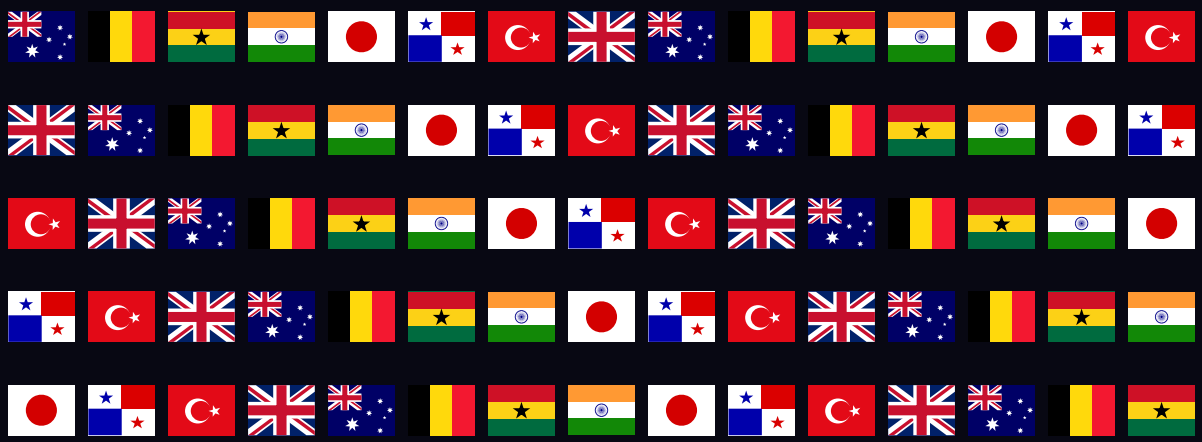
ELECTRICITY REGULATION

Belgium



LEXOLOGY
Getting The Deal Through

Consulting editor
Milbank LLP

Electricity Regulation

Consulting editors

John Dewar

Milbank LLP

Quick reference guide enabling side-by-side comparison of insights into the local legal framework; regulation of power generation, grid connection, and alternative energy sources; climate change policy; energy storage; nuclear power; transmission and distribution; sale of power, including retail and wholesale pricing and public service obligations; regulatory authorities; competition regulation including merger control; cross-border considerations including mergers and acquisitions and interconnection regulations; transactions between affiliates; and recent trends.

Generated 26 September 2022

Table of contents

Contributors

Belgium

Arnaud Coibion
arnaud.coibion@linklaters.com
Linklaters LLP

Linklaters

Lothar Van Driessche
lothar.van_driessche@linklaters.com
Linklaters LLP

Sari Corrijn
sari.corrijn@linklaters.com
Linklaters LLP

LEGAL FRAMEWORK

Policy and law

What is the government policy and legislative framework for the electricity sector?

Belgium is a federal state with several levels of government. The federal responsibilities regarding electricity supply include security of supply, the nuclear fuel cycle, production and federal supply licences, consumer protection and transmission (including local transmission) tariffs, as well as the North Sea. The three regions (Flanders, Wallonia and Brussels) are principally responsible for energy efficiency, (onshore) renewables, regional supply licences and distribution tariffs.

A large part of Belgian energy law, both at the federal and regional level, is based on the EU's internal market regulation (the Third Energy Package, which is supplemented by the Clean Energy Package, including legislation on the electricity market design, renewables and energy efficiency, which have yet to be transposed into Belgian law). These rules, often directly applicable or transposed into Belgian law, include rules on infrastructure investment and state aid, the regulation of network operators (eg, regulated tariffs, unbundling requirements and third-party access), network operation and safety, trading (eg, market coupling) and market monitoring and supervision by independent regulators. A further overhaul of EU rules is currently underway (the Fit for 55 and REPowerEU packages), which will lead to further changes to the Belgian implementation framework, once they become law.

Belgium has been heavily dependent on imported energy since the end of domestic coal production. Security of supply is therefore a key objective of Belgian energy policy. In 2019, the federal parliament first approved legislation for the introduction of a broader capacity remuneration mechanism (CRM) to guarantee the security of supply, secure the energy transition and offset Belgium's (partial) nuclear phase-out by 2025. This legislation was amended and further implemented via royal decrees in the spring of 2021. On 30 April 2021, Elia was instructed by the federal Energy Minister to organise a capacity auction for the first delivery period (November 2025 to October 2026) of the CRM. The CRM was subsequently approved by the European Commission under state aid rules and the first Y-4 auction took place in October 2021, with a rerun in April 2022 (after one of the projects originally awarded subsidies failed to secure an environmental permit by the deadline). Instruction for the Y-4 auction in October 2022 (delivery period November 2026 to October 2027) was given on 31 March 2022 and the prequalification process for this auction is currently ongoing. Prequalified bidders will need to put in their offers by 30 September. The process and timing may, however, be complicated by environmental concerns and permitting (for which the regional authorities have competency).

Other objectives of the Belgian federal and regional energy policies include energy efficiency, transparent and competitive energy pricing and climate and environmental protection.

Driven by EU efforts to deal with energy and climate challenges, the Belgian authorities support the development of capacities of power generation based on renewable sources of energy. Also, in 2019, the federal parliament approved legislation to create a framework for the issuance of new offshore concessions for renewable power production on the North Sea (the Princess Elizabeth zone), through a competitive tender procedure (the rules for which remain to be finally established by the federal government). In this way, the federal government hopes to increase the offshore wind capacity from 2.3GW currently to 5.5-5.8GW by 2030, and potentially to 8GW in the long run. Future offshore generation facilities may be able to benefit from the existing federal renewables support scheme (based on guarantees of origin and green certificates), with subsidy levels to be fixed based on the bids submitted in the competitive tender process.

At the same time, Belgium continues to rely heavily on nuclear power production (representing around 6GW of installed capacity or approximately 50 per cent of total production in the first half of 2022). In March 2022, the government decided on another extension by 10 years of the two youngest nuclear reactors. In July 2022, a (non-binding) agreement of principle was reached with ENGIE on the modalities for that extension, including a restart in November 2026.

Law stated - 28 July 2022

Organisation of the market

What is the organisational structure for the generation, transmission, distribution and sale of power? How is this reflected in the regulatory structure?

As a matter of principle and under EU law, the generation and import, trade and supply to consumers of power are liberalised and open to all market participants. Networks, on the other hand, are strictly regulated and subject to a national (transmission) or local (distribution) monopoly.

While most energy operators in Belgium, including the transmission system operator (TSO) and market operator or operators, are private companies, the municipalities either directly or indirectly control the transmission and distribution system operators (DSOs) throughout the country.

Following consecutive generations of EU internal energy market regulation, transmission and distribution activities previously performed by vertically integrated power companies have been disentangled from their respective production or import, trading and supply activities. In 2001, incumbents Electrabel and SPE (and their cooperation subsidiary CPTE) incorporated and contributed their transmission assets and activities to the newly established company Elia. In 2002, Elia was appointed the sole transmission system operator for electricity in Belgium and this designation was recently renewed for an additional 20-year period. In 2012, Elia was certified as a fully ownership unbundled TSO under the EU's Third Energy Package ownership unbundling rules.

Although ownership unbundling is not required for DSOs, Electrabel has divested all its historic participation in the Belgian DSOs. The DSOs enjoy a legal monopoly within their geographically confined areas, usually covering the territory of several municipalities.

Power can be traded by market participants on the Belgian power exchange operated by Epex SPOT Belgium. The Belgian exchange (formerly Belpex) was created in 2005 and merged with Epex SPOT in 2015. Epex SPOT in turn is owned by the EEX Group (through Powernext) and HGRT, a conglomerate of network operators including Elia. The Belgian power market has subsequently been coupled with markets in other European countries. The currently applicable Multi-Regional Coupling covers 19 countries and 85 per cent of European power consumption.

Law stated - 28 July 2022

REGULATION OF ELECTRICITY UTILITIES – POWER GENERATION

Authorisation to construct and operate generation facilities

What authorisations are required to construct and operate generation facilities?

A federal production licence must be issued by the federal Energy Minister, subject to a prior opinion from the federal Commission for the Regulation of Electricity and Gas (CREG), for each construction of a new generation facility, as well as the reconstruction or modification of an existing facility not subject to an individual licence resulting in an increase of the net capacity by more than 25MW.

Nuclear generation units and installations for the production of electricity from renewables and hydro storage that are the subject of an offshore concession are excluded from this requirement. The former can no longer be the subject of any permit or licence in Belgium (ie, subject to a change in law, no new nuclear generation units can be constructed in Belgium; although a major overhaul of the two youngest reactors will be possible following the agreement on their life extension). The latter installations are subject to specific procedures for obtaining the relevant offshore concessions and related permits and licences. A law change from 2019 has enabled the federal government to set up a competitive

tender procedure for the issuance of new offshore concessions by the relevant ministers, for a maximum duration of 30 years (including construction, operation and decommissioning phase; the government very recently approved a bill to extend this duration to 40 years), for the production of electricity from renewable sources, on the lots that have been reserved for that purpose in the new marine spatial plan covering the period from 2020 to 2026. Although the first auctions for these concessions were initially anticipated to take place already in 2020, with concessions awarded in 2021 (on time for the new wind parks to be completed by 2025), the required implementing legislation has not been approved to date. Significant onshore network reinforcement is required as well to bring the additional power to land. The transmission system operator (TSO) Elia has indicated that, as things stand, this work is likely to be finished at the earliest in 2026 and possibly later (depending, among other things, on permitting trajectories, which are highly contested). This could further jeopardise the timing for these new wind parks to become operational.

The construction and operation of generation facilities on land is subject to regional land planning and environmental law and regulations and may, therefore, require a building or a (combined) environmental permit, or both, depending on the nature of the installations. For offshore constructions (including cables for connection to the onshore transmission system), additional permits and authorisations may be required under federal law.

Law stated - 28 July 2022

Grid connection policies

What are the policies with respect to connection of generation to the transmission grid?

Under EU law, grid users (including generators) have a right to non-discriminatory grid access, subject to their compliance with the applicable (technical) requirements, payment of the applicable, pre-approved tariffs, and entering into industry-standard regulated contracts with the relevant network operators. A new technical regulation for the operation of and access to the transmission system entered into force on 27 April 2019, which replaced the previous one from 2002 (as amended from time to time).

Besides the tariffs and contractual framework, grid connection and access are covered by several grid codes at the national and EU level.

Priority grid access may apply in certain cases for certain types of (renewable) generation. Under EU legislation (the Clean Energy Package), the possibilities of priority grid access are reduced for new installations.

The network operators are required to keep commercially sensitive information obtained from grid users confidential.

A specific cable licence is required and compensation can be obtained for costs incurred for the connection of offshore (wind) generation units to the transmission grid. New offshore production installations must connect to the modular offshore grid (MOG), from where they will be connected to the onshore grid, at the connection point determined by the TSO and under the applicable technical requirements. The federal government will also establish the latest dates by which each required extension of the MOG must have entered into service and a compensation mechanism in the case of its delay or unavailability.

Specific rules also apply to private and direct lines, as well as closed industrial networks and closed distribution systems to which generators may connect, to ensure the viability of the public grid as well as the users' right to grid access.

Grid connection and access can be refused by the network operators under the applicable network codes if technically unfeasible or economically unviable, or to ensure the secure operation and integrity of the grid.

Law stated - 28 July 2022

Alternative energy sources

Does government policy or legislation encourage power generation based on alternative energy sources such as renewable energies or combined heat and power?

Except for power production and storage in the North Sea, renewable energy sources are a regional competence. Government policy and legislation encouraging the use of alternative energy sources are therefore decided on a federal (offshore) and a regional level and may differ between the three Belgian regions.

As a general rule, all three regions as well as the federal state (regarding offshore) have policies and a legal framework in place to support renewable energy generation. All of these include a system of guarantees of origin and green certificates (either federal or regional) that are issued for each kilowatt-hour of power produced, which can subsequently be sold either on the market (demand for certificates is driven by quota obligations for suppliers or grid users) or to the TSO or distribution system operator at a certain minimum price.

Offshore renewable generation is supported through the federal system of green certificates. Brussels promotes the use of renewable energy sources by assimilating the federal system of green certificates combined with a quota obligation, as well as through net-metering for small producers and investment aid for certain companies and projects. Flanders has its own system of green certificates and combined heat and power certificates combined with quota obligations in place, together with net-metering for small-scale generation and ecological premiums for environmentally friendly investments. Wallonia promotes renewable generation through various means, including the federal system of green certificates and quota obligations, investment aid and specific support schemes for certain technologies.

Law stated - 28 July 2022

Climate change

What impact will government policy on climate change have on the types of resources that are used to meet electricity demand and on the cost and amount of power that is consumed?

Belgium is committed to the Paris climate agreement. In 2015, during the Paris negotiations, the different regions and the federal state reached a Belgian internal climate agreement, allocating the efforts to be made by each region and the federal state toward reaching Belgium's overall climate targets. At the end of 2019, the Belgian federal and regional governments also agreed on a National Energy and Climate Plan for the period 2021-2030, which was submitted to the European Commission under Regulation (EU) No. 2018/1999.

Despite these commitments and in line with public opinion, energy policy has recently seen a shift towards reducing subsidies for renewable power generation (eg, cutting subsidies for biomass, photovoltaic generation and offshore wind). Moreover, security of supply and generation adequacy measures such as the already existing strategic reserve and the contemplated new capacity remuneration mechanism are likely to target mainly (new and existing) gas-fuelled power plants, both during a transitory period and after 2025, to compensate for the (partial) closure of nuclear power plants in Belgium. These policy options, as well as a changing geopolitical landscape (in particular, the war in Ukraine) may render the achievement of the Belgian climate targets more challenging.

Given the climate targets (in addition to the security of supply concerns), nuclear power will continue to play an important role in the Belgian energy mix until 2025 and beyond that, with the recently decided extension of the lifespan of the two youngest nuclear reactors by 10 years.

At the same time, climate targets are likely to push the different Belgian governments toward policies promoting energy efficiency measures, flexibility services, distributed generation, power2gas (hydrogen) and small-scale renewable

production that require fewer subsidies (such as heat boilers, which have seen prices drop drastically over recent years and are heavily promoted by the European Commission; and small-scale biomass, in the form of combined heat and power installations).

Law stated - 28 July 2022

Storage

Does the regulatory framework support electricity storage including research and development of storage solutions?

Electricity storage is subject to the opinion of CREG and the approval of the federal Energy Minister, and the Minister responsible for the North Sea to the extent relevant to the connection of offshore generation units.

Investments into the network by the TSO are compensated through the regulated tariffs under the applicable tariff methodology and proposal, as approved by CREG.

Following the Clean Energy Package, the possibilities for the TSO to develop storage solutions are further narrowed down to specific circumstances and under strict conditions (essentially when the market is unable to provide them).

Law stated - 28 July 2022

Government policy

Does government policy encourage or discourage development of new nuclear power plants? How?

Under the current state of the legislation, no new nuclear power generation units can be constructed in Belgium.

In 2015, the federal government reached an agreement with the incumbent producer and owner of the nuclear park, Electrabel, and its mother company, ENGIE, to keep nuclear power in the Belgian energy mix at least until 2025, subject to heavy investment into the seven existing nuclear generation units.

In March 2022, the government decided on another extension by 10 years of the two youngest nuclear reactors (Doel 4 and Tihange 3). In July 2022, the federal government made a non-binding agreement of principle with ENGIE setting out the key principles of that extension, which will need to translate into a binding agreement by the end of the year. The agreement of principle, among other things, provides for (1) a 10-year extension as of November 2026 (leaving a one-year gap for upgrade and maintenance between end of 2025 and end of 2026; the capacity gap in this period will need to be filled mostly by gas-fired power plants receiving capacity remuneration mechanism subsidies, which are still to be constructed); (2) a split of the risk and cost for storing and monitoring the (future) nuclear waste; and (3) a 50/50 participation by the Belgian state in a financing vehicle that will fund the investments necessary for the extension and future operations.

Law stated - 28 July 2022

REGULATION OF ELECTRICITY UTILITIES – TRANSMISSION

Authorisations to construct and operate transmission networks

What authorisations are required to construct and operate transmission networks?

Belgium has a single transmission system operator (TSO) to operate the entire public transmission system, which is appointed for a 20-year period by the federal Energy Minister following consultation with the Council of Ministers and

prior advice from the federal Commission for the Regulation of Electricity and Gas (CREG), on the proposal of one or more network owners that, jointly or separately, own a part of the transmission system covering at least 75 per cent of the national territory and at least two-thirds of the territory of each region. In addition to the national transmission grid (high and very high voltage), the TSO also operates the local grids with a transmission function (ie, with a nominal voltage level equal to or below 70kV).

Elia System Operator was initially appointed as the single TSO for a 20-year period on 13 September 2002. On 6 May 2019, Elia's TSO designation was renewed for an additional 20-year period, with effect from 17 September 2022. Following a strategic reorganisation of the Elia group (to accommodate its investments abroad without impacting Belgian consumers), newly incorporated Elia Transmission Belgium was appointed the single TSO in replacement of its mother company, renamed Elia Group, for a 20-year period with effect from 31 December 2019. The network assets are owned by its wholly owned subsidiary, Elia Asset. Under EU unbundling rules, Elia System Operator was certified by CREG as a fully ownership unbundled TSO on 6 December 2012. This certification was passed onto Elia Transmission Belgium on 31 December 2019.

Subject to certain conditions, third parties may obtain an individual licence from the federal Energy Minister to construct a direct line or may be authorised by the federal Energy Minister to operate a closed industrial network.

Much the same as for generation facilities, the construction and operation of transmission (and distribution) systems on and offshore require certain permits and authorisations under regional and federal law, depending on the nature and the location of the installations. Public utility easements may be granted to the TSO for infrastructures crossing private land and, in certain instances, the TSO may be entitled to expropriate the property of private owners in the public interest.

Law stated - 28 July 2022

Eligibility to obtain transmission services

Who is eligible to obtain transmission services and what requirements must be met to obtain access?

In principle, all grid users connected to the transmission system on 1 July 2004 or who are otherwise eligible (ie, under the laws of another EU member state) have a right of access to the grid on the following non-discriminatory conditions: subject to their compliance with the applicable (technical) requirements, payment of the applicable, pre-approved tariffs, and entering into industry standard regulated contracts with the relevant network operators. A new technical regulation for the operation of and access to the transmission system entered into force on 27 April 2019, which replaced the previous one from 2002 (as amended from time to time).

The TSO can refuse access only if it does not have sufficient capacity available (under the applicable rules on capacity allocation and congestion management) or if the access would prevent its proper execution of a public service obligation in the general economic interest, and without breaching the rules on the exchange of energy flows in a way that would harm the European interest.

Law stated - 28 July 2022

Government transmission policy

Are there any government measures to encourage or otherwise require the expansion of the transmission grid?

The TSO is required to draw up and update (every four years) a 10-year network development plan, taking into account

the EU-wide 10-year network development plan determined by the European Network of TSOs for Electricity. The 10-year network development plan is subject to the advice of CREG and the approval of the federal Energy Minister, and the minister responsible for the North Sea to the extent relevant to the connection of offshore generation units.

Investments into the network by the TSO are compensated through the regulated tariffs under the applicable tariff methodology and proposal, as approved by CREG.

Law stated - 28 July 2022

Rates and terms for transmission services

Who determines the rates and terms for the provision of transmission services and what legal standard does that entity apply?

Grid connection, access and balancing services are subject to regulated tariffs, which are pre-approved by CREG for a four-year regulatory period, based on a proposal by the TSO. The proposal must be based on a tariff methodology established in advance by CREG, which in turn takes into account the specific tariff guidelines set out in the law. The current tariff period runs from 1 January 2020 until 31 December 2023. On 4 July 2022, CREG approved the tariff methodology for the next tariff period 2024-2027, which is largely consistent with the methodology for the current tariff period and follows the same overarching principles (ie, a fair remuneration mechanism, combined with incentive components for certain expenses and revenues of the TSO). Once approved, the tariffs in principle remain unchanged during the entire tariff period, subject to revision that can be requested by the TSO or initiated by CREG if they are no longer proportionate owing to changed circumstances.

In addition to the regulated tariffs, transmission services are governed by industry-standard regulated contracts, which are also pre-approved by CREG. For electricity transmission, the main regulated contracts are the connection contract, the access contract and the balance responsible party contract.

The tariffs and regulated contracts are non-negotiable between the TSO and individual grid users. Any amendments are subject to prior CREG approval and are applied to all grid users simultaneously.

Law stated - 28 July 2022

Entities responsible for grid reliability

Which entities are responsible for the reliability of the transmission grid and what are their powers and responsibilities?

The TSO is responsible for the secure and reliable operation of the grid under the law and all the applicable (national and European) grid codes. Its various tasks and roles are detailed in the law. The federal regulator, CREG, as well as the federal energy administration and the federal Energy Minister, have certain specific monitoring and supervision competencies.

In the event of a sudden crisis in the energy market or when the physical safety of persons, the safety or the reliability of equipment or installations or the integrity of the transmission system are in jeopardy, the federal government, in consultation with the TSO and following an opinion from CREG, can take emergency measures (which can temporarily deviate from the provisions of the law).

Law stated - 28 July 2022

REGULATION OF ELECTRICITY UTILITIES – DISTRIBUTION

Authorisation to construct and operate distribution networks

What authorisations are required to construct and operate distribution networks?

Distribution system operators (DSOs) are appointed by the regional regulators or, in the Brussels-Capital region, by the Brussels government, to operate the distribution system of a certain geographically confined area, within which they enjoy a legal monopoly. The DSOs are appointed for a maximum period of 12 years (in Flanders) or 20 years (in Wallonia and Brussels). In the Flemish and Walloon regions, several DSOs are active. In the Flemish region, all DSOs work together through the single operating company, Fluvius, a company that was created through a merger of the previously existing operating companies Infrax and Eandis. The two largest DSOs in the Walloon region are Ores and Resa, with several smaller DSOs that are locally active. Sibelga is the sole DSO in the Brussels-Capital region.

Subject to certain conditions, third parties can obtain an individual authorisation from – or have to notify – the relevant regional regulator, to construct a new direct line or to operate a closed distribution system or a private network. Following a law change in the Flemish region, the construction and operation of a direct line that does not cross the borders of the own site, is no longer subject to prior approval, and the operation of a direct line that does cross the borders of the own site, is made subject to a levy, calculated based on the number of megawatt-hours annually injected into the line.

The construction and operation of both transmission and distribution systems may require certain permits and authorisations. Like the transmission system operator, DSOs may benefit from public utility easements for infrastructures crossing private land and, in certain instances, may be entitled to expropriate the property of private owners in the public interest.

Law stated - 28 July 2022

Access to the distribution grid

Who is eligible to obtain access to the distribution network and what requirements must be met to obtain access?

Under EU law, all DSOs must provide non-discriminatory access to their distribution system, subject to grid users entering into regulated contracts, compliance with the (technical) requirements and payment of distribution tariffs.

The DSOs may refuse access to their distribution system on specific conditions set out in the laws of each region. For instance, access can be refused if there is insufficient grid capacity or if the technical requirements are not met.

In the event of a dispute on the conditions for access, grid users can lodge a complaint before the competent regional regulator or before the courts.

Law stated - 28 July 2022

Government distribution network policy

Are there any governmental measures to encourage or otherwise require the expansion of the distribution network?

In Belgium, the legal framework does not provide for specific rates or tax benefits to encourage the development of distribution systems.

DSOs must operate, maintain and develop the distribution system for which they are responsible. In that framework, they must establish a multi-annual network development plan, to be approved by the relevant regional regulator, to ensure the continuation of the electricity supply, security and development.

In terms of economics, distribution system expansion is mainly encouraged through the regulated network tariffs, which are approved by the relevant regional regulator.

Law stated - 28 July 2022

Rates and terms for distribution services

Who determines the rates or terms for the provision of distribution services and what legal standard does that entity apply?

Under EU law, the rates for access to distribution systems are monitored and approved by the relevant regional regulator.

In each region, the regulator sets up a tariff methodology taking into account the specific tariff guidelines set out in the relevant regional legislation. Based on that methodology, each DSO establishes a tariff proposal that is approved by the relevant regulator. In practice, network tariffs are payable to the DSOs by the grid users and subsequently charged to the end-users.

In general, the tariffs are established for a multi-annual term and remain unchanged during the entire tariff period, but they can be subject to revision in limited circumstances. In Belgium, the tariff models in the various regions are shifting from a cost-plus model toward a more incentive-based model, bearing in mind that each region has its own specificities and requirements. The new methodology for the tariff period 2021 to 2024 in the Flemish region, as approved by the Flemish Regulator for Electricity and Gas on 13 August 2020 (and subsequently amended), has introduced a new tariff structure, which will be based on a capacity tariff to better reflect the financial impact of customer behaviour on the network operation – a first in Belgium. This new structure will be applied from 1 January 2023.

Like transmission services, distribution services are governed by regulated contracts to be pre-approved by the relevant regional regulator. The main regulated distribution contracts are the connection contract and the access contract. As for transmission, distribution tariffs and regulated contracts are non-negotiable between the DSOs and individual grid users and any amendments (subject to prior approval by the competent regulator) are applied to all grid users simultaneously.

Law stated - 28 July 2022

REGULATION OF ELECTRICITY UTILITIES – SALES OF POWER

Approval to sell power

What authorisations are required for the sale of power to customers and which authorities grant such approvals?

A regional supply licence is required for the sale of power to end-users in each region. These supply licences are granted in Flanders, Wallonia and Brussels by the Flemish Regulator for Electricity and Gas, the Walloon Commission for Energy and the Brussels Regulator for the Gas and Electricity Market (Brugel). Any person wanting to perform supply activities in the whole of Belgium must therefore obtain licences in all three regions. In all three regions, the supply licences are valid for an indefinite period. The laws of each region stipulate the exact licence requirements, the procedure, the reporting obligations and the grounds for suspension or revocation of the licence.

Exceptions to the supply licence obligation exist for the transmission system operator (TSO) and distribution system operators (DSOs) in the performance of their public services obligations (eg, as a social supplier).

If an end-user has a direct connection to the federal transmission system, a federal supply licence is also required to supply power to it.

Besides these general licences, Walloon and Brussels legislation provide for specific licences, namely:

- a licence for the supply of 100 per cent renewable energy (Brussels-Capital region);
- a licence limited to a capped capacity;
- a licence limited to certain types of clients or to a certain area; and
- a licence limited to ensuring a grid user's own supply (Wallonia).

Law stated - 28 July 2022

Power sales tariffs

Is there any tariff or other regulation regarding power sales?

The price of electricity is, in principle, based on market mechanisms. However, both federal and regional laws may intervene in the sale of electricity.

The federal Economy Minister may impose maximum prices for the supply of electricity to end-users and protected clients.

Federal law further provides that an electricity supplier must objectively justify its prices in comparison to its costs. In that framework, the federal Commission for the Regulation of Electricity and Gas has a general mission to monitor electricity prices but cannot (yet) take binding enforcement actions against suppliers. Further, the law sets out a package of measures regarding the variable prices charged for the supply of electricity to households and small and medium-sized enterprises.

The sale of electricity to household consumers is also governed by regional legislation. These regional laws determine, among other things, mandatory provisions in supply contracts and invoices, such as those dealing with minimum notice periods for termination, consumer protection, change of supplier and dispute resolution.

The Brussels legislation also enables Brugel to set up a progressive pricing system for electricity.

More generally, power suppliers must also comply with the rules set out in the Code of Economic Law, especially regarding unfair commercial practices, distance selling or publicity, and the new version of the Consumer Agreement ('the consumer in a liberalised electricity and gas market') and the related Code of Conduct. This industry-wide agreement aims to protect consumers against abusive practices developed and misleading information given by suppliers.

Law stated - 28 July 2022

Rates for wholesale of power

Who determines the rates for sales of wholesale power and what standard does that entity apply?

Subject to rules curtailing abusive market behaviour, power prices on the wholesale electricity markets are based on market mechanisms. The federal Economy Minister may impose maximum prices for the supply of electricity to end-users.

As part of a package designed to alleviate the pressure of rising energy prices on households and small and medium-

sized enterprises, the federal government, in February 2022, decided to reduce the VAT rate on power bills from 21 per cent to 6 per cent. This reduction remains at least until September 2022 and there appears to be growing consensus among federal coalition parties to make it permanent.

Law stated - 28 July 2022

Public service obligations

To what extent are electricity utilities that sell power subject to public service obligations?

Regional legislation sets out public service obligations for the TSO, DSOs and electricity suppliers.

These public service obligations vary from one region to another. As a rule, electricity suppliers must ensure the regularity and quality of the electricity supply. Besides this general public service obligation, the federal and regional legislators have imposed public service obligations on suppliers aimed at the protection of vulnerable consumers (eg, providing for specific procedures in the event of payment problems encountered by households), rational use of energy, protection of the environment and, in particular, promotion of renewable energy (eg, green certificates).

Other intermediaries, such as producers, must also abide by certain public service obligations, some of which are linked to the security of electricity supply (ie, the provision of certain services to be contracted by the network operators), such as in the framework of the strategic reserve and the future market-wide capacity remuneration mechanism.

The supplier of last resort is the relevant DSO (although in Flanders there is no legal provision in this respect, yet).

Law stated - 28 July 2022

REGULATORY AUTHORITIES

Policy setting

Which authorities determine regulatory policy with respect to the electricity sector?

The responsibilities for electricity policy are split between the competent ministers and the relevant administrations for the federal state on the one hand and the three regions on the other. At the federal level, the Energy Minister and the Directorate-General for Energy, part of the Federal Public Service for Economy, Small and medium-sized enterprises, Self-employed and Energy, are the key authorities that develop and implement electricity policy.

Several agencies independent from the federal and regional governments also regulate parts of the electricity sector. There is one federal regulator, the federal Commission for the Regulation of Electricity and Gas (CREG), and three regional regulators: the Flemish Regulator for Electricity and Gas (VREG), the Walloon Commission for Energy (CWaPE) and the Brussels Regulator for the Gas and Electricity Market (Brugel). The Federal Agency for Nuclear Control and the National Agency for Radioactive Waste and Enriched Fissile Materials supervise nuclear activities in Belgium, including the seven nuclear reactors and the treatment of nuclear waste.

Law stated - 28 July 2022

Scope of authority

What is the scope of each regulator's authority?

CREG monitors the proper functioning of the electricity market and compliance with the federal electricity legislation. The main competencies of CREG are approving transmission (including local transmission) tariffs, regulating

transmission system operators, monitoring the national electricity market and a broad advisory role.

The regional regulators have broad competencies, ranging from monitoring the regional electricity markets to imposing sanctions, ensuring compliance with the regional regulations and settling disputes. They are principally responsible for granting supply licences, approving distribution tariffs, regulating distribution system operators, monitoring the regional electricity markets and the renewable support schemes (other than for offshore renewables). The regional regulators also advise the regional governments, ensure compliance with the regional regulations and settle disputes.

The regulators are also vested with investigative powers and may impose sanctions on the electricity market players.

Law stated - 28 July 2022

Establishment of regulators

How is each regulator established and to what extent is it considered to be independent of the regulated business and of governmental officials?

The federal and regional regulators are independent administrative authorities established by federal or regional legislation. Under EU law, they act fully independently of the state, governments and regulated businesses such as the network operators.

Law stated - 28 July 2022

Challenge and appeal of decisions

To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

As a rule, most of the regulators' decisions are considered administrative acts. Accordingly, their annulment can be requested before the Council of State (the highest administrative court). The Council of State reviews the lawfulness of the disputed decisions.

As an exception to this general rule, the decisions of CREG and the tariff decisions of VREG and Brugel can be appealed in a de novo review before the Market Court of Brussels. CWaPE's decisions can be appealed before the Court of Appeal of Liège.

Any party that is affected by a decision of a regulator may also submit a request for review to these authorities. This is the only non-judicial challenge available.

Law stated - 28 July 2022

ACQUISITION AND MERGER CONTROL – COMPETITION

Responsible bodies

Which bodies have the authority to approve or block mergers or other changes in control over businesses in the sector or acquisition of utility assets?

A transaction with a nexus to Belgian may be assessed by either the European Commission or the Belgian Competition Authority.

European Commission

The European Commission has the authority to review all concentrations in the electricity sector with a 'community dimension' within the meaning of Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (OJ 2004, L24/1) (the Merger Regulation). According to the EU Merger Regulation, a concentration has a 'community dimension' when the annual global and European turnover of the undertakings concerned exceeds specified thresholds and depends on the sales dispersion across Europe. If these thresholds are fulfilled, the European Commission has exclusive jurisdiction to review the proposed transaction. National competition authorities, such as the Belgian Competition Authority (BCA), are then precluded from reviewing the transaction. Furthermore, in 2020, the European Commission published further guidance on the application of the referral mechanism under article 22 of the EU Merger Regulation. This guidance confirms that the European Commission will start accepting referrals from national competition authorities of transactions that fall below the national merger control thresholds if it affects trade between EU member states and threatens to significantly affect competition within the referring EU member state. Nevertheless, under article 9 of the EU Merger Regulation, EU member states could request the European Commission to refer a transaction to the national competition authority, if the transaction affects competition in a distinct market within that EU member state's territory.

Belgian Competition Authority

Pursuant to the provisions of Book IV (Protection of competition) of the Code of Economic Law (CEL), the relevant merger control authority in Belgium is the BCA, which is an independent administrative body composed of the president, the Competition College, the College of Competition Prosecutors and a management committee. Notifications of transactions are submitted to the Competition Prosecutor General and investigated by the team of Prosecutors appointed for the deal. The final decision is taken by the Competition College. Appeals against decisions approving or prohibiting a notified transaction may be lodged before the Brussels Markets Court, which is a separate section within the Brussels Court of Appeal that is responsible for appeals against decisions of certain regulatory authorities in Belgium, including the BCA.

Law stated - 28 July 2022

Review of transfers of control

What criteria and procedures apply with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or blocking the transaction?

European Commission

Concentrations with a 'community dimension' within the meaning of the EU Merger Regulation must be notified to the European Commission before their implementation. There are two alternative thresholds for the community dimension.

- A merger filing is required if (1) the combined worldwide turnover of all the merging companies exceeds €5,000 million; and (2) the EU turnover of each of at least two of the companies involved exceeds €250 million.
- A merger filing is also required if (1) the combined worldwide turnover of all the merging companies exceeds €2,500 million; (2) the combined turnover of all the merging companies exceeds €100 million in each of at least three member states; and (3) each of at least two of the companies involved have a turnover exceeding €25 million in each of the three member states included under (2).

In both alternatives, there is, however, no community dimension if each of the companies achieves more than two third

of its EU turnover within one and the same member state.

The European Commission must complete its initial review (Phase I) within 25 working days following the date of receipt of the notification (or receipt of complete notification if later). This period may be extended to 35 working days if the merging parties offer commitments to remedy any potential competition concerns within 20 working days from the notification, or if an EU member state requests a referral of the transaction. At the end of Phase I, the European Commission is required to decide:

- that it has no jurisdiction over the transaction, provided that such transaction does not fall within the ambit of the EU Merger Regulation;
- that the transaction does not raise serious doubts as to its compatibility with the common market; or
- to launch an in-depth investigation (Phase II).

If the European Commission opens a Phase II investigation, it has 90 working days in which it has to determine if the transaction is compatible with the EU internal market. This period may be extended to 105 working days if the parties offer commitments within 55 working days from the opening of the Phase II investigation. Following a Phase II investigation, the European Commission is required to decide if it (conditionally) clears or prohibits the transaction.

The cornerstone of the European Commission's assessment is the significant impediment to effective competition (SIEC) test. The European Commission will block a transaction if it could 'significantly impede effective competition in the internal market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position'. Parties may avoid such prohibition by offering commitments (such as divestment of part of the business or certain behavioural measures) to counter the competition concerns raised by the Commission. To this end, mergers and acquisitions in highly concentrated electricity markets may be subject to close scrutiny.

Belgian Competition Authority

The BCA reviews concentrations that do not have a ‘community dimension’ and where the undertakings concerned have a joint turnover in Belgium of more than €100 million, while at least two of the undertakings concerned each realise a turnover in Belgium of at least €40 million. Since 17 March 2022, the Belgian merger control procedure is subject to a standard filing fee of €17,450 for simplified mergers, and €52,350 for a regular merger procedure.

After the merger notification has been submitted, the BCA has 40 working days to complete its initial review of a transaction (Phase I), which can be extended to 55 working days if remedies are proposed. If the transaction qualifies for a simplified merger control procedure, the review period is limited to 15 working days. Should Phase I reveal any competition concerns that are not yet remedied in Phase I, the BCA may open an extended Phase II investigation. Phase II generally takes 60 working days, and can be extended to 80 working days if remedies are offered.

The substantive test applied by the BCA is similar to the EU test; that is, whether the proposed concentration will result in a significant impediment to effective competition on the Belgian market, in particular by creating or reinforcing a dominant position. In applying this test, the BCA will consider the market shares of the parties to the transaction, as well as other structural factors relevant to competition (such as the existence of potential new entrants on the market, barriers to entry, the availability of alternative products, etc). The BCA will closely review mergers and acquisitions in concentrated electricity markets.

Law stated - 28 July 2022

Prevention and prosecution of anticompetitive practices

Which authorities have the power to prevent or prosecute anticompetitive or manipulative practices in the electricity sector?

European Commission

The European Commission can enforce articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which (respectively) set out the prohibition of cartels (e.g. agreements on price fixing or market allocation, etc.) and the prohibition of abuse of a dominant position (eg, excessive pricing, output limitation, etc). To apply and enforce these provisions, the European Commission has the power to request all necessary information and to undertake inspections of companies (including dawn raids). The European Commission can impose significant fines if companies provide incomplete, incorrect or misleading information and if they do not cooperate during investigations.

In 2014, the European Commission adopted Directive 2014/104/EU on antitrust damages actions (OJ 2014, L 349/1) (the Damages Directive), which aims to remove practical obstacles to compensation for all victims of infringements of EU competition rules. The Damages Directive applies to all damages actions, whether individual or collective, that are available in the EU member states, including before the national courts.

Belgian Competition Authority

Under Book IV of the CEL, the BCA has the power to investigate (upon complaint of another market player or at its own initiative) and prosecute anticompetitive behaviour (including cartels, abuse of dominance, and abuse of economic dependence). To this end, the BCA is entitled to request all necessary information (including the production of emails and instant messages) and to conduct on-site investigations at the company's premises (ie, dawn raids). Not providing the required information or not cooperating during investigations can lead to high fines. Recently, the BCA has also received the power to impose fines for a failure to decline investigative interviews, which will be based on the average daily turnover of the undertaking.

Based on the Damages Directive, the Belgian federal parliament in June 2017 approved the Act on Antitrust Damages, which establishes a specific civil liability regime aimed to facilitate the recovery of damages suffered by victims of anticompetitive practices. Belgian legislation also provides for several claimant-friendly changes to the generally applicable liability regime in Belgium, such as a presumption that cartels cause harm, specific rules on the passing-on of cartel overcharges and the disclosure of evidence.

Energy regulators

The Federal Public Service for Economy, Small and medium-sized enterprises, Self-employed and Energy has identified the production of electricity and gas as a sector that deserves special attention. One of the missions of the federal and regional regulators is monitoring and supervising the energy market and guaranteeing transparency and competitiveness of those markets. In the performance of their tasks, they have the power to investigate anticompetitive behaviour (eg, the occurrence of elevated prices and price peaks). In that framework, there is a formal reciprocal exchange of information and regular coordination between the federal Commission for the Regulation of Electricity and Gas (CREG) and the BCA to allow for efficient coordination between the regulation of the energy sector and the enforcement of competition rules.

Law stated - 28 July 2022

Determination of anticompetitive conduct

What substantive standards are applied to determine whether conduct is anticompetitive or manipulative?

There are no sector-specific criteria for the energy sector under Belgian or EU competition rules. Therefore, the general provisions apply. Mirroring the provisions of articles 101 and 102 of the TFEU, articles IV.1 and IV.2 of the CEL prohibit agreements and concerted practices among undertakings, as well as the abuse of a dominant position, which lead to the prevention, restriction or distortion of competition on the Belgian market.

Certain agreements caught under article VI.1 of the CEL or article 101 of the TFEU may be exempted if they (1) yield benefits such as improving production or distribution or promoting technical or economic progress; (2) result in a share of the benefit being allocated to consumers; (3) provided that such agreements are not capable of eliminating competition in respect of a substantial part of the market; and (4) provided that the restrictive practices do not go beyond what is necessary.

In addition, article IV.2/1 of the CEL prohibits the abuse of a position of economic dependence that may distort competition in the Belgian market. A position of economic dependence on an undertaking is characterised by the absence of a reasonably equivalent alternative, allowing a company to impose terms on its counterparts that could not be obtained under normal market conditions. The abuse of such a position, through the actual enforcement of those terms, can take place in similar forms as an abuse of dominance, such as discrimination or refusal to supply.

Law stated - 28 July 2022

Preclusion and remedy of anticompetitive practices

What authority does the regulator (or regulators) have to preclude or remedy anticompetitive or manipulative practices?

The BCA or the European Commission may take certain actions if an undertaking has intentionally or negligently breached competition rules.

If an undertaking has breached article 101 or 102 of the TFEU or article IV.1 or IV.2 of the CEL, it may be fined up to 10 per cent of its worldwide group turnover and be ordered to cease the operation of the anticompetitive behaviour. Any agreements caught under these provisions are void and unenforceable. In cartel cases, a company can however receive a reduction in fines or even full immunity from fines when it provides evidence of the cartel and cooperates in full with the authority. In addition, a reduction of a fine for cartels or abuse of dominance is also possible through a settlement with the authority. If an undertaking has breached article IV.2/1 of the CEL (prohibition of an abuse of economic dependence), it may be fined up to 2 per cent of its worldwide group turnover and be ordered to cease or modify its conduct. In addition, the European Commission or the BCA may impose structural or behavioral remedies proportional to the anticompetitive behavior of the undertaking concerned.

Further, the BCA or the European Commission can impose interim measures to suspend restrictive practices in the case of urgency to prevent serious, imminent and irreparable damage to other undertakings or the general economic interest. Such interim measures can be imposed after a complaint or on the own motion of the BCA or the European Commission. While the European Commission rarely makes use of this power, the BCA has a standard practice of interim measure procedures.

The federal and regional regulators may, within their respective jurisdictions, also impose sanctions. Finally, CREG can also request the BCA to open an investigation in the case of breach of certain provisions of the CEL in the electricity sector.

Law stated - 28 July 2022

INTERNATIONAL

Acquisitions by foreign companies

Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

On 1 June 2022, the various Belgian governments reached a cooperation agreement on the introduction of a screening mechanism for foreign investments (FI) in Belgium. The Belgian FI screening mechanism is expected to enter into force on 1 January 2023 (albeit timing may still be impacted by the legislative procedure). This follows the roll-out of FI screening regimes throughout the EU in recent years, that originated with the adoption on 19 March 2019 of the FDI Screening Regulation (EU) No. 2019/452 (which entered into force on 11 October 2020) and the publication of European Commission Guidance to Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets.

The Belgian FI screening mechanism will apply to investments by non-EU investors in various sectors, which includes energy. More specifically, the screening process will apply to (indirect) investments in the electricity sector which relate to acquisitions of (1) 25 per cent or more of the voting rights in a Belgian company of which its activities relate to (a) critical infrastructures, both physically and virtually, for energy or (b) the provision of critical inputs, including energy; and (2) 10 per cent or more of the voting rights of a Belgian company that has realised a turnover of at least €100 million in the preceding financial year, and of which the activities relate to energy. Furthermore, investments that do not meet the thresholds may also be subject to an ex officio investigation.

If a deal falls within the scope of the regime, the investor will need to submit a notification to an Inter-Federal Screening Commission (ISC). The ISC is set up within the Federal Public Service for Economy, Small and medium-sized enterprises, Self-employed and Energy under the authority of the Federal Minister of Economic Affairs. It is composed of nine representatives from the competent Belgian governments, and is administratively chaired by a representative of the federal Ministry of Economic Affairs.

Clearance by the ISC must be obtained before the transaction is implemented (ie, there is a standstill requirement, similar to merger control). If the ISC concludes that a filing is complete, the review can take one or two phases:

- Phase I is an assessment phase of 40 calendar days (suspended or extended in various circumstances) during which competent representatives within the ISC will conduct an initial screening of the investment.
- If Phase I reveals potential risks to national security or Belgian strategic interests, an in-depth screening procedure (Phase II) is opened. This procedure can take up to 46 calendar days and even more in case of remedies or other reasons relating to the complexity of the case.

In addition to the anticipated Federal FI regime, Flanders has also a limited control mechanism, as set out in the Flemish Governance Decree of 7 December 2018 (in force since 1 January 2019). In contrast to the federal mechanism, the Flemish control mechanism involves an ex-post screening that applies solely to investments in Flemish government institutions. There are no specific thresholds for screening to be triggered, and it can also apply to EU investors. Legal acts resulting in FIs that threaten the Flemish region's or community's strategic interests, can be declared null or inapplicable, or be suspended by the Flemish government. Such power could, for example, be used to oppose the privatisation of power assets in Flanders.

Foreign investment into Flemish government institutions active in the electricity sector thus risk falling within the scope of both mechanisms. We expect such investments to be screened under the federal regime in close cooperation with

the Flemish Region (as prescribed in the agreement) to avoid an ex-post review under the Flemish regime. In practice, however, the concurrence would rarely occur.

Law stated - 28 July 2022

Authorisation to construct and operate interconnectors

What authorisations are required to construct and operate interconnectors?

Interconnectors are considered part of the transmission system in Belgium. Consequently, their construction and operation in Belgian territory are subject to the transmission system operator's (TSO) legal monopoly and therefore subject to the same authorisation and permitting requirements as other parts of the transmission system. The construction and operation of transmission (and distribution) systems on and offshore may require certain permits and authorisations under regional and federal law, depending on the nature and the location of the installations. Public utility easements may be granted to the TSO for infrastructures crossing private land and, in certain instances, the TSO may be entitled to expropriate the property of private owners in the public interest.

Incorporated offshore interconnectors must be structured in such a way that the TSO holds at least 50 per cent of the share capital and voting rights of the vehicle developing, maintaining and owning the offshore interconnector. In the case of unincorporated offshore interconnectors, the TSO must at all times remain the owner of the Belgian interconnector assets.

Law stated - 28 July 2022

Interconnector access and cross-border electricity supply

What rules apply to access to interconnectors and to cross-border electricity supply, especially interconnection issues?

The Belgian electricity transmission grid is part of a larger, European interconnected system. Grid users in principle enjoy a right to non-discriminatory grid access, including access to the interconnectors. Several mechanisms control the flows of electricity between countries. Each Balance Responsible Party (BRP) can exchange energy with BRPs in neighbouring countries on a non-discriminatory and non-transactional basis (ie, not involving a choice between transactions that have been entered into), while maintaining the balance between injection and offtake at the respective injection point or points falling under its responsibility.

Several allocation mechanisms are used to allocate the desired volumes of electricity to BRPs on an annual, monthly, daily or intraday basis. Annual and monthly capacity is allocated through explicit auctions. At such auctions, the BRP can set the price for the import or export concerning a specific bidding zone border for a certain volume (in megawatts) of power for each hour of the year or month in question through the acquisition of long-term transmission rights. Price formation on the European power exchanges is also influenced by market and price coupling mechanisms. The European transmission system operators have created shared rules governing the explicit auctions for allocating annual and monthly capacity.

The specific rules and requirements set out above apply to cross-border supplies of electricity to end-users in Belgium.

Law stated - 28 July 2022

TRANSACTIONS BETWEEN AFFILIATES

Restrictions

What restrictions exist on transactions between electricity utilities and their affiliates?

No specific restrictions exist on transactions between electricity utilities and their affiliates. Listed electricity utilities are, however, subject to the provisions of the Belgian Companies and Associations Code, which apply to related-party transactions with a listed company. Such provisions, which do not apply to transactions between the listed company and its subsidiaries, set out a procedure that purports to safeguard the corporate interest of the listed company through a review of the relevant transaction by a committee of independent directors.

Law stated - 28 July 2022

Enforcement and sanctions

Who enforces the restrictions on utilities dealing with affiliates and what are the sanctions for non-compliance?

Not applicable.

Law stated - 28 July 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in electricity regulation in your jurisdiction?

Key trends in Belgium include (1) the approval and ongoing implementation of legislation to enable the granting of new offshore concessions for renewable power production in the North Sea; (2) the 10-year life extension as of November 2026 of the two youngest nuclear reactors; and (3) the implementation of a market-wide capacity remuneration mechanism with yearly auctions to ensure the security of electricity supply beyond 2025, to offset the effects of the (partial) nuclear phase-out. Y-4 auctions for the first delivery period (2026) took place in October 2021 (with a rerun in April 2022) and resulted in an adjusted aggregate capacity awarded of 4,447MW, divided over 40 projects and cleared at an average annual cost of 31,674 €/MW. Whether all these projects will effectively materialise remains subject to numerous uncertainties, notably regarding permitting. The next Y-4 auction is scheduled for October 2022. Y-1 auctions will be held one year prior to each delivery year to fill the gaps.

The promotion and development of a viable use case and appropriate incentives for hydrogen is a topic that is currently high on the agenda, particularly in Flanders, and is largely driven by the industry in a bid to make production processes cleaner and render climate goals more achievable. This is also true for the development of (more efficient) carbon capture usage and storage technologies. A regulatory framework for all these activities has been proposed by the European Commission (the Fit for 55 package) and is currently going through the EU legislative process before it will be transposed into Belgian law.

Other noteworthy events of the past year include the bankruptcy and/or retreat from certain (regional) markets of electricity (and gas) suppliers due to a combination of rising wholesale energy prices, insufficient hedging and locked-in (fixed) supply contracts, as well as various successful financing rounds by system operators to refinance existing and fund new investments to facilitate the energy transition.

Law stated - 28 July 2022

Jurisdictions

Australia	King & Wood Mallesons
Belgium	Linklaters LLP
Ghana	Kimathi & Partners Corporate Attorneys
India	Trilegal
Japan	Nishimura & Asahi
Panama	Anzola Robles & Asociados
Turkey	Boden Law
United Kingdom	Milbank LLP