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| **Company** | **Comment** | **SEMO and External Counsel Response** |
| ESBI | The wording of the Deed of Charge seems too broad.  The definitions of Secured Assets/Obligations should be refined and refer specifically to the Collateral Reserve Account | We have taken external legal advice on the wording of the Deed of Charge and this format has been agreed with Danske Bank so is fit for purpose. |
| ESBI | The Deed also includes broad provisions for Market Operator to claim costs & expenses against the Participant in relation to setting up and claiming against the Deed.  It is not clear if this is justified.  What is the situation with putting a Letter of Credit in place, what costs & expenses can Market Operator claim under that? | For a PT to submit a brand new LOC SEMO incur a €50 charge, we also incur a €25 charge for every amendment a Participant submits to their LOC.  In terms of draw down I believe it is also €25.  All these are charged to the SEMO Market Operator accounts. |
| ESBI | The amendments to the Code suggests any conflict between Deed and Code, the Deed will prevail.  What is the rationale for this? | The rationale for the "prevailing" language is to ensure that in the event of any discrepancies between the charging language currently embedded in par 6.20.3 of the Code and the new stand-alone Deed of Charge, the latter will prevail. Please note that these prevailing provisions are limited to par 6.20.3 of the Code and do not apply to the entire Code, The charging provisions as currently set out in par 6.20.3 of the Code are very limited and are not, in our view, entirely adequate to create a first fixed security interest (together with appropriate enforcement rights) in favour of the Market Operator. This is the reason why, after extensive discussions, it was decided that a stand -alone Deed of Charge should be put in place and that in the event of conflict the provisions of the stand -alone Deed of Charge should prevail over the charging provisions of par 6.20.3 of the Code in order to avoid any confusion. |
| EBSI | The amendments and insertions in relation to suspension, termination and other remedies for failure to comply do not appear to be consistent and so go further than is necessary, e.g., there is a new insert 14 under paragraph 2.246 which seems wholly unnecessary as surely failure to comply would result in a Default Notice (per existing 13) where Collateral Reserve Account has been created but just needs to be increased and hasn’t been. And in the case of the initial setting up of the Collateral Reserve Account, failure to comply within proposed timelines should result initially in a deferral of the Effective Date or return of Participant paperwork. | The definition of "Default" covers material breach of the Code. The inclusion at 14 gives certainty to the intention that failure to comply with the account arrangements will result in a suspension order. |
| RAs | The proposal (see 2.243.2 of the Code) states that the Market Operator shall issue a Suspension Order in respect of all of a Participants Units if it fails to comply with "any applicable Account Security Requirements (including for the avoidance of doubt, the Deed of Charge and Account Security)" (Emphasis added). Suspension of Units may be a disproportionate response to such an event. Other events which trigger a Suspension Order include committing 3 Defaults within 20 Working Days. When a Suspension Order is issued, following the relevant Suspension Delay Period, the RAs have to make a decision whether or not the Units shall be suspended. In relation to Supplier Units, this requires all the customers to be migrated to a Supplier of Last Resort first. It would be rare for the RAs to be able to take a decision to put such a Suspension in place. It may therefore be more effective to include a clause that reads that the Participant's Cash Credit Cover would just not apply under such circumstances. | Our external legal advisors have included this as a suspension event to emphasise the importance of compliance with the account requirements. In addition, this was agreed at Meeting 50 of the Mods Committtee: Minutes extract "Chair sought consensus from the Committee as to whether a redrafted Deed of Charge including reference in the Code to registrable security for SEMO would be a sufficient safeguard. Committee consensus was that Option 2 Stricter enforcement and additional security around existing and future registration of charges, inclusive of a reference in the Code to registrable security in relation to Participant Collateral Reserve Accounts and involving provision for suspension to apply where a Participant fails to sign a Deed of Charge be pursued." |
| RAs | If this Modification Proposal were to be implemented on a day, there would be a significant number of Participants in breach of the provisions (particularly of Paragraph 2.243.2 of the Code) immediately. Indeed since the Deed of Charge and Account Security would not legally exist in the Code until the Mod was implemented, it could be that every Participant would be in breach. The Proposal may need to include provisions to allow it to be implemented in a controlled fashion over a period of time. This may be possible by drafting an appropriate Interim Provision to allow Participants to get the Deeds of Charge in place. | We are currently undertaking an exercise to ensure that every participant has entered into a revised for Deed of Charge and this will be co-ordinated by SEMO to coincide with the requirements so that this will be in place for all participants. |
| RAs | The legal drafting placed the legal text of the "Deed of Charge and Account Security" into Appendix 4 of AP1, rather than into an Appendix of the Code (like the Standard Letter of Credit). It may be that the “Deed of Charge and Account Security” should go into a newly created Appendix Q. | If this is a substantial issue we can move it to an appendix of the Code. |
| Viridian | There does not appear to have been any consideration as to whether a charge is necessary in respect of the SEM Collateral Reserve Accounts. A charge is unnecessary as the SEM Collateral Reserve Accounts are held on trust by the Market Operator, with full effective control over the SEM Collateral Reserve Accounts to be applied in accordance with the TSC. A charge does not provide any further practical benefit and is an unnecessary administrative burden. The TSC should be amended to delete the requirement for a charge. | The original proposal Mod\_02\_13 Registration of Charges raised on 29 January 2013 and first discussed at Meeting 47 on 12 February 2013, proposed removal of the obligation to register a charge over the Collateral Reserve Accounts having regard to the existing wording of Section 6.20. The proposed removal of the obligation to register a charge was due to the number of unsecured accounts which currently exist as a result of administrative oversights and the failure of some Participants to comply with the obligations set out in section 6.21 of the T&SC. At Meeting 47, the Committee agreed to seek legal support regarding the implications of the proposal.The legal advice received from External Counsel advised that the provisions currently set out in Section 6.21 may not be enforceable, therefore the three options referred to in Section 2.1 below, were proposed. It was accepted and agreed at Modification Committee Meeting 49 on 13 June 2013, that a charge would be necessary. The necessary background information pertaining to the Modification Proposal is captured in all Meeting minutes from Meeting 47 onwards. The legal advice received is documented verbatim in the MEMO that was circulated to the Modifications Committee in May 2013. |
| Viridian | The Market Operator therefore has effective full control, subject to the terms of the trust, over the funds in the SEM Collateral Reserve Account and it is difficult to understand how a charge in any way improves or provides any further benefit in respect of the SEM Collateral Reserve Account. | This trust structure is carried through the related provisions of par 6.32 to 6.36  of the Code  The practical effect of the trust that arises in favour of the SEM Creditors  pursuant to par 6.32.2  of the Code is that the Market Operator would be effectively under -collateralised - hence the necessity of having in place a stand-alone Deed of Charge in favour of the Market Operator to adequately secure the obligations owed to the Market Operator by the Participant under the Code and to provide the Market Operator with appropriate enforcement rights. |
| Viridian | If the Participant were to become insolvent, it is difficult to see how a receiver or administrator etc. would have any greater right to the funds than the Participant as a beneficiary under the trust created and as discussed above the Market Operator already has the right to apply the SEM Collateral Account in accordance with paragraph 6.32- the market is already protected by virtue of the trust.  It would appear the reasoning that a charge is sought is that a charge would somehow enhance the market’s protection in the event of the insolvency of a Participant as discussed above this does not appear to be true. From a commercial perspective the market’s true protection against the insolvency of a Participant lies in the ability to issue a Suspension Order under paragraph 2.246- i.e. prevent a Participant from participating further under the TSC were the Participant to become insolvent. | The Participant owes its obligations under the Code  to the Market Operator only (and not to the SEM Creditors) On this basis,  if the Participant does not owe any obligations to the SEM Creditors under the Code, it is not clear the reason why the trust was established  in favour of the SEM Creditors.    As stated above, this trust structure is carried through the related provisions of par 6.32 to 6.36  of the Code  The practical effect of the trust that arises in favour of the SEM Creditors  pursuant to par 6.32.2  of the Code is that the Market Operator would be effectively under -collateralised - hence the necessity of having in place a stand-alone Deed of Charge in favour of the Market Operator to adequately secure the obligations owed to the Market Operator by the Participant under the Code and to provide the Market Operator with appropriate enforcement rights. |
| Viridian | If a charge is deemed to be necessary, no amendments to the TSC are required. If the Market Operator looks closely at the present terms of the TSC it should conclude that it already has the ability to resolve the issue without resorting to Code changes, it is just a question of using the provisions already embedded in the TSC appropriately. | We have taken external legal advice on the necessary requirements to the TSC to ensure that the Deed of Charge requirements were observed by Participants. |
| Viridian | Registration time limits require the Deed of Charge to be sent to SEMO within 5 working days, this isunnecessary as charge already created from the moment funds placed into account (paragraph 6.20.3), all that is required is for the registration process to be completed which the Participant is obliged to co-operate with under paragraph 6.21, and if the Participant does not co-operate Market Operator has the ability to implement, again under paragraph 6.21. Should the Participant’s co-operation be required then the Market Operator already has a “stick” to require co-operation by implementing Suspension under paragraph 2.243. Creation of a hard coded time period may not work where Participant is not Irish/UK based. | The registration requirements in relation to the Deed of Charge will depend on the place of incorporation/jurisdiction of the Participant - pursuant to the proposed amendments,  the Market Operator will have the right under the Code to request any further documentation / requirements from a Participant who is not incorporated in the UK/Ireland as it may deem necessary in order to perfect the security granted by the Participant under the Deed of Charge (for example, the Market Operator may request a legal opinion covering status, capacity,  registration requirements etc in relation to a Participant who is incorporated in a foreign jurisdiction). In this respect, please refer to the proposed new definition of Account Security Requirements in the Glossary which includes under limb (iii) a catch-all clause to capture any registration requirements (including the provision of legal opinions) which the Market Operator may deem necessary in order to perfect the Deed of Charge granted by a Participant incorporated in a jurisdiction other than the UK/ Ireland. This definition is tracked through and referenced in the proposed amendments in Section 2 and Section 6 of the Code. |
| Viridian | Requirement  to create a clear obligation  on the Participant to provide SEMO with the original executed Notice of Assignment  to enable SEMO to give notice of the assignment of the Collateral Reserve Account to the SEM Bank and procure an acknowledgment of receipt of such Notice from the SEM Bank- this is unnecessary as the bank mandate is already in the name of Market Operator, it is not in the name of the Participant. | The obligation is on the Participant to provide the Market Operator with the original executed Notice of Assignment under the Deed of Charge. Under the Code, the cash collateral provided by a Participant is credited to a Collateral Reserve Account established with the SEM Bank in the sole name of the Market Operator and over which the Market Operator has sole control . However, the  Market Operator holds the monies credited to the Collateral Reserve Account on trust for various purposes and has no absolute title over such Collateral Reserve Account - hence the Notice of Assignment has to be signed by the Participant. This is to ensure that the security created by the Deed of Charge in favour of the Market Operator is perfected as far as possible - to this end, it is a requirement that the Notice of Assignment is executed by the Participant and returned to the Market Operator to enable it to serve such Notice to the SEM Bank. With regard to the acknowledgment of receipt of the relevant Notice of Assignment to be obtained  from the SEM Bank, following discussions with SEMO we had previously indicated  that for practical reasons it would be preferable that SEMO would procure such acknowledgment directly from the SEM Bank. |
| Viridian | At present the TSC is interpreted in accordance with the laws of Northern Ireland, with exclusive jurisdiction residing in the Courts of Ireland and Northern Ireland. Clause 12. of the proposed Deed of Charge and Account Security introduces the English courts as another jurisdiction. It makes little sense to me to introduce another jurisdiction into the mix for what after all is an all Ireland solution and market. | Conflict of law rules dictate that it is not essential that the contractual terms of a charge document are governed by the lex situs (law of location) of the charged assets. The expressed governing law of a charge document is relevant only to matters of contractual interpretation of the document. However, it is the law of the location of the charged assets (notwithstanding the expressed governing law of the charge document) that will determine whether the charge document has effectively created a security interest in the charged assets and whether such security interest has been properly perfected. As you correctly pointed out, English law was chosen as governing law of the Deed of Charge because the bulk of the accounts has been moved to London with Danske Bank. On the basis of the analysis above, even if the identity of the SEM Bank should change in the future and the accounts should be moved to a different jurisdiction, there would not be any legal requirement to amend accordingly the governing law of the Deed of Charge (as the effectiveness of the security interests created by the Deed of Charge will be determined as a matter of the law of the location of the secured assets (i.e. the Collateral Reserve Accounts) rather than by the governing law of the Deed of Charge. Having said that, there might be some practical benefit to align the governing law with the law of the location of the assets (where possible) but this would not be an absolute requirement. The existing charges with Danske Bank would not be affected by a change in the identity of the SEM Bank (provided that such existing charges were put in place correctly in the first place and that the relevant perfection/registration requirements were satisfied within the statutory time limits). |
| Viridian | Paragraph 6.19 requires the SEM Collateral Reserve Accounts to be in each “Currency Zone in which the Participant has registered a Unit”, which following the definitions of “Currency Zone” and “Jurisdiction” through means the SEM Collateral Reserve Accounts must be in Ireland and Northern Ireland, not England. This is particularly important given the nature of the trust under which the accounts are held, should the Participant wish to enforce the terms of the trust. | Our external legal advisors have not reviewed in detail the provisions in relation to the setting up of  the Collateral Reserve Accounts under the Code as this was not part of our remit in relation to the Deed of Charge and consequential amendments to the Code, nor can they comment on the factual decision of the Market Operator to move  the Collateral Reserve Accounts to the London branch of Danske Bank. However, they have highlighted the convergence of English law and Northern Irish law in relation to trusts. We would also refer you to the comments in relation to the law of the location of the secured assets (i.e. the Collateral Reserve Accounts) as set out above. |
| Viridian | Clause 2.2 of the proposed Deed of Charge and Account Security fundamentally misunderstands the nature of the SEM Collateral Accounts, i.e. that they are held in trust and that the Participants are beneficial owners, not legal owners. The Participants simply cannot charge as “legal” owner or with “full title guarantee”. As such the security is fundamentally flawed from the outset. | The Market Operator is named as  the legal owner of the Collateral Reserve Accounts -however, the Code provides that the Market Operator holds the cash collateral credited to the Collateral Reserve Account on trust for various purposes. SEMO wishes to ensure that any residual or beneficial interest that the Participant may have in the cash collateral and any rights, title and interest it may hold in and to the Security Assets (as defined in the Deed of Charge) are also captured by the Deed of Charge. Such rights could encompass any rights that the Participant may have against SEMO in respect of the Collateral Reserve Account and not just the rights that the Participant has against the SEM Bank  For this reason, the Deed of Charge has to be executed by the Participant as legal owner as well as beneficial owner. |
| Viridian | The Dispute procedures under the TSC are a fundamental part of the TSC, indeed where a Dispute arises it is acknowledged under paragraph 2.290 that “Referral of a Dispute to a DRB in accordance with the Dispute Resolution Process and compliance with the provisions set out in paragraphs 2.276 to 2.315 is a pre-condition to the entitlement to refer a Dispute to Court”. It is not open to the Market Operator to enforce the proposed Deed of Charge and Account Security upon an “Event of Default” as defined in the proposed Deed of Charge and Account Security if there is a Dispute, without following through the requirements in respect of the Dispute procedures under the TSC. | Our external legal advisors have not reviewed in detail the Disputes procedure under the Code as this was not part of our remit in relation to the Deed of Charge and consequential amendments to the Code . However, on the face of it,  there seems to be a fundamental difference between the definition of a "Dispute " (defined under par 2.276 as "any claim , dispute or difference of whatever nature between any of the Parties arising under , out of or in relation to the Code and the Framework Agreement..." ) and  the definition of "Default " under the Code (defined as "any material breach by a Party of the Code or the Framework Agreement"). We also note that in the event of certain fundamental breaches there does not seem to be any reference to the Disputes procedure- on the contrary, in those circumstances  the Market Operator can take immediate action (for example, if the Participant fails to provide the Required Credit Cover  the Market Operator can immediately issue a Suspension Order in respect of the Participant's Units)  As currently drafted, the Deed of Charge envisages that the security shall become enforceable upon the occurrence of an Event of Default, which is defined as  the failure by the Participant to pay or fulfil the Secured Obligations (i.e all monies and liabilities owed by the Participant under the Code). We would argue that, given that an Event of Default under the Deed of Charge constitutes a fundamental breach of the Participant's obligations under the Code (including failure to meet its payment obligations or to provide adequate credit cover under the Code), the Market Operator shall be in a position to enforce the security immediately upon the occurrence of such an Event of Default. |
| Viridian | Clause 10.5 of proposed Deed of Charge and Account Security- Entire Agreement. This fundamentally misunderstands the nature of the SEM Collateral Account, that it is a trust as set out in the TSC, the proposed Deed of Charge and Account Security is not the entire agreement in relation to the SEM Collateral Account- the provisions of the TSC set out the agreement in relation to the SEM Collateral Account. | Clause 10.5 states that the Deed of Charge constitutes "the entire agreement.....and supersedes any previous agreement between the parties **relating to the subject matter of this Deed** " . The subject matter of the Deed of Charge is the creation of a first fixed charge in favour of the Market Operator over the Participant's interest in the Collateral Reserve Account - it does not relate to the trust provisions set out in the Code. The rationale for Clause 10.5 is to avoid any confusion with the different form of stand-alone charge which we understand was previously used by the Market Operator. |
| Viridian | The re-ordering of the wording in relation to the “trust” is inadvisable – MO is the trustee for both the Participant and the SEM Creditors. | With regard to the trust arrangements, please see our general comments above. Following our recent discussions with SEMO, we would recommend that a full review of the T&S Code is carried out encompassing both the regulatory framework and the  technical aspects of the Code (with specific input from SEMO's technical advisors on the latter). In particular, in our view the trust arrangements should be "tested" in the context of such technical review to ensure that they are adequate for the purposes of the day-to -day technical operation of the Code. In light of the above, we agree that for the time being it might be prudent **(i)** to leave the wording in relation to the trust arrangements only as it currently reads in  par 6.20.3 (i.e. " ..in favour of the Market Operator as agent and as trustee for it  and the SEM Creditors to secure the relevant Participant’s payment obligations under the Code" etc) and **(ii)** to delete the proposed wording at the end of par 6.20.3 ("subject to the provisions of the Deed of Charge and Account Security"). **For the avoidance of doubt, all the other proposed amendments to par 6.20.3  should be retained as per the Modifications Table.** |
| BGE | Although I can understand SEMO’s concerns in principle in seeking a ‘deed of charge’ against cash collateral accounts, I have some concerns with respect to the wording proposed in the modification proposal. Specifically my concerns relate to the wording of the Deed of Charge as provided for in the Modification Proposal. Firstly, the wording seems to reiterate a lot of what should and is provided for in the TSC by virtue of the modification, which seems superfluous to me and much more descriptive than other high level deeds of charge I have seen. It also refers to English law for governance which seems contrary to the governance of the T&SC and doesn’t make sense to me. | External legal advice has been taken on the drafting required in the TSC and the Deed of Charge which has been negotiated and agreed with Danske Bank. As the bank is located in London, the Deed is governed by English law. |
| BGE | The ‘Notice of charge and assignment to Account Bank(s)’provided for in Schedule 2 Part 1 also seems overly onerous to me – perhaps I have misunderstood its use but given that the account rests with the SEM Bank, I’m not sure firstly why it is necessary and secondly, I’m not sure if we as participants can be guaranteed that this will be turned around in the time necessary to comply with the provisions of the TSC. | Please see above comments. In our view it is necessary for the Notice of Charge and Assignment to be served in order for the charge over the Collateral Reserve Account to be deemed as fixed security. Not serving the notices leaves open the argument that the security is floating in nature rather than fixed. |