

Memorandum

To GSMG
From Sandra Wybrow
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cc. Chris Rowell
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Legal issues – P111

To date, GSMG discussion of P111 has focussed on:

- the definition/scope of what might be a ‘contingent’ or ‘anticipatory’ modification; and
- the perception that the proposal may be seeking to fetter the discretion of the Authority or hedge against future regulatory risk.

Broadly, a contingent modification has been considered to be a proposal that is dependent upon another modification, or is, in itself, an incomplete proposal.

However, before continuing discussion along these lines, it is necessary to examine the substance of the proposal at a higher level. In our view, the key issue arising is whether a modification to the Code is required to extend the powers of the Panel in relation to ‘contingent’ proposals, given the existence of Sections F2.1.1 and F2.1.2. Recent developments in relation to P109 have caused us to consider operation of these sections in detail, and we believe they contain the powers P111 seeks to introduce.

Existing Code provisions

Section 2.1.2 relevantly provides that:

2.1.2 *A proposal made **pursuant to paragraph 2.1.1** shall be submitted in writing in accordance with BSCP 76, and shall contain the following information in relation to the proposal:*

...

(c) *a description (in reasonable but not excessive detail) of the **issue or defect** which the proposed modification seeks to address;*

...

(f) *the reasons why the Proposer believes that the proposed modification would better facilitate the achievement of the applicable BSC Objective(s) as compared with the **then current version of the Code**. (Emphasis added)*

What type of proposal constitutes a Modification Proposal?

The opening words of Section F2.1.1 are, “A proposal to modify **the Code** may be made by any of the following.....”. This means that to come within Section F at all a proposal must seek to modify the Code as it exists at that time. A proposed modification that does not relate to the current version of the Code is not a proposal to modify the Code.

What is the current version of the Code?

Code text becomes legally effective from the time it is approved by the Authority (unless a specific Effective Date is expressly stated in the Authority's decision letter), regardless of its Implementation Date. The current legal version of the Code at any particular time is the version of the Code as published, read together with the legal text of all Approved Modifications awaiting implementation.

What if there is a material failure to comply with 2.1.2?

Section F2.1.3 provides that:

2.1.3 *If a submitted proposal **fails in any material respect** to comply with the requirements of paragraph 2.1.2....the Modification Secretary may refuse to accept such submission, provided that:*

- (a) the Modification Secretary shall furnish the Proposer with the reasons for such refusal;*
- (b) the Modification Secretary shall report such refusal to the Panel at the next Panel Meeting;*
- (c) if the Panel decides to reverse the Modification Secretary's decision to refuse the submission, the Modification Secretary shall notify the Proposer accordingly and the proposal shall be dealt with in accordance with the succeeding provisions of this paragraph 2;*
- (d) nothing in this paragraph 2.1.3 shall prevent a Proposer from submitting a revised proposal in compliance with the requirements of paragraph 2.1.2 in respect of the same subject-matter. (Emphasis added)*

A contingent proposal will (assuming, of course, that it first achieves the threshold imposed by Section F2.1.1) fail in a material respect to comply with 2.1.2 as:

- there is no issue or defect **relating to the current version of the Code**; and
- there is no assessment of whether the proposal better facilitates the BSC Objective(s) **as compared with the current version of the Code**.

In such cases the Modification Secretary ought to refuse to accept the proposal pursuant to 2.1.3.

Such refusal would be a mere administrative action, rather than a subjective decision or judgement. It is not a question of the Modification Secretary being permitted to consider whether there is an 'adequate' issue or defect, or a 'good' issue or defect – but only whether there **is** an issue or defect **which relates to the Code** as it exists at the time of the proposal. The absence of a Code-related issue or defect must lead to a proposal being refused just as the absence of the Proposer's name and details would.

Similarly, the refusal of the Modification Secretary to accept a contingent proposal on the basis that it did not contain an assessment of whether the proposal better facilitates the BSC **objectives as compared with the current versions of the Code** would not involve the Modification Secretary considering the adequacy of the assessment, but whether there was a comparison **as against the existing Code**. There will be no such comparison in the case of a contingent proposal which assesses the proposal as against a version of the Code that will only exist if a modification is approved by the Authority.

P109

P109 is an example of a proposal which could have been refused by the Modification Secretary on the strength of F2.1.2(c) of (f). As you are aware, P109 essentially seeks to implement a hedging scheme in relation to Transmission Loss Factors (TLFs) should TLFs be set at any value other than zero in the future. At the time P109 was raised TLFs were set at zero, and therefore it can be argued that P109 effectively sought to mitigate future regulatory risk by ensuring against future 'unfavourable' changes to the Code. This raised no issue or defect with the current version of the Code at that time. Nor did it assess BSC Objectives against the then current version of the Code. However, during the P109 Assessment Procedure, the Authority approved P82 – effectively setting TLFs to a factor other than zero, and therefore in effect legitimising P109.

Panel Review

Section 2.1.3 provides for Panel review of the Modification Secretary's decision to refuse a proposal. This provides a safeguard ensuring the proper exercise by the Modification Secretary of his powers under Section F2.1.3. Such a review by the Panel should take into account legal advice as to the existence of an issue or defect **relating to the Code** or of an assessment of BSC Objective(s) against the **current version of the Code**. The Panel should overrule the Modification Secretary's decision only where he has erred in exercising his power under 2.1.2.

The way forward for P111

It is our view that as P111 seeks to provide the Panel with no broader powers than already exist under the Code, it is an unnecessary Modification Proposal. The appropriate action is for the GSMG to recommend to the Panel that P111 be sent to the Report Phase immediately in accordance with F2.2.11. Without such instruction from the Panel, the GSMG has no power to otherwise stop the P111 Assessment Procedure.

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