

Recent developments in the Netherlands energy market

BY LOUIS BOUCHEZ AND BART DE MAN

On 21 November 2006 the Unbundling Act (*Splitsingswet*), changing the Electricity Act 1998 and the Gas Act, was adopted in the Senate. The Second Chamber had voted in favour of it in April 2006. Hereinafter we will discuss some of the key issues of this act which may in the long term dramatically change the Dutch energy sector.

The Unbundling Act

The objective of the Unbundling Act is to stimulate competition on the energy market and at the same time secure the grid management and delivery of energy to the customers. Part of this is effectuated by separating the energy companies in a grid company – which owns and manages the grid – and a commercial energy company, which is concerned with the production, supply and trade of energy, i.e., electricity or gas. Thereto the Unbundling Act includes various measures, of which the three most important are:

- prohibition for the grid companies to own shares in the commercial energy companies and vice versa;
- a prohibition for grid companies and commercial energy companies to form part of the same group of companies;
- a transfer of the grid management regarding the high voltage grids (110 kV and up) to the Netherlands national grid manager Tennet.

Amendment of the Unbundling Act, EU Directive and Cross-Border Leases

The draft Unbundling Act was debated in the Senate on 14 November 2006 and subsequently an important amendment to the bill was agreed upon by a vast majority of the Senate.

The essence of the amendment is to adopt

the Unbundling Act, but to postpone the implementation of the unbundling itself until the occurrence of certain events described in the amendment. According to the amendment the implementation of the unbundling will not be effectuated until:

(i) it is clear that the European Union will adopt a directive imposing the EU member states to adopt legislation on mandatory unbundling; and

(ii) provisions are made with respect to the detrimental effects of the mandatory unbundling in relation to the US cross-border lease contracts regarding both power plants and grids entered into between Dutch energy companies and US investors.

Moreover, the amendment states that the mandatory unbundling will also come into effect if the public (i.e., the private end users) and the independent grid management are at risk. This could for example be the case if one or more energy companies are engaged in foreign activities/or will initiate cross-border alliances.

As soon as a specific EU directive regarding unbundling will be adopted, the first condition under (i) has been met. As a consequence of the unbundling coming into effect, measures will be taken to overcome the detrimental effect for cross-border leasing contracts. The reason for this is that there is a risk that contractual events of defaults will be triggered as a result of unbundling the energy company.

It is not intended that the amendment forces energy companies to unbundle prior to the EU directive on mandatory unbundling comes into effect. However, until that time, the energy companies will be forced to act in accordance with the rationale behind the Unbundling Act. Initially the Unbundling

Act will be implemented only partially, i.e. except for the part covering the unbundling of the grid and production and supply companies itself. However, the transfer of the management over grids with a voltage of more than 110 kV to national grid manager Tennet will be implemented immediately.

Cross-border takeovers?

The recent developments will make it much more difficult for foreign energy companies to take over Dutch gas and electricity companies, since for this the unlikely voluntary unbundling is a pre-condition. However, there may soon arise another opportunity for foreign energy companies to acquire Dutch gas and electricity assets. The reason for this being the fact that the two largest energy companies, Essent and Nuon, are currently negotiating a potential merger. Moreover, on 28 November 2006 the Netherlands Competition Authority (NMA) has published a so-called consultation document on national and cross-border mergers of electricity companies. The NMA considers the Netherlands' energy market as a market of a national nature. Therefore a merger between large energy companies such as Essent and Nuon is considered to be detrimental to the consumers in the Netherlands. Consequently, if Essent and Nuon would decide to merge, the NMA would impose conditions on them by forcing them to reduce their production capacity and client portfolios. It is in particular the gas and electricity production assets that may be interesting for foreign energy companies. ■

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