

Single Electricity Market
Market Monitoring Unit (MMU)
Investigation Process Manual

Further Consultation Paper

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2. INTRODUCTION

One of the market power mitigation measures put in place during the design of the Single Electricity Market dictates that any submissions made by generators to the market operator must be cost-reflective. A Market Monitoring Unit was established within the Regulatory Authorities (the Utility Regulator in Northern Ireland and CER in Ireland) to help the Regulatory Authorities monitor generator submissions and ensure that these principles are being adhered to.

The Market Monitoring Unit (“**MMU**”) is therefore required to undertake investigations from time to time to assess whether submissions by licensees are cost-reflective.

The purpose of this document is to consult on an investigation process manual that would complement and clarify the existing process followed by the MMU when carrying out such investigations. These existing processes are already described in previous documents published during the design of the SEM; the proposals contained herein are not intended to replace these existing procedures.

The remainder of the document is laid out as follows:

Chapter 3 describes the background the Market Monitoring Unit;

Chapter 4 describes the process that will generally be followed during investigations into possible breaches of the cost-reflective bidding principles;

Chapter 5 calls for responses and comments on the processes described within this paper;

Appendix 1 provides an overview of the legal framework and enforcement powers;

Appendix 2 describes the proposals within the previous consultation, a summary of responses to this consultation, and the SEM Committee’s comments on these responses;

Appendix 3 provides a flow chart showing the steps of an investigation.

3. BACKGROUND TO THE MARKET MONITORING UNIT

MARKET POWER MITIGATION

When the Single Electricity Market was being established, the Regulatory Authorities (“**RA**s”) concluded that market power would be present in the SEM as a result of the high concentration of generation ownership and control on the Island as a whole, and in Northern Ireland and the Republic of Ireland separately. In light of the apparent market power, the RAs developed a preferred approach to both limit market power and to control the abuse of any residual market power.

That approach was founded on a number of key building blocks. These are described in full in “*Market Power Mitigation in the SEM – Decision Paper – AIP/SEM/31/06*”, and include:

Directed Contracts

These are contracts that the RAs direct generators with market power to make available on an equal basis to all suppliers and will be suitable as supply hedges. These contracts mitigate market power by reducing the incentive for market participants to submit bids above competitive levels in order to influence current spot prices or future contract prices. The quantity, form, price and allocation method for these contracts is determined by the RAs.

Bidding Principles

The RAs decided to implement a series of bidding principles for the SEM. These bidding principles are described in the licence condition on cost-reflective bidding¹ and in the Bidding Code of Practice. These bidding principles state that any submissions by the Licensee must be cost-reflective. These submissions shall be treated as cost-reflective only if they are equal to the Short Run Marginal Cost. When calculating the Short Run Marginal Cost of a generation set or unit in respect of a Trading Day, constituent cost-items are to be valued at their Opportunity Cost.

Market Monitoring

The RAs also decided to develop a market monitor which would be responsible for oversight of the market operations of the SEM. The market monitor reports to the RAs and inform the RAs of significant deviations from bid principles and exploitation of market rules. This monitoring will help

¹ Condition 15 in Ireland Generation Licence and Condition 17 in Northern Ireland Generation Licence
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achieve the objective of preventing market participants from exercising any residual market power that exists after the implementation of directed contracts.

RELATED DOCUMENTS

The following documents are of relevance to this paper:

Table 1.1 Regulatory Authorities MMU framework

Document reference	Key content	Date
AIP/SEM/31/06 (Market Power Mitigation in the SEM Decision Paper)	Sets out the preferred approach of the RAs to limit market power and control the abuse of any residual market power.	April 2006
AIP/SEM/62/06 (Market monitor identity consultation document)	Set out three options for the MMU, including a standalone entity, the market or system operator(s) and the RAs. Evaluation criteria for the MMU are also set out by the RAs.	June 2006
AIP/SEM/82/06 (Market monitor identity decision document)	Sets out the RAs' decision for the MMU to be independent of all market participants and to operate within the RAs' regulatory offices.	July 2006
AIP/SEM/143/06 (Market monitoring in the SEM consultation paper)	Set out the high level roles and responsibilities of the market monitor and requested comments in relation to the functions of the MMU.	September 2006
AIP/SEM/217/06 (Market monitoring in the SEM decision paper)	Paper sets out more clearly the role of the MMU and its roles and responsibilities. Clarifies that the MMU will monitor the spot market only and would not specify and codify the steps in an investigation.	December 2006
AIP/SEM/511/07 (Market monitoring information paper)	Clarifies the relevant boundaries of the MMU (including between the spot and contract markets and the national competition/financial authorities) and sets out guidelines on how the MMU expects to interface with market participants.	October 2007

4. PROCESS FOR INVESTIGATIONS

A consultation paper on the process manual was published in December 2010². A summary of the proposals made in that consultation, the responses received and the SEM Committee's comments on those responses is provided in Appendix 2.

Following the comments received to the December 2010 consultation, the SEM Committee makes the following proposals as to how an MMU investigation into compliance with licence conditions would be carried out. As the MMU's focus is on the cost-reflective bidding licence condition, this process has been designed with that licence condition in mind, but it may also guide other investigations.

This process is being provided to market participants to make them aware of the process the MMU will follow while conducting such inquiries/investigations. Though the stages and milestones of MMU investigations are set out herein, flexibility will exist to deal with specific circumstances in each case, e.g. to follow any particular consultation or notice periods prescribed by statute.

The RAs will seek to adhere to this manual. However, this manual does not in itself impose requirements on, or purport to fetter the discretion of, the RAs.

In most cases it will be the SEM Committee that makes the final decision as to whether or not a generator has complied with its cost-reflectivity obligation and/or whether other actions should be taken. However, the SEM Committee has delegated authority to its Oversight Committee, who will generally take the decisions as to whether or not to investigate any particular matter. The Oversight Committee will work through the MMU to conduct any investigations; the staff members of the MMU will not themselves take any decision as to whether a licensee has acted in compliance with their licence or whether or not to exercise any particular power. Any references to the MMU, Oversight Committee, Regulatory Authorities and SEM Committee should be understood in that context.

This manual sets out the general procedures which will apply to investigations at both an informal and formal level. It does not however, provide a comprehensive description of the detailed

² http://www.allislandproject.org/en/mmu_current_consultations.aspx?article=2df98a0a-017b-40fa-b889-472262223b33

procedure and timings which will be followed in every case. This manual may be reviewed from time to time in order for the Regulatory Authorities to keep their procedures relevant and up to date. A flow chart of the investigation process is provided in Appendix 3.

INITIATION OF AN INVESTIGATION

An investigation is initiated by:

- The RAs following monitoring through the MMU;
- A complaint from a market participant or other third party.

Where the MMU notices something which may indicate non-compliance with a licence condition, or where it receives a general complaint from an interested party, the MMU may approach market participants and request further information. In the first instance this could include a telephone call or an e-mail, but may in certain circumstances (for example, when a greater level of detail is required) extend to a written request from the MMU.

Where such an informal information request is made, all licensees and other stakeholders should be aware that:

- the person from whom information has been requested may not be obliged to provide it;
- any information provided in response may be used in a formal investigation and could be passed to relevant third parties³; and
- any information provided may be used to establish compliance, or failure to comply, with any licence condition or inform SEM Committee action otherwise.

In circumstances where the MMU's day-to-day monitoring and informal information gathering raises no questions about compliance with cost-reflectivity licence conditions, no decision or further action need be taken.

In other circumstances, the Oversight Committee may consider information gathered by the MMU to raise such questions and so decide to use the RAs' information gathering powers and initiate an investigation.

³ For example, the Financial Conduct Authority, the Competition Commission or the Competition Authority.

The Oversight Committee may also decide that a formal information request should be made. This would usually (but not always) follow non-compliance with a previous request for information, or follow a well-documented letter of complaint from a market participant to the SEM Committee.

Where a well-documented formal complaint is made to the SEM Committee, a letter of response will usually be issued saying that a formal investigation process has commenced. Such a complaint will not usually be made public.

Where such a formal request is made, the Licensee shall be informed:

- of at least one of the legal bases on which it is required to provide the information, and where relevant, the licence conditions with whose compliance it is being investigated (in some circumstances the Licensee itself will not be the subject of the investigation, but information may be being sought in relation to a perceived licence breach by a third party);
- of the required timescales for provision of the information;
- that any information it provides will be analysed by the MMU;
- that information provided may be used to establish any current, past or future compliance with a licensee's licence obligations or inform SEM Committee action otherwise.

When information is being requested, wherever possible, an explanation of the reasons for the request will be provided. If a party from whom information is being requested is suspected of making submissions which are not cost-reflective this party will usually be informed of this within the information request. This may allow the market participant to take remedial action and avoid the need for a full investigation.

CONDUCT OF AN INVESTIGATION

When the MMU has received the requested information, it shall analyse the information and produce a report on whether or not the submission could be considered cost-reflective. Whilst doing so, it may be in further contact with the parties it requested information from in order to seek clarification on issues, and potentially further information. Once an investigation has been initiated, a licensee may be issued with a further, formal, information request.

In certain circumstances, the SEM Committee may decide that a provisional direction or other short notice direction should be issued, or that a licensee should be required to take (or not take) certain steps immediately. Such directions would likely be based on Article 42 of the 2003 Order or S.23 of the 1999 Act.

The MMU's analysis of any information received from the licensee shall be forwarded to the Licensee for written response. The Oversight Committee shall consider this response. If it then considers that the licensee's submission may not have been cost reflective, the case will then be escalated to the SEM Committee.

The SEM Committee will review all evidence available to it, including the MMU's report and the Licensee's written response. The SEM Committee may also ask for further information, or verbal representations from the MMU as well as the Licensee.

Considering all such information, the SEM Committee may decide to issue a direction to the licensee requiring it to take, or not take, certain action and/or may decide to take other steps such as issuing guidance on its interpretation of particular licence conditions or, in certain circumstances, imposing a financial penalty on the licensee, as applicable in each jurisdiction.

Various public notices may have been given during any investigation, but any SEM Committee decision to issue a direction or take other action will almost always be made public and be subject to some form of appeal by the licensee.

CONFIDENTIALITY

The Regulatory Authorities are mindful of the potential for all information they receive to be considered confidential. However, where information is particularly sensitive, the Licensee should make this clear within any response they provide to the Regulatory Authorities.

LIAISON WITH THE MMU

While the procedures above describe the methodology that the RAs, acting through the MMU will intend to use when investigating a possible breach of the Bidding Code of Practice and/or Licence Conditions, it remains that the MMU requests to be made aware in advance of any changes a market participant intends to make to its bid formulation.

5. RESPONSES

Responses are sought on the proposals described in this paper and should be sent, preferably in an electronic format, by 6 December 2013, to

Kenny Dane
Utility Regulator
Queens House
14 Queen Street
Belfast
BT1 6ED

kenny.dane@uregni.gov.uk

It is intended to publish all comments received. Those respondents who would like certain sections of their responses to remain confidential should submit the relevant sections in an appendix marked confidential together with an explanation as to why the section should be treated as confidential.

APPENDIX 1 - OVERVIEW OF LEGAL FRAMEWORK AND ENFORCEMENT POWERS

The legal framework of the SEM, the SEM Committee and the Joint Regulatory Arrangements applicable to the Oversight Committee and the MMU are explained below. Additionally, the functions and duties of the SEM Committee and the enforcement mechanisms applicable to licensed generators are set out below.

OVERVIEW OF SEM LEGISLATION

SEM COMMITTEE

The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 (2007 No. 913 (N.I. 7) (the SEM Order) and the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 (the Electricity Act) (“collectively referred to as the SEM Legislation”) respectively provide for the creation of a SEM Committee within both the Utility Regulator and the Commission for Energy Regulation.

As described in the Joint Regulatory Arrangements (AIP/SEM/07/565)⁴ the central decision-making rule which governs the exercise of regulatory functions shall be that:

- i. Any decision as to the exercise of a relevant function of the Commission in relation to a SEM Matter shall be taken on behalf of the Commission by the SEM Committee, and,
- ii. Similarly, any decision as to the exercise of a relevant function of the Authority in relation to a SEM Matter must be taken on behalf of the Authority by the SEM Committee.

A matter is a SEM matter if the SEM Committee determines that the exercise of a relevant function of the Authority or the Commission (as the case may be), in relation to that matter, materially affects, or is likely to materially to affect, the SEM.

The principal objective of the SEM Committee is to protect the interest of consumers of electricity in Northern Ireland and Ireland supplied by authorised persons, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the sale or purchase of electricity through the SEM.

⁴ [AIP-SEM-07-565 Joint Regulatory Statement plus annexes](#)

SCOPE OF AUTHORITY OF THE OVERSIGHT COMMITTEE AND MMU UNDER THE JOINT REGULATORY ARRANGEMENTS

OVERSIGHT COMMITTEE

As described in the Joint Regulatory Arrangements (AIP/SEM/07/565) and as established under the relevant legislation, the SEM Committee will be the ultimate decision making authority on all SEM matters.

The SEM Committee may, under the SEM legislation, establish sub-committees. Anything which is authorised or required to be done by the SEM Committee may be done by any sub-committee of the SEM Committee which is so authorised⁵.

A sub-committee of the SEM Committee known as the “Oversight Committee” was established at the SEM Committee’s meeting on 28 November 2007. The Oversight Committee is a committee made up of senior members of staff of each of the Regulatory Authorities appointed by the SEM Committee.

An Oversight Committee matter is defined as one which does not require the Oversight Committee to decide upon a matter of SEM policy. The Oversight Committee is then authorised to make decisions with respect to all Oversight Committee matters⁶. Under this framework, the Oversight Committee carries out its duties under the delegated authority of the SEM Committee.

THE MMU

In addition to being supported by the Oversight Committee, the SEM Committee is supported by a number of Joint Management Units (JMUs) which shall help supervise and co-ordinate key regulatory work streams.

The Market Monitoring Unit is one such JMU which supports the SEM Committee in its performance of a key regulatory function. Furthermore, working through the MMU is an integral part of the Regulatory Authorities’ Market Power Mitigation Strategy developed in 2006.

THE COMMISSION AND AUTHORITY’S POWERS OF INVESTIGATION

⁵ Schedule 1A (13) of the Electricity Act and Schedule 2 (5) of the SEM Order

⁶ [See AIP/SEM/08/017 SEM Committee Scheme of Delegation at Section 3, 29 January 2008 Final](#)

In addition to the SEM Legislation, the Electricity (Northern Ireland) Order 1992 (the '1992 Order') and the Energy (Northern Ireland) Order 2003 (the '2003 Order') in Northern Ireland and the Electricity Regulation Act 1999 (the '1999 Act') in Ireland also provide the legislative framework for the SEM.

That legislative framework, together with the various principles and rules contained in licences and other market documents, confers various powers and functions on the Regulatory Authorities. A number of those powers are especially relevant to investigations carried out through the MMU, including:

- **Information gathering:** In various circumstances the Regulatory Authorities can procure information from licensees (See for example, Art 51 of the 2003 Order; S.14 of the 1999 Act and / or [Condition 12/11] (or similar) of the generation licence)
- **Provisional or immediate directions:** Both the Utility Regulator and the Commission for Energy Regulation can, in certain circumstances, issue a licensee with a provisional or other immediate direction, requiring it to take or not take certain actions on short notice (See for example, Article 42 of the 2003 Order and S.23 of the 1999 Act).
- **Other directions, enforcement and penalties:** Both Regulatory Authorities can issue various directions to licensees in circumstances where they consider the licensee may not have complied, be complying, or comply in the future, with its licence obligations. Such directions can require licensees to do or not do certain things relating to compliance with their licence obligations. In some circumstances the Utility Regulator can also impose a financial penalty on a licensee. (See for example, Arts 42, 43 and 45 of the 2003 Order and Ss.24 & 25 1999 Act).

There are also various provisions which set out the processes that the SEM Committee must follow when exercising any of these powers. Those processes may differ depending on the subject matter of the investigation and the particular power being used. The process set out in section 4 describes the broad stages the SEM Committee expects any investigation to follow; the specific steps it takes will also be influenced by the detail of the statutory provisions relevant to any given case.

GENERATION LICENCES

The MMU focuses on monitoring compliance by Generators with Condition 15/17 of the Generic SEM Generation Licence (or its equivalent)⁷.

That Condition requires, among other things that⁸:

1. *The Licensee shall ensure that the price components of all Commercial Offer Data submitted to the Single Market Operation Business under the Single Electricity Market Trading and Settlement Code, whether by the Licensee itself or by any person acting on its behalf in relation to a generation [unit/set] for which the Licensee is the licensed generator, are cost-reflective.*

[...]

6. *The Licensee shall, in carrying out the activity to which paragraph 1 refers, act so as to ensure its compliance with the requirements of the Bidding Code of Practice.*

[...]

9. *The Licensee shall, if requested to do so by the [Commission/Authority], provide the [Commission/Authority] with: (a) a **reasoned explanation** of its calculations in relation to any Commercial Offer Data; and (b) **supporting evidence** sufficient to establish the consistency of that data with the obligations of the Licensee under this Condition.*

10. *In any case in which **Commercial Offer Data** are submitted to the Single Market Operation Business which are **not consistent with the Licensee's obligation***

⁷ There are a number of other licence types which are worthy of mention. In Ireland, Demand Side Units (“**DSUs**”) are licensed via a Supply Licence; in Northern Ireland, there is currently no provision for the issuing of a DSU licence. Where a licensee is operating as a DSU, Condition 19 of the Ireland Electricity Supply Licence sets an obligation on the licensee to submit Commercial Offer Data that are cost-reflective.

Aggregated Generator Units (“**AGUs**”) are regulated via a regulatory agreement between the Generator Aggregator and the relevant Regulatory Authority. Clause 8 of the Regulatory Agreement obliges the Generator Aggregator to submit Commercial Offer Data which are cost-reflective.

⁸ Text shown in square brackets appears in some licences but not all generation licences in the SEM

under paragraph 1 of this Condition, the Licensee shall immediately inform the [Commission/Authority] and provide to the [Commission/Authority] a statement of its reasons for the Commercial Offer Data submitted. [...]"

(Emphasis Added)

APPENDIX 2 - SUMMARY OF PREVIOUS CONSULTATION

PROPOSALS

In December 2010, a paper *“The MMU Governance Process Manual – Consultation Paper – SEM/10/085”* was published. The purpose of that paper was to:

- Clarify the role of the MMU and its responsibilities;
- Consult on the demarcation of types of investigation (formal or informal) and issues there under, including the publication of the complaint and of the MMU/Oversight Committee/SEM Committee findings.

Some of the proposals contained within that paper include:

- The publication of a monthly Traffic Light Report. This would make the market aware of cases that are currently being examined by the MMU. These cases would be classified according to the level of concern and its potential impact;
- The classification of investigations into formal investigations and informal investigations;
- Three different levels of enforcement, whereby it could be deemed that no breach had taken place, a breach had taken place but the Licensee should be asked to amend its behaviour, or where a breach has taken place and the Licensee is directed to amend its behaviour.

Procedures for the publication of information surrounding an investigation were also included.

RESPONSES

12 responses were received to the consultation. These are published along with this paper and a summary of these responses is provided below.

Endesa

A licensee’s relationship and obligations are to the RA issuing the licence. The SEM Committee is not a licensing body. Its decision binds licensees only insofar as these decisions are implemented by the licensing RA. Any requests, directions or determinations made to the licensee should be made by the relevant RA.

The MMU does not have delegated powers to request information from market participants. A participant's obligation to provide information arises under its licence and the request must come from the body issuing the licence in all instances.

A decision to investigate a party is a policy decision and should lie with the SEMC.

It is difficult to see how, in practice the decision-making arm of the RAs can be distinguished from the MMU, because by the RAs' own admission in AIP/SEM/217/06, they have no independent capability to address the technical questions that the MMU is asked to answer.

The statement in section 4.3 of the Governance Process Manual that the MMU will investigate 'well documented' complaints and refer complaints it believes to be 'well founded' to the RAs indicates that it exercises judgement and discretion.

The perception arises that in reaching any decision on a matter on which the advice of the MMU has been procured, the RAs will be unlikely to depart from the technical findings of the MMU and will be biased towards accepting such findings. In violation of the principles of natural justice, it would appear that this structure makes the MMU "a judge in its own cause." The MMU should operate as an independent and impartial monitoring unit which provides factual information to the SEM Committee in order that it may make decisions on breach of licence conditions.

It is not clear if information provided informally can be used as part of the formal investigation. Endesa Ireland would expect that a formal investigation is completely separate.

If the standard of 'major impact upon the market' is to be used then it should be defined and the basis for its imposition should be made clear. If the MMU is not an adjudicatory body it should not be reaching decisions on whether a suspected breach would have a major impact on the market and advising of a course of action.

It is not clear why the Oversight Committee should hold the decision on whether information will be published following a formal investigation. If any information is to be published following such an investigation it should be ensured that commercially sensitive information is not released and that information released is in line with the SEM Committee's decision.

It is stated that the MMU will pass relevant information to another body. Endesa Ireland is concerned by this suggestion and believes that a process should be set out, including details such as

who decides whether and what information is to be forwarded, how confidentiality issues are to be addressed and what other bodies might be involved. In the event that it is proposed to share information between the MMU and an external body, the process whereby this and other forms of information exchange and co-operation take place should be governed by a formal co-operation protocol that is published.

Endesa Ireland does not consider that the MMU should recommend to the SEM Committee to issue a binding direction against a participant, as this goes against the independent and impartial role it should play. It is particularly worrying that the MMU would take this strong course of action based on an informal investigation, where the powers to request information are weaker.

The use of the title 'Repeat Offenders' is inflammatory and prejudicial; the fact of a notification to the MMU does not mean that a breach has taken place. In addition, the MMU should not be permitted to use historic information in an investigation, rather it should be required to formally re-request information from a generator for use in a particular investigation.

In the discussion of 'Punitive Means' Endesa Ireland believes that potential actions should be set out. Participants are entitled to know what penalties may be imposed and what the legal basis for these is.

Endesa Ireland would note that a provisional order or direction has no force or basis in law.

In Information Gathering, standard forms should be developed by the MMU. These should set out the information requested and how that information relates to the issue being investigated. Realistic timelines should be given for response, including time for legal review by the party being investigated; Endesa Ireland suggests a minimum of 2 months should be allowed.

Decisions reached in investigations should create precedent for future investigations and outcomes should be published as such. This should apply equally to the substantive finding of whether there is a breach as to the decision as to whether the party will be requested to amend its behaviour or whether a binding direction will be issued under legislation. This is the interest of ensuring equality of treatment of all participants.

Tynagh

The process by which the MMU determines the validity of a complaint should be a core component of the process manual. The criteria for determining the validity of a formal complaint are outlined in

Annex A of SEM-07-511. These are not detailed enough and should be expanded with the aim of reducing the amount of MMU discretion involved in determining complaint compliance.

One notable absence within the proposed Investigation Process Manual is information regarding investigation timelines.

The MMU should establish a formal process whereby a generator wishing to apply a certain interpretation of the BCOP can table its plans to the MMU, and then secure sign off prior to implementation, to avoid needless investigation processes being subsequently entered into.

Bord Gáis Energy

The process manual refers to ‘punitive measures’ being placed on generators. It is BG Energy’s understanding that there may be an anomaly in the powers of the two RAs to penalise licensed generators in their respective jurisdictions.

While respecting and understanding the commercial sensitivity that can sometimes be involved in an investigation, it would be in the best interest of transparency, and indeed the spirit of the initiative, if some level of information regarding the conclusions of all investigations is published.

NIE Energy (now PowerNI)

NIEES supports any procedural change which will enhance the effectiveness, communication and transparency of the MMU. NIEES supports any procedural change which will enhance the effectiveness, communication and transparency of the MMU.

Synergen

Market Monitoring should be based on the presumption of innocence⁹. Therefore, there should be no public naming during the informal stage. Reporting on inquiries should be limited. Specifically, any complainant should only be told:

- that their complaint has been received and will be considered by the MMU;
- when the inquiry has been completed; and
- whether or not the inquiry has been taken forward to a formal investigation.

⁹ Consistent with the “Charter of Fundamental Rights of the European Union (2010/C 82/02)”.

Once a complaint is made, the complainant does not have any greater rights to information regarding that complaint than any other party.

Whilst the “what” and “when” of a bid is in the public domain, the “why” is between the Licensee and the appropriate regulatory body. Such confidentiality engenders a more open approach from Licensees i.e. full disclosure as opposed to minimum levels of compliance, is more likely.

Synergen accepts that further, more detailed, reporting would be provided following any investigation – although such transparency must avoid the disclosure of genuinely commercial information whilst providing sufficient information to the market and public at large to explain any decision taken.

Reporting should be limited for any inquiry with more information becoming publically available after any formal investigation (subject to issues of commercial confidentiality).

Viridian

It appears that the proposed process manual is intended to largely replace the existing process in AIP/SEM/511/07. Most aspects of the paper are a retrograde step.

Viridian suggests the need to enhance four main areas:

1. **Transparency** – Transparency is known to facilitate peer monitoring and promote the development of a competitive and liquid market. Reports should be published following all formal investigations. Reports should also be published following informal inquiries, particularly leading to a change in bidding behaviour.
2. **Timeliness** - there is considerable scope to improve the timeliness of MMU investigations and reporting, and resulting enforcement actions. Viridian suggest reducing the timelines for investigating and reporting suspected departures from the BCoP. It should be feasible for the MMU to complete a formal investigation and submit its report to the OC within 1 calendar month of receiving a formal complaint.
3. **Objectivity** – Viridian stress the need for clear and objective criteria for classifying complaints and for triggering investigations. VPE is very concerned about the vague, incomplete, and inappropriate basis proposed in the consultation paper and the process manual for classifying complaints and for triggering formal investigations. In particular VPE strongly objects to the

proposed test of “having a major impact on the market” for classifying complaints, initiating formal investigations (or indeed informal inquiries), and presumably for triggering enforcement actions.

- 4. Independence** – the MMU should be recognised as the competent authority in market monitoring and should be given sufficient autonomy and, guided by a clear process and mandate (with minimal interference from the RAs), use its best judgment to carry out its monitoring and reporting function expeditiously and with impartiality.

The above measures, reflected in a revised MMU Governance Process Manual, will significantly enhance the functioning of the MMU and market confidence in it. Whilst we recognise the need for discretion and flexibility, this should only be used in exceptional circumstances and should be fully justified and reported.

The proposed process manual is too vague and discretionary and does not provide the market assurance required. A more transparent, timely, objective and independent process that is only deviated from in well explained and exceptional circumstances will add significantly to the real and perceived effectiveness of the market monitoring function which is essential for a well-functioning, efficient, and competitive market.

Airtricity

If the MMU is seen to be and is demonstrably active, it is likely to create a psychological deterrence to all but the most blatant of market power abuses.

Given that the outcome of an investigation may return a ‘no breach’ verdict, there may be reputational and perhaps legal issues arising from identification of units prior to conclusions of investigations. Once an investigation has been concluded, we would see little difficulty in publishing, in addition to greater details on the nature of the case, the identity of the generating unit(s) to which the case relates.

AES

Publication of an Investigation Process Manual will reassure market participants that all investigations are being carried out consistently.

The MMU should retain the right to preserve confidentiality if there are justifiable grounds for doing so. In such circumstances the MMU should endeavour to include a brief justification as to why confidentiality is required.

In relation to repeat offenders, if the number of informal inquiries is the source of justification of the formal inquiry, then all of the previous informal inquiries should be re-examined.

PPB

A critical issue to consider is whether the identity of generators that are being investigated should be identified. This would improve transparency and enable all market participants to consider the matter and, if they desire, provide input into the investigation. Against this however, is that public identification may mean a generator's reputation is tainted even though, following investigation, they may be fully exonerated. Such unwarranted stigma could have negative consequences on a generator (e.g. view of the investment community) and therefore must be sensitively managed.

On balance, we consider that the benefits of identification outweigh the concerns, but only on the proviso that there is an equally public renouncement should the party be found to be compliant with the BCOP and its licence obligations.

Given the need to formally close off all investigations and to ensure all market participants are operating on a level playing field, a closure report must be published following the conclusion of all investigations (the detail required will clearly vary depending on the complexity and outcome of the investigation).

Section 5.5.2 indicates that the MMU will seek permission from the Oversight Committee where "the suspected breach would have a major impact upon the market". However, no objective criteria has been specified for determining what constitutes "a major impact upon the market".

In circumstances where the investigated party agrees to amend its behaviour, all market participants and not just the complainer should be informed.

Consumer Council

Transparent pricing in the market can provide benefits for supply companies competing in the SEM which may ultimately allow them to offer lower prices to consumers. However, the balance between effective competition and consumer protection must provide the optimal outcome for consumers.

ESBPG

We are in broad agreement with the procedures outlined in the Process Manual and believe in general, that the MMU has proposed a reasonable balance between transparency and the confidence in SEM that this generates, and the rights of participants for commercially sensitive information to remain confidential and for minor errors/misunderstandings not to be given undue significance.

For informal inquiries, the outcome should advise, if a breach was found, and if the participant was requested to alter their behaviour. Where an investigation leads to a significant new interpretation/understanding of the bidding principles that has general application it is important that a short report issues on same that is published so that there is clarity within the industry on the BCOP. For formal investigations, the same principles can apply.

SEMO

SEMO welcomes the publication of the Governance Process Manual as it provides greater clarity to Market Participants as to the kinds of interactions they can expect with the MMU. This kind of transparency can only be positive.

REGULATORY AUTHORITIES' COMMENTS ON RESPONSES RECEIVED

This section contains the SEM Committee's response to some of the main points raised within the responses to the original consultation.

1. It was suggested that *"a decision to investigate is a policy decision and should lie with the SEM Committee; giving such responsibility to the Oversight Committee would be contrary to the Scheme of Delegation, which states that no decision affecting the SEM may be taken without the prior authorisation of the SEM Committee"*.

The SEM Committee does not agree that a decision to investigate a potential licence breach is necessarily a policy decision and so out with the power delegated to the Oversight Committee. The SEM Committee acknowledge that such a decision could, in theory, affect general SEM policy, but do not consider that likely in most cases. The SEM Committee is continually mindful of the scope of authority delegated to the Oversight Committee and will assess each case on its own terms.

2. It was also claimed that the structure of an investigation as described in the consultation would make the MMU a *"judge in its own cause"*.

The SEM Committee is not proposing such a structure. The revised process set out in section 5 has been reworded accordingly.

3. It was also queried whether information obtained in an informal investigation can be used as part of a formal investigation.

The SEM Committee consider that, generally speaking, their responsibilities to monitor the market and help ensure compliance with licences make it important that they are able to draw on as much relevant evidence as possible when making any decision. In some circumstances this may include considering information gathered through earlier or informal investigations. The SEM Committee recognise that it is important that licensees are aware of that possibility and have suggested revisions to the process in section 5 to help draw it to their attention.

4. It is claimed that passing information to another body may be outside the MMU's powers.

The SEM Committee recognise that the ability to share information with another body will depend on the particular information being considered in any case and the applicable powers and any restrictions on information sharing/disclosure and the terms of any applicable Memorandum of Understanding (or similar) with the other body.

5. It was stated that a provisional order or direction pending the outcome of a formal investigation has no basis in law.

As set out in Appendix 1, both RAs have the power to make provisional or short order directions in certain circumstances.

6. Varying responses were received regarding the timescales for an investigation.

The SEM Committee does not consider it necessary to be overly prescriptive in this regard and instead consider that cases should be treated on a case-by-case basis. As noted in Appendix 1, the various statutes which relate to the RAs powers and the SEM set out certain processes and notice periods which will be followed in different cases.

APPENDIX 3 – INVESTIGATION FLOW CHART

