



Committee Kist publishes recommendations to public shareholders of energy companies

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This newsletter is sent from NautaDutilh

Public Shareholdership of Energy Companies Committee, 26 June 2008

As of 1 July 2008, the provisions in the Act on Independent Network Management ("Unbundling Act") containing the prohibition against network companies forming a group with commercial companies ("Group Ban"), has come into force. The Group Ban requires the full separation of vertically integrated energy companies, such as Nuon, Essent, ENECO and Delta. This separation must be implemented before 1 January 2011 and will result in:

- separate commercial companies which engage in the sale, distribution and/or production of energy ("Commercial Energy Companies") and;
- separate network companies operating gas and/or electricity networks ("Network Companies").

The implementation of the Group Ban will create the possibility for the local governments that are currently shareholders ("Public Shareholders") in the vertically integrated energy companies to sell (part of) their interest in the Commercial Companies to third parties.

In January 2008, the Minister of Economic Affairs appointed a committee of experts, under the chairmanship of Mr A.W. Kist, to provide the Public Shareholders with expert advice and information to enable them to make sound and strategic choices with regard to a possible sale of shares. The committee is referred to as the Public Shareholdership of Energy Companies Committee, or the Kist Committee ("Committee").

On 26 June 2008, the Committee presented its report entitled 'Public Shareholdership of Energy Companies' to Minister Van der Hoeven. The main recommendations can be summarized as follows:

- a. Shareholders should lay down more powers for the general meeting of shareholders in the articles of association of the energy companies so that they are better capable of serving public interests;
- b. The national government should provide clarity to the local governments (municipalities and provinces) on the financial consequences of the proceeds of a sale of shares in the Commercial Companies. Currently it is unclear whether (part of) these proceeds would - indirectly - accrue to the national government;
- c. The national government should examine whether it is desirable to impose restrictions or conditions on the acquisition of Commercial Energy Companies by private companies.^[1]
- d. Shareholders should first determine the use to which the proceeds of a possible sale of shares could be put. This purpose should then be weighed against the public interests being served by a continuing shareholdership, ultimately resulting in a decision whether or not to sell the shares;
- e. Shareholders should assess all consequences of the different options in the unbundling process and potential subsequent sale of shares in the Commercial Energy Companies. In this assessment, the public interest should be the guiding principle, rather than the interest

- of the management of the energy companies;
- f. The national government and the local governments should institute a direction group (*regiegroep*) to investigate the possibilities where a restructuring of the Network Companies could result in a consolidation. After determining the optimal regional spread of the networks, a valuation method and a timeframe for consolidation, the proposal for restructuring should result in three to five Network Companies. In addition, the smaller shareholders should be given an 'exit' opportunity, for example selling their shares in Network Companies to the national government or state-owned transmission system operators (e.g. TenneT or GTS).

Hereafter the recommendations of the Committee are set out in more detail and the current developments with regard to the selling process are briefly mentioned:

I. General recommendations

Recommendations to the national government

1. With regard to the security of supply, the national government should actively work on the streamlining and acceleration of permitting and other procedures pertaining to energy supply investments.
2. TenneT's powers as transmission system operator should be expanded and made more explicit so that it is able to work effectively and perform its statutory duty of guaranteeing the security of electricity supply.
3. To ensure the affordability of the supply of electricity and gas, it is of vital importance that the electricity and gas markets function well. The Committee therefore recommends that the national government work on the integration of national gas and electricity markets in Europe/Northwest Europe and the elimination of regulatory differences (including differences in environmental regulations) between the Netherlands and the surrounding countries, so that a level playing field is created for market parties.
4. To achieve sustainability targets, market parties will have to make major investments that are not immediately profitable. To induce these parties to make such investments, it is necessary to have a coherent and consistent incentive policy that provides sufficient certainty for investors.
5. It should be investigated whether the regulatory and supervisory mechanisms will be sufficient to adequately secure public energy-related interests following the unbundling process, especially bearing in mind the internationalization of the energy sector.

Recommendation to both the national government and the local governments

6. In order to secure public interests with regard to energy, it is desirable that the national government and the local governments remain in, or enter into, consultation with each other on the future of the Dutch energy supply.

Recommendations to the local governments

7. It is recommended that the local governments define which public interests they want to serve with their shareholdership and that they amend their powers (under the articles of association) accordingly.
8. The Committee urges the local governments that are shareholders to use their powers in a consistent and professional manner and, in this regard, to strengthen their mutual collaboration.
9. For decision-making purposes, shareholders should use their rights to information and arrive at a structured and mandatory process of information exchange with the management boards of the energy companies.
10. In the period before the actual unbundling, important decisions will be made with regard to the distribution of assets and employees among both companies. These are decisions that directly affect the shareholders' interests. It is therefore important that the shareholders stay informed of the unbundling plans and use their powers to direct the process.

II. Recommendations concerning Commercial Energy Companies

Recommendation to the national government

11. In connection with the possible sale by the local governments of shareholdings in production and supply companies, it is recommended that the national government

provide clarity on the consequences of such sales for the financial relationship between itself and the local governments.

Recommendations to the local governments

12. Provinces and municipalities that are considering the sale of their shares should first determine the use to which the proceeds will be put. After this has been done, the possibility of continuing the shareholding should then be weighed against the intended use of the proceeds. Proceeds of such sales should not be used for consumptive expenditure.
13. The decision whether or not to sell (all or part of) the shares in energy production and supply companies requires a full assessment of all of the consequences of the different options, including options that have been dismissed.
14. In the event of a decision to sell, shareholders should, in concert with each other and the relevant company, arrive at a controlled selling process so that all interests involved are taken into account.
15. If shareholders decide on a public-private collaboration, it is vital that long-term agreements are made concerning strategy or strategy scenarios, debt/equity ratios and decision-making powers.

Recommendation to the national government

16. The national government should also examine whether it is desirable, from a merger control perspective, to impose specific restrictions or conditions on the acquisition of energy companies.

III. Recommendations concerning Network Companies

Recommendation to the local governments

17. In view of the complexity of the unbundling process, the Committee considers it important that the Network Companies arrive at a strategic plan among themselves and in consultation with TenneT, GTS and the shareholders.

Recommendations to both the national government and the local governments

18. The Committee considers it necessary that the national government consult, whether in a coordinating role or otherwise, with the shareholders of energy companies that are required to unbundle. The purpose of the consultation should be to support these shareholders in giving form to their role in the unbundling process.
19. The Committee suggests that the national government and the local governments institute a direction group (*regiegroep*) as soon as possible to investigate the desirability and feasibility of a restructuring and scaling up process resulting in, e.g., three to five Network Companies.
20. This direction group should first investigate the optimal division of the networks and which uniform valuation method should be used. The group should also examine within which timeframe a restructuring could be implemented, and which actions need to be taken for this purpose.
21. The Committee considers it advisable that, together with the aforementioned restructuring, shareholders that wish to retain their holdings in the Network Companies receive advice and counselling. The direction group could play a part in this process. In addition, it is suggested that the national government should consider whether it is advisable to create an 'exit' for small shareholders, for example through the participation of the national government.
22. The Committee considers the unbundling stage to be a logical point in time for the national government to consult with the shareholding local governments and to manage the aforementioned processes (i.e. unbundling, restructuring and professionalization). Given that some companies are already set to unbundle, it is recommended that the national government take action in this regard in the near future.

Status of shareholders' plans: various companies

Nuon

Nuon's biggest shareholder, the province of Gelderland (44%), and a few other shareholders have indicated that they will not sell their shares during the next four to six years. Together these parties

hold a majority of the shares in the company.

The municipality of Amsterdam (9.6%) and the province of Friesland (12.6%), however, have indicated that they intend to sell their shares in Nuon.

Essent

On 27 June 2008, the shareholders of Essent approved the plan to search for a foreign partner. In due course, they will sell their shares in Essent's energy production and supply branch.

ENECO/Delta

The shareholders of ENECO and Delta have not made any public announcements as to their intentions with regard to their shareholdings in the relevant companies.

[1] NautaDutilh has some reservations as to the possibility of imposing such restrictions under applicable competition laws.

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