



Single Electricity Market

(SEM)

Capacity Market Code Workshop 31

Decision Paper

**CMC_11_23: Amendment to Drafting Introduced Under Modification
CMC_15_22**

SEM-23-087

22 November 2023

EXECUTIVE SUMMARY

The purpose of this paper is to set out the decision relating to a proposed modification to the Capacity Market Code (CMC). This was discussed at Workshop 31, held on 18 May 2023.

The decision(s) within this paper follows on from the associated consultation ([SEM-23-044](#)) which closed on 21 July 2023.

This paper considers the proposed modification, presented at Workshop 31, relating to:

- **CMC_11_23: Amendment to Drafting Introduced Under Modification CMC_15_22**
This proposal seeks to address delays, arising from third-party challenges, which have not been covered under CMC_15_22. The justification and rationale is the same as CMC_15_22 but this modification addresses a scenario which had not previously been included (Article 17/18 Direction).

Eleven responses were received to the Capacity Market Code Workshop 31 Modification Consultation Paper (SEM-23-044). One response was marked as partially confidential.

Summary of Key Decisions

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

Modification	Decision	Implementation Date
CMC_11_23: Amendment to Drafting Introduced Under Modification CMC_15_22	Make a Modification	Effective on publication

Appendix A Legal Text

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Appendix A Legal Text

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). Updated versions of the CMC and the TSC are published on the SEMO website.

Process and Timeline for this Modification

1.1.2. On the 04 May 2023, EPUKI submitted the Modification Proposal CMC_11_23 under the terms of B.12.4 of the CMC. This was marked as Standard.

1.1.3. The RAs reviewed the Modification Proposal and determined that it was not spurious.

1.1.4. The RAs determined the procedure to apply to the Modification Proposal. An overview of the timetable is as follows:

- i. The System Operators convened Workshop 31 on 18 May 2023 where the Modification Proposal was considered.
- ii. The System Operators, as set out in B.12.7.1 (j) of the CMC, were 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 consulted on the Modification Proposal with a response time of no less than 20 Working Days (as defined in the CMC) from the date of publication of the Consultation.
- iv. As per B.12.11 the RAs would make their decision(s) as soon as reasonably practicable following conclusion of the consultation and would publish a report in respect of these. The purpose of the decision paper is to set out the decision(s) relating to the Modification Proposal discussed during Workshop 31 to:
 - a) Make a Modification;
 - b) Not make a Modification; or
 - c) Undertake further consideration in relation to the matters raised in the Modification Proposals.

1.1.5. This decision paper provides a summary of the consultation proposal and sets out the SEM Committee's decision.

1.2. RESPONSES RECEIVED TO CONSULTATION

1.2.1. This paper includes a summary of the responses made to Capacity Market Code Modifications Consultation Paper [SEM-23-044](#) which was published on the 16 June 2023.

1.2.2. A total of eleven responses were received to consultation SEM-23-044 with one being marked as partially confidential. The respondents are listed below.

- Bord Gáis Energy (BGE)
- Bord na Móna (BnM)
- DRAI
- EirGrid / SONI (System Operators (SOs))
- Electricity Association of Ireland (EAI)
- Energia
- EPUKI
- ESB GT
- Gas Networks Ireland (GNI)
- Mutual Energy
- SSE

2. CMC_11_23 – AMENDMENT TO DRAFTING INTRODUCED UNDER MODIFICATION CMC_15_22

2.1. CONSULTATION SUMMARY AS PRESENTED BY EPUKI

2.1.1. This proposal sets out to address delays arising from third-party challenges which were not covered under CMC_15_22.

2.1.2. EPUKI argue that CMC_15_22 fails to address scenarios where a Direction under Article 17 or Article 18 of the Planning (General Development Procedure) Order (Northern Ireland) 2015¹, made by the Department of Infrastructure as a result of a third-party submission, has the potential to introduce delays to the planning process.

2.1.3. Articles 17 and 18 state respectively:

Directions restricting the grant of planning permission.

17. The Department may give directions to a council restricting the grant of planning permission by a council, either indefinitely or during such period as may be specified in the direction, in respect of any development or any class of development, as may be so specified.

Directions requiring information.

18. The Department may give directions requiring a council to give to the Department, and to such other persons as may be specified in the direction, such information as may be so specified with respect to applications for planning permission made to the council, including information as to the manner in which any such application has been dealt with.

2.1.4. The proposed modification therefore seeks to introduce wording which would address such instances and be consistent with the intent of CMC_15_22.

2.1.5. The Modification Proposal states that failure to implement the proposal may weaken the effectiveness of CMC_15_22 as applicable in Northern Ireland with third parties still being able to challenge and obstruct planning permission in Northern Ireland through Article 17/18 Directions. It would also result in inconsistency between the treatment of New Capacity in Northern Ireland and Ireland.

2.1.6. Further details on the Modification Proposal are set out in the appended Modification Proposal Appendix B, which includes the draft changes to the CMC.

¹ [The Planning \(General Development Procedure\) Order \(Northern Ireland\) 2015 \(legislation.gov.uk\)](https://legislation.gov.uk)

2.2. RESPONSES

- 2.2.1. Of those responses that addressed CMC_11_23, a small majority were in favour with others either opposing the modification or expressing concerns about it.
- 2.2.2. ESB GT did not support the proposed modification, believing Article 17 and Article 18 related to Directions issued by the Department prior to the granting of planning permission. This was not in line with the SEM-23-001 Decision which only considered appeals to already granted planning permissions as a ground for extension.
- 2.2.3. Arguing that these delays are part of the regular planning assessment procedure rather than appeals to reconsider the decision already made, ESB GT also noted that Article 17 provided for Directions by the Department to restrict the grant of planning, indefinitely. Therefore, the adoption of the modification could result in an indefinite delay to a Long Stop Date with negative implications for security of supply.
- 2.2.4. SSE agreed that there should not be jurisdictional inconsistencies and that there would be merit in addressing these potential delays due to NI legislation and ensuring that third parties cannot obstruct planning permission in NI due to these Articles. In their response, BGE shared similar views stating that there should be no undue discrimination between units in the Capacity Market based on their jurisdiction.
- 2.2.5. Having originally opposed CMC_15_22 and having raised concerns that it was retrospectively changing the terms of auctions already concluded, this remained Energia's position. They were opposed to CMC_11_23.
- 2.2.6. Energia noted that there were substantial differences between the issuing of an Article 17/18 Direction in Northern Ireland and a Third Party Appeal in the Republic of Ireland. At the time of an Article 17/18 Direction, no decision on the planning application has been made and all that may change, is which body ultimately gets to decide on that application. For a Third Party Appeal, the local authority has gone through the entire planning process and has made a decision, only for that decision to be appealed and an additional assessment to be undertaken by An Bord Pleanála. In addition, the Article 17/18 process is a known process at the start of an application that is foreseeable by a participant and is not the direct result of a claim from an objecting third-party.
- 2.2.7. Energia also raised concerns over the length of the proposed extension as the modification proposed to set it as the date of determination of the planning application. They argued that the date on which the Department decides to call-in would be more appropriate. They suggested that if the SEM Committee were to approve the modification, then the length of delay permitted should be reduced.
- 2.2.8. EirGrid/SONI also commented on the proposal remediating a period prior to a planning decision being effective, with the period constituting a part of the planning process in Northern Ireland. In terms of length of time, they stated that a potentially open-ended Remedial Action is undesirable from a SEM Committee perspective.

- 2.2.9. Separately, the SOs pointed out that the existing definition of Third Party Extension Period should be reviewed as, in relation to determinations by An Bord Pleanála in Ireland, there is an eight week period post-determination during which a Third Party may seek a Judicial Review. Therefore, it could be argued that the final grant of planning is not achieved until the eight week period has lapsed.
- 2.2.10. Referring to feedback received at Capacity Market Code Workshop 31 that the nature of Article 17/18 Directions were fundamentally different to those of planning appeals or judicial reviews, EPUKI, who proposed the modification, argued that this was not the case as an extension was only sought and necessitated where a planning application was approved. If an application was rejected, an extension would serve no purpose to a New Capacity project. Therefore, while a decision has yet to be made under Article 17/18, for all intent and purpose it could be assumed that a decision to approve a planning application had been made.
- 2.2.11. EPUKI considered the modification a necessity to protect New Capacity projects in Northern Ireland.

2.3. SEM COMMITTEE DECISION

- 2.3.1. The SEM Committee welcomes the feedback provided by participants both as part of the Workshop and through the Consultation process.
- 2.3.2. The SEM Committee's Decision ([SEM-23-001](#)) to approve a modified version of CMC_13_22 (and not amend drafting under modification CMC_15_22 (as referenced in Modification Proposal CMC_11_23)) to take account of delays resulting from third-party planning appeals and judicial reviews sought to apply a practical solution to the issue of delays from these processes.
- 2.3.3. CMC_11_23 proposes to amend the legal text implemented through SEM-23-001 in order to mitigate potential circumstances where there may be third party challenges to the planning process in Northern Ireland under Article 17 and Article 18 of The Planning (General Development Procedure) Order (Northern Ireland) 2015.
- 2.3.4. As noted in many of the consultation responses, the SEM Committee recognise that there are some process and timing differences between the mitigation measures implemented in SEM-23-001 and those being proposed under CMC_11_23.
- 2.3.5. One key distinction relates to SEM-23-001 primarily dealing with third-party challenges emanating after planning has been granted, while CMC_11_23 is concerned with a direction made during the planning process.
- 2.3.6. The SEM Committee is of the view that, noting the necessary differences in both jurisdictions as regards the planning system, Article 17 and 18 Directions form a necessary part of the overall planning framework in Northern Ireland, and that it is reasonable in the circumstances to cater for delays occurring from the use of these Directions in unforeseen circumstances.

- 2.3.7. While the SEM Committee supports the intention of the modification proposal and considers it to support the Code Objectives, the Committee has a concern over the potential length of any delay as this could be ill-defined and open-ended. With this in mind, the Committee proposes reviewing any agreed extension on a six-monthly basis.
- 2.3.8. During the consultation process, it also became apparent that the definition of **Third Party Extension** which was implemented through SEM-23-001, did not take account of the eight-week period after an An Bord Pleanála determination allowing for a third party to seek a Judicial Review. Ultimately, in Ireland, the final granting of planning has not been achieved until this eight-week period has elapsed.
- 2.3.9. The SEM Committee do not, as part of this decision on CMC_11_23, intend to modify the definition of **Third Party Extension** to take account to this eight-week period. There is, however, modification proposal CMC_18_23 which seeks to address this situation and is currently in progress.
- 2.3.10. As a result of the reasons outlined above, the SEM Committee is approving this Modification Proposal with amended text to provide a mechanism to review any extension (if it is still in place) after a period of six months.

3. NEXT STEPS

- 3.1.1. The SEM Committee will make proposed modification CMC_11_23 using the legal text accompanying this Decision Paper.
- 3.1.2. All SEM Committee decisions are published on the SEM Committee website: www.semcommittee.com