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Stage 02: Draft Modification Report

SECMP0043:

Modification to Services Force Majeure Provisions

Summary

This modification aims to introduce a process to allow DCC to claim relief under the Operational Performance Regime (OPR) for any exceptional events that are beyond its control.

Working Group View

- The Working Group is initially neutral as to whether SECMP0043 should be approved or rejected.

Impacts



- There are no impacts on SEC Parties identified.
- There are no impacts on DCC Central Systems or Party interfacing systems.

What stage is this document in the process?

01	Initial Assessment
02	Refinement Process
03	Modification Report
04	Decision

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About this Document

This document is a Draft Modification Report (DMR). This document provides detailed information on the issue, solutions, impacts, costs and Working Group discussions and conclusion on SECMP0043.

The Smart Energy Code (SEC) Panel will consider this report to ensure that due process has been followed and determine whether to issue the modification for Modification Report Consultation (MRC).



1. Summary

What is the issue?

In April 2018, Ofgem implemented the DCC Operational Performance Regime (OPR), through modification to the Smart Meter Communication Licence (DCC Licence). The key principles underpinning the design of the OPR performance measures are consistent with the Performance Measures in Section H13 of the Smart Energy Code (SEC). The OPR places performance incentives on DCC by placing 100% of the value of DCC's smart meter related margin at risk.

Following a review of current regulation, DCC does not believe that the OPR or the SEC provide a process for DCC to apply for relief for exceptional events; events outside DCC's control. Services Force Majeure (FM) (SEC Section M3) defines relief events and the process to claim relief for DCC Services, however Services FM is narrowly defined, and applies to a limited number of relief events, such as acts of terrorism or war. It does not apply to all events outside of DCC's control. In the absence of a process for a broader concept of relief events in the SEC, DCC believes there is a risk that they will be penalised under the OPR for delayed/ non-performance of its obligations due to events outside its control.

What is the Proposed Solution?

The proposed solution is to introduce provisions by which DCC can claim relief under the OPR for exceptional events, by defining OPR Reporting in SEC Section A and setting out the relief application procedures in SEC Section H. It will also clarify the procedure which the DCC and the Panel are to follow if the DCC wishes to claim Services FM outlined in SEC Section M3.

Impacts

Party

DCC will be able to claim for relief under the OPR for any exceptional events. There are no impacts on any other SEC Parties anticipated.

System

There are no impacts on DCC Central Systems or Party interfacing systems anticipated.

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Implementation Costs

The total estimated implementation cost to deliver SECMP0043 is approximately £1,200, consisting of SECAS time and effort to implement the changes.

Implementation Date

The Working Group recommends an implementation date of:

- **28th February 2019**, if a decision to approved is received on or before 14th February 2019.

Working Group's views

The Working Group is currently neutrality as to whether SECMP0043 better facilitates the SEC Objectives. Therefore, it is unable to form an opinion at this time on if the Modification Proposal should be approved or rejected.

2. What is the issue?

Background

The DCC licence contains a framework whereby Ofgem can establish an Operational Performance Regime (OPR) that would place performance incentives on the DCC's operations. The OPR would place 100% of the value of the DCC's smart meter-related margin at risk. Ofgem issued three industry consultations between March 2016 and June 2017 on the design and implementation of the OPR.

On 4 September 2017, Ofgem issued its decision to implement the OPR. The regime and changes to Schedule 4 of DCC's Licence to reflect the new obligations took effect from 1 April 2018.

Part of Ofgem's considerations looked at how exceptional events in the DCC's performance reporting should remain consistent between the OPR, the SEC and service provider performance measures. Respondents to Ofgem's June 2017 consultation on the implementation of the OPR believed that this should be consistent but felt there was a lack of transparency and consultation with industry on the content of the DCC's Allowed Exceptions (H13 - exceptions relating to day to day operational issues). DCC also expressed concern that exceptional events should be managed through robust code governance, and not treated in the same way as Allowed Exceptions.

In its decision, Ofgem stated:

*"If SEC parties believe that current processes can be improved, they should take actions to do so through SEC governance processes such as code modifications."*¹

What is the issue?

Services FM in SEC Section M3 defines relief events and the process to claim relief for DCC Services. This definition is narrow and only applies to a limited number of relief events, such as acts of terrorism or war. It does not apply to all events outside of DCC's control such as their operations being impacted by a power failure (i.e. a blackout) affecting a significant geographic region or access to a geographic region being quarantined (in connection to disease and illness). DCC is not able to claim relief for exceptional events, for OPR purposes, under contracts from its Service Providers because the OPR and SEC performance frameworks are different with respect to compensation, and the current definition of relief events is consistent with service provider contracts; the performance regime in the SEC trickles

¹ Ofgem's OPR Decision, Page 5 - https://www.ofgem.gov.uk/system/files/docs/2017/09/1._decision_on_dcc.pdf

down to the Service Provider contracts. The compensation element of the scheme is designed to compensate customers if DCC's performance is below the SEC defined service levels via a reduction in DCC's charges.

In the event of an exceptional event such as a black out impacting DCC Services, compensation from Service Providers will ultimately be passed through to customers via a reduction in DCC's charges. In parallel, DCC is impacted under the OPR, but is unable to recover the margin it may lose under the OPR from Service Providers as this results in the Service Provider paying twice for the failure.

DCC's analysis of current regulation is set out in the table below. The table highlights that a robust governance framework for managing exceptional events (encompassing a broader set of relief events) does not currently exist.

Regulation	Purpose	Relief Process for Exceptional Events	Applies to Performance Measures
DCC Licence – Schedule 4 OPR	Places performance incentives on DCC's operations.	No Ofgem's recommendation is that current SEC processes are reviewed for this	Yes SEC performance reporting will form basis of OPR performance reporting
SEC – M3 Services Force Majeure (FM)	DCC's rights and obligations in relation to claiming Services Force Majeure (for DCC Services)	No Services FM is narrowly defined and applies to a limited number of relief events such as acts of terrorism or war. It does not apply to all exceptional events	Yes However this is not expressly stated and is limited to a narrowly defined set of relief events
SEC – M3 Force Majeure (FM)	SEC Parties rights and obligations in relation to claiming FM	No FM applies to all circumstances, however relief for DCC Services applies under Services FM	No Services FM applies to DCC services
SEC – H13 Performance Measurement Methodology	Methodology for calculating SEC Performance Measures	No DCC is entitled to remove events or period of time from performance calculations (Allowed Exceptions). This is applied to exceptions relating to day to day operational issues (e.g. non-compliance with processes under the CHISIM)	Yes

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In summary, without a broader concept of relief events in the SEC, DCC considers that there is a risk that they will be penalised under the OPR for delayed/ non-performance of their obligations due to events outside their control. The modification aims to address this issue and ensure DCC's regulatory framework creates the correct incentives for DCC to efficiently discharge the obligations placed upon it.

3. Proposed Solution

Proposed solution

The proposed solution is to introduce a new process into the SEC where DCC would be able to make an application to the Panel for relief to be applied to its performance with regards to its reporting to Ofgem under the OPR. The process put forward has been modelled on the existing process by which DCC can claim relief against the SEC Performance Measures due to Services FM.

This will be achieved through amendments to SEC Sections A1, H13, and M3 as follows:

- A1 – define the terms OPR Reporting and OPR Exceptional Event;
- H13 – explicitly set out that DCC is entitled to apply for relief to the SEC Panel for an OPR Exceptional Event; however, such relief shall not apply in respect of the SEC Performance Measures under Section H13.4;
- M3 – make some procedural clarifications to the relief process for Services FM. OPR Exceptional Events (which are defined by reference to Force Majeure) also apply in respect of the DCC claiming relief for the purposes of OPR Reporting.

This will allow DCC to claim relief for a broader range of events under the SEC for OPR purposes only and will not apply to Service Provider performance reporting.

Draft legal text

The proposed legal text changes to SEC Sections A, H and M are provided in Attachment B.

4. Impacts

The following section sets out the impacts associated with the implementation of SECMP0043.

SEC Party impacts

DCC will be able to claim for relief under the OPR for any exceptional events. There are no impacts on any other SEC Parties anticipated.

Central System impacts

There are no impacts on DCC Central Systems or Party interfacing systems anticipated.

Testing

There are no testing impacts anticipated.

SEC and Subsidiary Document impacts

This modification will require changes to:

- Section A 'Definitions and Interpretations';
- Section H 'DCC Services'; and
- Section M 'General'.

Impacts on other industry codes

There are no other industry code impacts anticipated.

Greenhouse Gas Emission impacts

There are no Greenhouse Gas Emission impacts anticipated.



5. Costs

Estimated Implementation costs

The total estimated implementation cost to delivery SECMP0043 is approximately **£1,200**.

SEC costs

The estimated SEC implementation cost is detailed in the table below:

SECAS implementation costs		
Implementation Activity	Effort (man days)	Cost
Application of approved changes to the SEC. Publication of a new version of the SEC on the SEC Website and issuing this to SEC Parties. Review and update any impacted SEC guidance materials.	Two	£1,200 ²

² SEC man day effort based on a blended rate of £600 per day.



6. Implementation

Recommended implementation date

The Working Group is recommending an implementation date for SECMP0009 of:

- **28th February 2019**, if a decision to approved is received by 14th February 2019; or
- **10 Working Days following decision**, if a decision to approve is received after 14th February 2019.

DCC highlights that the OPR is already in force and that this process should be put in place as soon as possible, to mitigate any risks arising from an exceptional event. The Working Group agrees that, if SECMP0043 is approved, it should be implemented as soon as possible.

7. Working Group Discussions

Initial proposal and consideration

DCC's initial modification (submitted in November 2017) proposed amendments to the definition of Services FM and M3 only. Under this modification, DCC proposed the following changes:

- Changes to the definition of Services FM to allow for a broader definition of relief events, and to clarify that a breach by another Party of its SEC obligations would constitute a circumstance beyond the affected Party's control;
- Clarifications to the procedures in SEC Section M3 'Services FM and Force Majeure' which the DCC and Panel are to follow if the DCC wishes to claim relief. For example, the Panel would be required to provide a decision within 10 working days of the DCC's application. In addition to the existing circumstances that constitute Services FM, DCC would be able to make an application for Services FM to the SEC Panel with respect to measurement against the SEC Performance Measures for an event beyond DCC's control; that would constitute Services FM under the SEC

The Working Group considered this solution and expressed the following concerns with regards to the proposed legal text changes:

- The proposed legal text changes may result in unintended consequences: in particular they may give DCC the ability to seek relief against all of its obligations under the SEC, rather than being limited to assessing performance against the OPR performance measures;
- Members didn't believe there was any need for an extra definition on top of the existing ones as this would create a two-tier approach to Services FM events, depending on whether the affected Services fell under the OPR and this could potentially cause inconsistency across DCC services and;
- Members also questioned how the relief process would work in practice, and how confidential evidence would be shared.

DCC stated that Services FM is narrowly defined and does not capture all potential events outside DCC's control. DCC stated it simply wanted the ability to apply to the SEC Panel for relief for any events that were beyond its control, as some events cannot be foreseen or predicted. The following clarification points were made by DCC:

- The current SEC definition of relief events (under Services FM) is consistent with Service Provider contracts, the contracts will remain un-changed, and relief will be for OPR purposes only
- DCC is not able to claim relief for exceptional events for OPR purposes under contracts from its Service Providers. This is because the OPR and SEC performance frameworks are different with respect to compensation; and

- The relief position will be reported to Ofgem under DCC's reporting for the OPR. Ofgem believe that the decision for whether DCC has relief should be made by industry (therefore under SEC governance), however the final decision in relation to OPR performance will be made by Ofgem

For what potential events could relief under the OPR be needed?

DCC presented examples of potential events outside of its control to the Working Group, which are not captured by the current definition of Services FM. The scenarios included a power outage (preventing meter reads in the region), a region being quarantined due to foot and mouth disease outbreak (preventing DCC from accessing the region) and a SEC Party failing to comply with the SEC. DCC stated that these events may impact its ability to perform its obligations under the SEC. The examples were presented to demonstrate to the Working Group that the proposed modification would ensure governance is in place for DCC to apply for relief for events outside its control.

There was some support for the issue, but members felt that some of DCC's scenarios would fall under the FM definition, and noted that the relief process existed under Services FM and not FM. Therefore, there would need to be clarification around the difference between the two definitions. There was also concern that broadening the Services FM definition could potentially shield DCC's Service Providers from their contractual obligations. DCC clarified that relief would be for OPR purposes only, and would not be applied to Service Provider performance reporting under the SEC. DCC further noted that it should have the ability to apply to the SEC Panel to claim relief for events outside of its control, for the Panel to be able to make an informed decision, and not be limited by the current narrow definition of Services FM events, which would result in DCC being penalised due to a wording technicality under the SEC.

How has the legal drafting evolved?

DCC provided a set of proposed changes to SEC Section M3 with its original modification proposal which were presented to the SEC Lawyer. They reviewed the proposal and provided comments on the proposed amendments, which were issued for industry consultation. The SEC Lawyer's comments and the responses to the consultation were presented to the Working Group. It was concluded that alternative solutions for implementing the modification should be reviewed. The four options identified were:

- Option 1: Amend Section H13 'Performance Standards and Reporting', to introduce a mechanism for exceptional events for the OPR performance measures.
- Option 2: Introduce a Panel relief mechanism in the DCC Performance Measurement Methodology;

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- Option 3: Establish a separate mechanism for the OPR performance measures under Section M3 'Force Majeure'; or
- Option 4: Proceed with DCC's original position which is a change to the current Section M3 Services FM definition and process.

The SEC Lawyer, SECAS and DCC reviewed the options, and Option 1 was agreed as the most suitable way forward. Members felt they needed to better understand the development of this text and why only one option had been presented for consideration. They also considered whether a different approach should be taken with the legal text that would document the full process under Section H13, eliminating the need for any changes to Section M3 and the Services FM definition. One member considered that the proposed changes to the definition of Services FM seemed to go beyond the intent of the modification and noted that they could not support that change.

Justification for proceeding with Option 1

The SEC Lawyer established that the problem trying to be addressed is how best to give effect to the core objective of providing DCC with the broader relief provided by the definition of Force Majeure when assessing performance against the OPR performance measures. The SEC Lawyer believed the approach set out in the first drafting of the legal text for Option 1 seemed the most elegant way of achieving that end. During a meeting with DCC and SECAS, it was confirmed that there are inherent problems with the DCC's original proposal that are difficult to avoid. For example, the Panel and DCC would need to decide whether a particular event is just Services FM for measurement against the SEC Performance Measures, or Services FM for measurement against the OPR performance measures, or Services FM for the wider purposes of the SEC. In this context, the benefit of the approach is that it allows for a separate process under Section H13 for the OPR performance measures only, meeting the intent of the proposal.

A summary of the counter arguments as to why the other options were not used are as follows:

Option 1: Amend Sections H13 and M3

Rather than saying in Section H13.7 that DCC gets relief for Services FM, the SEC Lawyer preferred to say that DCC gets relief for "Exceptional Events" (which would be defined the same as Force Majeure). Sections M3.2 to M3.8 would be copied into Section H13, but changing "Services FM" to "Exceptional Events". Consequential changes would be required to M3.

There was still residual concern from the SEC Lawyer that it is odd to have two different concepts and processes for Force Majeure and adding a third would compound the position. Again, this is created by the legal text produced for Option 1 (though here there are two different concepts, where one of those concepts has two sub-sets). Following



discussions between DCC, SECAS and the SEC Lawyer, it was clarified that the concept of Exceptional Events should apply solely to OPR reporting by the DCC using a discreet process under Section H13 of the SEC. This has the benefit of leaving the existing SEC reporting against Performance Measures unchanged; and also leaves the relief mechanisms for Force Majeure and Service FM untouched.

Option 2: Amend the DCC Performance Measurement Methodology (PMM)

The SEC Lawyer was concerned that this would relegate a key concept to a document that sits outside the SEC, which would give the DCC too much control over the Performance Measures against which it is being assessed.

Option 3: Amend Section M3 more generally to introduce a mechanism specifically for OPR purposes

The intent of this is the same as under Option 1 above, but rather than adding the new “Exceptional Events” process in Section H13, it would be added in Section M3.

Option 4: Proceed with the DCC’s original proposal to amend the definition of Services FM and process

This approach applied the broader concept of Force Majeure in all cases, not just assessment of the Performance Measures which has subsequently been dropped by DCC.

Further amendments to the legal text facilitated additional discussions within the Working Group, and the version produced following these discussions is attached to this report.

SEC Section A

Members were against an amendment to the FM definition within the SEC that stated “it is agreed that a breach by another Party of its obligations under this Code is a circumstance beyond the Affected Party’s control”. The SEC Lawyer affirmed that this part of the definition is not required, with the main clarification point being that a breach by another Party will not affect DCC and won’t be an omission under the Code. DCC agreed to keep the FM definition unchanged.

It was agreed that a more complete definition of ‘OPR Exceptional Event’ is required, possibly by adding “with respect to OPR Reporting” to the end of the current definition. DCC and the SEC Lawyer agreed to amend the definition, and this revised definition is included in the attached legal text.

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SEC Section M

Members questioned the addition of the statement “other than this code” in Section M3.3(b) and requested clarification as to what this would mean. DCC maintains contracts with its Service Providers, and one member felt that this clause would allow DCC to claim Services FM where another Party has failed to perform their obligations, essentially shielding DCC from accepting responsibility where the real issue is a weak Service Provider contract. Other SEC Parties don’t have sight of these contracts, so it would be inappropriate to change the SEC to give DCC cover that the contracts don’t provide as the other Parties would have to deal with the consequences of this. The member thought it more appropriate for DCC to have FM clauses in their Service Provider contracts as opposed to adding a clause within the SEC to have delineation between the two so there is no overlap.

DCC confirmed that they are unable to claim Services FM because of a breach within their supply chain, and that it is M3.3(b) that states this. The addition of this statement was to clarify that the SEC itself does not count as a contract with the DCC for the purpose of this clause.

The SEC Lawyer confirmed that they were comfortable with the addition of the statement as it is not a substantive change and DCC are unable to use subcontractor noncompliance as an excuse for failing to discharge their duties.

SEC Section H

One member questioned if OPR reporting was being equated to general reporting in H13, and whether it affects anything else in the DCC Licence or the SEC. DCC confirmed that the relief is **only** for OPR reporting purposes, and that this clause would apply only where any OPR reporting is derived from other reporting under the SEC.

Members sought clarification on the number of claims DCC will be able to make - will they be able to claim relief for OPR, Services FM and FM and if this would be one claim or multiple claims. DCC stated that they can already claim Services FM as it is a current procedure in the SEC and would be able to claim for OPR Exceptional Events under the DCC Licence in regard to its reporting to Ofgem. Although it is possible to apply for both, this occurs at different levels.

If there is an event that applies to both OPR Exceptional Event reporting and Services FM, DCC confirmed that both will be claimed for, but Services FM is more an administrative task than anything. If DCC applies for Services FM, they wouldn’t need to apply for OPR Exceptional Event relief, as the exclusion of the event due to Services FM would automatically apply to reporting under the OPR. DCC agreed to add a clarification into the legal text that it would not need to apply for relief under the OPR if relief for Services FM was given.

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The Working Group questioned what details will need to be provided to the SEC Panel about the exceptional event, as this has a knock-on effect on the Panel who would have 10 Working Days to provide a response. Without adequate data and information, the Panel may not have sufficient knowledge to do their jobs within the timeframe, leading the way for negative or unfavourable decisions. DCC agreed that it was their responsibility to provide the correct details and would note this going forward. A Working Group member confirmed that it was their expectation that if the information provided was not adequate, the Panel would not grant the requested relief, and so it was in DCC's interests to provide as much detail as possible and respond quickly to any further requests from the Panel. They felt this provided a sufficient level of protection.

A member questioned the usefulness of Section H13.13(b), as it essentially goes without saying that an exceptional event will result in non-performance. DCC confirmed that the OPR Exceptional Event happens first, and non-performance is a result of that, stating that it would be helpful to Industry for this clause to be included. The clause is intended to specify that DCC needs to demonstrate that the event *directly* caused the non-performance in order to claim relief.

The Working Group queried whether it would be favourable to include timescales around when DCC notifies Users about the end of exceptional events, as the value of relief may be dependent on the timescale of the exceptional event. DCC clarified that they are unable to claim more relief than is specified in Section H13.12, and that there is not always a clear end date for when an exceptional event might finish - in theory, the last day of an exceptional event would be when DCC service resumes. DCC also stated that end dates for exceptional events will depend on the nature and type of event that occurs. Another member commented that DCC should be able to resume services via another avenue before the event itself ends, and it is that point which Section H13.14 is referring to. Furthermore, the longer DCC goes without resuming services, the more likely it is they wouldn't get relief due to not having followed all possible avenues.

One member noted differing views of the SEC Lawyer and DCC around the number of reports that would be produced. The SEC Lawyer considered that there are two performance measures and if an event occurs that is only an OPR Exceptional Event then that will provide relief from the OPR measures but not from the performance measures, meaning there are two answers and two reports.

DCC countered this and agreed that although there are two outcomes, there is only one report as far as the SEC is concerned, with the OPR reporting sitting outside of the SEC. This modification does not intend to introduce any new SEC reporting.

The group queried what exceptions DCC may reference in the Performance Measures Exceptions List (PMEL) and DCC agreed to feed these back at a later date.

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8. Working Group's Conclusions

The Proposer's view is that SECMP0043 better facilitates General SEC Objectives (b) and (g) and should be **approved**. Although the Working Group agree that this modification is most aligned with these objectives, the other members were unable to form a solid view at this time and maintained a neutral view.

Benefits and drawbacks of SECMP0043

The Proposer and the Working Group have identified the following benefits and drawbacks related to SECMP0043:

Benefits

- This modification makes the process of claiming for FM and OPR exceptional events fairer and holds DCC more accountable for their actions.
- There will be a benefit to Industry as it is them (via the Panel) that makes the decision as to whether DCC can be given relief with respect to the OPR.
- This modification aligns the SEC with the regulations set out in the DCC Licence with respect to the OPR.

Drawbacks

- This modification makes the process of claiming for FM, OPR exceptional events and the SEC more complicated as it adds in a further type of relief and accompanying process to be followed.

Views against the General SEC Objectives

The Proposer believes that this Modification Proposal better facilitates General SEC Objectives (b)³ and (g)⁴ For the reasons outlined below. The rest of the Working Group agrees that these are the relevant objectives for this modification, but members were unable to form a view as to whether these are or aren't better facilitated at this time.

³ To enable the DCC to comply at all times with the General Objectives of the DCC (as defined in the DCC Licence), and to efficiently discharge the other obligations imposed upon it by the DCC Licence.

⁴ To facilitate the efficient and transparent administration and implementation of this Code.



Objective (b)

Neither the OPR or the SEC provides a process for DCC to apply for relief for exceptional events (events outside DCC's control). Services FM (SEC Section M3) defines relief events and the process to claim relief for DCC Services; however Services FM is narrowly defined and does not apply to all events outside DCC's control. In the absence of a process for a broader concept of relief events in the SEC, DCC considers that there is a risk that it is penalised under the OPR for delays or non-performance of its obligations due to events outside its control. The modification aims to address this issue and ensure DCC's regulatory framework creates the correct incentives for DCC to efficiently discharge the obligations placed upon it, better facilitating General SEC Objective (b).

Objective (g)

The proposed solution ensures there is robust Code governance for the treatment of events outside DCC's control impacting the delivery of DCC Services. The procedural clarifications proposed are intended to improve current SEC processes. Overall the modification delivers improvements to SEC governance and better facilitates efficient and transparent administration and implementation of the Code.

For the avoidance of doubt, the Proposer believes that SECMP0043 is neutral against the remaining Objectives.

Appendix 1: Glossary

The table below provides definitions of the terms used in this document.

Term	Acronym
DCC	Data Communications Company
DMR	Draft Modification Report
FM	Force Majeure
MRC	Modification Report Consultation
PMEL	Performance Measures Exceptions List
PMM	Performance Measurement Methodology
SEC	Smart Energy Code
OPR	Operational Performance Regime
WGC	Working Group Consultation