EP UK Investments Response to SEM-25-027 CMC Capacity Workshop 43B

EP UK Investments ('**EPUKI**') welcomes the opportunity to respond to this consultation paper.

CMC_10_25 Amendments to E.7

EPUKI is strongly opposed to this modification and rejects the Regulatory Authorities' ('**RAs**') position that this is a clarificatory modification. The amendments proposed in CMC_10_25 fundamentally change the well-established presumption of qualification for participants. Whereas previously qualification applications would be rejected "*except in the circumstances set out in"* Section E.7, this modification would result in applications being accepted "*if (and only if) they have determined the Application for Qualification should not be rejected"*. This is a material change to the qualification assessment process and framing this modification as a clarification only is inaccurate and misleading and the SEMC themselves note that the proposal seeks to "*remove any presumption of qualification*"[1]. In the interest of clarity for participants, the RAs should provide further information on why this modification is considered to be clarificatory.

This modification undermines transparency and objectivity in the Capacity Auction process by removing reference to specific criteria by which an application for qualification would be rejected, and instead placing this assessment at the sole discretion of the System Operators ('**SOs**') with no objective criteria provided.

It is not clear what issue this modification is attempting to address and why the SEMC consider the presumption of qualification to be a problem. EPUKI has significant concerns on the impacts of this modification on the objectivity of the qualification process in the absence of any benefit for the SOs or participants.

A high Court judgement[2] (Kilshane Energy Limited v Eirgrid PLC [2025] IEHC 174) associated with a legal challenge to the T-4 2028/2029 Qualification Decisions explicitly states in Paragraph 158 that a decision to reject qualification applications "*disregarded the presumption of qualification provided for in the Code by placing the onus on the applicants to prove that the delivery of New Capacity was feasible"*. This confirms that participants are currently entitled to a presumption of qualification, and in trying to reverse this, this modification is a material change to the Capacity Market, rather than a clarification. This change would be an erosion of participant rights and would undermine competition in the Capacity Market.

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[1] Workshop 43, Part B, Consultation Paper: [SEM-25-027 CMC Mods WS43 (Part B) Consultation Paper.pdf]

[2] [Judgments | The Courts Service of Ireland]

This judgement also provides detailed information as to how qualification applications should be assessed, and the considerations involved in deciding to reject such an application. This modification undermines this guidance by reducing objectivity in the assessment of qualification applications and giving the SOs discretion as to whether a project qualifies.

This modification is contradictory to the Capacity Market Code ('**CMC**') objectives as set out in Section A.1.2 of the CMC. Specifically, the objective to "*facilitate the participation of undertakings including electricity undertakings engaged in or seeking to be engaged in the provision of electricity capacity in the Capacity Market"*. This modification has specifically been designed to make participation in the Capacity Market more difficult by seeking to remove the presumption which currently exists in relation to qualification and removing objective criteria by which applications should be assessed.

This modification is in direct conflict with objectives (d) "*to promote competition in the provision of electricity capacity to the SEM"* and (e) "*to provide transparency in the operation of the SEM"*, by undermining competition and allowing the SOs to reject qualification applications at their discretion.

This modification further seeks to amend the assessment for deliverability to be based only on achievability rather than feasibility. The RAs' stated reasoning for this change is that the achievability is considered 'clearer' than feasibility as a concept. No explanation or evidence has been provided to support this statement. Contrary to the stated intention, this change introduces ambiguity for participants given that feasibility has been used as a concept to date.

Furthermore, in a separate high Court determination [Prime Power Generation Limited & EP Kilroot Limited v the Northern Ireland Authority for Utility Regulation [2024] NIKB 102[3]) in relation to a separate legal challenge to the T-4 2028/2029 Capacity Auction qualification decisions provided a comprehensive overview of how feasibility of assessing qualification applications. Specifically, this judgement noted that feasibility means "*more than mere possibility. Some assessment of the reasonableness of achieving delivery is required. It is also less than being persuaded that delivery will be achieved on the balance of probabilities. Some level of doubt about delivery is permissible, but the appropriate level of doubt in all of the circumstances is itself a question of regulatory judgement"*.

The definition for feasibility as applicable in the CMC has been legally tested. Given the comprehensiveness of this definition and the precedent established of using feasibility as a delivery assessment, it is has not been explained why the SEMC now consider that 'feasible'

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[3] https://www.judiciaryni.uk/judicial-decisions/2024-nikb-102

requires removal and why it is unclear. EPUKI notes that the existing approach to qualification has been used in the Capacity Market for several years, and participants will be largely familiar with this approach. This proposal to adopt a new approach with new assessments and considerations would only serve to complicate and confuse an existing process, with no discernible benefits.

Given the detrimental impact of this proposal on competitiveness and transparency in the Capacity Market, and the lack of any clear need to implement this modification, EPUKI believes that this modification fails the proportionality test. EPUKI is strongly opposed to this modification proposal, and disappointed by the RAs framing of this modification as a clarification, rather than as a material change to the Capacity Market which, by its nature, it is.

EPUKI looks forward to the SEMCs consideration of these views and intends to consider all remedies available should the SEMC continue to pursue this modification proposal.

CMC_11_25 Clarification on Provisions Relating to 'Final and Binding' and Dispute Resolution under the CMC

EPUKI is strongly opposed to this modification and considers it is unlawful. EPUKI does not agree with the RAs' position that this modification is clarificatory in nature, it is very much a material and unwarranted interference with CMC Parties' rights.

This proposal aims to reinforce the idea that certain decisions of the Capacity Market Dispute Resolution Board ('**CMDRB**'), Final Qualification Decisions ('**FQDs**'), and the final Capacity Auction Results are deemed to be final and binding on Parties, save in the case of dishonesty or malice.

Specifically, reference to *"paragraphs [XX.6], E.9.4.8 and F.9.4.4"* is made with the apparent intention of excepting these provisions from the jurisdiction of the Courts. Taken sequentially:

1. *"Paragraph [XX.6]"* – presumably refers to the equivalent draft wording in CMC_12_25 which clarifies that the Regulatory Authorities (RAs) have the ability to uphold, vary, or replace the decision of the CMDRB.

2. *"E.9.4.8"* – refers to the provision in the CMC which states that FQDs are final and binding on the Parties.

3. *"F.9.4.4"* – refers to the provision in the CMC which states that final Capacity Auction Results are final and binding on a Participant. CMC_11_25 proposes a

further amendment to this paragraph to add the words *"(save in the case of dishonesty or malice)"* to this provision.

The impact of the proposed changes to paragraph B.2.1.2 will attempt to fetter to the legal rights of Parties to the CMC to seek access to the Courts of Ireland and of Northern Ireland to protect such rights including via judicial review and remedies such as interim or interlocutory relief. The right to judicial review is enshrined in law by Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980. In this instance, the SEMC seek to interfere and remove the rights of Parties to the CMC to seek to exercise their rights under the statue, further this through a subordinate document without appropriate parliamentary authority.

The proposed deletion of paragraph B.14.2.7 further perpetuates the attempt to limit CMC Parties' ability to protect their legal rights. Paragraph B.14.27 simply confirms the legal principle that such relief is always available to Parties from Courts with appropriate jurisdiction. Seeking to delete this provision risks prejudicing Parties' awareness of their legal rights to take such action, including during at any point during the Dispute Resolution Process, and seems to suggest that such relief is somehow secondary to the operations of the Dispute Resolution Process in the CMC. It operates to undermine legal certainty by removing an important safeguard that confirms the principle that Parties can seek urgent relief from the Courts when necessary. EPUKI disagrees with the view that deletion of B.14.7.1 and the amendment to E.14.7.1 simply clarifies the basis under which Parties to the CMC can commence litigation.

Considering further the proposed amendments to paragraph B.14.7.1 together with E.14.7.1, limiting litigation to cases of malice or dishonesty further interferes with other well-established principles in law, including under Article 6 of the European Convention on Human Rights. By limiting access to justice in this narrow manner, the proposal risks excluding legitimate legal challenges that fall outside these categories. EPUKI considers that such a limitation fails to account for other established grounds of legal challenge, including via judicial review in instances of errors of law; procedural impropriety; irrationality or unreasonableness; and breach of legitimate expectations.

We urge the RAs to reconsider the proposed amendments in light of these concerns and to ensure that the CMC remains consistent with the rule of law and principles of good decision-making and is not purporting to remove rights provided to CMC Parties by statute which cannot be lawfully overridden or reduced.

Considering the materiality of the changes proposed, EPUKI considers it necessary to undertake public consultation in relation to the design of dispute resolution under the CMC, which should include review of the scope of CMDRB jurisdiction and interaction with rights to judicial review. CMC_11_25 attempts to resolve structural issues, such as the function and authority of the CMDRB and the meaning of finality, without any broader consultation on lessons learned from past dispute processes. This lack of public engagement is unfair and very concerning. CMC_11_25 risks creating a dispute framework that is overly restrictive, legally vulnerable, and out of step with public law principles applicable in Northern Ireland and under the EU internal market framework. For example, EPUKI notes that Directive (EU) 2019/944 on common rules for the internal for electricity, Article 60(8), requires that "*Member States shall ensure that suitable mechanisms exist at a national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government"*. This is implemented through appropriate appeal process to independent parties and the courts.

EPUKI looks forward to the SEMCs consideration of these views and intends to consider all remedies available should the SEMC continue to pursue this modification proposal.

CMC_12_25 RAs role in relation to FQDs

EPUKI is opposed to this modification given its materiality coupled with the lack of transparency around the justification for this change. EPUKI has further concerns that this modification would result in a weakening of Participants' legal rights and would not constitute good regulatory practice in general.

The cumulative impact of the proposal removes the role of RAs in approving, rejecting, or substituting FQDs with their own, to those proposed by the SOs. Instead, the role of RAs is confined to reviewing decisions made by the CMDRB following a notice of review by Disputing Parties. Furthermore, the proposal seeks to dispense with the need for FQDs to reflect any updated information or change in circumstances affecting a Participant which the SOs become aware of, regardless of whether such an update or change could have resulted in a different outcome at an earlier stage of the Qualification Process. The proposal also seeks to remove the rights of Disputing Parties to challenge the review of CMDRB decisions by RAs "*save in the case of dishonesty or malice*".

These proposed changes raise several concerns. The modification distances the RAs from frontline oversight from a key element of decision-making in Capacity Auctions, arguably delegating authority to the SOs where the RAs currently have a role in exercising formal approval functions.

The RAs are public bodies with statutory duties to ensure the proper functioning of the electricity market. The proposal diminishes their decision-making role in a key regulatory process and could be viewed as incompatible with their independence as regulators established by the Electricity Regulation Act 1999 and the Energy (Northern Ireland) Order

2003 in Northern Ireland. In particular, the limitation to the review of RAs in a Qualification Dispute proposed to paragraph B.14.10.1 is clearly wrong. It runs counter to well-established principles in law, including under Article 6 of the European Convention on Human Rights and common law constitutional principles (Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 and R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22). As the law of Northern Ireland governs the CMC, it is also noted that the right to judicial review is enshrined in law by Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980. In this instance, a subordinate document seeks to interfere with the rights of Parties to the CMC to seek to exercise their rights under the statute.

EPUKI is also concerned that this proposal sits uneasily with the requirement for TSOs to act independently, and risks undermining the governance balance envisaged in the Capacity Market design. Instead of enabling a properly independent CMDRB to function as the forum for resolving disputes, the proposal leaves the CMDRB structurally weak - without mandatory inclusion of appropriate technical, engineering or financial expertise, while the RAs propose to step back from later-stage involvement without strengthening the CMDRB in parallel.

Moreover, this proposal appears to be codifying a flawed practice, where RAs are heavily engaged informally in early processes but seek to avoid responsibility for the final decision-making stage. The modification proposal notes that this proposal has been made following a "lessons learned" exercise carried out following the T-4 2028/2029 Capacity Auction. EPUKI notes that the details and outcome of this review was not made publicly available, and it is therefore difficult to assess the lessons learned, the effectiveness of this proposed change, or its alignment with the review.

No explanation has been provided to support the proposed removal of Section E.9.4.2 (d) and E.9.4.11 which require FQDs to reflect "*any updated information or change in circumstances affecting the Participant which the System Operators become aware of*". The modification proposal explicitly states that the modification will "*allow the RAs to rely (except where good cause could be shown) upon information which had been available at those earlier stages*". It is not clear why the RAs would be content to rely on outdated information, nor why the burden to provide 'good cause' should be placed on the Participant. The RAs should make decisions based on the most up-to-date and best available information. Making decisions based on information which the RAs are aware is no longer correct does not represent good regulatory practice. It is further unclear how allowing decisions to be made based on outdated information provides any benefit to consumers, or Participants.

This lack of consultation and robust stakeholder engagement creates a risk of unintended consequences associated with this modification. The proposal appears rushed, being brought forward within the pre-auction window, and EPUKI is concerned that this circumvents proper policy development. The RAs have acknowledged that this modification represents a "*substantive change*" and as such this modification should not be implemented without a more robust and considered review process.

EPUKI looks forward to the SEMCs consideration of these views and intends to consider all remedies available should the SEMC continue to pursue this modification proposal.

CMC_13_25 Amendments to Capacity Auction Timetable

EPUKI is opposed to this modification due to concerns around regulatory uncertainty and based on the potential undermining of D.2.1.12 of the CMC. EPUKI does not agree that this is a clarificatory modification, as these changes fundamentally remove existing restrictions on the RAs' powers within the context of the Capacity Market.

D.2.1.12 introduces a restriction whereby if the RAs choose to delay, postpone, or cancel a Capacity Auction, they must do so no later than five Working Days prior to the Capacity Auction. D.2.1.10 allows the RAs to amend the Capacity Auction Timetable by written notice to the SOs. This modification essentially removes this restriction by reference to D.2.1.10. This effectively makes D.2.1.12 obsolete in the context of the CMC.

EPUKI does not agree that there is a lack of clarity as to the interpretation of the two provisions of the Capacity Market Code. The inclusion of D.2.1.12 explicitly prevents the short-notice postponement or cancellation of the Capacity Auction. If this clause is not without prejudice to the powers of the SOs and the RAs under D.2.1.10, as proposed by the modification, then it serves no purpose within the CMC. The current drafting of the CMC is specifically designed to protect against short-notice postponements or cancellations, and therefore this modification is not merely clarificatory.

EPUKI notes that the RAs and SOs have conducted multiple Capacity Auctions annually for over seven years. It is disappointing that the RAs are unable to commit to a minimum five-working day buffer for postponements or cancellations to the Capacity Auction. This creates regulatory uncertainty and undermines investment certainty in the Capacity Auction.

EPUKI has further concerns around the potential consequences of this modification. Specifically, if Capacity Auctions are cancelled after submissions have commenced or the window for submissions has closed. This modification significantly expands the powers available to both the SOs and RAs and creates concerns around uncertainty and fairness in the auction process.

CMC_14_25 New Dates in Capacity Auction Timetable

EPUKI has no strong views on this modification. In general, EPUKI welcomes greater transparency around constraints to be applied in the Capacity Market, with information on constraints to be made available to participants as early as possible in the process.

EPUKI also highlights that locational constraints were originally included in the Capacity Remuneration Mechanism ('**CRM**') design as a transitional mechanism. This was identified in the State Aid approval for the CRM which noted that constraints "*will only apply to transitional auctions at this stage as the locational constraints are expected to be resolved afterwards"* and underlined "*the importance of resolving the transmission constraints swiftly"*. It is further noted that Price Review 5 included an incentive for EirGrid to resolve the Dublin locational constraint during the price review period (2020 – 2025).

It is disappointing that during this period the constraint situation has deteriorated with new maximum volume constraints being introduced in Dublin, and new constraints being proposed in other regions. EPUKI has concerns around the continued impact of constraints on the Capacity Market, resulting in distortion to competition and less efficient outcomes for consumers. This modification would codify the process around calculating constraints which is indicative of a wider trend of an increasingly constrained CRM.

CMC_15_25 Performance Securities for Extended Projects in T-4 2026/2027

EPUKI does not support this modification due to it being limited to the T-4 2026/27 only. EPUKI consider that the second Performance Security Posting Date/Event applicable to Awarded New Capacity should be aligned with the Substantial Financial Completion date for the capacity in question, including any applicable extensions, but that this should relate to all future auctions.