There and Back Again

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THERE AND BACK AGAIN: THE DUTCH ENERGY SECTOR FROM PRIVATISATION TO NEW PUBLIC ENERGY COMPANIES

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Abstract

The public energy company might experience a serious come-back in the Dutch energy sector. The ideas that drove (local) governments to privatise a few decades ago now seem to have been replaced by the idea that public energy companies could fulfil a role in the energy transition. Public energy companies can take into account social or community interests that commercial companies not always do and they allow local governments the opportunity to exert influence, for instance when developing renewable energy projects or when rolling out heat networks. However, they do not always operate at the lowest societal cost. Therefore, each time when a public energy company is founded or expanded, it should be reflected whether this serves the public interest and how the risks of the project can be mitigated.

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1 Introduction

After decades of policy and legislative efforts towards liberalisation[2] and privatisation[3] in the Netherlands,[4] a variety of new publicly owned companies starts to appear in the energy sector. There are various reasons for (local) governments to develop and own for example electricity production or heat distribution and supply companies. This contribution investigates the reasons for this countermovement from privatisation to new publicly owned energy companies,[5] and analyses to what extent this new movement is compatible with the principles of energy law as developed over the past few decades and currently enshrined in both EU law and Dutch law.

The central research question is 'how can the current appearance of publicly owned energy companies be explained and to what extent is this movement desirable'? The contribution is structured as follows. After a short history of the liberalisation, privatisation and unbundling efforts in the Netherlands (section 2), the diversity of new publicly-owned energy companies is described (section 3). After a reflection is presented on the desirability and risks of this new movement (section 4), an outlook is provided on the development of public energy companies in the future (section 5).

2 History of Liberalisation and Privatisation in the Dutch Energy Sector

Historically, the Netherlands used to have local (regional) utility companies. They were merged into larger companies (for the supply of electricity, gas, heat and sometimes

2 In the context of the energy sector, liberalisation entails introducing competition in the market by separating the regulated parts of energy companies (the network parts) from production and supply, and to allow various players on the production and supply markets.

3 Privatisation entails turning previously state-owned companies into private companies with a shareholding structure, after which the (public) shares in the company are sold (privatised).

4 A clear point of departure is the (European) Commission Working Document 'The Internal Energy Market'(1988), COM(88) 238 final. This was the inspiration for the Dutch Government to draft the 'Derde Energienota' (1995), Tweede Kamer, vergaderjaar 1995–1996, 24 525, nrs. 1–2, in which an explicit choice is made in favour of more competition (even beyond EU action on that point), p. 8. For a general introduction, see M.M. Roggenkamp, 'Chapter 10, Energy Law in the Netherlands' in Roggenkamp, Redgwell, Ronne, Del Guayo (Eds) *Energy Law in Europe* OUP, 2016 (3rd Ed), p. 727.

5 The term 'energy companies' is chosen as a broad term to encompass the various forms of new publicly owned companies, covering both electricity and heat, as well as various parts of the supply chain: production, distribution and supply to consumers.

water) in the 1970s.[6] These companies used to be publicly owned and were cast in the form of shareholding companies in which municipalities and provinces held most shares.[7]

With the 1995 policy paper *Derde Energienota,* liberalisation and unbundling were introduced in the Dutch energy sector, with pillars such as: third party access to electricity and gas networks, separation between network elements and production/supply elements, independent regulatory oversight, and liberalised production, import, export and supply of electricity (except supply to household consumers).[8]

The liberalisation of the electricity and gas sector was based on the ambition to reach an internal energy market in the EU, in which competition was introduced regarding the production and supply of electricity and gas. This would lower the prices for consumers and give them the freedom to switch supplier. In the Netherlands, this was translated into full ownership unbundling, the most far-reaching type of unbundling. This decision was based on the following arguments: unbundling would increase the independence of the TSO; make financing opportunities available for the TSO, as it would obtain economic ownership of the network; facilitate the regulatory supervision of the network (because of increased transparency) and put an end to cross-subsidisation between network elements and commercial elements of the energy sector.[9]

At the same time, after the separation of the regulated (network) parts from the commercial parts, the liberalised elements, namely production and supply could be privatised. At that time, it was discussed whether the regulated (network) elements should be privatised as well, following the privatisation of other elements of the energy sector.[10] There were several counter-arguments against keeping the networks in public hands. First, it was feared that this could lead to mergers between different network companies and to cross-subsidisation between different parts of the network. A second argument was that having the network in public hands would actually not guarantee that the public interest is best served.[11] After all, the railway and telecommunications networks, even though these sectors were both in public hands, had suffered from years of underinvestment in maintenance.[12]

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6 Roggenkamp 2016, p. 730.

7 Roggenkamp 2016, p. 730, 763.

8 Derde Energienota 1995, p. 8.

9 PA Josephus Jitta, HA Schaap, 'Privatiseer, maar met mate…? De privatisering van de Nederlandse energiesector nader beschouwd' *Onderneming en Financiering* [2004, nr 62], p. 3.

10 Jitta, Schaap 2004, p. 7/8.

11 Ibid., p. 7.

12 Ibid., p. 7.

It was already stated in 1995 that liberalisation can lead to privatisation, with a remark that it is the shareholders' competence to decide on privatisation of energy companies, but that it was more logical that production and/or supply companies were privatised, than network companies.[13] The risk that this would lead to private monopolies rather than public monopolies (both undesirable) was already recognised in the same document.[14] It was ultimately decided that the networks are not to be privatised.[15] Regarding production and supply companies, the Electricity Act 1998 and Gas Act 2000 were drafted under the assumption that the privatisation of these companies would have to be regulated only for a limited time, until the energy sector would be fully liberalised.[16] A gradual privatisation process has been going on since then, until 2020, when Eneco, the last large energy company owned by municipalities and provinces, was sold to Mitsubishi.[17]

3 The Current Energy Sector and the Role of Public Energy Companies Therein

This part portrays the variety of new publicly owned energy companies, organised per sector: electricity, gas and heat.

Electricity

Although the production and supply parts of the former vertically integrated companies have been fully privatised, a new development is that there are local governments wishing to take the production of electricity, notably via solar fields and wind farms, in their

13 Derde Energienota 1995, p. 99/101.

14 Ibid., p. 101.

15 Wet van 2 juli 1998, houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit (Elektriciteitswet 1998), art. 93, Wet van 22 juni 2000, houdende regels omtrent het transport en de levering van gas (Gaswet), art. 85.

16 Roggenkamp 2016, p. 731. During this period, privatisation of energy companies was only possible with the consent of the Minister of Economic Affairs.

17 Trouw, 25 March 2020, 'Eneco Definitief Verkocht aan Mitsubishi'.https://www.trouw.nl/nieuws/eneco-definitief-verkocht-aan-mitsubishi~b7af6b22/.

own hands.[18] Local governments mention three reasons for developing and owning renewable energy production installations. First, they wish to invest in renewable energy to attain their climate goals and to reduce the dependency of the municipality on (imported) energy sources. Second, by keeping this development in their own hands, they wish to exert much more influence on the way the projects are realised than when they would use a permitting procedure with a third party. In the conditions of a permit, some requirements can be listed, but project development and ownership gives more direct influence. A third reason is that these municipalities wish to use the profits of these projects within the local community, for example to re-invest in other parts of the energy transition that are more difficult to finance.[19]

Although the *production* of electricity by (subsidiaries of) local governments has increased again, this does not hold for the *supply* of electricity. In the municipalities that are exploiting their own electricity production installation, the electricity is usually supplied by another company.[20] This can be explained in two ways. First, the interest of municipalities lies rather with exerting influence over the way the production installation is realised from the perspective of spatial planning and integration in the landscape, than with the way the electricity is supplied to consumers. Second, the specific legal, administrative and technical requirements for the supply of electricity may pose a high barrier for local governments to supply electricity, especially to household consumers.[21] A notable exception is *TegenStroom,* a company fully owned by the municipality of

18 Examples are *Zonnepark Oosterweilanden*, fully owned by municipality *Twenterand; Zonnepark Leemdijk*, fully owned by municipality *Midden Drenthe*; *Zonnepark Ameland*, owned for 33,3% by the municipality of *Ameland*, 33,3% by a local energy cooperation and 33,3% by *Eneco*. The municipality of *Bergen* (Limburg) has decided to develop an 'energy landscape' with both solar fields and wind turbines, owned and developed by the municipality. The municipality of *Groningen* has decided to develop large renewable energy projects fully owned by the municipality as well. *Bodemzorg Limburg*, an organisation with several municipalities from Limburg as its shareholders, also realised three solar fields in Limburg, on former landfill sites.

19 See for example the Energy Transition Fund proposed in Groningen, College van B&W Groningen, Letter: 'Fonds Energietransitie (ophalen wensen en bedenkingen)' 18-3-2021, p. 2.

20 In the examples provided in footnote 18, these are either specialized companies that supply locally produced electricity to consumers: *EnergieVanOns (Leemdijk; Ameland)* or *VandeBron (Oosterweilanden)*. In the case of *Bodemzorg Limburg*, part of the electricity is supplied directly to the University of Maastricht.

21 In the Netherlands, a license is required for the supply of electricity to household consumers. Elektriciteitswet 1998, art. 95a. The supply of electricity needs to be 'reliable' (betrouwbaar), which entails requirements from an organizational, financial and technical perspective (Elektriciteitswet 1998, art. 95d). Moreover, suppliers of electricity need to adhere to several requirements for grid stability, and consumer protection (Elektriciteitswet 1998, art. 95m).

Haarlemmermeer, which acts as a supply company for its inhabitants, and that buys the electricity and gas it supplies from local energy projects.[22]

Gas

The gas sector has been unbundled and the transmission system company, Gasunie, is 100% state owned. The distribution system owners (DSOs) are owned by local governments. Interestingly, contrary to the electricity sector in which the production of electricity was at some point fully privatised, the Dutch state has kept a specific role in the production of (natural) gas and the marketing of this gas on the wholesale market via the state-owned company EBN. Thus, the Dutch gas sector is liberalised, regarding both the production and supply of gas, but, contrary to the electricity sector, the *production* of gas has not been fully privatised after liberalisation. This may be explained by the high strategic interests in a stable and reliable gas production.

Contrary to the electricity sector, the Dutch gas sector bears no sign of a movement of local governments towards more public ownership. This could be explained by the fact that the natural gas sector is in decline and that it is not yet known how the gas production, transmission, distribution and storage infrastructure will be used in the future. Moreover, since the large-scale production from the Groningen field, gas production was no longer in the hands of local governments but rather of the national government.

Although not powered by local governments but by the state-owned Gasunie, there is still a movement towards more active public companies in the gas sector in the Netherlands. Gasunie is very active in the development of various hydrogen projects,[23] as well as CCUS projects.[24] Thus, it is expanding its role beyond the ownership and operation of the natural gas transmission system into new sectors and economic activities. The expansion of Gasunie's activities in this direction can be explained by the search for new uses of the existing natural gas transmission network in the future.

Finally, as a bridge between gas and heat, EBN, the Dutch state-owned investment company that has a role as a non-operating partner in nearly all gas investments in the

22 https://tegenstroom.nl/over-tegenstroom

23 Hydrogen Backbone, Hystock, NortH2, HyTransPort.RTM, GZI Next and a project related to the Magnum Centrale. All projects are described on https://www.gasunie.nl/projecten.

24 Athos, Carbon Connect Delta, Porthos and smart use of CO2.

Netherlands and the Dutch EEZ is now expanding its role to the production of hydrogen and to becoming a risk-bearing partner in geothermal projects.[25]

Heat

In the Dutch energy transition, heat is an important subject. There is a demand for heat by buildings and some industrial processes. Currently, most heat demand is fulfilled by individual installations, such as gas-fired boilers (*cv-ketels*) or heatpumps. However, due to the transition to low-carbon heating, an increasing amount of buildings is heated via heat networks or other collective systems, such as collective heat/cold storage systems. Unlike the electricity and gas sector, there is no strict division between heat networks and production and supply of heat via these networks. The difference between electricity and gas on the one side and heat on the other can be explained as the structure of the heat market is different. Contrary to the electricity and gas market, separating networks and supply would lead to higher network costs and have a negative effect on security of heat supply, compared to a situation where the heat network and heat supply are in the hands of the same company.[26] Dutch NRA ACM explains that the coordination costs between the network operator and the production and supply of heat increase significantly with an unbundled system, which means that the benefits of an unbundled system will only exceed the costs when the scale of the heat network is much larger than the current size of heat networks in the Netherlands.[27] Thus, with few exceptions,[28] the Dutch heat sector is still characterised by vertically integrated heat companies.[29] Both public and private parties can operate these heat networks.[30]

In this regard, the drafting process of the new Dutch Heat Act[31] sparks an interesting debate between local governments on the one side and the Ministry of Economic Affairs and Climate on the other, on the role of municipalities and public energy companies in

25 https://www.ebn.nl/en/energy-transition/new-energy/

26 M. Dieperink, B. Teulings, 'Doorbraak in Warmtewet vraagt om frisse blik op publieke belangen', *Energeia*, 19 May 2021.

27 ACM, 'ACM-notitie Marktmodellen warmte en rol netwerkbedrijven', 24 June 2021, p. 15.

28 ACM 2021, p. 13/14: Municipality *Zaanstad* has a system with a split between the network company and the heat supplier. Where the transmission/distribution of heat is split from the supply of heat, the networks are often operated by the existing (gas and electricity) DSOs.

29 ACM 2021, p. 12.

30 ACM 2021, p. 6, p. 16.

31 This Act is officially named 'Wet houdende regels omtrent productie, transport en levering van warmte (Wet collectieve warmtevoorziening)' but also referred to as 'Warmtewet 2.0'.

the heat transition. A key question is whether municipalities should have the competence to give binding directions on the ownership of the heat network in a certain area: public, private or a combination.[32] With this competence, municipalities wish to be able to maintain public control. The State Secretary of Energy responded that this competence of municipalities to give binding directions on (public) ownership is not in line with the principle of the legislative proposal that different types of heat companies (public, private, public-private) can participate in the heat market on equal footing.[33] Moreover, the State Secretary brings forward that this competence is also not compatible with EU law, based on the principle of free movement which can only be limited in specific circumstances.[34]

However, upon closer inspection, it seems that this reasoning negates the fact that 'It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than procurement within the meaning of this Directive. (…).'[35] This recital confirms that governments are free to decide to provide a service themselves rather than contracting a company to do so. The case of semi-public companies is interesting in this regard: whereas purely public companies[36] could provide a service without the government organising a competitive (public procurement) procedure, this is not possible for semi-public companies, including public-private heat companies.[37]

In any case, the difference in approach on the role of municipalities in defining which entities should be able to participate in a heat network is deemed irreconcilable, and the legislative process is halted at the moment.[38] In conclusion, the role of public energy companies in the heat transition is still hotly debated, but will crystallise over the coming years with the introduction of a new Heat Act.

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32 *Kamerbrief 5 juli 2021 Voortgang Wet collectieve warmtevoorziening*, DGKE-WO / 21174776.

33 *Kamerbrief 5 juli 2021 Voortgang Wet collectieve warmtevoorziening*, p. 2.

34 Pels Rijcken, Notitie inzake Europeesrechtelijke analyse Wet collectieve warmtebedrijven, 28 May 2021, available as an appendix to the abovementioned *Kamerbrief,* chapter 5.

35 Directive 2014/25/EC on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L-94/243, recital 7.

36 Defined as a company over which the public authority 'exercises control similar to that which it exercises over its own departments'. CJEU, C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna,* 11 January 2005, ECLI:EU:C:2005:5, para 49.

37 CJEU, C-26/03, *Stadt Halle,* para 47-52.

38 *Kamerbrief 5 juli 2021 Voortgang Wet collectieve warmtevoorziening,* p. 2.

4 Two Points of Criticism

As shown above, both the electricity and gas sector as well as (controversially) the heat sector show a movement from privatisation to new public energy companies. However, in this part, two critical notes on this movement will be brought forward, namely on the development of the decision-making on this expansion and on the risk of failures.

First, the Netherlands Court of Audit (*Algemene Rekenkamer*) made some critical notes about the role of state-owned companies in the energy transition, namely TenneT, Gasunie and EBN (*staatsdeelnemingen)*. Over the last few years, the role of these companies has increased significantly, as have the investments that are necessary for the performance of these new roles. In the case of TenneT, the development of the Dutch part of an offshore grid will require massive investments.[39] GasUnie has become involved in the development of a heat network, *Warmtelinq*.[40] Another example, although not quoted in the report, is that Gasunie has taken up various roles in the development of hydrogen infrastructure, including the production of hydrogen.[41] Finally, EBN participates with a risk-bearing role in new geothermal energy projects.[42]

The Court of Audit concludes that the State is using its state companies TenneT, Gasunie and EBN to speed up the energy transition. However, it criticizes the fact that the expansion of roles of state companies has not been substantiated well enough.[43] As these extra roles require the investment of millions of euros of public money (that could have been spent on other purposes as well), it should be a well-developed decision when extra roles are granted to state companies. It is justified to use state companies in the energy transition, if this serves public goals. However, it is currently often not clear whether expanding the role of these companies contributes to the public goals that were stated. This should be investigated in more depth and the parliament should be better informed about how these decisions were reached.

The second critical point is about the large risks that public energy companies may run and the question whether (local) governments are able to manage these risks sufficiently and to exercise effective control over the investments that are made with public funds. An example is the assessment report of *Warmtebedrijf Rotterdam*, which has

39 According to a government estimate, EUR 4 billion until 2023, which TenneT can earn back over the coming 20 years. Source: https://windopzee.nl/onderwerpen/wind-zee/kosten/kosten-net-zee/.

40 Algemene Rekenkamer, Rapport 'In publieke handen: nieuwe taken voor staatsdeelnemingen in de energietransitie', 2021, p. 15.

41 See note 23 above.

42 Algemene Rekenkamer 2021, p. 13.

43 Ibid., p. 37 and further.

experienced gigantic cost overruns,[44] as well as several failures in both the risk assessment and the fact that private companies were able to transfer the risk to the public heat company.[45] This example shows that the investments and risks related to energy projects can be significant and require the (local) government to be able to assess and mitigate the risks well – this is not always a given.

5 Conclusion and Future Outlook

As a final reflection and future outlook, it seems that the ideas that drove (local) governments to privatise a few decades ago have now been replaced by the idea that public energy companies could fulfil a role in the energy transition. For example, public energy companies can take into account interests that commercial companies do not always take into account (social/community interests) and they allow local governments the opportunity to exert influence, such as in the case of the development of renewable energy projects as well as the roll-out of heat networks. However, this is not always for the lowest societal cost. It should be reflected each time a public energy company is founded or expanded, whether this serves the public interest and how the risks of the project can be mitigated. However, if these conditions are fulfilled, the public energy company might experience a serious come-back in the Dutch energy sector.

44 *Gemeenteraad Rotterdam, Eindrapport raadsenquete Warmtebedrijf Rotterdam*, 17 September 2020, p. 8: the cost estimation in 2005 was EUR 16 million, but in 2019 it was clear that at least EUR 171 million was necessary. Each time, the argument was that ending the project would be more costly than continuing with it.

45 Ibid. This concerns both the risk that less consumers would contract the heat company than anticipated (*vollooprisico)* as well as the risk that the prices would fluctuate. Finally also a large legal risk was present as the *Warmtebedrijf* had a contractual obligation to deliver heat to Vattenfall, while it was not (and still is not) able to finance the investments necessary to supply this heat.