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All interested parties,
stakeholders in GB and beyond,
and other regulatory bodies

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Date: 3 October 2016

To whom it may concern,

Consultation on our draft decision on application by EPEX SPOT SE to be designated a Nominated Electricity Market Operator in Great Britain for single day ahead and intraday coupling

Consultation on our draft decision on request for revocation of Nominated Electricity Market Operator designation in Great Britain for single day ahead and intraday coupling held by APX Commodities Limited

Background

On 11 December 2015 we¹ designated APX Commodities Limited (APX) as a Nominated Electricity Market Operator (NEMO) in Great Britain (GB) for single day ahead and intraday coupling², pursuant to Article 4(4) and 9(8) of the European Commission Regulation 2015/1222 establishing a Guideline on Capacity Allocation and Congestion Management (the CACM regulation)³.

In making our draft and final decisions we noted that during our designation process APX Group and EPEX SPOT SE (EPEX SPOT) had announced their intention to integrate their businesses. The transaction, leading to the acquisition of the APX Group by EPEX SPOT, as a wholly owned subsidiary, was completed on 4 May 2015.

In our final decision we explained that we had assessed changes to APX's application that had already taken effect as result of the integration process. We also explained that in making our decision we took into account that as part of the integration process it was expected that APX's clearing services would be transferred to European Commodities Clearing (ECC AG). Finally, we noted that we expected APX to keep the Authority informed ahead of and during any planned changes with respect to the post-merger-integration process.

¹ The Gas and Electricity Markets Authority. Ofgem is the Office of the Authority. The terms "Ofgem" and "the Authority", "we" and "us" are used interchangeably in this letter.

² [Final decisions on applications made by APX Commodities Limited and Nord Pool Spot AS to be designated Nominated Electricity Market Operators in Great Britain](#)

³ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management

Following this designation, EPEX SPOT provided us an update on its corporate integration project, which explained that APX will be integrated into EPEX SPOT, by means of cross-border merger or transfer of assets, and consequently APX will be liquidated, by 31 December 2016. As a result of this integration EPEX SPOT confirmed that the operations of single day ahead and intraday coupling and the services provided to members will be transferred from APX to EPEX SPOT. Furthermore, we were informed that contracts, licences and more generally duties and obligations will be transferred from APX to EPEX SPOT.

As explained in our decision letter for APX's NEMO designation⁴, we do not consider it possible for a designated NEMO to transfer or novate its designation to a different entity. This is because the CACM regulation is clear that an entity can only be designated a NEMO if it is determined to have met the criteria by the designating authority. In view of that, we do not consider that APX can transfer or novate its NEMO designation to EPEX SPOT in order to reflect the result of its integration process and transfer of operations.

As such, on 2 August 2016 APX submitted a request to the Authority to agree to revoke its NEMO designation, and, at the same time, EPEX SPOT submitted to us an application to be designated a NEMO in GB for single day ahead and intraday coupling. APX explained that the reason for its request to revoke its designation is to reflect the result of the integration process and the simultaneous application by EPEX SPOT for designation in GB.

Following receipt of the application from EPEX SPOT we have assessed whether the applicant meets the NEMO designation criteria set out in Article 6 of the CACM regulation. This has included assessment of the evidence submitted to the Authority, together with assessment meetings with the candidate to discuss their submission and, where necessary, request additional information to support their application.

This letter sets out and consults on our draft decisions.

Draft decision on application by EPEX SPOT to be designated a NEMO in GB

On the basis of our assessment of the application submitted by EPEX SPOT we consider that the candidate meets the designation criteria set out in the CACM regulation and should therefore be designated a NEMO in GB for single day ahead and intraday coupling. We provide draft designation notices for EPEX SPOT in Appendix 1.

We have processed the application from EPEX SPOT on the basis that it must notify us in the event that there are any material changes to its application, including -but not limited to- any substantial changes in relation to its integration with APX. In the event that there are any material changes we will assess whether this impacts on our assessment of EPEX SPOT's application.

We do not consider it appropriate to publish the evidence submitted by the candidate or our internal assessment. This is because the application and assessment contain commercially sensitive information relating to the business and operational arrangements of EPEX SPOT. However, we do consider it appropriate to provide stakeholders, and other regulatory bodies, with the opportunity to comment on our process and draft decision and to provide us with any evidence they consider may be relevant for us to take into account in making our final designation decision.

⁴ Final decisions on applications made by APX Commodities Limited and Nord Pool Spot AS to be designated Nominated Electricity Market Operators in GB

Draft decision on request for revocation of NEMO designation of APX Commodities Limited

We are minded to revoke the NEMO designation held by APX for single day ahead and intraday market coupling in GB. The revocation will reflect the integration of APX with EPEX SPOT by means of transfer of assets or cross-border merger and the subsequent liquidation of APX by 31 December 2016. Subject to our final decision, the coinciding designation of EPEX SPOT as a NEMO in GB for single day ahead and intraday market coupling will also reflect the transfer of single day ahead and intraday coupling operations from APX to EPEX SPOT.

In reaching our draft decision we assessed potential impacts that the revocation could have on the operation of the wholesale markets and on consumer interests. We concluded that we do not expect this process to disrupt the continuity of wholesale market operations or result in any consumer detriment. This is because, subject to our final assessment and decision, any revocation of the NEMO designation held by APX would coincide with the designation of EPEX SPOT as a NEMO in GB for single day ahead and intraday market coupling.

APX remains responsible until the effective revocation of its NEMO designation to inform us in the event of any material changes to its initial application or issues relating to the integration and transition of operations from APX to EPEX SPOT. We provide draft revocation notices for APX in Appendix 2.

We consider it appropriate to provide stakeholders, and other regulatory bodies, with the opportunity to comment on our draft decision and to provide us with any evidence they consider may be relevant for us to take into account in making our final decision.

Meaning and terms of a successful designation

The meaning and terms of any successful designation were set out in our decisions on the applications received from APX and Nord Pool Spot (NPS). We include the certain relevant aspects here for reference:

Successful designation

A successful designation in GB means the candidate is considered by the Authority to meet the criteria of the CACM regulation and is therefore a designated NEMO able to perform the tasks of NEMOs set out in the CACM regulation.⁵ A designation is not, and should not be considered as, confirmation of ongoing compliance of a designated NEMO with the requirements of the CACM regulation, or compliance of the entity designated as a NEMO with wider requirements of EU and UK law.

A designated NEMO will be responsible for and be required to make sure it continues to comply with the criteria and its wider obligations and requirements set out in the CACM regulation and EU and UK law. In particular, the assessment that an entity meets the criteria and is designated as a NEMO in GB does not prejudice future decisions to be taken under and in line with the CACM regulation, for example on capacity allocation and congestion management cost recovery.⁶ Similarly, designation is not, and should not be considered as, an approval of the systems and processes required under the EU regulation on energy market integrity and transparency (No 1227/2011) (REMIT)⁷, or be used as a defence to any breaches of the entity's obligations under REMIT.

⁵ The criteria are set out in Article 6 of the CACM regulation. NEMO tasks are set out in Article 7 of the CACM regulation.

⁶ Title III *Costs* of the CACM regulation

⁷ Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency Text with EEA relevance

Revocation and renewal

In the event a designated NEMO fails to maintain compliance with the criteria and is not able to restore compliance within six months of being notified of such failure by the designating authority, the member state where the NEMO has been designated shall ensure that designation is revoked.⁸ As the designating authority in GB we are responsible for NEMO designation and monitoring compliance with the criteria and so we will revoke a designation in GB if a NEMO fails to maintain compliance with the criteria and is not able to restore compliance within six months of notification in line with Article 4.8 and 9.8 of the CACM regulation.

In addition, we consider there may be other circumstances in which it would be appropriate for us to revoke a designation:

- A designated NEMO may itself wish to cease operation, in which case it should be able to request for its designation to be revoked. However, we do not consider it possible for a designated NEMO to transfer or novate its designation to a different entity. This is because the CACM regulation is clear that an entity can only be designated a NEMO if it is determined to have met the criteria by the designating authority.
- We also consider that in the case of insolvency, or if the Authority is satisfied that there has been a material misstatement of fact by or on behalf of a NEMO in making its application for designation as a NEMO, it may be appropriate to revoke a designation.

In revoking any designation we consider it may be necessary to allow for a reasonable period of time before revocation takes effect. This should take into account both the implications of any non-compliance and of revocation on the operation of the wholesale market and on consumer interests.

Therefore, in the case of failure to restore compliance after notification or if a NEMO requests or otherwise agrees for its designation to be revoked, the Authority will give not less than 30 days' notice of our decision before the date the revocation will take effect. In the case of insolvency the Authority will give not less than 24 hours' notice, and in the case of any material misstatement of fact seven days.

Finally, the CACM regulation requires an initial designation term of four years. However, it does not set out the arrangements that follow this initial term.⁹ We consider that six months prior to the expiry of this initial period designated NEMOs in GB should notify the Authority if they wish to continue to be designated in GB. This notification should include evidence that they continue to comply with the designation criteria. We will assess this evidence and, if appropriate, publish a decision to extend the NEMO's designation before its expiry date. We consider that any renewal of a designation following this initial four year designation should be for an ongoing period.

⁸ Article 4.8 of the CACM regulation

⁹ Article 4.2 of the CACM regulation

Next Steps and summary of consultation issues

We welcome any views from stakeholders and other regulatory bodies on:

1. Our draft decision to designate EPEX SPOT as NEMO in GB for day ahead and intraday coupling. In particular, we welcome any evidence that stakeholders and other regulatory bodies may consider relevant for us to take into account in reaching a final decision.
2. Our draft decision to revoke the NEMO designation held by APX. In particular, we welcome any evidence that stakeholders and other regulatory bodies may consider relevant for us to take into account in reaching a final decision.

Responses should be received by 31 October 2016 and should be sent to marcelo.torres@ofgem.gov.uk. If you'd like your response to remain confidential, clearly mark the document to that effect and include the reasons for confidentiality. Put any confidential material in the appendices to your response. We will respect this request, unless the law requires us to disclose anything, for example under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004. Unless marked confidential, all responses will be placed in our library and published on our website, www.ofgem.gov.uk.

If you have any queries more generally on the matters referred to in this letter, please feel free to contact marcelo.torres@ofgem.gov.uk

Having taken into account responses to our consultation, we will publish our final decisions, including any notices of successful designation and revocation.

Yours faithfully,

Mark Copley
Associate Partner, Wholesale Markets

Appendix 1 – Draft Notice of Designation of EPEX SPOT

Initial Designation for the purpose of Articles 4(4) and 9(8) of the Commission Regulation, No. 1222 of 24 July 2015, establishing a Guideline on Capacity Allocation and Congestion Management (the CACM regulation), (the Designation)

Designation

1. The Gas and Electricity Markets Authority (the **Authority**), pursuant to Articles 4(4) (*NEMOs designation and revocation of the designation*) and 9(8)(a) (*Adoption of terms and conditions or methodologies*) of the CACM regulation, hereby designates: EPEX SPOT SE, a company registered in Paris under company number 508 010 501, whose registered office is situated at 5 Boulevard Montmartre 7002 Paris (**EPEX SPOT**), as a Nominated Electricity Market Operator (**NEMO**), for single day ahead and intraday coupling in GB for an initial term of four years. The Designation is subject to the conditions set out below.

Obligations

2. As a NEMO **EPEX SPOT** will be expected to comply with all obligations placed on **NEMOs** under and in connection with the CACM regulation.

Effective Date and Revocation

3. The Designation shall take effect **at 12:00 am on 1 January 2017** and shall continue in force until **12:00 am on 1 January 2021**, unless renewed in accordance with paragraph 11 below.
4. The Authority may at any time by Notice revoke the Designation:
 - a) if **EPEX SPOT** agrees in writing with the Authority that the Designation should be revoked; or
 - b) if **EPEX SPOT** fails to maintain compliance with the criteria set out in Article 6 (*NEMO designation criteria*) of the CACM regulation and is not able to restore compliance within six months of being notified of its non-compliance by the Authority; or
 - c) if **EPEX SPOT**
 - i. is unable to pay its debts (within the meaning of section 123(1) or (2) of the Insolvency Act 1986, but subject to paragraph 5 of this Notice of Designation) or has any voluntary arrangement proposed in relation to it under section 1 of that Act or enters into any scheme of arrangement (other than for the purpose of reconstruction or amalgamation upon terms and within such period as may previously have been approved by the Authority);
 - ii. has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986) of the whole or any material part of its assets or undertaking appointed;
 - iii. has entered into administration under section 8 of and Schedule B1 to the Insolvency Act 1986;
 - iv. passes any resolution for winding-up other than a resolution previously approved in writing by the Authority; or
 - v. becomes subject to an order for winding-up by a court of competent jurisdiction; or
 - d) if **EPEX SPOT** is incorporated or has assets in a jurisdiction outside England and Wales and anything analogous to any of the events specified in sub-paragraph (c) occurs in relation to **EPEX SPOT** under the law of any such jurisdiction.
5. **EPEX SPOT** shall not be deemed to be unable to pay its debts for the purposes of paragraph 4 (c) (i) if any such demand as is mentioned in section 123(1)(a) of the

Insolvency Act 1986 is being contested in good faith by **EPEX SPOT** with recourse to all appropriate measures and procedures or if any such demand is satisfied before the expiration of such period as may be stated in any notice given by the Authority under paragraph 4.

6. For the purposes of paragraph 4 (a), the notice period for revocation shall be not less than [30] days from the date of the written agreement between **EPEX SPOT** and the Authority.
7. For the purposes of paragraph 4 (b), **EPEX SPOT** will have six months to provide the Authority with evidence that it has restored compliance following its notification of non-compliance by the Authority. If, following consideration of this evidence, the Authority decides, in its total discretion, to revoke the Designation it will give **EPEX SPOT** no less than [30] days' notice.
8. For the purposes of paragraph 4 (c), the notice period for revocation shall be not less than [24 hours].
9. The Authority may at any time revoke the Designation by giving no less than [7] days' notice in writing to **EPEX SPOT** where the Authority is satisfied that there has been a material misstatement (of fact) by, or on behalf of **EPEX SPOT**, in making its application for designation as a NEMO.
10. The Authority will publish any decision to revoke this Designation on its website.

Renewal

11. **EPEX SPOT** must confirm to the Authority six months before expiry of this initial designation, on **1 July 2020**, if it wishes to continue its designation on an ongoing basis and provide evidence that it continues to meet the criteria set out in Article 6 (*NEMO designation criteria*) of the CACM regulation.

Interpretation

12. References in this Designation to the provision of any enactment, where after the date of this designation
 - a) the enactment has been replaced or supplemented by another enactment, and
 - b) such enactment incorporates a corresponding provision in relation to fundamentally the same subject matter.

shall be construed, so far as the context permits, as including a reference to the corresponding provision of that other enactment.

Appendix 2 – Draft Notice of Revocation of Designation held by APX COMMODITIES LIMITED

Revocation of Designation in accordance with Condition 4(a) of Notice of Designation of APX COMMODITIES LIMITED

1. The Gas and Electricity Markets Authority (the **Authority**), pursuant to condition 4(a) of the Notice of Designation of APX COMMODITIES LIMITED (**APX**), dated 10 December 2015, hereby revokes the Nominated Electricity Market Operator (**NEMO**) designation for single day ahead and intra-day coupling held by **APX**, a company registered in England and Wales under company number 03751681, whose registered office is situated at 18 King William Street, London, EC4N 7BP.
2. The designation is revoked on the grounds that **APX** is to be liquidated and its operations transferred to **EPEX SPOT** as a result of an integration of these businesses, and that **EPEX SPOT** is to be at the same time designated a NEMO in GB for single day ahead and intraday coupling.

Effective Date and Revocation

3. The revocation shall take effect **12:00 am on 1 January 2017**. The revocation process is irreversible after the publication of the respective notice.

Mark Copley,
Associate Partner, Wholesale Markets

Duly authorised on behalf of the Gas and Electricity Markets Authority
3 October 2016