19 February 2018

SEC MP0043 – Services FM

1 Background

1.1 We have been instructed by SECCo to comment on the changes relating to the concept of "Services FM" proposed by MP00043 (Modification to Services Force Majeure Provisions).

1.2 The concept of "Services FM" under the SEC applies in respect of the Services to be provided by the DCC under the SEC. The concept provides relief to the DCC where the DCC fails to comply with the SEC due to certain events.

1.3 It is important to note that Services FM applies only in relation to DCC's obligation to provide the Services. Under the SEC, there is a separate concept of "Force Majeure" which applies to the DCC's other obligations and to the obligations of other Parties.

1.4 It is apparent from the consultation regarding the content of the SEC prior to its designation, that the reason for this approach was to ensure that the provisions concerning force majeure which apply to the Services to be provided by the DCC are aligned with the provisions of the DCC Service Provider contracts[1] –

In light of these comments, the Government has drafted Stage 1 of the SEC to include a standard section relating to force majeure for SEC Parties in line with existing codes. Given that the contracts between the DCC and its Service Providers are likely to define more narrowly the unforeseen events that would relieve the Service Providers of obligations to provide services, an additional section of the SEC has been drafted, referred to as 'Services FM'. This applies to the provision of DCC Services only. It is consistent with the anticipated contractual arrangements between the DCC and its Service Providers and reflects the provisions within the Government's model agreement applying to large and complex IT implementation.

1.5 Taking the DSP and CSP Central DCC Service Provider contracts as examples, the versions of these contracts published on the DCC's website contain the following definition in respect of force majeure:

means the occurrence after the Signature Date of any of the following: (a) war, civil war, riot, civil commotion or armed conflict; (b) Terrorism; (c) nuclear, chemical or biological contamination; (d) earthquakes, fire, storm damage or severe flooding (if in each case it affects a significant geographical area); and/or (e) any blockade or embargo (if in each case it affects a significant geographical area);

[1] Stage 1 of the Smart Energy Code – a Government response and a consultation on draft legal text (8 November 2012), paragraph 223.

1.6 On the basis of the above, it is apparent that the current definition of Services FM in the SEC matches the equivalent definitions in the DCC Service Provider contracts.

1.7 Clause 55 of the DSP contract and clause 56 of the CSP Central contract (as published in the DCC's website) are also very similar to Sections M3.1-M3.8 of the SEC.

2 Proposed Change to "Services FM" Definition (No. 1)

2.1 The addition in the opening paragraph of: "*any event or circumstance which is beyond the reasonable control of the DCC, including but not limited to*".

2.2 This is probably the most significant change provided for in the Modification Proposal. It would convert the "Services FM" definition from a narrow definition, to a very broad definition.

2.3 The effect of this addition would be to include within the definition of Services FM anything and everything which is beyond the reasonable control of the DCC. This would make it much easier for the DCC to claim that its failure to provide the Services in accordance with the SEC should be excused due to Services FM.

2.4 The proposer states in its proposal that this amendment is intended as a clarification to the definition, but it clearly changes (rather than clarifies) the meaning of the definition.

2.5 This change in meaning would be contrary to the Government's approach at the time of designating the SEC.

2.6 The amended definition would also be much broader than the definitions which apply under the DCC's Service Provider contracts.

2.7 It is not apparent to us why this change should be made. The proposer should be asked to provide further information as to why it is justified, and how it better facilitates the objectives.

3 Proposed Change to "Services FM" Definition (No. 2)

3.1 The addition of a new paragraph (f): "*a failure or delay by any other person in the performance of that other person's obligations under or in accordance with this Code*".

3.2 The effect of this change would be to include relief for the DCC where a person fails or delays in performing its obligations under the SEC. The principle of this amendment is less controversial.

3.3 The proposer states in its proposal that this amendment is intended as a clarification to the definition and to bring it in line with other codes.

3.4 However, the addition of this wording is not consistent with other codes (as the other codes

do not include this wording). Furthermore, it is not common to include such a principle within the concept of force majeure.

3.5 It is also changes (rather than clarifies) the meaning of the definition. However, as a matter of general law, a party is not liable in contract where the liability flowed from another party's breach. The addition does not therefore lessen the DCC's liability, but it does bring the scenario into the Services FM process.

3.6 We advise that the drafting should be clarified before the proposal is progressed. It should read – "*a breach by another Party of its obligations under this Code*".

4 Proposed Change to Section M3.3(b)

4.1 The addition in Section M3.3 of the following: "*For the purposes of this paragraph, this Code shall not be considered a contract with the DCC."*

4.2 This is linked to the change described in paragraph 3 above.

4.3 We advise that the drafting should be clarified before the proposal is progressed. Section M3.3(b) should read:

(b) in relation to any circumstances resulting from a failure or delay by any other person in the performance of that other person's obligations under a contract with the DCC other than this Code (unless that other person is itself prevented from or delayed in complying with its obligations as a result of Services FM); and/or

5 Proposed Change to Section M3.4

5.1 The amendment of Section M3.4 as follows: "*The DCC shall, as soon as reasonably practicable on becoming aware of the occurrence of the Services FM (and in any event within five (5) days of becoming aware of the occurrence of the Services FM), give to the Users …*".

5.2 The effect of this amendment would be to weaken the obligations of the DCC, and allow the DCC to seek to avoid or delay notifying Users on the basis that the DCC was not aware of the Services FM.

5.3 Whereas the current wording incentivises the DCC to put in place arrangements to identify when Services FM prevents or delays its performance (so that it can give notice within 5 days), the amendment potentially creates the reverse incentive (seeking to avoid awareness of issues).

5.4 This position would differ from that provided for in the DCC Service Provider contracts, where the service providers are required to provide notice "as soon as practicable and in any event within five (5) days".

5.5 The proposer has not given detailed reasons for why this is justified or how its better achieves the objectives.

6 Proposed Change to Section M3.5

6.1 The addition in Section M3.5 of the following: "*after consultation with the relevant operational sub-committee of the Panel*".

6.2 The effect of this amendment would be to expressly require the Panel to consult with its Sub-Committees.

6.3 It is likely that the Panel would do this in any event. It is also possible that the Panel may already have delegated this decision to a particular Sub-Committee. It is not apparent from the drafting which Sub-Committee the Panel should consult with.

6.4 Nevertheless, this is not an onerous obligation for the Panel.

6.5 We advise that the drafting should be clarified before the proposal is progressed, so as to read: : "*after consultation with any relevant Sub-Committee*".

7 Proposed Addition of Section M3.5A

7.1 The addition of a new Section M3.5A as follows: "*The Panel shall reach a determination as to whether the DCC is entitled to relief in respect of Services FM in accordance with Section M3.5 within 10 Working Days of the DCC notifying the Panel of the Services FM under Section M3.4."*

7.1 The effect of this amendment would be to require the Panel to reach a decision within 10 Working Days.

7.2 The proposer has not given detailed reasons for why this is justified or how its better achieves the objectives, but we assume that the proposer considers timely decision making to better facilitate the objective of efficient administration.

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