

GETTING THE DEAL THROUGH

# Electricity Regulation

in 31 jurisdictions worldwide

Contributing editor: Earle H O'Donnell

# 2008



Published by  
**GETTING THE DEAL THROUGH**  
in association with:

Araújo e Policastro Advogados  
Arthur Cox  
Berkemeyer, Attorneys and Counselors  
Berwin Leighton Paisner LLP  
bpv | Jádi Németh Attorneys at Law  
Carey y Cía Ltda Abogados  
Cavelier Abogados  
Ćurković Janušić & Banić  
Dewey & LeBoeuf Grzesiak LP  
Dewey & LeBoeuf LLP  
Estudio O'Farrell  
Gorrissen Federspiel Kierkegaard  
Headrick Rizik Alvarez & Fernández  
Heuking Kühn Lüer Wojtek  
Hoet Peláez Castillo & Duque  
Kelemenis & Co  
Kronbergs & Čukste  
Lenz & Staehelin  
López Velarde, Heftye y Soria  
Macchi di Cellere Gangemi  
McMillan Binch Mendelsohn LLP  
Minter Ellison Rudd Watts  
Nestor Nestor Diculescu Kingston Petersen  
ÖztekinBoden  
Peltonen Ruokonen & Itäinen, attorneys-at-law  
Rodrigo, Elías & Medrano Abogados  
Schönherr Rechtsanwälte  
SimmonsCooper Partners  
Stek  
Tark & Co  
Yukov Khrenov and Partners

# Netherlands

Jan Erik Janssen and Mabel Pigmans

Stek

## Policy

### 1 What is the governmental policy and legislative framework for the electricity sector?

The current government policy and legislative framework are largely based on European legislation, in particular the 1996 Electricity Directive (the First Electricity Directive). The implementation of this directive in the Netherlands prompted large-scale restructuring of the electricity sector and unleashed a wave of takeovers of and mergers between Dutch energy companies. The First Electricity Directive has been implemented in the Netherlands through the Electricity Act 1998 (Elektriciteitswet 1998) (the Electricity Act). This contains the basis for Dutch policy with respect to the electricity sector.

The Electricity Act entered into force in several phases between 1998 until 2002. It serves to ensure the three cornerstones of Dutch energy policy – reliability, sustainability and efficiency. It contains rules for the generation, transmission (transportation over the high-voltage grid), distribution (transportation over low-voltage grids) and supply of electricity. Further, it provides for the incorporation of a marketplace for electricity trading.

The generation of electricity was completely liberalised after the entry into force of the Transitional Act for the Electricity Production Sector (Overgangswet Elektriciteitsproductiesector) (the Transitional Act) in 2001.

Non-discriminatory access to the electricity grids is one of the main aims of the government's policy for the electricity sector. To guarantee the independence of the grid management and exclude preferential treatment of affiliate companies, a bill was adopted in November 2006, imposing ownership unbundling of the distribution grids on vertically integrated energy companies (the Split-up Act). The Split-up Act includes, among other things, a group prohibition stating that grid managers can no longer be part of the same group as companies engaged in production, trade or supply of energy. The group prohibition will enter into force on 1 July 2008, after which date vertically integrated energy companies have two years and six months to implement ownership unbundling (ie, by 1 January 2011).

When the Electricity Act entered into force, it provided for the complete opening of the market for the supply of electricity in the Netherlands, which went beyond the minimum requirements set out in the First Electricity Directive. Very large customers, which consume more than 2MW and represent approximately 35 per cent of total demand in the Netherlands, have been free to choose their supplier since the entry into force of the Act in 1998. Medium-sized customers, with consumption in excess of 3.80A and a 30 per cent share of total demand, have been free to do the same since 1 January 2002. Since 1 July 2004, the electric-

ity market has been opened up for all small business users and households, which represent approximately 35 per cent of total demand in the Netherlands. Before this phased liberalisation of the market for the supply of electricity, Dutch customers were bound to the licensed supplier in their region.

Since its entry into force, the Electricity Act has been amended several times. In July 2004, the Act was amended by the Implementation and Intervention Act (Implementatie- en Interventiewet) (the I&I Act). This Act implements the 2003 Electricity Directive (the Second Electricity Directive) and national policy. It provides for more far-reaching measures with respect to the protection of electricity consumers and the independence of the grid management than the original Electricity Act. Among other things, the I&I Act provides:

- for an expansion of the enforcement powers of the Dutch energy regulator – the Dutch Competition Authority (NMa) and its internal chamber, the Office of Energy Regulation (DTe) – particularly by introducing the possibility for the NMa to impose fines for a breach of the Electricity Act;
- for the enlargement of the ability of the minister of economic affairs (the minister) to intervene in cases of operational mismanagement by grid managers;
- that grid managers must have the beneficial ownership (*economisch eigendom*) of the grid. This provision entered into force on 1 January 2008. Grid managers appointed before 1 January 2008 have until 1 July 2008 to comply with this provision, at which date several provisions on independent grid management in the Split-up Act also enter into force;
- for the introduction of incentives to maintain network quality in the calculation of the regulated network tariffs; and
- for the introduction of a prohibition of unfair sales practices in the Electricity Act to protect consumers. The Split-up Act contains even further-reaching measures with respect to the protection of the electricity consumers and the independence of the grid management.

Further rules have been laid down in secondary legislation, like governmental decrees, ministerial decrees and in the codes adopted by the NMa, such as the Tariff Code (containing the network rates structure), various technical codes (the Grid Code, the Measurement Code and the System Code, containing rules for the generation, distribution and supply of electricity), and the Information Code (specifying responsibilities of market parties on exchanging information).

The implementation and enforcement of the Dutch governmental rules in the electricity sector have been entrusted to the minister and to the NMa, including the DTe. At the end of 2006, the NMa published its 'Vision Document on Mergers in the

Energy Sector', in which it lays down its views on market definition and takeovers, including at that time the rumoured merger between Essent and Nuon, the top two (integrated) energy companies in the Dutch market, which merger plans now have been cancelled.

### Organisation of the market

- 2 What is the organisational structure for the generation, transmission, distribution and sale of power?

Under the old regulatory regime before the entry into force of the Electricity Act, there was a distinction between large-scale generation and decentralised generation by self-producers. Large-scale generation was provided by four licensed generators: UNA, EPON, EPZ and EZH (which exploits the sole nuclear plant in the Netherlands at Borssele, and is owned by Essent and DELTA). The four licensed generators worked closely together and pooled their costs through the Dutch Electricity Generation Board (SEP), which was the central planning and dispatching entity and was responsible for the procurement of fuel. The electricity generated by the four licensed generators was supplied at uniform prices to the integrated regional distribution and supply companies.

With the entry into force of the Electricity Act and the Transitional Act, the market for the generation of electricity was fully liberalised and SEP lost its central role in electricity generation and supply in the Netherlands. Two of the four licensed generators have been acquired by foreign companies – Electrabel (which acquired EPON, renamed Electrabel Nederland) and E.ON (which acquired EZH, renamed E.ON Benelux Generation). UNA was acquired by the American company Reliant, but was sold to the Dutch Nuon Group in 2003. Currently, decentralised generation (mainly cogeneration) and imports cover approximately 40 per cent of total demand in the Netherlands. However, various market parties have announced plans to realise additional generation capacity, half of which are scheduled to become operational by 2011. Although it is yet uncertain whether all projects will be realised, the generation capacity increase might lead to an export capacity potential on the Dutch market as of 2011.

The import capacity on the Dutch borders is auctioned by TSO Auction, a wholly owned subsidiary of the Dutch transmission system operator, Tennet TSO (Tennet), in cooperation with the managers of the transmission grids in Belgium (Elia) and Germany (RWE Netz and E.ON Netz). Capacity auctions are held for yearly, monthly and daily import and export capacity. Daily import and export capacity on the interconnections between the Netherlands, Belgium and France is auctioned through a system of day-ahead market coupling: the import and export capacity is auctioned together with the electricity that is to be transported. This system is not used for the daily import and export capacity on the German border, nor for yearly or monthly import and export capacity.

The Electricity Act obliges the owners of transmission and distribution grids to appoint a grid manager for the management and operation of their grids. In conformity with the Second Electricity Directive, the Act requires legal unbundling of the grid manager. This system will be in place until 2011, when full ownership unbundling in accordance with the group prohibition in the Split-Up Act will have to be implemented (see question 1). The legal unbundling is accompanied by detailed provisions in the Electricity Act, which seek to ensure the organisational and financial independence of the grid managers and to prevent cross-subsidisation and the dissemination of strategic information. Each grid manager of a distribution grid and the manager

of the transmission grid must have a management board with members who have no links with a producer, supplier or trader of electricity, and a supervisory board of which the majority of members is independent from the aforementioned market players. In addition, the Electricity Act prescribes a two-tier board structure for the manager of the transmission grid, which obliges this grid manager to have a supervisory board with more powers at the expense of the shareholders. Tennet has been appointed as the grid manager of the national high-voltage grid. All the shares in Tennet are held by the Dutch state. The national high-voltage grid consists of the grids which are intended for the transmission of electricity at a voltage of 220kV or more and which are operated accordingly, as well as the interconnectors. The Split-up Act extends the definition of the high-voltage grid and, with that, extends the mandatory management by Tennet to all networks with a voltage of 110kV or higher. It does not require Tennet to obtain the beneficial ownership of these grids. These provisions entered into force on 1 January 2008.

At the time of writing (until ownership unbundling is implemented, see question 1) many of the distribution grids are owned by vertically integrated companies that are also active on the market for the supply of electricity and, in some cases, on the market for the generation of electricity as well (eg, Nuon, Essent and DELTA). These vertically integrated companies have entrusted the grid management to a separate legal entity within their corporate group. In 2006, there were 11 grid managers, one of which (ONS Netbeheer) was acquired by the Dutch energy company ENECO in 2006.

The sale of power in the Netherlands takes place on three markets that emerged after liberalisation of the Dutch electricity sector. These markets are: (i) the over-the-counter market (OTC); (ii) the Amsterdam Power Exchange (APX); and (iii) the imbalance market.

The OTC market covers approximately 90 per cent of Dutch demand. ENDEX provides clearing services for OTC-traded Dutch power futures.

The APX operates a spot market for day-ahead (physical) electricity trading. The APX was established in 1999 as the first electronic trading platform in continental Europe. Since 1999, the volumes traded on the APX have increased substantially and the APX has developed into an important marketplace in the liberalised energy market. The traders on the APX include virtually all the major energy players in Europe. By the end of 2007, the electricity trading part of the APX (APX Power) had 52 members. To become a participant in the APX trading system, companies have to sign a participation agreement and comply with the regulations of the APX. In 2001, the APX was acquired by Tennet, and on 1 January 2006, Nederlandse Gasunie acquired a minority share of 25.5 per cent in the APX.

The imbalance market is operated by Tennet and relates to the system of programme responsibility in the Netherlands, which has been developed to maintain the energy balance in the Netherlands. Tennet is responsible for maintaining this balance. Under the system of programme responsibility, a party that wants to supply electricity in the Netherlands must be acknowledged by Tennet as a 'programme-responsible party' and must enter into a programme responsibility agreement with Tennet. These parties must notify Tennet of their energy transactions one day in advance. When a party is unable to act according to its notified programme and creates imbalance, it will enter into an energy transaction with Tennet on the imbalance market to restore the balance, resulting in corresponding imbalance charges.

By far the largest suppliers in the Netherlands are the former

incumbents Essent, Nuon and ENECO, with estimated market shares of approximately 30 per cent, 25 per cent and 20 per cent. However, since the opening of the market for the supply of electricity, these market parties have lost market share to new entrants, such as E.ON, Electrabel and DONG Energy, and Dutch entrant Oxxio (the former Energiebedrijf.com), and because of increased imports of electricity. In 2005 and 2006, several Dutch supply companies were acquired by foreign and national energy companies. The supply business of NRE Energie was acquired by E.ON Benelux, new entrant Oxxio was acquired by Centrica, Rendo Energielevering and COGAS were acquired by Electrabel, Intergas Levering was acquired by DONG Energy, and ONS Energie was acquired by ENECO.

---

#### Regulation of electricity utilities – power generation

- 3** What governmental or administrative authorisations are required to construct and operate generation facilities?

The Electricity Act imposes no licence requirements on the construction and operation of generation capacity. For the construction of generation facilities, only permits are required under the applicable planning and environmental legislation.

- 4** What are the policies with respect to interconnection of generation to the transmission grid?

The system of regulated third-party access to the transmission grid also applies for generation facilities, which means that in principle, Tennet must connect generation facilities to the transmission grid on request (see question 7). Under this system, the maximum connection tariffs published by the NMa for each grid manager also contain connection fees for generation facilities.

The Grid Code contains several technical obligations for generation facilities with respect to connection to the grid to secure the integrity of the grid. In addition, the Grid Code obliges generators to provide information on their total installed capacity and on the availability of their generation capacity. Generators no longer have to pay part of the costs of the national high-voltage grid.

At the time of writing, legislation is being prepared to implement the 2006 Directive concerning measures to safeguard the security of the electricity supply and infrastructure investment, which has to be implemented in member states by 24 February 2008. The legislative proposal includes, among other things, the introduction of a 'safety net'. Under this system Tennet is obligated to contract additional generation capacity (the safety net) if insufficient investments are made in generation capacity in the Netherlands, to ensure security of the energy supply. This additional capacity will only be used if all available capacity on the Dutch market is exhausted. The proposed safety net is meant to ensure a balance between supply and demand and forms an incentive for companies to invest in generation capacity.

- 5** Does the governmental policy or legislation foster power generation based on alternative energy sources such as renewable energies or combined heat and power?

Until 1 July 2003, tax benefits and subsidies were given to both consumers and producers of electricity from renewable sources. This system did not, however, have the desired effect. A large part of the renewable energy for which the tax benefits and subsidies were received was imported from other EU member states at cheaper tariffs and did not come from (new) Dutch generation

capacity. To stop this 'leakage' to other countries, the system of tax benefits and subsidies was withdrawn from 1 July 2003 and replaced by a new subsidy system that only applies to new capacity for the generation of renewable energy and to combined heat and power (cogeneration) plants in the Netherlands. This new system, called the environmental quality of electricity generation (*Milieu kwaliteit van de Elektriciteitsproductie*, or MEP) and laid down in the Electricity Act, is administered by two subsidiaries of Tennet – CertiQ and EnerQ. EnerQ pays out subsidies on the basis of generation certificates (so-called certificates of origin), granted by CertiQ. The level of subsidy per kWh is set by the government and is laid down in ministerial decrees. Unlike the previous system of tax benefits and subsidies, the MEP subsidy scheme was set up as a 'self-financing' system, which runs through the budget of the manager of the national high-voltage grid and not through the state budget. Until 2007, EnerQ collected the funds it pays out as MEP subsidies from the grid managers, which collected €52 from each connection to the grids. EnerQ administered these funds and was accountable to the minister concerning incoming and outgoing funds flows, inter alia. Because, under this financing system, the outgoing funds flows heavily exceeded the budget, the MEP subsidy for new renewable energy projects was cancelled in August 2006 (projects that had been granted MEP before that date still receive a subsidy for the period in question). As per 1 January 2007, the subsidy scheme in the Electricity Act was amended so as to include a subsidy cap for newly granted subsidies. This cap can be set for the overall budget for subsidy, but also for different categories and subcategories of generation of renewable energy. Furthermore, following this amendment of the Electricity Act, the subsidy system is financed from public funds with retrospective effect as from 1 January 2006, and customers no longer have to pay €52 per year.

At the time of writing, a new system is being prepared by the Dutch government to replace the MEP subsidy with a subsidy called the stimulation of renewable energy production (*stimulerende duurzame energieproductie*, or SDE) for both renewable energy and combined heat and power projects. The draft ministerial decree for the SDE subsidy scheme includes a system whereby a maximum subsidy budget is set annually for different production categories. The Minister annually sets off any increase in the relevant energy price against the subsidy amount. Together with the publication of the subsidy amount, the Minister also announces the method of granting the subsidy. Subsidy can either be granted in chronological order of application (first come, first served) or by way of a tender procedure. The SDE is expected to enter into force early in 2008.

---

#### Regulation of electricity utilities – transmission

- 6** What governmental or administrative authorisations are required to construct and operate transmission networks?

The Electricity Act gives the manager of the transmission grid the exclusive power to construct, repair and extend the national high-voltage grid. An exception exists with respect to the construction of interconnectors. The owner of the transmission grid must appoint a grid manager that must operate the transmission grid and fulfil the obligations under the Electricity Act. The appointment of a grid manager requires the approval of the minister. To ensure the independence of the grid manager, a grid manager must be organised in line with the rules on legal, management and accounting unbundling (see question 2).

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

The Electricity Act provides for a system of regulated third party access to the transmission grid, as well as the distribution grids (see question 12). Under this system, the grid manager is obliged to provide third parties with a connection to the transmission grid on request and to carry out the transmission of electricity against the tariffs and conditions set by the NMa and in line with the regulations laid down in the Electricity Act and the codes of the NMa, all in a non-discriminatory manner. An exception to the obligation to carry out the transmission of electricity exists in case of lack of capacity.

In principle, the obligation to offer transmission services also exists for TSO Auction (a wholly owned subsidiary of Tennet) with respect to transmission of electricity over the interconnectors, in which case, however, additional conditions apply (see question 28).

- 8** Are there any governmental incentives to encourage expansion of the transmission grid?

There are no real governmental incentives that encourage the expansion of the transmission grid. However, if the grid manager makes a significant investment in the expansion of the transmission grid, the Electricity Act includes a provision that enables the grid manager to submit a proposal to the DTe for higher transmission tariffs to cover the costs of the investments. This possibility also exists for the grid managers of the distribution grid.

- 9** Is there any tariff or other regulation regarding the rates and terms for the provision of transmission services?

Under the system of regulated third-party access, the maximum tariffs and the (technical) conditions for the transmission of electricity and the connection to the transmission grid are set by the NMa. The transmission tariff is independent from the location at which the electricity is generated, the connection at which the electricity is put into the grid and the location of the connection at which the electricity is received (a 'postage stamp' tariff).

The (maximum) rates for the transmission of electricity and the connection to the transmission grid of Tennet are set by the NMa on the basis of the 'CPI-x' formula. In this formula, CPI refers to the consumer price index and the 'x' is an efficiency discount. Unlike in case of the managers of the distribution grids, a quality factor is not set for Tennet (see question 13).

- 10** Which entities are responsible for assuring reliability of the transmission grid and what are their authorities and responsibilities?

Under the Electricity Act, Tennet, as the grid manager of the national high-voltage grid, has the overall responsibility for the safe and reliable transmission of electricity in the Netherlands. Furthermore, every manager of a distribution grid is responsible for the reliability of its grid. If a grid manager does not comply with its statutory obligations, the NMa may impose sanctions, including an administrative fine (see question 18). The minister may order the grid manager to take specific measures to assure the reliability of the grid. If a grid manager does not comply with ministerial orders, the minister may appoint a trustee whose orders the grid manager must follow, or even withdraw the appointment of the grid manager and replace it. At the time of writing, new legislation implementing the 2006 Directive concerning measures to safeguard the security of the

electricity supply and infrastructure investment includes further requirements for Tennet to safeguard operational network safety (see also question 4).

### Regulation of electricity utilities – distribution

- 11** What governmental or administrative authorisations are required to construct and operate distribution networks?

Under the Electricity Act, grid managers have, in principle, exclusive power to construct, maintain, renew and operate electricity grids and provide for connections to their grids. There are only few exceptions to this exclusivity, eg, the construction and operation of so-called private networks and the provision of connections with a capacity of more than 10MVA. The owner of a distribution grid must appoint a grid manager, who must operate the distribution grid and fulfil the obligations under the Electricity Act and the codes.

The appointment of a grid manager requires the approval of the minister, who can also grant an exception to the obligation to appoint a grid manager in the case of a so-called private network. In order to obtain such an exception, the owner of the private network must enter into a cooperation agreement with the manager of the local distribution grid. To ensure their independence, grid managers must be organised in line with the rules on legal, management and accounting unbundling. Pursuant to the Split-Up Act, independence of grid managers will further be ensured through ownership unbundling (see question 2).

- 12** Who is eligible to obtain access to the distribution grid and what requirements must be met to obtain access?

Just as in the case of the transmission grid, the system of regulated third-party access applies with respect to access of third parties to the distribution grid and the requirements thereto (see question 7).

- 13** Is there any tariff or other regulation regarding the rates or terms for the provision of distribution services?

Under the system of regulated third-party access as laid down in the Electricity Act, the maximum tariffs and the (technical) conditions for the distribution of electricity and the connection to the distribution grid are set by the NMa. As for the transmission tariff, there is a postage stamp tariff (see question 9). Also pursuant to the Electricity Act, general terms and conditions applied by grid managers for distribution services must be reasonable and non discriminatory.

The (maximum) rates for the distribution of electricity and connection to the distribution grid of the individual grid managers are set by the NMa on the basis of the 'CPI-x+q' formula. In this formula, 'q' relates to the quality of the services offered by the individual grid manager compared to the other grid managers. The quality level of the services of a grid manager is determined on the basis of the number and the duration of transport interruptions.

For each grid manager, the NMa determines the 'x' factor and the 'q' factor for a minimum of three and a maximum of five years. The maximum distribution and connection tariffs of each grid manager are set by the NMa annually and apply for one calendar year. As from 2004, the NMa applies a system of 'yardstick' regulation, whereby a uniform 'x' factor is based on the total factor productivity growth.

---

**Regulation of electricity utilities – sales of power**


---

- 14** What governmental or administrative authorisations are required for the sale of power to customers and which authorities grant such approvals?

Only the supply of electricity to small business customers and households is subject to a light-touch licence. This supply licence is granted by the minister, who may attach conditions to the licence. The main condition attached to the licence amounts to a requirement to supply small business users and households, upon request, in a reliable manner and on reasonable conditions. The scope of the supply licence is nationwide, which means that the obligation to supply electricity in a reliable manner and on reasonable conditions exists with respect to all small business users and households in the Netherlands. A supply licence may be withdrawn when a supplier fails to meet its obligations under the Electricity Act and the supply licence.

- 15** Is there any tariff or other regulation regarding power sales?

Since the opening of the market for the supply of electricity, customers have been free to choose their supplier and to negotiate the prices for the supply of electricity. Only under the light-touch licence regime for the supply of electricity to small business customers and households, may the NMa impose a price cap if a supplier applies an unreasonably high tariff.

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

With respect to the supply of electricity to small business users and households, a light-touch licence regime exists, which requires the licence holder to supply small business users and households, upon request, in a reliable manner and on reasonable conditions (see question 15).

Furthermore, generators and suppliers are obliged to promote the efficient and environmentally responsible production and use of electricity.

---

**Regulatory authorities**


---

- 17** Which governmental or administrative authorities determine regulatory policy with respect to the electricity sector?

In the Netherlands, regulation of the electricity sector has been entrusted to the minister, the NMa and the DTe.

- 18** What is the scope of each regulator's authority?

The minister is charged with the overall implementation of the Electricity Act and the determination of the Dutch energy policy. In this respect, the minister has to publish a policy document, the Energy Report, at least every four years, which is meant to give guidance on decisions to be taken by the Dutch government relating to energy in the coming four years. In particular, the Energy Report sets out the way in which the importance of a reliable, sustainable and efficient energy supply must or may be taken into consideration in the coming four years. The last Energy Report was published in 2005. The Energy Report has to be discussed in parliament. Furthermore, the minister has a number of specific tasks under the Electricity Act. He is, among other things, directly charged with the monitoring of the security of supply in the Netherlands, and with the approval and dismissal of the designation of grid managers, the setting of maximum supply tariffs for small business users and households in case a

supplier applies unreasonably high tariffs, and the granting of an exception to the obligation to appoint a grid manager in case of a so called private network

Under the Electricity Act, the NMa is charged with the supervision of compliance with the Act and secondary legislation and the implementation thereof. The duties attributed to it under the Act include setting the tariff structure and conditions for the transmission and distribution of electricity, setting the yearly (maximum) connection and transport tariffs for each grid manager, and advising the minister on the performance of his duties under the Act. The NMa is also entrusted with the handling of complaints by customers with respect to the way in which a grid manager fulfils his duties under the Electricity Act. The NMa enjoys considerable powers to sanction infringements of the Electricity Act. The NMa has the power to sanction an infringement of the Act by a binding order, an order sanctioned by periodic penalty payments and, since the entry into force of the I&I Act, an administrative fine of up to 10 per cent of the annual turnover in the previous calendar year for certain violations of the Electricity Act or the codes. Apart from sector-specific regulations, the NMa is entrusted with the enforcement of general competition law in the Netherlands, on the basis of the Dutch Competition Act (see question 23). Guidelines on the way the NMa determines and imposes penalties in case of breach of the Competition Act and the energy and transport regulations, are laid down in the Penalty Code 2007 (Boetecode 2007). Such guidelines on breach of the Competition Act were already in place before 2007. However, the NMa was the first European competition authority to publish such guidelines also with respect to energy and transport regulations.

The DTe is a chamber within the NMa, which is managed by a director. The DTe has specifically been established for monitoring compliance with the Electricity Act.

- 19** How is each regulator established and to what extent is it considered to be independent of the regulated business and of elected officials?

Since 1 July 2005, the NMa (including the DTe) has been a non-departmental public body, headed by a board of directors, which means that it is independent of the minister. As of that date, the minister may no longer give the NMa instructions in specific cases. The minister may still issue general guidelines to the NMa.

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

Decisions of the minister and of the NMa or DTe under the Electricity Act are subject to administrative and judicial review. The Electricity Act and the General Administrative Law Act set out the procedure for administrative and judicial review and define the decisions that can be subject to review and the parties that can contest a decision of the minister and the NMa or DTe. In principle, parties that do not agree with a decision under the Electricity Act must lodge a notice of objection against the decision. After that, they may appeal the decision to the highest administrative court in the Netherlands, the Trade and Industry Appeals Tribunal. In the case of a decision that imposes a fine or an order sanctioned by periodic penalty payments, however, parties have to file their appeal against the ruling on their objection with the district court of Rotterdam. Judgments of the district court of Rotterdam may be challenged with the Trade and Industry Appeals Tribunal.

---

**Acquisition and merger control – competition**


---

- 21** Which governmental body or bodies have the authority to approve or disapprove mergers or other changes in control over businesses in the sector or acquisition of utility assets?

Changes in control of suppliers without an electricity grid or grid manager in the same corporate group and generation companies are not restricted under the Electricity Act, as illustrated by the sale of three of the four large-scale generators in the Netherlands (see question 2). Under the Electricity Act, however, ministerial consent is required for all changes relating to the ownership of a grid or changes in the shareholdings of a grid manager. Currently, privatisation of the electricity grids or (shares in) the network manager is not permitted. This means that the minister may only give his consent if the ownership of a grid or the shares in a grid manager will be transferred to the current shareholders in electricity grids in the Netherlands, ie, the Dutch state, provinces or municipalities.

The NMa has the authority to approve or disapprove mergers or other changes in control over businesses in the Netherlands under the Competition Act.

- 22** What criteria and procedures are applied 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 disapproving the transaction?

Notification of mergers, acquisitions and other transfers of control (also called concentrations) must be made to the NMa if: the aggregate worldwide turnover of the undertakings concerned in the previous calendar year exceeds €113.45 million and the individual turnover in the Netherlands of each of at least two of the undertakings concerned was at least €30 million in the previous calendar year.

Filing is mandatory. Filing can take place as soon as a concrete intention to undertake a concentration as described above exists. A signed agreement is not required. The Competition Act provides for a two-phase filing procedure for mergers that fall under the scope of the Competition Act. After filing, the NMa has to decide within four weeks whether a licence authorising the transaction is required (the first phase). If so, the parties must submit an application for a licence. The NMa must decide on this application within 13 weeks. The four-week and the 13-week periods will be suspended from the day on which the NMa officially requests further information from the notifying parties until the day on which such information has been received by the NMa.

In October 2007, the Competition Act was amended so as to include in Dutch legislation the ‘significant impediment to effective competition’ test in the new EC Merger Regulation. Pursuant to the amendment, the NMa will not give its approval if the concentration “could significantly impede effective competition on (part of) the Dutch market, especially if the impediment is the result of the creation or strengthening of a dominant position”. Up to October 2007, the NMa had investigated whether a dominant position that appreciably restricts competition on the Dutch market or a part thereof could arise or be strengthened as a result of the intended concentration.

The Competition Act prohibits the implementation of concentrations falling within its scope before they have been notified and a period of four weeks has passed without a decision being taken, or an approval or a licence being granted by the NMa.

A breach of the obligations to notify a concentration and not to close the transaction before approval or a licence of the NMa

has been obtained, may result in a void transaction. Further, the NMa may impose administrative penalties, such as an administrative fine up to a maximum of €450,000 or 10 per cent of the total turnover if the latter amounts to a larger sum. For each party that had the obligation to notify and make an order, possibly backed by a periodic penalty payment, to end the infringement.

If the NMa voices competition concerns regarding a concentration, the parties involved may propose remedies to remove the concerns. Pursuant to the 2007 amendments to the Competition Act, such remedies may be proposed in both the four-week and the 13-week period (first and second phases).

- 23** Which governmental or administrative authorities have the power to prevent or prosecute anti-competitive or manipulative practices in the electricity sector?

The NMa is responsible for enforcement of the Dutch Competition Act, which forbids, among other things, undertakings from abusing their dominant position (article 24 of the Competition Act, the Dutch equivalent of article 82 of the EC Treaty) and restrictions of competition within the meaning of article 6 of the Competition Act (the Dutch equivalent of article 81 of the EC Treaty). In cooperation with the NMa, the Consumers Authority (Consumentenautoriteit) is authorised to handle consumer complaints against companies that are in breach of the Dutch Civil Code or relevant legislation protecting consumers. The Consumers Authority is an office under the supervision of the Ministry of Economic Affairs. Please note that the Consumers Authority is not a regulator, only a supervisor.

- 24** What substantive standards are applied to determine whether conduct is anti-competitive or manipulative?

Dutch competition law contains prohibitions in relation to restrictions of competition and abuse of a dominant position. These prohibitions are laid down in articles 6 and 24 respectively of the Competition Act. Article 6 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings that have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof. Article 24 prohibits undertakings with a dominant position on the relevant market from abusing this position.

- 25** What authority does the governmental body have to preclude or remedy anti-competitive or manipulative practices?

Agreements that are in breach of article 6 of the Competition Act are null and void.

In case of a breach of article 6, the NMa may impose administrative penalties, ie, an administrative fine or an order sanctioned by periodic penalty payments. An administrative penalty may not be imposed if the natural person or legal entity in question may not be held responsible for the infringement. The NMa may impose a fine of up to the higher of €450,000 or 10 per cent of the turnover of the undertaking, or, if the infringement is committed by an association of undertakings, to the combined turnover of the undertakings that are members of the association in the financial year preceding the decision. A periodic penalty payment serves to reverse the infringement or to prevent a recurrence of the infringement. Every fine and order sanctioned by periodic penalty payments imposed by the NMa must be in line with the principle of proportionality. Pursuant to amendments

**Update and trends**

It is expected at the time of writing that in July 2008 a new capacity-related tariff for transmission on the distribution grid will be introduced in the small-scale users market (small businesses and households). Rather than on the basis of energy consumed by the user, as currently laid down in the Electricity Act, this distribution tariff is calculated based on the capacity of the user's connection. This calculation method significantly simplifies the administrative process. The new

tariff is part of a larger set of measures, all intended to drastically reduce the administrative burden on the small-scale users' market. Other measures are (i) the introduction of the 'supplier's model' whereby the supplier in one move invoices the consumer for both distribution and supply costs; and (ii) the introduction of the 'smart meter' (which can be read at distance).

to the Competition Act in October 2007, personal sanctions can also be imposed on principals and de facto managers up to a maximum amount of €450,000.

**International**

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

There are no such special requirements or limitations. The only limitation set in the Electricity Act exists in case of changes relating to the ownership of a grid or changes in the shareholdings of a grid manager, but this limitation applies for all parties other than the current shareholders of the grid managers, both Dutch and foreign (see question 21).

**27** What rules apply to cross-border electricity supply, especially interconnection issues?

The transmission capacity on the interconnectors available to market parties is allocated by TSO Auction through an auction process (see question 2). A party that wants to participate in the auctions must be registered at TSO Auction. The methodology for the auction to be carried out by TSO Auction has been set in the Grid Code. Other relevant rules are laid down in the Auction Regulations of TSO Auction. In line with the Grid Code, TSO Auction holds auctions for yearly, monthly and daily import and export capacity. The capacity a company can obtain on the Dutch borders is limited. The cross-border capacity that a programme-responsible party (including its group companies) may have at its disposal is limited to 400MW. The cross-border capacity is awarded by TSO Auction on the basis of 'the lowest accepted bid', 'first come, first served' and 'use it or lose it' principles.

Until 1 September 2005, the Grid Code provided for a priority reservation of cross-border capacity for the benefit of performance of stranded costs import agreements entered into by SEP before the liberalisation of the Dutch electricity market. This priority reservation has been successfully challenged before the Dutch court and has resulted in preliminary questions to the European Court of Justice. In its answers to these questions, the Court held on 7 June 2005 that the priority reservation of import capacity on the Dutch borders was incompatible with the Electricity Directive. In line with these answers, the NMa deleted the priority reservation from the Grid Code (see also question 2).

**Transactions between affiliates**

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

A grid manager is prohibited from giving a company in its corporate group any preferential treatment or granting it other advantages beyond what is customary in normal business practice. The following are in any event regarded as preferential treatment of a group company, or as granting privileges beyond those that are customary in normal business practice: (i) supplying a group company with data relating to customers who have submitted an application for connection to the grid or distribution; (ii) supplying goods or services to a group company for a consideration which is lower than the costs which may reasonably be attributed to such goods or services; or (iii) permitting the use by a group company of the name and logo of the grid manager in such a way that there is a danger of creating public confusion with regard to the origin of goods or services. The grid manager must include a statement with its annual accounts to the effect that the financial relationships between the grid manager and the group companies

**Stek**

**Jan Erik Janssen  
Mabel Pigmans  
Martha Brinkman**

**janerik.janssen@steklaw.com;  
mabel.pigmans@steklaw.com;  
martha.brinkman@steklaw.com**

Herengracht 551  
1017 BW Amsterdam  
Netherlands

Tel: +31 20 530 5200  
Fax: +31 20 530 5299  
www.steklaw.com

comply with the foregoing. Also, there are financing restrictions. The grid manager may not encumber the network or future network revenues with security rights or use these as security for financing purposes, except to the extent that this is done for the benefit of grid management. Under the Split-up Act, this rule will be broadened. As of 1 July 2008 the grid manager may also not accept personal liability for any group company debts (except for three specified exceptions).

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

The enforcement of the Electricity Act, including the prohibition on preferential treatment of affiliates by a grid manager, is entrusted to the NMa. In case of non-compliance with the prohibition of preferential treatment, the NMa may impose an administrative fine of up to the higher of €450,000 or 10 per cent of the undertaking's turnover. In case of non-compliance with the obligation to include a statement with its annual accounts to the effect that the financial relationships between the grid manager and the group companies comply with the foregoing, the NMa has the power to impose an administrative a fine of up to the higher of €450,000 or 1 per cent of the turnover of the undertaking. Furthermore, in each case the NMa may impose an order sanctioned by periodic penalty payments (see question 25).