

Single Electricity Market

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| Final REcommendation ReportMod\_02\_13: registration of charges02 OCTober 2015 |

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Document History

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| 1.0 | 18 Sept 15 | Modifications Committee Secretariat | Issued to Modifications Committee for review and approval |
| 2.0 | 02 October 15 | Modifications Committee Secretariat | Issued to Regulatory Authorities for final decision |

Reference Documents

|  |
| --- |
| **Document Name** |
| [Trading and Settlement Code](http://semopub/MarketDevelopment/MarketRules/TSC.docx) |
| [Mod\_02\_13 Registration of Charges](http://semopub/MarketDevelopment/ModificationDocuments/Mod_02_13%20Registration%20of%20Charges%20Submitted.doc) |
| [Working Group Agenda](http://semopub/MarketDevelopment/ModificationDocuments/Agenda%20WG%200.1.doc) |
| [Terms of Reference Legal Review](http://semopub/MarketDevelopment/ModificationDocuments/ToR_LegalReview_v1.0.doc) |
| [Meeting 49 Slides](http://semopub/MarketDevelopment/ModificationDocuments/Meeting%2049%20Slides.pptx) |
| [MO Slides Meeting 49](http://semopub/MarketDevelopment/ModificationDocuments/Cash%20Collateral%20Slide%20ND.pptx) |
| [Modification Proposal Version 2](http://semopub/MarketDevelopment/ModificationDocuments/Mod_02_13_v2%20V1.0.docx) |
| [Comments and responses on Version 2](http://semopub/MarketDevelopment/ModificationDocuments/Mod_02_13%20Reg%20of%20Charges%20Comments%20and%20Responses.zip) |
| [Meeting 52 Slides](http://semopub/MarketDevelopment/ModificationDocuments/Meeting%2052%20Slides.pptx) |
| [Viridian Material for Working Group](http://semopub/MarketDevelopment/ModificationDocuments/Viridian%20Material%20for%20WG.zip) |
| [Terms of Reference](http://semopub/MarketDevelopment/ModificationDocuments/ToR_02_13_V1.0.doc) |
| [Pinsent Masons Working Group Slides](http://semopub/MarketDevelopment/ModificationDocuments/Pinsent%20Masons%20WG%20Slides.PPT) |
| [Working Group Report](http://semopub/MarketDevelopment/ModificationDocuments/WG%20Report%20V2.0.doc) |
| [Slides Meeting 54](http://semopub/MarketDevelopment/ModificationDocuments/Mod_02_13v2%20summary%20Meeting%2054.ppt) |
| [Legal Costs](http://semopub/MarketDevelopment/ModificationDocuments/Legal%20Costs.ppt) |
| [External Counsel Responses to Participants Comments](http://semopub/MarketDevelopment/ModificationDocuments/PM%20Responses%20to%20Participants_%20Comments.pdf) |
| [Appendices to Legal Counsel Responses](http://semopub/MarketDevelopment/ModificationDocuments/Appendices%20to%20Responses.pdf) |
| [Legal Costs Update Meeting 61](http://semopub/MarketDevelopment/ModificationDocuments/Legal%20Costs%20Updated%20Meeting%2061.ppt) |
| [Modifications Proposal Version 3](http://semopub/MarketDevelopment/ModificationDocuments/Mod_02_13_v3.docx) |

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# MODIFICATIONS COMMITTEE RECOMMENDATION

## Recommended for approval – majority Vote

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| **Recommended for Approval by Majority Vote**  |
| Brian Mongan | Generator Member | Abstain |
| Connor Powell | Supplier Member | Approved |
| Derek Scully | Generator Alternate | Rejected |
| Eamonn O’Donoghue | Interconnector Member | Approved |
| Grainne O’Shea | Generator Alternate | Approved |
| Jill Murray (Chair) | Supplier Alternate | Approved |
|  Mary Doorly | Generator Member | Approved  |
| Patrick Liddy | DSU Member | Approved |
| Sean Doolin | Supplier Member | Approved |
| William Steele | Supplier Member | Rejected |

# Background

The Trading & Settlement Code requires credit cover to be provided by Participants as security for their obligations under the Code. Such credit cover can be provided either by way of letters of credit or cash collateral. The cash collateral takes the form of monies deposited in to the relevant Collateral Reserve Account opened with the SEM Bank (currently Danske Bank). The agreed level of credit cover is posted to the relevant Collateral Reserve Account and can be added to as the levels of credit cover required fluctuate.

The original version of the Modification Proposal was raised by EirGrid legal and sought removal of the obligation on the Market Operator to register a charge over the Collateral Reserve Accounts. A number of unsecured accounts exist in SEM as a result of both administrative oversights and the failure of some participants to comply with the obligations set out in the Code. This has resulted in no charge over certain Participants’ Collateral Reserve Accounts registered with the Market Operator and Participants potentially being in breach of the Code. Difficulties have also arisen with regard to registering charges in jurisdictions outside of SEM.

Independent legal advice was sought by the Modifications Committee to assess the impacts of the Modification Proposal.

The legal advice delivered to the Modifications Committee by External Counsel (legal advisors to the Modifications Committee) resulted in three options for consideration. Option 3 Title *Transfer* was put forward as the preferred option by External Counsel.

1. Do nothing:

Proposer (SEMO legal) withdraws the Modification Proposal and pursues Participants to register charge as per the Code Provisions set out in section 6.21. There is a substantial risk involved in this given the various difficulties experienced and shortcomings outlined above.

1. Stricter enforcement and additional security around existing and future registration of charges:

Amend the Code to remove the Code Charge and include an obligation that requires the Participant to enter into a separate Deed of Charge. This would apply only where a Participant wishes to provide cash collateral rather than a letter of credit. In addition to this a general "further assurances" obligation should be included in the Code. Consideration should also be given to the possibility of including deeds of charge in Participant Registration Packs and suspending Participants, where necessary, in the event of non-compliance.

1. Title transfer:

Outright title transfer of collateral from Participant to Market Operator, the Participant would cease to hold any right, title and interest in the relevant collateral. However, subject to any necessary specialist accountancy advice, we understand that this arrangement should not have materially adverse accountancy repercussions for Participants.  In cases where security interest had been created by a deed, it should be released by a deed. This option would require amendments to the Code.

The Modifications Committee, twice during the course of the discussions, agreed by majority that Option 2 ‘*Amendment of the Deed of Charge inclusive of registrable security and stricter enforcement’* is the preferred option to implement in SEM.

A first legal drafting was developed by External Counsel to reflect the changes necessary to enforce Option 2 above. This was followed by a number of revised versions which were discussed and commented on at Modifications meetings, conference calls and working group. In order to address legal concerns raised during these discussions, extensive negotiations with the SEM Bank were also necessary which resulted in the revised Deed of Charge incorporated in this version 3 of the proposal.

# PURPOSE OF PROPOSED MODIFICATION

## 3A.) justification of Modification

A Modifications to the Code required to regulate the position regarding security over Collateral Reserve Accounts and to give effect to the decision of the TSC Modifications Committee at Meeting 50 and reiterated again at Meeting 54:

“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.”

The Code contains embedded charge provisions which attempt to create a charge over the Participant's interest in the Collateral Reserve Account. However, it was recognised that the charge provisions embedded in the Code were not effective and SEMO attempted to introduce a ‘stand alone’ charge document to be executed by the Participants. Because the Code was not clear on the obligation to execute the charge, SEMO has encountered difficulty getting the charge documents fully executed and registered.  It was then decided that a more robust stand alone charge would be put in place (see new form of Deed of Charge and Account Security as set out in Appendix 4 to Agreed Procedure 1). The form of Deed of Charge and Account Security is governed by English law but includes enforcement provisions and charging language for all three main jurisdictions in which the Participants in the market operate (i.e. the Republic of Ireland, Northern Ireland and England and Wales). The form of Notice of Assignment and the Acknowledgment (attached as Schedule 2 to the Deed of Charge and Account Security) has been agreed with Danske Bank.

The proposed amendments to the Code seek to achieve the following: (i) to create  a clear obligation on the Participant to grant a fixed charge over the Collateral Reserve Accounts in favour of SEMO by entering into the Deed of Charge and Account on the date on which the cash collateral is paid into the Collateral Reserve Account (ii) to create a clear obligation  on the Participant to provide SEMO with the original executed Deed of Charge and Account Security  within a specified time limit (5 working days from the date on which the cash collateral is paid into the Collateral Reserve Account) in order  to enable SEMO to register the Deed of Charge and Account Security  within the prescribed time limit; (iii) 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; and (iv) to introduce  a specific sanction of default and suspension as a consequence of failure by the Participant to comply with the new Account Security Requirements  under the Code (which include the execution and registration requirements  in relation to  the Deed of Charge).

The proposed modifications ensure that SEMO remains in control of the process of registration of the Deed of Charge and Account Security and introduce a clear sanction (default and suspension) for failure of the Participant to comply with the new security requirements in relation to the Collateral Reserve Accounts under the Code.

## 3B.) Impact of not Implementing a Solution

There would be no effective way of ensuring that the SEMO charge over the Collateral Reserve Accounts is in place.

## 3c.) Impact on Code Objectives

This modification aims to further code objectives 1.3.1 namely:

 to facilitate the efficient discharge by the Market Operator of the obligations imposed upon it by its Market Operator Licences.

1. **Assessment of Alternatives**

A number of options have been considered throughout the course of the discussions on this Modification, to deal with the non-compliance highlighted during 2012 SEMO’s external Audit.

The original Modification seeking removal of the obligation was considered inadequate to guarantee Market security therefore it was agreed that other options should be considered.

The three main options identified were as detailed in Section 2 of this FRR:

1. Do nothing:
2. Stricter enforcement and additional security around existing and future registration of charges:
3. Title transfer:

The Committee sought advice from an external counsel specialised in such matters, and Pinsent and Mason were selected to that end. The consensus was to pursue Option 2 ‘*Stricter enforcement and additional security around existing and future registration of charges*’ which was voted on a number of subsequent occasions. A version 2 of the Modification was drafted including a new Deed of Charge to be executed by Participants. The discussion then moved on the content of the Deed of Charge which was modified following comments from Participants and negotiations with Danske Bank. Version 3 was raised to reflect those discussions and agreements, while adhering to the external counsel advice.

# Working Group and/or Consultation

## SUMMARY

MO Member presented slides providing the background and development of the proposal advising that at Modifications Meeting 53, Committee members requested that a Working Group be held to address comments submitted by Participants on the alternative version of the proposal.

Chair provided overview of the ToR and drew attention to its objectives and scope.

Viridian and Pinsent Masons (PM) presented at the Working Group.

## Actions:

* Participants to review [Pinsent Mason’s WG presentation](http://semopub/MarketDevelopment/ModificationDocuments/Pinsent%20Masons%20WG%20Slides.PPT) and [Viridian’s WG presentation](http://semopub/MarketDevelopment/ModificationDocuments/Viridian%20Material%20for%20WG.zip) and revert to Secretariat with feedback and comments on the slides as soon as possible, and no later than Tuesday 25th March
* Pinsent Masons to review  [Viridian’s WG presentation](http://semopub/MarketDevelopment/ModificationDocuments/Viridian%20Material%20for%20WG.zip) and  submit  comments  to Secretariat for circulation, no later than Tuesday 25th March

## recommendation:

* *The WG recommend that following review of the submissions of Participants and PM comments in relation to the presentations at the WG, the Modifications Committee ought to decide whether it is appropriate to direct PM to proceed with an updated Deed of Charge, or, whether the WG should convene again*

# impact on systems and resources

N/A

# Impact on other Codes/Documents

N/A

# MODIFICATION COMMITTEE VIEWS

## Meeting 47

MO Alternate explained proposal advising that it is proposed to remove the obligation to register a charge over the Collateral Reserve Accounts having regard to the existing wording of Section 6.20.

The obligation on Participants imposed by section 6.21 to facilitate the registration of charges over the Collateral Reserve Accounts has not been fulfilled by all Participants. Accordingly, it has proven very difficult to register a charge over the relevant Collateral Reserve Account within the statutory time limit of 21 days from the date of creation of the charge. This means that, in some circumstances, no charge over certain Participants’ Collateral Reserve Accounts exists and the MO has committed a breach of the Code.

There is substantial administrative work involved on the part of the MO in seeking to register charges over Collateral Reserve Accounts of Participants in this jurisdiction and in the UK or Northern Ireland. Furthermore, there are a number of Participants in jurisdictions other than Ireland or the UK and seeking to register a charge in another European jurisdiction is likely to prove very challenging and disproportionate to the ends to be achieved, particularly regarding the extent of control the MO has over these accounts in any event.

MO Alternate emphasised that this would only be required in extreme circumstances considering the level of control that the Trading Settlement Code provides in relation to SEM Collateral Reserve Accounts.

Supplier Alternate raised issue of similarities to the Elexon model. MO Alternate advised that Elexon was included as an example of a similar market set-up where the registration of a charge is not required.

Supplier Alternate queried as to whether Participants registering in the SEM should be utilising their own Clearing Bank. MO Member advised that Section 6.20 states that only the MO can instruct the SEM bank to make payments from an account.

Chair expressed the view that Section 6.21 was put in for a purpose therefore it is imperative to ensure that the issue it was designed to address will be adequately addressed upon removal of the clause. Discussion around possible risk to the market ensued. MO Member advised that EirGrid Legal did not believe there was any risk to the collateralisation of the market; otherwise the proposal would not have been raised. Nevertheless, they recognised that the Committee may require an additional legal view.

RA Member advised that expert legal advice was sought to review these provisions when they were originally included.

There was Committee support for independent legal advice to be sought.

Secretariat advised of the legal support budget available to the Committee.

Chair outlined the following issues to be raised with legal support:

* How secure are the funds to the market?
* If Section 6.21 is removed, are the remaining provisions in 6.20 adequate?
* If not, what should be included?

Generator Alternate raised a query regarding the multiple jurisdictions involved. Chair advised that Northern Irish law is the governing law.

Chair queried as to how the jurisdiction where the cash is held is defined. MO Member advised that collateral is within the SEM bank so it is always within the same jurisdiction.

## Meeting 48

Secretariat provided an update advising that part of the advices will be subcontracted to NI firm Pinsent Masons. Secretariat advised that an update should be available for the next meeting. Committee were in agreement that the proposal ought to be deferred.

## Meeting 49

Secretariat provided background of proposal advising that it was raised at Meeting 47 and that a memo summarising the discussion pertaining to the issue to date, had been circulated to the Committee. Proposer presented slides summarising the legal advice received from External Counsel and outlined the three possible options as follows:

1. Do nothing

Proposer withdraws Proposal and pursues Participants to register charge as per existing Code Provisions. There is a substantial risk involved in this given the various difficulties experienced and shortcomings involved.

1. Stricter enforcement and additional security around existing and future registration of charges. Amend the Code to remove the Code Charge and include an obligation that requires the Participant to enter into a separate Deed of Charge. (Consideration could also be given to the possibility of including Deeds of Charge in Participant Registration Packs and suspending Participants, where necessary, in the event of non-compliance).
2. Title transfer

Outright title transfer of collateral from Participant to Market Operator, the Participant would cease to hold any right, title and interest in the relevant collateral. Existing security interests created would need to be released.

Proposer stated that approximately 10 ‘unsecured’ accounts exist due to lack of co-operation by relevant Participants. Furthermore, SEMO has recently transferred collateral funds to 29 ‘unsecured’ accounts on foot of the new banking arrangements. Proposer further advised that Participants may wish to consult with their own professional legal advisers on the options.

Supplier Alternate sought clarification on whether the 29 unsecured accounts are an administrative problem as opposed to Participants taking issue with signing a Deed of Charge. Supplier Alternate further advised that when moving bank account to Danske Bank on foot of the new banking arrangements, Power NI were not asked to sign a Deed of Charge. Proposer advised that the decision was taken to discuss the issue with the Committee prior to requesting relevant Participants to sign the Deed of Charge.

MO Member presented an overview of the current status of cash collateral in the SEM, advising that there are currently 70 cash collateral accounts in the SEM, which together constitute 6% of the total SEM collateral (cash plus LOCs). SEMO regularly draws down on collateral accounts for small amounts without issue, where payments due have not been received on time. MO Member further advised that there has been one liquidation case so far in the SEM, which caused no issue for the SEM, although that is no guarantee that there would be no issue were another liquidation to take place.. Discussion on the options ensued, with the proposer advising that Option 3 (title transfer) would be the least administratively burdensome. Supplier Member sought clarification on this. MO Member advised that SEMO Finance have assured that it would not pose any issue for them to move to a title transfer model. Supplier Member expressed the view that more information on Option 3 is imperative.

Supplier Member queried as to whether Option 2 would be as effective a solution as Option 3 if it were to be implemented. Proposer stated that External Counsel have advised that Option 3 is the most effective solution. Supplier Member expressed concern that the Deeds of Charge in relation to the 29 unsecured accounts, should be put in place in tandem with pursuing the chosen option. Proposer expressed agreement and advised that this will be progressed.

Chair sought clarification that Participants registered in jurisdictions other than SEM have an account outside the SEM. Proposer advised that all Participants are required to register an account in SEM.

Chair sought clarification regarding External Counsel’s reference to due diligence, querying as to who would undertake this piece of work. Proposer advised of the likelihood of a joint effort between the Participants and the MO. Supplier Member expressed agreement that the issue must be resolved, however advised of uncertainty in relation to which option to pursue.

Generator Alternate queried as to whether Option 2 is an issue for international Participants. Proposer advised that it is an issue as the Deed of Charge may not be enforceable for international Participants. Discussion ensued around utilising a Deed of Charge for internal Participants and title transfer for external Participants. Chair expressed disagreement with pursuing this, due to its discriminatory nature.

Supplier Alternate queried as to what are the implications for this market if the current issue prevailed i.e. the existing provisions set out in 6.21 may not be enforceable. MO Member advised that 6% of the market is cash collateral, however this figure fluctuates further advising that the average size of collateral accounts is relatively small.

MO Member drew attention to the possibility of installing an upper limit on collateral accounts. MO Alternate recapped the existing problem advising that if there is a prior charge registered on a cash collateral account, due to legal reasons, SEMO may be unable to draw down on an account. Proposer advised that External Counsel provided advice based on a worst case scenario basis, however that the legal risk should not be underestimated. Proposer reiterated the fact that there has been one case of liquidation in the SEM.

Chair expressed agreement that Option 1 (do nothing) is a risk and queried as to whether it is viable for EirGrid Legal to enforce the registration of charges more robustly? Supplier Member expressed preference in discussing the cost of enforcing the registration of charges versus the cost of title transfer.

MO Member advised that if it the T&SC must be changed, it would be necessary to obtain legal advice which would incur costs. Chair expressed the view that if a serious risk to the market exists, the suggestion regarding an upper limit on cash collateral may be a good option. Supplier Member advised that some Participants are becoming increasingly reliant on LOCs and that cash restrictions on Participants may not be favourable.

Chair advised that general consensus was reached in relation to Option 1 not being a viable option. However no agreement was reached on Options 2 and 3. MO Member stated that it is at the discretion of Participants to decide which option to pursue. Chair further advised that SEMO and EirGrid do not have a firm view and are only in a position to advise on the matter, as it is really a matter for the Participants to determine what they consider as an acceptable risk to the market.

Secretariat queried as to whether Option 2 should be further addressed in relation to Participants registered outside the SEM jurisdiction. Chair stated that this would not be viable as it would necessitate consultation with all member states on the issue.

Chair emphasised that Participants should be cognisant that a vote should take place on the proposal at Meeting 50 in August.

## Meeting 50

Proposer provided an update on the status of the proposal advising that External Legal Counsel have been engaged in relation to amending the current Deed of Charge. Proposer expressed the viewpoint that Option 3 *Title Transfer* is External Counsel’s preferred option.

DSU Member sought clarification regarding what would happen in the instance of SEMO entering receivership with monies owed to a Participant. Supplier Alternate further queried as to whether Participants’ money would be guaranteed, in such a scenario. Proposer advised that this is a highly unlikely situation, but that in this instance, any outstanding payments would be reimbursed from SEMO to the Participant. SSE observer echoed the above queries.

Chair queried as to whether there would be a contractual guarantee in place between the Participant and the parent company (EirGrid) that would provide Participants with assurance they would receive any outstanding monies. Chair expressed the viewpoint that Option 3 *Title Transfer* as it stands is rather unequal and seems more favourable for SEMO as opposed to Participants. DSU Member expressed agreement with the suggestion of a two-way title transfer option.

MO Member advised that SEMO’s preference to amend the current provisions has arisen from External Counsel’s legal advice, which states that the current arrangements as set out in the T&SC may not be enforceable in all circumstances.

Chair reiterated the concern in relation to the risk posed to Participants in the event that SEMO should fall into receivership. Generator Member also expressed support of a guarantee in place for Participants if Option 3 *Title Transfer* was to be pursued. Proposer advised that it would be necessary to further assess the viability of a contractual guarantee internally.

SSE representative sought clarification as to why the registration of the charge over the Collateral Reserve Accounts has not been fulfilled by some Participants. Proposer advised that some Participants have simply not cooperated and that some are not based in the jurisdiction which causes logistical difficulties when trying to register the charge.

MO Member reminded the Committee that there would be no vote on legal drafting at the Meeting, further advising that the vote would be on which option to pursue. There was unanimous agreement that the current provisions should not remain as are and that changes need to be put in place.

UREGNI representative sought clarification around Option 3 *Title Transfer* whereby in a SEMO liquidation scenario, if a Deed of Charge is in place, the Participant would have priority rights in respect of the money. Proposer advised that it is understood that this is case.

Discussion ensued in relation to the feasibility of Option 2 *Stricter enforcement and additional security around existing and future registration of charges*. MO Member advised that this option is not applicable to Participants in jurisdictions outside the SEM. MO Member reiterated that it is highly challenging to ensure the compliance of external Participants.

Chair put forward the suggestion of an upper limit on the cash collateral accounts. Supplier Alternate was not in agreement that an upper limit could be a viable option as it provides difficulties. MO Member advised that many smaller Participants utilise cash collateral and that imposing a limit may be discriminatory.

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.

Suppler Member voiced a dissenting view in relation to Option 2, advising that it is an improvement on the current provisions; however residual risk remains whereas Option 3 would fully address the issues identified by External Counsel.

DSU Member expressed concern in relation to Option 3 *Title Transfer* and new entrants in particular, advising that it is unproven as to how banks or LOC providers would react to the SEMO having full title over Participants Collateral Reserve Accounts.

The Committee proceeded to vote on Option 2 and Option 3 respectively (results in table below):

Secretariat advised that the aim for Meeting 51 is to procure a vote on legal drafting.

## Meeting 51

MO Member advised that the Modifications Committee legal advisors are currently re-drafting the Modification Proposal and carrying out a legal review. MO Member advised that the proposal will be submitted for consideration at Meeting 52. Chair queried as to whether the updated version of the proposal will be circulated to the Modifications Committee. MO Member advised that upon completion of the final version, the proposal will be circulated to the Committee two weeks prior to the next Modifications Committee Meeting, in keeping with the standard procedure for Modification Proposals. As specialist legal advice is being obtained in developing the drafting, SEMO does not foresee further editing the legal drafting of the proposal following receipt from the legal advisors.

## Meeting 52

EirGrid legal representative presented slides on the alternative version of the proposal outlining the changes within the sections affected. EirGrid legal representative advised that currently there are approximately 10 unsecured accounts remain outstanding within the SEM, in addition to the 29 unsecured accounts transferred to Danske Bank. Vice-chair noted that all accounts could be unsecured as the rules currently in place are not sufficient. The concern is that there may be a previous charge registered over a Participant’s assets which could call into question whether the MO could draw down on collateral in an instance of a Participant going into liquidation.

Generator Member requested that the proposal be again deferred as the proposed changes are extensive, advising that additional time is required for Participants to conduct their in-house legal review.

MO Member confirmed that the legal advice delivered is specialist and delivered by an external legal firm specifically for the Mods Committee. MO Member further advised that market security is at risk while the accounts remain unsecured and drew attention to the continued risk to the market as a result of delaying a vote on the proposal. Chair queried as to whether SEMO can try and procure signage of the outstanding Deed of Charge by the relevant Participants. MO Member advised that as the Deed of Charge is currently being amended by this proposal, it is preferable that the updated secure Deed of Charge be signed.

MO Member put forward a suggestion that a call (Extraordinary Meeting) could take place between now and the next Mods Meeting to vote on the proposal in order that the time in which the collateral accounts remain unsecured is minimised.

The Committee agreed that Participants should review the draft proposal and revert with comments to the Secretariat by January 6th

Secretariat drew attention to the necessity for Participants to review the Modification Proposals before coming to each Meeting, however, the Secretariat acknowledged that there is a significant amount of change proposed within this proposal.

Secretariat advised that all comments will be circulated unless marked as confidential.

## Meeting 53

Secretariat advised that at Meeting 52 an action was placed on Participants to submit comments in relation to the proposal by 6th January. Participant comments in relation to the proposal were received and had been addressed by SEMO and External Counsel. The finalised spreadsheet was issued to Participants on 5th February. MO Member presented slides on the background of the proposal, stating that the independent legal advice sought by the Modifications Committee advised that the current provisions may not be enforceable and provided three alternative options for Committee consideration:

1. Do nothing
2. Stricter enforcement and additional security around existing and future registration of charges.
3. Title transfer

The Committee previously agreed that Option 2 was the preferred option to pursue, hence the alternative version of the proposal was drafted accordingly to reflect this option and was submitted at Meeting 52.

 MO Member advised that many of the Participant comments received in relation to the proposal had previously been addressed and voted on at previous Meetings. MO Member emphasised the importance of considering the comments in context of the various preceding discussions and not solely on the alternative version of the Modification Proposal in isolation. MO Member proposed to work through the comments spreadsheet at the Meeting. Consensus at the Meeting was that the Committee did not expect the spreadsheet to be addressed at the Meeting, and advised that more time was necessary to review the spreadsheet content.

Generator Member drew attention to one of Viridian’s comments stating that a charge is not necessary. MO Member advised that the original proposal Mod\_02\_13 Registration of Proposal sought removal of the obligation to register a charge over the Collateral Reserve Accounts however upon receipt of legal advice and agreement of the Committee, it was decided to pursue Option 2 as set out above. MO Member re-iterated that it is imperative to consider the proposal in the context of the previous discussion and decisions made on the proposal to date.

Chair suggested that as the Committee had not yet had time to review the material circulated within the spreadsheet, it may be sensible to hold a Working Group prior to the next Modifications Committee Meeting, where all issues pertaining to the proposal could be considered and discussed.

MO Member reiterated the suggestion of addressing some of the comments at the Meeting. Chair advised that it would be more prudent to address the comments during the dedicated WG.

Supplier Alternate expressed the view that as this is a legal issue which needs to be resolved, it is necessary for the relevant legal representatives to be present at the WG or to have provided significant input in relation to the issues in question.

Chair summarised that a WG is to be scheduled and that Participants must review the necessary material prior to the WG. MO Member reiterated that it is necessary for Participants and those attending the WG to review all of the historical content in relation to the proposal such as previous Meeting minutes, the legal advice received etc. and not the alternative version of the proposal is isolation.

Generator Member expressed disagreement with this suggestion, advising that it is an unfavourable restriction. MO Member advised that is not intended to be a restriction, merely to ensure that all relevant parties have full information of all discussion and agreements made to date regarding the proposal. Chair expressed agreement advising that it is important to discuss the proposal within its historical context otherwise; it will be difficult to make progress.

Secretariat requested that in the interest of having an informed discussion as possible at the WG, that Participants submit the various presentations they intend on presenting at the WG to the Secretariat in advance, to allow for circulation.

Generator Member expressed agreement that the historical context of the proposal is relevant however expressed concern that this will be the first WG on the issue and that it may be necessary to re-visit some of the previously discussed issues.

Chair advised that the legal advice was procured for the Committee as a whole and should be treated as such.

MO Member reiterated that the legal advice received is contrary to what the original proposal had suggested initially.

Chair summarised that all the relevant Participant internal legal advice and opinions received should be considered by Committee at the WG.

## Meeting 54

Secretariat presented slides providing a background to the proposal and an overview from the Working Group (WG), which was held on 13th March. Secretariat advised that the WG report is published on the SEMO website. Generator Member noted that the Pinsent Masons presentation was not circulated in advance of the WG, as per the action previously placed at Meeting 52 stating that all presentations should be circulated prior to the WG. This was noted by the Secretariat and Pinsent Masons representative. Secretariat advised of the below recommendation agreed by WG members:

* *The WG recommend that following review of the submissions of Participants and PM comments in relation to the presentations at the WG, the Modifications Committee ought to decide whether it is appropriate to direct PM to proceed with an updated Deed of Charge, or, whether the WG should convene again*

Secretariat advised that the Modifications Committee has a yearly budget of €25,000 designated for legal advices. Secretariat further advised that an invoice for approximately €16,000 euro has been received for the work carried out by PM until December 2013 and that work completed since the start of 2014 has not yet been invoiced. PPB representative expressed Viridian group view that the fundamental question is whether a charge is necessary. PM representative provided a brief overview of the PM view presented at the WG advising that an updated deed of charge reflective of the existing T&SC trust arrangements, is the most effective way of securing the market and that a charge is necessary. (For further detail refer to the WG report published on the SEMO website). PM Representative advised that the trust arrangement as proposed by Viridian (remove the T&SC charge and rely fully upon the CRA trust) does not protect the market in the event of insolvency as it would be open to challenge by a liquidator or administrator if no charge is registered. PM representative expressed the view that Viridian is the only Participant who has put forward a dissenting view to what is proposed by PM. PPB representative clarified that Viridian Group represents 3 different Participants operating in the market. PPB representative expressed the view that what is proposed by PM only affects the NI Participants and introduces discriminatory measures into the Code. PPB representative reiterated Viridian’s concern in relation to whether the charge is necessary at all. PM representative reiterated that the charge is necessary to ensure full security of the market.

Generator Member expressed the view that the arrangements that are currently in place have been effective since the beginning of the market. MO Member clarified that there are currently more collateral reserve accounts without a charge registered against them within the SEM than previously due to the accounts moving to Danske Bank London.

Secretariat drew attention to the Participant comments received subsequent to the WG stating that the BGE feedback advised of the opinion that a re-Drafted Deed of Charge should be prepared by Pinsent Masons taking into account, as they suggested, the trust provisions in the T&SC. Secretariat further advised that BGE expressed concern with regard to the timing around possible Participant suspension for not signing the deed of charge. Supplier Alternate expressed the view that the WG recommendation does not categorically state that a new deed of charge should be drafted; it recommends that the Committee should decide whether to re-draft or whether a further WG is necessary. Discussion ensued in relation to whether a second WG should be convened. Supplier Alternate and PPB representative expressed discontent that there was not enough time to review PM’s proposed material as it was not circulated prior to the WG. RA Alternate advised that although PM’s presentation was not submitted in advance of the WG, there has been time since the WG to review the material. PM representative explained that the PM view that was provided at the WG, is not going to change. There was consensus that a second WG was not necessary as the same principles that were discussed at length at the first WG would be revisited and put forward again.

Chair queried as to whether Viridian is opposed to the principle of a charge, or that the bank is in England.

PPB representative expressed discontent in relation to the extra costs associated and voiced concern in relation to the title of CRAs. PM representative advised that the issue of title was discussed at length during the WG, which is why the charge needs to be re-drafted as it needs to address that the Participant should still grant the charge over their beneficial interest in the accounts. PM representative advised that as discussed at the WG, the new deed of charge would be consistent with the trust arrangements currently within the T&SC.

RA Member advised that approximately 6% of credit cover is held in cash collateral, with the majority held in letters of credit. RA Member summarised that there are currently 2 options facing the Committee with the Modifications Committee External Counsel advising that one is more robust and secure than the other.

Generator Alternate advised that it should be the proposer who should draft the updated Deed of charge, not external Counsel. MO Member advised that it will be necessary to have the re-drafting carried out by External Counsel as EirGrid Legal do not have the specialist legal expertise to carry out the re-drafting and that Pinsent Masons are acting on behalf of the Modifications Committee, as the original proposal submitted by Eirgrid Legal proposed removing the charge, which was quite different to the proposal now under discussion. PPB representative expressed the view that the Modifications Committee has been invoiced on a deed of charge that is not fit for purpose (i.e what is proposed in Mod\_02\_13\_v2 Registration of Charges). PM representative advised that the initial instructions were not to look at the trust provisions within the T&SC.

PPB representative raised a general query in relation to customers not paying and whether the same provisions would need to apply. PM representative advised that not every type of security needs to be registered however if the security is cash collateral sitting in a bank account, it is imperative that it is registered.

Generator Alternate advised that the Committee must get sight of the updated deed of charge prior to voting on it. PM representative expressed agreement with the importance of having sight of the revised draft deed of charge to allow for the Committee to cast a fully informed vote. PM representative advised that Viridian Group was the only Participant to submit dissenting comments in relation to what is proposed by PM. Generator Member expressed the view that a lack of Participant comment on the issue should not be construed as agreement.

Generator Alternate queried as to whether EirGrid legal is satisfied with the proposed deed of charge solution as suggested by PM. MO Member confirmed that EirGrid legal is satisfied with the proposed solution and wants to ensure security of accounts and sought specialist legal advice as to the best way to ensure that security is in place.

Generator Alternate reiterated that the re-drafting of the deed of charge should be carried out by the proposer i.e EirGrid legal, not External Counsel. Chair expressed agreement that the proposer should re-draft the proposal.

Supplier Member thanked Viridian legal representative for the feedback received to date.

Chair stated that it is the intention to vote on this proposal at the next Modifications Committee Meeting.

The Committee voted and unanimously agreed on the actions as specified below.

## Meeting 55

Secretariat presented slide outlining the legal costs that have been accrued to date in relation to the proposal. Secretariat advised that the proposal has accrued significant costs of €76,000 to date and that this figure is not inclusive of the updated deed of charge which is currently in draft. Secretariat emphasised the importance of reviewing all material in advance and not re-visiting previously agreed decisions when dealing with External Counsel in order to prevent costs from rapidly accruing.

MO Member advised that a call was held with Pinsent Masons (PM) in relation to the issue of discrimination faced by NI Participants due to the location of the sterling bank accounts in London and the need for Participants to employ an agent of service to deal with the deed of charge. MO Member clarified that the accounts were moved to Danske Bank in London in order to meet the Code criteria requirements of acting as the SEM bank, which came about as an outcome of the implementation of Mod\_16\_11 Credit Worthiness Test for the SEM Bank and Credit Cover Provider banks.

Secretariat advised that PM are currently drafting the updated deed of charge and that it will be circulated for a three week review period with the aim of holding a conference call to discuss it prior to Meeting 56 on 14th August.

Generator Alternate made reference to a query that had been raised with SEMO in relation to the requirement to register a charge when the CRA is for a very small amount and is being utilised as a convenient way to pay small invoices, rather than to provide credit cover. MO Member advised that it has been discussed with PM and the RAs.

RA Alternate queried as to the Committee’s opinions on the issue raised by ESBI. Discussion ensued in relation to whether it would be possible to address the query in the deed of charge that is currently being drafted by PM. MO Member drew attention to the extensive legal costs that have been accumulated to date. MO Member advised that this issue was originally identified in the Market Audit however the non-compliance was on the relevant Participants who have not signed the deed of charge.

Chair advised that all risks must be adequately assessed to ensure that Participants feel comfortable voting on the proposal when the updated deed of charge is received. Discussion ensued around the possibility of having a lower cash collateral level limit of €100 where it would not be necessary to register a charge. MO Member advised that when this issue was previously discussed, there were concerns over the credit risk to the market of implementing such a limit. Generator Alternate re-iterated preference to include a lower cash collateral limit below which it would not be necessary to sign a deed of charge in the deed of charge currently being drafted. MO Member asked how many accounts were affected and asked Participants to feed back this information.

## Meeting 56

Secretariat advised that the RAs have granted an extension of the proposal until January 2015.

Secretariat advised that no deed of charge has been received and that Pinsent Masons (PM) have advised that the deed is being reviewed internally. Secretariat further advised that it is hoped to have the updated draft of the deed of charge for the next meeting however, this is dependent on when the updated draft is received. The draft must go to the Committee for a review period of 3 weeks, there is an action to convene a conference call to discuss the draft, and the alternative version of the proposal must be submitted two weeks in advance of the next Meeting. Secretariat advised that in relation to the below action, four Participants responded advising their companies are using CRAs for small invoices, as opposed to providing credit cover.

* Participants to advise Secretariat of how many company accounts (if any) are utilising CRAs for small invoices (rather than to provide credit cover) no later than COB 3rd July

Secretariat advised that the Participant feedback submitted in relation to the action has been issued to PM, however there has been no instruction provided for PM to address the feedback in the updated draft deed of charge, so as not to cause any further delay with circulation of the draft. There was Committee agreement that the issue should be discussed at the conference call that will be scheduled upon receipt of the updated draft, so as not to incur any further delays with the draft deed.

## Meeting 57

Secretariat advised that an updated draft of the Deed of charge was issued on 24th September for a Committee review period of 3 weeks. Secretariat advised that a conference call with legal representation is due to take place following the Committee review. Secretariat advised that Viridian have issued comments in relation to the updated Deed of Charge, further advising that External Counsel have not been instructed to carry out a review of the comments as this would incur a further cost.

Secretariat sought Committee view on whether External Counsel should be directed to undertake a review of all Participant comments, prior to scheduling the conference call. The Committee were agreeable that the Secretariat should collate and circulate all Participant feedback regarding the updated Deed of Charge, at which point the Committee should advise via email whether External Counsel should be directed to review all comments, with a conference call scheduled subsequent to that. The conference call is likely to take place approximately two weeks following the Deed of charge review period deadline of 15th October. Secretariat advised that a scope of cost for review of the comments will be requested from External Counsel.

## Meeting 58

MO Member presented slides outlining the background and history of the proposal and showing the legal costs that have been incurred to date. MO Member sought the Committee’s views in relation to how best to proceed given the extensive legal discussion that has been ongoing since the proposal was raised in January 2012, highlighting that at Meeting 50 the Committee voted to pursue stricter enforcement and additional security around existing and future registration of charges and at Meeting 54 the Committee voted for an updated Deed of Charge reflective of the trust arrangements. However, discussion has continually reverted to two diverging views as to whether a Deed of Charge is necessary and those views are likely to remain divergent, so the Committee needs to decide whether or not to proceed with drafting a new deed. Chair reiterated Viridian’s view that a charge is unnecessary. Supplier Member supported Viridian’s view advising that the Committee have three options in relation to the deed, vote to approve the deed, amend the deed to reflect Participant comments that were put forward, or reject the deed. External counsel representative advised that it is fundamental that the Committee are comfortable with the deed of charge prior to taking a vote.

External Counsel representative provided an overview of Participant comments that have been addressed in the formal written response. Discussion ensued in relation to the actions that were recorded at the conference call (set out below). MO Member advised that the concerns that had been raised by Participants at the conference call are currently being addressed by SEMO. Generator Member further advised that any monies that are to be recovered should not be absorbed by MO administration costs. Generator Member drew attention to whether Irish, NI, or English law (which would include Wales) is to be utilised for the deed due to bank accounts in the UK and drew attention to exclusion of Scotland. Generator Member further advised that given the legal costs that have been incurred to date, it is not prudent to continue to re-visit the concept of the deed of charge. All voting members except Viridian and Power NI were in agreement with AES’s above view. Generator Member expressed the view that it is imperative to have adequate security in place over the monies in the CRAs and that the Modifications Committee have received expert legal advice which has advised that a charge is necessary in order to ensure market security.

Generator Member drew attention to a concern that had previously been raised by ESB in relation to Participants using the CRAs for payment of small invoices. Secretariat advised that this comment was addressed in the formal written response (Number (ii), Pg 4) issued by External Counsel. Generator Member expressed the view that this response was not satisfactory and requested further consideration of the issue when external counsel are drafting the updated version.

Eirgrid legal representative advised that in order to progress the proposal, External Counsel must be directed to finalise the deed of charge taking into account Participants comments where possible and then the appropriate modifications to the Code and APs must be drafted.

Generator Member queried as to whether SEMO and Eirgrid will be focusing on getting those Participants who are not compliant to sign the updated deed first, once it is approved. Eirgrid legal representative confirmed that all Participants must sign the updated Deed, not only those Participants who are incompliant.

Energia representatives expressed the view that while they are not in agreement with the principle that a deed is necessary they are willing to accept the consensus view of the Committee and therefore would continue with the ongoing drafting and not revisit the concept of the deed of charge.

## Meeting 59

Secretariat advised that the actions that were previously recorded at the conference call held on 1st

December are all closed off and the corresponding sections have been removed from the updated deed.

EirGrid legal representative advised that it should be possible to address the majority of the comments

received from Viridian and AES, however this must be confirmed by Pinsent Masons. EirGrid legal

representative further advised that in relation to the Notice of charge to Account Bank(s) letter, Viridian’s

suggested removal of the clause stipulating that Participants must provide uncapped indemnities to the

bank, would need to be assessed by Danske Bank themselves. MO Member advised that there will be no

fees associated with Participants signing the deed of charge and that SEMO will continue to manage the

process and cost of administering of the new deed of charge. Generator Member expressed the view that

the issue of small accounts had not been addressed sufficiently by SEMO.

MO Member advised that a daily monitoring system is required to be put in place while the deeds have to

be signed just once. Supplier Member sought clarification that all collateral reserve account will require a

deed of charge to be signed. MO Member confirmed this. The Committee agreed that there should be a 1

week review period for the mark-ups of the deed that was submitted by Viridian and AES. Following this,

Pinsent Masons are to be directed to draft a new deed incorporating Participant comments where possible,

with a fee estimate to be provided in advance of the work being undertaken. The deed will then be

submitted for a two week Committee review period with a conference call to be arranged following this. The

proposal will be discussed again at Meeting 60 in April. Eirgrid legal representative advised that further

modifications to the Code and APs will be necessary upon finalisation of the deed. Secretariat requested

that all comments submitted in future should be material.

## Meeting 60

This was an extraordinary meeting held specifically to discuss the Make Whole Payments modifications proposals – Mod\_02\_13 Registration of Charges was not discussed at this meeting

## Meeting 61

Secretariat delivered a [presentation](http://semopub/MarketDevelopment/ModificationDocuments/Legal%20Costs%20Updated%20Meeting%2061.ppt) summarising legal costs, and options for progressing this proposal. Secretariat advised that at the conference call held on 13th April, a number of minor points were identified and these are currently being addressed by Pinsent Masons (PM). Secretariat further advised that the main remaining point of contention for Participants was in relation to the indemnity clause. EirGrid legal representative will have a preliminary discussion with Danske Bank in relation to the possible introduction of an indemnity cap. Following this discussion PM will discuss this directly with the bank and try to reach an agreement that can be incorporated into the deed. Secretariat further advised that PM have stated that any further amendments to the Deed of Charge (Option 2) are not possible (excluding amendments to the indemnity element). Secretariat advised that as per the market audit presentation, the registration of charges issue has appeared this year in the audit for the third consecutive year.

Supplier Member expressed the view that a significant amount of time, finance and resources has gone into the deliberation of the wider registration of charges issue. Supplier Member encouraged all Participants to engage with the discussion around the indemnity clause. Supplier Member advised that an unlimited indemnity clause is not ideal and that there should be some manoeuvrability with respect to this, however further stated that the issue must reach a conclusion in the near future. Chair expressed the view that it is imperative for other Participants to engage in the discussion on the deed of charge, further noting that significant legal costs have been incurred and that the legal advice budget for the Modifications Committee is not very substantial. In Generator Member’s absence, Chair expressed AES’s concerns in relation to the indemnity clause. Generator Member expressed the view that although SEMO have issued a response advising why the daily monitoring of account limits is not possible, it still does not seem correct that that a deed must be registered over the accounts that are using CRAs to pay the small invoices. MO Member clarified that SEMO does not differentiate between account types. Generator Member expressed dissatisfaction with this and requested that SEMO investigate whether a – change to the system to set up different account types is possible.

## Meeting 62

Eirgrid Legal Representative advised that following a series of negotiations Danske Bank have agreed to the removal of the indemnity clause requirement from the Deed of Charge. Chair welcomed this development advising that this was a great result. Eirgrid Legal Representative advised that a final review was being conducted with SEMO Finance. Once complete this version of the Deed will be circulated for review prior to a Conference Call to agree to the Deed. A review period of one week was suggested due to the minor changes since the last version of the document. Observer and Supplier Member expressed their wish for a minimum two week period as more acceptable.

Secretariat suggested that a briefing note be provided with the Deed detailing the final changes to aid the review process. Eirgrid Legal Representative advised that such a note would be provided and it was agreed that the Deed would be circulated as soon as available and a two week review period would then be followed with a conference call. Observer noted that a vote could not be taken on the Deed versioning as this is only a part of the full Modification. Rather an agreement should be reached on the version to be included in the Mod so that this could be voted on. Eirgrid Legal Representative agreed that the process to progress the modification to a conclusion would be to agree to the Deed on the call to then take a vote on the proposal at Meeting 63 on 13th August.

## Meeting 63

Secretariat apologised for the distribution of comments from Viridian late afternoon the day before the meeting should some members not have had visibility of the comments. Generator Member advised that the comments were a summary document highlighting a principle position more for inclusion in a Final Recommendation Report as the comments had already been already been discussed in detail. There were some additional comments to the Code Modification version 3 including a typo in the reference to section 2.3 instead of 2.4 which has been acknowledged by the EirGrid Group Legal Representative and will be revised as part of the FRR.

The EirGrid Group Legal Representative addressed the key changes in Mod\_02\_13 version 3 providing a summary of this proposal containing Deed of Charge version 8. Changes to version 7 were carried out as a response to comments discussed at the conference call on the 22nd July with regards to the definition of ‘Working Day’ and ‘Event of Default’.

MO Representative also discussed the changes to the Code regarding the timelines for submission of Credit Cover extended from 5 Working Days to 10 Working days. These have been aligned for both methods of Credit Cover in order to allow timely submission of executed Deed of Charge if issues arose with the Letter of Credit. MO rejected claims that this extension creates a barrier to entry for new Participants as evidence has shown that Participants posts Credit Cover well in advance of the current deadline for Registration and that no Registration has been delayed because of untimely posting of Credit Cover.

Chair asked why the process involved going straight to a situation of a suspension rather than a notification of default. In addressing this, the EirGrid Group Legal Representative discussed how the suspension brought more substance to non-compliance and also would limit the amount of time unsecured accounts would arise for. There are other situations where the Code would allow for a direct Suspension; however, version 3 of the Modification to the Code, has mitigated the risk to Participants by not making it an automatic event due to the wording of paragraph 2.246 where this has been added: ‘*The Market Operator may, with the prior written approval of the Regulatory Authorities, issue a Suspension Order*…’.

Generator Alternate questioned how a judgement could be made that the process was exhausted. The EirGrid Group Legal Representative advised that the advice given to the Modifications Committee by external legal counsel confirmed that no further omissions, changes or concessions could be made without affecting the legal integrity of the document. All routes had been fully explored with crucial successes such as the negotiation of the removal of the indemnity with Danske Bank, whose position on other matters could not be negotiated any further.

Chair asked if ultimately this Modification will result in a more secure Market. MO Member confirmed that this was indeed the external counsel advise out of all options considered.

Chair requested further clarifications in areas such a suggested discriminatory practice and jurisdictional location of the SEM accounts, however, there was acknowledgement of the time and effort dedicated to this proposal along with external legal counsel and the sentiment that a Vote should be taken to draw this process to a conclusion.

## conference calls

Conference calls were also held during this process focusing on discussions relating to the development of the actual Deed of Charge. Calls were held on 01 December 2014, 13 April 2015 and 22 July 2015.

# december 2014 - actions recorded at the call

|  |
| --- |
| * PM to provide clarification around the secured obligation aspect of Section 7.1 “Event of Default” and the separate definition of “Event of Default”
 |
| * PM to re-instate reference to “reckless” in Section 9.1 Liability
 |
| * Section 10.1 Assignment by the MO to be made subject to RA consent/approval
 |
| * PM/EirGrid legal to discuss with Danske Bank the possibility of removal of the indemnity in the Notice to the Bank/ the inclusion of a indemnity cap
 |

# april 2015 - actions recorded at the call

|  |
| --- |
| * SEMO to consider any possible risks around currency cost issue in relation to Clause 10.1 Currency conversion and indemnity
 |
| * SEMO to consider potential removal of clause 7.4 Application of proceeds and how the expenses are recovered and whether there are any implications with removal of section
 |
| * SEMO to consider modification of definition from Secured Obligations to Payment Obligations to avoid confusion re. performance obligations being charged also
 |

# july 2015 - summary

|  |
| --- |
| * No actions were taken at this meeting as this was a final call to address actions recorded previously and to respond to any final questions or comments which were then taken into consideration for any amendment in the published version 3 of the Mod.
 |

# Proposed Legal Drafting

A typo was highlighted by EirGrid Legal at Meeting 63 relating to references to T&SC section 2.3 which in fact should be T&SC section 2.4. These corrections have been rectified in the drafting below – all other drafting is as set out in Appendix 1below – Section ‘Legal Drafting Change’ :

* **Section 6.21**

6.21 If, at any time, a Participant (or Applicant, as applicable) wishes the Market Operator to establish a SEM Collateral Reserve Account on its behalf for the purposes of paragraphs 6.19 and 6.20, the Participant (or Applicant, as applicable) shall (i) on the same date on which its Required Credit Cover is posted and the cash collateral is paid into the relevant SEM Collateral Reserve Account(s), complete and enter into the Deed of Charge and Account Security (including the Notice of Assignment and Acknowledgment) in respect of such SEM Collateral Reserve Account and SEM Collateral Reserve Assets (ii) within 5 Working Days from the date on which its Required Credit Cover is posted, furnish to the Market Operator the original executed Deed of Charge and Account Security to for the purposes of the registration of such Deed of Charge and Account Security pursuant to section 860 of the Companies Act 2006 and/or section 409 of the Companies Act 2014 (Ireland), as appropriate, and/or at such other registry or registries as may be appropriate; (iii) within 5 Working Days from the date on which its Required Credit Cover is posted, furnish to the Market Operator the original executed Notice of Assignment and Acknowledgment for the purposes of enabling the Market Operator to give notice to the SEM Bank and procure the SEM Bank's acknowledgment pursuant to Clause 2.4 of the Deed of Charge and Account Security and (iv) do all such things and execute all such documents and provide any further information that the Market Operator may reasonably require in order to carry out such registrations within such timelines as may be specified by the Market Operator, having regard to any applicable time limit for the registration of such a charge.

* **Section 6.162 (2)**
* 2. a cash held deposit in a SEM Collateral Reserve Account as provided for in paragraphs 6.19, 6.20 and 6.21. For the avoidance of doubt, if a Participant elects to provide a cash deposit as part of its Required Credit Cover, then it shall (i) on the same date on which its Required Credit Cover is posted and the cash collateral is paid into the relevant SEM Collateral Reserve Account(s), complete and enter into the Deed of Charge and Account Security (including the Notice of Assignment and Acknowledgment) in respect of such SEM Collateral Reserve Account and SEM Collateral Reserve Assets (ii) within 5 Working Days from the date on which its Required Credit Cover is posted, furnish to the Market Operator the original executed Deed of Charge and Account Security to for the purposes of the registration of such Deed of Charge and Account Security pursuant to section 860 of the Companies Act 2006 and/or section 409 of the Companies Act 2014 (Ireland), as appropriate, and/or at such other registry or registries as may be appropriate; (iii) within 5 Working Days from the date on which its Required Credit Cover is posted and the Deed of Charge and Account Security is dated, furnish to the Market Operator the original executed Notice of Assignment and Acknowledgment for the purposes of enabling the Market Operator to give notice to the SEM Bank and procure the SEM Bank's acknowledgment pursuant to Clause 2.4 of the Deed of Charge and Account Security and (iv) do all such things and execute all such documents and provide any further information that the Market Operator may reasonably require in order to carry out such registrations within such timelines as may be specified by the Market Operator, having regard to any applicable time limit for the registration of such a charge. The Participant shall also fully comply with any other applicable Account Security Requirements in relation to the provision of cash collateral as set out in paragraphs 6.19, 6.20 and 6.21 of this Code and in Agreed Procedure 1 "Participant and Unit Registration and Deregistration", Agreed Procedure 9 "Management of Credit Cover and Credit Default" and Agreed Procedure 17 "Banking and Participant Payments"
* **The definition of ‘Account Security Requirements’ in the Glossary**

(ii) any requirement in relation to the Notice of Assignment and Acknowledgment pursuant to the terms and conditions of the Code (including, without limitation, as detailed in paragraphs 6.20 and 6.21) and to the provisions of Clause 2.4 of the Deed of Charge and Account Security

#  LEGAL REVIEW

Complete

# IMPLEMENTATION TIMESCALE

It is proposed that this Modification is implemented on a Trading Day basis with effect from one Working Day after an RA Decision is made.

# Dissenting Comments

We remain of the view that the Modification is unnecessary where simple code changes can be effected to perfect the Trust wording of the TSC, all further comments are subject to that point.

Main areas of concern in relation to the drafting:

**1. Is discriminatory:-**

a. On the face of it the Mod is discriminatory in respect of Sterling PTs in terms of the location of the Sterling CRA Account:- in that the Euro CRA is within the same legal jurisdiction as the Euro PTs (i.e. Ireland), whilst the Sterling CRA is not in the same legal jurisdiction as the Sterling PTs (i.e. not in Northern Ireland, but rather England which is a different legal jurisdiction);

b. On the face of it the Mod is discriminatory in respect of the Sterling PTs in terms of the governing law which applies:- for the Euro PTs the law of Ireland applies (i.e. same governing law as Euro PTs), whilst for the Sterling PTs the governing law of England is to apply (i.e. a different governing law for Sterling PTs);

c. On the face of it the Mod is discriminatory in respect of the Sterling PTs in terms of the legal jurisdiction to apply- in that for Euro PTs the legal jurisdiction is to the same as Euro PT’s (i.e. Ireland), whilst for the Sterling PTs the jurisdiction proposed is that of England, which is a different legal jurisdiction.

**2. Condones a breach of the TSC:-**

a. On the face of it this condones a breach of the TSC as it very clearly states that the Sterling CRA is to be in NI see para 6.19

**3. Condones the failure of the MO to properly administer the banking arrangements:-**

a. On the face of it the failure by the MO to stipulate a NI account for the Sterling CRA in the SEM Bank Tender is a failure of the MO to administer the banking arrangements in accordance with the TSC in accordance with para 6.14 of the TSC

**4. Introduces English law and jurisdiction into the TSC**

a. Which is wholly inconsistent with the terms of and the spirit of the TSC setting a unhelpful precedent for any subsequent revision of the TSC

**5. This Modification is inextricably linked Modification Mod 08\_14 (Clarification of Location of SEM Collateral Reserve Accounts):-**

a. Mod 08\_14 is also on the face of it discriminatory

b. The adoption of Mod 08\_14 does not affect or resolve points 1 to 4 above.

**6. The Modification contains no grace periods or transition periods, as such its passage without amendment will place all PTs utilising cash deposit in Default.**

a. This point was raised by the RA’s in their commentary on Mod\_02\_13\_v2 and has not been addressed.

**7. The Modification does not address “Difficulties have also arisen with regard to registering charges in jurisdictions outside the SEM”:-**

a. The Modification only addresses registration in a) RoI; b) NI and c) England – it does not address any other jurisdictions- i.e. the only justification outside SEM which it appears to address is England.

**8. The Proposed Modifications to TSC :-**

a. Create an inappropriate extension (an additional working week) of the period to provide required credit cover creating barriers for entry in relation to new PTs, in relation to both LOCs and Charge.

b. Disproportionate penalty in relation to non execution of the Proposed Deed of Charge and Account Security.

c. Misunderstands and fundamentally changes the trust under which SEM Collateral Reserve Accounts are held and is contrary to the legal advice given to SEM Mods Committee.

d. Introduces procedures which a) are procedurally inadequate and b) removes obligation on PTs registered outside of RoI; NI or England (i.e. registered outside SEM generally) to comply with local law requirements and c) removes ability of MO to register notwithstanding PT’s lack of co operation.

**9. The Proposed Deed of Charge and Account Security (which is not the same as version 7 previously presented Proposed Deed of Charge and Account Security) contains drafting defects which bring into doubt its enforceability** :-

a. Definition of “Working Day” does not work, drawing into doubt the date on which the Deed can be enforced under Clause 7;

b. Clause 2.2 a) description of the MO’s trust is wholly in accurate and contrary to TSC;

c. Clause 4.1 grants a general power of attorney which is disproportionate where none is contemplated in the TSC

d. Clause 5.2 creates a negative pledge in excess of that in TSC;

e. Clause 7.1 which governs the Event of Default- and hence enforcement- is predicated on non SEM Working Days and does not accurately identify the Invoice Due Dates by reference to the TSC, meaning that the key enforcement date cannot be accurately determined- throwing into doubt the entire enforceability of the deed.

f. Clause 7.4.1 (c) is in direct contravention of the MO’s concurrent trust obligations under the TSC;

g. Notice of Charge purports to deal with liability which is “off market”.

# Appendix 1: Mod\_02\_13 registration of charges

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