POSITION

Subject: FEBEG's comments on ELIA's public consultation on the revision of the connection contract
Date: 18 December 2020

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Elia has proposed an adaptation of the connection contract. The adjustments made are an implementation of the relevant articles in the Federal Technical Regulations (currently under revision) regarding capacity reservation in the context of a connection. FEBEG thanks ELIA for having the opportunity to provide initial comments on the draft connection contract as well as for organizing an ad-hoc Belgian Grid meeting on 29/10 to discuss the adapted contract and received feedbacks.
We hereafter provide our comments the document submitted to public consultation by ELIA[1].

The comments and suggestions of FEBEG are not confidential.

Introduction

Overall, FEBEG welcomes the proposals of Elia to adapt the connection contract, in order to ensure a smooth implementation of new projects, regardless of their participation in the CRM auctions. Indeed, the hoarding of capacity should be avoided as much as possible.

However, it is also of great importance not to put too many burdens on small new projects or on substantial modernisations, if not deemed effective. Especially the administrative and financial risks for existing assets not participating in CRM but undergoing substantial modernization should be limited. Under no circumstances should there be any impact on existing assets which do not undergo any major changes. It would be beneficial, for sake of transparency, that Elia would inform the market parties (in a format which respects confidentiality of course) of how big the problem is currently, based on the information of Elia? To have an idea on the size of the issues in relation to the complexity of the solution?

Overall, if projects are suffering from delays (or other issues which would put the contract at risk) the project developer/asset owner has the right to defend himself (with as many arguments as he wishes and within a sufficient amount of time) against sanctions from Elia, The termination of the contract by Elia should only be needed in case the project will clearly not materialize or if there is a clear case of fraud or wilful misconduct. Currently the proposal of Elia does not offer sufficient means for the project developer/asset owner to defend himself.

[1] https://www.elia.be/en/public-consultation/20201120_public-consultation-on-the-revision-of-the-connection-contract

Assessment of the proposed changes

We understand that the proposed changes can be summarised as follows (and ask Elia to confirm this analysis).

The objective of the amendment is to **oblige market parties, which have requested to add new capacities (or substantial modernisations) to realise projects within certain delays**, or **for existing connection contracts to use this capacity (and not hoard capacity)**. If capacity is not used, or if a new project is not realised, **in addition to the termination right** of Elia, which is applicable to all connection capacities, **a penalty is to be paid by some specific grid users** when Elia considers these projects to be at risk of blocking connection capacities.

According to FEBEG it is of utmost importance to ensure a level playing field between all projects that are being developed when applying the new rules that are implemented to avoid connection capacity hoarding. In this respect, any discrimination between projects that are eligible for the CRM as projects that are not eligible for the CRM as well as between projects that want to participate to the CRM and projects that do not want to participate to the CRM should be avoided. In this respect, the proposed modifications of the connection contract need to be further clarified.

The current text proposal by Elia states, in art. 12.2.2.that a penalty can only be expected for new projects or substantial modernisations above 10 MW which:

1. declare not to participate to CRM – and
2. are eligible to participate in the CRM auction

The related financial guarantees are only required to ensure that Elia will be able to retrieve the amount related to a – potential – penalty (see 2 conditions above). Therefore, **capacities/projects which do not risk penalties** (non eligible assets OR assets which participate in a CRM auction) **need no financial guarantees under the connection contract.**
The elements in Art. 12.2.2 however seem not in line with the overall reasoning in the connection contract and the overall principle that hoarding should be avoided. Indeed, **one could understand from Art.12.2.2. that non-eligible capacity is not at risk of penalties, and therefore, is not on the same level playing field as eligible capacity** of the same size (if more than 10 MW). Can Elia please clarify this and ensure a consistent approach over the whole contract?
The below table shows **our understanding of the logic behind penalties and bank guarantees in various cases**. We ask ELIA to confirm or not… this understanding and, in the near future, provide a table such as this one below (and also to add in such a table all important or relevant elements, not yet mentioned here).

Projects in CRM (NEW capacities, additional capacities, substantial modernisations)	**Projects, eligible but which do NOT participate in CRM… but also non eligible?**	**Substantial Modernisations which are eligible but do NOT participate in CRM**	**Projects > 10 MW, NOT ELIGIBLE for CRM (new or additional cap.)**	**Minor changes in connection contract and projects smaller than 10 MW**
Penalties and guarantees in CRM contract	Penalties under the connection contract for the additional capacity (injected)		Penalties or not ??	No penalties
No guarantees in connection contract	Guarantees in connection contract for the additional capacity (injected)		Financial Guarantees or not?	No financial Guarantees
Termination under connection contract only for additional injection capacity above 10 MW				
Other obligations?	Other obligations?		Other obligations?	

We ask Elia to confirm that it is the objective to limit the impact on assets undergoing limited modernizations as much as possible. Such projects should not be impacted by additional risk while operating as usual (maintenance projects, replacement of spare parts…). **Existing assets, not undergoing a substantial modernisation should in any case not be impacted by penalties and bank guarantees. Minor changes should be possible with very limited administrative burdens (or none at all).**

Overall remarks

Offshore wind

FEBEG wishes also to clarify that it considers that specifically for additional offshore wind to be developed in the 2nd wave of projects (MOG2) the connection issues should be discussed separately, as the situation is very specific (there is only 1 possible connection point, and there is a tender linked to a specific site). The (future) procedure for offshore should be based on the principle that only those who have a concession can ask for a connection. The terms for the connection are then part of the concession agreement.

Transition of projects in FTR V0, V1 & V2

Can Elia explain if/how projects in V0 and V1 of the federal grid code will be impacted by the principles lined out in this new connection contract?

Detailed remarks on the proposed changes

Definitions

FEBEG welcomes the efforts of Elia to use, as much as possible, definitions which are clear and leave little room for interpretation, this was indeed one of the issues with previous versions of the document. It is important to use the right definitions consistently throughout the text. **The clarifications related to the 3 definitions below have indeed improved the text,** compared to previous versions.

"Aansluitingscapaciteit" of "Capaciteit": het maximaal Schijnbaar vermogen in Injectie en/of Afname, uitgedrukt in megavoltampère (MVA) per Toegangspunt; de Aansluitingscapaciteit is vastgelegd in Bijlage 1 en wordt gespecifieerd voor Injectie en Afname;

Relevante Aansluitingscapaciteit: het maximaal schijnbaar vermogen in injectie en/of afname, uitgedrukt in megavoltampère (MVA), dat rechtstreeks verband houdt met een specifieke Aansluitingsaanvraag en geformaliseerd in Bijlage 8;

Relevante Aansluitingscapaciteit voor Injectie: het maximaal schijnbaar vermogen in injectie, uitgedrukt in megavoltampère (MVA), dat rechtstreeks verband houdt met een specifieke Aansluitingsaanvraag en geformaliseerd in Bijlage 8;

We do have some remarks and questions related to the following definitions, which are unfortunately still unclear of confusing:

"Aansluitingsaanvraag": zoals beschreven in de Technisch Reglementen en in het bijzonder elke aanvraag voor een nieuwe Aansluiting, een (al dan niet geringe) wijziging van de Aansluiting ***of een wijziging van het ter beschikking gesteld vermogen;***

We think it this definition is not well aligned with the procedures fixed in the case of "substantial modernisation', as we are convinced that non-significant changes should be treated in an administratively light way, which seems to be in contrast with this definition.
Specifically, we think the phrase "***een wijziging van het ter beschikking gesteld vermogen***;" does not add anything to this definition. It would seems logical to just mention "*new*" connections and substantial modernisation.
As an increase in capacity would be automatically covered by the above-mentioned cases (if you increase the capacity, are you not automatically in a procedure of substantial modernisation?). We suggest deleting the 2nd part of the phrase **"*een wijziging van het ter beschikking gesteld vermogen*". As this seems to open up the discussions to all sorts of minimal changes.** This in conflict with the idea that minor changes to an asset should be possible without the administrative burden of a new/adapted connection contract.

"*Aansluitingscapaciteit*" of "*Capaciteit*": **Can Elia confirm or verify if there is alignment between the definition of "*aansluitingscapaciteit*" in the CRM functioning rules and this one?** It is crucial to avoid confusion by using various definitions in various document. In addition, this definition is linked to ANNEX 1 and Table in 1.5**.** However this **table is not completely visible**. Therefore, it is not possible to verify whether or not we can agree with the contents of this table.
"*Ter Beschikking gesteld Vermogen voor Afname (MVA)"* is also mentioned in this table (as in the definition of Aansluitingsaanvraag) but is seems there is no definition of "*Beschikking gesteld Vermogen voor Afname*" in the document. Is this not needed?

Relevante Aansluitingscapaciteit *(voor injectie)* is linked to ANNEX 8. We appreciate that in ANNEX 8 it is clear which cases are relevant: new capacities, (substantial) modernisation and changes of 10 MW or more. We support this clarification. However, and this remark is relevant for the whole document, **it should be clarified which projects do need a bank guarantee and which do not**. In our view, no bank guarantees are needed if there is no risk for penalties, therefore, the text should be adapted to make this very clear.

Force majeure or fault from Elia side

In many paragraphs (9.4 and 12.2) it appears to be the case that the Grid User can only use Force Majeure or "fault by Elia" as arguments in case of delays or not respecting deadlines (and other obligations) in the contract. It thus appears that the defence of the grid user (against sanctions or a termination of the contract by Elia) is very limited.

Overall, **there is a clear imbalance between Elia and the grid user when it comes to delays and responsibilities related to these delays,** as from ANNEX 8 (see also below) **it appears that Elia is wavering all the responsibilities at their side** in case of delays at Elia Side.

In summary, we consider this to be problematic, **it is disproportionate to exclude the basic mechanism of Force Majeure although the principles established by Case Law are met**. FEBEG sees no reasons why the principle of Force Majeure cannot apply without any restriction.

According to Belgian case law, force majeure is defined as an event (or series of events) that

- renders it impossible for a debtor to perform its obligation (impossible d'exécuter),
- was not foreseeable (imprévisible), and
- could not be avoided or prevented by the debtor (irrésistible).

The third requirement requires that the debtor should have looked for ways to prevent or avoid either the existence or the adverse effects of an event that made it impossible for the debtor to perform an obligation. This requirement needs to be appreciated "in abstracto" by comparing the situation of the debtor with that of a reasonable person placed in the same circumstances of the case. As with the other requirements of force majeure, also this requirement has to be interpreted reasonably. All factual circumstances have to be taken into account when assessing it, such as time, location, economic, social and political circumstances and the means available for the debtor to avoid the event. **It is clear and undisputable that a delay in obtaining permits or authorizations can and should constitute an event of force majeure if the Capacity Provider has filed a due application for such permits or authorizations. Any delays in court or any unfounded appeals are unavoidable and unpreventable**.

Therefore, **we ask to remove the following paragraph**:

> *"Voor zover het Contract betrekking heeft op een project van Aansluiting van een Elektriciteitsproductie-eenheid en onverminderd andere vertragingen als gevolg van overmacht, maakt de vertraging in hoofde van de Netgebruiker bij de oprichting, bouw of exploitatie van een voornoemde Elektriciteitsproductie-eenheid, onder meer,* ***maar zonder daartoe beperkt te zijn****, als gevolg van een vertraging bij het verkrijgen van de benodigde in laatste administratieve aanleg definitief afgeleverde, uitvoerbare en niet meer aanvechtbare vergunningen of toelatingen voor de oprichting, bouw of exploitatie van de Elektriciteitsproductie-eenheid, geen reden tot overmacht uit"*

We cannot agree with this as this is a blunt increase of the risks for the project developer/asset owner. **The phrase "*maar zonder daartoe beperkt te zijn*" appears to open the door for non-consideration of any type of Force Majeure, which is not acceptable.**
In addition, a Force Majeure situation called upon by a party directly or indirectly involved, such as, for example, a federal or regional administration, should also be accepted by Elia. If not, the project developer/asset owner is exposed to unacceptable risks, namely having to accept force majeure from other parties, which cannot be passed through to Elia.
This seems very excessive. The result would be that even in justifiable cases of Force Majeure, as a consequence of the proposed amendments by Elia, the grid user cannot invoke this right. Can Elia justify this exclusion?

On top of this, a force majeure time relief of only 30 days is too short. Many force majeure cases (war, nuclear explosion, etc.) will definitely last for more than 30 days.

Expert for determination

As a general statement, FEBEG wishes that the possibility of the parties to refer a dispute to an expert for determination would be embedded in the contract before ELIA would actually terminate a connection agreement. An independent mechanism is required to judge upon conflicts between grid users and ELIA.

Termination of contract – 9.4.

We appreciate the clarification that Elia can only terminate (partially) under these specific circumstances. From this, we understand that termination by Elia without judicial approval is only possible in case non-availability of financial guarantees (when needed) or for projects exceeding 10 MW which are not realised in due time. Consequently, we understand that it would NOT be possible for existing capacities in the case of, for example, modernisation, to be confronted with a termination, except for the eventual additional capacity if it would exceed 10MW (which we thinks makes sense). **We ask Elia to confirm this interpretation**?

We appreciate the more workable procedure (more time, and worked out more in detail compared to the previous one) to follow when Elia has the intention to (partially) end the contract. However, **the delay of 20 working days is still very short**, and should be extended to 30 WD.

> *"Als de Netgebruiker niet reageert binnen een termijn van ~~20~~ 30 Werkdagen of bij gebrek aan een geldige rechtvaardiging wegens overmacht of wegens toerekenbaarheid aan ELIA, en voor zover de reden die de beëindiging rechtvaardigt niet is verholpen, wordt het Contract met onmiddellijke ingang door ELIA beëindigd door de verzending van een naar behoren gemotiveerd aangetekend schrijven."*

We do not agree however that only Force Majeure (with the current very limited scope) or fault on Elia side are the only possible means of defence to prevent termination of the contract.. However, they could be other reasons than Force Majeure which can explain a delay in a project and which can be justified towards Elia in the observations it will send to Elia or explained during the audition. The connection contract should only be terminated in the case there is no perspective for the grid user to commission its facility or in case of fraud or wilful misconduct.

9.4.2

We appreciate that Elia will use similar procedures as in 9.4.1. However, **it is still not clear HOW the project developer/asset owner can prove that the project is still in use**. In our view, Art. 4.2 bis seems to be the sole test that an asset is out of market. Art 4.2 is the hurdle to take in order to stop an operation, within the time limits foreseen by law.

In our view, there is a clear link with the definitions in the beginning of the contract: "*Exploitatie van een Elektriciteitsproductie-eenheid": de exploitatie van een Elektriciteitsproductie-eenheid vanaf de datum van de Ingebruikname van een Elektriciteitsproductie-eenheid tot de inwerkingtreding van de definitieve buitenwerkingstelling zoals beschreven in artikel **4bis van de Elektriciteitswet***". **This link should be clearer in the text**.

9.8: We find this confusing as it mentions penalties, however, it **refers to Art. 12.2.2** which **states that only specific projects** (ELIGIBLE and NON-CRM participation) **are at risk of penalties. This should be clarified/repeated in Art 9.8 to avoid confusion.** "*Onverminderd artikel 9.5. en 9.7., in geval van vervroegde beëindiging of opzegging van het Contract in overeenstemming met artikel 9.2., 9.3. en 9.4. vóór de Ingebruikname van een Elektriciteitsproductie-eenheid waarop de Aansluitingsaanvraag betrekking heeft, zijn in voorkomend geval de penaliteiten van toepassing vermeld in artikel 12.2.2."*

12.2. "start of use" of the project/asset and related obligations

Art 12.2 applies only to: "*substantiële wijziging aan de Aansluitingsinstallatie(s), evenals de Ingebruikname van een Elektriciteitsproductie-eenheid met een Relevante Aansluitingscapaciteit* ***voor Injectie van meer dan 10 MW***"
We therefore understand that (substantial) modernisations are not affected, unless the relevant connection capacity increase is more than 10 MW**. We ask Elia to confirm this interpretation and/or clarify if needed.**

The text mentions "***De Netgebruiker is niet verantwoordelijk*** *voor het niet* ***in gebruik nemen van*** *de Elektriciteitsproductie-eenheid* ***of voor enige opgelopen vertraging*** *bij de Ingebruikname van de Elektriciteitsproductie-eenheid* ***als die te wijten is aan overmacht of aan ELIA***."
Therefore, one can conclude that the grid user is responsible in ALL other cases… if this is the case, **the combination of the above paragraph** (and similar paragraphs in the text) **with the current proposals of Elia regarding Force Majeure (Art.7) cannot be accepted** by us. Indeed, as mentioned before, it is disproportionate to exclude the basic mechanism of Force Majeure although the principles established by Case Law are met. FEBEG sees no reasons why the principle of Force Majeure cannot apply without any restriction.

12.2.2. Sanctions

One could, from the paragraph below, conclude that that NON-Eligible projects (cannot participate in the CRM) **of >10 MW** (and all projects below 10 MW) **cannot be at risk of penalties, can Elia confirm? Therefore, logically, they do not need a bank guarantee? Does Elia really only want to sanction the eligible capacities? We think this is not in line with the general principles of capacity hoarding, there should be a level playing field between eligible and non-eligible capacities. If not, the paragraph needs to be adapted and clarified.**

> *"Zoals bepaald in artikel 14.1.1. zijn* ***deze sancties, evenwel uitsluitend van toepassing*** *indien de Netgebruiker aan ELIA zijn beslissing, of de beslissing van de eigenaar van de Elektriciteitsproductie-eenheid indien deze laatste verschilt van de Netgebruiker, meedeelt om met de betrokken Elektriciteitsproductie-eenheid* ***niet deel te nemen aan de jaarlijkse veiling van het capaciteitsvergoedingsmechanisme*** *vermeld in artikel 7undecies van de Elektriciteitswet en* ***op voorwaarde dat de Elektriciteitsproductie-eenheid*** *die het voorwerp uitmaakt van de Aansluitingsaanvraag* ***in aanmerking komt voor deelname aan de jaarlijkse veiling van het capaciteitsvergoedingsmechanisme****."*

Art 14 – Financial Guarantees

We appreciate the modifications and clarifications added in this article. More precisely, the fact that Art. 14.1 refers to Art. 12.2.2. **We** can thus **understand that a financial guarantee is only needed to ensure a "back up" in case of penalties. However, if we refer to 12.2.2. , it seems that penalties are only to be expected in case of NON-participation in the CRM of ELIGIBLE projects. One could conclude that other projects do not need a financial guarantee under the connection contract, as there is no risk of penalties. Can Elia confirm this interpretation?** (see also table above to clarify what applies to which case – penalties, guarantees, terminations…)

In our view, Elia needs to better align the text, in order to avoid such confusion. For example, **"eligibility" to participate in the CRM auctions, which was mentioned in Art.12.2.2.is not mentioned anymore in this article:** *"In overeenstemming met artikel 12.2.2. is de financiële garantie slechts*

verschuldigd voor zover (i) de Relevante Aansluitingscapaciteit voor Injectie van de Elektriciteitsproductie-eenheid meer bedraagt dan 10 MW en (ii) Indien de Netgebruiker, of de eigenaar van de Elektriciteitsproductie-eenheid, beslist om met zijn Relevant Capaciteit voor Injectie (of slechts een deel hiervan) niet deel te nemen aan de jaarlijkse veiling van het capaciteitsvergoedingsmechanisme."

It would be better to clarify this and ensure that Art 14 is in line with Art. **12.2.2.** related to penalties.

ANNEX 8

In 8.2. it seems that **Elia has a very limited liability in case of a project delay due to issues related to external parties. The contrast with the developer of the project is huge.** For us, there is a clear imbalance in the rights/obligations of Elia and the rights/obligations of the capacity holder/developer.

Bank /Financial Guarantees

We appreciate the improvements and alignment with the CRM contract