

Capacity Market Developments in the UK: the UK introduces interim changes to the capacity market whilst Tempus Energy's crusade continues

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The UK announces interim measures for dealing with the capacity market in the standstill period imposed by the Tempus Decision. In the meantime, Tempus Energy is pursuing national legal action against the UK as well as launching a challenge against the European Commission's decision to approve the Polish capacity market.

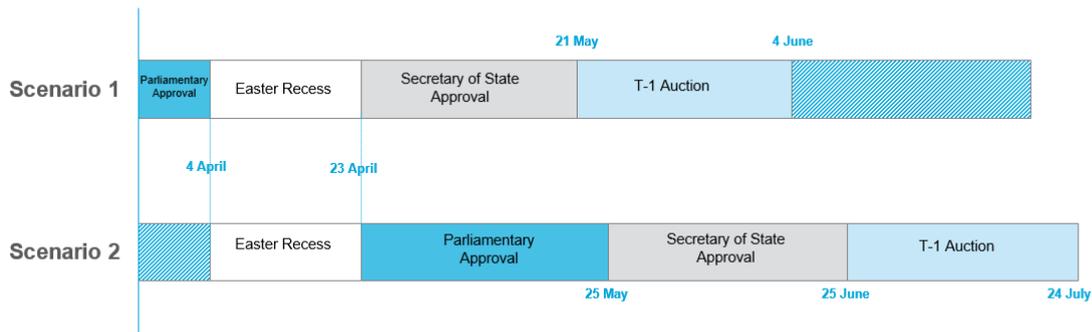
Tempus: Interim UK Proposals

In February, the UK Government published the outcome of its consultation on amending the GB Capacity Market to take account of the November 2018 Tempus Decision (the 'Government Response') (see our previous in-depth review of the decision and its effects [here](#)). The document sets out the UK Government's plan of action for the GB Capacity Market for the 'standstill period', i.e. the period from the date of the Capacity Market's suspension following the Tempus Decision until the nominated cut-off date of 20 October 2020.

Deferred T-1 Auction

National Grid, the GB Capacity Market Delivery Body, was scheduled to hold both a T-1 and a T-4 auction in January/February 2019, but these auctions were postponed following the Tempus Decision. The Government now intends to hold the delayed T-1 auction, previously scheduled for January, in summer 2019. Last week National Grid published indicative timelines of potential dates depending on whether UK parliamentary approval can be obtained before the 2019 Easter Recess or not:

Indicative Timelines



The new T-1 auction will grant ‘conditional capacity agreements’ to successful auction participants. These contracts will mirror the standard capacity market contracts, but payment under the contracts will be conditional on State aid approval being received. The Government has said that it expects that State aid approval will be received ahead of the start of the 2019/2020 delivery year, but to the extent that it is not provision is made for back-payments to be made to the successful bidders from the date that State aid approval is received. In the meantime, recipients will be expected to comply with their contractual obligations even while State aid approval is pending.

All capacity market units (CMUs) who are currently pre-qualified for this auction will be allowed to withdraw during a ‘withdrawal window’ by submitting a written notice to National Grid. Mandatory CMUs wishing to withdraw will also need to submit certain information on their operational status, but will also be allowed to withdraw. Pre-qualified CMUs will not need to post credit cover to participate in the new auction. Following the withdrawal window, the Secretary of State will confirm the final target for the auction.

Existing Capacity Market Contract-Holders

Payments to existing capacity market contract-holders have ceased since the Tempus Decision. The current proposal is premised on the assumption that State aid approval for the scheme would allow deferred payments to be made to capacity market contract-holders who meet their obligations during the standstill period. The Government Response reflects that a number of existing contract-holders asked for provision to be made for them to withdraw from their contracts voluntarily, but this request has been rejected. However, the Government has agreed to make certain changes to the obligations that CMUs must meet in the meantime, these include:

- For new build CMUs with a delivery year of 2021/22 the deadlines for submission of a distribution connection agreement and their financial commitment milestone will both be pushed back to the later of the 31 March 2020 or five months after the date on which State aid approval is received;
- The requirement for a progress report from an independent technical expert in the event of any material change to a construction milestone will be waived during the standstill period; and
- Metering tests for the 2020/21 delivery year have also been delayed until 20 June 2020 (or five months after the date of State aid approval), whichever is the later.

What if State aid approval is not granted by the 1 October 2020 deadline?

If the Commission does not grant State aid approval by 1 October 2020 existing and conditional contracts will be terminated. The Department of Business, Energy and Industrial Strategy (BEIS) has explicitly acknowledged, however, that the Government Response does not address all the consequences of this possibility. It provides:

In reaching the decisions set out in the Government Response, we have taken into account the risk that the European Commission will not grant State aid approval for the CM. In the event that it does not grant State aid approval for the CM, or if it makes that approval conditional on changes to the scheme, the Government will take all steps necessary in the light of that decision, including further consultation if appropriate. We do not consider, however, that it would be appropriate or proportionate

for us to make proposals in respect of the range of possible outcomes other than State aid approval at this stage.

Part of the difficulty facing BEIS is that any offer to provide termination or other compensation payments to suppliers if State aid approval is refused, would itself also run the risk of constituting illegal State aid. In the meantime, the Government Response does not do much to assuage the legal limbo which suppliers holding existing contracts, or contemplating participation in the new auction, find themselves.

Supplier Charge Payments

Payments under Capacity Market contracts are funded through a supplier charge, levied on all electricity suppliers. Collection of this charge was also suspended following the Tempus Decision. The Government Response confirms that collection mandatory collection will not be reinstated for the interim period, notwithstanding government's stated preference to recommence collections earlier in the process. However, suppliers may elect to make their payments if they wish, cognisant that the Government expects that all outstanding charges will need to be paid upon receipt of a positive State aid decision.

Ofgem, the UK energy regulator, has made clear that they will continue to factor the supplier charge into their methodology for calculating the retail price cap, so suppliers "can and should" continue to collect monies from their customers for the purpose of meeting their Capacity Market supplier charge payments. If State aid approval is not granted, the suppliers will be expected to reimburse customers for these charges. Ofgem has said that if this is the case it will consult on the best way to ensure customers can recover this money.

Tempus Energy's National Challenge to the GB Capacity Market

In the wake of the General Court's decision Tempus has also brought judicial review proceedings against BEIS, alleging that the legal effects of the Tempus Decision require that the UK not just suspend the Capacity Market as it has done, but also recover all of the payments that it has made to Capacity Market contract-holders to date. Current holders of Capacity Market contracts can expect to be served with a copy of this claim as directly affected parties.

European Developments

In Brussels, the European Commission announced on 21 February 2019 that they would be launching an in-depth investigation into the UK Capacity Market scheme. To that end the Commission published an invitation to interested parties to submit comments on the GB Capacity Market in the Official Journal of the European Union on 22 March 2019. Third parties will have four weeks from the date of publication to submit their views. The European Commission has also announced that it intends to appeal the Tempus Decision. The UK has confirmed that it will support the Commission in its appeal.

In the meantime, Tempus Energy announced on 15 March 2019 that it also intends to challenge the European Commission's decision to approve the Polish capacity market without opening an in-depth State aid investigation, the same grounds upon which it successfully challenged the UK approval.

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