Pinsent Masons

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Response to Participants' Comments on updated Deed of Charge

Introduction

This document sets out our high-level responses in relation to the comments received from ESB and Viridian Group relating to the proposed Deed of Charge over the Collateral Reserve Accounts under the Trading and Settlement Code (the "**Code**").

This document should be read in conjunction with our previous memoranda on this subject, dated 25 March 2014 and 2 April 2014 respectively and attached to this document as Appendix 1 and Appendix 2 (together, the "**Memoranda**") as well as our presentation delivered to the Working Group Meeting in Dublin on 13 March 2014 and attached to this document as Appendix 3 (the "**Presentation**").

This document is intended to be used as guidance only for the purposes of discussions with the Participants and the Market Operator and in particular for the purposes of the upcoming conference call scheduled on 1st December 2014. It does not intend to cover every issue arising from the Deed of Charge or the Collateral Reserve Accounts nor does it intend to be a substitute for reading the updated Deed of Charge in full.

Executive Summary

We have been instructed to prepare high-level responses to comments received from ESB and Viridian Group on the proposed Deed of Charge circulated on 24 September 2014. As a result of the feedback received from Participants, we have prepared a further revised draft of the Deed of Charge (attached to this document as Appendix 4, together with a DV comparison against the previous draft (attached to this document as Appendix 5)).

As a general observation, we would note that most of the comments set out under the sections "General Remarks" and "High Level Concerns" of Viridian's submission had been previously raised by Viridian and were subsequently dealt with and discussed at length and in detail at the Working Group Meeting and the Modifications Committee Meeting held in Dublin on 13 March 2014 and 3 April 2014 respectively. We would also note that the majority of Viridian's comments on the Deed of Charge have also been discussed in the meetings mentioned above.

For the reasons outlined above, we do not propose to revisit those general points in this document but would refer you to our legal analysis around those issues as set out in our Memoranda and Presentation.

In terms of methodology, this document does not seek to provide a line-by-line response to the Participants' comments on the Deed of Charge. However, we have endeavoured to address the main substantial issues arising from the feedback received from the Participants with a view to discuss such issues in more detail during the conference call on 1st December.

Conclusion

We maintain that a stand alone charge is necessary in order to adequately secure the monies deposited in the Collateral Reserve Accounts for the reasons set out in our Memoranda and Presentation, and in particular for the certainty it provides the Market Operator and the Participants in an enforcement scenario in the event of a Participant's insolvency.

In our view, the updated Deed of Charge (as further revised following comments from ESB and Viridian) is fit and adequate for its purpose of securing the Collateral Reserve Accounts, is aligned with the Code to the maximum extent possible and represents a reasonable compromise between the positions of the Participants and the Market Operator.

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PM responses to ESB Comments

We note that ESB confirms in its submission that it does not have an issue in principle with amending the provisions relating to the Registration of Charges under the Code.

In response to ESB's remark that comments submitted by Viridian have not been adequately addressed by SEMO, we would note that all the comments set out under the sections "General Remarks" and "High Level Concerns" of Viridian's submission had been previously raised by Viridian and were subsequently dealt with and discussed at length and in detail at the Modifications Working Group Meeting and at the Modifications Committee Meeting held in Dublin on 13 March 2014 and 3 April 2014 respectively.

For the reasons outlined above, we do not propose to revisit those general points in this Response but would refer you to our legal analysis around those issues as set out in the Memoranda and the Presentation (please see Appendix 1, Appendix 2 and Appendix 3 to this document). We would also note that the majority of Viridian's comments on the draft Deed of Charge have also been discussed in the meetings mentioned above.

With regard to the general point raised by ESB in relation to whether the proposed Deed of Charge addresses and resolves the issues arising from the existing Registration of Charges regime under the Code as listed as items (a) to (e) on page 1 of ESB's submission (attached to this document as Appendix 6) we maintain that a standalone Deed of Charge in the proposed form does indeed address and resolve those issues. Our legal analysis supports this conclusion. Turning to items (a) to (e) of ESB's submission in particular:

(a) the proposed amendments to the Code (which have been already submitted to the Modifications Committee) introduce a specific obligation for the Participants to enter into a standalone Deed of Charge in order to secure the amounts held in the Collateral Reserve Accounts and specific registration requirements. These specific obligations under the Code are necessary in order to ensure Participants' compliance with the registration requirements.

(b) it is envisaged that the registration process will be entirely and directly undertaken by the Market Operator. There is no administrative work involved on the part of the Participants (other than executing the Deed of Charge (and the attached Notice)) and returning it to the Market Operator. The Market Operator will then deal with the registration of the Deed of Charge at Companies House. This approach has the benefit to eliminate any administrative burden for the Participants as the Market Operator retains full control over the registration process (which is one of the practical issues that Mods 02 13 sought to address). There are no practical implications for the Participants.

(c) this point is addressed by having a stand alone Deed of Charge (which can be registered at Companies House/CRO) in place (as Companies House or CRO would not accept the Code for the purposes of registering the Deeds of Charge).

(d) Jurisdiction: the proposed Deed of Charge deals with the jurisdiction/governing law issue (please see our response to Viridian's comments on the relevant clauses of the proposed Deed of Charge).

(e) Enforceability: please refer to our analysis and our recommendation set out in our Memoranda on this point. For the reasons set out in the Memoranda, and in particular the certainty it will provide the Participants and the Market Operator in an enforcement scenario, we remain of the view that a stand-alone fixed charge should be granted by each Participant and registered at the relevant Companies Registry in order to adequately secure the monies deposited in the Collateral Reserve Accounts.

With regard to the Title Transfer option referenced in ESB's submission, we would note that the Committee consensus at Modifications Committee Meeting 50 (held on 15 August 2013) was that Title Transfer was not a viable option and the majority preference was indeed for Option 2 (Amendment of the Deed of Charge inclusive of registrable security and stricter enforcement).

On the basis of the decision made by the Committee at Modifications Committee Meeting 50 not to pursue the Title Transfer option, it would make little sense to discuss the Title Transfer option for the purposes of this document. However, for completeness we would highlight the following main issues arising from the Title Transfer option: (i) whilst the Title Transfer may work in the context of a bilateral arrangement (as per the Lexon Model in England), it would not work in a mandatory pool scenario as the SEM (ii) in a default scenario, enforcement of the Collateral Reserve Accounts would be problematic with an outright Title Transfer; and (iii) the Title Transfer option would have an impact on the balance sheets of Participants.

With regard to the remaining comments on pages 2 and 3 of ESB's submission (and using the same numbering), we would respond as follows:

(i) Please refer to our response in relation to Viridian's "General Remarks" and "High Level Concerns". As noted above, these comments have been addressed in the Memoranda and discussed at the Modifications Committee Working Group and at Modifications Committee Meeting 54 held in Dublin on 13 March 2014 and 3 April 2014 respectively.

(ii) The primary purpose of the Collateral Reserve Accounts is not, and was never, intended to be for the payment of small invoices. They are intended primarily to provide Credit Cover and cash collateral. According to paragraph 3.5.1 of Agreed Procedure 9, the "mechanism is provided to give additional flexibility in **exceptional circumstances**" and "should not be considered a replacement for the normal payment processes, as outlined in section 2.5 of Agreed Procedure 17".

(iii) Please see our previous analysis in our presentation to the Working Group on 13 March 2014, as well as our Memoranda and Presentation which illustrate the recent charges registration regime in the United Kingdom. Our analysis shows also that the Financial Collateral Arrangements (No.2) Regulations 2003 will most likely not apply to this scenario, and therefore the stand alone Deed of Charge over the Collateral Reserve Accounts will not be exempt from registration.

Finally, in relation to the comment on page 3, we would submit that the proposed revised Deed of Charge is not supposed to be an "interim solution". On the contrary, we believe that this will be a robust and practical solution to the issue of adequately securing the funds credited to the Collateral Reserve Accounts and will protect both the Participants and the Market Operator in the event of Participant's insolvency. Our legal analysis and review of existing case law supports this conclusion. For our underlying legal analysis, please see the Memoranda and the Presentation.

PM responses to Viridian Comments

All references to TSC are to Version 15.

General Remarks:-

- **I am still of the view that the Proposed Deed of Charge and Account Security is unnecessary where simple code changes can be effected to deal with the perceived inadequacy of the TSC and all comments are subject to that point. PM response: The rationale of having a standalone Deed of Charge and the legal analysis surrounding this requirement has been dealt with in our previous Memoranda and Presentation. It has also been discussed at length and in some detail at a Working Group Meeting on 13 March 2014 and at various Modifications Committee Meetings. Following discussions at the various meetings the majority of Participants, as well as the Regulatory Authorities, expressed their consensus in principle to have a standalone Deed of Charge subject to a review of the revised Deed of Charge. In this respect, please refer to our Memoranda and Presentation (attached as Appendices 1, 2 and 3)**
- So far as I am aware, no estimate of costs has been made in relation to the implementation of this document nor confirmation as to how many deeds or participants are affected- my high level assessment was that implementation alone was a cost of approximately 640k to the market. **PM response: We understand that as of last month, there are 93 cash collateral accounts; 57 in Euro and 36 in GBP. The total held in the Euro accounts is €5,624,832.47 (approx. 4% of total posted € credit cover) and in the GBP Accounts is £11,995,884.54 (approx. 19% of total posted GBP credit cover). With regard to cost, we would refer you to our response to point (b) of ESB's comments above. The Deed of Charge places little administrative burden on the Participants. Participants are simply required to execute the Deed of Charge and associated Notice and return them to the Market Operator, who will be responsible for attending registration of the Deed of Charge with the relevant Companies House/ Companies Registry. As the requirement for the appointment of an agent for service of legal proceedings in England has been removed from the Deed of Charge, from a practical perspective there will be little implications for Participants who have Sterling Collateral. The vast majority of the estimated cost breakdown put forward by Viridian is made up of legal fees- whilst the instruction of external counsel is at the discretion of the Participant, in our view these cost estimates are not realistic.**
- No explanation has been provided as to **(i)** why the Sterling account appears to be in London- nor **(ii)** account taken of the discriminatory effect of this. **PM response: In this respect, please see our comments under items 1 and 14 below.**
- Draft 3 for discussion purposes- is not as presented fit for purpose, I have set out in red below **27** points where it is in breach of or contrary to the TSC and in amber **8** points where it is excessive/ onerous/ already dealt with in the code. **PM response: In our view, the revised Deed of Charge is aligned with the provisions of the Code to the maximum extent possible, and does not breach any such provisions. In this respect, we refer you to our detailed comments below. Please also note our general comment under item 3.**

- It is disappointing that the proposer has not sought to explain any of the amendments contained within Draft 3 for discussion purposes.
- It is disappointing that the proposer has not sought to explain why comments to date provided by other parties have not been incorporated or why they have been rejected. **PM response: The majority of these comments have been previously discussed at length at the Working Group Meeting and Modifications Committee Meetings referenced above. However, for the sake of completeness, we have reiterated these points in detail in our comments below.**
- Conscious that it is easy to criticise without providing a solution I have sought to indicate (and have marked up) the amendments and the reasoning behind those amendments which I believe are necessary to attempt to make this charge work- if that is the course the SEM Mods Committee wishes to proceed with it. **PM response: Please see our detailed comments below.**

High Level Concerns:-

- Draft 3 seeks to secure all obligations due to the MO- it should only secure obligations in relation to the SEM Collateral Reserve Accounts (see point 3 below) - a point raised by ESBI in its initial analysis, and AES in its analysis subsequent to the Working Group. **PM response: In this respect, please see our comments under item 3 of Viridian's submission below.**
- Draft 3 still contemplates English law applying- a point raised by BGE in its initial analysis and by AES in its analysis subsequent to the Working Group. **PM response: In this respect, please see our comments under item 36 of Viridian's submission below.**
- The application of proceeds under Clause 7.4 is wholly inconsistent with the terms of the TSC and is prejudicial to the SEM Creditors who have every reason to expect that **all the funds in the SEM Collateral Reserve Accounts** are applied to them **immediately without any deduction in accordance with the TSC.** **PM response: In this respect, please see our comments under item 19 of Viridian's submission below.**
- Draft 3 is onerous and disproportionate - stepping far beyond anything contemplated in the TSC-
  - Providing uncapped indemnities to the MO (where the TSC explicitly deals with liabilities of the parties)
  - Providing uncapped indemnities to the Bank- which is not a party to the TSC. **PM response: In this respect, please see our comments under items 3,6 and 37 of Viridian's submission below.**
  - Provides for interest and expenses never contemplated in the TSC for the benefit of the MO. **PM response: In this respect, please see our comments under item 3 of Viridian's submission below.**
  - Provides for assignment and the appointment of attorneys, never contemplated. **PM response: In this respect, please see our comments under item 10 of Viridian's submission below.**
  - Is discriminates against Sterling Participants. **PM response: In this respect, please see our comments above and under items 1 and 14 of Viridian's submission below.**

  Circumvents the DRP process under the TSC. **PM response: In this respect, please see our comments under item 31 of Viridian's submission below.**

- Provides for powers to the MO, such as the opening of new accounts and currency exchange which are in breach of the TSC and wholly unnecessary given that each account is ring fence, must remain in the currency it was deposited in- and is immediately available in the correct currency. **PM response: In this respect, please see our comments under items 20 and 28 of Viridian's submission below.**

- I have detailed below the precise clauses which I believe are in breach of the TSC and or unnecessary / onerous- given after a cursory glance some **38** instances are identified I can only conclude that the present draft is not fit for purpose. **PM response: In this respect, please see our Conclusion above.**

Detailed comments are as follows:-

Point	Clause in Draft 3 of proposed Deed of Charge	Breach or Contrary to TSC?	Comments	Suggested Revision to clause	PM Response to Viridian Comments
1	• Clause 1.1 • "Business Day" means a day (other than a Saturday or Sunday) on which commercial banks are open for business in: • for the purpose of clause 11.1, the place specified in the address for notice provided by the recipient; and • for all other purposes, [London] [Belfast] or [Dublin];	**YES**	• The failure to align boiler plate was highlighted by Viridian back in January 2014, it is disappointing therefore for this not to have been attended to. • TSC does not think in terms of "Business Day" • TSC thinks in terms of "Working Day" which is specifically defined as:- **Working Day or WD** means a weekday which is not a public holiday, bank holiday or non-processing day as advised by the SEM Bank in Ireland or Northern Ireland. The term "Non-Working Day" shall be construed accordingly. • There should therefore be no reference to London- as a) contrary to TSC in that the Sterling account should be in NI and b) TSC specifically caters for this	To avoid multiple revisions to the document new definition of "Business Day" should be as follows:- Clause 1.1 "Business Day" means a Working Day as defined in the Code	We do not have an issue in principle with aligning the defined terms used in the Deed of Charge with the defined terms used in the Code to the extent possible. To that end, please see also the general clause at 1.1 of the proposed Deed of Charge (which cross-refers to definitions used in the Code). We have therefore accepted this point and have replaced "Business Day" with "Working Day". However, we must disagree with Viridian's comment that the definition of "Working Day" should not refer to London. SEMO has confirmed that the Sterling Collateral Reserve Accounts must be held with the SEM Bank (i.e. Danske Bank) in London in order to meet the required credit rating criteria under paragraph 6.15 of the Code and cannot be moved to Northern Ireland for the reasons discussed at the Modifications Working Group Meeting on 13 March 2014, and set out in more detail in response to item 15 of Viridian's comments below. On

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			and there should be no mismatch between the proposed Deed of Charge and the TSC • Concept of "Business Day" should be replaced with TSC definition of "Working Day"		that basis, it is necessary to include reference to London in the definition of "Working Day" and to English law in the governing law clause of the Deed of Charge (please see also our comments in relation to the governing law of the proposed Deed of Charge in response to item 14 of Viridian's comments below). As already noted above and as discussed at the Modifications Working Group Meeting on 13 March 2014, as a consequence of the fact that the Sterling Collateral Reserve Accounts must be held in London due to the credit ratings requirements under the Code, the definition of "Jurisdiction" under the Code will need to be amended to include England (as well as Ireland and Northern Ireland).
2	Clause 1.1 "Event of Default" means the failure by the Participant to pay or discharge the Secured Obligations in whole or part on the due date therefor or, if no	**YES**	• Obligation to pay on demand is in breach of the TSC. • Para 1.7.18 specifically provides that:-	Clause 1.1 "Event of Default" means the failure by the Participant to pay or discharge the Secured Obligations in whole or part	This element of the definition is intended to capture those Secured Obligations for which there is no specified payment date. The "on demand" element does not prejudice the Participants in that the Market

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	date for payment has been agreed, on demand		"18. where no timeframe for performance is specified in respect of any obligation to be performed by a Party, then such obligation shall be performed within a reasonable time" • On demand element should be removed from the definition	on the due date therefor;	Operator will only be able to make a "demand" under the Deed of Charge on the basis of a contractual entitlement (i.e. on the occurrence of failure on the part of the Participant to meet a Secured Obligation). On this basis, we submit that the current wording in the definition should be retained. Paragraph 1.7.18 is a generic interpretation provision and covers instances where "no timeframe for performance is specified". As such, it does not apply in this instance.
3	Clause 1.1 "Secured Obligations" means all or any monies, liabilities and obligations, whether actual or contingent and whether owed jointly or severally or as principal debtor, guarantor, surety or otherwise, which are now or may at any time hereafter (whether before or at any time after demand) be or	**YES**	• **This is excessively and disproportionately beyond the scope of para 6.20.3 a point already raised by- ESBI and Viridian- they should refer only to the SEM Collateral Reserve Account.** • **See specifically AP 15 3.3** which neatly describes how	Clause 1.1 "Secured Obligations" means the Participants obligations in respect of the SEM Collateral Reserve Account forming all or part of the Required Credit Cover	Section 6.20.3 of the Code states that "with effect from the time of payment into the relevant SEM Collateral Reserve Account, the relevant Participant thereby charges all sums paid into and accruing on that account by way of first fixed charge over cash at the SEM Bank in favour of the Market Operator as agent and trustee for it and the SEM Creditors to secure the relevant

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	become due in any manner by the Participant under the Code including interest and all lawful charges or expenses which the Market Operator may in the course of its business charge or incur in respect of any of those matters and so that the interest shall be computed and compounded according to the usual rate and practice under the Code as well as after as before any demand made or decree or judgement obtained under this Deed or the Security, and all or any monies, liabilities and obligations due under the Code or under this Deed		other amounts due to the MO are supposed to be dealt with:- "Unpaid Market Operator Charge The MO will bear the cost of any unpaid Market Operator Charges and these will be included in the calculation of the Market Operator Charge for subsequent years. For the avoidance of doubt, unpaid Market Operator Charges are not included within Unsecured Bad Debt. The unpaid Market Operator Charges are a debt of the relevant Participant that ranks pari passu with other Shortfall and Unsecured Bad Debt. Variable Market Operator charges will be recovered by the Market Operator from available Credit Cover or, if none is available, as part of the Market Operator Charge in subsequent		Participant's payment obligations under the Code, subject always to the provisions of paragraphs 6.32 to 6.36 inclusive." This wording indicates that the Collateral Reserve Accounts are set up to provide cash collateral in order to secure all the Participant's payment obligations under the Code. Viridian's suggested interpretation according to which the charge over the Collateral Reserve Accounts should only secure the obligations of the Participants under the same Collateral Reserve Accounts is circular and in open contradiction with the clear wording of Section 6.20.3 of the Code. We concur with Viridian that AP 15.3.3 describes how Variable Market Operator Charges can be recovered by the Market Operator from available Credit Cover (including funds deposited in the Collateral Reserve Accounts) in accordance with Section 6.32 of the Code. Interest may be accrued in relation to some of the payments under the

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			year" • SEMO and External Counsel's response to this point was "We have taken external legal advice on the wording of the Deed of Charge and this format has been agreed with Danske Bank and so is fit for purpose"- o The Agreement of Danske bank is irrelevant- its not a party to this deed- and is not surprising given that it is provided an uncapped indemnity o Does not address the point. • Under para 6.20.3 the charge is expressed in relation to the SEM Collateral Reserve account-it is not there to secure:- o <u>all or any monies, liabilities and</u>		Code, as outlined in Section 6.32. The Market Operator does not charge interest, rather the interest will compound on the outstanding payment obligations of the Participants. Interest accrued on outstanding Variable Market Operator Charges is recoverable through the Collateral Reserve Accounts (Section 6.32.3 of the Code). We are willing to remove from the definition of Secured Obligations reference to ""all lawful charges" to avoid any misinterpretation of the same. The statement "We have taken external legal advice on the wording of the Deed of Charge and this format has been agreed with Danske Bank and so is fit for purpose" was made by SEMO in relation to the indemnity point under the Notices, in that the Bank were unwilling to move on a capped indemnity. (On the indemnity point, please see also our response to Viridian's comments above and under items 6 and 37 below). It was not

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			obligations, whether actual or contingent and whether owed jointly or severally or as principal debtor, guarantor, surety or otherwise, which are now or may at any time hereafter become due in any manner by the Participant under the Code ○ including interest and all lawful charges or expenses which the Market Operator may in the course of its business charge or incur in respect of any of those matters ○ and so that the interest shall be computed and compounded according to the usual rate and practice under the Code as well as after as before any demand made or decree or judgement obtained under this Deed or the		made in relation to the definition of Secured Obligations or to the proposed Deed of Charge as a whole. Participants are given the option whether to enter into Letters of Credit or to set up Collateral Reserve Accounts (or both) for the purposes of providing credit collateral in respect of their payment obligations under the Code. The mechanism through which a Letter of Credit is drawn down is clearly different and not comparable to the enforcement of a charge over accounts. It therefore follows that different processes will be required in the event of a Participant's default in respect of the differing methods of providing Credit Cover (the analysis of which goes beyond the scope of this note). However, it is worth reiterating that the Participants have total discretion in electing one or the other method of providing Credit Cover under the Code (and can indeed "switch" from one method to another subject to the conditions set out in paragraph 6.35.3 of the

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			Security, and all or any monies, liabilities and obligations due under the Code or under this Deed • Letters of Credit cannot be used in this fashion.		Code).
	Clause 1.4 The parties hereby acknowledge and agree that this Deed is entered into pursuant to section 6 of the Code. In the event that any of the defined terms used in this Deed are ambiguous, they must be construed in accordance with the Code.	**NO**	• Section 6 covers a lot- i.e. all of Financial and Settlement- it would be preferable for this to pin point para 6.20.3	**Clause 1.4** The parties hereby acknowledge and agree that this Deed is entered into pursuant to paragraph 6.20.3 of the Code. In the event that any of the defined terms used in this Deed are ambiguous, they must be construed in accordance with the Code.	In our view it is necessary to refer to Section 6 as a whole rather than narrow down the cross-reference to par. 6.20.3. It is not possible or advisable to read par. 6.20.3 in isolation. On the contrary, par. 6.20.3 should be read in the context of the entire Section 6. On this basis, the current wording will be retained.
	Clause 2.1 The Participant undertakes to the Market Operator that it will pay and discharge the Secured Obligations on the due date therefor, or, if no date for payment has been agreed, on demand.	**YES**	• Payment obligations are dealt with under the TSC there should not be a separate undertaking in respect of them- this beyond the scope of a charge on an account • Contrary to paragraph 1.7.18 of the Code	Clause 2.1 Delete and renumber accordingly	There seems to be a systematic misunderstanding of the scope and purpose of the Code as opposed to the Deed of Charge and how the interaction between them should operate. The Deed of Charge is intended to create a security interest over the monies deposited in the Collateral Reserve Accounts. The fact that the Deed of Charge is being put

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			• Clause unduly onerous, excessive and should be deleted.		in place in furtherance of the provisions of the Code and in accordance with those provisions does not imply that the Deed of Charge does not require its own mechanism in order to properly function as a security document. The undertaking or covenant to pay is a key provision under any security document. Without a covenant to pay, the security-taker (i.e. SEMO) would not have a contractual entitlement to enforce the security. This undertaking captures the fundamental obligation of the entity providing the security to pay and discharge the underlying secured obligations. This is an absolutely core provision (and as such completely standard) in a charge, whether it is a charge over accounts or otherwise. On this basis, Clause 1.4 must be retained. As noted above, paragraph 1.7.18 is a generic interpretation provision and covers instances where "no timeframe for performance is specified". As such, it does not apply in this

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					instance.
4	Clause 2.2 All the Security: (a) is created in favour of the Market Operator for itself as the Market Operator under the Code and as a security trustee on behalf of the other SEM Creditors, in both cases to secure the Participants' compliance and performance of their obligations under the Code;	**YES, Breach of TSC and trust under the TSC**	• Security is NOT created for MO- security is created to ensure that SEM Creditors are actually paid- i.e. MO is only permitted to use in respect Variable Market Operator Charge (after obligations to SEM Creditors discharged) and may NOT use the SEM CRA Collateral Reserve Account for Market Operator Charge • Charge is only there to secure the SEM CRA Collateral Reserve obligations IT IS NOT there to secure other general compliance and performance under the Code • Paragraph 6.30 specifically states that the SEM CRA is held on trust for the SEM Creditors and the MO "to the extent that any Credit Cover shall relate to the Variable Market Operator	**Clause 2.2** All the Security: (a) is created in favour of the Market Operator as security trustee on behalf of the SEM Creditors, trustee for its self in respect of the Variable Market Operator Charge, and as trustee to repay to the Participant (subject to the terms of paragraph 6.32 of the Code);	Section 6.20.3 of the Code states that "with effect from the time of payment into the relevant SEM Collateral Reserve Account, the relevant Participant thereby charges all sums paid into and accruing on that account by way of first fixed charge over cash at the SEM Bank in favour of the Market Operator as agent and trustee **for it and** the SEM Creditors to secure the relevant Participant's payment obligations under the Code, subject always to the provisions of paragraphs 6.32 to 6.36 inclusive" (Emphasis added). We must therefore disagree with Viridian's interpretation that "the Charge is only there to secure the Participants' obligations under the Collateral Reserve Accounts" - as noted above, this is a circular interpretation in contradiction with the wording of the Code. The wording of Section 6.20.3 clearly indicates that the Market Operator will hold the sums on trust for itself as Market Operator

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			Charge" and then it is held to repay to the Participant under paragraph 6.32.1. • **See specifically AP 15 3.3** which neatly describes how other amounts due to the MO are supposed to be dealt with:- "Unpaid Market Operator Charge The MO will bear the cost of any unpaid Market Operator Charges and these will be included in the calculation of the Market Operator Charge for subsequent years. For the avoidance of doubt, unpaid Market Operator Charges are not included within Unsecured Bad Debt. The unpaid Market Operator Charges are a debt of the relevant Participant that ranks pari passu with other Shortfall and Unsecured Bad Debt. Variable Market Operator charges will be recovered		and for the SEM Creditors. The Variable Market Operator Charge is recoverable from available Credit Cover, or in the event that no Credit Cover remains, can be added to the Market Operator Charge for the next year (per AP 15.3.3). Incidentally, reference in Viridian's comments to par 6.30 seems irrelevant as that paragraph deals with Trading Clearing Accounts and Capacity Clearing Accounts rather than with Collateral Reserve Accounts. In any event, the order of payment in Clause 7.4 (*Application of proceeds*) under the proposed Deed of Charge does not envisage at all that Market Operator Charges will be recoverable upon enforcement of the security under the Deed of Charge. Clause 7.4 is subject to the terms of the Code. Therefore under Clause 7.4(c) of the Deed of Charge, only Variable Market Operator Charges (but not Market Operator Charges) will be

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			by the Market Operator from available Credit Cover or, if none is available, as part of the Market Operator Charge in subsequent year		recoverable upon the enforcement of the Deed of Charge (only after the SEM Collateral Reserve Assets have been applied to meet the Shortfall or Unsecured Bad Debt in full in accordance with paragraph 6.32.3 of the Code). As usual in an enforcement scenario, live costs and expenses of enforcement rank in priority of any other items in the waterfall of payments. We have included additional wording at the end of the clause to clarify that in a pre-enforcement scenario, the credit balances held in the Collateral Reserve Accounts shall be applied in accordance with Sections 6.32 and Sections 6.35 of the Code.
5	Clause 2.3 As continuing security for the payment and discharge of the Secured Obligations, the Participant as beneficial owner hereby charges by way of first fixed charge and assigns absolutely by way of a first fixed security interest to the Market Operator the Security Assets	**YES**	• Paragraph 6.20.3 creates an obligation to charge only not to assign. • In order to assign you must have legal title- which the Participant does not.	Clause 2.3 As continuing security for the payment and discharge of the Secured Obligations, the Participant as beneficial owner and equitable owner hereby charges by way of first fixed charge the Security Assets (including, for the avoidance of doubt, all the	We are willing to remove the assignment language in Clause 2.3 in order to move matters forwards - albeit we maintain that it is conceptually possible to assign the underlying contractual relationship under the Deed of Charge (rather than the beneficial interest of the Participant in the credit balances held in the

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	(including, for the avoidance of doubt, all the Rights in connection therewith)			Rights in connection therewith) to the Market Operator	Collateral Reserve Account).
6	Clause 2.4 Immediately after delivery of this Deed, the Participant shall give notice to the Account Bank in the form set out in Part 1 of Schedule 2. The Market Operator shall procure the Account Bank's acknowledgement and agreement in the form set out in Part 2 of Schedule 2.	**Beyond the scope of what is required in TSC**	• TSC requires the accounts to be in the legal name of MO- the relationship is between MO and bank- notices from the Participant are irrelevant to the bank- it should be concerned with the legal owner- i.e. MO • The Notices themselves are disproportionate and onerous (a point noted by BGE) they contain:- o Two uncapped indemnities to the bank which is unreasonable and beyond the scope of anything contemplated in the TSC o Make references to documents (mandate) which the Participant has not seen o Refer incorrectly to an	Clause 2.4- Delete	This point has been discussed at length at the Modifications Working Group Meeting on 13 March 2014. Notices are required for the purposes of perfecting the security and preserving its priority. The notices must be from the Participant to the SEM Bank as it is the Participant that charges its beneficial interest in the Collateral Reserve Accounts. We do not see the issue here as it is in the Participants' best interests to ensure that the security is enforceable against the relevant Participant in a default scenario for the benefit of the other Participants. From a practical point of view, the only requirement for the Participants is to execute the relevant Notice (at the same time as they execute the Deed of Charge) and return it to the Market Operator. As noted above in our responses to ESB's comments, the Market Operator will then deal with the registration of the Deed of

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			assignment ○ Are governed by English Law		Charge with Companies House. As part of this process, the Market Operator will also send the Notice (signed by the Participant) to the SEM Bank and liaise directly with the SEM Bank to obtain the relevant Acknowledgement. Therefore from a practical perspective, the implications for the Participants in relation to the Notices will be minimal. As failure of serving the Notices to the SEM Bank may potentially impact on the priority of the security, it is crucial that the Notices are served. On this basis, this clause must be retained. With regard to the content of the Notices (and in particular the uncapped indemnities), the SEM Bank indicated at the time these were negotiated that the uncapped indemnities are strict requirements under their internal policy and that there will be no room for negotiation in that respect. In our experience, this is not an unusual position and it is generally difficult to get Banks to move away from their internal

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					policies. On this basis, there may be little point in seeking to re-open negotiations on the indemnities with the SEM Bank. This will also inevitably lead to incurring further legal costs.
7	Clause 3.5 (g) The Participant agrees that none of its obligations or the Market Operator's rights, powers and discretions under this Deed shall be reduced, discharged or otherwise adversely affected by: (g) any renumbering, redesignation, consolidation, sub-division or replacement of the Account[s] or its [their] being transferred to another branch or department of the Account Bank[s];	**YES**	• This is in direct contravention of the TSC- specifically paragraph 6.19 which provides that the MO shall:- "maintain a SEM Collateral Reserve Account with the SEM Bank in each Currency Zone in which the Participant has a registered Unit as applicable and so that the relevant cash deposit shall be paid into such SEM Collateral Reserve Account" • No where in the code or the trust is the MO given the right to sub divided, consolidate etc it is specifically precluded from doing this under paragraph	Clause 3.5 (g)- Delete.	In respect of the location of the Sterling Collateral Reserve Accounts in London, please see our comment in response to Viridian's comment in item 1 above. We are willing to take on board the comment regarding the consolidation and sub-division of accounts and have therefore removed the references to consolidation and sub-division from Clause 3.5 (g) of the Deed of Charge. The other provisions are mechanical and administrative in nature and in our view will not lead to "commingling" of accounts.

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			6.22 which provides:- "the Market Operator shall not commingle any funds standing to the credit of the SEM Trading Clearing Accounts, the SEM Capacity Clearing Accounts or any SEM Collateral Reserve Account with its own personal or any other funds."		
8	Clause 3.6 Without prejudice to the provisions of Clause 2 (Creation of Security), the Participant shall promptly after being requested to do so by the Market Operator, do all such acts and things, give such instructions (in material or dematerialised form) and sign, seal and execute and deliver all such deeds and other documents as the Market Operator may require for perfecting or protecting the Security in respect of the Security Assets or its priority or for facilitating the operation of	**Excessive / Disproportionate / already dealt with by TSC**	• This is already dealt with in paragraph 6.21 • Is unnecessary and excessive • BGE have already made the point that much in this proposed Deed of Charge "seems to reiterate a lot of what should and is provided for in the TSC"	Clause 3.6 Delete	This is a "further assurance" provision which is completely standard in any type of security document. These supporting provisions in security documents are required to ensure that any consequential requirements to perfect the security are put in place. The objection that there is a similar provision under the Code is not on point, for the reasons outlined in our response to Viridian's comment in relation to Clause 2.1 under item 3 above. As the Deed of Charge is a separate document from the Code, these standard further assurance provisions are required. On this basis, this

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	the Account[s] and the realisation or application of the Security Assets and the exercise of the rights, powers and discretions conferred on the Market Operator under this Deed. The obligations of the Participant under this Deed shall be in addition to and not in substitution for the covenants for further assurance deemed to be included herein by virtue of the Law of Property (Miscellaneous Provisions) Act 1994.				clause must be retained.
9	Clause 3.7 At any time after the Market Operator has received or is deemed to be affected by notice (whether actual or constructive) of the creation of any subsequent Security Interest over or affecting any part of the Security Assets or the proceeds of realisation, the Market Operator may open a new account or accounts on behalf of the Participant. If the Market Operator does not open a new account or accounts it shall	**YES**	• This is a breach of the TSC- MO is not permitted to open new accounts- it may only open the SEM Collateral Reserve Account – see paragraph 6.19 and paragraph 6.22 already referred to above.	Delete	This is another standard supporting provision to protect the security. This clause only applies <u>after</u> the Market Operator has notice of the creation of the Participant effectively seeking to charge its beneficial interest in the Collateral Reserve Account to a third party i.e. in a scenario where the security could potentially be jeopardised. Only at this point in time, when the Participant is acting in breach of its obligations under the Code and the Deed of Charge, can the Market Operator open a new

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	nevertheless be treated as if it had done so at the time when it received or was deemed to have received such notice and as from that time all payments made to the Market Operator shall be credited or be treated as having been credited to the new account or accounts and shall not operate to reduce the amount covered by the Security				account. This provision is necessary for the protection of the security and –ultimately – of the other Participants' interest.
10	Clause 4 POWER OF ATTORNEY 4.1 Appointment The Participant by way of security hereby irrevocably appoints the Market Operator or its nominee and every Receiver separately as its attorney (with full powers of substitution and delegation) on its behalf and in its name or otherwise, at such times and in such a manner as the attorney may think fit:	**Onerous and Excessive**	• At no time does the TSC contemplate appointing the MO or anyone else as a Participant's Attorney- this an excessive and onerous above any reasonable scope contemplated by the TSC • Paragraph 6.20.3 provides that MO shall act as agent.	Delete	This is another supporting provision for the purposes of perfecting or enforcing the security. The power of attorney clause is regarded as standard in a security document. The key point to note is that the powers conferred under the power of attorney will only become exercisable once the security becomes enforceable (i.e. the Participant is in default) (please see Clause 4.3) or else if the Participant has failed to fulfil its further assurance obligations under Clause 3.6 . There are no other circumstances where the powers conferred under the power of attorney will be triggered. On this basis, this

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	(a) to do anything which the Participant is obliged to do (but has not done) under this Deed and/or the Code including, without limitation, to sign, seal, execute and deliver all deeds, documents, notices, further securities, transfers or assignments of and other instruments relating to, and give instructions (in material or dematerialised form) in respect of, the Security Assets; (b) generally to exercise all or any of the rights, powers and discretions conferred on the Market Operator in				clause will be retained.

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	relation to the Security Assets under the Code; and (c) generally to exercise all or any of the rights, powers and discretions conferred on the Market Operator or that Receiver, as applicable, in relation to the Security Assets under this Deed, or (in the case of Security Assets located in England) the Law of Property Act, or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of Property Acts, or (in the case of Security Assets located in Ireland) the Irish				

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	Act. 4.2 Ratification The Participant hereby ratifies and confirms and agrees to ratify and confirm whatever its attorney may do or purport to do in the exercise or purported exercise of the power of attorney given by the Participant under this Clause. 4.3 Exercise of power The appointment effected under Clause 4.1 (Appointment) shall take effect immediately, but the powers conferred shall only become exercisable upon the Security becoming enforceable or if the Participant does not fulfil any of its obligations under Clause 3.6 (Further assurance) within [two] Business Days of notice from the Market Operator				

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	or any Receiver to do so.				
11	Clause 5 REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS 5.1 Representations and warranties The Participant represents and warrants to the Market Operator that: (a) it is duly incorporated and validly existing under the law of [England] [Scotland] [Northern Ireland] [Ireland] [other]; (b) it has the capacity and power to enter into this Deed and perform its obligations hereunder and to create the Security;	**Excessive**	• Participants should not be required to make representations- at most it is reasonable for Participants to provide warranties in relation to due incorporation and execution	Clause 5 WARRANTIES AND UNDERTAKINGS 5.1 Warranties The Participant warrants to the Market Operator that: (a) it is duly incorporated and validly existing under the law of [England] [Scotland] [Northern Ireland] [Ireland] [other]; (b) it has the capacity and power to enter into this Deed and perform its obligations hereunder and to create the	These are standard representations, warranties and undertakings. We do not see how or why it would be problematic for the Participants to give basic representations as to incorporation, capacity, corporate authorisations etc.

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	(c) it has taken all necessary corporate action to authorise the execution and delivery of the Deed and the performance of its obligations hereunder and the creation of this Security; (d) its entering into this Deed and the performance of its obligations hereunder and the creation of the Security will not contravene any law, regulation, agreement or judicial or official order to which it is a party or by which it is bound, or cause any limitation on any of its powers however imposed, or the right or ability of its			Security; (c) it has taken all necessary corporate action to authorise the execution and delivery of the Deed and the performance of its obligations hereunder and the creation of this Security; (d) its entering into this Deed and the performance of its obligations hereunder and the creation of the Security will not contravene any law, regulation, agreement or judicial or official order to which it is a party or by which it is bound, or cause any limitation on	

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	directors to exercise any of such powers, to be exceeded; (e) all actions, authorisations and consents required or advisable in connection with the creation, performance, validity and enforceability of this Deed and the Security and the transactions hereby contemplated and to ensure that (subject to all necessary registrations being made) the Security constitutes a valid, legal, binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of			any of its powers however imposed, or the right or ability of its directors to exercise any of such powers, to be exceeded; (e) all actions, authorisations and consents required or advisable in connection with the creation, performance, validity and enforceability of this Deed and the Security and the transactions hereby contemplated and to ensure that (subject to all necessary registrations being made) the Security constitutes a valid, legal,	

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	any liquidator, administrator or creditor of the Participant have been obtained or effected and are and shall remain in full force and effect; (f) it is and will be the sole absolute unencumbered beneficial owner of the Security Assets free of any other Security Interest or third party claims or interests, other than any such Security Interest, claim or interest that has been or may from time to time be created in favour of the Market Operator and/or any other person pursuant to the Code; (f) it has not			binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant have been obtained or effected and are and shall remain in full force and effect; (f) it is and will be the sole absolute unencumbered beneficial owner of the Security Assets free of any other Security Interest or third party claims or interests, other than any such Security	

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	(otherwise than pursuant to this Deed or otherwise in favour of the Market Operator and/or any other person pursuant to the Code) granted or created any Security Interest over or sold, transferred, lent, assigned, parted with its interest in, disposed of, or granted or created any option or other right to purchase or otherwise acquire the Security Assets or any interest therein, or agreed, conditionally or unconditionally, to do so; (h) the Participant's obligations under this Deed and (subject to all necessary registrations being			Interest, claim or interest that has been or may from time to time be created in favour of the Market Operator and/or any other person pursuant to the Code; (g) it has not (otherwise than pursuant to this Deed or otherwise in favour of the Market Operator and/or any other person pursuant to the Code) granted or created any Security Interest over or sold, transferred, lent, assigned, parted with its interest in, disposed of, or granted or created any option or other	

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	made) the Security are and until fully and unconditionally discharged will be valid, legal, binding and enforceable and the Security constitutes and will remain a valid, legal, binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant; and (i) each of the above representations and warranties will be correct and complied with in all respects at all times during the continuance of the Security as if repeated by reference to the			right to purchase or otherwise acquire the Security Assets or any interest therein, or agreed, conditionally or unconditionally, to do so; (h) the Participant's obligations under this Deed and (subject to all necessary registrations being made) the Security are and until fully and unconditionally discharged will be valid, legal, binding and enforceable and the Security constitutes and will remain a valid, legal, binding and enforceable first fixed Security	

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	circumstances existing at such times.			Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant; and (i) each of the above warranties will be correct and complied with in all respects at all times during the continuance of the Security as if repeated by reference to the circumstances existing at such times.	
12	Clause 5.2 5.2 Undertakings The Participant undertakes to the Market Operator	**Excessive and already Dealt with by TSC**	• The undertakings are excessive, beyond that provided for in the TSC and in most cases already dealt with under the terms of the TSC:-	Clause 5.2 Delete	As per our comment above, we do not see the reason why the Participants should not be in a position to give standard undertakings as to negative pledge, restrictions on withdrawals, no prejudice to the

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	that it shall: (a) not save as permitted by the Code make or attempt to make any withdrawal from the Account[s] or create, attempt to create or permit any Security Interest (other than the Security or any Security Interest in favour of the Market Operator and/or any other person created pursuant to the Code) to subsist over or in respect of any of the Security Assets; (b) not sell, transfer, lend or otherwise dispose of, or grant or create any other Security Interest over, or any option or other right to purchase or		○ 5.2 (a) and (b) are dealt with by paragraphs 6.24 and 6.34 specifically:- ○ 6.24 "Except as expressly provided for in this Code, no Party or Participant shall enter into any arrangements which assign or charge or purport to assign or charge any interest any Party or Participant may have in any SEM Trading Clearing Account, SEM Capacity Clearing Account or SEM Collateral Reserve Account" (emphasis added) • 6.33 "Each Participant with a SEM Collateral Reserve Account undertakes not to seek withdrawal of any funds to which it may otherwise be entitled in the relevant SEM Collateral Reserve Account except in the circumstances permitted by paragraph 6.35. The Market Operator		security etc. As an overarching comment, we would reiterate that the mere circumstance that similar representations and undertakings may be included under the Code does not entail that these provisions should not be included under the Deed of Charge, for the reasons outlined in our response to Viridian's comment in relation to Clause 2.1 under item 3 above.

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	otherwise acquire, the Security Assets or any interest therein (other than any Security Interest in favour of the Market Operator and/or any other person created pursuant to the Code) or agree, conditionally or unconditionally, to do so; (c) not take or omit to take any action which would prejudice the Security or impair the Security Assets and shall, at its own cost, promptly take all action which is at any time necessary or which the Market Operator may request, to protect the interests of the Participant and the Market Operator in		shall reject any purported notice of withdrawal not complying with this paragraph 6.34, the Code or the Bank Mandate. The Code shall take precedence over the Bank Mandate" (emphasis added) • Circumvents the circumstances in which the Participant is entitled to withdraw- i.e. paragraph 6.35. o 5 (c) is already dealt with by paragraph 6.21 o 5(d) goes beyond anything specified in the TSC o 5(e) again goes beyond anything specified in the TSC o 5(f) goes beyond TSC and is already dealt with in paragraph 6.21		

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	the Security Assets; (d) not vary or abrogate any of the rights attached to the Security Assets or take or omit to take any action which would have that result; (e) ensure that no monies or liabilities are outstanding in respect of any of the Security Assets; (f) take all action within its power to procure, maintain in effect and comply with all the terms and conditions of all approvals, authorisations, consents and registrations necessary or advisable under or				

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	in connection with this Deed and the Security; or (g) procure that the Security shall at all times be a valid, legal, binding and enforceable first fixed security interest over the Security Assets ranking in priority to the interests of any liquidator, administrator, examiner or creditor of the Participant.				
13	Clause 6 OPERATION OF ACCOUNT[S] Withdrawals The Participant shall not be entitled to make any withdrawals from the Account[s] without the prior written consent of the Market Operator, which	**Breach of TSC**	• This is in breach of the requirements for withdrawal under para 6.35 which specifically provides for:- ○ Quarterly interest to be paid out by the MO (paragraph 6.35.1) ○ Change in composition	Clause 6 Delete.	We agree in principle with Viridian that the operation of the Collateral Reserve Accounts <u>prior to enforcement of the security</u> must be aligned with the Code. Whist this has always been the intention, we have amended the wording in Clause 6 to ensure that it mirrors the withdrawals regime under the Code. On that basis, this clause will be retained

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	consent: (a) shall not be unreasonably withheld or delayed in the case of any withdrawal expressly permitted pursuant to section 6 of the Code; and (b) if given, may be provided by the issue of written instructions by the Market Operator to the relevant Account Bank to effect the relevant withdrawal.		(6.35.3) ○ Such transfers are MANDATORY, there is no question of consent or delay by the MO (6.35.4)		(in the amended version).
14	Clause 7.1 7.1 Security enforceable Upon or at any time after the occurrence of an Event of Default: (a) the Security shall become	**Breach of TSC**	• The Security Assets should only be in Ireland (Euro) and Northern Ireland (Sterling). All references to England are not accepted and should be stripped out of this clause.	Clause 7.1 7.1 Security enforceable Upon or at any time after the occurrence of an Event of Default: (a) the Security shall become	In respect of the location of the Sterling Collateral Reserve Accounts in London, please see our response to Viridian's comment in item 1 above. Please also note that a further explanation of the requirement for the Sterling Account to be in London was provided at Modifications Committee Meeting 55 held on 19 June

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	enforceable; and (b) the following power of sale and other powers, in each case as varied and extended by this Deed, shall be exerciseable: (i) in respect of Security Assets which are located in England, the power of sale and other powers conferred by Section 101 of the Law of Property Act; (ii) in respect of Security Assets which are located in Northern Ireland, the power of sale and other powers			enforceable; and (b) the following power of sale and other powers, in each case as varied and extended by this Deed, shall be exercisable: (i) in respect of Security Assets which are located in Northern Ireland, the power of sale and other powers conferred by Section 19 of the Conveyancing Act 1881 and Section 4 of the	2014. At the meeting, SEMO explained that the SEM Bank (Danske Bank) did not meet the Credit Worthiness Test under the Code in relation to its branches in Northern Ireland, and for that reason the accounts had to be moved to London. However, as there is no longer a requirement under the Deed of Charge to appoint an agent for service of legal proceedings in respect of the Sterling Collateral Reserve Accounts based in London, we do not see any practical consequences for the Participants flowing from the location of the Sterling Collateral Reserve Accounts in London.

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	conferred by Section 19 of the Conveyancing Act 1881 and Section 4 of the Conveyancing Act 1911; (iii) in respect of Security Assets which are located in Ireland, power of sale and other powers conferred by the Irish Act.			Conveyancing Act 1911; (ii) in respect of Security Assets which are located in Ireland, power of sale and other powers conferred by the Irish Act.	
15	Clause 7.2.2.1	**Breach of TSC**	• As noted above the Security Assets should only be in Ireland (Euro) and Northern Ireland (Sterling). All references to England are not accepted and should be stripped out of clause 7	Clause 7.2.2.1 Delete	Please see our response under item 14.
16	Clause 7.2.3.7	**Breach of TSC and**	• The liability of the MO is expressly set out in	Clause 7.2.3.7	We agree that the liability of the Market Operator under the Deed

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	7.2.4.7 The Market Operator may, at any time and from time to time, delegate by power of attorney or in any other manner (including, without limitation, under the hand of any officer of the Market Operator) to any person or persons or company or fluctuating body of persons all or any of the powers, authorities and discretions which are, for the time being, exercisable by the Market Operator under this Deed or under the Irish Act without the restrictions contained in the Irish Act in relation to the Security Assets or any part thereof, and any such delegation may be made upon such terms and conditions (including power to sub-delegate) and subject to such	**trust**	paragraph 6.38 specifically: ○ 6.38 "No Party or Participant shall have any claim against the Market Operator for breach of trust or fiduciary duty by the Market Operator under the Code except in the case of reckless or wilful misconduct." It should not be able to reduce this or side step the liability by appointing another person.	7.2.4.7 The Market Operator may, at any time and from time to time, delegate by power of attorney or in any other manner (including, without limitation, under the hand of any officer of the Market Operator) to any person or persons or company or fluctuating body of persons all or any of the powers, authorities and discretions which are, for the time being, exercisable by the Market Operator under this Deed or under the Irish Act without the restrictions contained in the Irish Act in relation to the Security Assets or any part thereof, and any such delegation	of Charge should reflect the same level of liability of the Market Operator under the Code. On this basis, we have amended this clause as per Viridian's comment.

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	regulations as the Market Operator may think fit, and the Market Operator shall not be in any way liable or responsible to the Participant for any loss or damage arising from any act, default, omission, or misconduct on the part of any such delegate (or sub-delegate). (emphasis added)			may be made upon such terms and conditions (including power to sub-delegate) and subject to such regulations as the Market Operator may think fit.	
17	Clause 7.3.1 (c) (c) generally to exercise all the rights powers and discretions in respect of the Security Assets it would be entitled to exercise if it were the absolute owner of the Security Assets.	**Breach of TSC and trust**	• MO should not be able to act as if it were the "absolute owner"- this is a breach of its duty to act as Trustee for the SEM Creditors and the Participant, monies MUST be applied in accordance with the provisions of paragraphs 6.32.1 (i.e. for the benefit of the SEM Creditors and where none outstanding towards Variable Market Operator Charge) and 6.35 for the Participant in respect of	Clause 7.3.1. (c) Delete.	This clause is applicable only after the security has become enforceable, namely in a default scenario. This is a standard contractual power which is required for the purposes of enforcing the security. This clause will not apply in a non-default scenario. On this basis, this clause will be retained.

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			interest and composition of Credit Cover		
18	Clause 7.3.2 7.3.2 Receiver 7.3.2.1 At any time after the Security has become enforceable the Market Operator may without further notice appoint by way of deed, or otherwise in writing, any one or more person or persons to be a receiver (the "Receiver") of all or any part of the Security Assets and thereafter from time to time, by way of deed, or otherwise in writing, may remove any such person appointed to be Receiver and may, in a similar manner appoint another in his or her place. 7.3.2.2 Where more than one	**Breach of TSC**	• These are cash accounts- there are therefore no circumstances in which the extra cost of appointing a Receiver could be justified. • Any such appointment will only a) slow down the application of the monies for the benefit of the SEM Creditors; b) reduce the amount of money available for the benefit of the SEM Creditors (i.e. money frittered away on the appointment of a Receiver) • This is a breach of the trust under which the MO holds the accounts • The TSC does not contemplate that Participants should appoint another party to act on its behalf • The TSC specifically contemplates that the costs	Clause 7.3.2	We concur with Viridian that the appointment of a receiver in the context of enforcement of the Collateral Reserve Accounts is highly unlikely. On this basis, we have removed Clause 7.3.2 and associated references throughout the document.

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	person is appointed Receiver, they shall have power to act separately (unless the appointment by the Market Operator specifies to the contrary). 7.3.2.3 The Market Operator may fix the remuneration of the Receiver without the restrictions contained in Section 109 of the Law of Property Act (in the case of Security Assets located in England), section 108(7) of the Irish Act (in the case of Security Assets located in Ireland) and without the restrictions contained in Section 24 of the Conveyancing and Law of Property Act 1881 (in the case of Security Assets located in Northern Ireland).The		of enforcement are and should be part of the Market Operator Charge- See specifically AP 15 3.3 which neatly describes how other amounts due to the MO are supposed to be dealt with:- "Unpaid Market Operator Charge The MO will bear the cost of any unpaid Market Operator Charges and these will be included in the calculation of the Market Operator Charge for subsequent years. For the avoidance of doubt, unpaid Market Operator Charges are not included within Unsecured Bad Debt. The unpaid Market Operator Charges are a debt of the relevant Participant that ranks pari passu with other Shortfall and Unsecured Bad Debt. Variable Market Operator charges will be recovered by the Market Operator		

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	remuneration of the Receiver shall be a debt secured by this Deed which shall be due and payable immediately upon it being paid by the Market Operator. 7.3.2.4 Any Receiver appointed by the Market Operator under this Deed shall be the agent of the Participant and the Participant shall be solely responsible for his or her acts and remuneration, as well as for any defaults committed by him or her. 7.3.2.5 Any Receiver appointed by the Market Operator under this Deed shall, in addition to the powers conferred on him by the Law of Property Act and the Insolvency Act 1986		from available Credit Cover or, if none is available, as part of the Market Operator Charge in subsequent year"		

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	(in the case of Security Assets located in England), the Conveyancing and Law of Property Acts and the Insolvency (Northern Ireland) Order 1989 (as amended) (in the case of Security Assets located in Northern Ireland), have the power to do all such acts and things as an absolute owner could do in the management and realisation of the Security Assets. 7.3.2.6 The power to appoint a Receiver (whether conferred by this Deed or by statute) shall be, and remain, exercisable by the Market Operator despite any prior appointment in respect of all or any part of the Security Assets.				

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19	Clause 7.4 7.4 Application of proceeds All monies realised or otherwise arising from the enforcement of the Security shall subject to Clause 7.5 (Monies on suspense account) be applied by the Market Operator or any Receiver: (a) in or towards payment or satisfaction of all costs and expenses incurred by the Market Operator (and any Receiver, attorney or agent appointed by it) under or in connection with this Deed and the Security; (b) in or towards the remuneration of any Receiver (as agreed between the Receiver and	**Breach of TSC and trust**	• This is in breach of the manner in which funds in the SEM Collateral Reserve Accounts are meant to be applied:- I.e. to SEM Creditors, MO for Variable Market Operator Charge, and then to Participant (assuming conditions of paragraphs 6.33 or 6.35 are fulfilled) • The creation of "suspense" accounts is in breach of the TSC- there are at most 2 SEM Collateral Reserve Accounts (one Euro and one Sterling) – which must be ring fenced and not co mingled (see paragraph 6.22) • It prejudices and delay's the SEM Creditors entitlement to the funds in the SEM Collateral Reserve account- by giving the MO and that of those appointed by the MO (for which there is no entitlement to do so under	**Clause 7.4** Application of proceeds. All monies realised from the enforcement of the Security shall be applied by the MO in accordance with paragraph 6.32 and paragraph 6.35.	Clause 7.4 will only have effect in a default scenario once the security has been enforced. This clause sets out the waterfall of payments in relation to proceeds received from the enforcement of the security. The Code does not deal with enforcement of security, which is why a separate and fundamentally different mechanism is needed under the Deed of Charge. While we agree with Viridian's analysis of the payment mechanism in relation to paragraphs 6.32 and 6.35 of the Code, we would again reiterate that this is the mechanism applicable in a pre-enforcement scenario. In an enforcement scenario, the order of payment set out in Clause 7.4 of the Deed of Charge will apply. In this respect, please see also our comments under item 4 above. The creation of suspense accounts will only occur in a post-enforcement scenario and as part of the enforcement process. Please also refer to our comments under item 4 and item

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	the Market Operator); (c) in or towards payment or satisfaction of the remaining Secured Obligations in accordance with the terms of the Code; and (d) in payment of any surplus to the Participant or any other person entitled thereto; provided that prior to the enforcement of the Security, any credit balances held in the Account[s] shall be applied in accordance with the provisions of sections 6.32 and 6.35 of the Code. This Clause is subject to the settlement of any claims which have priority over the Security and shall not prejudice the Market		the TSC) all its expenses- i.e. in doing so the amount available for the SEM Creditors for whom the security is intended, will be reduced and there will be an inevitable delay to the application of the sums where these procedures are stepped through-this is in clear breach of the TSC and the purpose of the SEM Collateral Reserve accounts and represents an unacceptable position in relation to the SEM Creditors- who the TSC envisages should immediately benefit from the sums- just like an LOC. • The MO should not be concerned with “any other person entitled”, this only places it at risk and is out with the terms of the TSC. • The Clause should be amended to reflect purely the payment cascade contemplated by the TSC		19 above in relation to application of proceeds. With regard to the comment in relation to the Letter of Credit, please refer to our response under item 3 above. We accept the point in relation to the wording "any other person entitled" and have removed this from the Deed of Charge.

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	Operator's right to recover any shortfall from the Participant in accordance with the provisions of the Code		and no other.		
20	Clause 7.5 Nothing in this Deed shall limit the right of the Market Operator (and the Participant acknowledges that the Market Operator is so entitled) if and for so long as the Market Operator in its discretion shall consider it appropriate, to place all or any monies arising from the enforcement of the Security into a suspense account or accounts (which may be with the Account Bank), without any obligation to apply the same or any part thereof in or toward the discharge of the Secured Obligations provided that if the aggregate of such monies so placed to the credit of such suspense account or accounts shall equal or exceed the Secured Obligations, the Market Operator shall, subject always to Clause 8 (Release), forthwith	**Breach of TSC and trust**	• TSC envisages one account for each amount (Euro and Sterling), which must not be co mingled (breach of trust and TSC) • There is no facility or need for the MO to open new accounts (breach of trust and TSC) • Accounts Must be with the SEM Bank in the Currency Zone (para 6.19)- it may not place it with any other bank, i.e. ("which may or may not be with the Account Bank) (breach of trust and TSC) • The MO must apply the SEM Collateral Reserve Account in accordance with the provisions of paragraphs 6.32 and 6.35- to do otherwise is to	Clause 7.5 Delete	We have accepted the point in relation to the wording "may be with the Account Bank" and have amended Clause 7.5 to read "must be with the Account Bank".

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	apply the same towards settlement of the Secured Obligations.		prejudice the entitlement of the SEM Creditors (breach of trust and TSC) • It matters not whether the amounts in the SEM Colleteral Reserve Account are above the Secured Obligations, they MUST be applied for the benefit of the SEM Creditors. (breach of trust and TSC) • The release of security is not prerequisite to the Participants entitlement of interest return or revision of the composition of Required Credit Cover under paragraph 6.35 (breach of trust and TSC)		
22	Clause 7.6 7.6 Balance The rights powers and discretions conferred on the Market Operator under this Deed are subject only to its obligation to account to the Participant for any	**Breach of TSC, breach of trust**	• This is wholly inaccurate- MO must at all times • operate any discretion in accordance with the TSC- i.e. primarily for the benefit of the SEM Creditors, then to itself in terms of the Variable Market Operator Charge and finally to the	Clause 7.6 Delete	We have slightly tweaked this clause to clarify that it is subject to the terms of the Code.

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	balance of the Security Assets or their proceeds remaining in its hands after the Secured Obligations have been fully and unconditionally paid and discharged		Participant. This flies in the face of the MO's express duties as trustee		
23	Clause 7.7.1 7.7.1 No person dealing with the Market Operator in relation to the Security Assets shall be concerned to enquire whether any event has occurred upon which any of the rights, powers and discretions conferred under or in connection with this Deed or (in the case of Security Assets located in England) the Law of Property Act or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of Property Acts or (in the case of	**Breach of TSC**	• This should be expressed as following enforcement- the charge should not in any way affect any of the parties positions prior to enforcement • References to English law are not relevant and should be stripped out, English law should not be involved in TSC- see paragraphs 2.1 and 2.2 of the TSC specifically:- ○ 2.1 "This Code and any disputes arising under, out of, or in relation to the Code shall be interpreted, construed and governed in accordance with the laws of Northern	Clause 7.7.1 7.7.1 Following enforcement no person dealing with the Market Operator in relation to the Security Assets shall be concerned to enquire whether any event has occurred upon which any of the rights, powers and discretions conferred under or in connection with this Deed or or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of	This clause deals with the position of third parties. Making the clause subject to enforcement of security would defeat the purpose of the clause (given that from a third party's perspective the main risk is whether the enforcement is valid). On this basis, this clause will be retained.

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	Security Assets located in Ireland) the Irish Act is or may be exerciseable, or whether any of the rights, powers and discretions exercised or purported to be exercised by it hereunder has otherwise become exercisable, whether any of the Secured Obligations remains outstanding, or generally as to the propriety or validity of the exercise or purported exercise of any right, power or discretion hereunder. All the protection to purchasers and other persons contained in Sections 104 and 107 of the Law of Property Act (in respect of Security Assets located in England), Sections 21 and 22 of the Conveyancing and Law of Property Act		Ireland." ○ 2.2 "Subject to the provisions relating to the Dispute Resolution Process, the Parties hereby submit to the exclusive jurisdiction of the Courts of Ireland and the Courts of Northern Ireland for all disputes arising under, out of, or in relation to the Code." • SEM Collateral Reserve Accounts should be held in accordance with paragraph 6.19 i.e. MO to "to establish and maintain a SEM Collateral Reserve Account with the SEM Bank in each Currency Zone in which the Participant has a registered Unit as applicable and so that the relevant cash deposit shall be paid into such SEM Collateral Reserve Account."	Property Acts or (in the case of Security Assets located in Ireland) the Irish Act is or may be exercisable, or whether any of the rights, powers and discretions exercised or purported to be exercised by it hereunder has otherwise become exercisable, whether any of the Secured Obligations remains outstanding, or generally as to the propriety or validity of the exercise or purported exercise of any right, power or discretion hereunder. All the protection to purchasers and other persons contained Sections 21 and 22 of the Conveyancing and	

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	1881 (in respect of Security Assets located in Northern Ireland) and sections 104, 105 and 106(1) of the Irish Act (in respect of Security Assets located in Ireland) shall apply to any person purchasing from or dealing with the Market Operator or its nominee or delegate as if the Secured Obligations had become due and the statutory powers of sale in relation to the Security Assets had arisen on the date of this Deed. 7.7.2 The receipt or discharge of the Market Operator shall be an absolute discharge to any purchaser or other person dealing with the Market Operator or its nominee or			Law of Property Act 1881 (in respect of Security Assets located in Northern Ireland) and sections 104, 105 and 106(1) of the Irish Act (in respect of Security Assets located in Ireland) shall apply to any person purchasing from or dealing with the Market Operator or its nominee or delegate as if the Secured Obligations had become due and the statutory powers of sale in relation to the Security Assets had arisen on the date of this Deed. 7.7.2 Following enforcement the receipt or discharge of the Market Operator shall be	

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	delegate in relation to the Security Assets and any such purchaser or other person shall not have any obligation to enquire after or see to the application of any payments made by it to the Market Operator or its nominee or delegate or at its direction.			an absolute discharge to any purchaser or other person dealing with the Market Operator or its nominee or delegate in relation to the Security Assets and any such purchaser or other person shall not have any obligation to enquire after or see to the application of any payments made by it to the Market Operator or its nominee or delegate or at its direction.	
24	Clause 8.1 8.1 Release When the Market Operator confirms in writing to the Participant that the Secured Obligations have been fully and	**Breach of TSC**	• This should be expressed as "following enforcement", the regime should not apply unless enforcement is in effect- as otherwise a breach of TSC and trust and its fiduciary duty. • Even if after enforcement,	Clause 8.1 Delete.	This clause deals with the release of the security after the secured obligations have been discharged (i.e. after the security has become obsolete). It is a standard clause and is for the benefit of the Participants. On that basis, this clause will be

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	unconditionally paid or discharged the Market Operator shall at the Participant's request, and at its expense, discharge the Security and retransfer to the Participant so much of the Security Assets as has not been realised or applied in or towards satisfaction of the Secured Obligations. Any payment or realisation in respect of the Secured Obligations which in the reasonable opinion of the Market Operator is liable to be avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, shall not be regarded as having been irrevocably effected until the expiry of the period during which it may be challenged on any such ground. 8.2 Avoidance of payments The Market Operator's		a breach of the requirements to apply to SEM Creditors, Viriable Market Operator Charge and then to Participant (esp in relation to interest and composition of Required Credit Cover) • There is no requirement under the code for confirmation to be provided in writing- under the code it is a matter of fact. • This provides for a subjective test, under the TSC it is an objective test (see paragraph 6.33)		retained.

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	right to recover the Secured Obligations in full shall not be affected or prejudiced by any payment or realisation which is avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, or by any release or discharge given by the Market Operator on the faith of any such payment or realisation. 8.3 Retention of Security If any payment or realisation in respect of the Secured Obligations is, in the Market Operator's reasonable opinion, liable to be avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, the Market Operator shall be entitled to retain this Deed and the Security undischarged and shall not				

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	be obliged to retransfer the Security Assets until the expiry of the period during which it may be challenged on any such ground.				
25	Clause 9.1 9.1 Delegation The Market Operator may delegate any right, power or authority exercisable by it under this Security to such person, on such terms and conditions (including power to sub-delegate) and in such manner as it thinks fit, but such delegation shall not preclude the Market Operator from itself exercising any such right, power or authority.	**Breach of TSC, terms of trust**	• The MO is the sole trustee under the TSC it should not have any power to delegate (none is provided for under the TSC) and as discussed above can only lead to further unnecessary costs.	Clause 9.1 Delete.	We agree that the Code does not afford the Market Operator a power to delegate. However, the Deed of Charge is a separate document and the Market Operator must have the ability to delegate, as this may be necessary in an enforcement scenario. We have accepted the comment in relation to the liability of the Market Operator. In this respect, please see our comment under item 16 above.
26	Clause 9.2 The Market Operator or any delegate shall not in any circumstances be liable to the Participant or any other person	**Breach of TSC**	• There is no power for MO to delegate • This is in breach of the threshold for liability in relation to the MO	Clause 9.2 The Market Operator shall not in any circumstances be liable to the Participant or any other person as	See item 25 above.

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	as mortgagee in possession or otherwise for any losses, damages, liabilities or expenses arising from or in connection with the application or enforcement of the Security or any realisation, appropriation or application of the Security Assets or from any act, default or omission of the Market Operator or delegate or his/her or its officers, employees or agents in relation to the Security Assets or otherwise in connection with this Deed and the Security, except to the extent caused by the wilful neglect or default of the Market Operator or delegate or his/her or its officers, employees or agents.		specifically set out at paragraph 6.38:- 6.38 "No Party or Participant shall have any claim against the Market Operator for breach of trust or fiduciary duty by the Market Operator under the Code except in the case of reckless or wilful misconduct. "	mortgagee in possession or otherwise for any losses, damages, liabilities or expenses arising from or in connection with the application or enforcement of the Security or any realisation, appropriation or application of the Security Assets or from any act, default or omission of the Market Operator in relation to the Security Assets or otherwise in connection with this Deed and the Security, except to the extent caused by reckless or wilful misconduct.	
27	Clause 10.1 10.1 Non compliance by Participant If the Participant fails to make any payment or fulfil any obligation due by it under or pursuant to this Deed, the Market Operator	**Breach of TSC**	• This should be expressed as following enforcement. • What on earth is "interest at 2% per annum over the Market Operator's cost of funding from time to time"? would the MO wish to state in public what its "cost of funding from time to time"	**Clause 10.1** **10.1** If, following enforcement, the Participant fails to make any payment due by it under or pursuant to this Deed, the Market Operator shall be entitled to charge Default Interest from the date of enforcement until settlement	Following on from discussions with SEMO, we understand that this scenario is not relevant in the context of the Collateral Reserve Accounts. On this basis, we are willing to remove the clause in order to simplify the Deed of Charge.

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	shall be entitled to do so in accordance with the Code and on its behalf and in its name (or in its own name as it considers expedient) and/or to take such action to remedy or mitigate the consequences of such failure as it considers expedient, and the amount of any such payment and/or the costs incurred in fulfilling such obligation or mitigating the consequences of such failure, shall be repayable by the Participant on demand, together with interest at 2% per annum over the Market Operator's cost of funding from time to time from the date of demand until settlement and shall constitute Secured Obligations.		currently is?- its not something the MO is given the right to under the TSC. • TSC recognises two types of interest:- o Default Interest means a rate of interest being two percent (2%) above LIBOR and o Interest means interest paid on the deposits in the SEM Trading Clearing Accounts, SEM Capacity Clearing Accounts and SEM Collateral Reserve Accounts. If interest is to apply it should clearly be at the rate contemplated in the TSC i.e. 2% above LIBOR. • Exactly what steps is the MO going to take to mitigate the situation- is this not putting the MO's own funds at risk?- not a	and such Default Interest shall constitute Secured Obligations.	

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			good idea • MO's obligations must surely be to deal with the accounts in accordance with the TSC – i.e. apply the money how its intended-anything else prejudices the SEM Creditors and or puts the MO at risk from the SEM Creditors.		
28	Clause 10.2 10.2 Currency conversion and indemnity 10.2.1 Irrespective of the currency (whether Sterling, Euro or otherwise) in which all or part of the Secured Obligations or the Security Assets from time to time is/are expressed, the Market Operator shall be entitled, for any purpose under or in connection with this Deed, at any time and	**Breach of TSC and trust**	• Currency conversion is a breach of the TSC- the Euro and Sterling SEM Collateral Accounts must stay in the separate ring fenced accounts- for payments in Euro and Sterling, paragraph 6.19 and 6.22 • Given payment currency and contract currency are always the same 10.2.2 is superfluous • TSC does not recognise an indemnity should be provided to the MO.	Clause 10.2 Delete.	Paragraph 6.9 of the Code states that "in relation to the Variable Market Operator Charge, the Market Operator shall apply the Trading Day Exchange Rate relating to the relevant Trading Period." We are of the view that since the Variable Market Operator Charge may be taken from any surplus Credit Cover, including from the Collateral Reserve Accounts, then a Currency conversion mechanism is needed within the Deed of Charge to align with the exchange mechanism envisioned for the Variable Market Operator

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	without prior notification to the Participant, to convert the amount(s) in question into either Sterling or Euro as the Market Operator may from time to time consider appropriate: any such conversion shall be effected at the Trading Day Exchange Rate. 10.2.2 If by reason of any applicable law or regulation, or pursuant to any judgement, decree or order against the Participant, or in respect of the liquidation or other insolvency of the Participant, or for any other reason, any payment under or in connection with this Deed is due or made in a currency (the "payment currency") other than the		• Delete clause as in breach of TSC, excessive, unnecessary and provides for an indemnity not contemplated in TSC		Charge under the Code.

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	currency in which it is expressed to be due under or in connection with this Deed (the "contractual currency") then to the extent that the amount of such payment actually received by the Market Operator when converted into the contractual currency at the Trading Day Exchange Rate falls short of the amount due under or in connection with this Deed, the Participant shall as a separate and independent obligation indemnify and hold the Market Operator harmless against the amount of such shortfall.				
29	Clause 10.3 10.3 Assignment 10.3.1 The Market Operator may at any time	**Conflict with TSC and already dealt with**	• TSC paragraph 2.339, already deals with the issue of assignment 10.3.1 and 10.3.2 introduces a circularity that gives uncertainty where none is	Clause 10.3 10.1 Neither party may assign or transfer the benefit or obligations under	The provision in paragraph 2.339 states that "except with the prior written consent of the Regulatory Authorities, or as otherwise expressly provided herein, a Party shall not assign or transfer

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	(without notice to or consent of the Participant) assign or transfer the benefit of this Deed and the Security or any of its rights or obligations thereunder, provided that such assignment and transfer is in compliance with any applicable requirements of the Code. The Market Operator shall be entitled to impart any information concerning the Participant to any assignee, transferee or proposed assignee or transferee or to any person who may otherwise enter into contractual relations with the Market Operator in relation to this Deed, the Secured Assets or the Secured Obligations. 10.3.2 The Participant may	**in TSC**	needed- consent for either party to assign their obligations under TSC requires the RA's consent and should not circumvent the RA's ability to add conditionality to any such assignment. • 10.3.1 and 10.3.2 should therefore reference paragraph 2.339.	this Deed save in accordance with paragraph 2.339 of the Code. 10.2 This Deed shall be binding upon and inure to the benefit of each of the parties hereto and their respective permitted successors, transferees and assignees and references in this Deed to any of them shall be construed accordingly.	or purport to assign or transfer all or any of its rights or obligations under the Code or the Framework Agreement." The operative language here is "under the Code or the Framework Agreement". The subject matter of the Deed of Charge is different, and so different rights of assignment need to be provided.

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	not, without the prior written consent of the Market Operator which may be given or withheld in the Market Operator's absolute discretion, assign, transfer or otherwise deal with the benefit or burden of this Deed or the Security or any of its rights or obligations thereunder. 10.3.3 This Deed shall be binding upon and inure to the benefit of each of the parties hereto and their respective permitted successors, transferees and assignees and references in this Deed to any of them shall be construed accordingly.				
30	Clause 10.4 10.4 Certifications	**Breach of TSC**	• The MO is obliged to provide to the Participant detailed ledger accounts showing all payments in	Clause 10.4 Delete.	We agree that Clause 10.4 in relation to Certifications is not required and have removed it

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	Any certification or determination by the Market Operator in connection with any Secured Obligation or other matter provided for in this Deed shall, save in the case of manifest error, conclusive evidence of the matters to which it relates.		and out and provide to the Participant full details on request- it follows that it simply cannot self certify amounts due- either the amounts are properly due, or they are not-manifest error does not come into it. • Such self certification circumvents the Dispute Resolution procedures at paragraphs 2.276 to 2.313 the Deed of Charge should not be used to circumvent the DRP procedures of the TSC (indeed enforcement seems to me the exact circumstances where DRP is most likely to come into effect).		from the Deed of Charge.
31	Clause 10.5 10.5 Entire agreement This Deed constitutes the entire agreement and understanding of the parties in relation to the security interests created herein in furtherance of the	**Breach of TSC and trust**	• It does not represent the entire understanding- reference must be made to the Code • DRP must apply to the Charge • There are no clauses in the Code, its sections,	Clause 10.5 10.5 Agreement This Deed constitutes the charge created in furtherance of the paragraph 6.20.3 of the Code and supersedes any previous agreement	In our view this clause works as currently drafted as it relates to the "security interest created herein in furtherance of the provisions in Section 6 of the Code", which is a separate subject matter from the Code. It is not envisaged that the Dispute Resolution Procedure under the Code will apply to the Deed of

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	provisions in Clause 6 of the Code and supersedes any previous agreement between the parties relating to the subject matter of this Deed.		paragraphs and sub paragraphs etc. • If this Charge is to be granted- then any pre existing charge must be replaced.	between the parties relating to paragraph 6.20.3 of the Code.	Charge. As stated above, although there is a process for Settlement Disputes under paragraphs 2.282-2.285 of the Code, we would draw your attention to the following provisions: (a) Paragraph 2.281, which states that "the obligations of the Parties under the Code (including payment of any invoice amounts by the Invoice Due Date) shall not be affected by reason of the existence of a Dispute, save as provided for in any determination of the Dispute Resolution Board or a Court"; and (b) Paragraph 6.114, which states that "any payment due under the Code by any Party or Participant shall continue to be due and payable in accordance with its terms (including as to timing) notwithstanding (i) any Data Queries, Settlement Queries or Settlement Disputes in respect of such payments or (ii) any Shortfall, Unsecured Bad Debt, Default, Suspension,

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					Deregistration or Termination arising in relation to any such Party or Participant". The DRP process is not designed to cover the Security enforcement process. The reference to "Clause 6" has been amended to "Section 6".
32	Clause 10.6 10.6 Non-reliance Each of the parties acknowledges and agrees that in entering into this Deed it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) of any person (whether a party or not) other than as expressly set out in this Deed.	**Excessive**	• Participants at most should be obliged to make warranties and not representations or undertakings as detailed above at point [ ]	Clause 10.6 10.6 Each of the parties acknowledges and agrees that in entering into this Deed it does not rely on, and shall have no remedy in respect of any warranty (whether negligently or innocently made) of any person (whether a party or not) other than as expressly set out in this Deed.	Please see our comments under items 11 and 12 above.

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33	Clause 10.10 10.10 Expenses The Participant shall indemnify the Market Operator on demand against all liabilities, costs, charges and expenses properly and reasonably incurred by the Market Operator and its nominees and delegates (including the fees and expenses of any legal advisers and where appropriate any VAT) in connection with the preparation, execution and registration of this Deed and the Security and the enforcement or preservation of the Market Operator's rights under this Deed and the Security together with interest at 2% per annum over the Market Operator's cost of funding from time to time from the date of demand until settlement, and the amount thereof shall be a	**Excessive and in breach of the TSC**	• Costs of enforcement are matters of the Market Operator Charge- see specifically AP 15 3.3 which neatly describes how other amounts due to the MO are supposed to be dealt with:- "Unpaid Market Operator Charge The MO will bear the cost of any unpaid Market Operator Charges and these will be included in the calculation of the Market Operator Charge for subsequent years. For the avoidance of doubt, unpaid Market Operator Charges are not included within Unsecured Bad Debt. The unpaid Market Operator Charges are a debt of the relevant Participant that ranks pari passu with other Shortfall and Unsecured Bad Debt. Variable Market Operator charges will be recovered by the Market Operator	**Clause 10.10** 10.10 Expenses Each party shall pay its own costs incurred in connection with the negotiation, preparation, execution and registration of this agreement	This clause covers the live costs of enforcement incurred by the Market Operator in enforcing the security. It is not clear why the Market Operator should bear the cost of enforcement deriving from a Participant's default. As in any other security enforcement situation, the Market Operator must be entitled to recover its costs and expenses relating to enforcement.

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	Secured Obligation.		from available Credit Cover or, if none is available, as part of the Market Operator Charge in subsequent year • TSC does not provide for an indemnity to the MO- only "Indemnities" catered for in the TSC are specifically:- o Under Para 2.293, in respect of the Dispute Resolution Board; o Under Para 2.352, in respect of Data Protection and o Under Paragraphs 6.261 and 6.262 in respect of VAT • Given the experience to date, Participants should not be made to bear the cost of the MO's unreasonable and poor drafting in connection with this Deed of Charge • The parties should bear		

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			their own costs in respect of the drafting and negotiation of this deed, or at the very most a contribution of €50 which appears to be the corresponding cost for a Letter of Credit. • What on earth is "interest at 2% per annum over the Market Operator's cost of funding from time to time"? would the MO wish to state in public what its "cost of funding from time to time" currently is?- its not something the MO is given the right to under the TSC. • TSC recognises two types of interest:- o Default Interest means a rate of interest being two percent (2%) above LIBOR and o Interest means interest paid on the deposits in the SEM Trading Clearing Accounts, SEM		

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			Capacity Clearing Accounts and SEM Collateral Reserve Accounts. If interest is dealt properly as indicated in relation to clause 10.1 above this point does not arise. • Liability of the parties and participants is specifically dealt with at paragraphs 2.317 to 2.327 which briefly state that liability must be foreseeable and excludes consequential loss-see specifically:- 2.317 No Party shall be liable to any other Party for loss arising from any breach of the Code or the Framework Agreement other than for loss resulting directly from such breach (but without prejudice to any other provision of the Code which excludes or limits liability in respect		

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			of any breach for loss directly resulting from such breach) and which was reasonably foreseeable as not unlikely to occur in the ordinary course of events from such breach in respect of: 1. physical damage to the property of any other Party or its officers, employees, or agents; and/or 2. the liability (in law) of any other such Party to any other person for loss in respect of physical damage to the property of such other person. 2.318 No Party shall in any circumstances be liable to any other Party in respect of any breach of the Code or the Framework Agreement for:		

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			1. loss of profits, loss of income, loss of contract, loss of anticipated savings, loss of investment return, loss of goodwill, loss of use, or loss of reputation; or 2. any indirect or consequential loss or any incidental or special damages (including punitive damages); or 3. loss resulting from the liability of any other Party to any other person howsoever and whensoever arising save as provided in paragraphs 2.317.2 and 2.320. 2.319 The limitations of liability set out in paragraph 2.317 are without prejudice to any provision of the Code or the Framework Agreement which		

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			provides for an indemnity and shall not relieve any Party of an obligation to pay any amounts due pursuant to the Code. 2.320 Nothing in the Code or the Framework Agreement shall limit or exclude the liability of any Party for death or personal injury resulting from the negligence of such Party or for fraudulent misrepresentation or any other liability which cannot be limited or excluded under Applicable Laws. 2.321 All terms, conditions, warranties and representations implied pursuant to Sections 13 to 15 of the Sale of Goods Act, 1893 and Section 39 of the Sale of Goods and Supply of Services Act, 1980 (Ireland) and		

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			Sections 13 to 15 of the Supply of Goods Act, 1979 (United Kingdom) and Sections 2 to 5 and 7 to 10 of the Supply of Goods and Services Act, 1982 (United Kingdom) are excluded to the fullest extent permitted by law. 2.322 The rights and remedies of the Parties pursuant to the Code and the Framework Agreement as set out therein are, save as expressly provided otherwise, cumulative and are in exclusion of all other substantive (but not procedural) rights or remedies express or implied and whether provided by common law, statute, tort, in equity or otherwise by law. Without prejudice to the foregoing and		

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			paragraph 2.333 (Waiver), each Party to the fullest extent permitted by law: 1. waives any rights or remedies; and 2. releases each other Party from any duties, liabilities, responsibilities or obligations, arising or provided by common law, statute, tort, in equity or otherwise by law in respect of the Code. 2.323 Without prejudice to the preceding paragraph 2.322, where any provision of the Code or decision of the DRB provides for any amount to be payable by a Party upon or in respect of that Party's breach of the Code or the Framework Agreement, each Party agrees and		

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			acknowledges that the remedy conferred by such provision or decision is exclusive of and is in substitution for any remedy in damages in respect of such Default or the event or circumstance giving rise thereto. 2.324 Nothing in the Code or the Framework Agreement relating to limitation on liability shall prevent or restrict any Party from enforcing any obligation owed to it under or pursuant to the Code in accordance with the provisions of the Code subject to any applicable limitation of liability. 2.325 Save as expressly provided otherwise in the Code or the Framework Agreement, nothing in		

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			paragraphs 2.317 to 2.323 shall apply to or restrict the exercise or enforcement of any rights or remedies which one Party may have against another Party or person pursuant to any other agreement besides the Code and the Framework Agreement. 2.326 For the purposes of paragraphs 2.317, 2.318 and 2.320, references to a "Party" includes any of its Participants, officers, employees or agents, and each Party shall hold the benefit of those paragraphs for itself and as trustee and agent for its officers, employees and agents. 2.327 Each of paragraphs 2.317 to 2.326 shall be construed as a		

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			separate and severable contract term, and shall remain in full force and effect and shall continue to bind the Parties even if a Party ceases to be a Party to the Code or the Code is terminated.		
25	Clause 10.11 10.11 Calculations To the extent that this Deed provides for the making of a calculation or determination by the Market Operator, it will be made in good faith and, taking into account the circumstances of its making, in a commercially reasonable manner.	**Breach of TSC**	• The MO is obliged to provide to the Participant detailed ledger accounts showing all payments in and out and provide to the Participant full details on request- it follows that it simply cannot self certify amounts due- either the amounts are properly due, or they are not-manifest error does not come into it. • Circumvents the Dispute Resolution procedures at paragraphs 2.276 to 2.313 the Deed of Charge should not be used to circumvent the DRP procedures of the TSC (indeed enforcement seems to me the exact	Clause 10.11 Delete	Following discussions with SEMO, we have removed this Clause 10.11 in relation to Calculations as it is not relevant.

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			circumstances where DRP is most likely to come into effect). • MO must make calculations in accordance with the TSC not some other standard.		
36	Clause 12 12.1 This Deed (including any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with: (i) insofar as the Security Assets are located in England, the laws of England; insofar as the Security Assets	**Breach of TSC.**	• References to English law should simply not be there-as ○ the accounts are not meant to be there in the first place; ○ we should not be introducing the English legal system into an all Ireland solution ○ paragraphs 2.1 and 2.2 specifically cater for how	Clause 12 12.1 This Deed (including any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with: (i) insofar as the Security Assets are located in Northern Ireland, the laws of Northern Ireland;	We have amended the governing law to "flex" in accordance with the location of the security assets (i.e. the Collateral Reserve Accounts). In relation to the reason for the location of the Sterling Collateral Reserve Accounts in London, please see our comments under item 14 above. The location of the security assets (lex situ) will dictate the substantive law which will be applied by a court upon enforcement of the security. It follows that flexible governing law

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	are located in Northern Ireland, the laws of Northern Ireland; and (iii) insofar as the Security Assets are located in Ireland, the laws of Ireland. 12.2 The parties irrevocably submit: (i) insofar as the Security Assets are located in England, to the non-exclusive jurisdiction of the English Courts; (ii) insofar as the Security Assets are located in Northern Ireland, to the non-exclusive jurisdiction of the Northern Irish Courts; and (iii) insofar as the Security Assets are located in Ireland, to the non- exclusive jurisdiction of the Irish Courts.		interpretation and enforcement should be carried out- i.e. NI law interpretation and enforcement by either Ireland or Northern Ireland courts o the proforma letters of credit provide for NI law interpretation and either Ireland or Northern Ireland enforcement and the charge and the locs should be no different o its debatable whether Ireland interpretation is compatible with the provisions of the TSC	and (ii) insofar as the Security Assets are located in Ireland, the laws of Ireland. 12.2 The parties irrevocably submit: (i) insofar as the Security Assets are located in Northern Ireland, to the non-exclusive jurisdiction of the Northern Irish Courts; and (ii) insofar as the Security Assets are located in Ireland, to the non-exclusive jurisdiction of the Irish Courts [NB this is a pragmatic solution- not strictly in accordance with TSC] OR 12.1 This Deed (including any non-contractual	provisions are the most adequate to cater for security assets located in different jurisdictions. Given that the initial requirement for appointment of an agent for service of proceedings has been removed from the Deed of Charge, there will be no practical consequences for the Participants as a result of having the Sterling Collateral Reserve Account in London.

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				obligations arising out of or in connection with it) shall be governed by and construed in accordance with the laws of Northern Ireland 12.2 The parties irrevocably submit to the exclusive jurisdiction of the Northern Irish Courts and Irish Courts [in strict compliance with the TSC]	
37	Schedule 2- not extracted	**In breach of the TSC**	• As SEMO is the legal account holder such notices are totally irrelevant • The Notice purports to refer to an assignment-which is a breach of the TSC • The Notice purports to provide an uncapped indemnity from the Participant to the Bank on	Delete	Please see our comments in relation to the Notices and the uncapped indemnities under items 3 and 6 above. The governing law under the Notices and associated Acknowledgment will "flex" in accordance with the location of the security assets (i.e. the Collateral Reserve Accounts). In this respect, please see also our comments in relation to the governing law

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			2 occasions which is unacceptable- liability to third parties outwith the TSC is simply not contemplated by TSC • It makes reference to documents- the mandate and terms of conditions- which the Participant has no sight of nor control • It purports in all cases to be governed by English law		under item 32 above.
38	Schedule 3- not extracted		• It follows from the above comments that Schedule 3 is also no applicable.	Delete	Please see item 37 above.

Appendix 1- PM Memorandum dated 25 March 2014

Appendix 2- PM memorandum dated 2 April 2014

Appendix 3- PM Presentation (delivered to the Working Group on 13 March 2014)

Appendix 4- Revised Deed of Charge (Clean)

Appendix 5- Delta View comparison of latest Deed of Charge (Draft 4) with draft circulated on 4 September 2014 (Draft 3)

Appendix 6- ESB Comments dated 17 October 2014