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federation of belgian industrial energy consumers

Febeliec answer to the Elia consultation on the drop procedure

Febeliec would like to the thank Elia for this consultation on the unilateral cancellation of the designation of the access holder and balancing responsible party conform article 198 of the Federal Grid Code (or the so-called drop procedure). Febeliec would like to thank Elia for the many discussions and interactions on this topic and the constructive approach. However, Febeliec very strongly opposes the proposed approach, as it significantly enlarges the scope of article 198 of the FGC beyond default of payment. While Febeliec appreciates the efforts done by Elia to come up with an approach that has merits in the framework of a general drop procedure, article 198 of the FGC strongly and explicitly limits the scope of such procedure to only default of payment and this on the very explicit wish of the legislator at the time of redaction of the newest version of the FGC. Febeliec has also always stated that it does not at all object to the instauration of a drop procedure under the framework of the current article 198, as it is clear that when a BRP and/or access holder is not being remunerated for the delivered service, it should be possible to end the service delivery. However, when Febeliec takes into account the alternative reasons for initiation cited by FEBEG for such a drop procedure, such as non-sufficient financial guarantees or a modification of the offtake profile of a grid user, Febeliec is strongly opposed that these should be allowed for the activation of article 198 of the FGC as these are arbitrary and because of the potentially very severe consequence of a drop procedure (disconnection of the grid user) are not at all in perspective. Moreover, the proposed extended drop procedure could even be used in less-competitive market segments to enforce less attractive conditions for grid users or even block investment projects in consumption or generation assets by the supplier as these would constitute a change in the offtake profile. Febeliec thinks that in the case beyond the current scope of default of payment in article 198 of the FGC (to which Febeliec as stated above does not object), the concerned parties should use the legal means that exist, but this should not be included in the FGC. Moreover, the by some parties requested extension of the drop procedure seems to be based mostly on the relation between the supplier and the grid user, whereas the scope of article 198 and the access contract is limited to the access holder and/or BRP. Febeliec as such does not see any reason to change its standing position on this topic and thus does not at all validate any extension of the scope of article 198 of the FGC, even not under the proposed approach by Elia.

On the proposal itself, Febeliec, apart from some typos, has some major concerns (beyond the fact that Febeliec is strongly opposed against any extension of the scope of article 198 as described above):

- The concept still mixes three roles (supplier, access holder and BRP), of which only two are relevant for article 198, while it is exactly the third role which will now be the determining factor of the drop procedure. As Elia also already indicates, it is not necessarily the case that all three roles are fulfilled by the same economic actor (and some roles might even be fulfilled by different actors).
- The proposed approach does not mention anymore, as opposed to the previous discussions, that there is suspension of the procedure in case of summary proceedings (“kortgeding”) nor that the procedure can/will be stopped based on the outcome of such proceedings. Moreover, Febeliec continues to be surprised that in order to avoid that a supplier should have to go to court for default of payment or other reasons to end the designation of the access holder and/or BRP, it is now the grid user that will have to do so to avoid being cut off the grid by a party (the supplier) who is not even mentioned at all in article 198. Febeliec finds this approach a reversal of the burden of proof and strongly opposes this.
- Febeliec was of the impression that the proposal of Elia was supposed to be a package deal, with the proposed procedure but also at the same time the absolute certain abolition of annexes 12 and 13 of the Access Contract, which from the final version of the document is much less clear and as such even more unacceptable to Febeliec than for the other reasons cited in this consultation answer. The abolition of annexes 12 and 13 is an absolute conditio sine qua non for Febeliec for even the slightest discussion on the proposed procedure. In case these annexes would be retained in the access contract, all the concerned decision makers would according to Febeliec potentially open the doors for very perverse effects and potentially even additional possibilities for market power abuse. Febeliec will under no circumstance accept any possible change to the drop procedure unless there is an unequivocal legal or regulatory decision to abolish annexes 12 and 13.
- Febeliec regrets to the strongest possible extent that other than via a court decision, which is not even referred to anymore and which, as described above, feels like reversal of the burden of proof, there is not any validation of the proportionality of any initiated drop procedure. Febeliec is afraid that this could lead to market power abuse, to the detriment of consumers, which would be a very grave negative effect. Because of the very severe potential impact of being cut off the grid, grid users could find themselves in a very difficult position, even though they have never defaulted on any payment, merely because they want to invest in (generation) assets

or participate in demand side response/market response, which could change their offtake profile. Febeliec believes that such impact would go very strongly against the market trends and wishes of the government, as a.o. expressed in its NECP, and is thus very surprised that Elia and decision makers would want to extend the scope of article 198 and potentially worsen the economic climate and go against government policy decisions. Febeliec asks that such essential proportionality test shall be included, by the regulator or any other relevant neutral party, if needed to be designated or created, in light of the severe consequences. As the proposed approach by Elia includes the modification of legal texts, Febeliec is of the impression that in case legislators would despite all the argumentation of Febeliec and other stakeholders still want to press ahead with legal modifications to extend the scope of article 198, additional legal modifications can be included to enable such provision of a proportionality test of a neutral party.

- Concerning the comparison with the gas sector, Febeliec has argued that these sectors are to very large extent incomparable, as is also described in the note. Moreover, Febeliec cannot imagine that Elia or any other stakeholders would want to imply that gas and electricity markets and market systems are identical, as this would also have many implications for modifications in other fields than drop procedures which should then also be put on the table.
- On the proposed points 4.3.1 and 4.3.2, Febeliec believes that BRP respectively access holder should not be referred to, as the drop procedure is always only for one of the roles and these could be taken up by different actors. Moreover, Febeliec reiterates its comment that the financial risk of the supplier is not in scope of article 198 of the FGC, and that it strongly opposes that this is now included in the scope. In case a supplier would have issues with payment or any other possible reason, this should be handled by applying the legal means in the Belgian legal system and should not be integrated in the scope of article 198 which is only referring to default of payment of the access holder or BRP and is very explicit about that point.

Febeliec believes that it is not of the interest of grid users and specifically consumers, but also not in the interest of society as a whole, to extend the scope of article 198, as this could lead to perverse effects on the contractual relationships of grid users, on investments and on making grid users more flexible. Febeliec nevertheless does understand that it should be possible for a BRP or access holder to be able to end a contract when payments are defaulted upon, and this also in the interest of all other consumers, as this could otherwise lead to additional costs or risk premiums to be covered by those. Nevertheless, Febeliec wants to stress that also before the current version of the FGC, suppliers (not even referred to in article 198), access holders and/or BRPs could always initiate legal proceedings against supposedly non-complying grid users, whereas the proposed approach reverses this situation. Febeliec thus wants to indicate that in case it would be impossible to find an alternative to the current article 198 of the FGC, to which Febeliec has no comments and to which it agrees completely (under the premise of default of payment), it could also be decided to remove this article completely from the FGC and reverse back to the situation that always existed, where the legal system will be used to determine the just outcome. Febeliec strongly wants to stress that during the very mong and extensive discussions on the FGC, such article was never discussed and it was not introduced as a proposal of the Elia Users' Group, yet inserted at a much later point and with a very clear delineation (default of payment). Febeliec would not appreciate at all that each time such approach is used to limit the rights and increase the obligations for grid users, as it is a non-transparent approach and does not benefit the confidence of grid users in the legislative process nor the overall investment climate in Belgium.