

NOTICE OF INTENTION TO ACCEPT BINDING COMMITMENTS OFFERED BY EPEX SPOT SE AND EEX IN RELATION TO ELECTRICITY WHOLESALE TRADING ACTIVITIES

Date: 2 May 2019

Overview

In January 2019 we announced that we had opened an investigation into whether there has been an infringement of Chapter II of the Competition Act 1998 and / or Article 102 of the Treaty on the Functioning of the European Union, concerning a potential abuse of a dominant position in relation to wholesale trading activities. Our investigation has examined whether EPEX Spot SE, a power exchange operating in Great Britain, has abused or is abusing a dominant position in relation to access to cross-border intraday electricity trading platform and related services between GB and Ireland.

This document explains the Authority’s proposal to accept commitments offered by EPEX Spot SE and its parent company, EEX, which are designed to address our competition concerns. We are inviting interested parties to submit any comments on those commitments no later than **4pm on Monday 20 May 2019**.

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1. Introduction

- 1.1. The Gas and Electricity Markets Authority (the “**Authority**”) has, among other powers, the power to investigate potential infringements of the prohibition contained in Chapter II of the Competition Act 1998 (the “**CA98**”) and/or Article 102 of the Treaty on the Functioning of the European Union (the “**TFEU**”) in relation to commercial activities in the gas and electricity sectors. These powers are held concurrently with other regulators,

namely the Competition and Markets Authority (the “**CMA**”) and the Northern Ireland Authority for Utility Regulation (the “**NIAUR**”).

- 1.2. The abuse of a dominant position is prohibited by Chapter II of the CA98 and Article 102 of the TFEU.
- 1.3. Where the Authority has begun an investigation under the CA98, section 31A of the CA98 gives it the power to accept commitments from any person (or persons) concerned to take any action (or refrain from taking any action) as the Authority considers appropriate for the purposes of addressing the competition concerns it has identified.
- 1.4. The Authority is proposing to accept commitments offered by EPEX Spot SE (“**EPEX**”) and European Energy Exchange (“**EEX**”), as 51% shareholder in EPEX, to address competition concerns identified during the course of an investigation into an alleged abuse of a dominant position by EPEX. As required by paragraph 2 of Schedule 6A of the CA98, the Authority invites representations from interested parties on this proposed course of action.
- 1.5. The draft text of the commitments offered is set out in Annex 1 of this document.
- 1.6. Formal acceptance of the commitments by the Authority would result in the investigation being discontinued with no decision made as to whether Chapter II of the CA98 or Article 102 of the TFEU has been infringed by the undertaking under investigation. If accepted, the proposed commitments would be binding and enforceable under section 31E of the CA98.
- 1.7. The Authority now invites interested parties to make representations on the proposed commitments. The Authority will consider such representations before making its final decision on whether to accept the commitments.
- 1.8. In order to assist the parties in responding to this consultation, this Notice:
 - Describes the industry concerned
 - Outlines our investigation to date
 - Sets out our competition concerns
 - Summarises the commitments that have been proposed
 - Explains why we provisionally consider that these commitments address our competition concerns
- 1.9. Details of how to submit representations are set out in section 7 of this document. The closing date for representations is **4pm on Monday 20 May 2019**.

2. Background

EPEX Spot SE (EPEX)

- 2.1. EPEX is a power exchange which operates a number of markets in Great Britain (“GB”) that allow trading parties to buy and sell electricity the day prior to (or on the day of) delivery. At present, it is one of two Nominated Electricity Market Operators (“NEMOs”) in GB that are designated to perform single day ahead and single intraday coupling with other European electricity markets.
- 2.2. EPEX is part of the wider EEX Group, which provides services to facilitate the trading of energy and non-energy products in a number of different countries. EEX owns a 51% shareholding in EPEX¹.
- 2.3. EPEX works closely with European Commodity Clearing (“ECC”), also part of the EEX Group, which acts as the central counterparty for EPEX’s markets (including in GB), with responsibility for financially settling and nominating transactions. EEX owns a 100% shareholding in ECC.

The all-island Single Electricity Market

- 2.4. Two interconnectors link the GB electricity network to the single all-island electricity market² comprising Northern Ireland and Republic of Ireland (the Single Electricity Market, or “SEM”). The trading arrangements under SEM have recently been revised in order to allow for market coupling between the SEM and other European electricity markets and to implement the terms of the Capacity Allocation and Congestion Management Regulation No. 2015/1222. The project to implement these changes is known as the “I-SEM”³.
- 2.5. As part of the I-SEM project, EirGrid plc (the transmission system operator in the Republic of Ireland) was designated as NEMO in Ireland⁴ and SONI Ltd (the transmission system operator in Northern Ireland) was designated as NEMO in Northern Ireland⁵. Their respective responsibilities were to be discharged via a contractual joint venture named SEMOpX.⁶
- 2.6. In 2017, EirGrid and SONI appointed EPEX and ECC as service providers in respect of the provision of shipping and power exchange services in Ireland⁷. Under the terms of their

¹ The remainder is owned by HGRT, a holding of transmission system operators.

² The use of the term “market” in this background section should not be taken as indicating the Authority’s provisional or definitive conclusions as to market definition for the purposes of its assessment under Chapter II CA 98 and Article 102 TFEU.

³ The revised trading arrangements in place following implementation of the I-SEM project are still referred to as the SEM

⁴ Designation dated 24 July 2015 and issued by Commission for Energy Regulation

⁵ Designation dated 24 July 2015 and issued by the Utility Regulator for Northern Ireland

⁶ See <https://www.semopx.com/about/>

⁷ http://static.epexspot.com/document/37178/20170228_EPEX_ECC_Irish_Power_clean.pdf

appointment, the responsibilities of EPEX and ECC include operating the necessary trading systems (performing the functions of the two NEMOs in Ireland for the purpose of the single day-ahead coupling) as well as clearing and settlement.

The new intraday auctions

- 2.7. A key element of the I-SEM project is the establishment of a day ahead auction and two new intraday auctions, all coupled with the GB market. Two groups were established to oversee the delivery of these coupled auctions. First is the Joint Steering Committee (the "**JSC**"), which includes representatives of the interconnectors as well as the transmission system operators and power exchanges in both the GB and Irish markets (including EPEX). Second is the Joint Implementation Group (the "**JIG**"), which in addition to members of the JSC also included the GB and Irish regulators.
- 2.8. Under the original I-SEM design, arrangements were to be put in place that would allow more than one NEMO to offer GB customers access to the new coupled intraday auctions between GB and the SEM (as was the case with the coupled day ahead auction). This would allow power exchanges operating in GB to compete for the business of trading parties looking to participate in the new coupled GB-SEM intraday auctions.
- 2.9. In January 2018, EPEX informed the JSC that the existing plan to go live with multiple NEMOs via the proposed virtual hub at I-SEM launch ("**I-SEM go-live**") (which at that point was scheduled for May 2018) was no longer agreeable, and that it was not willing to participate in the testing required to enable the necessary arrangements under the existing plan to be put in place. It suggested alternatives including postponing the I-SEM launch to allow time for the arrangements to be made for more than one NEMO to access the intraday auctions, or launching with only one NEMO on the GB side of the market.
- 2.10. After considering the alternatives proposed by EPEX, a decision was taken by the JSC that the arrangements that were to be put in place for I-SEM go-live would initially provide only for the participation of EPEX in the coupled intraday auctions. This was to avoid the risk of putting the I-SEM go-live date at risk, but with the clear intention and commitment to deliver arrangements that would support participation of more than one NEMO in those auctions as early as practicable.
- 2.11. I-SEM go-live was subsequently delayed until 1 October 2018. This was for reasons unrelated to delivery of the coupled intraday auctions.
- 2.12. On 1 October 2018, the two new coupled intraday auctions between GB and the SEM were launched. From that date, GB trading parties have been able to access these auctions only via EPEX's trading platform. Despite the delay to the launch date, and the time that has now elapsed since go-live, the necessary arrangements required for other GB NEMOs to participate in these auctions have still not been put in place.

3. The investigation

Decision to open an investigation

- 3.1. In November 2018, the Authority decided that there were reasonable grounds for suspecting an infringement of the Chapter II prohibition of the CA98 and/or Article 102 of the TFEU.
- 3.2. Before exercising investigatory functions under Part I of the CA98, the Authority is required to consult with other authorities having concurrent jurisdiction in relation to that case. In this case, the Authority consulted with the CMA and the NIAUR.⁸ The CMA and NIAUR indicated their agreement with the case being allocated to the Authority and the CMA confirmed that allocation on 14 December 2018. As a consequence the Authority opened an investigation into EPEX's conduct.
- 3.3. On 18 December 2018, the Authority notified EPEX that the investigation had been opened and outlined the Authority's concerns in relation to EPEX's conduct. The Authority also served a formal notice on EPEX requiring the production of documents and provision of information by notice under section 26 of the CA98 (a "**section 26 notice**").
- 3.4. In January 2019, the Authority published a notice on its website announcing that it had opened an investigation concerning a potential abuse of a dominant position in relation to wholesale trading activities.
- 3.5. During the course of its investigation, the Authority also sought, through issues of further section 26 notices, information from other market participants, including a sample of EPEX's customers. These parties have provided further evidence in relation to the investigation.

Offer of binding commitments

- 3.6. On 27 March 2019, the first state of play meeting between EPEX and the Authority took place. At this meeting, EPEX indicated its desire to engage in discussions about offering binding commitments to resolve the Authority's competition concerns. In doing so, EPEX made clear that any offer of commitments was without prejudice to its position that it has not infringed the CA98 or the TFEU.
- 3.7. In order to facilitate discussions, the Authority sent to EPEX a written statement of its competition concerns.⁹

⁸ The Authority has continued to engage with these authorities during the investigatory process. Further, the Authority has, on relevant matters, engaged with other national competition authorities ("**NCA**") including the Competition and Consumer Protection Commission, the NCA for the Republic of Ireland.

⁹ Section 4 of this document is based on that document.

- 3.8. EPEX submitted a draft set of commitments on 3 April 2019. Following discussions between the Authority and EPEX, EPEX sent a revised set of proposed commitments to the Authority on 17 April 2019.
- 3.9. The commitments are also offered by EEX as parent company of ECC. Having 100% shareholding in ECC, EEX will be able to exercise decisive influence over the conduct of its subsidiary¹⁰ to ensure that ECC contributes to the delivery of access to the cross-border intraday electricity trading platform and related services between GB and Ireland.
- 3.10. The Authority has reached a preliminary view that the commitments offered by EPEX and EEX address its competition concerns, for the reasons set out in this Notice. The Authority is therefore proposing to exercise its discretion to discontinue its investigation by way of a formal decision accepting commitments under section 31A of the CA98.

4. The Authority's competition concerns

- 4.1. The Authority's preliminary view, for the reasons outlined in this section, is that there are reasonable grounds to suspect that EPEX holds a dominant position in a market comprising the provision of a cross-border intraday electricity trading platform and related services (such as clearing and settlement) between GB and Ireland. Our preliminary view is that by failing to take the steps necessary to allow other NEMOs to access the intraday auctions between GB and the SEM, EPEX's alleged conduct is likely to have the effect of hindering the maintenance or growth of effective competition in the relevant market. This is because the result of EPEX's actions (or lack thereof) is to prevent its rivals from entering that market – i.e. other power exchanges have been denied access to an essential facility required to offer the GB-SEM coupled intraday auctions via their trading platforms.
- 4.2. The proposed commitments have been received at an early stage in our investigation, at a time when information gathering and analysis was ongoing. Given this, we have not at this point reached any conclusions regarding whether the alleged conduct described below infringes UK or EU competition law. Notwithstanding this we consider that the competition concerns are sufficiently clear that it is appropriate for us to accept commitments in relation to this investigation for the reasons we describe further below. For the avoidance of doubt, the offer of commitments by EPEX and EEX does not constitute an admission that there has been an infringement of Chapter II of the CA98 or Article 102 TFEU.

Market definition

- 4.3. In order to determine whether an undertaking holds a dominant position, for the purposes of Chapter II of the CA98 and Article 102 TFEU, it is necessary to define the relevant market. Market definition is a tool used to identify and define the boundaries of

¹⁰ Judgment in *Alliance One & Others v Commission* joined cases C-628/10 P and C-14/11 P, EU:C:2012:479 (*Alliance One*), paragraphs 46 to 48

competition between undertakings.¹¹ Defining the relevant market typically involves an assessment of the degree of substitutability between different groups of candidate products, to reach a conclusion on which of those alternatives are similar enough to be viewed as belonging to the same market.

- 4.4. Electricity suppliers¹², electricity generators¹³ and trading companies¹⁴ (we refer to these three groups as “**traders**” in the remainder of this section) use the intraday markets offered by EPEX via its platform - and the related clearing¹⁵ and settlement¹⁶ services of ECC - to trade electricity in the period immediately prior to the point at which it is used by end consumers (“**delivery**”). These near-term markets allow EPEX’s customers to take advantage of the latest information (eg forecasts of temperature, wind or plant availability) to fine tune their position to match the expected demand of their customers, optimise their generation, or to take advantage of arbitrage opportunities.
- 4.5. In our view, traders in GB are unlikely to be able to substitute away from trading in the intraday timeframe easily in response to an increase in fees or deterioration in service levels. In particular, we considered that under such a scenario, the most likely reaction of suppliers and generators (or trading companies acting on their behalf) would be to carry out all of their short-term optimisation at the day-ahead stage – i.e. on the morning of the day prior to delivery. However, in doing so, they would not have available to them the same information on weather, demand and plant availability, and this would cause them to face a materially higher risk of imbalance, and an associated increase in costly

¹¹ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN)

¹² I.e. companies that contract with, and provide electricity to, end consumers. In GB electricity suppliers are licensed by the Authority under the Electricity Act 1989. Suppliers will contract with generators and or purchase electricity on wholesale markets in order to ensure the demands of their customers are met. If a supplier’s customers use more or less electricity than they have contracted to purchase, the supplier then falls into imbalance, and must pay charges to reflect the resulting costs to the system.

¹³ I.e. companies that generate electricity using renewable and/or non-renewable sources. In GB generators are licensed by the Authority under the Electricity Act 1989 unless they can benefit from an exemption from the requirement to hold such a licence. If a generator produces more or less electricity than it has contracted to sell, the supplier then falls into imbalance, and must pay charges to reflect the resulting costs to the system.

¹⁴ We use this term to refer to persons who are neither generators nor suppliers but who buy and sell electricity either on their own behalf or on behalf of their clients.

¹⁵ Clearing involves a central counterparty acting as a buyer to the seller and a seller to the buyer, guaranteeing the transaction against default by either party between execution and delivery of the contract.

¹⁶ Settlement in this context involves both physical settlement (eg notifying trades), and financial settlement (i.e. making payments to, and collecting payments from, traders).

imbalance charges. The forward contracts available prior to day ahead would comprise an even less suitable alternative.¹⁷

- 4.6. We further noted that traders place significant importance on liquidity (i.e. the extent of trading taking place on a given platform) in choosing which market to use. Given this, we considered that – all else equal – the additional access offered by a coupled GB-SEM auction would make that auction a materially more attractive platform on which to trade than a GB-only alternative, as a result of it offering customers a greater pool of potential counterparties (i.e. buyers and sellers in both the GB and Irish markets). We would expect traders to be unresponsive to a small but significant increase in the transaction fees they incurred for using a coupled auction, if that were where the liquidity resided.
- 4.7. While we have not reached a conclusion on the relevant market, given the above, we considered that there were reasonable grounds to consider that the relevant product market would comprise the provision of a cross-border intraday electricity trading platform (and the services related to such a platform, such as clearing and settlement) between GB and Ireland.
- 4.8. In relation to the relevant geographic market, we noted that what was being traded in the coupled auctions were contracts for the delivery of electricity on the GB transmission network. Therefore – consistent with previous Commission decisions¹⁸ – we considered that the relevant geographic market would be likely to be national in scope.

Dominance

- 4.9. As set out above, EPEX is the *sole* provider of trading services specifically in respect of the coupled GB-SEM intraday auctions, and has been the sole provider of these services since 1st October 2018.
- 4.10. Given this, we considered that it is likely to hold a dominant position in the market for the provision of a cross-border intraday electricity trading platform and related services between GB and Ireland.

EPEX's conduct in relation to the coupled intraday auctions

- 4.11. A dominant undertaking has a special responsibility to ensure that its conduct does not impair genuine competition on the market.¹⁹ In our preliminary view, by failing to take

¹⁷ This is because of the different purpose that these contracts are typically used for (hedging against broad trends in commodity prices); and the different way in which forward trading takes place (typically via brokers rather than on an exchange). We note in this regard that the European Commission has in its decisions previously distinguished between relevant markets for longer term forward trading, and shorter term 'spot' markets (see, for example, *OPCOM* (AT.39984)) – although it has not been necessary for the purposes of those investigations to go on to consider whether further segmentation exists such that separate markets should be defined for day ahead and intraday trading.

¹⁸ See eg Case COMP/M.5911 – *TenneT/Elia/Gasunie/APX-ENDEX*, paragraph 42.

¹⁹ Case C-322/81 *Michelin v Commission* EU:C:1983:313, paragraph 57

the steps necessary to allow other NEMOs to access the intraday auctions between GB and the SEM, EPEX is likely to have prevented its rivals from entering the relevant market. The resulting reduction in competition between trading platforms has the potential to lead to an increase in fees, or a reduction in service levels or choice, for customers using the cross-border intraday markets compared to what would otherwise be expected; and ultimately worse outcomes for energy consumers.

4.12. At present, and in the period leading up to I-SEM go-live, EPEX has possessed substantial control over other NEMOs' ability to access the GB-SEM intraday auctions. This is a consequence of:

- EPEX's position on the JSC, the committee responsible for taking the original decisions about the design and implementation of the intraday auctions;
- The role of EPEX in providing power exchange services in the SEM and EPEX's sister company ECC, owned exclusively by EEX, in providing shipping services in the SEM. Because of their role in (for example) collating the Irish order books and settling trades with Irish trading parties, cooperation with both of these parties is required to put in place the necessary arrangements for market coupling; and
- The fact that EPEX and ECC have since I-SEM go-live been responsible for the operation of the coupled intraday auctions in GB (with the implication that their cooperation would now be required for other parties to access those auctions).

4.13. GB operates a competitive model for electricity trading platforms, with competition between power exchanges helping to keep trading fees down, and putting pressure on platforms to improve the quality of the services that they offer. The need to ensure that multiple NEMOs are given access to the coupled intraday auctions between GB and the SEM to ensure consistency with this competitive model has been recognised by the JSC and JIG since the start of the I-SEM project, and consistently reiterated since the decision in early 2018 to go-live with EPEX only.

4.14. The Authority considers that through its actions (and inactions) EPEX has effectively excluded (and continues to exclude) other NEMOs from being able to access the intraday auctions between GB and SEM. For example, we consider that EPEX's competitors' ability to access the intraday markets is likely to have been restricted as a result of EPEX either delaying or failing to: agree a project plan; agree the necessary contracts, set up the necessary connection and participate in testing.

4.15. Some internal communications within EPEX, ECC and the wider EEX Group refer to the existence of a 'mandate', which appears to relate to a decision to exclude other NEMOs from the intraday auctions relatively early in the I-SEM project. Some of these documents also appear to recognise the potential commercial advantage to EPEX of other NEMOs not being able to access the auctions.

4.16. At various points, the issue of resource constraints (in particular in relation to ECC) has been raised by EPEX as a reason for its failure to progress delivery of the arrangements to afford access. However, it is not clear that the conflicting demands on its resources could not have been anticipated in advance (and thus mitigated), nor that the constraints

EPEX and ECC have faced justify the extent of delays. The robustness of such reasoning (particularly in the earlier period) is also undermined by our review of internal documents to date, which indicates a misalignment between the terms of the updates provided to the JSC as compared to the updates provided internally to management.

- 4.17. The Authority considers that, by failing to take the steps necessary to allow other NEMOs to access the intraday auctions between GB and the SEM, EPEX's alleged conduct has prevented its rivals from entering the relevant market, and is therefore likely to have distorted competition in that market. Given the importance of liquidity to trading parties' choice of where they trade, and the resulting direct network effects (with one customer's choice of market affecting which platform other customers use), even small differences in the trading opportunities that power exchanges are able to offer can have the potential to result in a significant distortion to competition.
- 4.18. In addition, the Authority is concerned that the alleged conduct of EPEX could over time distort the level of competition in other closely associated markets. For example, it may reduce EPEX's rivals' ability to compete in the day ahead timeframe (despite both GB NEMOs having access to the coupled day ahead auctions), if trading parties were to choose a single platform for all near-term trading in order to avoid the need for multiple IT interfaces.

5. The commitments

- 5.1. For the purpose of addressing the Authority's competition concerns (as described in chapter 4 above), EPEX and its parent company EEX have, without prejudice to their position that there has been no infringement of the CA98 or the TFEU, offered formal commitments to the Authority. The full details of the offered commitments are contained in Annex 1 of this document and are summarised below. The text highlighted in yellow denotes a non-confidential version of the relevant text to take account of confidentiality representations and the Authority's consideration of those representations²⁰.
- 5.2. Following engagement with EPEX and other relevant persons, the Authority has reached the provisional conclusion that its competition concerns are addressed by the commitments offered. Formal acceptance of the commitments would result in the Authority terminating its investigation and not proceeding to a decision on whether the CA98 or the TFEU has been infringed. Accordingly, any decision by the Authority accepting binding commitments will not include any statement as to whether the conduct of EPEX (and the undertaking of which it is a part) that is the subject of this investigation has infringed the CA98 or TFEU prior to the acceptance of the commitments or once the commitments are in place.

EPEX and EEX's proposed commitments

²⁰ Such consideration has been undertaken under the framework of Part 9 of the Enterprise Act 2002.

5.3. The commitments proposed are as follows:

- a) First is an obligation that EPEX and EEX will do everything within their control to ensure that the project can go-live by 23 July 2019:
 - i) EPEX will seek to agree a set of proposed milestones with all relevant stakeholders, and use its best endeavours to meet those milestones. We note in this regard that the milestones attached to the Annex were agreed by the JSC in principle on 25 April 2019.
 - ii) EPEX will enter into the contractual relationship with the project management officer, and use its rights and obligations under the contract to ensure that the officer takes reasonable steps to ensure that all parties in the SEM-GB Regional Project work towards achieving the target date.
 - iii) EEX will ensure that ECC similarly takes all reasonable steps to deliver the project within the agreed timetable.
- b) Second is an obligation in terms of reporting on progress against the agreed milestones for a period lasting until three months after go live:
 - i) EPEX will appoint a member of its senior management team as the individual responsible for ensuring compliance with the commitments.
 - ii) EPEX will provide the Authority with written reports on a fortnightly basis on the progress of the commitments and milestones, and inform the Authority as soon as practicable in the event of any delays to the agreed timetable.
 - iii) EPEX will provide the Authority with any supporting information and documents (reasonably requested) in relation to the commitments and compliance.
 - iv) EPEX will notify the Authority as soon as reasonably practicable of any delays or changes in the milestones and provide sufficient information to allow the Authority to assess the reasonableness of any such change.
- c) Third is an obligation on EPEX to:
 - i) Create and deliver compliance training to those involved in the project in relation to the Authority's competition concerns and the rationale behind the content of the commitments. The training shall be mandatory, and delivered within one week from the implementation date;
 - ii) Carry out a review of its competition law compliance procedures. A summary of the outcome of that review will be submitted to the Authority in EPEX's final compliance report (to be received 3 months after go live).

- 5.4. To ensure the target date is met, the project will be identified within all relevant EEX, ECC and EPEX project management committees as a top priority. The commitments will be co-signed by the CEOs of EEX and EPEX. Given that a number of the milestones will take place prior to any formal obligations being put in place, EPEX has also agreed to provide fortnightly reports on progress against the timetable in the interim period.

6. The assessment of the proposed commitments

The CMA's Guidance as it applies to the Authority

- 6.1. The decision on whether to accept commitments is at the discretion of the Authority. In considering whether and how to exercise that discretion, the Authority has regard to the relevant guidance published by the CMA. The guidance sets out the circumstances in which it may be appropriate to accept commitments, as required by section 31D of the CA98.²¹ Relevant aspects of the guidance are summarised briefly below. References to the CMA in the guidance are replaced by references to the Authority in the interests of clarity.
- 6.2. The guidance sets out that the Authority is likely to consider it appropriate to accept binding commitments where (a) the competition concerns are readily identifiable, (b) the competition concerns are addressed by the commitments offered, and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time. The guidance clarifies that the Authority is unlikely to accept commitments in, among other things, cases involving a serious abuse of a dominant position.²² Further, it explains that it will not be appropriate to accept binding commitments where compliance with them and their effectiveness would be difficult to discern or where not to complete the investigation would undermine deterrence.

The Authority's assessment

- 6.3. The Authority has carefully considered the proposed commitments, as set out in the Annex, and whether these address its competition concerns.
- 6.4. On the basis of that assessment, the Authority's preliminary view is that this is an appropriate case for commitments and acceptance of the proposed commitments offered by EPEX and EEX is appropriate taking into account the framework set out above. The reasons for this are summarised below.

²¹ Paragraphs 10.17 to 10.20 of *Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8*

²² In the relevant footnote (footnote 98) in the guidance the CMA explains this concept further as follows "*That is, those which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of the Chapter II prohibition and/or Article 102, this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing.*"

- 6.5. First, the competition concerns (as described in section 4 above) are readily identifiable. As explained in that section, the Authority is concerned that the result of EPEX's actions (or lack thereof) is to prevent its rivals from entering the relevant market by offering access to the GB-SEM coupled intraday auctions via their trading platforms. The resulting reduction in competition between trading platforms could in turn lead to an increase in fees, or a reduction in service levels or choice for customers using the cross-border intraday markets, compared to what would otherwise be expected; and ultimately a deterioration in outcomes for energy consumers. In addition, we are concerned that the alleged conduct could distort the level of competition in closely associated markets, for example reducing EPEX's rivals' ability to compete effectively in the day ahead timeframe.
- 6.6. Second, the Authority has reached the provisional decision that the commitments offered would, once implemented, address the competition concerns. Currently there are two NEMOs designated in GB. Under the terms of the commitments, EPEX will be obligated to take the steps necessary to enable the other GB NEMO to access the GB-SEM intraday auctions such that any potential exclusionary effect of EPEX's conduct to date would be removed and that its rivals in the market for the provision of coupled intraday auction services would be able to compete on equal terms. By restoring competition, this would avoid the risks identified above in relation to EPEX's conduct, in terms of higher fees, or reduced service levels or choice, for customers using the cross-border intraday markets.
- 6.7. Third, the Authority has reached the provisional view that the commitments offered are capable of being implemented effectively and within a short period of time. Included within the commitments will be a comprehensive set of milestones against which EPEX and ECC will be held accountable. Such accountability will be via the ongoing reporting and compliance requirements. The conduct of the mandatory compliance training to all staff involved in implementation within one week of the commitment decision also supports the position that the commitments are capable of effective implementation and within a short period of time. Under the commitments, access to the intraday auctions will be delivered by 23 July 2019, significantly earlier than envisaged in other project plans discussed by the JSC.
- 6.8. The commitments will remain in place until three months after the other GB NEMO has secured access to the GB-SEM intraday auctions to ensure that the new arrangements operate effectively. Given that our concern relates to other power exchanges' ability to access the coupled intraday auctions, we consider the duration of the commitments to be appropriate to allow for our concerns to be addressed and reflect a proportionate time limit for application of the commitments in the circumstances.
- 6.9. The Authority does not consider that accepting commitments in this case would significantly undermine deterrence. The requirement that EPEX take the steps necessary to ensure its rivals are able to compete on a level playing field will send a strong signal as to the Authority's willingness to pursue potential breaches of competition law and to do so to a stage which it considers most effectively addresses the relevant competitive harm(s) in the circumstances. The Authority considers that the value of addressing the

exclusion of rivals as a matter of urgency outweighs any potential loss of deterrence that may result from the closure of the investigation.

- 6.10. Finally, the proposed commitments do not preclude the Authority from taking further enforcement action in relation to other suspected breaches of competition law, or in related markets, where these raise competition concerns.

7. Intention and invitation to comment

- 7.1. For the reasons set out in this Notice, the Authority provisionally considers that the commitments offered by EPEX and EEX as set out in the Annex to this document are sufficient to address its competition concerns. Therefore, the Authority intends to accept the commitments by means of a formal commitments decision.
- 7.2. As required by paragraph 2(2)(d) of the Schedule 6A to the CA98, the Authority now invites those who are likely to be affected by the commitments offered to make representations on the proposed commitments. The Authority will take account of any such representations made before making its final decision whether to accept the commitments.
- 7.3. The Authority shall inform the European Commission prior to the adoption of a decision accepting commitments in accordance with the requirement under Article 11(4) of Council Regulation 1/2003.
- 7.4. Any person wishing to comment on the commitments should submit written representations to reach the Authority by **4pm on 20 May 2019**. Representations should be submitted to:

Silvia Mariani

*Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU*

Or by email to:

silvia.mariani@ofgem.gov.uk

- 7.5. The Authority does not intend to publish the responses to the consultation. However, the information contained in the responses may be used or summarised in a manner which maintains anonymity.
- 7.6. In the event that the commitments are not accepted and the Authority is considering disclosing the information (for example in or with a statement of objections), it will engage with the provider of that information to offer the opportunity to make representations on confidentiality. The Authority will then consider those representations in accordance with the legal framework imposed by Part 9 of the Enterprise Act 2002.

ANNEX 1

COMMITMENTS GIVEN BY EPEX SPOT SE AND EUROPEAN ENERGY EXCHANGE PURSUANT TO SECTION 31A OF THE COMPETITION ACT 1998

- (1) EPEX Spot SE (“**EPEX**”) and European Energy Exchange (“**EEX**”), as 51% shareholder in EPEX, agree to make the following commitments (the “**Commitments**”), on condition that they are accepted by the Gas and Electricity Markets Authority (“**GEMA**” or “**Ofgem**”) in a Commitments Decision.
- (2) The Commitments are being offered by EPEX and EEX under Section 31A of the Competition Act 1998 (the “**Act**”) in order to bring Ofgem’s investigation to a close by addressing Ofgem’s competition concerns.
- (3) The giving of the Commitments by EPEX and EEX does not constitute an admission of any wrongdoing by EPEX and/or EEX. In particular, neither of EPEX or EEX have been the subject of any Ofgem infringement decision or statement of objections and nothing in these Commitments may be construed as implying that either party agrees with any concerns identified by Ofgem in its investigation relating to the cross border intraday auctions between GB and the SEM, including in a Commitments Decision.
- (4) These Commitments are without prejudice to EPEX’s and EEX’s position should Ofgem or any other party commence or conduct proceedings or other legal action against EPEX and/or EEX.

(A) Interpretation

- (5) For the purposes of these Commitments the following definitions apply:
 - (a) **Commitments Compliance Officer** means a senior EPEX employee appointed pursuant to Commitment 2 and with the prior approval of Ofgem whose function is to monitor compliance with the Commitments
 - (b) **Commitments Decision** means a formal decision by the Authority under section 31A CA98 to accept these Commitments such that section 31B CA98 applies with respect to the Authority’s investigation relating to wholesale trading activities.
 - (c) **CRU** means the Commission for Regulation of Utilities which is Ireland’s independent energy regulator
 - (d) **ECC** means European Commodity Clearing AG, a 100% subsidiary of EEX and whose role is to provide shipping and congestion services in the SEM-GB Regional Project
 - (e) **EirGrid** means EirGrid plc, one of the two Irish transmission system operators and one of the Parties to the SEM-GB Regional Project
 - (f) **EWIC** means the East West Interconnector, operated by the EirGrid Interconnector Designated Activity Company, which links the electricity grids between Ireland and Great Britain
 - (g) **Go-Live** means the launch of the multi-NEMO / Power Exchange SEM-GB coupled intraday auctions as set out in Appendix 1
 - (h) **Go-Live Date** means the date on which Go-Live is achieved
 - (i) **Implementation Date** means the date these Commitments are signed
 - (j) **IDA** means intraday auction

- (k) **JSC** means the Joint Steering Committee, in which all Parties to the SEM-GB Regional Project are represented, whose role is to elaborate and consider the different technical and/or operational matters of the SEM-GB Regional Project
 - (l) **Monitoring Period** means a three-month period following the Go-Live Date for the purposes of ensuring that the Go-Live arrangements operate effectively
 - (m) **Moyle** means Moyle Interconnector Ltd, which links the electricity grids between Northern Ireland and Scotland
 - (n) **NEMO** means Nominated Electricity Market Operator (as such term is defined under Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management), which is a market operator designated to participate in single day ahead and single intraday coupling with other European electricity markets
 - (o) **Nord Pool** means Nord Pool AS, one of the two Power Exchanges in Great Britain and one of the Parties to the SEM-GB Regional Project
 - (p) **NRAs** means National Regulatory Authorities
 - (q) **Parties to the SEM-GB Regional Project** means ECC, EirGrid, EPEX, EWIC, Moyle, National Grid, Nord Pool, and SONI
 - (r) **PMO** means Project Management Officer who is appointed by the JSC in the context of the SEM-GB Regional Project to assist SEM-GB Regional Project parties in the management of the Project while being independent from those parties
 - (s) **“PX”** or **“Power Exchange”** means a company that organises directly, or through services of a third-party, wholesale trading of electricity in anonymous, cleared markets, in accordance with public and non-discriminatory rules
 - (t) **SEM-GB Regional Project** or **Project** means the multi-NEMO / Power Exchange SEM-GB coupled intraday auctions
 - (u) **SEMOpX** means the contractual joint venture between SONI and EirGrid which is responsible for performance of Power Exchange functions of SONI and EirGrid
 - (v) **SONI** means SONI Limited, one of the two Irish transmission system operators and one of the Parties to the SEM-GB Regional Project
 - (w) **Target Date** means the date which is intended to be the Go-Live Date as set out in the Project plan included in Appendix 1, which at the date of these Commitments is 23 July 2019 (as may be amended under Section C, paragraph 9(1))
 - (x) **NIAUR** means the utility regulator for Northern Ireland
- (B) Commencement and Duration**
- (6) Having been signed by EPEX and EEX, these Commitments shall take effect from the Implementation Date and will cease to apply on the conclusion of the Monitoring Period following the Go-Live Date.
 - (7) Nothing in this provision will prevent EPEX from requesting an amendment to, or early termination of, the Commitments (or requesting new commitments to substitute for the Commitments) at any point in

time in light of, for example, changed market circumstances, or changes in the milestones set out in Appendix 1 resulting from third-party actions outside the control of EEX or EPEX.

- (8) Both GEMA and EPEX recognise that delivery of the Project is dependent not only on the actions of EPEX and EEX but also of third parties, including Nord Pool. Accordingly, EPEX or EEX shall not be liable for any delays arising from technical, testing or other aspects which resulted from third-party action and were not in the reasonable control of EPEX or EEX.

(C) The Commitments

I. Commitment 1: Provision of access to trading platform services for coupled ID auctions for other NEMOs by the Target Date

- (9) EPEX and EEX shall use their best endeavours to ensure that the Go-Live Date for the provision of access to trading platform services for coupled intraday auctions for other NEMOs, in particular Nord Pool, for the SEM-GB Regional Project is achieved by the Target Date.

Specific actions

1. EPEX will seek to agree with all relevant stakeholders and do everything within its control to meet the milestones included in Appendix 1 and deliver the Project by the Target Date. Subject to the prior approval of Ofgem, where the timetable to the Target Date is delayed as a result of the actions of third parties (i.e. parties other than EPEX, EEX or ECC), the Target Date and the milestones included in Appendix 1 shall be adjusted to reflect the extent of the delay.
2. EPEX shall enter into the contractual relationship with the PMO (whose contract with EirGrid and SONI expired on 31 March 2019) with a view to facilitating the delivery of the Project by the Target Date. In this regard, EPEX will enter into a contract with the PMO in April 2019 to that effect. EPEX will inform the PMO of the Commitments and shall use its rights and obligations under the contract to ensure that the PMO takes reasonable steps to ensure that all parties in the Project mobilise to achieve the Target Date. A summary of the PMO's contract with EPEX is included in Appendix 2.
3. EEX shall ensure that ECC will similarly take all reasonable steps to deliver the Project within the milestones included in Appendix 1. For the avoidance of doubt, ECC shall not be required, as a result of this Commitment, to accept disproportionate contractual or commercial terms that it would not ordinarily accept in the context of other projects of a similar type. In order to assess ECC's reasonableness in commercial negotiations, ECC, EEX and EPEX shall provide Ofgem with relevant benchmarks and explanations where delay to the Project may be due to a road-block in those negotiations.

II. Commitment 2: Reporting and provision of information

- (10) EPEX shall appoint a Commitments Compliance Officer whose function will be to monitor compliance with the Commitments and the provision of bi-weekly reports to Ofgem against the milestones set out in Appendix 1. The Commitments Compliance Officer shall report to Ofgem as soon as practicable any delays or changes in milestones and provide sufficient information for Ofgem to assess the reasonableness of such changes.

Specific actions

In particular, EPEX shall:

1. Appoint [a member of EPEX's Senior Management Team (with the prior approval of Ofgem)] as the designated Commitments Compliance Officer responsible for ensuring compliance with the Commitments and reporting obligations set out in these Commitments. [To ensure accountability for the progress of the Project against the milestones set out in Appendix 1, the designated employee will be of significant standing and seniority within EPEX and will be independent of the day-to-day work of the Project team.] With the prior approval of Ofgem, EPEX may designate a suitable alternative employee [as a replacement for the current] Commitments Compliance Officer if necessary in the circumstances.
2. Provide Ofgem with written reports on a fortnightly basis on the progress of the Commitments and milestones set out in Appendix 1.
 - (a) EPEX shall provide Ofgem with the report on a Monday by 5pm UK time (6pm CET) every fortnight starting from the first Monday following the Implementation Date until these Commitments cease to apply.
 - (b) The report shall cover the various milestones set out in Appendix 1, an update on progress, and any further information relevant for Ofgem to assess EPEX's and EEX's compliance with the Commitments. In particular, should there be any third-party dependencies that may risk delivery of the milestones, these will be clearly set out in the report.
 - (c) The reports shall be in a consistent format, clearly presented and sufficiently detailed such that Ofgem is able to assess the progress of the Project against the milestones set out in Appendix 1.
 - (d) Each report shall include a Compliance Statement in the form set out in Appendix 3.
3. Report to Ofgem, via the Commitments Compliance Officer, as soon as practicable (and in any event within two working days) in the event that EPEX becomes aware of any delays or similar changes to the milestones set out in Appendix 1 likely to change the Go-Live Date. In such cases, the report of the Commitments Compliance Officer shall contain full details of the reasons for such a delay.
4. Provide Ofgem with any supporting information and documents, reasonably requested, in relation to the Commitments and compliance therewith.

III. Commitment 3: Compliance training and review

- (11) EPEX shall create and deliver compliance training of appropriate quality and standard, which will specifically outline and explain Ofgem's competition concerns and the rationale behind and content of these Commitments. The training will be mandatory for all EPEX staff involved in implementing and delivering the Project from the Implementation Date (and their managers / supervisors) and will be delivered within one week of the Implementation Date.
- (12) EPEX shall also carry out a review of its current competition law compliance procedures to assess their ongoing suitability, and shall include a summary of the review, including any associated actions arising from it, in the final report to Ofgem submitted pursuant to Commitment 2.

Specific actions

In particular, EPEX shall:

1. share the list of relevant individuals who will receive the training and a copy of the materials that will be used for those training sessions with Ofgem.
2. conduct a review of its competition compliance procedures and include a summary of the review in the final report to Ofgem pursuant to Commitment 2.

(D) Review and compliance

- (13) Ofgem may take action in accordance with its statutory powers should it become aware of any non-compliance by EPEX and/or EEX with the Commitments.
- (14) Any communication from EPEX and/or EEX to Ofgem relating to the Commitments shall be addressed to: [●], 10 South Colonnade, Canary Wharf, London E14 4PU or by email to [●] or such other postal or email address as Ofgem may direct in writing.
- (15) Without prejudice to the generality of section 31A(4)(b) of the Act, EPEX and/or EEX may request that Ofgem reviews (with any such review being at Ofgem's discretion) the Commitments with a view to releasing or modifying the Commitments where there has been a material change to the reasons and/or facts on which the Commitments Decision is based and where Ofgem has reasonable grounds for believing that its competition concerns no longer arise.



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Appendix 1

Project Plan and Milestones

Appendix 2

Summary of the contract between EPEX and the PMO

- (1) In the context of the SEM-GB Regional Project, EPEX entered into an agreement with a management consultancy firm for the provision of Project Management Officer (“PMO”) services. This agreement, which entered into force on 1 April 2019 and is scheduled to remain in force until 30 calendar days after the Go-Live Date, sets out the procedures and the terms and conditions applicable to the provision of services by the PMO to EPEX, which acts on behalf of all the Parties to the SEM-GB Regional Project.
- (2) This consulting company is a member of NextContinent, an international network of independent consulting firms. Since 2008 it has been providing program management support and expertise to several transmission system operators (“TSOs”), Market Coupling projects and regional initiatives. This consulting firm was already contracted to provide these PMO services in the context of the SEM-GB Regional Project and its original contract expired at the end of March 2019.
- (3) Its role is, as before 1 April 2019, to continue supporting the SEM-GB Regional Project with the objective of achieving Go-Live by the Target Date . Its role as a PMO notably consists of being in charge of the overall project management and support, being responsible for the JSC meetings and any escalations, and securing the integration, coordination and alignment with other related projects where needed, and leading overall test management.

Appendix 3
Compliance Statement

Compliance statement relating to commitments offered by EPEX

I, *[name]*, confirm on behalf of EPEX Spot (“**EPEX**”) that:

- (1) Subject to any matters reported under paragraph (3) below, in the period from *[date]* to *[date]* (the “Relevant Period”):
 - (a) EPEX has complied with the contemplated commitments offered by it and accepted by Ofgem on *[date]* (the “**Commitments**”);
 - (b) No breach of the Commitments has occurred; and
 - (c) No action has been taken by EPEX that might prejudice compliance with the Commitments.
- (2) EPEX has made reasonable enquiries of EEX and ECC and is satisfied that during the Relevant Period both parties have complied with the Commitments and that neither party has breached the Commitments or taken action that might prejudice compliance with the Commitments.
- (3) Pursuant to the Commitments, Ofgem has been informed of any breaches of the Commitments that have occurred in the Relevant Period and/or any delay to the Commitments caused by third-party dependencies’ in the Relevant Period.
- (4) EPEX remains in full compliance with the Commitments and will continue to provide to Ofgem any information and documents as Ofgem may reasonably require for the purpose of monitoring and/or enforcing compliance with the Commitments in accordance with the Commitments.

Signed for and on behalf of EPEX Spot:

.....

[Name and Title]

On: [Date]

At: [Place]