

EP UK Investments (EPUKI) Response to SEM-22-092 – Capacity Market Code Urgent Working Group Modification Consultation Paper

EPUKI welcomes the opportunity to respond to this Consultation Paper. EPUKI supports the SEMC's minded-to position in relation to the introduction of a new modification which combines elements of the modifications presented at the Capacity Market Code (CMC) Modifications Workshop in November 2022. Additionally, we support in principle the modification proposed by the SEMC subject to a number of recommendations which are included in our response.

The delivery of Awarded New Capacity is critical for Security of Supply in Ireland and Northern Ireland (NI), and we acknowledge that the SEMC is attempting to address this through the implementation of this modification. We believe that addressing the risk of Third Party delays is an essential step to ensuring an efficient and effective Capacity Remuneration Mechanism (CRM) as well as helping to ensure that new projects are financeable. A well-functioning CRM will deliver the best outcome for consumers through a secure and competitive market.

In recent years, the CRM has failed to deliver a substantial amount of New Capacity. The timeline associated with the delivery of new projects is very challenging and this is further exasperated as a result of Third-Party challenges to planning and permits. Any steps which can be taken by the SEMC to mitigate against these challenges will have a positive effect on the functionality of the CRM and, ultimately, the consumer.

As previously indicated, we acknowledge that the challenge of Third-Party delays is an issue which must be addressed as soon as possible to avoid projects being terminated or becoming economically unviable. **As such, we welcome the SEMC's decision to progress this modification urgently and the delay principle in the 'minded to' position but believe that there are some important refinements needed to the proposed modification to ensure that final investment decisions (taking into account financeability) are not impeded in the way that the current legal drafting would do.** These proposed changes are addressed later in this document.

We recognise that a respondent voiced concern that the previous modification was retrospective if applied to New Capacity which was awarded in previous Capacity Auctions. Having sought comprehensive legal advice on this modification, we are satisfied that this is not the case. We note that Section B.12.15 of the CMC states that:

“For the avoidance of doubt, a Modification shall have effect as and from the date specified by the Regulatory Authorities or, where applicable, the Modifications Committee and in no event shall that date be earlier than the date on which the Modification is approved by the Regulatory Authorities, or, where applicable, the Modifications Committee. Under no circumstances shall Modifications have retrospective effect”.

As this modification seeks to amend the dates for milestones which are yet to be delivered, they would not satisfy the definition of retrospectivity as established in the Code. This modification would only be retrospective if it sought to change dates which had occurred earlier than any decision to approve this modification.

Additionally, we believe that a precedent exists whereby significant changes to market conditions have been introduced after the outcome of the Capacity Auction. One such example of this is the introduction of Secondary Trading which took place after the Capacity Auction and was not available at the time when the auction took place.

While the SEMC voiced concerns that CMC_10_22 did not take into account the contingency which developers would be expected to include in project plans we do not believe this is possible within the current T-3 and T-4 timelines. These auctions only leave either 2½ years (T-3) or 3½ years (T-4) to obtain planning consent (and any other consents required) and then construct the facility which is the absolute minimum needed.

There is simply no possibility of accounting for contingency for permitting and planning challenges taken by third parties in this timeframe. For example, in the current market the fastest that a large OCGT plant could be constructed is approximately 2½ years which leaves almost no time for all consents to be granted assuming a T-3 award. Similarly, a CCGT takes approximately 3½ years to construct which, again, leaves almost no time for all consents to be granted assuming a T-4 award.

Recommendations Related to SEMC Minded-To Position

The recommendations below primarily relate to the proposed legal drafting as set out in Section 2.5.28 of the Consultation Paper. It should be noted that although we have several proposed changes, the following two changes are, in our view, vital to ensure that the modification functions effectively and ensure that new build projects are financeable. We recommend changes are made to the legal drafting to reflect the recommendations below. As such, we have proposed updated legal drafting in both clean and tracked mode, included in the appendices to this response.

1. Duration of the extension: The period required for the extension of Capacity Quantity End Date and Time needs to take account of not just the original Third-Party Extension Period but also the Judicial Review challenge period that follows any planning decision (8 weeks in Ireland / 3 months in Northern Ireland), the period of time that the participant has to apply for the extension (maximum of 20 days) and, finally, the time that the RA's require to determine their Decision. We have proposed legal drafting to reflect this in J.5.6.1 and also in the definition of the Third Party Extension Period.
2. Duration of the Contract: We are concerned that in the event that an Extension of Capacity Quantity End Date is granted that the RAs could terminate the Awarded Capacity for the First Capacity Year under J.6.1.6 of the Capacity Market Code thus resulting in a reduction of Capacity Payments which goes against the spirit of this modification. This would prevent the financing of the project and we would like the legal drafting to be updated such that the participant receives the full duration of Capacity Payments (e.g. ten years) commencing on Substantial Completion.

Our other comments are noted below.

3. For the process of applying for an extension under both J.5.5 and J.5.6 we believe that the drafting should allow for an Enforcing Party to act on behalf of the Participant. This would be a straightforward drafting change and would ensure that the proposed extension actions are consistent with other actions under Section J of the Code. We have recommended legal drafting to reflect this in J.5.5.1 and J.5.6.1.
4. To ensure clarity, we recommend that the legal drafting is clear that any extension will result in a maximum payment period of ten years, (i.e., capacity quantity end date extended to a point that is no greater than ten years after date of Substantial Completion). This will mitigate against any unintended outcomes whereby a delay may extend the lifetime of a contract

beyond ten years. We have included a sentence to this effect within our recommended legal drafting to be considered further by the RAs. It is possible that the Capacity Quantity Start Date would need to be updated also, however we believe that the sentence we have included (limiting the updated end-date to ten years after Substantial Completion) should deliver the same effect.

5. In Section J.5.5.2, the submission is subject to requirements under Section J.4.2.6. We believe that it may be more appropriate to refer to Section J.4.2.5.
6. Section J.5.5.2 refers to evidence which confirms the commencement of Third Party Review or Third Party Planning Appeal and clarity is welcomed on the threshold of evidence required. Any Planning Appeal or Judicial Review would be levied against a public authority responsible for the relevant decision rather than the Participant itself. As such, a copy of evidence initiating proceedings may not be available to the Participant. One workaround would be a requirement for a statutory declaration stating that the Participant is aware that these proceedings have been commenced. This has been reflected in our recommended drafting.
7. We recommend that Section J.5.5.3 is removed to avoid confusion noting that this uncertainty will prevent financeability of the project. Currently, the drafting of Section J.5.5.2 means that the System Operators (SOs) have no right to refuse an application for extension once the relevant support documentation is submitted. As such it is unclear what the SOs will be reviewing under this section.
8. Section J.5.5.4 includes a mechanism for the SOs to terminate New Capacity if certain conditions are met. As currently drafted, the mechanism states that the SOs “may” terminate New Capacity. This is a point of some uncertainty as it is unclear in what instances the SOs will decide to terminate. As such, we believe the drafting should provide an indication of the parameters for when the RAs would approve this termination (i.e. whether it would serve the interests of consumers in Ireland and Northern Ireland and how the resulting capacity gap would be filled). This has been reflected in our recommended drafting.
9. Termination condition J.5.5.4 (c) should only be applicable where there is no right of appeal by the losing authority. This could be facilitated by including the term “finally”. This has been reflected in our recommended drafting.
10. Clarity is required on when the 20 Working Day period under Section J.5.6.2 begins. Current drafting suggests that the 20 Working Day period begins at the point of determination of the Third Party Extension Period. Is this when such a determination is deemed to have happened? Or is it when the Participant has been made aware of such determination?
11. Section J.5.6.3 (a) states that applications for extension shall “contain the information required by the Regulatory Authorities”. This is ambiguous and some clarity is required on exactly what information the Regulatory Authorities (RAs) would look for alongside an application. This definition should be tightened up. Similarly, clarity is required on points (c) and (d).

12. Section J.5.6.3. (b) includes a requirement for the engineer to be approved by the RAs. Clarity is required on circumstances in which the engineer is rejected by the SEMC. If the Participant has only 20 days to make an application and the engineer in question is rejected, will the period for submission be restarted or otherwise paused?
13. Section J.5.6.8 provides the SEMC with significant discretion as to whether or not to approve the extension request. While any decision will need to be consistent with the usual public law obligations, there is still a degree of uncertainty on whether or not requests for extensions will be approved. Further, there are no timelines provided for the SEMC's assessment of an application request, with the potential for further information requests proposed under Section J.5.6.7. This means that the process for approving an extension could be quite open-ended.

We recommend some tightening around this process to provide additional certainty to Participants. If the RAs envision consultation, or updated Implementation Plans to be required at this point, it should be clarified within the drafting.

14. Finally, we believe that some drafting changes are required on the definition of Third Party Extension Period and have proposed some changes.

Appendix A: Recommended Legal Drafting – Clean

J.5.5 Extension of Long Stop Date by Third Party Planning Appeal or Judicial Review

J.5.5.1 Subject to the requirements of paragraph J.5.5.2, a Participant (or Enforcing Party acting on behalf of a Participant) may apply to the System Operators to extend the date of Substantial Financial Completion and Long Stop Date associated with a Capacity Market Unit by a period equal to the Third Party Extension Period where the Capacity Market Unit is subject to a Third Party Judicial Review or Third Party Planning Appeal.

J.5.5.2 The date of Substantial Financial Completion and Long Stop Date shall be extended under paragraph J.5.5.1 subject to the requirements of paragraph J.4.2.5 and the Participant submitting the following proofs to the System Operators: (a) Statutory declaration signed on behalf of the Participant by a Participant Director confirming that a challenge (either Judicial Review or Planning Appeal) has commenced, and (b) Statutory declaration signed on behalf of the Participant by a Participant Director confirming that the Participant, and its agents and/or its employees had no involvement in instigating the Third Party Judicial Review or Third Party Planning Appeal.

J.5.5.3 The System Operators may, subject to J.5.5.4, terminate the New Capacity for which an extension was granted under J.5.5.1 if:

(a) Substantial Financial Completion has not been achieved after more than twelve months has passed since the end of the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated;

(b) an Implementation Progress Report indicates that Substantial Financial Completion will not be achieved after more than twelve months has passed since the end of the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated; or

(c) the Third Party Judicial Review or Third Party Planning appeal has been decided, finally, in favour of the third party appellant.

J.5.5.4 The System Operators shall consult with the Regulatory Authorities prior to taking any action under paragraph J.5.5.3 and shall only take any such action if it is in the interest of the consumer to do so and which includes an assessment of how any resulting capacity shortfall would be filled.

J.5.6 Extension of Capacity Quantity End Date and Time

J.5.6.1 Where the System Operators have granted an extension under paragraph J.5.5.1, a Participant (or Enforcing Party acting on behalf of a Participant) may seek the approval of the Regulatory Authorities for an extension to the Capacity Quantity End Date and Time associated with a Capacity Market Unit by a period no greater than the Third Party Extension Period plus (i) the time required by the participant to make the application up to the maximum of twenty Working Days and (ii) the time required for the RAs to determine the extension.

For the avoidance of doubt, any extension to the Capacity Quantity End Date and Time should

result in the new Capacity Quantity End Date and Time falling no greater than ten years after the date of Substantial Completion for the relevant Capacity Market Unit.

J.5.6.2 A Participant seeking approval of the Regulatory Authorities under paragraph J.5.6.1 shall submit an application (called a “Third Party Exception Application”) to the Regulatory Authorities within 20 Working Days of the of the determination of the Third Party Extension Period.

J.5.6.3 A Third Party Exception Application shall:

- (a) contain the information required by the Regulatory Authorities [*no specific drafting changes here, but examples of such information requested*].
- (b) contain a certificate addressed to the Regulatory Authorities from an independent Certified Engineer, with experience and expertise in the construction and operation of the relevant type of equipment or technology, approved by the Regulatory Authorities (such approval not to be unreasonably delayed or withheld) certifying that, having made all due and careful enquiry and to the best of their knowledge, the extension being claimed under this section J.5.6 can be directly attributed to the Third Party Judicial Review or Third Party Planning Appeal that led to an extension being granted under J.5.5.1 [*no specific drafting changes here but information re. potential rejection of engineers by the RAs requested*].
- (c) be in the form prescribed by the Regulatory Authorities [*no specific drafting changes here but information requested on the form prescribed by the RAs*].
- (d) be made in the manner prescribed by the Regulatory Authorities [*no specific drafting changes here but information requested on the manner prescribed by the RAs*].

J.5.6.4 For the purposes of paragraph J.5.6.3(b), a person is regarded as independent if:

- (a) the person is not an Affiliate of the relevant Participant;
- (b) the person is not a current employee of the relevant Participant or an Affiliate of the relevant Participant;
- (c) the person has not been an employee of the relevant Participant or an Affiliate of the relevant Participant with the previous two years; and
- (d) the person is not engaged on terms, nor party to any other arrangements, which could allow the Participant or any Affiliate of the Participant to exercise undue influence on any report, assessment, certificate or commentary prepared by that person or otherwise compromise the objectivity of such report, assessment, certificate or commentary.

J.5.6.5 A certificate under this section J.5.6 shall be in the form published from time to time by the Regulatory Authorities.

J.5.6.6 In a certificate given under paragraph J.5.6.3(b), the Certified Engineer giving the certificate shall confirm that they are independent within the meaning of paragraph J.5.6.4 and shall certify each of the matters referred to in paragraph J.5.6.4.

J.5.6.7 The Regulatory Authorities may request that a Participant provide additional information or evidence in relation to a Third Party Extension Application.

J.5.6.8 If a Participant makes a Third Party Exception Application, then the Regulatory Authorities shall notify the Participant and the System Operators whether or not they approve the Third Party Exception Application and, if they do approve it the updated value of the Capacity Quantity End Date and Time that will apply. *[Additional clarity requested on the process for RA approval].*

J.5.6.9 The System Operators shall update the Capacity Quantity End Date and Time in Capacity and Trade Register as set out in Appendix F to reflect any changes approved by the Regulatory Authorities.

[No drafting changes are envisioned to Section J.6.1]

We propose the following definition for Third Party Extension Period:

Third Party Extension Period means, in respect of the Substantial Financial Completion and Long Stop Date extension under Paragraph J.5.5.1, the period of time covering the date that relevant planning and permissions would have been granted and valid, in the absence of a third-party challenge. This will be equal to either the date on which there has:

- i. Been served a notice of motion in respect of the Third Party Judicial Review to the date on which the Third Party Judicial Review is concluded, either by order, direction, or decision of the court (not appealed by the third party to the Third Party Judicial Review), or otherwise; or;
- ii. Been served a notice of motion in respect of the Third Party Planning Appeal to the date of being notified of the determination of An Bord Pleanála in respect of the Third Party Planning Appeal.

Plus, a 3 month period in Northern Ireland, being the time period for parties to initiate a challenge by way of judicial review and an 8 week period in Ireland, being the time period for parties to initiate a challenge by way of judicial review.

Appendix B: Recommended Legal Drafting – Tracked

J.5.5 Extension of Long Stop Date by Third Party Planning Appeal or Judicial Review

J.5.5.1 Subject to the requirements of paragraph J.5.5.2, a Participant **(or Enforcing Party acting on behalf of a Participant)** may apply to the System Operators to extend the date of Substantial Financial Completion and Long Stop Date associated with a Capacity Market Unit by a period equal to the Third Party Extension Period where the Capacity Market Unit is subject to a Third Party Judicial Review or Third Party Planning Appeal.

J.5.5.2 The date of Substantial Financial Completion and Long Stop Date shall be extended under paragraph J.5.5.1 subject to the requirements of paragraph ~~J.4.2.6~~ **J.4.2.5** and the Participant submitting the following proofs to the System Operators: ~~(a) Documentary evidence confirming the commencement of the Third Party Judicial Review or Third Party Planning Appeal, and~~ **(a) Statutory declaration signed on behalf of the Participant by a Participant Director confirming that a challenge (either Judicial Review or Planning Appeal) has commenced, and** ~~(b) Statutory declaration signed on behalf of the Participant by a Participant Director confirming that the Participant, and its agents and/or its employees had no involvement in instigating the Third Party Judicial Review or Third Party Planning Appeal.~~

~~J.5.5.3 Where the System Operators have granted an extension under paragraph J.5.5.1, they shall review this decision no less often than on receipt of each Implementation Progress Report required in respect of the affected New Capacity under paragraph J.4.2.1.~~

J.5.5.4.3 The System Operators may, subject to J.5.5.5.4, terminate the New Capacity for which an extension was granted under J.5.5.1 if:

- (a) Substantial Financial Completion has not been achieved after more than twelve months has passed since the end of the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated;
- (b) an Implementation Progress Report indicates that Substantial Financial Completion will not be achieved after more than twelve months has passed since the end of the Substantial Financial Completion Period of the Capacity Auction Results Date in the Capacity Auction Timetable for the Capacity Auction in which the capacity was allocated; or
- (c) the Third Party Judicial Review or Third Party Planning appeal has been decided, **finally**, in favour of the third party appellant.

~~J.5.5.4~~ The System Operators shall consult with the Regulatory Authorities prior to taking any action under paragraph J.5.5.4.3 **and shall only take any such action if it is in the interest of the consumer to do so and which includes an assessment of how any resulting capacity shortfall would be filled.**

J.5.6 Extension of Capacity Quantity End Date and Time

J.5.6.1 Where the System Operators have granted an extension under paragraph J.5.5.1, a Participant may seek the approval of the Regulatory Authorities for an extension to the Capacity Quantity End Date and Time associated with a Capacity Market Unit by a period no greater than the Third Party Extension Period **plus, (i) the time required by the participant to make the application up to the maximum of twenty Working Days and (ii) the time required**

for the RAs to determine the extension.

For the avoidance of doubt, any extension to the Capacity Quantity End Date and Time should result in the new Capacity Quantity End Date and Time falling no greater than ten years after the date of Substantial Completion for the relevant Capacity Market Unit.

J.5.6.2 A Participant seeking approval of the Regulatory Authorities under paragraph J.5.6.1 shall submit an application (called a “Third Party Exception Application”) to the Regulatory Authorities within 20 Working Days of the of the determination of the Third Party Extension Period.

J.5.6.3 A Third Party Exception Application shall:

- (a) contain the information required by the Regulatory Authorities *[no specific drafting changes here, but examples of such information requested]*.
- (b) contain a certificate addressed to the Regulatory Authorities from an independent Certified Engineer, with experience and expertise in the construction and operation of the relevant type of equipment or technology, approved by the Regulatory Authorities (such approval not to be unreasonably delayed or withheld) certifying that, having made all due and careful enquiry and to the best of their knowledge, the extension being claimed under this section J.5.6 can be directly attributed to the Third Party Judicial Review or Third Party Planning Appeal that led to an extension being granted under J.5.5.1 *[no specific drafting changes here but information re. potential rejection of engineers by the RAs requested]*.
- (c) be in the form prescribed by the Regulatory Authorities *[no specific drafting changes here but information requested on the form prescribed by the RAs]*.
- (d) be made in the manner prescribed by the Regulatory Authorities *[no specific drafting changes here but information requested on the manner prescribed by the RAs]*.

J.5.6.4 For the purposes of paragraph J.5.6.3(b), a person is regarded as independent if:

- (a) the person is not an Affiliate of the relevant Participant;
- (b) the person is not a current employee of the relevant Participant or an Affiliate of the relevant Participant;
- (c) the person has not been an employee of the relevant Participant or an Affiliate of the relevant Participant with the previous two years; and
- (d) the person is not engaged on terms, nor party to any other arrangements, which could allow the Participant or any Affiliate of the Participant to exercise undue influence on any report, assessment, certificate or commentary prepared by that person or otherwise compromise the objectivity of such report, assessment, certificate or commentary.

J.5.6.5 A certificate under this section J.5.6 shall be in the form published from time to time by the Regulatory Authorities.

J.5.6.6 In a certificate given under paragraph J.5.6.3(b), the Certified Engineer giving the certificate shall confirm that they are independent within the meaning of paragraph J.5.6.4 and shall certify each of the matters referred to in paragraph J.5.6.4.

J.5.6.7 The Regulatory Authorities may request that a Participant provide additional information or evidence in relation to a Third Party Extension Application.

J.5.6.8 If a Participant makes a Third Party Exception Application, then the Regulatory Authorities shall notify the Participant and the System Operators whether or not they approve the Third Party Exception Application and, if they do approve it the updated value of the Capacity Quantity End Date and Time that will apply. *[Additional clarity requested on the process for RA approval].*

J.5.6.9 The System Operators shall update the Capacity Quantity End Date and Time in Capacity and Trade Register as set out in Appendix F to reflect any changes approved by the Regulatory Authorities.

[No drafting changes are envisioned to Section J.6.1]

We propose the following definition for Third Party Extension Period:

Third Party Extension Period means, in respect of the Substantial Financial Completion and Long Stop Date extension under Paragraph J.5.5.1, the period ~~from the date on which the relevant Participant has either~~ *of time covering the date that relevant planning permissions would have been granted and valid in the absence of a third-party challenge. This will be equal to either the date on which there has:*

- i. Been served a notice of motion in respect of the Third Party Judicial Review to the date on which the Third Party Judicial Review is concluded, either by order, direction, or decision of the court (not appealed by the third party to the Third Party Judicial Review), or otherwise; or;
- ii. *Been served a notice of motion in respect of the Third Party Planning Appeal to the date of* being notified of the determination of An Bord Pleanála in respect of the Third Party Planning Appeal.

Plus, a 3 month period in Northern Ireland, being the time period for parties to initiate a challenge by way of judicial review and an 8 week period in Ireland, being the time period for parties to initiate a challenge by way of judicial review.