



Belgian Parliament Takes the Lead in Hydrogen Transport with New Hydrogen Act

The Belgian Parliament recently adopted the Hydrogen Act, a landmark piece of legislation that regulates the transport of green hydrogen through pipelines. This newflash critically reflects on this legislation, highlighting its innovations and weaknesses.

I. Context of the Hydrogen Act: A Blueprint for Belgium's Hydrogen Future

On 11 July 2023, the Belgian Parliament adopted the Hydrogen Act^[1], establishing a dedicated **regulatory framework for hydrogen pipeline networks**. This groundbreaking legislation seeks to promote the optimal development of the Belgian hydrogen market and hydrogen **transportation** infrastructure with the aim of turning Belgium into a central import and transit hub for renewable hydrogen to North-Western Europe. With this Act, Belgium is ahead of the revision of the EU gas market legislations under the "Hydrogen and decarbonized gas markets package", scheduled for the end of 2023.

The Hydrogen Act seeks to maintain Belgium's lead in the hydrogen economy by building on its existing strengths in the field, such as its extensive network of pipelines and its expertise on the matter. It also provides a framework for the multiple hydrogen projects scheduled to be rolled out in mid-2026. The Act will have to be supplemented by royal decrees and ministerial orders to allow the regulatory framework to evolve in line with the development of the hydrogen market. It should be noted from the outset that the Act only regulates hydrogen transport but not its supply, production and distribution.

II. Key Provisions

- 1) The Act sets out the conditions and procedure for the designation of a **single hydrogen Network Operator ("HNO")** subject to ownership and unbundling

For the entire Belgian territory, a single HNO will be responsible to operate the hydrogen transport infrastructure, carry out the network development plans, and establish the commercial relations with network users. Consequently, the **HNO will monopolise the operation and management of new hydrogen transport pipelines**.

Other existing networks may obtain the "independent operator" status or maintain the ownership of their networks, while requesting the HNO to manage their networks. Under the independent operator status, existing hydrogen networks can be managed by their owners without a time limit, and owners can request the extension of existing hydrogen networks according to a defined procedure. Alternatively, the ownership and management of existing networks can be transferred to the HNO (subject to approval by the HNO) but the methodology for asset transfer value still needs to be developed. It should be noted that horizontal integration into hydrogen and gas infrastructure is allowed under legal separation.

The designation of the HNO may take place approximately 6-7 months after the entry into force of the Act (ten days following the publication in the Belgian Official Journal), involving the regulator CREG, the General Directorate of Energy, the Council of Ministers and the Minister of Energy herself (Tinne Van der Straeten). The latter will be in charge of the formal designation of the HNO, which shall be **valid for 20 years** and may be prolonged at the HNO's request, five years before its expiration.

2) The Act sets out the **responsibilities** of the HNO and independent operators

The HNO and independent operators (if any) should **facilitate free and non-discriminatory access** to the hydrogen transport network at regulated tariffs in accordance with the Third-Party Administrator's Code of Conduct. Planning-wise, the Act requires a **Network Development Plan ("NDP")** every two years, with a 10-year horizon, monitored by the CREG and approved by the Ministry. The NDP includes a 4-year binding Investment Program. Lastly, the Act seeks to guarantee the **quality** of the hydrogen transported by allowing the HNO to propose quality standards which will have to be approved by the minister before entering into force.

3) The CREG is designated as the regulator

The CREG will have the same competences as it has in relation to gas and electricity and will be responsible for establishing the allowed revenues framework. Moreover, CREG has to approve the tariffs proposed by the HNO.

4) Hydrogen transmission

The Acts regulates the transport of Hydrogen with a maximum permissible operating pressure **above 16 bar** for

- i) imports and exports;
- ii) for connecting distribution networks;
- iii) for connecting large consumers directly;
- iv) for connecting large production units and;
- v) for connecting large storage facilities.

5) Conditions to grant subsidies to HNO

With regard to subsidies, the Act provides that the HNO must:

- Develop a solid business plan compatible with the National Hydrogen Strategy and its connection to the grid should be possible;
- design the project with future demand (growth) in mind;
- develop a project that takes advantage, when technically feasible and economically efficient, of the reuse of existing pipelines;
- demonstrate the need of the grant for carrying out the project;
- demonstrate that the subsidy intends to reduce investment costs, while not exceeding 50% of the total investment costs; and
- demonstrate that it complies with the other obligations set out by the Act.

6) Beyond the scope of the Act

As mentioned, the Act does not regulate the supply, production and distribution of hydrogen. Moreover, hydrogen terminals and storage are not covered by the Act.

III. A Critical Review

1) Issues Surrounding the Division of Competences

Hydrogen is at the crossroads of the division of competences between the federal authority and the regions. The federal authority is responsible for major transport infrastructures[2], while the regions are responsible for public gas distribution.[3] "Distribution" includes hydrogen supply to customers via medium- and low-pressure networks, whereas "transport" covers high-pressure networks (the 16-bar threshold for the distinction introduced by the Act is deemed admissible by the Council of State).[4]

However, **it still needs to be made clear how to divide and organize the division of competences for the transport and distribution through hydrogen pipelines.** According to the Council of State, the Constitutional Court's conclusions on the division of competences regarding closed industrial networks could be applied by analogy for hydrogen pipelines. To determine the division of competences, the Constitutional Court analyzed the intrinsic functionality of the network (rather than relying on the connection to either the distribution network or the transport network).[5] As a result, a network intended to serve end customers is generally considered to be under regional jurisdiction. With these criteria in mind, the Council of State ruled that the terms "geographically limited hydrogen networks"[6] in Article 5 § 5 and 20 of the preliminary draft, submitted to the Council of State for its opinion, encroached on a regional competence since such networks in principle carry out a distribution activity. Although the current version of the Act no longer mentions any geographically limited network, it cannot be excluded that other discussions surrounding the division of competences may arise in the future. This may jeopardize the validity of the Act, especially given that problems may arise beyond the wording of the Act since some network elements may have a mixed function (both transport and distribution).

Moreover, a recent Flemish preliminary draft decree on the introduction of a regulatory framework for hydrogen distribution once again illustrates the uncertainties surrounding the qualification of transport vis à vis distribution. [7] In light of this, it remains to be seen if one of the regions will challenge the federal state's potential encroachment on its powers by filing an appeal for the nullification of the Act before the Constitutional Court.

2) The Delegation of Special Powers to the King

A second issue in the Hydrogen Act relates to Article 5 § 5, last subparagraph. This provision grants the possibility to the executive to abolish the provisions that grant authorization for the extension of existing networks. Although it can be acceptable to delegate special powers to the executive to exercise prerogatives that normally belong to and are exercised directly by the Parliament, this delegation needs to respect certain conditions of validity as set out by the Council of State:[8]

- (i) A delegation of special powers must be justified in the light of specific factual circumstances generally described as exceptional or crisis circumstances;
- (ii) the delegation must be limited in time (generally, the limit is between 6 months and one year);
- (iii) the powers conferred to the executive must be precisely defined, both with regard to the objectives, the matters concerned and the scope of the measures taken; and
- (iv) the hierarchy of norms and the division of powers must be respected.

Yet, Article 5 of the Hydrogen Act faces several shortcomings: First, the Act does not specify the exceptional circumstances or crisis circumstances that would justify delegating special powers to the King. Second, the special powers are not limited in time, meaning that the King could hold these powers indefinitely. Third, the delegation's objectives are not precisely defined, which could lead to abuse of power. For these reasons, **it is likely that this provision would be found unconstitutional if challenged**, as it could be considered to violate Articles 105 and 108 of the Constitution.

3) The Potential Implications of the Flaws of the Act on Hydrogen Contracts

Independent hydrogen market players who engage or intend to engage in contracts in the field of hydrogen transportation must be aware of the mentioned flaws of the Hydrogen Act and the development of regulatory hydrogen frameworks at the regional levels. In light of this, market players should consider **integrating appropriate change of law, hardship and force majeure clauses**. Our Energy and Utilities experts have a thorough knowledge of the regulatory framework at hand and can provide tailored advice on developing hydrogen projects in line with these regulations.

[1] FR: "Loi relative au transport d'hydrogène par canalisations", NL: "Wet betreffende het vervoer van waterstof door middel van leidingen".

[2] Art. 6 § 1, VII, second paragraph c) BWHI.

[3] Art. 6 § 1, VII, first paragraph b) BWHI.

[4] Advice CE n° 71.998/VR/3 of 12 October 2022.

[5] Constitutional Court 9 July 2013, nr. 98/2013.

[6] This is the translation of the French "réseau d'hydrogène géographiquement limité" or the Flemish "een gesloten industrieel net" zie Constitutional Court 9 July 2013, nr. 98/2013, B.10.3-B.12.

[7] Bis-note to the Flemish Government, p. 6-8, available online at: Beslissingen van de Vlaamse Regering | Vlaanderen.be. It should be noted that it will be the new Flemish Utilities Regulator (Vlaamse Nutsregulator) who will be in charge of the distribution of hydrogen.

[8] Advice C.E.25.167/1 of 31 May 1996 and Advice C.E.67.142/AG of 25 March 2020.



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