



**Single Electricity Market  
(SEM)**

**Capacity Market Code Modifications Working Group 33**

**Decision Paper on CMC\_18\_23: Amendment to Definition of  
Third-Party Extension Period**

**SEM-24-015**

**16 February 2024**

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## EXECUTIVE SUMMARY

The purpose of this decision paper is to set out the decisions relating to a proposed modification to the Capacity Market Code (CMC). This was discussed at Workshop 33, held on 21 September 2023.

The decision within this paper follows on from the associated consultation ([SEM-23-084](#)) which closed on 1 December 2023.

This paper considers the proposed modification presented at Workshop 33 relating to:

- CMC\_18\_23: Amendment to Definition of Third-Party Extension Period

Seven responses were received to the Capacity Market Code Workshop 33 Modification Consultation Paper (SEM-23-084). None were marked as confidential.

### Summary of Key Decision

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

Modification	Decision	Implementation Date
CMC_18_23: Amendment to Definition of Third-Party Extension Period	Approve	Effective on publication

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# 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 for modification of the CMC**

1.1.2. Section B.12 of the CMC outlines the process used to modify the code. 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 deemed urgent, modifications are subsequently discussed at a Working Group held on a bi-monthly basis. Each workshop 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 workshop meeting is due to take place. If a proposal is received less than 10 working days before a workshop, and is not marked as urgent, it is deferred for discussion at the next Working Group.

1.1.6. Following each workshop, 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 workshop.

1.1.7. If a proposal is received and deemed 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 07 September 2023, Kilshane Energy submitted one Modification Proposal (CMC\_18\_23); under the terms of B.12.4 of the CMC. The modification was marked as Urgent.
- 1.1.10. Following a review of the proposal, the RAs determined that the Modification Proposal should be treated as Standard.
- 1.1.11. The RAs reviewed the Modification Proposals and determined that it was not spurious.
- 1.1.12. 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 33 where the Modification Proposal was considered on 21 September 2023.
  - 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 would then consult 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 Proposals discussed during Workshop 33 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.
- 1.1.12. 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-23-084](#) which was published on the 23 October 2023.
- 1.2.2. Seven responses were received to the Consultation. None were marked as confidential. The respondents are listed below.
- Bord Gáis Energy (BGE)

- Bord na Móna (BnM)
- EirGrid & SONI (TSOs)
- Energia
- EP UK Investments (EPUKI)
- ESB Generation and Trading
- SSE

## 2. MODIFICATION PROPOSAL

### 2.1 CMC\_18\_23 – AMENDMENT TO DEFINITION OF THIRD-PARTY EXTENSION PERIOD

Proposer: Kilshane Energy

CMC\_18\_23: Consultation summary as presented by Kilshane Energy

- 2.1.1 This Modification Proposal is intended to address an apparent gap in the definition of the Third-Party Extension Period as it pertains to Ireland.
- 2.1.2 The current definition of Third-Party Extension Period covers the period from when a Participant receives a copy of the Third-Party Planning Appeal to the date of the determination by An Bord Pleanála (ABP) in respect of the Third-Party Planning Appeal. It also covers the period from when, in respect of Ireland, a Participant has been served with an originating notice or, in respect of Northern Ireland, been served with an application for leave to apply for judicial review, in respect of the Third-Party Judicial Review.
- 2.1.3 There is an eight-week period which follows the determination of ABP in respect of the Third Party Planning Appeal whereby an appellant can apply for leave to apply for judicial review of the ABP determination. Only after this eight-week period has lapsed will a Participant be certain of either a judicial review proceeding, or no further action and a final grant of planning permission being awarded.
- 2.1.4 Kilshane argued that as a result, no investment decisions can be made during this eight-week period and that it follows that it is entirely consistent with decision SEM-23-001 to include this period in the definition of Third Party Extension Period, which will ensure the full period a Participant is delayed from being able to meet their SFC and LSD milestones aligns with any extension granted under J.5.5 of the CMC.
- 2.1.5 The Modification Proposal states that failure to implementing the proposal increases delivery risk of projects that have been delayed due to a Third-Party Planning Appeal.

## CMC\_18\_23: Responses

- 2.1.6 The majority of responses to the consultation were supportive. BGE considered that the proposal *“is in the spirit of SEM-23-001 and ensures that the full period of delay until ‘Final Planning’ is granted is covered by J.5.5”*. SSE similarly *“agree with the SEM Committee’s stance to approve SMC\_18\_23 and amend the definition of Third Party Extension Period in the Capacity Market Code so that the full delay period is captured”*.
- 2.1.7 Conversely Energia opposed the modification proposal, reiterating their earlier position that contract extensions on the basis of Third Party Judicial Reviews and Planning Appeals represented a retrospective change to terms of concluded auction processes. Energia also added that should the modification be approved, *“participants should be required to evidence to the RAs the period for which the appellant had leave to apply for judicial review prior to a further 8-week extension being granted.”*
- 2.1.8 The TSOs noted that with the Third Party extension period as currently defined, a project subject to a Judicial Review would be required to apply for two separate extensions, one for the period of the planning appeal and one for the subsequent period of judicial review.
- 2.1.9 The TSOs recommended that legal counsel is sought to ensure the remedial action for Extension of Long Stop Date by Third Party Planning Appeal or Judicial Review is complete and fully reflects the processes in Ireland and Northern Ireland.
- 2.1.10 The TSOs also recommend that the definition of Third Party Extension Period is amended slightly to replace the ‘either or’ logic between paragraph (i) and (ii) with ‘and/or’ to reflect that either one or both of the paragraphs may be relevant to a project.
- 2.1.11 Finally, the TSOs recommended explicitly citing the eight-week period in the legal drafting in order to be more definitive, noting that the Planning and Development Act 2000 (S.50(4.a.iii)) states that the High Court shall not extend the eight week *“unless it considers that there is good and sufficient reason for doing so”* – which indicates that later applications may be possible on an exceptional basis.

## CMC\_18\_23: SEM Committee Responses

- 2.1.12 The SEM Committee has considered the arguments raised by one respondent in relation to retrospectivity and is satisfied that the proposed Modifications will not operate retrospectively. As with SEM-23-001 Urgent Modifications Decision Paper, and SEM-23-101 Decision on the Supplementary Consultation on Modified and Combined Modifications to Facilitate Delivery of Capacity, the proposals do not seek to reopen settled transactions.
- 2.1.13 Regarding the argument that participants should be required to evidence to the RAs the period for which the appellant had leave to apply for judicial review prior to a further eight-week extension being granted, the SEM Committee note that the eight-week period is set

down in statute<sup>1</sup> and consider that an additional submission to evidence this period is not necessary.

2.1.14 Regarding the TSO recommendation to seek legal council the RAs consider that this new amended Modification has sufficient coverage of the Acts as currently written but are open to seeking additional legal council if it proves necessary in the future to accommodate additional amendments.

2.1.15 Regarding the TSO recommendation to explicitly cite the eight-week period in the legal drafting in order to be more definitive, the SEM Committee agree with this drafting change and the accompanying legal drafting has been updated accordingly.

#### [CMC\\_18\\_23: SEM Committee Decision](#)

2.1.16 With respect to this modification the SEM Committee decision is to approve, as aligned with the original intention of SEM-23-001, with the modifications to the legal drafting as recommended by the TSO, now accounting for the context of approved CMC\_11\_23 in relation to Article 17/8 in NI. The final drafting is provided as an annex to this publication.

## 3. NEXT STEPS

3.1.1 The SEM Committee will make proposed modification CMC\_18\_23 using the draft legal text accompanying this Decision Paper.

3.1.2 All SEM Committee decisions are published on the SEM Committee website: [www.semcommittee.com](http://www.semcommittee.com)

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<sup>1</sup> [Planning and Development Act, 2000, Section 50 \(irishstatutebook.ie\)](http://irishstatutebook.ie)