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Observations on the planned Belgian capacity mechanism

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1. The Commission is currently assessing the compatibility with State aid rules of a market-wide capacity mechanism¹ under the form of reliability options notified by Belgium in December 2019 in order to address alleged security of supply concerns as from 2025 (hereafter "**the Planned CM**").
2. ClientEarth is hereby alerting the Commission of several concerns, many of which have also been raised by a number of stakeholders including the Belgian National Regulatory Authority CREG, market operators, trade associations², energy markets experts and civil society organisations engaged on energy matters.³ As detailed below, each of these elements raise doubts as to the compatibility of the Planned CM with section 3.9 of the Guidelines on State Aid for Environmental Protection and Energy ("EEAG") and Chapter IV of the recast Electricity Market Regulation 2019/943 ("EMR").
3. We therefore urge the Commission to first, wait that all information on the design of the scheme are decided upon by the Belgian authorities before assessing the file and, second, **conduct an in-depth assessment of the State aid measure through a formal investigation procedure.**
4. Our specific concerns relate to the following topics:
 - a. **Important design elements of the Planned CM still need to be decided upon** by the Belgian authorities before the file can be found complete. The resource adequacy assessment is also not in line with Article 24 EMR. The file should not be assessed until these issues are solved;
 - b. So long as there is a **political uncertainty** about the portion of nuclear power in Belgium's energy mix beyond 2025, the market environment would not be favourable to the entry of new capacity, due to the difficulty for new market entrants to effectively compete with depreciated nuclear plants. Only when market signals are more favourable for new investments, one can assess whether there are still market failures to be resolved through a capacity mechanism, in accordance with paragraphs 34, 217, 223 and 224(d) EEAG. In any case, the Planned CM, if authorised, should be reduced over time if some nuclear capacity is to remain in the energy mix while the CM would apply.

¹ Law of 22 April 2019 "modifiant la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité portant la mise en place d'un mécanisme de rémunération de capacité", MB, 16-05-2019, n° 2019012267 page 47033

² See e.g. EDORA and ODE's joint reply to the consultation on Belgium's market implementation plan, of 17 January 2020 sent to ener-market-reforms@ec.europa.eu

³ See e.g. APERE's position on Belgium's market implementation plan, of 13 January 2020:

http://apere.org/sites/default/files/AvisAPEReEUCRM.pdf?utm_source=sendinblue&utm_campaign=PERe_info_Un_projet_coteux_et_nocif_pour_le_climat&utm_medium=email

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- c. All known imbalances should be primarily resolved by Balance Responsible Parties (BRPs) and therefore BRPs should be exposed to adequate financial incentives to do so.⁴
 - d. **The Planned CM goes against the objective of common interest to phase out environmentally and economically harmful subsidies and will lock Belgium in a costly, long scheme that will favour gas to the detriment of achieving decarbonisation goals;**
 - e. Even in a scenario where all nuclear power would be phased-out in Belgium by 2025 - which is currently acted in Belgian law - **there is no demonstrated need for a market-wide capacity mechanism** given Belgium's planned or contemplated market reforms, high level of interconnection with reliable neighbouring countries and domestic resources. In any case, the volume offered under the Planned CM should be decreased should the scheme be authorised and should be nuclear power prolonged;
 - f. At the very least, if an adequacy issue is identified in the Belgian electricity market, a strategic reserve would still be the less distortive option and one should be set up, or the current one prolonged⁵, by priority over the Planned CM in accordance with Article 21(3) of the recast Electricity Market Regulation;
 - g. The overly long contracts for new generation capacity and the weakness of preference mechanisms for low-carbon resources are not appropriate. Moreover, the Planned CM risks furthering concentration of the already oligopolistic electricity market in Belgium.
5. We hereby endeavour the Commission to review carefully all documentation relating to this Planned CM (in particular studies from the National Regulatory Authority CREG), to make an independent and enlightened assessment of the scheme and, should doubts persist, to **open a formal investigation** as required by the Procedural Regulation.⁶

⁴ Belgium's Implementation Plan, p. 16, available at: <https://ec.europa.eu/energy/sites/ener/files/belgian-electricity-market-implementation-plan.pdf> (last accessed 26/02/2020)

⁵ We highlight that Belgium's strategic reserve has never been activated. Operators responded to signals in winters where scarcity was feared in a very proactive manner. This flexibility resulted in Belgium not facing any resource adequacy issue at times where the strategic reserve was meant to play a role.

⁶ Four capacity mechanisms (Great Britain, Poland, Ireland, amendments to the Italian scheme) are being challenged before the General Court and Court of Justice on the ground that the Commission has not opened formal investigations whereas there were, according to the claimants, doubts as to the compatibility of the mechanisms with the internal market.

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1 The design of the Planned CM is incomplete

6. Firstly, the necessity of the scheme should not be assessed until Belgium submits a national resource adequacy assessment ("NRAA") that complies with Article 24 EMR. We refer to our section 2.1.3 below for more details.
7. Secondly, despite the notification of the scheme in December 2019, it appears that crucial design features are still not decided upon by the Belgian authorities: in particular, the financing of the scheme⁷, CAPEX levels used for determining the lengths of capacity agreements⁸ and the minimum capacity threshold determining eligibility to the pre-qualification procedure.⁹ These elements are fundamental to assess the appropriateness of the scheme and we understand that the Commission already questioned the Belgian authorities in this respect.
8. The Commission should therefore not be in a position to assess the compatibility of the scheme as long as these information are missing.

2 Doubts as to the compatibility of the Planned CM with State aid rules

2.1 Objective of common interest

9. Whereas ensuring security of supply is a recognised objective of common interest under section 3.9.1 EEAG, Member States need to establish both that they have “primarily considered alternative ways of achieving [resource] adequacy which do not have negative impact on the objective of phasing out environmentally or economically harmful subsidies” and that there is a genuine resource adequacy issue.
10. The Belgian authorities do not appear to have demonstrated either of these criteria and it is therefore not established that the Planned CM genuinely pursues an objective of common interest.

⁷ Art. 12 of Law of 22 April 2019

⁸ Art. 6 of Law of 22 April 2019; CREG made proposals but there is no royal decree to date. See CREG's proposal (C)1907 of 12 December 2019 and responses to the public consultation at <https://www.creg.be/fr/publications/proposition-c1907> (last accessed on 12/02/2020). See also the complementary mission to PWC: <https://economie.fgov.be/sites/default/files/Files/Energy/Seuls-investissements-CREG-Feedback-PwC-20200207.pdf>

⁹ Art. 6 of Law of 22 April 2019. In this respect, **Belgium should consider a low participation threshold** to ensure that the scheme is effectively open to all resources, in particular the cleanest and most flexible ones. Indeed, it has been acknowledged by the UK, for example, that a 2 MW participation threshold could constitute a technical barrier for some capacity providers such as DSR, and therefore, the UK committed to lower this threshold to 1 MW. This was welcome by the Commission on the ground that “the market reality is progressing and there may be in future some DSR operators with a capacity below 2 MW which would prefer entering the CM auctions without aggregation”. These capacity providers must indeed be duly considered, even if they are small. The Commission also welcomed the UK's commitment to re-assess whether an even lower threshold could be relevant in future. See Commission's decision on SA.35980 on GB capacity mechanism of 24 October 2019, para. 289.

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2.1.1 NEGATIVE IMPACT ON THE OBJECTIVE OF PHASING-OUT ENVIRONMENTALLY HARMFUL SUBSIDIES

11. It was made clear in the debates preceding the adoption of Law of 22 April 2019¹⁰, in Elia's resource adequacy assessment and in multiple public communications that the Planned CM primarily aims at remedying the alleged security of supply issue by **increasing gas capacity** in the country. Renewable energy sources, demand side management and interconnection are eligible but they are not facilitated or increased in priority, contrary to what paragraph 220 EEAG prescribes.
12. As you are well aware, gas is a fossil fuel that is environmentally harmful due to, notably, its level of greenhouse gases emissions. It goes counter the EU and Belgium's climate objectives to promote the construction of new gas capacity where more sustainable alternative exist.¹¹
13. Some authors argue that "*the Guidelines do not provide enough room for limiting the participation of power plants with high carbon emission in capacity mechanisms. This, in turn, might limit the EU's ability to meet its wider climate objectives.*"¹² It is correct that the Commission cannot prohibit the inclusion of emissive resources into capacity mechanisms beyond what Article 22(4) EMR prescribes. We also argue that so far, the Commission has not deeply assessed compliance of capacity mechanisms with paragraph 220 EEAG.
14. However, paragraph 220 EEAG contains useful and enforceable wording to (i) make a much more detailed assessment of the mix of capacity providers that would be eligible to the Planned CM and (ii) direct capacity payments in priority towards the least emissive resources. Firstly, paragraph 220 confirms that there is a **common objective of phasing out environmentally harmful subsidies**. Secondly, the Commission shall control that Belgium has "primarily" considered alternative, cleaner ways to meet the objective of security of supply.
15. Furthermore, the Commission has quite some room to interpret its own Guidelines - subject to respecting them - as recently confirmed in the Sustainable Europe Investment Plan communication.¹³ In this respect, we recall that paragraph 220 EEAG must be interpreted consistently with the **TFEU's overarching principles that EU policies (including**

¹⁰ See the Report of Mr ; de Lamotte on the law proposal of 29 March 2019 (doc no. 54/3584/004 p.4): « Le mécanisme de subventionnement à l'examen poursuit un objectif double: d'une part, fournir aux investisseurs potentiels des garanties quant à la rentabilité des investissements dans les centrales au gaz afin de préparer la sortie de l'énergie nucléaire (...) Compte tenu des incertitudes qui entourent le calendrier définitif de la sortie du nucléaire, ce mécanisme de rémunération de capacité est plus que nécessaire pour convaincre les producteurs d'énergies alternatives aux centrales nucléaires, qui seront progressivement fermées, de construire de nouvelles centrales au gaz. La construction et l'exploitation de ces centrales doivent pouvoir être compétitives par rapport aux producteurs d'énergie nucléaire.», available at <https://www.lachambre.be/FLWB/PDF/54/3584/54K3584004.pdf> (last accessed on 06/02/2020)

¹¹ The National Bank of Belgium confirms that adding gas capacity would make it more difficult to reach Belgium's decarbonisation targets. See Report 2019, p. 203, available (in FR) at: https://www.nbb.be/doc/ts/publications/nbbreport/2019/fr/t1/rapport2019_complete.pdf

¹² EU Energy Law vol. XII Electricity Market Design in the European Union, ed. Claeys & Castels 2020, chapter 4 (auth. Andras Hujber & Mathilde Carboneille), para. 4.19

¹³ Commission's communication on the Sustainable Europe Investment Plan, 14 January 2020, COM(2020) 21, p. 13

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competition policy) must strive at protecting the environment and human health.¹⁴ The EEAG must also be interpreted consistently with other relevant EU policies. In this respect, the EEAG, the European Green Deal and the Sustainable Europe Investment Plan¹⁵ communications provide that subsidies to fossil fuels should be phased-out¹⁶ – **correlatively, granting new subsidies should be avoided.**

16. We trust that the Commission has at its disposal **sufficient legal grounds**, and the **correlative obligation**, to interpret paragraph 220 EEAG in the most effective manner to achieve the objective of avoiding environmentally harmful subsidies while permitting Belgium to meet its objective of security of supply (if there is an identified resource adequacy concern, which is not strongly established).
17. We thus recommend that the Commission make a very detailed assessment of compliance of the Planned CM with paragraph 220 EEAG. It should question whether the Planned CM does not go against the common objective of phasing out environmentally harmful subsidies whereas it supports new gas capacity to a great extent, in light of scientific evidence of the level of emissions of this fossil fuel and in light of the capability of cleaner, more sustainable resources, which are being developed in Belgium, to achieve security of supply.

2.1.2 NEGATIVE IMPACT ON THE OBJECTIVE OF PHASING-OUT ECONOMICALLY HARMFUL SUBSIDIES

18. Promoting and locking gas in Belgium's energy mix will also **harm the economy**. Financing for 15 to 23 delivery years¹⁷ a technology that is already low in the merit order due to its high operational costs - whereas renewables and flexibility solutions are much cheaper - would lock the country in disbursing excessive monies without an established need for it (see below on the alleged resource adequacy concern). The mere fact that there is **no sustainable economic case for subsidising (new) gas capacity** should lead the Commission to conclude that the Planned CM does not comply with paragraph 220 EEAG.
19. These prospects are even less acceptable from an economic angle than the method of financing of the scheme is still not determined.¹⁸ It also makes it impossible to evaluate the costs of the scheme over its proposed duration (estimates vary between 360 and 940 million euros per year for 10 to 15 years). Disbursing the capacity payments out of State budget or levying a surcharge on providers or on consumer bills (with or without exempting

¹⁴ Art. 7, 9 and 11 TFEU

¹⁵ Sustainable Europe Investment Plan, section 4.3

¹⁶ The caveat "or at least the most polluting one" watering down this statement makes little sense and does not provide any threshold for what is more or less polluting.

¹⁷ As detailed below, the length of capacity agreements that could be granted to gas capacity would potentially be of 15 years given the level of CAPEX expected to be incurred by new gas entrants. Payments relating to capacity delivered as from 2025 would run until 2040; and those allocated for delivery as from 2028, until 2043.

¹⁸ See Art. 12 of Law of 22 April 2019

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certain consumers¹⁹) may have different economic impacts. Belgian consumers' electricity bills are already high²⁰ and at 73% composed of taxes and levies.²¹ Belgian consumers have already been paying for a strategic reserve through their electricity bill between 2015 and 2019, though the strategic reserve has never been activated in this period. **It is thus a priority that the Belgian authorities decide on this crucial parameter** before the Commission can assess the scheme. It is also crucial that the Commission assesses whether the financing plans are limited to the minimum necessary to finance the scheme - which itself must be limited to the minimum necessary to achieve the alleged objective of security of supply.

2.1.3 ABSENCE OF A GENUINE RESOURCE ADEQUACY CONCERN

20. Paragraph 221 EEAG requires that the alleged security of supply concern “be clearly defined” in a consistent manner with ENTSO-E’s analysis in accordance with the internal market legislation. The Commission requested in the past that Member States present an adequate and detailed resource adequacy assessment (“RAA”). Now, Articles 23 and 24 EMR require that national RAAs be based on the methodology and European RAA conducted by ENTSO-E, which are still in progress.
21. Hence, Belgium's notification of the Planned CM on the basis of a resource adequacy assessment published by Elia in June 2019 (before ENTSO-E even consulted on its draft methodology²²) is premature. We also highlight that the Law of 22 April 2019 plans the adoption of the CM on the basis of Elia’s RAA of November 2017 - which is not the RAA that is now replied upon and it was certainly not taking the EMR into account.
22. The fact that the RAA notified by the Belgian authorities *tends to be* in line with the requirements of the EMR is not sufficient. **At present, it cannot be concluded that the Planned CM meets the objective of security of supply, at fault of demonstrating a security of supply concern as per the methodology established in the EMR.** Belgium should wait at least for the final ENTSO-E methodology to re-assess its security of supply concerns and rely on ENTSO-E's findings or re-submit a NRAA that follows ENTSO-E's methodology. **This is a matter of compliance with Article 24 EMR and with paragraph 221 EEAG** that now needs to be interpreted consistently with the EMR.

¹⁹ So far, the Member States that have a capacity mechanism in place financed by a levy on consumers' bills have not discriminated between consumers. Only Poland plans to reduce the surcharge that some energy intensive industries are paying but this scheme is still under a formal investigation (see Commission's opening decision on SA.51502 and ClientEarth's observations of July 2019 (amended August 2019): <https://www.documents.clientearth.org/library/download-info/observations-on-reductions-from-a-capacity-mechanism-levy-for-energy-intensive-users-in-poland/> (last visited 05/02/2020)).

²⁰ The share of energy bills in households' budget is already high, mainly due to distribution and charges and levies. See e.g. Amendment 3 and explanatory note of Ms. Temmerman and others of 12 March 2019 (doc no. 54/3584/002, p.4-5), available at: <https://www.lachambre.be/FLWB/PDF/54/3584/54K3584002.pdf> (last accessed on 06/02/2020). See also CREG's Study (F)2012 of 14 November 2019 " Etude sur le poids de la facture d'électricité et de gaz naturel dans le budget des ménages belges en 2018", available at: <https://www.creg.be/sites/default/files/assets/Publications/Studies/F2012FR.pdf> (last accessed on 12/02/2020).

²¹ CREG, Electricity prices sheet January 2020: <https://www.creg.be/sites/default/files/assets/Prices/boordtabel.pdf>

²² The consultation opened on 5 December 2019. <https://consultations.entsoe.eu/entso-e-general/proposal-for-european-resource-adequacy-assessment/> (last accessed on 20/02/2020)

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23. Besides, the analyses of the existence and/or volume of a resource adequacy concern, as well as the question of which parameters should be used also greatly vary amongst stakeholders including Elia, the Government and CREG to name just the major ones. Waiting for the uniform ENTSO-E methodology could contribute to align positions or at least help comparing them on an equal basis. In any case, the Commission must assess the necessity of the Planned CM in light of the European RAA, the most adequate (updated) NRAA (if there is to be one²³) and its own analysis, ideally supported by independent analysis.
24. In fact, Elia's RAA of June 2019 anticipates a resource adequacy issue of up to 3.9GW by 2025 due, in part, to the nuclear phase-out in the country and, in part, by concerns about the availability of imported electricity from neighbouring countries which are engaged in phasing out coal (Germany, France and the Netherlands).²⁴ This is a "high impact, **low probability**" scenario; the Base case anticipates a need for 2.4GW. These findings were endorsed by the Directorate General for Energy of the Federal Public Service for Economy in October 2019.²⁵
25. However, as you are well aware, the National Regulatory Authority CREG issued its own study in July 2019 that seriously undermines and even contradicts Elia's RAA.²⁶ CREG found that despite a nuclear phase-out scenario (which is highly probable despite discussions at national level about a lifetime extension of 2GW of nuclear power), there **will not be a resource adequacy issue in Belgium such as to justify a market-wide capacity mechanism**.
26. Even in Elia's studies it is clear that the adequacy concern is decreasing after 2025 (see table on page 138 of Elia's adequacy analysis from June 2019). For the volume of energy not served ("EENS"), this decrease is very sharp (23 GWh of EENS in 2025 and only 6.5 GWh in 2030, of which only 3.5 GWh of EENS can be avoided by the market-wide CRM). This decrease of the adequacy concern after 2025 is not mentioned clearly by Elia nor the government.
27. In our opinion, Elia's RAA of June 2019 does not sufficiently evidence a security of supply concern in Belgium beyond 2025 and can therefore not be used as a basis for authorising the Planned CM:
- a. A Base case scenario should be used instead of a High Impact, Low Probability scenario that necessarily overestimates (and risks to over-procure) capacity to face security of supply issues that may either never occur or could be coped with by measures that are less distortive of the energy only market. Assumptions must be realistic with a high degree of probability. Low probability events, if they occur, can

²³ As per Article 20(1) EMR, Member States can rely on the European RAA and are not obliged to adopt national RAAs.

²⁴ The uncertainty in neighbouring countries is evaluated in the NRAA to account for 1.5GW beyond 2025.

²⁵ <https://economie.fgov.be/sites/default/files/Files/Energy/Mecanisme-remuneration-capacite-Note-E2-02-10-2019.pdf>

²⁶ We underline that publishing CREG's study on the FPS Economy's webpage dedicated to the Planned CM would increase transparency: <https://economie.fgov.be/fr/themes/energie/securite-dapprovisionnement/mecanisme-de-remuneration-de>

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generally be dealt with on a case by case basis through market flexibility, regulation or policy, as relevant;

- b. One may realistically expect less extreme winters than those that are referred to by Elia (1985 and 1987). We highlight that the strategic reserve that was made to cope with extreme winter events was in fact never activated.
- c. The LOLE > 3 hours seems overestimated. Based on CREG's calculations, a scenario in which the strategic reserve is maintained would have a significant impact on the number of hours with LoLE: - "For 2025: with strategic reserves, the average LoLE decreases from 9,4 hour to 5,6 hour - For 2028: with strategic reserves, the average LoLE decreases from 6,0 hour to 3,6 hour (with 1,8 GW it decreases to 3 hours)". According to CREG "These results show a significant decrease of LoLE hours due to strategic reserves and even almost no adequacy issue in 2028".²⁷

28. CREG's studies reach critical and at times, opposite conclusions to Elia's. While the merits of these conclusions should be assessed critically and independently by the Commission, they seriously question the merits of the RAA that was notified by the Belgian authorities as a basis for the Planned CM. Again, it cannot be acceptable that the TSO, the Belgian authorities and the NRA so strongly disagree on the parameters to be used to assess the need for the Planned CM, and reach diverging conclusions. There is no need to recall that GREG, as NRA, has the broadest views on the prospects and implementation of market reforms. This should be settled by further adequacy assessments conducted in compliance with Chapter IV of the EMR and critically analysed by the Commission.

2.1.4 ALTERNATIVE WAYS TO ACHIEVE RESOURCE ADEQUACY

29. The Commission is well aware of the prioritisation of market reforms and strategic reserves above market-wide capacity mechanisms as per Article 21 EMR. In this respect, Elia's RAA lacks analysis of market reforms that have been proposed by the National Regulatory Authority CREG including scarcity pricing (or shortage pricing function, as referred to in Articles 20(3)(c) and Article 44(3) of Regulation (EU) 2017/2195).²⁸

²⁷ CREG's Reaction to the consultation organised by DG Energy (European Commission) on Belgium's market reform plan, 16 January 2020, ref. (Z)2050, para. 26, available at: <https://www.creg.be/sites/default/files/assets/Publications/Notes/Z2050EN.pdf> (last accessed 26/02/2020)

²⁸ See Note CREG(Z)1527 of 12/05/2016 on Scarcity Pricing applied to Belgium:

<https://www.creg.be/sites/default/files/assets/Publications/Notes/Z1527EN.pdf>.

Note CREG(Z)1707 of 30/11/2017 on an extended analysis of the capacity remuneration in scarcity conditions,

<https://www.creg.be/sites/default/files/assets/Publications/Notes/Z1707EN.pdf> and

<https://www.creg.be/sites/default/files/assets/Publications/Notes/Z1707annex.pdf>;

Note CREG(Z)1986 of 12/09/2019 on implementation of a scarcity pricing mechanism in Belgium ,

<https://www.creg.be/sites/default/files/assets/Publications/Notes/Z1986EN.pdf> and

<https://www.creg.be/sites/default/files/assets/Publications/Notes/Z1986Annex.pdf>

Note CREG(Z)2050 of 16/01/2020 : Reaction to the consultation organised by DG Energy (European Commission) on Belgium's market reform plan

<https://www.creg.be/sites/default/files/assets/Publications/Notes/Z2050EN.pdf>

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2.2 Necessity for State intervention

2.2.1 THE NEED FOR A CM IS NOT ADEQUATELY ANALYSED AND QUANTIFIED

30. Paragraph 222 EEAG requires that “the nature and causes of the generation adequacy problem, and therefore the need for State aid to ensure generation adequacy, should be properly analysed and quantified (...)”. We refer to our points above and CREG's studies demonstrating that doubts exists as to the merits of the conclusions reached by Elia and the parameters used for their demonstration.
31. It is deplorable that the note of the DG Energy of the FPS Economy considered that conducting alternative and critical analysis would be a burden and should be disregarded: *"Compte tenu de l'urgence du problème d'adéquation de la Belgique et, afin d'éviter par diverses analyses supplémentaires la paralysie dans l'implémentation du mécanisme de rémunération retenu, l'Etat belge entend utiliser les évaluations d'adéquation les plus récentes comme base de justification du besoin d'intervention. Les résultats de l'étude de juin 2019 du GRT sont donc considérés. Cette façon pragmatique de procéder a été validée par un échange formel entre le SPF Economie et la DG ENER de la Commission européenne (DG Ristori)."*²⁹ Allegations that this "pragmatic" approach was validated by the Commission's DG ENER are surprising and if correct, outrageous:
- a. They are Belgium's and the Commission's responsibilities to, respectively, provide evidence and control that there is first, a genuine resource adequacy concern that, second, can only be solved through a market-wide capacity mechanism - taking into account all steps of the reasoning including removing of regulatory barriers, increasing market signals, identifying residual market failures and checking whether a less distortive mechanism (e.g. a strategic reserve) would not suffice to solve the problem;
 - b. All analysis and data that are available shall be studied and all additional studies that can be conducted, must be, at the Commission's initiative when necessary. The discrepancies between the TSO and the NRA's analysis, and the arbitrage of the Government biased by a so-called urgency and apparent laziness to conduct a further independent study³⁰ do call, we argue, for **an independent assessment conducted by the Commission or an expert instructed by it**;
 - c. It cannot be deemed "pragmatic" to simply rely on the NRAA of Elia when CREG draws opposite conclusions about the need to lock in Belgium in a costly, lengthy scheme which is, what is more, not in line with the EU's decarbonisation objectives.

²⁹ Note de la DG Energie du SPF Economie : analyse des commentaires de la CREG formulés dans l'étude (F)1957 et positionnement quant à l'existence d'un besoin pour assurer la sécurité d'approvisionnement en électricité, 2 October 2019, para. 63, available at: <https://economie.fgov.be/sites/default/files/Files/Energy/Mecanisme-remuneration-capacite-Note-E2-02-10-2019.pdf> (last accessed on 20/02/2020)

³⁰ Several studies from Elia or consultancy PWC have been conducted since 2016. See <https://economie.fgov.be/fr/themes/energie/securite-dapprovisionnement/mecanisme-de-remuneration-de> (last accessed 20/02/2020)

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On the contrary, **pragmatism calls for a rational, uncontroversial assessment of the scheme and a comprehensive analysis of the status of the energy only market;**

- d. There is no urgency in assessing the compatibility of the scheme. Belgium aims at organising the first Y-4 auctions in 2021, which leaves ample time to prepare them even while the Commission is investigating the scheme.³¹ Emergency Y-1, Y-2 or Y-3 auctions could even be organised if there was such a need, as per Articles 8 or 10 of Law of 22 April 2019.³² In any case, **the Commission would be severely faulting if in light of a so-called urgency, it authorised a scheme which necessity, adequacy, incentive effect and proportionality are not established** in light of the evidence available at present.

32. We also recommends that DG COMP analyses CREG's studies in detail. The scheme must also be assessed in light of Belgium's market reform plan³³ and the opinion of the Commission on it (in progress).

33. On the merits, the Belgian power market has already demonstrated a clear resilience to adequacy concerns. The case of winter 2018-2019 is particularly telling, since during that winter, market parties added several hundreds of MW of capacity (up to 1.2 GW in total) in a few month time, in the face of an adequacy crisis (with baseload forward prices for November 2018 reaching 200 €/MWh, indicating severe adequacy concerns). The ex-post conclusion of the CREG was that there was always at least a margin of 3.7 GW, indicating no adequacy concern during this winter (see study 1950 and para. 94 of study 1957: "(...) *However, last winter 2018-2019, Belgium faced the risk of inadequacy due to the sudden and unexpected unavailability of nuclear capacity. Several market parties said that they developed additional market response, such as demand response for several hundred MW, to address the shortfall in nuclear capacity, part of which was possible by actions undertaken by the Authorities. This capacity is not taken into account by Elia. The CREG-study 1950 on this period shows that there was always an additional capacity of at least 3.7 GW available for Belgium, even during the months when there was only one or two nuclear reactors available in Belgium*").

³¹ So long as preparatory acts remain subject to the Commission's authorisation of the scheme, Article 108(2) TFEU would be complied with.

³² Subject to the Commission's authorisation of the scheme.

³³ Belgian Electricity Market: Implementation Plan: <https://ec.europa.eu/energy/sites/ener/files/belgian-electricity-market-implementation-plan.pdf> (last accessed 05/02/2020). This market reform plan was subject to a public consultation that closed on 17 January 2020. Consultation page: <https://ec.europa.eu/energy/en/consultations/consultation-belgiums-market-reform-plan> (last accessed 05/02/2020).

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2.2.2 RESIDUAL MARKET FAILURES ARE NOT SUFFICIENTLY EVIDENCED

34. Paragraph 223 EEAG states that "the Member States should clearly demonstrate the reasons why the market cannot be expected to deliver adequate capacity in the absence of intervention, by taking account of on-going market and technology developments." To this end, the Member States must now submit market reform plans, subject to Commission's approval.
35. The Market Implementation Plan submitted by Belgium could be more ambitious and was definitely established in the perspective of supporting the adoption of the Planned CM. Without commenting on the substance of the Implementation Plan³⁴, we would like to highlight the following:
- a. Many of the data on Belgium's energy mix date back from 2017 and are outdated. It is not realistic that the TSO would not hold more recent data, at least until mid-2019. Data on onshore and offshore wind for 2019 are available, for example.³⁵
 - b. Market reforms will have to take place in any case in order to implement the new EU 2030 environment and climate targets and the Clean Energy for all Europeans Package. **The appropriate remedy for the potential lack of implementation of those necessary market reforms would be an infringement proceeding, not the authorisation of a State aid scheme in substitution.**
 - c. The Regions have not officially endorsed nor co-authored the Market Implementation Plan whereas they are jointly competent, under Belgian law, for energy market matters³⁶ - while security of supply falls within federal competence. As the Regions appear to have had limited input into the drafting of the Plan³⁷ - and have been silent on the Planned CM - the Commission should be very careful as to its accuracy and projections made and investigate the Regions' actual energy markets policies (in particular for development of demand response and energy efficiency).
 - d. Given that the Market Implementation Plan is crucial for assessing the compatibility of the Planned CM with paragraph 223 EEAG, the Commission should wait that any issues relating to this Plan (raised in the public consultation or separately) are solved before it takes a decision on the compatibility of the Planned CM with State aid rules. Indeed, if all or part of the alleged resource adequacy concern can be

³⁴ Available at: <https://ec.europa.eu/energy/sites/ener/files/belgian-electricity-market-implementation-plan.pdf> (last accessed 26/02/2020). DG ENER received feedback pursuant to the public consultation that closed on 17 January 2020 and we trust DG COMP is analysing the responses as well in the course of the CM's compatibility assessment.

³⁵ See Annex to these observations.

³⁶ The Federal Government is in charge of, among others, nuclear electricity production, offshore wind production, securing electricity supply (including the strategic reserve), some energy storage facilities, and the transmission networks. The key responsibilities of the Regions cover other RES production, energy efficiency and distribution networks. Electricity Market design falls within the ambit of both federal and regional jurisdictions.

³⁷ See e.g. comments from EDORA and ODE's in their joint reply to the consultation on Belgium's market implementation plan, of 17 January 2020 sent to ener-market-reforms@ec.europa.eu

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solved via market reforms, the CM would not be needed, its design should be reviewed and/or it should be downsized.

2.3 Appropriateness of the scheme

2.3.1 ELIGIBILITY OF CAPACITY PROVIDERS

36. We welcome that storage, demand side response³⁸ and foreign capacity³⁹ are eligible to the scheme. As mentioned earlier though, increasing the proportion of gas into Belgium's energy mix counteracts the objective of phasing out environmentally harmful subsidies.

37. It is also important that all types of capacity, including demand side response, can participate both to the Y-4 and Y-1 auctions.⁴⁰ This should contribute to limit barriers to those new capacity providers which cannot always foresee the capacity they could provide 4 years ahead from their first pre-qualification.

38. Nevertheless, uncertainties remain about:

- a. The eligibility of new gas capacity in light of the objective of common interest to phase out subsidies to fossil fuels embodied in paragraph 220 EEAG as well as in the Green Deal and Sustainable Europe Investment Plan communications (see above on doubts relating to meeting an objective of common interest);
- b. The minimum pre-qualification threshold. Elia proposed an aggregated threshold of 1MW. A low threshold ensures that all relevant capacity providers including demand response do not face technical barriers to participate. As an example, the threshold is now set at 1MW in Great Britain after the original 2MW threshold was identified as a potential barrier.⁴¹

39. We also welcome that the Belgian authorities consulted neighbouring Member States in view to comply with Article 21(2) EMR⁴² - even though such consultation should ideally have taken place before the Belgian Parliament approved the Planned CM in principle as per Law of 22 April 2019. Whilst some respondent countries such as the Netherlands and Germany have argued that participation of their providers to the Belgian scheme could create security of supply issues in their own country, there is no evidence that this would

³⁸ Art. 22(1)(h) EMR

³⁹ Art. 26 EMR

⁴⁰ See The Chamber's law proposal of 21 February 2019 (doc no.54/3584, p.26) in this respect.

⁴¹ See Commission's decision of 24 October 2019 on SA.35980 on the GB Capacity Mechanism, para. 194 and 289; Judgement of 15 November 2018, T-793/14, *Tempus Energy Ltd. and Tempus Energy Technology Ltd v. Commission*, ECLI:EU:T:2018:790, paras. 256-258

⁴² Report on the consultation of the neighbouring member States, 11 December 2019, available at:

<https://economie.fgov.be/sites/default/files/Files/Energy/Belgian-capacity-remuneration-mechanism-Report-consultation-neighbouring-Member-States-December-2019.pdf> (last accessed 26/02/2020)

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be the case in practice.⁴³ Besides, this is not a ground for opposing the inclusion of foreign capacity into a capacity mechanism under Article 26 EMR.

2.3.2 LENGTH OF CAPACITY AGREEMENTS

40. The Law of 22 April 2019 foresees that capacity agreements have a duration of maximum 1, 3, 8 or 15 delivery periods of a year.⁴⁴ The agreements a capacity provider is eligible to depend on the level of CAPEX incurred for new or refurbished capacity. CREG recommends to reserve the lengthier contracts to the highest investments (> EUR 600/kW) in order to limit the distortive effect of the Planned CM.⁴⁵ Consultancy bureau PWC recommends to lower this threshold in order to enable OCGT gas plants, more CCGT and solar installations above 2 MW to access 15-year contracts as well.⁴⁶ There is still no regulation confirming the ratio between the level of CAPEX incurred and the length of capacity agreements, for the implementation of new Article 7undecies §7 of Law of 29 April 1999.⁴⁷
41. The possibility of aligning the duration of capacity agreements with a level of CAPEX has been authorised by the Commission in other cases (Great Britain, Poland, Italy). However, it is important that the durations of capacity agreements are adequate and proportionate to meet the objective of achieving security of supply at least cost i.e. not remunerating capacity providers beyond the periods for which there is a genuine risk for security of supply (if there is any, which we challenge).⁴⁸
42. In particular, the obligation for Member States to phase out their capacity mechanisms or reducing the amount of the committed capacities on the basis of the implementation plans referred to in Article 20 EMR⁴⁹ calls for the award of shorter capacity agreements e.g. for a maximum of 3 or 8 delivery periods. By committing a Member State in long-term payments, long-term contracts can hinder market reforms.⁵⁰
43. We also highlight that capacities that do not have a prospect of viability on the Belgian electricity market absent a guarantee of receiving capacity payments for 15 years would not be a sustainable investment, economically speaking, for the country (and for taxpayers

⁴³ A Dutch operator (to take this example, but the same reasoning applies to other Member States) could well provide its usual amount of electricity to the Dutch market while reserving capacity under a Belgian capacity contract if it is able to do both - and therefore contribute to security of supply in both countries. Moreover, the Planned CM takes into account indirect foreign capacity provided through the interconnections, thus reducing the need for calling for volumes of direct capacity to which foreign operators could participate in (equally to domestic providers). Lastly, there is no prohibition for Belgian operators to provide capacity to a neighbouring market, potentially compensating the participation of a Dutch operator to the Belgian scheme.

⁴⁴ The Chamber's law proposal of 21 February 2019 (doc no.54/3584, p.23) clarifies that the agreements will actually have a longer duration given that they would be concluded ahead of the first delivery period, generally 4 years ahead. Available at: <https://www.lachambre.be/FLWB/PDF/54/3584/54K3584001.pdf> (last accessed 06/02/2020)

⁴⁵ <https://www.creg.be/fr/publications/note-z2024>

⁴⁶ <https://economie.fgov.be/sites/default/files/Files/Energy/Seuils-investissements-CREG-Feedback-PwC-20200207.pdf>

⁴⁷ See Art. 6 Law of 22 April 2019

⁴⁸ See Art. 22(1)(c) EMR: " Any capacity mechanism shall: (...) not go beyond what is necessary to address the adequacy concerns referred to in Article 20".

⁴⁹ Art. 21(8) EMR

⁵⁰ See e.g. the Commission's capacity Market Working Group of 14 April 2015 analysis that "[Longer contracts] increase the costs of any future market design transition, since long contracts would in principle need to be honoured if in future a new market design was adopted." Available at: https://ec.europa.eu/competition/sectors/energy/capacity_mechanisms_working_group_april2015.pdf (last accessed 21/02/2020) and quoted in CREG's Proposal (C)1907

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money) nor a sustainable means to achieve adequacy of the system for the longer term. On the contrary, it is foreseeable that these operators cease providing an adequate level of capacity as soon as the Planned CM would be phased-out (as it needs to be eventually, under Article 21(8) EMR) and the Planned CM would thus not have helped Belgium to build the adequate capacity required by the system in the longer run. In other words, if the one or 3-year capacity agreements are not sufficient to achieve the security of supply targets, both market reforms and the design of the Planned CM must be revised - not the contracts lengths extended.

2.4 Incentive effect

44. As mentioned above, the Belgian authorities expect to increase domestic (including gas) capacity with the Planned CM. If there were market operators who, by their own means, would invest in new capacity such as to cover (part of) the gap identified by Elia, there would be no ground for putting in place an aid scheme to the same end and the Planned CM shall not be authorised.
45. In 2019, a gas operator BTK claimed that it would be ready to build new capacity in Belgium by 2022 regardless of capacity payments.⁵¹ However it seems that BTK had not undertaken concrete steps towards achieving this project for now and we are not aware of new gas projects scheduled. Nevertheless as mentioned above, the perpetuated confusion about a potential partial continuation of nuclear power beyond 2025 disincentivises new entrants due to difficult, if not illusory competition with depreciated nuclear plants, in addition to obstacles to enter a very concentrated market.
46. Thus, although the Planned CM could be found *prima facie* to have an incentive effect for investments in new capacity and maintaining current capacity on the market, **better market signals could achieve the same investments without aid.**⁵² These signals could be given by:
 - a. clarifying the proportion of nuclear power to remain in the system beyond 2025 (or confirming that the current law phasing out nuclear power by 2025 would not be revised), in order to provide legal certainty to operators and the adequate market signals to assess whether market failures still remain unaddressed;

⁵¹ "Segers says his business has prepared a **business plan without taking into account the CRM mechanism**, the support mechanism that the federal government has developed to attract investors to build new electricity capacity. "But that is of course welcome." Moreover, "The company is therefore **planning sufficient capacity to absorb the closure of the nuclear power plants almost completely**" [and] "want to become a player that provides energy security in this country for twenty years" See https://www.standaard.be/cnt/dmf20190515_04401588?_section=67989657&utm_source=standaard&utm_medium=newsletter&utm_campaign=middagupdate&adh_i=e484b557deec7030512a31b7317bf1ed&imai=&M_BT=2360872151323 (last accessed 05/02/2020) – own translation .

⁵² See EU Energy Law vol. XII Electricity Market Design in the European Union, ed. Claey's & Castels 2020, chapter 4 (auth. Andras Hujber & Mathilde Carbonnelle), para. 4.15: "However, tendering procedures are not an effective measure to drive investment in generation adequacy. A particular risk for tenders is that the new capacity pushes existing capacity out of the market and creates a situation where **market players in the future may rely on tenders to invest in new capacity rather than reacting to market signals**".

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- b. addressing market concentration to incentivise operators to remain or enter the market.

2.5 Proportionality

47. Should the Planned CM be authorised on the basis of a scenario without nuclear power in Belgium's energy mix beyond 2025, the volume of capacity offered under the Planned CM should obviously be reduced should this scenario changes i.e. should nuclear power remain in the energy mix beyond 2025.

2.6 Avoidance of undue negative effects on competition

48. Paragraph 233(d) EEAG provides that "the measure should (...) not unduly strengthen market dominance".
49. The Belgian market is highly concentrated with Engie Electrabel (69%) and EDF Luminus (17%) representing most of the market shares. Engie Electrabel indicated that they are interested to deliver at least half of the new gas fired power plants⁵³ and Luminus is planning to build new gas fired power plants.⁵⁴ The Planned CM could reinforce this market power given the possibilities for these strong players to place lower bids in the auctions. This was notably an issue when assessing the negative effects on competition of the French countrywide capacity market in 2016.⁵⁵
50. Belgium should therefore make sure that auctions are designed in such manner as to avoid any market power exercising.
51. Besides, paragraph 233(e) EEAG provides that "The measure should (...) give preference to low-carbon generators in case of equivalent technical and economic parameters". To this end, some CMs (in Poland and Italy) provide for a so-called "green bonus" that prioritises resources with lower greenhouse gas emissions for the allocation of capacity contracts, or grants them longer contracts⁵⁶, in case the auctions clear at equal bids.
52. The Planned CM does not provide for a mechanism ensuring priority of low-carbon *resources*⁵⁷ therefore compliance with paragraph 233(e) EEAG is not ensured. In order to respect both the objectives of paragraphs 220 and 233(e) EEAG, the Planned CM should provide for an **emissions performance threshold in CO₂e** that would go further than

⁵³ <https://trends.knack.be/economie/bedrijven/johnny-thijs-voorzitter-engie-electrabel-voor-electrabel-mogen-de-kerncentrales-dicht/article-longread-1548653.html>

⁵⁴ <https://www.tijd.be/ondernemen/milieu-energie/luminus-wil-nieuwe-gascentrale-bouwen-in-seraing/10199653.html>

⁵⁵ Commission's opening decision of 13 November 2016 and final decision of 8 November 2016 on SA.39621

⁵⁶ ClientEarth is however not supportive of the design of the Polish and Italian capacity mechanisms, in general and on these clauses specifically. In relation to the "green bonus" in the Polish scheme, only generation capacity and storage are eligible to a 2-year contract extension whereas demand response is not; which is arguable not in line with paragraph 233(e) EEAG.

⁵⁷ Since Chapter IV EMR is in force, the notion of resources shall prevail over the one of generation, also in the EEAG. Demand response management and storage should therefore be included in this rule.

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Article 22(5) EMR and exclude gas. Bonuses or preferential conditions to cleaner resources should also be envisaged.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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