Neutral Citation No: [2024] NIKB 102 *Judgment: approved by the court for handing down (subject to editorial corrections) **	*Ref:* **SCO12659** *ICOS No:* **24/099871/01; and 24/100765/01** *Delivered:* **27/11/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PRIME POWER GENERATION LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY EP KILROOT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION (ACTING THROUGH ITS SINGLE ELECTRICITY MARKET COMMITTEE)

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Tony McGleenan KC and Philip McAteer (instructed by Millar McCall Wylie, Solicitors) for the applicant in the first case
David Dunlop KC and Matthew Corkey (instructed by Carson McDowell LLP) for the applicant in the second case
John Larkin KC and Laura King (instructed by O'Reilly Stewart, Solicitors) for the respondent and proposed respondent respectively in both cases
Paul McLaughlin KC and Simon Turbitt (instructed by Tughans LLP) for SONI, an interested party and notice party respectively in both cases
Stewart Beattie KC and Philip McEvoy (instructed by Cleaver Fulton Rankin Ltd) for EirGrid, an interested party and notice party respectively in both cases

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SCOFFIELD J

Introduction and procedural history

[1] There are two applications before the court, each of which relates to a forthcoming capacity auction in which electricity-generating undertakings bid to supply capacity to the electricity transmission network. The applications raise similar and related issues; and have been heard together.

[2] In each case, the challenge is to a decision of the Single Electricity Market Committee ("the SEM Committee" or "SEM-C"). The SEM Committee is a committee by which the Northern Ireland Authority for Utility Regulation (NIAUR) ("the UR"), the energy regulator in Northern Ireland, and the Commission for Regulation of Utilities (CRU), the energy regulator for Ireland, act jointly in the exercise of regulatory functions relating to the single electricity market (SEM) on the island of Ireland. The composition and functioning of the SEM Committee was described by Humphreys J in his judgment in *Re SONI Ltd's Application* [2022] NIQB 21 at [3] and [10]-[14]. Technically, the respondent in these cases is the UR, acting through its SEM Committee; but in substance the challenge is to the decision-making of the Committee which makes decisions on an all-island basis.

[3] The first application ("the first case") is brought by Prime Power Generation Limited (PPG), a private company limited by shares carrying on the business of building energy infrastructure in Northern Ireland, as well as generating electrical energy for the purposes of sale. The decision under challenge is a "qualification decision" of 4 November 2020 by which the respondent committee determined that the applicant company is not qualified to participate in the Single Electricity Market T-4 2028/2029 Capacity Auction ("the capacity auction"), which was then due to take place from 21 to 28 November 2024, in respect of PPG's candidate unit bearing the reference GU_504270 ("the PPG candidate unit"). That candidate unit is located at Airport Road West, Belfast Harbour Estate, Belfast. It will be a 480MW single shaft combined cycle gas turbine (CCGT) project, primarily fuelled by natural gas via a high pressure gas transmission connection.

[4] In turn, the SEM Committee's decision involved a decision to accept or approve (or, alternatively, not to reject) a Final Qualification Decision (FQD) which had been made by the relevant system operators (SOs). The system operators are SONI and EirGrid, the respective electricity transmission system operators in Northern Ireland and Ireland, and together the system operators of the SEM, each of which is a notice party in these proceedings. It is now agreed that it is the SEM Committee, and not the SOs, which made the legally effective decisions as to whether any capacity unit qualifies for participation in an auction. (These are not cases where, as might occur, the SEM-C failed or declined to make any decision and the SOs' FQDs became final by default.) Nonetheless, in both cases some criticism has been made of "preceding decisions" by the SOs which, it is contended, were not properly corrected or remedied by the decision of the SEM-C.

[5] The PPG proceedings were commenced on Wednesday 13 November 2024 and were brought on for hearing on an urgent basis. The case was listed for review on Thursday 14 November 2024 in order to discuss how best to proceed. All parties accepted that there was a need for expedition, given the imminence of the capacity auction. There are potential adverse consequences of PPG being wrongly excluded from the auction; of PPG being wrongly included as a bidder; and also, of postponing the auction. The court was invited by the parties to schedule a hearing the following day (Friday 15 November), which it did. The applicant favoured a full

rolled-up hearing on all issues. The proposed respondent opposed that course and invited the court to deal with the matter in the conventional way by first addressing the question of whether leave to apply for judicial review should be granted and, if so, then addressing the question of interim relief. Given the proposed respondent's objection to a rolled-up hearing, I decided that we would proceed to consider the issue of leave and interim relief, although all parties were advised that they should come prepared to address the merits of the case as fully as possible, since the strength of the merits might well be relevant to the question of interim relief and/or further timetabling of the case.

[6] As it happened on 15 November there were two significant developments. The first is that the second application was lodged. This case ("the second case") is brought by EP Kilroot Ltd (EPK), which owns and operates Kilroot Power Station. It also sought to challenge a qualification decision made by the UR, on 4 November but communicated to it on 7 November, to the effect that one of its candidate units did not qualify to participate in the same capacity auction. This decision related to EPK's project of constructing a 500MW electricity generation plant within the existing Kilroot Power Station. This project is known as 'GT West' and bore the reference GU_504170 ("the EPK candidate unit"). It would involve replacing the existing (but now closed) coal-fired generating units within the main building at Kilroot Power Station with a new gas-fired CCGT plant. The second case had been in prospect but was only lodged in court on 15 November 2024. It then required to be dealt with; but the proposed respondent was not in a position to deal with that case on 15 November.

[7] The second significant development was that the UR indicated through counsel that, having reflected on the issue and having regard to the provisions of section D.2.1.10 of the Capacity Market Code (CMC) ("the Code"), it and the CRU (together, "the Regulatory Authorities" or "the RAs") would be prepared to exercise their power to give written notice to the SOs amending the timetable for the capacity auction by postponing it for a short period (of in or around a week) in order to permit more time for these proceedings to be dealt with. That possibility was discussed with all represented parties and a consensus view emerged that this would be a better way to proceed for a variety of reasons. It would permit the PPG case to be dealt with on a substantive basis, rather than merely considering the question of leave and interim relief. It would permit the EPK case to 'catch up' and also be dealt with substantively at the same time as the PPG case. That would permit the court, and parties, to have an overview of the issues in both cases and ensure that the challenges to the conduct of the capacity auction were not dealt with on a partial or piecemeal basis. It would also allow time for all parties, including in particular the SEM-C and the SOs, to file any evidence necessary to address the case in full. By consent of all parties, the hearing (of both cases) was put back to Thursday 21 November 2024.

[8] In accordance with the expectation generated by the discussions in court on 15 November, later that day the RAs issued a written notice pursuant to section

D.2.1.10 of the CMC amending the timetable for the capacity auction. This had the effect that, instead of being held between 21 and 28 November, the auction would be held between 3 and 5 December 2024; with further consequent amendment to the timetable for steps following the submission of bids. At the SOs' invitation, the court granted interim relief on 19 November requiring that they comply with this amended timetable. The court acknowledged that, strictly speaking, this order may have been unnecessary given the alteration of the timetable which had already been effected by the RAs' written notice. Nonetheless, the order was made in case there was any doubt about the legality of the amendment to the timetable pursuant to that provision; and to promote legal and market certainty. In light of the limited nature of the amendment to the timetable and having regard to section B.15.1.2 of the CMC and all of the circumstances of the case, the court did not consider it necessary or appropriate to require any party to give a cross undertaking in damages in respect of the interim relief granted.

[9] The cases proceeded to hearing on 21, 22 and 25 November 2024. Three days were required because of the extent of the submissions and the complexity of the issues. In addition, the principal evidence from the respondent and notice parties was served only on the morning of the first day of hearing, with additional evidence following. That resulted in some further evidential response from EPK and ultimately to proposed amendments to the pleadings in the case of PPG. Those additional grounds have been dealt with on a rolled-up basis. Indeed, in light of the evidence which was filed by the respondent and the notice parties in each case, the grounds of challenge advanced in oral argument were considerably refined from those initially set out in the applicants' pleaded cases. The grounds of challenge were nonetheless extremely wide-ranging. I have sought to address most if not all of them, and certainly the main grounds, in this overly lengthy judgment. If a point is not expressly addressed, I did not consider it to have merit.

[10] Mr McGleenan KC appeared with Mr McAteer for the applicant PPG; and Mr Dunlop KC appeared with Mr Corkey for the applicant EPK. Mr Larkin KC appeared with Ms King for the UR, acting through its SEM Committee, as respondent in the first case and proposed respondent in the second. In each case also, Mr McLaughlin KC appeared with Mr Turbitt for SONI; and Mr Beattie KC appeared with Mr McEvoy for EirGrid. I am grateful to all counsel for their helpful written and oral submissions and for the speed with which those submissions were prepared. I also record the court's appreciation of the significant work undertaken by the solicitors for the principal parties in each case, assembling and presenting voluminous papers and evidence in a highly compressed timescale. For convenience, notwithstanding that each case had progressed to a slightly different stage at the hearing, I will simply refer to the UR as "the respondent" in both cases and to SONI and EirGrid as "the notice parties" in both cases also.

The capacity auction and the qualification process

[11] The context of these cases is the operation of the SEM, the single wholesale electricity market across the island of Ireland. The two transmission system operators, SONI and EirGrid, are required to enter into, and at all times administer and maintain in force, a code which makes provision for arrangements to secure generation adequacy and capacity to meet the demands of consumers. This code – the Capacity Market Code referred to above – is an extremely important document in the context of the present litigation. It is the primary instrument which governs the rights and responsibilities of the various parties to these proceedings for present purposes (albeit that the Code is subject to a number of other legal obligations). It includes rules and procedures for the application for, and allocation of, agreements to remunerate the provision of electricity capacity across the island of Ireland.

[12] In terms of this jurisdiction, SONI is required to enter into the CMC by virtue of Condition 23A(1) of its transmission licence granted by the then Department of Enterprise, Trade and Investment. By Condition 23A(2) of that licence, SONI must comply with the CMC insofar as it is applicable to it as the holder of a licence granted under Article 10(1)(b) of the Electricity (Northern Ireland) Order 1992 ("the 1992 Order)." I return to some of the other conditions of SONI's transmission licence conditions in due course.

[13] Capacity auctions are the means by which participating power-generation undertakings may sell electrical capacity from candidate units to the grid for a given capacity year. Qualified participants submit sealed bids online to sell capacity to the grid, specifying the amount of wattage of capacity being offered and the price for that capacity. At the conclusion of the auction, the bids are arranged from lowest to highest. For a given capacity year, the SOs will have a total capacity which they wish to purchase from participants. Generally speaking, they accept the lowest bid for capacity and continue accepting higher bids in order until the total capacity requirement is met. (I understand that there are some circumstances in which higher-priced bids may take priority over lower priced bids through the auction software where, for instance, this is required in order to avoid significant over-procurement which may breach State Aid requirements.) The "market clearing price" is set at the level of the bid in which the total capacity requirement was ultimately met; and that then becomes the price paid to all successful bidders who bid at or under that price. Such auctions are a mechanism designed to ensure that the generation capacity on the island is sufficient to meet demand and that the regulatory-approved generation adequacy standard is satisfied.

[14] In order to participate in a capacity auction a company such as either of the applicants must qualify. In the first instance, the SOs make provisional qualifications decisions (PQDs) about these issues. There are then means by which such decisions may be revisited, either upon a request for review to the SOs and/or by raising a dispute with the Capacity Market Dispute Resolution Board (CMDRB) ("the Board"). All of this is provided for in the CMC, which sets out an elaborate

dispute resolution process which involves referring the matter to the CMDRB, further details of which are discussed below. The CMDRB consists of a panel of three independent and impartial members, each of whom is required to have relevant experience in alternative dispute resolution procedures and/or appropriate experience of the electricity industry and to be familiar with the provisions of the CMC.

[15] If a potential bidder is unhappy with a decision of the Board in relation to a qualification dispute, it must issue a notice of dissatisfaction (NOD), otherwise it will be bound by the Board's decision. Where an NOD is issued, further options remain open to the bidder. First it may try to persuade the SOs to change their provisional decision before submitting it, as a FQD, to the SEM-C for approval. Failing that, the intending bidder may ask the SEM-C to reject the SOs' FQD and substitute a different decision which allows its unit to qualify. The option of seeking redress in the courts is the last port of call.

[16] In simplistic terms, one of the requirements for qualification for a capacity auction (where the bidder is seeking to rely on 'new capacity') is that the candidate unit will be ready to provide capacity at the relevant time to which the capacity auction relates. There are a number of requirements which apply to that end. In addition, the SOs may reject an application for qualification if they consider that the delivery of part or all of any new capacity proposed is not feasible. As discussed further below, this calls for an exercise of judgement, first on the part of the SOs and then also potentially on the part of the SEM-C. Consideration of these matters involves evaluation of whether and how a candidate unit will be developed and connected to the electricity transmission system.

[17] The principal evidence on behalf of the respondent in these cases is contained in a number of affidavits sworn by Mr Colin Broomfield, who is the Director of Markets at the UR and one of the two members of the sub-committee of the SEM-C known as the SEM Oversight Committee (OSC) which advises the SEM-C in its decision-making. In his affidavits, he has provided a range of evidence relating to the SEM, the capacity market and the capacity auction process.

[18] Mr Broomfield explains that the capacity market is an important mechanism for the maintenance of security of supply of electricity on the island of Ireland and, in particular, for ensuring that the generation capacity is sufficient to meet demand. In his submissions Mr Larkin encapsulated this aim in the pithy phrase that capacity auctions are about "keeping the lights on." Capacity auctions are held in respect of a capacity year, which begins on 30 September in any given capacity year. The SOs are required to hold a T-4 auction for each capacity year. These are the primary capacity auctions, held approximately four years in advance of the capacity being delivered. This period is designed to provide new projects, which are sufficiently advanced in terms of their development at the time of the auction, time to build after the auction taking place. In this way competition is facilitated between new and existing capacity. The qualification process is designed, at least in part, to assess

whether new capacity *is* sufficiently advanced to achieve completion before the commencement of the relevant capacity year. Supplementary T-1, T-2 and T-3 auctions may also be held at shorter intervals before the start of the capacity year. If new capacity is successful in a T-4 auction it will generally be awarded a 10 year contract; whereas successful existing capacity will generally receive a one-year contract; although the upcoming T-4 auction also provided for intermediate length contracts.

[19] Mr Broomfield emphasises that, if a developer is not sufficiently advanced to meet the auction's qualifications criteria in a particular year, it could continue to develop this project so as to be able to qualify for the T-4 capacity auction the following year (or, indeed, top-up auctions run closer to the start of the capacity year). It may be that some added urgency arises in relation to the forthcoming T-4 auction for the 2028/29 year given that the State Aid approval for the capacity market mechanism is due to expire in 2028, although it is anticipated that the capacity mechanism will still exist beyond this, and work is planned in relation to a new or amended State Aid approval.

[20] Participants which are awarded market capacity in an auction will receive regular payments for ensuring that the offered capacity is available to the market. In return, successful capacity providers are required to deliver upon their obligations, including making available the awarded capacity and providing sufficient energy to satisfy their awarded capacity through participation in the SEM energy markets.

[21] Mr Broomfield also explains the qualification process in some detail. He avers that it is essential in order to provide confidence that units successful in an auction will be able to deliver upon their obligations and contribute to the security of electricity supply in Ireland and Northern Ireland. For present purposes the most relevant aspects of Mr Broomfield's evidence are probably those in which he deals with the importance of the timing of the T-4 auction and of the qualification assessments. T-4 auctions have to be timed to ensure that capacity can be delivered at the beginning of the delivery period, with demand typically being higher during those winter months. The respondent's evidence is that it is imperative that the capacity of those who are successful at auction is capable of being delivered from 30 September of the relevant year onwards.

[22] The respondent's evidence is also to the effect that, in its experience, delivering new capacity within the T-4 timeframe is challenging and that, across the SEM, there has been an unfortunate history of projects delivering late. The applicants make the understandable point that it is the SOs and RAs which set the timetable and that they may amend the arrangements either to hold earlier auctions (for example, T-5 auctions) or simply maximise the time available for project development by holding a T-4 auction at the earliest permissible time under the Code. There may be force in these suggestions but that is not a matter for the court; and the present cases must be addressed within the constraints of the timescales which have been adopted for this auction process.

[23] The respondent makes the further point that each week of delay in holding a T-4 auction increases the likelihood that projects competing in it will not be capable of delivery by the commencement of the capacity year. It is suggested that delay to the present auction could potentially give rise to investor uncertainty and trigger the withdrawal of projects which have applied to participate in, and qualified for, the auction. Any delay in the auction, and consequent reduction in the time available to deliver capacity after a successful bid, may cause developers to withdraw from it. The respondent also observes that, in the 2027/28 T-4 auction, the required quantity of capacity was not obtained, primarily because all capacity which qualified for the auction did not end up participating in it. In response to this, and the related risk to security of supply in the 2027/28 year, the SOs have introduced a number of changes in the current process, including the introduction of early-delivery incentives which will allow those contracted within the upcoming auction to deliver and be paid for doing so up to one year early. The respondent is concerned, therefore, that qualified bidders who are or will be in a position to deliver early may be put off by delay or uncertainty around the upcoming auction. That would give rise to concerns about adequacy of capacity for the 2028/29 year and also exacerbate existing concerns in relation to the 2027/28 year.

[24] Mr Broomfield also outlines and explains a number of concerns in relation to bidders being permitted to participate in the T-4 capacity auction on the basis of projects which are not feasible in terms of delivering the offered capacity from the start of the delivery period. His evidence is that this has the potential to cause significant competition problems, to compromise the security of supply, and to cause consumer detriment. The qualification process aims to identify credible providers and ensure genuine competition between different new and existing capacity providers. The concerning consequences of admitting bidders whose projects are not feasible within the delivery timeframe may be summarised as follows:

(1) This may result in qualified bidders, who could have delivered, failing to succeed in the auction, if their price is higher than the developer whose project ultimately fails to deliver (or potentially because the auction software accepts a higher-priced bid in order to avoid over-procurement which would breach requirements of the State Aid approval).

(2) The participation of capacity which is not credible may send a false signal to the market, which may affect the bids of other competitors.

(3) If such projects were to succeed in the capacity auction and subsequently not deliver or deliver late, this may impact the level of competition for subsequent capacity auctions. Capacity may need to be replaced within a shorter timeframe, for example by means of a T-3 or T-1 auction, which may limit competition as fewer projects will be eligible to compete, increasing consumer costs and risks to security of supply. This could lead to the need for the SOs, regulators and government to consider temporary, emergency generation as a last-resort option at a high cost.

(4) The failure of projects to deliver may also reduce competition in the broader energy markets because, when it comes to the relevant capacity year, the supply/demand balance may be worse on an everyday basis, potentially leading to higher consumer costs.

(5) The failure of a project to deliver may also have negative environmental consequences because there may be a consequential need to retain older and more polluting existing generation, which may otherwise exit the market, for longer. Alternatively, a tighter supply/demand balance in the energy market may mean that generation which is less efficient, and more polluting may operate more frequently.

(6) More broadly, since the all-island SEM is a relatively small market, there are locational capacity constraints which require the procurement of a minimum level of capacity within subsections of the market (for instance, in Northern Ireland). The procurement of new capacity of scale for Northern Ireland will therefore have a greater proportional impact for both consumers and the broader market.

[25] In relation to that last point, each of the candidate units with which these proceedings are concerned would provide roughly 25% of Northern Ireland's required capacity. Both applicants pray this in aid of their applications and the associated financial and employment benefits which are likely to arise in the event of successful development. However, by the same token, the risks arising from non-delivery in such circumstances, about which the UR is concerned, are correspondingly increased. Similarly, the SOs produce an annual adequacy forecast statement, known as the Generation Capacity Statement (GCS), the most recent of which shows a forecast deficit of capacity across the island for 2028 and 2029. The applicants contend that their respective projects could hugely assist in addressing this forecast deficit. However, that is only the case if they are in fact delivered and operational on time. If they are not, the problem would be magnified. All this really serves to illustrate is that the stakes are high in seeking to accurately assess the feasibility and delivery of candidate units.

Relevant provisions of the CMC

[26] The CMC is an extremely lengthy document. It includes many provisions which are relevant, or potentially so (to a greater or lesser degree), to issues which arise in these proceedings. I have set out below a number of the most important of these; and referred only briefly, if at all, to others.

[27] The Capacity Market Code Objectives are set out in section A.1.2.1 of the CMC. These reflect the objectives which the Code is designed to facilitate, as set out in Condition 23A(4) of SONI's transmission licence, and also Article 9 of the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 ("the 2007

Order"). However, they are expressly noted not to be intended to create legally binding obligations or to create enforceable rights: see section A.1.3.1.

[28] Chapter B of the Code deals with legal matters and the governance and administration of the Code. Subject to the provisions within the Code itself relating to the specified dispute resolution process, the parties submit to the exclusive jurisdiction of the courts of Ireland and the courts of Northern Ireland "for all disputes arising under, out of, or in relation to this Code": see section B.2.1.2. The Code, and any disputes arising in relation to it, are to be governed in accordance with the laws of Northern Ireland: see section B.2.1.1.

[29] Section B.14 deals with dispute resolution. There are two categories of dispute under the CMC: a 'qualification dispute' and a 'general dispute' (being a dispute which is not a qualification dispute). The issues in both cases before the court relate to qualification disputes, that is disputes relating to or arising out of the qualification process under the CMC. A dispute arises where a party gives a notice of dispute which, in relation to a qualification dispute, must not be given unless the party has lodged an application for review with the SOs. Where a dispute is referred to the CMDRB, its decision shall be in writing, providing reasons: see section B.14.8.6. That decision is binding on the disputing parties, subject to the content of sections B.14.8.8 to B.14.10.1 of the Code. These permit a party who is dissatisfied with the CMDRB's decision to give a NOD, within two working days in the case of a qualification dispute. Where such a notice is provided, the CMDRB decision is not final. Save as stated in section B.14.2.7 and section B.14.10, "no Disputing Party shall be entitled to commence any Court proceedings of whatever nature in relation to or in connection with a Dispute unless a notice of dissatisfaction has been given…": see section B.14.8.9. Where such a notice is not provided within the relevant time limit, the CMDRB's decision becomes final and binding: see section B.14.8.10. The SOs must also give effect to a CMDRB decision in relation to a qualification dispute in making FQDs in respect of the relevant qualification process: see B.14.9.3. (It is unclear whether this obligation falls away if a NOD is served within time after the Board has given its decision. The position of the respondent and the notice parties in these proceedings appears to have been that, where a NOD is served, the SOs are free to depart from the determination of the Board although, at least in the result, this did not happen either case.)

[30] The CMDRB has a range of powers when it determines a dispute, but these are somewhat limited. The effectiveness of its decisions when it upholds a dispute raised by an applicant for qualification appears to rest principally on the obligation upon the SOs to give effect to its decision in their FQDs. In particular, the Board may not make a decision or order that an auction be cancelled, postponed, delayed, suspended, re-run or annulled, although it may recommend that the RAs do so.

[31] Section D of the Code deals with processes in advance of the capacity auction. It provides that a capacity year is a period commencing at the start of the trading day beginning on 30 September and ending at the end of the Trading Day ending on

30 September in the following year. It further provides that the SOs shall conduct a T-4 auction for each capacity year, that is a capacity auction some four years in advance of the year for which capacity is being sought (in the period no less than 42 and no more than 54 months prior to the start of the relevant capacity year). The RAs *may* instruct the SOs to conduct other capacity auctions for a capacity year in addition to the T-4 auction if they consider it necessary to do so to preserve system security or, in some cases, where they consider that to do so would provide a lower overall cost for additional capacity than simply using a T-1 auction (that is, an auction no less than two and no more than 13 months before the start of the relevant capacity year). The SOs must submit a proposed capacity auction timetable to the RAs for approval and, once approved, must publish it. As mentioned above, there are facilities for amendment of the timetable either by the SOs (with approval from the RAs) or by the RAs themselves.

[32] Chapter E of the Code is the most important chapter for present purposes. It deals with qualification and the qualification process. The SOs are required to undertake a qualification process in respect of each capacity auction for a capacity year: see section E.1.1.3. Section E.4 sets out the requirements for applications for qualification; and section E.6 provides that the SOs must assess the applications made for a variety of purposes, including whether the candidate unit is (or is not) qualified.

[33] Section E.7.1.1 of the CMC, upon which PPG places particular emphasis, provides that:

> "The System Operators shall accept an Application for Qualification and determine that the relevant Candidate Unit is Qualified to be a Capacity Market Unit, or part of a Capacity Market Unit, under section E.6, except in circumstances set out in this section E.7."

[34] In approaching the assessments the SOs are required to make in this exercise, para E.7.1.2 provides that:

> "In applying the following provisions of this section E.7 and section E.8, the System Operators shall act reasonably and exercise the judgement reasonably expected of a Prudent Industry Operator performing a similar role in similar circumstances."

[35] Section E.7.2.1(f) is the specifically relevant provision of the CMC for the purposes of the PPG case. It provides – under the general heading 'Administrative Considerations' – as follows:

> "The System Operators may reject an Application for Qualification for a Capacity Year in respect of a Candidate Unit or combination of Candidate Units where:
>
> …
>
> (f) they consider the delivery of a part or all of any New Capacity proposed in the Application for Qualification is not feasible (either technically or in the applicable time frame); …"

[36] Section E.7.5.1(c) is the specifically relevant provision of the CMC for the purposes of the EPK case. The full provision of that section of the Code – under the general heading 'Requirements for New Capacity' – provides as follows:

> "The System Operators shall reject an Application for Qualification for a Capacity Year in respect of New Capacity for a Generator Unit or Interconnector comprising a Candidate Unit unless they consider that:
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> (a) where New Capacity is under development, the information provided reflects an accurate view of the state of that development;
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> (b) the Implementation Plan dates are achievable;
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> (c) Substantial Completion of the Generator Unit or Interconnector can be achieved prior to the start of the relevant Capacity Year; and
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> (d) all Qualification Data required to be provided in the Application for Qualification is provided and is accurate."

[37] As mentioned above, the SO qualification process is essentially conducted in two stages. The SOs first produce provisional decisions, PQDs, after which disappointed applicants for qualification can seek a review and then raise a dispute for determination by the CMDRB. The evidence is that the PQDs are approved by the Capacity Market Board, which is made up of managers from within SONI and EirGrid, with the proposed decision and rationale for the decisions being prepared by the Capacity Market Team in advance. There is a very limited obligation in the Code upon the SOs to provide reasons for PQDs. The CMC provides that where the SOs propose to reject an application for qualification, they shall notify the participant of the requirements under section E.7 that the application for qualification failed to satisfy (see section E.9.2.2). In practice, this is done by the publication on the Capacity Market Platform (CMP) of a 'result code.' These are defined in a document

entitled, 'Capacity Market: Qualification Results Codes 2028/2029 T-4 Capacity Auction' published by the SOs on 16 August 2024 ("the results codes document"). This document defines the various codes, including 'reject codes', and the provision of the CMC to which they relate. The document also states as follows:

> "Often the reasons for rejection relate to specific issues pertaining to the Application for Qualification and the System Operators endeavour to provide participants with information on the specific issues that are resulting in the rejection of the Application so that the Participant has an opportunity to challenge the decision and in many cases to address the issue prior to the Final Qualification Submission Date."

[38] After any reviews and CMDRB determinations arising out of the PQDs, the SOs must prepare a set of final qualification decisions, the FQDs, in relation to the qualification process for each capacity market unit, which then go to the SEM-C for approval: see section E.9.4.3. Section E.9.4.2(c) and (d) of the CMC provides that:

> "The Final Qualification Decisions in respect of a Capacity Market Unit shall:
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> …
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> (c) correct any error or omission in the Provisional SO Qualification Decisions in respect of the Capacity Market Unit which the System Operators become aware of; and
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> (d) reflect any updated information or change in circumstances affecting the Participant which the System Operators become aware of."

[39] There is therefore an obligation on the SOs to keep the PQDs under review and update the position when submitting their FQDs to the RAs, either by correcting earlier errors or reflecting new information or developments. The final decision – should they choose to act at all – rests with the RAs, operating through the SEM-C. That follows from the provisions of sections E.9.4.5 to E.9.4.7 of the Code, which provide as follows:

> "E.9.4.5 The Regulatory Authorities may approve or reject one or more Final Qualification Decisions submitted by the System Operators under paragraph E.9.4.3 by written notice to the System Operators (giving reasons in the case of rejection).

E.9.4.6 If the Regulatory Authorities reject a Final Qualification Decision submitted by the System Operators under paragraph E.9.4.3, then the Regulatory Authorities may by written notice to the System Operators determine an alternative decision in substitution for that of the System Operators.

E.9.4.7 If the Regulatory Authorities do not notify the System Operators that they reject a Final Qualification Decision on or before the date that is two Working Days before the Final Qualification Results Date specified in the applicable Capacity Auction Timetable, then they will be deemed to have approved the decision submitted by the System Operators."

[40] The respondent also places significant reliance upon section E.9.4.8, which is in the following terms:

> "The Final Qualification Decisions approved, or deemed to have been approved, by the Regulatory Authorities (and as substituted by the Regulatory Authorities) under this section E.9.4 are final and binding on the Parties."

The decision-making process

[41] It is convenient to set out here a brief summary of the decision-making process which was followed by the respondent and some of the input it received into that decision-making process. As appears from the above summary of relevant Code provisions, the SOs first make a PQD. There is then an opportunity for review and dispute resolution before the CMDRB if an applicant for qualification is dissatisfied with the PQD. The SOs then submit a FQD to the SEM-C in each case. Since these decisions are required to reflect any updated information, the FQD may change from the PQD – even if the applicant's dispute has not been upheld by the Board – upon the provision of additional information which assuages the SOs' concerns. As discussed further below, the FQDs are transmitted to the RAs by way of a spreadsheet using results codes indicating the reason for rejection where the unit is not assessed as qualified.

[42] In the process for this auction, the FQDs were initially submitted to the RAs on 15 October ("the first FQD spreadsheet"). A meeting then took place between the SOs and the OSC on 18 October 2024, which appears to have been at the SOs' request. I imagine this was so that the SOs could provide an update in cases where there was ongoing engagement with bidders; and also so that the OSC could better understand the SOs' position on the applications and feed this into the full SEM-C's

consideration which was to follow, particularly in cases where the applicant for qualification had been through a process before the CMDRB and then served an NOD in relation to the result of that process.

[43] On 23 October, there was a further spreadsheet provided by the SOs to the RAs ("the second FQD spreadsheet") which was designed to correct problems with the first and which contained "revised" FQDs. In his evidence Mr Broomfield has indicated that this was provided in order to take account of a new aspect to the present auction, namely the award of intermediate length contracts, but that it also contained changes designed (according to the SOs) to remedy the inadvertent 'truncation' of reasons text in the earlier spreadsheet.

[44] The meeting of the SEM-C which dealt with qualification was held over three dates: 31 October, 4 November and 6 November 2024. The minutes of this meeting, insofar as relevant to the two applicants, have been disclosed in the course of these proceedings. The first meeting on 31 October appears to have been something of a preparatory meeting. At the commencement of the meeting on 4 November, the Committee addressed some general issues as to its decision-making process and then began to consider the various cases where qualification applications had been rejected. The PPG case and the EPK case were each considered at the meeting of 4 November. The Committee also had the benefit of briefing notes or memos prepared by the Capacity Remuneration Mechanism (CRM) Team. The first of these ("the first CRMT memo"), dated 31 October, was provided at the first of the SEM-C's meetings.

[45] At the meeting on 31 October, the Committee questioned members of the OSC about their meeting with the SOs on 18 October. The Committee agreed that the OSC should review the notes of that meeting with the SOs and identify whether the OSC notes of that meeting "reveal any new information." If new information was identified, OSC would then make a judgement as to whether it was 'material' and, if so, "provide a right of reply on this information and an associated timetable for this process." If no new information was identified, or any new information was not judged to be material, OSC would made a recommendation (on the substance of the qualification process) at the next meeting on 4 November. Accordingly, the Committee delegated to OSC the consideration of whether further engagement with the applicants for qualification was required, with this being envisaged if new, material information had been shared with them by the SOs at the 18 October meeting.

[46] In terms of substantive consideration of the FQDs, it seems that in each case the OSC introduced the analysis of the issue contained in a further CRMT memo dated 4 November ("the second CRMT memo") and the issue was then discussed. Amongst other things, the second CRMT memo contained the OSC's report on their examination of their notes of the meeting with the SOs on 18 October. In neither case with which these proceedings are concerned was it judged necessary for OSC to give the applicant for qualification a right of reply. (Whether it ought to have done

so is an issue, especially in the EPK case.) In this regard, the second CRMT memo states: "Following SEMC on 31 October OSC have reviewed the notes of the meeting and do not consider that the SOs provided significant new material at the meeting or (with one exception) particular information that is not otherwise covered in the CMDRB decisions."

[47] Before making decisions on the qualification disputes, all of the SEM-C members confirmed that they had, and had read, a range of materials which are set out in Annex A to the minutes of the meeting. They also indicated that they had had access to a range of further materials, should they have wished to have seen them. The materials the Committee members indicated they had read included the second CRMT memo; the relevant CMDRB decisions; the NODs provided by the applicants; and legal briefings which had been prepared for the Committee (in respect of which privilege has not been waived). The members also indicated that they had received and read certain correspondence relating to a number of the cases.

[48] Legal advice was available at the key SEM-C meetings. It addressed the correct approach to the terms "feasible" and "achievable" within the CMC. The minutes specifically record that, in view of the importance of the business and of the proper interpretation of the CMC, the Chair invited Committee members at the 4 November meeting to confirm their agreement to the interpretation which was set out in (what became) an annex to the minutes. It is expressly minuted that members agreed to this and decided to adopt the interpretation of sections E.7.2.1 and E.7.5.1 of the CMC which was reflected in the advice to them.

[49] That advice is set out in Annex B to the minutes in the following terms:

> "Legal advice has been given, in respect of which privilege is not waived, to the SEM Committee as to the meaning of the word 'feasible' when used in clause E.7.2.1(f) (and also the word 'achievable' when used in clause E.7.5.1(b), or 'achieved' in E.7.5.1(c)).
>
> In this advice these expressions mean reasonably practicable, reasonably doable or deliverable.
>
> There are two aspects of feasibility in clause E.7.2.1(f): first, whether there is something in the technical nature of the proposal that makes it unlikely to occur/be delivered; and, second, even if a proposal is technically feasible/practicable/doable, it may still not be feasible/reasonably practicable/reasonably doable in the relevant timescale."

[50] Before proceeding to make decisions on the FQDs, the SEM-C also discussed its decision-making approach at the 4 November meeting. It agreed to proceed in

accordance with a 'Decision Tree' which is set out at Annex C to the minutes; and to apply its "Agreed Policy Approach" (set out in the decision tree) to the effect that it would normally only depart from the FQDs submitted by the SOs "if they were plainly wrong." As observed in submissions, the SEM-C therefore exercised something of a reviewing function, rather than reaching its own conclusion on the qualification disputes entirely de novo; although the decision tree also leaves scope for the SEM-C to reject a FQD even if it is not considered to be plainly wrong (where the Committee nonetheless considers it would be appropriate to reject the FQD taking account of its various objectives and duties).

[51] Before addressing the substance of the decisions, the Chair also reminded Committee members of the possibility, should they think it necessary, of obtaining further information if they wished before taking their decisions.

Factual background in the PPG case

[52] In PPG's case, the SOs' PQD of 16 August 2024 was to refuse its application for the PPG candidate unit on the basis that it did not qualify under section E.7.2.1(f) of the CMC. The CMP text was as follows:

> "REJECT_NOT_FEASIBLE Connection of this project to the 275kV transmission system at Castlereagh 275kV is not feasible in the timeline."

[53] As one can see, that determination was reached on the basis that the applicant's likely connection would be at a substation in Castlereagh. It was considered that connection to Castlereagh was not feasible within the delivery timeframe because Castlereagh would require a re-build and the final arrangement for the new substation was yet to be determined.

[54] As noted above, that decision was subject to review. PPG sought a review on 20 August 2024 and provided what it considered to be a significant update along with the review request. The update related to the fact that PPG expected the planning permission which had been granted to EPK in relation to its candidate unit at Kilroot to be overturned in judicial review proceedings (brought by a third party objector) which were then ongoing. As discussed in further detail below, EPK had been given a connection offer by SONI which envisaged its GT West project connecting to the transmission system at Kilroot. If that project could not then proceed and/or its connection offer was withdrawn, on the basis that it no longer had the necessary planning consent, PPG expected that it should be able to make use of the bay at Kilroot substation for connection of its own candidate unit. Having been given a connection offer, the EPK project was ahead of PPG in the connections queue (which is published by SONI in the form of the connections register). If EPK's connection offer was withdrawn, in principle PPG may be able to 'leapfrog' EPK in the queue and make use of the spare bay for 275kV connection at Kilroot. In its correspondence of 20 August to SONI, PPG therefore wanted confirmation that the

anticipated loss of EPK's planning permission would result in its connection offer being invalidated and there being a spare bay at Kilroot 275 kV substation into which PPG's own project could then seek connection.

[55] The SOs' review decision was provided on 6 September 2024, and it upheld the PQD, rejecting the PPG application for qualification. The key passages from the relevant communication from the SOs are in the following terms:

> "It is important to note that the size of the connection means that only connection at 275kV is feasible, with the nearest 275kV substation being at Castlereagh. As set out in the Transmission Development Plan for Northern Ireland (TDPNI), 2 Castlereagh will require a rebuild due to the concrete structures and the final arrangement for the new substation is yet to be determined.
>
> Under SONI's three-part process for developing the grid, the first part is to identify options to address system needs and develop a preferred option. To carry out the Part 1 works to identify the preferred option for Castlereagh re-build will involve technical, environmental and civil design to develop a substation with sufficient rating and capacity to address the network needs. SONI will appraise the options against need, and this will include whether any spare bays are provided. SONI estimates that the process to identify the preferred option will take 2 years.
>
> In terms of considering alternative options, a connection at Kilroot 275kV substation could be assessed however, this is further away in distance, expected to be more expensive and part of the cable route would be required to be submarine or Horizontal Directional Drilled (HDD). This would need to be checked for viability. However, it should be noted that Kilroot substation is almost at capacity, and it is expected that additional reinforcements would be required to facilitate the connection of Prime Power there. This is not achievable within the timeframes.
>
> Based on the above the System Operators maintain that this project is not feasible within the timeframes and are therefore upholding the original decision not to qualify this Unit."

[56] It can be seen, therefore, that this decision took into account the possible connection of the PPG candidate unit at Kilroot substation, as well as its possible

connection at Castlereagh. The applicant raised a notice of dispute with the CMDRB on 11 September 2024. The Board made its decision on 9 October 2024 and declined to uphold the dispute, confirming the decisions of the SOs referred to above. In the meantime, however, there was a range of communications between PPG and SONI. Although this is not always spelt out, it seems that SONI was primarily corresponding with PPG in this period in their respective roles as transmission system operator and applicant for a grid connection, rather than jointly with EirGrid as the SOs administering the capacity auction qualification process.

[57] PPG's deponent in these proceedings is Mr Brian McMullen, the Project Lead within PPG for its candidate unit. From mid-August to mid-September 2024 Mr McMullen was in touch with the Connections Team at SONI in relation to the quashing of EPK's planning permission at Kilroot. PPG was aware from the summer that there was an ongoing challenge to EPK's planning permission because it (PPG) had also had a planning approval granted at the same time by the same district council and its permission was also under challenge. SONI initially indicated that it could not discuss details of other developers' projects (ie EPK's project). Mr McMullen was told that if there was any change to the connections queue, the publicly available connections register would be updated to reflect this.

[58] In light of the indication that SONI could not discuss the details of another developer's project, PPG sought to gain some further information by asking more generalised questions or framing similar questions in relation to their own connection application. On 11 September Mr McMullen emailed SONI to make the point that two planning applications in relation to EPK's project at Kilroot (references LA02/2022/1074/F and L02/2022/0656/F) had been formally quashed in the High Court on 9 September. On this basis, he asserted that it was PPG's understanding that it was now "the only fully consented large scale power generation project in Northern Ireland."

[59] More importantly, Mr McMullen set out PPG's understanding that, as a result of EPK's planning permissions being quashed, a spare bay had then become available at the Kilroot 275kV substation and that PPG was next in line on the connections register to be offered this spare bay. His email continued as follows:

> "Regarding both the Transmission Connection and the CRM Qualification Applications, we have been informed by SONI that connection to Castlereagh is not technically feasible within the delivery timeframe from the T-4 2028/29 auction. PPP [Prime Power Project] agrees with this assessment and therefore a connection at 275kV from the PPP to Kilroot substation is the only technically feasible option. The logic therefore follows that this becomes the LCTA.

> We believe that PPP therefore should be offered the connection at Kilroot upon publication of the judgement confirming the quashing referenced above.
>
> PPP sent a query to SONI (see below) asking if their Connections Policy allows for a customer to specify a preferred connection point. This query is still outstanding. In the event SONI can provide sound reasoning as to why the Kilroot connection option cannot now be considered the LCTA for the PPP, we would like to formally communicate our preference to connect at Kilroot substation as our "preferred connection point."
>
> We are also formally communicating that we would be open to contestably delivering the electrical connection for the PPP to Kilroot substation. We are already carrying out feasibility studies on the subsea section of the cable route and have contacted Belfast Harbour, who are open to this option as there is precedent with the gas transmission pipeline crossing the channel."

[60] On 19 September SONI replied indicating that there was "no publicly available information suggesting that the planning applications referenced have been quashed." PPG has expressed scepticism about this on the basis that, as Mr McGleenan put it, this was "headline news." In any event, on 24 September, PPG provided SONI with a copy of the High Court order quashing the EPK permissions. Ms Watson, the Head of Networks at SONI, responded on 26 September, having been continually pressed by PPG, as follows:

> "Under the terms & conditions of our connection offers, as you are aware, planning permission is a condition precedent to offer acceptance. Our offers also state that "should any particular condition(s) precedent for the acceptance of the offer no longer be fulfilled at any stage following acceptance of the Offer, then SONI shall terminate the offer via a Termination Notice if the Customer is unable to provide written evidence to SONI, and to SONI's satisfaction, the particular condition(s) precedent that is no longer fulfilled has been fulfilled again within 28 days from when the particular condition(s) precedent became unfulfilled."
>
> With this in mind, and without referencing any project specifically, the current situation at Kilroot remains unchanged.

> The team is currently completing assessments to determine the LCTA for your project. The option of connecting at Kilroot forms part of this assessment, and this is ongoing."

[61] These emails make reference to the LCTA for the PPG project. That is a reference to the Least Cost Technically Acceptable (LCTA) connection which is identified by SONI for the connection of a generating unit to the transmission system. This concept and its relevance are discussed in further detail below.

[62] Further correspondence between PPG's solicitors and SONI followed, in which the solicitors were contending that EPK had no valid planning permission for its project at Kilroot; were seeking further information; and were demanding that Kilroot substation be determined as PPG's LCTA connection (wrongly referring to this as the Least Cost Technically *Available* connection) and that SONI confirm immediately that PPG qualified for the capacity auction. Ms Watson of SONI responded in a more formal letter of 27 September emphasising that the capacity auction and associated qualification process was a *separate* process to the connection offer process and that SONI (acting alone in its capacity as transmission system operator) could not comment on the qualification issue. This correspondence again confirmed that there was no change to the connections register at that point; and that if there was any change to the circumstances the connections register would be updated to reflect this. (It will be noted that these exchanges were within the 28 day grace period after the quashing of the EPK planning permissions on 9 September within which EPK could effectively show cause to SONI that its connection offer should not be terminated. As described in further detail below, EPK contended that there was and is no reason for its connection offer to be terminated and was arguing strenuously against any proposed termination.)

[63] Meanwhile, the hearing of PPG's qualification dispute before the CMDRB was held on 1 October. PPG's written submissions focused, amongst other things, on the recent developments, *viz* the quashing of the EPK planning permission. On 4 October, PPG also submitted a report (a 'Subsea Installation Technical Note') from a specialist consultancy, OWC. This was designed to help demonstrate the feasibility of the PPG candidate unit connecting to the transmission system at Kilroot, using a subsea cable crossing Belfast Lough from its location in East Belfast to Kilroot, just outside Carrickfergus.

[64] The CMDRB issued its decision on 9 October. The Board did not uphold PPG's dispute. Its approach to the question of 'feasibility' under the Code is discussed below. However, it considered both options which had been proposed by PPG. It concluded that the SOs were entitled to assess the connections for PPG – whether at Castlereagh, Kilroot or any other options – as not being feasible within the applicable timeframe based on the information presented in the application or later through the dispute resolution process. The Board specifically found that "the option of connecting to the Kilroot Sub-Station is "not sufficiently developed to be

regarded as realistic in the applicable timeframe." On 11 October PPG issued a NOD in relation to the Board's decision.

[65] The FQD was submitted by the SOs on 15 October 2024. It was in the following terms:

> "REJECT_NOT_FEASIBLE Connection of this project to the 275kV transmission system at Castlereagh 275 kV station is not feasible in the timeline."

[66] As noted above (see para [43]), there was a revised FQD spreadsheet submitted to the RAs on 23 October. It contained an annotation in relation to the PPG bid as follows:

> "REJECT_NOT_FEASIBLE Connection of this project to the 275 kV transmission system at Castlereagh 275 kV station is not feasible in the timeline. Based on the Implementation Plan provided in the Application for Qualification, the System Operators consider that Substantial Completion of the Generator Unit cannot be achieved prior to the start of the Capacity Year. In accordance with E.7.5.1(c) of the Capacity Market Code, the Application for Qualification is rejected."

[67] There are some notes available to the court relating to that section of the meeting between OSC and the SOs on 18 October (referred to at para [42] above) which dealt with the PPG candidate unit and PPG's NOD. There are no minutes of this meeting, given its nature; but some handwritten and typed-up notes from the OSC side have been provided. These indicate that there was discussion of the possible connection at Castlereagh, which needed to be developed. It was noted that PPG was in the connection queue but did not have a transmission connection offer at that time. The proposed subsea cable across Belfast Lough to facilitate potential connection at Kilroot was also discussed. It further appears to have been noted that there was presently no bay for PPG at the Kilroot substation because of EPK's GT West project. The notes support the conclusion that the view was taken that the PPG project was not feasible for the purposes of qualification *regardless* of whether it was able to benefit from a spare bay at Kilroot substation because, in any event, the "timelines for this [are] too long."

[68] The meeting of the SEM-C which dealt with qualification was held over three dates, as discussed above. The decision in relation to PPG was made on 4 November and is addressed at paras 25-29 of the minutes. The OSC introduced the analysis of the case from the second CRMT memo and the issue was then discussed. The Committee noted the Board's determination in the case, along with the NOD which had been submitted and the further correspondence sent on behalf of PPG to the RAs (pre-action protocol letters of 21 October and 1 November 2024). The advice to

the Committee in relation to this application in the second CRMT memo was as follows:

> "**Prime Power (Belfast) (rejected under E.7.2.1(f) – not feasible)**
>
> OSC do not consider that the TSOs provided material new information (over and above that which was already in the possession of the developer) on this unit at this meeting and in particular information that is not otherwise covered in the CMDRB decisions. Further it is noted that Millar McCall Wylie on behalf of Prime Power Generation Ltd wrote to the UR on 21 October and 1 November, these letters were reviewed as part of this consideration.
>
> An aspect of the CMDRB considerations and the subsequent correspondence received from Millar McCall Wylie relate to the potential availability of an option for Prime Power to connect to the grid via the Kilroot sub-station. Prime Power argue that this option has now become available due to the quashing of planning permission for EP Kilroot GT West. Prime Power argue that as this planning permission is void, their project is next in line for a bay at this sub-station.
>
> A significant aspect of Prime Power's arguments relate to the LCTA connection options available. Given the uncertainty in relation to planning at Kilroot GT West, as outlined above, there is clearly uncertainty as to whether a connection at Kilroot sub-station would be the LCTA solution. Overall, a high level of uncertainty remains over the potential connection options for this unit and overturning the FQD (and allowing its participation in the upcoming capacity auction) would potentially raise significant security of supply and competition issues.
>
> The OSC consider there is insufficient justification to recommend overturning the FQD in regard to this unit."

[69] The key passages in the SEM-C minutes (at paras 27-28) are as follows:

> "27. Members noted PPG's position that the loss by EPK of the offer from SONI to connect at the Kilroot Sub-station (KSS) would provide it with the opportunity to connect its project at that point instead of at the

> Castlereagh Sub-station (CSS). Members also noted OSC's report as to the uncertainty over that matter (i.e., the loss of EPK's connection offer). In the view of members, irrespective of whether EPK would or would not retain its connection offer in respect of the KSS, the question for the Committee was whether they considered that it would not be feasible (within the meaning of E.7.2.1(f)) for PPG to deliver its project either (as the SOs had proposed) by connecting it at the CSS or (as PPG) was arguing at the KSS.
>
> 28. Turning to the material before the Committee on that question, members did not see anything which encouraged them to take a more favourable position than the SOs (again, irrespective of whether EPK would or would not retain its connection offer in respect of the KSS) on the question of feasibility of delivery either via connection at the CSS or at the KSS. Indeed, members thought that adopting the approach to feasibility for which PPG contended could pose both security of supply and competition risks."

[70] The final notification of this decision on the CMP on 7 November 2024 was as follows:

> "REJECT_ NOT_FEASIBLE Connection of this project to the 275 kV transmission system is not feasible in the timeframe."

[71] There are a variety of matters in dispute between the parties in the first case. The central issues raised when the case was initially pleaded were (i) whether the SEM-C was wrong to consider that Castlereagh was the relevant LCTA connection (in light of the text set out in the preceding paragraph); (ii) whether it should (instead or as well) have identified Kilroot as the LCTA connection; and (iii) in that event, whether it was wrong to conclude that connection to Kilroot was not feasible within the relevant timeframe. In the course of the proceedings some additional grounds have been added and the focus of the argument has shifted somewhat.

[72] PPG sent a pre-action protocol letter on 1 November 2024. A response on behalf of the UR, acting through the SEM Committee, was sent by O'Reilly Stewart, Solicitors on 8 November 2024. These proceedings were then commenced on 13 November 2024.

Factual background in the EPK case

[73] EPK submitted its original application for qualification of GT West for the relevant auction on 4 June 2024, completing the relevant pro forma supplied by the SOs. Section 2 of that form required EPK to identify the earliest and latest points at which milestone dates could occur for the project. These milestones are all defined terms within Chapter J of the CMC. The first milestone date is "Substantial Financial Completion" (SFC), which is the date when all Major Contracts and Finance Documents (as defined) in respect of the proposed project are in full force and effect. EPK identified the earliest and latest dates for SFC as between 15 June 2025 and 17 June 2026.

[74] The last step is "Substantial Completion" (SC). In order to qualify a candidate unit proposing new capacity for a capacity auction, the SOs must be satisfied that SC of the unit can be achieved prior to the start of the relevant capacity year (see section E.7.5.1(c) of the CMC, set out at para [36] above). EPK proposed dates for the SC of the GT West project as being as early as 3 April 2028, extending to as late as 30 September 2028. The deadline which it was required to meet for qualification was SC before the start of the relevant capacity year which, in this instance, was 1 October 2028. Accordingly, the latest date proposed by EPK for SC was the last available, permissible date. It stresses, however, that this was only on the very worst-case scenario.

[75] EPK also emphasises that it had from June 2024, when it applied for qualification in the capacity auction, until the end of September 2028 to achieve SC. In total, this amounted to a period of some 51 months. If its earliest date of achieving SFC as specified in its application was achieved (15 June 2025), that would allow it a period of 39 months to achieve SC before the 1 October 2028 deadline. If it only achieved its latest date for SFC, the construction period between SFC and SC would be reduced to a period of 27 months. A consistent theme of its case has been that this was never intended to be the *actual* construction period but only the least amount of time it could foresee itself as having (on the worst-case scenario), which it still considered to be achievable.

[76] EPK was notified that its application had provisionally been rejected by way of PQD on 19 August 2024. The reason given was in the following terms:

> "REJECT_PLAN Not clear how CCGT can be constructed in 27 months from Commencement of Construction to Substantial Completion. Construction schedule closer to 40 months expected. Where more detailed schedules can be provided these can be considered. Commissioning timeline too short."

[77] On 20 August 2024 EPK responded, complaining that the PQD wrongly focused on the worst-case scenario which it did not expect to transpire. The period of 27 months only arose taking the latest identified dates from SFC to SC and leaving out of account the earliest possible dates, when there were "many interdependencies

between the two sets of dates." EPK also queried whether 40 months was in fact required for construction of the CCGT plant. In the experience of its parent company, a period of 30-36 months was thought to be more typical. It sought a review of the PQD making the point, inter alia, that it already held a transmission connection offer from SONI. The SOs responded on 6 September 2024, rejecting the review request. The reasons provided included the following:

> "The System Operators' assessment considers a worst-case scenario. It is not clear to the System Operator how the project schedule is being constructed and what assumptions have been made in order to understand the feasibility.
>
> On this basis the System Operators are minded to uphold the original decision to provisionally not qualify this Unit. However, where a detailed baseline schedule for this project can be provided, the System Operators can consider this when submitting its Final Qualification Decisions to the Regulatory Authorities in accordance with E.9.4.2 of the Capacity Market Code."

[78] EPK understandably, given the wording of this response, considered that it was being invited to provide a more detailed schedule showing that its proposed timescales were credible. It filed a notice of dispute on 19 September 2024 and provided a Gantt chart (a line-by-line programme outlining the necessary steps to construct the unit) showing a breakdown of the proposed programme schedule and a revised implementation plan. The purpose of this exercise was essentially to show that it was possible to construct a power station in 27 months.

[79] As a notice of dispute had been served, the issue of EPK's qualification also proceeded to a hearing before the CMDRB. EPK rely upon the fact that the SOs' submission to the Board accepted that the construction of the candidate unit was not "entirely infeasible." At the same time, the SOs' submission explained again that the SOs were required to consider a range of scenarios including a worst-case scenario. They indicated that they had taken into account the implementation plan provided by EPK but considered that this "stands at odds with [the SOs'] own experience of the delivery timescales associated with New Capacity." They did not consider it prudent to accept the implementation plan at face value in these circumstances and remained concerned at the significant ramifications of non-delivery of this project. However, the SOs continued to invite EPK to provide additional information, which they indicated they may take into account in the submission of their FQD to the SEM Committee.

[80] The hearing of EPK's dispute took place before the Board on 30 September 2024. This applicant also relies upon the fact that the Chair observed that the SOs were to meet with EPK to discuss their requirements for the implementation plan.

The SOs sought further information by email of the same date, confirming that they were reviewing the Gantt chart supplied with EPK's dispute submission and raising a number of queries for it to address. First, they observed that the Gantt chart and implementation plan were still working to the *latest* dates. Second, they were concerned that EPK appeared to be contemplating ordering major equipment and undertaking civil works *prior* to Substantial Financial Completion (SFC). Third, the statuses of EPK's planning and permitting activities were not included. The SOs' email therefore sought the "actual master plan" which EPK was working to and a revised and signed implementation plan reflecting this, that is, the plan sitting between the earliest and latest dates which had previously been identified which was viewed as realistic rather than unduly optimistic or pessimistic.

[81] A meeting then took place between EPK and the SOs on 3 October 2024, after the Board hearing but before it had issued its determination. It is clear that there was a parallel process of discussion or negotiation between EPK and the SOs running alongside the formal hearing of the dispute; and it seems that this was either encouraged by, or at least acquiesced in, by the Board. The EPK note of the meeting with the SOs on 3 October, which has been exhibited in these proceedings, suggests that the SOs wanted a "realistic schedule" and detail of how much expenditure or works were planned to occur before SFC. The note also indicates that the SO representative (Mr Downey of EirGrid) was understood to have said that they "were not wedded to 40 months but that this may put too much pressure on SFC" and "this could be shortened to say 36-38 months in order to provide more time for negotiating major contracts" (or words to that effect).

[82] This meeting was followed by a further email from EPK to the SOs on the same date. This included all of the information which EPK considered the SOs might reasonably need to determine the application, based on their discussion with the SOs earlier that day ("the 3 October materials"). As requested, EPK provided a revised implementation plan and an updated Gantt chart. The implementation plan provided on this occasion was said to supersede the previous submissions. The chart had been prepared by engineers within EPK's parent company. It was based on providing 40 months from SFC to SC overall. The email noted that:

> "We've also referenced the relevant planning/permitting activities necessary to achieve SFC. The project will rely on the extant 1973 planning approval for generation at Kilroot Power Station (the same as GT6 and GT7)."

[83] The reference to the 1973 planning approval arises because, as discussed above (see paras [57]-[58]), EPK would have known at that stage that the planning permissions granted on foot of its planning applications made in 2022 ("the 2022 permission") had been quashed. EPK's new position, described further below, was that it was able to complete the GT West project without the 2022 permission, relying simply on the planning permission relating to the Kilroot Power Station granted in 1973.

[84] EPK's email of 3 October also noted as follows:

> "As we discussed our assumptions for the Latest Dates in this submission are based on a 'reasonable' case rather than the absolute 'worst case' we assumed previously. We apologise if our previous 'worst case' assumption has led to confusion, and we are pleased that we now have an agreed basis on how to determine the 'Latest Dates' which will help us both for this and future submissions."

[85] Along with the email and additional materials provided on 3 October, EPK also submitted a new version of the qualification application with a revised section 2, setting out the schedule identifying the earliest and latest dates for achieving the milestones set out in the CMC. Now, the earliest date for SFC was identified as 3 February 2025 and the latest date for it was 3 June 2025. Even assuming the latest date, the table allowed 39 months for construction after SFC. If the earliest date for SFC was achieved, that allowed a possible 43 months for construction before the commencement of the relevant capacity year. The Gantt chart proceeded on the basis that a date between these two was realistic (3 March 2025).

[86] The Board's decision in the EPK case was issued on 9 October 2024. However, this related only to the original implementation plan and did not engage with the updated information contained in the 3 October materials, which had been supplied by EPK to the SOs after the Board hearing. The SOs' position in the hearing had been that 40 months was the standard construction period for such a project, based on their previous experience; and that the implementation plan and chart which the applicant had provided was designed to show that the worst-case scenario of 27 months was achievable. It was perhaps unsurprising, therefore, that the Board did not uphold the EPK dispute. The Board held that the SOs had "raised reasonable concerns in relation to the timelines required to construct and commission the Unit." In doing so, the Board considered that the SOs were exercising a prudent judgment. It held that the SOs were entitled to reject the EPK candidate unit's application for qualification under both section E.7.5.1(b) and (c) of the Code.

[87] However, as appears above, there was still engagement between EPK and the SOs in the background which really superseded the debate which had been had before the Board. In those circumstances, EPK wrote to the SOs seeking to ensure that the updated information it had provided (particularly on 3 October) would form part of the deliberations leading to their FQD, in conformity with the requirements of section E.9.4.2(d) of the CMC. EPK complains that it did not receive a meaningful response from the SOs between 3 October and 15 October, when the first FQD spreadsheet was passed to the SEM-C. A holding response was received on 8 October indicating that the SOs were reviewing the submitted information and hoped to provide an updated view later that day, which was not forthcoming. A formal letter was sent to the SOs on 23 October seeking reassurance that the FQD

would reflect the new information. Mr Downey of EirGrid responded on 24 October to acknowledge receipt of this letter; and to apologise for not providing an update as he had previously said he would. Mr Downey indicated that he would seek to provide an update as soon as possible. That also did not occur, as far as the evidence suggests.

[88] Additional materials disclosed in the course of these proceedings give some insight into what the SOs' thinking may have been at that time. From EPK's perspective, however, it felt it was being stonewalled in the face of increasingly urgent enquiries. Accordingly, EPK decided to write directly to the UR (together with the SOs) on 31 October 2024 providing the 3 October materials to try to ensure that the UR (and SEM-C) understood its position.

[89] The reference in the preceding paragraph to materials which have recently been disclosed is to emails passing between Mr Downey of EirGrid and Ms Watson of SONI on 15 October. That date was the deadline within the capacity auction timetable for submission of FQDs. EPK had been pressing Mr Downey for an update further to their meeting on 3 October, including in a further email on the morning of 15 October. Mr Downey drafted a response to be sent to EPK "regarding their efforts to address the issues for GT West" which he shared with Ms Watson of SONI for approval. The substance of the draft response was as follows:

> "The System Operators consider that while the changes are positive in respect of the feasibility of the construction schedule, they have come at the expense of the time available to reach Substantial Financial Completion. At this stage, the System Operators continue to consider that the revised Implementation Plan is not achievable. In particular, the plan does not allow time to regain the planning permission that the project has relied on to date. We note that EP are seeking to rely on the original 1973 planning permission for the GT West Works. The System Operators, acting reasonably, in accordance with E.7.1.2 of the Capacity Market Code, do not consider that this is credible given the nature of the proposed works and the history of the planning applications in respect of these works.
>
> We note that validity of GT West's planning permission is a matter under consideration by SONI formally in respect of the Connection Offer and this is a separate matter for which no decision has been reached by SONI. The System Operators will give due consideration to any decision reached by SONI with regard to the Connection Offer and update the Regulatory Authorities accordingly. For the time being, in accordance with E.7.5.1 of the Capacity

> Market Code, the System Operators intend to submit a Final Qualification Decision to reject GU_501470."

[90] Ms Watson responded later that evening in the following terms:

> "We are not in a position to give a formal view on the planning permissions for GT West until we have followed due process and careful consideration so all we can do at this stage is state facts, I therefore suggest the following instead. **It's really important we do not give a decision on the planning permission or offer through the capacity market as we have not reached a conclusion yet**." [bold emphasis in original]

[91] Ms Watson suggested amendments to Mr Downey's proposed response which retained most of his text, including that the SOs continued to consider that the revised implementation plan was not achievable and that the changes to the construction schedule had come at the expense of the time available to reach SFC. However, whilst Ms Watson's suggested text referred to the quashing of EPK's planning permission, it merely went on to say that this was a matter that was under consideration by SONI, and that no decision had been reached. Again, it indicated that the SOs would give due consideration to any decision reached by SONI in relation to the EPK connection offer and update the RAs accordingly. Some time later, Ms Watson emailed Mr Downey again to suggest that "a quick chat may do no harm before sending" with a view to including "legal view from those working on the planning permissions matter with us." Whether such a conversation occurred or not has not been addressed in the evidence but, in any event, it seems that no response (in either form) was sent to EPK. Mr Dunlop submits, however, that these emails indicate that the key – indeed, only – concern exercising the SOs at this stage was the impact which the quashing of the planning permission would have on the achievement of SFC.

[92] The FQD submitted to the SEM-C for approval was in the following terms:

> "REJECT_PLAN Not clear how CCGT can be constructed in 27 months from Commencement of Construction to Substantial Completion. Construction schedule closer to 40 months expected. Where more detailed schedules can be provided these can be considered. Commissioning timeline too short."

[93] A few days later, there was the meeting between the OSC and the SOs on 18 October 2024, at which the issues raised in the notices of dissatisfaction were discussed. The OSC notes suggest that the issue of the planning permission for the project was a significant (and seemingly the first) topic of discussion, with an awareness of the fact that EPK was relying on the 1973 permission, and a query over

the effect the quashing of the 2022 permission would have on EPK's connection offer. There also appears to have been an awareness that EPK was threatening legal proceedings to restrain the termination of its connection offer. One note comments that EPK was now saying that their 1973 planning permission was sufficient, "which begs the question why was [a] new [planning permission] applied for, or put another way, calls into question the suggestion that [planning permission] is not required." The timelines for the build also appear to have been discussed, with the SFC date being another significant issue, and an awareness that the dispute which had proceeded before the Board was about the delivery timeframe.

[94] As noted above (see para [46]), the second CRMT memo suggested that, with one exception, there was no new information provided by the SOs at the 18 October 2024 meeting. The exception appears to have been in EPK's case because the memo immediately continues as follows:

> "In relation to the Kilroot GT West project, the SOs referred to planning permission associated with the project having been quashed and consequently SONI were in the process of terminating the connection offer. They flagged that this termination process was something that the developer (EP) were disputing via court proceedings (injunction) and that the developer's view was that a 1973 planning permission for the site was sufficient.
>
> While this material was not covered in the CMDRB decision, the quashing of the planning permission associated with the project is in the public domain and is something that the RAs were aware of beforehand. It is also referenced in the pre-action correspondence mentioned above which had been received by the RAs in relation to [redacted]. That correspondence also states an understanding that SONI have issued a Notice of Termination to the developer in relation to its connection offer. In addition, the pre-action correspondence received on 31 October on the Kilroot GT West project suggests that that project will be constructed under the 1973 permission mentioned above and that the connection offer remains in effect.
>
> In light of the above, OSC does not consider it necessary to provide a right of reply to [redacted] or EP on the information concerning the quashing of the planning permission before the SEM Committee reviews the relevant FQDs."

[95] The second CRMT memo contains a further, relatively detailed discussion of the position in relation to the EPK project. Much of this overlaps with the earlier section quoted above. As to the substance of the FQD, the SEM-C was advised in the following terms:

> "**EPUKI GT West (rejected under E.7.5.1(b) – Implementation Plan dates not achievable)**
>
> For this project the TSOs referred to planning permission associated with the project having been quashed and consequently SONI were in the process of terminating the connection offer. The TSOs flagged that this termination process was something that EP were disputing via court proceedings (injunction), and EP Kilroot's view was that a 1973 planning permission for the site was sufficient.
>
> Whilst this material may not have been covered in the CMDRB decision, the quashing of planning permission associated with the project is in the public domain and is something we were aware of beforehand. In EP Kilroot's latest letter (31 October), they suggest the GT West project will be constructed under a 1973 planning consent and the grid connection offer remains in effect. In this letter EP Kilroot also highlight and provide a copy of a revised implementation plan, which they provided to the TSOs on 3 October 2024.
>
> Firstly, in relation to the CMDRB decision for this unit, a significant aspect was the feasibility of its Implementation Plan. EPK originally submitted an Implementation Plan outlining a construction timeframe of 27 months, which the TSOs did not consider feasible. EPK then state they submitted a revised Implementation Plan on 3 October. This does not appear to have been considered by the CMDRB. The TSOs submitted their FQDs to us on 15 October and we met with them on 18 October. At the meeting on the 18 October the TSOs made reference to discussions around the revised Implementation Plan, without getting into the detail. EPK make reference in their latest correspondence to a lack of response from the TSOs to clarify their position on the revised Implementation Plan. We do not have a specific response on this particular issue.
>
> Secondly, with the planning decision associated with Kilroot GT West project being recently quashed, as noted

> above, this led to SONI initiating a process of terminating their connection offer. However, EPK have argued their 1973 planning permission remains valid (as does their connection offer). As a result, there is a high degree of uncertainty over the status of the planning permission required for GT West project. Hence, overturning the FQD for this unit (and allowing its participation in the upcoming capacity auction) would potentially raise significant security of supply and competition issues.
>
> The OSC consider there is insufficient justification to recommend overturning the FQD in regard to this unit."

[96] The later minutes of the SEM-C indicated that, at its meeting of 4 November, in response to questions put by members, the OSC "could not confirm whether the SOs had expressed a view at the 18 October meeting as to the matter of achievability in particular in relation to the revised Implementation Plan submitted to the SOs on 3 October." This is consistent with the content of the CRMT memo that the OSC did not have a "specific response" on this issue and had not gotten into detail with the SOs about it. It seems the SEM Committee probed the OSC on that matter and did not receive any clear answer.

[97] The respondent accepted the FQD from the SOs and rejected EPK's request that it be overturned. The decision published in relation to this on the CMP on 7 November was in the following terms:

> "REJECT_PLAN Based on the latest Implementation Plan provided in the Qualification Process on 3 Oct 2024 the System Operators consider that Substantial Completion of the Generator Unit cannot be achieved prior to start of the Capacity Year. In accordance with E.7.5.1(c) of the Capacity Market Code the Application for Qualification is rejected."

[98] The key passages of the SEM-C minutes in relation to the EPK unit are in the following terms:

> "32. Members also noted that EPK appeared to be contesting the withdrawal of its connection offer in respect of the KSS [Kilroot Sub-Station] and disputing the relevance of the quashing of the planning permission for its project on that matter. However, members took the view that the central question for them was whether irrespective of whether EPK would or would not retain its connection offer in respect of the KSS, they considered the

implementation plan dates for the project to be achievable (within the meaning of E.7.5.1(b)).

33. OSC, in response to members' questions, could not confirm whether the SOs had expressed a view at the 18 October meeting as to the achievability in particular in relation to the revised implementation plan submitted to the SOs on 3 October. However, it was also recalled that the FQDs submitted by the SOs on 15 October maintained the position (i.e., after the SOs had had the opportunity to reflect that information supplied on 3 October) that it was not reasonably demonstrable that the proposed CCGT could be constructed in 27 months (as opposed to something closer than 40 months) in the absence of more detailed schedules. On that basis, members did not think it would be necessary for them to invite OSC to make further enquiries of the SOs as to their views on the revised plan.

34. Turning to the material before the Committee on the question of achievability, members did not see anything which encouraged them to take a more favourable position than the SOs (again, irrespective of whether EPK would or would not retain its connection offer in respect of the KSS) on that question, notably in light of EPK's revised implementation plan (which they viewed as having been produced by the developer at a relatively late stage and in a relatively short space of time). Indeed, members thought that there would be both security of supply and competition risks in doing so."

[99] The minutes also specifically record that the members had received and read the EPK correspondence of 31 October 2024.

[100] At 12.54 pm that day (4 November, probably in the course of the SEM-C meeting), Marie Therese Campbell, an official within the UR's office who reports to Mr Broomfield sent a text message to Mr Downey within EirGrid asking whether it was correct that EPK "never received any feedback from the SOs on their REVISED implementation plan" [capitalised emphasis in original]. Mr Downey responded at 3.59 pm saying, "We haven't responded to them on this yet but final [qualification] decision to you reflects consideration of revised IP and still rejects (as SFC timeline too tight)." This appears to suggest, as the emails discussed at paras [89]-[91] may also be thought to, that the length of the construction period was no longer the issue but, rather, the achievement of the SFC in time for the longer construction period to commence.

[101] The SEM-C decision published on the CMP on 7 November was in the following terms:

> "REJECT_PLAN Based on the latest Implementation Plan provided in the Qualification Process on 3 Oct 2024 the System Operators consider that Substantial Completion of the Generator Unit cannot be achieved prior to start of the Capacity Year. In accordance with E.7.5.1(c) of the Capacity Market Code the Application for Qualification is rejected."

[102] Although this would have been unknown to the respondent at the time when the key decisions were made by the SEM-C in this case, on 8 November 2024 EPK issued a writ seeking injunctive relief to restrain SONI from terminating its connection offer and declaratory relief to the effect that it had satisfied the conditions of its accepted connection offer.

Summary of the parties' positions in the first case

[103] PPG relies upon a range of proposed grounds of challenge in respect of the impugned decision. These include illegality; failure in the respondent's duty of inquiry; taking immaterial considerations into account; leaving material considerations out of account; procedural unfairness; irrationality; breach of legitimate expectation; and breach of policy. Although it is accepted that the UR, acting through the SEM-C is the only respondent in the case, PPG argues that it adopted and maintained earlier errors made by the SOs and/or the CMDRB, such that its decision is "infected by those errors." Several key strands of PPG's submissions – which give rise to overlapping grounds of judicial review – are as follows:

(a) It was the respondent's responsibility to determine a LCTA connection on the basis of those connections which are actually available. The Castlereagh substation was, in effect, not available for connection *at all*. It therefore should not have been considered to be, or have been determined to be, the applicant's LCTA connection. In short, it should have been ignored.

(b) Instead, the applicant's LCTA connection should have been considered to be the Kilroot substation. That is because PPG's project was first in the queue for, and entitled under the connections register to, the next available bay for connection at Kilroot (following the quashing of the 2022 planning permission in relation to one of the existing bays which had been allocated to EPK).

(c) In failing to identify Kilroot as the applicant's LCTA connection, the respondent (and the earlier decision-makers, the SOs and the CMDRB) failed to discharge their duty of inquiry by looking into this option in adequate

detail. Alternatively, they failed to consider other possible options, such as Ballylumford.

(d) The respondent and earlier decision-makers have wrongly taken into account matters of commercial viability which are separate to the question of feasibility under the CMC and legally extraneous considerations.

(e) The meaning accorded to the word "feasible" was in error because it required an applicant for qualification to demonstrate that it was more likely than not able to connect to the relevant substation in the available timeline, placing an unwarranted and wrongful burden on applicants for qualification.

(f) The respondent also unlawfully relied upon an unpublished policy, or acted in a procedurally unfair way, by failing to disclose the approach it was going to adopt to the meaning of the word "feasible" in the Code to the applicant, the public, or the earlier decision-makers.

(g) The respondent wrongly took into account an erroneous statement of reasons for refusal provided by the SOs and/or the erroneous or inconsistent decisions of the earlier decision-makers.

(h) The respondent wrongly left out of account the evidence it provided from OWC as to the feasibility of a subsea connection between its candidate unit and Kilroot.

(i) The respondent and earlier decision-makers have failed to give any or adequate reasons for their decisions, particularly (although non-exhaustively) as to why the evidence from OWC in relation to feasibility was not accepted. The SOs wrongly considered themselves restricted to a maximum of 512 characters, so fettering their discretion, and wrongly conflated and confused reasons related to refusal under sections E7.2.1(f) and E.7.5.1(b) of the Code respectively. The respondent has not provided any reasons at all.

(j) The respondent also approved and imposed an unfair timetable – which was compounded by the failure to give adequate reasons – which did not provide sufficient time for a disappointed applicant to bring proceedings before the court "in a timeframe which will allow reasonable consideration of all issues by the Court."

(k) The decision of the respondent and those of the SOs and the CMDRB are irrational in the *Wednesbury* sense (in particular, by concluding that Castlereagh was the applicant's LCTA connection and/or that connection to Kilroot was not feasible).

(l) Non-feasibility is a discretionary and not a mandatory reason for rejection of a qualification application and the respondent, and the earlier decision-makers,

failed to separately consider whether this issue ought or ought not to have resulted in the PPG candidate unit's exclusion from the auction. This was compounded by an erroneous conflation of reasoning for refusal under sections E.7.2.1(f) and E.7.5.1(b) respectively.

[104] In response, some key strands which might be identified from the respondent's argument include the following:

(a) The SEM-C's decision has been accepted by PPG as "final and binding" under section E.9.4.8 of the CMC, such that the applicant should not be permitted to challenge it in these proceedings at all, which should simply be dismissed on that basis.

(b) The applicant has failed to discharge its duty of candour to the court in a number of respects, in particular because, in Mr McMullen's first affidavit, there is no averment dealing with problems over PPG's own planning permission; with the delay in it obtaining a connection offer from SONI; or dealing with the regulatory (and other) hurdles standing between PPG and its connection under Belfast Lough to Kilroot.

(c) The challenge is, at heart, a merits challenge simply because PPG does not like the result of the decision which the respondent has reached. However, this was the legitimate exercise of expert and informed judgement.

(d) The SEM-C minutes show that the Committee adopted its own approach to the interpretation of the word "feasible" in the Code, which was unimpeachable. This did not represent the application of an undisclosed "policy" and can give rise to no legitimate complaint by the applicant.

(e) The respondent took into account a situation where PPG's potential connection to the grid was at Kilroot; but this does not avail the applicant since, even on that basis, the project is not feasible within the appropriate timescale.

(f) There is no plausible ground to suggest that the SEM-C's decision was irrational, either in substance or as to the level of inquiry it undertook.

(g) The OWC report was taken into account and given appropriate weight but merely illustrated a range of problems with the feasibility, within time, of the proposed connection at Kilroot.

(h) The likely cost of a project can factor into an evaluation of whether or not it will happen at all or the time it is likely to take. Although cost may not be relevant, significantly or at all, to *technical* feasibility, it is certainly relevant to the feasibility of completion within the relevant time.

(i) There is no duty upon the SEM-C to provide reasons under the Code in the circumstances of this case. In any event, the approved SEM-C minutes which have now been disclosed provide adequate reasons.

(j) The timetable adopted was not unfair and permitted the applicant, as it has, to seek the intervention of the court.

Summary of the parties' positions in the second case

[105] EPK also relies upon a range of grounds, including illegality; leaving material considerations out of account; procedural unfairness; and irrationality. Its case is less widely pleaded than that of PPG. Several key strands of EPK's submissions – which again give rise to overlapping grounds of judicial review – are as follows:

(a) The SOs wrongly adopted a 'worst case scenario' analysis. They did not consider what was *likely* to happen but simply worked from the latest date proposed for SFC (noting that this reduced the construction period down to 27 months). This error flowed through to the UR's decision-making, which resulted in its applying an incorrect test under the CMC.

(b) The UR failed to discharge its duty of inquiry by obtaining relevant information which was required. In particular, the UR failed to make adequate inquiry into the position adopted by the SOs with regard to the achievability of the revised implementation plan for GT West at the meeting between OSC and the SOs on 18 October.

(c) The respondent took irrelevant considerations into account and/or failed to consider relevant considerations. In particular, EPK complains that it was a particularly egregious error for the SEM-C to accept the SOs' position that it was not "reasonably demonstrable that the proposed CCGT could be constructed in 27 months as opposed to something closer than 40 months." It also complains that the respondent's decision did not reflect the updated information contained in the 3 October materials.

(d) The UR minutes noted that EPK was "contesting the withdrawal of its connection offer", which is entirely inaccurate because its connection offer has not been withdrawn and remains in force. This is a serious factual error which undermines the respondent's decision.

(e) The respondent has failed to give reasons for its decision and the applicant does not know the basis upon which it is said that it does not meet the requirements of section E.7.5.1(c) of the CMC

(f) In all of the circumstances, the respondent has failed to comply with the objectives and duties set out in Article 9 of the 2007 Order and/or the CMC Objectives set out at section A.1.2.1 of the Code, particularly by failing to

facilitate the participation of undertakings such as it in the provision of capacity and failing to promote competition.

(g) EPK also adopts PPG's argument in relation to the general unfairness of the auction timetable by reason of the limited time for challenge to qualification decisions before auction commencement.

[106] The key elements of the respondent's case in the EPK challenge are as follows:

(a) It repeats its objection that the applicant has agreed that the SEM-C's decision on its FQD is final and binding so that it is not properly open to EPK to pursue this challenge.

(b) The minutes of the SEM-C meeting show that it did not simply adopt a 'worst-case scenario' approach. It simply applied the tests set out in the Code which, in this case, related to whether SC was "achievable"; and EPK does not complain about the legal interpretation adopted by the respondent in relation to that term.

(c) SEM-C was aware of its ability to seek further information but its decision not to do so was not irrational, particularly in the context of the complex and pressured chain of regulatory decisions and events in which it was operating.

(d) The minutes of the meeting show that SEM-C did not conclude that EPK's connection had been lost. Rather, it determined the issue without regard to the connection status of EPK. Given the imperative of timely, efficient decision-making it was right to do so.

(e) Just because an implementation plan contains particular dates or milestones does not mean that these must be accepted uncritically by either the SOs or the RAs, each of whom bring expert judgement to bear on the issue. It was not irrational for SEM-C to conclude that the timetable was not achievable.

(f) As in the PPG case, the respondent contends that it was under no duty to provide reasons but that, in any event, it provided adequate reasons in the minutes.

(g) There has been no breach of the respondent's obligations under Article 9 of the 2007 Order.

The 'quasi-ouster' issue

[107] The respondent makes the case that each application should be dismissed on the basis that each applicant has agreed, in accordance with the terms of the CMC, that its determinations which are under challenge in these cases will be "final and

binding" upon them. That arises by virtue of section E.9.4.8 of the Code, which provides:

> "The Final Qualification Decisions approved, or deemed to have been approved, by the Regulatory Authorities (and as substituted by the Regulatory Authorities) under this section E.9.4 are final and binding on the Parties."

[108] Although the respondent recognises that this provision in the Code could not be sufficient to formally oust the jurisdiction of the High Court (as a provision in an Act of Parliament might be), it nonetheless urges the court to dismiss the applications on the basis that, as a matter of contractual obligation, the applicants have each given up any right to pursue a challenge in court against a qualification decision of the RAs. In his submissions, Mr McGleenan referred to this as a "quasi-ouster" argument. It is appropriate to deal with it first since, if it were correct, it may provide a complete answer to the challenge in each case. The respondent drew attention to the terms of the Capacity Market Framework Agreement (CMFA), which is made as a deed and to which each applicant is a party, by which parties agreed to "observe, perform and be bound by" the CMC, warranting at the same time that they had fully satisfied themselves as regards the nature and extent of the CMC.

[109] To resolve this aspect of the respondent's argument, the court has to construe the provision set out above upon which the respondent relies alongside those other portions of the Code which clearly contemplate recourse to litigation. As noted above (see para [28]), subject to the provisions of the Code relating to the Dispute Resolution Process, all parties to the CMC submit to the jurisdiction of the courts of Ireland and Northern Ireland, pursuant to section B.2.1.2, in relation to disputes. Section B.2.1.2 states as follows:

> "Subject to the provisions relating to the Dispute Resolution Process, the Parties hereby submit to the jurisdiction of the Courts of Ireland and the Courts of Northern Ireland (and no other court) for all disputes arising under, out of, or in relation to this Code."

[110] Section B.14.2.7 of the Code is also relevant. It provides as follows:

> "The provisions set out in this Dispute Resolution Process shall not prejudice or restrict any Party's entitlement to seek interim or interlocutory relief directly from the appropriate Court or Courts having competent jurisdiction."

[111] Section B.14.10.1 is also relevant. It is in the following terms:

> "Any Dispute in respect of which a notice of dissatisfaction has been issued may only be finally settled by proceedings in a Court having competent jurisdiction."

[112] Section B.14.10.2 makes provision permitting a disputing party to adduce evidence or raise arguments in court which were not put before the CMDRB. Section B.14.10.3 makes provision to the effect that a disputing party may not commence proceedings prior to attempting to resolve the dispute through the Code's dispute resolution procedure and, if they do so, those proceedings should be stayed.

[113] In the respondent's submission, what the provisions of Chapter B of the Code referred to above contemplate is only a court challenge to a decision of the CMDRB (or, possibly, to a decision of the SOs who are subject to the jurisdiction of the CMDRB) but not any decision of the RAs which stand *outside* and above the dispute resolution process set out in the Code, whose decisions are final and binding.

[114] That is a superficially attractive argument. However, what may be finally settled by proceedings in a court consistently with the Code, pursuant to section B.14.10.1, is "any Dispute." To understand, what might therefore be the subject of court proceedings under the Code, requires one to turn to the definition of a 'Dispute' in section B.14.1.1. This is drafted in very wide terms indeed:

> "Subject to paragraph B.14.1.2, a "Dispute" means any claim, dispute or difference of whatever nature between any of the Parties howsoever arising under, out of or in relation to this Code or the Capacity Market Framework Agreement (including the existence or validity of the same)."

[115] It seems that the RAs, and the SEM-C, may not themselves be parties to the CMC, as that term is defined. However, given the breadth of the definition of the term 'Dispute' as set out above – including any difference of whatever nature howsoever arising under or in relation to the Code – I consider that the Code contemplates the final determination of qualification disputes such as these by the civil courts (provided they have jurisdiction and act within the ambit of their proper constitutional function).

[116] The respondent placed reliance upon the fact that, if it made no determination in relation to a FQD submitted to it by the SOs, this is deemed to be final. Clearly, a decision by the SOs in relation to a FQD would be amenable to judicial review (provided the CMDRB mechanism had first been exhausted). It is difficult to see why the SOs' FQD decision should be insulated from challenge merely by reason of having been deemed final through inaction on the part of the SEM-C. The respondent contends that this may reflect the urgency and time sensitivity of the qualification and auction process; but that is catered for in the auction timetable

itself and in the ability of the court to grant interim relief (acknowledged by the Code at para B.14.2.7).

[117] It also appears to me to be significant that section B.14.10.3 makes express provision that legal proceedings brought by a disputing party should be stayed but only in limited circumstances (where the Code's dispute resolution procedure has not been exhausted and the proceedings are therefore premature), which do not apply here. In each case, the applicant has exhausted the dispute resolution procedure and issued an NOD in respect of the determination of the Board.

[118] Perhaps most importantly, section B.2.1.2 of the Code recognises the jurisdiction of the courts to settle disputes arising under or out of the Code. This is expressed to be subject *only* to "the provisions relating to the Dispute Resolution Process." Those provisions are set out in section B.14 of the Code. The provision upon which the respondent relies (section E.9.4.8) is *not* a provision relating to the dispute resolution process. The general jurisdiction of the courts to resolve disputes under the Code is therefore not subject to it.

[119] I would construe section E.9.4.8 as indicating that there is no further right of recourse within the mechanisms established by the Code for a disappointed applicant for qualification. It does not, in my view, insulate the SEM-C's decision from possible legal challenge. Given the public interest in such decisions being made lawfully, and the very significant commercial and public interests in play, it would be surprising if the Code had the effect of excluding any possibility of legal challenge to the SEM-C's qualification decisions. Much clearer words would be required in order to achieve that. For those reasons, I reject the respondent's contention that the applicant's cases should be dismissed in limine.

Candour

[120] The respondent has raised three concerns about PPG's discharge of its duty of candour to the court in bringing these proceedings (see para [104](b) above). These are that, in the circumstances of the case, the applicant was under an obligation to disclose and explain (i) difficulties with the planning status of its own project; (ii) the delay in it obtaining a transmission connection offer from SONI; and (iii) the regulatory hurdles standing in the way of its planned connection at Kilroot. I have no significant concerns in relation to the third of these. There is somewhat more substance to the first and second but, in neither case do I consider this sufficient to dismiss the applicant's claim or withhold relief.

[121] An issue was raised by the respondent at the hearing on 15 November in relation to PPG's candour in respect of its own planning permission. That is because a letter had been provided to the RAs, dated 7 November, by EPK which suggested that planning permission was not in place for PPG's candidate unit; and no mention whatever of any planning issues with its own project had been mentioned in the evidence filed with PPG's application. This issue was then specifically dealt with in

a second affidavit of Mr McMullen. In short, the EPK contention was that the planning permission for the PPG candidate unit, granted on 4 April 2019, had expired without having been implemented within the appropriate timeframe and had therefore lapsed. PPG's position is that this planning permission was implemented by the undertaking of sufficient works pursuant to the permission to commence the development before the planning permission expired. It has documented these works and, in order to confirm its position, has lodged an application for a certificate of lawfulness of proposed use or development (CLOPUD) in relation to the proposed development of its project pursuant to the permission. That application has not yet been determined by the local planning authority.

[122] I do not consider this issue to have amounted to a significant lack of candour in the presentation of the applicant's application. The EPK letter was only disclosed on 15 November, after PPG's application for leave to apply for judicial review had been lodged. As far as PPG was concerned, it had no issue with its planning status. Albeit representations had been made to the relevant council in opposition to its CLOPUD application on behalf of an unnamed objector, EPK's own solicitors had responded to these representations and considered that they were without merit. PPG had also been informed by SONI that planning permission is not a condition precedent to the submission of an application for qualification for the capacity auction (although of course it is relevant to obtaining a connection offer and to the achievement of SFC in the course of project development). On balance, I would not consider this to be an issue which warranted the setting aside of leave or the withholding of relief. I cannot know whether the issue will transpire to be as straightforward as PPG believes; but I accept that it took the view at all material times that has been adequately dealt with and will be resolved in its favour.

[123] As to the regulatory hurdles which PPG will face in seeking to connect its project to the transmission system at Kilroot, this is dealt with in some detail in the report provided by OWC, upon which the respondent now relies, and which was exhibited to the applicant's papers. I do not consider there was any attempt to withhold information in relation to those hurdles.

[124] I was more exercised about the issue of the delay in obtaining a connection offer and, specifically, the extension which had been granted to SONI by the UR for the making of such an offer to PPG. As appears from the discussion below, I consider this to be a highly relevant factor in relation to PPG's complaints about failure to determine (or incorrect determination of) its LCTA connection. In my view, given the case PPG was making, the fact and significance of the UR's extension granted to SONI for the making of a connection offer to PPG ought to have been addressed in a more up-front way in its evidence. Nonetheless, the key materials in relation to it, particularly the letter of 13 June 2024 from the UR granting the extension to SONI, was exhibited to Mr McMullen's first affidavit. Again, therefore, there was no attempt to conceal this issue from the court.

Some overarching legal principles

[125] Before turning to the substance of each of the cases, it is appropriate to call to mind a number of important legal principles which should shape the court's analysis.

[126] The first is that the court will be exceptionally slow to interfere with the exercise of the expert and informed judgement of a regulator. For that reason, it seems to me that each of these cases are, in principle, difficult cases for the applicants to mount. With some exceptions, many of the grounds relied upon hinge on the determination by the SEM-C of the feasibility or achievability of complex projects, with multiple hurdles to overcome, being completed within a set timescale. This involves the exercise of judgement, and predictive judgement at that, in a highly technical and complex area with a wide range of variables. Many of the applicants' grounds of challenge (irrationality; ignoring relevancies; considering irrelevancies; and failure of inquiry) resolve to *Wednesbury* challenges. Neither applicant shies away from a straight irrationality challenge. However, in areas such as this, leaving aside errors of law and procedural unfairness, the court's role will be extremely light-touch.

[127] The respondent also makes the powerful point that it is not its decision alone which has reached the conclusion with which each applicant takes issue. Rather, in each case, the qualification issue has proceeded through various layers of expert consideration and decision-making, all to the same effect. The decision that neither applicant's candidate unit should qualify for the capacity auction has been reached by the SOs, not only provisionally but after review; by the independent CMDRB; and, lastly, by the expert regulators acting jointly through the SEM Committee. It is right that the weight that can be placed on those earlier assessments may be significantly reduced where the earlier decision-maker has applied an incorrect interpretation of the Code (as did the CMDRB in the PPG case) or been deprived of relevant, updated material (as was the CMDRB in the EPK case); but the respondent is entitled to place some reliance upon the fact that all of the decision-makers have spoken with one voice on the substantive issue of qualification or not.

[128] As to the discharge of an authority's duty of inquiry upon which each applicant relies – sometimes referred to as the *Tameside* duty – the most helpful, authoritative summary of the approach which the courts will adopt to this is found in the judgment of Hallet LJ in *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261 at paras [99]-[100]. For present purposes, the key principles are that the obligation upon the decision-maker is only to take such steps to inform itself as are reasonable; that it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken, subject only to *Wednesbury* review; and that the court should not intervene merely because it considers that further inquiries would have been sensible or desirable.

The 'preceding decisions'

[129] In the PPG case, only one respondent has been identified at section 2 of the Order 53 statement (which has been amended several times), namely the UR, acting through its SEM-C. The SOs and the CMDRB are specifically noted to be notice parties only. They have been treated as notice parties throughout the proceedings. The CMDRB was not represented at any point. Nonetheless, the applicant has claimed relief, at section 4 of its Order 53 statement, in the form of an order of certiorari quashing the decisions which preceded that of the SEM-C on 4 November, namely the SOs' PQD and FQD in its case and the Board's determination.

[130] I do not consider that this is an appropriate way to proceed. If the decisions of the SOs and the Board were to be the subject of challenge, they should have been named as proposed respondents and have participated as such. Leave was granted on a number of grounds on 15 November on the basis that the UR, as sole respondent, did not actively oppose the grant of leave. This is also a case where the SEM-C chose to make its own qualification determinations. It is not a case where it sat back and allowed the SOs' FQDs to be deemed final pursuant to section E.9.4.7 of the CMC. In my view, the decision made by SEM-C on 4 November supersedes the decisions of the earlier decision-makers. It may be possible for SEM-C to have fallen into error by itself adopting or replicating a legal error made by an earlier decision-maker. Unless that is established to be the case, however, I proceed on the basis that the applicant cannot succeed in challenging the legally effective decision made by SEM-C by reason simply of identifying errors in the approach or decisions of earlier decision-makers. In the EPK case, no such relief is sought against the decisions of the SOs and/or CMDRB, although it (like PPG) seeks to rely upon the errors of earlier-decision makers having been adopted by the final decision-maker.

Error of law or misdirection

[131] An issue of some importance between the parties in the PPG case is the correct meaning of, or approach to, the word 'feasible' in the relevant provisions of the CMC. At times, the applicant's approach has seemed to the effect that 'feasible' means the same as (or little more than) 'possible.' Insofar as that submission is advanced in relation to feasibility within the applicable timeframe, I reject it. The word must take colour from its context. Depending on context, the word 'feasible' can have shades of meaning from (barely) possible, to practical or practicable, to likely. PPG is particularly critical of the CMDRB's approach in its determination relating to the PPG qualification dispute when it adopted the meaning of 'more likely than not.'

[132] The evidence on behalf of the notice parties is that the SOs did not apply a test for feasibility which required an applicant for qualification to demonstrate that delivery of new capacity within the timeframe should be more likely than not. The approach of the SOs was recorded at para 66 of the decision of the Board in the PPG case, namely that 'feasible' in this context means 'reasonably possible.' The Board recorded the PPG submission as being that a project is feasible if it is "simply one that is not impossible." It then cited the Collins Dictionary definition of the word

'feasible', which gave two meanings. The first was "able to be done or put into effect; possible." The second was "likely; probable." The Board considered that the PPG arguments focused on the first of these definitions, but it was not persuaded that this was the appropriate definition of the word 'feasible' in the context of the Code. In para 69 of its decision, the Board said that it agreed with the SOs' and that the term 'feasible' in the context of the Code (particularly at section E.7.5.1(f)) means "probably or more likely than not", which it considered to essentially be the second definition it had cited from the dictionary. At para 89 of its decision, the Board again held that the term 'feasible', as used in the Code, meant 'more likely than not.'

[133] As indicated above, the meaning of the word "feasible" in section E.7.5.1(f) of the Code must take its meaning from its context. The purpose of the qualification stage in capacity auctions is to permit an assessment of undertaking's capacity to deliver electricity capacity for the start of the relevant capacity year. Winning bidders receive capacity agreements, which commit them to be available to supply power when needed. The respondent and notice parties submit that it is critical that successful bidders are able to provide the capacity that they secured through the auction and that the qualification process is designed to filter out unreliable or unfeasible projects to protect the market from capacity shortfalls. That is to ensure that there is security of supply, that consumers are protected and that there is price stability within the market.

[134] At the same time, the assessment of feasibility obviously does not require a completed connection at the time of application; nor absolute certainty that the project will inevitably be delivered on time. One purpose of T-4 capacity auctions is to permit new capacity which is being developed to compete. No project is ever entirely risk free and there will always be some level of uncertainty about how things may work out.

[135] How then should this issue be approached as a matter of law? In my view, the word 'feasible' carries a different shade of meaning in each of its uses in section E.7.2.1(f) of the Code. The reference to the delivery of new capacity being *technically* feasible is much closer to that end of the spectrum where the question is whether it is technically possible. Is there any technical reason why the capacity simply could not be delivered? Provided the delivery of the new capacity is technically possible, the more complex question is whether it is feasible within the applicable time frame. This issue is more predictive in nature and calls for more of an exercise of regulatory judgement. There are more variables to be taken into account and it is not a mere engineering query. In this case, I agree with the position adopted by the SEM-C (and the SOs) that the question is whether in-time delivery is 'reasonably practicable' (which is materially similar in meaning to reasonably possible or reasonably doable). The important point is that this is more than mere possibility. Some assessment of the reasonableness of achieving delivery is required. It is also less than being persuaded that delivery *will* be achieved on the balance of probabilities. Some level of doubt about delivery is permissible but the appropriate level of doubt in all of the circumstances is itself is a question of regulatory judgement.

[136] That an element of judgement is required is, in my view, supported by the provision made in section E.7.1.1 of the CMC referring to the SOs acting reasonably and exercising "the judgement reasonably expected" of a prudent industry operator. The term 'Prudent Industry Operator' is defined in the Glossary of the CMC as "an operator engaged in the electric utility industry which performs in accordance with Prudent Electric Utility Practice." In turn, 'Prudent Electric Utility Practice' is defined as "those standards, practices, methods and procedures… which are attained by exercising that degree of skill, care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator in Europe engaged in the same type of undertaking under the same or similar circumstances." These provisions also helpfully indicate the importance of the SOs (and the SEM-C in turn) taking a *prudent* approach and engaging in a degree of foresight. In making their assessment, the SOs cannot be reckless, closing their eyes and merely hoping for the best. They will, however, be prepared to accept a reasonable degree of risk, based on experience.

[137] Mr McGleenan relied upon the definition of 'new capacity' in support of his arguments. A formal definition is included in the Glossary of the CMC; but a simpler formulation is set out at section C.1.1.2 of the Code which explains some key concepts used in the capacity market. It describes 'new capacity' as "the potential increase in capacity of a Generator, Generator Unit or Interconnector (of a Capacity Market Unit that comprises those units) where that capacity is yet to be commissioned." I do not consider that this materially assists PPG in its case in relation to misdirection or irrationality. In this context, capacity clearly means capacity which is in a position to be offered to the market by means of a connected generator unit.

[138] A sub-argument related to the respondent's interpretation of the word "feasible" in the PPG case was that, since the SEM-C took a different view on that matter than the CMDRB, it had an undisclosed "policy" which it ought to have disclosed to PPG (and others, including SONI and the CMDRB) in accordance with the principles set out in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. I reject that submission for a number of reasons, including those advanced by the respondent. First, the adoption of a particular construction of a word in the Code does not in my view amount to a "policy." Second, this does not appear to have been a pre-existing policy. The SEM-C sought and obtained legal advice on the issue which it had before it, and accepted, at the key meeting. Third, the applicant cannot legitimately complain that the *correct* meaning of the phrase has been adopted by the respondent (as I have held) and, indeed, the less favourable meaning to it which had been adopted by the CMDRB has been rejected by the respondent. Fourth, the meaning adopted by the SEM-C was materially similar to that adopted by the SOs in the PPG dispute before the Board, so that the applicant was aware of it and able to make representations in relation to it, should it have wished. In my view there is no equivalence between the respondent's actions in the present case and the public law error diagnosed by the Supreme Court in *Lumba.*

[139] The issue of misdirection or error of law, at least in the sense discussed above, does not arise in the EPK case. It accepted in submissions that the approach adopted by the respondent – both as to the meaning of the word 'feasible' and also the meaning of the words 'achievable' or 'can be achieved' in section E.5.2.1(b) and (c) - was legally correct. This issue does not strictly arise therefore in the EPK case. However, it seems to me that the SEM-C was right to take the view, for similar reasons as expressed above, that the meaning of those terms in section E.5.2.1 also requires a degree of judgement and goes beyond mere possibility to a question of whether achievement of the implementation plan dates, and proposed SC is reasonably practicable.

The substantive consideration of PPG's application for qualification

Determination of the LCTA connection for PPG

[140] The definition of an LCTA connection is contained within SONI's Transmission Connection Charging Methodology Statement (TCCMS). SONI is required to complete studies to determine the LCTA for any project for which a connection application is received. SONI says that such studies are ongoing presently to consider both Castlereagh and Kilroot as options for the PPG candidate unit. The LCTA connection for any project is formally identified within a connection offer from SONI, when such an offer is issued.

[141] In its written submissions PPG complained that the SOs had not yet made any decision in relation to its project's LCTA connection. At the same time, it has also complained that the SOs (wrongly) considered Castlereagh to be the LCTA connection, without adequately considering other options such as Kilroot "or Ballylumford or even elsewhere." These two complaints do not sit easily together.

[142] The nub of its complaint, however, at least on its written case, appears to be that the SOs did not determine Kilroot to be its LCTA connection and did not proceed on that basis in the course of consideration of its candidate unit's application for qualification for the auction. Relatedly, PPG contends that the SOs must determine an LCTA connection on the basis of the connections that are actually available. Since Castlereagh will be out of commission for several years, PPG argues that it cannot as a matter of fact be determined to be the LCTA connection. On the other hand, since it is the SOs' obligation to identify the LCTA connection, the applicant argues that they must clearly indicate what the LCTA connection is.

[143] In several of the applicant's papers or communications the concept of an LCTA connection is understood, or misquoted, as referring to the lowest cost technically *available* connection. (This is evident, for instance, in correspondence sent to SONI from PPG's Dublin solicitors and in its written submissions to the CMDRB). However, the question is not whether the connection point is currently or immediately available. The question is whether the connection point is technically *acceptable*. In some circumstances an LCTA connection which is identified for

connecting an asset to the transmission system will itself need additional works (such as reinforcement works) and will not immediately be available to facilitate the connection. That does not prevent SONI from identifying that point as the LCTA connection. It merely means that some additional system assets will be required before the connection can go live.

[144] If the relevant connection for the PPG candidate unit is at Castlereagh it appears to be common case that it would not be feasible for PPG to provide its new capacity in the relevant timeframe. That is because the Castlereagh substation is scheduled to undergo extensive upgrade works. It requires a re-build due to its concrete structures. The final arrangement for the new substation is yet to be determined; and SONI has indicated that the first step is to identify options to address system needs and develop a preferred option. It estimates that this process alone will take some two years. PPG therefore accepts that it would not be feasible to connect its new unit at Castlereagh within the timeline required for the capacity auction. On that basis, the applicant's argument is that the Castlereagh connection should simply have been ignored. Since, in its view, a bay had become free at Kilroot upon the quashing of EPK's planning permission, it considers that this is the lowest cost, technically *available* option and that it should have been determined as its LCTA connection point.

[145] However, the approach to this issue on the part of SONI is not governed by its, or the SEM-C's, role in qualification decisions for the purpose of capacity auctions. Rather, SONI's role in identifying an LCTA connection is part of its wider role, and subject to its obligation, to plan and develop the transmission system in an efficient, coordinated and economic manner. Put another way, the determination of the LCTA connection is part of the connection offer process. SONI and EirGrid are not required to *determine* the LCTA as part of the capacity auction qualification process. PPG's focus is obviously on gaining admission to capacity auctions as soon as possible; and securing connection as soon as possible to that end. But determination of the LCTA connection for a unit is not an obligation imposed upon SONI or the SOs more generally, much less the SEM-C, in the course of the capacity auction qualification process.

[146] In Ms Watson's affidavit on behalf of SONI this point is well made. She has emphasised the fact, as she did in her earlier correspondence to PPG, that the process for connection to the all-island transmission networks at entry or exit points on the transmission system is *separate* to any application for qualification of a unit for the capacity auction. The capacity market is merely one way for a unit to generate revenue once it is constructed and connected to the all-island transmission networks.

[147] SONI therefore rejects the suggestion that it has identified or determined PPG's LCTA as being at Castlereagh. That determination, which forms part of the connection offer process, is separate to the process for qualification for the capacity auction. It remains ongoing. The determination of the LCTA does not take into account delivery for this, or any particular, capacity auction. No decision has yet

been taken in respect of the LCTA connection for the applicant's project because, as Ms Watson avers, "it is simply too early in the timeline for the project to determine the issue." As noted above, the LCTA for any project is formally identified only within a connection offer from SONI, when that is issued. It is recognised that, pursuant to the TCCMS, an applicant for connection is entitled to request a Contestable Offer and/or connection at a point which is not the LCTA; but, even where that occurs, it is still necessary for the transmission system operator to undertake the process of identifying the LCTA since that is relevant to the connection charges and who ultimately bears the costs of the construction of additional System Assets and Connection Assets (as those terms are defined).

[148] SONI's evidence is that there are complications in respect of both of the options identified by PPG and that further time is required to consider and determine an LCTA for the project. In light of these issues, on 31 May 2024, SONI applied to the UR for an extension of the timeframe for determining the LCTA and issuing a connection order for the applicant's project. PPG was consulted on this process, as was NIE Networks. The UR has granted SONI an extension until 17 August 2026 to conduct the ongoing studies, determine the LCTA and make a connection offer to the applicant. That decision was made on 13 June 2024, with the UR determining that the extension application was properly founded. In PPG's response of 31 May 2024 when it was consulted on the extension application, it indicated that it was sympathetic to the technical complexities of preparing a connection offer for a large CCGT transmission connection. It nonetheless complained that two years and two months was a lengthy extension and asked to be kept up to date. Significantly however, in the context of the present application, PPG stated that, "The timing of the connection offer is fundamental to the feasible delivery of the project."

[149] SONI's evidence in this regard is supported by that of Ms Fitzgerald of EirGrid. She avers that it is not envisaged that the relevant requirements will be met until 2026 and, as a result, no pre-construction or construction works for the grid connection can commence until after that point, upon acceptance of a connection offer. In the circumstances it was considered by the SOs that the delivery of the new capacity proposed was not feasible in the applicable timeframe at either Castlereagh or Kilroot. There was simply not sufficient time available for the required works in either case for PPG's project to be constructed and connected prior to the commencement of the relevant capacity year.

[150] For the reasons just explained, I reject the submission, insofar as it is made, that the SOs are required to determine a LCTA in the course of an application for qualification for a capacity auction. In assessing the feasibility of the project within the relevant timeframe, the SOs may well need to take a view in relation to what the LCTA is likely to be, or at least how quickly it is likely to be determined. However, determination of the LCTA is not a necessary step in the qualification procedure. That is to confuse and conflate two separate processes.

[151] Having said that, the SOs obviously have to take a view in the course of the qualification process, when considering the temporal feasibility of a project delivering new capacity, as to what its likely connection point will be. In considering this, there is nothing unlawful in the SOs considering various possible options for the connection (as, indeed, PPG urged them to do). The applicant is critical of the observation made by the Board that the SOs are required to assess the feasibility of the candidate's proposed connection to the transmission network and "in the absence of any proposal by the candidate, then the SO is entitled to make a reasonable presumption" with, in this instance, the closest option having been identified as a reasonable presumption. There may be reasons why the closest connection point is not likely to be considered to be the LCTA connection or why, even if it is, SONI requires or permits connection to the grid at a different point. All of these matters will fall for consideration where, as here, an undertaking applies for qualification for a capacity auction at an early stage and without the benefit of a connection offer.

[152] (It is to be noted that Appendix D of the CMC, which sets out the information required in an application for qualification, includes, at para 5(d), "a copy of either the Connection Agreement(s) or a Connection Offer(s) from the relevant Transmission System Operator" confirming the capacity of the new capacity unit. This has obviously not been interpreted as requiring a new unit to already have a connection agreement or connection offer at the time of application for qualification, nor is that specified in section E.7 of the Code. However, consideration of the qualification application will obviously be much simpler where a connection offer or agreement has been achieved.)

[153] PPG complains that, under Condition 25 of its transmission licence, SONI is obliged to offer an interconnection agreement for connection to the all-island transmission networks as soon practicable after it receives a connection application and in any event within three months: see Condition 25(2), (5) and (7)(b). PPG's application for connection was made on 29 February 2024 and was deemed effective a few weeks afterwards. It therefore feels it was entitled to an offer by mid-June 2024. However, reliance on these provisions in isolation ignores other important obligations within that licence condition. In particular, pursuant to Condition 25(2), a connection offer made by SONI must "make detailed provision" regarding, inter alia, the carrying out of any works required for the connection and for the obtaining of any necessary consents; the date by which any such works shall be completed; and the connection charges to be paid. It is those matters, amongst others, which require the detailed technical assessment SONI is currently undertaking. The licence condition also recognises that the UR may consent to a longer period for the making of a connection offer; and that SONI is not obliged pursuant to Condition 25 to make any connection offer in certain circumstances. Both of these issues were raised by SONI in the course of its application to the UR for an extension of time to make a connection offer to PPG.

Consideration of the Kilroot option

[154] The most important point in relation to the substance of the PPG challenge, however, is that both the SOs and, latterly, the SEM-C considered the feasibility of its project on the basis that it might connect to the transmission system at Kilroot. That is clear from the reference in the SEM-C minutes to the PPG project not being feasible irrespective of whether EPK would or would not retain its connection offer. In other words, the Committee proceeded on the basis that the way was clear for PPG to make use of the bay at Kilroot which had been assigned to EPK's GT West project.

[155] For the moment, that appears to be a generous assumption in PPG's favour. PPG proceeded on the basis that, upon the quashing of EPK's planning permission, there was then a spare bay at Kilroot which was it's for the taking. However, that does not necessarily follow. As evident from the discussion elsewhere in this judgment, EPK has taken the view, and has informed SONI, that the construction of its GT West Power Station is not a development requiring the 2022 permission and that it is already authorised under the planning approval for the power station granted in 1973. SONI is currently considering this issue on the basis of information about the proposed new generating capacity which has recently been received from EPK. In her evidence Ms Watson has averred that there are ongoing considerations in respect of the planning permission for EPK's GT West project "but at the time of the qualification decision (and currently), that connection offer remains live and has not been terminated." On this basis, EPK remains ahead of PPG in the queue for connection. In addition, it seems that EPK, like PPG in relation to its own site, has also submitted an application for a CLOPUD to provide clarity on this issue. This is under consideration by the appropriate district council but, if granted, may be sufficient for EPK to meet the conditions precedent for its connection offer. SONI has not presently made any decision on whether or not EPK's grid connection offer should be terminated. On this basis, the position of SONI is that "it is therefore incorrect to say either that the GT West Power Station project has been removed from the SONI Connections Register or that there is currently a spare bay at Kilroot."

[156] It could hardly therefore be said to be a clearly established fact that PPG can benefit from the 'spare' bay at Kilroot. Insofar as PPG seeks to argue that the respondent made a material error of fact in this regard, capable of satisfying the high hurdle for court intervention on this ground (see, for example, *E v Secretary of State for the Home Department* [2004] 2 WLR 1351, at para [66]), I consider that unarguable. PPG has also argued that Kilroot was not, as the SOs had indicated, almost at capacity. However, that assumption proceeded on the basis that EPK's connection offer could no longer be sustained. As the discussion above illustrates, that remains to be seen. At the time of the decision-making in the PPG case, however, EPK's connection offer had not been terminated (nor has it now).

[157] Nonetheless, assuming that the appropriate connection point for the PPG candidate unit should be taken to be the Kilroot substation, and assuming that it can move ahead of EPK in the connections queue, there is still an issue as to whether it is feasible for its new capacity to be provided within time using that connection. There

was no real dispute between the parties that PPG's proposed connection to the grid at Kilroot is technically feasible. The issue is whether it was feasible "in the applicable time frame." The SOs considered not. The Board also considered that connection at Kilroot was "not sufficiently developed to be regarded as a realistic in the applicable timeframe." It also 'noted' that "the requirement to deliver a subsea cable across Belfast Lough would be a significant project from a number of perspectives, including environmental designations and navigational requirements." It is unclear whether this observation was drawn from consideration of the OWC report, but it could well have been.

[158] In this regard, PPG places heavy reliance upon the OWC report produced for the purpose of the CMDRB process, also referred to as an "indicative schedule" or as a technical note. This schedule was designed to demonstrate the feasibility of connecting the applicant's candidate unit to the Kilroot substation. Indeed, the applicant contends in its Order 53 statement that the OWC technical note put the feasibility of the project "beyond doubt." That might be so in the sense of technical feasibility (ie it is technically possible); but not in the sense of being reasonably practicable within the relevant timeframe.

[159] In her evidence on behalf of SONI, Ms Watson avers that the OWC report "only related to one issue", namely the feasibility and potential timeline for installation of the *subsea cable* across Belfast Lough. She avers that it did not address the various other concerns about the applicant's application. This would include the time to be taken for PPG to secure a connection offer. In addition, Ms Watson comments that the OWC report contains many caveats and identifies a number of key risks and wider considerations many of which have the potential to cause delay. She avers that the SOs took into account factors dealt with in the OWC report in their assessment of whether a connection at Kilroot would be feasible within the timeline. This is supported by an affidavit from Ms Anne Fitzgerald, the Head of Market Interface at EirGrid. She avers that the technical note prepared by OWC was duly considered by the SOs upon its receipt and prior to the SOs submitting their FQD submissions to the RAs. She says that, following consideration of this note, the SOs did not consider that the decision not to qualify the applicant's unit ought to be changed or altered.

[160] The caveats and risks identified in the OWC report which might sound on the feasibility of the new capacity being available in the appropriate time frame are obvious from a reading of that report. Section 3 of the report provides an indicative schedule for cable works. This is explained to be an "initial, indicative, high-level schedule." As Mr Larkin observed in the course of his submissions, none of the consenting elements which OWC identified as necessary – such as licence applications submissions, the planning award and marine licence award - are timetabled into this indicative schedule. The schedule is also explained to be "based on the (relatively limited) information publicly available" and is "subject to change as the details are developed further." Although "no showstoppers" had been identified, the report also drew attention to a number of engineering challenges and

development risks. An assumption which had been adopted is that the programme end date would be Quarter 1 of 2028.

[161] The OWC report goes on to outline a number of environmental consenting activities which will be essential to the delivery of the project. These include obtaining a marine licence; environmental impact assessment; agreement for a lease from the Crown Estate; and planning permission for the onshore aspects of the project at either end of the subsea cable. The report also notes that other consents which are, or may be, required include a coastal survey licence, wildlife licence and an Area of Special Scientific Interest (ASSI) assent. The report goes on, at section 4, to identify a number of risks which need to be understood and mitigated to ensure successful delivery given the early stage of development of the cable works. It recites a number of key points, which are non-exhaustive. These include a number of scientific or environmental designations which would increase the complexity of the marine licence application process, potentially increasing the time to determine the application. (It might also be said that the presence of such designations materially increases the risk of environmental challenge to the grant of any consent). They also include possible restrictions on installation operations which may be imposed by the Harbour Authority given the high density of vessel traffic in the Victoria Channel. Long lead times for offshore cable manufacturing slots are also identified, requiring early engagement.

[162] In summary, although it is unclear whether the CMDRB took the OWC report into account in reaching its determination (the report having been furnished to the Board *after* its hearing but before it gave its decision), it was clearly taken into account by the SOs in advance of submitting their FQD. The result code promulgated after the SEM-C meeting removed reference to connection at Castlereagh, obviously because the SEM-C's consideration did not proceed solely by reference to possible connection at Castlereagh. Its conclusion that connection, even assuming that occurred at Kilroot, was not feasible in the timeframe comes nowhere close to be irrational in my view.

[163] A further issue was raised in Ms Watson's affidavit, which PPG complained was a new issue. She averred that the distance between the applicant's proposed unit and Kilroot may also need to be compensated for by reactive power compensation. The reason for this is that the cable produces reactive power, which in turn increases the voltage on the network outside of required standards (as set out in the Transmission System Security Planning Standards). The reactive compensation would counteract this rise in voltage to bring the network voltage back within required standards. The length of the cable required to connect the applicant's project would impact on how that issue was to be resolved and SONI has not yet made a full assessment of these issues. It will do so as part of the connection offer process. However, depending on the resolution of that issue, PPG may in fact require two bays at Kilroot, rather than only one: one for connection of the generating unit and one for reactive power compensation. On no reading of the situation are there two such bays available at present. The inclusion of this issue in

SONI's evidence may represent an element of ex post facto justification. I do not believe there is previous mention of it in the papers; and there is no evidential basis for suggesting that it played a role in the SEM-C's consideration of the case. Nonetheless, it simply serves to emphasise again that the necessary technical assessments in relation to PPG's potential connection at Kilroot have not yet been undertaken.

[164] In truth, PPG accepts that such are the difficulties with connection at Castlereagh in the short to medium term that it was not a feasible proposition for its candidate unit in relation to the capacity auction. It has, somewhat belatedly and opportunistically, sought to take advantage of the quashing of EPK's planning permission at Kilroot. (That is by no means intended as any criticism of PPG's actions. Commercial operators are both entitled and expected to act opportunistically and with a degree of ruthlessness with respect to taking advantage of their competitors' misfortune or missteps.) However, in my view PPG had an unrealistic expectation as to what could or might occur in view of the quashing of the EPK permissions. Firstly, it appears to have failed to anticipate the argument now mounted strongly by EPK that the 2022 permissions were not in fact necessary consents for the development of its candidate unit. In any event, it also appears to me that PPG has wrongly elided the separate processes of qualification for the capacity auction and the transmission connections process. This is perhaps most evident in Mr McMullen's email of 11 September (see paras [58]-[59] above) in which he appeared to contemplate that, because of the time pressures connected to the capacity auction, PPG's connection application could be expedited and Kilroot could simply be identified immediately as the LCTA connection for the PPG project and/or that a connection offer at Kilroot could be issued without any determination of the LCTA (and, therefore, without a proper understanding of the costs implications of a connection offer at that point). In the exercise of its functions as transmission system operator, SONI could not reasonably have been expected to proceed in that way.

Has commercial viability wrongly been taken into account?

[165] PPG also submits that issues of commercial viability are "beyond the scope of the CMC." The argument advanced in these proceedings is a good deal less contentious than PPG's submission before the CMDRB, in which it argued that the risk of its candidate unit not being available for the relevant capacity year, assuming that was successful at auction, was simply a commercial risk that PPG was willing to bear and not a reason for its non-qualification. In my view, particularly with the benefit of Mr Broomfield's evidence, the Board rightly dismissed this argument.

[166] PPG still argues that the respondent (and the earlier decision-makers) wrongly took into account matters of commercial viability, in particular whether connection to Kilroot would be commercially viable for the applicant, by noting that connection there was "expected to be more expensive" because of the necessary infrastructure involved. On the applicant's case, matters of commercial viability

were concerns for it alone and are not to be taken into account in considering "feasibility" within the context of the CMC.

[167] SONI has met this criticism of the SOs' consideration evidentially. Ms Watson avers that it is incorrect to assert that the SOs undertook a free-standing assessment of the commercial viability of the possibility of a PPG connection at Kilroot. Her sworn evidence is that commercial viability did not form part of the SOs' decision on this application. She further says that this was clarified by the SOs at the CMDRB hearing. The observation in the email of 6 September 2024 that a possible connection at Kilroot was likely be more expensive is, it is submitted, simply a matter of fact. This was not a conclusion on the financial viability of the project and no such assessment was made. However, the cost of the connection assets is a factor which SONI needs to take into account as transmission system operator when determining the LCTA, which is why the cost is not a completely extraneous consideration.

[168] In light of this evidence, I do not consider that PPG can succeed on this ground. There is no evidence that SEM-C considered the commercial viability of Kilroot connection, or its cost, to be a material issue. However, it also appears to me to be an ambitious submission that issues of commercial viability can never be taken into account in assessing the feasibility of a project being delivered within the relevant time frame. It is likely to be irrelevant to the question of the technical feasibility of the project; but when it comes to the assessment of whether delivery within the timeframe is reasonably practicable, there may be scope for commercial realities to be taken into account.

[169] The territory is governed by the Capacity *Market* Code. The auction process is designed, in large measure, to promote competition. The relevant entities, including the applicant, are all market participants who are hoping to develop and operate commercially viable units. Put more prosaically, an option which is commercially unviable is much less likely to be pursued (or funded) than one which is not. For a variety of reasons a market participant may choose at their own risk to overspend (as some may see it) on a project, or some aspect of the project, with longer term objectives in mind. However, it seems to me that there is nothing to require that, in context of feasibility or achievability within the relevant timeframe, such matters must be left out of account entirely. A prudent industry operator is unlikely to do so.

[170] The applicant also contended that "procurement, logistical, planning or commercial matters or risks" cannot be taken into account. I cannot accept that submission in such sweeping terms. Problems with procurement and logistics, or a failure to secure the necessary planning approvals, are self-evidently relevant to whether it is feasible to secure a connection within a particular timescale.

Failure to discharge duty of inquiry

[171] A further argument was that the decision-makers did not make adequate enquiries in relation to the possibility of PPG's unit connecting to the transmission system at Kilroot, or having Kilroot identified as its LCTA connection; nor in relation to the possibility of it connecting at other locations, for example at Ballylumford. This argument was not pressed in any detail in oral submissions. I do not consider that it was irrational for the SOs or the SEM-C to not make further enquiries about PPG's connection at Kilroot. As appears from the discussion above in relation to extension of time for the making of a connection offer, this issue is technically complex. The SEM-C was entitled to take a view on the feasibility of connection at Kilroot, as PPG urged it to do, without having to make further detailed enquiries about technical aspects.

[172] I also do not consider that the respondent was obliged to address its mind to, or make further enquiries about, potential connection of PPG's candidate unit at other (unspecified) connection points. Ballylumford has been mentioned as a potential option but with no detail whatever on the part of the applicant as to the method of intended connection or potential details in relation to this. It is further away than both of the potential connection points which were considered; and is likely to suffer from the same feasibility concerns as the Kilroot option, which is also across the Lough. It does not appear to have been put forward as a serious contender. The respondent was entitled to proceed by considering only the options which had been put forward by PPG as the realistic options.

Procedural unfairness - reasons

[173] I do not consider there to be an arguable case of procedural unfairness arising from any contention that PPG did not have a fair opportunity to present its case or to deal with matters adverse to its application. The phased nature of the decision-making – involving, as it did, an initial provisional decision on the part of the SOs and then a contested dispute before the CMDRB – meant that, in advance of the final decision on the part of the respondent, the issues had been ventilated and the applicant was aware of the concerns it had to meet. It sought to do so by the provision of the OWC report which was submitted and considered. I have already held that the non-disclosure of the SEM-C's legal view on the meaning of 'feasibility' did not give rise to any unfairness.

[174] The central complaint within the applicant's procedural unfairness ground is that the various decision-makers have failed to give adequate reasons (contrary, inter alia, to para B.14.8.6 of the CMC). In particular, it is contended that it is not clear why the Kilroot connection option was rejected. As to the ultimately impugned decision, the applicant contended that no reasons at all had been provided.

[175] The provisions of the Code itself which relate to the giving of reasons at various points are somewhat idiosyncratic. When a PQD is made proposing to reject an application for qualification, the SOs need only notify the participant of the

requirement under section E.7 which the application failed to satisfy (see section E.9.2.2). Where the participant seeks a review of that decision, there is a more fulsome obligation upon the SOs to provide their reasons for the outcome of the reconsideration (see section E.9.3.6(a)). That is why, in each case, there was a detailed email from the SOs on 6 September outlining to each applicant the reasons for declining to overturn the PQD. There is no express requirement for reasons to be given for a FQD. As to the RAs, the only express obligation upon them is to give reasons *to the SOs* in cases where they reject the SOs' FQD (see section E.9.4.5). In neither case with which I am concerned did the SEM-C reject the outcome proposed by the FQDs, although it may have differed somewhat in its reasoning.

[176] Given what is at stake for applicants for qualification, and the potential investment which they may have made in order to get into a position to make a qualification application, I proceed on the basis (without finally deciding) that fairness does require them to be given reasons for the rejection of their bid by the final decision-maker, notwithstanding that this is not expressly provided for in the Code. I also note that the SEM-C did seek to provide reasons in these cases by, in the first instance, publication of results codes on the CMP on 7 November along with associated explanatory text.

[177] One of PPG's new proposed grounds is that, in providing the PQD, the SOs were "limited to 512 characters." This appears in an email from Mr Downey to Ms Foster of SONI in discussing a draft commentary to be provided with the results code in relation to the PQD relating to PPG. I decline to grant leave on this ground on the basis that it is unarguable. As indicated above, all the Code requires at this point is that the relevant requirement under the Code is identified. In any event, there is a right to further reasons from the SOs if a review is sought, as it was in this case. As matters progressed considerably before the final, legally effective decision in this case, in my view no material unfairness arose from the limitations on the commentary which could be provided at the PQD stage. This is not to say that the approach which has been adopted is necessarily sensible, much less optimal; but that is not the question for the court.

[178] PPG also contended that there were conflicting accounts given in relation to the provision of the Code which had been relied upon in rejecting their application for qualification. This was raised both as a breach of the obligation to give reasons and as indicating that the respondent was (or may have been) influenced by reasoning of which the applicant had no knowledge. This was in turn argued to give rise to procedural unfairness representing the taking into account of an irrelevant consideration. It arises by reason of there having been some reference in the papers to reliance on section E.7.5.1(c) (a mandatory ground for rejection on the basis of SC of the unit not being achievable before the start of the relevant capacity year), rather than section E.7.2.1(f) (the discretionary ground for rejection on the basis that delivery of the new capacity is not feasible).

[179] I reject these elements of the applicant's case. In an affidavit sworn by Mr Curran, Senior Lead Analyst within the Capacity Markets Team in EirGrid, who was involved in the consideration of PPG's application, he has confirmed that at all times the ground upon which the application was refused was section E.7.2.1(f) in relation to feasibility. He has further averred that at no time was it ever intended to rely upon section E.7.5.1(c) in this case. It is true that there was some reference to the second of these provisions in the text of the updated FQD results spreadsheet sent to the RAs on 23 October 2024. This entry is in fact internally inconsistent because the results code used relates to section E.7.2.1(f); albeit the additional text at the end refers to section E.7.5.1(c). Mr Curran explained, when this was raised by the respondent's legal team, that it looked as though the wrong text had simply been copied in from the results code document in error.

[180] Perhaps more importantly, in Mr Broomfield's affidavit he has indicated that, in framing the analysis he presented to the CMC for consideration, he assumed that the reason provided in the FQD spreadsheet on 15 October 2024 was the SOs' *only* reason for rejection. Indeed, he did not even notice the added text at the time of the meeting or in preparing his analysis. This is why the OSC analysis contained within the second CRMT memo includes a reference to section E.7.2.1(f) of the CMC in the heading. Mr Broomfield has averred that he understands that the SEM-C made the same assumption in its approach to considering PPG's application; that the erroneous reference to section E.7.5.1 played no part in his consideration of the FQD in respect of PPG; and that his apprehension is that it also played no part in the consideration of the FQD by the SEM-C. This is supported by the fact that the approved FQD notified to PPG on 7 November repeats the reference to the correct provision of the Code. Although Mr Broomfield is not himself a member of the SEM-C, he was present at the meeting and involved in the relevant discussions. There is a short affidavit from Mr John French, the Chief Executive of the UR, who has averred that he was authorised to swear it on behalf of the respondent. He is a member of the SEM Committee and, having read the affidavits of Mr Broomfield, approves the contents and confirms that they are true insofar as they are within his knowledge. He also avers that he authorised Mr Broomfield to file those affidavits on behalf of the UR "as accurately reflecting the position of the SEM Committee." I am not satisfied that the erroneous reference to section E.7.5.1 in the second FQD spreadsheet played any role at all in the decision-making in this case.

[181] The other (incorrect) reference to section E.7.5.1 is contained within PPG's own notice of dispute, after only the PQD had been issued by the SOs which had referred to the correct provision of the Code. The SOs' submission to the CMDRB correctly identified section E.7.2.1(f) as the relevant provision; and picked up on the erroneous citation by PPG of section E.7.5.1, albeit they also commented that there was "a high degree of similarity" between the considerations.

[182] Returning to the main reasons challenge, I consider that any obligation to give reasons in a case such as this is limited given (a) the absence of any express requirement to give reasons in the Code to which the parties have agreed to be

bound; (b) the expert nature of the judgement required to be exercised by the decision-makers in relation to the question before them (here, feasibility within a certain timescale); (c) the nature of the decision-making process, in which a disappointed applicant will already have some understanding of the issues from the PQD, the review decision and the process before the Board; and (d) the inevitable time pressure which is likely to arise in working towards the holding of the relevant auction.

[183] What precisely is required will depend upon the context. At the very least, the applicant must be informed of the requirement within the Code which has been fatal to its application for qualification. A short explanation of the basis for this may also be required in some cases, dealing with any principal contentious issues, but bearing in mind the iterative process which has been gone through and the informed nature of the audience. In the present case, it would have been helpful if the commentary issued on 7 November had made clear that possible connection at Kilroot for the PPG project had been considered.

[184] Nonetheless, in view of the above discussion, I am satisfied that the provision of the adopted SEM-C minutes in this case more than satisfied any obligation on the part of the respondent to give reasons.

Procedural unfairness – timing

[185] A further aspect of procedural unfairness which is complained of is, that the respondent approved and/or imposed an unfair timetable. The indicative auction timetable set out in the CMC envisages that the final qualification results will be published three weeks before the auction run date. In the present case, that would be 31 October. However, the timetable approved allowed only for publication of qualification results two weeks prior to the auction date. The SEM-C's decisions were only promulgated on 7 November. The capacity auction timetable only allowed from that date (7 November – the Final Qualification Results Date) until 21 November (the Capacity Auction Submission Commencement) to mount a challenge.

[186] The extent of reliance which can be placed on the CMC in this regard is obviously constrained by the fact it sets out only an "indicative" timetable, contained in appendix C to the CMC. The applicant is nonetheless concerned that the UR has approved a scheme which allows a participant only 10 working days to have an application brought before the court and judgment delivered in an area of this complexity. It is further concerned about the cumulative effect of the lack of reasons provided by SEM-C coupled with the shortness of the post-qualification, pre-auction window. In particular, the applicant submits that this, along with the respondent's unwillingness to postpone the auction, has the effect of stymying any proper opportunity of challenge before a court of competent jurisdiction.

[187] It is obviously the case that time was tight in terms of the commencement of these proceedings and those brought by EPK. However, in my view this does not sound on the fairness of the qualification decisions themselves. It is a logically posterior issue. In any event, the experience in each of these two cases illustrates that, albeit with some effort, disappointed applicants for qualification are able to mount legal challenges and to do so within a timeframe which permits the grant of effective relief. In particular, provided an applicant has sufficient time to seek the intervention of the court before the commencement of the capacity auction, it will be in a position to seek interim relief postponing the holding of the auction. Both applicants were able to do so in this case. The option of seeking interim relief from the court is expressly acknowledged in the Code: see section B.14.12.7 (set out at para [110] above). In PPG's case, interim relief was in fact granted (see para [8] above) in order to supplement the pragmatic step which had been taken by the RAs in response to the proceedings. In those circumstances, this element of the applicant's case cannot avail it.

Fettering, or failure to exercise, discretion

[188] One of the further grounds sought to be introduced by the applicant, having considered the disclosure and evidence provided by the respondent and notice parties, is that there is no evidence whatever that, having identified an issue with the feasibility of the PPG project, either the SOs or the SEM-C recognised that this was only a *discretionary* basis for rejecting a qualification application (in contrast to the mandatory grounds for rejection in section E.7.5.1); nor that they went on to separately consider how that discretion should be exercised. Mr McGleenan relied upon the case of *Re Duff's Application (Re Glassdrumman Road, Ballynahinch)* [2024] NICA 42, at para [57], to illustrate the proposition that, where discretion is conferred, the deciding authority should both appreciate and address the exercise of the discretion. That case relates to planning policy and is somewhat removed from the circumstances of the present case. Nonetheless, I accept as a general proposition that, in order to lawfully exercise a discretion, the relevant authority must appreciate that there are options open to it and address its mind to the question of how its discretion should be exercised; or at least keep its mind open to the exercise of a discretion in a case where a policy is applied.

[189] Section E.7.2.1 of the Code provides only that the SOs *may* reject an application for qualification where one of the following conditions are met. There are a number of such conditions where the discretion to reject the application may not be exercised (as Mr Larkin accepted, for instance where the application was submitted late but with good reason and/or where no prejudice arose); and others where the exercise of such discretion appears much less likely. To direct themselves properly, the SOs (and the SEM-C considering whether to reject or approve their decision) should have appreciated that they were not automatically required to reject the PPG bid once they had concluded the non-feasibility condition was met. Despite all of the evidence filed in this case, there is nothing to suggest that such a consideration was undertaken, and I find, on the balance of probabilities, that it was

not. The evidence points towards a view being taken that non-feasibility under section E.7.2.1 would result in exclusion just as failure to satisfy a mandatory requirement under section E.7.5.1 would do. Moreover, the results code document appears to treat all of the reject codes in a similar fashion, making no distinction between the different categories of reasons for rejection set out in the Code.

[190] I therefore consider there to be force in this ground. Indeed, on analysis, it is the only ground in the PPG case with any real substance. Neither the SOs nor SEM-C, having reached the view that the PPG project was not feasible within the timeframe, considered expressly whether this should nonetheless not result in its exclusion from the auction in pursuant to section E.7.2.1 of the CMC.

[191] However, I do not consider it appropriate to grant any intrusive relief in relation to this flaw, in the form of an order quashing the SEM-C's decision and remitting the matter back to it for reconsideration, for the following reasons. In summary, I am satisfied to the high degree required on the basis of the evidence and submissions which have been presented in this case, that remitting the matter back to the SEM-C for reconsideration would inevitably result in the same decision, ie rejection of the PPG application.

[192] On this issue, Mr McLaughlin for SONI indicated that the category of cases in which a project which was judged not to be feasible within the appropriate time frame would nonetheless be permitted to participate in the capacity auction was "vanishingly small." For the respondent, Mr Larkin said there were no circumstances which could readily be envisaged where this would occur. He also submitted that it would be in breach of SEM-C's legal obligations (which take precedence over provisions of the Code: see section B.4.1.1) to permit the PPG bid to qualify in the circumstances of this case. In this regard he particularly relied upon its principal obligations, discussed at paras [230]-[233] below.

[193] PPG also contended that none of the E.7.5.1 mandatory grounds for rejection had been made out in its case. It therefore concluded that the SOs and the SEM-C must have formed the view that its implementation plan dates were achievable, and that SC could be achieved prior to the start of the capacity year. This does not necessarily follow. In the first instance, it seems utterly at odds with the substance of the SOs' and SEM-C's consideration of this case, discussed in detail above. It also assumes that the SOs will first consider the grounds for mandatory rejection (or, more accurately, the mandatory pre-conditions for qualification) before addressing the discretionary grounds for disqualification. However, it is not clear that this is the way in which the consideration actually proceeded. This is not addressed clearly in the evidence. It may well be that some or all of the discretionary or administrative grounds for rejection are addressed first in some or all cases. Some of those set out in section E.7.2.1, for instance, would naturally fall for consideration at the very start of the qualification process (for example, submitting the application after the relevant deadline, providing materially deficient information in the application, or applying when the participant is under a suspension order or in default).

[194] There is, however, some evidence about the possible application of a mandatory ground of rejection in this case which is of assistance. As noted above (see para [181]), in their submission to the Board, the SOs addressed PPG's incorrect reference to section E.7.5.1 in its notice of dispute. However, significantly, they continued as follows:

> "We consider there to be a high degree of similarity between the System Operators' considerations for the purposes of E.7.2.1(f) and E.7.5.1(b) and (c), and the Application for Qualification could have, in the System Operators' view, been rejected on the basis of any of these sub-paragraphs.
>
> In light of the above and exercising what they consider to be the judgement reasonably expected of a Prudent Industry Operator, the System Operators have not qualified the Relevant Proposed Generator Unit where it considers delivery of the New Capacity, if awarded, to be infeasible."

[195] The detailed evidence provided by Mr Broomfield on behalf of the respondent in relation to the risks which arise from qualifying candidate units which are not considered to be feasible or achievable within the timescale (these terms meaning essentially the same thing), along with the evidence presented on the substance of the question of the candidate unit's feasibility, also persuade me that, in the event of reconsideration of PPG's application, the same outcome is inevitable. To remit the matter to the respondent for reconsideration in those circumstances would be pointless and, at the same time, may itself give rise to a number of the risks which can flow from uncertainty surrounding the holding of a capacity auction.

Consideration of EPK's case

Application of an incorrect test

[196] I turn then to consider the grounds of challenge relied upon by the applicant in the second case. A central complaint on the part of EPK when its case was commenced was that the SOs did not consider what was likely or reasonably likely to occur but adopted the most pessimistic outlook possible. The SOs' submissions to the CMDRB noted that in "exercising the judgement reasonably expected of a Prudent System Operator, the System Operators are required to consider a range of scenarios, and as stated to the Applicant in the email of the 6 September, this includes a worst-case scenario." This does not suggest that the SOs considered *only* a worst-case scenario; but that they consider themselves bound to consider *a range* of scenarios, *including* the worst-case scenario. That does not appear to the court to be objectionable. A prudent operator will consider a range of possibilities as to how a project might pan out.

[197] However, EPK complained that the *only* scenario which the SOs and the SEMC actually considered was in fact the worst-case scenario. That, the applicant argued, could only arise if the UR was considering the applicant's original implementation plan (and not the implementation plan and Gantt chart submitted later) and was only considering the worst-case scenario. The applicant submitted that it cannot be said to be reasonably prudent to work on the assumption that, in developing and constructing a unit for admission to a capacity auction, the worst possible scenario would unfold at every stage.

[198] There may be some force in that submission. However, when the full evidence now before the court is considered, it is clear that the focus of the SOs at the time of its FQD being submitted to the SEM-C, and more importantly the focus of the SEM-C in its consideration, was not directed to the 27 month worst-case scenario for construction. By that point, the debate had moved on considerably (even if the text of the FQD submitted to the SEM-C did not adequately reflect this). The content of the second CRMT memo, the SEM-C minutes and the explanatory text issued alongside the CMP reject code on 7 November all make clear that the shortness of the period of 27 months for construction on a worst-case scenario identified in EPK's initial application for qualification was not a material factor, much less a determining factor, in the decision-making at that stage of the process.

[199] Moreover, EPK indicated in its submissions in this case that it agrees with the legal advice provided to the UR that, in construing the meaning of "achieved" in para E.7.5.1 of the CMC, the test to be adopted as what is "reasonably practicable, reasonably doable or deliverable." However, the applicant's submission was to the effect that the UR did not apply this test and simply adopted the earlier error of the SOs. I cannot accept that submission. In the first instance, it would require the court to conclude that the respondent took legal advice and recorded that legal advice in an annexe to the relevant minutes but nonetheless proceeded to ignore it in the course of the decision-making conducted in the relevant meeting. In addition, as just mentioned above, I also consider this is inconsistent with the contemporaneous documents which shed light on the respondent's decision-making.

Failure of duty of inquiry

[200] EPK also alleges unlawful breach of the respondent's duty of inquiry. The core of EPK's complaint in relation to SEM-C's failure to obtain additional information is that the Committee failed to make adequate inquiry into the matters raised at the OSC meeting on 18 October and into the SOs' updated view on the achievability of the construction period which it had proposed on 3 October 2024. I deal with this issue below in conjunction with the issue of procedural fairness.

[201] A separate point raised in the written submissions was whether SONI was applying the same definition of 'achievable' or 'achieved' as SEM-C. I do not consider that the UR was required to make any particular enquiry into the legal interpretation adopted by the SOs of the word 'achievable.' Provided the

respondent itself did not fall into error in this regard, there will be no error of law. It was not irrational for the UR not to enter into detailed debate with the SOs about these issues of legal interpretation. It had to take and apply its own view on this issue which, in the event, is not challenged by EPK in these proceedings.

[202] I also do not consider that the UR was required to make further enquiries into whether the SOs considered and properly analysed the information provided by it on 3 October 2024. It was plain from materials before the court that the SOs had considered this. There was no reason for SEM-C to doubt that it had been conscientiously taken into account. As discussed further below, I do consider, however, that, in the circumstances of this case, the SEM-C ought to have made further enquiries about the SOs' views on the achievability of the implementation plan dates and SC *after* having considered that material.

[203] Subject to the point mentioned at para [201] above and addressed further below, I did not find any merit in a number of EPK's more specific complaints about failure of inquiry.

Relevancies, irrelevancies and irrationality

[204] The applicant is highly critical of the conclusion that it was not reasonably demonstrable that the proposed unit could be constructed in 27 months (assuming that was the limited timescale which transpired to be available). It submitted that it provided a revised implementation plan and a significant body of detailed evidence in the 3 October materials which indicated completion of its project was achievable and that a period of much longer than 27 months would be available for construction. It considers that the SOs must therefore have largely ignored or failed to consider this information. This is because it was only within the original implementation plan submitted in June 2024 that the remote possibility of construction within 27 months was even contemplated. The later implementation plan, particularly that supplied on 3 October 2024, even adopting a worst-case scenario analysis, allowed 39 months for construction. In those circumstances the applicant submits that it is difficult to conceive how the respondent could have considered that the applicant was unable to demonstrate how it can undertake the construction of the unit in 27 months.

[205] This complaint appears to me to misunderstand the respondent's reasoning. The misunderstanding may have been contributed to by the failure of the SOs to meaningfully engage with EPK after the submission of the 3 October materials; and/or by the wording of the FQD submitted on 15 October, which does not appear to me to reflect the reality of the SOs' thinking at that point, nor indeed their engagement with the OSC.

[206] I do not find the evidence to establish that the respondent refused EPK's application for qualification on the basis that a 27 month construction period was inadequate. The debate had plainly moved on from that point. The issue which

appears to have been of concern to the SEM-C was that the time available for the implementation plan *overall* was insufficient. The applicant's arguments had focussed on the period from SFC to SC. However, the implementation plan had to address the milestones *leading to* SFC also. It was the overall timeframe which was ultimately considered problematic by the SEM-C.

[207] The content of implementation plans (an "implementation plan" being a defined term under the CMC) is dealt with in Chapter J of the Code, particularly at section J.2. It must address a number of major milestones including Substantial Financial Completion, Commencement of Construction Works and Substantial Completion (each of which are also defined). SFC is only achieved, inter alia, when all necessary consents and authorisations in respect of the construction of each new or refurbished generator unit has been obtained, including any necessary planning consent. However, the overall timeframe for the project must be achievable taking into account the stages both before and after SFC.

[208] The key point is that by extending the time period for construction post-SFC, EPK had *shortened* the period available to achieve SFC. This is most immediately apparent when one simply contrasts the dates for SFC proposed in EPK's initial application for qualification (submitted in June) with those proposed in the 3 October materials:

(a) In the original application, the *earliest* date put forward for SFC was 15 June 2025 and the latest anticipated date for SFC was 17 June 2026, over a year later. In the 3 October materials, the *latest* date put forward for SFC was 3 June 2025, which (somewhat surprisingly) is *earlier* than the date initially considered to be the *earliest possible*.

(b) The earliest date for SFC in the latest version of the implementation plan was 3 February 2025, almost 4½ months earlier than the date initially considered to be the earliest possible.

(c) The anticipated (supposedly realistic) date for SFC used in the latest version of the Gantt chart was 3 March 2025 – again, almost 3½ months earlier than the date initially considered to have been the earliest possible.

[209] In those circumstances, it is perhaps to be expected that the SOs and SEM-C may have concerns about the credibility of the anticipated date for achievement of SFC. Those concerns about achievement of SFC as proposed could only be increased by the current issue over the planning status of the project. If a fresh planning permission has to be sought, this will inevitably give rise to additional delay. However, even dealing with the present uncertainty (that is, establishing to SONI's and/or the local planning authority's satisfaction that the project can be developed on the basis of the 1973 permission alone) will take some time before there is confidence that the project can proceed on a sound footing as regards planning control.

[210] In principle, I consider that it was open to the SEM-C (and SOs) to take a view on the achievability within time of the EPK project without having to resolve the question of whether or not EPK was right in its assertion that no further planning consent was required. The nature of the process is such that qualification decisions may have to be taken – as in the PPG case – at a time and in circumstances where there is considerable uncertainty about a significant matter which is not capable of early resolution or resolution by the relevant decision-makers in the course of the qualification process. In such circumstances, the SOs and SEM-C must do the best they can exercising their experience and judgment in accordance with section E.7.1.1 of the Code.

[211] For reasons explained below, I consider that the respondent should have put itself in a position where it would or may have obtained further information which might have assisted it in exercising its judgement. Viewing the matter on the basis of the information which SEM-C actually had before it at its meeting of 4 November, however, the applicant's challenge that it reached an irrational decision is not in my view made out. Some further complaints that the respondent took into account irrelevant considerations (such as an erroneous view that its connection offer had in fact been terminated) are dealt with below.

Procedural fairness and duty of inquiry revisited

[212] In this case, I do have a concern about the procedural fairness of the approach adopted by the SEM-C, and indeed the SOs. From the time of the PQD on 19 August 2024 to the FQD on 15 October 2024, the engagement between EPK and the SOs (and also the CMDRB) was focused on the length and credibility of the available construction period after SFC. It is difficult to discern the precise basis for the FQD on the part of the SOs for a variety of reasons. First, the text simply reflects what had been set out in the PQD, notwithstanding all of the additional engagement there had been between the parties in the interim period. Second, no evidence has been filed by the SOs in the EPK case. Moreover, no submissions were made by the SOs in opposition to the EPK case (unlike in the PPG case) on the basis that it would not be appropriate for them to do so having declined to file any evidence. On the balance of the evidence, however, it seems fairly clear that the SOs were not concerned – or were much less concerned – about the build period post-SFC and were instead much more concerned about failure to achieve the SFC in the timeframe EPK proposed, with the knock-on effects on the project programme to which that would give rise. Was there unfairness in failing to explain to EPK this change in approach and permit them a right of reply in relation to it?

[213] EPK's deponent, Mr Crankshaw, the Head of Business Development within EPUKI (the parent company of the applicant), has made the point that neither the SOs nor the RAs had communicated any concerns to EPK about the status of its planning permission being relevant prior to the SEM-C's decision on the FQD. That may well be correct; although I take it with a pinch of salt for two reasons. First, it is unlikely to have come as a surprise to EPK that the quashing of the planning

permission it had been relying upon (whether or not that permission was strictly necessary for the development) would be an issue of interest and concern to the SOs. Second, in the exchanges between the SOs and EPK on 3 October, the materials submitted by the EPK Project Manager (Mr McClean) indicated that the project would rely on the 1973 planning approval, having been asked by Mr Downey of EirGrid to address the statuses of their planning and permitting activities. That at least put the issue on the agenda. However, it is right to say that no specific concerns were raised with EPK by the SOs or SEM-C about the quashing of its planning permission or the potential effect of that on its connection offer, notwithstanding that this was probably the main topic of discussion at the meeting between the OSC and SOs on 18 October.

[214] Mr Crankshaw has also averred that, had SONI or the RAs raised the issue with the applicant before the SEM-C's decision, it "would have been able to correct the factual errors implicit within the Respondent's decision making process including the suggestion that the Applicant's connection offer had been withdrawn and that the Applicant did not have planning permission for the Unit it was seeking to qualify." I do not consider that the SEM-C decision is liable to be set aside on the basis of material factual error. Although there are references in some of the papers to the EPK connection offer being withdrawn or being in the process of being terminated, on a full reading of the materials it is plain that the SEM-C was aware that EPK's connection offer had *not* been withdrawn. It properly considered the content of EPK's letter of 31 October, which made the point that the connection offer was still in effect. Whether the offer was in the process of being terminated or not is a matter of semantics, since an issue had clearly arisen giving rise to consideration of termination of the offer by SONI. That process had been put on hold, in light of EPK's representations and (threat of) legal proceedings, pending more fulsome consideration of the issue. SEM-C properly proceeded on the basis that there was a high degree of uncertainty as to how all of that would be resolved in the fulness of time but that the connection offer was still in place for the time being.

[215] Mr Crankshaw makes the further point that the 1973 permission has always been relied upon for the purpose of a large proportion of the works on its candidate unit. The 2022 planning application was for the purpose of "project optimisation", allowing the project to be completed more efficiently with the benefit of some external works to Kilroot Power Station beyond the footprint of the existing buildings. However, EPK's position is that the unit, as proposed in the connection application, has always been "entirely deliverable" under the 1973 permission. This is said to be evidenced by correspondence and enclosures sent to SONI – in its capacity as transmission system operator, not SEM SO – on 1 and 13 November. That correspondence contained a number of expert reports which were not shared with SEM-C: a report from Fichtner Consulting Engineers designed to show that EPK could lay out the GT West development within the existing Kilroot turbine hall and a technical note from AtkinsRéalis designed to show that there were no differences to the technical data within the grid connection application associated with locating the development within the existing hall.

[216] EPK also relies upon the fact that it is not necessary to have planning permission in place in order to enter a capacity auction. It relies upon its own recent experience of having entered a capacity market auction in respect of its GT6 and GT7 units in the 2023/24 T-4 auction, 2024/25 T-4 auction and 2025/26 T-3 auction in circumstances where those units did not have full planning permission when they successfully qualified for the first two of those auctions. As mentioned above, PPG was told by SONI in advance of submitting its bid that planning permission was not a prerequisite to apply for qualification. Having said that, as I have already observed, a project's planning status is plainly relevant to it obtaining (or retaining) a connection offer and to the timeframe for it achieving SFC.

[217] The emails between Mr Downey and Ms Watson of 15 October (see paras [89]-[91] above) indicate that, within EirGrid at least, there was concern that EPK would be required to "regain" its 2022 planning permission and a feeling that it was "not credible" given the nature of the proposed works for EPK to rely on its 1973 permission alone. The issue of the credibility of EPK's position in this regard also appears to have been discussed at the 18 October meeting (see para [93] above).

[218] As to the possible need to obtain further information about the SOs' views of the achievability or reasonableness of the construction period proposed by EPK on 3 October, there is also a good argument that SEM-C should have required this and/or should have provided EPK with what was termed a "right of reply" in relation to matters discussed at the 18 October meeting. The EPK case was the one exception where new information appears to have been provided by the SOs at that meeting of the 18 October (see para [94] above). That new information appears to have related to the issue of EPK's planning status and its possible effect on its extant connection offer. It is difficult to see how this new information would not be viewed as "material" given the extent of the discussion about it in the second CRMT memo and, indeed, in the SEM-C minutes. Rather, the position appears to have been adopted that EPK nonetheless did not require a right of reply because the quashing of its planning permission was "in the public domain." However, that is beside the point for two reasons. First, SEM-C had envisaged that a right of reply would be afforded if new information was provided which was material. It did not appear to caveat that in some other way (see para [45] above). Second, and perhaps more importantly, it was unclear to EPK that these issues were now important issues, and perhaps the key issues, in its application for qualification. One might take a view it would be naïve for EPK not to consider this; but it was not for it to guess. In my judgment, fairness required EPK to be given some opportunity to address these factors.

[219] It also seems that there was information which EPK might have deployed had it been given a right of reply which it does not appear to have deployed before the RAs, including information (such as reports submitted to SONI on 1 November) designed to show that it *was* credible that it did not require a fresh planning permission. In particular, Mr Crankshaw has now provided an explanation as to why the 2022 permission was sought even though it was not necessary. That was

also not before the SEM-C. Had EPK been aware of the new thinking on the part of the SOs, I consider it highly likely that its letter to the RAs of 31 October would have been in materially different terms and would have sought to have addressed these issues in much more detail.

[220] Additionally, it is striking that the OSC did not 'get into the detail' of the issue which, up until the submission of the FQD, appears to have been the main issue in dispute between the SOs and EPK. The OSC did not "have a specific response on this particular issue", illustrating that the focus appears to have shifted decisively to the achievement of SFC. However, the two issues are interlinked. For instance, if the SOs had taken the view that the construction period provided in the most up-to-date implementation plan was now, in fact, capable of being shortened to some degree, that might allow some additional time for achievement of SFC. It is clear that, at the meeting of 4 November, the SEM-C members asked the OSC again for the SOs' views on the revised implementation plan but were provided with no material assistance on this issue. The pressure of time to make a decision is likely, in my view, to have overborne the approach which would (and should) have been taken if the Committee did not feel themselves under such pressure.

[221] Notwithstanding the absence of information about the SOs' view, the reference in the minutes to the revised implementation plan having been produced at a relatively late stage and in a relatively short space of time – with which EPK takes issue – suggests that a sceptical view of the revised plan may have been taken by the Committee. Whether or not such scepticism is justified, this was an issue upon which the SOs could again have provided some input if the request for their views on the issue had been followed up. The SOs could have expressed a view on whether the revised plan was credible and realistic, however late it had been produced; and also information on the circumstances which had led to it being produced at a late stage.

[222] Finally, in para 33 of its minutes, the SEM-C appears to have decided that no further information from the SOs was necessary because they stood by their view that "it was not reasonably demonstrable that the proposed CCGT could be constructed in 27 months (as opposed to something closer to 40 months)." It said that "on that basis", the SEM-C members did not think it would be necessary for them to invite the OSC to make further enquiries of the SOs as to their views on the revised plan. As I have concluded above, the reasonableness of the 27 month construction period was no longer the issue. It seems to the court, therefore, that the SEM-C explained its decision not to seek further input from the SOs in relation to the most up-to-date implementation plan on an erroneous basis.

[223] Taking these considerations together, whether viewed as an issue of procedural fairness, an irrational failure to pursue plainly material information which it had requested with no adequate response, or a failure to properly follow its own procedure for the granting of a 'right of reply' where new and material information was discussed at the meeting of 18 October, I consider that the

procedure adopted by the SEM-C in relation to EPK's application in the final stages was legally flawed.

[224] For that reason, I do propose to grant relief in the EPK case to allow a short, further period for reconsideration on the part of the SEM-C, taking into account any additional points the applicant may wish to make. That process should be significantly constrained, in my view, in order to avoid further disruption to the capacity auction timetable in light of the risks to which additional delay might give rise, as discussed in Mr Broomfield's evidence. I have reached this conclusion on balance, given that I am aware that the SEM-C made its decision irrespective of whether or not EPK retained its connection offer (ie on the assumption that it would retain that offer). Nonetheless, I do not consider that EPK was given the opportunity it should have been, at the heels of the hunt, to deal with the new issues which had emerged in the thinking of the SOs, the OSC and the SEM-C at a late stage. Whether this should or might make any difference is not a matter for me. However, there is sufficient doubt about that question that I consider it appropriate to grant a remedy of the nature mentioned above. I have weighed the risks identified by Mr Broomfield in the balance but do not consider they outweigh the grant of such relief in this instance, particularly in view of the nature of the grounds upheld and the possibility of remedying this within a short timescale.

CMC Objectives, licence obligations and the 2007 Order

[225] In light of the conclusion reached above, it may be unnecessary to deal in any detail with the remaining grounds of challenge in the EPK case, but I do so in any event for the sake of completeness.

[226] EPK contended that the SEM-C failed to comply with the objectives and duties set out in Article 9 of the 2007 Order in a number of respects and/or the CMC Objectives set out at section A.1.2.1 of the Code, particularly by failing to facilitate the participation of undertakings such as it in the provision of capacity and by failing to promote competition. As noted above (see para [27]), the CMC Objectives are expressly said to be legally unenforceable. However, they have much in common with other potentially enforceable obligations which rest upon either SONI or the SEM-C.

[227] Condition 23A of SONI's transmission licence requires it to enter into the CMC, with the CMC being a document which "(a) makes provision in respect of the capacity arrangements described in paragraph 3; [and] (b) is designed to facilitate achievement of the objectives set out in paragraph 4; …" The capacity arrangements referred to in paragraph 1(a) of this licence condition are "arrangements to secure generation adequacy and capacity to meet the demands of consumers…" (see Condition 23A(3)). It may be considered significant that the CMC must *make provision* in respect of arrangements to *secure* generation adequacy and capacity; whereas it must merely be *designed to facilitate* the achievement of *objectives* which are then set out. Put another way, the primary purpose of the CMC appears to be about

securing generation adequacy, rather than (for example) facilitating the participation of undertakings seeking to be engaged in the provision of electricity capacity in the capacity market.

[228] The objectives set out Condition 23A(4) of SONI's transmission licence are in the following terms:

> "The objectives referred to in paragraph 1(b) are:
>
> (a) to facilitate the efficient discharge by the Licensee of the obligations imposed on it by this licence, and to facilitate the efficient discharge by the Republic of Ireland System Operator of the obligations imposed on it by the Republic of Ireland System Operator Licence;
>
> (b) 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;
>
> (c) to facilitate the participation of undertakings including electricity undertakings engaged or seeking to be engaged in the provision of electricity capacity in the Capacity Market;
>
> (d) to promote competition in the provision of electricity capacity to the Single Electricity Market;
>
> (e) to provide transparency in the operation of the Single Electricity Market;
>
> (f) to ensure no undue discrimination between persons who are or may seek to become parties to the Capacity Market Code;
>
> (g) 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.

[229] These objectives do not apply directly to the respondent in this case. Moreover, they are objectives to be reflected in the provisions of the CMC itself (which should be "designed to facilitate achievement" of them). In reality, they are

little more than a general interpretive guide to the provisions of the CMC in this case.

[230] The respondent's obligations which may be relevant are set out in Article 9 of the 2007 Order. Article 9(1) provides as follows:

> "The principal objective of—
>
> …
>
> (c) the SEM Committee in carrying out its functions under Article 6(2),
>
> is to protect the interests of consumers of electricity in Northern Ireland and Ireland supplied by authorised persons, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the sale or purchase of electricity through the SEM."

[231] Article 9(2) continues as follows:

> "The… SEM Committee shall carry out those functions in the manner which it considers is best calculated to further the principal objective, having regard to—
>
> (a) the need to secure that all reasonable demands for electricity in Northern Ireland and Ireland are met; and
>
> (b) the need to secure that authorised persons are able to finance the activities which are the subject of obligations imposed by or under Part II of the Electricity Order or the Energy Order or any corresponding provision of the law of Ireland;
>
> (c) the need to secure that the functions of the Department, the Authority, the Irish Minister and CER in relation to the SEM are exercised in a co-ordinated manner;
>
> (d) the need to ensure transparent pricing in the SEM; and

(e) the need to avoid unfair discrimination between consumers in Northern Ireland and consumers in Ireland."

[232] A number of observations about these provisions may be appropriate. First, the respondent's principal objective is framed in terms of protecting the interests of consumers of electricity in Northern Ireland and Ireland. In doing so it should of course promote effective competition between persons engaged (or hoping to be engaged) in the sale of electricity through the SEM. However, it must only promote competition "whenever appropriate"; and the competition to be promoted must also be "*effective* competition." Mr Broomfield has explained in his evidence, in terms, that the purpose of the qualification process is to ensure that competition in a T-4 capacity auction is effective or genuine competition, whereas permitting units to qualify which will not be in a position to provide their awarded capacity would be to undermine consumer interests and permit skewed competition.

[233] A balancing of potentially conflicting objectives – for instance to encourage new market entrants but also safeguard security of supply – therefore requires the exercise of regulatory judgement. That is underscored by the reference in Article 9(2) of the 2007 Order to the SEM-C exercising its functions "in the manner which it considers is best calculated" to further the principal objective. PPG did not rely upon a breach of the objectives or obligations set out in the 2007 Order and Mr McGleenan in his submissions accepted (correctly, in my view) that the principal objective and the subsidiary objectives set out in Article 9(2) were in the nature of target duties. They will rarely give rise to an independent, enforceable obligation on the facts of a particular case, unless there is something particularly extreme or exceptional in the circumstances. That is partly because the relevant objectives, including protecting consumer interests and promoting or facilitating competition, may sometimes pull in different directions. In those circumstances it is for the relevant regulator to determine how its functions are best to be exercised having regard to the statutory objectives.

[234] In summary, I did not consider that reliance upon these provisions materially added to EPK's case. For instance, its reliance on the general objective of providing transparency in the operation of the SEM does not, in my view, materially alter the existence or content of any duty to provide reasons which would otherwise arise under the Code or as a result of the requirements of procedural fairness.

Unequal treatment

[235] Finally, EPK also made the case that any requirement that it needed to show proof of a planning permission at this stage represents different treatment from "other parties who have qualified for the auction even though they have yet to apply for planning permission and are therefore entirely subject to the vagaries of the planning system both in Northern Ireland and the Republic of Ireland." It was argued that this was contrary to the objective of ensuring no undue discrimination

between persons who are or may seek to become parties to the CMC; and/or a breach of the respondent's duty under Article 9(6) of the 2007 Order not to discriminate unfairly between authorised persons or persons who are applying to become authorised persons.

[236] I do not consider this ground to be arguable. There is no evidence that either the SOs or the SEM-C required EPK to prove that it had a planning permission as a pre-condition to qualification. As I have observed on a number of occasions in this judgment already, possession of an extant planning permission for the candidate unit is not a requirement for qualification. However, it is foolish to suggest that the planning status of a project is not relevant to its feasibility or achievability within the relevant timeframe. Possession of a valid and adequate planning permission is necessary to obtain or retain a connection offer; and also to achieve SFC. As to the potential comparators upon whose purported differential treatment the unlawful discrimination claim is based, no evidence has been provided in relation to their identity or circumstances such as would begin to permit the court to conclude that there had been unequal treatment amounting to unlawful discrimination, whether contrary to the 2007 Order or otherwise.

Potential Code modification

[237] These proceedings have highlighted a number of features of the CMC in relation to which the SOs and RAs might profitably consider modification. Chief amongst these is the overlap between the bases for non-qualification contained in section E.7.2.1(f), section E.7.5.1(b) and section E.7.5.1(c) respectively. Submissions on the part of the respondent suggested that there was almost total duplication between the second and third of these provisions. Submissions on the part of both the respondent and SONI suggested that there was little, if any, valid distinction between the considerations arising under the first of these provisions on the one hand and the second and third on the other. Although there may be circumstances where it is proper to deal with the question of feasibility under section E.7.2.1 rather than achievability under section E.7.5.1, these were not immediately apparent to any of the parties. Moreover, the distinction between the first of these (which gives rise to a discretionary ground for disqualification) and the second (which gives rise to a mandatory basis for disqualification) is apt to encourage confusion. If a proper distinction is to be drawn, this should be more clear from the relevant text. Although it is not a matter for the court, these are issues upon which the appropriate authorities might wish to reflect.

Conclusion

[238] By reason of the foregoing, no relief is to be granted in the first case. There was only one issue in the PPG case which caused me significant concern in the way in which the respondent considered the matter. However, for the reasons given above, I am satisfied that it is neither necessary nor appropriate to quash the decision and send it back to SEM-C for reconsideration.

[239] I refuse leave on all of the additional grounds added in the first applicant's amended Order 53 statement dated 22 November (underlined in blue), except for those at paras 5.1(i)(z) and (viii)(l) relating to the ground discussed at paras [188]-[190] above.

[240] I have found a small but important number of complaints made out in the EPK case, relating to additional information from the SOs and EPK (should EPK have wished) which ought to have been available to the SEM-C before making its final decision. I grant leave to apply for judicial review on the ground set out at paragraph 5.1.3(d) in EPK's amended Order 53 statement dated 20 November 2024, as best reflecting the legal error identified above. (Although Mr Dunlop's submissions on these issues strayed somewhat wider than that ground, embracing in particular additional complaints of procedural unfairness, I do not consider it necessary to direct amendment of the Order 53 statement to add additional grounds). I refuse leave to apply for judicial review on the other grounds in the second case.

[241] I propose to quash the respondent's decision in the EPK case (on the basis discussed at paras [211]-[224] above) to permit some further reconsideration, within a tight timescale, of its decision on the FQD submitted to it. I am not minded to grant any relief which would see the present date for the auction postponed further. Given the extensive materials which have been filed by the parties in these proceedings and the submissions which have been made, it seems to me that very little further will remain to be done in order to ensure that the further consideration to be undertaken by the SEM-C proceeds on an adequately informed basis. There is no reason, in my view, why this should not be achieved by close of business on Friday 29 November.

[242] I will hear the parties on the precise terms of relief to be granted in light of the court's findings above; and on the issue of costs.