



25<sup>th</sup> February 2011

Mr Clive Bowers,  
Commission for Energy Regulation.  
The Exchange,  
Belgard Square North,  
Tallaght,  
Dublin 24.

Mr Kenny Dane,  
Utility Regulator,  
Queens House,  
14 Queen Street,  
Belfast,  
BT1 6ER.

Via email

**Re: SEM-10-85**

Dear Clive, Kenny,

Endesa Ireland welcomes the opportunity to respond to the consultation paper on the Market Monitoring Unit Governance Process Manual.

Endesa Ireland is supportive of the intention to formalise MMU procedures and makes the following comments with respect to the proposals, dealing first with the Governance Process Manual and then with the Investigation Process Manual. Where the same point arises in both documents it is not repeated.

An overarching point is that a generator licensee's relationship and obligations are to the Regulatory Authority issuing the licence, as provided for by legislation. The SEM Committee is not a licensing body and its decisions bind licensees only insofar as these decisions are implemented by the licensing Regulatory Authority. As stated in section 8A(4) of the Electricity Regulation Act 1999:

*'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'<sup>1</sup>*

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<sup>1</sup> 'Relevant function' is defined in s8A(6) to mean '(a) a function under this Act relating to electricity, (b) a function under the Internal Market Regulations'



Similarly, Order 6(2) of the Electricity (Single Wholesale Market)(Northern Ireland) Order 2007 states:

*'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.'*<sup>2</sup>

The implication of these sections is that the relevant functions themselves are still exercised by the Commission and the Authority. This means that any requests, directions or determinations made to the licensee should be made by the relevant Regulatory Authority (as provided by legislation). Endesa Ireland considers that clarity must be maintained as to each body's powers and functions. This issue arises a number of times in the specific points outlined below.

### **Governance Process Manual**

- Section 2.2 - It is stated that the MMU was established within NIAUR. Endesa Ireland considers that as the MMU is an SEM joint management unit the location of the unit is irrelevant. The governance process should not change if the unit were to be moved to to another appropriate body.
- The Process Manual proposes that responsibility for investigations be given to the Oversight Committee. Endesa Ireland would argue that as a decision to investigate a participant is a policy decision, it should lie with the SEM Committee (as stated in section 3.2). In particular, Endesa believes that giving such responsibility to the Oversight Committee would be contrary to the 'Scheme of Delegation' (SEM/08/017), published by the SEM Committee, which states that

*"no decision affecting the SEM may be taken without the prior authorisation of the SEM Committee."*

- Endesa considers that any decision to formally investigate a market participant is a decision that affects the SEM and as such must be taken by the SEM Committee itself.
- Section 3.5.1 – It is mentioned that information may be sought from another licensee (eg SEMO) in relation to an investigation. Endesa Ireland believes that any such requests for information must be specifically justified and proportionate to the purpose for which the information is being sought in compliance with relevant licence requirements. Such requests should pay due regard to the importance of commercial confidentiality.

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<sup>2</sup> Relevant function is defined in 6(4) and 6(5).

- Section 4.1 - The paper refers to the MMU managing projects not associated with monitoring. If the Manager and Analysts working in the MMU do so this is not in their capacity as a sub-committee of the SEM Committee and should not be included in the MMU Governance Manual.
- Section 4.3 - The Paper states that the MMU is not an adjudicatory body, however there have been conflicting statements on this point.

The RAs' Decision Paper "Market Power Mitigation in the SEM"  
(AIP/SEM/217/06) states:

"the MMU is an advisory arm of the Regulatory Authorities ... It is inappropriate to treat the MMU process as if it were a regulatory tribunal or an adjudicatory process of any kind ... the MMU will not resolve complaints ... the MMU would not be the deciding entity."

In contradiction to this, AIP/SEM/217/06 also states that "the MMU is an advisory arm of the Regulatory Authorities which exists to answer certain technical questions which the Regulatory Authorities would have difficulty answering without such help....".

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.

In addition, the statement in Section 4.3 of this paper that the MMU will investigate 'well documented' complaints and refer complaints it believes to be 'well founded' to the RAs indicates that it does exercise judgement and discretion.

We are not aware of transparent and robust rules and procedures that separate the workings of the MMU, and its legal personality, from the remainder of the RAs' operation.

Accordingly, 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."

In these circumstances Endesa Ireland does not agree with the statement in the paper that "the MMU currently does not function as an adjudicatory body."

Endesa Ireland considers that 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 should be required that any decision of the MMU Manager (eg Section 4.5) is agreed with the Shadow Manager and where agreement cannot be reached the Oversight Committee should be required to take a decision, reflecting the fact that the MMU is a Joint Management Unit.

Footnote 7 speaks in terms of the Shadow Manager being kept aware of complaints received and informal inquiries and will be consulted with before the MMU ask the Oversight Committee to launch a formal investigation. Endesa Ireland believes that there should be greater participation from the Shadow Manager, befitting of a Joint Management Unit.

- Section 3.5.1, 5.1 and 5.2.2 – 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.

According to AIP-SEM-511-07 participants may communicate with their own regulator in relation to market monitoring.

- Section 5.2.1 - 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; all information used in the investigation should be formally requested. On this basis, we believe that clear internal protocols should be put in place to govern the use of information formally obtained by MMU on foot of an investigation separately from information provided informally.
- Section 5.2.2 - It is proposed that where the MMU believes the behaviour of a party would have a major impact upon the market, they will ask the Oversight Committee for permission to proceed with a formal investigation. Once presented with the MMU report, if the Oversight Committee believes there has been a breach of the licence condition it will refer the case to the SEM.

Endesa Ireland considers that 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. Endesa Ireland is not convinced that this standard is appropriate.

In addition, if the MMU is not an adjudicatory body (as stated in section 4.3, discussed above) 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. The MMU should be independent and impartial in carrying out its tasks and should only ever set out facts, not provide opinions or suggest courses of action.

As discussed above, Endesa Ireland considers that the decision as to whether a formal investigation should proceed is a policy decision and as such can only be taken by the SEM Committee. Similarly, taking a preliminary 'screening' view as to whether certain behaviour constitutes a breach of licence is a policy decision and the SEM Committee should not delegate this power to the Oversight Committee.

- Section 5.3.1 – It is stated that where the MMU is confident that the behaviour of a party should change it will ask the Oversight Committee to refer the case to the SEM Committee to issue the party with a binding Direction. Endesa Ireland considers that if the MMU is not an adjudicative party it should not advice courses of action, rather it should highlight the facts.

Endesa Ireland points out that the SEM Committee cannot issue a binding Direction, it must ask the RAs to do so (see also Section 5.3.3).

- Section 5.3.3 – Where the Oversight Committee determines that a matter warrants referral to the SEM Committee this should be included in the SEM Committee Minutes. Currently Oversight Committee Decisions are not included in the SEM Committee meeting minutes. As the Oversight Committee has delegated powers to make decisions that impact the market, these decisions should be included in the SEM Committee minutes.
- Section 5.3 – 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.

Similarly, it should be ensured that any report furnished to the party that raised the complaint does not contain any commercially sensitive information.



## Investigation Process Manual

- Overall, the MMU should set out a detailed step by step process for the conduct of regulatory investigations. Endesa would expect a transparent investigation procedure to include at a minimum the following:
  - timelines and procedures for the gathering and verifying of information from Endesa (including proportionality of information requests);
  - providing the operator under investigation with a statement of the main issues to be investigated by the MMU;
  - considering the operator's response to the statement of issues;
  - notifying the operator under investigation of any provisional findings and possible remedies;
  - receiving representations from the operator under investigation on any provisional findings / remedies; and
  - procedures and timelines for appealing any provisional findings / remedies.
  
- Section 3.6 – It cannot be the case that 'a suspected breach of the BCOP is considered a licence breach', this wording should be corrected.
  
- Section 4.6 - MMU Traffic Light Report – If generating units are to be listed, the name of the person or company raising the issue should also be included as otherwise this process may be used as a way to discredit companies, whether or not they are found in breach.
  
- Section 5 - Endesa Ireland believes that the contents of the Enforcement Journal should be published in the interests of procedural certainty and transparency.
  
- Section 5.1 – 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. Endesa Ireland considers that this may be outside of the MMU's powers. 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. The agreement of such a protocol is a well-established practice between other regulatory bodies.

- Section 5.2 – If the SEM Committee’s compulsory information gathering powers are not being exercised during an informal investigation, what authority is there for the request of information and what parameters determine what information is requested? See comments above that it is the RA who licensed the participant in question who has the power under licence condition to request information.
- Section 5.3 - The ‘complainer’ might be better named a ‘notifier’ and his/her identity should be made public if the generator is to be made public.
- Section 5.4.7.d – The MMU should be required to set out how the information requested by it relates to the specific issue at hand and how it will assist the investigation. The MMU should not be permitted to go on a ‘fishing expedition’ in the collection of information.
- Section 5.4 - 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.
- Section 5.5 - 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. This is consistent with well-established legal prohibitions on the use of ‘similar fact evidence’.
- Section 6.4 - 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.
- Section 6.4 – Endesa Ireland would note that a provisional order or direction has no force or basis in law.



- Section 7.3 – 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. It should be open to a participant to request an extension to this timeframe from the SEM Committee.
- 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.

Please don't hesitate to contact me should you wish to discuss any aspects of this response.

Regards,

A handwritten signature in blue ink that reads 'Deirdre Powers'.

Deirdre Powers  
Director, Energy Management