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Development on independence of energy regulator

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Introduction

In a recent case before the Administrative High Court for Trade and Industry (CBb), it was successfully argued that the division of competences between the legislator and the energy regulator (ACM) enshrined in EU energy law had been violated. This case forms part of an ongoing discussion about the independence and exclusive powers of the energy regulator following European Court of Justice (ECJ) case law, which has resulted in the disapplication of several important Dutch energy law provisions.

The establishment of independent national regulatory authorities (NRAs) by member states is a fundamental aspect of the regulation of the energy market. The independence is deemed instrumental in ensuring that the decisions made by the NRAs are truly impartial and non-discriminatory, while the possibility of undertakings and economic interests connected with the government, the majority or political power being treated more favourably is excluded. As such, the Electricity and Gas Directives contain detailed provisions on the objectives, duties and powers of regulatory authorities.(1) In Dutch legal practice, however, these provisions lived a quiet life in peaceful obscurity.

This changed after the publication of the ECJ judgment in *Commission v Germany*, which was preceded by *Commission v Belgium* and *Prezident Slovenskej republiky*.(2) In these judgments, the ECJ ruled on the independence and the powers of NRAs. The judgments have led to a renewed interest in the division of competences between the national legislator and the ACM in the Netherlands.

On 29 November 2021, the ACM published a press release dedicated to these judgments. In the press release, the ACM noted that the judgments made clear that the ACM has exclusive competences in setting network tariffs and conditions on network access and transport. The ACM further noted that these judgments would have implications for the tasks it carries out in the field of energy, and that it would further identify the exact consequences.

Since then, the ECJ judgments have resulted in the disapplication of several energy law provisions by the ACM and the CBb, including, most notably:

- the 18-week grid connection term in section 23 of the Electricity Act (*Elektriciteitswet 1998*);
- the volume correction scheme in section 29 of the Electricity Act; and
- a much-debated ministerial decree on the dismantling costs of natural gas connections.

Statutory 18-week connection term for DSOs

Grid connections must be realised within a reasonable period. Pursuant to section 23 of the Electricity Act, this reasonable term expires after 18 weeks for small-capacity connections. The statutory 18-week term was adopted by the national legislator and has, for years, been strictly enforced by the courts. Failing to meet the 18-week deadline has led to fines and liability of regional distribution system operators (DSOs), despite alleged labour shortages, scarcity of materials, and an extremely large workload.

Following the ECJ judgments, the ACM decided to revoke a fine it had imposed on a DSO for failing to realise a grid connection within the statutory 18-week term. According to the ACM, the ECJ judgments made clear that setting conditions, such as the 18-week connection term, is an exclusive competence of the ACM. Because it was instead set by the national legislator, the ACM deemed the legal basis of the fine non-binding.(3)

For a while it seemed that the 18-week term would nonetheless remain in force. In recent judgments, the 18-week term continued to be applied strictly, mostly because an alternative term was lacking. However, in its decision of 10 May 2023,(4) the ACM decided for the first time to disapply the 18-week term in a dispute between a company and a DSO. The company argued that the DSO had violated section 23 of the Electricity Act, because the connection was realised after 45 weeks. The DSO invoked the ECJ judgments and argued that section 23 should be set aside by the ACM because it is non-binding. The ACM sided with the DSO and explicitly held, on the basis of the ECJ judgments, that the legislator was not allowed to enshrine the 18-week term in law. In this case, the term of 45 weeks was considered long, but reasonable by the ACM.

Statutory discount on tariffs for industrial power consumers

For many years, large industrial power consumers in the Netherlands have enjoyed a significant discount on their network tariffs, known as the volume correction scheme. This discount is laid down in section 29 of the Electricity Act. To apply a discount of no more than 90% to the tariff components of the transmission tariff that relate to consumption, in accordance with the statutory formula, this provision requires a system operator when charging the transmission tariff for a customer with an operating time of at least 65% and an annual consumption of at least 50 gigawatt hours.

In its press release of 24 May 2023, the ACM announced that it would no longer consider the statutory discount from 2024. According to the ACM, the national legislator should not have enshrined the discount in law, because the power to set tariffs is exclusively reserved for the ACM. Furthermore, the ACM noted that external research commissioned by the ACM showed that, in practice, companies receiving the discount did not cause lower costs for system operators than other consumers. Therefore, the ACM did not deem the discount justified.

Ministerial instructions to ACM

The transition away from natural gas is subject to much public debate. In this context, a parliamentary majority adopted a resolution that the costs for dismantling natural gas network connections should no longer be exclusively borne by consumers, but that these should be divided 50/50 between consumers and DSOs. A ministerial decree was adopted by the government to enshrine this into law. Later, for practical reasons, the ministerial decree was amended so that the costs would be exclusively borne by the DSOs. The ministerial decree prompted the ACM to adopt a decision to amend the technical network codes accordingly.

In appeal against this decision, the applicant argued that the ACM should have made its own assessment because setting tariffs is an exclusive competence of the ACM. The applicant referred to the ECJ judgments. In its judgment of 20 June 2023,[(5)] the CBb sided with the applicant and held that the ACM had in fact received and followed instructions from the minister without making its own assessment. Pursuant to the Gas Directive, the ACM should have based the decision exclusively on its own assessment. Because the ACM had failed to make its own assessment, the CBb held that the decision to amend the technical network codes was incompatible with the Gas Directive and should, therefore, be annulled.

Comment

The ECJ judgments have played an important role in exposing fundamental flaws in energy law and practice. The ACM has set aside long-standing case law and statutory provisions, and it has become more aware of the exclusive powers conferred on it by EU law. Energy market participants have also become aware of the additional arguments this may provide in legal proceedings. That, in turn, has led to intensified judicial scrutiny – the ACM itself was sent back to the drawing board by the CBb because it had unlawfully followed ministerial instructions.

It seems that the national government duly took note before it introduced the Energy Bill to Parliament last month. The Energy Bill aims to replace the current Gas and Electricity Acts and implement parts of the clean energy package, mainly the Electricity Directive.[(6)] The draft bill was amended after comments from the ACM and the advisory body of the Council of State with respect to the ECJ judgments and the powers reserved for the ACM. The division of competences is turning out to be a point of attention that cannot be ignored, which is good news for the rule of law in the Netherlands.

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Endnotes

(1) See:

- article 59 of Directive 2019/944;
- article 37 of Directive 2009/72; and
- article 41 of Directive 2009/73.

(2) See:

- ECJ 2 September 2021, C-718/18, ECLI:C:2021:662 (*Commission v Germany*);
- ECJ 3 December 2020, C-767/19, ECLI:C:2020:984 (*Commission v Belgium*); and
- ECJ 11 June 2020, C-378/19, ECLI:C:2020:462 (*Prezident Slovenskej republiky*).

(3) ACM 2 December 2021, case No. ACM/21/050865 (published on 15 December 2021 in Dutch).

(4) ACM 10 May 2023, case No. ACM/22/177650 (published on 9 June 2023 in Dutch).

(5) CBb 20 June 2023, ECLI:NL:CBB:2023:297.

(6) Directive 2019/944.