APPENDIX C – RESPONSE TEMPLATE

SUMMARY INFORMATION

Respondent's Name	Bord Gáis Energy Limited
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Confidential Response	N

CAPACITY MARKET CODE MODIFICATIONS WORKSHOP 43 (PART B) CONSULTATION COMMENTS:

Bord Gáis Energy (**BGE**) welcomes the opportunity to respond to the SEM Committee's (**SEMC's**) consultation SEM-25-027 regarding proposed Capacity Market Code (**CMC**) modifications (**Mod/Mods**) presented at the Capacity Market Workshop 43B.

1. CMC_10_25 Amendments to section E.7 Requirements for Qualification

BGE is broadly in support of this Mod subject to the need for the Regulatory Authorities (RAs) to retain discretion on final qualification decisions.

Regarding the first amendment suggested in this Modification – the addition of words in section E.7.1.1 to remove any presumption of qualification – BGE has no objection to the added words to help achieve the Regulatory Authorities' aim of increased clarity.

Regarding the second proposed amendment - which has the effect of changing the System Operators (**SOs'**) assessment from a requirement that the SOs "*may* reject" an application for qualification if the project is not considered "*feasible*" by the relevant deadline to requiring that the SOs "*shall* reject" such an application if the project is not considered "*achievable*" by the time allowed - as it is entirely possible for the SOs to be unsure as to feasibility/ achievability of a project by the relevant deadline such that achievability could be argued one way or the other, BGE believes that it is necessary that an element of discretion remains in the hands of the RAs when it comes to finalising qualification decisions

(**FQD**) considering also that the SOs are a SEM market participant too and a risk of a conflict of interest arises. When read together with Mod CMC_12_25 it appears that the RAs may not have the final say in all FQDs if CMC_12_25 (part 1 of which Mod BGE does not support) is approved. We ask that the RAs' requirement to sign-off all qualification decisions is retained.

In practice, BGE does not see that there is a big difference in the practical effect of the words 'feasible' vs. 'achievable' but we can accept the proposal provided it is clarified that the RAs retain the final say on qualification decisions overall. That responsibility should not be entirely left in the hands of the SOs as facilitators of the capacity market and given their role as SEM market participants too.

2. CMC_11_25_Clarification on provisions relating to "final and binding" and dispute resolution under the CMC

BGE does not support this proposed modification and urges the SEMC's revision of its minded-to position particularly in light of concrete legal concerns the Mod raises.

We note the RAs' statements made at the Workshop addressing this proposal[1], including that this is a "*clarificatory Modification which does not seek to change the substance of the CMC*". However, the RAs also noted in the Workshop that "a *decision made by the RAs can only be challenged if it was made dishonestly or maliciously*". In the consultation paper the RAs have further clarified (in response to BGE's query as to whether the RAs' view was that "dishonesty or malice" would have to be proven to go to court) that the intent here is to "*clarify that dishonest decisions or decisions made maliciously are not final and binding under the CMC. In broad terms, malice and dishonesty connote intentional wrongdoing. There would a need to be an evidential basis for any claim that a decision had been taken dishonestly or maliciously. In other words, mere assertion would be unlikely to be sufficient*". BGE notes that it is subsequently by reference to this clarification intent that the SEMC is "*minded to accept*" this Modification Proposal.

The language in the Mod and in the consultation paper itself is very concerning to BGE. On the face of it the intent is described as to clarify that the RAs' decisions around "Qualification" and "Final Capacity Auction Results" are not final and binding if "*dishonesty or malice*" on the part of the RAs is involved. However, given the RAs' explanation of the threshold of / an evidential basis for claiming a decision was taken dishonestly or maliciously (referenced above) needing to be determined before litigation could arise, there is in fact a change to the substance of the CMC here. The RAs are in effect seeking to narrow the opportunity for market participants to seek any redress to the courts, by limiting such redress to when a participant can prove (evidence) that a decision has been taken dishonestly or maliciously.

[1] As summarised in the Consultation paper

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To understand the change, it is worth recapping that, at present:

- the only limitation on a market participant to bring litigation to court under the CMC is that a dispute must first be brought through the Dispute Resolution Process in compliance with the CMC – no other hurdle to seeking judicial redress exists.
- it is explicitly stated in the CMC that the Dispute Resolution Process provisions "*shall not prejudice or restrict any Party's entitlement to seek interim or interlocutory relief directly from the [Courts]*"[2]- there are no circumstances anywhere in the CMC where the right to seek something like an injunction would be limited.

The effect of the RAs' amendments / deletions/ drafting of the CMC under this Mod however includes that there is to be no right to bring any litigation to court whatsoever, including interim or interlocutory relief or referral of a Dispute to Court, *unless*:

a) the litigation relates to final decisions on qualification and capacity auction results, <u>and</u> the evidential basis of "malice or dishonesty" has been determined, or
b) the matter has been referred to the dispute resolution board <u>and</u> if appealing a board's final and binding decision, the evidential basis of "malice or dishonesty" has been determined.

Regarding interim/ interlocutory relief specifically, the proposed addition in paragraph B.2.1.2 in the Mod removes the prospect of a market participant seeking interlocutory relief, such as an injunction, in any circumstances under the CMC. We cannot support restriction in the CMC on the entitlement to seek interim/ interlocutory relief which should be permitted at any stage and in all circumstances considering too that such relief has a very high threshold to meet before it is granted by a court in any event. The current unamended B.2.1.2 provides that the jurisdiction of the Irish and Northern Irish courts shall apply subject only to the requirement for certain disputes to go through the Dispute Resolution Process (*which Process is explicitly stated as not being prejudicial or restrictive of a Party's entitlement to seek interim or interlocutory relief*), after which a dispute can then be referred to Court. The Mod's proposed text however:

i) makes B.2.1.2 also "*subject to*" the statements that Final Qualification Decisions and Final Capacity Auction Results are final and binding "save in the case of dishonesty and malice", and
ii) in B.14.2.7, deletes the entitlement of a Party to seek interim or interlocutory relief even if a Dispute Resolution Process is involved.

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[2] The Mod proposes deletion of this sentence from the CMC

Together, the overall effect of this specific proposed text (i and ii above) is to deny market participants the entitlement to seek injunctive/interim/interlocutory relief in all circumstances including for dispute resolution, qualification and auction result decisions unless the new subjective evidence threshold of malice or dishonesty is met. It also infers that even a mistake made 'honestly' has no way of being fairly challenged. As mentioned, the courts already apply a strict high threshold for such relief. BGE cannot therefore agree to these changes to B.2.1.2, the general legal entitlement to seek interim/interlocutory relief should not be limited under CMC.

In essence, by caveating "final and binding" decisions with the need to have evidence of 'malice' or 'dishonesty' (for which no insight as to what the evidential burden might entail is given) before litigation can be brought seeks to introduce a major hurdle for market participants to overcome before being able to challenge a CMC related decision. It hugely narrows the scope of market participants to hold decision-makers to account under the CMC and also raises complexity in interpretation and likely cost in determining what it may mean in future.

<u>The Mod cannot in our view proceed, specifically for the following legal reasons</u>.

Under the Irish constitution, the right of access to courts is a fundamental constitutional right and this Mod undermines that right. Article 34.1 of the Constitution mandates that justice be administered in courts established by law. Irish courts have interpreted this to include a right of access to justice - the principle that parties to litigation must be given adequate opportunity to make their case forms the basis of the rights to fair procedures and a fair trial. While the constitution is primarily applicable to "human persons", caselaw confirms that constitutional protections can extend to companies especially when a constitutional provision does not explicitly limit its application to "human persons" in its language[3] – Article 34 does not limit its application to 'human persons' whereas several other constitutional provisions do. BGE therefore opines that there are clear grounds to stipulate that the RAs' proposal to apply a "pre-litigation" threshold of proving "*dishonesty or malice*" would not be enforceable under constitutional law given its effect is a limitation on the right to access the courts.

Similarly, Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial and this right has been interpreted by the European Court of Human Rights as encompassing the ability to institute proceedings before a court (right to access court) and have a fair hearing. Legal entities such as companies can invoke this Article 6 right to a fair trial also.[4] BGE thus concludes that the RAs' suggested limitation (by introducing the evidentiary threshold of dishonesty and malice), undermines this Article 6 ECHR right also.

[3] Iarnród Eireann v Ireland [1996] 3 I.R. 321
[4] BTS Holding A.S. v Slovakia 2017; Iliria SRL v Albania 2009

Furthermore, the central tenet of one of the two common law principles of natural justice, *audi alteram partem*, is that a person affected by, or with an interest in, the outcome of judicial or administrative decisions has the right to be given adequate notice and adequate opportunity to make their case.[5] This Mod runs counter to this common law principle also.

BGE believes that the proposals would not hold up under a judicial review (**JR**) process and so would be meaningless in practice. Taking the ground of "illegality" under judicial review in Ireland, for example, illegality arises when a decision-maker misdirects itself in law, exercises a power wrongly or acts *ultra vires* by purporting to exercise a power that it does not have. Considering the possible commercial impact of denying a participant the right to access the courts or interlocutory relief due to a decision on Qualification for an auction / Final Auction Results / a dispute resolution board decision, it is not inconceivable that a party would go the judicial review route in relation to the matter under the CMC. The court will review the process by which the decision maker (CRU and UREGNI in this instance) reached its decisions to assess whether it was validly made. The RAs' attempt here to introduce a threshold below which a participant cannot bring litigation, raises concerns of "illegality" given that the RAs do not have the jurisdiction/ legal authority under Order 84 of the Superior Courts Rules to decide a) when disputes can or cannot pass the RAs (who has standing to bring a JR) or b) what hurdles should be cleared, before going the litigation route.[6]

Finally, from a contract law perspective, the proposals conflict with the general contractual rules on certainty. The words 'malice' and 'dishonesty' are subject to interpretation and are very likely in BGE's view to fall foul of the risk of the term or provision being regarded as contractually void due to vagueness or uncertainty. Given the extent of uncertainty involved in determining what is actual malice/dishonesty and in proving it, the proposal is too uncertain under contract law to be effective in our view. It is further unclear as to whom the malice or dishonesty should be proven – it would be inappropriate for the RAs to effectively be the judge, jury and final decision-maker for the threshold. Ultimately, while the CMC can provide (which it already does)[7] for certain avenues to be pursued before referrals to court, the precondition of proving dishonesty/ malice (and to whom) is too vague and uncertain to have contractual effect.

Ultimately, we do not believe the RAs have the legal standing to seek to narrow the scope/ introduce a threshold, for when a participant can take a CMC matter to court. Access to justice is essentially a pillar of the rule of law and so introduction of this proposed text would be fruitless

[5] G.W. Hogan and G.F. Whyte, J.M. Kelly: The Irish Constitution (4th edn, Bloomsbury 2006), [6.1.52] – [6.1.63].
[6] Subject only to the existing requirement for the dispute to have gone through the CMC dispute resolution process first – it is standard to have alternative dispute processes provided for in contracts (e.g. mediation, arbitration) before a referral to court can be made
[7] Regular preconditions of court proceedings being arbitration or mediation or in the case of the CMC, the dispute resolution process

in practice and not upheld in a court of law. On this basis, BGE cannot support the principle or proposed text in this Mod and we urge the SEMC to consider the range of legal difficulties we have outlined above in considering the final decision on this Mod.

3. CMC_12_25_RAs role in relation to Final Qualification Decisions (FQDs))

BGE does not support the Part 1 proposal of this Mod primarily as: it incorporates the malice and dishonesty concerns addressed in our answer to CMC_11_25 above, it raises the risk of conflict of interest issues with the SOs as primary decision maker, and the RAs have wider obligations than the SOs to take into consideration in finalising decisions; BGE does however support the "alternative" put forward in "Part 2" of the Mod proposal subject to a clarification point in referencing paragraph E.7.1.

PART 1 of MOD

Regarding the initial (**Part 1**, more substantive) proposal BGE raises the same concerns it had regarding the proposal for an evidential basis of "dishonest or malice" to be proven before a participant can have recourse to the Courts – we do not believe that this language stands up under constitutional law, common law or contract law and it would fall foul of the ground of illegality under judicial review also given that the RAs do not have the legal power to limit the right of access to courts (the determination of who has legal standing is for the Courts).

In general, BGE does not support the rationale for the RAs seeking to remove themselves from confirming decisions on qualification – the effect of this Mod is that the SOs will hold the pen on what market participants qualify or not, leaving no final say to the RAs (unless a matter has been through dispute resolution). We believe that enabling the SOs to be the final decisions makers on qualification (outside of disputed matters) risks raising a conflict of interest given the SOs' role as a fellow SEM market participant but also administrator of the CMC. Furthermore, the RAs have broader obligations[8] to take into consideration when making decisions pursuant to the CMC and the RAs' role in this regard should not be fettered or narrowed as is proposed here. Otherwise, consumer impact and competition issues could materialise. We note also that the capacity market, as an EU state aid, must continuously be compatible with EU internal market rules and an ability to raise a question if needed on a CMC related decision should not be limited by the CMC.

Regarding the RAs' reference in the explanation for the Mod to having an intended two-week period to consider all proposed FQDs and decide whether to approve/ reject, BGE's understanding is that the RAs can have access to the decision-making information involved in the dispute resolution process as and when they see fit. If it would support the RAs' role, to be closer to the details of dispute resolution cases earlier than

[8] As per section 9 of the Electricity Regulation Act 1999 (as amended)

they are at present, we believe that access to dispute resolution process information should be addressed in a manner that does not dilute the RAs' role as the final decision maker under the CMC. We therefore do not support the part 1 suggestions.

PART 2 of MOD

BGE supports the majority of the clarification suggestions in the 'alternative' text proposal in **Part 2** of the CMC Mod. However, we are unclear as to the intended effect of the addition in paragraph E.9.4.5 of the text "*Having regard to the provisions of paragraph E.7.1*". Our concern is that it may be read as restricting the scope of matters that the RAs can consider in approving/rejecting decisions. We suggest therefore that the text is deleted or amended to read "*Having regard to, but not limited to, the provisions of paragraph E.7.1*". We therefore support this part 2 proposal subject to the deletion or amendment suggested immediately above.

4. CMC_13_25_Amendments to the Capacity Auction Timetable

BGE does not support the Mod as written & suggests a) at least 1 WD notice of timetable changes, 2) no cancellation after auction commences

The effect of the proposed added text in D.2.1.12 is that, in all cases, the auction timetable (including for a delay, postponement or cancellation of an auction) can be amended at any time with no notice before/after an auction is due to/ has commenced. BGE believes that a) it is inequitable to postpone/cancel an auction after it has commenced and b) a certain level of notice, for e.g. 1 working day (1 WD) at least, should apply for a delay, postponement or cancellation.

BGE therefore supports this Mod subject to:

1) that at least 1 WD notice would apply in all circumstances (whether under D.2.1.10 or D.2.1.12) where a delay, postponement or cancellation of an auction is decided; and
2) wording being included confirming an auction will not be cancelled/postponed after its commencement.

5. CMC_14_25_New Dates in the Capacity Auction Timetable

BGE supports this Mod but requests that the reference "for the first time" is deleted from the proposed text and that earlier information ~A-25 on LCCAs should also be provided to market participants to enhance transparency and investment signals.

The removal of the words "*for the first time*" is requested as we believe it is unnecessary wording and risks causing confusion especially as the RAs have clarified that the SOs are to carry out this proposed process for each and every auction going forward.

BGE like other participants would also greatly welcome earlier information on the LCCAs and their related volumes information. If the information proposed to be shared from the SOs to the RAs under cell 1A of the Mod, was also shared with market participants BGE believes this would provide a strong investment signal for prospective projects and does not raise a market power concern. The timing of this cell 1A information (at Auction-25 weeks) is before the qualification window for auctions and simultaneous to the initial auction information pack and would be valuable transparent information for which we see no reason for not sharing with market participants.

The interaction between F.4.1.1 and F.4.1.5 appears to be that the SOs can amend their view on locational capacity constraints and related volumes, once Final Qualification Decisions have been received from the RAs. BGE requests that any changes in LCCA values between the time of submission of LCCA values to the RAs and the final figures for LCCA values, should be transparently reported in the Volumes paper issued after each capacity auction.

6. CMC_15_25_Performance Securities for Extended Projects in T-4 2026/27

BGE supports this modification as a reasonable ask given the precedence from previous auctions, subject to:

a) The Mod applying to all capacity auctions held to date and not to just a specific narrow set of auctions; and
b) That as well as the Performance Security Posting Dates/ Events being extended by a period equal to the Third-party Extension Period in question, the relevant remaining Termination penalties and the corresponding application of monthly windows (which can vary auction to auction) would move (timewise) in tandem.

APPENDIX C – RESPONSE TEMPLATE

ID	Proposed Modification and its Consistency with the Code Objectives	Impacts Not Identified in the Modification Proposal Form	Detailed CMC Drafting Proposed to Deliver the Modification
CMC_10_25: Amendments to E.7	Provided the RAs retain the responsibility to have a final say on Final Qualification Decisions, we believe this proposed mod has merit under Code Objectives (a)-(d) and (g)	An effect of the changed text in the Mod is that instead of the requirement that the SOs "may" deny qualification if a project is not "feasible", is that the SOs "shall" reject qualification if the project is not "achievable" – and when read with CMC_12_25 it ultimately removes the RAs' discretion to have the final say on qualification decisions. Putting qualification decisions entirely in the SOs' hands is not appropriate in our view given they are fellow market participants which raises conflict of interest risks, and the RAs have wider statutory duties to consumers and the financing of generation activities and security of supply to consider for example.	We suggest an addition is needed to ensure that the RAs must be the final decision maker and confirm all final qualification decisions

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ID	Proposed Modification and its Consistency with the Code Objectives	Impacts Not Identified in the Modification Proposal Form	Detailed CMC Drafting Proposed to Deliver the Modification
CMC_11_25: Clarification on provisions relating to 'final and binding' and dispute resolution under the CMC	BGE does not believe that the proposed modification promotes any of the CMC objectives outlined in the CMC. Specifically, its approval: could damage the provision of adequate future capacity (contrary to Code Objective (b)); would not better facilitate undertakings seeking to engage in providing electricity (contrary to Code Objective (c)); dampens scope for competition (contrary to Code Objective (d)); and reduces transparency considering for example the subjectiveness of 'malice' or 'dishonesty' which ultimately adds complexity and likely cost in determining its meaning if the Mod applied (contrary to Code Objective (e)); overall this would impact consumer interests with respect to price, quality, reliability and security of electricity supply across the island (contrary to Code Objective (g)).	The Mod is presented as a "clarification" mod to make it clear that decisions made dishonestly or maliciously are not "final and binding". In practice, the effect of these words is that 'malice' or 'dishonesty' introduces a new burden of evidence for any party that may seek to challenge or dispute a CMC decision. The words do not clarify but rather add subjectivity and complexity into the CMC (with a consequent risk of added cost in interpreting malice/dishonesty) and encroach on legal rights of access to courts. They risk affecting the provisions they are contained in, in terms of the validity and certainty of the terminology used.	N/A – BGE does not support this proposed modification

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ID	Proposed Modification and its Consistency with the Code Objectives	Impacts Not Identified in the Modification Proposal Form	Detailed CMC Drafting Proposed to Deliver the Modification
CMC_12_25: RAs' role in relation to FQDs	PART 1: The language on 'malice' or 'dishonesty' would fall foul of the CMC objectives as described for CMC_11_25 above. Making the SOs' primary FQD decider could undermine facilitating undertakings' participation (contrary to CMC Objective (c); and undermine the promotion of competition/ transparency / ensuring no undue discrimination (contrary to CMC Objectives (d)/(e)/(f); with potential negative impacts for consumers contrary to CMC Objective (g). PART 2: The part 2 alternative (with BGE's suggested amendment) has the potential to promote especially CMC Objectives: (b) in terms of market development; (c) market participation; (d) and (g) in terms of competition and consumer interests.	In practice, narrowing the RAs' role in Final Qualification Decisions to one where the RAs are involved only at the end of the dispute resolution process (and not for other FQDs) places the decision-making in the hands of the SOs, who while are administrators of the CMC the SOs are also market participants which raises risks of conflict of interest. It is not appropriate or acceptable to BGE to place final qualification decisions in the hands of the SOs, the RAs' discretion and need to make decisions in line with statutory and CMC obligations should not be fettered in this regard.	The 'alternative' as written in Part 2 only is supported once our concern around referencing para E.7.1 in para E.9.4.5 is addressed - please see our response on the Mod in the main body text above.

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CMC_13_25: Amendments to the Capacity Auction Timetable	This proposal, together with BGE's asks, would promote in particular CMC objectives (a)-(e) and (g).	The modification could be read as leaving open a gap for the RAs', SOs to decide to cancel an auction after it has commenced (which BGE does not support) or give 1+ hours' notice of a change to auction timetable before it is due to start. Not least from the administrative burden perspective market participants should have >1WD notice of any such change.	BGE supports this Mod subject to: 1) wording being included confirming an auction will not be cancelled/postponed after its commencement and 2) that at least 1 WD notice would apply in all circumstances (whether reading D.2.1.10 or D.2.1.12) where a delay, postponement or cancellation of an auction is decided.
CMC_14_25: New Dates in the Capacity Auction Timetable	The 'competition' and 'transparency' aims under CMC objectives (d) and (e) and consumer interests under CMC objective (g) would especially be promoted if the LCCA information was also shared with market participants at A-25	We believe that a potentially positive impact, if addressed accordingly, of the Mod is that market participants would also receive LCCA information ~ week A-25 – this would not give market power advantages but would serve to enhance investment signals, benefitting competition.	Request that "*for the first time*" is deleted from the proposed text. Seek to add that the LCCA information at A-25 will also be shared with market participants to benefit transparency and competition.

APPENDIX C – RESPONSE TEMPLATE

ID	Proposed Modification and its Consistency with the Code Objectives	Impacts Not Identified in the Modification Proposal Form	Detailed CMC Drafting Proposed to Deliver the Modification
CMC_15_25: Performance Securities for Extended Projects in T-4 2026/7	BGE believes this Mod would promote efficient operation of the market (Objective (b)); participation of undertakings (Objective (c)); competition, transparency and consumer interests (Objectives (d), (e), (g))).	It appears inequitable not to apply this change to all auctions, as opposed to a subset of auctions. The termination penalties/related timelines should move in tandem with the timeline changes for the performance securities also or there could be an inequitable mismatch here in terms of monetary quantums and due dates as across performance securities and termination penalties.	Changes required to reflect that the Mod applies to all capacity auctions and that termination timeline/penalties also move simultaneously with movements in timelines/related quantum for performance securities.

NB please add extra rows as needed.