

The European Commission announced yesterday that it has found the GB Capacity Market to be in line with EU state aid rules. In this client alert, our dedicated **Capacity Market Support Team** takes a look at what the **state aid approval** means for capacity providers and electricity suppliers.

Following an in-depth examination of the Capacity Market, the Commission confirmed that the British Capacity Market scheme covering the period 2014–2024 complies with EU state aid rules, specifically with the 2014 Guidelines on State Aid for Environmental Protection and Energy. In particular, the investigation confirmed that the scheme is necessary to guarantee security of electricity supply in Great Britain, is in line with EU energy policy objectives and does not distort competition in the Single Market.

Notably, the Commission did not find any evidence that the scheme would put demand response operators (DSR) or any other capacity providers at a disadvantage with respect to their participation in the scheme.

In addition, considering recent market and regulatory developments (including the entry into force of the new Electricity Regulation<sup>1</sup>), and other issues identified during the UK's recent five-year review of the capacity market, the UK has committed to implementing certain improvements to the scheme for the future. In particular, these improvements concern: (i) the lowering of the minimum capacity threshold for participating in the auctions; (ii) the direct participation of foreign capacity; (iii) the participation rules for new types of capacity; (iv) the access to long-term contracts; (v) the volume in the year-ahead auction and (vi) the compliance with the new Electricity Regulation.

The in-depth investigation follows the EU General Court judgment which annulled the Commission's prior approval of the scheme, as a result of a successful challenge by Tempus Energy, a DSR provider. The General Court held that the Commission should not have approved the scheme without first conducting an in-depth investigation of its impact on DSR as a resource for maintaining system security.



<sup>1</sup> REGULATION (EU) 2019/943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 June 2019 on the internal market for electricity available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R0943&from=EN>.

The Commission, supported by the UK government, appealed against the judgment, whilst at the same time starting the in-depth investigation that the General Court said should have been conducted. In order to comply with its standstill obligation under EU state aid rules (which prohibits the implementation of new state aid prior to the Commission's approval), the UK government suspended payments to capacity providers, who had already been awarded capacity agreements. The collection of Capacity Market charges from electricity suppliers was also suspended, though subsequently arrangements were made enabling suppliers to submit payments voluntarily, pending the outcome of the Commission's investigation.

Meanwhile, Tempus launched fresh proceedings in the Administrative Court in London to compel the government to close the Capacity Market entirely, cease the collection of charges from suppliers and the making of deferred payments to capacity providers, and recover and reimburse payments and charges already made.

Now that the Commission has found the Capacity Market to be compliant with state aid rules, it is anticipated that **Capacity Market payments and charges will be resumed going forward**. Although Tempus has two months within which to challenge the Commission's re-approval, any such challenge would not automatically have a bearing on the re-instatement of Capacity Market payments and charges. In a written notice to the House of Commons, Andrea Leadsom, Secretary of State for Business, Energy and Industrial Strategy, stated that the government expects that, once it receives the Commission's full decision, it will be able to recommence the processes of charging suppliers and paying capacity providers, including for the **£1 billion back-payments**, most of which it expects **to be paid in January 2020**. As ever though, payments to capacity providers will be dependent on successful recovery of charges from suppliers.

The saga is not yet over though. There are still two pending proceedings: (i) the Tempus claim in the Administrative Court of London and (ii) the Commission's appeal before the European Court of Justice against the annulment of its original decision. On the first proceeding, a substantive hearing is scheduled to take place in London for four days in November this year. The result of the Commission's appeal is anticipated in Q1 of 2020.

The Commission decision also clears the way for the conditional capacity agreements awarded in the replacement T-1 auction, held in July 2019, to become fully operable capacity agreements. The three capacity auctions scheduled for early 2020 will also go ahead as planned.

## Contacts

If you want more information about how these changes to the Capacity Market may impact your business, please reach out to one of our dedicated **Capacity Market Support Team**.



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