Netherlands

ELECTRICITY /NATURAL GAS —RECENT DEVELOPMENTS IN CONNECTION WITH TRANSMISSION AND DISTRIBUTION SYSTEM OPERATORS

℔ keywords to be inserted by the indexer

Introduction

The Netherlands is the only EU Member State that has imposed mandatory ownership (functional) unbundling on all of its distribution system operators (DSOs). As of 1 February 2017, all but one of the Netherlands' DSOs are no longer part of a group that is also engaged in energy production, trade or supply-related activities. On a separate note, the Netherlands' Minister of Economic Affairs (MEA) recently sent a Bill to Parliament which would facilitate a cross border exchange of a minority of shares in each of the Netherlands' transmission system operators (TSOs) with foreign TSOs. This article briefly describes the unbundling requirements relating to system operators as set out in the Netherlands' Electricity Act and Gas Act including recent developments, and explains the conditions under which the envisaged cross border exchange of shares may take place.

Ownership unbundling (TSOs and DSOs)

The Netherlands has implemented the unbundling requirements set out in the EU's Third Electricity Directive (2009/72/EC) and its Third Gas Directive (2009/73/EC) aimed at the effective separation of energy production and supply interests from the transmission systems and the TSOs. In this regard, the Netherlands have opted for full ownership unbundling (FOU), i.e. ensuring—in summary—that the same person shall not directly or indirectly exercise control over a production or supply company on the one hand and over a transmission system or TSO on the other, and vice versa. In practice, the FOU of the Netherlands' TSO for electricity, TenneT TSO B.V. (TenneT TSO), has been arranged as follows. The Dutch State, through the Ministry of Finance, is the sole shareholder in TenneT Holding B.V. (TenneT) which, in turn, is the sole shareholder in TenneT TSO. The transmission system is owned by TenneT subsidiaries. The State is not involved in the production or supply of electricity. Arranging the FOU of Gasunie Transport Services B.V. (GTS), the Netherlands' TSO for gas, was slightly more complicated because the Dutch State is also involved in the production and supply of gas. The State, through the Ministry of Finance, is the sole shareholder in N.V. Nederlandse Gasunie (Gasunie) which, in turn, is the sole shareholder in GTS. The transmission system is owned by Gasunie. Although the State, through GasTerra (10% interest) and EBN (100% interest), is also involved in the production and supply of gas, this is permitted under the Third Gas Directive's ownership unbundling rules because these interests are held by a separate government body: the MEA.

In addition to implementing the EU unbundling requirements, but unrelated thereto, the Netherlands went one step further by adopting, in 2006, the "Amendment to the Electricity Act and the Gas Act in connection with further rules concerning Independent Network Management", the so-called Unbundling Act, requiring the full ownership unbundling of vertically integrated energy companies. The core provision of the Unbundling Act is the so-called "group prohibition" which prohibits the TSOs and DSOs for electricity and gas from being a part of the same group of companies (as defined in the Dutch Civil Code) as companies engaged in production, trading and/or supply activities in the Netherlands. Furthermore, network companies (i.e. the system operator and related group companies) are prohibited from holding any shares, directly or indirectly, in an electricity production, trading and/or supply company or related companies in the Netherlands, and vice versa.

The Unbundling Act's group prohibition entered into force on 1 July 2008 and all energy companies in the Netherlands were required to comply with the provision by 1 January 2011. In the face of this, three of the largest energy companies—Essent, Eneco and Delta—initiated legal proceedings against the Dutch State at the beginning of 2008, arguing that the unbundling obligation is in breach of European law as it restricts the free movement of capital and the freedom of establishment without there being any compelling reasons in the public interest justifying such restriction. These proceedings led to a preliminary ruling by the European Court of Justice (joined cases C-105/12, 22 October 2013) and culminated in the Netherlands' Supreme Court judgement of 26 June 2015 which concludes that the group prohibition, assuming that it limits the above-mentioned freedoms, is justified by compelling reasons in the public interest which are suitable for achieving the legislature's envisaged goals (preventing cross-subsidies, consumer protection, safeguarding security of supply and ensuring that system operators do not engage in activities that endanger their public function) and which do not go further than necessary for that purpose.

Despite the Supreme Court's judgment of 26 June 2015, the DSOs opposition against the imposition and enforcement of the group prohibition has not yet ceased. In recent legal proceedings, Eneco and Delta argued that the group prohibition breaches art.1 para.1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which protects their ownership rights. In these appeal proceedings against the judgment rendered by the court of the Hague on 11 March 2009 in favour of the Dutch State, the DSOs raised doubts as to the effectiveness of the group prohibition, claimed that they will be put at a disadvantage in comparison with other (foreign-owned) energy companies, and that they will lose the advantages of an integrated energy company such as a higher credit rating as a result of which they would have to attract financing for their commercial activities against less advantageous conditions.

The Amsterdam Court of Appeal, in its judgments of 1 November 2016, ruled that the above, as such, is insufficient to conclude that the group prohibition and the unbundling that is required as a result thereof, poses a disproportionate burden on the DSOs such that the fair balance between the general interest and their individual (ownership) interests has been disrupted to a relevant extent. In relation to Delta, however, the Court of Appeal has pointed out that Delta, in addition to losing the above-mentioned advantages, may be forced to sell its profitable grid related activities and be left with only the loss-making commercial activities (e.g. the Borssele Nuclear Power Plant). According to the Court of Appeal, this raises the question whether such would impose upon Delta a disproportionate burden which could only be fairly balanced if Delta is to a certain extent compensated for its financial loss. The Court of Appeal has requested Delta and the Dutch State to inform it of their substantive opinions on this issue before taking a decision. The decision is expected later this year.

The net result of the above is that two of the largest energy companies in the Netherlands, Essent and Nuon, unbundled voluntarily in the second half of 2009 resulting in the sale of their production, trading and supply activities to RWE and Vattenfall respectively. Their network activities consisting of DSOs Enexis and Liander and their distribution systems, remain publicly owned. Eneco, one of the other two major energy companies in the Netherlands was required to implement FOU by 1 February 2017 at the latest. Eneco achieved this deadline by unbundling into Eneco Group (production, trade and supply) and Stedin Group (system operator and infrastructure businesses). The only major energy company that remains to be unbundled is Delta, which is required to unbundle by 1 July 2017, subject to a penalty for non-compliance imposed upon it by the regulator.

In this context it is also relevant to note that a member of the Socialist Party (not a party in government) submitted a private member's bill (*initiatiefwetsvoorstel*) on 28 September 2016 which provides that the group prohibition shall not apply to DSOs, such as Eneco and Delta. It remains to be seen whether this legislative proposal will be submitted to Parliament and, if so, whether it will be adopted in time to "accommodate" Delta which, as mentioned, is required to unbundle by, at the latest, 1 July 2017. In this regard, it is relevant to note that, in December 2015, the Stroom legislative proposal—aimed at modernising and integrating the Electricity Act and the Gas Act—was rejected by the Upper House of Parliament by a one vote margin because it "confirmed" the group prohibition.

Cross border exchange of shares (TSOs)

The MEA envisages the possibility that up to 25% of the shares in TenneT TSO and GTS can be held directly or indirectly by a foreign TSO. The MEA has set out provisions to this effect in the proposed Energy Transition Continuation Act (Wetsvoorstel voortgang energietransitie) which was sent to Parliament on 8 December 2016.

The legislative proposal provides that a foreign body charged, on the basis of national statutory rules, with the operation of a transmission system, i.e. a foreign TSO, or its direct or indirect shareholder, may directly or indirectly hold shares in TenneT TSO or GTS, provided that: (i) at least 75% of the shares in, and the predominant control over, the Dutch TSO remain held, directly or indirectly, by one or more Dutch public bodies; (ii) the cooperation between the Dutch TSO and the foreign TSO is advanced; (iii) there is an exchange of shares that benefits the reliability, affordability or sustainability of the Dutch transmission system; and (iv) the shares in the Dutch TSO (or the group of companies—i.e. the economic entity as defined in art.2:24 of the Dutch Civil Code—to which it belongs) are held by a foreign TSO which operates a grid that is connected to the Dutch transmission system, either directly or through an interconnector (e.g. a German or Belgian TSO). Any concrete intention to exchange shares requires the consent of both Houses of Parliament.

By way of background information it is relevant to note the following. TenneT and Gasunie, the sole shareholders in TenneT TSO and GTS respectively, are both 100% state-owned. At present the Netherlands' Electricity Act provides that all shares in TenneT TSO must be held (directly or indirectly) by a public body (i.e. the State of the Netherlands, provinces, municipalities or other public bodies). The Netherlands' Gas Act does not contain a corresponding provision in relation to GTS, but from a political and policy-related perspective the same basic premise applies.

Although TenneT and Gasunie already have the possibility of entering into cooperative arrangements with foreign TSOs, the above entails that such arrangements may not involve the sale of shares in TenneT TSO or GTS. Current legislation does not prohibit TenneT and GTS from participating in or acquiring other TSOs, provided that such participations are in the public interest and provided that the financial consequences and potential risks are considered acceptable.

TenneT (2015)	
www.tennet.eu	
Total asset value	€15,424 million
Turnover	€3,300 million
Shareholder(s)	Dutch State (100%).

Gasunie (2015)	
www.gasunie.nl	
Total asset value	€10,361 million
Turnover	€1,631 million
Shareholder(s)	Dutch State (100%).

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