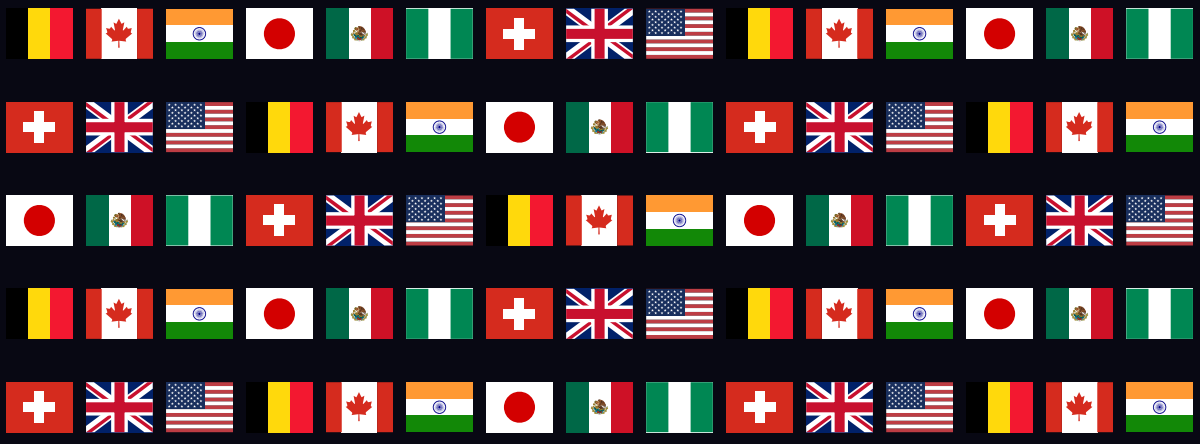
ENERGY DISPUTES

Belgium



LEXOLOGY
Getting The Deal Through

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Energy Disputes

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Quick reference guide enabling side-by-side comparison of local insights, including domestic energy development and policy; rules and industry standards; performance mitigation; nuisance; liability and limitations; enforcement; alternative dispute resolution; privacy and privilege; jurisdiction; regulatory agencies; new entrant access to infrastructure; judicial review; fracking; boundary disputes; energy treaties; investment protection; cybersecurity; trends in taxation, climate change regulation, and other recent trends.

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Belgium

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GENERAL

Development

Describe the areas of energy development in the country.

Historically, the majority of energy in Belgium has been produced by nuclear power plants. This has given rise to a multitude of political challenges. In 2003, the federal government agreed to gradually phase out nuclear power, following which the share of nuclear power in Belgium's energy production mix decreased; in 2022, nuclear energy formed less than half of the total energy production in the country. However, at the beginning of 2023, and after numerous political discussions, the federal government reached an agreement to keep two nuclear power plants open until at least 2035.

Wind power is also an important source of energy production – in 2022, onshore and offshore wind farms represented 12.5 per cent of Belgium's electricity mix. Also in 2022, Elia, the Belgian transmission system operator, announced a project to construct an electricity hub in the North Sea to connect offshore wind farms with the mainland and establish new connections with neighbouring countries. This hub will provide capacity for new offshore wind farms, now the first offshore wind energy zone in the Belgian North Sea is fully operational.

Solar energy has also become increasingly important in recent years, mainly due to the use of domestic solar panels.

Fossil fuels remain the most important sources of energy consumption in Belgium. Due to a lack of natural sources and the closure of coal mines at the end of the 20th century, Belgium is heavily dependent on the import of natural gas, liquid natural gas (LNG) and oil, which are predominantly delivered by pipelines or boat via terminals in the ports of Antwerp-Bruges.

Law stated - 18 January 2023

Role of government

Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

Due to the influence of EU law, the Belgian energy market evolved from a closed national market dominated by monopolistic companies to an open trade market with separate entities that are responsible for the generation, transmission, distribution and supply of energy. However, the Belgian federal and regional governments remain in control of the energy sector through a permit and licensing system for energy production and infrastructure, and supervision by regulatory authorities. At the same time, the regulatory framework has become more complex, taking into consideration the federal evolution of Belgian's government system.

The applicable regulatory framework and related requirements depend on the type of energy source and generation facility.

The construction of new power plants or the reconstruction or modification of existing installations requires a production licence issued by the federal energy minister if the work will lead to an increase in the facility's electricity production of more than 10 per cent or if production capacity will exceed 25MW, on the basis of the Law of 1999 on the organisation of the electricity market (the Electricity Law). Regional regulations also require a building permit and, depending on the nature of the installation, an environmental permit.

Additional permits are required for the construction of offshore wind farms, such as:

- a domain concession, which has a maximum time limit of 30 years (see the Electricity Law and the Royal Decree of 2000 on the conditions to obtain domain concessions);

- a federal marine environmental permit (see the Law of 2022 on the protection of the marine environment (the Marine Environment Law)); and
- a permit for the use of submarine cables for connection to the onshore transmission system (see the Law of 1969 on the exploration and exploitation of non-living resources of the territorial sea and the continental shelf).

Finally, pursuant to the Law of 1975 on the research and exploitation of underground reservoir sites for gas storage and the Law of 1999 on the organisation of the gas market (the Gas Law), a permit is also required for the storage of gas or the construction and exploitation of gas transmission installations.

The production and exploitation of geothermic energy are not regulated on a federal level. Specific requirements for geothermic energy installations, such as the need for an environmental permit or domain concession, follow from regional regulations.

The construction of nuclear power plants is exempt from permit or licensing requirements. Due to the federal government's intention to close all Belgian nuclear power plants, no new nuclear power plants can be constructed in Belgium (see the Law of 2003 on the gradual withdrawal of nuclear energy for the purpose of industrial electricity production (the Nuclear Exit Law). Pursuant to the agreement in principle that was reached between the federal government and nuclear power plant operators at the beginning of 2023, the Belgian state will need to continue investing in nuclear power to keep two existing plants open until at least 2035. Since the nuclear power plants will remain in operation longer than initially planned, several financial obligations have been imposed on operators of these nuclear power plants, including payments of an annual fee and repartition contributions to the Belgian state. Political discussions are currently ongoing to amend the Nuclear Exit Law to provide for the possibility of small modular reactors as part of Belgium's long-term energy strategy.

The supply of renewable energy is subsidised due to the phasing out of nuclear energy and in order to reach the renewable energy targets. Flanders operates a system of green certificates, which was recently changed to serve as a tendering mechanism for the majority of larger solar and wind installations, and combined heat and power certificates alongside quota obligations. In Brussels and Wallonia, renewable energy is promoted using a similar system of green certificates and quota obligations. At the federal level, offshore renewables are also supported by a green certificate scheme.

As regards energy policy, Belgium has to align its policy with the European Union's Energy Union Strategy of 2015 and hence is obliged to adopt a national energy and climate plan to adhere to EU climate and energy targets for 2030. Belgium's federal structure means it lacks a uniform national energy plan, due to the division of competencies on energy policy between the federal and regional levels. The three regions – Flanders, the Brussels-Capital Region and Wallonia – are each competent to determine their own energy policies, which include energy efficiency, renewable energy, regional supply licences, energy distribution and distribution tariffs. The Belgian federal government is competent for federal aspects of energy policy, including international energy policy, the security of energy supply, nuclear policy, product policy, federal energy supply licences, consumer protection in relation to energy pricing, energy transmission, offshore energy production, and tax-related energy aspects. In this context, the Belgian federal government appoints and regulates the Belgian network operators, Elia (the Belgian transmission system operator) and Fluxys (the Belgian operator of the natural gas transmission network).

Due to the fragmentation of energy policy in Belgium, the federal and regional governments have developed a cooperative system to share the burden of meeting Belgian's climate and energy objectives in light of its European and international obligations. At the end of 2022, a new cooperation agreement for 2021–2030 was agreed upon for the distribution of the climate and energy targets and of the federal revenues from the auctioning of emissions rights in 2015–2020. The agreement is currently being finalised.

All the competent governments have published energy and climate plans for the period 2021–2030, which closely align with the European Union's priorities (ie, decarbonisation and transitioning to renewable energy, energy efficiency,

ensuring energy security, ensuring a fully integrated internal energy market, and research, innovation and competitiveness). These plans form together the Belgian National Energy and Climate Plan 2021–2030 (NECP):

- Federal government: Federal Energy- and Climate Plan 2021–2030 of 2019;
- Flanders: Flemish Energy and Climate Plan for 2021–2030 of 2019 (updated in 2021);
- Wallonia: Clean Air Climate Energy Plan of 2019 (updated in 2022); and
- Brussels-Capital Region: Energy Climate Plan of 2019.

The Belgian federal and regional governments will execute a review and update of the NECP in 2023. The European Commission has deemed, on multiple occasions, that the NECP is insufficient to meet EU energy and climate objectives. The Brussels Court of First Instance also stated this in the climate litigation case VZW Klimaatzaak v Kingdom of Belgium & Others (the appeal proceedings are ongoing).

In 2020, the Belgian federal and regional governments agreed on Belgium's long-term strategy for 2050, which focuses on the targets for reducing greenhouse gas emissions by 2050 and is based on the long-term strategies developed by both the federal and regional governments for their respective regions.

Law stated - 18 January 2023

COMMERCIAL/CIVIL LAW – SUBSTANTIVE

Rules and industry standards

Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

In principle, energy contracts are governed by general civil and commercial laws. The guiding principle is that parties are bound by their agreement.

In addition, certain energy contracts are subject to regulatory requirements and supervision of regulatory authorities, including the following:

- electricity sector: connection contracts, access contracts and access responsibility contracts; and
- natural gas sector: connection contracts, contracts relating to access and transmission services, and natural gas distribution contracts.

Operators such as Elia (Belgium's electricity transmission operator) and Fluxys (Belgium's gas and liquid natural gas LNG infrastructure operator), and, where relevant, other companies active in the energy sector are also required to use standard contracts for regulated services. The standard contracts set out the conditions under which the user is able to subscribe to these services and the conditions for the provision of these services by the operator, and are subject to approval by the Commission for Regulation of Electricity and Gas (CREG). This is in line with the gas sector's 2010 code of conduct regarding accessing the natural gas transmission network and the infrastructure for storage of natural gas and LNG facilities, and the electricity sector's 2019 technical regulations regarding operating and accessing the electricity transmission system. Further details are provided in the grid codes for electricity and gas, adopted by the CREG in 2022.

Supply contracts are subject to fewer restrictions, although parties are still required to comply with the general regulatory frameworks applicable to the gas and electricity sectors. Further obligations arise from an agreement concluded between the federal government, suppliers and consumer organisations to protect consumers from unfair market practices or misleading information from suppliers. The agreement sets out measures for marketing and sales

techniques, transparency, pre-contractual information, supply contracts, termination of contracts, invoicing etc. The most recent version of the agreement dates from 2018.

Law stated - 18 January 2023

What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

The general principle under Belgian's recently reformed Civil Code is that the common intentions of the parties, rather than the literal meaning of the text, should be taken into account when interpreting a contract. This means a court must identify what the parties really meant and prioritise this intention over the letter of the contract. However, an interpretation cannot be manifestly incompatible with the text, taking into account the contract's wording and circumstances.

The Belgian Civil Code also provides guidelines for a court to find common intention. These include recourses to usage or, where a clause can have two meanings, it should be interpreted in a way that produces a lawful effect, rather than another way.

If a court cannot determine the common intention of a business-to-business contract, or a clause within one, they must interpret the contract in one of the following ways:

- standard contracts: to the disadvantage of the party drafting the contract;
- limitation of liability clauses: to the disadvantage of the debtor; and
- in all other cases: to the disadvantage of the clause's beneficiary.

Law stated - 18 January 2023

Describe any commonly recognised industry standards for establishing liability.

The common standard for contractual liability is that of negligence arising from failure to exercise the care the party would exercise fulfilling their own affairs — a wrongful act has been committed that a reasonable person placed in the same circumstance would not have, taking the personal and professional circumstances of the person into consideration.

There are specific cases in which a strict liability regime is applied to establish liability, and not a fault-based liability, such as for operators of nuclear power plants or for perturbation affecting the Belgian maritime spaces caused by pollution and any related damages.

Law stated - 18 January 2023

Performance mitigation

Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility, recognised in your jurisdiction?

Force majeure is a recognised concept in Belgian civil law. It is defined as a circumstance that occurs by way of an extraneous cause that makes it impossible for the defaulting party to perform its contractual obligations. During the

period of force majeure, the contract is suspended.

The concept of 'hardship' has only recently been introduced under Belgian civil law, and is only applicable to contracts concluded after 1 January 2023. It applies to situations where, due to an unforeseeable and non-imputable change in circumstances beyond the debtor's control, the performance of the agreement becomes excessively onerous, without becoming impossible. Public contracts are subject to the Belgian rules on the performance of public rules, which also provided for the modification of the contract in case of changes in circumstances (see the 2013 Royal Decree on the general implementing rules for public contracts).

The conditions for force majeure and hardship in civil law are supplementary law. Therefore, parties often deviate from them contractually or clarify which circumstances should fall under these notions. Such amendments are subject to the legal framework of unfair provisions for business-to-business (except for public procurements and related contracts) and business-to-consumer contracts under Book IV of the Belgian Code of Economic Law and the general principle of abuse of right.

Law stated - 18 January 2023

Nuisance

What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

There does not exist a specific regime for nuisance or negligence claims under Belgian law. The general civil law concept of undue interference is applied to environmental nuisance claims. Industrial or residential neighbours can claim damages on the basis that they do not have to tolerate excessive nuisances that breach the equilibrium between neighbouring sites, without needing to provide evidence of a fault.

The administrative approach often taken by parties is to challenge permits through administrative proceedings. The main principle in this regard is that decisions can be challenged by a competent government or a higher administrative authority. Subsequently, and depending on the circumstances, a challenge can be initiated before specific administrative appeal courts to assess the legality of the administrative decision.

In Flanders, the Council for Permit Disputes is competent for requests for annulment or suspension, lodged against a final decision taken by administrative authorities with respect to environmental permits in the region. Afterwards, it is possible to initiate an appeal before the Council of State (the supreme administrative court of Belgium). In the Brussels-Capital Region, the Environmental College is competent to hear appeals against decisions by the Brussels-Capital government on environmental matters. Appeals can be lodged directly before the Council of State to challenge final administrative decisions for which there are no competent administrative authorities. The same principle applies to decisions by the Walloon Region and the federal government or public authorities acting under their authority. However, administrative appeals are not available for permits for nuclear installations or for activities in the Belgian marine areas.

Third parties wishing to file an appeal against an administrative decision must demonstrate an interest, which means that the party must be adversely affected, or fear being adversely affected, by the contested decision. This includes environmental harm.

In environmental matters, a specific right of civil action for the protection of the environment exists on the basis of the Law of 12 January 1993 concerning a right of action in matters of environmental protection . In accordance with this law, a public prosecutor, an administrative authority or a non-profit organisation that complies with specific conditions, can introduce a demand before the president of the Court of First Instance to establish a violation (or potential violation) of environmental law and order this infringement to be brought to an end.

Law stated - 18 January 2023

Liability and limitations

How may parties limit remedies by agreement?

As a general rule under Belgian civil law, parties are entitled to an integral compensation of their damages in case of a contractual default. This is limited to the damages foreseeable at the time of the conclusion of the contract.

As energy contracts are subject to the general civil and commercial legal frameworks, parties enjoy the contractual freedom to determine their rights and obligations under their contract. Therefore, clauses determining the amount of damages in the case of contractual liability, or limiting or exonerating liability, are generally admitted.

Exoneration or liability limitation clauses are subject to specific limitations. Most importantly, parties cannot exonerate themselves for wilful misconduct of their own or by their agents or representatives. Additionally, these clauses cannot undermine the essential obligations under the contract.

Furthermore, clauses limiting legal remedies in the case of infringement should take the regimes on unfair provisions in business-to-business and business-to-consumer contracts in mind. Parties must ensure that such clauses do not result in an imbalance between the rights and obligations of the parties. In particular, exoneration clauses are subject to specific rules to ensure their fairness.

Law stated - 18 January 2023

Is strict liability applicable for damage resulting from any activities in the energy sector?

There does not exist a general strict liability regime for the energy sector, although specific regimes can apply, depending on the nature of an activity.

The Marine Environment Law provides for liability without fault in the case of damages to the marine environment of the Belgian North Sea, defined as any perturbation affecting the maritime spaces caused by pollution and any related damages.

Pursuant to Belgium's international obligations (ie, the Paris Convention of 29 July 1960), operators of nuclear power plants are also subject to a strict liability regime. The Law of 1985 on nuclear civil liability (the Nuclear Liability Law) establishes strict liability for operators of nuclear power plants in cases of nuclear accidents within Belgium's territory. Damages are assessed based on the general principles of Belgian civil law.

Finally, under the influence of the European Union's Environmental Liability Directive (Directive 2004/35/CE), liability regimes for environmental damages have been put in place by Belgium's regional governments, which include both strict and fault-based liability regimes. The strict liability regimes apply when environmental damage is caused by an activity for which an environmental permit is required, such as for certain activities in the energy sector, or when an imminent threat of such damage occurs by reason of any of those activities.

Law stated - 18 January 2023

COMMERCIAL/CIVIL LAW – PROCEDURAL

Enforcement

How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?

Belgium does not recognise the theory of group contracts. In general, connected contracts are assessed based on the general principles of contract law, such as the relativity and autonomy of agreements between parties and the will of the parties. In the case of competing clauses, the Belgian courts will interpret connected contracts to assess whether the parties wished to prioritise one particular agreement. This assessment is based on the existence of explicit contractual clauses, such as a clause concerning the relation of the contract to other related contracts, or of a general framework agreement governing the contractual relations.

If not, the parties' initial agreed arbitration clause, choice of forum or choice of law applicable to the dispute cannot be discarded, unless the parties agree otherwise. The courts will, in principle, be required to apply the competing clauses concurrently by separating the different contractual relationships, especially if different parties are involved.

Law stated - 18 January 2023

Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Under the general principle of contractual freedom, parties are entitled to agree on the conditions or modalities of a dispute resolution clause.

Split clauses (ie, clauses offering different dispute resolution mechanisms for different claims or types of disputes between the parties) are generally admissible. Belgium has no case law equivalent to the case law of the French Supreme Court on asymmetric clauses (clauses where only one party is bound by a dispute resolution clause).

Stepped clauses, which provide that a succession of dispute resolution processes (eg, negotiation or mediation) must take place before proceedings can be commenced, are enforceable in Belgium.

Law stated - 18 January 2023

How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Belgian courts can use experts to make findings or give opinions of technical natures. An expert is appointed by a court, either upon a party's request or on the initiative of the court. The role of the expert is governed by the principles of independence and impartiality. The precise facts that an expert observes or records while researching or examining the matter they are appointed to investigate have authentic probative value and can only be contradicted by opening a forgery procedure. However, the expert's opinion, which is based on these findings, has no particular probative value and will be assessed at the discretion of the court.

Each party is also entitled to appoint their own unilateral expert who will act on its behalf. The findings of a party expert are considered factual evidence without particular probative value.

Law stated - 18 January 2023

What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

An interim measure is defined as a measure:

- that is sought by a party prior to or pending litigation;
- to provisionally regulate a situation; and
- cannot wait until the court has rendered its final judgment on the merits (urgency).

In Belgium, generally, interim measures are requested through separate summary proceedings before the president of the civil courts for urgent cases, or in front of the court in charge of the merits of the case, pending the proceeding.

Belgian courts may grant a broad range of provisional and interim measures to prevent or cease irreparable harm, including provisional payments. The sole condition for this is that the measure must not affect the outcome of the case and can be overturned by a court when deciding the case's merits.

Parties also have the option to initiate summary proceedings before the Council of State in certain administrative cases, which results in the suspension of the administrative act. They may also rely on the specific right of civil action for the protection of the environment to request practices that are harmful to the environment cease.

Law stated - 18 January 2023

What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

Enforcement of EU judgments falls under the Brussels Recast Regulation and does not require exequatur. The non-enforcing party can only oppose automatic enforcement based on limited grounds. Judgments ordering provisional measures issued by a court that is not competent on the merits require exequatur. An exequatur is a unilateral proceeding and enforcement can only be refused on limited grounds.

As of 1 September 2023, Belgium (as an EU member state), will become a party to the Hague Convention on the recognition of judgments in civil and commercial matters , applying to Ukrainian decisions.

Belgium is also a signatory to a number of multilateral and bilateral conventions on the recognition and enforcement of foreign judgments, the most notable of which is the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (New Lugano Convention), applying to judgments from Switzerland, Norway and Iceland. Under this framework, exequatur procedures are required.

Other non-EU judgments must receive exequatur before being enforced in Belgium, in line with the Belgian Code of Private International Law.

Regarding the enforcement of arbitral awards, Belgium is a party to the New York Convention and does not make difference between domestic and international awards at the enforcement stage. Enforcement requires exequatur, which can only be refused based on the seven grounds of the New York Convention. Belgium is also the party to five bilateral treaties with France, the Netherlands, Germany, Switzerland and Austria, which provide for specific enforcement procedures and conditions. The competing applications of these bilateral treaties and the New York Convention are debated and can create legal uncertainty.

Law stated - 18 January 2023

Alternative dispute resolution

Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

No.

Law stated - 18 January 2023

Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

Energy disputes in Belgium are predominantly litigated in court. This is a result of the strong regulatory framework for the energy sector and the exclusive competence of administrative courts for the validity of permits. The regulatory dispute resolution bodies have also the required specialisation to resolve energy disputes, especially given the technical nature of the disputes.

However, arbitration might be increasingly used in for disputes that fall outside the legal framework, given the obvious advantages of confidentiality, quality and certainty of a quick resolution of the dispute. This would, for example, be the case for energy supply agreements that leave parties with an import level of contractual freedom to determine the applicable law, the rules applicable in the case of a dispute, and the competent forum to settle such dispute.

Law stated - 18 January 2023

Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

Information exchanged between parties in a dispute is not per se confidential or without prejudice.

Confidentiality can be ensured via confidentiality agreements. The intervention of lawyers can also strengthen confidentiality as communications between lawyers and clients are confidential and correspondence between Belgian lawyers (thus between the lawyers of the different parties in settlement discussions) is confidential and cannot be produced in court.

Mediation is regulated by the Belgian Judicial Code and has been split into non-judicial, judicial and voluntary mediation. Statements made and documents drafted during mediation are confidential. Settlement agreements following mediation are either ratified by the court or enforced as contracts, but are in principle not confidential.

In any event, discovery is very limited under Belgian law. Courts can only, at the request of a party or of its own volition, require a party (or a third party) to disclose documents if there are serious and precise indications that the party owns documents proving a precise fact. In practice, it is rare that courts require parties to produce documents, and this will be limited to very specific documents.

Law stated - 18 January 2023

Privacy and privilege

Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

Under Belgian procedural law, there is no formal discovery or e-discovery phase. Parties carry the burden of proof and are required to provide the evidence upon which they rely to the courts and the other parties. To obtain a court order to disclose documents from the opposing party or third parties, a very high threshold must be reached, namely there must be serious and precise indications that the party owns documents proving a precise fact.

Parties can only push back against such a court order if a justifiable ground for non-disclosure exists. Generally, professions that are bound by obligations to respect professional secrecy cannot disclose information which they have acquired in the context of their profession without being subject to criminal and disciplinary sanctions. Data privacy, data protection considerations and trade secrets cannot be used as justification for withholding disclosure, as

disclosure required by law or a court order is one of the explicit exceptions grounds under the General Data Protection Regulation (GDPR) and the Law of 2018 on the protection of trade secrets . However, they can serve as grounds for partial disclosure.

Law stated - 18 January 2023

What are the rules in your jurisdiction regarding attorney-client privilege and work product privileges?

Belgian law and the professional rules of conduct for lawyers provide a broad protection to lawyers' communications and documents, based on the principle of legal professional secrecy and the confidentiality of correspondence between lawyers.

Lawyers practising in Belgium are bound by a duty of professional secrecy, which is of public order, meaning that it is of particular importance in the Belgian legal order, cannot be deviated from and must be raised by the judge at his or her own initiative. This duty covers all confidential information related to the representation of a client, whatever its source, medium and persons concerned. In complying with this duty, lawyers have the right and the duty to refuse orders for the disclosure and seizure of confidential documents and to refuse to testify.

Exceptions are narrowly interpreted. Even clients cannot produce such documents, unless and to the extent disclosure is necessary for their defence in court.

Additionally, lawyers' professional rules of conduct protect communications between lawyers with a specific set of confidentiality rules that apply even if the communications are not covered by professional legal secrecy. In principle, all communication (including e-mails) between Belgian lawyers is confidential, unless they fall under one of the specific exceptions provided by the professional rules of conduct (see the Lawyer's Code of Ethics of the French - and Dutch-speaking bars). Any use of confidential communications between lawyers is subject to the approval of the president of the bar.

Law stated - 18 January 2023

Jurisdiction

Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

In administrative cases that are connected to the energy regulatory framework, an administrative act should first be challenged with the higher administrative authority based on the general principle of administrative control. Only once the internal administrative recourses have been exhausted can a party challenge the act before the administrative courts.

This is not the case for civil liability cases, which can be brought directly before the courts.

Law stated - 18 January 2023

REGULATORY

Relevant agencies

Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

In accordance with European Union law, Belgium established independent regulatory authorities for the energy sector at both the federal and regional levels.

The Commission for Regulation of Electricity and Gas (CREG) is the federal regulator, consisting of a committee of independent directors, a general council and a dispute settlement body, established by the Law of 1999 on the organisation of the electricity market (the Electricity Law) and the Law of 1999 on the organisation of the gas market (the Gas Law). CREG is competent for matters regarding:

- the production, transport and transmission of electricity and gas;
- supervising transparency and competition of the energy markets;
- the development of electricity and natural gas networks and infrastructure;
- transmission tariffs;
- overseeing consumer interests; and
- the general well-functioning of the markets.

At the regional level, the competent regulators are:

- Flanders: the Flemish Regulation Entity for the Electricity and Gas market (VREG);
- Wallonia: Walloon Commission for Energy (CWaPE); and
- Brussels-Capital Region: the Brussels Energy Regulator (BRUGEL).

The regional regulators also consist of boards of directors and dispute settlement bodies and are competent for matters regarding the organisation, operation, control and promotion of transparency of the electricity and gas markets in their regions. They also monitor compliance with relevant regulatory obligations.

Several other regulatory authorities exist that are charged with specific aspects of energy regulation:

- The Federal Agency for Nuclear Control (FANC) is the national nuclear regulator and supervises all nuclear activities;
- The Agency for Radioactive Waste and Enriched Fissile Material (ONDRAF/NIRAS) manages all radioactive waste and surplus fissile materials that are outside the sites of nuclear operators within Belgian territory;
- The Financial Services and Markets Authority (FSMA), which supervises the Belgian financial sector, closely co-operates with CREG to ensure the integrity and transparency of the energy markets; and
- The Petroleum Products Analysis Fund (FAPETRO) monitors the quality of petroleum products placed on the Belgian market.

Law stated - 18 January 2023

Access to infrastructure

Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

Grid connection and access rights for the gas sector are regulated in the code of conduct on the access to the natural gas transmission network and the infrastructure for the storage of natural gas and LNG facilities; and in the technical regulations for operating and accessing the electricity transmission system for the electricity sector. These are also

covered in the grid codes for electricity and gas.

Under these frameworks, all interested parties have the right to access the grid. Network operators can only refuse access to new entrants if no sufficient capacity is available or if the access would prevent its proper performance of a public service obligation, and must ensure that any exclusion is done on a non-discriminatory basis. Any refusal should be communicated to CREG. Access to the infrastructure is based on standard processes that set out the rules for processing access requests and allocation. Compliance with the technical requirements and entering into standard regulated access contracts are required to obtain access.

Law stated - 18 January 2023

Judicial review

What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

The federal and regional regulators, and in particular the dispute settlement bodies established within these institutions (if applicable), are the main authorities competent for the legal review of administrative decisions in energy matters. However, not all of these dispute settlement bodies are fully operational.

- The Chamber of Disputes established within the CREG by the Gas and Electricity Laws is not operational, due to a lack of implementing regulation.
- The Disputes Service within BRUGEL is operational and is competent for the resolution of complaints in the electricity and gas market that fall under regional competencies.
- The CWaPE contains two dispute settlement bodies – the Regional Conciliation Service for Energy and a Chamber of Disputes.
- Flanders' regional government abolished the dispute resolution bodies within VREG in 2004.

The Markets Court with the Brussels Court of Appeal is competent to hear appeals related to certain energy disputes, such as decisions of CREG and tariff decisions by VREG, CWaPE and BRUGEL. Otherwise, an annulment of a regulator's decision can be sought before the Council of State (the highest administrative court in Belgium).

Furthermore, the Belgian Competition Authority (BCA) is competent to hear appeals against decisions of CREG on approval, application for review, refusal to approve a decision of a system operator regarding access to the transmission or distribution grids, and the allocation method or methods for allocating the available capacity on interconnectors for electricity exchanges with foreign transmission networks.

The Federal Ombudsman is able to perform non-judicial reviews within the energy sector. In particular, it is competent for complaints regarding the functioning of the electricity and gas markets and contractual disputes between end customers and electricity and gas companies. If a dispute relates to a regional competence, the case must be transferred to the relevant regional body.

Law stated - 18 January 2023

Fracking

What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

There is no specific regulation on fracking in Belgium.

Law stated - 18 January 2023

Other regulatory issues

Describe any statutory or regulatory protection for indigenous groups.

There is no specific regulation on indigenous groups in Belgium.

Law stated - 18 January 2023

Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

In 2022, the Belgian federal and regional governments agreed on a cooperation agreement implementing a general screening mechanism that applies to foreign direct investments in Belgium. The legislative process is almost finalised, and the bill is expected to enter into force in July 2023. The screening process applies to foreign investment by a foreign investor established outside the EU that can have an impact in Belgium, which includes investments in the energy sector.

If a non-EU company intends to participate in Elia (the Belgian transmission system operator) and Fluxys (the Belgian operator of the natural gas transmission network), the operator must notify CREG of the transaction, which will, in turn, notify the European Commission. The certification procedure is set out in the Electricity and Gas Laws and focuses on assessing whether the transaction would impact energy supply in Belgium and the European Union.

Otherwise, the technical regulations and codes of conduct for the electricity and gas sector equally apply to foreign companies that intend to obtain access or connect to the Belgium's transmission network. Operators are required to assess such applications on a non-discriminatory manner.

Law stated - 18 January 2023

What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

The complex regulatory framework for the energy sector gives rise to several liability risks. As a general rule, non-compliance with a regulatory regime leads to civil liability, administrative sanctions imposed by the relevant regulatory authorities or enforcement agencies, or criminal liability. Pursuant to the double jeopardy principle, administrative and criminal sanctions cannot be combined.

Specifically, if companies do not comply with their obligations under the Electricity and Gas Laws, the following sanctions can be imposed on both corporate bodies and individuals (depending on the nature of the violation and the specific circumstances):

- Gas sector:
  - administrative fines of between €1,240 and 10 per cent of a company's total turnover on the gas market; or
  - imprisonment of between eight days to one month (converted to a criminal fine for corporate bodies), a criminal fine of between €2.48 to €2.478.94 multiplied by the indexation factor to keep pace with inflation, currently set at eight, or both.
- Electricity sector:
  - administrative fines of between €1,240 and 3 per cent of the company's total turnover on the electricity market, which can be combined with a penalty payment (maximum of 1 per cent of the company's annual turnover in

Belgium); or
- imprisonment of up to six months, a maximum criminal fine of €1,495.79 multiplied by the indexation factor of eight or both.

The legal framework on environmental protection (which includes compliance with environmental permits, the protection of soil, water, air and waste, and nature conservation) applies to companies within the energy sector, depending on the nature of their activities. Environmental regulations are strongly influenced by EU law and fall under the competence of regional governments, although some aspects are governed by federal legislation (eg, protection against ionising radiation). All three of Belgium's regions have adopted a wide variety of administrative and criminal sanctions for breaches of obligations under specific environmental regulations.

Liability for the prevention of, or compensation for, environmental damages under regional environmental codes is of particular importance for the energy sector, as it falls under the strict-liability regime. Operators of economic activities are required to take immediate steps to prevent damage if there is an imminent threat and to control damage that occurs so as to limit its effects. On this basis, operators of economic activities are liable for the resulting environmental damages based on the 'polluter pays all' principle.

A specific environmental and health and safety regime exists for the protection of the population and the environment against the hazards of ionising radiation on the basis of the eponymous Law of 15 April 1994 . Under this regime, companies in the nuclear sector must respect specific measures to protect nuclear material during its production, use, storage or transport against unauthorised possession, theft or sabotage. Non-compliance can result in criminal or administrative sanctions for both corporate bodies and individuals (depending on the nature of the violation and the specific circumstances). The use of nuclear materials is also penalised under the Belgian Criminal Code. Under the strict liability regime for nuclear accidents, pursuant to the Nuclear Liability Law, an operator of a nuclear power plant can be held liable for a maximum amount of €1.2 billion for a nuclear accident or €297,472,229.73 for an accident that occurs while transporting nuclear materials, although exceptions exist.

Finally, pollution of Belgium's territorial waters within the North Sea can trigger liability for operators that have activities in the North Sea, under the Marine Environment Law. Infractions can be subject to:

- a prison sentence ranging from eight days to five years, a criminal fine ranging between €100 to €2 million, multiplied by an indexation factor of eight, or both; or
- an administrative fine of the same amount as a criminal fine.

These sanctions can be imposed on both corporate bodies and individuals (depending on the nature of the violation and the specific circumstances).

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OTHER

Sovereign boundary disputes

Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

The Ukraine war is affecting Belgium, as well as the European Union, as it is dependent on imported Russian oil (approximately 30 per cent) and to a lesser extent gas (2.1 per cent) for its energy supply. (These figures are based on the most recent data of July 2022 from the Federal Public Service Economy.)

Law stated - 18 January 2023

Energy treaties

Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

Yes. However, Belgium (as are many other EU member states and even the European Union itself according to recent leaks in the press) is considering withdrawing from the Energy Charter Treaty (ECT), due to dissatisfaction with the current draft of a reformed ECT.

Law stated - 18 January 2023

Investment protection

Describe any available measures for protecting investors in the energy industry in your jurisdiction.

As an EU member state, Belgium falls under the Achmea case law of the European Court of Justice, which denies protection granted by investment treaties, including the ECT, to investments made by EU investors within Belgium. Such investments are governed by EU law.

Non-EU investors can claim protection under the ECT until Belgium officially withdraws from it. But even if Belgium withdraws, the ECT includes a 20-year sunset clause, allowing parties to make claims based on it during that time.

Law stated - 18 January 2023

Cybersecurity

Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

Pursuant to the Law of 2019 establishing a framework for the security of networks and information systems of general interest for public security, an operator of essential infrastructure or service, which includes those in the energy sector, must set up a security plan to comply with their obligation take necessary and proportionate technical and organisational measures to manage risks threatening the security of networks and information systems that the essential services they provide depend on. Such operators must also notify the Centre for Cybersecurity Belgium (CCB) of security incidents relating to their networks and information systems.

Furthermore, the CCB has set up an early warning system to issue standardised warnings about new cyber threats and cyberattacks to operators of essential infrastructure. Alerts about intrusions or other cyber threats are shared on a platform so operators can take appropriate actions.

Law stated - 18 January 2023

UPDATE AND TRENDS

Update and trends

List any major developments (case law, statute or regulation) that are anticipated to affect the energy sector in your jurisdiction in the next 12 months, including any developments related to the taxation of energy projects. What is the anticipated impact of climate change regulations, treaties and public opinion on energy disputes?

From a regulatory perspective, energy transition will remain a focal point in 2023. The current political context pushes the acceleration of energy transition, as the war within the European continent between Russia and Ukraine has highlighted the European Union's dependence on imported Russian gas. In 2022, the EU published a plan to reduce its dependency on Russian fossil fuels, accelerate energy transition, and make European energy systems more resilient. This will result in further changes to Belgium's energy policy, and related federal and regional frameworks, and could be a driver for disputes in the energy sector.

Another focal point will be the risk of climate litigation against state entities but also against private corporate bodies, which will likely accelerate in 2023. This is due to an increasing focus on bringing strategic climate litigation against state and corporates entities across Europe, and targeted legislative proposals that are underway in the EU and Belgium.

Following the adoption of the EU Corporate Sustainability Due Diligence Directive, it can be expected that climate litigation across the whole of the EU will increase. In particular, because the Directive introduces separate legal bases on which claimants may rely on when bringing action against actors in the energy sector. Belgium's draft duty of vigilance bill of 2 April 2021, which intends to impose supply chain due diligence requirements on corporate bodies, will likely be adapted first to comply with the provisions of the Directive before the bill is adopted.

The draft bill reforming the Belgian Criminal Code could establish a criminal offence of 'ecocide', defined as deliberately committing an unlawful act causing serious, widespread and long-term damage to the environment knowing that such acts cause such damage. If adopted, Belgium would be the first European country to recognise ecocide as a standalone crime. However, the bill is at an early stage of the legislative process.

Appeals in the notable climate litigation cases of VZW Klimaatzaak v Kingdom of Belgium and Others and ClientEarth v Belgian National Bank are pending. The outcome of these cases could inform the commencement or conclusions of future energy disputes in Belgian courts, especially on human rights grounds. A shift is already noticeable in administrative cases where the Council for Permit Disputes has, in recent cases, considered the climate impact of the project in its review of the legality of the permit.

Law stated - 18 January 2023

Jurisdictions

Belgium	White & Case
Canada	Norton Rose Fulbright
India	Trilegal
Japan	Atsumi & Sakai
Mexico	White & Case
Nigeria	Perchstone & Graeys
Switzerland	White & Case
United Kingdom	Norton Rose Fulbright
USA	Norton Rose Fulbright