POSITION

Subject: Febeg's comments on ELIA's Consultation regarding the CRM Capacity contract
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Elia launched a formal public consultation of the stakeholders on the standard capacity contract with a view to its approval by the CREG. This capacity contract will be signed between a capacity provider and Elia as referred to in article 7undecies § 7, al. 1 of the Electricity Act.

FEBEG thanks Elia for having the opportunity to answer Elia's Public consultation on the CRM Capacity contract[1] and for all the efforts & processes put in place for the development of the CRM framework.

While FEBEG fully supports the implementation of the CRM in Belgium and invites Elia to continue the work in order to ensure a swift implementation of the CRM as well as a successful first auction in 2021, FEBEG does not fully adhere to all obligations proposed by Elia in the CRM contract and functioning rules (nor on some underlying principles for which FEBEG has expressed its concerns at different occasions)

The comments hereafter aims to provide Febeg's position on the capacity contract and should be considered as necessary improvements to the current proposal made by Elia. Febeg also refers to its comments on the functioning rules during the public consultation by Elia and to the comments it will make during the public consultation of the CREG.

The comments and suggestions of Febeg are not confidential.

[1] https://www.elia.be/en/public-consultation/20201120_formal_public-consultation-on-the-crm-capacity-contract

Executive summary

The CRM is a system through which the Capacity Provider engages in having capacity at the disposal of the market and for which Elia remunerates the Capacity Providers. In this respect a contract is to be signed between the ELIA, and the Capacity Providers.The proposed capacity contract should aim to ensure that the capacity providers are present during the delivery period. Indeed, the Capacity Provider promises to make capacity available to the market (not to Elia) and is remunerated for it. If the capacity provider does not make that capacity available, he will be penalised by the provisions already foreseen in the functioning rules.

However, the right balance has to be found in relation to the rights and obligations of the Capacity Providers in the envisaged capacity contract. FEBEG however fears that the current contract proposal of ELIA is out of market standards and will be detrimental to the investment climate, the costs of the Belgian CRM and the appetite of market players to participate in such mechanism.

It seems that the capacity contract is drafted as a catch-all safety net which, in case of serious supply issues and would allow ELIA to transfer liability claims which would not be covered in existing contracts to the Capacity Providers. This raises some concerns as this would apply to only Capacity Providers and not to those that are not participating to the CRM

This is for example illustrated by an unlimited liability of the Capacity Provider towards the market in case of failure of the CMU (including the obligation of supporting the cost of contracting additional capacity by ELIA), next to the substantial penalties foreseen in the functioning rules. However, Capacity Providers have no impact on the volume that will be procured by Elia on behalf of the Belgian authorities in order to ensure the security of the supply in Belgium. Moreover, the balancing of the grid is an (European) obligation that lies within the hands of the Transmission System Operator.

This can also be illustrated in the draft contract, which is denying Capacity Providers to invoke Force Majeure for any event during permitting, construction, and operation of the concerned capacity, although the principles of Force Majeure as foreseen in Belgian Case law would be met. This is of course disproportionate.

Additional and even important concerns and examples of FEBEG are highlighted in the extensive note attached. FEBEG kindly invites ELIA to a further debate based upon the comments below to ensure a balanced capacity contract providing a level playing field.

General remarks

Elia as contractual counterparty

According to the Electricity Act, the Royal Decree on the financing mechanisms of the CRM (article 7quaterdecies) will indicate who will be the contractual counterparty. This Royal Decree has not yet been enacted. Thus it is premature to consider Elia will be the contractual counterparty.

Moreover, even if Elia would be appointed as the contractual counterparty, this does not necessarily mean that Elia has a direct and personal claim ("aanspraak") towards the capacity providers to have the capacity at its disposal or at the disposal of "the Market". The Capacity Provider does not "deliver" capacity to Elia or whichever other party (apart from its BRP and offtakers). Apart from the necessary services it can contract, Elia cannot purchase capacity for generation to be sold on the Market or to be resold, as this would infringe European law.

The CRM is a system through which the Capacity Provider engages in having capacity at the disposal of the market and for which Elia, as a CRM facilitator and payment channel of any public financing mechanism, pays a remuneration. Elia can sanction the lack of attaining the promised capacity, but it does not "contract the capacity". It only "contracts" the engagement to have the capacity ready in the interest of the Belgian electricity market.

Article 7undecies, § 9, of the Electricity Act provides that only the CREG is competent to monitor the proper functioning of the capacity remuneration mechanism. In this contract however, large discretionary powers are given to Elia in its role of facilitator, without the CREG always being consulted or having any powers. Febeg asks Elia to finetune with the CREG how this article 7undecies, § 9, of the Electricity Act is to be interpreted in the light of this contract.

In any case, Elia only acts as an "organisor/facilitator" for the promised availability of the capacity which will be at the disposal of "the market" (the Belgian grid users). In a way, although legally imperfect because of the unknown and unidentifiable beneficiaries ("begunstigden"), by participating in the CRM, the capacity provider is the "promiser" ("belover") of the capacity and Elia is the stipulator ("bedinger"). This means that the only enforceable "claim" Elia has towards the Capacity Provider is the availability of the capacity at a specific moment for that market. Not less, not more.

Failing such availability, this does not alter or modify Elia's patrimonial position. The capacity provider has not promised to deliver the capacity (and the energy) to Elia, so Elia cannot claim or lose the capacity (and the energy). The CRM contract should only condition the question whether Elia has to pay the capacity remuneration or impose penalties.

The penalties included in the Functioning Rules constitute an exhaustive compensation clause at the expense of the Capacity Provider. Apart from that indemnity clause, it does not appear that Elia can, notwithstanding Chapter I.6 of the Functioning Rules, suffer any "damage" which is a consequence of any breach of the obligations ("promises") under this contract by the Capacity Provider. He has an obligation of means to make capacity available to the market. If he fails to do so, the only "sanction" is the specific arrangement provided for in the Functioning Rules. Elia has no claim of its own to the fulfilment of the obligations by the Capacity Provider. Nor has Elia stipulated or may it stipulate such claims for third parties. Provided that, which is certainly not the case, the third parties are identifiable under the contract ("begunstigden") and provided that these parties suffer damages caused by faults,

they have their legal redress towards any market player involved in the global functioning of the market and responsible for these faults.

Therefore, unless Elia establishes the contrary, the liability regime in this agreement can only be relatable to the damage that the Capacity Provider would suffer (failure to pay (on time) the compensation) as a result of Elia's fault, and to the immediate damage Elia might suffer. If Elia could establish that it might suffer personal and direct damages, these damages have in any case to be different from damages Elia could suffer because of the non-fulfilment of obligations in other contracts Elia has concluded.

Different versions

There is a discrepancy in the different versions. Some clauses have a different meaning and scope in the various language versions. Febeg invites Elia to draft three language versions with precisely the same scope and meaning of the different clauses.

Key clauses in different Elia contracts

As the CREG wrote earlier, Elia uses different wording for important clauses in each agreement. Febeg invites Elia to draft a base set of essential clauses (force majeure, interpretation, liability, …) that will be implemented in every contract of Elia in the same way, allowing at the same time the necessary deviations from these principles if needed for the execution of that specific contract.

Services, transactions.

The draft functioning rules contain the following essential definitions:

Transaction: “An agreement about the contractual rights and obligations resulting from the Service, closed in the form of a Capacity Contract between a Capacity Provider and ELIA, in the Primary Market or the Secondary Market at a Transaction Date, identified by a transaction identification number, for the Contracted Capacity and covering a Transaction Period.”

This Contract is thus also a “Transaction”.

The definition of Transaction refers to “Service”, defined as: “The Capacity Provider’s rights and obligations related to the delivery of a Capacity, as stipulated in the Functioning Rules and in the Capacity Contract.” The Service is thus also a capacity contract, meaning a set of rights and obligations related to the delivery of a Capacity.

This would mean that “Service” and “Transaction” can be the same Capacity Contract.

Febeg invites Elia to distinguish better between (i) the Contract, (ii) the promised obligation of the Capacity Provider (“the Services”) and a specific service or event under these Services (“the Transaction”).

One contract, different CMU's

Febeg requests a sufficient distinction between the contract concluded between the Capacity Provider and Elia and the different CMU's that are covered by the (Annex to the) Contract. An event relating to one CMU should not affect all other unaffected CMUs, under the provisions of this contract. This applies, for example, to situations of force majeure, but also to early termination. Febeg is happy to cooperate in the search for a solution to make such a distinction.

Signature of the contract

The timing of the signing of the Capacity Contract for both primary as secondary market transactions is unclear based on the Functioning Rules and different sections of the Capacity Contract.

- In the Functioning Rules section paragraph 222 signing takes place within 40 WD after the notification of the Auction results.
  In the Functioning Rules paragraph 302: signing takes place 40 WD from the Transaction Validation Date.
- In the Whereas of the Capacity Contract consulted upon:
  "*In accordance with the Electricity Act, at the end of the Auction or after validation of the Transaction on the Secondary Market, the Capacity Providers sign a Capacity Contract with ELIA*"

Febeg requests clarification.

Project finance

For some CMU's, the Capacity Provider might seek third party financing. As in most major project lending, the lenders will want to have certain rights securing their loans (direct agreement, step-in rights). Febeg requests that the contract allows third party financing and the necessary contractual clauses.

Specific remarks

Generally speaking, Febeg is of the opinion that the Capacity Contract lacks important definitions in order to improve its readability. A concise definition in the Capacity Contract of the most important terms (even though they are also defined in the Functioning Rules) will help interpret the (exact scope of the) obligations of the Parties

Article 1. Definitions

Definition of Capacity Contract

The definition of Capacity Contract in this capacity contract differs from the definition in the Functioning Rules.

Definition of Direct Damage:

If a definition of direct damage is to be included in the agreement, then the proposed definition is sub-optimal. Any damage must be causally linked to the fault, so any damage must be a 'direct and immediate result' of the fault.

As indicated above, Elia has no claims on the capacity made available by the Capacity Provider. It is only entitled to enforce the Capacity Provider's commitment to making that capacity available by either paying the capacity remuneration or imposing penalties. If the Capacity Provider fails, the penalty system will be triggered. As Elia can only recover damage, insofar as such damage is personal to Elia, through this penalty system, any reference to Elia's hypothetical additional task to conclude other contracts, in the definition of direct damage must be omitted.

Definition of Indirect Damage:

According to the articles 1150 and 1151 of the Civil code, any compensation for consequential loss is excluded. If Indirect Damage is something else than consequential loss, this should be clarified. Moreover, according to these articles in the Civil Code, lucrum cessans and damnum emergens are direct damages.

If, however, another definition of indirect damage is to be included in the agreement, the proposed definition is sub-optimal. It is limited to damage which a party would suffer because it is contractually bound to make a certain payment to a third party. However, indirect damage can be more than the performance of a party's contractual obligations towards a third party.

It is unclear what the purpose of this definition is.

Definition of gross negligence / simple fault

Whether a negligent act would constitute "gross negligence" ("zware fout"/"faute grave") or a "simple fault" ("lichte fout"/"faute simple") will always be up to a judge to decide. This definition does not add anything to the existing interpretation margin of the concept and is thus superfluous. It has no added value. All reference to "gross negligence" should be "decapitalised".

Article 2. Interpretation

5. Febeg does not fully grasps what is meant with "realisation" ("concretisering"/"concrétisation") of a specific obligation. Either this clause makes no sense if one executes an obligation (realises/executer/uitvoeren), or another term should be used, expressing that the obligation or provision is "elaborated" ("élaboré"/"uitgewerkt") in this Contract and that such elaboration does not alter or modify the overriding obligation or provision of the Functioning Rules.

6. Febeg asks Elia to provide a coherent and correct version of the contract in the three languages. In any case, Elia should indicate which version prevails over the other versions if it fails to give the three agreements the same content and scope.

Article 3. Conclusion of the contract

General remark: Febeg asks Elia to clarify within which timeframe the contract and the different transactions can be (counter-)signed by Elia. Certitude that the contract or transactions have been entered into, are critical for the execution of the putting at the disposal of capacity and might lead to delays in planning for the Capacity Provider. If Elia does not countersign the contract or the transaction within a set timeframe, Elia should also be held liable.

8. Either the obligation to sign a Connection Contract is a condition precedent under the (already concluded) Capacity Contract, or the signing of a Connection Contract is a condition to enter into the (not yet concluded) Capacity Contract. In the first case, the non-fulfilment of the condition precedent (ontbindende voorwaarde/condition résolutoire) will lead to the dissolution of the Capacity Contract. In the latter case, the fact that no Connection Contract is signed, will prevent the candidate capacity provider to sign the Capacity Contract. In such case, the candidate does not participate in the CRM and cannot be subject to penalties.

9. This clause 9 contains two completely separate commitments from the capacity provider.

The first and second sentences refer to the situation where a Capacity Provider provides the Service based on a Grid User Declaration for a Grid User (including a user of a CDS). This wording makes it clear that it is unclear what the exact subject matter of the Capacity Provider's obligations under the Capacity Contract is and who its beneficiaries of those obligations are.

The first sentence implies an information obligation concerning the otherwise undefined "User of the Elia-Grid" (the Electricity Act knows the term "grid user" but not the term "user of the Elia grid"; the operating rules do not contain a description of "User of the Elia-Grid" either). The Capacity Provider must inform the grid users to whom it will provide the "Service". That "Service" will then necessarily be a different set of rights and obligations (expressed in this Contract) than that which the Capacity Provider would provide to Elia (*quod non*, based on the French and English versions).

The second sentence refers to "rights and obligations of Elia under the agreement". Again, it is not clear to Febeg what rights (claims) Elia could derive from the contract, the operating rules or the CRM system in general. If Elia believes that it is the beneficiary of the result of any obligations of the Capacity Providers, the Electricity Act must be amended accordingly and to the extent that this would be in line with European legislation.

The third sentence refers to "co-contractors" of the Capacity Provider, without limiting it to the parties referred to in the first two sentences. Therefore, "co-contractor" may also refer to a constructor or a service provider. Besides, that sentence seems to be intended to relieve Elia of any claim by a Capacity Provider's contracting party if Elia were to impose a penalty on the Capacity Provider. It is not entirely clear to Febeg on what basis the contractor of the Capacity Provider could bring a claim against Elia if it were to impose a (rightful) penalty on the Capacity Provider.

Moreover, the notion "gross negligence" in the English version of this sentence is not capitalised, thus meaning something else than the definition of "Gross Negligence". As stated before, Febeg suggests deleting the definition of "Gross Negligence". As such, the non-capitalisation can be accepted throughout the contract in all three languages.

Article 4. Subject matter of the contract

11-13. As set out above, it is not clear what is meant by 'Transaction', 'Capacity' or 'Service'. These are fundamental concepts. The 'Service' is the real object of the obligations of the Capacity Provider.

13. Moreover, as it appears from the wording of this sentence, the Capacity Provider undertakes to Elia ("s'engage envers Elia à fournir le Service"/ "Elia de (…) Dienst te leveren") to provide ("fournir"/"leveren") a Service. This does, in the English and the French version of the contract, not necessarily means that the Service has to be provided to Elia (and thus, that Elia is the creditor of the Service), but only that there is an engagement vis-à-vis Elia that the Service will be available. On the contrary, in the Dutch version, Elia is the creditor of the Service ("[aan] Elia de (…) Dienst te leveren"). Thus, according to the Dutch version, the off-taker of the Service is Elia. In this last version, this appears to be problematic, as the Service, in the case of a generation installation, consists out of putting at the disposal of Elia a certain generation capacity (MW), with an equivalent outcome of energy (MWh) (because capacity without energy seems meaningless). According to the Dutch version, it might then be upon Elia, which will have been supplied with a capacity and the corresponding quantity of energy, to dispose of this energy. And it is questionable whether the CRM remuneration should then comprise the market price of the generated power.

Thus, Febeg assumes that the Dutch version of the agreement has been drafted incorrectly and bases itself on the French and English versions of this clause 13.

These versions lead to the confirmation that Elia is not a creditor of its own of the capacity provider's obligation (the "provision of the Service"). The capacity provider assumes the commitment to make the Service available to "the Market" and will, when market conditions permit, effectively implement the Service for "the Market". Elia, for its part, undertakes, when the Capacity Provider making the Service available to the market, to compensate the capacity provider for this Service. The commitment of the capacity provider therefore leads to another commitment by Elia to provide financial support. If the capacity provider does not comply with its commitment, Elia will not have to comply with its commitment either. In addition, since the operating rules so provide, Elia may sanction the capacity provider for not making the Service available to the market.

Article 5. Remuneration, penalties and payback obligations

On this article 5, Febeg also refers to the comments already expressed during Elia's public consultation of the functioning rules.

5.1 Determination of the Remuneration

18. For the avoidance of doubt, we should clarify that capacity remuneration or Monthly remuneration is to be understood as excluding VAT in the entire contract.

21. In case of permanent reduction of the remuneration for a CMU, it should be clear that the obligations and liabilities for the capacity provider also permanently stops. This is a logical consequence of the real subject of this contract: the Capacity Provider puts at the market's disposal a certain capacity; in return, Elia subsidises the Capacity Provider. If however Elia permanently reduces the capacity remuneration, after two consecutive Delivery Periods, and the Functioning Rules does not foresee a possibility to reinstall the original capacity remuneration, then the entire subject of this contract has been lost.

22. Financial penalties are applicable only in case a missing volume is communicated to Elia by the Capacity Provider in the framework of the quarterly pre-delivery monitoring report, and no mitigation plan has been proposed by the capacity provider as specified in the Functioning Rules. The clause needs to be more clear on this matter. Furthermore, the Capacity Provider should be allowed to contest any unilateral decision on penalties by Elia.

5.2 Determination of penalties and the Payback Obligation

General remark: Only this section could govern the indemnification a Capacity Provider has to pay if it fails to have at its disposal and at the disposal of the market ("deliver") the indicated capacity. This indemnity clause supersedes the liability clause for any non-performance by the Capacity Provider.

5.5 Contestation

General remark: as pointed out in the consultation on the functioning rules, ELIA is on the one side the contracting party of the capacity provider, but also the 'judge' on important matters in relation to the Contract (the "supervisor"-function), such as the correct provision of data in the prequalification file (e.g. derating factor, application form) or the determination of the missing capacity in the pre-delivery monitoring.

However, according to the Electricity Act the CREG has been given the responsibility to monitor the good functioning of the CRM. It is unclear how both duties, in the framework of this Contract, could coincide.

Concerning the technical aspects, in case of contestation, Febeg suggests inserting a procedure involving the CREG, but also an independent expert, who can be considered as a neutral party and could settle issues of divergence between ELIA and the Capacity Provider.

29. Febeg suggests that a Capacity Provider should have at least thirty (30) Working Days to contest the amounts.

33. Febeg suggests that to start a mediation procedure before a dispute procedure. Febeg assumes that, in the interest of the market and the parties, parties should seek an amicable solution rather than a conflictual.

Article 6. Invoicing and payment

General remark: It is unclear when the first payment procedure will start.

34. This paragraph lists the minimum information required to be indicated on an invoice. Febeg wants to point out that the (minimum) invoicing requirements set forth by article 5 Royal Decree n° 1 go beyond this list and a proper invoice must contain these all (next to (additional) legal requirements, for audit purposes.

35. This paragraph only mentions pro forma invoices and credit notes, Febeg believes this paragraph also mention final invoices and credit notes.

Febeg also wants to stress out the effect of the combined lecture of clauses 5.3.2. (§28) and 6.2 in terms of both (i) timing of issuance of the invoices for VAT purposes and (ii) annuality of tax for corporate income tax.
For VAT purposes, invoices need, in principle, to be issued the 15th day of the month following the supply.
For income tax purpose, especially for Q4 transactions, a special attention will need to given to the 'invoices to issue' , 'invoices to receive' so that all events of a tax year are well considered.

Therefore, when reading those 2 clauses together, it appears that the time-gap between the 'supply' and the final invoice is longer than the delay allowed by the VAT legislation, which is can trigger penalties at the occasion of an audit. We ask Elia to align the terms to common market practices.

44. Final invoices shall be paid within thirty (30) calendar days from the last day of the month of the date of receipt. FEBEG does not agree with this proposition: invoices should be paid 30 calendar days after the date on which the invoice is received.

Article 7. Liability

As a general remark, Febeg repeats what it said above. The Capacity Provider has no debt or obligations towards Elia for the capacity it has to make available to the market. The fact that Elia, on behalf of the Belgian State and of the market, has to pay the Capacity Remuneration (after possible deductions) does not yet make it entitled to the capacity subscribed by the Capacity Provider. Any "claims" for the non-availability of the capacity are already covered in the article 5.

This is an essential point.

Febeg wonders what other damage Elia could suffer as a result of the capacity provider's breach of its availability undertaking. If such damage would exist, and to the extend that such damage is different from damages Elia might suffer due to the non-compliance with other obligations of other contracts, only that (limited) damage could be contemplated if Elia could motivate why such damage is not already covered by the penalty clause of article 5.

Febeg asks Elia to clarify the interaction and dependence of this article with similar articles in various other contracts (e.g. BRP, access, CIPU, ...) that the Capacity Provider or the party it designates conclude with Elia. The multiplicity of contracts offered by Elia for the different services it contracts means that ultimately the provisions of one agreement may overlap or conflict with provisions of another agreement.

For the sake of completeness and notwithstanding the remarks above, Febeg has the following comments on the proposed articles if the general principle expressed in these comments were not accepted.

48. This sentence has as such no added value and could even be interpreted in contradiction with other paragraphs of this article 7.
However, the paragraph refers to the principle of relativity of contracts, meaning that a contract generates rights and obligations only between parties and that a contract does generally create third-party rights. However, the vague drafting of the article could also lead to risky interpretations. Namely by referring only to "faults" or "damages" and could lead to confusion. Febeg suggests omitting this paragraph.

As Febeg points out throughout this document, towards third parties, each party to the contract might be liable for damages caused by its fault (article 1382 ff. Civil Code). In our opinion, the Capacity Contract cannot and should not regulate the relations and the liability regime of the Capacity Provider towards third parties. The Capacity Contract is a bilateral agreement with Elia and can set only liability towards each other. Therefore, the Capacity Contract cannot provide that the Capacity Provider is "directly liable for any damage suffered by a third party".

49. This paragraph reiterates the general principle that each contracting party must execute the agreement in good faith and, consequently, must mitigate its damages caused by the fault of the other party. It adds nothing to nor deviates from this general principle. It could be omitted.

50. This clause aims at setting a specific term for requesting compensation. Such request as such cannot be "invalid" ("nietig"), but only, if the termhas elapsed, "inadmissible" ("onontvankelijk"/"irrecevable"), or, as the French version states, "décheant" ("verval"). The English translation using "forfeiture" is incorrect, as forfeiture means "a right lost as a legal penalty". Also to the extent that a time limit is justified, 30 calendar days is certainly too short and overly obstructive.

51. As explained above, the Capacity Contract aims at (i) the engagement that the Capacity Provider will put at the disposal "of the Market" the promised capacity and (ii) how Elia will contractually compensate (or penalise) the Capacity Provider when it delivers what he engaged or when he fails to "deliver". The penalisation covers, as a lump sum, all "damages" for non-fulfilment of the Capacity Provider's obligations.

Next to this contract, the Capacity Provider (or its BRP) and Elia are bound by a set of other contracts (eg. BRP contract, access contract, connection contract, ancillary services contracts, CIPU-contract, ...). These contracts are also concluded "on the occasion of" or "in the context of" the CRM contract. Liability clauses in these contracts cover faults and damages related to each respective contract.

The "catch-all" manner in which this clause 51 is written exceeds any reasonable use of a liability clause.

More specifically, this clause broadens the liability to extra-contractual liability. This goes against standing case law in Belgium: As a rule, a contracting party can only be held liable on an extra-contractual basis by the other party if the fault imputed to him constitutes a breach not only of the contractual obligation, but also of the general standard of care incumbent on him and if this fault has caused damage other than that due to poor performance (see, a.o., Cass. 17 March 2017, nr. C.16.0283.N). If a party wants to invoke extra-contractual liability, then, necessarily, the conditions of case law must be met and, more importantly, the liability regime cannot be covered in the contract.

Finally, the clause refers simply to "faults" or "damages" without further specification and reference to the definitions provided in the Contract. This point is drafted in a very broad way and does not provide that the liability can be invoked only by the other Party, in case of a damage caused to this other Party. The following wording should therefore be added:

> "51. The provisions of this article apply to all cases in which the contractual ~~or non-contractual~~ liability of a Party is invoked by the other Party in the event of ~~damage~~ Direct Damage caused to this other Party by a ~~fault~~ gross negligence committed by the offending Party, during the validity period of this Contract, on the occasion of or in the context of the performance of the obligations set in this Contract or in the context of the provisions of the Functioning Rules that this Contract implements~~, or their (failure to) execute~~."

52. Apart from the necessary reminder that a capacity provider's failure to have the capacity at the disposal of the market, as described by the functioning rules, is covered by the penalty regime, Elia, as a legal entity, does not establish which other contractual claim towards the capacity provider beyond the scope of that penalty regime it might have.

Further, this clause refers to "damages" which could be interpreted as both Direct and Indirect damages being covered. This would mean that a Party is liable for Direct and Indirect Damages in case of fraud, wilful misconduct or Gross Negligence. This is however in part in contradiction with the point 53.

53. This paragraph implicitly recognises that the liability for the failure of the capacity provider to have the capacity at the disposal of the market is covered by the penalty regime. As stated above, Febeg would be interested to know what other damages, not covered by any other contract the capacity provider and Elia will or have conclude(d), Elia could suffer from such failure and how this would fit in a valid legal structure of the roles and responsibilities within the CRM mechanism.

Following this clause, a Party would only be liable for Indirect Damages in case of fraud or willful misconduct, without including Gross Negligence. This contradicts article 1151 of the Civil Code, according to which "even where the non-performance of the contract has been caused intentionally by the debtor, the compensation must include, as regards the loss suffered" (*damnum emergens*) "by the creditor" and the loss of profit" (*lucrum cessans*) ", only that which is an immediate and direct consequence of the non-performance of the contract".

If Indirect Damages cover other damages than "consequential loss", the contradiction between points 52 and 53 has to be clarified by providing that Indirect Damages (to be redefined) are not due in case of Gross Negligence.

54. This clause is too broadly formulated, referring to any action by the contractual counterparts of the Capacity Provider. The contractual partners can have actions against Elia, for which the Capacity Provider has no responsibility whatsoever. Elia, as TSO is responsible for balancing the grid and is in charge of the functioning of the CRM. In general grid users, including the contractual counterparts of the Capacity Provider, have signed contracts with Elia (e.g. Access Contract) and do have a direct action against Elia. The article is so broad that the Capacity Provider has to provide such guarantee even if 1) it is not related to the performance of the Capacity Contract/Functioning Rules by the Capacity Provider and 2) even if the Capacity Provider has complied with all of its contractual and regulatory obligations toward its contractual counterparts. The Capacity Provider has to guarantee Elia against "any" action of such grid user even if the grid user has suffered damage caused by Elia or even if the action is in no way related to the CRM.

The liability regime between the Capacity Provider and the grid users will be determined in the agreements that will be signed between them.

55. Only the liability for Gross Negligence is capped, meaning that in case of fraud and wilful misconduct the liability is unlimited. Furthermore, the liability of the Capacity Provider is limited to twice the Capacity Remuneration, but this cap is limited "per claim and per calendar year". It is unclear how "per claim" should be understood. We also fail to see why only Elia should benefit from a maximum amount of limitation. In other Elia contracts, such as the contract for ancillary services, both parties benefit a limit of EUR 12,500,000.

If a third party suffers damage caused by the fault of the Capacity Provider and launches a claim against the Capacity Provider, the above liability caps will not be applicable as the Capacity Provider normally cannot oppose the inner contractual (bilateral) provisions to a party which is not part of the Contract (i.e. principle of relativity of contracts). The Capacity Provider, not being an executive agent of Elia, can be held liable by third parties based upon the provisions of the Civil Code. These third parties will have to prove the fault of the Capacity Provider, the damages they suffered and the (exclusive or non-exclusive) causal link between the fault and the damages. In Febeg's view, this should not be covered by the Contract, as it is a simple application of general law. If however Elia takes the view that the Capacity Provider is an executive agent of Elia, the Capacity Provider is shielded from any claims by third parties (Stuwadoors-doctrine).

56. The notion "gross negligence" in the English version is not capitalised, thus meaning something else than the definition of "Gross Negligence". As stated before, Febeg suggests deleting the definition of "Gross Negligence". As such, the non-capitalisation can be accepted in all three language versions.

57. This is also a very broad article that addresses a situation that might not relate to the performance of the Capacity Contract and involves internal relationships/discussions and disputes between the Capacity Provider and third parties. It is not clear in what context such a situation may arise, and it is therefore unwise to provide that Elia can "never" be held liable. Elia could well be in a contractual relationship with one of these parties and could have committed a fault in that context.
The notion "gross negligence" in the English version is not capitalised, thus meaning something else than the definition of "Gross Negligence". As stated before, Febeg suggests deleting the definition of "Gross Negligence". As such, the non-capitalisation can be accepted in all three language versions.

58. Following elements should be taken into account concerning liabilities:
    1. Only Elia is responsible for balancing the grid. Elia is also the only person who can take specific action relating to other parties to solve grid problems.
    2. Market parties can only be held responsible for elements within their control. Penalties have already been put in place for unavailability, thereby making the damage claims redundant.
    3. In addition to unavailability penalties, BRP's will also have to pay imbalance to Elia already covering the direct damages.

The article provides the following elements:

- the article applies "Notwithstanding any other provision of this article," meaning that the liability regime applies independently from all of the above rules and principles;
- the "Capacity Provider is directly liable for any damage suffered by a third party" : the Capacity Contract establishes and confirms the liability of the Capacity Provider towards a third party ;
- "any damage": both Direct and Indirect damages are covered.
- "due to a lack of capacity": this is an extensive term which does not refer to the obligations of the Capacity Provider under the Capacity Contract or the Functioning Rules (i.e. Available Capacity, Missing Capacity).
- "A fault committed by the Capacity Provider": any type of fault is covered – Simple Fault, Gross Negligence, fraud, wilful misconduct.
- "where applicable, indemnifies ELIA against any such damage": there is no liability cap.
- the Capacity Provider is held liable even if 1) "the fault" is not related to the performance of the Capacity Contract/Functioning Rules by the Capacity Provider and 2) even if the Capacity Provider has complied with all of its contractual and regulatory obligations under the CRM.

The Capacity Contract covers Elia against all actions by third parties that suffered damage because of the lack of capacity caused by the fault of the Capacity Provider. Elia can ask compensation for any claims made by third parties, without any liability limitation of the Capacity Provider – the liability is not limited to Gross Negligence in the framework of the contract and the financial cap is not applicable. In this context, if Elia had already compensated the third party, the Capacity Provider will have to repay Elia, no matter the amount and even if no Gross Negligence was committed.

Moreover, the Capacity Contract declares that the Capacity provider is directly liable for any damage suffered by a third party. In our opinion, the Capacity Contract cannot and should not regulate the relations and the liability regime of the Capacity Provider with third parties. The Capacity Contract is a bilateral agreement with Elia and can set only liability towards each other. As the Capacity Provider is not an executive agent of Elia, in its contractual relationship with third parties, the Capacity Provider should not guarantee Elia for any claims of third parties. If however, the Capacity Provider is deemed to be an executive agent of Elia, in its contractual relationship with third parties, the Capacity Contract should provide that the Capacity Provider guarantees Elia against claims of third parties (in case of a lack of capacity caused by fraud, wilful misconduct or Gross Negligence within the framework of the Contract) but cannot provide that the Capacity Provider is "directly liable for any damage suffered by a third party". Moreover, the article does not refer to the Capacity Providers' obligations under the contract and CRM rules.

The existence of bilateral provisions can be opposed to third parties, but they do not create rights for the third parties, unless the clauses are formulated as a 'third-party-clause' which should be avoided.

It is, however, unclear whether third parties may claim damages vis-à-vis Elia that are not directly covered by penalty clauses or lump sum obligations.

If serious problems in the system would arise, leading to the implementation of the afschakelplan/plan de délestage, or even to a brown/black-out, multiple actors might be partly to blame for such events, including in any case Elia. Elia has then to assume its responsibility. Through this clause, Elia could pass on the claims to the capacity provider. This is unacceptable and uninsurable.

Article 8. Force Majeure

General remarks

The concept of force majeure is not strictly defined in the Civil Code so that it is usual to do so in contracts and, above all, to already define several circumstances which the parties agree to regard as force majeure (cf. 62). In any case, case law interprets this very strictly. According to Belgian case law, force majeure is defined as an event (or series of events) that

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

59. The general concept of force majeure is repeated in this clause.

60. As the CREG wrote in earlier opinions, Elia uses different wording for important clauses in each agreement. In addition to this lack of uniformity between the various contracts, there is also a problem with the translation of the proposed clauses.

For example, the Dutch and French versions of the second paragraph of the force majeure clause refer to "any event or unforeseen or unusual situation". In the English version it reads "any unforeseeable or unusual event or situation". The English version is the version which respects most the general principles on force majeure in Belgian civil law. If however, the Dutch and French version prevails, "any event", even foreseeable or usual could trigger the application of the force majeure procedure. This could not be the aim.

61. Febeg has no comments and interprets this clause as excluding economic hardship from the concept of force majeure.

62. As expressed during the consultation of the functioning rules, the unavailability of a unit under the CRM can also be due to third parties, such as, e.g. the unavailability of the gas or electricity transmission grid. It is not clear how such situations will be managed and should thus be clarified. This clause refers to Elia's system and the DSO's, but not the Fluxys system. Moreover, it is unclear whether events on the systems abroad are covered.

Febeg proposes the following wording for the examples:

- Natural disasters resulting from earthquakes, floods, storms, cyclones or other exceptional weather events recognised as such by a public authority with expertise in this area, as well as epidemics and pandemics;
- A nuclear or chemical explosion and its consequences;

- Situations of exceptional (or one-of-a-kind) risk during which the sudden unavailability of the distribution or transmission gas and electricity grid or of a Capacity or a CMU is caused by reasons other than ageing, lack of maintenance or the competence of operators; including the unavailability of the IT system, whether or not caused by a virus, when all state of the-art precautions had been taken;
- The temporary or continuing technical inability of the grid to exchange electricity because of disturbances within the Belgian control area caused by electricity flows resulting from energy exchanges within another control area or between two or more other control areas, where the identity of the market players involved in said energy exchanges is not, and cannot reasonably be, known to ELIA;
- An inability to operate the distribution or transmission gas and electricity grid , equipment forming a functional part of the distribution or transmission gas and electricity , or equipment belonging to the CAPACITY PROVIDER due to a labour dispute that gives rise to a unilateral measure by employees (or groups of employees) or any other social conflict;
- Fire, explosion, sabotage, acts of a terrorist nature, acts of vandalism, damage caused by criminal acts, criminal coercion or threats of the same nature or acts that have the same consequences;
- War (whether declared or not), the threat of war, invasion, armed conflict, embargo, revolution or uprising;
- and
- A situation in which a competent authority declares an emergency and imposes exceptional and temporary measures on distribution or transmission gas and electricity grid operators and/or users, such as the measures necessary to maintain or restore the safe and efficient functioning of grids or systems, including load-shedding orders issued in the event of power shortages.

63 The third requirement of force majeure under the general rules of the Belgian law of contract (and tort) 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 indisputable that a delay in obtaining permits or authorisations can and should constitute an event of force majeure if the Capacity Provider has filed a due application for such permits or authorisations. Any delays in court or any unfounded appeals are unavoidable and unpreventable.

Moreover, the functioning rules expressly foresee penalties in case the permits are not timely obtained. This is sufficient.

Finally, FEBEG does not understand what Elia means with the delays in “operation” in this same paragraph.

65. It is unclear to Febeg how a capacity provider can limit the consequences of a force majeure, as a force majeure event is an event beyond the control of the party invoking such event. Febeg suggests to rephrase this paragraph as follows: "Party shall use reasonable endeavours to minimise the adverse consequences of any Force Majeure Event."

66. Unlike other contracts entered into by Elia for the performance of the tasks entrusted to it by the Electricity Act and its implementing decrees, the provision of capacity is not an obligation of the capacity provider vis-à-vis Elia, but a commitment by the CRM operator with a view to its support by the CRM mechanism. If a situation of force majeure arises (e.g. a technical problem meeting the definition of force majeure that cannot be remedied within thirty days), this may only give rise to the suspension of the commitments under the contract, but not to its termination. Indeed, after that thirty-day period, the incident may be resolved and the parties may be able to resume the performance of their obligations under the agreement. Given the substantial investments and risks for a CRM project, it seems unjustified that such possibility of remedying an event of force majeure is made impossible by the brief period of 30 days.

However, considering the important investments made by the Capacity Providers, , it appears justified that in case of an early termination of the contract due to a force majeure, the Capacity Provider are at least partially reimbursed for the investment costs already incurred.

Febeg proposes the following formulation:

> *"66. If one of the Parties, as a result of the force majeure situation, is unable to fulfil its essential obligations under the Contract, and if the situation of force majeure persists for an unreasonable period and there is no perspective any more in this respect for the obligations to be fulfilled the other Party may terminate the Contract with immediate effect by sending a registered letter or a motivated email with acknowledgment of receipt setting out the reasons for the termination.*
> *In case of such termination of the Contract by both parties, the Capacity Provider will be reimbursed of the costs already incurred in the framework of its participation in the CRM and the fulfilment of its contractual obligations"*

Article 9. Confidentiality

Febeg notes that only annex A should be treated as confidential. Only an infringement of the confidentiality obligation with regard to this annex could constitute a "gross negligence".

Febeg requests that a Capacity Provider can share the contract and its appendices with its affiliated companies, and external legal, financial and technical advisors and financing providers.

Article 10. GDPR

In paragraph 89 it is only described what should happen in the case of a breach of Personal Data with the Capacity Provider with respect to the Personal Data it provides to Elia, not what happens when the breach is at Elia side. Febeg believes the same protocol should be valid in such case.

Article 12. Revision of the contract

98. Febeg agrees with the imperative modification of the contract following the events mentioned in this Clause. Febeg agrees that this clause gives no power to either party to trigger the modification of the contract outside the events of listed in the clause.

99. In respect of the preceding, Elia should first have to address and analyse the need to modify some clauses of the contract following the events described in para 98. The result of such an analysis should be shared with the market parties. Only after the decision of the CREG that circumstances described in para 98 necessitate a modification of the contract, Elia could propose such changes, upon consultation of the market parties, for approval to the CREG.

The part "in the case of conditions of the standard capacity contract on which is based this Contract over
which CREG has the power of approval," should be deleted as it has no added value.

103. Febeg notes that it is not up to the parties to decide what a judge might decide.

104. Febeg does not accept that Elia could unilaterally decide to revise the capacity remuneration. The payment of the remuneration is the essential obligation of Elia and the reason why a capacity provider would agree to sign this contract. Moreover, article VI.91/5 of the Economic Law Code clearly states that, unless there is proof to the contrary, the following clause shall be presumed to be unlawful: 1° grant the company the right to unilaterally change the price, characteristics or conditions of the contract without valid reason; (…)

108. FEBEG does not agree with the fact that no compensation shall be payable by Elia to the Capacity Provider in the case of delay of infrastructure works by Elia or a third party. The postponement of the start of the Delivery Period by 1 year of the concerned transaction will have important financial consequences for the Capacity Provider for which it should be compensated (financing, lack of market revenues, etc.). This proposition is not balanced compared the penalties that are applied in the case a CRM Provider is not available on time with its project.

109. Febeg notes that such events may not give rise to the revision of the contract, but can constitute a force majeure event.

Article 13. Early suspension and termination

110. The liability of the Capacity Provider is covered by the penalty regime of article 5.
This Clause starts from the presumption that the Capacity Provider is a debtor towards Elia for the "delivery of the capacity". It is not. Consequently, whichsoever act of "gross negligence" can only be sanctioned following the general rules on extracontractual liability. As these extracontractual faults have no impact on the obligations of the Capacity Provider towards Elia, they cannot form a basis to unilaterally terminate the contract.

Moreover, any such sanctions on non-compliance with the overall CRM framework have to have a legal basis, which they have not.

In any case, Elia could not be the judge of the Capacity Provider being "guilty" or not of a Gross Negligence. As already mentioned, the definitions provided in the proposal of Capacity Contract are vague and unclear and allow for an extensive range of interpretations. This article grants an unreasonable discretionary power to Elia to consider if the Capacity Provider has committed or not a Gross Negligence and to unilaterally terminate the Contract solely based on its judgement. In general, judicial intervention is required to determine if a Gross Negligence has been committed by a party to a contract, as the context and the events that have occurred are never simple.

Also, 30 days is not an acceptable term for remedial action. This short amount of time would leave the Capacity Providers with no other choice than to launch summary proceedings to challenge Elia's unilateral decision which would lead to time and money consuming proceedings. It also appears unjustified to terminate the contract because after only 30 days (considering that most Capacity Providers will make considerable investments in the coming years given their participation on the CRM).

111. In the FR, a "Transaction" is defined as "an agreement about the contractual rights and obligations resulting from the Service, closed in the form of a Capacity Contract between a Capacity Provider and ELIA, in the Primary Market or the Secondary Market at a Transaction Date, identified by a transaction identification number, for the Contracted Capacity and covering a Transaction Period".

We suggest adding also as grounds for termination by the Capacity provider such as: failure in obtaining the permit, failure to make any undisputed payment under this agreement within 90 days of the relevant payment date and Elia becoming bankrupt or Insolvent.

Article 14. Assignment of the contract

112. Febeg proposes to reformulate the paragraph to ensure that if the conditions set out are fulfilled, the Contract may be assigned to another legal entity.

> "The Contract may not be assigned by the CAPACITY PROVIDER, either in whole or in part, without prior written permission from ELIA. Said permission shall be granted when the following conditions are met:"

On these conditions, Febeg is surprised that Elia requests proof of information it will already have (CRM Candidates, fulfilment of obligations due).

113. Febeg asks Elia to elaborate on the necessity to have the approbation of the CREG in case of assignment of the Contract for Capacity Providers having multi-year contracts. While Febeg could understand that the CREG needs to be informed about the new contact persons, especially when the ex-post investment file is not finalised yet, we fail to see the added value of such additional step in the process of transferring the contract. Febeg wants to avoid that any additional procedural steps would undermine the assignment and the business case of a CMU.

In any case, the current paragraph 113 is undoubtedly too vague in the current proposition. Capacity Providers should be able to assess upfront the chances the transfer of the Contract to another legal entity will be possible. If the role of the CREG in this approval process is justified, we suggest to list all the requirements and conditions for such an assignment to be approved. 114. Febeg supposes that "not" is unintentionally omitted between "may" and "be" in the first line.

Article 16. Applicable law – settlement of disputes

Febeg has no comments, apart from the suggestion to insert in paragraph 123 an independent mediation procedure, as foreseen by the Judicial Code, and allowing both parties to continue their cooperation in the interest of the Belgian electricity market.