ELECTRICITY
ASSOCIATION
OF IRELAND

6 Merrion Square North,

Dublin,

D02 FF95

17/07/2025

Commission for Regulation of Utilities

The Exchange

Belgard Square North

Tallaght

D24 PXW0

RE: Proposed RAs' modifications to the Capacity Market Code CMC_11_25 and CMC_12_25

Dear SEM Committee,

It has come to EAI's attention, through our members, that a change to the Capacity Market Code (CMC) via modification CMC_11_25 is being proposed. This modification would have the intent and effect of narrowing the scope of market participants to raise litigation, including interlocutory relief, under the CMC.

As the matter goes to the heart of governance under the CMC, EAI believes it merits an industry level representation to the SEM Committee on the issue.

1. EAI members' consensus view is that the proposed modification CMC_11_25 is *ultra vires* the Regulatory Authorities (**RAs'**) powers, because:

    a. Narrowing the right to redress pursuant to the modification undermines the requirements under the Electricity Regulation Act 1999 (as amended) for: i) the CRU (*and SEMC when a matter has SEM impact*) to carry out their functions and exercise their powers in a manner that ensures no undue barriers exist for electricity as regards market entry and operation (*Article 9(3)(d)*) and ii) the CRU to promote competition in the generation and supply of electricity and the continuity and security of electricity supplies (*Articles 9(4)(a)(i) and (v)*). If market participants are limited or deterred from escalating disputes around qualification or final auction decisions for example, this could have an undue negative impact on market entry, competition, and enhanced electricity supplies.

   b. The evidence thresholds for 'malice' and 'dishonesty' are currently unknown, ultimately subjective and could realistically be perceived as an attempt to limit market participants' constitutional and European rights of access to justice and courts. This right of access is enshrined in Article 34 of the Irish constitution and Article 6 of the European Convention of Human Rights, both of which can be relied on by legal entity companies.

2. EAI members also believe that, contractually speaking, wording that seeks to limit a party's right to access justice could fall foul of contractual rules. While it is acceptable to include prerequisites, like following the CMC disputes process before going the judicial route on disputes (which the CMC already provides for), effectively carving out the right to seek redress through the Courts would not be a legitimate proviso under contract law.

3. EAI members do not believe that the proposed CMC_11_25 modification promotes any of the CMC objectives outlined in CMC paragraph A.1.2.1 (a – g). Specifically, it could damage the provision of adequate future capacity (Code objective (b)); would not better facilitate undertakings seeking to engage in providing electricity (Code objective (c)); dampens scope for competition (Code objective (d)); and reduces transparency (Code objective (e)); overall

impacting consumer interests with respect to price, quality, reliability and security of electricity supply across the island (Code objective (g)).

4. EAI has also been made aware of a cross-over of the 'malice' or 'dishonesty' evidence threshold being reflected in mod CMC_12_25 also. EAI does not support the prospect of outcomes of CMC dispute resolution boards only being permitted to be challenged if 'malice' or 'dishonesty' in the decision-making is effectively proven. Furthermore, the final decision for Qualification Decisions should rest with the RAs. What the SEMC describe as the more 'substantive' change in Part 1 of the mod is therefore not supported by EAI.

5. The endeavour by the RAs to limit Court access is both unlawful under Article 34 and inapplicable due to the nature of the rules of the High Court (Order 84) which govern JR proceedings. It is for the Courts to determine standing, not for the RAs to determine unliterally how to limit same.

6. In addition, we have noted that CRM is a State Aid. As such, we also view that the RAs do not have limiting powers to restrict Court access as the CRM is regulated by Regulation (EU) 2019/943. Member States are obligated to ensure effective review of decisions to ensure adherence with EU Law, including through using the preliminary reference procedure (Article 267 TFEU). This would limit this State Aid oversight aspect.

We therefore urge the SEMC to revise its minded-to position and to exercise the power under CMC paragraph B.12.11.1 (b) to "*not make a Modification*" considering that EAI, which represents 90% of the SEM generation market members, is unanimously opposed to the proposed modification CMC_11_25 and part 1 of CMC_12_25 being adopted.

If you have any questions in relation to the above, please do not hesitate to contact this office.

ELECTRICITY ASSOCIATION OF IRELAND

Yours sincerely,

Dara Lynott

CEO

Electricity Association of Ireland