



Law Society  
of Scotland

# UK Government Consultation Response

Capacity Market: proposal to relax the rules  
temporarily in response to COVID-19

30 April 2020



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Energy Law subcommittee welcomes the opportunity to consider and to respond to the UK Government consultation: Capacity Market: proposal to relax the rules temporarily in response to COVID-19 (the consultation). The sub-committee has the following comments to put forward for consideration.

## Background

The consultation is seeking views on the proposals to introduce temporary rules to modify the application of the Electricity Capacity Regulations 2014 (the Regulations) and Capacity Market (CM) rules during the COVID-19 pandemic emergency.

The consultation is about the intent to change the Regulations and CM rules so that much will depend on more detail of actual changes that have not been set out fully within the consultation. Changes to the Regulations would require legislation, presumably made as a matter of urgency and by using the COVID-19 emergency powers, though the consultation does not detail any actual timescales for putting this through the UK Parliament. We are aware that other changes to the CM rules would fall under the auspices of Ofgem. We assume that the UK Government will make the relevant CM rules' changes following this consultation.

Furthermore, we query if the intention is for such changes to be retrospective, given one of the changes regarding Satisfactory Performance Days will be required by the date of the consultation response, namely 30 April?

We note that capacity providers are being encouraged if experiencing delays or difficulties in meeting their CM obligations due to the COVID-19 pandemic or related restrictions that this should be communicated by way of updates to the Delivery Body. There are, we assume, both regular updates emanating from UK Government to the capacity providers as well as a plan to highlight the necessary modifications that will have been made to the Regulations and CM rules in due course. We would welcome further details of plans as to timescales and planned communications with the relevant industry.

Under the Regulations, CM participants receive monthly payments for their agreed obligation which in return, they are expected to be available to respond with their agreed generation volumes or load reductions when called on by National Grid at times of system stress. The existing deadlines and obligations set out in the Regulations would be relaxed, providing them with extra time to lodge appeals for failures to comply.

The COVID-19 pandemic emergency is driving the need for these proposed changes where, on balance, the proposals for relaxation seem justified and appropriate.

However, there is a need for the UK Government, though the Department of Business, Energy & Industrial Strategy, not to lose sight of any unexpected consequences of implementing these changes, by reducing the consultation time for those affected by the Regulations and CM rules to respond. There is a need to recognise that they may be struggling with staffing and resource capacity as a result of COVID-19.

Some proposals, as we outline below, seem appropriate; others more questionable though we understand the policy basis on which only one package of changes should be brought forward, for ease of legislation and communication, as outlined above. We consider that twelve months may be a lengthy period in which to relax certain requirements but given the uncertainty over the length of COVID-19 lock down and recovery phase, this too may be a reasonable and justified period for extension.

There is a need to be aware of the possibility for judicial review where the changes that may be made are not proportionate.

## **The Consultation Proposals**

The CM is the UK Government's flagship scheme designed to balance the grid during peaks and troughs in power demand throughout the year (if a "system stress event" is called). Owing to the lockdown, as a result of embedded generation and a significant drop in industrial and commercial demand, concerns have arisen over generation and the impact this is having and will continue to have on the UK grid's ability to remain balanced.

Much of the consultation inevitably relates to technical aspects of the Regulations and the CM rules. We consider that the proposals regarding:

- The Satisfactory Performance Days (SPD) are reasonable given the impending deadline if changes are not made.
- The need for changes to the metering test would not appear so urgent though as for SPD, this seems appropriate in the circumstances.
- The Substantial Completion Milestone and Minimum Completion Requirement are delayed for twelve months which seem appropriate as though lengthy, capacity payments would not be made until the relevant milestones are met in any event.
- The Demand Side Response seems fine.

## Concerns

We have highlighted above issues above over the urgency and lack of time for consultation in respect of the proposed changes. We also raise the following points:

### European Competition Law

European competition law required the CM to have state aid clearance by the European Commission in order to be deemed lawful. We assume that the UK Government has obtained legal advice that the proposed changes are compliant given the recent investigation into state aid by the Commission regarding the CM scheme. The issues that arose in the Tempus<sup>1</sup> case though of a highly technical nature should be avoided.

### Independent Technical Experts' (ITE) Reports

**Six-monthly ITE:** Justification for the removal of the waiver of the requirement for the six-monthly progress ITE Reports falling due during the 2020/21 financial year to be produced is interesting. We understand the potential problems with requiring these ITE Reports in the short term during the COVID -19 pandemic emergency. Normally, in a 2-year period of progress monitoring, four reports would be required. Each ITE Report comments on progress in the previous 6-month window, e.g. progress towards construction milestones and provides notice of any material change to the construction plan.

Assuming social distancing rules remain in place for time, exactly how many ITE Reports will need to be waived will depend on the respective timing for each operator. It is important that the purpose of the ITE Reports is not missed as they are there to ascertain that construction milestones are not being met; there is still a need to know if these are not being met and this should not be lost sight of.

Guidance as to what "very difficult to obtain" in respect of ITEs should be provided as this could mean that a report could have been obtained even though it was somewhat difficult to produce. Could a non-exhaustive list of examples be provided to indicate to CM providers what would be accepted as circumstances where a waiver would be given on the basis that it was "very difficult to obtain"? Alternatively, there could be a requirement to take "reasonable steps" to produce the ITE Report which may be more acceptable to the industry.

We assume that it is not intended that the production of ITEs are not intended to fall under the scope of essential work under COVID-19.

<sup>1</sup> Case 793/14 Tempus Energy Ltd and Tempus Energy Technology v Commission

The basis for the ITE relaxation seems to relate to the need to reduce the administrative burden on capacity providers relative to certain milestones and requirements along with the requirement to implement the UK Government's COVID-19 advice on social distancing. We have interpreted this to mean that (1) the administrative burden will be lowered for those operators for whom the pandemic has impacted upon their ability to meet their obligations and (2) that the changes will be reversed once the issues caused by the pandemic are resolved.

Regarding the latter point, we would encourage the UK Government to explain how they intend to reverse the changes being made to the Regulations and CM rules post COVID-19. How will this assessment be undertaken?

**Report on Operational Status for Distribution Connected sites and Refurbishing CMUs:** The consultation refers to the ITE report that is required to confirm "operational" in terms of paragraphs (b), (c) and (d) of the CM Rule 1.2.1. The suggestion is for this to be issued through a desk-based exercise by obtaining written evidence from the Distribution Network Operator confirming the relevant tests have been completed. Exactly what written evidence would suffice is unclear though the consultation suggests that this could be achieved through provision of photographs and other relevant evidence. We cannot comment on exactly what would be required by way of evidence, but this could mean that there would be a risk in accepting a standard lower than an ITE report when seeking to confirm that the CMU is fully commissioned.

An ITE Report confirms "operational" as being where there was a system stress event, the CMU would be capable of responding to a signal to provide its capacity. For example, for one type of CMU "operational" includes an ITE issuing a certificate confirming that the CMU and supporting infrastructure have been fully commissioned. It seems preferable to have a director sign a declaration as that requires the director to put their name to the confirmation and gives scope for potential action to be taken in the event of non-performance where the CMU was not actually operational after all. That threat of action against the director in the event of non-performance would provide an incentive for confirmation that a CMU was operational. That would act as a better guarantee that the CMU is confirmed as operational when it is are operational – as a level of liability would attach to the director who signed the declaration.

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