



# Single Electricity Market

## TERMS OF REFERENCE WORKING GROUP

MOD\_15\_19

### CLARIFICATION TO THE DESCRIPTION OF THE ROLE OF THE DISPUTE RESOLUTION BOARD UNDER THE TSC

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## 1 INTRODUCTION

Modification Proposal Mod\_15\_19 Clarification to the description of the role of the Dispute Resolution Board under the TSC was presented by the RAs at Meeting 94 of the Modifications Committee on Thursday, 24<sup>th</sup> October 2019.

The background of this modification was provided stating that a payment was made from the socialisation fund to a Participant following a decision from the Dispute Resolution Board. Details could not be provided as to why this payment was directed due to confidentiality. The proposer noted that this had been discussed by the SEM Committee. The RAs were notified of this Dispute and subsequent decision and the SEM Committee have requested that a modification should be raised as a matter of urgency to resolve concerns that were highlighted due to this decision. The proposer indicated that the modification should be considered as a standard proposal with a sense of urgency, as opposed to formally as an Urgent Proposal, with no emergency meeting or committee specified timeline therefore required.

There is a concern within the SEM Committee that there are areas where the Code is not clear and provides more leeway for the Dispute Resolution Board to make decisions than that which might be considered appropriate. The RA Member stated that this is a rules-based system in which Market Participants operate and that all parties including the DRB should operate within the rules of the TSC. The proposer indicated their view that if SEMO follow the rules in the Code then the Dispute Resolution Board should not take a decision requiring actions outside the Code, which might stray into policy making. The RAs, have a role set out in legislation to determine policy, and cannot allow this authority to be considered as delegated to a third party such as the Dispute Resolution Board or otherwise.

The proposer listed the changes set out in the proposal confirming that one of the key Code Objectives furthered relate to non-discrimination against parties. The proposer observed that the Dispute Resolution Board is a human exercise and that it is therefore important that the process should be designed so that it works regardless of which member of the board is reviewing the facts before them.

A number of Supplier Members and Generator Members voiced concern that this was a significant change to the Code and a very high bar was being introduced to the Dispute Resolution process. The view was expressed by a number of Members that there is a need for more transparency on the Dispute Resolution Board decision which prompted the Modification Proposal and that this change merits further investigation so that there is no 'knee jerk' reaction. Concern was also stated by an observer who noted that they felt that the proposer should share their legal advice and/or the Modifications Committee should seek their own legal advice given what they saw as the significant ramifications of the proposal. They expressed the view that the changes being proposed were inappropriate and would damage the Dispute Resolution provisions by inappropriately limiting the ability of the Dispute Resolution Board to make its determination and prescribe remedial action. These concerns were shared by some Committee Members. The Observer reiterated calls for more detail on the Dispute that appeared to have prompted the proposal. Some Members expressed particular concern in relation to the new section under B.19.6.1A due to the view that it narrowed the Dispute Resolution Board function inappropriately.

Concerns were also raised about the removing references to the Code objectives and about unintended consequences of such radical changes as a lot of effort had been put in the original

Terms of Reference for the DRB and they have proved satisfactory to date. Why was a Modification only raised now? It was replied that removing the Code Objectives will not limit the DRB but highlight the fact that they have to consider the Code in its entirety not just individual objectives. Also, the rules regarding DRB had never been questioned before as there has never been a decision with impact of this nature. SEMO alternate also re-iterated that previous DRB had identified issues as part of the Dispute where no remedial action could be prescribed under the Code and in that case a review of affected section of the Code was suggested with a view of raising appropriate Modifications. By removing the open interpretation it is guaranteed a more equal approach as it removes a lot of the subjectivity to the decision making process while leaving the DRB free to provide their own interpretation of sections of the Code.

The MO Member noted their view that it would be inappropriate for the Modifications Committee to discuss a particular Dispute, particularly given the confidential nature of the information. Further, that they did not feel that this was necessary in order to consider the proposal since they felt it should be possible to consider it in the context of the broader concepts and principles to which it relates. They also noted that a large part of the role of the Dispute Resolution Board is to help Parties resolve issues when they don't agree and avoid such issues going to court as part of a broader set of Dispute Resolution provisions within the Code which commences with attempts at amicable resolution prior to arbitration via the Dispute Resolution Board.

The MO Member noted their concern that the Dispute Resolution process currently could be seen to allow for the Dispute Resolution Board to reach a decision that requires remedy outside of that allowed under the Code and where by a Party which has acted in accordance with the provisions of the Code. In this case a decision could be taken where the Code has not been breached such that a Dispute Resolution Board may direct a Party to the Code to undertake a remedial action, as part of its decision that contradicts their obligations either under the Code or elsewhere. The MO Member indicated that in their view this was inappropriate and could increase the likelihood of Disputes ending up in court, contrary to the aim of the Dispute Resolution process. They indicated that they therefore could see merit in a Modification Proposal which requires the Dispute Resolution Board to be bound by a requirement limit their decisions to being on the basis of whether or not Parties have acted in accordance with the Code and to limit their directions to actions which remedy a breach of the Code similar to what is being proposed

The RA Member gave assurance that a full legal review was carried out before this modification was raised and acknowledged that it was the right of the Committee to raise their own separate legal review. The proposer confirmed that they did not wish to inappropriately reduce the role of the Dispute Resolution Board but rather that they should seek a resolution to issues of compliance with the Code rather than indirectly making policy decisions. Where remedial action was not available under the Code they should potentially advise a Modification to the Code which would come back to the Panel and the SEMC for consultation.

Discussion moved to the most appropriate way to move forward in considering the proposal. Some Members indicated that, while it may be necessary for the Committee to formally seek legal advice, they felt that it was worth attempting to find agreement on some form of proposal within the Committee first noting the call from the SEM Committee to progress a change as a matter of urgency and that past experience indicated that requesting and discussing formal legal advice could be a time consuming exercise and that Members may be able to avail of their own internal legal advice in a more timely fashion and that this may suffice. A number of possibilities were discussed in relation to next steps.

The proposer noted the importance to progress this efficiently and suggested a Working Group in the hope of agreeing an approach which makes the necessary changes while recognising that Market Participants were concerned about the decision making ability of the Dispute Resolution Board being unreasonably narrowed. The proposer agreed that more discussion was required on the modification and a version 2 of the proposal could be developed in the Working Group. This step could prevent a formal Urgent Modification being required such that the Committee would have to determine a strict timetable. It was agreed that Committee Members should document their concerns ahead of a Working Group being convened to progress the proposal. The committee agreed to defer the proposal pending follow up actions including convening a Working Group.

## 2 OBJECTIVES

The objectives of the Modification Working Group are to:

- a) to provide an overview of the Dispute Resolution Board process, and discuss the potential changes which need to be made;
- b) to discuss the concerns of the Market Participants and the Regulatory Authorities about the decision-making ability of the Dispute Resolution Board being narrowed;
- c) to discuss the Modification and a potential version 2 of the Proposal;
- d) to make a recommendation to the Modifications Committee;

## 3 SCOPE

The scope of the Working Group will be limited to:

- a) A decision on the changes which need to be made to ensure the scope, roles and outputs of the Dispute Resolution Boards process are appropriately defined;
- b) A discussion of these changes and any concerns raised by the Modifications Committee or other Working Group attendees.

## 4 DELIVERABLES

- a) Working Group report detailing the discussion and outcome of the meeting;
- b) Recommendation to the Modifications Committee;
- c) Finalised drafting of a potential version 2 of the Modification Proposal.

## 5 STAKEHOLDERS

Market Participants, potential new entrants to the market, Market Operator, System Operators, Regulatory Authorities. Meter Data Providers, Interconnector Parties and the Dispute Resolution Panel.

## 6 ROLES AND RESPONSIBILITIES

- a) Working Group Chair – to be confirmed in advance of Meeting (as stated in section 7);
- b) Any stakeholders as outlined above to participate to achieve the objectives as per Section 2;
- c) Secretariat to draft report and update Modifications Committee.
- d) Proposer to compile information for potential version 2 of the proposal.

## 7 RESOURCES

- Chair to be confirmed in advance of meeting
- Secretariat
- Proposer
- Market Participant representatives
- SO representatives
- MO representatives
- RA representatives
- Interconnector representatives
- Potential new entrants

## 8 WORK BREAKDOWN STRUCTURE

- a) Discussion on the changes to be made to the DRB process;
- b) Time to voice concerns of the Market Participants about the decision making ability of the Dispute Resolution Board being narrowed and any other concerns with the proposed Modification.

## 9 SCHEDULE

An initial half day Working Group meeting is proposed for 15<sup>th</sup> November 2019 to address the objectives of the meeting.

If further meetings are required to address the objectives in full, the timeline for further engagement will be defined at the initial meeting.

## 10 RISKS AND RESTRAINTS

There is a risk that the Working Group may stray beyond the objectives set out above into wider issues. If such a discussion occurs, the Chairperson will refer parties to the objectives and the scope of the Working Group.