

Crown Van Gelder decision – more clarity on scope of energy dispute resolution procedure?

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Introduction

In its 8 October 2020 judgment in *Crown Van Gelder*, the European Court of Justice (ECJ) clarified which complainants have standing before the national regulatory authority to lodge a claim against a transmission or distribution system operator under the Dutch expedited energy dispute resolution procedure.⁽¹⁾ According to the ECJ, customers with only an indirect connection to the transmission system may submit a claim against the transmission system operator in cases of, for instance, a power outage. Arguably, this judgment increases the risk of possible liability for European transmission system operators.

Legislative background

The EU rules with respect to electricity have been implemented in the Dutch Electricity Act 1998. These include the EU Electricity Market Directive (2009/72/EU) (the fourth internal market directive, EU Directive 2019/944/EU, has yet to be implemented). Article 37(11) of EU Directive 2009/72/EU and its similar preceding provisions in the first and second internal market directives provide for the right to submit a complaint against a transmission or distribution system operator in relation to that operator's obligations under said directive to the national regulatory authority. This regulator, acting as a dispute settlement authority, will issue a decision within two months of receipt of the complaint. The national regulatory authority in the Netherlands is the Authority for Consumers and Markets (ACM). This complaint right has been implemented in Section 51(1) of the Electricity Act. In contrast to the English language version of EU Directive 2009/72/EU, which gives this right to "any party", the Electricity Act refers to "a party that has a dispute with a system operator".

Facts

Crown van Gelder operated a paper mill in North Holland. The paper mill was connected to the distribution system operated by the regional distribution company Liander, which in turn was fed by the high-voltage system operated by national transmission system operator TenneT. On 27 March 2015 an incident in a TenneT substation caused a large-scale power outage. As a result, the transport of electricity to the paper mill was interrupted for several hours.

Crown van Gelder submitted a complaint to the ACM that TenneT had not done everything reasonably possible to prevent the interruption of the electricity supply. In the complaint, Crown van Gelder also argued that the high-voltage grid design of the substation did not meet the legal requirements. On 30 April 2018 the ACM declared the complaint inadmissible. In the absence of a connection to the national transmission system, the ACM held that Crown van Gelder could not be considered a 'party' that had a dispute with TenneT within the meaning of Section 51(1) of the Electricity Act. Crown van Gelder appealed that decision before the Administrative Court of Appeal for Trade and Industry. The court started a preliminary reference procedure before the ECJ in which the European Commission intervened.

Decision

Before the ECJ, the ACM argued that a 'party' with a complaint against a system operator within the meaning of the European legislative framework should be interpreted as a contractual party with a connection to the

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system of that system operator. Both Crown van Gelder and the European Commission argued that the term "any party" should be interpreted more broadly and that the restrictive interpretation advocated for by the ACM undermined the effectiveness of the prescribed dispute settlement procedure.

In line with the opinion of Advocate General Pitruzzella,⁽²⁾ the ECJ broadly interpreted the concept of any party that has a complaint with a system operator. The ECJ referred to the fact that in the English language version of EU Directive 2009/72/EU, the term "any" precedes the term "party", which indicates a broad interpretation of the term "party". Moreover, other language versions do not refer to a party to a contract, but rather to persons which have an interest in seeking recourse to the regulatory authority. The ECJ considered this textual analysis to be confirmed by a contextual and teleological analysis, pointing out, among other things, that limiting the scope of complainants to customers with a direct link to the system operator would be at odds with the objective of the directive to ensure a high level of consumer protection and the ability of a regulatory authority to ensure that system operators comply with all of their obligations thereunder. Thus, the ECJ ruled that the scope of complainants against a transmission system operator under this dispute resolution mechanism cannot be restricted by the condition of having to have a connection to the national grid.

Comment

The ECJ had already clarified the scope of Article 37 of EU Directive 2009/944/EU in early 2020 in *Energivirasto*,⁽³⁾ in which it ruled that this provision does not require a member state (in that case, Finland) to:

confer competence on the regulatory authority to settle disputes between household customers and system operator and, consequently, to grant household customers who have lodged a complaint with the regulatory authority against a system operator the status of 'party' within the meaning of that provision, and the right to appeal against the decision taken by that authority following that complaint.

Crown van Gelder is another welcome clarification of the access to the sector-specific dispute resolution procedure. In any event, it will lead to interesting new case law on TenneT's liability for the large-scale power outage on 27 March 2015. By a judgment of 12 March 2019, the Administrative Court of Appeal for Trade and Industry upheld, in part, the ACM's decision in a dispute resolution procedure lodged by Tata Steel, a party directly connected to the TenneT grid, that TenneT had breached its statutory duties with respect to this incident. Civil litigation between Tata Steel and TenneT is pending. The court still has to give its judgment in *Crown van Gelder*, but this case will no doubt also lead to civil litigation. In that litigation, it will be interesting to see what role the exclusion of liability provisions in the connection and transportation agreement of TenneT plays with respect to parties not directly connected to its grid. Dutch law provides for an exception to the rule that contractual provisions can bind only the parties to a contract by accepting that under certain circumstances it is justified for a third party to also be bound by a contractual provision.⁽⁴⁾

In any event, it is interesting that in the consultation for a new energy act (which would integrate and replace both the Electricity Act and the Gas Act), TenneT, which is still 100% state owned, asked for the incorporation of statutory provisions with respect to damages and liability in the event of a transport interruption on its high-voltage grid in the new regulatory regime.

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Endnotes

(1) ECJ, 8 October 2020, C-360/19, [ECLI:EU:C:2020:805](#).

(2) Opinion of Advocate General G Pitruzzella, 4 June 2020, C-360/19, [ECLI:EU:C:2020:432](#).

(3) ECJ, 23 January 2020, C-578/18, [ECLI:EU:C:2020:35](#).

(4) See [ECLI:NL:RBGEL:2021:219](#), in Dutch.