



**Single Electricity Market
(SEM)**

**Capacity Market Code Working Group 26
Decision Paper**

SEM-22-074

14 October 2022

EXECUTIVE SUMMARY

The purpose of this decision paper is to set out the decision relating to the Proposed Modification to the Capacity Market Code (CMC) discussed at Working Group 26 held on 21 July 2022.

The decision within this paper follows on from the associated consultation ([SEM-22-050](#)) which was due to close on 20 September 2022. However, due to the additional Bank Holiday in Northern Ireland, the consultation process closed on 21 September 2022.

This paper considers the proposed modification presented at WG26 which related to:

➤ **CMC_10_22: Introduction of New Remedial Action in the Event of Third Party Delays**

The aim of this proposal is to modify the CMC to extend the long-stop date and the maximum duration of New Capacity, in instances where Substantial Completion has been delayed as a result of the delivery of third party activities in a timely manner.

11 responses were received to the Capacity Market Code Working Group 26 Modification Consultation Paper, with 3 responses being marked confidential and one response being designated partially confidential.

Summary of Key Decisions

Following consideration of the proposal and the responses received to the consultation the SEM Committee have decided:

Modification	Decision	Implementation Date
CMC_10_22: Introduction of New Remedial Action in the Event of Third Party Delays	Rejected	Not Applicable

Contents

EXECUTIVE SUMMARY 2

1. Overview..... 4

 1.1. Background..... 4

 1.2. Responses to Consultation 6

2. CMC_10_22 – Introduction of New Remedial Action in the Event of Third Party Delays..... 7

 2.1. Consultation Summary 7

 2.2. Summary of Responses 8

 2.3. SEM Committee Decisions..... 12

3. Next Steps..... 13

Appendix A – Responses to SEM-22-050

1. OVERVIEW

1.1. BACKGROUND

1.1.1. The SEM CRM detailed design and auction process has been developed through a series of consultation and decision papers, all of which are available on the SEM Committee's (SEMC) website. These decisions were translated into legal drafting of the market rules via an extensive consultative process leading to the publication of the Trading and Settlement Code (TSC) and the Capacity Market Code (CMC). An updated version of the [CMC \(7.0\)](#) was published on 13 September 2022 and the most recent version of the [TSC](#) was published on 17 May 2022.

Process for modification of the CMC

1.1.2. Section B.12 of the CMC outlines the process used to modify the code. In particular, it sets out the processes for proposing, consideration, consultation and implementation or rejection of Modifications to the CMC.

1.1.3. The purpose of the Modifications process is to allow for modifications to the CMC to be proposed, considered and, if appropriate, implemented with a view to better facilitating code objectives as set out in Section A.1.2 of the CMC. (B.12.1.2).

1.1.4. Modifications to the CMC can be proposed and submitted by any person, (B.12.4.1), at any time. Unless the modification is urgent modifications are subsequently discussed at a Working Group held on a bi-monthly basis. Each Working Group represents an opportunity for a modification proposer to present their proposal(s) and for this to be discussed by the workshop attendees.

1.1.5. For discussion at a Working Group, Modification proposals must be submitted to the System Operators at least 10 working days before a Working Group meeting is due to take place. If a proposal is received less than 10 working days before a Working Group and is not marked as urgent it is deferred for discussion to the next Working Group.

1.1.6. Following each Working Group, and as per section B.12.5.6 of the CMC, the RAs are required to publish a timetable for the consideration, consultation and decision relating to the Modification(s) proposed during a Working Group.

1.1.7. If a proposal is received and deemed to be contrary to the Capacity Market Code Objectives or does not further any of those objectives, the Regulatory Authorities (RAs) will reject the proposal on the grounds of being spurious, as set out in section B.12.6 of the CMC.

1.1.8. If a proposed modification is deemed urgent by the RAs, CMC Section B.12.9.5 will become active and the RAs will determine the procedure and timetable to be followed in the assessment of the Modification Proposal. The CMC states that the procedure and timetable may vary from the normal processes set out in the code, allowing for the modification to be fast-tracked.

Process and Timeline for this Modification

- 1.1.9. On 8 July 2022 the SOs notified the RAs of the proposed modification submitted for discussion at WG26 held on 21 July 2022.
- 1.1.10. This proposed modification was marked as urgent, however, upon review of the proposal, the RAS deemed it to be standard and will therefore be processed through the normal Modification process.
- 1.1.11. Following a review of the proposal, the Regulatory Authorities determined that the proposal was not spurious.
- 1.1.12. On the 4 August 2022 the RAs determined the procedure to apply to the Modification Proposal. The procedure is shown in detail in Appendix A. An overview of the timetable is as follows:
 - i. The System Operators convened Working Group 26 where the Modification Proposal was considered on 21 July 2022.
 - ii. The System Operators, as set out in B.12.7.1 (j) of the CMC, are to prepare a report of the discussions which took place at the workshop, provide the report to the RAs and publish it on the Modifications website promptly after the workshop.
 - iii. The RAs will then consult on the Proposed Modification, with a response time of 20 Working Days (as defined in the CMC), from the date of publication of the Consultation.
- 1.1.13. As contemplated by B.12.11 the RAs will make their decision as soon as reasonably practicable following conclusion of the consultation and will publish a report in respect of their decision. The purpose of this decision paper is to set out the decision relating to the Modification Proposal discussed during Working Group 26 to either:
 - a) Implement a modification;
 - b) Reject a modification; or
 - c) Undertake further consideration in regards to matters raised in the modification proposal.
- 1.1.14. This decision paper sets out a summary of the consultation proposals and sets out the SEM Committee's decision.

1.2. RESPONSES TO CONSULTATION

1.2.1. This paper includes a summary of the responses made to the Capacity Market Code Modifications consultation paper ([SEM-22-050](#)) which was published on 22 August 2022.

1.2.2. A total of 11 responses were received by close of the consultation period, with 3 responses being marked confidential and one response being designated partially confidential. The non-confidential respondents are outlined below and copies of each response can be obtained from the SEM Committee website.

- Bord Gáis Energy (BGE)
- Bord na Móna (BnM)
- EirGrid and SONI Ltd
- EP UK Investments (EPUKI)
- ESB Generation and Trading (ESBGT)
- Kilshane Energy
- Mutual Energy
- SSE

2. CMC_10_22 – INTRODUCTION OF NEW REMEDIAL ACTION IN THE EVENT OF THIRD PARTY DELAYS

2.1. CONSULTATION SUMMARY

- 2.1.1. This proposal was submitted by EPEDL and aimed to modify the CMC to extend the long-stop date and the maximum duration of New Capacity, in instances where Substantial Completion has been delayed as a result of the delivery of third party activities in a timely manner.
- 2.1.2. Within their submission, EPEDL stated that the CMC requires units delivering Awarded New Capacity to establish an implementation plan which outlines key milestone dates for the delivery of New Capacity. Further to this they highlighted that a key milestone is the Substantial Completion milestone, which needs to be satisfied for a New Capacity Market Unit to be flagged as 'Actual' in the Capacity and Trade Register.
- 2.1.3. Further to this they state that, in order to achieve Substantial Completion, participants must rely on System Operators, planning authorities and other statutory undertakers to exercise their functions in a timely manner. Specifically, the completion of the electricity grid connection, planning permission, and gas connection.
- 2.1.4. EPEDL highlight that late delivery of any of these activities represents a significant risk to delivery of New Capacity which is beyond the control of the Participant and advise that the risk of non-controllable, third-party delays will affect investment decisions made by Participants developing New Capacity projects, possibly resulting in the non-delivery of these projects.
- 2.1.5. EPEDL advised that, if implemented and in the event of a third party delay which results in a milestone being completed after the date provided in the initial Implementation Plan, the long-stop date and Maximum Capacity Duration will be extended proportionally.
- 2.1.6. As set out in the consultation paper, the SEM Committee were concerned about the failure of the modification to take account of the contingency which they would expect to form part of any Implementation Plan.

The SEM Committee also had concerns that by removing many of the penalties which arise if capacity is not delivered in a timely fashion, it creates an incentive to submit more optimistic Implementation Plans than is currently the case.
- 2.1.7. The SEM Committee had raised the issue that the proposed Modification also has the potential to exacerbate the situation where capacity which will not be delivered for the start of the first Capacity Year displaces capacity that could have been delivered on time in the Auction.
- 2.1.8. Managing the potential adverse consequences of the proposed Modification is likely to require greater scrutiny of New Capacity applications at the time of Qualification (in particular, by the System Operators under E.7.5.1 (b) and (c)). This may lead more applications to be rejected and, consequently, more requests for reviews and disputes of the SOs Qualification decisions.

- 2.1.9. When reviewing the proposed Final Qualification Decisions, and in particular when using their powers under E.9.4.5, the RAs would need to be cognisant of the presumption under the proposed J.5.3.3 that they will be granting extensions when New Capacity is delayed. As with the SOs decisions under E.7.5.1, the need to protect consumers' interests and to comply with Code Objective A.1.2.1 (b) to facilitate adequate future capacity, mean that the RAs may have to take a more robust view on the probability of timely deliverability of New Capacity.
- 2.1.10. Given the concerns raised at the Working Group, the SEM Committee were minded to reject this proposal for implementation.

2.2. SUMMARY OF RESPONSES

- 2.2.1. While the majority of responses to the consultation were in favour of the proposed modification, a significant number supported its rejection.
- 2.2.2. The following section outlines some of the issues raised.
- 2.2.3. BGE were strongly supportive of the modification, believing that its approval would, for projects that were already contracted for delivery from capacity year 2024/25 and beyond in particular, substantially alleviate the increasing financial risks these projects are facing in the current unprecedented market circumstances.
- 2.2.4. They highlighted that, if approved, the effect of the modification is that the 10-year duration of the contracts (being the duration under which initial investment case decisions would have been made) will continue to be respected such that the overall revenues for the project will be closer to the financials that informed initial go/no-go decisions.
- 2.2.5. BGE stated that they were very concerned with the RAs' "minded to" decision to reject the modification. They noted that as delays, such as those experienced by global supply chains, could not reasonably have been foreseen at the time of the capacity auction, it would have been difficult for participants to have built in contingency. The modification, as they saw it, would help revise the contingency to a more informed contingency period that can now be more reasonably forecast – that extra time being determinable based on the evidence market participants, possibly supported by third parties, would submit. The Substantial Completion and LSD dates could then be revised in tandem.
- 2.2.6. In terms of the modification's focus, it was thought that this should be on capacity that has contracted already and planned for delivery in 24/25 and 25/26. These units would be updating already submitted implementation plans so the realism of the dates for these particular projects would be much easier to decipher. They believed that the retrospective nature of the modification should not be a concern as it relates to future delivery and that more critically, the RAs have a statutory duty to protect consumers and ensure security of supply. These obligations in pursuit of public policy should trump any concerns around retrospectivity.
- 2.2.7. On the System Operators' query around "Third Parties", BGE proposed to better define what kind of "allowable delays" may be captured. The idea is not that the SOs are considered "third party"

to the capacity market but rather they are recognised as an entity that is critical to the timely delivery of the projects in question and if they too are hampered by supply chain delays, this is outside of their control as well as outside of market participants' control. BGE did not believe it was necessary to name an exhaustive list of entities that are key to the delivery of projects but instead ask that the effects and the range of parties they could extend to, are recognised in the modification.

- 2.2.8. To alleviate concerns around participants submitting unrealistic timelines for delivery, BGE asked that the RAs consider a 'sunset clause' for this extension option with the duration of the clause covering the capacity that is contracted to deliver over the tight capacity margins predicted over the next 3 to 4 years.
- 2.2.9. In their response, BnM thought that the current code does not address the risk associated with third party delays, specifically where there are delays due to issues across planning, grid connection and gas connection, and the impact these can have on an investor. Such delays can unfairly result in projects having to withdraw from contracts which exacerbates the capacity deficit issue. They argued that CMC_10_22 seeks to amend the code to provide more suitable arrangements to support the delivery of new capacity by allocating risk to those best able to manage it.
- 2.2.10. Believing that the modification should be approved, BnM stated that the premise for the SEMC minded to position to reject the proposal seemed to be based on the need for additional work pre-auction in scrutinising qualification applications, at which stage 3rd party delays are unlikely to be known, as well as concern over the removal of financial incentives to deliver. From an industry perspective, the respondent thought that focusing on improving third party delivery in so far as possible is also a way to address third-party risk to ensure the delays do not materialise. In addition, there are already significant financial incentives for developers to deliver on time – performance bonds, reputational risk and potential market revenues etc.
- 2.2.11. The response also stated that in terms of the modification having the potential to exacerbate the situation where capacity which will not be delivered for the start of the first Capacity Year displaces capacity that could have been delivered on time in the Auction, this assumes that it is known at the time of the auction which projects will suffer from 3rd party delays. BnM believed that there should be greater concern towards facilitating a sound project which might be delayed for reasons genuinely outside of its control – than towards rejecting it for another project which is likely to have shorter delivery timelines for the same capacity year in a subsequent auction which is therefore likely to have greater potential for delay in completion.
- 2.2.12. In their response, the TSOs', EirGrid and SONI, supported the SEM Committee's *minded to reject* position, in part due to its broad application. They also believed that an unintended consequence of the proposal would be to increase the risk of timely delivery.
- 2.2.13. The TSOs stated that the existing contractual milestones for capacity – including Minimum Completion before the applicable Long Stop Date (18 months after the start of the first Capacity Year in which the Awarded New Capacity is to be provided) – provide reasonable contingency for events within and outside the control of the project. They also cautioned that as the proposed remedial action would apply to awarded capacity which competed and was successful in previous

qualification and auction process, careful consideration of the impact of the modification applicable to these participants would be required to ensure no undue advantage was conferred.

- 2.2.14. EirGrid and SONI also argued that there are circumstances where a specific remedial action may be merited and should a remedial action for third party delays be introduced, it should seek to address very specific risks, e.g., the time risk associated with legal challenges in the context of obligated delivery milestones. The TSOs were of the view that there is merit in facilitating due planning processes in both jurisdictions to allow projects and third parties to utilise the statutory and legal processes available to them, such that they do not make it impossible for a project promoted to deliver or commit further to deliver contracted capacity. Such a facility would need to be implemented with unambiguous definitions and criteria and apply to precise circumstances.
- 2.2.15. Such a remedial action facility should not apply when the contracted party's actions or omissions cause a delay to the planning process, nor when the party instigates legal proceedings on their own behalf. Nor should the action apply to anything other than legal proceedings with respect to the planning process i.e., Judicial Review. However, further detail outlining how this might work in practice, was limited.
- 2.2.16. The TSOs stated that it might be extremely difficult, if not impossible, to determine with due diligence which party is 'solely responsible' and what qualifies as 'sufficient detail' with respect to the application is unclear and open to interpretation.
- 2.2.17. EPUKI stated that they were disappointed with the minded to position presented by the SEM Committee and considered this to be inconsistent with the objectives of the Capacity Market Code, the functions of the two Regulators and stated policy of the Irish government.
- 2.2.18. They believed that the proposed modification was not only of significant benefit to the consumer but that it would also increase competition and reduce the risk of insufficient new capacity in upcoming auctions. Failure to implement the modification leaves New Capacity exposed to instances where a third-party(s) can cause a delay to project delivery in time for the relevant Capacity Year and outside the control of the developer. This could lead to contract erosion (loss of market income, risking a project's economic return) and contract termination potentially resulting from projects missing Implementation Milestones (particularly Substantial Financial Completion) or Long-Stop Dates and hence having their Capacity contracts terminated.
- 2.2.19. EPUKI also made reference to the recent Ernst & Young (EY) review of the CRM¹, arguing that its recommendations should not be ignored in the context of the modification decision. They believed that the recommendations made in the EY report aligned with the intent of CMC_10_22.
- 2.2.20. In terms of third parties, EPUKI believed that all statutory bodies and relevant monopolies which affect the delivery of the project should be considered third parties, including TSOs, the gas TSOs, the Environmental Agencies, planning authorities, statutory consultees and the regulators. Equally, all third party processes should be included, with this including any appeal of Judicial Review of a Planning Permission Grant or any other permission or licence.

¹ <https://www.semcommittee.com/publications/sem-22-054-call-comments-ey-review-performance-sem-capacity-remuneration-mechanism>

- 2.2.21. ESBGT were of the view that the proposal was a necessary response to ongoing issues around the shortening of the duration between the Auction and the Delivery Year, adding that anything less than the full four years puts added pressures on developers and reduces timeline tolerances for planning and connection delays which are not in the control of the participant.
- 2.2.22. Welcoming the proposal, ESBGT stated that risk associated with uncontrollable delays, which are solely the result of Third Parties are portrayed to the market as guaranteed, like grid connection direction, present a challenge to Capacity Market participants who wish to make competitive bids into Capacity Auctions. Arguing that the issues find their root in the faster process applications where planning and connection agreements are secured after New Capacity Applications as opposed to the linear process where planning and delivery are secured ahead of Application, ESBGT believed that ensuring projects have secured the necessary planning and connection agreements in advance and then allowing for the full four years for development of the project (as originally intended) represented the best tool to reducing project risk delay.
- 2.2.23. ESBGT also believed that the modification should be included for connection agreements not delivered in line with the Capacity Market, as per the intention of the CRU Direction. They argued that if the CRU and EirGrid are of the view that the CRU direction does not require a connection agreement for delivery for the start of the capacity year this needs to be clearly identified by the CRU so that this risk can be accommodated in the project plan and bid price (as stated by the RAs in this consultation paper). To perform neither of the above, is grossly unfair to generators and, worse, ultimately exposing the customer to high prices and greater security of supply issues
- 2.2.24. ESBGT also proposed the following legal drafting:
- “ J.5.3.1 Where the completion of the Substantial Completion Milestone is delayed solely as a result of a failure of a third party, where directed by a Regulatory Authority, to complete a milestone when required to do so in accordance with the initial Implementation Plan, a Participant or an Enforcing Party (on behalf of a Participant) may apply to the Regulatory Authorities for an extension to the Maximum Capacity Duration and Long Stop Date associated with the relevant Capacity Market Unit.”*
- 2.2.25. Kilshane Energy noted the importance of the modification and believed that the reference to ‘Third Party’ requires further clarification. They also pointed out that a participant can apply for an extension to the SFC milestone and questioned why the same logic did not apply to Minimum Completion by LSD.
- 2.2.26. Kilshane Energy expressed the view that neither the CMC nor Modification CMC_10_22 as currently drafted address the specific delivery risks that the introduction of a CRU Direction introduce. They suggested that Modification CMC_10_22 should be amended, in particular when a CRU Direction is in force, to include provision for the open-ended nature of the planning application process, especially with regard to projects that may end up in judicial review. Without this additional provision, they strongly believed that the risk of non-delivery of projects that qualified into CRM auctions under the CRU Direction is extremely high.
- 2.2.27. Mutual Energy agreed with the suggestion in the consultation paper that the proposal increases the risk of overly speculative or optimistic applications into the capacity auctions, potentially

removing incentives to build adequate time into development plans. They added that this is not in line with the Code objectives of provision of adequate future capacity in a financially secure manner.

- 2.2.28. On the key concern that gas connections aren't delivered in time, they believed that this is something that should be managed through the developer's own project planning and management process with the current capacity market design does not sufficiently disincentivise speculative behaviour when it comes to gas connections.
- 2.2.29. The respondent also noted that there is currently no requirement for a participant in the capacity auction process to even assess whether or not they are likely to receive a gas connection before being awarded a contract under the capacity market. Instead, new generators may be awarded Capacity Market contracts in auctions sometimes little more than 3 years before delivery date and only then approach gas TSOs for a connection. If gas TSOs are unaware of the potential connection, this may not have been factored into network development planning with no guarantee that gas capacity is available.
- 2.2.30. In their opinion, any modification seeking to exempt developers from penalties when delays to commissioning have occurred which are outside of their control should at least also seek to introduce incentives to reduce speculative behaviour as outlined above.
- 2.2.31. In terms of CMC drafting, Mutual Energy proposed adding a sub-paragraph such that the Application for Qualification will be rejected, unless such evidence of a reasonable indication that a gas connection will be available by the commencement date of the Capacity Market contract has been provided. The response also suggested adding in a gas connection as a requirement as part of the Implementation Plan as described in the Code.
- 2.2.32. SSE considered that the modification may go some way to addressing the need for greater monitoring and more permissive processes to ensure that there was not a repeat of non-delivery of units when the system needed capacity.
- 2.2.33. SSE did not share the view of the SEMC that introducing the modification would remove the incentive for a realistic Implementation Plan as this was already limited by the amount of visibility or control that generators have related to third party delivery.
- 2.2.34. While supportive of the principle of the modification, the respondent suggested some additional measures to manage any perceived risk of abuse of the provision. These included limiting the number of extensions that could be applied for under such third-party circumstances per project, given the impact it could have on the Long Stop Date, as well as better pre-qualification screening to ensure projects with the best potential for delivery are those that compete for contracts.

2.3. SEM COMMITTEE DECISIONS

- 2.3.1. The SEM Committee welcomes the feedback provided by participants, both as part of the Working Group forum and with regard to the Consultation process.

- 2.3.2. Whilst a significant number of respondents supported the implementation of the proposed modification, the SEM Committee continue to have concerns around potential implications should the modification be approved in its current form.
- 2.3.3. The Committee are not only concerned that the modification fails to take account of the contingency they would expect to form part of any Implementation Plan but that by removing many of the penalties which arise if capacity is not delivered in a timely fashion, an incentive is created to submit more optimistic Implementation Plans than is currently the case.
- 2.3.4. As mentioned in several consultation responses, the Committee note that third party delays may be outside the control of developers. However, concern remains that attempting to address this issue and mitigate potential consequences through the implementation of this modification could ultimately lead to a weakening of incentives to conclude projects in timely manner. Given the current capacity challenges, this would be an unfavourable outcome.
- 2.3.5. The Committee note the range of views around the definition of what should represent a third party delay and potential options to tighten that definition.
- 2.3.6. The Committee notes the comments from the SOs that the actions of project developers may contribute to or exacerbate third party delays. As drafted, the Modification assumes all delays (or none) are caused by the third party and that none are covered by contingency. It leaves the burden of proof with the RAs and leaves no room for a nuanced approach which recognises that it may not be appropriate to extend the Long Stop Date and/or RO Duration by the full period of any third party delay.
- 2.3.7. Many respondents highlighted the relevance of the Modification to auctions that have already taken place, and one raised concerns in relation to retrospectivity.
- 2.3.8. The Committee particularly note the views expressed in relation to the length of time between the Capacity Auction itself and the Delivery Year with anything less than the full four years putting additional pressure on developers and reducing tolerances for delays even further.
- 2.3.9. The SEM Committee acknowledge many of the issues raised during the consultation process. However, given the continuing concerns around the breadth of the proposed modification and the potential implications arising as a result, the SEM Committee rejects this proposal.

3. NEXT STEPS

- 3.1.1. Given that the SEM Committee have decided to reject this proposed modification, there are no actions required of the System Operators, with regards to implementation.
- 3.1.2. All SEM Committee decisions are published on the SEM Committee website: www.semcommittee.com