Submission by Energia to SEM Committee on Capacity Market Code Working Group 12 Urgent Modification Consultation Paper SEM-20-023

CMC_05_20 Amendments relating to the Clean Energy Package

20th April 2020

1. Introduction

Energia welcomes the opportunity to respond to the SEM Committee Urgent Modification Consultation Paper SEM_20_023 and titled "CMC_05_20 Amendments relating to the Clean Energy Package" (the "**Consultation Paper**") and the associated Modification Proposal From SEM-20-023 (b) (the "**Modification**") and High Level Technical Guidance document SEM-20-023 (c) (the "**Technical Guidance**").

Energy Regulation EU 2019/943 (the "**Regulation**"), which forms part of the Clean Energy Package came into force on 4 July 2019. Chapter 4 of the Regulation sets out specific requirements for resource adequacy, including the general principles and design principles of any capacity mechanism. This Regulation impacts on the capacity auctions which take place after 31 December 2019, commencing with the T-4 CY2023/24 capacity auction.

The process for the T-4 CY2023/24 capacity auction is well underway and so the Modification is being urgently progressed to be in place for this imminent capacity auction together with updating the qualification requirements for future auctions. However, Article 22(4) of the Regulation contains deceptively complex provisions that risk being transposed incorrectly if rushed through. The most complex aspects of this are in Article 22(4)(b) relating to existing capacity that started commercial production before 4 July 2019. New capacity that started commercial production on or after 4 July 2019 is relatively simple by comparison and these changes are the only ones that are required for the T-4 CY2023/24 capacity auction.

Unfortunately, the proposed Modification does not comply with the requirements of Article 22(4)(b) of the Regulation and therefore does not further the Code objectives, as claimed. Further amendments to the Capacity Market Code (CMC) are therefore necessary to enable compliance, including how the CO_2 emissions limits are to be checked and enforced on an ongoing basis, in particular the 350kg CO_2 annual allowance applicable to existing capacity. Unless and until such amendments are made, there will continue to be a disconnect between the CMC and the legal requirements within the Regulation..

Therefore, similar to the approach adopted in Great Britain, we recommend that the CMC only be modified to make the required changes for new capacity at this stage. The modifications relating to existing capacity are far more complex and can be made subsequently after due consideration. This two-phased approach clearly facilitates compliance with the Clean Energy Package (being the objective of the Modification reflected in Section 2.1.25 of the Consultation Paper) and indeed secures increased likelihood of compliance by giving additional time to consider the more complex elements of Article 22(4)(b).

The remainder of this response is structured as follows. Section 2 provides comments on the Modification Proposal, elaborating on the above concerns, and section 3 provides initial comments on the Technical Guidance published with the Consultation Paper. For completeness, we have reflected a summary of our comments in 'Appendix D - Response Template' which is submitted separately but should be read in conjunction with this submission.

2. Modification Proposal and requirements for Existing Capacity

As outlined above, Great Britain adopted a two-phased approach to implement changes required to comply with the Regulation. The consultation published in Great Britain in July 2019 clarifies on page 35 that: "*In order to require compliance with the carbon emission limits in respect of **new-build** capacity participating in the early 2020 auctions, amendments were*

made to the Rules by the Capacity Market Amendment (No. 5) Rules 2019, which came into force on 18 July 2019 (prior to the prequalification window in 2019)" but that in relation to existing capacity (pre 4 July 2019) the Government has undertaken a consultation on:

- Whether carbon emissions limits for existing capacity should take effect on 1 July 2025, or 1 October 2024;
- What length of agreements should be awarded to Refurbishing CMUs that will not meet the emissions limits;
- How best to deal with false or inaccurate Fossil Fuel Emissions Declarations and the recovery of capacity payments in such cases.

We advocate the adoption of the same approach in SEM, whereby the changes for new capacity are made now and detailed consideration be given to existing capacity thereafter, and in particular how to deal with ex-post verification and recovery of capacity payments where required.

Article 22(4)(b) provides that "*from 1 July 2025 at the latest, generation capacity that started commercial production before 4 July 2019 and that emits more than 550 g of CO2 of fossil fuel origin per kWh of electricity and more than 350 kg CO2 of fossil fuel origin on average per year per installed kWe shall not be committed or receive payments or commitments for future payments under a capacity mechanism*".

The complexity in relation to existing capacity comes from the restriction on receipt of capacity payments for plants emitting *"more than 350 kg CO2 of fossil fuel origin on average per year per installed kWe"*. It is critical that compliance with this requirement be tested at Qualification stage, as proposed by the current Modification, and if the plant does not comply based on historic emissions it must not be permitted to qualify for the auction.

However, given that Qualification is some four years before a Capacity Year T, compliance with the emissions limits must also be tested at the beginning of the Capacity Year. If the plant had exceeded the emissions limits on average in the relevant period determined by the Regulatory Authorities prior to the delivery of the capacity, then the plant is prohibited by the Regulation from receipt of Capacity Payments. This is a strict requirement of Article 22(4)(b) but is not currently reflected in the proposed Modification. This legal obligation must be incorporated into the CMC.

Similarly, the proposed modification does not currently include (i) any ex post validation; nor (ii) any sanction for breach of emissions limits following the ex post validation. The requirement for ex-post validation and sanctions for breach of emissions limits following ex post validation are both included in the ACER Opinion No 22/2019 (the "**ACER Opinion**") and must be transposed into the CMC. That said, the treatment of both ex post validation and sanctions in the ACER Opinion is somewhat perfunctory, and in this respect does not comprehensively deal with the express requirements of the Regulation which are binding on Member States, regulators and market participants. In particular, we would make the following observations in relation to the discussion of ex-post validation and sanctions in the ACER Opinion:

1. Having regard to the wording of the Regulation, the need for ex post validation is unarguable. In our view, the circumstances listed in the ACER Opinion in which ex-post validation is required are all reasonable and should be reflected in Irish law. However, if it is accepted that there are circumstances where it is necessary to

validate emissions ex post where compliance was based on assumptions made prior to the capacity year, it must surely be the case that ex post validation is necessary in all cases in which compliance with emissions limits are based on assumptions made prior to the Capacity Year. Specifically, where compliance with emissions limits is based on assumptions as to running hours, ex post validation of compliance with the emissions limits must be incorporated.

2. The ACER Opinion does not specify the sanctions that must be implemented if an ex-post validation exercise identifies a breach of emissions limits. However the Regulation is absolutely clear on what the sanction is, namely that the plant "*shall not be committed or receive payments or commitments for future payments under a capacity mechanism"*. The sanction is therefore that capacity payments received in the year must be repaid and no future capacity payments may be made. It is not at all clear why the obligation in I.1.2.1(d) has been changed to a "reasonable endeavours" obligation. The sanction breaching emissions limits under the Regulation is, as a matter of law, the loss of an entitlement to receive capacity payments. This is absolute and concerns raised at the Working Group about factors outside of a Participant's control impacting real-time operation of a unit are irrelevant. This must also be reflected in the CMC.

Further amendments to the CMC are therefore necessary to enable compliance, including how the CO_2 emissions limits are to be checked and enforced on an ongoing basis, in particular the 350kg CO_2 annual allowance applicable to existing capacity.

As advocated above, changes for new capacity can be made now before the CY23/24 capacity auction closes, whilst detailed consideration is given to existing capacity thereafter. Energia has reviewed the proposed legal drafting in the Modification Proposal with that in mind and has suggested minimal changes in Schedule 1 of this submission to give effect to the above recommendations.

3. Technical Guidance

The Consultation Paper is accompanied by a Technical Guidance document which was not available for review or discussion by market participants at Working Group 12. As stated within Section 2.1.21 of the Consultation Paper, the Technical Guidance has been drafted due to concerns over the clarity of the ACER Opinion in respect of calculating CO2 emission limits and therefore intends to *"create greater clarity as to the determination of CO2 emissions to be made under the CMC. The intention is that this should ensure that all Applications for Qualification are made and validated on a consistent basis".*

Whilst welcoming the intent, Energia does have concerns with a number of aspects of the Technical Guidance document. Firstly, and as mentioned above, the Technical Guidance was drafted after the Working Group 12 discussion and in response to concerns raised about the clarity of ACER Opinion. However, this has resulted in this document only being submitted to market participants on 8th April 2020 for review. Noting that the consultation period fell over the Easter holidays this has provided very limited time for market participants to sufficiently review the document.

Furthermore, as stated above the intention of the Technical Guidance is to provide clear guidance on the determination of CO2 emissions under the CMC so that a consistent approach is applied**.** Energia supports this principle as it will provide important clarity both for

existing generation capacity and for future investments in the development of new capacity. However, our initial review of the Technical Guidance suggests that it does not provide the clear guidance and direction that is intended. Such an example can be found in point 5 of the Technical Guidance in relation to secondary fuels whereby it states the CO2 emissions should be based on historic average usage of both fuels, but it is unclear how exactly this is calculated. In addition, point 9 of the Technical Guidance still allows for market participants to adopt their own approach to CO2 submissions in circumstances that have not been covered by the Technical Guidance.

Given the above concerns, Energia recommends that the Technical Guidance be considered a working document that is subject to change following a fully comprehensive review by industry and that it incorporates changes as required. It is important that any changes or updates are then revised in the Technical Guidance in a timely manner. It is our understanding that the Technical Guidance will be subject to ongoing changes based on the proposed legal drafting of the CMC under section D.4.1.1 which states that *"When determining CO_2 emissions and their compliance with the CO_2 Limits, Parties shall take account of the latest technical guidance published from time-to-time by the Regulatory Authorities".* Energia is of the view that allowing for amendments to the Technical Guidance is crucial given the complexity of the issues they are providing guidance on and the requirement for the Technical Guidance to provide a clear and consistent approach as intended. We note this is a complex area still being considered by Energia and we will revert with further comments in due course.

4. Conclusion

Proposed Modification CMC_05_20 has been put forward by the RAs so that amendments are made to the CMC in order to implement the requirements of the Regulation in respect of CO_2 emissions limits.

Unfortunately, the proposed Modification does not comply with the requirements of Article 22(4)(b) of the Regulation 3 and therefore does not further the Code objectives, as claimed. Further amendments to the CMC are therefore necessary to enable compliance, including how the CO_2 emissions limits are to be checked and enforced on an ongoing basis, in particular the 350kg CO_2 annual allowance applicable to existing capacity. Unless and until such amendments are made, there will continue to be a disconnect between the CMC and the legal requirements within the Regulation .

Therefore, similar to the approach adopted in Great Britain, we recommend that the CMC only be modified to make the required changes for new capacity at this stage. The modifications relating to existing capacity are far more complex and can be made subsequently after due consideration. This two-phased approach clearly facilitates compliance with the Clean Energy Package (being the objective of the Modification reflected in Section 2.1.25 of the Consultation Paper) and indeed secures increased likelihood of compliance by giving additional time to consider the more complex elements of Article 22(4)(b).

Energia has reviewed the proposed legal drafting in the Modification Proposal with that in mind and has suggested minimal changes in Schedule 1 of this submission to give effect to the above recommendations.

With respect to the Technical Guidance, Energia recommends that this be treated as a working document that is subject to change following a fully comprehensive review by industry and

that it incorporates changes as required. We note this is a complex area still being considered by Energia and we will revert with further comments in due course.

Schedule 1: Proposed Modifications to Text in Modification Proposal

Add to Glossary

CO_2 Limits means the limits on CO_2 emissions which apply in relation to participation in capacity mechanisms as set out in Article 22(4) of Regulation 2019/943/EU.

Add new para E.2.1.6:

E.2.1.6 A Participant with a Candidate Unit that is New Capacity and which does not, or will not, comply with the CO_2 Limits shall not apply for the Candidate Unit to be Qualified in a Qualification Process.

Add a new para E.7.2.3:

E.7.2.3 The System Operators shall reject an Application for Qualification for a Capacity Year in respect of each Candidate Unit which is New Capacity, or each Generator Unit forming part of each Candidate Unit which is New Capacity, which does not, or will not, comply with the CO_2 Limits.

Add new paras E.7.4.4:

E.7.4.4 The System Operators shall reject that element of an Application for Qualification for a Capacity Year in respect of New Capacity for an Aggregated Generator Unit in respect of any Generator comprising it that does not, or will not, comply with the CO_2 Limits.

E.7.4.5 The System Operators shall reject that element of an Application for Qualification for a Capacity Year in respect of New Capacity for a Demand Side Unit in respect of any Demand Site comprising it that does not, or will not, comply with the CO_2 Limits.

Modify para E.7.5.1 as follows:

E.7.5.1 The System Operators shall reject an Application for Qualification for a Capacity Year in respect of New Capacity for a Generator Unit or Interconnector comprising a Candidate Unit unless they consider that:

(a) where New Capacity is under development, the information provided reflects an accurate view of the state of that development;

(b) the Implementation Plan dates are achievable;

(c) Substantial Completion of the Generator Unit or Interconnector can be achieved prior to the start of the relevant Capacity Year;

(d) all Qualification Data required to be provided in the Application for Qualification is provided and is accurate; and

(e) the New Capacity will comply with the CO_2 Limits.

Modify I.1.2 as follows:

I.1.2.1 In addition to its other obligations under this Code, a Participant shall, with respect to each of its Capacity Market Units:

(a) in respect of Awarded New Capacity:

(i) use reasonable endeavours to achieve each Milestone by the date indicated in respect of that Milestone in the relevant Implementation Plan for delivery of the Awarded New Capacity;

(ii) provide Implementation Progress Reports to the System Operators in accordance with section J.4;

(iii) maintain adequate Performance Security in accordance with section J.3;

(b) dedicate and use its reasonable endeavours to make available the Awarded Capacity;

(c) for each Imbalance Settlement Period within the Capacity Year:

(i) for each Capacity Market Unit that is an Interconnector, maintain a level of availability for imports into the SEM for each Imbalance Settlement Period not less than the Obligated Capacity Quantity and be subject to Difference Charges in accordance with the Trading and Settlement Code;

(ii) for each Capacity Market Unit comprising one or more Generator Units, through its participation in the day-ahead market, intraday trade and/or Balancing Market, schedule or provide sufficient energy for each Imbalance Settlement Period to satisfy its Obligated Capacity Quantity and be subject to Difference Charges in accordance with the Trading and Settlement Code.; and

~~(d) use reasonable endeavours to comply with the CO2 Limits.~~

Modify J.2.1.1(c) as follows:

(c) Substantial Completion: this milestone is achieved when:

(i) all the construction, repowering or refurbishment works associated with providing the Awarded New Capacity are substantially complete (subject only to snag or punch list items or any other matters which do not prevent substantial completion or taking over the works taking place under the applicable Major Contracts);

(ii) a Final Compliance Certificate, Operational Certificate or Final Operational Notification has been issued under the applicable Grid Code in respect of each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity;

(iii) the Proportion of Delivered Capacity in respect of the Awarded New Capacity is not less than 90%; and

(iv) each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity has met all Trading and Settlement Code and Grid Code requirements for participating in the Balancing Market.; and

(v) each new or refurbished Generator Unit providing Awarded New Capacity complies with the CO2 Limits.

Modify J.6.1.1(a) as follows:

(d) Minimum Completion: Awarded New Capacity achieves Minimum Completion when:

(i) all the construction, repowering or refurbishment works associated with providing the Awarded New Capacity are substantially complete (subject only to snag or punch list items or any other matters which do not prevent substantial completion or taking over taking place under the applicable Major Contracts);

(ii) each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity has undergone commissioning testing;

(iii) a Final Compliance Certificate, Operational Certificate or Final Operational Notification has been issued under the applicable Grid Code in respect of each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity;

(iv) the Proportion of Delivered Capacity in respect of the Awarded New Capacity is not less than 50%; and

(v) each new or refurbished Generator Unit or Interconnector providing the Awarded New Capacity has met all Trading and Settlement Code and Grid Code requirements for participating in the Balancing Market; and

(vi) each new or refurbished Generator Unit providing Awarded New Capacity complies with the CO2 Limits; and

Add a new Section D.4 as follows:

D.4 Compliance with CO2 Limits

D.4.1.1 When determining CO2 emissions and their compliance with the CO2 Limits, Parties shall take account of the latest technical guidance published from time-to-time by the Regulatory Authorities.

D.4.1.2 If any determination of CO2 emissions and their compliance with the CO2 Limits is not covered by the technical guidance published by the Regulatory Authorities, Parties shall take account of the technical guidance published by ACER pursuant to Article 22(4) of EU Regulation 2019/943 or any other applicable technical guidance issued by ACER.

D.4.1.3 If a determination of CO2 emissions and their compliance with the CO2 Limits is not covered by either D.4.1.1 or D.4.1.2, then Parties shall make their own determination taking account of the principles underlying the technical guidance from the Regulatory Authorities and ACER.

Add new sub-para to Appendix D (4)

(n) evidence that the Candidate Unit which is New Capacity complies with the CO2 Limits, including details of any determination of CO2 emissions;

(o) in the case of Candidate Units using bioliquids and/or biomass fuels (as defined in Article 2 of Directive 2018/2001/EU), evidence that they meet the criteria set out in Article 29 of Directive 2018/2001/EU to be eligible for financial support.