

Appendix 1- PM Memorandum dated 25 March 2014





SEMO Trading & Settlement Code

Introduction

We have carried out a follow-up review of the charging and trust provisions in the Trading & Settlement Code ("**Code**") in response to the feedback received from Participants on the proposed supplemental and standalone charge. It is suggested in some of the feedback provided that such a charge is unnecessary and that the existing Code provisions provide sufficient security on their own over the amounts deposited in the Collateral Reserve Accounts ("**Accounts**").

We agree that the existing Code provisions do endeavour to provide security over the Accounts to the Market Operator ("**MO**"), the nature of which is discussed below. In our view, however, and following a review of the relevant caselaw and most recent legislative changes, the existence of that security interest, which is evidenced by the security language employed in the charging and trust provision, gives rise to a registerable security interest. In order to register this interest, a supplemental and standalone charge document is required because the Code itself is not capable of registration. It therefore remains our view that a supplemental and standalone charge is necessary and that this is the safest option for both the MO and the Participants in the Single Electricity Market ("**SEM**").

We discussed our reasoning for this conclusion at the recent Mods Committee Working Group meeting and this is now further summarised in this note.

Code Wording

The provisions in sections 6.30 to 6.37 in the Code ("**Provisions**") outline the scenarios under which a constructive trust will arise over the monies which are deposited by the Participants and held by the MO in the Accounts. Under these arrangements:-

- the MO is the trustee;
- the Participants, SEM Creditors and MO (according to their several and very separate interests) are the beneficiaries (or, more accurately, potential beneficiaries) of the trust, as and when the circumstances outlined in the Provisions arise; and
- the trust property is the equitable and/or contingent interest arising in the credit balances held in the Accounts (with the legal title vested in the MO).

Under the Code, the MO is obliged to make payments in certain circumstances for and on behalf of the Participants in satisfaction of their obligations under the Code. These payments are administered from the monies held in the Accounts.

Security Interest

In essence, the Provisions create a deposit arrangement in which a pool of money is held as collateral to ensure the payment of Participant's obligation arising under the Code and thus the Provisions aim to protect against the potential impact of Participant liquidation. To give effect to that intention, the arrangements between the parties under the Provisions, including the rights of appropriation and application which are vested in the MO, are clearly intended to give rise to a security interest over the equitable interest in the credit balances held in the Accounts. To put it another way, the arrangement envisaged is one of set-off and deduction from a credit balance which, however one may analyse it, constitutes a security right.

This conclusion is supported by the case of *Smith (as Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001]¹, a decision noted in the earlier advice issued in conjunction with McCann Fitzgerald. In that case, the House of Lords held that a creditor's contractual right to sell debtor assets, appropriate the proceeds of sale and apply them in satisfaction of payment obligations, amounted to a charge which was void as against the liquidator for lack of registration.

Is the trust created sufficient?

The Provisions create a trust over the credit balances in the accounts which will arise in the circumstances set out in the Code. The potential beneficiaries of the trust are the Participants, SEM Creditors and MO. As the trust arises on the operation of certain events it can be characterised as a constructive trust arising in the circumstances outlined in the Code

Regardless of the exact nature of the trust, it is evident that a security interest in favour of the MO is encompassed within those arrangements over the Participants' beneficial interest in the Accounts so that the MO is empowered to make payments on behalf of the Participants under the Code, and subject to that to hold the monies on trust for the benefit of the Participants themselves. The primary question is the extent to which that arrangement would survive a challenge by a liquidator of a Participant seeking to access the monies held on account subject to this regime.

The case of *Re Kayford (in liquidation)* [1975]² was cited as evidence that the trust arrangements under the Code would be robust enough to withstand the appointment of an administrator or liquidator. In that case a company placed money received from mail order customers into a special trust account from which it only made withdrawals when goods were delivered to customers. When the company went into liquidation it was held that the money in the account belonged to the customers whose orders had not been fulfilled and so was not available to the liquidator.

It is our view that this case is distinguishable from the circumstances arising under the Code for a number of reasons. Firstly, the monies transferred by customers to the company constituted consideration for goods which were subsequently not delivered. By comparison, the Participants are placing monies into the Accounts to provide the MO with collateral to secure their payment obligations. Secondly, it was the company which became insolvent in *Kayford* rather than the customers which, in this context, would be analogous to the MO becoming insolvent rather than the Participants. Thirdly, Mr. Justice Megarry made it clear that his decision was heavily influenced by the fact that members of the public were owed these monies stating that 'different considerations may perhaps arise in relation to trade creditors'; it is unlikely that any court would ever feel the same policy objective and indeed sympathy for the MO of the SEM in the event of Participant insolvency. Finally, *Re Kayford* was not followed in the case of [].

We, therefore, on balance feel that the Code does (as was intended) create a security interest.

Intention behind the Code

We believe that s.6.20(3) supports the interpretation of the Provisions being a security interest over the Participants' interest in the Accounts in so far as it states that:

"the relevant Participant thereby charges all sums paid into and accruing on that account by way of first fixed charge over cash at the SEM Bank in favour of the Market Operator as agent and trustee for it and the SEM Creditors to secure the relevant Participant's payment obligations under the code, subject always to the...[P]rovisions"

¹ UKHL 58, [2001] 3 WLR 1347

² [1975] 1 All ER 604

Paragraph 6.21 goes further in that it places an obligation on each the Participants in respect of such security interest stating that:

"to ensure the enforceability of the charge created...the Participant...shall complete and sign the particulars of charge in respect of such SEM Collateral Reserve Account and SEM Collateral Reserve Assets for registration of the charge with the relevant companies registry or other appropriate body...and the Participant shall do all such things and execute all such documents as necessary to facilitate such registrations"

It was clearly the intention of the drafters of the Code to create a security interest in respect of the Accounts coupled then with an obligation on the MO to administer payments on behalf of Participants in the circumstances as set out in the Provisions.

Floating vs. Fixed Charge

In terms of analysis, the nature of the security interest created must constitute either a fixed or floating charge. It is our view following a review of the caselaw and an analysis of the provisions themselves that this security interest would be characterised as floating for the following reasons.

The factors to consider in making this determination were outlined in *National Westminster Bank plc v Spectrum Plus Limited and others* [2005].³ In this case, the House of Lords held that determining whether a charge over book debts takes effect as a floating rather than fixed charge will depend on the degree of control that the chargor has in respect of the secured assets. In *Spectrum Plus* the analysis of the security arrangements and the degree of 'control' of the parties was relatively straightforward based on the facts of that case. There is limited guidance, however, on how more complex arrangements may be interpreted by the Courts. In practice, whether the control requirement will be satisfied will depend entirely on the facts of each case and the degree of control that the chargor can exercise over the assets.

When considering the critical analysis carried out in *Spectrum Plus* in light of the Code provisions, it is clear that the MO has a hybrid role in respect of the Accounts. On the one hand, the Accounts are in the sole name of the MO who has sole control over them (s. 6.20.2) but, as against this, whilst the Participants have given a general 'no withdrawals' undertaking in s 6.34, they are also given the right in s.6.35 to deal with the monies in the Accounts, provided that certain conditions are satisfied.

In addition, the drafting provides that if the Participant is not in default:

- the MO must transfer quarterly interest to the Participant unless they request otherwise;
- upon the request of the Participant, the MO must transfer any excess credit cover in the Accounts to the Participant;
- the Participant can change the composition of its Posted Credit Cover for, by example, substituting cash collateral with a Letter of Credit; and
- upon the request of the Participant, the MO must transfer from the Accounts an amount specified by the Participant in order to make payment against an outstanding invoice.

It is therefore clear that the Participant has some degree of control over the assets, albeit limited to specific circumstances and subject to the satisfaction of certain conditions. In that context it is a more accurate assessment to characterise the security interest over the Participant's beneficial interest in the Accounts as a floating rather than fixed security.

Exemption from Registration?

Following on from our view that the security interest created by the Provisions would probably be characterised as a floating charge, the next consideration is whether that charge falls within the remit of the Financial Collateral Arrangements (No.2) Regulations 2003 (SI 2003/3226) (the '**Regulations**').

³ UKHL 41

The Regulations remove the requirement for registration of security interests which arise within the context of a 'security financial collateral arrangement'. Such arrangements can include floating charges.

In *Gray and others v G-T-P Group Limited: Re F2G Realisations Limited (in liquidation)* [2010]⁴ the court was asked to consider whether a floating charge fell within the scope of the Regulations. In this case, the charge arose in the context of a trust over a bank account - with obvious parallels to the Code provisions. The court was asked to consider the concept of 'control' as this term is not defined in either the Regulations or indeed the European Directive which they seek to implement.

In *Gray* the meaning of 'control' was construed very narrowly so that a high degree of 'legal control' was required for a floating charge to qualify as a 'security financial collateral arrangement' for the purposes of the Regulations. It was held that mere administrative or practical control over collateral will not be sufficient to establish the necessary 'control' for a charge to fall within the remit of the Regulations and therefore be exempt from the requirement for registration. Furthermore, the collateral-taker must be able to prevent the collateral-provider from dealing with the collateral - there must be a form of 'dispossession', namely the legal right of control over the secured assets must be removed from the collateral-provider. It follows that a right of the collateral-provider to, for example, withdraw collateral is inconsistent with this requirement. This would support the conclusion that the Provisions would not be characterised as a floating charge falling within the scope of the Regulations and thus exempt from registration.

Subsequently, the changes introduced by the amended Regulations in 2010 clarified the definition of possession to include the rights of the collateral-provider to substitute financial collateral of the same value or to withdraw excess collateral and this matches the withdrawals and substitution rights of the Participants under s.6.35 of the Code as outlined above. Whilst this might support a conclusion that the Provisions could fall within the remit of the Regulations there continues to be a degree of ambiguity and very little judicial authority on the point. Due to this level of uncertainty, in general the practice remains that the registration requirements under the Companies Act 2006 are still complied with in respect of security arrangements which potentially may fall within the remit of the Regulations. Furthermore, as a result of the new UK registration regime which came into force on 6 April 2013, effectively introducing a voluntary registration regime under which any charge created by a company 'may' be registered under the Companies Act, it is regarded as prudent practice to register any charge, regardless of whether such charge qualifies as a floating charge which may potentially be exempted from registration under the Financial Collateral Regulations.

Agency Relationship

The Provisions can also be interpreted as a contractual arrangement between the parties which appoints the MO as the agent of the Participants empowered to administer the Accounts on their behalf, by making deductions, etc. and holding the surplus balances on trust for the Participants. Again, however, such an arrangement creates a security interest in favour of the MO over the credit balances in the Accounts and, as it stands, we are of the view that (a) this is still a security interest and (b) it would not survive Participant insolvency because the right of the MO to act as agent of the Participant would be superseded by the appointment of a liquidator or administrator over a Participant.

This view is supported by the decision in *Sowman v D Samuel Trust Limited* [1978]⁵, in which it was held that the rights of a receiver of a company (as a deemed agent of the company) was subject to termination (in the event of liquidation) although on the particular facts 'a winding up or liquidation of a company will put an end to the agency, [did] not put an end to the powers of a receiver'. On the facts the 'attorneyship' survived because it had been given by way of security and was irrevocable.

Therefore, for the Code provisions as interpreted in this manner to be effective in the event of Participant insolvency, a Power of Attorney 'by way of security' (per s.3 Powers of Attorney (Northern

⁴ EWHC 1772 (Ch)

⁵ 1 WLR 22

Ireland) Act 1971) would need to be given by the Participants in favour of the MO over their interest in the Accounts. This would give the MO the right to fully deal with and administer the Accounts as the attorney of the Participants and, if expressed as such, the attorneyship in those circumstances would be irrevocable even on the appointment of an administrator or liquidator.

However, we still take the view that even if technically enforceable in the case of insolvency the arrangement is fundamentally constituted as a security interest and therefore we once again caution that, on a challenge by an administrator or liquidator, the security interest that arises may be held by a court overall to be one that ought to have been registered, and is therefore void as against a liquidator for lack of registration.

Equitable Right of Set-Off?

In furtherance of that point, it should be noted that it was suggested in *Smith*, above, that even though the charge over the debtor's assets was void for lack of registration, that the contractual obligations between the parties gave rise to an equitable right of set-off between the parties, which allowed the creditor to set-off payments owed by the debtor on foot of the agreed terms between the parties.

The Court disagreed with this analysis stating that if permitted this would simply allow the exercise of rights which should have been registered as a charge and dismissed this argument as an indirect attempt to avoid the consequences of non-registration. It is exactly that analysis that raises our concerns.

Our Recommendation

Having looked at all of this (as summarised) and for the reasons outlined, we would advise that we feel it is prudent to analyse the Code provisions on the basis that:

- (a) they create a security interest over the Participants' contingent and beneficial interest in the Accounts;
- (b) this security interest is best characterised as a floating charge which is not exempt from the requirement to be registered; and
- (c) in order to carry out the registration of such security interest a supplemental and standalone charge document is required.

In our view, this interpretation of the Provisions also reflects the intention of the drafters, as is palpable from the language used in the Code, particularly the provisions at 6.20(3) and 6.21 as noted above.

In summary, we are anxious to ensure that the MO will not be faced with a scenario in which it is unable to enforce the security interests which arise under the Provisions in respect of the Participants' interest in the Accounts, leaving it potentially unable to carry out its obligations under the Code to make payments from those Accounts. Such an outcome would not be in the best interests of either the Participants or the MO and it would be detrimental to the operation of the SEM. In our view the contention that the existing trust arrangements (whether categorised as a trust or an agency arrangement) are, per se, sufficient to adequately secure the funds in the Accounts in the event of Participant liquidation is not sustainable and is not supported by the relevant caselaw. Therefore, for the reasons set out in this note, and in particular the certainty it will provide to the MO, we advise that a standalone charge is put in place by all existing and new Participants and registered thereafter at the relevant Companies Registry.



Appendix 2- PM memorandum dated 2 April 2014



SEMO Trading & Settlement Code
Modifications Committee Working Group

Introduction

By way of background, we refer to our previous note issued to the Modifications Committee Working Group on the 25th March, which is to be read in conjunction with this note. Unless otherwise defined herein, terms defined in our previous note shall have the same meaning in this note.

We have now carried out a review of the further analysis and feedback provided by Viridian in relation to the proposed supplemental and standalone charge and circulated by email to the Modifications Committee Working Group on the 25th March.

On the basis that we were instructed to carry out a high-level review only of the new analysis submitted by Viridian, this note does not seek to provide a detailed response to such analysis. However, we have endeavoured to address the main substantial issues arising from it.

The main contention of Viridian's new analysis is that a supplemental stand-alone charge is unnecessary for the purposes of adequately securing the funds deposited in the Collateral Reserve Accounts and that the same objective could be achieved by (i) removing the existing charging provisions set out in section 6.20.3 and (ii) amending the existing trust language in section 6.20.3 and other relevant sections under the Code in order to create a trust arrangement analogous to a so-called Quistclose trust (in respect of which, please see paragraph *Quistclose trusts* below).

We disagree with that analysis as, on the basis of existing case law, a trust arrangement (regardless of its exact nature and whether it could be characterised as a Quistclose trust, an express trust or a resulting trust) is open to challenge by a liquidator of a Participant and for that reason offers at best questionable protection to the Participants and the Market Operator in the event of a Participant insolvency for the reasons outlined in this note.

It remains therefore our view that a supplemental stand-alone fixed charge to be granted by the Participants over their beneficial interest in the Collateral Reserve Accounts would constitute the safest and most robust security in respect of the amounts deposited in the Collateral Reserve Accounts.

Quistclose trusts

A Quistclose trust is a form of trust that may arise when monies are transferred for an exclusive and specific purpose. As noted in Viridian's analysis, the funds transferred from a transferor to the recipient remain the property of the transferor unless the recipient applies them for the specified purpose. If the recipient applies the funds for the specified purpose, the Quistclose trust ends at that point in time. It follows that in the event of the insolvency of the recipient prior to the application of the monies for the specified purpose, those funds will not be part of the insolvency assets of the recipient.

Applying the Quistclose trust principles outlined above to the Code scenario, each Participant would be a transferor of the funds deposited in the Collateral Reserve Accounts and the Market Operator would be the recipient of such funds for the purposes specified in the Code.

It is therefore Viridian's contention that in the event of the insolvency of the recipient (i.e. the Market Operator), the monies deposited in the Collateral Reserve Accounts would not be part of the Market Operator's insolvency assets. Whilst we agree to an extent with this conclusion, we must stress how the fundamental test for the proposed Quistclose trust arrangement (as an alternative to a supplemental stand-alone charge as robust security for the Collateral Reserve Accounts) should be not against the insolvency of the Market Operator but rather against the insolvency of the Participant.

The caselaw quoted by Viridian in support of their analysis (amongst others, *Barclays Bank v Quistclose Investments Ltd* [1968] UKHL 4, *Twinsectra Ltd v Yardley and others* [2002] UKHL 12) relates exclusively to the insolvency of the recipient (i.e. the Market Operator) and not to the insolvency of the transferor (i.e. the Participant).

Furthermore, whilst the principles of a Quistclose trust set out in Viridian's analysis might apply to the insolvency of the recipient (i.e. the Market Operator) in a so-called "classic" Quistclose trust (namely in the context of a loan transaction), the extent to which a Quistclose trust can apply to arrangements other than loans (as, for example, the arrangement under the Code) is not certain and has been the subject of wide debate amongst commentators.

In fact, there is consensus amongst the commentators that a Quistclose trust analysis may not apply where an alternative interpretation reflects more accurately the commercial effect of the underlying transaction, particularly if the arrangement considered is not a loan transaction.

Crucially, there is a strong argument, supported by the decision in *Obaray (in liquidation) v Gateway (London) Limited* [2000] and a decision to the same effect in *Compaq Computer Ltd v Abercorn Group Ltd & Others* [1991] (as well as the decision in *Smith (as Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] referred to in our previous note) that a trust arrangement of the type proposed by Viridian could be interpreted as tantamount to effectively an equitable charge (regardless of whether such arrangement can be categorised as a trust and regardless of the exact nature of such trust). Such equitable charge should be registered in order not to be void against an administrator or liquidator for lack of registration. (In this respect, we refer you to the security analysis set out in our previous note).

Floating vs. Fixed Charge

It is suggested in Viridian's new analysis that we are now recommending that a supplemental floating charge is put in place by the Participants rather than a fixed charge. This is not correct and we still maintain –as per our previous advice – that the supplemental charge should be drafted as a fixed charge over the beneficial interest of the Participants in the Collateral Reserve Accounts.

For clarity, as illustrated in our previous note, it is our view following a review of the caselaw and an analysis of the Code provisions that the security interest created by the existing trust provisions in the Code itself would most likely be characterised as floating rather than fixed security for the reasons set out in our previous advice (please refer to the paragraph *Floating vs Fixed Charge* of our previous note). That security analysis applies also to the Quistclose trust arrangement proposed by Viridian.

However, we would recommend that a supplemental fixed charge is granted by the Participants over their beneficial interest in the Collateral Reserve Accounts in order to "cure" the ranking and priority of the security interest created by the trust provisions under the Code and ultimately to strengthen the position of the Market Operator as secured creditor in the event of a Participant insolvency.

Conclusion

In our view, Viridian's contention that a Quistclose trust arrangement would be sufficient to adequately secure the funds in the Collateral Reserve Accounts in the event of Participant insolvency is not sustainable and is not supported by the relevant caselaw.

In our view and on the basis of existing caselaw, the risk remains that a court would construe the Quistclose trust arrangement proposed by Viridian as fundamentally constituting a security interest over the Participant's beneficial interest in the Collateral Reserve Accounts which, on a challenge by an administrator or liquidator, would most likely be held by a court to be a security interest that ought

to have been registered, and is therefore void as against an administrator or liquidator for lack of registration.

Therefore, for the reasons set out in both our previous note and this note, and in particular the certainty it will provide to the Participants and the Market Operator in an enforcement scenario, we remain of the view that a supplemental stand-alone fixed charge should be granted by each Participant and registered at the relevant Companies Registry in order to adequately secure the monies deposited in the Collateral Reserve Accounts.




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



**SEMO MODIFICATIONS
COMMITTEE WORKING
GROUP**

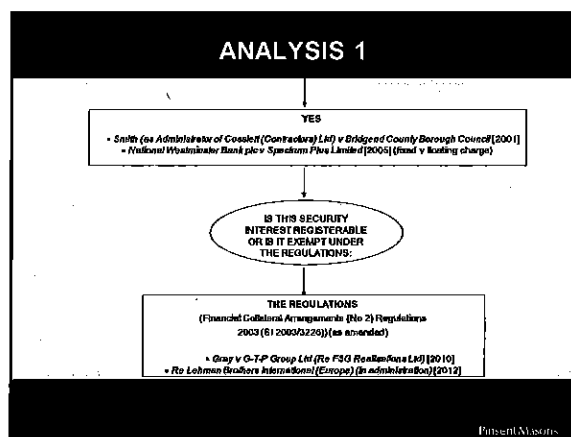
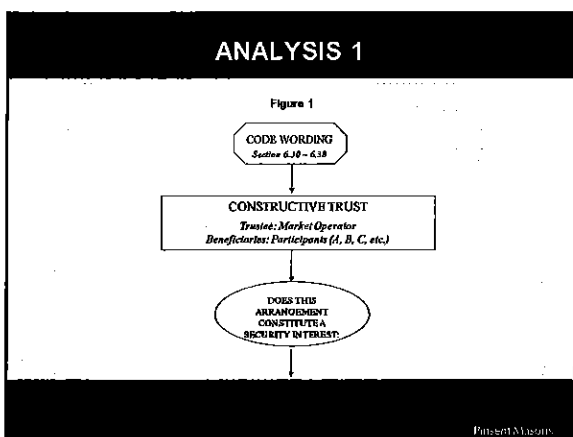
**Mod 02 13
Registration of Charge v2
13th March 2014**


Pinsent Masons

**Trust Provisions under the Trading & Settlement
Code**

- Sections 6.30 – 6.38 of the Code
- Trust Language - slightly misleading
- Two interpretations: Analysis 1 & 2

Pinsent Masons



ANALYSIS 1

CHARGE IS REQUIRED AND IT
NEEDS TO BE REGISTERED

Presentations

ANALYSIS 1

CONSTRUCTIVE TRUST

- over the monies deposited in the Collateral Reserve Accounts

SECURITY INTEREST

- Deposit Account Scenario
- Rights of Market Operator

Presentations

ANALYSIS 1

CONSTRUCTIVE TRUST:

- Trustee = Market Operator ('MO')
- (Potential) Beneficiaries =
 - >>Participants
 - >>SEM Creditors
 - >>Market Operator

Presentations

ANALYSIS 1

CONSTRUCTIVE TRUST:

- Why constructive?
- Trusts arise in circumstances as set out in the Code (per s.6.30).
- No clearly identifiable trust fund *prior* to the occurrence of certain events which are set out in s.6.32.

Presentations

ANALYSIS 1

- Trust Property = contingent interest arising in the Collateral Reserve Accounts
- Legal Title is vested in the MO
- The Participants can give a charge over their *equitable* interest in the Collateral Reserve Accounts

Pascual Marone

ANALYSIS 1

SECURITY INTEREST:

- Arrangements between the parties
- MO rights of set-off and deduction
- MO appropriation & application rights give rise to security interest over the Participants' interest in the credit balances

Pascual Marone

ANALYSIS 1

Smith (as Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council [2001]

- Bridgend Council advanced £1.8m to Cosslett Ltd to purchase plants and machinery for producing coal. Repayment to the Council was from sums Cosslett would otherwise have been paid for the coal production;
- Contract stated the Council could complete the contract if Cosslett abandoned it and condition 63 gave Council the right to *enter the plant, sell it and the machinery, and apply the proceeds of sale to satisfy the sums owed on foot of the contract.*
- Cosslett went into administration and abandoned the contract. The Council appointed another company to complete the works and sold the plant and machinery
- Administrator sued the Council for damages for conversion of the plant and machinery (as the Council could no longer deliver up same)
- Argued that Condition 63 amounted to an unregistered floating charge which was therefore void for lack of registration.

Pascual Marone

ANALYSIS 1

SMITH:

- Court held that a creditor's contractual right to sell debtor assets and appropriate the proceeds of sale and apply them in satisfaction of payment obligations, amounted to a charge which was void for lack of registration.

This supports the analysis that:

- a security interest arises under the Code provisions; and
- it needs to be registered or it will be void against an administrator / liquidator

Pascual Marone

ANALYSIS 1

Intention to create a security interest:

- s.6.20.3: *"the relevant Participant thereby charges all sums paid into and accruing on that account by way of first fixed charge over cash at the SEM Bank in favour of the Market Operator as agent and trustee for it and the SEM Creditors to secure the relevant Participant's payment obligations under the code, subject always to the provisions of paragraphs 6.32 to 6.36 inclusive"*

Presentations

ANALYSIS 1

Intention to create a security interest:

- s.6.21 *"to ensure the enforceability of the charge created...the Participant...shall complete and sign the particulars of charge in respect of such SEM Collateral Reserve Account and SEM Collateral Reserve Assets for registration of the charge with the relevant companies registry or other appropriate body...and the Participant shall do all such things and execute all such documents as necessary to facilitate such registrations"*

Presentations

ANALYSIS 1

Does the security interest created by s.6.30-6.38 constitute a Floating vs. Fixed Charge?

- *National Westminster Bank plc v Spectrum Plus Limited and others* [2005]
- House of Lords held that determining whether a charge over book debts takes effect as a floating rather than fixed charge will mainly depend on the degree of control that the chargor has in respect of the secured assets.

Presentations

ANALYSIS 1

Applying *Spectrum Plus*:

Market Operator has a hybrid role

- Collateral Reserve Accounts in sole name of MO

BUT

- MO does not have absolute title; and
- Participants have right to deal with monies in the Collateral Reserve Accounts, provided that certain conditions are satisfied (6.35).

Presentations

ANALYSIS 1

Applying *Spectrum Plus*:

Rights of participants per 6.35

Provided that the participant is not in default:

- the MO must transfer quarterly interest to the Participant unless they request otherwise
- if the Participant so requires, the MO must transfer any excess credit cover in the Collateral Reserve Accounts to the Participant

Fin-ent/Macros

ANALYSIS 1

Applying *Spectrum Plus*:

Rights of participants per 6.35 (continued)

Provided that the participant is not in default:

- the Participant can change the composition of its Posted Credit Cover by, for example, substituting cash collateral with a Letter of Credit;
- upon request of the Participant, the MO must transfer from the Accounts an amount specified by the Participant in order to make payment against an outstanding invoice.

Fin-ent/Macros

ANALYSIS 1

Applying *Spectrum Plus*:

- Participant has a degree of control
- Therefore, per *Spectrum Plus*, the charge over the Participant's beneficial interest in the Accounts =

FLOATING not fixed.

Fin-ent/Macros

ANALYSIS 1

Is this floating charge exempt from registration?

Consider:

- Financial Collateral Arrangements (No.2) Regulations 2003 (SI 2003/3226) (the 'Regs').
- Does the security = a 'security financial collateral arrangement'?
- If yes = exemption from requirement to register with Companies House

Fin-ent/Macros

ANALYSIS 1

Is this floating charge exempt from registration?

Consider:

- *Gray and others v G-T-P Group Limited: Re F2G Realisations Limited (in liquidation)* [2010]
- Charge arose in the context of a trust over a bank account.
- For Regs to apply collateral must be 'in the possession or under the control' of the collateral-taker
- Meaning of 'in the possession or under the control' not defined in the Regs or the European Directive implemented by the Regs

Pinet & Masons

ANALYSIS 1

GRAY:

Court considered meaning of 'control':

- concept of 'control' construed very narrowly
- high degree of 'legal control' required for a floating charge to qualify as a 'security financial collateral arrangement'
- administrative or practical control over collateral will not be sufficient

Pinet & Masons

ANALYSIS 1

GRAY:

Court considered meaning of 'control' (continued):

- can the collateral-taker prevent the collateral-provider from dealing with the collateral? 'dispossession'
- legal right to the secured assets must be removed from the collateral-provider - right of a collateral-provider to, for example, withdraw collateral is inconsistent with this requirement

Pinet & Masons

ANALYSIS 1

Is the floating charge exempt from registration?

No, in our view the charge created by the trust arrangements under the Code does not fall within the scope of the Regulations (and thus would not be exempted from the registration requirement)

Pinet & Masons

ANALYSIS 1

Amended Regulations, 2010:

- 'possession' can include rights of the collateral-provider to substitute financial collateral of the same value or to withdraw excess collateral
- BUT no clarification in relation to definition of 'control'

Presentations

ANALYSIS 1

- Still much ambiguity in respect of ambit of Financial Collateral Regulations
- Financial Markets Law Committee recommended further clarifications on the meaning of 'possession' and 'control' (Jan 2013)
- Little judicial authority
- new UK registration regime (6 April 2013) introduced voluntary registration - any charge created by a company 'may' be registered
- Therefore, prudent practice to register ANY charge, even if it may on the face of it fall within the scope of the Regs

Presentations

ANALYSIS 1

- Charge created by the trust arrangements under the Code must be registered to avoid the security interest being void against an administrator or liquidator
- A supplemental and standalone charge document reflecting the security interests created by the trust arrangements is required for registration purposes

Presentations

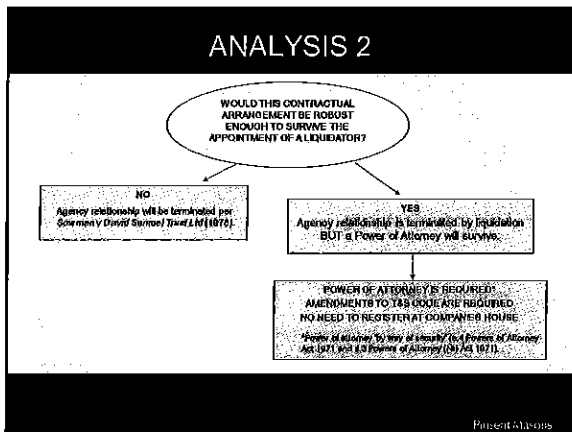
ANALYSIS 2

Figure 2

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graph TD
    A[CODE WORDING  
Section 630 - 634] --> B[CONSTRUCTIVE TRUST:  
AGENCY RELATIONSHIP  
(in accordance with the contractual obligations  
between the parties)]
    
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Presentations



ANALYSIS 2

S.6.30-6.38 of the Code

Contractual arrangement results in an AGENCY RELATIONSHIP:

- MO is the agent of the Participants
- clear contractual agreement between the parties empower MO to administer the Accounts, make deductions, etc.

Presentations

ANALYSIS 2

S.6.30-6.38 of the Code

- Contractual matrix constitutes an arrangement under which the MO can enforce its rights
- Would this contractual arrangement survive the insolvency of a Participant?

Presentations

ANALYSIS 2

- Participant liquidation / administration?
- Contractual arrangements will not be sufficiently robust
- *Sowman v D Samuel Trust Limited* [1978]

Presentations

ANALYSIS 2

Sowman:

- Following the winding up of a company, a receiver of a company (as deemed agent of the company) was subject to termination (in the event of liquidation)
- on the facts, the 'attorneyship' survived as given 'by way of security' and it was irrevocable
- *'a winding up or liquidation of a company will put an end to the agency, it will not put an end in any way to the powers of a receiver'*

Presentations

ANALYSIS 2

Power of Attorney 'by way of security' (s.3 Powers of Attorney (Northern Ireland) Act 1971)

- given by a Participant in favour of the MO in respect of its interest in the Collateral Reserve Accounts
- gives the MO the right to fully deal with and administer the Collateral Reserve Accounts as the attorney of the Participants in accordance with the trust arrangements under the Code
- In the circumstances such attorneyship by way of security would be irrevocable on the appointment of an administrator or liquidator

Presentations

EQUITABLE RIGHT OF SET-OFF?

- It was suggested in *Smith*, above, that even though the charge over the debtor's assets was void for lack of registration, surely the contractual obligations between the parties gave rise to an equitable right of set-off between the parties, which allowed the creditor to set-off payments owed by the debtor on foot of the agreed terms between the parties

Presentations

EQUITABLE RIGHT OF SET-OFF?

- Court disagreed with this analysis stating that if permitted this would simply allow the exercise of rights which should have been registered as a charge and dismissed this argument as an indirect attempt to avoid the consequences of non-registration

Presentations

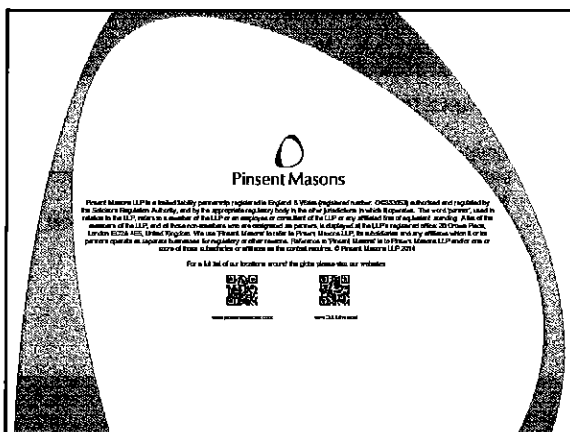
CONCLUSION

- Analysis 1 is the most 'true' interpretation of the Code provisions
- It reflects the spirit of the Code & the drafters' intentions
- It provides certainty to the MO and to Participants
- It is the safest approach

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QUESTIONS?



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Appendix 4- Revised Deed of Charge (Clean)

Draft 4: for discussions purposes

DEED of CHARGE and ACCOUNT SECURITY

between

[the Participant]

and

EirGrid p.l.c. and SONI Limited

Dated [] 20[•]

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DEED of CHARGE and ACCOUNT SECURITY dated the [] day of [] 20[] between:

- (1) [] **LIMITED [PLC]** incorporated in [England] [Scotland] [Northern Ireland] [Ireland] (Registered Number []) whose registered office is at [] (the "**Participant**"); and
- (2) **EirGrid p.l.c.** incorporated in Ireland (Registered Number 338522) whose registered office is situated at Block 2, The Oval, 160 Shelbourne Road, Ballsbridge, Dublin 4 and **SONI Limited** incorporated in Northern Ireland (Registered Number NI038715) whose registered office is situated at Castlereagh House, 12 Manse Road, Belfast together trading as the Single Electricity Market Operator (the "**Market Operator**").

RECITALS

- (A) The Market Operator and the Participant are parties to the Single Electricity Market Trading and Settlement Code governing the wholesale sale and purchase of electricity on the island of Ireland (the "**Code**").
- (B) Pursuant to the Code, the Participant is obliged to put in place Required Credit Cover to secure the Participants payment obligations under the Code and has elected as permitted by the Code to open SEM Collateral Reserve Account(s) within the meaning of the Code, being the Account(s) referred to in this Deed, to provide such security.
- (C) The parties hereby acknowledge and agree that the Market Operator is the legal account holder of the SEM Collateral Reserve Account(s) for the purposes of discharging the obligations of the Participant under the Code (if not otherwise performed) and subject to that on trust for the Participant beneficially.
- (D) Pursuant to section 6.20.3 of the Code, the Participant has agreed to create in favour of the Market Operator a first fixed charge over its equitable and beneficial interest arising in the credit balances held in such Account(s) and all funds held to the credit thereof from time to time and has agreed to execute this Deed for that purpose.
- (E) It is intended that this document takes effect as a deed notwithstanding the fact that a party may only execute this document under hand.

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

Capitalised terms or expressions defined in the Code shall, except where the context otherwise requires and save where otherwise defined herein, have the same meanings in this Deed.

In addition, in this Deed:

"Account[s]" means the collateral bank account[s] specified in Schedule 1 (as [that account][any such account] may from time to time be re-designated or re-numbered or replaced), including any successor or replacement account, or subdivision or sub-account, of [that account][any such account];

"Account Bank[s]" means the bank[s] with which the Account[s] [is] [are] held being, as at the date of this Deed, as specified in Schedule 1, which shall include reference to any successor [of any] thereof;

"Credit Cover" means the credit cover required of and provided by the Participant in a form that meets the requirements of the Code;

"this Deed" means these presents (including the Schedules) as amended, amended and restated, varied, supplemented, novated, extended or restated from time to time;

"Conveyancing and Law of Property 1881 Acts" means, together, the Conveyancing and Law of Property Act 1881 and the Conveyancing Act 1911;

"Event of Default" means the failure by the Participant to pay or discharge the Secured Obligations in whole or part on the due date therefor or, if no date for payment has been agreed, on demand;

"Irish Act" means the Land and Conveyancing Law Reform Act 2009 of Ireland;

"Law of Property Act" means the Law of Property Act 1925;

"parties" means the parties to this Deed and "party" means either of them;

"Required Credit Cover" means the Credit Cover calculated by the Market Operator in accordance with the Code;

"Rights" means all present and future right, equitable title and beneficial interest of the Participant in respect of the Account[s], including (without limitation):

- (i) the benefit of all covenants, undertakings, representations, warranties and indemnities;
- (ii) all powers and remedies of enforcement and/or protection;
- (iii) all rights to receive payment of all amounts assured or payable (or to become payable), all rights to serve notices and/or to make demands and all rights to take such steps as are required to cause payment to become due and payable; and
- (iv) all causes and rights of action in respect of any breach and all rights to receive damages or obtain other relief in respect thereof;

"Schedule[s]" means any one or more of the Schedules to this Deed;

"Secured Obligations" means all or any monies, liabilities and obligations, whether actual or contingent and whether owed jointly or severally or as principal debtor, guarantor, surety or otherwise, which are now or may at any time hereafter (whether before or at any time after demand) be or become due in any manner by the Participant to any SEM Creditor and/or to the Market Operator under the Code including interest or expenses which the Market Operator may in the course of its business charge or incur in respect of any of those matters and so that the interest shall be computed and compounded according to the usual rate and practice under the Code as well as after as before any demand made or decree or judgement obtained under this Deed or the Security, and all or any monies, liabilities and obligations due under the Code or under this Deed;

"Security" means all or any of the Security Interests now or at any time hereafter created by or pursuant to this Deed;

"Security Assets" means the Account[s] and the debt[s] thereby represented and all sums, whether principal or interest, accrued or accruing, which are now or may at any time hereafter be deposited in or otherwise standing to the credit of the Account[s], together with all the Rights in connection therewith;

"Security Interest" means any mortgage, charge, pledge, lien, retention of title arrangement (other than in respect of goods purchased in the ordinary course of business), hypothecation, encumbrance or security interest of any kind, or any agreement or arrangement having substantially the same economic or financial effect as any of the foregoing (including any "hold back" or "flawed asset" arrangement);

"SEM Creditor" has the meaning given to this term under the Code;

"Trading Day Exchange Rate" has the meaning given to this term under the Code; and

"Working Day" means a day (other than a Saturday or Sunday) on which commercial banks are open for business in:

- (a) for the purpose of clause 11.1, the place specified in the address for notice provided by the recipient; and
- (b) for all other purposes, [London] [Belfast] or [Dublin].

1.2 Interpretation

In this Deed, unless the context requires otherwise:

- 1.2.1 words importing the singular shall include the plural and vice versa;
- 1.2.2 references to this Deed or any other document shall be construed as references to this Deed or such other document as amended, supplemented, novated, extended or restated from time to time;
- 1.2.3 references to any statute or statutory provision (including any subordinate legislation) shall include any statute or statutory provision for the time being in force which amends, extends, consolidates or replaces the same and shall include any orders, regulations, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.4 references to a "person" shall include any individual, firm, company, corporation, body, trust or foundation, or any association, partnership or unincorporated body (whether or not having separate legal personality);
- 1.2.5 any reference to a party includes its permitted successors, transferees and assignees;
- 1.2.6 references to a document "in the agreed form" means a document in a form agreed by the Participant and the Market Operator and initialled by, or on behalf of, each of them for the purpose of identification as such; and
- 1.2.7 "tax" means all forms of taxation, duties, imposts and levies whatsoever in the nature of taxation whenever and wherever imposed, including (but without limitation) all stamp duties, imposts, duties, capital and revenue taxes and value added tax, and "taxes" and "taxation" shall be construed accordingly.

1.3 Headings

The table of contents and the headings in this Deed are included for convenience only and shall be ignored in construing this Deed.

1.4 Construction

The parties hereby acknowledge and agree that this Deed is entered into pursuant to section 6 of the Code. In the event that any of the defined terms used in this Deed are ambiguous, they must be construed in accordance with the Code.

2 CREATION OF SECURITY

2.1 Payment

The Participant undertakes to the Market Operator that it will pay and discharge the Secured Obligations on the due date therefor, or, if no date for payment has been agreed, on demand.

2.2 General

All the Security:

- (a) is created in favour of the Market Operator for itself as the Market Operator under the Code and as a security trustee on behalf of the other SEM Creditors, in both cases to secure the Participants' compliance and performance of their obligations under the Code;
- (b) is created over all the Participant's Security Assets; and
- (c) is security for the payment or discharge of the Secured Obligations.

2.3 Security

As continuing security for the payment and discharge of the Secured Obligations, the Participant as beneficial owner hereby charges by way of first fixed charge to the Market Operator the Security Assets (including, for the avoidance of doubt, all the Rights in connection therewith).

2.4. Notices

Immediately after delivery of this Deed, the Participant shall give notice to the Account Bank in the form set out in Part 1 of Schedule 2. The Market Operator shall procure the Account Bank's acknowledgement and agreement in the form set out in Part 2 of Schedule 2.

3 PROTECTION OF SECURITY

3.1 Continuing security

The Security shall be a continuing security notwithstanding any intermediate payment or satisfaction of the Secured Obligations and shall remain in force until the Secured Obligations have been fully and unconditionally paid and/or discharged (as appropriate) under the Code.

3.2 No prejudice

The Security shall be in addition to and shall not in any way prejudice or be prejudiced by any other Security Interest, right or remedy which the Market Operator may now or at any time hereafter hold for all or any part of the Secured Obligations.

3.3 No waiver

Failure or delay on the part of the Market Operator in exercising any right, power or discretion under or pursuant to this Deed shall not operate as a waiver thereof, nor will any single or partial exercise of any such right, power or discretion preclude any other or further exercise thereof. The rights, powers and discretions contained in this Deed are in addition to and not substitution for any right of set-off, compensation, retention, combination of accounts, lien or other right or remedy provided by law.

3.4 Severability

The provisions of this Deed shall be severable and distinct from one another and if at any time one or more of such provisions is or becomes or is declared void, invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions of this Deed shall not in any way be affected or impaired thereby.

3.5 Non impairment

The Participant agrees that none of its obligations or the Market Operator's rights, powers and discretions under this Deed shall be reduced, discharged or otherwise adversely affected by:

- (a) any variation, extension, discharge, compromise, dealing with, exchange or renewal of any Security Interest or any right or remedy which the Market Operator or any other person may have now or in the future from or against the Participant or any other person in respect of any of the Secured Obligations; or
- (b) any failure, act or omission by the Market Operator or any other person in taking up, perfecting or enforcing any Security Interest or guarantee from or against the Participant or any other person in respect of the Secured Obligations; or
- (c) any increase in or waiver or discharge of any of the Secured Obligations or any termination, amendment, variation, supplement, restatement, novation or replacement of any deed, document or agreement relating thereto; or
- (d) any grant of time, indulgence, waiver or concession to the Participant or any other person; or
- (e) any of the administration, receivership, examinership, liquidation, winding-up, insolvency, bankruptcy, incapacity, limitation, disability, discharge by operation of law or any change in the constitution, name or style of the Participant or any other person; or
- (f) any invalidity, illegality, unenforceability, irregularity or frustration of any of the Secured Obligations; or
- (g) any renumbering, redesignation or replacement of the Account[s] or its [their] being transferred to another branch or department of the Account Bank[s]; or
- (h) anything done or omitted to be done by the Market Operator or any other person which but for this provision might operate to exonerate or discharge or otherwise reduce or extinguish the liability of the Participant under this Deed or the Security.

3.6 Further assurance

Without prejudice to the provisions of Clause 2 (*Creation of Security*), the Participant shall promptly after being requested to do so by the Market Operator, do all such acts and things, give such instructions (in material or dematerialised form) and sign, seal and execute and deliver all such deeds and other documents as the Market Operator may require for perfecting or protecting the Security in respect of the Security Assets or its priority or for facilitating the operation of the Account[s] and the realisation or application of the Security Assets and the exercise of the rights, powers and discretions conferred on the Market Operator under this Deed. The obligations of the Participant under this Deed shall be in addition to and not in substitution for the covenants for further assurance deemed to be included herein by virtue of the Law of Property (Miscellaneous Provisions) Act 1994.

3.7 **New accounts**

At any time after the Market Operator has received or is deemed to be affected by notice (whether actual or constructive) of the creation of any subsequent Security Interest over or affecting any part of the Security Assets or the proceeds of realisation, the Market Operator may open a new account or accounts on behalf of the Participant. If the Market Operator does not open a new account or accounts it shall nevertheless be treated as if it had done so at the time when it received or was deemed to have received such notice and as from that time all payments made to the Market Operator shall be credited or be treated as having been credited to the new account or accounts and shall not operate to reduce the amount covered by the Security.

4 **POWER OF ATTORNEY**

4.1 **Appointment**

The Participant by way of security hereby irrevocably appoints the Market Operator or its nominee separately as its attorney (with full powers of substitution and delegation) on its behalf and in its name or otherwise, at such times and in such a manner as the attorney may think fit:

- (a) to do anything which the Participant is obliged to do (but has not done) under this Deed and/or the Code including, without limitation, to sign, seal, execute and deliver all deeds, documents, notices, further securities, transfers or assignments of and other instruments relating to, and give instructions (in material or dematerialised form) in respect of, the Security Assets;
- (b) generally to exercise all or any of the rights, powers and discretions conferred on the Market Operator in relation to the Security Assets under the Code; and
- (c) generally to exercise all or any of the rights, powers and discretions conferred on the Market Operator in relation to the Security Assets under this Deed, or (in the case of Security Assets located in England) the Law of Property Act, or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of Property Acts, or (in the case of Security Assets located in Ireland) the Irish Act.

4.2 **Ratification**

The Participant hereby ratifies and confirms and agrees to ratify and confirm whatever its attorney may do or purport to do in the exercise or purported exercise of the power of attorney given by the Participant under this Clause.

4.3 **Exercise of power**

The appointment effected under Clause 4.1 (*Appointment*) shall take effect immediately, but the powers conferred shall only become exercisable upon the Security becoming enforceable or if the Participant does not fulfil any of its obligations under Clause 3.6 (*Further assurance*) within [two] Working Days of notice from the Market Operator to do so.

5 **REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS**

5.1 **Representations and warranties**

The Participant represents and warrants to the Market Operator that:

- (a) it is duly incorporated and validly existing under the law of [England] [Scotland] [Northern Ireland] [Ireland] [other];

- (b) it has the capacity and power to enter into this Deed and perform its obligations hereunder and to create the Security;
- (c) it has taken all necessary corporate action to authorise the execution and delivery of the Deed and the performance of its obligations hereunder and the creation of this Security;
- (d) its entering into this Deed and the performance of its obligations hereunder and the creation of the Security will not contravene any law, regulation, agreement or judicial or official order to which it is a party or by which it is bound, or cause any limitation on any of its powers however imposed, or the right or ability of its directors to exercise any of such powers, to be exceeded;
- (e) all actions, authorisations and consents required or advisable in connection with the creation, performance, validity and enforceability of this Deed and the Security and the transactions hereby contemplated and to ensure that (subject to all necessary registrations being made) the Security constitutes a valid, legal, binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant have been obtained or effected and are and shall remain in full force and effect;
- (f) it is and will be the sole absolute unencumbered beneficial owner of the Security Assets free of any other Security Interest or third party claims or interests, other than any such Security Interest, claim or interest that has been or may from time to time be created in favour of the Market Operator and/or any other person pursuant to the Code;
- (g) it has not (otherwise than pursuant to this Deed or otherwise in favour of the Market Operator and/or any other person pursuant to the Code) granted or created any Security Interest over or sold, transferred, lent, assigned, parted with its interest in, disposed of, or granted or created any option or other right to purchase or otherwise acquire the Security Assets or any interest therein, or agreed, conditionally or unconditionally, to do so;
- (h) the Participant's obligations under this Deed and (subject to all necessary registrations being made) the Security are and until fully and unconditionally discharged will be valid, legal, binding and enforceable and the Security constitutes and will remain a valid, legal, binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant; and
- (i) each of the above representations and warranties will be correct and complied with in all respects at all times during the continuance of the Security as if repeated by reference to the circumstances existing at such times.

5.2 Undertakings

The Participant undertakes to the Market Operator that it shall:

- (a) not save as permitted by the Code make or attempt to make any withdrawal from the Account[s] or create, attempt to create or permit any Security Interest (other than the Security or any Security Interest in favour of the Market Operator and/or any other person created pursuant to the Code) to subsist over or in respect of any of the Security Assets;
- (b) not sell, transfer, lend or otherwise dispose of, or grant or create any other Security Interest over, or any option or other right to purchase or otherwise acquire, the Security Assets or any interest therein (other than any Security Interest in favour of the Market Operator and/or any other person created pursuant to the Code) or agree, conditionally or unconditionally, to do so;

- (c) not take or omit to take any action which would prejudice the Security or impair the Security Assets and shall, at its own cost, promptly take all action which is at any time necessary or which the Market Operator may request, to protect the interests of the Participant and the Market Operator in the Security Assets;
- (d) not vary or abrogate any of the rights attached to the Security Assets or take or omit to take any action which would have that result;
- (e) ensure that no monies or liabilities are outstanding in respect of any of the Security Assets;
- (f) take all action within its power to procure, maintain in effect and comply with all the terms and conditions of all approvals, authorisations, consents and registrations necessary or advisable under or in connection with this Deed and the Security; or
- (g) procure that the Security shall at all times be a valid, legal, binding and enforceable first fixed security interest over the Security Assets ranking in priority to the interests of any liquidator, administrator, examiner or creditor of the Participant.

6 OPERATION OF ACCOUNT[S]

Withdrawals

The Participant shall only be entitled to seek any withdrawals from the Account[s] provided that:

- (a) the Participant is not in default in respect of any amount owed to a SEM Creditor;
- (b) the other conditions as set out in paragraphs 6.34 and 6.35 of the Code apply; and
- (c) the Security under this Deed has not been enforced.

7 ENFORCEMENT

7.1 Security enforceable

Upon or at any time after the occurrence of an Event of Default:

- (a) the Security shall become enforceable; and
- (b) the following power of sale and other powers, in each case as varied and extended by this Deed, shall be exercisable:
 - (i) in respect of Security Assets which are located in England, the power of sale and other powers conferred by Section 101 of the Law of Property Act;
 - (ii) in respect of Security Assets which are located in Northern Ireland, the power of sale and other powers conferred by Section 19 of the Conveyancing Act 1881 and Section 4 of the Conveyancing Act 1911;
 - (iii) in respect of Security Assets which are located in Ireland, power of sale and other powers conferred by the Irish Act.

7.2 Law of Property Act, Conveyancing and Law of Property Acts and Irish Act

Insofar as the Security Assets are located in:

- (a) England, Clause 7.2.2 below in relation to the Law of Property Act shall apply;
- (b) Northern Ireland, Clause 7.2.3 below in relation to the Conveyancing and Law of Property Acts shall apply; and
- (c) Ireland, Clause 7.2.4 below in relation to the Irish Act shall apply.

7.2.2 Law of Property Act

The powers conferred by Section 101 of the Law of Property Act as varied and extended by this Deed, shall be deemed to have arisen immediately upon execution of this Deed, and Sections 93, 103 and 109 of the Law of Property Act shall not apply to this Deed.

7.2.3 Conveyancing and Law of Property Acts

The powers conferred by Section 19 of the Conveyancing Act 1881 and Section 4 of the Conveyancing Act 1911, as varied and extended by this Deed, shall be deemed to have arisen immediately upon execution of this Deed, and Sections 17, 20 and 24 of the Conveyancing Act 1881 shall not apply to this Deed.

7.2.4 Irish Act

7.2.4.1 In the event that:

- (a) the laws of Ireland apply to:
 - (i) the Security Assets or any of them; or
 - (ii) the Security or any of it; or
- (b) in the event of the appointment in Ireland of a receiver, liquidator, examiner or similar officer to the Participant or over any or all of its assets,

the provisions of Chapter 3 (Obligations, powers and rights of mortgagee) of Part 10 (Mortgages) of the Irish Act, save as specified in Clauses 7.2.4.2 to 7.2.4.5, inclusive, below, shall apply to this Deed notwithstanding anything to the contrary contained in this Deed.

- 7.2.4.2 The provisions of sections 96(1)(c) (Powers and rights generally), 97 (Taking possession), 99(1) (Mortgagee in possession), 101 (Applications under sections 97 and 100), 103(2) (Obligations on selling), 106(3) (Application of mortgagee's receipts), 107 (Application of proceeds of sale), 108(1) (Appointment of receiver), 108(7) (Remuneration of receiver), 109 (Application of money received by a receiver) and 110(2) (Insurance) of the Irish Act shall not apply to this Deed.
- 7.2.4.3 The restrictions and any requirements to give notice to the Participant contained in section 108(1) (Appointment of Receiver) of the Irish Act shall not apply to this Deed.
- 7.2.4.4 Notwithstanding anything to the contrary contained in the Irish Act, the Market Operator reserves the right to consolidate mortgage securities without restriction.
- 7.2.4.5 The Participant shall not be entitled to take any action in respect of the Security Assets pursuant to section 94 (Court order for sale) of the Irish Act.
- 7.2.4.6 The restrictions and any requirements to give notice to the Participant contained in section 100 (Power of sale) of the Irish Act shall not apply to this Deed.
- 7.2.4.7 The Market Operator may, at any time and from time to time, delegate by power of attorney or in any other manner (including, without limitation, under the hand of any officer of the Market Operator) to any person or persons or company or fluctuating body of persons all or

any of the powers, authorities and discretions which are, for the time being, exercisable by the Market Operator under this Deed or under the Irish Act without the restrictions contained in the Irish Act in relation to the Security Assets or any part thereof, and any such delegation may be made upon such terms and conditions (including power to sub-delegate) and subject to such regulations as the Market Operator may think fit.

7.3 Rights upon enforcement

7.3.1 Powers of Market Operator

At any time after the Security has become enforceable, the Market Operator shall be entitled, without any notice to, demand on or consent of the Participant, either in its own name or in name of the Participant or otherwise, and in such manner and on such terms and conditions as it thinks fit, to take possession of and realise the Security Assets and apply the proceeds of realisation in or towards payment or satisfaction of the Secured Obligations in accordance with Clause 7.4 (*Application of proceeds*), and in particular, without limiting the generality:

- (a) to call in and/or uplift or withdraw the sums standing to the credit of the Account[s] in whole or part (and whether or not any deposit period may be broken by so doing);
- (b) to do all things it may consider necessary or expedient for the realisation of the Security Assets or incidental to the exercise of any of the rights conferred on it under or in connection with this Deed, the Law of Property Act, the Conveyancing and Law of Property Acts or the Irish Act; and
- (c) generally to exercise all the rights powers and discretions in respect of the Security Assets it would be entitled to exercise if it were the absolute owner of the Security Assets.

7.4 Application of proceeds

All monies realised or otherwise arising from the enforcement of the Security shall subject to Clause 7.5 (*Monies on suspense account*) be applied by the Market Operator:

- (a) in or towards payment or satisfaction of all costs and expenses incurred by the Market Operator (and any attorney or agent appointed by it) under or in connection with this Deed and the Security;
- (b) in or towards payment or satisfaction of the remaining Secured Obligations in accordance with the terms of the Code; and
- (c) in payment of any surplus to the Participant;

provided that prior to the enforcement of the Security, any credit balances held in the Account[s] shall be applied in accordance with the provisions of sections 6.32 and 6.35 of the Code.

This Clause is subject to the settlement of any claims which have priority over the Security and shall not prejudice the Market Operator's right to recover any shortfall from the Participant in accordance with the provisions of the Code.

7.5 Monies on suspense account

Nothing in this Deed shall limit the right of the Market Operator (and the Participant acknowledges that the Market Operator is so entitled) if and for so long as the Market Operator in its discretion shall consider it appropriate, to place all or any monies arising from the enforcement of the Security into a suspense account or accounts (which must be with the Account Bank), without any obligation to apply the same or any part thereof in or toward

the discharge of the Secured Obligations provided that if the aggregate of such monies so placed to the credit of such suspense account or accounts shall equal or exceed the Secured Obligations, the Market Operator shall, subject always to Clause 8 (Release), forthwith apply the same towards settlement of the Secured Obligations.

7.6 Balance

The rights powers and discretions conferred on the Market Operator (subject to the terms of the Code) under this Deed are subject only to its obligation to account to the Participant for any balance of the Security Assets or their proceeds remaining in its hands after the Secured Obligations have been fully and unconditionally paid and discharged.

7.7 Third parties

7.7.1 No person dealing with the Market Operator in relation to the Security Assets shall be concerned to enquire whether any event has occurred upon which any of the rights, powers and discretions conferred under or in connection with this Deed or (in the case of Security Assets located in England) the Law of Property Act or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of Property Acts or (in the case of Security Assets located in Ireland) the Irish Act is or may be exercisable, or whether any of the rights, powers and discretions exercised or purported to be exercised by it hereunder has otherwise become exercisable, whether any of the Secured Obligations remains outstanding, or generally as to the propriety or validity of the exercise or purported exercise of any right, power or discretion hereunder. All the protection to purchasers and other persons contained in Sections 104 and 107 of the Law of Property Act (in respect of Security Assets located in England), Sections 21 and 22 of the Conveyancing and Law of Property Act 1881 (in respect of Security Assets located in Northern Ireland) and sections 104, 105 and 106(1) of the Irish Act (in respect of Security Assets located in Ireland) shall apply to any person purchasing from or dealing with the Market Operator or its nominee or delegate as if the Secured Obligations had become due and the statutory powers of sale in relation to the Security Assets had arisen on the date of this Deed.

7.7.2 The receipt or discharge of the Market Operator shall be an absolute discharge to any purchaser or other person dealing with the Market Operator or its nominee or delegate in relation to the Security Assets and any such purchaser or other person shall not have any obligation to enquire after or see to the application of any payments made by it to the Market Operator or its nominee or delegate or at its direction.

7.8 Redemption of prior securities

7.8.1 The Market Operator shall be entitled at any time:

- (a) to redeem any prior Security Interest over the Security Assets; and/or
- (b) to procure the transfer of such Security Interest to itself or its nominee; and/or
- (c) to settle and pass the accounts of the person or persons entitled to any such prior Security Interest and any accounts so settled and passed shall, save for manifest error, be conclusive and binding on the Participant.

7.8.2 The Participant shall pay the Market Operator, immediately on demand, the costs and expenses incurred by the Market Operator in connection with any such redemption and/or transfer, including the payment of any principal or interest, and these shall be subject to the terms of Clause 10 (*Miscellaneous*) and shall be Secured Obligations.

8 RELEASE

8.1 Release

When the Market Operator confirms in writing to the Participant that the Secured Obligations have been fully and unconditionally paid or discharged the Market Operator shall at the Participant's request, and at its expense, discharge the Security and retransfer to the Participant so much of the Security Assets as has not been realised or applied in or towards satisfaction of the Secured Obligations. Any payment or realisation in respect of the Secured Obligations which in the reasonable opinion of the Market Operator is liable to be avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, shall not be regarded as having been irrevocably effected until the expiry of the period during which it may be challenged on any such ground.

8.2 Avoidance of payments

The Market Operator's right to recover the Secured Obligations in full shall not be affected or prejudiced by any payment or realisation which is avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, or by any release or discharge given by the Market Operator on the faith of any such payment or realisation.

8.3 Retention of Security

If any payment or realisation in respect of the Secured Obligations is, in the Market Operator's reasonable opinion, liable to be avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, the Market Operator shall be entitled to retain this Deed and the Security undischarged and shall not be obliged to retransfer the Security Assets until the expiry of the period during which it may be challenged on any such ground.

9 LIABILITY OF MARKET OPERATOR OR DELEGATE

9.1 Delegation

The Market Operator may delegate any right, power or authority exercisable by it under this Security to such person, on such terms and conditions (including power to sub-delegate) and in such manner as it thinks fit, but such delegation shall not preclude the Market Operator from itself exercising any such right, power or authority.

9.2 Liability

The Market Operator or any delegate shall not in any circumstances be liable to the Participant or any other person as mortgagee in possession or otherwise for any losses, damages, liabilities or expenses arising from or in connection with the application or enforcement of the Security or any realisation, appropriation or application of the Security Assets or from any act, default or omission of the Market Operator or delegate or his/her or its officers, employees or agents in relation to the Security Assets or otherwise in connection with this Deed and the Security.

10 MISCELLANEOUS

10.1 Currency conversion and indemnity

10.1.1 Irrespective of the currency (whether Sterling, Euro or otherwise) in which all or part of the Secured Obligations or the Security Assets from time to time is/are expressed, the Market Operator shall be entitled, for any purpose under or in connection with this Deed, at any time and without prior notification to the Participant, to convert the amount(s) in question into either Sterling or Euro as the Market Operator may from time to time consider appropriate: any such conversion shall be effected at the Trading Day Exchange Rate.

10.1.2 If by reason of any applicable law or regulation, or pursuant to any judgement, decree or order against the Participant, or in respect of the liquidation or other insolvency of the Participant, or for any other reason, any payment under or in connection with this Deed is due or made in a currency (the "**payment currency**") other than the currency in which it is expressed to be due under or in connection with this Deed (the "**contractual currency**") then to the extent that the amount of such payment actually received by the Market Operator when converted into the contractual currency at the Trading Day Exchange Rate falls short of the amount due under or in connection with this Deed, the Participant shall as a separate and independent obligation indemnify and hold the Market Operator harmless against the amount of such shortfall.

10.2 Assignment

10.2.1 The Market Operator may at any time (without notice to or consent of the Participant) assign or transfer the benefit of this Deed and the Security or any of its rights or obligations thereunder, provided that such assignment and transfer is in compliance with any applicable requirements of the Code. The Market Operator shall be entitled to impart any information concerning the Participant to any assignee, transferee or proposed assignee or transferee or to any person who may otherwise enter into contractual relations with the Market Operator in relation to this Deed, the Secured Assets or the Secured Obligations.

10.2.2 The Participant may not, without the prior written consent of the Market Operator which may be given or withheld in the Market Operator's absolute discretion, assign, transfer or otherwise deal with the benefit or burden of this Deed or the Security or any of its rights or obligations thereunder.

10.2.3 This Deed shall be binding upon and inure to the benefit of each of the parties hereto and their respective permitted successors, transferees and assignees and references in this Deed to any of them shall be construed accordingly.

10.3 Entire agreement

This Deed constitutes the entire agreement and understanding of the parties in relation to the security interests created herein in furtherance of the provisions in Section 6 of the Code and supersedes any previous agreement between the parties relating to the subject matter of this Deed.

10.4 Non-reliance

Each of the parties acknowledges and agrees that in entering into this Deed it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) of any person (whether a party or not) other than as expressly set out in this Deed.

10.5 Amendments

No amendment or variation of this Deed shall be effective unless it is in writing and executed by or on behalf of each of the parties.

10.6 Third party rights

The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Deed and only the parties hereto may enjoy its benefit or enforce its terms.

10.7 Counterparts

This Deed may be executed in any number of counterparts, and by one or more parties hereto in separate counterparts, each of which shall be deemed to be an original, but all such counterparts shall together constitute one and the same instrument.

10.8 Expenses

The Participant shall indemnify the Market Operator on demand against all liabilities, costs, charges and expenses properly and reasonably incurred by the Market Operator and its nominees and delegates (including the fees and expenses of any legal advisers and where appropriate any VAT) in connection with the preparation, execution and registration of this Deed and the Security and the enforcement or preservation of the Market Operator's rights under this Deed and the Security together with interest (as calculated in accordance with the Code) from the date of demand until settlement, and the amount thereof shall be a Secured Obligation.

11 NOTICES

11.1 Notices and deemed receipt

Any demand or notice to be given under this Deed shall be in writing signed by or on behalf of the party giving it and shall be served by delivering it personally or sending it by pre-paid recorded delivery or registered post or by facsimile to the address and for the attention of the relevant party set out in Clause 11.2 (or as otherwise notified by that party thereunder). Any such notice shall be deemed to have been received:

- (a) if delivered personally, at the time of delivery or attempted delivery;
- (b) in the case of pre-paid recorded delivery or registered post, at the time of delivery or attempted delivery; and
- (c) in the case of facsimile, at the time of transmission, where in order to prove transmission it shall be sufficient to produce confirmation of uninterrupted transmission by a transmission report,

provided that if deemed receipt occurs before 9am on a Working Day the notice shall be deemed to have been received at 9am on that day and if deemed receipt occurs after 5pm on a Working Day, or on a day which is not a Working Day, the notice shall be deemed to have been received at 9am on the next Working Day.

11.2 Addresses for notices

The addresses and facsimile numbers of the parties for the purposes of this Clause 11.2 are:

The Market Operator

Address: []

For the attention of: []

Fax number: []

The Participant

Address: []

For the attention of: []

Fax number: []

or such other address or facsimile number as may be notified in writing from time to time by the relevant party to the other.

11.3 No electronic service

For the avoidance of doubt no demand or notice given under this Deed shall be validly given if sent by e-mail.

12 GOVERNING LAW AND JURISDICTION

12.1 This Deed (including any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with: (i) insofar as the Security Assets are located in England, the laws of England; insofar as the Security Assets are located in Northern Ireland, the laws of Northern Ireland; and (iii) insofar as the Security Assets are located in Ireland, the laws of Ireland.

12.2 The parties irrevocably submit: (i) insofar as the Security Assets are located in England, to the non-exclusive jurisdiction of the English Courts; (ii) insofar as the Security Assets are located in Northern Ireland, to the non-exclusive jurisdiction of the Northern Irish Courts; and (iii) insofar as the Security Assets are located in Ireland, to the non-exclusive jurisdiction of the Irish Courts.

EXECUTED AND DELIVERED as a deed on the date first above stated.

SCHEDULES

SCHEDULE 1

The Account[s] and Account Bank[s]

Name of Account	Number of Account	Bank, Branch and sort code where Account held
[]	[]	[]

SCHEDULE 2
Part 1: Notice of charge to Account Bank(s)
[On letterhead of Participant]

To: Name of Account Bank (the "Account Bank")
Branch: []
Address: []
Attention: []

Date: []

Dear Sirs

Account number[s]: [specify] (the "Account[s])"

We ([insert name] (the "**Participant**") hereby give notice that by a Deed of Charge and Account Security between us and EirGrid p.l.c. and SONI Limited together trading as the Single Electricity Market Operator (the "**Market Operator**") dated the [] day of [] 200[] (the "**Account Security**") we have charged by way of first fixed charge to the Market Operator our whole right, equitable title and beneficial interest present and future in the Account[s], the debt(s) thereby represented, and all sums, whether principal or interest, now or hereafter deposited in or otherwise standing to the credit of the Account[s]. A copy of the Account Security is annexed.

We irrevocably instruct and authorise you, without further reference to, or enquiry or permission from, us:

- a. to disclose to the Market Operator any information about the Account[s] which it may request;
- b. to comply with the terms of any written notice or instruction relating to the Account[s] which you may receive from the Market Operator;
- c. to hold all sums standing at credit of the Account[s] to the order of the Market Operator;
- d. to pay or release any sum standing at credit of the Account[s] only in accordance with the written instructions or with the written consent of the Market Operator.

For the avoidance of doubt, any notice, instruction or authorisation from the Market Operator may validly be given by fax or email. In the event of the Account Bank suffering any cost, expense or loss of any nature as a result of acting in reliance upon such notice, instruction or authorisation that the Account Bank reasonably considers to have been made or issued by the Market Operator and which was not so made or issued, we hereby agree to indemnify the Account Bank forthwith upon demand against any such cost, expense or loss of any nature so arising, save to the extent arising from gross negligence or wilful misconduct on the part of the Account Bank.

The instructions and authorisations in this letter may not be revoked or amended without the prior written consent of the Market Operator.

Please confirm that you have not received notice or are otherwise aware of any other assignment, charge, encumbrance or third party interest in respect of the Account[s] or the sums standing at credit of or any rights or benefits relating to the Account[s] and that you have not claimed or exercised, and will not claim or exercise any right of set-off, counterclaim, deduction, lien or combination of accounts or security interest in respect thereof.

In the absence of gross negligence or wilful misconduct on its part, the Account Bank shall not be liable to the Participant, Market Operator or any other person with respect to any act or omission in connection with the services provided. Provided that it has complied with the terms of the written acknowledgement by it of this notice and, to the extent not inconsistent with such acknowledgment,

with the mandate relating to, and terms and conditions applicable to the Account[s], under no circumstances shall the Account Bank be liable to the Participant, Market Operator or any other person for indirect or consequential damages and the Account Bank shall not in any event be liable for the following direct losses: loss of profits, loss of contracts, loss of goodwill, whether or not foreseeable, even if the Account Bank has been advised of the likelihood of such loss or damage and regardless of whether the claim for loss or damage is made in negligence, for breach of contract or otherwise.

Provided that the Account Bank has complied with the terms of the written acknowledgement by it of this notice and, to the extent not inconsistent with such acknowledgment, with the mandate relating to, and terms and conditions applicable to the Account[s], we hereby agree to indemnify and hold the Account Bank harmless from and against all losses incurred or suffered by the Account Bank and its officers, directors, employees and shareholders resulting directly or indirectly from the Account Bank carrying out its obligations under this mandate or acting in accordance with any instructions relating to the Account[s], save to the extent arising from gross negligence or wilful misconduct on the part of the Account Bank.

This letter is governed by [Northern Irish/Irish/English] law.

Please acknowledge receipt and confirm your agreement to the terms hereof by sending the attached acknowledgement to the Market Operator with a copy to us.

Yours faithfully

For and on behalf of [Participant]

.....
Authorised Signatory

SCHEDULE 2
Part 2: Acknowledgement from Account Bank(s)
[On letterhead of [each] Account Bank]

To: EirGrid p.l.c.
and SONI Limited
Address: []
Attention: []

Date: []

Dear Sirs

Account number[s]: [specify] (the "Account[s]")

We hereby acknowledge receipt from [Participant] of a notice of charge dated [] (the "Notice") of its whole right, equitable title and beneficial interest, present and future, in and to the Account[s], the debt(s) thereby represented, and all sums, whether principal or interest, now or hereafter deposited in or otherwise standing to the credit of the Account[s] which appears on its face to be validly given and Danske Bank A/S has not nor is it required to verify or confirm with any person whether such notice was actually given by any person authorised to do so or the circumstances which would entitle such notice to be given had actually occurred). We also acknowledge receipt of a copy of the Deed of Charge and Account Security dated [] 200[] between you and the Participant (the "Account Security").

We confirm that:

- a we accept the instructions contained in the Notice and undertake to comply with its terms;
- b we have not received nor are we aware of any other assignment, charge, encumbrance or third party interest in the Account[s] or the sums standing at credit of or, any rights and benefits relating to the Account[s];
- c we have not claimed or exercised, nor will we claim or exercise, any right of set-off, counterclaim, deduction, lien, combination of accounts or security interest in respect of the Account[s]; and
- d we will not permit any amount to be withdrawn from the Account[s] except on your written instructions or with your prior written consent in accordance with the provisions of Clause 6 (Withdrawals) of the Account Security or otherwise (to the extent not inconsistent with the foregoing) in accordance with any bank mandate in relation to the Accounts.

We are aware that you will rely on this letter in respect of your rights under the Account Security.

This letter is governed by [Northern Irish/Irish/English] Law.

Yours faithfully

For and on behalf of [Account Bank]

.....
Authorised Signatory
Copied to: [Participant]
Address:
Attention:

[Appropriate execution blocks for Participant to execute as a deed to be included]

**THE COMMON SEAL of
Eirgrid p.l.c.
was affixed hereto
and this Deed was delivered:**

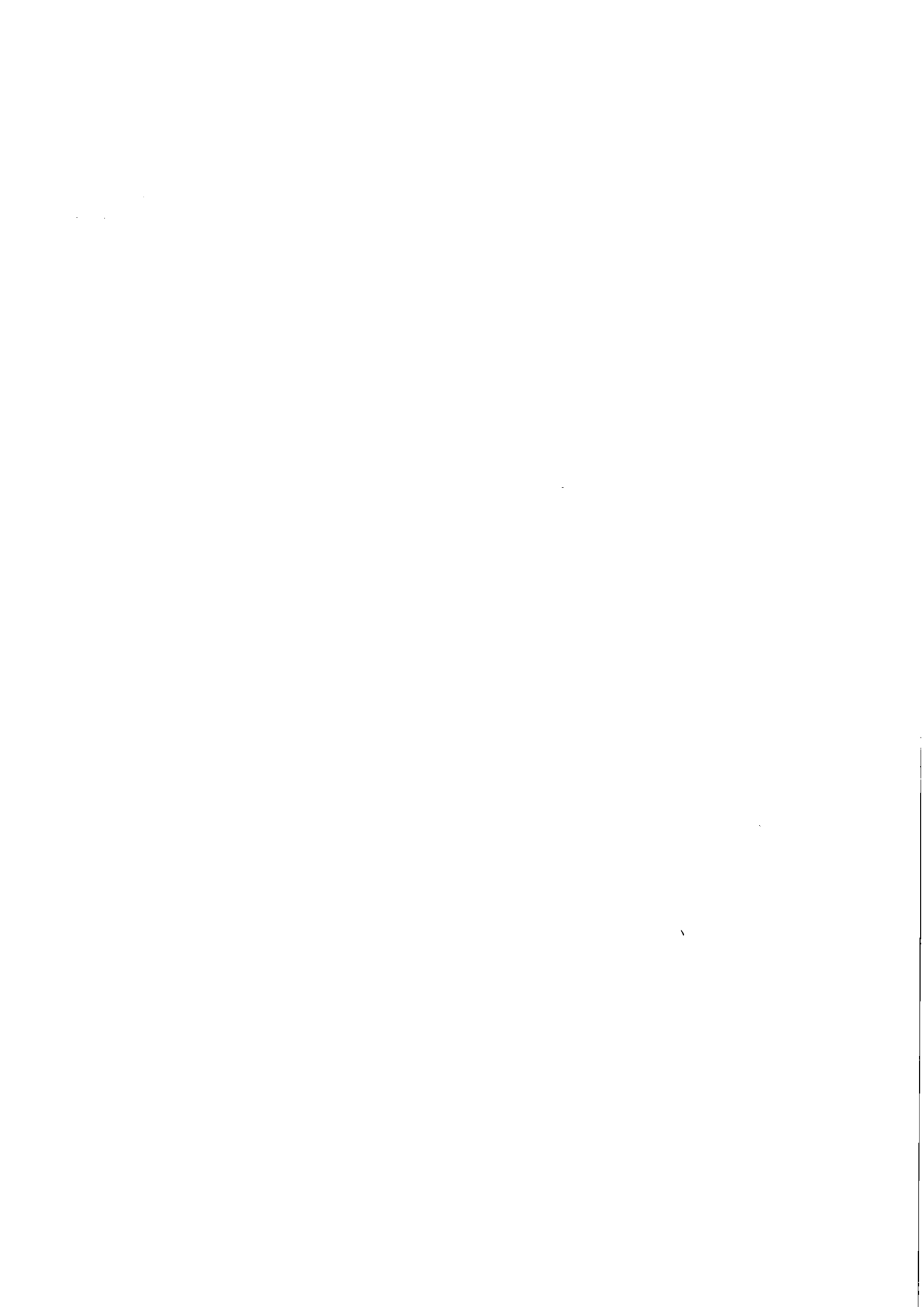
Director

Director/Secretary

**EXECUTED and DELIVERED as a
DEED by SONI Limited
acting by:**

.....	Director
.....	Full Name
.....	Director
.....	Full Name

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



Draft 34: for discussions purposes

DEED of CHARGE and ACCOUNT SECURITY

between

[the Participant]

and

EirGrid p.l.c. and SONI Limited

Dated [] 20[•]

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SCHEDULES

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DEED of CHARGE and ACCOUNT SECURITY dated the [] day of [] 20[] between:

- (1) [] **LIMITED [PLC]** incorporated in [England] [Scotland] [Northern Ireland] [Ireland] (Registered Number []) whose registered office is at [] (the "**Participant**"); and
- (2) **EirGrid p.l.c.** incorporated in Ireland (Registered Number 338522) whose registered office is situated at Block 2, The Oval, 160 Shelbourne Road, Ballsbridge, Dublin 4 and **SONI Limited** incorporated in Northern Ireland (Registered Number NI038715) whose registered office is situated at Castlereagh House, 12 Manse Road, Belfast together trading as the Single Electricity Market Operator (the "**Market Operator**").

RECITALS

- (A) The Market Operator and the Participant are parties to the Single Electricity Market Trading and Settlement Code governing the wholesale sale and purchase of electricity on the island of Ireland (the "**Code**").
- (B) Pursuant to the Code, the Participant is obliged to put in place Required Credit Cover to secure the Participants payment obligations under the Code and has elected as permitted by the Code to open SEM Collateral Reserve Account(s) within the meaning of the Code, being the Account(s) referred to in this Deed, to provide such security.
- (C) The parties hereby acknowledge and agree that the Market Operator is the legal account holder of the SEM Collateral Reserve Account(s) for the purposes of discharging the obligations of the Participant under the Code (if not otherwise performed) and subject to that on trust for the Participant beneficially.
- (D) Pursuant to section 6.20.3 of the Code, the Participant has agreed to create in favour of the Market Operator a first fixed charge over, ~~and to assign by way of first fixed security to the Market Operator,~~ its equitable and beneficial interest arising in the credit balances held in such Account(s) and all funds held to the credit thereof from time to time and has agreed to execute this Deed for that purpose.
- (E) It is intended that this document takes effect as a deed notwithstanding the fact that a party may only execute this document under hand.

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

Capitalised terms or expressions defined in the Code shall, except where the context otherwise requires and save where otherwise defined herein, have the same meanings in this Deed.

In addition, in this Deed:

"Account[s]" means the collateral bank account[s] specified in Schedule 1 (as [that account][any such account] may from time to time be re-designated or re-numbered or replaced), including any successor or replacement account, or subdivision or sub-account, of [that account][any such account];

"Account Bank[s]" means the bank[s] with which the Account[s] [is] [are] held being, as at the date of this Deed, as specified in Schedule 1, which shall include reference to any successor [of any] thereof;

~~**"Business Day"** means a day (other than a Saturday or Sunday) on which commercial banks are open for business in:~~

- ~~(a) for the purpose of clause 11.1, the place specified in the address for notice provided by the recipient; and~~

(b) — for all other purposes, [London] [Belfast] or [Dublin];

"Credit Cover" means the credit cover required of and provided by the Participant in a form that meets the requirements of the Code;

"this Deed" means these presents (including the Schedules) as amended, amended and restated, varied, supplemented, novated, extended or restated from time to time;

"Conveyancing and Law of Property 1881 Acts" means, together, the Conveyancing and Law of Property Act 1881 and the Conveyancing Act 1911;

"Event of Default" means the failure by the Participant to pay or discharge the Secured Obligations in whole or part on the due date therefor or, if no date for payment has been agreed, on demand;

"Irish Act" means the Land and Conveyancing Law Reform Act 2009 of Ireland;

"Law of Property Act" means the Law of Property Act 1925;

"parties" means the parties to this Deed and "party" means either of them;

"Required Credit Cover" means the Credit Cover calculated by the Market Operator in accordance with the Code;

"Rights" means all present and future right, equitable title and beneficial interest of the Participant in respect of the Account[s], including (without limitation):

- (i) the benefit of all covenants, undertakings, representations, warranties and indemnities;
- (ii) all powers and remedies of enforcement and/or protection;
- (iii) all rights to receive payment of all amounts assured or payable (or to become payable), all rights to serve notices and/or to make demands and all rights to take such steps as are required to cause payment to become due and payable; and
- (iv) all causes and rights of action in respect of any breach and all rights to receive damages or obtain other relief in respect thereof;

"Schedule[s]" means any one or more of the Schedules to this Deed;

"Secured Obligations" means all or any monies, liabilities and obligations, whether actual or contingent and whether owed jointly or severally or as principal debtor, guarantor, surety or otherwise, which are now or may at any time hereafter (whether before or at any time after demand) be or become due in any manner by the Participant to any SEM Creditor and/or to the Market Operator under the Code including interest ~~and all lawful charges or~~ expenses which the Market Operator may in the course of its business charge or incur in respect of any of those matters and so that the interest shall be computed and compounded according to the usual rate and practice under the Code as well as after as before any demand made or decree or judgement obtained under this Deed or the Security, and all or any monies, liabilities and obligations due under the Code or under this Deed;

"Security" means all or any of the Security Interests now or at any time hereafter created by or pursuant to this Deed;

"Security Assets" means the Account[s] and the debt[s] thereby represented and all sums, whether principal or interest, accrued or accruing, which are now or may at any time

hereafter be deposited in or otherwise standing to the credit of the Account[s], together with all the Rights in connection therewith;

"Security Interest" means any mortgage, charge, pledge, lien, retention of title arrangement (other than in respect of goods purchased in the ordinary course of business), hypothecation, encumbrance or security interest of any kind, or any agreement or arrangement having substantially the same economic or financial effect as any of the foregoing (including any *"hold back"* or *"flawed asset"* arrangement);~~and~~

"SEM Creditor" has the meaning given to this term under the Code;

"Trading Day Exchange Rate" has the meaning given to this term under the Code.; and

"Working Day" means a day (other than a Saturday or Sunday) on which commercial banks are open for business in:

(a) for the purpose of clause 11.1, the place specified in the address for notice provided by the recipient; and

(b) for all other purposes, [London] [Belfast] or [Dublin].

1.2 Interpretation

In this Deed, unless the context requires otherwise:

- 1.2.1 words importing the singular shall include the plural and vice versa;
- 1.2.2 references to this Deed or any other document shall be construed as references to this Deed or such other document as amended, supplemented, novated, extended or restated from time to time;
- 1.2.3 references to any statute or statutory provision (including any subordinate legislation) shall include any statute or statutory provision for the time being in force which amends, extends, consolidates or replaces the same and shall include any orders, regulations, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.4 references to a **"person"** shall include any individual, firm, company, corporation, body, trust or foundation, or any association, partnership or unincorporated body (whether or not having separate legal personality);
- 1.2.5 any reference to a party includes its permitted successors, transferees and assignees;
- 1.2.6 references to a document **"in the agreed form"** means a document in a form agreed by the Participant and the Market Operator and initialled by, or on behalf of, each of them for the purpose of identification as such; and
- 1.2.7 **"tax"** means all forms of taxation, duties, imposts and levies whatsoever in the nature of taxation whenever and wherever imposed, including (but without limitation) all stamp duties, imposts, duties, capital and revenue taxes and value added tax, and **"taxes"** and **"taxation"** shall be construed accordingly.

1.3 Headings

The table of contents and the headings in this Deed are included for convenience only and shall be ignored in construing this Deed.

1.4 Construction

The parties hereby acknowledge and agree that this Deed is entered into pursuant to section 6 of the Code. In the event that any of the defined terms used in this Deed are ambiguous, they must be construed in accordance with the Code.

2 CREATION OF SECURITY

2.1 Payment

The Participant undertakes to the Market Operator that it will pay and discharge the Secured Obligations on the due date therefor, or, if no date for payment has been agreed, on demand.

2.2 General

All the Security:

- (a) is created in favour of the Market Operator for itself as the Market Operator under the Code and as a security trustee on behalf of the other SEM Creditors, in both cases to secure the Participants' compliance and performance of their obligations under the Code;
- (b) is created over all the Participant's Security Assets; and
- (c) is security for the payment or discharge of the Secured Obligations.

2.3 Security

As continuing security for the payment and discharge of the Secured Obligations, the Participant as beneficial owner hereby charges by way of first fixed charge ~~and assigns absolutely by way of a first fixed security interest~~ to the Market Operator the Security Assets (including, for the avoidance of doubt, all the Rights in connection therewith).

2.4. Notices

Immediately after delivery of this Deed, the Participant shall give notice to the Account Bank in the form set out in Part 1 of Schedule 2. The Market Operator shall procure the Account Bank's acknowledgement and agreement in the form set out in Part 2 of Schedule 2.

3 PROTECTION OF SECURITY

3.1 Continuing security

The Security shall be a continuing security notwithstanding any intermediate payment or satisfaction of the Secured Obligations and shall remain in force until the Secured Obligations have been fully and unconditionally paid and/or discharged (as appropriate) under the Code.

3.2 No prejudice

The Security shall be in addition to and shall not in any way prejudice or be prejudiced by any other Security Interest, right or remedy which the Market Operator may now or at any time hereafter hold for all or any part of the Secured Obligations.

3.3 No waiver

Failure or delay on the part of the Market Operator in exercising any right, power or discretion under or pursuant to this Deed shall not operate as a waiver thereof, nor will any

single or partial exercise of any such right, power or discretion preclude any other or further exercise thereof. The rights, powers and discretions contained in this Deed are in addition to and not substitution for any right of set-off, compensation, retention, combination of accounts, lien or other right or remedy provided by law.

3.4 Severability

The provisions of this Deed shall be severable and distinct from one another and if at any time one or more of such provisions is or becomes or is declared void, invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions of this Deed shall not in any way be affected or impaired thereby.

3.5 Non impairment

The Participant agrees that none of its obligations or the Market Operator's rights, powers and discretions under this Deed shall be reduced, discharged or otherwise adversely affected by:

- (a) any variation, extension, discharge, compromise, dealing with, exchange or renewal of any Security Interest or any right or remedy which the Market Operator or any other person may have now or in the future from or against the Participant or any other person in respect of any of the Secured Obligations; or
- (b) any failure, act or omission by the Market Operator or any other person in taking up, perfecting or enforcing any Security Interest or guarantee from or against the Participant or any other person in respect of the Secured Obligations; or
- (c) any increase in or waiver or discharge of any of the Secured Obligations or any termination, amendment, variation, supplement, restatement, novation or replacement of any deed, document or agreement relating thereto; or
- (d) any grant of time, indulgence, waiver or concession to the Participant or any other person; or
- (e) any of the administration, receivership, examinership, liquidation, winding-up, insolvency, bankruptcy, incapacity, limitation, disability, discharge by operation of law or any change in the constitution, name or style of the Participant or any other person; or
- (f) any invalidity, illegality, unenforceability, irregularity or frustration of any of the Secured Obligations; or
- (g) any renumbering, redesignation, ~~consolidation, sub-division~~ or replacement of the Account[s] or its [their] being transferred to another branch or department of the Account Bank[s]; or
- (h) anything done or omitted to be done by the Market Operator or any other person which but for this provision might operate to exonerate or discharge or otherwise reduce or extinguish the liability of the Participant under this Deed or the Security.

3.6 Further assurance

Without prejudice to the provisions of Clause 2 (*Creation of Security*), the Participant shall promptly after being requested to do so by the Market Operator, do all such acts and things, give such instructions (in material or dematerialised form) and sign, seal and execute and deliver all such deeds and other documents as the Market Operator may require for perfecting or protecting the Security in respect of the Security Assets or its priority or for facilitating the operation of the Account[s] and the realisation or application of the Security Assets and the exercise of the rights, powers and discretions conferred on the Market Operator under this Deed. The obligations of the Participant under this Deed shall be in

addition to and not in substitution for the covenants for further assurance deemed to be included herein by virtue of the Law of Property (Miscellaneous Provisions) Act 1994.

3.7 **New accounts**

At any time after the Market Operator has received or is deemed to be affected by notice (whether actual or constructive) of the creation of any subsequent Security Interest over or affecting any part of the Security Assets or the proceeds of realisation, the Market Operator may open a new account or accounts on behalf of the Participant. If the Market Operator does not open a new account or accounts it shall nevertheless be treated as if it had done so at the time when it received or was deemed to have received such notice and as from that time all payments made to the Market Operator shall be credited or be treated as having been credited to the new account or accounts and shall not operate to reduce the amount covered by the Security.

4 **POWER OF ATTORNEY**

4.1 **Appointment**

The Participant by way of security hereby irrevocably appoints the Market Operator or its nominee ~~and every Receiver~~ separately as its attorney (with full powers of substitution and delegation) on its behalf and in its name or otherwise, at such times and in such a manner as the attorney may think fit:

- (a) to do anything which the Participant is obliged to do (but has not done) under this Deed and/or the Code including, without limitation, to sign, seal, execute and deliver all deeds, documents, notices, further securities, transfers or assignments of and other instruments relating to, and give instructions (in material or dematerialised form) in respect of, the Security Assets;
- (b) generally to exercise all or any of the rights, powers and discretions conferred on the Market Operator in relation to the Security Assets under the Code; and
- (c) generally to exercise all or any of the rights, powers and discretions conferred on the Market Operator ~~or that Receiver, as applicable,~~ in relation to the Security Assets under this Deed, or (in the case of Security Assets located in England) the Law of Property Act, or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of Property Acts, or (in the case of Security Assets located in Ireland) the Irish Act.

4.2 **Ratification**

The Participant hereby ratifies and confirms and agrees to ratify and confirm whatever its attorney may do or purport to do in the exercise or purported exercise of the power of attorney given by the Participant under this Clause.

4.3 **Exercise of power**

The appointment effected under Clause 4.1 (*Appointment*) shall take effect immediately, but the powers conferred shall only become exercisable upon the Security becoming enforceable or if the Participant does not fulfil any of its obligations under Clause 3.6 (*Further assurance*) within [two] ~~Business Working Days~~ of notice from the Market Operator ~~or any Receiver~~ to do so.

5 **REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS**

5.1 **Representations and warranties**

The Participant represents and warrants to the Market Operator that:

- (a) it is duly incorporated and validly existing under the law of [England] [Scotland] [Northern Ireland] [Ireland] [other];
- (b) it has the capacity and power to enter into this Deed and perform its obligations hereunder and to create the Security;
- (c) it has taken all necessary corporate action to authorise the execution and delivery of the Deed and the performance of its obligations hereunder and the creation of this Security;
- (d) its entering into this Deed and the performance of its obligations hereunder and the creation of the Security will not contravene any law, regulation, agreement or judicial or official order to which it is a party or by which it is bound, or cause any limitation on any of its powers however imposed, or the right or ability of its directors to exercise any of such powers, to be exceeded;
- (e) all actions, authorisations and consents required or advisable in connection with the creation, performance, validity and enforceability of this Deed and the Security and the transactions hereby contemplated and to ensure that (subject to all necessary registrations being made) the Security constitutes a valid, legal, binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant have been obtained or effected and are and shall remain in full force and effect;
- (f) it is and will be the sole absolute unencumbered beneficial owner of the Security Assets free of any other Security Interest or third party claims or interests, other than any such Security Interest, claim or interest that has been or may from time to time be created in favour of the Market Operator and/or any other person pursuant to the Code;
- (g) it has not (otherwise than pursuant to this Deed or otherwise in favour of the Market Operator and/or any other person pursuant to the Code) granted or created any Security Interest over or sold, transferred, lent, assigned, parted with its interest in, disposed of, or granted or created any option or other right to purchase or otherwise acquire the Security Assets or any interest therein, or agreed, conditionally or unconditionally, to do so;
- (h) the Participant's obligations under this Deed and (subject to all necessary registrations being made) the Security are and until fully and unconditionally discharged will be valid, legal, binding and enforceable and the Security constitutes and will remain a valid, legal, binding and enforceable first fixed Security Interest over the Security Assets ranking in priority to the interests of any liquidator, administrator or creditor of the Participant; and
- (i) each of the above representations and warranties will be correct and complied with in all respects at all times during the continuance of the Security as if repeated by reference to the circumstances existing at such times.

5.2 Undertakings

The Participant undertakes to the Market Operator that it shall:

- (a) not save as permitted by the Code make or attempt to make any withdrawal from the Account[s] or create, attempt to create or permit any Security Interest (other than the Security or any Security Interest in favour of the Market Operator and/or any other person created pursuant to the Code) to subsist over or in respect of any of the Security Assets;
- (b) not sell, transfer, lend or otherwise dispose of, or grant or create any other Security Interest over, or any option or other right to purchase or otherwise

acquire, the Security Assets or any interest therein (other than any Security Interest in favour of the Market Operator and/or any other person created pursuant to the Code) or agree, conditionally or unconditionally, to do so;

- (c) not take or omit to take any action which would prejudice the Security or impair the Security Assets and shall, at its own cost, promptly take all action which is at any time necessary or which the Market Operator may request, to protect the interests of the Participant and the Market Operator in the Security Assets;
- (d) not vary or abrogate any of the rights attached to the Security Assets or take or omit to take any action which would have that result;
- (e) ensure that no monies or liabilities are outstanding in respect of any of the Security Assets;
- (f) take all action within its power to procure, maintain in effect and comply with all the terms and conditions of all approvals, authorisations, consents and registrations necessary or advisable under or in connection with this Deed and the Security; or
- (g) procure that the Security shall at all times be a valid, legal, binding and enforceable first fixed security interest over the Security Assets ranking in priority to the interests of any liquidator, administrator, examiner or creditor of the Participant.

6 OPERATION OF ACCOUNT[S]

Withdrawals

The Participant shall ~~not only~~ be entitled to ~~make seek~~ any withdrawals from the Account[s] ~~without the prior written consent of the Market Operator, which consent:~~ provided that:

- (a) the Participant is not in default in respect of any amount owed to a SEM Creditor;
- ~~(a) shall not be unreasonably withheld or delayed in the case of any withdrawal expressly permitted pursuant to section 6 of the Code; and~~
- ~~(b) if given, may be provided by the issue of written instructions by the Market Operator to the relevant Account Bank to effect the relevant withdrawal.~~
- (b) the other conditions as set out in paragraphs 6.34 and 6.35 of the Code apply; and
- (c) the Security under this Deed has not been enforced.

7 ENFORCEMENT

7.1 Security enforceable

Upon or at any time after the occurrence of an Event of Default:

- (a) the Security shall become enforceable; and
- (b) the following power of sale and other powers, in each case as varied and extended by this Deed, shall be exercisable:
 - (i) in respect of Security Assets which are located in England, the power of sale and other powers conferred by Section 101 of the Law of Property Act;

- (ii) in respect of Security Assets which are located in Northern Ireland, the power of sale and other powers conferred by Section 19 of the Conveyancing Act 1881 and Section 4 of the Conveyancing Act 1911;
- (iii) in respect of Security Assets which are located in Ireland, power of sale and other powers conferred by the Irish Act.

7.2 Law of Property Act, Conveyancing and Law of Property Acts and Irish Act

Insofar as the Security Assets are located in:

- (a) England, Clause 7.2.2 below in relation to the Law of Property Act shall apply;
- (b) Northern Ireland, Clause 7.2.3 below in relation to the Conveyancing and Law of Property Acts shall apply; and
- (c) Ireland, Clause 7.2.4 below in relation to the Irish Act shall apply.

7.2.2 Law of Property Act

The powers conferred by Section 101 of the Law of Property Act as varied and extended by this Deed, shall be deemed to have arisen immediately upon execution of this Deed, and Sections 93, 103 and 109 of the Law of Property Act shall not apply to this Deed.

7.2.3 Conveyancing and Law of Property Acts

The powers conferred by Section 19 of the Conveyancing Act 1881 and Section 4 of the Conveyancing Act 1911, as varied and extended by this Deed, shall be deemed to have arisen immediately upon execution of this Deed, and Sections 17, 20 and 24 of the Conveyancing Act 1881 shall not apply to this Deed.

7.2.4 Irish Act

7.2.4.1 In the event that:

- (a) the laws of Ireland apply to:
 - (i) the Security Assets or any of them; or
 - (ii) the Security or any of it; or
- (b) in the event of the appointment in Ireland of a receiver, liquidator, examiner or similar officer to the Participant or over any or all of its assets,

the provisions of Chapter 3 (Obligations, powers and rights of mortgagee) of Part 10 (Mortgages) of the Irish Act, save as specified in Clauses 7.2.4.2 to 7.2.4.5, inclusive, below, shall apply to this Deed notwithstanding anything to the contrary contained in this Deed.

7.2.4.2 The provisions of sections 96(1)(c) (Powers and rights generally), 97 (Taking possession), 99(1) (Mortgagee in possession), 101 (Applications under sections 97 and 100), 103(2) (Obligations on selling), 106(3) (Application of mortgagee's receipts), 107 (Application of proceeds of sale), 108(1) (Appointment of receiver), 108(7) (Remuneration of receiver), 109 (Application of money received by a receiver) and 110(2) (Insurance) of the Irish Act shall not apply to this Deed.

7.2.4.3 The restrictions and any requirements to give notice to the Participant contained in section 108(1) (Appointment of Receiver) of the Irish Act shall not apply to this Deed.

- 7.2.4.4 Notwithstanding anything to the contrary contained in the Irish Act, the Market Operator reserves the right to consolidate mortgage securities without restriction.
- 7.2.4.5 The Participant shall not be entitled to take any action in respect of the Security Assets pursuant to section 94 (Court order for sale) of the Irish Act.
- 7.2.4.6 The restrictions and any requirements to give notice to the Participant contained in section 100 (Power of sale) of the Irish Act shall not apply to this Deed.
- 7.2.4.7 The Market Operator may, at any time and from time to time, delegate by power of attorney or in any other manner (including, without limitation, under the hand of any officer of the Market Operator) to any person or persons or company or fluctuating body of persons all or any of the powers, authorities and discretions which are, for the time being, exercisable by the Market Operator under this Deed or under the Irish Act without the restrictions contained in the Irish Act in relation to the Security Assets or any part thereof, and any such delegation may be made upon such terms and conditions (including power to sub-delegate) and subject to such regulations as the Market Operator may think fit, ~~and the Market Operator shall not be in any way liable or responsible to the Participant for any loss or damage arising from any act, default, omission, or misconduct on the part of any such delegate (or sub-delegate).~~

7.3 Rights upon enforcement

7.3.1 Powers of Market Operator

At any time after the Security has become enforceable, the Market Operator shall be entitled, without any notice to, demand on or consent of the Participant, either in its own name or in name of the Participant or otherwise, and in such manner and on such terms and conditions as it thinks fit, to take possession of and realise the Security Assets and apply the proceeds of realisation in or towards payment or satisfaction of the Secured Obligations in accordance with Clause 7.4 (*Application of proceeds*), and in particular, without limiting the generality:

- (a) to call in and/or uplift or withdraw the sums standing to the credit of the Account[s] in whole or part (and whether or not any deposit period may be broken by so doing);
- (b) to do all things it may consider necessary or expedient for the realisation of the Security Assets or incidental to the exercise of any of the rights conferred on it under or in connection with this Deed, the Law of Property Act, the Conveyancing and Law of Property Acts or the Irish Act; and
- (c) generally to exercise all the rights powers and discretions in respect of the Security Assets it would be entitled to exercise if it were the absolute owner of the Security Assets.

~~7.3.2 Receiver~~

~~7.3.2.1 At any time after the Security has become enforceable the Market Operator may without further notice appoint by way of deed, or otherwise in writing, any one or more person or persons to be a receiver (the "Receiver") of all or any part of the Security Assets and thereafter from time to time, by way of deed, or otherwise in writing, may remove any such person appointed to be Receiver and may, in a similar manner appoint another in his or her place.~~

~~7.3.2.2 Where more than one person is appointed Receiver, they shall have power to act separately (unless the appointment by the Market Operator specifies to the contrary).~~

~~7.3.2.3 The Market Operator may fix the remuneration of the Receiver without the restrictions contained in Section 109 of the Law of Property Act (in the case of Security Assets located~~

~~in England), section 108(7) of the Irish Act (in the case of Security Assets located in Ireland) and without the restrictions contained in Section 24 of the Conveyancing and Law of Property Act 1881 (in the case of Security Assets located in Northern Ireland). The remuneration of the Receiver shall be a debt secured by this Deed which shall be due and payable immediately upon it being paid by the Market Operator.~~

~~7.3.2.4 Any Receiver appointed by the Market Operator under this Deed shall be the agent of the Participant and the Participant shall be solely responsible for his or her acts and remuneration, as well as for any defaults committed by him or her.~~

~~7.3.2.5 Any Receiver appointed by the Market Operator under this Deed shall, in addition to the powers conferred on him by the Law of Property Act and the Insolvency Act 1986 (in the case of Security Assets located in England), the Conveyancing and Law of Property Acts and the Insolvency (Northern Ireland) Order 1989 (as amended) (in the case of Security Assets located in Northern Ireland), have the power to do all such acts and things as an absolute owner could do in the management and realisation of the Security Assets.~~

~~7.3.2.6 The power to appoint a Receiver (whether conferred by this Deed or by statute) shall be, and remain, exercisable by the Market Operator despite any prior appointment in respect of all or any part of the Security Assets.~~

7.4 Application of proceeds

All monies realised or otherwise arising from the enforcement of the Security shall subject to Clause 7.5 (Monies on suspense account) be applied by the Market Operator ~~or any Receiver:~~

(a) in or towards payment or satisfaction of all costs and expenses incurred by the Market Operator (and any Receiver, attorney or agent appointed by it) under or in connection with this Deed and the Security;

~~(b) in or towards the remuneration of any Receiver (as agreed between the Receiver and the Market Operator);~~

(b) ~~(e)~~ in or towards payment or satisfaction of the remaining Secured Obligations in accordance with the terms of the Code; and

(c) ~~(d)~~ in payment of any surplus to the Participant ~~or any other person entitled thereto;~~

provided that prior to the enforcement of the Security, any credit balances held in the Account[s] shall be applied in accordance with the provisions of sections 6.32 and 6.35 of the Code.

This Clause is subject to the settlement of any claims which have priority over the Security and shall not prejudice the Market Operator's right to recover any shortfall from the Participant in accordance with the provisions of the Code.

7.5 Monies on suspense account

Nothing in this Deed shall limit the right of the Market Operator (and the Participant acknowledges that the Market Operator is so entitled) if and for so long as the Market Operator in its discretion shall consider it appropriate, to place all or any monies arising from the enforcement of the Security into a suspense account or accounts (which ~~may~~ must be with the Account Bank), without any obligation to apply the same or any part thereof in or toward the discharge of the Secured Obligations provided that if the aggregate of such monies so placed to the credit of such suspense account or accounts shall equal or exceed the Secured Obligations, the Market Operator shall, subject always to Clause 8 (Release), forthwith apply the same towards settlement of the Secured Obligations.

7.6 Balance

The rights powers and discretions conferred on the Market Operator (subject to the terms of the Code) under this Deed are subject only to its obligation to account to the Participant for any balance of the Security Assets or their proceeds remaining in its hands after the Secured Obligations have been fully and unconditionally paid and discharged.

7.7 Third parties

7.7.1 No person dealing with the Market Operator in relation to the Security Assets shall be concerned to enquire whether any event has occurred upon which any of the rights, powers and discretions conferred under or in connection with this Deed or (in the case of Security Assets located in England) the Law of Property Act or (in the case of Security Assets located in Northern Ireland) the Conveyancing and Law of Property Acts or (in the case of Security Assets located in Ireland) the Irish Act is or may be ~~exercisable~~exercisable, or whether any of the rights, powers and discretions exercised or purported to be exercised by it hereunder has otherwise become exercisable, whether any of the Secured Obligations remains outstanding, or generally as to the propriety or validity of the exercise or purported exercise of any right, power or discretion hereunder. All the protection to purchasers and other persons contained in Sections 104 and 107 of the Law of Property Act (in respect of Security Assets located in England), Sections 21 and 22 of the Conveyancing and Law of Property Act 1881 (in respect of Security Assets located in Northern Ireland) and sections 104, 105 and 106(1) of the Irish Act (in respect of Security Assets located in Ireland) shall apply to any person purchasing from or dealing with the Market Operator or its nominee or delegate as if the Secured Obligations had become due and the statutory powers of sale in relation to the Security Assets had arisen on the date of this Deed.

7.7.2 The receipt or discharge of the Market Operator shall be an absolute discharge to any purchaser or other person dealing with the Market Operator or its nominee or delegate in relation to the Security Assets and any such purchaser or other person shall not have any obligation to enquire after or see to the application of any payments made by it to the Market Operator or its nominee or delegate or at its direction.

7.8 Redemption of prior securities

7.8.1 The Market Operator shall be entitled at any time:

- (a) to redeem any prior Security Interest over the Security Assets; and/or
- (b) to procure the transfer of such Security Interest to itself or its nominee; and/or
- (c) to settle and pass the accounts of the person or persons entitled to any such prior Security Interest and any accounts so settled and passed shall, save for manifest error, be conclusive and binding on the Participant.

7.8.2 The Participant shall pay the Market Operator, immediately on demand, the costs and expenses incurred by the Market Operator in connection with any such redemption and/or transfer, including the payment of any principal or interest, and these shall be subject to the terms of Clause 10 (*Miscellaneous*) and shall be Secured Obligations.

8 RELEASE

8.1 Release

When the Market Operator confirms in writing to the Participant that the Secured Obligations have been fully and unconditionally paid or discharged the Market Operator shall at the Participant's request, and at its expense, discharge the Security and retransfer to the Participant so much of the Security Assets as has not been realised or applied in or towards satisfaction of the Secured Obligations. Any payment or realisation in respect of the Secured Obligations which in the reasonable opinion of the Market Operator is liable to be

avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, shall not be regarded as having been irrevocably effected until the expiry of the period during which it may be challenged on any such ground.

8.2 **Avoidance of payments**

The Market Operator's right to recover the Secured Obligations in full shall not be affected or prejudiced by any payment or realisation which is avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, or by any release or discharge given by the Market Operator on the faith of any such payment or realisation.

8.3 **Retention of Security**

If any payment or realisation in respect of the Secured Obligations is, in the Market Operator's reasonable opinion, liable to be avoided or otherwise invalidated or adjusted by law, including any enactment or rule of law relating to insolvency, the Market Operator shall be entitled to retain this Deed and the Security undischarged and shall not be obliged to retransfer the Security Assets until the expiry of the period during which it may be challenged on any such ground.

9 **LIABILITY OF MARKET OPERATOR OR DELEGATE**

9.1 **Delegation**

The Market Operator may delegate any right, power or authority exercisable by it under this Security to such person, on such terms and conditions (including power to sub-delegate) and in such manner as it thinks fit, but such delegation shall not preclude the Market Operator from itself exercising any such right, power or authority.

9.2 **Liability**

The Market Operator or any delegate shall not in any circumstances be liable to the Participant or any other person as mortgagee in possession or otherwise for any losses, damages, liabilities or expenses arising from or in connection with the application or enforcement of the Security or any realisation, appropriation or application of the Security Assets or from any act, default or omission of the Market Operator or delegate or his/her or its officers, employees or agents in relation to the Security Assets or otherwise in connection with this Deed and the Security, ~~except to the extent caused by the wilful neglect or default of the Market Operator or delegate or his/her or its officers, employees or agents.~~

10 **MISCELLANEOUS**

~~10.1~~ **Non compliance by Participant**

~~If the Participant fails to make any payment or fulfil any obligation due by it under or pursuant to this Deed, the Market Operator shall be entitled to do so in accordance with the Code and on its behalf and in its name (or in its own name as it considers expedient) and/or to take such action to remedy or mitigate the consequences of such failure as it considers expedient, and the amount of any such payment and/or the costs incurred in fulfilling such obligation or mitigating the consequences of such failure, shall be repayable by the Participant on demand, together with interest at 2% per annum over the Market Operator's cost of funding from time to time from the date of demand until settlement and shall constitute Secured Obligations.~~

10.1 ~~10.2~~ **Currency conversion and indemnity**

10.1.1 ~~10.2.1~~ Irrespective of the currency (whether Sterling, Euro or otherwise) in which all or part of the Secured Obligations or the Security Assets from time to time is/are expressed, the Market Operator shall be entitled, for any purpose under or in connection with this Deed, at

any time and without prior notification to the Participant, to convert the amount(s) in question into either Sterling or Euro as the Market Operator may from time to time consider appropriate: any such conversion shall be effected at the Trading Day Exchange Rate.

10.1.2 ~~40.2.2~~ If by reason of any applicable law or regulation, or pursuant to any judgement, decree or order against the Participant, or in respect of the liquidation or other insolvency of the Participant, or for any other reason, any payment under or in connection with this Deed is due or made in a currency (the "**payment currency**") other than the currency in which it is expressed to be due under or in connection with this Deed (the "**contractual currency**") then to the extent that the amount of such payment actually received by the Market Operator when converted into the contractual currency at the Trading Day Exchange Rate falls short of the amount due under or in connection with this Deed, the Participant shall as a separate and independent obligation indemnify and hold the Market Operator harmless against the amount of such shortfall.

10.2 **40.3 Assignment**

10.2.1 ~~40.3.4~~ The Market Operator may at any time (without notice to or consent of the Participant) assign or transfer the benefit of this Deed and the Security or any of its rights or obligations thereunder, provided that such assignment and transfer is in compliance with any applicable requirements of the Code. The Market Operator shall be entitled to impart any information concerning the Participant to any assignee, transferee or proposed assignee or transferee or to any person who may otherwise enter into contractual relations with the Market Operator in relation to this Deed, the Secured Assets or the Secured Obligations.

10.2.2 ~~40.3.2~~ The Participant may not, without the prior written consent of the Market Operator which may be given or withheld in the Market Operator's absolute discretion, assign, transfer or otherwise deal with the benefit or burden of this Deed or the Security or any of its rights or obligations thereunder.

10.2.3 ~~40.3.3~~ This Deed shall be binding upon and inure to the benefit of each of the parties hereto and their respective permitted successors, transferees and assignees and references in this Deed to any of them shall be construed accordingly.

~~40.4~~ **~~Certifications~~**

~~Any certification or determination by the Market Operator in connection with any Secured Obligation or other matter provided for in this Deed shall, save in the case of manifest error, conclusive evidence of the matters to which it relates.~~

10.3 **40.5 Entire agreement**

This Deed constitutes the entire agreement and understanding of the parties in relation to the security interests created herein in furtherance of the provisions in ~~Clause~~ Section 6 of the Code and supersedes any previous agreement between the parties relating to the subject matter of this Deed.

10.4 **40.6 Non-reliance**

Each of the parties acknowledges and agrees that in entering into this Deed it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) of any person (whether a party or not) other than as expressly set out in this Deed.

10.5 **40.7 Amendments**

No amendment or variation of this Deed shall be effective unless it is in writing and executed by or on behalf of each of the parties.

10.6 ~~10.8~~Third party rights

The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Deed and only the parties hereto may enjoy its benefit or enforce its terms.

10.7 ~~10.9~~Counterparts

This Deed may be executed in any number of counterparts, and by one or more parties hereto in separate counterparts, each of which shall be deemed to be an original, but all such counterparts shall together constitute one and the same instrument.

10.8 ~~10.10~~Expenses

The Participant shall indemnify the Market Operator on demand against all liabilities, costs, charges and expenses properly and reasonably incurred by the Market Operator and its nominees and delegates (including the fees and expenses of any legal advisers and where appropriate any VAT) in connection with the preparation, execution and registration of this Deed and the Security and the enforcement or preservation of the Market Operator's rights under this Deed and the Security together with interest at ~~2% per annum over the Market Operator's cost of funding from time to time~~ (as calculated in accordance with the Code) from the date of demand until settlement, and the amount thereof shall be a Secured Obligation.

~~10.11~~ **Calculations**

~~To the extent that this Deed provides for the making of a calculation or determination by the Market Operator, it will be made in good faith and, taking into account the circumstances of its making, in a commercially reasonable manner.~~

11 NOTICES

11.1 Notices and deemed receipt

Any demand or notice to be given under this Deed shall be in writing signed by or on behalf of the party giving it and shall be served by delivering it personally or sending it by pre-paid recorded delivery or registered post or by facsimile to the address and for the attention of the relevant party set out in Clause 11.2 (or as otherwise notified by that party thereunder). Any such notice shall be deemed to have been received:

- (a) if delivered personally, at the time of delivery or attempted delivery;
- (b) in the case of pre-paid recorded delivery or registered post, at the time of delivery or attempted delivery; and
- (c) in the case of facsimile, at the time of transmission, where in order to prove transmission it shall be sufficient to produce confirmation of uninterrupted transmission by a transmission report,

provided that if deemed receipt occurs before 9am on a Business-Working Day the notice shall be deemed to have been received at 9am on that day and if deemed receipt occurs after 5pm on a Business-Working Day, or on a day which is not a Business-Working Day, the notice shall be deemed to have been received at 9am on the next Business-Working Day.

11.2 Addresses for notices

The addresses and facsimile numbers of the parties for the purposes of this Clause 11.2 are:

The Market Operator

Address: []

For the attention of: []

Fax number: []

The Participant

Address: []

For the attention of: []

Fax number: []

or such other address or facsimile number as may be notified in writing from time to time by the relevant party to the other.

11.3 No electronic service

For the avoidance of doubt no demand or notice given under this Deed shall be validly given if sent by e-mail.

12 GOVERNING LAW AND JURISDICTION

12.1 This Deed (including any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with: (i) insofar as the Security Assets are located in England, the laws of England; insofar as the Security Assets are located in Northern Ireland, the laws of Northern Ireland; and (iii) insofar as the Security Assets are located in Ireland, the laws of Ireland.

12.2 The parties irrevocably submit: (i) insofar as the Security Assets are located in England, to the non-exclusive jurisdiction of the English Courts; (ii) insofar as the Security Assets are located in Northern Ireland, to the non-exclusive jurisdiction of the Northern Irish Courts; and (iii) insofar as the Security Assets are located in Ireland, to the non-exclusive jurisdiction of the Irish Courts.

EXECUTED AND DELIVERED as a deed on the date first above stated.

SCHEDULES

SCHEDULE 1

The Account[s] and Account Bank[s]

Name of Account	Number of Account	Bank, Branch and sort code where Account held
[]	[]	[]

SCHEDULE 2
Part 1: Notice of charge and assignment to Account Bank(s)
[On letterhead of Participant]

To: Name of Account Bank (the "Account Bank")
Branch: []
Address: []
Attention: []

Date: []

Dear Sirs

Account number[s]: [specify] (the "Account[s]")

We (*insert name*) (the "Participant") hereby give notice that by a Deed of Charge and Account Security between us and EirGrid p.l.c. and SONI Limited together trading as the Single Electricity Market Operator (the "Market Operator") dated the [] day of [] 200[] (the "Account Security") we have charged by way of first fixed charge ~~and assigned by way of first fixed security interest to the Bank to the Market Operator~~ our whole right, equitable title and beneficial interest present and future in the Account[s], the debt(s) thereby represented, and all sums, whether principal or interest, now or hereafter deposited in or otherwise standing to the credit of the Account[s]. A copy of the Account Security is annexed.

We irrevocably instruct and authorise you, without further reference to, or enquiry or permission from, us:

- a. to disclose to the Market Operator any information about the Account[s] which it may request;
- b. to comply with the terms of any written notice or instruction relating to the Account[s] which you may receive from the Market Operator;
- c. to hold all sums standing at credit of the Account[s] to the order of the Market Operator;
- d. to pay or release any sum standing at credit of the Account[s] only in accordance with the written instructions or with the written consent of the Market Operator.

For the avoidance of doubt, any notice, instruction or authorisation from the Market Operator may validly be given by fax or email. In the event of the Account Bank suffering any cost, expense or loss of any nature as a result of acting in reliance upon such notice, instruction or authorisation that the Account Bank reasonably considers to have been made or issued by the Market Operator and which was not so made or issued, we hereby agree to indemnify the Account Bank forthwith upon demand against any such cost, expense or loss of any nature so arising, save to the extent arising from gross negligence or wilful misconduct on the part of the Account Bank.

The instructions and authorisations in this letter may not be revoked or amended without the prior written consent of the Market Operator.

Please confirm that you have not received notice or are otherwise aware of any other assignment, charge, encumbrance or third party interest in respect of the Account[s] or the sums standing at credit of or any rights or benefits relating to the Account[s] and that you have not claimed or exercised, and will not claim or exercise any right of set-off, counterclaim, deduction, lien or combination of accounts or security interest in respect thereof.

In the absence of gross negligence or wilful misconduct on its part, the Account Bank shall not be liable to the Participant, Market Operator or any other person with respect to any act or omission in connection with the services provided. Provided that it has complied with the terms of the written

acknowledgement by it of this notice and, to the extent not inconsistent with such acknowledgment, with the mandate relating to, and terms and conditions applicable to the Account[s], under no circumstances shall the Account Bank be liable to the Participant, Market Operator or any other person for indirect or consequential damages and the Account Bank shall not in any event be liable for the following direct losses: loss of profits, loss of contracts, loss of goodwill, whether or not foreseeable, even if the Account Bank has been advised of the likelihood of such loss or damage and regardless of whether the claim for loss or damage is made in negligence, for breach of contract or otherwise.

Provided that the Account Bank has complied with the terms of the written acknowledgement by it of this notice and, to the extent not inconsistent with such acknowledgment, with the mandate relating to, and terms and conditions applicable to the Account[s], we hereby agree to indemnify and hold the Account Bank harmless from and against all losses incurred or suffered by the Account Bank and its officers, directors, employees and shareholders resulting directly or indirectly from the Account Bank carrying out its obligations under this mandate or acting in accordance with any instructions relating to the Account[s], save to the extent arising from gross negligence or wilful misconduct on the part of the Account Bank.

This letter is governed by ~~English~~ [Northern Irish/Irish/English] law.

Please acknowledge receipt and confirm your agreement to the terms hereof by sending the attached acknowledgement to the Market Operator with a copy to us.

Yours faithfully

For and on behalf of [Participant]

.....
Authorised Signatory

SCHEDULE 2
Part 2: Acknowledgement from Account Bank(s)
[On letterhead of [each] Account Bank]

To: EirGrid p.l.c.
and SONI Limited
Address: []
Attention: []

Date: []

Dear Sirs

Account number[s]: [specify] (the "Account[s]")

We hereby acknowledge receipt from [Participant] of a notice of charge and ~~assignment~~ dated [] (the "Notice") of its whole right, equitable title and beneficial interest, present and future, in and to the Account[s], the debt(s) thereby represented, and all sums, whether principal or interest, now or hereafter deposited in or otherwise standing to the credit of the Account[s] which appears on its face to be validly given and Danske Bank A/S has not nor is it required to verify or confirm with any person whether such notice was actually given by any person authorised to do so or the circumstances which would entitle such notice to be given had actually occurred). We also acknowledge receipt of a copy of the Deed of Charge and Account Security dated [] 200[] between you and the Participant (the "Account Security").

We confirm that:

- a we accept the instructions contained in the Notice and undertake to comply with its terms;
- b we have not received nor are we aware of any other assignment, charge, encumbrance or third party interest in the Account[s] or the sums standing at credit of or, any rights and benefits relating to the Account[s];
- c we have not claimed or exercised, nor will we claim or exercise, any right of set-off, counterclaim, deduction, lien, combination of accounts or security interest in respect of the Account[s]; and
- d we will not permit any amount to be withdrawn from the Account[s] except on your written instructions or with your prior written consent in accordance with the provisions of Clause 6 (Withdrawals) of the Account Security or otherwise (to the extent not inconsistent with the foregoing) in accordance with any bank mandate in relation to the Accounts.

We are aware that you will rely on this letter in respect of your rights under the Account Security.

This letter is governed by ~~English law~~ [Northern Irish/Irish/English] Law.

Yours faithfully

For and on behalf of [Account Bank]

.....
Authorised Signatory
Copied to: [Participant]
Address:
Attention:

[Appropriate execution blocks for Participant to execute as a deed to be included]

**THE COMMON SEAL of
Eirgrid p.l.c.
was affixed hereto
and this Deed was delivered:**

Director

Director/Secretary

**EXECUTED and DELIVERED as a
DEED by SONI Limited
acting by:**

.....	Director
.....	Full Name
.....	Director
.....	Full Name

Appendix 6- ESB Comments dated 17 October 2014



Memo

To: Áine Doran – Regulation, G&WM

From: Roisin McArdle – Solicitor, Group Commercial Legal

Date: 17 October 2014

Re: Registration of Charges – Mod_02_013, TSC

Ref: RMcA

Áine,

Recent correspondence and conversations refers.

In principle we have no objection to a proposal to amend the Registration of Charges provisions in the TSC provided those amendments resolve the problems presented in the first instance without creating new or greater inefficiencies or inadequacies.

As currently drafted I would not be satisfied that the Deed of Charge does in actual fact resolve the problems and/or creates inefficiencies and inadequacies. If SEMO is satisfied that the amendments Viridian has suggested are unnecessary then SEMO should explain why the amendments are not necessary and explain why comments to date have not been incorporated or why they have been rejected.

In Mod_02_13, it was submitted that the problems with the existing Registration of Charges regime included:

- (a) Non-compliance of Participants creates difficulty with registering charges within 21 days,
- (b) Substantial administrative work involved,
- (c) Companies Registration Office (Dublin) required extra documentation,
- (d) Jurisdiction – registering in jurisdictions outside of Ireland or the UK was challenging & disproportionate to the ends to be achieved, and
- (e) Enforceability – which issue arose following external legal advice.

If the TSC was being started again from scratch it is debatable whether Registration of Charges would actually be seen as the most practical solution to the securing of an interest over the Collateral Reserve Accounts. It might well be that other options, e.g., title transfer,

business trust, etc., would instead find itself in the TSC. This is supported by the "...*firm view...*" from SEMO's external legal advisers which recommended title transfer as being the most appropriate form for securing an interest over the Collateral Reserve Account.

In this regard, following Modification Committee Meeting 49, more information was provided on "Option 3 (Title Transfer)" and concluded by way of "MEMO: Title Transfer" that "*Further specifics regarding this arrangement will likely emerge if it proceeds to the drafting stage. However, it is likely to be a much cleaner, cost effective and less cumbersome arrangement than the current mechanism..*".

Despite these conclusions, the Modification Committee decided to pursue an amendment to the Registration of Charges. The rationale for this decision seems to rest on:

1. The fact that there were "*approximately ten unsecured accounts...due to lack of co-operation*"; - i.e., point (a) above, and
2. SEMO had "*...recently transferred collateral funds to 29 "unsecured" accounts on foot of the new banking arrangements...*" and this seemed to introduce a "*...degree of urgency...*" and therefore, "*...on an interim basis...SEMO are proceeding to review and revise the current draft Deed of Charge and proceed to request the relevant Participants to delivery duly executed deeds...*", and
3. At Modification Committee Meeting 50 it was expressed that Option 3 (Title Transfer) was unequal and more favourable to SEMO as opposed to the Participants.

It seems the decision was only intended to be an "interim" solution and as such is really only designed to partially address the original point (a) above, i.e., to introduce enforcement measures to ensure that the existing uncooperative participants furnish the relevant documentation and (e).

There is no reference to how "interim" this solution is intended to be or when or if a more enduring solution is to be put forward to address all the original concerns arising under Mod_02_013.

If SEMO presses ahead with its current proposal it will no doubt be a cumbersome process not least for participants who have already complied fully with the existing process. It appears existing cooperative participants will be expected to spend time, money and resources to replacing the existing registered charges and will be subject to the proposed new enforcement measures if it doesn't manage to meet the deadlines for furnishing relevant documentation to SEMO. It is also likely to be more difficult for existing cooperative participants to comply with the new process as there will be a need to co-ordinate the release of the existing charge with the registration of the new charge. And this is notwithstanding the fact that this solution is considered an interim one.

It has also become clear with the attempts to modify the Deed of Charge and TSC provisions that, inter alia:

- (i) This option requires more substantive changes than was probably contemplated at the time of the proposal and decision in 2013 – this is evidenced by the

responses to date from various participants who have commented on the proposed TSC and Deed of Charge amendments. In this regard I don't propose doing a line by line mark up of the Draft 3 Deed of Charge suffice to say that I generally agree with Viridian's "general remarks" and "high level concerns" on the matter;

- (ii) Other ancillary matters had not been considered, e.g., a number of "Collateral Reserve Accounts" are not used for the purposes of Required Credit Cover but to pay small invoice amounts,
- (iii) With the passage of time since Mod_02_013 was first submitted (almost two years) circumstances are likely changed - for instance the proposed amendments to Companies Acts in Ireland, where it is proposed a charge over cash or money credited to an account of a financial institution, or any other deposits will not have to be registered.

It is unreasonable for SEMO to push ahead with amendments to the Registration of Charges if those amendments go further than was intended in the first instance, does not actually provide a solution to all the original problems or creates new inefficiencies or inadequacies.

A review of the documentation to date suggests that the amendments to the Registration of Charges was to be an interim solution to a particular urgent need and it was probably assumed that amending existing TSC provisions and Deed of Charge would be a relatively straightforward matter. That has turned out not to be the case.

It would seem reasonable and prudent therefore to ask Modification Committee to revisit its original decision to ensure that the same circumstances exist and its original rationale(s) for making the decision is still sound and there are not other more suitable interim or enduring alternatives to be considered or reconsidered.

Kind regards,

Roisin McArdle
SOLICITOR

