Decision on modifications to Generation Licences and Electricity Supply Licences

<table>
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<th>Decision Paper</th>
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<tr>
<td>Reference:</td>
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Executive Summary

The Integrated Single Electricity Market (I-SEM) is due to go-live on 23 May 2018 and aims to maximise the efficient use of interconnection and facilitate greater cross-border electricity trade through day-ahead and intra-day market coupling. The I-SEM project spans the wholesale electricity markets in Ireland and Northern Ireland. The Commission for Energy Regulation (CER) in Ireland and the Utility Regulator (UR) in Northern Ireland, also referred to as the Regulatory Authorities (RAs), have been working alongside EirGrid Plc and SONI Ltd to develop the I-SEM, under the governance of the SEM Committee (SEMC).

In order to give effect to the I-SEM, as contained in decisions of the SEM Committee, a number of modifications are necessary to various categories of licences, including Generation Licences, Supply Licences, Market Operator (MO) Licences, Transmission System Operator (TSO) Licences and Interconnector Licences. Such modifications consist of changes to existing licence conditions as well as the introduction of new licence conditions.

On 2 June 2017, pursuant to sections 19 and 20 of the Electricity Regulation Act, 1999 the Commission for Energy Regulation (CER) issued a statutory notice¹ and an Information Paper (CER/17/111) proposing a number of licence modifications to the following categories of licences²:

- Electricity Supply Licences, granted by the CER pursuant to Section 14 (1) (b) of the Electricity Regulation Act, 1999 (the Act)
- Public Electricity Supply (PES) Licence granted to ESB Electric Ireland pursuant to Section 14 (1) (h) of the Act
- Generation Licences granted to Generators with an installed capacity exceeding 10MW, pursuant to Section 14 (1) (a) of the Act
- Generation Licence granted to ESB pursuant to Section 14 (1) (a) of the Act

¹ In accordance with Section 20 of the ERA, 1999, the Statutory Notice was published in the Irish Times and Belfast Gazette.

² A similar process for licence modifications was conducted by the Utility Regulator in Northern Ireland.
• Terms and Conditions for Generators with an installed capacity of less than 10MW and over 1MW, licensed by Order pursuant to S.I. 384 of 2008. For ease of reference, this class of generators will be referred to throughout this paper as “Generators under 10MW”

The proposed changes included modifications to existing licence conditions as well as the introduction of new licence conditions. A summary of the proposed modifications to the aforementioned categories of licences is enclosed in Annexes 7.1 and 7.2 of this paper. The track-changed version of the proposed modifications, together with supporting reasoning, can be found in Information Paper CER/17/111.

The window for objections or representations closed on 4 July 2017. The CER received 9 submissions in relation to the proposed licence changes. A list of respondents is included in Section 1.4. For transparency purposes, a summary of respondents' objections and representations is included under relevant headings in this Decision Paper.

Having considered the responses received, the CER engaged with respondents with a view to gaining a deeper understanding of their objections and representations and provide respondents with a further opportunity to discuss their concerns regarding the proposed licence modifications. In response to representations made, we have made changes to some of the licence modifications set out in CER/17/111. These are detailed in the relevant sections of this paper. The purpose of the changes is to address some of the concerns raised by respondents and amend typographical errors. The CER is of the view that the final licence modifications do not amount to substantive changes from the content and intent of the proposed modifications outlined in the statutory notice published on 2 June.

The purpose of this paper is to outline CER’s decisions and supporting reasoning in respect of the modifications to the aforementioned categories of licences. The final licence modifications are reflected in the track-changed versions of the Electricity Supply Licences (including the PES Licence) and the Generation Licences (including the ESB Generation 3 The PES licence also includes track-changes originated in previous modifications. These track-changes are marked in bright red. The modifications detailed in this paper are marked in dark red.
Licence) published alongside this paper⁴. The track-changed versions of these licences indicate changes as compared to existing licences. The licence modifications set out in these licences apply to all Generation Licences and Electricity Supply Licences granted under sections 14(1) (a) and 14(1)(b) of the Act, respectively.

The decisions made in respect of proposed modifications to the Generation Licences also apply to the relevant Terms and Conditions for Generators under 10MW.

In considering the representations and objections received, the CER has also considered whether sufficient grounds exist to hold a public hearing under section 20(7) (b) of the Act. We do not think such grounds exist, as all the submissions received, (including the feedback provided by respondents during bilateral meetings), were sufficiently clear as to the representations or objections that respondents wished to raise. Pursuant to section 20(8) of the Act, the CER has notified the relevant respondents of the reasons for the rejection of the representations and objections (which have not been accepted) and the reasons for not holding a public hearing.

The modifications to the Generation Licences and Electricity Supply Licences as contained in this Decision Paper will each take effect in accordance with their terms and in any case no earlier than 16 October 2017.

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⁴ Readers are asked to note that sections containing transition conditions and conditions to apply from SEM Go Active to SEM Go Live have been removed from Electricity Supply Licences (including the PES Licence) and Generation Licences (including the ESB Generation Licence). These sections are no longer valid as they have been outdated by the passage of time (i.e. the transition to SEM). As such, these sections are now redundant. These sections are:
- Section A Transition Conditions (Electricity Supply Licence),
- Section A Transition Conditions and Section B Conditions to Apply from SEM Go Active to SEM Go Live (PES Licence),
- Section A Transition Conditions and Section B Conditions to Apply from SEM Go Active to SEM Go Live (Generation Licence), and;
- Section A Transition Conditions and Section B Conditions to Apply from SEM Go Active to SEM Go Live (ESB Generation Licence)
In accordance with section 22(3) of the Act, the CER will serve notice of the modifications of the licences on all affected licence holders. This will include details of their statutory rights of appeal (to request the Minster to establish an Appeals Panel within 28 days of the decision to modify their licence). The notice of such modifications will also be published in the Irish Times and the Belfast Gazette. To give effect to these decisions for Generators under 10MW, a new statutory instrument will be published. It is expected that the new statutory instrument for Generators under 10MW will be published in Q1 2018.

Finally, the CER in Ireland and the UR in Northern Ireland have shared the responses received with respect to the statutory consultations in both jurisdictions, on this tranche of proposed licence changes to implement I-SEM. The regulatory reasoning behind the decisions set out in this paper takes into account the content of all responses received by the CER and the UR, as well as the feedback from bilateral meetings.
Impact Statement

The Single Electricity Market (SEM) is the wholesale electricity market for the island of Ireland. It is jointly regulated by the Commission for Energy Regulation (Republic of Ireland) and the Utility Regulator (Northern Ireland). The decision-making body which governs the market is the SEM Committee (SEMC).

The SEM is undergoing significant change. EU legislation is driving the coming together of energy markets across Europe with the aim of creating a single and fully liberalized EU-wide wholesale electricity market. The implementation of these common EU guidelines will allow electricity and gas to be traded freely across the EU.

The SEM Committee is proceeding with a process to arrive at an EU compliant solution for SEM. This solution is known as I-SEM. The aim is to ensure that Ireland can obtain the benefits of EU electricity integration in a compliant manner and maintain as far as possible the positive aspects of SEM. ISEM will deliver increased levels of competition which should help put a downward pressure on prices as well as encouraging greater levels of security of supply and transparency.

In order to give effect to the I-SEM, as provided for in Decisions of the SEM Committee, the CER issues a decision on proposed changes to Generation Licences and Electricity Supply Licences.

This document is most likely to be of interest to holders of Generation Licences (including Generators with an installed capacity of under 10MW) and Electricity Supply Licences, in addition to market participants.
SUMMARY OF PROPOSED MODIFICATIONS TO THE ELECTRICITY SUPPLY LICENCES AND THE PES LICENCE

ANNEX 7.2

SUMMARY OF PROPOSED MODIFICATIONS TO THE GENERATION LICENCES AND THE ESB GENERATION LICENCES
## Glossary of Terms and Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>BM</td>
<td>Balancing Market</td>
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<td>BMPCOP</td>
<td>Balancing Market Principles Code of Practice</td>
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<td>CER</td>
<td>Commission for Energy Regulation (Ireland)</td>
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<td>CM</td>
<td>Capacity Market</td>
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<tr>
<td>CMC</td>
<td>Capacity Market Code</td>
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<tr>
<td>CRM</td>
<td>Capacity Remuneration Mechanism</td>
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<td>DSO</td>
<td>Distribution System Operator</td>
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<tr>
<td>EAI</td>
<td>Electricity Association of Ireland</td>
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<tr>
<td>ESB</td>
<td>Electricity Supply Board</td>
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<tr>
<td>ETA</td>
<td>Electricity Trading Arrangements</td>
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<td>EU</td>
<td>European Union</td>
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<td>HLD</td>
<td>High Level Design</td>
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<tr>
<td>I-SEM</td>
<td>Integrated Single Electricity Market</td>
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<td>IWEA</td>
<td>Irish Wind Energy Association</td>
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<td>IWFA</td>
<td>Irish Wind Farmers’ Association</td>
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<td>MO</td>
<td>Market Operator</td>
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<td>MW</td>
<td>Mega Watt</td>
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<td>NEMO</td>
<td>Nominated Electricity Market Operator</td>
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<tr>
<td>PES</td>
<td>Public Electricity Supplier</td>
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<tr>
<td>RA</td>
<td>Regulatory Authority</td>
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<tr>
<td>SEM</td>
<td>Single Electricity Market</td>
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<td>SEMC</td>
<td>Single Electricity Market Committee</td>
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<tr>
<td>TSC</td>
<td>Trading and Settlement Code</td>
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<tr>
<td>TSO</td>
<td>Transmission System Operator</td>
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<tr>
<td>UR</td>
<td>Utility Regulator (Northern Ireland)</td>
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1. Introduction

1.1 Background to proposed modifications

The Integrated Single Electricity Market (I-SEM) is due to go-live on 23 May 2018 and aims to maximise the efficient use of interconnection and facilitate greater cross-border electricity trade through day-ahead and intra-day market coupling. The Commission for Energy Regulation (CER) in Ireland and the Utility Regulator (UR) in Northern Ireland, also referred to as the Regulatory Authorities (RAs), have been working alongside EirGrid Plc and SONI Ltd to develop the I-SEM, under the governance of the SEM Committee (SEMC). The SEM Committee has published policy papers on key issues related to the implementation of I-SEM, including:

- I-SEM Roles and Responsibilities
- Energy Trading Arrangements
- Capacity Remuneration Mechanism
- Market Power
- Financial Transmission Rights

SEM Committee papers relevant to these areas, together with other I-SEM related papers, can be found on the SEM Committee website https://www.semcommittee.com/. Information on the CER's role and relevant legislation can be found on the CER’s website at www.cer.ie.

The implementation of SEM Committee policy decisions is effected via modifications to various licences (including Supply and Generation licences), new or amended market rules (including the Trading and Settlement Code, the NEMO Exchange Rules and the Capacity Market Code) and other means overseen by the RAs and reflected in new compliance requirements.

In order to implement the required licence modifications, a dedicated licensing team was established within the RAs in 2015. The licensing team commenced the licence modifications process in 2016 and, to date, two sets of licence modifications for TSO and MO licences have been completed. A third tranche of proposed modifications to Generation and Supply licences was conducted in June 2017. The CER and UR conducted the statutory process of licence modifications in accordance with legislation specific to their jurisdiction.
1.2. Purpose of the paper

This paper outlines the CER’s decisions on the modifications to Generation Licences (including the ESB Generation Licence) and Electricity Supply Licences (including the PES licence) required for the implementation of I-SEM. The final modifications are reflected in the track-changes version of licences published alongside this Decision Paper. This paper also sets out the CER’s decisions in respect of modifications to the Terms and Conditions for Generators under 10MW.

1.3. Structure of the paper

The structure of this paper includes the following sections:

- Section 1 provides background to the proposed modifications to the Electricity Supply Licences and Generation Licences and an overview of responses received to the proposed licence modifications
- Section 2 sets out CER’s decisions on the proposed modifications to existing conditions in the Electricity Supply Licences and the PES Licence
- Section 3 sets out CER’s decisions on the proposed modifications to existing conditions in the Generation Licences and the ESB Generation Licence
- Section 4 sets out CER’s decisions on the proposal to introduce new conditions (i.e. the Capacity Market Code condition and the BMPCOP condition) in the Electricity Supply Licences and the Generation Licences. This section also includes decisions in respect of including those conditions in the PES licence and the ESB Generation Licence.
- Section 5 outlines CER’s decisions on proposed modifications to the Terms and Conditions for Generators with an installed capacity of under 10MW
- Section 6 provides information about next steps
1.4. Overview of responses to the proposed licence modifications

The CER received 9 submissions to the notice of proposed licence modifications. A list of respondents is set out below.5

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Number of submissions</th>
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<tbody>
<tr>
<td>Bord Gais Energy</td>
<td>1</td>
</tr>
<tr>
<td>Bord na Mona Plc</td>
<td>1</td>
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<tr>
<td>Collin Wind Power Ltd</td>
<td>1 on behalf of all licence holders</td>
</tr>
<tr>
<td>Dunmore Wind Power Ltd</td>
<td></td>
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<tr>
<td>Killybegs Wind Power Ltd</td>
<td></td>
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<tr>
<td>Huntstown Power Company Limited (Huntstown 1)</td>
<td>1 on behalf of all licence holders</td>
</tr>
<tr>
<td>Viridian power Limited (Huntstown 2)</td>
<td></td>
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<tr>
<td>Hollyford Windfarm Limited (Hollyford)</td>
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<tr>
<td>Windgeneration Ireland Limited (Meenadreen)</td>
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<tr>
<td>Viridian Energy Limited (Energia)</td>
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<tr>
<td>ESB GWM</td>
<td>1</td>
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<tr>
<td>Crokahenny Windfarm DAC</td>
<td>1</td>
</tr>
<tr>
<td>Mountainlodge Power DAC</td>
<td>1</td>
</tr>
<tr>
<td>Raheenleagh Power DAC</td>
<td>1</td>
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<tr>
<td>SSE Airtricity</td>
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The CER would like to thank all respondents for their comments and feedback. We have taken into account, and considered the representations made by each of these parties in forming our decisions on each of the proposed licence modifications. The UR and CER

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5 Responses submitted by ESB, Bord Gais Energy and Bord na Mona are published on the CER’s website. We did not, as of the date of publication, receive confirmation from the remaining respondents as to permission to publish their submissions. Where permission is received, the CER will publish the relevant response(s).
have collaboratively considered all responses to each respective consultation carefully in the interests of policy-fit, consistency and alignment across the two jurisdictions.

There were no objections in respect of some proposals (i.e. proposal to remove the definition of the Trading and Settlement Code and to amend the definition of Intermediaries to include reference to the Capacity Market Code).

Generally, the respondents’ comments focused on the proposed introduction of the Balancing Market Principles Code of Practice and the Capacity Market Code conditions in all licence categories, as well as on the modification of the existing cost-reflective bidding condition.

Some respondents disagreed with the proposed modifications to the cost-reflective bidding condition and the proposed introduction of the BMPCOP and the Capacity Market Code conditions as currently drafted. In general, these respondents raised a variety of legal and policy issues, mainly in relation to insufficient detail in the licence conditions, unlawful exercise of powers by the CER and recovery of eligible costs. In addition, some respondents provided suggestions in relation to the drafting of the new licence conditions (i.e. the Capacity Market Code and the BMPCOP conditions).

Other comments to the proposed licence modifications include:

- Requests for clarity on some issues such as the timing of the Director’s Certificate to be provided under the BMPCOP condition.
- Requests for confirmation that further necessary amendments to licence conditions will be consulted upon
- Queries in respect of the continued need for a PES licence in the deregulated electricity markets
- Criticism of the decision not to increase the timelines for consultation beyond the statutory minimum
- Criticism of the CER’s general approach to justification of licence modifications by referring to previous SEMC decisions
- Criticism of the CER’s and SEMC’s consultation and decision making approach
Subsequent to the publication of the statutory notice, the CER engaged with respondents (in bilateral meetings) with a view to gaining a deeper understanding of the concerns raised in their responses and provide respondents with an additional opportunity to express views as to how these concerns may be addressed. The CER notes that, during this engagement, the respondents did not raise any new issues in respect of the proposed licence modifications other than those set out in their responses. The CER considered additional representations made during those meetings (including proposed alternative drafting of the licence conditions).

For transparency, a summary of representations received has been included in this Decision Paper, under relevant headings. The main legal and policy issues, together with queries within the scope of the proposed modifications, are addressed in turn under the relevant sections of this Decision Paper.

1.5. Related documents

The SEM Committee has published policy papers on key issues related to the implementation of I-SEM, which can be found on the SEM Committee website https://www.semcommittee.com/.

Below are the most recent documents reflecting SEM Committee policy decisions. Further information regarding recent developments in the SEM and SEM Committee policies are contained on the following websites www.semcommittee.com, www.cer.ie, www.uregni.gov.uk.

- Decision on Modifications to the EirGrid Market Operator Licence and EirGrid Transmission System Operator Licence, necessitated to implement the Integrated Single Electricity Market (CER/16/171);
- Decision on Modifications to EirGrid Market Operator Licence and Transmission System Operator Licence, necessitated to implement the Integrated Single Electricity Market (CER/17/036);
- Consultation Paper Offers in the I-SEM Balancing Market (SEM-16-059)
- Decision on Complex Bid Offer Controls in the I-SEM Balancing Market (SEM-17-020);
• BMPS Terms of Reference Decision Paper (SEM-16-058);
• Consultation on I-SEM Balancing Market Principles Code of Practice (SEM-17-026);
• Decision on BMPCoP (SEM-17-049)
• Decision on I-SEM Trading and Settlement Code Amendments Decision Paper (SEM-17-024)
• Consultation Paper CRM CMC (SEM-17-004)
• Decision Paper CRM CMC (SEM-17-033)
• CER Information Paper on Proposed Modifications to Generation and Supply Licences (CER/17/111)

Information on the CER’s role and relevant legislation can be found on the CER’s website at www.cer.ie

2. Decisions on proposed modifications to existing conditions in Electricity Supply Licences and the PES Licence

This section sets out CER’s decisions on proposed modifications to existing conditions in the Electricity Supply Licences and the PES Licence. These proposed modifications and supporting rationale were detailed in Information Paper CER/17/111. The final modifications are outlined in the track-changes version of the Electricity Supply Licences and the PES Licence published alongside this Decision Paper.

The CER’s decisions in relation to the introduction of new licence conditions in the Electricity Supply Licences and the PES licence (i.e. the Capacity Market Code condition and the BMPCOP condition) are treated separately in section 4.

The final modifications are reflected in the track-changes version of the Electricity Supply Licence, published alongside this Decision Paper. The track-changed version of this licence indicates changes as compared to existing licences. The licence modifications set out in this licence will apply to all Electricity Supply Licences granted under sections 14(1) (b) of the Act.
2.1 Section B, Condition 1 Interpretation and Construction

(a) Summary of proposed modifications
It was proposed to remove the definition of the Trading and Settlement Code from Condition 1. It was considered that the definition was no longer required as the Trading and Settlement Code has been replaced by the Single Electricity Market Trading and Settlement Code. As such, the term is now redundant.

(b) Summary of responses
The CER did not receive objections to the proposed modifications. One respondent suggested that consideration should be given to including a new definition for the “Single Electricity Market Trading and Settlement Code” in the relevant licences, for clarity reasons.

(c) CER’s response
The Single Electricity Market Trading and Settlement Code is defined in the Electricity Supply Licence as “the code of that name developed pursuant to Section 9 of the Act, as from time to time revised, amended supplemented or replaced with the approval or at the instance of the Commission”. The CER notes that there is a difference between this definition and the definition for the same term contained in the MO and TSO Licences.

The definition in those licences is “Single Electricity Market Trading and Settlement Code means the Trading and Settlement Code provided for in Regulation 4 of the Single Market Regulations, as from time to time revised, amended, supplemented or replaced”. In addition, the MO and TSO Licences provide a definition for the Single Market Regulation: “means the Electricity Regulation Act 1999 (Single Electricity Market) Regulations 2007”. Regulation 4 of the Single Market Regulations refers to the code established by the Commission pursuant to section 9 BA (1) of the Act (i.e. the same section of the Act as referred to in the definition in the supply licence). As such, whilst the definitions are not in identical terms, the CER is satisfied that they are consistent with each other and should not give rise to confusions as to their meaning.
(d) CER’s decision
The CER’s decision is to remove the definition of the Trading and Settlement Code from the Electricity Supply Licence, as proposed. The CER has further decided not to amend the definition of the Single Electricity Market Trading and Settlement Code for the reason set out above.

2.2 Condition 13 Intermediaries

(a) Summary of proposed modifications
It was proposed that paragraph 1(a) of this condition and the definition of Intermediary would be amended to include reference to the Capacity Market Code as it would be possible for suppliers to act as Intermediaries under both the Single Electricity Market Trading and Settlement Code (TSC) and the Capacity Market Code. It was further proposed that a new paragraph would be introduced to provide for the CER to determine the date and, if required, the transitional arrangements, for the amendments to this condition to come into effect.

(b) Summary of responses
The CER received no objections to the proposed modifications. One respondent suggested editorial changes to amend typographical errors (i.e. line 4 of condition 13(2) should read “….as the Commission may by direction…”).

(c) CER’s response
The CER agrees with the drafting suggestions regarding line 4 of paragraph 2 in Condition 13 Intermediaries and has made the necessary amendments to remove the typographical error.

(d) CER’s decision
The CER’s decision is to amend paragraph 1(a) of this condition and the definition of Intermediary to include reference to the Capacity Market Code and to include a new paragraph to provide for the CER to determine the date and, if required, the transitional arrangements, for the amendments to this condition to come into effect.
2.3 Condition 19 Cost-Reflective Bidding in the Single Electricity Market

(a) Summary of proposed modifications
It was proposed to include a new provision stating that this condition would cease to have effect at a date (and subject to such transitional arrangements) as determined by the CER. The proposed modification is required to enable the Commission to ‘turn off’ the application of this condition which will cease to have effect at the same point in time as the new proposed condition, Condition 19a Balancing Market Principles Code of Practice is to come into effect.

(b) Summary of responses
Four respondents commented specifically on the proposed modifications to the cost-reflective bidding condition. The comments and objections received referred to the proposed modifications to both Electricity Supply Licences and Generation Licences. The summary below captures respondents’ views in respect of both licence categories.

These respondents disagreed with the proposal to remove the cost-reflective condition from the Generation and Supply Licences, and to replace with the new BMPCOP condition. The main supporting arguments included:

- Elements such as the bidding controls, the definition of the Short Run Marginal Cost and the principles of cost recovery should be contained within the licence. In this context, one respondent considered that the CER should amend the modifications proposed in respect of the cost-reflective bidding licence conditions to ensure that “the underlying components of the Short Run Marginal Cost would be identified, outlined and subject to the defined governance process for modification through a Generation or Supply Licence”.

The proposal to transfer the content related to cost-reflective bidding from the licence to a subsidiary industry document would undermine the statutory framework underpinning the process for licence modifications and frustrate the licence holders’ rights to appeal.

One respondent was of the view that the proposed “bidding condition in the licence must be amended to reflect that it should only apply to operators [ ] that are successful in the capacity auction” and that the proposed licence framework did not provide “sufficient clarity for the bidding by operators who have not been successful in the capacity market”.

Respondents made further comments and objections in respect of this proposal in their submissions related to the proposal to introduce a new licence condition (BMPCOP condition) in Electricity Supply Licences and Generation Licences. These comments are summarised and addressed separately in section 4.2.

(c) CER’s response

The CER’s reasoning for the replacement of the cost reflective bidding condition with the new BMPCOP condition is fully set out in section 4.3 below and covers each of the arguments raised above.

(d) CER’s decision

The CER’s decision is to amend the condition as proposed. This will enable the CER to switch off the condition at the same point in time as the BMPCOP is to take effect.

2.4 Decision on proposed modifications to existing conditions in the PES Licence

(a) Summary of proposed modifications

The modifications proposed for the Electricity Supply Licence were also proposed in respect of the PES licence. Given that the proposed modifications impact on the conditions which are common between the Electricity Supply Licences and the PES Licence, the same
supporting information in relation to the nature of and reasons for the modifications were put forward in respect of both types of licence.

(b) Summary of responses
Only one respondent submitted comments in respect of the proposed modifications to the PES Licence. In its submission, the respondent stated that the objections and representations made in relation to the proposed modifications regarding cost-reflective bidding and the Capacity Market Code conditions also apply to the PES Licence. In addition, the respondent queried the continued need for the PES Licence in the deregulated supply market.

(c) CER’s response
As stated previously, the proposed modifications impact on the conditions which are common between the Electricity Supply Licences and the PES Licence. The CER notes that the objections and representations made in relation to the proposed modifications regarding cost-reflective bidding, the Capacity Market Code and the BMPCOP conditions were also made in respect of the PES Licence. Therefore, the CER is of the view that the responses provided in this paper in relation to those proposed modifications to the Electricity Supply Licences are also applicable in respect of the PES licence. To avoid repetition, these responses are not reiterated under this section.

The rationale for the need for the PES licence in the deregulated market has been provided to the respondent in the course of the engagement that succeeded the review of responses.

(d) CER’s decision
The CER’s decision is that the modifications to the Electricity Supply Licences will also be implemented in respect of the PES licence. The final modifications are reflected in the track-changes version of the Public Electricity Supply Licence, published alongside this Decision Paper. The track-changed version indicates changes as compared to the existing PES licence.

The table below indicates the existing conditions from the PES Licence which will be modified as indicated in section 2.1, 2.2 and 2.3:
This section sets out CER’s decisions on proposed modifications to Generation Licences, including ESB Generation Licence. The proposed modifications and supporting rationale were detailed in Information Paper CER/17/111. The final modifications are outlined in the track-changes version of the Generation Licences and the ESB Generation Licence published alongside this Decision Paper.

The CER’s decisions in relation to the introduction of new conditions in the Generation Licences, including the ESB Generation Licence, (i.e. the Capacity Market Code condition and the BMPCOP condition) are treated separately in section 4.

The final modifications are reflected in the track-changes version of the Generation Licence, published alongside this Decision Paper. This track-changed version indicates changes as compared to existing licences. The licence modifications set out in this licence will apply to all Generation Licences granted under sections 14(1) (a) of the Act.

### 3.1 Section C, Condition 1 Interpretation and Construction

(a) **Summary of proposed modifications**

<table>
<thead>
<tr>
<th>Condition in the Electricity Supply Licences</th>
<th>Condition in the PES Licence</th>
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<tbody>
<tr>
<td>Section B Condition 1: Interpretation and Construction</td>
<td>Section C Condition 1: Interpretation and Construction</td>
</tr>
<tr>
<td>Condition 13: Intermediaries</td>
<td>Condition 19: Intermediaries</td>
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</table>
It was proposed to remove the definition of the “Trading and Settlement Code” from Condition 1. The definition is no longer required as this code has been replaced by the Single Electricity Market Trading and Settlement Code. As such, the term is now redundant.

(b) Summary of responses
The CER did not receive objections to the proposed modifications. One respondent suggested that consideration should be given to including a new definition for the “Single Electricity Market Trading and Settlement Code” in the relevant licences, for clarity reasons.

(c) CER’s response
This modification was also proposed in respect of the Electricity Supply Licence. The CER notes that the definition in the Generation Licences is the same as the definition in the TSO and MO licences. As regards the difference with the Supply Licences, the CER’s position as set out in section 2.1(c) above applies, that is that we are satisfied that the definitions are consistent.

(d) CER’s decision
The CER’s decision is to remove the definition of the Trading and Settlement Code from the Generation Licences, as proposed. The CER has further decided not to amend the definition of the Single Electricity Market Trading and Settlement Code.

3.2 Condition 14 Trading and Settlement Code

(a) Summary of proposed modifications
It was proposed to amend the title of the condition to “Single Electricity Market Trading and Settlement Code” and to remove paragraph 1 of the condition which requires the licence holder to be party to and comply with the Trading and Settlement Code (which is no longer in force). The proposed modifications to this condition reflect the fact that the Trading and Settlement Code has been replaced by the Single Electricity Market Trading and Settlement Code and as such, the condition no longer needs to refer to the (now defunct) Trading and Settlement Code.
(b) Summary of responses
The CER received no objections to the proposed modifications.

(c) CER’s response
The CER notes that respondents did not submit objections or representations in respect of the proposed modification.

(d) CER’s decision
The CER’s decision is to amend the title of the condition to “Single Electricity Market Trading and Settlement Code” and to remove paragraph 1 of the condition which requires the Licence holder to be party to and comply with the Trading and Settlement Code (which is no longer in force).

3.3 Condition 15 Cost-Reflective Bidding in the Single Electricity Market

(a) Summary of proposed modifications
As with the Electricity Supply Licences, it was proposed to include a new provision stating that this condition will cease to have effect at a date (and subject to such transitional arrangements) as determined by the CER. The proposed modification is required to enable the Commission to turn off the condition at the relevant point in time when the proposed new condition, Condition 15a Balancing Market Principles Code of Practice will come into effect.

(b) Summary of responses
A summary of responses in respect of this proposed licence modifications is included in section 2.3 (b) above.

(c) CER’s response
The CER’s response to objections and representations received is included in section 2.3 (c) above.

(d) CER’s decision
The CER’s decision is to amend the condition as proposed. This will enable the CER to switch off the condition at the same point in time as the BMPCOP condition is to take effect.

3.4 Decision on proposed modifications to the ESB Generation Licence

(a) Summary of proposed modifications
The modifications proposed for Generation Licences were also proposed in respect of the ESB Generation Licence. Given that the proposed modifications impact on the conditions which are common between the two licences, the same supporting information in relation to the nature of and reasons for the modifications were put forward in respect of both types of licence.

(b) Summary of responses
Responses received in respect of proposed modifications to the ESB Generation Licence are similar to those received in respect of the same modifications to all other Generation Licences. The summary of responses included in section 3 above are representative of responses received in relation to proposed modifications to the ESB Generation Licence.

(c) CER’s response
As stated previously, the proposed modifications impact on the conditions which are common between the Generation Licences and the ESB Generation Licence. The CER notes that respondents’ comments in respect of the proposed modifications to the Generation Licences and ESB Generation Licences were similar. Therefore, the CER is of the view that the responses provided in relation to proposed modifications to the Generation Licences are also applicable in respect of the ESB Generation Licence. To avoid repetition, our responses are not reiterated under this section.
(d) CER’s decision

The CER’s decision is that final modifications to the Generation Licences will also be implemented in respect of the ESB Generation Licence.

The final modifications are reflected in the track-changes version of the ESB Generation Licence published alongside this Decision Paper. This track-changed version indicates changes as compared to existing licence conditions. The licence modifications set out in this licence will apply to all ESB Generation Licences granted under sections 14(1) (a) of the Act.

The table below indicates the existing conditions from the PES Licence which will be modified as indicated in section 3.1, 3.2 and 3.3:

<table>
<thead>
<tr>
<th>Condition in the generic Generation Licence</th>
<th>Condition in the ESB Generation Licences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section C Condition 1</td>
<td>Section C Condition 1</td>
</tr>
<tr>
<td>Interpretation and construction</td>
<td>Interpretation and construction</td>
</tr>
<tr>
<td>Condition 14</td>
<td>Condition 16</td>
</tr>
<tr>
<td>Trading and Settlement Code</td>
<td>Trading and Settlement Code</td>
</tr>
<tr>
<td>Condition 15</td>
<td>Condition 17</td>
</tr>
<tr>
<td>Cost-Reflective Bidding in the Single Electricity Market</td>
<td>Cost-Reflective Bidding in the Single Electricity Market</td>
</tr>
</tbody>
</table>

4. Decision on the proposal to introduce *new licence conditions* in the Electricity Supply Licences and the Generation Licences

This section sets out CER’s decisions on the proposal to introduce new conditions in the Electricity Supply Licences and the Generation Licences, namely the Capacity Market Code condition and the BMPCOP condition. Respondents put forward similar arguments in respect of this proposal in relation to the Generation Licences and the Electricity Supply Licences; therefore, these are dealt with under the same section, to avoid repetition.
These proposed modifications and supporting rationale were detailed in Information Paper CER/17/111. The final modifications are outlined in the track-changes version of the licences published alongside this Decision Paper.

The CER’s decisions in relation to proposed modifications to existing conditions in the Electricity Supply Licences and the Generation Licences are treated separately in sections 2 and 3.

The final modifications are reflected in the track-changes version of the Electricity Supply Licence and the Generation Licence, published alongside this Decision Paper. These track-changed versions indicate changes as compared to existing licences. The licence modifications set out in this licence will apply to all Generation Licences and Electricity Supply Licences granted under sections 14(1) (a) and (b) of the Act, respectively.

4.1 Cost recovery / Market design

A number of concerns raised by respondents in relation to the two proposed new licence conditions relate fundamentally to the impact of the I-SEM market design (as reflected in those conditions) on the ability of existing generators to earn sufficient revenues to cover their costs. These concerns were expressed with respect to specific generation plant that may be selected both in the Capacity Remuneration Mechanism (CRM) to meet local capacity requirements and that are constrained-on in the Balancing Mechanism (BM), under non-energy actions, to meet system constraints to a very material degree, or only generates in response to a non-energy action.

This section addresses the RAs underlying rationale for these market design decisions in order to remind stakeholders of the context within which the two new licence modifications are being implemented.

The primary objective of the RAs in designing and implementing the new capacity and energy market arrangements is to act in the interests of customers wherever appropriate by promoting effective competition, and where effective competition is not possible, to implement regulatory oversight that mimics the outcome of a competitive market. In pursuing that objective the CER must, of course, have regard (amongst other things) to the
need to ensure that market participants are able to finance their activities and to the need to ensure security of supply.

The CER’s task as economic regulator is to assess the extent to which allowing the recovery of particular costs is consistent with our overall objective and our statutory duties. One consequence of that, as has been stated in a number of consultation and decision papers\(^6\), is that market revenues may not be high enough to enable existing generators to recover certain costs (such as sunk costs) which they might otherwise wish to include in their bids into the BM and/or the CRM. However, the rationale for bids into the BM, for instance, to be based on short run marginal costs (and should not include sunk costs) is set out in the various consultation and decision papers.

In seeking to achieve as far as possible the outcome that would prevail in a competitive market, operators with higher costs, whether for historic reasons or otherwise, will earn a lower return than lower cost and/or more efficient operators. Such an outcome is entirely consistent with the proper performance of our statutory duties and with the wider legal requirements which respondents have identified.

The I-SEM market design recognises that not all aspects of the market will be fully competitive, and incorporates a set of regulatory measures (notably in the CRM and bidding controls regime) designed to mitigate the exercise of market power capable of being exercised by incumbents, as well as measures designed to stimulate new entry. These measures have been developed in a series of decisions, including (as regards the CRM) the Decision Papers on CRM Parameters and Auction Timings (SEM-17-022) and on the Capacity Market Code (SEM-17-033)\(^7\) and (as regards the bidding controls regime) the

\(^6\) In SEM-17-020, for instance, it was stated, “The SEM Committee is clear, given that complex bid offer controls are designed to ensure that complex bid offer data reflects short run marginal cost, that such controls should not permit the inclusion of sunk costs in such bid offer data” (paragraph 3.5.13). And in SEM-17-022 it was stated, “The SEM Committee considers that […] the approach of not including sunk costs in NGFCs and hence USPCs is central to controlling market power in the first transitional auction” (paragraph 6.3.43).

\(^7\) Decision made under Condition 6A (Capacity Market) in the EirGrid TSO licence (and the corresponding condition in the SONI licence).
Decision Papers on Complex Bid Offer Controls in the BM (SEM-17-020) and on the Balancing Market Bidding Code of Practice (SEM-17-048), which each take legal effect in accordance with their terms.

It is only to be expected that existing generators will be impacted (and impacted differently to others) to some extent by such measures. Whilst the CER’s task as economic regulator seeks to maintain a level playing field, it is the nature of regulation of the market that some such differential impacts cannot be avoided and the CER, as regulator, take them into account in pursuing its statutory objective and in considering the matters discussed above.

It is also important to emphasise that the I-SEM market design will allow existing generators who are likely to be called upon to offer capacity in the CRM or to generate in response to requests for non-energy actions in the BM to recover not simply the costs reflected in their bid prices, but also the infra-marginal rent available within the capacity and balancing market clearing prices. In addition flexibility is being built into the I-SEM market design (such as in relation to the Unit Specific Price Cap mechanism) to allow general provisions on cost recovery to be adjusted, where appropriate, to accommodate the particular circumstances of individual generators.

Nonetheless, participation in a regulated market, such as the I-SEM (or the SEM for that matter), necessarily involves submitting to a regulatory regime (with associated regulatory obligations) which is not static, but has to evolve in order to meet changing circumstances, including the competitive environment and the presence of market power. Market participants are able to choose, in response to such changes, whether to remain part of that market and accept the associated ongoing regulatory obligations and costs or to exit the market, subject to compliance with the obligations (and costs) associated with exit. In that context, generators are entitled to approach the TSOs as regards the seeking of derogations from the Grid Code requirements concerning exit from the market.

Whilst the RAs are satisfied with the constraints on cost recovery which have been included, in the interest of market power mitigation, in the design of the CRM and in the bidding controls regime (and are reflected in the two proposed new conditions), they recognise that, under certain circumstances or alternatively during the transitional period, generators seeking to exit the market may, in light of the three year notification requirement for closure under the Grid Code, face financial burdens which are not covered by I-SEM
market revenues. As stakeholders are already aware, the TSOs have been requested to develop an appropriate framework for any additional mechanism to address particular local security of supply concerns, taking account of the overall energy, capacity and system services market arrangements and relevant Grid Code requirements.

4.2 Capacity Market Code condition

(a) Summary of proposed modifications

A proposed new condition requiring licence holders to sign up to and comply with the Capacity Market Code insofar as applicable to them. Whilst the licence condition is to be incorporated into all supply and generation licences, in practical terms in the context of electricity suppliers, the obligations to comply with the Code (and in turn, the licence condition) will be most relevant for those suppliers that elect to offer demand side response into the capacity market.

(b) Summary of responses

Three respondents did not object to the proposed modifications, with one drawing our attention to a typographical error in paragraph (2) of the proposed condition. Comments and objections were received from three other respondents, of which one argued that the proposed licence condition places “an open ended obligation on operators to participate in the capacity market without any commensurate rights bestowed upon the licensee”. This respondent considered that the condition should be amended to include a set of principles which provide some clarity and protection for the licensee, as well as recognition that participating capacity providers will be given an opportunity to recover the appropriate costs of providing their capacity to the TSOs. Similar arguments were put forward by another respondent, who asserted that the Capacity Market Code is not underpinned by legislative basis and, therefore, the licence condition needs to contain more detail on the Capacity Market, including underlying principles of the market and the providers’ opportunity to recover relevant costs.

Lastly, one respondent objected strongly to the introduction of this condition in Electricity Supply Licences (and Generation Licences), on grounds that the proposal to include a generic licence condition requiring compliance with the Capacity Market Code with no further principles renders it “unlawful” for reasons including (a) vagueness or failure to
provide legal certainty, (b) it is ultra vires the CER’s statutory powers and duties, (c) the approach seeks to circumvent the statutory governance and accountability framework and unjustifiably undermines generators’ rights, (d) it supersedes relevant case law, (e) it is inconsistent with a generator’s right to property as protected under the Irish Constitution and (f) it may place generators in direct conflict with competition law. The respondent further stated that, where restrictions being imposed on licence holders, then they should be set in the terms and conditions of the licence and that, such terms and conditions, should not be so vague as to be deprived of any meaning as to give the CER unfettered discretion as to the scope of the obligations to which a licence holder is subject.

(c) CER’s response
Need for CMC Principles
The CER notes the various representations received in relation to the alleged absence of principles to govern the Capacity Market Code and to protect the interests of participants in the capacity market, for instance in relation to the issue of cost recovery.

The CER considers such allegations to be wholly misconceived. It should be pointed out as a preliminary point that the CMC (and, thus, the auction and other rules which it contains) is in fact subject to a set of governing principles in the form of objectives which are set out paragraph 4 of Condition 6A of the EirGrid TSO licence. These objectives are:

- to facilitate the efficient discharge by EirGrid of the obligations imposed on it by the TSO licence, and to facilitate the efficient discharge by the NI TSO of the obligations imposed on it by its licence;
- to facilitate the efficient, economic and coordinated operation, administration and development of the Capacity Market and the provision of adequate future capacity in a financially secure manner;
- to facilitate the participation of undertakings including electricity undertakings engaged or seeking to be engaged in the provision of capacity in Capacity Market;
- to promote competition in the provision of capacity to the SEM;
- to provide transparency in the operation of the SEM;
- to ensure no undue discrimination between persons who are or may seek to become parties to the Capacity Market Code; and
• 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.

Paragraph (1) of that condition requires EirGrid to enter into and, in conjunction with SONI, at all times administer and maintain in force, the CMC, which is required to be a document which: (a) makes provision in respect of the capacity arrangements described in paragraph (3) of the condition; (b) is designed to facilitate achievement of the objectives described above; and c) contains modification procedures which provide that any modifications to the CMC must be subject to the prior approval of the CER and which enable the CER to propose modifications to the CMC.

Paragraph (1) also provides that EirGrid is to be taken to have complied with the requirements described in the previous paragraph to the extent that it adopts, on the date of such designation, as the CMC the document designated as such by the CER for the purposes of Condition 6A and, on an on-going basis, reviews and proposes such modifications to that document (in accordance with the modification provisions therein) as would be necessary to ensure that that document meets those requirements.

The CER’s final decision in respect of condition 6A was taken in a decision published on 10 March 2017 (CER/17/036), following on from an earlier decision of 1 July 2016 (CER/16/171). Those decisions were each preceded by a public consultation exercise (opened on 16 December 2016 and 20 April 2016 respectively) to which a variety of market participants responded.

Those papers represented the culmination of a lengthy process of engagement concerning the institutional and governance arrangements for the Capacity Remuneration Mechanism which included SEM-15-016 on Roles and Responsibilities as well as Consultation Paper

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8 Designation of the CMC was undertaken by each of the Regulatory Authorities pursuant to decision of the SEM Committee approving the CMC contained in Decision Paper SEM-17-033 published on 2 June 2017.

Respondents will also be familiar with the detailed governance provisions which must be complied with in the event of proposals to modify the Capacity Market Code. 9

The CER completely rejects therefore the suggestion that the obligation to be party to, and to comply with, the CMC is in any sense ‘open ended’. On the contrary, the governance provisions highlighted above substantially control and constrain the ability of the TSOs (and the RAs) to impose obligations on participants in the I-SEM capacity market. Not only that, but those provisions were developed in consultation with market participants, thus allowing legitimate concerns regarding, for instance, cost recovery to be accommodated.

**Additional legal concerns**

The CER notes the additional legal concerns which were raised in connection with the alleged absence of principles to govern the Capacity Market Code (i.e., (a) vagueness or failure to provide legal certainty, (b) ultra vires the CER’s statutory powers and duties, (c) circumvention of the statutory governance and accountability framework and unjustifiable undermining of generators’ rights, (d) superseding of relevant case law, (e) inconsistency with a generator’s right to property and (f) conflict with competition law) and notes that these concerns closely resemble the arguments (described in section 4.3(b) below) raised against the proposed condition on cost-reflective bidding in the BM.

To that extent, the CER adopts the same position in relation to those arguments in the context of the CMC and the proposed licence condition requiring adherence to and compliance with that code as it does in the context of the BMPCOP and the proposed licence condition on cost-reflective bidding in the BM.

In relation to those arguments concerned specifically with necessity and proportionality, and the question of whether the proposed licence condition can be considered necessary for I-SEM implementation, the CER also wishes to add that the need for a licence condition of

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9 See section B.12 of the Capacity Market Code.
the type proposed was identified as long ago as SEM-15-044 (CRM Detailed Design). In that Consultation Paper the SEM Committee pointed out that, should the CRM be mandatory for existing licence holders in Ireland and Northern Ireland (as, of course, it was subsequently decided to be), the RAs would amend generation and supplier licences to require accession to the capacity market rules and prequalification for auction. The need for those licence conditions in light of the decision on mandatory participation was, in turn, confirmed in section 3.1 of SEM-17-033 (CRM CMC Decision Paper).

(d) CER’s decision

The CER has decided to introduce a new condition titled “Capacity Market Code” in all Generation and Supply Licences granted pursuant to Section 14 (1) (a) and (b), respectively. The final modifications are reflected in the track-changes version of the Generation Licence and Electricity Supply Licence, published alongside this Decision Paper. These track-changed versions indicate changes as compared to existing licences.

The table below indicates the numeration of the new condition Capacity Market Code in the Supply Licences and Generation Licences, respectively:

<table>
<thead>
<tr>
<th>Electricity Supply Licences</th>
<th>Condition number 23</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Electricity Supply Licence</td>
<td>Condition 28</td>
</tr>
<tr>
<td>Generation Licences</td>
<td>Condition 20</td>
</tr>
<tr>
<td>ESB Generation Licences</td>
<td>Condition 23</td>
</tr>
</tbody>
</table>

4.3 Balancing Market Principles Code of Practice condition

(a) Summary of proposed modifications

A proposed new licence condition requiring the licensee (in the case of a holder of Electricity Supply Licence - where it is operating as a Demand Side Unit) to comply with the BMPCOP when formulating and submitting Commercial Offer Data (COD) in the Balancing Market.

The proposed condition makes provisions for the CER (acting jointly with the UR if it elects) to publish the BMPCOP and amend it following consultation. It also provides that the
BMPCOP will (a) apply only to those categories of COD which are specified in it from time to time and (b) make such provision as appears requisite to the CER to ensure such data are cost reflective. The proposed condition will also give the CER power to issue directions to licensees to secure compliance with the licence condition and the BMPCOP.

(b) Summary of responses
One respondent was strongly in favour of regulatory oversight of complex bid offer data in the BM for so long as there is market power, and the scope for the exercise of market power abuse, exists in the I-SEM. This respondent commented that a number of changes to the BMPCOP were required before its finalisation. These changes include:
- increasing the range of output, from 1MW, over which marginal costs are assessed;
- preventing double counting of Gas Transportation Capacity (GTC) costs where the fuel cost already incorporates an element of GTC cost;
- not applying the proposed Opportunity Costs valuation approach to Variable Operating and Maintenance costs given the impracticalities of such; and
- enabling reasonable provision for increased risks to be incorporated in start-up costs

This respondent gave conditional support for the proposal to introduce the BMPCOP condition (as drafted), contingent on the RAs addressing the points outlined above. In addition, this respondent sought clarity on when the first director’s certificate will require to be signed.

The majority of respondents disagreed with the proposal to introduce the new BMPCOP condition (as drafted) in the Electricity Supply Licences and the Generation Licences. These respondents raised a number of legal and policy issues in relation to the proposed BMPCOP licence condition. A summary of the main policy and legal points made by respondents is set out below:

Policy issues:
- The proposal to transfer content from licences to a subsidiary industry document (the BMPCOP) would create risk for licence holders and threatens the recovery of eligible costs. The prescriptive approach taken (i.e. defining cost standards by reference to a changeable list of items as opposed to a Short Run Marginal Cost requirement), will force generators to price below cost and actually increase market power.
The fact that the BMPCOP framework will apply to generators / DSUs which have not been successful in the CM is not reasonable. Generators and DSUs in this predicament should be able to recover their fixed as well as variable costs, as they have no revenue streams from the CM.

The current BMPCOP provision on risk to plant and equipment should be retained to maintain cost recovery. Regulatory oversight of complex bid offer data in the BM is required for so long as there is market power.

One respondent commented that the BMPCOP condition would apply to all plant, not just plant with temporal and locational market power and considered that this universal approach was unjustified and had no basis for it in the CER’s previous decisions. This respondent further argued that, as a result of the new I-SEM design (in particular the removal of protections against energy actions by the TSOs and the design of the BM Net Imbalance Volume) plant without relevant market power will be caught. Finally, it considered that amendments should be made to ensure that restrictions would only be triggered when the CER has demonstrated that temporal or locational market power exists.

One respondent argued that the proposed modification is not necessary to implement the I-SEM, as stated by the CER in the Statutory Notice.

One respondent considered that the BMPCOP condition (and the Capacity Market Code condition) is not, as regards the specific obligations they imposed, necessary to facilitate I-SEM, as stated in the Information Paper CER/17/111. The respondent further argued that “it is entirely insufficient for the CER only to refer to decisions of the SEM Committee [ ] as the appropriate justifications for such changes” and that “appropriate justification must be provided in the context of this specific statutory process”.

Legal issues – As part of their overall response, two respondents raised significant legal concerns in relation to the proposed modifications to the Generation Licences and Electricity Supply Licences. These concerns can be grouped under the following headings:

- **Unlawful exercise of powers by the CER**: some respondents considered that the introduction of the two licence conditions (in the proposed format) would deprive market participants of their statutory right of appeal and that the degree of flexibility sought by the CER is impermissible and ultra vires under the relevant statutory framework.
• **Failure by the CER to provide legal certainty:** it was alleged that the proposed introduction of the new licence conditions would create potential legal uncertainty and that the degree of discretion sought to be retained by the CER would render the proposed conditions void or unlawful

• **Insufficient detail within the licence conditions and contrary to Case Law:** it was argued that the terms and conditions that a licence holder is subject to must be contained within the licence, and that licence conditions should be substantive and contain the necessary principles as required by statute. Two respondents were of the view that the proposals were contrary to case law and referenced the matter of Viridian and Endesa v. CER (2011)

• **Failure by the CER to have regard to its statutory duties:** it was argued that the implementation of such proposals would amount to the CER having failed to fulfil their statutory duties, and that the CER has not taken account of the need for efficiency and economy on the part of authorised persons

• **The CER’s proposals are not compatible with the general legal principles:** one respondent was of the view that the proposals in respect of the cost reflective bidding, are not compatible with the following legal principles:
  
  o Proportionality and necessity – the respondent argued that the proposal was in breach of CER’s legal obligation to proportionality set out in Section 9BD of the Act and in the EU Electricity Directive (2009/72/EC)

  o Transparency, accountability and consistency – the same respondent argued that the proposal was in breach of these legal principles, which derive from Section 9BD of the Act

  o One respondent considered that the proposals in respect of the cost reflective bidding licence conditions run contrary to the general direction of travel for EU electricity markets, as set out in the EC’s Working Document on the Final report of the Sector Inquiry on Capacity Mechanism. It was further argued that the proposed approach is inconsistent with generator’s property rights under the Irish Constitution. Another respondent was of the view that by reason of the proposed BMPCOP Condition, a generator was forced to bid at a level below their Short Run Marginal Cost and such an obligation would be contrary to competition law.

Other comments submitted by respondents include:
• Request for clarity on when the first director’s certificate will require to be signed and whether the form of certificate will be issued by the CER or will market participants be required to use their own template.
• Request for confirmation that should further modifications to licence conditions be necessary (i.e. Directed Contracts), these are consulted upon.
• Request for clarity in respect of recovery of eligible costs in situations where a plant does not hold a reliability option but chooses not to close, and ‘finds itself required by the TSO in the balancing market’.
• Criticism of CER’s general approach to justification of licence modifications by referring to previous licence conditions.
• Criticism of the decision not to increase timeline for consultation beyond statutory minimum.
• Criticism of CER’s and SEMC’s consultation/decision making approach.

(c) CER’s response

Approach to decision-making

The CER notes the various criticisms levelled at the approach taken to consultation on the two proposed licence conditions, notably as regards the justification of proposals by reference to previous decisions of the SEM Committee and as regards the limited time made available for formulation of consultation responses.

The CER is wholly satisfied that its approach has been a fair and robust one, having regard to applicable statutory and other requirements, notably the framework of statutory duties laid out in sections 9BC and 9BD of the Electricity Regulation Act 1999.

As regards the reference by the CER to previous decisions of the SEM Committee, it is important to recognise that, in line with the allocation of responsibilities under the 1999 Act, the proposals being consulted upon are designed to give effect to those previous decisions. It is only to be expected, therefore, that the CER would wish to refer to those previous decisions in articulating those proposals and to have regard to them in evaluating the responses which have been received on them.
Turning to the criticism of the time made available for responses, it is important in the CER's view to take account of the various previous opportunities that have been afforded to stakeholders for commenting at various stages of policy formulation. The CER also notes that no allegations have been made of any specific detriment suffered by respondents as a result of the time made available.

**Impact on cost recovery**

The CER notes the various concerns expressed by respondents as regards the impact of the proposed licence condition on their ability to recover costs, such as by allowing costs to be defined in the BMPCOP, allegedly requiring pricing of bids below cost, by depriving generators of their property rights and also contributing to the abuse of market power (potentially contrary to competition law).

As regards the supposed risk of allowing for costs to be defined in the BMPCOP, the CER notes that the existing licence condition concerned with cost reflective bidding in the SEM already creates extensive scope for the definition of cost components in a subsidiary code. Whilst the range of material which may be defined in the BMPCOP may be more extensive in comparison, that difference should not, in the CER's opinion, create any materially greater risk to cost recovery than the current arrangements.

Nonetheless, the CER considers that there would be merit in providing some additional prescription in the proposed licence condition as regards the cost recovery standard to be applied by the CER in developing the BMPCOP (and reflecting the approach already evident on the face of the BMPCOP document\(^{10}\)).

Turning to the criticism that the licence condition (and BMPCOP) may result in licence holders being unable to recover their costs and in the violation of their property rights, the CER would first of all refer to its earlier comments concerning cost recovery and I-SEM market design. The proposition that a generator may have costs which are, in certain circumstances, legitimately recoverable does not logically lead to the conclusion that such costs must necessarily be recovered via bids submitted into the BM. Equally, the inability of

\(^{10}\) See paragraph [2] of the BMPCOP published in SEM-17-048
a generator to recover particular costs in those bids does not mean that it will necessarily be prevented from recovering its costs in another way or via some other mechanism.

The bidding controls regime established by the proposed licence condition is designed to ensure the recovery of those short run marginal costs which would be reflected in BM bids in the absence of market power. In the CER’s view, the requirement that costs which may be recovered in BM bids reasonably reflect those short run marginal costs recoverable in a competitive market is entirely consistent with the requirements of competition law (and with the respect for the property rights of bidders), when viewed within the context of the I-SEM market design taken as a whole and, in particular, those market power mitigation measures forming part of the overall design.

**Application to plant without market power**

In response to the concerns expressed regarding the application of the bidding controls regime to some plant which may not necessarily enjoy temporal or locational market power, the CER refers to the points made in SEM-17-020 section 3.4 on this issue.

Due to the uncertainty around the location and timing of system constraints, bidding controls will be applied to all generation units’ complex bid offer data, in order to protect I-SEM customers from the potential risk of abuse from temporal and locational market power, with the result that some ‘early energy’ actions (as well as non-energy actions) will be regulated under the BMPCOP.

The SEM Committee previously concluded that it would not be technically feasible at present to distinguish these different actions and that, pending the development of a technical solution and taking into account the mitigating factors mentioned in section 3.4 of SEM-17-020, the mitigation of market power risks in respect of non-energy actions is sufficiently important to justify the application of controls to all complex bid offer data submitted by generators.

**Necessity, proportionality and consistency**

The CER notes the concerns expressed by respondents concerning the necessity of the proposed licence condition, the proportionality of the approach being adopted and its inconsistency with previous decision-making.
These concerns have, in the CER’s view, been taken fully into account in the approach taken to the development of I-SEM policy in this context. The need for a bidding controls regime of the sort now proposed (and the merits of that regime relative to those of other approaches, including a so-called ‘minimal change’ option) was examined by the SEM Committee in an extensive consultation and engagement exercise which involved, notably, a consultation which commenced in November 2015 with the publication of a consultation paper on I-SEM Market Power Mitigation (SEM-15-094), followed by a decision paper on I-SEM Market Power Mitigation (SEM-16-024) in May 2016. Both of those papers explored in detail the rationale for ex ante bidding controls in the I-SEM along with other market power mitigation measures. The detailed design of the proposed regime, was considered by the SEM Committee in the process leading up to SEM-17-020 and SEM-17-048. This approach has enabled the adoption of a regime that satisfies all applicable requirements, whether in terms of the CER’s relevant statutory duties (including those requiring regard to be had to economy and efficiency) or wider considerations, such as those of proportionality or good regulatory practice.

As regards the question of consistency, the CER understands the importance of acting consistently and is committed to doing so. However, the duty to act consistently applies to a given set of circumstances. To the extent that those circumstances change (as is the case with the introduction of the I-SEM and the development of a bidding controls regime suited to it), previous decisions and decision-making practice may remain relevant but cannot, and should not, be mechanically applied to the new situation.

**Discretion conferred by licence condition**

The CER notes the concerns which have been expressed concerning the extent of the authority conferred on it by the proposed licence condition.

As previously explained by the SEM Committee, the extent of authority conferred by the proposed licence condition is considered necessary to facilitate the creation of a dynamic BMPCOP document for I-SEM that can give greater clarity to industry regarding eligible costs, particularly given the evolving nature of energy markets and the growth in new generation technologies. The proposed approach means that, in the future, doubts as to the meaning or application of the BMPCOP can be definitively resolved by the SEM
Committee and recorded in the BMPCOP document, which would be updated by the SEM Committee to reflect particular circumstances following the appropriate consultation process. As noted previously, from a consumer interest perspective, and a market design and market power perspective, it is reasonable and prudent to have a framework that allows timely amendments to any future BMPCOP document should potential deficiencies arise or need for changes be identified.

**Alleged frustration of appeal rights and ultra vires action**

The CER notes the allegations that the discretion conferred on it as regards the making and revision of the BMPCOP would frustrate existing rights of appeal, or would otherwise be unlawful or ultra vires.

It is worth reminding respondents that the existing cost reflective bidding condition which applies in the SEM already confers substantial authority on the CER to make provision via a subsidiary code. Whilst the range of material which may be defined in the BMPCOP may be more extensive in comparison, there is no substantive legal difference between the two situations, whether in terms of the availability of statutory appeal rights or the availability of statutory vires. In neither situation, in the CER’s view, is there any question of frustrating such rights or exceeding such vires.  

It should also be remembered, as previously pointed out by the SEM Committee, that the CER is a ‘creature of statute’ and is required to comply with the same statutory duties (e.g., as to the financing of licensed activities) when making decisions in relation to a subsidiary document such as the BMPCOP as when it is taking decisions to modify licence conditions. Nonetheless, as indicated above, the CER does consider that there would be merit in providing some additional prescription in the proposed licence condition as regards the

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11 Respondents have referred to previous case law (specifically, Viridian and Endesa v. CER (2011)) as authority for the proposition that the CER lacks vires to establish the BMPCOP arrangements. However, as previously discussed by the SEM Committee, whilst that case law rightly identifies a need for a delegate to respect the extent of the authority delegated to it, there is nothing in that case law to suggest a substantive limit on the extent of authority to be delegated, at least to the extent relevant in the present context.
parameters within which discretion is to be exercised by the CER in developing the BMPCOP. In addition, the CER also considers that the proposed licence condition should explicitly respect the change management provisions included within the version of the BMPCOP published in SEM-17-048, so as to underscore the CER’s commitment to accountability in respect of future revisions of the BMPCOP.

Lack of legal certainty
The CER notes the concerns which have been expressed concerning the lack of legal certainty provided by the proposed licence condition (given the extent of the delegated authority which it contains).

The CER considers that the question of legal certainty must be assessed by taking the terms of both the proposed licence condition and the BMPCOP into account, since it is only by doing so that the nature and extent of the legal obligations imposed on market participants can be properly understood. The SEM Committee has taken care to share its thinking on the development of the BMPCOP in the process of engagement leading up to the publication of SEM-17-048. As a result, market participants have now been provided with considerable clarity and certainty as to the nature and extent of the obligations to which they will be subject.

Certification requirement
The CER recognises that the provisions of paragraph 8 of the proposed condition leave open the question as to the period to be covered in the first directors’ certificate of compliance to be furnished after the licence condition comes into effect.

Having considered how best to resolve the uncertainty, the CER has decided that it will specify, in the directions bringing the condition into effect, that the period to be covered in the first certificate will run from the date of coming into effect until 31st March 2019.

Additional changes to the BMPCOP
The CER notes that various suggestions (mentioned above) were made in response to the consultation as to changes which might be made to the BMPCOP before its finalisation. The CER also notes that market participants and others were provided with an opportunity to comment on the terms of the BMPCOP in a consultation which closed during the course of May 2017. This consultation exercise resulted in the publication of the finalised BMPCOP (SEM-17-049) on 11 July 2017.

The CER notes that the comments concerning the BMPCOP submitted in relation to the proposed licence condition do not raise any points which were not also raised by respondents to that earlier consultation exercise on the BMPCOP itself. To that extent, the points raised have already been taken into account by the SEM Committee in finalising the terms of the BMPCOP.

(d) CER’s decision
As indicated above, the CER has decided in light of representations received from respondents to adjust the text of the final licence condition so as to provide further specification as regards the parameters for CER decision-making in respect of the BMPCOP. Accordingly, the provision in paragraph (2)(b) of the proposed text (which guides the CER’s discretion in making (and revising) the BMPCOP) which referred to Commercial Offer Data being “cost reflective” has been changed so as to refer to Commercial Offer Data which, “reasonably reflect the short run marginal cost of operating the generating unit to which they relate”, and also to make explicit that the purpose of the BMPCOP is to facilitate the efficient operation of the BM by contributing to the mitigation of market power in the I-SEM.

In addition, as also indicated earlier, the CER has decided in light of representations received to specify in a new paragraph (3) of the condition that any future modification of the BMPCOP should respect any additional change management provisions included in the BMPCOP itself (which currently requires, for instance, a call for evidence).

Finally, the wording of paragraph (1) of the proposed condition which contained a potentially confusing duplication of the verb “ensure” (in relation to compliance with the BMPCOP) has been changed so as to refer instead to licence holders having to “secure” compliance with the BMPCOP. The change does not materially alter the meaning or effect of the paragraph.
In addition to the changes mentioned above, the final modifications also correct certain minor typographical errors contained in the proposed text.

The final modifications are reflected in the track-changes version of the Generation Licence and Electricity Supply Licence, published alongside this Decision Paper. These track-changed versions indicate changes as compared to existing licences. The licence modifications set out in these licence will apply to all Generation Licences and Electricity Supply Licences granted under sections 14(1) (a) and (b) of the Act, respectively.

The table below indicates the numeration of the new condition Balancing Market Code of Practice in the Supply Licences and Generation Licences, respectively:

<table>
<thead>
<tr>
<th>Electricity Supply Licences</th>
<th>Condition number 19a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Electricity Supply Licence</td>
<td>Condition 25a</td>
</tr>
<tr>
<td>Generation Licences</td>
<td>Condition 15a</td>
</tr>
<tr>
<td>ESB Generation Licences</td>
<td>Condition 17a</td>
</tr>
</tbody>
</table>

4.4 Decision on the proposal to introduce new licence conditions in the Public Electricity Supply Licence and the ESB Generation Licences

(a) Summary of proposed modifications
The 2 new conditions proposed to be introduced in the Generation and Supply Licences were also proposed in respect of the ESB Generation Licences and the PES Licence. Given that the proposed modifications impact on the conditions which are common between the two licences, the same supporting information in relation to the nature of and reasons for the modifications were put forward in respect of both types of licence.

(b) Summary of responses
Responses received in respect of proposed modifications to the ESB Generation Licences and PES licence are broadly similar to those received in respect of the same modifications to the Generation and Supply Licences. The summary of responses included in section 4.3
above are representative of responses received in relation to proposed modifications to the ESB Generation Licence and PES licence.

(c) CER’s response
The CER notes that respondents’ comments in respect of the proposal to introduce the 2 new conditions in the PES Licence and ESB Generation Licences were similar to those received in respect of the same proposal vis-à-vis Generation and Supply Licences. Therefore, the CER is of the view that the responses provided in section 4.3 address all points raised. To avoid repetition, our responses are not reiterated under this section.

(d) CER’s decision
The CER’s decision is that the 2 new conditions (i.e. the Capacity Market Code and the Balancing Market Principles Code of Practice) will also be introduced in the ESB Generation Licences and the PES Licence. The final modifications are reflected in the track-changes versions of the ESB Generation Licence and the PES Licence published alongside this Decision Paper. These track-changed versions indicates changes as compared to existing licences. The licence modifications set out in this licence will apply to all ESB Generation Licences granted under sections 14(1) (a) of the Act and to the PES Licence.

The table below indicates the existing conditions from the PES Licence and the ESB Generation Licences which will be modified as indicated in section 4.3 above:

<table>
<thead>
<tr>
<th>Capacity Market Code condition</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Electricity Supply Licence</td>
<td>Condition 28</td>
</tr>
<tr>
<td>ESB Generation Licences</td>
<td>Condition 23</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Balancing Market Principles Code of Practice</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Electricity Supply Licence</td>
<td>Condition 25a</td>
</tr>
<tr>
<td>ESB Generation Licences</td>
<td>Condition 17a</td>
</tr>
</tbody>
</table>
5. Decisions on proposed modifications to the Terms and Conditions for Generators under 10MW

(a) Summary of proposed modifications
In Information Paper CER/17/111, the CER proposed modifications to the Terms and Conditions for Generators under 10MW. The nature of proposed modifications and supporting reasoning was similar to those put forth in respect of proposed modifications to the Generation Licence. The proposed modifications were detailed in the Information Paper CER/17/111.

In summary, the CER proposed that two new licence conditions are introduced, namely Condition 10a: Balancing Market Code of Practice and Condition 13: Capacity Market Code. In addition, proposals were made to amend the existing condition 10 Cost-Reflective Bidding in the Single Electricity Market.

(b) Summary of responses
One respondent objected to the proposed new Terms and Conditions for Generators under 10MW for the reasons put forward in respect of the proposed modifications related to the BMPCOP and the Capacity Market Code conditions. Another respondent stated that their views in respect of the Balancing Market Principles Code of Practice condition were also relevant to this category of generators. Furthermore, similar to suggestions made in relation to the Interpretation and Construction condition in the Supply Licences and Generation Licences, consideration should be given for clarity purposes to the need to include a new definition for the Single Electricity Market trading and Settlement Code. Finally, this respondent drew the CER’s attention to the duplication of a paragraph in Condition 13.
The CER notes that respondents did not dispute the position that the SI for Terms and Conditions for Generators under 10MW should be amended in the same manner as the Generation Licence conditions.

(c) CER’s response
The CER notes that respondents’ representations and objections in respect of proposed modifications to the Terms and Conditions for Generators under 10MW are similar to those put forward in respect of the proposed modifications to Generation Licences. In light of this, our response to comments regarding proposed modifications to Terms and Conditions for Generators under 10MW are the same as those provided in respect of proposed modifications to Generation Licences, as set out in relevant sections in this paper. These responses are not reiterated herein to avoid repetition.

(d) CER’s decision
The CER’s decision is that final modifications to the Generation Licences will also be implemented in respect of the Terms and Conditions for Generators under 10MW. To give effect to these decisions for Generators under 10MW, a new statutory instrument will be published. It is expected that the new statutory instrument for Generators under 10MW will be published in Q1 2018.

6. Next Steps

Pursuant to section 22(3) of the Electricity Regulation Act 1999, the CER will serve a notice of the modifications of licences to all affected licence holders. This will include details of their statutory rights of appeal (to request the Minster to establish an Appeals Panel within 28 days of the decision to modify their licence). This notice will also be published in the Irish Times and in the Belfast Gazette. The modifications to the Generation Licences (including the ESB Licence) and Electricity Supply Licences (including the PES licence) as contained in this Decision Paper will take effect in accordance with their terms and in any case no earlier than 16 October 2017.
### Annexes

**Annex 7.1**

**Summary of proposed modifications to the Electricity Supply Licences and the PES Licence**

<table>
<thead>
<tr>
<th>Condition</th>
<th>Summary of proposed modification and supporting rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>New Condition</strong> Balancing Market Principles Code of Practice</td>
<td>New condition requiring the licence holder (where it is operating as a Demand Side Unit) to comply with the Balancing Market Principles Code of Practice in formulating and submitting Commercial Offer Data to the Single Market Operation Business. The proposed modification is required to implement the SEM Committee decisions on suppliers, operating as Demand Side Units, in relation to the Balancing Market Principles Code of Practice.</td>
</tr>
<tr>
<td><strong>New Condition</strong> Capacity Market Code</td>
<td>New condition requiring licence holders to sign up to and comply with the Capacity Market Code insofar as applicable to them. Insofar as licence holders have obligations under the Capacity Market Code e.g. offering demand side response, it is important that they are subject to a licence condition to comply with the terms of the code.</td>
</tr>
<tr>
<td><strong>Existing condition</strong> Interpretation and Construction</td>
<td>Delete the definition of the term “Trading and Settlement Code”. The definition is no longer required as this code has been replaced by the Single Electricity Market Trading and Settlement Code.</td>
</tr>
<tr>
<td><strong>Existing condition</strong> Intermediaries</td>
<td>Amend paragraph 1(a) and the definition of Intermediary to include reference to the Capacity Market Code. Include a new paragraph 2</td>
</tr>
</tbody>
</table>
to provide for the coming into effect of the amendments to this condition.

In I-SEM, it will be possible for licence holders to act as an Intermediary (in respect of generation units) under both the Capacity Market Code and the Single Electricity Market Trading and Settlement Code. As such, it is necessary to expand the scope of the condition to oblige licence holders to comply with the Capacity Market Code (as well as the TSC) in their capacity as Intermediary.

<table>
<thead>
<tr>
<th>Existing condition</th>
<th>Introduce a new provision to allow the Commission to &quot;turn off&quot; this condition from a date determined by it (being the same date on which the new proposed BMPCOP condition will take effect).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost Reflective Bidding in the Single Electricity Market</td>
<td></td>
</tr>
</tbody>
</table>

**Existing condition**
Cost Reflective Bidding in the Single Electricity Market

Introduce a new provision to allow the Commission to "turn off" this condition from a date determined by it (being the same date on which the new proposed BMPCOP condition will take effect).
## Annex 7.2
### Summary of proposed modifications to the Generation Licences and the ESB Generation Licences

<table>
<thead>
<tr>
<th>Condition</th>
<th>Summary of proposed modification and supporting rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>New Condition</strong></td>
<td>New condition requiring the licence holder to comply with the Balancing Market Principles Code of Practice in formulating and submitting Commercial Offer Data to the Single Market Operation Business in the Balancing Market. The proposed modification is required to implement the SEM Committee decision to establish a generic licence condition to require generation licence holders to comply with the Balancing Market Principles Code of Practice.</td>
</tr>
<tr>
<td>Balancing Market Principles Code of Practice</td>
<td>New condition requiring licence holders, or their Intermediaries, to sign up to and comply with the Capacity Market Code insofar as applicable to them. Insofar as licence holders have obligations under the Capacity Market Code, it is important that they are subject to a licence condition to comply with the code.</td>
</tr>
<tr>
<td><strong>Existing condition</strong></td>
<td>Delete the definition of the term “Trading and Settlement Code”. The definition is no longer required as this code has been replaced by the Single Electricity Market Trading and Settlement Code.</td>
</tr>
<tr>
<td>Interpretation and Construction</td>
<td>Amend the title of the condition to “Single Electricity Market Trading and Settlement Code” and delete paragraph 1 of the Condition which obliges the licence holder to comply with the “Trading and Settlement Code”. The proposed modifications to this condition are to reflect the fact that the Trading and Settlement Code has been replaced by the Single Electricity Market Trading and Settlement Code.</td>
</tr>
<tr>
<td><strong>Existing condition</strong></td>
<td>Modification of the condition to allow the Commission to “turn off” this condition at a date and time determined by it (being the same point in time as the new condition “Balancing Market Principles Code of Practice” will become effective).</td>
</tr>
<tr>
<td>Trading and Settlement Codes</td>
<td></td>
</tr>
<tr>
<td>Cost Reflective Bidding in the Single Electricity Market</td>
<td></td>
</tr>
</tbody>
</table>