

CRE consultation on amendments to the ARENH framework agreement (Force Majeure provisions)



EFET response – 15 September 2020

We thank CRE for the opportunity to provide comments on the proposed amendments to the ARENH framework agreement relating to Force Majeure provisions.

We draw our comments below from the 20-year experience of EFET with contractual standardisation in the field of energy trade.

1. Are you in favour of the proposed changes envisaged, in particular with regard to the provisions applicable in case of invoking the benefit of Force Majeure?

Definition of Force Majeure

In article 10.1, CRE proposes to change the definition of Force Majeure from: “*Force majeure means an irresistible and unpredictable event making the fulfilment of obligations impossible for the Parties under reasonable economic conditions*” to “*Force majeure means an event external to the Party invoking it, irresistible and unpredictable, and which prevents the fulfilment of its obligation.*”

The amendment contains two important modifications:

- a clarification that Force Majeure needs to be assessed from the perspective of the party invoking it – rather than from all the parties, as the existing provision could be interpreted; and
- a removal of the possibility to invoke Force Majeure for economic reasons.

The recent period of the Covid 19 crisis and the confinement, characterised by low demand of electricity, has seen a number of ARENH buyers claim Force Majeure provisions. These claims were based on the drastic change of economic conditions between the ARENH auctions and the delivery of energy, making their initial purchase of ARENH volumes uneconomic in the end. Given that these claims gave rise to legal battles, we consider it wise to clarify the framework agreement.

The EFET Master Agreement for the electricity trading defines Force Majeure as follows¹: *“Force Majeure” means an occurrence beyond the reasonable control of the Party claiming Force Majeure (the “Claiming Party”) which it could not reasonably have avoided or overcome and which makes it impossible for the Claiming Party to perform its delivery or acceptance obligations.”*

We observe that the definition of Force Majeure in the EFET Master Agreement for electricity trading is broadly aligned with the CRE proposal for a new definition of Force Majeure in the ARENH framework agreement, with (1) a focus on the party invoking Force Majeure, and (2) no possibility to claim Force Majeure for a degradation of economic conditions. On these two points, we would support the changes proposed by CRE.

However, we also observe that the wording of the Force Majeure definition in the ARENH framework is now extremely tight. We believe that the words “irresistible and unpredictable” were appropriate when the definition of Force Majeure included also the degradation of economic conditions. With the disappearance of the latter, we would suggest relaxing the wording slightly and aligning it on market practice – and reinstating the word “reasonable” in the definition.

Hence we advise CRE to use the following definition in the ARENH framework agreement:

“Force majeure means an event external to the Party invoking it, that cannot it could not reasonably predict and avoid, and which prevents the fulfilment of its obligation.”

(in French: *“La force majeure désigne un événement extérieur à la Partie qui l’invoque, qu’elle ne pouvait raisonnablement prévoir et éviter, et qui empêche l’exécution de son obligation.”*)

We believe that this formulation clarifies the controversial points raised in the recent period, while keeping a balance between the parties to and ARENH contract.

Application of Force Majeure provisions

Notification of Force Majeure

In article 10.2, CRE proposes to delete the reference to the claiming party’s knowledge of the Force Majeure event, and request notification of the event as from the occurrence of the event. In the EFET Master Agreement, reference is made to the claiming party’s knowledge of the Force Majeure event, like in the original version of the ARENH framework agreement: *“The Claiming Party shall as soon as practical after learning of the Force Majeure notify the other Party of the commencement of the Force Majeure [...]”*. We invite CRE to keep the original text at the beginning of article 10.2 and keep a reference to the claiming party’s knowledge of the event. It could otherwise lead to situations whereby Force Majeure is challenged by one party as claimed too late even though the claiming party may not have been aware of the event triggering it.

¹ EFET General Agreement concerning the Delivery and Acceptance of Electricity, version 2.1(a), available at: [https://efet.org/Files/Documents/Downloads/EFET%20General%20Agreement%20Power%20-%202.1\(a\)%20F%20September%202007%20\(V%20Version%203\).pdf](https://efet.org/Files/Documents/Downloads/EFET%20General%20Agreement%20Power%20-%202.1(a)%20F%20September%202007%20(V%20Version%203).pdf).

The same considerations are valid for the notification of the end of the Force Majeure event: the maximum deadline of two days should be applicable as of the knowledge by the claiming party of the end of the event.

Still in article 10.2, we support the CRE proposal to simplify the notification medium and introduce the possibility to claim Force Majeure via e-mail.

Termination of contract

Article 10.4 foresees the possibility for the non-claiming party to terminate the contract if the suspension of the claiming party's obligations due to Force Majeure lasts more than two months.

The EFET Master Agreement for electricity trade foresees that a contract *"may be terminated at any time [if one] Party is released from its obligations under the Agreement due to Force Majeure for more than thirty (30) consecutive days or for more than sixty (60) days in aggregate within a period of one calendar year"*.

Considering the nature of the ARENH framework agreement and the need to balance the reasonable expectations of the contracting parties, while keeping in mind their possibly different competitive positions on the French electricity market, we support the CRE proposal to (1) insert a provision foreseeing the possibility for the non-claiming party to terminate the ARENH framework contract after a prolonged period of Force Majeure claimed by the other party, and (2) to set this period to two months.

Legal effects of a Force Majeure claim

We generally support the two-day delay between the notification (start and end) of Force Majeure before taking effect, as proposed in article 13.1 (details on point 3). Nonetheless, we advise CRE once again to modify the wording of the article to make reference not to the start of the Force Majeure event, but the knowledge of it by the claiming party (see comments above).

The end of the paragraph relating to point 3 and detailing the effects of a Force Majeure claim should be complemented by standard wording on the inability of the parties to claim damages in case the Force Majeure claim is not contested. As an example, the EFET Master Agreement for electricity trade foresees that: "No obligation to pay damages will accrue to the Claiming Party with respect to those quantities not delivered or received."

2. What other changes do you think are necessary to clarify the implementation of this provision, given the experience from the recent period?

No comment.

3. Do you consider that other provisions in the framework agreement should be changed? If yes, which ones and for what reasons?

No comment