



## **WORKING GROUP 1 REPORT**

### **MOD\_15\_19 CLARIFICATION TO THE DESCRIPTION OF THE ROLE OF THE DISPUTE RESOLUTION BOARD UNDER THE TSC**

**15 NOVEMBER 2019**

**CONFERENCE CALL**

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# **Table of Contents**

1	Introduction .....	5
2	Background.....	6
3	Discussion.....	9
4	Recommendations .....	12
5	Next Steps & Actions.....	13
6	Appendix 1 – CRU & Uregni Modification Proposal .....	14

## Document History

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## Distribution List

Name	Organisation
Modifications Committee Members	Modifications Committee
Working Group Attendees	Various

## Reference Documents

Document Name	Document Reference
Mod_15_19	<a href="#">Proposal Form</a>
Mod_15_19	<a href="#">Terms of Reference</a>
Mod_15_19	<a href="#">Proposal Form v2</a>

## In Attendance

Name	Company
Gina Kelly (Chair)	CRU
Kevin Hannafin	Energia
Jagtar Basi	ESB
Stacy Feldmann	SSE
Robert McCarthy	Electricity Exchange
Ian Mullins	Bord Gais Energy
Andrew Burke	Enerco
Rochelle Broderick	Budget Energy
Katia Compagnoni	SEMO
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Barry Hussey	CRU
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Elaine Gallagher	SEMO
Roy Foreman	Power NI
Sean McParland	Energia
Emma Keaveney	ESB
Paraic Higgins	ESB

## 1 INTRODUCTION

Secretariat welcomed all participants and thanked them for committing their time to the Working Group. A high level overview of the Working Group process was provided covering timescales, communication and the objective of submitting a Working Group Report with a Recommendation to the Modifications Committee.

Mod\_15\_19 Clarification to the description of the role of the Dispute Resolution Board was received by the Secretariat on 7<sup>th</sup> October 2019. This modification was first raised at Meeting 94 on 24<sup>th</sup> October 2019 with a Working Group proposed. This Working Group was confirmed at Meeting 94 on 24<sup>th</sup> October 2019.

At Meeting 94 the Proposer provided a background of this Modification 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. An 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 Participants and Generator Participants 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 Participants 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 a Participant 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 Participant reiterated calls for more detail on the Dispute that appeared to have prompted the proposal. Some Participants 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. A SEMO representative also reiterated 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.

An MO Participant 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 Participant 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 Participant 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

An RA Participant 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 Participants 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.





#### Overview & Background

The Proposer provided a background on this Modification. It was raised and discussed at Meeting 94 following a dispute outcome by the Resolution Board in relation to an event which occurred in January 2019. Specific details of this event cannot be provided due to the confidentiality of the Dispute process.

Following comments raised at Meeting 94, a revised drafting of the Modification was submitted for the Working Group discussion in order to provide more clarity in the explanation and to address some of the concerns raised by Participants with the aim of giving clarity to the role of the DRB in resolving Disputes.

A Generator Participant appreciated the changes made but felt that the message here is that the rule book is the rule book with no scope for wider interpretation outside of the Code and the knock on effect would be to weaken the position of the Dispute Resolution Board. In cases where resolution was not provided, this could have the impact where there could be more instances forwarded to the courts at the expense of Participants. Another Generator Participant noted that following the review of the amended draft proposal it was felt that there was no explanation on any appropriate outcome of a decision being recommended by the DRB where it does not fall within the Code. The new drafting doesn't mention the possibility for the DRB to recommend Modifications to the Code, for example, and if that was the intention, as per RAs comments in the introduction, then it should be made explicit.

The Proposer reminded that the current situation is that the Dispute Resolution board can make a decision on an equitable basis that may not reflect the Code as currently drafted and that would not be transparent and fair to other Participants. The DRB will still be able to interpret the Code but a rule or policy change would always have to go through the committee process for a final decision. The DRB should only be able to propose a solution which is provided for in the Code. A Dispute should have the aim of determining whether a Party has complied with the Code or not rather than provide an outcome that requires one of the Parties to be in breach without being at fault. A discussion followed on this with a view held by a Generator Participant that the DRB has a right to resolve and remedy a dispute outside of the confines of the Code. The RAs and SEMO confirmed that the role of the DRB was defined within the provisions of the code and they can still resolve disputes by proposing a solution within the Code or a suggestion to change the Code.

The Chair spoke of the recent decision by the DRB to resolve a Dispute based solely on the equity. If the current draft proposal is not sufficient to clarify the issue, the Proposer seeks the contribution of the Participants to arrive at an agreed position.

A Generator Participant asked for an explanation of what wasn't provided for in the code for the DRB to make the decision they did. The RAs provided a brief background reiterating the confidentiality required. At the heart of the issue, 1.7 million was paid out from the Socialisation Fund although the disputed Party was not at fault. This fund is an insurance fund for suppliers to ensure at all times that the hedge is covered. There was no provision in the code for using this fund for any other reason. Therefore the decision of the DRB is not in line with the Code.

A Generator Participant argued that a Modification has been raised in relation to DSU payments out of the Socialisation Fund; therefore the Socialisation Fund can be used for other purposes. An RA Representative confirmed this is correct with the difference that this change is going through the standard channels for policy changing and eventually will be voted and decided upon by the SEM committee. Unlike the DRB decision, it will be discussed by the industry and will go through a transparent and open process for change and, if approved eventually, will not have retrospective effect.

A discussion followed in which different points of view were raised over the role of the DRB. There was a view that the DRB should be allowed to review the rules of the code more openly while the RAs opinion was that the DRB's role is to interpret a set of circumstances based on the code objectives and there is a concern that the DRB have the ability to make wide ranging decisions that end up being outside of the code and stray into policy making.

A SEMO Representative stated that the T&SC is a contract with a set of rules to which all Participants sign up to. There has never been an instance where DRB has decided for something outside the code even if one the Party was found at fault. In past judgements, the fault was recognised and suggestions were made

to follow up with changing the Code but no remedy could have been provided because none available under the code.

A Generator Participant agreed with this view point and understood that the DRB made a decision on an individual position which can be considered extreme. In this instance it was an individual member and a suggestion was made that we look at the current make-up of the DRB and mandate for multiple members in certain circumstances, for example in case of high materiality disputes or issues of significant interest to the market. SEMO noted that a provision for multiple members is already in the Code but consideration should be made that mandating it would increase the cost and one of the objectives of the dispute process is to be inexpensive.

This was a unique decision without any sight of case history so it is very difficult for parties to understand the DRB position. A Generator Participant stated there is a desire for transparency and parties should have access to previous decisions in a redacted way if required. That will help create a history of precedents for the benefit of other DRB panels or disputing parties that can be referred to in order to maintain consistency and reduce likelihood of going to court.

A SEMO Representative agreed this decision was an exception as DRB has consistently applied the Code in its decisions prior to this, and, in their opinion, the proposed Modification actually decreases the risk of reaching the courts because prevent outcomes made on a subjective judgement of the Panel without the security and the consistency of the rules in the Code. In fact this is the first time that the prospect of bringing a decision to court has been considered as an option.

It was asked if there was a need for an alternative Modification as it appeared that there was a design issue not DRB issue; this is because if disputes can have no remedy maybe it is because the code has fallen short of describing what is required. SEMO suggested that having no remedy is also a legitimate outcome. It was agreed by a Generator Participant that it is not possible to legislate for every eventuality but an equitable remedy allows for a resolution that can be fair beyond the Code. Removing that would deprive the DRB of its role. SEMO also replied that the drafting already provides for remedy that could come in a variety of forms such as re-settlement or asking Parties to bring a new Modification.

Transparency around decisions was brought up again and there was a request to see the reasons behind this decision. .

There was agreement from a number of Generator Participants that changes to the wording of the code could undermine the DRBs resolution process in particular for General Disputes.

The RAs agreed that useful comments were raised above and there is a potential to tweak the wording around resolution. It was confirmed that a review of other Codes was carried out and in the UK DRB trading disputes are resolved in line with the code and this is the same practice what is being suggested in this Modification. There was no mention of equity or fairness in the codes reviewed.

The RAs also confirmed that the decision has had chilling effect on the RAs consideration of future interactions and discussions with the Committee. The fact that subsequent to the event disputed a Modification was raised to change the systems should not have been used as a justification that the event was unfair and for compensation to be provided for outside of the Code. The rules are the rules and sometimes are in one's favour sometimes they aren't but subsequent changes should not be used retrospectively. If that were the case it would affect the way to bring about Modifications to the Code for any big issue that needs to be resolved in an urgent manner. If issue arises where people are negatively impacted then a code change could be required and consulted going forward. A Generator Participant stated the Modification mentioned was for the north/south tie-line and not about the socialisation fund. He appreciated the RAs openness in sharing information but there was no clarity on how the equitable solution was drawn up and no comment could be made without having view of the decision. Concerns were also raised with regard to not maintaining reference to the Code Objectives. The RAs responded that the Code Objectives are too vague and could cause unforeseen judgements such as in this case.

Another Generator Participant commented that this decision can be attributed to a panel member going awry, but the process has worked well so far and this appears to be a kneejerk reaction.

The issue of discrimination was also raised by SEMO, due to a remedy allocated to a Party without consideration of other negatively affected parties, as a result of a subjective judgement. This would create uncertainty because if the panel has total freedom to establish remedies, all parties could be affected

parties in any disputes. Affected Parties could not be established with certainty as anyone could be. This would not be the case if the provisions of the Code would always be considered including in the circumstances of deciding for remedy.

A Generator Participant raised the issue that raising a Modification after the event would be too late for the affected Party. The RAs replied that the DRB should resolve a dispute not providing remedy to a design issue.

The Chair thanked all for their comments and some of the suggestions proposed were summarised again for clarity:

- 1) Drafting to include a provision allowing the DRB to suggest raising a Modification if a solution is not available;
- 2) The potential introduction of category of DRB depending on the materiality or the relevance of an issue disputed;
- 3) Addressing the issue of transparency and how to communicate details of a decision to the market to avoid that DRB decision ending up in a vacuum;
- 4) A review of the concept of equity in the drafting.

The RAs asked if the participants would prefer to see the decisions published and there was an overall agreement from the Working Group and this transparency would be good as it would add a check to make sure the DRB are monitored.

An RA representative also restated that they would welcome additional comments and suggestions as soon as possible in advance of the next meeting and asked Participants permission to extend the submission date for a new version of this Modification by a week to the 28<sup>th</sup> November 2019. Participants agreed that this was not a new Modification and they accorded the extension to the deadline.

## 4 RECOMMENDATIONS

The next draft of the modification would consider inclusion of suggestions from Participants such as:

- 1) Allowing the DRB to suggest raising a Modification if a solution is not available;
- 2) The potential introduction of category of DRB depending on the materiality or the relevance of an issue disputed;
- 3) Addressing the issue of transparency and how to communicate details of a decision to the market to avoid that DRB decision ending up in a vacuum;
- 4) A review of the concept of equity.

## 5 NEXT STEPS & ACTIONS

### ACTION

- Secretariat to draft Working Group 1 Report – this will then be sent for Attendee Review and subsequently provided to the Modifications Committee;
- RAs to circulate points raised at the Working Group and participants to respond with comments on these points and their definition of the Dispute Resolution Board.
- Proposer will issue an official version 2 of this modification proposal to be discussed at the December Modification's meeting following a review by the Working Group attendees. The submission deadline in this instance will be extended to 28<sup>th</sup> November 2019.

## 6 APPENDIX 1 – CRU & UREGNI MODIFICATION PROPOSAL

### MODIFICATION PROPOSAL FORM

<b>Proposer</b> <i>(Company)</i>	<b>Date of receipt</b> <i>(assigned by Secretariat)</i>	<b>Type of Proposal</b> <i>(delete as appropriate)</i>	<b>Modification Proposal ID</b> <i>(assigned by Secretariat)</i>
<b>CRU and Utility Regulator</b>	<b>7<sup>th</sup> October 2019</b>	<b>Urgent</b>	<b>Mod_15_19</b>

#### Contact Details for Modification Proposal Originator

<b>Name</b>	<b>Telephone number</b>	<b>Email address</b>
<b>CRU and Utility Regulator</b>		

#### Modification Proposal Title

**Clarification to the description of the role of the Dispute Resolution Board under the TSC**

<b>Documents affected</b> <i>(delete as appropriate)</i>	<b>Section(s) Affected</b>	<b>Version number of T&amp;SC or AP used in Drafting</b>
<b>T&amp;SC Part B Appendix B</b>	<b>B.19</b>	<b>Version from 12 April 2019</b>

#### Explanation of Proposed Change

*(mandatory by originator)*

As notified by SEMO on 9 August 2019, a recent determination of the Dispute Resolution Board in relation to a dispute raised by a market participant found that EirGrid and SONI acted correctly under the terms of the Trading and Settlement Code but awarded a recovery of €1,696,000 million from the Socialisation Fund to the disputing market participant.

The details of this dispute and rationale for this decision have not been shared publicly however they have been submitted to the RAs by the Market Operator. This Modification has been raised following a review of this decision. A number of changes are proposed to the TSC in order to clarify that the DRB's primary role is to determine whether a party has acted in accordance with the provisions of the TSC.

It is the RAs' view that the Trading and Settlement Code requires clarification in order to ensure that the DRB's role is limited to taking decisions on whether a Party has complied with the provisions of the TSC, consistent with a number of comparable industry codes. Where a market outcome is seen to be unfair or inequitable, any appropriate solution should be subject to SEMC decision-making and consultation with stakeholders affected by any change.

In particular, a number of sections of the TSC refer to the resolution of disputes on an equitable basis and having

regard to the Code objectives which may be interpreted as not being aligned to the primary objective of the DRB to decide whether or not any Party has acted in accordance with the provisions of the Code.

#### Legal Drafting Change

(Clearly show proposed code change using **tracked** changes, if proposer fails to identify changes, please indicate best estimate of potential changes)

A.2.1.5 This section **Error! Reference source not found.** is for information only and, without prejudice to the rights, duties and obligations set out in the Licences and legislation referred to therein, is not intended of itself and should not be construed so as to create legally binding obligations as between or impose rights and duties on the Parties, provided that the Modifications Committee shall be required to have regard to the Code Objectives in accordance with section B.17 ~~and any Dispute Resolution Board shall be required to have regard to those objectives in accordance with paragraph B.19.5.~~

#### B.19.5 Objectives of the Dispute Resolution Process

B.19.5.1 It is intended that the Dispute Resolution Process set out in or implemented in compliance with the Code and described in detail in the following paragraphs should to the extent possible:

- (a) be simple, quick and inexpensive;
- (b) preserve or enhance the relationship between the Disputing Parties;
- (c) ~~resolve and~~ allow for the continuing and proper operation of the Code having regard to the Code Objectives;
- (d) resolve Disputes ~~on an equitable basis strictly~~ in accordance with the provisions of the Code ~~having regard to the Code Objectives~~;
- (e) take account of the skills and knowledge that are required for the relevant procedure; and
- (f) encourage resolution of Disputes without formal legal representation or reliance on legal procedures.

#### B.19.6 Dispute Resolution Board

B.19.6.1 A The role of the DRB shall be to investigate any Dispute in order to decide whether or not the Disputing Parties have acted in accordance with the provisions of the Code.

#### B.19.10 DRB Decisions

B.19.10.1 DRB decisions shall be limited to the following courses of action:

- (a) ~~declare~~ declaring that:
  - (i) the Dispute has been wholly or partially upheld ~~because the relevant Party did not act in accordance with the provisions of the Code~~; or
  - (ii) the Dispute has not been upheld ~~because the relevant Party has acted in accordance with the provisions of the Code~~;
- (b) ~~declare~~ declaring the correct application or interpretation of a provision of the Code ~~having regard to Code Objectives~~;
- (c) ~~advise~~ advising any other form of relief ~~arising from a breach of the provisions of the~~

Code that may be appropriate in the circumstances; ~~or~~

- (d) ~~recommend~~ recommending that a Disputing Party take a specified action within a specified timeframe where such action will remedy a breach of the provisions of the Code or
- (e) advising that no relief is possible:
- (i) as no provisions of the Code have been breached or
  - (ii) as the remedies sought are not provided for in the Code.

## Appendix B: Template for Dispute Resolution Agreement

### 4. Objectives of the Dispute Resolution Procedure

4.1 It is intended that procedures effected under this Dispute Resolution Agreement should to the extent possible:

1. be simple, quick and inexpensive;
2. preserve or enhance the relationship between the Disputing Parties;
3. without prejudice to the obligations of each of the Disputing Parties pursuant to the Code and in particular paragraph B.19.1.7 thereof, preserve and allow for the continuing and proper operation of the Code and the Single Electricity Market;
4. resolve disputes ~~on an equitable basis strictly~~ in accordance with the provisions of the Code; and
5. encourage resolution of disputes without formal legal representation or reliance on legal procedures.

### Modification Proposal Justification

*(Clearly state the reason for the Modification)*

The aim of this modification is to provide appropriate clarity in the TSC that the DRB's role is limited to taking decisions on whether a Party has complied with the provisions of the TSC.

### Code Objectives Furthered

*(State the Code Objectives the Proposal furthers, see Section 1.3 of Part A and/or Section A.2.1.4 of Part B of the T&SC for Code Objectives)*

- (a) *to facilitate the efficient discharge by the Market Operator of the obligations imposed upon it by its Market Operator Licences;*
- This change clarifies the grounds on which a dispute can be raised and upheld by the DRB which may lead to less time burden in resolving disputes.
- (b) *to facilitate the efficient, economic and coordinated operation, administration and development of the Single Electricity Market in a financially secure manner;*
- As above.
- (c) *to ensure no undue discrimination between persons who are parties to the Code; and*
- This allows any issues concerning the equity or appropriateness of provisions within the TSC to be addressed in a transparent manner through the Modifications Committee and SEMC Decision making.



(d) *to promote the short-term and long-term interests of consumers of electricity on the island of Ireland with respect to price, quality, reliability, and security of supply of electricity.*

- This change ultimately promotes the interest of consumers as it ensures that any decisions on policy matters which may have a financial impact can be considered in an open and transparent manner through defined decision-making processes.

**Implication of not implementing the Modification Proposal**

*(State the possible outcomes should the Modification Proposal not be implemented)*

If this Modification is not implemented, the DRB may in future disputes determine whether the provisions of the Code resulted in an equitable outcome for the relevant party, which may negatively impact on the Modifications Committee process, the wider objectives of the Code and on SEMC decision making.

**Working Group**

*(State if Working Group considered necessary to develop proposal)*

**Impacts**

*(Indicate the impacts on systems, resources, processes and/or procedures; also indicate impacts on any other Market Code such as Capacity Market Code, Grid Code, Exchange Rules etc.)*

No

**Please return this form to Secretariat by email to [balancingmodifications@sem-o.com](mailto:balancingmodifications@sem-o.com)**