

DSO unbundling – where are we now?

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Introduction

It has been widely reported that Dutch law requires ownership unbundling not only with respect to transmission system operators (TSOs), but also with respect to Dutch distribution system operators (DSOs). To that effect, the Dutch Electricity and Gas Acts prohibit DSOs from being in the same corporate group as companies engaged in the production, trade or supply of electricity or gas in the Netherlands (ie, the group prohibition). The Electricity and Gas Acts also provide that if a DSO is part of a corporate group (also referred to as a 'network' group), that group cannot engage in activities that may adversely affect the operation of the system concerned, which includes activities that are unrelated to and not associated with infrastructure (ie, the prohibition on non-infrastructure-related activities). Further, the ownership of distribution systems and shares in DSOs must be in the hands of the Dutch states, provinces, municipalities or other state bodies.

With these provisions, the Netherlands is an outlier in the European Union. The internal market directives for electricity and gas contain only the strictest unbundling requirements for TSOs. However, even for TSOs, ownership unbundling is not required (in the Netherlands, electricity and gas TSOs are subsidiaries of the Dutch state). The implementation of the Dutch form of ownership regulation for DSOs has paralysed a large part of the Dutch energy sector for many years and has yet to be completed.

DSO unbundling so far

The original deadline for Essent, Nuon, Eneco and Delta – the existing integrated large Dutch energy companies whose shares were held by municipalities and provinces – to comply with the ownership unbundling requirements was January 1 2011 (for further details please see "[Legislation Amendments Force Energy Companies to Unbundle by 2011](#)"). This deadline was easily met by Nuon and Essent, which sold their production and supply businesses to Vattenfall and RWE, respectively. The resulting network groups that remain in the hands of the old municipal and provincial shareholders are Alliander (Nuon) and Enexis (Essent). The Alliander and Enexis groups contain the ring-fenced and strictly regulated DSOs Liander and Enexis, respectively, as well as group companies active in other infrastructure-related activities, such as transformers and high-voltage installations.

Eneco and Delta (as well as Essent, regardless of its split up) argued before the Dutch courts that the group prohibition violated European law, among other things. After losing their case before the The Hague District Court in 2008, the energy companies were victorious in 2010. On June 22 2010 The Hague Appeal Court ruled that the group prohibition, as well as the prohibition on non-infrastructure-related activities, was contrary to the free movement of capital as set out in Article 63 of the Treaty on the Functioning of the European Union. As a result, it was held, just short of the January 1 2011 deadline, that:

- Eneco and Delta could remain integrated companies; and
- the group prohibition and the prohibition on non-infrastructure-related activities could not be enforced by the (predecessor of the) Authority for Consumers and Markets (ACM).

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The Dutch state appealed the 2010 shock judgment before the Supreme Court and was victorious in 2015, following a European Court of Justice judgment delivered after the Supreme Court's request for a preliminary ruling (C-105/12, C-105/12 and C-107/12). In its June 22 2015 judgment, the Supreme Court quashed the 2010 judgement and ruled that the group prohibition and the prohibition on non-infrastructure-related activities was compatible with EU law. In the cases of Eneco and Delta, the Supreme Court held that it could not answer the question posed by Eneco and Delta as to whether the group prohibition violated Article 1 of the First Protocol of the European Convention on Human Rights (protecting ownership rights), as this question had not been addressed by The Hague Appeal Court first. As such, the Supreme Court referred these cases to the Amsterdam Appeal Court for a judgment on this remaining point. In November 11 2016 judgments, the Amsterdam Appeal Court:

- ruled in *Eneco* that the group prohibition did not violate Article 1 of the First Protocol of the European Convention on Human Rights; and
- highlighted in *Delta*, in an interim judgment, a proportionality issue relating to the fate of Delta's nuclear plant following unbundling.

More importantly, after the Supreme Court judgment, the group prohibition and the prohibition on non-infrastructure-related activities 'came alive' again and could again be enforced by the ACM. At the end of 2015, the ACM ordered Eneco and Delta to unbundle before February 1 2017 and July 1 2017, respectively, with the proviso of significant periodic penalty payments for non-compliance.⁽¹⁾ Around the same time, the Senate rejected by the smallest possible majority the so-called 'STROOM' bill – which proposed a comprehensive overhaul of the Electricity and Gas Acts, integrating them into one modernised act – because the responsible minister of economic affairs would not put the unbundling of Eneco and Delta on hold (for further details please see "[Senate rejects Electricity and Gas Act Bill – offshore transmission system delayed](#)"). However, the scuppering of the STROOM bill could not stop this forced unbundling, as the group prohibition is provided for in the existing Electricity and Gas Acts. Before February 1 2017, Eneco implemented the unbundling requirements in a manner whereby its shareholders have shares in two companies, Eneco and network group Stedin. Delta has sold its network group to Stedin and will comply with the unbundling requirements on closing, which is expected before July 1 2017.

Thus, to a large extent, DSO ownership unbundling in the Netherlands is a done deal. A last minute legislative initiative to abolish has proved to be futile and is expected to be withdrawn (for further details please see "[Legislative initiative to abolish unbundling regional network operator](#)").

What next?

The Dutch legislature has decided that DSOs can form part of a larger corporate infrastructure group. However, the scope and extent of the permissible infrastructure-related activities within a network group have come under increased scrutiny and have been the subject of debate. Somewhat ironically in view of the situation in Germany and its anti-unbundling litigation history, RWE/Essent has asked the ACM to take enforcement action against Alliander's non-DSO activities, including its electrical charging infrastructure subsidiary Allego. This request was rejected by ACM.⁽²⁾ Both RWE/Essent and Nuon/Vattenfall have appealed the ACM's decision before the Rotterdam District Court.

In the meantime, the minister of economic affairs has submitted a bill to Parliament, which aims to modernise the Electricity and Gas Acts with a view to the transition towards a low-carbon energy supply (for further details please see "[Energy amendment bill allows for TSO cross-shareholdings - but conditions apply](#)"). The bill also contains a limitative list of the permissible activities of a network group, similar to that in the rejected STROOM bill. Rather remarkably for a regulator that must supervise compliance with parliamentary rules instead of making them itself, the ACM has been a vocal supporter of this bill, including, in particular, the further delineation of the activities of the network groups.⁽³⁾

Nonetheless, the bill – including the role for the network companies in the energy transition – is controversial, and the parliamentary process is on hold following the general elections in March 2017 and the subsequent negotiations for the formation of a new government. Various parties want a more ambitious and comprehensive overhaul of the existing Electricity and Gas Acts than that

foreseen in the bill. At present, the negotiations to form a new coalition government include Democrats 66, which has an ambitious environmental agenda. The fate of this bill, as well as the bill for a climate act and various other initiatives to foster a low-carbon society, hinge on the outcome of this formation process.

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Endnotes

- (1) See press releases "[Energy company Eneco has 14 more months to unbundle](#)" and "[Energy company DELTA has 19 more months to unbundle](#)" of December 8 2015.
- (2) See press release "[Alliander is allowed to continue with its other activities](#)" of May 9 2016.
- (3) See press release "[Give the market the opportunity to function properly on the energy transition](#)" of January 17 2017.

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