

Legal Alert

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Standardised CDM Modalities of Communication

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On 13 February 2009, the CDM Executive Board (CDM EB) adopted the procedures (the "**Procedures**") for modalities of communication (MoC) between project participants (PPs) in clean development mechanism (CDM) projects and the CDM EB, and a standardised MoC form (the "**MoC Form**").¹ This Legal Alert gives an overview of the main elements of the Procedures and highlights certain insolvency issues related to the MoC.

Introduction

The Procedures and the MoC Form standardise the format for the MoC. Certain unofficial communication practices that had become customary between PPs and the CDM EB (such as the possibility to appoint a joint Focal Point) are now officially adopted and standardised.

The Procedures and MoC Form were adopted after public consultation. First drafts of the MoC Form and the Procedures were published by the CDM EB in July 2008. Subsequently, a proposal for amendments was submitted by the International Emissions Trading Organisation (IETA). Most of IETA's proposals have been incorporated in the MoC Form and in the Procedures.

¹ The Procedures and the MoC Form are contained in Annex 59 and Annex 60 to the EB 45 Report.

Main aspects

The MoC specify the method for all official communication between the PPs of a CDM project and the CDM EB and UNFCCC Secretariat. For each CDM project, the MoC must be submitted at the time of registration of the project design document by the relevant designated operational entity (DOE). The MoC may subsequently be changed.

Standard MoC Form

The MoC Form² is a standard form that must be used for submitting and changing the MoC. The MoC Form must be duly signed by all PPs of the CDM project. The Procedures provide that the identity of the PPs must be established and their signatures registered through a due diligence process, which process is to be performed by DOEs for all new entities entering as PPs at the point of requesting registration. However, the Procedures do not clarify how the DOE should conduct the due diligence and what level of scrutiny it must apply (e.g., may the DOE rely on information given by the PPS, or should it check the commercial register?). If the project is already registered, the Secretariat will perform the due diligence process on entities requesting registration as new PPs to the project.

² The MoC Form can be downloaded from:
http://cdm.unfccc.int/Reference/PDDs_Forms/Registration/index.html

Focal Point

In the MoC Form, a Focal Point must be appointed in respect of the CDM project. The Focal Point is defined as any entity, or entities, nominated through the MoC by all PPs to communicate with the CDM EB and the Secretariat in relation to some or all of the scopes of Focal Point authority as described in the Procedures. The Focal Point role can be fulfilled by one or more of the PPs of the relevant CDM project, but the PPs can also appoint one or more external entities as Focal Point.

Scopes of authority

The MoC Form and Procedures distinguish between three scopes of authority:

- (a) authority to instruct the Secretariat and communicate with the CDM EB on the allocation/forwarding of the Certified Emission Reductions (CERs) issued in respect of emission reductions generated by the project;
- (b) authority to request the addition of PPs and/or to communicate any voluntary withdrawal and to update contact details of PPs (including changes in company's name and legal status, addresses, etc.);
- (c) communication with the Secretariat and CDM EB on matters related to registration and/or issuance (including receiving copies of all communication related to the project).

One or more entities can be nominated as Focal Point for each scope of authority in a shared or joint Focal Point role. Therefore, three types of Focal Point exist:

- **Sole Focal Point:** the Focal Point is one entity and only the signature of an authorised signatory of that entity is required for communication related to the corresponding scope of authority.
- **Shared Focal Point:** the Focal Point role is shared by two or more entities and the signature of an authorised signatory of any of these entities is required for communication related to the corresponding scope of authority.
- **Joint Focal Point:** the Focal Point role is shared by two or more entities and the signatures of the authorised signatories of each of these entities are

required for communication related to the corresponding scope of authority.

The MoC Form must contain the names, contact details and specimen signatures of the authorised signatories of the PPs and the entity or entities that will act as Focal Point. In the MoC Form, each party can nominate a primary and an alternate authorised signatory and the signature of either of them will suffice to represent the relevant party. It is also possible to register electronic signatures, which require a digital certificate to be provided by the Secretariat.

Changes to the MoC and to PPs

Modifications to the nomination of the Focal Point for any or all of the scopes of authority are considered to be reasons for changing the MoC. PPs can change the MoC by having their authorised signatories sign a new MoC Form, which form must be submitted through the current Focal Point for the scope of authority sub (c) (as this Focal Point remains the relevant point of communication for the Secretariat and CDM EB, until the new MoC have been submitted).

The same procedure of changing the MoC must be followed in case of addition or withdrawal of PPs which encompass changes to the nomination of the Focal Point in any of the scopes of authority. In cases where the addition or withdrawal of PPs is not associated with changes in the nomination of the Focal Point(s), the Focal Point for the scope of authority sub (b) must submit a separate form (Annex 2 to the MoC Form), duly signed by the authorised signatory of the PPs concerned, which shall be attached to the existing MoC.

Implementation of the MoC Form

The Procedures and the MoC Form entered into effect upon approval by the CDM EB on 13 February 2009. The MoC Form must therefore be used as the standard form for all new MoC submissions.

In cases where an MoC statement was already signed by all PPs before 13 February 2009, but the project is not yet registered, the DOE may submit the signed statement in its original format providing evidence that it was signed prior to the availability of the MoC Form. A grace period of eight months will be granted for these

exceptional cases to be submitted for registration, after which the MoC Form must be used.

Contractual obligations

In the Procedures, it is stated that the CDM EB considers that neither itself nor the Secretariat has the authority or responsibility to enforce private contractual obligations arising from the sale and buying of CERs. Honouring such contractual obligations is the sole responsibility of the registered PPs and nominated Focal Point(s).

Insolvency issues

For parties active in CDM, it is relevant to know if the bankruptcy of a PP would affect the validity of the MoC and the authority of the Focal Point. The PP's agreement to the nomination of the Focal Point may be regarded as a power of attorney, delegation or mandate, which terminates by operation of law upon the insolvency or bankruptcy of the grantor thereof under many, if not all, national insolvency laws. We have requested the Secretariat to clarify this issue and received the following answer:

"[...] If a project participant files for bankruptcy protection or other change occurs with respect to the property rights between or among project participants, the secretariat ordinarily would not be informed of such changes. As stated above, if any such change results in a change of FP, then the secretariat would have to be so informed, either by the project participants or the bankruptcy court/trustee or both."

It seems that the Secretariat considers the validity of the MoC and the authority of the Focal Point not to be affected by the bankruptcy of a PP. In case of such bankruptcy of a PP (which is not the Focal Point), the

CDM EB would continue to treat the Focal Point as its contact for the relevant scope of authority, until new MoC (signed by all PPs) are submitted. However, the Secretariat's answer is not entirely clear. It is stated that if a PP files for bankruptcy (or another change occurs with respect to the property rights between or among PPs) and this "results in a change of Focal Point, then the secretariat would have to be so informed, either by the project participants or the bankruptcy court/trustee or both". Pursuant to this sentence, it seems possible that if a PP (which is not the Focal Point) goes bankrupt, the bankruptcy court/trustee can inform the CDM EB that such bankruptcy has resulted in a change of Focal Point. The original Focal Point nomination would then be affected without new MoC having been submitted.

Unfortunately, the Secretariat was not willing to further clarify its position on the possible bankruptcy of PPs. Similar questions can be raised if the Focal Point itself is declared bankrupt. For instance, if the Focal Point for the scope of authority sub (a) goes bankrupt, who will then be authorised to instruct the CDM EB with respect to the forwarding of the relevant CERs? Will the bankruptcy trustee of the Focal Point be authorised to sign and submit requests for forwarding on behalf of the Focal Point? Or will the CDM EB require the PPs to submit new MoC (signed by all PPs) to appoint a new Focal Point?

The CDM EB and Secretariat will probably deal with such issues once they arise, on a case-by case basis. However, it is unfortunate that no general guidance has been given, especially in view of the current economic environment.

Contact information

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