ESB Generation and Trading Response SEMC Consultation Paper on Capacity Market Code Modifications (Workshop 43, Part B)

SEM-25-027

17/07/2025

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1. SUMMARY INFORMATION

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2. INTRODUCTION

ESB Generation and Trading (GT) welcomes the opportunity to respond to SEMC Workshop 43 Part B Consultation Paper on the following Capacity Market Code (CMC) modification proposals:

- **CMC_10_25:** Amendments to E.7
- **CMC_11_25:** Clarifications on provisions relating to 'final and binding' and dispute resolution under the CMC
- **CMC_12_25:** RAs role in relation to Final Qualification Decisions
- **CMC_13_25:** Amendments to Capacity Auction Timetable
- **CMC_14_25:** New Dates in Capacity Auction Timetable
- **CMC_15_25:** Performance Securities for Extended Projects in T-4 2026/27

3. ESB GT RESPONSE

3.1 CMC_10_25: Amendments to E.7

3.1.1 Proposed Modification and its Consistency with the Code Objectives (RA's)

The proposed change focuses on improving the clarity and consistency of the CMC by amending sections E.7.1.1, E.7.2.1, and E.7.5.1. The main goal is to eliminate ambiguity in the qualification process for Capacity Market Units. Specifically, the revision to E.7.1.1 introduces supposedly clearer language to ensure that no unit is presumed qualified unless all necessary tests are passed. In E.7.2.1, subsection (f) is removed, with its relevant content integrated into E.7.5.1 to streamline the Code and remove redundancy. The amendments to E.7.5.1 further consolidate overlapping provisions and clarify the requirements for new capacity.

ESB GT understands that, overall, the proposal is designed to enhance the legal precision of the Code and ensure a more transparent and consistent qualification process and that the recent court decisions related to the qualification process has guided the construction of the proposed modification.

ESB GT are not convinced that the amendments proposed here are consistent with what this section of the code should allow for. The *"uncertainty in regard to presumptions on qualification"* allows for an important level of interpretation which is helpful in retaining flexibility in the Code.

Secondly, ESB GT thinks that the adoption of the concept of achievability rather than feasibility has far greater implications on the Code than has been considered, thus, we would be hesitant to support such a change at this time without an explicit clarification that the interpretation of "feasible" with respect to the Code should be as outlined in recent Northern Ireland jurisprudence as detailed below.

In this regard it would be important to consider the recent and relevant jurisprudence in Northern Ireland regarding this precise point. In the case of Re Prime Power Generation Ltd and EP Kilroot Ltd (Judicial Review) [2024] NIKB 102, 27 November 2024, although the Court does not explicitly contrast the terms "feasible" and "achievable", paragraph 237 does refer to the ambiguity in the CMC particularly the overlap between section E.7.2.1(f) (which deals with feasibility) and sections E.7.5.1(b) and (c) (which relate to mandatory rejection grounds, including achievability).

In this case feasible was interpreted as referring to a technical or engineering-based assessment of whether a project is capable of being delivered within the relevant timeframe. The Court focused on the interpretation and application of feasibility under the CMC, particularly section E.7.2.1(f), which allows the System Operator (SO) to reject an application if delivery is not feasible (either technically or in the required timeframe). In paragraphs 135 – 139 of the Judgment, the Court described the test of "feasibility" as "not one of certainty or even probability, but of whether delivery is reasonably practicable." The Court commented that *"no project is ever entirely risk free and there will always be some level of uncertainty about how things may work out."*

ESB GT is of the view that if the word "feasible" is to be used rather than "achievable", then the Courts' interpretation of this word should also be codified and referenced within the CMC. This will ensure that any issues which might arise around introducing a requirement of near certainty into the Code as was expressed in Re Prime Power Generation, would then be unlikely to reoccur.

3.1.2 Impacts Not Identified in the Modification Proposal Form

None

3.1.3 Detailed CMC Drafting Proposed to Deliver the Modification

Clear definitions of "feasible" and/or "achievable" should be included in the CMC as referenced above.

3.2 CMC_11_25: Clarifications on Provisions Relating to "final and binding" and dispute resolution under the CMC.

3.2.1 Proposed Modification and its Consistency with the Code Objectives

ESB GT does not agree that the proposed modification is consistent with CMC objectives (b) (c) and (d).

The purpose of this proposed change is to clarify how the terms "final and binding" are applied within the dispute resolution framework of the CMC. Specifically, it aims to ensure that decisions made by the RAs are not considered final and binding if they were made dishonestly or with malicious intent but that in all other respects such decisions would be final and binding.

ESB GT understands that this clarification is aimed at reinforcing the integrity of the dispute resolution process by explicitly excluding bad-faith decisions from the protections typically afforded to final determinations.

ESB GT does not support this proposed modification and has concerns around its impact on the rights of market participants. The existing ability for a participant to utilise the Courts is a right that is important in enabling decisions to be scrutinised to affect the right outcome. ESB GT would be reluctant to give up that right, even it if is one that is only used sparingly. It is in fact clarity provided by the Courts which has prompted the consideration of this issue by the SOs and RAs. On this basis it would seem to be contrary to the principles of justice and fairness as well as the respect for the rule of law, that is undermined by this modification.

Limiting challenges to decisions made with “dishonestly” and/or “malice” sets a very high bar. ESB GT is concerned that this could prevent legitimate grievances from being addressed if they do not meet these specific and stringent criteria, potentially allowing unfair decisions to stand unchallenged.

In addition, the terms “dishonesty” and “malice” still might be ambiguous, despite the RAs’ clarifications. Any ambiguity in this regard could lead to inconsistent interpretations and applications, potentially leading to confusion and unfair outcomes.

3.2.2 Impacts Not Identified in the Modification Proposal Form

None

3.2.3 Detailed CMC Drafting Proposed to Deliver the Modification

No proposed change.

3.3 CMC_12_25: RAs role in relation to Final Qualification Decisions

3.3.1 Proposed Modification and its Consistency with the Code Objectives

ESB GT is of the view that the proposed modification does not promote any of the CMC objectives. Specifically, it could damage the provision of adequate future capacity (Code objective (b)); would not better facilitate undertakings seeking to engage in providing electricity (Code objective (c)); dampens scope for competition (Code objective (d)); and reduces transparency (Code objective (e)); overall impacting consumer interests with respect to price, quality, reliability and security of electricity supply across the island (Code objective (g)).

Under current arrangements, Final Qualification Decisions (FQDs) are submitted by the SOs for approval or rejection by the RAs in accordance with section E.9.4 of the Code. Section E.9.4 allows the RAs to determine an alternative decision in substitution to any FQD submitted by the SOs which is final and binding on all parties. FQDs are typically submitted to the RAs for a decision five weeks prior to the auction (or the date specified in the relevant Capacity Auction Timetable) and just two weeks before Final Qualification Results Date when the results must be notified to market participants.

Currently, market participants who have their Application for Qualification rejected by the SOs may appeal the decision by lodging and Application for Review with the SOs by the relevant deadline in accordance with section B.14.5. If dissatisfied with the outcome of this initial appeal to the SOs, the market participant may then raise a Qualification Dispute by serving the SOs with a Notice of Dispute (copied to the RAs) by the relevant deadline.

A Qualification Dispute is referred to the Capacity Market Dispute Resolution Board (CMDRB) when the SOs forward the Notice of Dispute to the Panel Chairperson for a decision in accordance with the rules and procedures set out in B.14.8 and B.14.9. If dissatisfied with the CMDRB decision, a Disputing Party may give notice to the SO and

CMDRB of its dissatisfaction (notice of dissatisfaction) by the relevant deadline in accordance with B.14.8.8.

Except in certain circumstances, no Disputing Party shall be entitled to commence Court proceedings in relation to a Dispute unless a notice of dissatisfaction has been given. Provision B.14.2.7 stipulates that the provisions of the Dispute Resolution Process "*shall not prejudice or restrict any Party's entitlement to seek interim or interlocutory relief directly from the appropriate Court or Courts having competent jurisdiction.*"

This modification proposal seeks to allow a party to a Qualification Dispute to request an RA review of any decision made by the CMDRB. Notably, it would confine the RAs' role in relation to FQDs to that of reviewing a CMDRB decision (where a (new) "Notice of Review" has been submitted to the RAs by the dissatisfied Party within 2 working days of receiving the decision).

The modification would also allow, where permitted, for the submission and consideration by the RAs of evidence not previously submitted to the CMDRB.

Further, the proposal seeks to limit recourse to the Courts in relation to a Qualification Dispute as currently provided for in the Code, except in limited cases.

ESB GT is supportive of some elements of the proposed modification, as it would codify the right of a Disputing Party to make direct appeal to the RAs if dissatisfied with a decision made by the CMDRB prior to initiating any Court Proceedings and would allow the RAs to intervene as an adjudicator in the Qualification process further in advance of an auction. That said, we are of the view that as the RAs are copied on Disputes by SEMO currently, that this may not represent a major change.

Under current arrangements, Provisional Qualification Results Date is typically A-11 weeks, with FQDs submitted to the RAs for a decision at A-5 weeks, and Final Qualification Results notified to market Participants at A-3 weeks. We believe that this additional recourse to appeal may therefore reduce the risk of auction delays and allow for a more thorough consideration by the RAs of the arguments submitted by the Disputing Parties.

We note that the T-4 2028/29 Auction was delayed due to the number and complexity of Qualification Disputes brought before the CMDRB in the lead up to the auction. At least one of these cases also resulted in Court Proceedings, leading to further delay. Such delays increase the risk of non-delivery of awarded new capacity at a time when capacity terminations may heighten the threat to security of supply.

In order to fully assess the proposed changes to the RAs role in relation to FQDs, we urge transparency as to the nature of assessment of the SO submission currently carried out by the RAs, and the reasons for any rejection by the RAs of an FQD in the past.

We would further welcome clarification as to the grounds on which the RAs would make any decision, if different from those set out in section B.14.9, applicable to the CMDRB.

The legal drafting in [XX.8] states that any decision by the RAs as part of the review process shall be final and binding "save in the case of dishonesty or malice." Proposed additions to B.14.10.1 would rule out the possibility for a party to seek recourse to the Courts after a review decision by the RAs except in the circumstances set out above.

We understand that this element of the proposal interacts with RA proposal *CMC_11_25: Clarifications on provisions relating to 'final and binding' and dispute resolution under the CMC,* and that the two modifications should be read in conjunction.

We consider that the implementation of this modification proposal could cause the SEMC to act ultra vires. Article 9BC of the Electricity Regulation Act 1999 (as amended) provides that the SEMC must carry out its respective functions having regard to: - *“the need to secure that authorised persons are able to finance the activities which are the subject of conditions or obligations imposed by or under this Act or in the Internal Market Regulations or any corresponding provision of the law of Northern Ireland.”* And – *“the need to avoid unfair discrimination between consumers in the State and consumers in Northern Ireland.”* The proposed amendment by the RAs could result in the failure of the SEMC to perform its function in the manner prescribed in legislation by not having regard to these functions. It is possible that Capacity Market decisions could result from inaccurate though not malicious application of the Code. It is also possible that these decisions could impact market participants and customers in Ireland and Northern Ireland differently. This being the case, removing the right of final access to justice through the Courts has the potential to result in ultra vires actions by the RAs.

The final right of legal challenge in the Courts with respect to Capacity Market decisions is an important legal right in ensuring both the Code and its objectives are fulfilled and in avoiding unfairness. This is particularly the case where Capacity Market decisions (once taken) are implemented over many years. Removing the right to legally challenge in all but limited circumstances frustrates the proper functioning of the Capacity Market and inhibits transparency.

Narrowing the right to redress pursuant to the modification would also undermine the requirements under the Electricity Regulation Act 1999 (as amended) for:

(i) the CRU (and SEMC when a matter has SEM impact) to carry out their functions and exercise their powers in a manner that ensures no undue barriers exist for electricity as regards market entry and operation (Article 9(3)(d));

(ii) the CRU to promote competition in the generation and supply of electricity and the continuity and security of electricity supplies (Articles 9(4)(a)(i) and (v)).

If market participants are limited or deterred from escalating Disputes around qualification or final auction decisions, for example, this could have an undue negative impact on market entry, competition and, ultimately, security of supply.
Moreover, we do not understand the rationale for the proposed change. Surely, as a matter of course there would be a presumption that regulators would typically act without malice and dishonesty. Rebutting the presumption would then be a matter for anyone challenging a decision of the regulators and which would be difficult to allege and evidence. That said, the evidence thresholds for ‘malice’ and ‘dishonesty’ are currently unknown and ultimately subjective and could realistically be perceived as an attempt to limit market participants’ constitutional and European rights of access to justice and courts. This right of access is enshrined in Article 34 of the Irish constitution and Article 6 of the European Convention of Human Rights, both of which can be relied on by legal entity companies.

ESB GT is concerned that this modification changes in a fundamental way access to the Courts which has to date formed part of the legal and governance structure of the CMC. The modification seems to effectively remove any real mechanism for challenging a decision taken by the RAs in relation to the Capacity Market, where alleging malice and dishonesty on the part of the RAs would be very difficult to substantiate. To date recourse to the Courts has been a helpful mechanism in ensuring fairness, and equity together with legal and financial certainty for market participants.

Recently, the case of Re Prime Power Generation Ltd demonstrated the importance of recourse to Courts, where anomalies in drafting such ambiguity in the meaning of “feasibility” and “achievability” came to light. This modification seems to have been prompted by the Courts’ decision in this case. The effect of the implementation of this modification may be that judgments such as in Re Prime Power Generation Ltd would no longer take place. This would be a great disservice to the RAs, SOs and market participants and to potential DRBs. The intention to limit the ability to challenge is explicitly provided in the proposed drafting which reads:

> "*The Parties shall not commence any litigation in respect of any Disputes or any decisions taken under this Code save (i) where the malice or dishonesty exception to a final and binding decision applies or (ii) the matter has been referred to the CMDRB and the requirements of this section B.14 have been complied with".*

Ultimately the CMC is a contract and contracts may and, where warranted, should be interpreted in Court. ESB GT is of the view that wording that seeks to limit a party's right to access justice could fall foul of contractual rules and norms. While it is acceptable to include prerequisites like following the CMC Disputes process before deciding to refer a dispute to Court (which the CMC already provides for), effectively carving out and thereby removing the right to seek redress through the Courts would be unlikely be a legitimate provision under contract law. Furthermore, the fact that there is a jurisdiction clause in section B.2.1.2 of the CMC whereby the parties submit to the jurisdiction of the Courts of Ireland and Northern Ireland indicates that it has always been envisaged that access to the Courts would be a right of Parties to the Code. Access to the Courts is also a fundamental principle of law which should continue to be upheld.

ESB GT accepts that there is a balance to strike between arriving at a speedy decision to ensure certainty in line with tight timelines on the one hand, and in ensuring fairness and equity for market participants on the other hand. We do not consider that the modification strikes this balance.

ESB GT does not support this modification proposal, which effectively takes the contractual right of access to the Courts, away from parties to the Code. The principle of the right of access to the courts has been heretofore enshrined in market codes since the creation of the SEM.

We therefore urge the SEMC to revise its minded-to position and to exercise its power under CMC paragraph B.12.11.1 (b) to "*not make a Modification*".

If this modification is introduced, we would urge the RAs and SOs to make available to applicants as much information in relation to qualification decisions as possible, as early as possible, to allow for a thorough assessment of the decision, prior to initiating a Dispute. This is especially important if recourse to the Courts would no longer be provided for following the amended Dispute Resolution Process.

While we understand that the legal drafting relating to Part 2 - Alternative Proposal is intended to be a read as a standalone modification and an alternative to the more extensive changes to the legal drafting in 'Part 1', the intended impact of this Alternative Proposal is unclear where Code references are missing. We are therefore unable to fully assess the impact and necessity of the Alternative Proposal.

3.3.2 Impacts Not Identified in the Modification Proposal Form

None

3.3.3 Detailed CMC Drafting Proposed to Deliver the Modification

We consider that the RAs should exercise their right not to decide on this modification as we have indicated key legal and procedural reasons including incompatibility with the Code objectives to support this position.

Were this modification to be progressed, we consider it prudent that the Working Group obtain legal advice as to the vires of this modification in line with SEMC functions set out in legislation. We also recommend that before a decision be taken on this modification that an opportunity be given for separate submissions to be made to the SEMC.

3.4 CMC_13_25: Amendments to Capacity Auction Timetable

3.4.1 Proposed Modification and its Consistency with the Code Objectives

ESB GT views this modification proposal as administrative in nature and a welcome clarification in relation to the powers of the RAs and SOs to introduce changes to the Capacity Auction Timetable, including at short notice.

We understand that the proposal does not vary these powers in any way, and that any delay, postponement or cancellation of a Capacity Auction remains subject to the conditions set out in D.2.1.12.

3.4.2 Impacts Not Identified in the Modification Proposal Form

None.

3.4.3 Detailed CMC Drafting Proposed to Deliver the Modification

No proposed changes.

3.5 CMC_14_25: New Dates in Capacity Auction Timetable

3.5.1 Proposed Modification and its Consistency with the Code Objectives

ESB GT agrees that the proposed modification is consistent with CMC objectives (b) and (e).

This modification proposal seeks to introduce new dates in the Capacity Auction Timetable which would require the SOs to submit "indicative" Locational Capacity Constraint (LCC) volumes to the RAs at A-25 weeks to coincide with the publication of the Initial Auction Information Pack (IAIP) for the relevant auction (Part 1), and to submit adjustments to the Final Capacity Requirement which include final LCC volumes at A-11 weeks (Part 2).

ESB GT is supportive of the modification, which we believe would allow more time for the RAs to scrutinise (indicative) LCC volumes proposed by the SOs.

We are encouraged by the update given by the RAs at the Capacity Market Modifications Committee meeting (Workshop 43b) in relation to the establishment of a Panel of Technical Experts (PTE) to increase transparency around volume setting in the capacity market following SEM-22-054.

In light of recent developments which have led to the introduction of L2 LCCA Maximum Quantities in the Dublin Area, a proposal to introduce a Maximum Quantity (L2) for the Cork Harbour Area set out in T-4 2029/30 Auction Parameters Consultation, and in the absence of a formal LCCA Maximum methodology, transparency around volume setting is vital to allow market participants to assess commercial risk and opportunities.

While we understand that the process timings surrounding LCC calculations are bound by various factors, we would therefore urge the RAs and SOs to make the volumes available to market participants as early as possible to allow for sufficient time to prepare for the auction and avoid possible Qualification Disputes in relation perceived (or forecast) system constraints.

3.5.2 Impacts Not Identified in the Modification Proposal Form

None

3.5.3 Detailed CMC Drafting Proposed to Deliver the Modification

No additional changes in proposed drafting identified.

3.6 CMC_15_25: Performance Securities for Extended Projects in T-4 2026/27

3.6.1 Proposed Modification and its Consistency with the Code Objectives

ESB GT agrees that the proposed modification is consistent with CMC objectives (b), (c), (d), and (f).

This proposal seeks to amend the timelines associated with the posting of Performance Securities for projects awarded in the T-4 2026/27 Auction and availing of an extension under section J.5.5 or J.5.7 of the Code where the extension is in relation to a planning delay. Currently, market participants must typically post their penultimate Performance Security from 13 months prior to the start of the relevant Capacity Year (or as otherwise set out in the relevant FAIP).

This modification follows CMC_06_24 *Performance Securities for Extended Projects* which was rejected by the RAs on the grounds that the arrangements in place under SEM-23-069 for the T-3 2024/25 and T-4 2025/26 auctions reflected the exceptional challenges facing projects awarded in those auctions. In its decision, the RAs specifically cite the need to mitigate against “largely unpredictable third-party planning delay,” and further state that “it would be undesirable to permit extension of time for a third-party delay under SEM-23-001 without recognising that the underlying delay can lead to issues in respect of Performance Securities.”

As stated in our response on CMC_06_24, ESB GT supports equal treatment for all projects granted an extension (due to planning delay) under the Code.

We would therefore urge the RAs to consider extending the arrangements under SEM-23-069 to capacity awarded in all auctions to create a level-playing field, mitigate undue risk exposure for developers, and ultimately avoid the risk of termination (recognizing the changes to qualification criteria introduced because of CRU Direction D/25/9470).

3.6.2 Impacts Not Identified in the Modification Proposal Form

None

3.6.3 Detailed CMC Drafting Proposed to Deliver the Modification

No additional changes in proposed drafting identified.

5. CAPACITY MARKET CODE OBJECTIVES

A.1.2.1 *This Code is designed to facilitate achievement of the following objectives (the "**Capacity Market Code Objectives**"):*

a) to facilitate the participation of undertakings including electricity undertakings engaged or seeking to be engaged in the provision of electricity capacity in the Capacity Market;
b) to promote competition in the provision of electricity capacity to the SEM;
c) to provide transparency in the operation of the SEM;
d) to ensure no undue discrimination between persons who are or may seek to become parties to the Capacity Market Code; and
e) through the development of the Capacity Market, to promote the short-term and long-term interests of consumers of electricity with respect to price, quality, reliability, and security of supply of electricity across the Island of Ireland.
f) become parties to the Capacity Market Code; and
g) through the development of the Capacity Market, to promote the short-term and long-term interests of consumers of electricity with respect to price, quality, reliability, and security of supply of electricity across the Island of Ireland.