

# Decision

(B)2526  
30 March 2023

## Decision on the formal requirements for a request for a derogation from the intermediate price cap

Article 22, § 2, paragraph 2 of the Royal Decree of 28 April 2021 laying down the parameters for determining the volume of capacity to be anticipated, including their calculation methods, and the other parameters necessary for the organisation of the auctions, as well as the method and conditions for granting an individual derogation from the application of the intermediate price cap(s) under the capacity remuneration mechanism

Confidential version

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# INTRODUCTION

In application of Article 22, § 2, paragraph 2 of the Royal Decree of 28 April 2021 laying down the parameters for determining the volume of capacity to be anticipated, including their calculation methods, and the other parameters necessary for the organisation of the auctions, as well as the method and conditions for granting an individual derogation from the application of the intermediate price cap(s) under the capacity remuneration mechanism, the purpose of this draft decision is to establish the formal requirements for requesting a derogation from the intermediate price cap to be considered for the 2023 auction.

This decision consists of five parts. The first part briefly describes the legal framework. The second part describes the background. The third part replies to the comments received during the public consultation. In the fourth part, the CREG details the adjustments made to the formal requirements for a request for derogation from the intermediate price cap. The fifth part contains the formal requirements for a derogation request.

This decision was approved on 30 March 2023 by the CREG Management Committee.

## 1. LEGAL FRAMEWORK

1. In accordance with Article 22, § 2, paragraph 2 of the Royal Decree of 28 April 2021 laying down the parameters for determining the volume of capacity to be anticipated, including their calculation methods, and the other parameters necessary for the organisation of the auctions, as well as the method and conditions for granting an individual derogation from the application of the intermediate price cap(s) under the capacity remuneration mechanism (hereafter: Methodology RD), it is the CREG's responsibility to define the formal requirements for requesting a derogation from the intermediate price cap (hereafter: IPC)

2. This article lists the minimum elements that the request must contain:

*1° the identification of the capacity market unit, or units in the event of linked capacities, via a unique identification number from the pre-qualification procedure as defined in the operating rules, and the auction to which the request applies;*

*2° an accurate estimate and description, or a description of the absence, if any, of the following cost components with respect to the capacity market unit, or units in the event of linked capacities, for the capacity supply period to which the request applies:*

*a) broken down by delivery point where applicable, the annual fixed operational and maintenance costs (in €/year), including the additional specification of fixed network tariffs and activation costs for the availability tests requested by Elia, as defined in the operating rules, if these are deemed relevant, supplemented where applicable by the assumptions as to at least the number of hours during which the unit(s) has (have) been activated and the number of start-ups or activations on which these estimates are based, as well as the relationship between the fixed costs and the number of activations on the one hand, and the number of operating hours on the other;*

- b) *the fixed costs associated with the management of a portfolio of delivery points relevant for operating on the energy market (in €/year) by the relevant capacity market unit, during the capacity supply period to which the request applies;*
- c) *broken down by delivery point where applicable, the annualised recurring investment expenditure not directly linked to an extension of the technical lifetime of the installation or to an increase in the nominal reference power, including, where applicable, the provisions for major maintenance work on the installations, which does not necessarily take place every year, (in €/year), supplemented where applicable, by the assumptions as to at least the number of hours during which the unit(s) has (have) been activated and the number of start-ups or activations on which these estimates are based, as well as the relationship between the fixed costs and the number of activations on the one hand, and the number of operating hours on the other;*
- d) *broken down by delivery point, where applicable, the annualised non-recurring investment expenditure relevant for the provision of the service with the relevant capacity market unit, or units in the event of linked capacity, during the capacity provision period to which the request applies (in €/year);*
- e) *the variable costs for the energy supply (in €/MWh), including the additional specification, where appropriate, of at least the following elements included in these variable costs: variable operational and maintenance costs, including variable network tariffs if deemed relevant, the efficiency factor or, in the event of storage systems, the round-trip efficiency;*
- f) *for an aggregated bid, the difference between the capacity offered and the sum of the installed capacity of the various delivery points;*
- g) *the fixed start-up or activation costs by specifying the cost per start-up or activation, excluding the costs for the fuel needed purely for start-up (in €/start-up or €/activation), supplemented, where appropriate, by an indication of the type and quantity of fuel needed purely for start-up (in GJ/start-up).*

*For each investment, at least the following data should be provided: the total investment expenditure, the financing expenditure including the weighted average cost of capital, the economic lifetime of the investment, the justification relating to the provision of the service, the year of the investment and the resulting annualised cost.*

*The non-recurring investment costs eligible for the calculation of the missing money of the capacity market unit, or units if they are linked capacities, are the initial non-recurring investment costs ordered based on the first decision, in accordance with Article 7j, §6 of the Electricity Law, and that are incurred at the latest on the day before the first day of the capacity supply period.*

*3° where applicable, a precise estimate and description of the revenues (in €/year) with respect to the capacity market unit, or units in the event of linked capacities, for the capacity supply period to which the request applies, other than the annual inframarginal rents and the net revenues from the provision of balancing services referred to in paragraph 8, 3° and 4°, such as, but not necessarily limited to, revenues related to steam and/or heat;*

*4° where applicable, a precise estimate of the operating restrictions linked to operation that affect the provision of the service with the capacity market unit in question, or units in the event of linked capacities, and a description of the impact of these restrictions on revenues, during the capacity supply period to which the request applies, for example, but not necessarily restricted to: energy restrictions, activation restrictions, planned maintenance periods, must-run restrictions;*

*5° an estimate and a precise calculation of the missing-money (in €/MW/year) of the capacity market unit concerned, or units in the event of linked capacities, for the capacity supply period to which the request applies.*

*The components issued by the applicant for derogation referred to in points 2° to 4° in support of the application must be specific to the capacity market unit concerned, or units in the event of linked capacities.”*

## **2. BACKGROUND**

3. In its decision (B)2237, the CREG previously laid down the formal requirements for a request for a derogation from the intermediate price cap to be taken into account in the 2021 auction and made them available on its website on 12 May 2021.

4. In order to facilitate their interpretation, the CREG subsequently published an adapted version of these formal requirements in its decision (B)2237-2 of 17 June 2021. The CREG also published an Excel version of these formal requirements in order to facilitate the input of data by the derogation applicants.

5. In its decision (B)2356, the CREG established the formal requirements for a request for a derogation from the intermediate price cap to be taken into account in the 2022 auction. These formal requirements were published on its website on 31 March 2022. The main objective of the adjustments made to the formal requirements for the 2022 auction is to increase the predictability for the market players regarding the processing of the requests for derogation from the intermediate price cap. The CREG's objective is also to ensure consistency between the assessment of the intermediate price cap and the assessment of the merits of the requests for derogation from the intermediate price cap. The CREG also adapted the Excel version of these formal conditions in order to facilitate the input of data by the applicants for derogation.

6. Decision (B)2356 is currently under appeal at the Market Court. In the context of this appeal, the Market Court requested the opinion of the European Commission on the scope of its decisions on the CRM and, in particular, on the IPC derogation mechanism provided for in the RD Methodology. The European Commission issued its opinion on 22 March 2023.

7. In accordance with Article 23, § 1 of its internal rules of procedure, the CREG's Board of Directors has decided to organise a public consultation on its website on draft Decision (B) 2526 on the formal conditions that must be met by a request for derogation from the maximum intermediate price cap in order to be considered for the 2023 auction. This public consultation took place from 14 to 21 March 2023.

### 3. CONSULTATION OF MARKET PLAYERS

8. In the context of its public consultation regarding its draft decision (B)2526 of 14 March 2023, the CREG received three responses from Febeg, Febeliec and Engie, including a partially confidential one.

9. Comments on the methodology royal decree, the calibration of the IPC and a thorough review of the conditions in which existing capabilities can participate in the CRM and recover their costs are outside the scope of the consultation on the formal requirements for a request for derogation from the intermediate price cap and will not be dealt with in this decision.

10. Engie fully supports Febeg's position.

#### 3.1. COUTS ELIGIBLES DANS LA DEMANDE DE DEROGATION

11. Febeg and Engie do not agree with the CREG that certain costs (overheads, local taxes, rental costs and costs of optimising gas logistics) are excluded in the assessment of the "missing money" of the IPC derogation requests if they have not been included in the IPC calculation. Febeg and Engie consider that these costs are real and are borne by the assets concerned and should therefore be included in the calculation of the missing money.

[CONFIDENTIAL]

First of all, the CREG confirms that the cost categories included in the derogation request must correspond to the categories taken into account in the AFRY study "Update of Peer Review of "Cost of Capacity for Calibration of Belgian CRM"" Study", on which Elia based its proposal for the intermediate price cap in its calibration report. Indeed, the report to the King of the Methodology Royal Decree<sup>1</sup> explicitly states the link between the cost estimate for the determination of the intermediate price cap by ELIA and the evaluation of the derogations from the intermediate price cap by the CREG:

*In particular, in order to determine certain required cost elements, Elia shall request the assistance of an independent expert. In this respect, the independent expert will present, in a documented study, various data relating to the cost elements relevant for the estimation of the maximum interim price for all existing technologies in the market under consideration. It is considered appropriate that the selection of the independent expert and the monitoring of this study be done, if possible, in consultation with the commission, since there is a link between the estimation of the costs for the determination of the netCONE parameter relevant for the calibration of the demand curve carried out by the commission and the costs for the determination of the intermediate maximum price and the assessment of the derogations from the intermediate maximum price by the commission.*

The CREG therefore considers that these costs (overheads, local taxes, rental costs and the costs of optimising gas logistics), which are excluded from the calculation of the IPC, should not be taken into account when analysing the requests for derogation from the IPC.

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<sup>1</sup> <http://www.ejustice.just.fgov.be/eli/arrete/2021/04/28/2021041351/justel#rapportroi>

This approach was confirmed by the European Commission in its opinion of 22 March 2023. In fact, in this opinion, the Commission indicated that, among other things, overheads, local taxes and rental fees do not fall under the categories provided for in the RD Methodology. In the same opinion, however, the Commission states that it used this RD Methodology to conclude that the CRM is compliant with the internal market. As a result, according to the European Commission, an IPC derogation mechanism such as that anticipated in the RD Methodology, which does not provide for the costs in question to be taken into account, is consistent with European law.

12. Febeg and Engie support the fact that electricity collection costs are now explicitly considered eligible. Engie, however, specifies that it is not clear where these costs should be reported in the XLS file and asks the CREG to clarify this point in the XLS file (by adding a specific line).

Febeliec could accept the proposed limitation on the electricity acquisition costs that can be included in the derogation application, but requests that this and other elements of a derogation application be properly reviewed by the regulator. Febeliec emphasises that a derogation of the intermediate cap should not be granted lightly and that all of the constituent elements must be properly evaluated, as a derogation will undeniably increase the cost of CRM to consumers and thus impact the lowest possible cost criterion if not applied with great care.

The CREG points out that the AFRY study "Update of Peer Review of Cost of Capacity for Calibration of Belgian CRM" specifies that electricity is imported from the grid when a power plant is shut down (for planned maintenance or due to a forced outage). Given the high level of correlation between the import amount and the hours of operation of the plant, AFRY considers this cost to be generally treated as a variable cost. The CREG therefore considers that the electricity purchase costs that can be included are limited to the electricity imported from the grid when the unit is shut down (for planned maintenance or due to a forced outage). These costs are considered variable costs.

The CREG specifies that this cost can be included under the line "[Other variable costs 1]".

### **3.2. DATA TO BE PROVIDED IN THE FRAMEWORK OF THE IPC DEROGATION REQUEST**

13. Febeg and Engie consider that the data to be provided in the request for derogation from the IPC should be limited to the data that are absolutely necessary to assess the missing money of the supply period covered by the auction. In particular, Febeg and Engie consider that the revenue data are not useful for the CREG, as the revenue for the delivery period is calculated by ELIA. Engie considers that two years of historical cost data should be a maximum.

First of all, the CREG recalls that Art 22 §2 5° of the Methodology Royal Decree stipulates that the request for derogation from the IPC must include at least:

*An accurate estimate and calculation of the missing-money (in €/MW/year) of the relevant capacity market unit, or units in case of linked capacities, for the capacity supply period to which the request applies.*

The CREG therefore considers that the request for derogation from the IPC must include the data relating to the income that was taken into account for the calculation of the missing money for the period during which the CRM was supplied. In addition, the CREG requests a history of all the data necessary for the calculation of the missing money in order to enable it to assess the merits of each request for derogation. In fact, the CREG assesses the validity of the data transmitted for the year in which the CRM is supplied on the basis of the justifications transmitted to certify the historical data and to justify the expected changes in these historical data.

### **3.3. ADDITIONAL REMARKS**

14. Febeliec is strongly opposed to a consultation with a response time of just one week. While Febeliec understands that the CREG considers the changes to be minor, it considers that too many consultations in recent years have had durations shorter than the minimum period for consultations stated in the CREG's internal guidelines. For Febeliec, a one-week consultation sets a very worrying precedent, as this is clearly insufficient time to draft an opinion and allow a thorough internal discussion with members and the other stakeholders in order to provide valuable input. Febeliec strongly believes that either a consultation receives the required attention, including a sufficient duration, or the issuing party does not hold a consultation and takes full responsibility for such an approach. Stakeholder dialogue and consultation are, quite rightly, a central element of the regulatory decision-making process and should not be compromised. Febeliec is therefore opposed to the approach chosen by the CREG, in particular the dangerous precedent that has been set.

FEBEG also argues that a consultation period of one week is not at all reasonable.

The CREG considers that dialogue and consultation with the stakeholders are central elements of the decision-making process and, as far as possible, ensures that sufficient time is allowed to respond to its consultations. The CREG is aware that the deadline for response in this case was particularly short. However, the content of the formal requirements adopted in this case is very largely based on the formal requirements annexed to decision (B)2356, which had itself been subject to a ten-day public consultation. The CREG considers that the duration of the consultation that preceded the adoption of this decision was therefore sufficient to allow the interested parties to comment on the limited changes to the formal requirements.

15. Engie disputes that both personnel costs and salaries are subject to the growth of the consumer price index (CPI) forecast by the Federal Planning Bureau. The electricity production sector requires and must attract very specific and technical profiles. [CONFIDENTIAL]

The evaluation of the revenues by Elia is subject to an indexation in Euro 2027-28 on the basis of the growth of the consumer price index forecast by the Federal Planning Bureau. To ensure consistency between the evaluation of the costs and the evaluation of the revenues taken into account in the calculation of the missing money, the CREG considers that all the costs must be indexed solely on the basis of the growth of the same consumer price index.

16. [CONFIDENTIAL].

17. [CONFIDENTIAL].



18. [CONFIDENTIAL]

19. Engie believes that if third party documentation is not available [CONFIDENTIAL] to justify the capital costs, the CRM applicant should be allowed to demonstrate the level of these costs on the basis of other evidence [CONFIDENTIAL].

The CREG will take into account any relevant justification provided by the CRM applicant if third party documents are not available (e.g. due to internal work or for another reason) provided that this unavailability is duly justified.

20. Engie draws the CREG's attention to the reasonableness of potential requests for additional information. Engie reminds the CREG of the limited time to respond to these requests and the period in which they will be launched (summer with many employees on holiday). Moreover, requesting information from third parties will take longer than compiling data internally. Engie also considers that market players should be able to provide any supporting documents they deem relevant [CONFIDENTIAL].

The CREG confirms that it will ensure that requests for additional information are kept to a minimum and that it will only do so if it considers that additional information is necessary for its assessment. In order to avoid requests for additional information, the CREG recommends that Engie explain as far as possible the calculations that led to the values included in the requests for derogation from the IPC and to justify all the evidence used in these calculations by means of third-party documents, or any other supporting document in the event that no third-party documents are available.

21. [CONFIDENTIAL]

22. [CONFIDENTIAL]

## **4. ADJUSTMENTS TO THE FORMAL REQUIREMENTS FOR A REQUEST FOR A DEROGATION FROM THE INTERMEDIATE PRICE CAP**

23. The main objective of the adjustments made to the formal requirements for the 2023 auction is to take into account the expected evolution of the consumer price index for the supply period from November 2027 to October 2028.

24. In order to ensure consistency between the assessment of the intermediate price cap and the assessment of the appropriateness of the derogations from the intermediate price cap, the formal requirements specify that the cost categories included in the derogation request must correspond to the categories taken into account in the AFRY study "Update of Peer Review of "Cost of Capacity for Calibration of Belgian CRM"<sup>2</sup>, on which Elia based its recommendation of the intermediate price cap in its calibration report<sup>3</sup>. Based on the clarification provided by AFRY on the categories of costs taken into account in its assessment, the CREG adapted the formal requirements by specifying that the electricity purchase costs that can be included in the request for derogation from the IPC are limited to the

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<sup>2</sup> [https://www.elia.be/-/media/project/elia/elia-site/public-consultations/2022/20221028\\_afry\\_update-of-the-peer-review-of-cost-of-capacity-for-calibration-of-belgian-crm.pdf](https://www.elia.be/-/media/project/elia/elia-site/public-consultations/2022/20221028_afry_update-of-the-peer-review-of-cost-of-capacity-for-calibration-of-belgian-crm.pdf)

<sup>3</sup> [https://www.elia.be/-/media/project/elia/elia-site/users-group/ug/wg-adequacy/2022/20221128\\_dy2027---y-4-auction---calibration-report.pdf](https://www.elia.be/-/media/project/elia/elia-site/users-group/ug/wg-adequacy/2022/20221128_dy2027---y-4-auction---calibration-report.pdf)

electricity imported from the grid when the unit is shut down (for planned maintenance or due to a forced shutdown). These costs are considered as variable costs.

## 5. FORMAL REQUIREMENTS FOR A DEROGATION REQUEST

25. The formal requirements that must be met for a derogation request to be considered, are set out in Appendix 1.

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For the Commission of Electricity and Gas Regulation:

Laurent JACQUET  
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Koen LOCQUET  
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## **APPENDIX 1**

**Application form for a derogation from the intermediate price cap**

## **APPENDIX 2**

**Declaration on honour derogation form the intermediate price cap**

## **APPENDIX 3**

**Responses to the public consultation**

- 3.1 Febeg
- 3.2 Febeliec
- 3.3 Engie (partly confidential reaction)