

MMU Regime

Synergen's response to SEM-10-085

1 Introduction

This paper is Synergen's response to the consultation paper "The Market Monitoring Unit (MMU) Governance Process Manual" published by the RAs in December 2010 (SEM-10-085). Synergen has no objection to this response being published.

2 Discussion

Synergen welcomes the transparency provided by the RAs in SEM-10-085 regarding the MMU regime and opportunity to comment on the RAs' approach to informal inquiries (Level Zero, One and Two) and formal investigations (Level Three) related to compliance of market participants with the SEM bidding principles contained in the Bidding Code of Practice. Whilst Synergen considers that (i) a degree of regular reporting and transparency is appropriate with regard to the MMU activities; and (ii) the MMU processes are generally reasonable; it has serious concerns regarding some elements of the proposed reporting during the initial levels. Explicitly, the RAs sought stakeholder views on two issues / questions as set out in Section 6 of SEM-10-085 and Synergen's views are set out against these two questions.

Consultation Point 1. Should the Traffic Light Report devised by the MMU, signifying when a party is subject to Inquiry/investigation, be made public?

It is vitally important that market monitoring is based on a presumption of innocence¹ and thus Synergen opposes the public naming of participants during the informal query stages of assessment by the MMU to avoid the "**no smoke without fire**" problem. Synergen considers it reasonable to report only on the total number of active inquiries at Level Zero, One and Two. However, once a formal investigation (Level Three) has been launched a degree of public reporting is vital as it will allow other stakeholders to provide input in the MMU process, should the MMU request such information.

Consultation Point 2. Once a case has been investigated, what level of information is to be published, to whom and in what arena?

Synergen considers that reporting on inquiries should be limited. Specifically any complainant should only be told:

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

¹ Consistent with the "Charter of Fundamental Rights of the European Union (2010/C 83/02)".

In principle Synergen believes that market information should be either (a) confidential to the party concerned; or (b) publically available. The same principle should also apply to any discussions between the MMU and any party under scrutiny by the MMU – at whatever stage such an examination has reached. Licensees have clear obligations to disclose relevant information to the MMU with regard to their bidding, and may choose to do so off their own initiative, or following a request from the MMU. It is critical that whilst the “what” and “when” of a bid is in the public domain via T&SC provisions, the “why” is a between the Licensee and the appropriate regulatory body. Primarily, this is important because information provided on bidding is likely to involve the disclosure of commercially confidential information by the Licensee to the Regulatory Authority. A secondary reason for such confidentiality is that it engenders a more open approach from Licensees i.e. full disclosure, as opposed to minimum levels of compliance, is more likely.

Once a complaint has been made to the MMU, the complainant does not have any greater rights to information regarding that complaint than any other party. It would be both commercially prejudicial to the party that is the subject of the complaint, and inequitable across market participants as a whole, if a complainant was able to utilise the inquiry regime as a way of gaining further detailed insight / data into another participant’s approach to compliance with the BCOP. However, 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.

3 Summary

In summary, Synergen supports many aspects of the MMU approach detailed in SEM-10-085. However, Synergen considers that reporting should be limited for any inquiry with more information becoming publicly available any formal investigation (subject to issues of commercial confidentiality).