DRAFT LEGAL TEXT FOR PROPOSED MODIFICATION P378

Insert new Supplement to the BSC after the Pool Supplement as follows:

BALANCING AND SETTLEMENT CODE
CM SUPPLIER INTERIM FUND SUPPLEMENT

1 INTRODUCTION

1.1 Status and Background

1.1.1 This CM Supplier Interim Fund Supplement ("**Supplement**") is part of the Code with effect from the Relevant Implementation Date.

1.1.2 The background to the arrangements in this Supplement is as follows:

(a) on 15 November 2018, a decision of the General Court of the Court of Justice of the European Union annulled the European Commission's decision to approve the grant of state aid pursuant to the capacity market (established by regulations and rules made pursuant to the Energy Act 2013)

(b) immediately following the judgment and in order to prevent the further granting of aid pursuant to the capacity market arrangements, the Secretary of State (in addition to directing the Transmission Company to postpone further capacity market auctions) requested the CM Settlement Body to halt making capacity payments under existing agreements and the collection of charges from Suppliers (the "**CM funding suspension**");

(c) as a consequence, the CM Settlement Body has ceased the collection from Suppliers of any amounts in respect of capacity market supplier charges pursuant to the Electricity Capacity (Supplier Payment etc.) Regulations 2014 (the "**Regulations**"), which were due to be collected in respect of the period of the CM funding suspension (the "**suspension period**"), and has offered to refund to Suppliers any such amounts already paid in respect of the suspension period;

(d) the Secretary of State has indicated that if, following a formal state aid investigation into the capacity market (including existing capacity agreements), the European Commission makes a positive final state aid decision in relation to the capacity market, the CM funding suspension may be ended on a basis which requires payments to be made to capacity providers in respect of the suspension period and accordingly under which Suppliers may be liable to pay capacity market supplier charges in order to fund such payments (the "**potential deferred liability**");

(e) in order to mitigate risk to the stability of the market for the generation and supply of electricity resulting from such deferred liability if it arises, and to provide a basis on which Suppliers may, during the suspension period, pass on to their customers on an orderly basis costs in respect of funding such potential deferred liability, Suppliers and other Parties wish to make independent contractual arrangements for Suppliers to fund in advance their potential deferred liability for such capacity market supplier charges;

(f) eligible Suppliers are therefore to be obliged to pay CM Supplier Interim Charges to BSCCo to provide a fund (to be held by BSCCo as the CM Supplier Interim Fund) materially equivalent to the amounts needed by Suppliers to meet their potential deferred liabilities; and if such liabilities arise, BSCCo is to pay the CM Supplier Interim Fund directly to the CM Settlement Body;

(g) the CM Settlement Body has provided to BSCCo, for the purposes of administering the CM Supplier Interim Fund, a copy of the Regulation 27(1)(c) Notice given to each Supplier in relation to the delivery year beginning 1 October 2018;

(h) for simplicity, it is agreed that:

(i) the amounts payable by each Supplier as CM Supplier Interim Charges are to be determined pursuant to the relevant Supplier Schedule of Invoicing, without adjustment or reconciliation;

(ii) Suppliers are not required to provide any security in respect of their obligations to pay CM Supplier Interim Charges;

(iii) if Suppliers become liable for any amount in respect of the potential deferred liability, the whole of the CM Supplier Interim Fund will be paid to the CM Settlement Body (and it will be for the CM Settlement Body to determine what amounts of such fund are to be paid to capacity providers and what amounts refunded to Suppliers, or what further amounts Suppliers may need to pay in accordance with the Regulations);

(iv) it is anticipated that the amount of interest (after tax) earned on the CM Supplier Interim Fund (and retained by BSCCo) will be enough (at least) to cover BSCCo's costs (including any bank charges) of implementing this Annex, and accordingly no separate charges are to be made to any class of Party in respect of such implementation;

(i) BSCCo will administer the CM Supplier Interim Fund in accordance with the provisions of this Supplement.

1.2 General

1.2.1 This Supplement sets out:

(a) the obligations on BSCCo to establish and maintain the CM Supplier Interim Fund;

(b) the obligations on Suppliers to make payments in respect of CM Supplier Interim Charges to BSCCo, and the consequences of failing to make such payments;

(c) the obligations on BSCCo to invoice to Suppliers and receive payments in respect of CM Supplier Interim Charges;

(d) the obligations on BSCCo to hold the CM Supplier Interim Fund and to release and pay it according to specified occurrences.

1.2.2 The provisions of the Code shall apply as amended or supplemented by this Supplement until the provisions of this Supplement are fully discharged.

1.2.3 For the avoidance of doubt:

(a) nothing in this Supplement applies in relation to any Trading Charges, Reconciliation Charges, BSCCo Charges or other payments due from Parties pursuant to the Code;

(b) the provisions of this Supplement are established to implement an arrangement developed by the Parties (rather than the Secretary of State or any other Competent Authority), and are separate from and independent of the provisions of the Code referred to in Section F1.1.9.

1.2.4 For the purposes of this Supplement:

(a) "**CM Supplier Interim Fund**" means the fund comprising the amounts received by BSCCo in respect of CM Supplier Interim Charges pursuant to this Supplement (and in accordance with paragraph 2.3.1, not including interest on such amounts);

(b) "**CM Supplier Interim Charges**" means the amounts payable by Suppliers pursuant to this Supplement;

(c) "**Interim Charge Year**" means a delivery year within the Interim Charge Period;

(d) "**Interim Charge Period**" means the period comprising the delivery year commencing 1 October 2018 (and 'delivery year' has the same meaning as in the Regulations);

(e) "**Fund Charging Period**" means the period starting on the first day of the month in which the Fund Effective Date falls and ending on the earlier of:

(i) the occurrence of a Release Trigger, and

(ii) the end of the Interim Charge Period;

(f) "**Interim Fund Term**" means the period starting on the Fund Effective Date and ending on the earlier of:

(i) the occurrence of a Release Trigger, and

(ii) the Backstop Date;

(g) "**Fund Effective Date**" means:

(i) except as provided in paragraph (ii), the second (2nd) Business Day after the Relevant Implementation Date;

(ii) if the Relevant Implementation Date falls within the last ten (10) Business Days of a month, the later of the date determined under paragraph (i) and the first Business Day of the following month;

(h) "**Release Trigger**" means the CM Release Trigger or the Supplier Release Trigger each as defined in paragraph 4;

(i) "**Backstop Date**" means 30 September 2020;

(j) "**Regulation 27(1)(c) Notice**" means the notice to be given by the CM Settlement Body to a Supplier pursuant to regulation 27(1)(c) of the Regulations in relation to a delivery year;

(k) "**Supplier Schedule of Invoicing**" mean, for a Supplier and an Interim Charge Year, the schedule of monthly capacity market supplier charges set out in the second column (entitled 'Supplier Charge amount (£)') of the Regulation 27(1)(c) Notice in relation to that year (and disregarding the third and fourth column relating to 'Credit Cover');

(l) "**Supplier Contributed Amount**" means for each eligible Supplier the aggregate amount received by BSCCo from the Supplier in respect of CM Supplier Interim Charges.

1.3 BSCCo's powers and duties

1.3.1 For the purposes of Section C3, and without prejudice to Section C1.2, the functions, powers and responsibilities of BSCCo include the implementation of this Supplement.

1.3.2 BSCCo shall have no duties or responsibilities in connection with the CM Supplier Interim Fund except as expressly provided in this Supplement.

1.3.3 BSCCo shall be entitled to rely on the accuracy and authenticity of any communication or document provided to it in connection with this Supplement by the CM Settlement Body or any Supplier or any other Party without enquiry.

1.3.4 Notwithstanding paragraph 1.3.3, if BSCCo considers there is any uncertainty as to whether any event or circumstance specified in this Supplement has occurred or exists, BSCCo shall be entitled to investigate or make enquiry of any person as to such matter before making any payment or taking any other step pursuant to this Supplement.

2 SUPPLIER INTERIM FUND

2.1 Establishment of Fund

2.1.1 BSCCo shall:

(a) establish the CM Supplier Interim Fund;

(b) credit to the CM Supplier Interim Fund all amounts received by it in respect of CM Supplier Interim Charges under this Supplement;

(c) during the Interim Fund Term, hold the CM Supplier Interim Fund in accordance with this Supplement;

(d) at the end of the Interim Fund Term, apply and pay the CM Supplier Interim Fund as provided in paragraph 4.

2.1.2 For the purposes of paragraph 2.1.1, BSCCo shall:

(a) establish, maintain and operate a bank account (the "**Fund Account**") in which the monies comprising the CM Supplier Interim Fund shall be held separately from any other monies held or administered by BSCCo;

(b) direct all payments in respect of CM Supplier Interim Charges to be made to the Fund Account;

(c) pay into the Fund Account any amount in respect of CM Supplier Interim Charges received by BSCCo in any other account;

(d) ensure that the Fund Account is used only to hold the CM Supplier Interim Fund, that no other amounts are paid into the Fund Account, and that no amounts are paid out of the Fund Account other than as prescribed in this Supplement.

2.1.3 The Fund Account shall be an interest bearing account, in BSCCo's name, from which withdrawals are permitted on no more than two (2) Business Days' notice, opened with the BSC Banker.

2.2 Status of Fund

2.2.1 The CM Supplier Interim Fund shall be the absolute property of BSCCo, and during the Interim Fund Term no Supplier or other Party shall have any beneficial or other interest in the CM Supplier Interim Fund; provided that BSCCo shall and shall only make payments from the CM Supplier Interim Fund on the terms of this Supplement.

2.2.2 The CM Supplier Interim Fund shall be operated only in accordance with this Supplement and no third party shall have control of or influence over the CM Supplier Interim Fund.

2.2.3 The entitlement of a Supplier to be paid (at the end of the Interim Fund Term) an amount from the CM Supplier Interim Fund is contingent upon the occurrence of the conditions specified in paragraph 4.2.2.

2.3 Interest and Costs

2.3.1 Interest actually accruing on the moneys in the Fund Account shall be paid into another account of BSCCo, and deducted from BSC Costs in determining Annual Net Main Costs in accordance with Section D4.1(a) (as if such interest were listed in paragraphs (i) to (vii) of that Section);

2.3.2 No Supplier or other Party is entitled to receive such interest, or has any other right as to interest in respect of the CM Supplier Interim Fund.

2.3.3 BSCCo shall pay any bank charges imposed in respect of the Fund Account or transactions in the Fund Account from monies other than the CM Supplier Interim Fund.

2.3.4 The costs (including any bank charges, and any tax payable on interest) incurred by BSCCo in the implementation of this Supplement are BSC Costs and (without prejudice to paragraph 2.3.1) no specific charge is made to Suppliers or Parties of any class in respect of such costs.

2.4 Accounting

2.4.1 BSCCo shall keep complete and accurate records in respect of the CM Supplier Interim Fund and the Fund Account including:

(a) the amounts received by it from each Supplier and credited to the CM Supplier Interim Fund;

(b) the amounts of interest accrued and applied in accordance with paragraph 2.3.1;

(c) any bank charges imposed in respect of the Fund Account or transactions in the Fund Account;

(d) the amounts paid out of the CM Supplier Interim Fund in accordance with paragraph 4.

3 CM SUPPLIER INTERIM CHARGES

3.1 Determination of CM Supplier Interim Charges

3.1.1 For the purposes of this Supplement:

(a) a Supplier shall be an "**eligible Supplier**" in relation to an Interim Charge Year if the CM Settlement Body has provided (as referred to in paragraph 1.1.2(g)) to BSCCo a Regulation 27(1)(c) Notice for such Supplier for that Interim Charge Year;

(b) in relation to an eligible Supplier and a month in the an Charge Year, any amounts expressed as "**payable by that Supplier**" shall be the amounts shown as payable by that Supplier for that month under the Supplier Schedule of Invoicing;

(c) a "**Charging Month**" is a month falling (in whole or part) within the Fund Charging Period;

(d) the "**First**", "**Second**" and "**Third**" Charging Months are respectively the first, second and third months of the Fund Charging Period.

3.1.2 For the avoidance of doubt:

(a) a Supplier (including a person which becomes a Supplier after the date on which Regulation 27(1)(c) Notices for a delivery year were given by the CM Delivery Body to Suppliers) which is not an eligible Supplier in relation to an Interim Charge Year has no right or obligation to pay CM Supplier Interim Charges or otherwise participate in the arrangements under this Supplement in relation to that Interim Charge Year;

(b) no adjustment or reconciliation shall be made in respect of the amounts paid or payable by an eligible Supplier in respect of CM Supplier Interim Charges notwithstanding any calculation of any adjustment or reconciliation (or other calculation) made by the CM Settlement Body.

3.1.3 Eligible Suppliers shall pay CM Supplier Interim Charges for each Charging Month in accordance with this paragraph 3.

3.1.4 BSCCo shall determine the amount to be paid by each eligible Supplier by way of CM Supplier Interim Charges for each Charging Month in accordance with paragraph 3.1.5.

3.1.5 In respect of each eligible Supplier and each Charging Month, the CM Supplier Interim Charge shall be:

(a) in respect of the First Charging Month, the total amount payable by that Supplier in respect of January of the Interim Charge Year and each month of the Interim Charge Year thereafter up to (and including) the First Charging Month;

(b) in respect of the Second Charging Month, the sum of:

(i) one-half of the total amount payable by that Supplier in respect of October, November, and December of the Interim Charge Year; and

(ii) the amount payable by that Supplier in respect of the Second Charging Month;

(c) in respect of the Third Charging Month, the sum of:

(i) the balance (being one-half) of the total amount payable by that Supplier in respect of October, November and December of the Interim Charge Year, and

(ii) the amount payable by that Supplier in respect of the Third Charging Month;

(d) in respect of each Charging Month thereafter, the amount payable by that Supplier in respect of that Charging Month.

3.2 Payments and Invoicing

3.2.1 For each Charging Month, BSCCo shall prepare and send to each eligible Supplier an invoice ("**Interim Charge Invoice**") in respect of the CM Supplier Interim Charge payable by that Supplier:

(a) for the First Charging Month, on the Fund Effective Date;

(b) for each subsequent Charging Month, on the first Business Day of that month, subject to paragraph (c).

3.2.2 Each Interim Charge Invoice must be in writing dated and, where BSCCo has been provided with an address for the electronic service of such invoices, be sent electronically.

3.2.3 A Supplier must pay the amount set out in an Interim Charge Invoice to BSCCo:

(a) by no later than the end of the fifth (5th) Business Day after the date of issue of the Interim Charge Invoice;

(b) in sterling, in immediately available funds;

(c) to the Fund Account;

(d) in full, without defence, set-off or counterclaim.

3.2.4 Upon the occurrence of a Release Trigger:

(a) subject to paragraph (b), no further amounts shall become payable by Suppliers in respect of CM Supplier Interim Charges (in respect of any month within the Interim Charge Year); and BSCCo shall immediately cease issuing Interim Charge Invoices;

(b) Suppliers shall remain liable for payment of CM Supplier Interim Charges for which invoices have been issued before the occurrence of such Release Trigger, whether due for payment before or after such occurrence.

3.2.5 The amounts included in an Interim Charge Invoice issued by BSCCo are final and binding in the absence of manifest error.

3.3 Payment Default

3.3.1 A Supplier shall be a Defaulting Party for the purposes of Section H3 and shall be in Default for the purposes of that Section where, in respect of the Defaulting Party's liability for amounts in respect of CM Supplier Interim Charges and in relation to any amount which has become due for payment by the Defaulting Party under the Code in respect thereof:

(a) the Defaulting Party has not paid the amount in full on the due date for payment; and

(b) on or after the due date for payment BSCCo has given notice to the Defaulting Party requiring payment of such amount, which notice BSCCo shall give no later than the first Business Day after the due date; and

(c) the Defaulting Party has not paid such amount in full by the third (3rd) Business Day after the date of BSCCo's notice under paragraph (b).

3.3.2 Where a Party is a Defaulting Party under paragraph 3.3.1, the Panel Secretary shall convene a Panel Meeting pursuant to Section B4.7 provided that such meeting shall be held no later than two (2) Business Days after the end of the notice period specified in paragraph 3.3.1(c).

3.3.3 In respect of this paragraph 3:

(a) Section H3.2 shall apply to any Default arising under this paragraph 3.3;

(b) BSCCo may send any notice required by this Supplement by email in which case Sections H9.2.2(d) and H9.2.6 shall apply and, for the avoidance of doubt, Section H9.2.5 shall not apply to any such notice; and

(c) any failure by BSCCo or the Panel Secretary to meet a timescale set out in this paragraph 3 shall not be deemed to have remedied or invalidated the Default.

4 RELEASE OF CM SUPPLIER INTERIM FUND

4.1 CM Release Trigger

4.1.1 The "**CM Release Trigger**" occurs if, after the Relevant Implementation Date and no later than the Backstop Date:

(a) the CM Settlement Body issues invoices to any Supplier or Suppliers for amounts payable by way of capacity market supplier charges in respect of any period or periods for which CM Supplier Interim Charges have been paid or become payable under this Supplement; and

(b) any Supplier gives notice to BSCCo that the condition in paragraph (a) is satisfied;

and the CM Release Trigger occurs when the notice in paragraph (b) is received by BSCCo.

4.1.2 If the CM Release Trigger occurs (and the Supplier Release Trigger has not previously occurred), BSCCo shall pay the amount of the CM Supplier Interim Fund in full to the CM Settlement Body within five (5) Business Days after the occurrence of the CM Release Trigger.

4.1.3 For the avoidance of doubt, the CM Release Trigger occurs and the full amount of the CM Supplier Interim Fund is payable to the CM Settlement Body in accordance with paragraphs 4.1.1 and 4.1.2, irrespective of:

(a) the amounts for which invoices (as referred to in paragraph 4.1.1(a)) are issued or the periods (as referred to in that paragraph) to which such invoices relate; and

(b) whether the European Commission has made a positive final state aid decision as referred to in paragraph 1.1.2(d).

4.1.4 Where BSCCo makes payment to the CM Settlement Body under paragraph 4.1.2, in order to facilitate the CM Settlement Body treating such payment as being made on account of the obligations of each eligible Supplier for the capacity market supplier charges (the invoicing of which gave rise to the CM Release Trigger), BSCCo shall provide to the CM Settlement Body a statement detailing for each Supplier the Supplier Contributed Amount, together with such other information as ESC may reasonably request for the purpose of its compliance with the Regulations.

4.2 Supplier Release Trigger

4.2.1 The "**Supplier Release Trigger**" occurs if:

(a) any Supplier presents to the Panel evidence that:

(i) the European Commission has made a Negative Decision (as defined in Article 9(5) of Council Regulation (EU) 2015/1589):

(A) in respect of the capacity market generally, or

(B) in respect of the capacity market in so far as it would involve capacity payments to capacity providers in respect of the period or any part of the period from the start of the Interim Charge Period to the date of such Negative Decision (or to any later date), and

(ii) no proceedings against the European Commission's decision have been instituted in the General Court within the period allowed; or

(b) any Supplier presents to the Panel evidence that:

(i) (irrespective of the status of any state aid investigation as referred to in paragraph 1.1.2(d)) the Secretary of State has made a final and definitive decision as to whether and the basis on which the capacity market will apply in the period (**relevant period**) from the start of the Interim Charge Period to the date of such final and definitive decision (or to any later date);

(ii) no proceedings for judicial review of the Secretary of State's decision have been commenced within 3 months after such decision was made; and

(iii) pursuant to such decision, there is no prospect that capacity payments will be required to be made to capacity providers in respect of the relevant period or any part of the relevant period;

and

(c) (in the case in either paragraph (a) or (b)) the Panel decides that it is satisfied by such evidence that the conditions in paragraph (a)(i) and (ii) or (as the case may be) paragraph (b)(i), (ii) and (iii) are met;

and the Supplier Release Trigger occurs at the end of the meeting at which the Panel makes the decision in paragraph (c).

4.2.2 If either:

(a) the Supplier Release Trigger occurs (and the CM Release Trigger has not previously occurred), or

(b) no Release Trigger has occurred by the Backstop Date

BSCCo shall pay to each Supplier (subject to paragraph 4.2.5) from the CM Supplier Interim Fund an amount equal to the relevant Supplier Contributed Amount (and the "**Supplier Release Date**" is the occurrence of the Supplier Release Trigger or as the case may be the Backstop Date).

4.2.3 BSCCo shall make payment to each Supplier of the amount under paragraph 4.2.2:

(a) within five (5) Business Days after the Supplier Release Date;

(b) to such account with a bank which would be eligible to be a Settlement Bank as the Supplier has notified to BSCCo not later than the Supplier Release Date (and failing such notification, to the Supplier's Settlement Account);

(c) without any set-off in respect of BSCCo Charges or any other amount payable by the Supplier to BSCCo.

4.2.4 The occurrence, after the Supplier Release Date, of the circumstances in paragraph 4.1.1(a) or (b) shall not affect the obligation of BSCCo to make payment to Suppliers under this paragraph 4.2.

4.2.5 If a Supplier has been dissolved (or otherwise has ceased to exist legally) before the Supplier Release Date and any amount would otherwise be payable to such Supplier under this paragraph 4.2, then:

(a) if, no later than twenty (20) Business Days after the Supplier Release Date, the Authority directs the Transmission Company that such amount is to be paid to another Supplier, BSCCo shall pay such amount to that Supplier;

(b) otherwise, such amount shall be paid to another account of BSCCo and deducted from BSC Costs in determining Annual Net Main Costs in accordance with Section D4.1(a).

5 DATA AND REPORTING

5.1 Consents

5.1.1 The Parties hereby consent to:

(a) the CM Settlement Body and the CM Settlement Services Provider providing such data to BSCCo as BSCCo reasonably requires in order to invoice and collect CM Supplier Interim Charges, administer the CM Supplier Interim Fund and release such funds in accordance with this Supplement;

(b) in the event that BSCCo releases the CM Supplier Interim Fund to the CM Settlement Body pursuant to paragraph 4.1, BSCCo providing such data relating to the CM Supplier Interim Fund to the CM Settlement Body and the CM Settlement Services Provider as those persons require in order to administer the capacity market or as may be required for the purposes of any accounting or auditing requirements.

5.1.2 Sections H9.4.1 and H9.4.2 do not apply in relation to paragraph 5.1.1(a).

5.1.3 BSCCo will seek to agree with and record in a letter to the CM Settlement Body the data which BSCCo is to provide to the CM Settlement Body pursuant to this Supplement.

5.2 Reporting

5.2.1 By the fifteenth (15th) day of each Charging Month, BSCCo shall provide a report to Parties setting out:

(a) the total amount of CM Supplier Interim Charges invoiced to Suppliers for that Charging Month;

(b) the total amount received from eligible Suppliers in respect of CM Supplier Interim Charges for that Charging Month;

(c) the total amount of the CM Supplier Interim Charges invoiced to Suppliers for the whole of the Interim Charge Period including that Charging Month;

(d) the total amount of the CM Supplier Interim Fund following the receipt of the amounts in (b).

5.2.2 By the tenth (10th) Business Day after the CM Release Trigger occurs or (as the case may be) after the Supplier Release Date, BSCCo shall provide a report to Parties setting out:

(a) the amount of the CM Supplier Interim Fund as at such date (but including amounts payable and received as provided in paragraph 3.2.4(b)); and

(b) the total amount paid to the CM Settlement Body or to Suppliers pursuant to paragraph 4.1 or 4.2 (as the case may be) and the date on which such payment was made; and

(c) the balance of the fund being zero (except where paragraph 4.2.5 applies, in which case BSCCo shall provide a supplementary report following payment of the amount referred to in that paragraph).