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# Parliament takes lead in hydrogen transport with new Hydrogen Act

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

### Context of Hydrogen Act

On 11 July 2023, Parliament adopted the Hydrogen Act,<sup>(1)</sup> establishing a dedicated regulatory framework for hydrogen pipeline networks. This ground-breaking 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 regulates hydrogen transport, but not its supply, production and distribution.

### Key provisions

#### **Conditions and procedure for designation of HNO subject to ownership and unbundling**

For the entire Belgian territory, a single hydrogen network operator (HNO) will be responsible for:

- operating the hydrogen transport infrastructure;
- carrying out the network development plans; and
- establishing 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. Notably, horizontal integration into hydrogen and gas infrastructure is allowed under legal separation.

The designation of the HNO may take place approximately six to seven months after the entry into force of the Act (ten days following the publication in the *Belgian Official Journal*), involving the regulator Commission for Electricity and Gas Regulation (CREG), the general directorate of energy, the council of ministers and the Minister of Energy Tinne Van der Straeten herself. The latter will oversee the formal designation of the HNO, which will be valid for 20 years and may be prolonged at the HNO's request, five years before its expiration.

#### **Responsibilities of 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 four-year binding investment programme. 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.

#### **CREG is designated as 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 must approve the tariffs proposed by the HNO.

#### **Hydrogen transmission**

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

- imports and exports;
- connecting distribution networks;

- connecting large consumers directly;
- connecting large production units; and
- connecting large storage facilities.

### **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 (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.

### **Beyond the scope of 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.

### **Critical review**

#### **Issues surrounding 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,<sup>(2)</sup> while the regions are responsible for public gas distribution.<sup>(3)</sup> "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).<sup>(4)</sup>

However, it still needs to be made clear how to divide and organise 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 analysed the intrinsic functionality of the network (rather than relying on the connection to either the distribution network or the transport network).<sup>(5)</sup> 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"<sup>(6)</sup> in article 5 sections 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 jeopardise 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 regarding distribution.<sup>(7)</sup> 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.

#### **Delegation of special powers to King**

A second issue in the Hydrogen Act relates to article 5 section 5 last subparagraph. This provision grants the possibility to the executive to abolish the provisions that grant authorisation 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 the following conditions of validity as set out by the Council of State:<sup>(8)</sup>

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

However, 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 could be found unconstitutional if challenged, as it could be considered to violate articles 105 and 108 of the constitution.

### **Comment**

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. Therefore, market players should consider integrating appropriate change of law, hardship and force majeure clauses.

#### Endnotes

- (1) The French wording is: "Loi relative au transport d'hydrogène par canalisations", while the Flemish wording is: "Wet betreffende het vervoer van waterstof door middel van leidingen".
- (2) Article 6 section 1, VII, second paragraph c) BWHI.
- (3) Article 6 section 1, VII, first paragraph b) BWHI.
- (4) Advice CE No. 71 998/VR/3 of 12 October 2022.
- (5) Constitutional Court 9 July 2013, No. 98/2013.
- (6) This is the translation of the French "réseau d'hydrogène géographiquement limité" or the Flemish "een gesloten industrieel net". Constitutional Court 9 July 2013, No. 98/2013, B.10.3-B.12.
- (7) Bis-note to the Flemish Government, page six to eight, available <https://beslissingenvlaamseregering.vlaanderen.be/>. It should be noted that the new Flemish Utilities Regulator (Vlaamse Nutsregulator) 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.