, the Commission has previously considered but left open the clearing of different categories of commodity derivatives (such as ‘soft’ agricultural commodity derivatives as distinct from ‘hard’ commodity derivatives such as energy derivatives),⁶⁹ and that further sub-segmentation by individual commodity is possible.⁷⁰
- (60) EEX submits that the provision of clearing services for power derivatives forms part of the market for the provision of multilateral and bilateral trading for Nordic power derivatives (as distinct for example from German power derivatives and EUA futures).⁷¹ It further explains that while orderbook and block trades of Nordic Power contracts are both executed on-exchange and subsequently, centrally cleared by the CCP, bilateral OTC transactions are not executed on-exchange and, in the case of Nordic power derivatives at least, are not cleared by CCPs at all.⁷² This would mean concretely that CCP clearing of OTC trades does not exist for Nordic power derivatives. Instead, the contracting parties manage the counterparty risk themselves. Moreover, EEX submits that, in line with Commission precedents, trading and clearing should be considered as part of the same product market for Nordic power derivatives.⁷³
- (61) Nasdaq Power has not provided its specific views on how to define the product market relating to its clearing of Nordic power contracts.
- (62) For the same reasons as described in paragraphs (42) and (48), for the present decision the Commission considers it appropriate to distinguish between power derivatives (a type of commodity derivative) based on the underlying electricity market to which they relate (e.g. Nordic power derivatives).

⁶⁷ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraph 747-749; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 286-294.

⁶⁸ Case M.6166 - *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph 444; Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraph 748, 750.

⁶⁹ Commission decision of 24 June 2013 in Case M.6873 - *Intercontinental Exchange / NYSE Euronext*, paragraph 28; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 300-307.

⁷⁰ Commission decision of 24 June 2013 in Case M.6873 - *Intercontinental Exchange / NYSE Euronext*, paragraphs 31ff; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraphs 300-307.

⁷¹ EEX’s Response, Section 3.2.

⁷² EEX further explains that based on Art. 5 of the EMIR Regulation, a CCP needs a specific permission to offer clearing services for OTC derivatives. As far as the Parties are aware, no CCP has such a permission for OTC Nordic power derivatives (and neither do the Parties), see the Parties’ response to RFI 6, para. 23 to 27.

⁷³ M.6166 - *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph. 243; M.6873 - *Intercontinental Exchange / NYSE Euronext*, paragraph 16, M.8660 - *Fortum / Uniper*, 15/06/2018, para. 37 et seq.

- (63) In relation to EEX's statement that clearing of OTC trading does not exist for Nordic power derivatives, the Commission notes that this approach comes from EEX's view that OTC trading refers exclusively to off-venue trading, i.e. excluding block trading (which EEX rather considers as a form of ETD trading). However, as outlined above, this does not reflect the Commission's approach in previous cases relating to the provision of services to facilitate trading, under which clearing is possible for on-venue OTC derivatives. Likewise, in its past cases relating to the clearing of derivatives, the Commission has defined separate product markets by execution environment, i.e. ETD trades and OTC trades. Notably, it observed that while ETDs are always traded in bundles including trading and clearing, OTC derivatives are different as they can be traded either on electronic OTC platforms, or purely bilaterally and they can be cleared or not, and as OTC trading venues are connected to several CCPs.⁷⁴ For the purposes of this decision, the Commission will follow the approach in its previous cases (the Commission notes that while EEX put forward an alternative market definition, it did so without providing reasons or evidence as to why the Commission's approach in previous cases would not be applicable). In any event the precise categorisation of block trading as a form of ETD trading or OTC trading does not affect the conclusions in this decision.
- (64) In light of the foregoing, for the purposes of this decision and without prejudice to the outcome of its investigation, the Commission considers that the provision of clearing services for Nordic power derivatives could (i) form part of a broader market comprising the provision of services to facilitate trading and clearing for Nordic power derivatives or (ii) a separate plausible product market for the provision of clearing services for Nordic power derivatives, which could be further segmented between clearing of ETD and OTC (block traded) Nordic power derivatives (which could potentially be further sub-segmented by customer or contract type). For the purposes of this decision, the Commission will focus its *prima facie* assessment of the impact of the Transaction on the most relevant segmentation,⁷⁵ namely the provision of clearing services for Nordic power derivatives.
- (b) Relevant geographic market
- (65) The Commission has not previously considered the relevant geographic scope of the market for clearing services for power derivatives specifically.
- (66) More generally, it has considered that the geographic scope of the market for clearing services for exchange-traded commodity derivatives to be at least EEA-

⁷⁴ Case M.7995 - *Deutsche Börse/London Stock Exchange Group*, Commission decision of 29 March 2017, paragraphs 732-736; Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraph 310.

⁷⁵ The Commission considers on the basis of the information available that the segmentation referred to in paragraph (64) is the most relevant segmentation for the purposes of this decision, as it represents the main area of overlap between the Parties and therefore where *prima facie* the effects of the Transaction is likely to be most pronounced. For completeness, as explained in paragraph (108), the impact of the Transaction would be comparable in a combined plausible market encompassing both the facilitation of trading and clearing services for Nordic power derivatives. Moreover, the impact would be comparable on the narrower plausible markets for clearing of ETD and OTC (block traded) Nordic power derivatives, given that the Parties are the only players active on these narrower segments.

wide, or possibly worldwide, in scope, but ultimately the Commission left this question open.⁷⁶

- (67) The Commission has not assessed the geographic scope of the market for clearing services for OTC traded commodity derivatives, but it has considered the relevant geographic market for clearing services for OTC traded interest rate derivatives to be at least EEA-wide in scope.⁷⁷
- (68) EEX submits that the market for the provision of multilateral and bilateral trading and clearing services for Nordic power derivatives is worldwide (or at least EEA-wide).⁷⁸
- (69) Nasdaq Power has not provided specific views on how to define the geographic market regarding its clearing of Nordic power contracts.
- (70) In light of the foregoing, for the purposes of this decision and without prejudice to the outcome of its investigation, the Commission considers the geographic scope of the potential market for the provision of clearing services for Nordic power derivatives to be at least Nordic-wide (considering that the majority of the parties' combined customers of trading and clearing of Nordic power derivatives are located in the Nordics)⁷⁹, or possibly EEA-wide or even worldwide, in scope. In any event, the geographic market definition can be left open for the purposes of this decision, as the conclusions in this decision would be the same under any of these market definitions.⁸⁰

3.2.2. *Effect on trade between Member States*

- (71) According to paragraph 43 of the Referral Notice, the first substantive condition is fulfilled when the concentration subject of the referral is liable to have some discernible influence on the pattern of trade between Member States.⁸¹ The concept of "trade" covers all cross-border economic activity and encompasses cases where the transaction affects the competitive structure of the market.⁸²
- (72) As explained in the Article 22 Guidance, to assess this criterion the Commission will examine whether the transaction may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁸³ Specific factors which could be relevant may include the location of (potential) customers and the availability and offering of the products or services at stake.⁸⁴

⁷⁶ Case M.9564 - *London Stock Exchange Group/Refinitiv Business*, Commission decision of 13 January 2021, paragraph 310.

⁷⁷ Case M.6166 - *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012, paragraph 768.

⁷⁸ EEX's Response, Section 3.2.

⁷⁹ EEX's Response, Section 4.1.

⁸⁰ This is because, as outlined in Section 3.2.3.3(b), EEX and Nasdaq Power appear to be the only two providers of clearing services for Nordic power derivatives worldwide (with the exception of ICE Endex, which has no market share).

⁸¹ See Commission Notice on Case Referral in respect of concentrations ("Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 43.

⁸² Guidance on Article 22 Referrals, paragraph 14.

⁸³ Guidance on Article 22 Referrals, paragraph 14.

⁸⁴ Guidance on Article 22 Referrals, paragraph 14.

- (73) In their Referral Requests, the Referring Countries consider that the Transaction would affect trade between Member States, and between Member States and Norway, because the Parties are active in the facilitation of trading and clearing of Nordic power derivatives in several European countries and these markets may be broader than national.⁸⁵
- (74) The Parties do not provide specific views as to whether the Transaction affects trade between Member States.
- (75) For the reasons detailed below, the Commission agrees with the Referring Countries' view that the Transaction affects trade between Member States, and between Member States and Norway, and thus fulfils the first substantive criterion of Article 22 of the Merger Regulation.
- (76) First, the Commission considers on a preliminary basis that Transaction gives rise to overlaps involving services offered in several Member States and in Norway. Both EEX and Nasdaq Power offer services to facilitate the financial trading of electricity and clearing services in the Nordics, France and Germany, giving rise to a horizontal overlap in these countries.
- (77) Second, as explained by the Referring Countries,⁸⁶ the relevant markets might be broader than national. As explained in Sections 3.2.1.1(b) and 3.2.1.2(b) above, the provision of services to facilitate the financial trading of Nordic power derivatives is likely at least Nordic-wide in scope, if not broader (EEA- or worldwide). Likewise, the provision of clearing services for Nordic power derivatives is likely at least Nordic-wide in scope, if not broader (EEA- or worldwide). In its Complaint, the Complainant examines the Parties' position in the Nordic region as a whole.⁸⁷
- (78) Third, both EEX and Nasdaq Power offer Nordic system price derivatives covering the 12 Nordic bidding zones across Sweden, Denmark, Finland and Norway. The Parties' customers of Nordic power derivatives linked to the system price include energy producers and consumers that are located across each of these four Nordic countries.⁸⁸ In addition, the Parties also have EEA customers of Nordic power derivatives outside of the Nordics.⁸⁹
- (79) Based on the above, the Commission considers that the Transaction is capable of affecting trade between Member States and concludes that the first substantive condition for an Article 22 referral request is met.

3.2.3. *The Transaction threatens to significantly affect competition within the territory of the Member States making the request*

- (80) Paragraph 44 of the Referral Notice provides that a referring Member State should demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse effect on competition and thus deserves

⁸⁵ Page 4 of the Danish Referral Request, page 4 of the Finnish Referral Request, page 3 of the Swedish Referral Request, and page 1 of the Norwegian Referral Request.

⁸⁶ Page 4 of the Danish Referral Request, page 4 of the Finnish Referral Request, page 2 of the Swedish Referral Request, and page 1 of the Norwegian Referral Request.

⁸⁷ The Complaint, paragraph 20.

⁸⁸ EEX Response, section 4.1, which specifies the turnover generated with Nordic power derivatives in each of the Nordic countries, as well as at EEA- and worldwide levels.

⁸⁹ Ibid.

close scrutiny, without prejudice to the outcome of a full investigation. Preliminary indications may be in the nature of *prima facie* evidence of a possible significant adverse impact and they are without prejudice to the outcome of a full investigation.⁹⁰

3.2.3.1. Referral requests

- (81) **Denmark:**⁹¹ The Danish NCA submits that the Transaction threatens to significantly affect competition in Denmark because it leads to considerable horizontal overlaps, namely: As regards the provision of trading services, the Transaction would merge the only two suppliers of on-exchange trades of Nordic power derivatives. Considering a possibly broader market for the provision of trading services for Nordic power derivatives, encompassing both on-exchange and OTC, the Danish NCA considers that the merged entity would have a market share of around [50-60]%. As regards the provision of clearing services, the Transaction would combine the only two providers of clearing services for Nordic power derivatives, effectively leading to a monopoly. Based on this, the Transaction could lead to higher trading and clearing fees in Denmark.^{92 93}
- (82) **Finland:**⁹⁴ Likewise, in its preliminary assessment,⁹⁵ the Finnish NCA focused on the Parties' horizontal overlaps in the possible markets for trading and clearing of Nordic Power derivatives. It observes that according to the information provided by EEX and the Complainant, the Transaction would combine the only two providers of on-exchange trading for Nordic power derivatives. These trades would also be exclusively cleared by the merged entity. It notes that EEX estimates that the combined market share of the Parties in the market for Nordic power derivatives is close to [90-100] %. It is the Finnish NCA's understanding that the majority of derivative trading in the Nordic region is executed through an exchange (Nasdaq Power or EEX). The inclusion of OTC trades in the relevant product market would not materially affect the market position of the merged entity. In short, the Finnish NCA explains that the Transaction would combine the only two providers of on-exchange trading for Nordic power derivatives and that post-Transaction, the Parties will hold a significant market position in the trading and clearing of Nordic power derivatives, which will impact competition within the territory of Finland as in other Member States.
- (83) **Sweden:**⁹⁶ The Swedish NCA concurs with the Finnish and Danish NCAs, noting that conditions on the markets for trading and clearing of Nordic power derivatives are similar across the Nordic region. It finds that the Transaction gives rise to an overlap in the markets for on-exchange trading and clearing of Nordic power derivatives and that the combined entity would be in a monopoly position on said

⁹⁰ Guidance on Article 22 Referrals, paragraph 15.

⁹¹ The Danish Referral Request takes account of information provided by the Danish Financial Authority, the Danish Utility Regulator, and third parties, including the Complainant for the purposes of its *prima facie* assessment, see page 3 of the Danish Referral Request.

⁹² Pages 5 and 9 of the Danish Referral Request.

⁹³ Pages 5 and 9 of the Danish Referral Request.

⁹⁴ The Finnish Referral request annexes the Complaint as well as information provided by EEX in response to various RFIs by the Commission, which it refers to as underlying evidence for its *prima facie* assessment, see Annexes 1, 3 to 5 to the Finnish Referral Request.

⁹⁵ Pages 4 and 5 of the Finnish Referral Request.

⁹⁶ The Swedish Referral Request refers to the Danish and the Finnish Referral Requests and to information provided by the Parties and the Complainant for its *prima facie* assessment.

markets. Even if OTC trading is included, the market position of the combined entity would remain very strong. The Swedish NCA notes that the power derivatives exchanges of Nasdaq Power and EEX serve the whole of the Nordic electricity/power market area. This would include Denmark and Finland (that is to say the two Member States that made the initial requests under Article 22 of the Merger Regulation), but also Finland, Norway and the Baltics. The Swedish NCA also points to the fact that the Parties have customers that trade in and require clearing services for Nordic power derivatives who are located in Sweden. Thus, the Transaction could possibly lead to higher clearing fees, as well as reduced access to clearing services, which would affect Sweden-based customers.

- (84) Furthermore, the Swedish NCA submits that EEX's plan to change the combined entity's business structure to replace EPADs with zonal futures (a product EEX is planning to introduce) could indicate that the combined entity is able to act independently on the market and thus, that it would be dominant post Transaction.⁹⁷
- (85) **Norway:**⁹⁸ The Norwegian NCA submits that EEX's submission⁹⁹ seems to indicate that the Parties' combined share on the market for on-exchange traded Nordic power derivatives could be close to a monopoly. According to the Norwegian NCA, information suggesting harm to competition in a Community-wide market would support a presumption that competition may also be harmed in Norway. Therefore, the Norwegian NCA concludes that the Transaction threatens to significantly affect competition in one or more markets in Norway.

3.2.3.2. Parties' views

- (86) EEX submits that the Transaction does not threaten to significantly affect competition within the territories of Denmark, Finland, Sweden, or any other Member State, or Norway.
- (87) First, it submits that there are multiple options open to market participants to trade power derivatives for the purpose of hedging volume and price risk. In particular, it submits that multilateral or exchange trading and bilateral OTC trading are substitutable.¹⁰⁰
- (88) Second, it notes that neither Party is active with regard to OTC trading of power derivatives, and that the Danish Referral Request is incorrect to suggest that the Parties have a combined share of [50-60]% for OTC trading for Nordic power derivatives.¹⁰¹
- (89) Third, it submits that, in each of the Referring Countries, the Parties' turnover generated with Nordic, French and German power derivatives is either [...]. With regard to Nordic power derivatives specifically, it notes that EEX has revenues of EUR [...] in Denmark, [...] in Finland, revenues of EUR [...] in Norway, and revenues of EUR [...] in Sweden.¹⁰²

⁹⁷ Page 4 of the Swedish Referral Request.

⁹⁸ The Norwegian Referral Request refers to the Danish and Finnish Referral Requests and to information provided by the Parties and the Complainant for its *prima facie* assessment.

⁹⁹ EEX's Reply of 5 July 2023 to RFI 1, Annex 6.

¹⁰⁰ EEX's Response, paragraphs 5(d) and 28.

¹⁰¹ EEX's Response, paragraph 5(b).

¹⁰² EEX's Response, section 4.1.

- (90) Fourth, it submits that there could be no elimination of competition between the Parties because: (i) EEX only offers Nordic system price futures whereas Nasdaq Power offers both Nordic system price futures and EPADs to give a complete hedging strategy. It submits that as a result, market participants do not see EEX as a substitute to Nasdaq Power; (ii) OTC trading represents an important source of competition for multilateral trading such as ETDs, even if, because OTC trades are not centrally reported, their role may be understated; (iii) there are other exchanges that are either currently active in offering Nordic power derivatives (ICE Endex), or which plan to enter the market (Nord Pool – which has indicated that it will offer EPADs like Nasdaq Power); and (iv) EEX’s current level of activity in the Nordic power derivatives market generally, including in Denmark, Finland, Sweden, and Norway, is insufficient for the Transaction to have any impact on the structure of the market.¹⁰³
- (91) Fifth, it argues that the market reaction to the Transaction has been positive, which reflects that, rather than causing harm, the Transaction will benefit competition in light of the fact that the markets for trading power derivatives play an important role in enabling effective and efficient hedging which contributes to price stability in electricity supply markets to the benefit of consumers. EEX argues that: (i) [...]; (ii) the trading of Nordic power derivatives is a declining market with decreasing liquidity resulting in higher hedging costs and reduced ability and incentive of exchanges to invest, which in turn has resulted in an increase of unregulated, untransparent and often uncollateralized OTC trading to manage that hedging risk; (iii) EEX has a strategy to turn around this decline for the benefit of all current and potential market participants. EEX submits that, with its model of zonal futures, it will create a liquid, cleared and transparent exchange trading marketplace for Nordic power derivatives.¹⁰⁴
- (92) Nasdaq Power highlights the following developments as important to understand the current context of the Nordic power trading market. According to Nasdaq Power, over the last decade there has been a significant decline in the volume of Nordic power futures traded on-exchange, which it has been unable to reverse, in particular given its lack of scale and scope in this sector. It notes that, in response to this decline in exchange-traded Nordic power futures, customers have increasingly moved to bilateral OTC contracts. Nasdaq Power explains that this decrease in liquidity in the trading and clearing of Nordic power contracts has negative consequences for Nordic energy markets, both on-exchange and for OTC trades which rely on exchange trades to agree prices. [...].¹⁰⁵
- (93) Nasdaq Power submits that [...].¹⁰⁶
- (94) The Parties jointly submit that there is no factual basis for the assumption that trading and clearing fees would increase post-Transaction. They argue that the liquidity issues that the market for Nordic power derivatives has experienced have led to higher transaction costs. By addressing these liquidity issues, the Transaction would therefore lead to lower transaction costs.¹⁰⁷

¹⁰³ EEX’s Response, paragraph 5(d).

¹⁰⁴ EEX’s Response, paragraph 5(e).

¹⁰⁵ Nasdaq’s Response, sections 2 and 3.

¹⁰⁶ Nasdaq’s Response, section 4.

¹⁰⁷ Parties’ Joint Response, paragraph 16.

- (95) They also argue that the presence of other market players offering clearing services will ensure that these services remain available.¹⁰⁸

3.2.3.3. Commission's assessment

- (a) Provision of services to facilitate the financial trading of Nordic power contracts
- (96) On the basis of the *prima facie* analysis submitted by the Referring Countries, and taking into account the submissions by the Parties and information gathered from market participants, the Commission considers that, without prejudice to the outcome of its investigation, the concentration threatens to significantly affect competition within the territory of the Referring Countries with regard to the provision of services to facilitate the financial trading of Nordic power contracts.
- (97) First, according to the Parties' own market share estimates, post-Transaction the new entity will have a monopoly for services to facilitate Nordic power derivatives trading on-exchange (i.e. Nordic power ETDs), with an increment of approximately [0-5]%, irrespective of the exact geographic scope of the market.¹⁰⁹ This is the case irrespective of whether on-venue OTC trades are considered a distinct market from ETD trades in line with the Commission's precedents or, as EEX argues, on-venue OTC trades are considered as a form of ETD trades. In this situation, the elimination of the competitive pressure exerted on Nasdaq Power by EEX could give the merged entity an incentive to increase the trading fees or otherwise worsen conditions, which could harm market participants.
- (98) The Commission notes EEX's submission with regard to the fact that EEX only offers the trading and clearing of Nordic system price derivatives whereas Nasdaq Power offers the trading and clearing of both Nordic system price derivatives and EPADs, meaning that they are not alternatives to each other. However, the Commission notes that the Parties have not submitted that these two offerings would be in different markets. Rather, the Commission observes that the Parties are the only two exchanges active in the market that offer at least the Nordic system price.
- (99) Second, the Parties' combined share remains significant even under alternative market definitions. When considering a broader market encompassing both ETD and OTC traded Nordic power derivatives (in particular, also taking into account OTC bilateral (off-venue) trades as argued by EEX), the combined market share of the Parties would remain significant (around [50-60]%) (with the increment being around [5-10]%) according to the Complainant,¹¹⁰ which is supported by the initial evidence gathered by the Commission).¹¹¹ On a narrower market definition, while the Parties

¹⁰⁸ Parties' Joint Response, 14 August 2023, paragraph 18.

¹⁰⁹ EEX's response of 5 July 2023 to RFI 1, Annex 6, pages 4-5 of the Danish Referral Request, page 4 of the Finnish Referral Request as well as the Complaint, paragraphs 35-36; Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraphs 6-8.

¹¹⁰ The Complaint, paragraph 23.

¹¹¹ Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 10; Minutes of a call with a market participant on 7 July 2023 at 15:00, paragraph 5; Minutes of a call with a market participant on 7 July 2023 at 16:00, paragraph 6. EEX does not provide an estimate of the proportion of such a combined market that would be represented by OTC bilateral (broker/voice) trades for Nordic power derivatives specifically, but for illustrative purposes points out that industry estimates state that for French and German power derivatives brokers represent [20-30]% and for European power derivatives they represent around [40-50]%. This is consistent with the indications from the Complainant and the initial evidence gathered by the Commission that the Parties' share on such a

are not active on the OTC off-venue segment, EEX's estimates indicate that the Parties' market share would be close to a monopoly for the facilitation of OTC on-venue trades.¹¹² According to the Horizontal Merger Guidelines, which reflect well-established case law, very large market shares — 50% or more — may in themselves be evidence of the existence of a dominant market position.¹¹³

- (100) Third, with regard to EEX's submission that the Transaction has a limited impact as EEX is a small player in the relevant markets in the Nordics and, as a result, the addition of this small increment to Nasdaq Power would not impact competitive dynamics, the Commission observes that the Transaction results in the creation of a monopoly (as regards on-exchange trading of Nordic power derivatives) or at the very least a significant combined position (as regards a market including both on-exchange and OTC trading of Nordic power derivatives). Furthermore, while EEX is indeed small in the Nordics, some market participants noted that its fees are lower than Nasdaq Power's¹¹⁴ and that it is a leading provider of trading and clearing services for power derivatives in several other Member States (implying that this might be advantageous for its Nordic offering as its existing customers in other Member States could easily use its service to begin trading Nordic Power derivatives too).¹¹⁵ Accordingly, even if EEX is a small player in the Nordics, its offering can be seen as attractive, it is an established provider in a number of other Member States and, in any case, it appears to be one of the only sources of competitive pressure for Nasdaq Power. A careful assessment of the extent of constraint from EEX is warranted.¹¹⁶
- (101) Fourth, with regard to EEX's argument that ICE Endex also offers Nordic power derivatives trading services and that Nord Pool has recently announced its planned entry into the market, the Commission considers that this argument does not lead to the *prima facie* conclusion that the Transaction does not threaten to significantly affect competition given the significant market position of the Parties post-Transaction. The Commission notes that, according to EEX, ICE Endex has no trading volumes for Nordic power derivatives and its market share is zero,¹¹⁷ which is supported by the initial evidence gathered by the Commission.¹¹⁸ Regarding the potential entry by Nord Pool, it would need to be further investigated by the Commission whether such entry is indeed a possibility capable of posing a threat and

combined market for services to facilitate ETD and OTC Nordic power derivatives (where, other than brokers, EEX and Nasdaq Power are the only other active players) would be significant.

¹¹² EEX's response of 5 July 2023 to RFI 1, Annex 6. EEX observes that the latter estimate may be overstated, as not all OTC bilateral trading volumes are reported in market data relied upon to prepare the estimates.

¹¹³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31 of 5.2.2004, page 3, (the "Horizontal Merger Guidelines"), paragraph 17.

¹¹⁴ Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 7.

¹¹⁵ Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 13.

¹¹⁶ For completeness, in response to the views of the Swedish NCA (paragraph (84)), the Parties argue that EEX was in any case intending to introduce zonal futures, so its announcement that it intends to replace EPADs with zonal futures should not indicate that the merged entity would have market power. They also argue that [...] (Parties' Joint Response, paragraphs 19ff). The Commission considers that while these aspects may merit investigation (for instance as regards the counterfactual), they do not impact the *prima facie* finding that the Transaction threatens to affect competition in the Member State, which is driven by the Commission's assessment of the relevant market structure based on the information available to it.

¹¹⁷ EEX's response of 5 July 2023 to RFI 1, Annex 6.

¹¹⁸ Minutes of a call with the Complainant on 29 June 2023 at 15:30, paragraph 20. Minutes of a call with a market participant on 5 July 2023 at 13:00, paragraph 10.

whether that threat of entry would be sufficient to counteract the potential negative effects of the Transaction.

- (102) Fifth, with regard to EEX's arguments that turnover in each of the Referring Countries for Nordic power derivatives is either [...], the Commission considers that this argument does not lead to the conclusion that the Transaction *prima facie* does not threaten to significantly affect competition given the significant market position of the Parties post-Transaction. As a starting point, the Commission notes that there is no de minimis threshold that the Commission applies when considering the impact of a merger on effective competition in the market. Moreover, as explained below in Section 3.3 regarding the appropriateness of the referral, and as submitted by Nasdaq and EEX themselves, the effective functioning of the markets for trading and clearing of electricity are of key significance for the overall energy markets in the Nordics. Moreover as regards specifically the argument that in 2022, EEX [...] in Finland from facilitating the trading with Nordic power derivatives, the Commission notes that this does not alter its *prima facie* assessment, as (i) the [...] turnover in Nordic power derivatives in 2022 may not be representative, and (ii) it cannot be excluded without a market investigation that the mere possibility for Finnish customers to use EEX as an alternative to Nasdaq Power constitutes some competitive constraint.
- (103) Sixth, with regard to EEX and Nasdaq's argument that the acquisition will bring additional liquidity to the market and have pro-competitive effects, the Commission considers that this argument does not lead to the conclusion that the Transaction *prima facie* does not threaten to significantly affect competition given the significant market position of the Parties post-Transaction. During the course of a full investigation, the Parties would need to demonstrate that these claimed efficiencies would benefit consumers, be merger-specific and be verifiable.
- (104) Seventh, with regard to EEX and Nasdaq's arguments that [...], the Commission considers that this argument does not lead to the conclusion that the Transaction *prima facie* does not threaten to significantly affect competition given the significant market position of the Parties post-Transaction. The Commission refers to [the Parties' submissions].¹¹⁹ [...].
- (105) The effects from the Transaction would materialise in each of the Referring Countries, as the relevant geographic market for services to facilitate the trading of Nordic power derivatives appears to be at least Nordic-wide (if not EEA-wide or global) and as many of the Parties' customers are based in the Nordics, including in Sweden. The Commission therefore considers that the Transaction *prima facie* threatens to significantly affect competition in the provision of services to facilitate the trade in Nordic power derivatives within the territory of Sweden.
- (b) Clearing services for Nordic power contracts
- (106) On the basis of the analysis submitted by the Referring Countries, and taking into account the submissions by the Parties and information gathered from market participants, the Commission considers, without prejudice to the outcome of its investigation, that *prima facie* the concentration threatens to significantly affect

¹¹⁹ In particular, the Commission takes note that the internal documents of Nasdaq that have been provided to the Commission indicate that [...]. Nasdaq's reply to RFI 1, Attachment 1 slides 6 and 16 and Attachment 2, slide 2.

competition within the territory of the Referring Countries with regard to the clearing of Nordic power contracts.

- (107) The Commission notes that post-Transaction, the merged entity will have a monopoly for the provision of clearing services for Nordic power derivatives (irrespective of the geographic market definition or whether this market is further segmented), as only EEX and Nasdaq Power are currently active in clearing of Nordic power derivatives (even if ICE Endex in principle offers this service, it does not have any market share).¹²⁰ In addition, brokers who may be active in the market for the provision of services to facilitate the trading of Nordic power derivatives are not active in clearing those derivatives and would thus not exercise any competitive constraint on the merged entity as regards clearing. The merged entity could therefore have the ability and incentive to raise its clearing fees or otherwise worsen conditions, which could harm market participants. As explained by the Danish¹²¹, the Finnish¹²², and the Swedish¹²³ NCAs and supported by the preliminary evidence gathered by the Commission,¹²⁴ on a narrower market definition, this could impact both the clearing of (i) exchange-traded Nordic power derivatives, and (ii) on-venue OTC Nordic power derivatives. Even on the broad market definition put forward by EEX, whereby cleared ETD trades, cleared OTC trades and uncleared OTC trades are part of the relevant market, the Commission understands that the majority of all Nordic power derivative trades are cleared (by the Parties) and so the Parties would have a significant position.
- (108) As noted above, the Parties have assessed the impact of the Transaction on a combined market for trading and clearing of Nordic power derivatives. Even under this alternative market definition, the Parties' market shares are likely to be significant. As outlined in Section 3.2.3.3(a) and the foregoing paragraph, the Parties are likely to have a significant position with respect both to the provision of services to facilitate trading of Nordic power derivatives, on the one hand, and the provision of clearing services for Nordic power derivatives, on the other. Accordingly, *prima facie* they would have a significant position on a combined overall market encompassing both of these services. Even if the constraint from brokers is included, the Parties' position is likely significant, as explained in paragraph (107).
- (109) The Commission's assessment of the arguments put forward above¹²⁵ in relation to the provision of services to facilitate the financial trading of Nordic power contracts is also applicable to the assessment of the clearing of Nordic power derivatives. Therefore, the Commission considers that the impact on the provision of clearing services for Nordic power derivatives merits review (irrespective of whether it is a separate market or together with services to facilitate trading of Nordic power

¹²⁰ EEX's response of 5 July 2023 to RFI 1, Annex 6, and the Complaint, paragraphs 18-20. Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraphs 11-13; Minutes of a call with a market participant on 7 July 2023 at 15:00, paragraphs 9-10; Minutes of a call with a market participant on 7 July 2023 at 16:00, paragraph 6.

¹²¹ Pages 5 and 9 of the Danish Referral Request.

¹²² Page 5 of the Finnish Referral Request.

¹²³ Page 3 of the Swedish Referral Request.

¹²⁴ Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 12; Minutes of a call with the Complainant on 29 June 2023 at 15:30, paragraphs 11 and 17; Minutes of a call with a market participant on 7 July 2023 at 16:00, paragraph 6; Minutes of a call with a market participant on 7 July 2023 at 15:00, paragraph 7.

¹²⁵ See Section 3.2.3.3(a) (the Parties do not distinguish clearing from trade facilitation and thus their arguments for both are the same).

derivatives), for similar reasons as described regarding trading in Section 3.2.3.3(a), namely: (i) the Parties would have a monopoly for the clearing of Nordic power derivatives, (ii) even under alternative market definitions¹²⁶, the Parties' position is likely significant, (iii) an assessment of the constraint from EEX is warranted as it is the only other player currently active in clearing Nordic power derivatives, (iv) the Parties' modest turnover does not mean that competition could not be harmed, and (v) the Parties' arguments regarding the efficiencies of the Transaction and the relevant counterfactual merit further review.

- (110) The effects from the Transaction would materialise in each of the Referring Countries, as the relevant geographic market for clearing of Nordic power derivatives appears to be at least Nordic-wide (if not EEA-wide or global) and as many of the Parties' customers are based in the Nordics, including in Sweden. The Commission therefore considers that the Transaction *prima facie* threatens to significantly affect competition in the clearing of Nordic power derivatives within the territory of Sweden.

3.2.3.4. Conclusion

- (111) In light of the foregoing, the Commission considers that the second substantive requirement, namely that the Transaction threatens to significantly affect competition within the territory of Sweden, is met.

3.3. Appropriateness of the referral

3.3.1. Referral requests

- (112) The Danish, Finnish and Swedish NCAs all submit that the Transaction fits the discretionary criteria referred to in the Article 22 Guidance and the Referral Notice. They highlight the importance of energy markets in Europe given the current energy crisis. Notably, the markets for trading and clearing power derivatives fulfil the crucial role of limiting the financial risks associated with volatile energy prices. The importance of the Transaction is therefore understated by the turnover generated in these markets, as the revenue does not reflect the economic importance of the affected markets, nor the scope of power derivatives trading that is facilitated by the Parties' activities.
- (113) They also submit that the cross-border nature of the effects of the Transaction places the Commission in the best position to review the Transaction and coordinate potential remedies, if necessary.

3.3.2. The Parties' submissions

- (114) EEX submits that the Transaction does not constitute an acquisition that is intended to be covered by the Article 22 Guidance. It argues that neither Party is a start-up, research company or potential competitive force, nor are they innovators or in possession of competitively significant assets or key inputs. EEX adds that, contrary to the situation in *Illumina/GRAIL*,¹²⁷ the consideration paid for the target [...].

¹²⁶ See paragraphs (97)-(99).

¹²⁷ Case M.10188 *Illumina/GRAIL*, Commission decision of 19 April 2021.

Accordingly, EEX does not consider a referral pursuant to Article 22 of the Merger Regulation to be appropriate.¹²⁸

- (115) Similarly, Nasdaq submits that the market for exchange trading of Nordic power futures is a mature one which has not been subject to innovative changes and is not expected to be subject to such changes in the future. Accordingly, Nasdaq Power's value and market position can be accurately assessed looking at its revenues and the market for exchange trading of Nordic power derivatives does not meet the criteria for a referral under Article 22.¹²⁹
- (116) EEX also submits that, contrary to the previous instance of Article 22 referral,¹³⁰ the concentration does not endanger a common good since the Parties' activities do not affect the production or supply of electricity. The financial products offered aim to hedge the risks associated with fluctuating electricity prices which is abstract from the underlying commodity (electricity).¹³¹
- (117) EEX further submits that the concentration would not give the Parties the ability or incentive to foreclose competition. Other market participants are present on the market for trading and clearing power derivatives. In addition, there is a significant substitutability between exchange trading and OTC trading; OTC trading, which neither of the Parties' offer, represents 44% of the market in European power derivatives.¹³²
- (118) The Parties jointly submit that the Referring Countries did not provide evidence of a real risk that the Transaction may have a significant adverse impact on competition. Instead, the evidentiary threshold used in the referral requests was that of hypothetical possibility.¹³³
- (119) They further highlight that the alleged economic importance of their activities for the Referring Countries is not a relevant criterion for the Commission to take into account when assessing the appropriateness of the referral. The relevant criterion should be whether the turnover of the Parties on a relevant market reflects their competitive potential. In this context, the Parties submit that Nasdaq Power operates on a mature market and its turnover is appropriate to evaluate its competitive potential.¹³⁴
- (120) Finally, the Parties submit that the Commission's guidance and Q&A relating to Article 22 does not envisage to cover concentrations similar to the Transaction and none of the examples considered in this guidance are comparable to the concentration. From a policy perspective, the Parties argue that the Commission

¹²⁸ Parties' response of 5 July to RFI 1, pages 1-2; Parties' Joint Response, paragraphs 28-30.

¹²⁹ Nasdaq's Response; Parties' Joint Response, paragraphs 28-30.

¹³⁰ Case M.10188 *Illumina/GRAIL*, Commission decision of 19 April 2021.

¹³¹ EEX's Response, paragraph 90.

¹³² The Commission notes that the parties also submitted this argument in the context of their assessment of whether the transaction threatens to significantly affect competition within the territory of the Member States making the request. The Commission therefore addresses this argument in the relevant section.

¹³³ Parties' Joint Response, paragraph 27. In this respect, the Commission's finding that on a *prima facie* assessment the Transaction does threaten to significantly affect competition is set out in Section 3.2.3.3.

¹³⁴ Parties' Joint Response, paragraph 34.

should not accept this referral as it would increase the unpredictability of Article 22 referrals beyond the types of cases initially envisaged by the Commission.¹³⁵

3.3.3. *The Commission's assessment*

(121) In exercising its discretion under Article 22 of the Merger Regulation, the Commission bases itself on the principles set out in the Referral Notice and the Article 22 Guidance.

3.3.3.1. The Referral Notice

(122) Pursuant to paragraph 45 of the Referral Notice, referrals of concentrations already notified should normally be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States and where it appears that these would be best addressed at the Commission level. The same applies *a fortiori* when a concentration is not subject to compulsory notification at Member State level and was not notified on a voluntary basis.

(123) The Referral Notice identifies two types of cases that are most appropriate for referral under Article 22:

(a) cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets; and

(b) cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

(124) The Commission considers that the Transaction fulfils the criteria of cases constituting the first category of cases envisaged in paragraph 45 of the Referral Notice. As outlined in Sections 3.2.1.1(b) and 3.2.1.2(b)(77) above, for the purposes of the present decision and without prejudice to the Commission's investigation, the markets for the financial trading of Nordic Power contracts and for related clearing services are considered to likely encompass at least the Nordics and thus be wider than national in geographic scope. As detailed in Section 3.2.3.3, the Transaction threatens to significantly affect competition and thus could give rise to serious competition concerns in the aforementioned supranational markets, to which the main economic impact of the concentration is connected.

(125) Furthermore, the Transaction would be best investigated at the Commission level for the following reasons.

(126) First, no Member State has jurisdiction to review the Transaction. In contrast, an investigation by the Commission would mean that the impact of the Transaction on competition in the Referring Countries would be assessed.

¹³⁵ Nasdaq's Response, section 1; EEX's Response, sections 2.3 and 6.

- (127) Second, the Commission has prior experience in the sector. It has previously reviewed concentrations relating to clearing services (such as Case M.9564 - *LSE Group/Refinitiv Business*), the financial trading of electricity (such as Case M.8660 - *Fortum/Uniper*), as well as abusive practices relating to services to facilitate the spot trading of electricity (Case AT.39984 - *Romanian Power Exchange/OPCOM*). The Commission is therefore well-placed to assess the markets concerned in the Transaction.
- (128) In light of the foregoing, the Commission finds that the present concentration falls under the first category of cases referred to in paragraph 45 of the Referral Notice and that, on balance, the Transaction presents a real risk of negative effects on competition and trade between Member States and would be best addressed at the level of the Commission.

3.3.3.2. The Article 22 Guidance

- (129) In exercising its discretion to accept or refuse a referral request the Commission also takes into account the factors set out in the Article 22 Guidance, which clarifies how the criteria set out in the Referral Notice should be applied in cases where the referring national authorities do not have jurisdiction to review the concentration in question.
- (130) In addition, the Article 22 Guidance notes that it provides only general guidance and that the Commission retains a considerable margin of discretion in deciding whether to accept referrals.¹³⁶ When considering whether to exercise this discretion, the Commission should above all bear in mind the need to ensure effective protection of competition in all markets affected by the transaction.¹³⁷
- (131) In the present case, the Transaction falls within the category of cases described in the Article 22 Guidance as suitable candidates for Article 22 referrals. In accordance with paragraph 19 of the Article 22 Guidance, the Transaction involves undertakings whose importance for competition is not reflected in their turnover. As explained below, this applies to Nasdaq Power and it appears that it could also apply to EEX.
- (132) The trading of power derivatives makes it possible to use long term contracts to lock in future prices, meaning that: “*more suppliers and consumers can guard against excessively volatile prices over longer periods of time*”. The result is that consumers and businesses have greater predictability and stability of energy prices, protecting them from future price shocks, which helps to boost the industrial competitiveness of the EU economy.¹³⁸ In view of the recent energy crisis, one of the key areas of focus of the current Commission is to ensure that energy markets work efficiently, including as regards electricity derivatives.¹³⁹ In this context, the Commission also

¹³⁶ Article 22 Guidance, paragraph 3.

¹³⁷ Article 22 Guidance, paragraph 18.

¹³⁸ Commission press release: “Commission proposes reform of the EU electricity market design to boost renewables, better protect consumers and enhance industrial competitiveness”, IP/23/1591 and Commission proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union’s electricity market design, COM(2023) 148 final.

¹³⁹ State of the Union Address by Commission President von der Leyen on 14 September 2022, SPEECH/22/5493, explaining that: “*we also know that energy companies are facing severe problems with liquidity in electricity futures markets, risking the functioning of our energy system [...] We will work with market regulators to ease these problems [...] The current electricity market design –*

notes that the recent state aid decisions approving the Danish and Finnish schemes to support electricity producers and suppliers further illustrates the importance of the energy markets for the Commission, as well as the difficult situation in which Nordic power companies currently find themselves¹⁴⁰. Moreover, the Commission considers that a robust and competitive clearing ecosystem is important to enhance trust in the financial system and support liquidity of key markets, supporting a competitive EU economy.¹⁴¹

- (133) Nasdaq Power has a very strong market position in the Nordics (close to a monopoly on some plausible market definitions) with respect to both services to facilitate the financial trading of electricity in the Nordics and clearing services for exchange-traded and on-venue OTC power derivatives, as described in paragraphs (98)-(99) and (107)-(108) above. Its trading and clearing platforms attract the vast majority of liquidity for Nordic power derivatives. Market participants have indicated that liquidity is the most important factor influencing the choice of trading and clearing platform for Nordic power derivatives.¹⁴² Although, as EEX points out,¹⁴³ Nasdaq Power's turnover is modest (EUR [...])¹⁴⁴, [...], its trading and clearing platforms facilitate the trading and clearing of Nordic power derivatives, and thus facilitate a very large and economically significant market. The platforms are thus of key significance for customers of Nordic power derivatives in view of the significant liquidity and the important functionality they provide.
- (134) Therefore, Nasdaq Power's large trading and clearing platforms are of particular significance for consumers and businesses in the Nordics given their contribution to energy price stability. This means that Nasdaq Power's customer contracts for open positions linked to its trading and clearing platforms (and the liquidity they contain and attract) can be considered to be competitively significant assets within the meaning of paragraph 19 of the Article 22 Guidance. More generally, in view of the importance of trading and clearing of power derivatives to the stability and

based on merit order – is not doing justice to consumers anymore [...] we will do a deep and comprehensive reform of the electricity market.”

¹⁴⁰ Commission decision SA.104267 of 7 October 2022, para.6: “[...] in Finland most electricity companies face or are at instant danger of facing liquidity problems, amongst others, because of collateral requirements for exchange trading. According to data from the Finnish Ministry of Finance, electricity producers hedge most of their production on the electricity derivatives exchange. [...]. According to Finland, with sharply increased prices in the electricity derivatives market the collateral requirements may be as much as 10 to 20 times higher than in normal circumstances. This creates a liquidity problem to energy companies, even if these companies are profitable”; Commission decision SA.104224 of 7 October 2022, para. 4: “The adverse price movements following Russia’s invasion of Ukraine have already required energy companies to post significant amounts of additional cash collateral. [...] With continued adverse price developments and the long maturities of the open derivative positions, there is a real risk that the companies producing electricity will not [be] able to obtain the liquidity they need from the markets and run out of cash. With over 70% of their future production hedged in the centrally-cleared derivatives markets, Finnish electricity producers are particularly exposed to these risks”; Commission decision SA.104602 of 4 November 2022, para.4: “[...] The current price hikes can put severe stress on the energy companies’ liquidity positions, and in extreme cases, it may prove difficult for the companies to secure the necessary liquidity in the market, even if the core business of the company is sound.”

¹⁴¹ Commission proposal for a Directive of the European Parliament and of the Council amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions, COM(2022) 698 final.

¹⁴² Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 7. Minutes of a call with a market participant on 7 July 2023 at 16:00, paragraph 5.

¹⁴³ EEX’s response of 5 July 2023 to RFI 1, page 2.

¹⁴⁴ Parties’ response to RFI 3.

predictability of energy prices for Nasdaq Power’s customers, in particular energy suppliers and energy-intensive businesses, Nasdaq Power’s services can be considered a key input for other industries within the meaning of paragraph 19 of the Article 22 Guidance. For these reasons, the Commission considers that Nasdaq Power’s significance extends beyond its turnover. The Commission therefore considers it appropriate to assess the impact of the Transaction in the course of an investigation pursuant to Article 22(3) of the Merger Regulation.

- (135) Likewise, the Commission considers that EEX’s importance for competition may not be reflected in its turnover, in accordance with paragraph 19 of the Article 22 Guidance. This is because it cannot be excluded at this stage and without an investigation that EEX would represent an actual or potential important competitive force within the meaning of paragraphs 37-38 of the Horizontal Merger Guidelines.¹⁴⁵ The Commission takes note of EEX’s argument that it is a small player in the Nordics for trading and clearing of power derivatives. However, the Commission considers that EEX’s influence on market dynamics may be substantially greater than its market share would suggest, such that its removal as a competitor could have a significant impact on the market, despite its small shares, for the following reasons. EEX is currently the only active competitor to Nasdaq Power in the provision of services to facilitate the (on-exchange) financial trading of electricity and clearing services for exchange-traded power derivatives in the Nordics.¹⁴⁶ The Complainant notes that EEX is the “*only credible rival*” to Nasdaq Power.¹⁴⁷ It submits that the removal of the only remaining competitor to Nasdaq Power would mean that the merged entity “*would ultimately obtain greater scope to control the terms offered to market participants*”¹⁴⁸ and “*deny market participants a choice of trading venues, [and] eliminate the competitive pressure that the Parties currently exert on each other*”.¹⁴⁹ While EEX is currently small in the Nordics, some market participants noted that it offers lower fees than Nasdaq Power,¹⁵⁰ and more generally that EEX is a leading provider of trading and clearing services for power derivatives in several other Member States (which might be advantageous for its Nordic offering as its existing customers in other Member States could easily use its service to begin trading Nordic Power derivatives too).¹⁵¹ The Commission therefore considers that EEX may be an (at least potential) important competitive force with respect to Nordic power derivatives, the presence of which in the market could exert a competitive constraint on the incumbent Nasdaq Power not reflected in its current

¹⁴⁵ Commission’s Guidance on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5-18 (the “Horizontal Merger Guidelines”).

¹⁴⁶ EEX’s response of 5 July 2023 to RFI 1, Annex 6, which notes that currently all Nordic power derivatives trades that are cleared are through Nasdaq or EEX, explaining that ICE Endex can in principle offer clearing services for these products but it does not have any cleared volumes at present.

¹⁴⁷ The Complaint, paragraph 3.

¹⁴⁸ The Complaint, paragraph 30.

¹⁴⁹ The Complaint, paragraph 34.

¹⁵⁰ Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 7.

¹⁵¹ Minutes of a call with a market participant on 5 July 2023 at 14:00, paragraph 13. For instance, EEX claims that in 2022, its market share for German power futures was [70-80]% and for Spanish power futures was [80-90]% (EEX Press Release - Annual volumes: EEX Group consolidates leading position in global energy markets, 24 January 2023, available at: https://www.eex.com/en/newsroom/detail?tx_news_pi1%5Baction%5D=detail&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Bnews%5D=6690&cHash=0e91f25db51aa7d3c4d374de3aacc06e#:~:text=The%20Power%20trading%20volume%20within,from%2046%25%20to%2059%25.)

market shares, and considers that it is appropriate to investigate this aspect in the context of an investigation pursuant to Article 22(3) of the Merger Regulation.

- (136) Finally, the Transaction does not fall within the scenarios of paragraphs 21 and 22 of the Article 22 Guidance, since the Transaction has not yet been implemented, and has not been notified in any Member State.
- (137) In light of the foregoing, the Commission considers the Transaction to be appropriate for referral to the Commission pursuant to Article 22 of the Merger Regulation.

4. CONCLUSION

- (138) For the abovementioned reasons, the Commission has decided to examine the concentration by which EEX proposes to acquire sole control of Nasdaq Power. This decision is based on Article 22(3) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President