

## THE NETHERLANDS

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## A. Introduction

This chapter contains a brief introduction to the Dutch energy regulation landscape. It also describes some current issues and upcoming changes. **24.01**

### (1) A brief glance at the regulatory landscape

Most energy regulation in the Netherlands is laid down in the Electricity Act 1998 (EA) and the Gas Act (GA). The appointed national transmission network operator (TSO) for **24.02**

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electricity is TenneT TSO BV (TenneT). Gasunie Transport Services BV (GTS) is the national transmission network operator of the gas network. The supervisors on the Dutch energy market are the Netherlands Authority for Consumers & Markets (ACM) and the Minister of Economic Affairs (MEA).

## (2) Implementation of the Third Energy Package

**24.03** In the Netherlands, the Third Energy Package Directives (the E-Directive<sup>5</sup> and the Gas Directive)<sup>6</sup> and Regulations (the E-Regulation<sup>7</sup> and the Gas Regulation)<sup>8</sup> were implemented by an Act of 12 July 2012 upon amendment of the EA and GA. This Act implemented regulation on control of interconnectors, control of gas supplies, European and regional cooperation, unbundling, and stronger protection of consumers. The Act also introduced a level-playing-field clause and the possibility to ask for an exemption for closed distribution systems. Further, the Act assigned the ACM as national regulatory authority (NRA) and increased its tasks.

## (3) Third-party access

**24.04** A regime of unadulterated regulated third-party access to electricity and gas networks applies. The regulated third-party access conditions are adopted by the ACM at the proposal of the joint network operators, which must consult market representative organizations. The ACM has been authorized to grant an exemption from the regulated conditions. The regime differs for liquefied natural gas (LNG) companies: the rules which the conditions must respect are adopted in a ministerial decree. Conditions of the individual LNG companies must be approved by the ACM, which will review these conditions against the ministerial decree. Here, the GA does not provide for the mandatory involvement of market parties.

## (4) Unbundling

**24.05** Ownership and operation of the electricity and gas transportation networks should have been unbundled from supply and production activities as of 1 January 2007. The EA and the GA also prohibit a production, supply, or trading company from being appointed as a network operator. In a case regarding the permissibility of the unbundling requirements the Dutch Supreme Court ruled that—in short—the Dutch implementation of unbundling requirements is not in conflict with the free movement of capital.<sup>9</sup> However, in two cases the energy companies also claimed that these requirements violated their right on protection of property (Article 1 of the First Protocol to the European Convention on Human Rights). These cases are still pending.

## (5) The Gas Building

**24.06** A typical Dutch phenomenon is the '*Gasgebouw*' (Gas Building). The Gas Building is a metaphor for a complex structure of public law regulations and private law agreements, which was developed in the years following the discovery of the major Groningen gas field in 1959 (the

<sup>5</sup> Directive 2009/72/EG.

<sup>6</sup> Directive 2009/73/EG.

<sup>7</sup> Regulation (EC) No 714/2009.

<sup>8</sup> Regulation (EC) No 715/2009.

<sup>9</sup> HR 26 juni 2015, ECLI:NL:HR:2015:1727 (Staat/Essent), ECLI:NL:HR:2015:1728 (Staat/Eneco) en ECLI:NL:HR:2015:1729 (Staat/Delta).

Groningen Field). The Gas Building, which is still intact, covers almost the entire upstream-to-downstream chain of exploration and production, supply, and distribution.

In the Gas Building, the Nederlandse Aardolie Maatschappij BV (NAM) obtained an exclusive concession for the exploitation of the Groningen Field. NAM is a joint venture company owned equally by ExxonMobil and Shell. The sale of gas from the Groningen Field is exclusively assigned to GasTerra BV (GasTerra). GasTerra is jointly owned by the Dutch state (50 per cent direct and indirect shareholding) and ExxonMobil and Shell (each holding 25 per cent of the issued share capital). **24.07**

(a) LNG

There is currently one LNG terminal active in the Netherlands (Gate terminal near Rotterdam). LNG regulation is relatively new and is sometimes different from traditional gas regulation. For example, the tariff regulation for LNG is restricted to the calculation method. Also, the GA requires LNG operators to appoint an operator for their installations. This operator must be independent from other activities relating to the transport or storage of gas. The Gate terminal is largely exempt from the LNG regulation under the GA. A Dutch LNG task force is currently exploring the possibilities to improve LNG (safety) regulation. **24.08**

(6) STROOM

A proposal for revision of the EA and GA was prepared and submitted to Parliament, called 'STROOM'. The proposal was to merge the EA and GA, to bring this new 'Electricity and Gas Act' more in line with EU energy directives and to revise the tariff regulation and requirements for network operators. However, the Senate of the Dutch Parliament rejected the STROOM Bill on 22 December 2015. The timing and content of a new proposal will depend on political developments. The rejected STROOM Bill also provided a legal framework for the transmission system for offshore wind energy and created a basis for compensation of damages caused by the late completion or unavailability of the offshore grid. To avoid a delay in the development of offshore wind farms the Minister quickly submitted a new Bill regarding these subjects. This bill came into force on 1 April 2016.<sup>10</sup> Another legislative Bill for the revision of the EA and GA, aimed at the energy transition, is expected in the course of 2016.<sup>11</sup> **24.09**

## B. Access Issues

### (1) Network operation (transmission and distribution)

(a) Electricity

The national electricity high-voltage grid is defined as the grid of 110 kV and higher and the cross-border interconnections with alternating current (AC).<sup>12</sup> Distribution networks are the networks operated at levels of up to 50 kV. **24.10**

<sup>10</sup> *Wijziging van de Elektriciteitswet 1998 (tijdig realiseren doelstellingen Energieakkoord)* ('Amendment of the Electricity Act 1998 (timely realization objectives Energy Agreement)').

<sup>11</sup> *Wetsvoorstel Voortgang Energietransitie* ('Legislative bill progress energy transition').

<sup>12</sup> EA, Art 10, para 1. Of which 220 and 380 kV are the extra-high-voltage network and 110 and 150 kV are the high-voltage network.

- 24.11** The national transmission network is operated by TenneT, the Dutch TSO for electricity. The TSO has a number of specific tasks in addition to the tasks that Article 16, paragraph 1 EA imposes on the network operators in general. The general tasks are in essence to operate, maintain, and extend the existing network, build new networks, secure safe, reliable, and efficient electricity transport, provide a connection to the network, and foster the safety of the use of electric installations. The TSO has the additional responsibility to carry out the system of programme responsibility,<sup>13</sup> balance the system and maintain system reliability, and take measures in respect of security of supply.<sup>14</sup> Further, the EA gives the MEA the power to charge the electricity TSO with the duty to provide data that is relevant to security of supply issues.<sup>15</sup> Also, the TSO is entrusted with tasks attributed to it in the E-Regulation.
- 24.12** The TSO is also exclusively charged with the operation of existing and to-be-built interconnectors. But, contrary to the general principle applying to domestic networks,<sup>16</sup> it has not been given an exclusive right to build new interconnector capacity. Also, the TSO is appointed as the issuing body for the guarantees of origin, as meant in the renewable energy directive.<sup>17</sup> Further, the EA contains a provision obliging the MEA to appoint a legal entity or legal entities charged with establishing and maintaining an electricity exchange, subject to regulatory supervision.<sup>18</sup> The APX has been appointed as that entity for the electricity market. See also paragraph 24.42. In the (near) future, the TSO will also be responsible for the construction and operation of the offshore grid and will have ownership of this offshore grid.<sup>19</sup>
- 24.13** The lower-voltage networks are operated by the various regional distribution network companies, or distribution system operators (DSOs). The generality of their tasks has been described above. They have an additional task of assessing the suitability of an electricity production installation to produce renewable electricity and to measure the renewable electricity output.<sup>20</sup> This provides the DSOs with a key role in the system of renewable energy certification carried out by the TSO. They have a similar key role in providing measurement data to the TSO to enable it to operate the system of programme responsibility, as described in paragraph 24.54 *et seq.*

(b) Gas

- 24.14** The gas network consists of the national high-pressure transmission network, owned, and operated by GTS,<sup>21</sup> and regional middle- and low-pressure networks, operated by the DSOs. The latter networks comprise about three-quarters of the total gas network.

<sup>13</sup> See para 24.54 *et seq.*

<sup>14</sup> EA, Art 16, para 2.

<sup>15</sup> EA, Art 16, para 2, sub f, juncto 4a.

<sup>16</sup> Building or extending networks is in principle the exclusive responsibility of the network operator whose network is concerned. An exception applies in the case of a development of new residential areas with a combined electricity and gas or heat infrastructure. A municipality may choose to assign the construction of the new network to the DSO or to a market party following a public procurement procedure. EA, Arts 16, para 3, and 20, para 3.

<sup>17</sup> Directive 2009/28/EC. EA, Arts 73 *et seq.* The MEA is charged with the issuance of guarantees of origin and delegated this power to TenneT, in its capacity as managing director of Certiq BV.

<sup>18</sup> EA, Art 86e.

<sup>19</sup> *Wijziging van de Elektriciteitswet 1998 (tijdig realiseren doelstellingen Energieakkoord)* ('Amendment of the Electricity Act 1998 (timely realization objectives Energy Agreement)').

<sup>20</sup> EA, Art 16, para 1, *sub h*. This would also apply to the TSO to the extent renewable energy installations would be connected directly to the high-voltage grid.

<sup>21</sup> It has been announced in May 2015 that part of the GTS grid will, in the future, be operated by another Gasunie subsidiary, being Gasunie Grid Services (GGS).

Gas network operators are obliged to operate, maintain, and develop their networks at economically sound and environmentally friendly conditions in a manner that secures the safety, efficiency, and reliability of these networks.<sup>22</sup> The same applies to gas storage and LNG terminal operators in respect of their installations.<sup>23</sup> In addition to the generality of the tasks and responsibilities of the gas network operators, GTS has been charged with tasks that reflect its position in the Gas Building, as briefly described in paragraph 24.06, and the Small Fields Policy.<sup>24</sup> GTS as independent gas TSO has a central role in the functioning of the gas supply system, comparable to that of the electricity TSO. The gas TSO is given the duty to balance the system, maintain system reliability, and to take measures in respect of security of supply and transportation.<sup>25</sup> The GA further assigns tasks to the TSO, in addition to those of the DSOs, in the gas field depletion policy, which can be viewed in the context of security of supply.<sup>26</sup> The GA gives the MEA the power to charge the gas TSO with the duty to provide data that are relevant to security of supply issues.<sup>27</sup> This is similar to what has been provided in respect of the electricity TSO for the electricity market. Given that the natural gas used and transported in the Netherlands includes both high- and low-caloric gas, GTS has the duty to convert high-caloric gas to low-caloric gas or (administratively) *vice versa*.<sup>28</sup> Finally, GTS is entrusted with tasks attributed to it in the Gas Regulation or which may be attributed to it by the MEA pursuant to the Security of Supply of Natural Gas Regulation.<sup>29</sup> 24.15

Similar to what the EA does in respect of an exchange for the electricity market, the GA obliges the MEA to appoint a legal entity or legal entities charged with establishing and maintaining a regulated gas exchange.<sup>30</sup> The MEA has appointed ICE ENDEX as gas exchange for the Dutch gas market. 24.16

## (2) Access rules

### (a) Electricity

(i) **General principles** Electricity network operators must provide non-discriminatory network access (ie, connection and transportation) to anyone.<sup>31</sup> Network capacity shortage is a valid reason for refusing transportation. If the refusal relates to renewable energy, the network operator must notify the ACM and provide information about which measures will be undertaken to avoid future refusals. Capacity shortages have increasingly become an issue, both on the interconnectors and in domestic networks. Part of this can be attributed to new capacity being installed in already congested areas and to the increase in renewable 24.17

<sup>22</sup> GA, Art 10.

<sup>23</sup> GA, Art 10.

<sup>24</sup> GA, Arts 54 and 55. To prevent rapid depletion of the Groningen Field, the Dutch government developed the 'Small Fields Policy'. Stated simply, this policy aims at satisfying gas demand primarily from gas produced from small onshore and offshore fields with the Groningen Field performing a balancing function. An important feature of this policy is that GTS has been given a right of first refusal to buy gas from producers of non-Groningen gas.

<sup>25</sup> GA, Art 10a.

<sup>26</sup> GA, Arts 54a and 54b.

<sup>27</sup> GA, Arts 10a, para 1, sub f juncto 52a.

<sup>28</sup> GA, Art 10a, para 1, sub c, and n and p.

<sup>29</sup> Regulation 994/2010.

<sup>30</sup> GA, Art 66b.

<sup>31</sup> EA, Arts 23 and 24.

energy in the Netherlands and neighbouring countries, especially Germany. Locational disputes have arisen over the last few years, for example, because connections at a certain tension level force the network operator to make (deep) investments in the network that it cannot fully recover through the regulated tariffs or which will necessitate an increase in transportation tariffs for those having a connection to the particular grid.

- 24.18** Article 27, paragraph 2 EA provides that one is entitled to a connection at the tension level applied for, unless technical reasons prevent the network operator from complying with the application. This provision further contains a set of principles regarding network connection. Companies may opt for a public procurement procedure to be connected to the network if the connection capacity requested exceeds 10 MVA.<sup>32</sup> The consent of the network operator is required. However, the network operator may only refuse consent if the reliability of its network can no longer be maintained. Entities that use electricity for public purposes<sup>33</sup> or mining activities are equated by law to such companies when, for technical reasons, they have various connections of which the individual capacity does not exceed 10 MVA.
- 24.19** (ii) **Access conditions** With the first Electricity Directive leaving a choice between regulated and negotiated third-party access systems, the Netherlands opted (in the EA) for regulated third-party access to the electricity networks from the outset. Technical conditions (on transportation, connections to the network, metering, network operation quality, balancing, connections between and repair of networks, programme responsibility, and capacity allocation on interconnectors) are set and, where necessary, modified by the ACM at the joint proposal of the TSO and DSOs or at the initiative of the ACM itself. Market parties are involved at the preparatory stages.<sup>34</sup> The conditions are adopted in codes: the Network Code, System Code, and Metering Code (together the Codes). The proposed conditions must comply with ministerial regulations.<sup>35</sup> Decisions by the ACM to adopt, modify, or reject an application to modify the Codes are subject to administrative appeal proceedings.<sup>36</sup> The Network Code includes a set of service level criteria in respect of customer service and financial compensation in case of a network failure. The provisions regarding financial compensation do not curtail the right to claim full damages in private law. The ACM has been authorized to grant an exemption from the regulated conditions.<sup>37</sup> In addition to the ACM network regulations, the network operators must comply with European network codes adopted pursuant to the Gas Regulation and the Electricity Regulation. In the event of a conflict, the European network codes prevail over the national network codes.
- 24.20** Despite their regulated character, network connection and electricity transport services are provided on the basis of private law contracts. General conditions apply to these contracts. The EA stipulates that these conditions must be reasonable, objective, and non-discriminatory.<sup>38</sup> The EA determines that Articles 236 and 237 of Book 6 of the Dutch Civil Code, blacklisting and 'grey-listing' a number of general conditions in consumer transactions, apply equally

<sup>32</sup> EA, Art 16c.

<sup>33</sup> Such as street lighting, telecommunications, water purification, and transport.

<sup>34</sup> EA, Art 33.

<sup>35</sup> EA, Art 26b.

<sup>36</sup> Dutch General Administrative Law Act, Sch 2, Art 4.

<sup>37</sup> EA, Art 37a.

<sup>38</sup> EA, Art 26a.

to small businesses.<sup>39</sup> The contractual freedom is limited by the network regulation under the EA and the Codes, and may not conflict with this network regulation and the EA and the ministerial regulations.

(b) Gas

(i) **General principles** Gas network operators and LNG companies must provide non-discriminatory network access (ie, connection, transportation, and ancillary services) with anyone so requesting at terms which are reasonable, transparent, and non-discriminatory.<sup>40</sup> A network operator (including the TSO) or an LNG company may refuse to provide transportation and ancillary services or LNG activities, respectively, or may offer these services or activities under conditions that depart from the conditions that have been set in accordance with applicable procedures, in case of a capacity shortage, or when the fulfilment of its statutory tasks would be compromised by providing these services.<sup>41</sup> In addition, GTS can be exempted from the obligation to provide transportation and ancillary services, if fulfilment of these services will or may have severe adverse economic and financial consequences in connection with take-or-pay obligations arising from existing gas purchase agreements.<sup>42</sup> The ACM is authorized to decide on the application for such an exemption. If the ACM grants an exemption, it must notify the European Commission it has granted this exemption. No such exemption has been granted to date. 24.21

Gas storage companies are obliged to negotiate non-discriminatory access and ancillary services when technically and/or economically necessary for providing efficient access to the system for the supply of customers. This obligation does not apply if no capacity is available or capacity cannot reasonably be demanded from the operator. In addition, an exemption from the third-party access requirements may be granted by the ACM<sup>43</sup> for new gas storage installations. 24.22

(ii) **Access conditions** With effect from 1 January 2006, a regime of unadulterated regulated third-party access to the gas networks applies.<sup>44</sup> This is in line with the requirement of Articles 32 and 41 of the Gas Directive. In line with Article 33 of the Gas Directive, a system of negotiated access (without the former guidelines, which have disappeared altogether) continues to apply to gas storage companies when technically and/or economically necessary for providing efficient access to the system for the supply of customers.<sup>45</sup> The regulated third-party access regime for gas networks under the GA is in all material aspects the same as the access regime which applied from the start in the electricity market, described in paragraph 24.19 above. The conditions are adopted by the ACM at the proposal of the joint network operators, which must consult market representative organizations. The proposed conditions must comply with ministerial regulations. As a result, codes generally applicable 24.23

<sup>39</sup> EA, Art 26a, para 5.

<sup>40</sup> GA, Arts 14 and 14a, respectively.

<sup>41</sup> GA, Art 15.

<sup>42</sup> GA, Art 16.

<sup>43</sup> GA, Arts 18g *et seq.*

<sup>44</sup> GA, Arts 12-12i. Access in the gas market—except for the household and the small business segment, where a regime of regulated third-party access applied from the beginning—was initially based on a hybrid access regime of negotiated access against a backdrop of law-based ‘guidelines’ for tariffs and conditions, adopted by (the predecessor of) the ACM.

<sup>45</sup> GA, Arts 18g *et seq.*

to gas network operation apply similarly as do codes in the electricity market. Decisions by the ACM to adopt, modify, or reject an application to modify such regulations are subject to administrative appeal proceedings.<sup>46</sup> The ACM has been authorized to grant an exemption from the regulated conditions.<sup>47</sup> In addition to the ACM network regulations, the network operators must comply with European network codes adopted pursuant to the Gas and the Electricity Regulation. In the event of a conflict, the European network codes prevail over the national network codes.

- 24.24** Regulated third-party access has been introduced for LNG companies as well, but in a different form. Here, rules which the conditions must respect are adopted in a ministerial decree, rather than in ACM regulations.<sup>48</sup> Conditions of the individual LNG companies must be approved by the ACM, which will review these conditions against the ministerial decree.<sup>49</sup> Unlike the situation with respect to the conditions for network access, the GA does not provide for the mandatory involvement of market parties.<sup>50</sup>
- 24.25** Gas transport and LNG services are provided on the basis of private law contracts. General conditions apply to these contracts. The GA stipulates that these conditions must be reasonable, objective, and non-discriminatory.<sup>51</sup> The GA determines that Articles 236 and 237 of Book 6 of the Dutch Civil Code, blacklisting and greylisting a number of general conditions in consumer transactions, apply equally to small businesses.<sup>52</sup> The contractual freedom is limited by the network regulation under the GA and the codes, and may not conflict with this network regulation and the GA and the ministerial regulations.

### (3) Cross-border trade

#### (a) Electricity

- 24.26** Interconnector capacity for imports and exports is auctioned off by Joint Allocation Office (JAO). This central auction office has been commissioned by twenty TSOs across Europe (including TenneT) to conduct the auctions. The TSOs remain exclusively responsible for cross-border transports. Public law rules apply to the auctions. These have been adopted in the Network Code.<sup>53</sup> Private law rules apply to the legal relationship between the TSOs and the bidders. These have been set out in a set of auction rules that was developed by JAO together with the TSOs involved.
- 24.27** Over the last few years, TenneT, together with other European TSOs and power exchanges, has taken steps towards market coupling. This started with trilateral market coupling (the Netherlands, Belgium, and France) in 2006, was extended to Central Western Europe (CWE) market coupling (including Germany and Austria), and was further extended in 2014 and 2015 with north-western and southern Europe countries. In May 2015, Flow Based Market Coupling was achieved in CWE.

<sup>46</sup> Dutch General Administrative Law Act, Sch 2, Art 4.

<sup>47</sup> GA, Art 12h.

<sup>48</sup> Regulations on access to LNG installations.

<sup>49</sup> GA, Art 13.

<sup>50</sup> Such involvement may, however, be organized on the basis of general administrative law rules.

<sup>51</sup> GA, Arts 14, paras 3 and 14a, para 3, respectively.

<sup>52</sup> GA, Arts 14, paras 7 and 14a, para 4, respectively.

<sup>53</sup> Network Code, paras 5.6.5 *et seq.*



In line with the steps towards a pan-European electricity market, the electricity exchanges APX and EPEX Spot announced in April 2015 that they would be integrated.

(b) Gas

GTS—together with thirty-six other TSOs—is a participant in the PRISMA European Capacity Platform. Through this platform, which was launched in April 2013, day-ahead capacity at various European interconnection points will be offered through the platform. This is an important transitional step towards the new allocation rules and standard products applicable from 1 November 2015, as set out in Commission Regulation (EU) No 984/2013, including the Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems (CAM). **24.28**

As of January 2014, GTS and its connected German TSOs offer bundled capacity at all their cross-border interconnection points. The bundled products connect the Dutch virtual transfer point (VTP) Title Transfer Facility (TTF) with the German VTPs of NetConnect Germany (NCG) and Gaspool. **24.29**

As of 2014, all products for high-caloric gas (H-gas) at the Belgian–Dutch border are progressively offered to the market. The minimum available capacity at both sides of the border is bundled on PRISMA. Where and when relevant, GTS auctions the remaining part as unbundled standard products, while Fluxys Belgium continues to offer and allocate its unbundled capacity as requested via its Electronic Booking System. **24.30**

(4) Tariffication

(a) Electricity

The tariff structures for network access are set by the ACM in the Tariff Code, in accordance with the regulations by the MEA,<sup>54</sup> and at the joint proposal of the TSO and the DSOs, after consultation with representative organizations.<sup>55</sup> The tariff structures describe the elements and methods of calculating the connection and transportation tariffs, the tariff for measuring electricity in the household and small business segment, and network access conditions.<sup>56</sup> **24.31**

The setting of tariffs that network operators may charge for their statutory tasks takes place in several steps, taking into account the tariff structures.<sup>57</sup> The first step is a ‘method decision’, to be taken by the ACM after consultation with the joint network operators and market representative organizations. In the method decision, which applies for a period of three to five years,<sup>58</sup> the ACM determines the regulatory framework for the statutory tasks of the network operator.<sup>59</sup> An important part of the method decision is the setting of parameters. The most important ones are the individual efficiency factor of a network operator (the theta),<sup>60</sup> the sector productivity factor **24.32**

<sup>54</sup> EA, Art 26b. See the Regulation on electricity tariff structures and conditions (*Regeling tariefstructuren en voorwaarden elektriciteit*). In this Regulation, the MEA adopted regulations which the tariff structures as proposed by the joint network operators and adopted by the ACM must comply with.

<sup>55</sup> EA, Arts 26b, 27, 31, 33, and 36.

<sup>56</sup> EA, Art 27.

<sup>57</sup> For the TSO, these tasks are the transport task and the system tasks. For the DSOs, these tariffs are for the transport and connection tasks. As of 2015, no separate tariff for the system task is charged.

<sup>58</sup> In practice, the ACM usually opts for periods of three years.

<sup>59</sup> EA, Arts 41–41c.

<sup>60</sup> Also referred to as the static efficiency. The ACM sets the theta (static efficiency) for the (electricity) TSO based on a national supplement to an international cost benchmark. This approach is based on the ACM’s interpretation of Art 14 of the E-Regulation. For DSOs, reference benchmark between the DSOs applies.

(the frontier shift),<sup>61</sup> and the projected weighed cost of capital (the WACC).<sup>62</sup> Changes between different regulation periods in the value of these parameters or in the regulatory methodology used by the ACM to set the parameters are not uncommon and have an impact on the financial position and results of networks operators. When setting these parameters and the methods to set the parameters, the ACM has a great deal of discretion<sup>63</sup> according to case law to date by the Trade and Industry Appeals Tribunal, the court where appeals against method decisions are filed, and that assesses the method decisions only sparingly.

- 24.33** The second step in the setting of tariffs is the 'x-factor decision' by the ACM, which determines the annual efficiency deduction that a network operator must apply to its revenues and (consequently) tariffs.<sup>64</sup> The third step is the 'q-factor decision' by the ACM for the DSOs.<sup>65</sup> The q-factor represents the quality factor. These decisions are, like the method decision, set for a period of three to five years.
- 24.34** The final step, which is taken annually, starts with each individual network operator submitting a proposal for its tariffs to the ACM, based on the tariff structures and the formula and parameters following from the method decision, the x-factor decision, and—for DSOs—the q-factor decision. The ACM will then set the tariffs for each network operator. All these tariffication decisions are subject to administrative appeal proceedings.<sup>66</sup>
- 24.35** Connection tariffs are payable by anyone with a connection to the public network. Tariffs for connections with a capacity starting at 10 MVA and connections that deviate from the standard connection are virtually unregulated; they are based on individually pre-calculated project costs. Not counting a relatively minor component independent of transported volumes,<sup>67</sup> transportation tariffs, based on cost allocation to the various tension levels, are payable by end-users in proportion, broadly stated, to contracted capacity (KW) and transported volumes (KWh). This tariff is to be paid only by customers, not by producers.<sup>68</sup>

*(b) Gas*

- 24.36** As explained in paragraph 24.23, a system of regulated tariffs (including a tariff for measuring gas in the household and small business segment) for network access<sup>69</sup> applies as of 1 January 2006. It mirrors all elements of the network access tariffication regime in the electricity market, set out above in paragraphs 24.31 to 24.35: a framework ministerial decree regarding the content of tariff structures, adoption of tariff structures by the ACM, a

<sup>61</sup> Also referred to as the dynamic efficiency. The frontier shift is used to determine how much more efficient the business operations can become, by determining how the efficient cost level of a network operator could develop during a regulation period (of three to five years).

<sup>62</sup> The WACC is based on many variables, also set by the ACM, including risk-free rate, interest surcharge, market risk premium, equity beta, gearing, taxable base, and inflation. The WACC may vary considerably from regulation period to regulation period.

<sup>63</sup> The same applies to setting the x-factor, q-factor, and tariffs by the ACM (see further in this chapter).

<sup>64</sup> Named after the 'x' in the tariff escalation formula.

<sup>65</sup> The quality term does not apply to the TSO.

<sup>66</sup> Dutch General Administrative Law Act, Sch 2, Art 4.

<sup>67</sup> Related to data collection and measurement.

<sup>68</sup> The producer's tariff was initially set at zero and was abolished as of mid-2015.

<sup>69</sup> GA, Arts 12, 12b-i, and 80-2.

(the frontier shift),<sup>61</sup> and the projected weighed cost of capital (the WACC).<sup>62</sup> Changes between different regulation periods in the value of these parameters or in the regulatory methodology used by the ACM to set the parameters are not uncommon and have an impact on the financial position and results of networks operators. When setting these parameters and the methods to set the parameters, the ACM has a great deal of discretion<sup>63</sup> according to case law to date by the Trade and Industry Appeals Tribunal, the court where appeals against method decisions are filed, and that assesses the method decisions only sparingly.

- 24.33** The second step in the setting of tariffs is the 'x-factor decision' by the ACM, which determines the annual efficiency deduction that a network operator must apply to its revenues and (consequently) tariffs.<sup>64</sup> The third step is the 'q-factor decision' by the ACM for the DSOs.<sup>65</sup> The q-factor represents the quality factor. These decisions are, like the method decision, set for a period of three to five years.
- 24.34** The final step, which is taken annually, starts with each individual network operator submitting a proposal for its tariffs to the ACM, based on the tariff structures and the formula and parameters following from the method decision, the x-factor decision, and—for DSOs—the q-factor decision. The ACM will then set the tariffs for each network operator. All these tariffication decisions are subject to administrative appeal proceedings.<sup>66</sup>
- 24.35** Connection tariffs are payable by anyone with a connection to the public network. Tariffs for connections with a capacity starting at 10 MVA and connections that deviate from the standard connection are virtually unregulated; they are based on individually pre-calculated project costs. Not counting a relatively minor component independent of transported volumes,<sup>67</sup> transportation tariffs, based on cost allocation to the various tension levels, are payable by end-users in proportion, broadly stated, to contracted capacity (KW) and transported volumes (KWh). This tariff is to be paid only by customers, not by producers.<sup>68</sup>

*(b) Gas*

- 24.36** As explained in paragraph 24.23, a system of regulated tariffs (including a tariff for measuring gas in the household and small business segment) for network access<sup>69</sup> applies as of 1 January 2006. It mirrors all elements of the network access tariffication regime in the electricity market, set out above in paragraphs 24.31 to 24.35: a framework ministerial decree regarding the content of tariff structures, adoption of tariff structures by the ACM, a

<sup>61</sup> Also referred to as the dynamic efficiency. The frontier shift is used to determine how much more efficient the business operations can become, by determining how the efficient cost level of a network operator could develop during a regulation period (of three to five years).

<sup>62</sup> The WACC is based on many variables, also set by the ACM, including risk-free rate, interest surcharge, market risk premium, equity beta, gearing, taxable base, and inflation. The WACC may vary considerably from regulation period to regulation period.

<sup>63</sup> The same applies to setting the x-factor, q-factor, and tariffs by the ACM (see further in this chapter).

<sup>64</sup> Named after the 'x' in the tariff escalation formula.

<sup>65</sup> The quality term does not apply to the TSO.

<sup>66</sup> Dutch General Administrative Law Act, Sch 2, Art 4.

<sup>67</sup> Related to data collection and measurement.

<sup>68</sup> The producer's tariff was initially set at zero and was abolished as of mid-2015.

<sup>69</sup> GA, Arts 12, 12b-i, and 80-2.

method decree for determining the efficiency and quality factor, a price escalation formula which includes an efficiency and (for DSOs) quality factor, and finally the submission of individual network tariffs to the ACM for determination. Decisions by the ACM to adopt, modify, or reject an application to modify tariff structures are subject to administrative appeal proceedings.<sup>70</sup> The ACM has been authorized to grant an exemption from the regulated tariff structures.<sup>71</sup>

Gas storage companies remain subject to a regime of regulated negotiated third-party access when technically and/or economically necessary for providing efficient access to the system for the supply of customers.<sup>72</sup> **24.37**

In respect of LNG companies, the tariff regulation is restricted to the method of calculation. Individual LNG companies must submit their calculation methods for approval to the ACM. Rules regarding the calculation methods are laid down in a ministerial decree.<sup>73</sup> Tariffs must conform to the approved calculation method but are not as such subject to approval. **24.38**

#### (5) Market entry

No formal barriers to market entry exist in the field of electricity production. The same is true for wholesale trade and supply and retail of 'renewable' electricity. **24.39**

With regard to gas, as has been set out in paragraph 24.07, gas from the Groningen Gas Field is produced exclusively by NAM and marketed exclusively by GasTerra. The prohibition for others than the local government-owned energy companies to supply non-renewable electricity and gas to household and small business consumers lapsed on 1 July 2004. A licence requirement continues to exist for supply to households and small businesses,<sup>74</sup> but any supply company meeting the requirements regarding organizational, financial, and technical capabilities is eligible for obtaining such a licence. **24.40**

The EA contains a basis for a Royal Decree in which rules may be adopted on making energy, transportation capacity, or generation capacity available to the market.<sup>75</sup> A similar provision, regarding transport, storage, and production capacity in the gas market has been introduced for the GA.<sup>76</sup> The MEA has, however, stressed the ultimate remedy character of these provisions, which he will rely on only if market mechanisms fail. **24.41**

As has been seen in paragraphs 24.12 and 24.16, the EA and GA instruct the MEA to appoint legal entities charged with establishing and maintaining an electricity exchange and a gas exchange, respectively. The APX has been appointed as that entity for the electricity market. The MEA has appointed ICE ENDEX as gas exchange for the Dutch gas market. **24.42**

<sup>70</sup> Dutch General Administrative Law Act, Sch 2, Art 4.

<sup>71</sup> GA, Art 12h.

<sup>72</sup> GA, Arts 18g *et seq.*

<sup>73</sup> GA, Art 13.

<sup>74</sup> This refers, in respect of gas, to the group of customers with a connection with a total maximum capacity of 40 m<sup>3</sup>(n) per hour.

<sup>75</sup> EA, Art 86d.

<sup>76</sup> GA, Art 66a.

## C. Other Regulatory Issues

### (1) Unbundling

#### (a) Electricity

- 24.43** Legal unbundling between network operation and supply and production is required by the EA.<sup>77</sup> Ownership and operation of the electricity and gas transportation networks should have been unbundled as of 1 January 2007. This is implemented by means of a prohibition for network operations to be part of a group which includes entities engaged in the trade, production, or supply of electricity or gas, known as the group prohibition. However, not all electricity companies comply with this prohibition yet (see para 24.47).
- 24.44** The national transmission network is operated by the limited liability company TenneT, which is the Dutch TSO. TenneT has been appointed for that purpose<sup>78</sup> and is owned by the Dutch state. The lower-voltage networks are operated by various limited liability companies, the DSOs. They have been appointed by the local government-owned distribution undertakings.<sup>79</sup> The ACM may in certain cases grant an exemption to appoint a network operator for 'private' networks (closed distribution systems), such as networks that distribute electricity within a production site of a company or the sites of cooperating companies.<sup>80</sup> The ACM may attach conditions to the exemption. In practice a set of standard conditions is attached to the exemption.<sup>81</sup>
- 24.45** The TSO must have ownership of the network it operates.<sup>82</sup> DSOs must have economic ownership of the networks they operate.<sup>83</sup>
- 24.46** To ensure the independent and non-discriminatory behaviour of the legally unbundled network operating companies, the EA prohibits a production, supply, or trading company being appointed as network operator.<sup>84</sup> It further contains provisions<sup>85</sup> aimed at ensuring independence of the board of directors and the majority of the supervisory board of the network operator from being independent from electricity production, supply, or trading companies and provisions prohibiting network operators from engaging (with some exceptions) in competitive activities<sup>86</sup> or to cross-subsidize or otherwise treat group companies

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<sup>77</sup> Also, the Decree implementing the independence requirements of the energy directives (*Besluit uitvoering onafhankelijkheidseisen energierichtlijnen*) contains several requirements for the TSO and interconnector operator.

<sup>78</sup> The MEA will appoint a network operator for the national high-voltage network (EA, Art 10, para 2) and for the interconnection networks (EA, Art 10a, para 1). For the other networks, the owner appoints a network operator (EA, Art 10, para 9).

<sup>79</sup> EA, Art 10, para 9.

<sup>80</sup> EA, Art 15.

<sup>81</sup> The standard conditions can be found on the website <<https://www.acm.nl/nl/download/bijlage/?id=11396>> last accessed March 2016.

<sup>82</sup> EA, Art 10a, para 4.

<sup>83</sup> EA, Art 10a. This is a minimum requirement, which does not intend to prohibit the transfer of the legal ownership to a DSO. A similar requirement does not apply to the TSO. The reasons are that the TSO already has the economic ownership of (most of) the transmission network (with the exception of several parts of the high-voltage network that are subject to cross-border leases) and, more importantly, that it is not aligned in a group with production and/or supply companies.

<sup>84</sup> EA, Art 11, para 1.

<sup>85</sup> EA, Art 11, para 2 for the DSOs, EA, Art 11a for the TSO.

<sup>86</sup> EA, Art 17.

preferentially.<sup>87</sup> Electricity production, supply, and trading companies, shareholders, and group companies of a network operator are not allowed to interfere with the network operators' statutory tasks and duties.<sup>88</sup> The EA obliges network operators that are part of a group to adopt an internal compliance programme to ensure non-discriminatory performance of tasks and use of the powers conferred upon them.<sup>89</sup>

A case regarding the group prohibition (see under para 24.43), as well as a prohibition on other ancillary activities, was taken to court by three large energy companies of which two do not comply with the prohibition.<sup>90</sup> The central question in this case was whether the group prohibition and the prohibition on other ancillary activities are in conflict with the free movement of capital. According to the Court of Justice of the European Union, the prohibitions indeed restrict the right to free movement of capital, but such a restriction may be justified by the underlying public interests, such as consumer protection and security of supply. Whether the prohibitions are appropriate to these objectives was left to be answered by the Dutch Supreme Court.<sup>91</sup> **24.47**

On 26 June 2015, the Dutch Supreme Court ruled that, assuming that the prohibitions restrict free movement of capital and free establishment, these measures are justified for reasons of public interest. They are also appropriate measures for achieving the legislators' objectives and do not go beyond what is necessary in that respect. According to the Supreme Court, this meant that the principles of free movement of capital and freedom of establishment had not been violated.<sup>92</sup> For one energy company this is the end of the road. The other two companies, however, also invoked Article 1 of the First Protocol to the European Convention on Human Rights during their appeal. This issue was not considered by the Court of Appeal because it already held the Unbundling Act contrary to free movement of capital and freedom of establishment. In its judgment, the Supreme Court referred this issue to the Court of Appeal of Amsterdam, which will have to assess the validity of Eneco's and Delta's arguments on protection of property. In the meanwhile, the ACM decided that the two companies must be unbundled before 1 February 2017 (Eneco) and 1 July 2017 (Delta) and imposed this order subject to penalties. **24.48**

(b) Gas

Legal unbundling between regional network operation and supply and production is required by the GA.<sup>93</sup> Ownership and operation of the gas transportation networks should have been unbundled as of 1 January 2007. Similar to electricity, this is implemented through the 'group prohibition'. Not all gas companies comply with this prohibition yet (see para 24.47). **24.49**

<sup>87</sup> EA, Art 17.

<sup>88</sup> EA, Art 16, para 4.

<sup>89</sup> EA, Art 11b.

<sup>90</sup> Delta, Eneco, and Essent.

<sup>91</sup> For more information, see the judgment of the Court of Justice of the EU (C-105/12 – C-107/12) and the conclusion by the Dutch Advocate-General to the Supreme Court (Dutch only: ECLI:NL:PHR:2014:1801, ECLI:NL:PHR:2014:1802, ECLI:NL:PHR:2014:1803).

<sup>92</sup> HR 26 juni 2015, ECLI:NL:HR:2015:1727 (Staat/Essent), ECLI:NL:HR:2015:1728 (Staat/Eneco) en ECLI:NL:HR:2015:1729 (Staat/Delta).

<sup>93</sup> Also, the Decree implementing the independence requirements of the energy directives ('*Besluit uitvoering onafhankelijkheidseisen energierichtlijnen*') contains several requirements for the TSO, interconnector operator, and gas storage operators.

- 24.50** The national gas transmission network is operated by GTS, which is the Dutch TSO. GTS has been appointed for that purpose and is owned by the Dutch state.<sup>94</sup> The lower-voltage networks are operated by various limited liability companies, the DSOs. They have been appointed by the local government-owned distribution undertakings.<sup>95</sup> The ACM is authorized, similar to that in respect of electricity networks, to exempt 'private' gas networks (closed distribution systems) from the mandatory appointment of a network operator.<sup>96</sup>
- 24.51** The TSO, similar to the EA, must have ownership of the network it operates.<sup>97</sup> Also, DSOs must have economic ownership of the networks they operate.<sup>98</sup>
- 24.52** Provisions in respect of independent and non-discriminatory behaviour by gas network operators<sup>99</sup> are essentially the same as the provisions in that respect for electricity network operators, as discussed above. Similar to the obligation for electricity network operators, the GA contains the obligation for network operators that are part of a group to adopt an internal compliance programme to ensure a non-discriminatory performance of tasks and use of powers conferred upon them.<sup>100</sup>
- 24.53** (i) **Gas storage and LNG terminal operators** The GA requires gas storage and LNG operators to appoint an operator of their installations.<sup>101</sup> The operator does not have to be a private or public limited company. The gas storage company must be independent from other activities relating to the transport or storage of gas, if the operator is also a producer or supplier of gas, or if a producer or supplier is part of the group to which the operator belongs.<sup>102</sup>
- (2) **Balancing of demand and supply**
- (a) *Electricity*
- 24.54** Balancing of demand and supply, a responsibility of the TSO, is essential to the integrity of the system. Balancing the system is done on a technical level through a continuous process of tuning of production facilities, deployment of contracted reserve power, and/or deployment of contracted load management. On a transactional level, the TSO carries out the system of 'program responsibility' (*programmaverantwoordelijkheid*).<sup>103</sup> The system is described in its complex detail in the System Code.<sup>104</sup> It may be briefly summarized as follows.
- 24.55** Programme responsibility is the responsibility for market players to balance demand and supply in their contemplated transactions. If, when compared with energy programmes which the responsible parties have submitted for clearance to the TSO, more energy is taken off the network than is fed into the network, the TSO is deemed to have supplied the energy shortfall. If more energy has been fed into the network than has been taken off

<sup>94</sup> GA, Art 2, para 1.

<sup>95</sup> GA, Art 2, para 8.

<sup>96</sup> GA, Art 2. The standard conditions can be found on the website <<https://www.acm.nl/nl/download/bijlage/?id=11395>> last accessed March 2016.

<sup>97</sup> GA, Art 3b, para 4.

<sup>98</sup> GA, Art 3b, para 1.

<sup>99</sup> GA, Arts 3, 3a, 7, and 10b–d.

<sup>100</sup> GA, Art 3c.

<sup>101</sup> GA, Art 9a.

<sup>102</sup> GA, Art 9b, para 1.

<sup>103</sup> EA, Art 16, para 2, under a and b, and for gas GA, Art 31, para 1, under c.

<sup>104</sup> All Dutch codes (electricity and gas) can be found on the website <<https://www.acm.nl/nl/onderwerpen/energie/codes-energie/overzicht-codes-energie/>> last accessed March 2016.

the network, the TSO is deemed to have taken the excess energy. In the first case, the TSO will invoice the programme-responsible party concerned for energy-deemed-supplied at a price (the imbalance price), which includes an 'incentive factor', effectively meaning that the programme-responsible party pays more than a market-based price. In the latter case, the TSO must pay to the programme-responsible party a price (the imbalance price) for energy-deemed-taken, which again includes an 'incentive factor', effectively meaning that the programme-responsible party receives less than a market-based price. The resulting proceeds of the incentive factor during a year are taken into account in the calculation of the following year's system tariffs and thus returned to the market.

To stimulate the TSO to acquire balancing power at a market-based price, the ACM has adopted a regulation in the Network Code.<sup>105</sup> This obliges producers and large industrial consumers with contracted power of more than 60 MW to offer to the TSO the regulating and reserve power that they can make available for balancing purposes. The TSO has developed a bid-price ladder auction to purchase the power offered. Smaller producers and consumers are allowed to participate on a voluntary basis. **24.56**

*(b) Gas*

In April 2014, the ACM implemented the European Network Code on Gas Balancing into the 'Transmission Code Gas – TSO'.<sup>106</sup> **24.57**

To enable a shipper to balance its position at portfolio level, GTS offers daily balancing with an hourly tolerance. Each hour, GTS forecasts the system balance signal for the end of that hour. Depending on the outcome of the forecast, GTS could take actions to prevent an imbalance, resulting in Within Day Market transactions (short-term transactions for wholesale trade) in order to balance the system. In case of severe imbalance that cannot be balanced via Within Day Market transactions, GTS could announce an emergency situation, in which GTS can take other measures.<sup>107</sup> **24.58**

The shippers have to pay costs if GTS intervenes. **24.59**

**(3) New infrastructure**

The EA and the GA provide for powers of the MEA to grant an exemption for all or part of new infrastructure from the provisions governing third-party access, the group prohibition, and the regulatory control of tariffs or tariff methodologies. According to Article 86c EA and Article 18h GA, the MEA can only grant an exemption if strict conditions are met, laid down in Article 36 (paragraph 1) of the Gas Directive and Article 17 (paragraph 1) of the E-Regulation. An exemption can also be granted where there is a significant increase in capacity in existing infrastructure. The ACM must notify the Commission of the exemption.<sup>108</sup> When granting an exemption, the MEA may adopt rules and methodology for interconnector management and capacity allocation. The exemption may be restricted to a limited period of time. **24.60**

<sup>105</sup> Network Code, para 5.1.1.1.a.1.

<sup>106</sup> The new code entered into force on 29 April 2014.

<sup>107</sup> The other measures contain ceasing the process for initiating Within Day Market transactions, using contracted means for emergency situations or giving instructions for entry and/or exit points.

<sup>108</sup> Gas Directive, Art 36, para 8 and E-Regulation, Art 17, para 7.



**24.61** The EA and the GA also provide possibilities to shorten and streamline the decision-making procedures for designated, new, large energy projects with a national interest. This is shaped by declaring that the National Coordination Regulations (*Rijkscoördinatierегeling*), as laid down in the Spatial Planning Act (*Wet ruimtelijke ordening*), could be applicable to those projects. This means that the granting of permits will be coordinated and that the spatial plans will be taken at a national level.

**(4) Provision of information to regulatory agency**

**24.62** Provisions in the EA and the GA regarding supply of information and data to the MEA are manifold and diverse. A general obligation is imposed on market players (producers, traders, suppliers, exchanges) and network operators to provide at the request of the MEA<sup>109</sup> all information the MEA needs in order to fulfil the tasks that the EA, the E-Regulation, the GA, and the Gas Regulation have assigned to the MEA. As mentioned before, the MEA also has the power to request the gas and electricity TSOs to provide data that is relevant to security of supply.

**24.63** The ACM has the same powers as the MEA.<sup>110</sup> In addition, the ACM is authorized to ask any person or company for any information and documents the ACM requires for the performance of its statutory duties<sup>111</sup> and the ACM can investigate a company's accounts when the ACM requires this information in case of sanctions.<sup>112</sup> Also, there are duties of disclosure for energy companies. See also under Section D.

**(5) Public service obligations (PSOs)**

**24.64** PSOs have not been defined as such in the EA and the GA. They have, however, been implemented materially in all aspects. On a general level, gas and electricity network operators and gas storage and LNG terminal operators must operate, maintain, and develop their installations in an efficient, safe, reliable, and environmentally friendly manner.<sup>113</sup> Regulatory control over conditions and prices of network access and the quality and capacity of the networks have been discussed above.

**(6) Universal service provisions**

**24.65** Licences to supply households and small businesses can be obtained by any supply company that has the required organizational, technical, and financial capabilities and resources.<sup>114</sup> The licence holder is obliged to supply electricity or gas at 'reasonable tariffs and conditions' to any household or small business consumer so requesting. The regulator may set maximum tariffs if it is of the opinion that the tariffs charged by licence holders are unreasonable.<sup>115</sup> Supplier and network operators must 'exercise a policy aimed at preventing' consumers from being shut off in the period between 1 October of a year through 1 April of the following year, and rules can be adopted in this respect in a ministerial decree.<sup>116</sup> The EA and the GA

<sup>109</sup> EA, Art 78 and GA, Art 1h.

<sup>110</sup> Art 2 of the Decree on the ACM's mandate, power of attorney and authorization (*Besluit mandaat, volmacht en machtiging ACM*) and Art 6b of the Act establishing the ACM (*Instellingswet ACM*).

<sup>111</sup> Act establishing the ACM, Art 6b.

<sup>112</sup> *ibid* Art 12l.

<sup>113</sup> EA, Art 16 and GA, Art 10.

<sup>114</sup> EA, Arts 95a and 95d, GA, Arts 43 and 45.

<sup>115</sup> EA, Art 95b, GA, Art 44.

<sup>116</sup> EA, Art 95b, paras 7 and 8, GA, Art 44, paras 7 and 8.

also contain provisions, which go into a dazzling extent of detail, regarding unfair and misleading trading practices, fairness and transparency of contractual supply, and transportation conditions, as well as accessibility of transparent information on tariffs and conditions.<sup>117</sup>

The electricity TSO and the gas TSO have been charged with security of supply tasks. The electricity TSO's task in respect of security of supply has been elaborated in the Codes, as required by Article 31, paragraph 1 sub g of the EA: the System Code provides for an elaboration through the programme-responsibility concept.<sup>118</sup> The gas TSO's task in this respect has also been elaborated in the Codes, as required by Article 12b, paragraph 1 sub d of the GA.<sup>119</sup> The gas TSO must provide security of supply both in relation to peak demands and in relation to a licence holder unable to perform its supply obligation due to financial circumstances or a withdrawal of its licence. **24.66**

In Article 16, paragraph 2, sub a EA and Article 10a, first paragraph, sub g GA, *security of transportation* has been identified as statutory tasks of the electricity TSO and the gas TSO, respectively, distinct from their tasks in respect of *security of supply*. **24.67**

#### (7) Impact of competition law on regulatory law

Different directorates within the ACM deal with the regulatory tasks and the enforcement of the competition rules (ie, the cartel prohibition, the prohibition on abuse of dominance and merger control). Pursuant to Article 7 Act establishing the ACM (*Instellingswet ACM*), the different directorates are free to exchange information with each other. As a result, information obtained for regulatory purposes may be used for the enforcement of the competition rules. **24.68**

This raises questions about the relationship between competition rules administered and sector-specific regulation. Although different points of view exist with regard to how the balance between the competition rules and the sector-specific rules must be struck, this can generally be characterized in terms of *ex ante* and *ex post* concepts. The ACM's energy directorate has the task of helping to create a level playing field in the Dutch energy sector. To that end it imposes *ex ante* rules of conduct on market players. For example, it determines tariff structures, tariffs, and access conditions. The ACM's competition directorate applies the competition rules, apart from *ex ante* in the regulation of concentrations, the cartel prohibition and rules on abuse of a dominant position *ex post*. The ACM is responsible for enforcing these prohibitions and for imposing sanctions if these rules are violated. **24.69**

An example of the impact of competition law on the energy market is the following. In 2013, the ACM was asked to analyse the Dutch Energy Agreement, an agreement concluded by the Dutch government with the energy sector. Part of the agreement was to close down five coal power plants, approximately 10 per cent of the Dutch production capacity of electricity. Based on an analysis of the costs and benefits of the plan, the ACM concluded that the plan was not reconcilable with the cartel prohibition. **24.70**

Within the field of state aid, the EU state aid rules apply to the Dutch energy market; no national state aid rules apply. At a national level, some energy subsidy schemes could result **24.71**

<sup>117</sup> EA, Art 95m and GA, Art 52b.

<sup>118</sup> System Code, paras 3.1a *et seq.*

<sup>119</sup> Code on Legal Obligations of TSO of common interest, paras 2.1 and 2.2.

in state aid. That state aid will only be allowed when the aid is in accordance with EU state-aid rules.

## D. Enforcement

### (1) Powers of regulatory agencies

**24.72** The ACM and the MEA are the domestic regulators on the energy markets within the confines of the jurisdiction of the Netherlands. The ACM is a member of the European Agency for the Cooperation of Energy Regulators (ACER).

#### (a) Electricity and gas

**24.73** The ACM has similar supervision and enforcement powers in the electricity and gas market.

**24.74** The supervision powers of the ACM are regulated in Division 5.2 of the Dutch General Administrative Law Act (GALA). The ACM is entitled to enter every place, except for a home, without the occupant's permission.<sup>120</sup> The ACM is authorized to require the provision of information and to order the provision of and to inspect identification papers.<sup>121</sup> Further, the ACM is entitled to require inspection of and copy business information and documents. If copying is not possible, the documents and information may be taken away for a short period of time to make a copy.<sup>122</sup> The ACM is also entitled to inspect and measure goods and take samples of the goods.<sup>123</sup>

**24.75** Any person who is requested or ordered to provide assistance is obliged to cooperate fully with such request.<sup>124</sup> All exercise of these competences is subject to requirements of necessity and proportionality.

**24.76** In the gas market, the MEA supervises the safety, reliability, and quality of the gas transport network and has the control of the gas supply. The MEA may issue binding instructions to enforce compliance regarding these subjects.<sup>125</sup>

**24.77** The ACM can in a binding decision, subject to court appeal, rule on complaints regarding the way a network operator performs its statutory tasks and duties and exercises powers conferred upon it.<sup>126</sup> This power extends to disputes about access regarding gas storage and LNG facilities. The ACM has no power to intervene if the network operator, gas storage company, or LNG company is subject to the jurisdiction of another EU Member State.<sup>127</sup>

**24.78** The ACM may issue binding instructions to enforce compliance with the EA and GA in general or regulations based on the EA and/or GA, as well as EU Regulations 713/2009, 714/2009, 715/2009, 994/2010, and 1227/2011.<sup>128</sup>

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<sup>120</sup> GALA, Art 5:15.

<sup>121</sup> GALA, Arts 5:16 and 5:16a.

<sup>122</sup> GALA, Art 5:17.

<sup>123</sup> GALA, Art 5:18.

<sup>124</sup> GALA, Art 5:20.

<sup>125</sup> GA, Art 1c.

<sup>126</sup> EA 1998, Arts 51 and GA, 19.

<sup>127</sup> EA 1998, Arts 52 and GA, 20.

<sup>128</sup> EA 1998, Arts 5a and GA, 1b.

The ACM is authorized to issue administrative fines of up to 10 per cent of the annual turnover of the offender in case of non-compliance with EU Regulation 1227/2011. This fine can be doubled in case of a repetition of the offence within five years.<sup>129</sup> The ACM is also equipped with the power to impose an order subject to penalty payments for non-compliance with certain provisions of the EA and GA or regulations based on the EA and/or GA, as well as EU Regulations 713/2009, 714/2009, 715/2009, 994/2010, and 1227/2011.<sup>130</sup> A decision to impose a penalty payment or administrative fine is subject to court appeal in two instances. The competent court in the first instance is the District Court of Rotterdam and in the second instance, the Trade and Industry Appeals Tribunal. **24.79**

To tackle fundamental and structural underperformance by network operators, the MEA is authorized to order a network operator to take measures to comply with its statutory tasks and duties.<sup>131</sup> If it fails to comply, the MEA may either appoint another legal entity as network operator or appoint an interim administrator in the network operator's company, with director's liability vis-à-vis the network operator's company for acts that contravene orders given by that administrator.<sup>132</sup> **24.80**

### (2) Constitutional issues

There are no constitutional issues of note and the ACM and the MEA are the domestic regulators on the energy markets within the confines of the jurisdiction of the Netherlands. **24.81**

### (3) Enforcement

Enforcement issues are discussed in the next subsection on case law. **24.82**

### (4) Case law

Most complaints and court proceedings conducted on the basis of the EA and the GA regard the interpretation of sector regulation and the legal and economic correctness of regulatory decisions. Very few cases, however, concern the interpretation and extent of the enforcement powers of the regulator as such. **24.83**

One court case that regarded the extent of the enforcement power of the regulator concerned an administrative fine of EUR 7.2 million the ACM imposed on energy supplier Greenchoice for a violation of Article 95b EA and Article 44 GA. Greenchoice failed to send final accounts to customers who switched to another energy supplier. This was in violation of its own contractual terms and led to a total amount of EUR 9.3 million that was not paid back to the customers. **24.84**

The case centred around whether the ACM was authorized to impose this fine. Article 95b EA and Article 44 GA state that an energy supplier has the duty to deliver electricity or gas on reasonable terms and at reasonable tariffs. The ACM argued that on this basis it was also authorized to impose a fine for violating the contractual terms. However, the Trade and Industry Appeals Tribunal did not agree and annulled the fine. The Tribunal ruled that the **24.85**

<sup>129</sup> EA 1998, Art 77i and GA, Art 60ad.

<sup>130</sup> EA 1998, Art-77h and GA, Art 60ac.

<sup>131</sup> EA 1998, Art 13, para 2 and GA, Art 5, para 2.

<sup>132</sup> EA 1998, Arts 13, para 3 and 13a and GA, Arts 5, para 3 and 5a.

ACM is only authorized to impose a fine on the basis of Article 95b EA and Article 44 GA if the terms and tariffs are unreasonable, but not if in itself reasonable terms are violated.<sup>133</sup>

**24.86** Another case regarded the scope of the duty of confidentiality in the EA and GA. The Trade and Industry Appeals Tribunal annulled the fine that the ACM had imposed on Liander and Nuon for breach of the duty of confidentiality pursuant to Article 29 EA and Article 37 GA.<sup>134</sup> The Tribunal ruled that there could only be a breach of the duty of confidentiality in case of an active and imputable disclosure of data by the network operator. This was not the case. For the explanation of the concept 'breach of the duty of confidentiality', the Tribunal referred to the explanation of this concept in the Dutch Criminal Code. Prior to the ruling, the Tribunal had asked the advice of the Advocate General in administrative law. His conclusion contains comprehensive information about the explanation in administrative law of the—of criminal law origin— notions of guilt, imputation, vicarious criminal liability of organizations, and co-perpetrator.

## E. Conclusion

### (1) General

**24.87** Implementation of the Second and Third EU Energy Packages has to a very large extent been achieved in the Netherlands. The EU directives have been transposed into national law. The infringement proceedings which the European Commission had originally initiated against the Netherlands in this respect were closed in 2012. Full-ownership unbundling has—save for a few cases—been implemented. Third-party access is the leading regime in the Netherlands and compliance with EU access and tariffication rules is closely monitored by the authorities (in particular: the ACM). The Dutch legislation tends to be even stricter than required pursuant to the EU Energy Packages, although the 'extras' compared with the EU rules have decreased over the past few years.

**24.88** Steps are clearly being taken towards a European energy market. In recent years, several Dutch companies active in the energy market have been taken over by foreign companies and new foreign companies have entered the Dutch market. The TSOs and DSOs form an exception and are still fully owned by the Dutch state or local authorities. Interconnectors have become operational and new interconnectors are planned to be constructed. At all levels—including TSOs, exchanges, and regulators—there is cross-border cooperation or even integration. Market coupling in electricity has steadily increased and will continue to expand. The energy market is much more European than it was ten years ago.

### (2) Future directions

**24.89** What can we expect for the future? The cooperation and integration in Europe regarding energy are likely to continue to increase and will certainly have an effect on energy in the Netherlands and the regulation of energy. Dutch regulation will gradually be replaced by EU regulation. Also the network codes will be increasingly set at EU level (between ENTSO-E and ENTSO-G, ACER, and the European Commission). Based on the experience in the last ten years, ACER and the European Commission are likely to push for more EU regulation.

<sup>133</sup> CBB 4 September 2014 (ECLI:NL:CBB:2014:318).

<sup>134</sup> CBB 25 March 2015 (ECLI:NL:CBB:2015:76).

The directions in the years to come will without a doubt be influenced by shifts in the energy mix. The Dutch domestic gas reserve is expected to last for roughly half a century; more gas will be imported. In addition, the emphasis will lie on renewable energy. Just 5 per cent of the Dutch energy consumed comes from renewable sources. The share of renewable energy is to increase to 16 per cent in 2023. A large part of this will come from wind energy (both offshore and onshore) and solar energy. This requires large efforts in the coming years: billions in subsidies, investments in infrastructure, congestion management, etc. In the meantime, the existing players in the market are facing political and economic developments. All this will provide new challenges for the regulation of the energy market, at both national and international levels. The Second and Third Energy Packages will definitely not be the final destination, but rather a starting point. **24.90**