

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

**Decision Paper**

**SEM-14-012**

**18 February 2014**

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## 2. INTRODUCTION

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

The 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 describe the process that will generally be followed during investigations into possible breaches of the cost-reflective bidding requirements. These have been developed following two consultations, one published in December 2010 and one published in October 2013<sup>1</sup>. The remainder of the document is laid out as follows:

**Chapter 3** describes the background to the Market Monitoring Unit;

**Chapter 4** summarises the responses to the October 2013 consultation;

**Chapter 5** provides the SEM Committee’s comments on the responses received to that consultation;

**Chapter 6** takes account of these responses and describes the process that will generally be followed during investigations into possible breaches of the cost-reflective bidding requirements.

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<sup>1</sup> Both consultations can be found at the following link:  
[http://www.allislandproject.org/en/mmu\\_current\\_consultations.aspx?article=2df98a0a-017b-40fa-b889-472262223b33](http://www.allislandproject.org/en/mmu_current_consultations.aspx?article=2df98a0a-017b-40fa-b889-472262223b33)

**Appendix 1** provides a flow diagram that will generally be followed during investigations into possible breaches of the cost-reflective bidding requirements.

### 3. BACKGROUND TO THE MARKET MONITORING UNIT

#### MARKET POWER MITIGATION

When the SEM was being established, the Regulatory Authorities (“**RAs**”) 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 are 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 are determined by the RAs.

##### *Bidding Principles*

The RAs decided to implement a series of bidding requirements for the SEM. These are described in the licence condition on cost-reflective bidding<sup>2</sup> and in the Bidding Code of Practice (“**BCOP**”)<sup>3</sup>. These requirements stipulate that submissions shall be treated as cost-reflective only if they are equal to the Short Run Marginal Cost (as defined in the licence condition). 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 (as defined in the BCOP).

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<sup>2</sup> Condition 15 in Ireland Generation Licence and Condition 17 in Northern Ireland Generation Licence

<sup>3</sup> <http://www.allislandproject.org/en/market-power-consultation.aspx?article=44d688de-8ac1-4bd3-846c-06d0f3b85ef8>

### *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 bidding requirements and exploitation of market rules. This monitoring will help 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*

<b>Document reference</b>	<b>Key content</b>	<b>Date</b>
<a href="#">AIP/SEM/31/06</a> (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
<a href="#">AIP/SEM/62/06</a> (Market monitor identity consultation document)	Sets 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
<a href="#">AIP/SEM/82/06</a> (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
<a href="#">AIP/SEM/143/06</a> (Market monitoring in the SEM consultation paper)	Sets out the high level roles and responsibilities of the market monitor and requested comments in relation to the functions of the MMU.	September 2006
<a href="#">AIP/SEM/217/06</a> (Market monitoring in the SEM decision 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
<a href="#">AIP/SEM/511/07</a> (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. SUMMARY OF RESPONSES TO PREVIOUS CONSULTATION

On 23 December 2010, the SEM Committee published a consultation paper on the MMU Investigation Process Manual. Based upon the 12 responses received to that consultation, further proposals were developed. On 8 October 2013, the SEM Committee published a further consultation paper on the MMU Investigation Process Manual; six responses were received to this consultation. These responses were from:

- Bord Gáis Energy (“**BG Energy**”)
- Energia
- ESB Generation and Wholesale Markets (“**ESB GWM**”)
- Power NI Energy Limited Power Procurement Business (“**PPB**”)
- The Single Electricity Market Operator (“**SEMO**”)
- Tynagh Energy Limited (“**TEL**”)

These responses are being published in full alongside this decision paper and are summarised below.

##### **BG Energy**

It is BG Energy’s view that the MMU may have a function in the implementation of the provisions of the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) and would welcome clarity from the MMU as to whether/ how it envisages the requirements of REMIT impacting on its current role in the SEM.

With regard to the initiation of investigations, it would be helpful if the MMU could clarify what they consider to be a well-documented, well-founded complaint. This would enable market participants to properly compile a submission that meets the MMU requirements. Furthermore, it is stated that when determining whether an informal investigation should be upgraded to a formal investigation, the MMU will consider whether the actions complained of could have/ have “a major impact upon the market”. Further clarity on what this means would be welcomed.



The monthly MMU Traffic Light Report (“**the monthly MMU Report**”) is considered to be a very useful suggestion as it will inform the market of issues that are currently under review, their seriousness and in time will ultimately provide clarity for market participants on issues that have already been raised and resolved in the market.

The 2010 Consultation suggested that publication of a report “may” occur after an investigation. BG Energy believes that in the interests of transparency conclusive information on all investigations is necessary and a report should be published after all investigations that are entered into the monthly MMU Report.

All reports should contain the grounds for and details of the action complained of, including a detailed justification for how the action breaches the Trading and Settlement Code (“**T&SC**”)/ BCOP if at all; the reaction/ justification of the party under investigation; the change in behaviour/ measures requested of the party under investigation including their reaction or planned reaction to same; as well as any penalties imposed on the party under investigation. The party under investigation/ unit in question should not be identified in reports save where a conclusive determination of the party’s breach of the T&SC/ BCOP has been made and an appeal has either been declined by the party under investigation or the appeal has upheld the determination made. Unless a party is permitted to be identified in the aforementioned circumstances, the details given in the report should not enable other market participants to infer the identity nor the commercial bidding strategy of the party under investigation. Otherwise, there is a risk of reputational damage which will be difficult to rectify even if public acknowledgement of the mistake subsequently occurs. Parties under investigation should be permitted sight of the report before its publication.

The rules of commercial confidentiality and professional secrecy must be respected as appropriate. All market participants should receive the same report information regardless of whether they were the complainant or not. At no stage should a complainant be identified as this would deter complaints from being made.

In terms of the party that is being investigated, BG Energy considers that the party should at all times (rather than 'wherever possible'), on request to the MMU, be informed of the grounds of the claim including whether it is an MMU-based or third party based claim. The date the claim was made, the period of time it relates to and the current status of their case should also be made available to parties under investigation at their reasonable request.

Finally, BG Energy requests clarity and certainty on the consequences of breaches faced by generators.

### **Energia**

The current consultation states that its "purpose ...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".

Thus it is necessary to refer to multiple documents to try and understand what the MMU's investigation process and procedures are and it is unclear which take precedence when there are potential conflicts or inconsistencies. This does not help to clarify the existing process and therefore we strongly suggest that one overarching and comprehensive MMU process manual be compiled and published for further consultation.

### **ESB GWM**

ESB GWM would welcome further visibility on the MMU investigation process. For example, do the MMU provide any report reports/statistics on the number of investigations completed quarterly or annually? It would be helpful if the MMU provided KPIs regarding its investigation process – the number of investigations completed annually, the number of open and closed investigations and the timelines involved with closing out investigations.

ESB GWM would welcome further information regarding the issuing of guidance, the financial penalty and the basis of same that is referred to in the consultation. For example, how is the financial penalty determined and is the treatment of the penalty the same in both jurisdictions?

## **PPB**

It is unclear from the consultation document whether it is still the intention of the RA's to proceed with its previous proposals to introduce a Traffic Light Report showing the status of all current investigations. It is also unclear whether the MMU will maintain an Investigation Register/Enforcement Journal showing the history of all closed investigations. In our response to consultation document SEM-10-85 PPB were in favour of both of these documents being public documents.

PPB has no objections to the high level process described in section 4 of the consultation document. We would welcome more information on the criteria used in assessing whether a complaint is deemed to be a breach of either licence or the BCoP.

The flow chart in Appendix 3 would benefit if the feed from "Oversight Committee agree that a formal request should be issued" went through a decision box "Does the licensee respond?" with a "yes" feeding into the decision "Does the information .....licence conditions?". It is unclear what process will follow in circumstances where the investigated party refuses to provide information and whether in such circumstances the action would be to escalate the matter to the SEM Committee.

## **SEMO**

The Market Operator continues to support the work carried out by the MMU by supplying relevant data as and when required. There are a number of Acts being implemented by ACER with regard to REMIT. It is not yet clear where the Registered Reporting Mechanism on energy transactions for REMIT will lie. Under Article 15 of REMIT there is a potential risk that SEM may be in breach should it not have a market monitoring function.

## **Tynagh**

Amongst Tynagh's concerns highlighted in the response to the original consultation was the notable absence of investigation timelines, a point that remains unaddressed in the Further Consultation paper and which Tynagh now wish to reiterate.

The Investigation Process Manual should include realistic timelines for the conclusion of inquiries/investigations by the MMU. Without clear deadlines, a participant could become subject to one or several 'open-ended' inquiries/investigations. The participant subject to a MMU investigation should at all times be able to ascertain if the investigation is ongoing or concluded.

Tynagh is supportive of the proposals outlined in SEM-13-047. A transparent process for MMU investigations, both formal and informal, is required.

## 5. RESPONSES TO COMMENTS RECEIVED

The SEM Committee has considered all of the comments received in the responses to the October 2013 consultation in full. Within this section, the SEM Committee provides its response to the main points raised within those comments.

*BG Energy stated that, it would be helpful if the MMU could clarify what they consider to be a well-documented, well-founded complaint. This would enable market participants to properly compile a submission that meets the MMU requirements.*

**Response:** The consultation paper stated that 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. A formal complaint to the SEM Committee would usually need to include evidence, examples and justification as to why the party making the complaint considers that there may have been non-compliance with a licence condition.

*BG Energy and PPB enquired about the introduction of the Traffic Light Report*

**Response:** The SEM Committee has decided against the publication of the monthly Traffic Light Report. Various public notices may be given during any investigation; 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.

*BG Energy believes that in the interests of transparency conclusive information on all investigations is necessary and a report should be published after all investigations that are entered into the monthly MMU Report.*

**Response:** As stated above, various public notices may be given during any investigation. However, there will be no obligation to publish a report after all investigations.

*BG Energy raises the point that the rules of commercial confidentiality and professional secrecy must be respected as appropriate. All market participants should receive the same report*

*information regardless of whether they were the complainant or not. At no stage should a complainant be identified as this would deter complaints from being made.*

**Response:** 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.

*In terms of the party that is being investigated, BG Energy considers that the party should at all times (rather than 'wherever possible'), on request to the MMU, be informed of the grounds of the claim including whether it is an MMU-based or third party based claim.*

**Response:** 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. There may be instances where information is being requested from a party who is not currently suspected of making submissions which are not cost reflective, but the information may be relevant into an investigation into a third party.

*BG Energy and ESB GWM requests clarity and certainty on the consequences of breaches faced by generators, how a financial penalty is determined and is the treatment of the penalty the same in both jurisdictions.*

**Response:** Following an investigation, the SEM Committee may decide to take steps such as imposing a financial penalty on the licensee. Financial penalties imposed are likely to differ for different investigations and will take account of the relevant legislation within each jurisdiction.

*PPB suggested an amendment to the flow chart in Appendix 3 of the consultation as it was unclear what process will follow in circumstances where the investigated party refuses to provide information in response to a formal request.*

**Response:** Licensees are required to respond to formal information requests under Condition 11 (Northern Ireland Generation Licence)/ Condition 12 (Ireland Generation Licence). Not responding to such a request is likely to constitute a breach of licence.

*Tynagh state that the Investigation Process Manual should include realistic timelines for the conclusion of inquiries/investigations by the MMU.*

**Response:** The stages and milestones of an MMU investigation were described in the consultation. However, flexibility will exist to deal with specific circumstances in each case. The manual does will not impose requirements on, or purport to fetter the discretion of, the RAs.

## 6. PROCESS FOR INVESTIGATIONS

Following the comments received to the previous consultations, the SEM Committee is adopting the proposals described within the October 2013 consultation. The MMU investigation process is therefore described within this chapter.

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 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 1.



## 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 parties<sup>4</sup>; 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.

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.

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<sup>4</sup> For example, the Financial Conduct Authority, the Competition Commission or the Competition Authority.

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.

#### 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.

# APPENDIX 1 – INVESTIGATION FLOW CHART

