

Proposal for HSOTC Evaluation Panels

May 2020

Purpose

The purpose of the Evaluation Panels is to test how the proposed Code provision might be interpreted and applied in diverse real-life situations or market behaviours ('case studies') with two expert panels (working separately from each other) acting as proxies for the Rulings Panel and Courts. The panels would also apply the existing high standard provisions to the same case studies.

Questions and concerns have been raised by some stakeholders that the proposed Code changes would give rise to unintended interpretations and outcomes, including the risk of enabling de facto price control.

Further, some MDAG members and stakeholders have suggested it would be useful to have some examples or further guidance on how the proposed Code provisions would work in practise.

The proposal panel evaluation exercise would provide:

- useful (more empirical) insights:
 - on the range of likely interpretations and the degree to which unintended applications of the proposed rule are likely to occur; and
 - into how the proposed rule compares to the existing high standard rule in its application to the same fact situation; and
- useful information to draw on in formulating possible Guidelines to accompany the proposed rule.

Scope

- Case studies to be evaluated against the proposed rule include offering behaviour in pivotal situations, offering behaviour in islanded situations, offering behaviour in situations where parties have some degree of market power, offering behaviour in genuine scarcity situations.
- Case studies that would be out of scope for these panels include instances of market manipulation or insider trading.

Panel members and administration

- Proposal for two panels consisting of three members each. The option for one panel is also open.
- One member would be designated Chair to ensure the evaluation meeting progresses effectively.
- The panels would evaluate the same case studies.
- With a view to reflecting likely (real world) diverse make up of a Court or Rulings Panel, panel make up would be designed to reflect a broad spectrum of views.

- Members would be compensated for their time. The Authority would provide secretariat resource.
- Potential conflicts of interest will be assessed for each panel member.

Structure of panel work

- Panels would be provided with the following material in advance:
 - Summary of the proposed rule from the HSOTC discussion paper*
 - Description of case studies to be evaluated
- **Pre-meeting:** Panels would have a pre-meeting with Authority staff and the MDAG Chair to explain the task and clarify any questions.
- **Evaluation meeting:** Panels would meet for up to 5 hours to discuss. The Secretariat would be in attendance but no other Authority or MDAG members would attend, to avoid bias.
- Panels would document their deliberations, with the support of the Secretariat, and present them to the MDAG at the earliest meeting.

*To ensure no preconceptions, panel members should not read the discussion paper or submissions.

Description of possible case studies

- There could be 4-6 case studies.
- MDAG members and Authority Staff will develop the case studies. Stakeholder (e.g. those who responded to the consultation and other interested parties e.g. MEUG) would also be consulted, to ensure the scenarios we are testing would be useful to those parties.
- Case studies would be generic. They could be fashioned and stylised from analogous actual events, but it is important they there are 'no names' and the case study is not seen as a proxy for revisiting a decision of an actual event. It should include a genuine scarcity high price situation where a party may have had market power but this did not cause the high price.
- It is not a forensic exercise and the panels will not necessarily have all of the facts of each case. If they need to make important assumptions, they should simply state them in their view. Alternatively, they should state any factors that would swing their decision, if there are gaps.

How the panel findings will be used

- Panel findings will be used to inform the MDAG's deliberations on their final recommendations to the Authority for the *'Review of spot market trading conduct provisions'* project, alongside submissions and cross-submissions from the HSOTC discussion paper.
- Panel findings should not be considered to hold any legal precedent or limit future Authority Compliance findings on this topic.
- Material presented to the MDAG will be published on the Authority's website, as is usual for all MDAG meeting material.