

Appendix 1:

The Market Monitoring Unit (MMU) Investigation Process Manual

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2 INTRODUCTION

The purpose of this manual is to set out the procedures that should be followed by the Market Monitoring Unit (“**MMU**”) during inquiries and investigations. It is being provided to market participants to make them aware of the process the MMU will follow while conducting such inquiries/investigations.

This manual is intended to provide guidance to both the MMU and licensees as to the conduct of investigations.

Though the stages and milestones of MMU investigations are set out herein, flexibility will exist to deal with specific circumstances in each case.

The Regulatory Authorities will seek to adhere to this manual. However, this manual does not in itself impose requirements on, or purport to fetter the discretion of, the Regulatory Authorities.

The SEM Committee may decide, with or without liaison with the MMU, to use any of the RAs’ applicable interim/emergency powers such as the issuance of interim directions without recourse to the processes for inquiry/investigation laid out in this paper. This could for example occur in unlikely cases of acute market abuse or substantial short-term risk of market failure.

This manual does not provide a comprehensive description of the procedure to be followed in every case. The Regulatory Authorities will issue a timetable and case management directions to the parties involved on a case by case basis.

This Manual may be reviewed from time to time in order for the Regulatory Authorities to keep their procedures relevant and up to date.

3 LEGAL FRAMEWORK FOR LICENCE COMPLIANCE

The legal framework of the SEM, the SEM Committee and the Joint Regulatory Arrangements applicable to the Oversight Committee and the MMU is explained below. Additionally, the functions and duties of the SEM Committee and the enforcement mechanisms applicable to licensed generators are explained at a high level.

3.1 SEM COMMITTEE

The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 (2007 No. 913 (N.I. 7) (SEM Order) and the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 (Electricity Act) (“collectively referred to as the SEM Legislation”) respectively provide for the creation of the SEM Committee.

As described in the Joint Regulatory Arrangements (AIP/SEM/07/565)¹ the central decision-making rule which governs the exercise of regulatory functions shall be that:

- i. Any decision as to the exercise of a relevant function of the Commission (**the Commission for Energy Regulation - CER**) in relation to a SEM Matter shall be taken on behalf of the Commission by the SEM Committee, and,
- ii. Similarly, any decision as to the exercise of a relevant function of the Authority (**the Northern Ireland Authority for Utility Regulation – the Utility Regulator**) in relation to a SEM Matter shall be taken on behalf of the Authority by the SEM Committee.

A matter is a SEM matter if the SEM Committee determines that the exercise of a relevant function of the Authority or the Commission as the case may be, in relation to that matter, materially affects, or is likely materially to affect, the SEM.

The principal objective of the SEM Committee is to protect the interest of consumers of electricity in Northern Ireland and Ireland supplied by authorised persons, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the sale or purchase of electricity through the SEM.

¹ SEM-07 - [AIP-SEM-07-565 Joint Regulatory Statement plus annexes 2](#)

3.2 OVERSIGHT COMMITTEE

The SEM Committee may under the SEM legislation, establish sub-committees. Anything which is authorised or required to be done by the SEM Committee may be done by any sub-committee of the SEM Committee which is so authorised². A sub-committee of the SEM Committee known as the “Oversight Committee” (OC) was established at the SEM Committee’s meeting on 28 November 2007. The OC is a committee made up of senior members of staff of each of the Regulatory Authorities and appointed by the SEM Committee. An OC matter shall be defined as one which does not require the OC to decide upon a matter of SEM policy. The OC is therefore authorised to make decisions with respect to all OC matters³.

Under this framework, the Oversight Committee carries out its duties under the delegated authority of the SEM Committee. The OC oversees the operation of the MMU in this context.

3.3 MARKET MONITORING UNIT (MMU)

The MMU forms part of the Market Power Mitigation strategy developed by the RAs during 2006.

The MMU reviews behaviour in the market on an ex-post basis. This includes investigating the exercise of market power, monitoring the compliance of market participants with the Bidding Code of Practice⁴ and other market rules and reviewing prices reported in the market.

As part of the Market Power Mitigation Strategy, the MMU monitors compliance with the Licence Condition on Cost Reflective Bidding in the SEM⁵ and the SEM bidding principles contained in the Bidding Code of Practice.

² Schedule 1A (13) of the Act and Schedule 2 (5) of the Order

³ See AIP/SEM/08/017 SEM Committee Scheme of Delegation at Section 3, 29th January 2008 Final

⁴ [Bidding Code of Practice Decision and Response to Comments AIP-SEM-07-430 Response and Decision](#)

⁵ Condition 15 in Irish Generation Licences and Condition 17 in Northern Irish Generation Licences.

3.4 RELEVANT FUNCTIONS OF THE COMMISSION AND THE AUTHORITY REGARDING LICENSEES

Any decision as to the exercise of a relevant function of the Authority or the Commission in relation to a SEM matter shall be taken on behalf of the Authority or the Commission, as the case may be, by the SEM Committee. For the purposes of this Process Manual it is useful to outline the 'Relevant Functions' of the Regulatory Authorities which may be exercised on behalf of the particular Regulator by the SEM Committee and which may be relevant to and utilised in relation to a MMU Investigation.

3.4.1 RELEVANT FUNCTIONS OF THE COMMISSION REGARDING LICENCE COMPLIANCE

Section 8A(6) of the Electricity Regulation Act 1999 (as inserted by the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007) provides that a Relevant Function of the Commission means a function under the Electricity Regulation Act 1999 (as amended) relating to electricity and a function under the Internal Market Regulations.

The Relevant Functions of the Commission which may be exercised by the SEM Committee in relation to the licence compliance include, inter-alia, the functions and duties to:

- To monitor the performance of, revoke and enforce licences under the Act (Section 9(1) (g) of the Act). With regard to this Relevant Function it is important to highlight Condition 15 of the Generic Licence⁶ (or is equivalent) on Cost Reflective Bidding in the SEM, and the power of the CER to issue a direction to the licensee there under, and Condition 12 on the Provision of Information to the Commission, both of which are relevant to the activities of the MMU.
- To monitor licensees to ensure they continue to conform to the conditions and requirements of their licences under section 14(12) of the Act;
- To publish information and advice in accordance with the provisions of this Act (section 9(1)(h) of the Act);
- To monitor the level of transparency and competition (section 9(1D) (h)).
- To promote competition in the generation and supply of electricity in accordance with the Act (section 9(4)(a));

⁶ <http://www.allislandproject.org/en/generation.aspx?page=2&article=f51097ff-25d3-40dd-8c73-48264829e2b2>

- To appoint an Authorised Officer to carry out any of the acts set out in section 11(4) of the Act in relation to licensees. Section 12 of the Act confers upon the Authorised Officer the power obtain a search warrant where there is reasonable grounds for suspecting that there has been a contravention of a condition or requirement of a licence.

- **Issue directions to a licensee in accordance with the following sections of the Act:**
 - **Section 23** states that where the Commission is satisfied that where certain listed circumstances have arisen or are likely to arise it may direct the holder of the licence to discontinue or refrain from specified practices. The circumstances include that immediate action is necessary to protect the interest of other holders of licences or authorisations, or where the Commission is of the opinion that the licensee is contravening or likely to contravene a licence conditions or requirement and immediate action is necessary to cease or prevent same.

 - **Section 24** states that where the Commission is of the opinion that the holder of a licence or an authorisation may be contravening (or may be likely to contravene) a condition or requirement, it may issue a notice to the licensee stating the condition or requirement which the Commission considers that the licensee may be contravening (or may be likely to contravene), the acts or omissions which in the opinion of the Commission may constitute or would be likely to constitute contravention of the condition or requirement concerned; and specify the period within which representations or objections may be made. On consideration of representations or objections a direction may be made to the licensee to take such measures as are necessary to cease the contravention or to prevent a future contravention.

- **To issue a determination under Section 25 of the Act.** Section 25 states that where the Commission decides not to give a direction under Section 24, the Commission may make a determination that the holder of a licence or an authorisation has committed a specified breach of a condition or requirement. As soon as practicable after making a determination the Commission shall:
 - publish a notice of the determination in a newspaper circulating in the State;
 - Serve a copy of the notice and a copy of the determination on the holder of the licence or authorisation to whom the determination relates.

- Section 26 states that in order to ensure compliance with a direction given under section 23(2) or section 24, the Commission may apply in a summary manner *ex parte* or on notice to the High Court for an order requiring the holder of a licence or an authorisation who, in the opinion of the Commission, is contravening or who is likely to contravene a condition or requirement to discontinue or to refrain from specified practices.

The above list is not intended to be an exhaustive summary of the Relevant Functions of the Commission but is used to provide an indication of the powers that the SEM Committee may exercise in relation to a licensee whose bidding behaviour is under investigation.

3.4.2 RELEVANT FUNCTIONS OF THE AUTHORITY REGARDING LICENCE COMPLIANCE

Section 6(4)(a-d) of The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 provides that a Relevant Function of the Authority means a function under:

- Part II of the Electricity Order;
- a function under the Energy Order which relates to electricity;
- a function under Part IV of the Electricity Order 1992 (Amendment) Regulations (Northern Ireland) 2005 (SR 2005/ 335);
- a function under Article 3 or Schedule 1,

Functions of the Authority which may be exercised by the SEM Committee regarding licence compliance include, but are not limited to:

- The power to grant licences.
- The ability to make modifications to licence conditions.
- The power to require information, as per Article 31 of The Electricity (Northern Ireland) Order 1992, if it appears that a licensee is contravening any of its licence conditions.
- To protect the interests of consumers by promoting effective competition between persons engaged in commercial activities connected with the generation, transmission or supply of electricity. (Article 12(1) The Energy (Northern Ireland) Order 2003).
- If satisfied that the Licensee is contravening, or likely to contravene a relevant condition or requirement, the Authority may make a provisional or final

enforcement order for the purpose of securing compliance with a licence condition/requirement. (Article 42 The Energy (Northern Ireland) Order 2003).

- Article 45 of The Energy (Northern Ireland) Order 2003 allows the Authority to impose a financial penalty on a Licence holder where they are satisfied that the licence holder has contravened or is contravening a condition, requirement or provision of Community Regulation.

Schedule 3 of the SEM Order confers powers of entry (to the Authority) if the SEMC determines:

- (a) That there are reasonable grounds for suspecting that a licence holder is contravening, or has contravened, any condition of his licence; and
- (b) That any such contravention would materially affect or be likely materially to affect the SEM.

Electricity (Northern Ireland) Order 1992

Article 28 of the Electricity Order states that where the Authority is satisfied that a licence holder is contravening (or is likely to contravene) any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.

Article 29 states that before making a final or provisional order, the Authority shall give notice:

- stating that it proposes to make or confirm the order and setting out its effect;
- setting out:
 - (i) the relevant condition or requirement for the purpose of securing compliance with which the order is to be made or confirmed;
 - (ii) the acts or omissions which, in his opinion, constitute or would constitute contraventions of that condition or requirement; and
 - (iii) the other facts which, in his opinion, justify the making or confirmation of the order; and
- Specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed order or proposed confirmation may be made.

Article 31 gives the Authority power to require information from a Northern Ireland licence holder where it appears to the Authority that a licence holder may be contravening, or may have contravened any relevant condition or requirement.

Article 48 states that it the duty of the Authority to investigate any matter which appears to be an enforcement matter and which is the subject of a representation (other than one appearing to the Authority to be frivolous) made to the Authority by or on behalf of a person appearing to the Director to have an interest in that matter.

Energy (Northern Ireland) Order 2003

Part VI of the Energy Order gives the Authority the power of enforcement of relevant conditions of electricity licences (some of these Articles repeat the provisions granted to the Authority under the Electricity Order);

Article 42 of the states that where the Authority is satisfied that a licence holder is contravening, or is likely to contravene, any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.

Article 45 gives power to the Authority to impose financial penalties onto licence holders who have contravened licence conditions.

Article 51 of the Energy Order gives the Authority power to require information from a Northern Ireland licence holder where it appears to the Authority that a licence holder may be contravening, or may have contravened any relevant condition or requirement.

3.5 GENERATION LICENCES

3.5.1 NORTHERN IRELAND GENERATION LICENCE

Condition 11 of the Northern Ireland Generation Licence states that the Licensee shall furnish the Authority with such information that it considers necessary or that the Authority may require for the purposes of performing:

- (a) The functions assigned to it by or under the Electricity Order, the Energy Order, the SEM Order or the Directives Regulation; and
- (b) Any functions transferred to it under the Electricity Order, the Energy Order, the SEM Order or the Directives Regulation.

Condition 10 of the NIE Energy Licence places the same requirements on PPB.

3.5.2 IRELAND GENERATION LICENCE

Condition 12 of the Irish Generation Licence requires the Licensee to furnish to the Commission such information as the Commission may consider necessary for the purpose of performing the functions assigned or transferred to it by or under the Act.

3.6 THE BIDDING CODE OF PRACTICE

The Bidding Code of Practice⁷ is published jointly by:

- a. the Northern Ireland Authority for Utility Regulation (the Authority), in accordance with paragraph 5 of the following conditions of licences in Northern Ireland:
 - (i) Condition 17 of each electricity generation licence; and
 - (ii) Condition 57 of the public electricity supply licence granted to Northern Ireland Electricity plc under Article 10(1) of the Electricity (Northern Ireland) Order 1992 under a licence document dated 31 March 1992 and transferred to NIE Energy Limited; and

- b. the Commission for Energy Regulation (the Commission), in accordance with paragraph 5 of the following conditions of licences to generate electricity in the Republic of Ireland:
 - (i) Condition 17 of the interim electricity generation licence granted to the Electricity Supply Board on 21 April 2006;
 - (ii) Condition 16 of the electricity generation licence granted to Synergen on 31 July 2002; and
 - (iii) Condition 15 of electricity generation licences granted to all other licensed generators of electricity.

The Bidding Code of Practice (“BCOP”) sets out the principles to be used in calculating the costs to be reflected in the commercial offer data which generators submit to the Market Operator. Licensees are bound to comply with the BCOP as per a condition of their licence. **A breach or suspected breach of the BCOP is considered a licence breach** and can be investigated by the MMU.

⁷ [AIP-SEM-07-430](#)

4 OVERVIEW OF MMU INVESTIGATIONS

4.1 DELEGATION OF POWER FROM THE SEM COMMITTEE TO THE MMU

Schedule 2, Paragraph 5 of the SEM Order permits the SEM Committee to establish sub-committees, the membership of which may include persons who are not members of the SEM Committee.

Schedule 2, Paragraph 9 of the SEM Order permits that anything which is authorised or required to be done by the SEM Committee may be done by:

- (a) Any member of the SEMC who is authorised for that purpose by the Committee, either generally or specifically;
- (b) Any sub-committee member of the SEM Committee which is so authorised; or
- (c) Any member of the staff of the Authority or CER who is so authorised.

Sub-paragraph (b) does not apply to a sub-committee whose members include any person who is not a member, or member of the staff, of the Authority or the Commission.

Under this framework, the Oversight Committee carries out its duties under the delegated authority of the SEM Committee. The Oversight Committee oversees the operation of the MMU in this context.

4.2 PURPOSE OF MMU INQUIRIES AND INVESTIGATIONS

The principal purpose of an inquiry or investigation by the MMU is to collect evidence upon which the SEM Committee, or a delegate of its authority or an authorised sub-committee, can make a balanced and appropriate decision, as to whether there has been non-compliance with a regulatory requirement.

4.3 SCOPE OF MMU ACTIVITY

The MMU continually reviews and monitors the bidding behaviour of generating units in the SEM. Through these activities, the MMU may discover an issue of concern with regard to the bidding behaviour of a generator in the SEM.

Alternatively, an issue of concern with regard to the bidding behaviour of a generator in the SEM may be brought to the attention of the MMU by a third party, such as another generator in the SEM.

In the event that the MMU notices an issue of concern, or a third party brings an issue of concern to the MMU's attention, the MMU will open a case folder within its Enforcement Journal on that issue.

4.4 OBJECTIVE OF THE MMU

The objective of the MMU in informal inquiries and formal investigations is to collect, collate and analyse all relevant information relating to that suspected breach of licence. The MMU cannot issue binding directions, but where necessary will present evidence to the Oversight Committee and SEM Committee. The SEM Committee may issue a binding direction based on this evidence.

4.5 OVERVIEW OF TYPES OF INQUIRY / INVESTIGATION

4.5.1 INFORMAL INQUIRY

An informal inquiry may be initiated and carried out by the MMU where the MMU considers that an inquiry should be carried out in response to an issue of concern arising from its own market monitoring, or on receipt of a complaint from a third party. This is considered an issue relating to a Level 0 – 2 Concern (below).

4.5.2 FORMAL INVESTIGATION

A formal investigation may be carried out by the MMU where the OC decide to initiate a formal investigation based on the findings of the informal inquiry of the MMU, or if the circumstances so warrant, on the petition of the MMU without having carried out an initial inquiry. This is considered an investigation initiated by the OC relating to a Level 3 Concern (below).

4.6 TRAFFIC LIGHT REPORT

When MMU becomes aware of a concern for any particular generating unit it will open a case with a distinct case ID that will be entered into the Traffic Light Report. This Traffic Light Report will contain the following levels:

Table 1: MMU Traffic Light Report

| Level | Concern level | Description |
|-------|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 0 | Low | A simple day to day query on COD, TOD, Availability etc, asking for addition information and explanation for change if any. |
| 1 | Medium | A low to medium concern with a more detailed information request query. |
| 2 | High | Medium to high concern, a highly specific detailed query for information with an urgent need to process as it may have a significant impact on the market. |
| 3 | Investigation | Formal Investigation Process |

The MMU Traffic Light Report will be published on the AIP website on a monthly basis. It will make the market aware of cases that are currently being examined by the MMU. The following information will be contained within the Traffic Light Report:

- The level (0, 1, 2 or 3) that a case is currently at within the Traffic Light Report;
- The generating unit(s) the case relates to; and
- The issue being investigated (e.g. Technical/Commercial Offer Data, availability)

If a party is not currently under the attention of the MMU, it will not be given a rating and will not appear on the Traffic Light Report.

The maintenance of the Traffic Light Report (i.e. initiation, movement and closure of cases) folds in to the launch of inquiries and investigations as laid out in the Process Tree in Section 8.

5 LEVEL 0, LEVEL 1 AND LEVEL 2 – INFORMAL INQUIRY

This section sets out the process that the MMU will usually follow when conducting an informal inquiry into the bidding behaviour of a generator in respect of any or all of its generation units. When a case has been initiated by the MMU, or brought to the attention of the MMU by a third party, the MMU will open a folder within its Enforcement Journal on that case.

In some circumstances it may be reasonable for the MMU to conduct an informal inquiry in a different way to that set out below. In such cases the MMU will develop an alternative process⁸, communicating that process to the generator.

5.1 PURPOSE

The informal inquiry process is designed to do three things:

- Allow the MMU to identify whether an issue of concern should be investigated by itself, another JMU or another body (e.g. the competition authority in either jurisdiction). If the issue should be investigated by another body, the MMU will pass on the relevant information;
- Allow the MMU to clarify whether there is evidence that a generator may have acted in breach of its licence and/or the BCOP, and make a recommendation to the Oversight Committee as to how it should proceed.
- Provide an opportunity for the MMU to consider and clarify day-to-day issues in relation to generator bidding behaviour.

5.2 KEY CHARACTERISTIC

During an informal inquiry, the SEMC's compulsory information gathering powers are not being exercised.

5.3 STARTING THE INFORMAL INQUIRY PROCESS

An informal inquiry may be started by either:

- Information obtained by the MMU through its own market monitoring;
- Information obtained by the MMU via a compliant.

⁸ Giving particular consideration to the need for the generator whose behaviour is being scrutinised to have a fair opportunity to understand and respond to the inquiry.

5.4 INFORMAL INQUIRY PROCESS

The MMU will usually follow the process below in relation to an informal inquiry. Cases that arise through information obtained by the MMU through its own market monitoring will start at step 4.

1. The MMU will review the complaint and decide if it is complete;
2. If it is incomplete, the MMU will contact the complainer and explain what information is missing;
3. If the complainer submits the missing information, the case will move to step 4. If the complainer does not submit the missing information, the MMU will record that an incomplete complaint was received on its Enforcement Journal.
4. The MMU will open a case on its Enforcement Journal. The MMU will consider if the issue for concern is one that it would be appropriate for it to investigate. If it is not, but should be investigated by another body, the MMU will pass the matter to the appropriate body. The complainer will be contacted to explain the referral.
5. The MMU will consider whether there are any grounds to conduct further analysis in relation to the complaint. If there are no grounds to conduct an informal inquiry (e.g. because it is frivolous or does not merit SEM resources), the MMU will close the case. The complainer will be informed where one exists.
6. If there are grounds to conduct further analysis, the MMU will decide what level on the Traffic Light Report the case should be placed.
 - a. If the MMU considers the case should be placed at Level 0, 1 or 2, an informal inquiry will be launched (step 7).
 - b. If the MMU considers that the case should be placed at Level 3 on the Traffic Light Report, the MMU will ask the Oversight Committee permission to launch a formal investigation.
7. The MMU will commence the informal inquiry by contacting the generator(s) concerned. this will set out:
 - a. The issue for concern (although the identity of the complainer will not be revealed);
 - b. The fact that the MMU has started an informal inquiry into that issue;

- c. A request that the generator provide information in relation to its bidding behaviour;
 - d. The particular information the MMU would like;
 - e. The timescale within which the MMU would like to receive that information;
 - f. The name and contact details of the person responsible for management of the informal inquiry within the MMU;
8. The MMU will inform the complainer that it is conducting an informal inquiry.
 9. Where the MMU considers that information held by other persons may be of use it will contact those other persons and request the information, only naming the generator concerned where necessary.
 10. The MMU will consider all the information received and may ask for further information, clarifications or explanations from any generator or person.
 11. Where there are changes to the expected timescale, the MMU will update the generator concerned, any complainer and any other party from which it has requested information where there are changes to the expected timescale. The reasons for these changes will be included.

A generator may offer to provide particular undertakings as to its future behaviour. The MMU will include details of any offer within its report.

Having considered all the relevant information, the MMU will decide whether it considers the party may be in breach of its obligations.

If the MMU does not consider the party is in breach, it will close the case and remove it from the Traffic Light Report. The Oversight Committee will be informed at their next meeting. The complainer will be informed that no breach was found.

If the MMU considers that the party may be in breach, it will either:

- a) Request that the party amend its behaviour. This will not constitute a direction under legislation.
 - o If the party agrees to amend its behaviour, the MMU will close the case and remove it from the Traffic Light Report. The OC will be informed at their next meeting. The complainer will be informed that the party has agreed to amend its behaviour and the case has been closed.

- If the party does not agree to amend its behaviour, the MMU will issue a report to the OC. This report will contain the MMU's findings and ask the OC to pass the case to the SEMC to issue the party with a binding direction under legislation. The OC will review the MMU's report and either:
 - Pass the case to the SEMC to grant the binding direction under legislation. This binding Direction will be made public. The case will be closed and removed from the Traffic Light Report.
 - Decline to pass the case to the SEMC. The case will be closed and removed from the Traffic Light Report. The complainer will be informed that the OC did not consider it necessary to pass the issue to the SEMC.

- b) Issue a report to the OC asking for permission to launch a formal investigation into the generator concerned or another generator. The process to be followed during a formal investigation is described in Section 6.

When closing a case and removing it from the Traffic Light Report, the MMU may, with the permission of the OC publish a short statement of its findings.

At the conclusion of an informal inquiry, a clarification to the BCOP may be published by the SEMC. It may also be appropriate to amend the BCOP, using the procedures described therein.

5.5 REPEAT OFFENDERS

The MMU is aware that under the guidelines set out above, a market participant may be the subject of numerous informal inquiries. (This could be inquiries relating to the same generating station or a number of different generating stations.) Although these generators may agree to amend their behaviour upon the request of the MMU, the volume of informal inquiries carried out may become a particular concern. The MMU may therefore feel it necessary to ask the Oversight Committee for permission to launch a Formal Investigation into that participant's behaviour, using the methodology described in Section 6.

Such a Formal Investigation would re-examine any or all of the previous informal inquiries relating to that participant's behaviour. It may also examine complaints received and recorded on the Enforcement Journal but which when received were not deemed serious enough to warrant inquiry.

The Outcome of this Formal Investigation may include the issuing of Formal Directions, publication of the participant's behaviour and punitive measures.

6 LEVEL 3 – FORMAL INVESTIGATION

This section sets out the process that the MMU will usually follow when conducting formal investigations into the bidding behaviour of a generator in respect of any or all of its generation units. In some circumstances it may be reasonable for the MMU to conduct formal investigations in a different way to that set out below. In such cases the MMU will develop an alternative process⁹ and will communicate that alternative process to the generator.

Following a Formal Investigation, the SEM Committee will be responsible for making the final determination as to whether or a generator is breach of its licence. The SEM Committee may also issue binding directions in order to bring about a change of behaviour.

6.1 PURPOSE

A formal investigation process is designed to provide the SEMC with sufficient evidence to decide whether a generator is breaching its licence or is likely to breach its licence and to give the generator concerned a reasonable opportunity to understand and make representations in relation to such a breach. A formal investigation process is therefore also designed to provide the SEMC with sufficient information to decide on the appropriate action to be taken in response to any actual or likely licence breach.

6.2 KEY CHARACTERISTICS

- During a formal investigation process the RAs' powers to require generators to provide them with information are being exercised.
- Formal investigations will generally require a generator or other person to provide more information in a greater level of detail and explanation than an informal inquiry.
- In certain circumstances the SEMC may decide that the RAs should issue provisional orders or directions requiring a generator to behave or not behave in a particular way pending the outcome of the formal investigation.

6.3 STARTING THE FORMAL INVESTIGATIONS PROCESS

⁹ Giving particular consideration to the need for the generator whose behaviour is being scrutinised to have a fair opportunity to understand and respond to the investigation.

A formal investigation process may be started by either:

- A decision by the OC following an informal inquiry; or
- A decision by the OC where no informal inquiry has taken place.

6.4 POTENTIAL OUTCOMES OF A FORMAL INVESTIGATION

A formal investigation process may result in either:

- A decision by the SEMC that the generator concerned has breached or is likely to breach its licence but that no further action should be taken (for example because the generator concerned has agreed to give particular undertakings as to its future behaviour);
- A decision by the SEMC that the generator concerned has breached or is likely to breach its licence and that further action should be taken (for example a direction or order to secure or enforce compliance with the licence); or
- A decision by the SEMC that the generator concerned has not breached its licence.

In certain circumstances the SEMC may decide that the RAs should issue a **provisional order or direction** to the generator concerned, which would require them to behave or not behave in a particular way pending the outcome of the formal investigation.

Following a Formal Investigation, the SEM Committee may deem it necessary to issue punitive measures against the party concerned. The nature of any punitive measure will be proportional to the severity of the breach of licence, and will be characterised by the jurisdiction within which the party holds a licence.

6.5 THE FORMAL INVESTIGATION PROCESS

Once the OC has given permission for the MMU to launch a formal investigation, the MMU will usually follow the process below in relation to that investigation.

1. The MMU will write to the generator concerned setting out:
 - a. A narration of any informal inquiries undertaken (usually identifying any complainer)
 - b. details of the behaviour of concern, including which licence condition and/or BCOP provision such behaviour may be contrary to
 - c. the fact that such behaviour may constitute a breach of its licence
 - d. the fact that the OC has decided to start a formal investigation into the behaviour of concern

- e. the fact that the RAs have various powers to require the generator concerned to provide them with information, including explicit reference to any particular powers being used in that case and any OC decision to use those powers
- f. the information that the MMU wishes to receive from the generator concerned
- g. the timescale within which the MMU wishes to receive the information
- h. the expected timescale within which the full investigation will take place; and
- i. the name and contact details for the person within the MMU responsible for management of the investigation.

The OC may decide to permit the launch of a formal investigation without the MMU having carried out an initial inquiry. If this occurs, the MMU will notify any complainer to confirm that the OC has given permission to launch a formal investigation.

In all cases when a formal investigation is launched, the MMU will issue a short statement to the market of the fact an investigation has been launched. The MMU will invite representations from the generator concerned and any other named persons on the content of this statement.

The MMU will then follow steps 7 – 11 of the informal inquiry process, identifying the generator concerned and any complainer in correspondence with other parties where it is necessary to do so.

As with the informal inquiry process, the generator concerned or any other party may voluntarily submit information or offer undertakings to the MMU. Such information and offers will be described in the report prepared by the MMU under step 2 below.

2. The MMU will prepare a draft report for the OC narrating all the details of the formal investigation and enclosing any evidence gathered during that investigation. The OC will consider that report and make an initial determination whether the matter should be passed to the SEM Committee.
3. If the OC determines that the matter does not warrant referral to the SEMC, the case is closed and removed from the Traffic Light Report
4. If the OC considers that the matter does warrant referral to the SEMC, the case will then become a SEMC issue. The MMU's report is sent to the party concerned for response. The party will be given 20 working days to make representation to the SEMC.
5. The SEMC considers the representation made by the party and arrives at a final determination. If the SEMC's final determination is that the party is not in breach, the case is closed and removed from the Traffic Light Report

6. If the final determination is that the party is in breach, the SEMC will either:
 - a. Request the party to amend its behaviour
 - b. Issue the party a binding direction under legislation.

Following completion of the formal investigation, the OC will publish findings in the relevant form. The case will be removed from the Traffic Light Report.

In support of its functions, the SEMC may decide to take various different forms of further action, including directions under the generation licences or enforcement notices, orders or directions under the governing statutes. Its actions are likely to be directed specifically at the generator concerned and be designed to secure its compliance with its licence and/or the BCOP. These actions may also be directed to the industry as a whole and designed to provide future clarity as to the SEMC's view of the obligations contained within any particular licence and/or BCOP provision.

At the conclusion of a formal investigation, a clarification to the BCOP may be published by the SEMC. It may also be appropriate to amend the BCOP, using the procedures described therein.

7 ADMINISTRATIVE MEASURES DURING AN INQUIRY/INVESTIGATION

7.1 ENFORCEMENT JOURNAL

The MMU keeps an enforcement journal as a record of all cases. This enforcement journal contains all the relevant information relating to the inquiry/investigation. All cases should be entered into the enforcement journal, with a unique Case-ID¹⁰, whether they are informal inquiries (Level 0, Level 1, Level 2) or formal investigations (Level 3). For each case, the Enforcement Journal should:

- List all potential and actual evidence, both supportive and contrary;
- Show where each piece of evidence originated. Following detailed responses to information requests it is good practice to include a reference for ease of retrieval;

The Enforcement Journal should contain enough evidence to avoid being dependent on memory. There is a possibility that the analysis may have to be justified at a later date. Information should also be sufficient in case the case is handed over during periods of leave and for further references by others internally/externally.

7.2 DOCUMENT MANAGEMENT

The case file within the enforcement journal should record:

- All correspondence
- All advice sought e.g. internal or external legal, consultants etc.
- All information sought e.g. from market operator/system operator
- All decisions – dates taken, by whom and details of decided matter;
- Internal Notes from meetings/telephone calls;
- Agreed minutes of meetings (if any).

If the MMU decides not to pursue a line of enquiry, or a particular company, it should be documented. If another person takes over the file it should be clear how the Investigation Team arrived at their decision. It should not be assumed that this is obvious to the reader.

Content should be considered carefully – it is important to remember that the file may be reviewed by third parties. Statements that are biased or lack impartiality should not be

¹⁰ The Case-ID should be in the format YYYY-MM_CASENUMBER. CASENUMBER will begin at 1 at the start of the month.

made. Neither should personal comments. All e-mails should be kept professional and carefully checked before being sent.

Contact Log – within the Enforcement Journal, the MMU should create a Contact Log, which should include the regulation contact of the company being investigated. This person will be the point of contact for all communications during enquiries/investigations. Companies will be expected to keep their contacts with the MMU up to date.

7.3 INFORMATION GATHERING

Information requests can be sent to individuals, complainants, other organisations (e.g. System Operators, Market Operators), competitors and the company under investigation. It should be made clear when making a request what evidence is required from whom, and when it is required. If information is requested pursuant to a licence condition, the appropriate authority to issue a request on this basis should be sought and the fact information is sought under a licence condition should be clearly stated on the request.

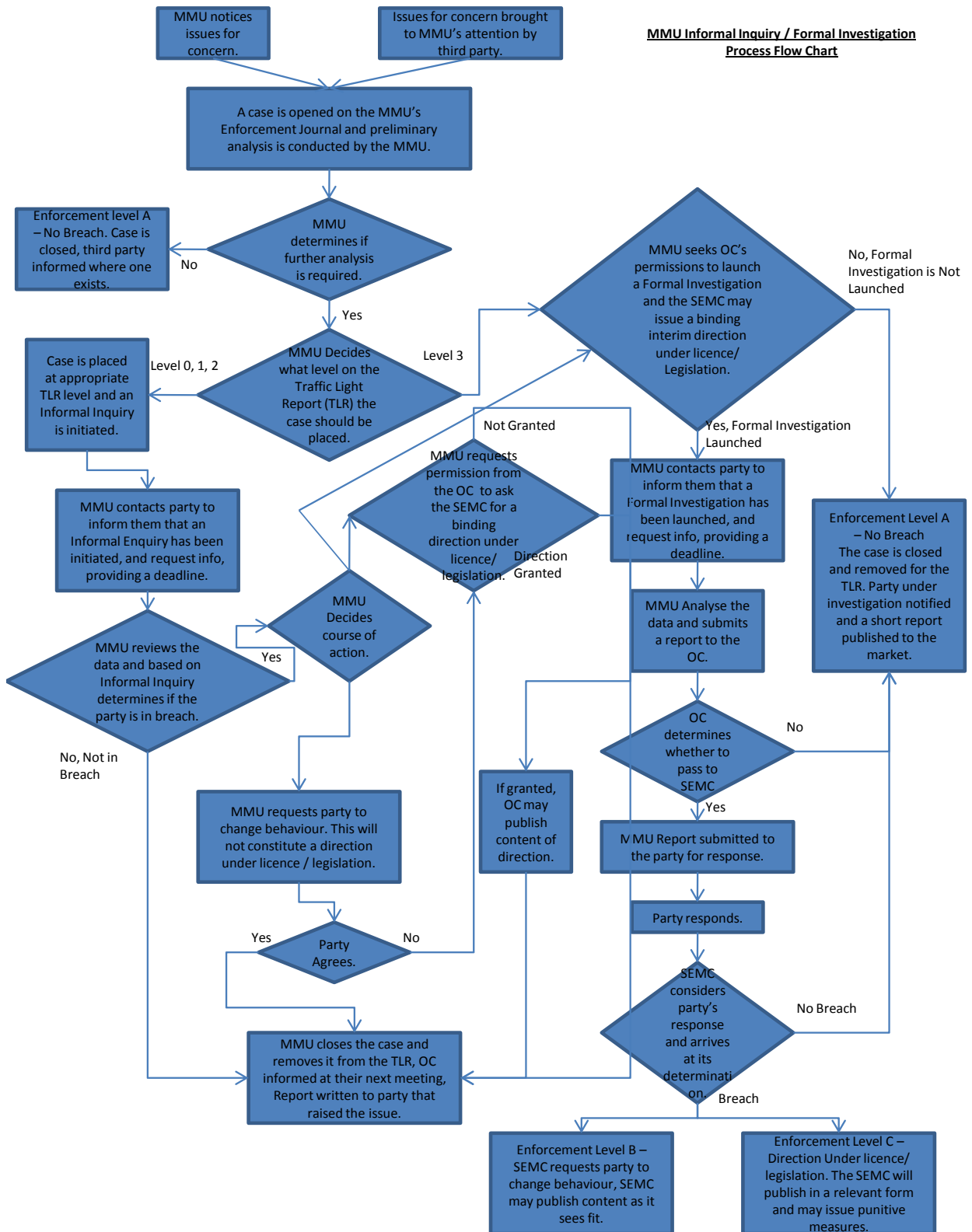
When requesting information, the MMU must:

- Provide a clear explanation of the reason why that party is being consulted
- Pose clear and concise questions to obtain information on market definition, competitors, barriers to entry etc.
- Set a date for response (and follow up if necessary)
- Keep a full and accurate record of all relevant correspondence and communications (including file notes and telephone conversations)

If a party responds to an information request via the telephone, the MMU should:

- Attempt to avoid detailed discussions;
- Encourage the party to respond in writing;
- Make a note of all telephone conversations.

8 PROCESS FLOW CHART



ANNEX 1: SAMPLE TRAFFIC LIGHT REPORT

| Level of Concern | Case ID | Generating Unit(s) | Area of Concern | Period |
|------------------|---------|------------------------|---------------------------------|---------------------|
| 3 | | Curtisian Unit - 1 & 2 | Commercial Offer Data – No Load | Jan 2010 to present |
| 2 | | Morrisstephen – CCGT 2 | COD – P/Q Pairs | Nov 2010 to present |
| 1 | | Peterhook Unit - 3 & 4 | TOD | Mar 2010 – Dec 2010 |
| | | Sumner - Unit 1 | TOD | Nov 2010 to present |
| 0 | | Oryfact – Unit 1 | COD – Start-up Costs | Nov 2010 to present |