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# Effective legal protection of the energy consumers in the Netherlands

# The importance of effective legal review

- NRAs play a key role in decentralised application of EU/national energy law;
- EU law has increased the discretionary powers of the NRAs;
- EU law has increased the political independence of NRAs to ensure consistency and level playing field;
- Need for democratic and legal accountability!
- This contribitution examines the legal accountability of the NRAs.

# Central Question

*What is the role of the Trade and Industry Appeals Tribunal in awarding effective legal protection to the energy consumers (domestic and non-domestic users) against the decentralised application of energy law by the NRAs?*

# Method

- Legal and theoretical part to identify and specify criteria of effective legal protection (normative part);
- Selection of case studies (qualitative empirical part);
- Assessment of results in the light of normative framework (analytical part).

# Criteria of effective legal protection

Right to effective legal protection is a general principle of law and enjoys the status of a fundamental right (Article 14 Charter on Fundamental rights and Articles 6 and 13 of ECHR).

Article 19(1) TEU

"*Member States must provide remedies sufficient to ensure effective judicial protection in the fields covered by Union law.*"

This principle provides some minimum guarantees -→further specification by national law and national courts.

# Criteria of effective legal protection

In some cases EU law harmonizes the requirements of effective legal protection;

For instance Article 4 of the Framework directive for the electronic communications sector stipulates:

*"1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.*

# Criteria of effective legal protection

Article 37, par 17 of Directive 2009/72/EC for the internal market in electricity provides:

*"Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government*".

- Significant leeway for MS and courts;
- Interpretation in light of right to effective legal protection (e.g. Case C-426/05, Tele 2, Case C-510/13, E.ON);

# Criteria of effective legal protection

Analysis of European case law and specific provisions lead to the following criteria for effective legal review:

- Legal standing for network users and competitors affected by regulatory obligations imposed on network operators;
- Adequate motivation of judgment;
- Access to appropriate expertise on EU law, energy law and the economic and technological workings of the market;
- Courts should safeguard independence of the NRAs;
- Courts should be empowered to award effective remedies;
- Cases should be decided within a reasonable time;
- Duty to ask preliminary questions in case of doubts regarding the interpretation and validity of EU law.

# Criteria of effective legal protection

Effective review of procedure and substance of the case

*Procedural part*

- Have the correct procedures been followed?
- Respect of the principles of good administration?

# Criteria of effective legal protection

*Substance of the case*

Analogical application of Tetra Laval Standard

- Facts factually accurate, reliable and consistent?
- Facts complete and do they cover all relevant information for the assessment of the situation?
- Correct interpretation of the law?
- Reasonable application of discretion?
    - In principle no substitution of ACM's decision in case of discretion.
    - Distinction with appeal on the merits.

# Framework in the Netherlands

- ACM responsible for the implementation of the energy directives (regulated third party access).
  - Regulation based on yard stick competition
  - Legal formula; $TIt = (1 + ((cpi - x + q)/100 )) TIt-1$
- Procedures
  - Collaboration between joint system operators, representative organizations and the ACM
    - Consultation of the market parties by ACM
    - Consultation via sounding board groups
- Legal review by Trade and Industry Appeals Tribunal; Legality review

# Example: Gas Transport Services case

- 3 judgments in the period between 2006-2009 and 2009-2012;
- Important points; Beginning costs and valuation Regulatory Asset Base GTS;
- In the second judgment the CBB annulled the ACM decision due to illegal interventions by the Dutch Minister of Economic Affairs;
- New decision: appeal by VEMW and Vereniging Energie Nederland.

# Valuation method RAB

| Calculation method | RAB | Supported by | Consequences |
|---|---|---|---|
| 1 Purchase value | €6,3 billion | Gasunie (the State ) | Higher RAB<br>higher network costs |
| 2 Historical costs minus regulatory depreciations | €4,84 billion | ACM (and CBB) | |
| 3 Accounting value | €1 billion | VEMW | ⬇ |

# Example: Gas Transport Services case

Third judgment CBB:

- How should Article 13 of Regulation 715/2009 be interpreted?

  "*reflect the actual costs incurred, in so far as such costs correspond to those of an efficient and structurally comparable network operator and are transparant".*

  - Very restraint and marginal review; emphasis on discretion ACM.
  - Article 13; leeway for method that does not lead to exact compensation of the costs;
    - * It is not excluded that users pay twice for the same service
    - * Decisive weight to interests of network operators
    - *Limited explanations impact on consumers' interests
    - * Preliminary question?

# Conclusions

- Period between 2002-2013 CBB reviewed a number of crucial regulatory decisions in a restrained way;
  - No full review of establishment, completeness and accuracy of the facts;
  - Significant leeway for ACM when weighing interests;
  - Hardly reference to EU law and consumers' interests;
  - No preliminary questions in case questions of EU law arose;
  - Hard for energy consumers to effectuate their right to effective legal protection.
  - A more thorough review of the substance of the case is recommended.