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Rectification of wrong or  
misleading statements of  
Chapter III of the 8th  
Energy Sector Report of  
the Monopolies  
Commission pursuant to §  
62 EnWG

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Berlin/Paris

**Preliminary remark by EPEX SPOT:** Chapter III of the 8<sup>th</sup> Energy Sector Report of the Monopolies Commission released on 1 September 2021 contains numerous incorrect and misleading statements. These incorrect and misleading facts and grounds bias the core legal and economic analysis of the Monopolies Commission. The aim of the present paper is to rectify, in a non-exhaustive manner, these statements and provide missing information where most needed.

**Summary, paragraph 1:** *“For almost the entire period the order books of the two electricity exchanges, EPEX SPOT and Nord Pool, active in Germany are shared and accessible to all electricity traders via the pan-European trading platform XBID so that supply and demand of electricity can be matched efficiently.”*

- **EPEX SPOT:** Supply and demand can be matched as efficiently during order book sharing times as well as outside of order book sharing times.

**Summary, paragraph 1:** *“However, the incumbent, EPEX SPOT, on which over 90% of the market volume is traded in intraday trading in the GER/LUX bidding zone, stops sharing its order books 60 minutes before delivery”*

- **EPEX SPOT:** Firstly, in the context of this paragraph, it is misleading to refer to EPEX as the incumbent. Nord Pool was the first power exchange to launch an intraday market in September 2006 in Germany, followed by EEX in October 2006. In 2009, following the creation of EPEX SPOT and the transfer of EEX Power Spot to EPEX SPOT, EPEX SPOT started organising an intraday market in Germany. Secondly, is not an individual decision by EPEX SPOT to stop order book sharing 60 minutes before delivery, but the implementation of an ACER decision. According to the ACER Decision No. 04/2018 on cross-zonal intraday gate opening and gate closure times (IDCZGCT), order book sharing stops European wide 60 minutes before delivery<sup>1</sup>, i.e., at the moment when cross-border capacity allocation stops.

**Summary, paragraph 1:** *“During the last hour, trading is only possible locally on the platforms of EPEX SPOT or Nord Pool.”*

- **EPEX SPOT:** It is wrong to state that during the last hour, trading would only be possible locally on the platforms of EPEX SPOT and Nord Pool. Trading is also possible with other players, such as Over-The-Counter (OTC) brokers, local trading venues and large trading companies offering direct market access services. These venues are in direct competition with spot power exchanges outside of coupled markets under CACM, in addition to the competition amongst NEMOs in coupled markets under CACM.

**Summary, paragraph 3:** *“Until 1 June 2021, EPEX SPOT did not share its order books until 6 pm or 10 pm”*

- **EPEX SPOT:** Since the launch of XBID on 12 June 2018 and until 31 May 2021, EPEX SPOT transmitted incoming bids from the German market directly to the shared order book of the Single Intraday Coupling (SIDC) as of 18:00 D-1. 18:00 D-1 was until 31 May 2021 the time of the opening of the shared order book and corresponded to the technically and regulatory earliest possible time for the transmission of orders by NEMOs in Germany. Due to technical issues faced by TSOs, no NEMO in Germany, including Nord Pool, could transmit incoming orders to the SIDC shared order book before 18:00 D-1. It is therefore wrong to assert that EPEX SPOT did only share order books at 22:00.

**Summary, paragraph 4:** *“However, the Monopoly Commission expects it will improve competition between electricity exchanges, which in turn promotes innovation and investment in the intraday market.”*

- **EPEX SPOT:** The Monopoly Commission considers that the sharing of liquidity over the entire intraday timeframe will improve competition between power exchanges and that, consequently, innovation and investments in the intraday market will be boosted. This consists in reasoning the wrong way round. Indeed, liquidity is built by an exchange as a result of competition on other parameters of competition, including

<sup>1</sup> Except for the Estonia-Finland bidding zone border where the intraday cross-zonal gate closure time is set to 30 minutes before the start of the relevant intraday market time unit (see ACER Decision No 04/2018, para. 59). Rectification of wrong or misleading statements of Chapter III of the 8th Energy Sector Report of the Monopolies Commission pursuant to § 62 EnWG

innovation and investments in, e.g., enhanced system performance, trading functionalities, new products etc. Encroaching on companies' fundamental rights such as the right to property actually entails negative effects on their incentives to invest and innovate, which in turn jeopardizes effective and dynamic competition.

**Summary, paragraph 6:** *“Furthermore, Article 7 of Regulation (EU) No. 2019/943 imposes the obligation to share order books over the entire period of intraday trading in the GER/LUX bidding zone.”*

- **EPEX SPOT:** Neither Article 7 of Regulation (EU) No. 2019/943 (the “Electricity Regulation”) nor any other article of the Electricity Regulation imposes the obligation to share order books over the entire period of intraday trading in the DE/LUX bidding zone. The Electricity Regulation concerns only timeframes when cross-border capacities can be allocated and does not require the sharing of order books after the IDCZGCT in local markets. This rectification also applies, inter alia, to **Number 124**.

**Summary, paragraph 7:** *“After weighing up all arguments, the Monopolies Commission recommends that the Bundesnetzagentur fully enforce Article 59(4) and (5) sentence 2 of the CACM Regulation and Article 7(1) of Regulation (EU) 2019/943, which oblige the sharing of order books over the entire period of intraday trading.”*

- **EPEX SPOT:** This reading of CACM Regulation and Electricity Regulation is erroneous. EPEX SPOT notes that neither the CACM Regulation nor the Electricity Regulation require the sharing of order books after IDCZGCT, nor does such a call enter into their purpose and scope.

**Number 45:** *“Market coupling of the individual bidding zones in Europe was designed in such a way that market participants only buy or sell electricity, but not capacity, on exchanges in the short term.”*

- **EPEX SPOT:** Market coupling can be either implicit or explicit. This statement is to be understood as referring to implicit market coupling, rather than simply “market coupling”.

**Number 50:** *“Trading is done on the nominated electricity market operators (i.e., NEMOs), also known as electricity exchanges.”*

- **EPEX SPOT:** Not all electricity exchanges are NEMOs. Pursuant to the CACM Regulation, “*nominated electricity market operator (NEMO)*” means an entity designated by the competent authority to perform tasks related to single day-ahead or single intraday coupling”. The legal status of a NEMO can be obtained if a power exchange applying for such status meets the NEMO designation criteria set by Article 6 of the CACM Regulation. It is a free business decision for power exchange whether or not to apply for a NEMO designation to perform market coupling tasks, and/or to offer trading services outside of the CACM Regulation framework, i.e. offering only local products without cross-border capacity allocation.

**Number 50:** *“Traders can trade electricity in the GER/LUX bidding zone on EPEX SPOT and Nord Pool across all of Europe.”*

- **EPEX SPOT:** In addition to EPEX SPOT and Nord Pool, other designated NEMOs in Germany are: EXAA AG and Nasdaq Oslo ASA.

**Number 50:** *“EPEX SPOT, set up in 2008, is the established electricity exchange in Germany. The German Federal Network Agency (i.e., Bundesnetzagentur (BNetzA)) appointed Nord Pool as NEMO in the GER/LUX bidding zone in 2016.”*

- **EPEX SPOT:** It is misleading to compare the date of the foundation of the company EPEX SPOT with the date of the appointment of Nord Pool as a NEMO in Germany. It suggests that EPEX SPOT would be active on the German market since 2008 and Nord Pool since 2016. In fact, Nord Pool launched the first Intraday markets in CWE. Nord Pool started its intraday service in Germany in September 2006, with an exclusive access to Denmark-Germany cross-zonal capacity (through the Kontek cable) until June 2018. EEX followed shortly in in October 2006. EPEX was not the incumbent or “established electricity exchange” in the German Intraday markets. This erroneous presentation of EPEX SPOT as the incumbent power exchange in Germany discredits the Monopolies Commission’s legal and economic argumentation.

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**Number 52:** *“Electricity trading in the day-ahead market starts on the day before delivery at 10 am and essentially consists of one pan-European auction (i.e., Single-Day-Ahead-Auction (SDAC))”*

- **EPEX SPOT:** Within the CACM framework, “SDAC” stands for “single day-ahead coupling”, not specifically for “single day-ahead auction”.

**Number 53:** *“During the SDAC, traders can make offers and bids for every time of delivery (i.e., quarter, half and full hours) of the following day, which reflects their willingness to sell and buy.”*

- **EPEX SPOT:** In SDAC, only 60-minute products are currently available, not quarterly or half-hour products.

**Number 60:** *“The CACM Regulation allows Member States to name only one NEMO in their region if a statutory national monopoly existed previously. According to the case law of the European Court of Justice (ECJ), the granting of an exclusive right to an undertaking by a Member State does not already constitute a violation of Article 106(1) in conjunction with Article 102 TFEU simply because it creates a dominant position or even a monopoly. The contrary only applies if an undertaking is already abusing its dominant position within the meaning of Article 102 TFEU or if the State measure creates a situation that incentivises the undertaking to commit such a violation. Only in the event of a violation of Article 106(1) in conjunction with Article 102 TFEU would it have to be examined whether the state measure is justified under Article 106(2) TFEU, because it concerns a service of general economic interest.”*

- **EPEX SPOT:** Article 106 TFEU read in conjunction with Article 102 TFEU prohibits State measures granting exclusive rights when that results in a distortion of competition. Indeed, the mere creation of a dominant position through the grant of exclusive rights is not in itself incompatible with Article 102 TFEU. However, if the undertaking at stake is led, merely by exercising those rights, to abuse its dominant position, or if such rights are liable to create a situation in which that undertaking is led to commit such abuses, then the State measure will be contrary to Article 102 and Article 106(1) of the TFEU. That being said, considering – as the Monopolies Commission seems to do – that the continuation of national legal monopolies would only be problematic in case of established violation of Article 106(1) read in conjunction with Article 102 TFEU is short sided. Indeed, to really foster competition between NEMOs in Europe, then monopolistic NEMOs shall be abolished. Six years after the entry into force of the CACM Regulation, 1/3 of EU Member States still allow monopolistic NEMOs, such as Spain and Italy. This means that in these countries, no competition between NEMOs is possible over the entire SIDC trading period as there is only one monopolistic NEMO in the country. Other power exchanges are not allowed to apply for NEMO status. This simply corresponds to a denial of competition.

**Number 61:** *“Besides, the actual opening time still differs from the official opening time in the GER/LUX bidding zone.”*

- **EPEX SPOT:** On 31 May 2021, the German Intraday cross-zonal gate opening time was changed from 18:00 CET D-1 to 15:00 CET D-1. It is therefore unclear to which mismatch the Monopolies Commission’s report, published 1 September 2021, refers to.

**Number 67:** *“To implement this, the European Cross Border Intraday Market (XBID) Solution was found in June 2018.”*

- **EPEX SPOT:** Whilst the European cross-border intraday market solution (the XBID Solution), went live in June 2018, the cooperation, between several power exchanges and TSOs including EPEX SPOT, for the development of such solution started several years before the entry into force of the CACM Regulation.

**Number 68:** *“The shipping module offers all market participants information on all orders made via XBID.”*

- **EPEX SPOT:** The XBID shipping module does not interact directly with market participants. Instead, it provides information on the transactions concluded to all relevant parties of the post-coupling process.

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**Number 73:** *“Therefore, traders can now access electricity trades from 3 pm via both of the NEMOs in Germany, EPEX SPOT and Nord Pool.”*

- **EPEX SPOT:** In addition to EPEX SPOT and Nord Pool, other designated NEMOs in Germany are: EXAA AG and Nasdaq Oslo ASA. See number 50 above.

**Number 74:** *“In conclusion, it can be stated that the beginning and the end of cross border intraday trading is set at 3 pm in the CACM Regulation in conjunction with the ACER Decision, yet it is currently not implemented consistently in Germany.”*

- **EPEX SPOT:** As recalled by the Monopolies Commission’s report, the German intraday cross-zonal gate opening time was recently changed (on 31 May 2021, it was changed from 18:00 CET D-1 to 15:00 CET D-1). It is therefore unclear why the Monopolies Commission’s report, published 1 September 2021, refers to an inconsistent implementation of CACM Regulation in Germany.

**Number 79:** *“Regulation (EU) No. 2019/943 provides the base to make continuous sharing of order books mandatory.”*

- **EPEX SPOT:** Neither Regulation 2019/943 nor related EU regulations provide any legal basis for a forced pooling of liquidity between NEMOs at all times.

**Number 85:** *“Most of the trade volume in the German intraday market is traded on the established electricity exchange, EPEX SPOT.”*

- **EPEX SPOT:** It is misleading to refer to EPEX SPOT as the “established electricity exchange”. See number 50 for explanation.

**Number 86:** *“Since EPEX SPOT processes over 90% of the intraday trade volume, this market trend also reflects the market leader’s growth rate.”*

- **EPEX SPOT:** It is the other way round: a platform’s growth reflects the market’s growth.

**Number 86:** *“Thus, the sharing of order books seems to have a positive impact on new competitors’ growth in shares of supply.”*

- **EPEX SPOT:** It is misleading to refer to Nord Pool as “new competitor” of EPEX SPOT, given that Nord Pool was the first power exchange to launch an intraday market in September 2006 in Germany, followed by EEX in October 2006, as explained under summary, paragraph 1.

**Number 87:** *“Nowadays, both NEMOs have access to the entire trade volume of the GER/LUX bidding zone for most of the intraday trading period.”*

- **EPEX SPOT:** It is misleading to refer to EPEX SPOT and Nord Pool as “both NEMOs” since there are other designated – but non-operational - NEMOs in Germany, namely EXAA AG and Nasdaq Oslo ASA. See number 50 above.

**Number 87:** *“Although intraday trading between 3 pm and 6 pm is only possible within Germany and not beyond national borders, as required by the CACM Regulation, there is enough volume available in the German electricity market to enable efficient electricity trading.”*

- **EPEX SPOT:** 3 pm and 6 pm must refer to D-1.

**Number 88:** *“Extending intraday trading between 3 pm and 10 pm to the entire European market would result in a better match of supply and demand because the number of suppliers and buyers increases by the number of electricity traders from abroad and, therefore, the trade volume increases. However, a geographic expansion of the market including the other European bidding zones and a resulting increase in trade volume will not intensify competition between NEMOs as long as the same amount of trade volume can be accessed via both exchanges.”*

- **EPEX SPOT:** 3 pm and 10 pm must refer to D-1.

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**Number 89:** *“While electricity exchanges can directly influence most of these factors, only a large customer base achieves high trade volumes.”*

- **EPEX SPOT:** The volumes of trades on the intraday market do not only vary depending on the number of market participants active on the market but also on the market design itself and on the balancing market design and rules.

**Number 90:** *“If trade volume is split between two trading platforms in the last hour, there will be no efficient and uniform pricing.”*

- **EPEX SPOT:** First of all, the continuous intraday market does not have a uniform price as it is a pay-as-bid price, and each transaction has a different price. With regard to efficient pricing, there is and will be an efficient pricing. Each power exchange calculates its own price, but market participants can and do arbitrage between the two or more exchanges, which narrows the bid-ask spread differential between the two or more exchanges and therefore leads to price convergence.

**Number 90:** *“While prices of EPEX SPOT will remain almost unchanged during this period, due to the remaining high trade volumes, Nord Pool’s customers will not have access to transparent information about volumes and prices on its trading platform during this period. Sharing order books between EPEX SPOT and Nord Pool in the intraday market offsets this competitive disadvantage.”*

- **EPEX SPOT:** Access to transparent information on volumes and prices on a power exchange platform – continuously provided by such platform to its members - is not altered by whether or not such platform’s liquidity is shared with other platforms’ liquidity. There is therefore no “competitive disadvantage” to be offset.

**Number 91, and footnote 50:** *“A survey of electricity traders, which the Monopolies Commission carried out as part of its research, supports these findings. 50”*

*“50 The Monopolies Commission could distribute the survey via one of the NEMOs and two associations to 40% of traders who were active in March 2021 at one of the NEMOs in the GER/LUX bidding zone. In total, 23% of the addressed traders responded to the survey. The traders who participated in the survey traded approximately a quarter of the total trade volume in the intraday market in 2020. [...]”*

- **EPEX SPOT:** As a general remark, it should be stressed that a limited and therefore non-representative number of market participants replied to the survey conducted by the Monopolies Commission. Consequently, the qualitative analysis based on this survey cannot be considered as a representative and comprehensive analysis from which relevant and reliable observations could be derived.

**Number 91:** *“EPEX SPOT customers state that liquidity is very important to them when choosing a NEMO, while Nord Pool customers predominantly value low fees.”*

- **EPEX SPOT:** The qualitative analysis is based on few responses and thus not representative and not reliable. See number 91, and footnote 50, above.

**Number 91, Footnote 51:** *“Among the electricity traders who took part in the survey, almost four in five trade on both exchanges, whereas in reality only about every fifth trades on both NEMOs.”*

- **EPEX SPOT:** We estimate that today, not only 20% but a large majority of our volumes on the intraday market come from members with double membership with another NEMO.

**Number 92:** *“In conclusion, for the majority of traders Nord Pool is an alternative to EPEX SPOT, but the lower level of liquidity prevents them from trading partially or exclusively on Nord Pool.”*

- **EPEX SPOT:** The qualitative analysis is based on very few responses and thus not representative and not reliable. See number 91, and footnote 50, above.

**Number 93:** *“Furthermore, traders were asked whether sharing order books may promote competition in the intraday market. When order books are shared, the majority of traders expect efficient competition to take place based on fees and service instead of liquidity. Some emphasise the importance of shared order books specifically*

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for the last hour of trading before delivery. Some also explicitly mention the elimination of EPEX SPOT's current competitive advantage by accumulating almost all liquidity on its trading platform."

- **EPEX SPOT:** The qualitative analysis is based on very few responses and thus not representative and not reliable. See number 91, and footnote 50, above.

**Number 94:** "The following analysis, based on shares of trade volume, assesses whether and how the restricted order book sharing in the last hour before delivery affects competition between the two electricity exchanges." [...] "The discontinuity exists because all trades up until 60 minutes to delivery are accessible via XBID; within the last 60 minutes, trading is restricted to the respective exchange."

- **EPEX SPOT:** Firstly, it is misleading to present the lack of liquidity pooling in the last hour before delivery as "restricted order book sharing" or "restricted [trading]", as there is simply no obligation to further socialize liquidity past the gate closure time when no cross-zonal capacity is available. Secondly, it is misleading to focus the quantitative analysis only on market shares. The meaning of market shares must be put in the right context. In particular, OTC volumes during the intraday timeframe cannot be determined because they are based on bilateral transactions which are usually no public information. Therefore, market shares calculated based on public information might be overestimated.

**Number 97:** "EPEX SPOT's share of total trade volume increases by about 6 percentage points due to restricting all trade to its local platform in the last hour."

- **EPEX SPOT:** It is misleading to present the lack of liquidity pooling in the last hour before delivery as "restricting all trade to [EPEX] local platform". See number 94 for explanation.

**Number 99:** "However, since the regression discontinuity analysis only determines the average effect at the discontinuity, one cannot draw the conclusion that EPEX SPOT benefits less each year by restricting trade to its local platform."

- **EPEX SPOT:** It is misleading to present the lack of liquidity pooling in the last hour before delivery as "restricting trade to [EPEX] local platform". See number 94 for explanation.

**Numbers 100 - 103: Chapter 3.2.4 "The trade volume in the last hour before delivery is increasing", see for example Number 100:** "In fact, there seems to be a trend towards trading just before the start of delivery in the short-term electricity market. According to BNetzA, electricity trade is increasing in the last 60 minutes before delivery and is becoming more important, especially due the increase in renewable energy."

- **EPEX SPOT:** It is not true that the share of volumes traded in the last hour before delivery in Germany increases. The importance of the last hour before delivery varies across Member States since the intraday market is not as developed everywhere. In Germany, the share of volumes traded in the last hour before delivery – though more important than in other European markets – has been stable over the past 3 years. A declining trend can even be observed since 2020.

Furthermore, the importance of the last hour for the integration of increasing renewable generation should not be overestimated. For instance, Denmark is a global leader in the system integration of variable renewable energy, in particular wind energy, whilst not allowing trading in the last hour before delivery. In fact, the integration of increasing renewable generation rather depends on other market design evolutions, such as e.g., maximizing the opportunities for cross-border trade. There are further European countries where trading in the last hour before delivery is not possible at all, such as in Sweden and Norway.

**Number 105:** "Until 2016, EPEX SPOT was the only NEMO in the GER/LUX bidding zone. As already discussed in 3.2.2, exchanges benefit from indirect network effects, which made it difficult for Nord Pool to newly enter the market and prompt traders to switch platforms. Hence, it is likely that the unevenly distributed trade volume reflects EPEX SPOT's advantage in time and the existence of network effects and not primarily the preference of traders on which exchange they like to trade."

- **EPEX SPOT:** First, the NEMO status was only created with the entry into force of the CACM Regulation in 2015. EPEX was appointed NEMO in Germany in 2015, Nord Pool in 2016. Second, it is misleading to state that EPEX SPOT was the only NEMO in the DE/LUX bidding zone until 2016, to present Nord Pool a "newly

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enter[ing] the market” and to present EPEX SPOT as having an “advantage in time”, as it ignores the fact that Nord Pool was the first power exchange to launch an intraday market in September 2006 in Germany, followed by EEX in October 2006, as explained under summary, paragraph 1.

**Number 106:** *“Therefore, the argument that the electricity exchange, which was initially the only one in the market, developed its customer base because of innovation and investment is at least partly wrong. Only with Nord Pool entering the market was competition introduced into the intraday market in Germany.”*

- **EPEX SPOT:** This is wrong and ignores the history of power exchanges on the German intraday market (see comment on summary, paragraph 1).

**Number 107:** *“In the intraday market, competition currently only exists in the period in which order books are actually shared. For example, it has been noticed that some indicators of liquidity at EPEX SPOT worsen significantly in the last hour before delivery, when order books are no longer shared and competition between NEMOs disappears.”*

- **EPEX SPOT:** It is wrong to allege that competition only exists when order books are shared. Effective and sustainable competition already existed and still exists also outside of order book sharing times between power exchanges pursuant to the CACM Regulation and ACER’s Decision No 04/2018 framework, and also between power exchanges and other types of companies that offer trading facilitation services, such as brokers, aggregators, and independent software providers.

**Number 107:** *“If the sharing of order books is extended to the last hour before delivery, investment and innovation incentives for EPEX SPOT may increase instead of decreasing.”*

- **EPEX SPOT:** As explained by EPEX SPOT to the Monopolies Commission (see Annexes 2 and 3), the systematic sharing of liquidity, which is neither economically nor legally justified for power exchanges to compete, would jeopardize investment and innovation, to the ultimate detriment of market participants and consumers.

**Number 108:** *“Furthermore, it is rather unlikely that the sharing of order books will dampen product innovations.”*

- **EPEX SPOT:** Ibid.

**Number 109:** *“Moreover, there are indications that competition is driving innovation and investment in the intraday market. For example, market participants mentioned several times in conversations that, when Nord Pool entered the market, it extended the trading period. Nord Pool introduced in September 2016 that traders can bid up to 20 minutes before delivery in the intraday market within the GER/LUX bidding zone. In March 2017, EPEX SPOT reduced the lead time for bids on its local trading platform from 60 minutes to 30 minutes.”*

- **EPEX SPOT:** The example of lead time reduction by Nord Pool and EPEX SPOT is an example of competition outside of order book sharing. It shows that competition outside of order book sharing works. It is thus not suitable for demonstrating that order book sharing drives innovation. The opposite is the case.

**Number 110:** *“When in need of electricity in Germany at a given time, one can only purchase it at a limited number of electricity exchanges at short notice.”*

- **EPEX SPOT:** Electricity cannot only be purchased at short notice at power exchanges, but also OTC brokers, etc.

**Number 110:** *“This is achieved by sharing order books, where total demand meets total supply.”*

- **EPEX SPOT:** First, security of supply is not supported by sharing liquidity but rather by fostering the ability to trade between bidding zones and the release of sufficient cross-border capacity for such purpose. Second, all demand and supply are not concentrated on power exchanges’ platforms, since trading is also possible with other players, such as OTC brokers, local trading venues and large trading companies offering direct market access services.

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**Number 111:** *“Therefore, after weighing all the arguments, the Monopolies Commission concludes that sharing order books promotes competition among electricity exchanges in intraday trading, which enhances the efficient allocation of supply and demand of electricity and thus supports the goal of secure energy supply.”*

- **EPEX SPOT:** Ibid. Order book sharing does not enhance the efficient allocation of supply and demand of electricity. An efficient allocation of supply and demand can also be ensured when order books are not shared as well as through other market players.

**Numbers 112 - 115: Chapter 3.4 “Refusal to share order books may represent an abuse of a dominant position”, see for example Number 112:** *“This requires that, under certain circumstances, a dominant undertaking must grant competitors access to a facility which it controls here: the order books.”* ; **Number 113:** *“The exceptional obligation of the dominant undertaking to grant access is an expression of the special responsibility of the undertaking for competition in the downstream market.”* ; **Number 114:** *“Concerning the possibility of eliminating all competition in the downstream market (above (i)), it could be argued against the fulfilment of this criterion that several exchanges are currently active in intraday electricity trading.”* ; **Number 115:** *“This aspect may be relevant when assessing the requirement of access to the facility to compete in the downstream market (above (ii)) as well as in the present case.”*

- **EPEX SPOT:** In this fast-track and incomplete legal reasoning, and amongst other shortcomings, it seems to be assumed without discussion, that a power exchange’s order book is an essential facility, and that there exists a relevant downstream market on which competition would be eliminated, without such market being at least identified if not defined. These unreliable developments discredit the Monopolies Commission’s legal and economic argumentation.

**Number 115:** *“The CACM Regulation and Regulation (EU) 2019/943 impose an obligation to share order books during the entire period of intraday trading, which a dominant undertaking may not have implemented so far.”*

- **EPEX SPOT:** The CACM Regulation and Regulation (EU) 2019/943 do not impose an obligation to share order books during the entire period of intraday trading, but concern only cross-border situations and do not require the sharing of order books after the IDCZGCT in local markets. This rectification also applies, inter alia, to **Number 124**.

**Numbers 116 – 122: Chapter 3.4 “Refusal to share order books may represent an abuse of a dominant position”, see for example Number 116:** *“The British discussion primarily focuses on the market coupling between Great Britain, the Republic of Ireland and Northern Ireland and the use of a common trading platform for all electricity exchanges during the day ahead and intraday auctions.66”* ; **Number 117:** *“Furthermore, OFGEM explicitly recommends the sharing of order books to ensure that all NEMOs have access to the day-ahead and intraday auctions.67”*

- **EPEX SPOT:** As a general remark, the selection of cases in this chapter is biased, i.e., two cases, including one ongoing, against EPEX SPOT. Through such references, there seems to be an assumption that such cases and the Monopolies Commission’s report relate to comparable facts and concerns. This is not the case. The references to a UK case are irrelevant for the Monopolies Commission’s assignment, namely German energy markets. Such references are also incorrect and misleading. For instance, no “use of a common trading platform for all electricity exchanges” was at stake, nor did OFGEM explicitly recommended the sharing of order books as a specific remedy. Further, the opening of an investigation by the European Commission does not imply that EPEX SPOT has acted in breach of the EU competition rules. Such irrelevant and misleading developments discredit the Monopolies Commission’s legal and economic argumentation.

**Number 123:** *“The sharing of order books is technically not connected with the provision of capacities for cross border trading. The shared order book and the capacity management module in XBID are two independent processes, so that NEMOs can theoretically share trade orders via XBID in the shared order book at any time and regardless of the TSOs’ provision of capacities and thus cross border trading.”*

- **EPEX SPOT:** The sharing of order books in XBID is intended only for cross-border capacity allocation purposes. The XBID solution was developed in cooperation between TSOs and Power Exchanges with an external service provider. In practice, the shared order book, and the capacity management modules in XBID

Rectification of wrong or misleading statements of Chapter III of the 8th Energy Sector Report of the Monopolies Commission pursuant to § 62 EnWG

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continuously communicate with each other, since the matching of orders from the SOB module depends on the capacities made available in the capacity management module.

**Number 127:** *“In order to create a level playing field for all NEMOs, the sharing of order books should not be linked to any period but should generally apply to all bids in the intraday market.”*

- **EPEX SPOT:** Firstly, the sharing of order books in XBID shall remain strictly limited to the purpose of allocating cross-zonal capacity. Indeed, the sharing of order books is an exceptional measure adopted for the regulatory purpose of efficiently allocating cross-zonal capacity as part of market coupling, at the expense of competition between power exchanges. Secondly, “all bids in the intraday market” are not placed on NEMOs’ trading platforms, since trading is also possible with other players, such as OTC brokers, local trading venues and large trading companies offering direct market access services. These venues represent direct competition to spot Power Exchanges outside coupled markets under CACM, on top of the competition amongst NEMOs in CACM coupled markets. Lastly, the further socialization of liquidity between NEMOs will create an unlevel playing field between NEMOs and other trading venues such as OTC brokers etc.

**Numbers 128-129, Chapter 3.6 “Conclusion: Promote competition between electricity exchanges”**

- **EPEX SPOT:** In light of the above non-exhaustively listed obvious shortcomings, EPEX SPOT disagrees with the Monopolies Commission’s legal and economic argumentation and consequent conclusions and recommendations.