Transparency under REMIT and EU competition law

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The object of this article is to address certain issues concerning transparency under the REMIT (the EU Regulation on Market Integrity and Transparency, hereafter "REMIT" or "the Regulation")[1] and EU competition law.[2]

Some background on REMIT is set out in **Section 1**.

The main issue addressed is the way that REMIT requires market participants to give information on factors which could be relevant to their trading positions, in order to promote fair competition amongst traders, whilst some disclosure of forward-looking information to competitors may be viewed as a restriction by object in EU competition law.

In other words, disclosures in this context may be argued not to be restrictions of competition at all, or not restrictions by object, because their object and effect is to further competition;[3] and/or lawful insofar as they are required by EU law.[4] Yet there is some uncertainty as to how the competition agencies may react to what their energy brethren are requiring. It is a hot topic, because companies seeking to comply with all relevant obligations face delicate questions as to what should be disclosed when. There are signs of solutions, notably recognition of the need for aggregation of data in some cases, but more clarification would be welcome.

This will be discussed further in **Section 2**.

In addition, there are certain fundamental issues going to whether the sort of transparency sought by some energy regulators is as desirable as they appear to believe. Secret competition is usually considered to be a good thing.[5] Transparency in order to allow markets to work is also usually a good thing. In energy, there needs to be a balance between the two, as in any market. This will be discussed further in **Section 3**.

1. What is the REMIT?

REMIT entered into force in December 2011. It prohibits market manipulation and insider trading on wholesale energy markets in the EU. It also requires the disclosure of so-called "inside information" and the provision of very significant amounts of information to the Agency for the Cooperation of Energy Regulators ("ACER").

As regards *market manipulation*, the Regulation broadly prohibits market practices and the dissemination of misleading information, which may lead to artificial price levels.[6] In other words, practices and/or trading in a market in such a way as to lead to an artificially low or high price, which price is used to the benefit of those concerned.[7]

1 OJ L326/1, 8 December 2011.
2 With thanks to Roberto Grasso for his assistance.
3 Case 56/65, *Société Technique Miniere* [1966] ECR 235; Case C-238/05, *Asnef Equifax* [2006] ECR I -11125; Case C-67/13 P, *Cartes Bancaires*, Judgment of 14 September 2014, ECLI:EU:C:2014:2204.
4 Joined Cases C-359/95 P and C-379/95 P, *Commission and France v Ladbroke Racing* [1997] ECR I-6265, paras 33-34.
5 Comments of the *Bundeskartellamt* regarding the Draft Guidelines on Fundamental Electricity Data Transparency, 16 September, 2011, p.2 *"...it is crucial that secret competition ("Geheimwettbewerb") is protected."* (These comments were available at the following site but, at the time of writing, appear to have been removed: http://ec.europa.eu/energy/gas_electricity/consultations/20110916_electricity_en.htm.).
6 Art.5 and Art. 2(2) REMIT.
7 If the relevant trades concern financial instruments on regulated

As regards *insider trading*, the Regulation is designed to prevent a trader who works in an organisation that controls key market assets, from trading with an informational advantage which others, not in that organisation, do not have.[8] The idea is that, if an electricity trader knows that key supplies will not be available at a certain hour on a certain day (e.g. an electricity plant will be out for maintenance) so that prices may raise then, he will not be able to take advantage of that, without others having the same opportunity.

As regards the disclosure of *inside information*, the Regulation provides that market participants are under an obligation publicly to disclose "inside information" regarding their business or facilities in an effective and timely manner.[9] The information to be disclosed includes:

- Information relevant to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas, or related to the capacity and use of LNG (Liquefied Natural Gas) facilities, including planned and unplanned availability of these facilities.[10]
- Categories of information which have to be made public pursuant to other EU or national regulations and contracts and customs on the relevant wholesale energy market.[11]
- A rather open-ended category of "other information that a reasonable market participant would be likely to use" as part of its decision to enter into a transaction, or to trade in a wholesale energy product.[12]

The publication of inside information, including in aggregated form, in accordance with the *EU Cross-Border Regulations on Electricity and Gas* (*Regulations 714 and 715/2009*)[13] or guidelines or network codes pursuant thereto, constitutes public disclosure.[14]

REMIT is complex, because it applies to markets in which trading is not just in organised market places, but also very often "OTC" (over the counter), meaning through direct supply contracts of varying durations, with negotiated prices, the contents of which are confidential to the parties. In some cases, there may also be a linkage of different forms of trading, insofar as a supply contract price may be linked to some extent to a price at a trading point on an organised market place.

REMIT is in force, but still coming. In other words, as an EU Regulation it has direct effect in national courts, but structurally it is to be enforced by national regulators, who have been given related national powers since 2011. A huge amount of data on transactions of all types is also still to be transmitted to ACER in the course of 2015 and 2016 to allow for monitoring by national regulators and ACER.[15]

The area is also complex because there are potential overlaps between three types of regulation: (i) the REMIT's regulation of trading in wholesale energy markets, (ii) financial services regulation of related financial instruments on regulated markets; and (iii) competition law.

More specifically, in this area there is a direct overlap in some core concepts: REMIT is concerned with market manipulation, which may be wider than typical anti-competitive practices and conduct, but which may be manifested in collusive practices which may distort competition. For example, if A and B agree on a trade which inflates market pricing, some may argue that should only be susceptible to "market manipulation" review. Others may argue that competition may be affected, so a competition review is justified. Defence counsel will claim "double jeopardy" and that this is not fair and contrary to fundamental rights for the same act. Yet that has not stopped the Financial Regulatory Authorities and the EC from both sanctioning those found to have colluded to distort LIBOR.[16]

markets, other legislation reflecting similar principles may apply, e.g. *The Market Abuse Directive*, Regulation 2003/6/EC, OJ L96/16, 12 April 2003.

8 Art.3 REMIT.

9 Art.4 REMIT.

10 Art. 4 second sentence and Art. 2(1)(b) REMIT.

11 Art. 2 (1) (a) and (c) REMIT.

12 Art. 2 (1)(d) REMIT.

13 OJ L211, 14 August 2009, pp.15 and 36 respectively.

14 Art. 4 (4) REMIT.

15 See WilmerHale Alert, "*REMIT – Implementing Measures Clarifying Data Reporting Obligations*", 4 February, 2015, John Ratliff, Roberto Grasso, available at: https://connect.wilmerhale.com/pages/,DanaInfo=www.wilmerhale.com,SSL+publicationsandnewsdetail.aspx?NewsPubId=17179876224.

16 See for the United Kingdom FSA/FCA, e.g. http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf; http://www.fca.org.uk/news/lloyds-banking-group-fined-105m-libor-benchmark-failings ; and for the EC, see e.g. http://europa.eu/rapid/press-release_IP-13-

Similarly, both REMIT and EU competition law can apply to information disclosure.

It will also be clear that the parallel application of sector-specific regulations and EU competition law is not new. There have been various cases, mainly drawn from the telecoms and agricultural sectors.

In general the EU competition rules only apply to the autonomous conduct of undertakings, so do not apply to acts required by other legislation. However, if an undertaking retains a discretion as to how it may act, the exercise thereof may fall within the EU competition rules. The European Commission ("EC") is also not prevented from intervening by national legislation.[17] In practice, the EC looks carefully at the regulatory circumstances, to see whether all or part of a certain practice was the result of regulation, or if not, whether the parties believed that it was authorised. Sometimes the EC has reduced the scope of an infringement or sanctions in such situations.[18]

REMIT itself states that it applies without prejudice to European competition law.[19]

2. Specific transparency issues

2.1 The main issue

As noted above, under Art. 4(1) of the REMIT market participants are under an obligation to publicly disclose inside information regarding their business or facilities in an effective and timely manner. Importantly, such information, if it were made public, should "be likely to significantly affect the prices of wholesale energy products".[20]

These are terms of art, the meaning of which are still being explored and developed. However "publicly disclose" broadly appears to mean "publicly disseminate" and the key point on timing is that disclosure should be before trading. Inside information is almost by definition confidential (although in some cases clearly of interest to others, such as where a key connector is owned). Some (small) reassurance of some remaining confidentiality to those who own energy assets is to be found in the statement in Recital (12) of REMIT that "the market participant's own plans and strategies for trading" are not considered inside information![21]

It will be immediately apparent to competition lawyers that there are potential EU competition law issues here. The *EC Horizontal Guidelines*[22] provide that, where a company makes a unilateral announcement that is "genuinely public", this is not generally a concerted practice within the meaning of Art. 101 of the Treaty on the Functioning of the European Union ("TFEU").

However, a series of public announcements by competitors could prove to be a strategy to reach a common understanding about the terms of coordination.[23] In other words, companies usually would not announce such future plans on issues such as capacity etc. for fear that others might follow with other reductions, leading to possible claims of competition infringement. A listed company may be required to reveal a major issue, if it may affect its share price, but would usually not do more. Yet, here disclosures have to be made to comply with the REMIT.

Even if the publication of certain information is not considered to be a concerted practice under Art. 101 TFEU, there may also be a concern that, through raising the overall level of transparency, other additional information exchange might give rise to anti-competitive effects.[24]

2.2 Competition authority concerns

It may be useful to recall here that excessive transparency to the detriment of competition was a concern raised by several competition authorities in the public consultation on the *Draft ERGEG Comitology Guidelines on Fundamental Electricity Data Transparency* ("The Draft Fundamental Guidelines").[25] The Draft Fundamental Guidelines were proposed in connection with the *Cross-border (Electricity)*

1208_en.htm.

17 See *Ladbroke Racing*, cited above fn 4 and Case 280/08 P, *Deutsche Telekom*, Judgment of 14 October 2010, [2010] ECR I-9555 at paras 80-82 and 90.

18 See e.g. Reyners Fontana, De Luca and Morillas, EC competition Policy Newsletter, Vol. 1, 2005 at p.65, available at http://ec.europa.eu/competition/publications/cpn/2005_1_65.pdf.

19 Art. 1.2 REMIT.

20 Art. 2(1) REMIT.

21 Recital (12) REMIT.

22 *EC Guidelines on the applicability of Art. 101 TFEU to Horizontal Co-operation Agreements*, OJ C11/1, 14 January 2011, para. 63 ("EC Horizontal Guidelines").

23 *EC Horizontal Guidelines*, para. 63.

24 *EC Horizontal Guidelines*, para. 93.

25 The Draft Fundamental Guidelines from 8 September 2010, are available at http://www.ceer.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/ELECTRICITY.

Regulation[26] and had as their purpose the establishment of a minimum level of "fundamental data" transparency.[27] "Fundamental data" in this context means broadly the information which shows the overall situation of actual energy supply.

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The level of transparency required under the Draft Fundamental Guidelines was high and required to be made public information on generation capacity, installed capacity, forecasts on available capacity, as well as *ex ante* and *ex post* planned and unplanned unavailability.[28] Importantly, the information to be supplied was also individualised ("unit-by-unit").

A number of EU national competition authorities which responded to the public consultation pointed out that this high degree of market transparency could facilitate collusion between market participants.[29]

The German *Bundeskartellamt* was concerned that the disclosure of such data could allow conclusions to be drawn as to the marginal costs of production and create incentives for withholding of capacity to influence a market price. Moreover, it was concerned that transparency might facilitate collusion. It noted that "the less uncertainty remains on market outcomes, the easier collusion between market participants can be arranged".[30] The *Bundeskartellamt* therefore argued for the publication of *aggregated* data only on the basis of local or regional balancing zones, since that "allows electricity generators to operate adequately without secret competition being endangered".[31]

The *Italian Competition Authority* was also critical. The focus of its comments was again on the detail of the disclosures contemplated ("unit-by-unit data on an hourly basis") and the risk that this could create opportunities for collusion among generators, particularly if a relevant market is oligopolistic. The Authority also favoured *aggregation* of data.

The *French Competition Authority* took a similar position: "...detailed recent and future generation data published by the operator, by unit and on an hourly basis may increase risks of production capacity withholding by electricity producers". The Authority was concerned that generators would be able to anticipate more precisely the shape of the aggregate supply curve and that this would make withholding more attractive, because it would reduce the risk that withholding would not affect the equilibrium price.

There may be counter-arguments to this sort of concern. For example, some might argue that the parallel increased disclosures of data to ACER will make it easier to monitor collusion and any withholding and therefore deter it. Further, as discussed below, one may argue that the disclosures have a pro-competitive effect, so should be allowed.

However, the key point for the discussion here is that competition authorities do not necessarily see things in the same way as energy regulators and there is a need to balance and reconcile these concerns.

REMIT requires the public disclosure of what is called under the *EC Horizontal Guidelines* "strategic data", "data that reduces strategic uncertainty in the market",[32] since the REMIT requires that market participants make public information relating to production capacity, availability etc...In such circumstances, companies complying with REMIT

26 Cited above fn 13.
27 *Draft Fundamental Guidelines*, p. 4.
28 *Draft Fundamental Guidelines*, pp. 7-8.
29 See the Responses by the French, German, Danish and Italian competition authorities in the Consultation on Draft Guidelines on Fundamental Electricity Data Transparency. As noted above these were available at http://ec.europa.eu/energy/gas_electricity/consultations/20110916_electricity_en.htm.
30 See the comments of the *Bundeskartellamt*, cited above fn 5, at p.2.
31 *Ibid*, p.3.
32 *EC Horizontal Guidelines*, para 86.

may be expected to provide only what appears to be *specifically required* by that legislation and *to take a cautious view in any grey area* (e.g. where, on the definitions outlined above, some disclosures may not be clear and/or pose a competitive question).

It should also be borne in mind again, that the combined transparency obligations flowing from the *Cross-border Regulation*, REMIT and other transparency platforms and initiatives may enhance the risk of collusion. This is brought out well in a very useful paper by Professors Feltkamp and Musialski, in which they chart the various obligations to disclose fundamental and transactional data.[33] Obligations may overlap to some extent, but the main point is that they are many and various and their overall effect has to be taken into account in assessing compliance.

Compliance with REMIT as an EU competition law defence

As noted above, if anti-competitive conduct is *required* of undertakings by legislation the EU competition rules do not apply. In such a situation, the restriction of competition is not attributable to the autonomous conduct of the undertakings concerned. The EU competition rules may apply, however, if it is found that legislation leaves open the possibility for competitive action which may be restricted or distorted by the autonomous conduct of undertakings[34].

The focus here should be therefore on the extent to which undertakings have *a discretion* in deciding what they should disclose. It is stressed that such scope for action was the focus of the EC's intervention in, for example, the margin squeezing case, *Deutsche Telekom*, which was subsequently upheld by the European Court of Justice ("ECJ").[35] Similarly in *AstraZeneca*, in the context of action to deny generic pharmaceutical competition, the ECJ held that the fact that AstraZeneca's conduct was *allowed* under the relevant Directive did not mean that it escaped the prohibition laid down in Art. 102 TFEU.[36]

In *Telefónica*,[37] again in the context of margin squeezing, the ECJ also considered whether, given national regulatory action under EU telecoms regulations, subsequent EC action applying the EU competition rules was unlawful. The ECJ held that it was not, stating that the EU competition rules supplement the relevant framework adopted by the EU legislature for regulation of the telecommunications markets and that the EC retained the right to apply the EU competition rules despite national regulatory action.[38]

All this leaves a fair amount of uncertainty as to the extent to which specific compliance with REMIT is a defence. One would think that it should be, where the requirement to disclose is clear. On the other hand, since it is recognised in REMIT itself that its operation is subject to the application of the competition rules[39] and it is noted in REMIT that information may have to be aggregated when disclosed[40], it remains clearly advisable for companies to be cautious about what they disclose.

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33 See, R. Feltkamp and C. Musialski, "*Integrity and Transparency in the EU Wholesale electricity Market – New rules for a better functioning market?*", OGEL (Journal of Global Energy Law & Regulation),Vol. 5 (2013), p. 56 available at www.ogel.org.
34 See the case-law cited above at fns 4 and 17.
35 Case 280/08 P, *Deutsche Telekom*, [2010] ECR I-9555, para. 90.
36 Case C-457/10 P, *AstraZeneca*, Judgment of 6 December 2012, ECLI:EU:C:2012:770, para 132.
37 Case T-336/07, *Telefónica*, Judgment of 29 March 2012, ECLI:EU:T:2012:172, paras 292-293.
38 *Ibid*, para. 300.
39 See above fn 19.
40 See above Art.4(4) REMIT.

be limits to such a position, to explain further (perhaps in coordination with ACER). For example, indicating situations where the EC thinks information should be aggregated and released only via common platforms allowing that. Given the open-ended nature of some of the inside information definitions noted above and the relevance of market context to many information exchange assessments, such an approach may well have limits, but it might help to alleviate some uncertainty, especially in light of the sort of national competition authority comments noted above.

2.3 Transparency disclosures "in context"

In any event, it is arguable that disclosures for the purposes of REMIT may not be considered to be restrictions of competition, or restrictions by object, given their nature and context.
The key point here is that the concept of such disclosures is to facilitate energy trading and a level competitive playing field when doing so, not to restrict or distort competition.

The argument for disclosure here is usually framed in terms that an incumbent in a market would know far more than others as to what are the basic facts going to the market structure, simply because it owns or controls them the key assets concerned. Disclosure therefore removes that information "asymmetry" and both reduces the risk of abusive unilateral conduct and gives others the opportunity to trade on equal terms (at least with the information concerned). Equally, it is said that a trader cannot know if it can agree to supply energy through the network if it does not have the key facts on capacities etc., so data revealing such facts are "fundamental" to trading and competition.

This is analogous to case-law such as the old *Société Technique Minière*[41] case, where, as is well known, the ECJ held that, in deciding whether an agreement or practice is caught by what is now Art. 101(1) TFEU, it is necessary to look at the precise purpose of the agreement or practice, in the economic context in which it is to be applied. In doing so, it is necessary to look at the precise nature of the restrictions concerned. If it is not apparent that the agreement or practice is sufficiently deleterious to competition, then the economic effect has to be considered. In that case an exclusive right to sell was considered not likely to be restrictive by object, insofar as it might be necessary for penetration of a new market.

It is also analogous to cases such as *Asnef Equifax*[42], where the ECJ noted that the exchange of the information in question (there on credit risk by credit institutions in Spain) was not restrictive by object (because it facilitated greater lending overall). Further that, provided certain conditions were met, such an exchange, viewed in its actual context, might not be considered to be restrictive by effect and/or might be capable of clearance under what is now Art.101(3) TFEU.

Taking all that into account, it appears very difficult to argue that disclosures under REMIT are, *by their nature* restrictive of competition and restrictive by object.

These arguments are both old and new, as the recent and topical *Cartes Bancaires*[43] judgment has shown. The ECJ found that, in considering whether certain card banking practices were restrictive by object, account had to be taken of the fact that, even if the practices might have restrictive effects, they were drafted so as to achieve a certain balance between the issuing and acquisition activities of banks and therefore to prevent free-riding by card issuers on transaction infrastructure paid for by others. As such, they were not restrictive by object in nature.

The same may be said here, insofar as disclosures under REMIT are not by nature designed to restrict or distort competition. On the contrary, they are specifically designed to assist energy supply and trading, with a level playing field and to facilitate more trading overall.

These principles therefore mean that competition authorities will also have to be cautious in their approach. One would think that only clear-cut cases of excessive disclosure going beyond what is clearly required under REMIT and with a clear anti-competitive aim should be the subject matter of competition intervention.

41 Cited above, fn 3, see paras 249-250.

42 Cited above, fn 3, see paras 46-49, 54-62 and 67-72.

43 Cited above, fn 3, see paras 59-87.

2.4 Accepted Market Practices

Under REMIT certain practices may be considered to be so-called "accepted market practices" ("AMPs"). The idea here is that such practices would be accepted by the competent regulatory authority, as part of an explanation that certain acts are not market manipulation.[44] According to Recital (27) of REMIT, ACER should address the issue of such AMPs in the guidance which it issues on REMIT, to ensure coherent application with the *Market Abuse Directive* ("MAD")[45]. ACER has done this, with the relevant "Guidance" now in its third edition ("ACER Guidance").[46]

In its Guidance, ACER notes that, under the MAD, the concept of AMPs may apply either in relation to market manipulation, or in relation to the information which users of commodity derivatives markets would expect to be made public concerning commodity derivatives.

ACER then indicates a list of factors to be taken into account by competent authorities when assessing particular practices in wholesale energy markets.[47] Notably, ACER states that the level of transparency of the relevant market practice to the whole market is a crucial factor in deciding whether it could be accepted as an AMP.

ACER also notes that it currently considers the application of AMPs primarily in relation to the information which users of wholesale energy markets would expect to be made public concerning wholesale energy products. The implication appears to be that the following may qualify:

- Disclosure of inside information through national or regional inside information platforms fulfilling the minimum quality requirements listed by the Agency, if nominated by the competent NRA(s) and notified to ACER; and
- Disclosure of inside information in an aggregated/anonymised way in order to comply with competition law and notified to ACER, if considered necessary at national level and agreed upon by the national NRA with the national competition authority and notified to the Agency.[48]

Clearly this is interesting material insofar as it goes to the context of any disclosures and it suggests that some efforts have been made already to align transparency and competition concerns, with again the middle course of aggregation being a solution in some cases.

3. Broader transparency issues

Finally, it may be useful to add two other comments, which may be obvious to some, but which naturally strike a competition lawyer looking at all this (and may explain why I was asked to contribute this paper to this journal's debate).

First, in an effort to promote the European Energy Market, the EU is heavily pushing transparency in the relevant electricity and gas networks and promoting a "common European transparency platform" for so-called "fundamental data". This has led to many initiatives to promote cross-border transparency.[49] The idea here is to allow users of the grids/pipelines to see what they can trade when and commercially to understand what that means (e.g. can they supply customers X and Y at such and such a time?).

However, while some information is clearly technical and related to common infrastructure (e.g. as noted above, where an interconnector is closed so that supply may become difficult, or blocked and a bottleneck will arise), other information, whilst technical in a sense, is more commercial and proprietary (e.g. will such and such a plant be supplying at full capacity at such and such a time, which may affect prices or not depending on its importance and other supply and demand circumstances to that part of a grid or network).

It may be that not to disclose that information appears wrong to an energy regulator, thinking in terms of trying to give all traders an equal opportunity to trade and, in particular, if an incumbent has so much knowledge that it may be able to control and manipulate/abuse things. However, to compe-

44 Arts.2(2)(a)(ii) and 2.(3)(a)(ii) REMIT.
45 Cited above, fn 7.
46 See, http://www.acer.europa.eu/remit/Documents/REMIT%20ACER%20Guidance%203rd%20Edition_FINAL.pdf.
47 ACER Guidance, pp. 57-58.
48 ACER Guidance, pp. 58-59.
49 See, e.g. the very useful paper by Adeline Lassource, "*The European Energy Market Transparency Report*", 2013 Edition, available at: http://fsr.eui.eu/Publications/RESEARCHREPORT/Energy/2013/ETAReport2013.aspx .

tition lawyers who deal with many markets other than energy, the sense of such disclosure is less self-evident. In most markets, such information is not available and to disclose it would be viewed as illogical and potentially anti-competitive.

So, in the author's view, in order to reconcile the promotion of functioning energy markets with competition, transparency has to be justified and proportionate to the aim pursued and not assumed be an absolute ideal.

Finally, a competition lawyer coming to all this may also have the impression, rightly or wrongly, that energy regulators see organised market place trading as the ideal solution. Perhaps because such trading is perceived as facilitating liquidity in the market and breaking up more traditional patterns of supply.

However, again a competition lawyer working with other markets may question that. Clearly there may be a place for trading, such as meeting spot/short term fluctuations in supply and demand, but in other cases customers may be looking for more lasting solutions and need long or medium duration contracts. For example, if a company has a metal furnace to heat all day and all night all year (because if it cools there will be irremediable damage), that company may not be comfortable relying on spot for its sourcing! So it will seek long-term secure supplies, likely involving tenders and prices based on a balancing of the commercial value of that security of supply, with the volume advantages and risks of price changes over time.

It may also be that a customer will have more trust in more traditional competition and negotiation in that case, even with price indexation risks, than the vagaries of trading markets (including the risks of how those behave and market manipulation). That is perhaps one of the reasons why so much energy is still traded by OTC contract.

It may be therefore that trading in organised market places should not be considered the ideal solution for trading and pricing in energy markets. Negotiated long-term deals based on more traditional competition have their valid place, in parallel to other deals which, for other valid reasons, will be short-term and spot traded.

Such competition in forms and systems (with their different transparencies) should be not only accommodated, but welcomed, as providing the variety which is essential to healthy markets.