

COMMISSION DECISION

of 8 July 1999

concerning the application of the Netherlands for a transitional regime under Article 24 of Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity

(notified under document number C(1999) 1551/6)

(Only the Dutch text is authentic)

(1999/796/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity⁽¹⁾, and in particular Article 24 thereof,

Having informed the Member States of the application made by the Netherlands,

Whereas:

I. FACTS

1. Procedure

- (1) By letter of 20 February 1998, the Dutch Permanent Representation sent its provisional notification of transitional regimes under Article 24 of Directive 96/92/EC to the Commission. On 29 May, the Commission's services undertook a fact-finding mission to the *Ministerie van Economische Zaken* in The Hague. The Commission asked for additional information regarding some elements of the notification, which it received by letter of 22 June.
- (2) By letter of 16 October, the Dutch Permanent Representation sent further information regarding the notification of transitional regimes.

2. Structure and development of the electricity sector in the Netherlands

(a) Generation

- (3) There are four electricity producers in the Netherlands:

EPON — NV Elektriciteits-Productiemaatschappij Oost- en Noord-Nederland

EPZ — NV Elektriciteits-Productiemaatschappij Zuid-Nederland

EZH — NV Elektriciteitsbedrijf Zuid-Holland

UNA — NV Energieproductiebedrijf UNA.

They generate around 70% of domestic electricity demand. The remaining 30% is imported (around 13%) or supplied by independent producers or autoproducers.

- (4) The four production companies coordinate their activities to a certain extent through SEP (Samenwerkende Elektriciteits-Productiebedrijven NV), owner of the national high-voltage grid and the legal person responsible for all electricity imports until 1 January 1999. SEP is responsible for the management of Dodewaard nuclear power plant (currently being decommissioned) and of Demkolec, a coal gasification plant, and for the international commitments referred to in point 4.1, recital 12. The four production companies and SEP are parties to a cooperation agreement (Overeenkomst van Samenwerking, hereinafter 'OvS').

- (5) The production companies are in turn owned as follows:

EPON — distribution companies

EPZ — distribution companies

⁽¹⁾ OJ L 27, 30.1.1997, p. 20.

EZH — province, larger cities in the region, municipalities and a distribution company

UNA — two provinces and the cities of Utrecht and Amsterdam.

(b) Transmission

- (6) Until January 1999, electricity transmission was carried out by SEP, owner of the high-voltage grid and the sole importer of electricity.
- (7) TenneT, an independent agency which is owned by SEP and in which the State intends to have a majority stake, has been responsible for transmission since 1999.

(c) Distribution

- (8) There are 23 electricity distribution companies. These are publicly owned (provinces, cities and municipalities).

3. Liberalisation of the Dutch electricity market: implementation of Directive 96/92/EC

- (9) The Dutch Electricity Act 1998 entered into force on 1 August 1998. A supplementary law modifies the Electricity Act 1998 and deals mainly with details regarding access to the network and supply to captive customers. The supplementary law was adopted on 1 June 1999.
- (10) The Dutch Government has opted for a gradual opening up of the electricity market. Since 1 January 1999, one third of customers have been eligible and another third will become eligible in 2002. As of 2007, all Dutch electricity customers will be free in their purchase of electricity. The supplementary law provides for regulated third party access to the grid. Since 1 January 1999, the importation of electricity has been free for eligible customers and for distributors for their eligible customers, subject, however, to a reciprocity requirement.
- (11) The transmission system operator, TenneT, is, as mentioned above, separated legally from generation and supply and has been operational since 1 January 1999. The State intends to have a majority stake in the transmission system operator.

4. The transitional regime notified by the Dutch Government

4.1. Introduction

- (12) The Dutch Government has notified the following transitional measures pursuant to Article 24 of Directive 96/92/EC.

1. *District heating*: recovery of the losses on some district heating projects until the last contract expires in 2021.
2. *Demkolec*: recovery of the extra costs of construction and operation of Demkolec, a demonstration of coal gasification plant at Buggenum.
3. *Protocol*: a protocol agreement has been concluded between Dutch generators and distributors, under which the generators agree to sell, and the distributors agree to purchase, all the output of the generators (representing 70% of the present sales of the distributors) up to and including 2000. In the event that this voluntary agreement is cancelled, for commercial or legal reasons, the Minister reserves the right to impose it, or similar provisions, by law.
4. *International commitments*: recovery of possible losses from the following contracts:
 - power procurement contracts between SEP and EdF, Preussen Elektra and Statkraft,
 - investment obligations of SEP to Statnett for the NorNed cable,
 - a gas take-or-pay contract between SEP and StatOil.

- (13) The international commitments mentioned above were added to the Dutch notification letter of 16 October 1998. They were not referred to in the initial notification of 20 February 1998.

- (14) In the initial notification two further schemes were mentioned:

- *delay of privatisation of the electricity sector*. Until the end of 2001, the express agreement of the Minister will be necessary for any sales of shares outside the circle of present shareholders,
- the phasing in of *corporation tax* keeping pace with the liberalisation process.

(15) However, these two schemes were withdrawn from the final notification. This is because of information provided by the Commission's services during the abovementioned meeting of 29 May. The Commission noted that these issues could not be regarded as derogations from Directive 96/92/EC and could therefore not be considered under Article 24 of the Directive. The Commission reserves the right to examine these issues according to other provisions of Community law.

4.2. Details of the notified schemes

4.2.1. District heating projects

(a) The commitment

(16) In 1990, the production companies took over a fuel price guarantee from the distributors for the purpose of district heating. Consumers are given a guarantee that they will not pay more than users of gas heating. Nine of these district-heating projects, involving three production companies, are running at a loss; these projects are mentioned. The contracts all date from before February 1997. In the areas in question, district heating is not competitive, chiefly because of the level of capital investment and thus amortisation. The contracts are a result of government policy, dating back to 1979, to promote district heating for environmental reasons.

(b) The extent of the stranded costs

(17) The losses have been calculated by accounting firm Coopers Lybrand at between NLG 1,628 and 2 billion, depending on fluctuations in the gas price.

(c) Method of recovery

(18) Article 77a of the Electricity Act 1998 provides for the recovery of stranded costs resulting from district heating projects by means of a surcharge on the electricity transport tariff.

(19) The Dutch authorities intend to put in place a recovery scheme which will run for twenty years. Financing will be to a maximum of NLG 2 billion, to be recovered from a surcharge on the electricity transport tariff. The scheme has four beneficiaries: producers EZH, EPZ, UNA and EPON or their legal successors, which are party to

the contracts for district heating with fuel price guarantee.

(20) Yearly accounting controls are imposed on the beneficiaries. The Commission can have access to the accounts, if it so requests.

4.2.2. Demkolec

(a) The commitment

(21) The construction and operation of the demonstration coal gasification plant, Demkolec, required very substantial, and exceptional, investment in research, development and the demonstration of environment-related technology. This investment has not yet been written off. The extra costs cannot be recuperated through the national basic tariff for electricity after liberalisation. The Government decided to build Demkolec in order to diversify supply and for environmental reasons.

(b) The extent of the stranded costs

(22) Coopers Lybrand has calculated the extra investment in Demkolec that has not yet been written off at NLG 458,4 million. The calculation was based on the net value on 1 January 2001 of the difference between the costs of Demkolec and a modern gas-fired plant with a cost price of NLG 0,07/kWh.

The calculation takes account of the Commission-approved subsidy to Demkolec of NLG 18,3 million. It remains, however, to be verified whether the preferential loan granted by the European Investment Bank has been accounted for in this calculation. The Dutch authorities have notified a maximum of NLG 550 million guilders as a transitional scheme for the Demkolec plant.

(c) Method of recovery

(23) Article 77a of the Electricity Act 1998 provides for the recovery of the stranded costs of building and running the demonstration coal gasification plant 'Demkolec' by means of a surcharge on the electricity transport tariff.

(24) The Dutch authorities intend to introduce a recovery scheme to be financed by a levy on the transport tariff which will run for two years. The maximum of NLG 550 million will be reimbursed to the sole beneficiary, SEP.

4.2.3. Protocol

(a) The commitment

(25) Producers and distributors are bound by a Protocol which runs from 1997 until the end of 2000. The distributors have agreed to buy all the electricity produced by the four generators (covering 70% of distributors' needs under the pre-liberalisation regime). The Protocol regulates costs, prices and tariffs for the period of 1997 to 2000. The reason why the Government is supporting the maintenance of this Protocol is to allow the Dutch producers to recover part of any stranded costs resulting from the fact that the generating capacity is no longer competitive at the lower prices resulting from liberalisation. In order to cover these costs, therefore, the Protocol effectively guarantees that these companies receive significant and continued market share and sales levels.

(b) The extent of the stranded costs

(26) It is impossible at this stage to determine what financial consequences the repeal of the Protocol would have for producers.

(c) Method of recovery

(27) In the event that the Protocol is annulled, for whatever reason, the Minister for Economic Affairs retains the right and legal mandate to impose the agreement, or one similar, by law. However, it is not clear (a) when or if this is likely to occur or (b) precisely which measures would be adopted if the Minister exercised this possibility. It is therefore unclear what form any imposition by the Minister of an agreement between producers and distributors might take.

4.2.4. International commitments

(a) The commitments

(28) (i) The EDF electricity import contract. The initial contract dates from 1989. The most recent amendment dates from April 1998 and obliges SEP to take at least 65% of 600 MW until 31 March 2000[...](*).

(ii) Preussen Elektra electricity import contract dating back to 1989. Annual off-take commitment by SEP of 1 500 GWh until 31 December 2005.

(iii) NorNed cable contract, dating back to 31 January 1994. SEP is committed to pay 50% of cable construction costs and has to off-take 2,16 TWh/a from Statnet. The cable has to be operational on 1 October 2001 and the contract runs until 2016.

(iv) Gas take-or-pay contract between SEP and StatOil dating back to 1989.

(b) The extent of the stranded costs

(29) The extent of the costs will depend on the fluctuations in electricity and gas prices on the market. If prices on the Dutch market fall to NLG 0,07/kWh, SEP (through the OvS, the production companies for their proportional part) is responsible for the loss on these import contracts, to a total of NLG 3,1 billion. In these circumstances, no government intervention will take place.

(30) However, once the market price for electricity falls below NLG 0,07/kWh, the authorities take over more of the costs of additional losses on these contracts resulting from further falls in the electricity price. The government contribution to the loss is progressive and is linked to a contribution from the production companies to cover the loss. At a price of NLG 0,05/kWh, the Government would pay an estimated NLG [...](* billion to SEP, while the production companies would contribute NLG [...](* billion.

(31) On top of this progressive government contribution, if prices fall to below NLG 0,055/kWh, the Government will contribute more. The initial loss of NLG [...](* billion, taken on by the producers when the market price falls to NLG 0,07/kWh, will be paid in full by the authorities once the market price has dropped to NLG 0,055/kWh. Thus at a price of NLG 0,05/kWh, the authorities would pay a total of NLG [...](* billion (the initial [...](* billion loss plus the [...](* billion additional loss), while the production companies would pay NLG [...](* billion.

(32) The total amounts mentioned in this paragraph are maximum amounts of the Net Present Value which are adjusted annually.

(33) Use of the NorNed cable will be free for the Statnet import contract. TenneT will not receive payment for

(*) Business secret.

the use of this transport facility. It is not clear whether SEP can use this cable free of charge for export to Norway.

(c) Method of recovery

- (34) The Dutch authorities intend to impose a surcharge on the transport tariff which will recover the losses on the power and gas purchase contracts and finance the laying of the Dutch part of the NorNed cable. The recovery scheme will run until the last contract runs out, which is in 2026. The beneficiary of the scheme is SEP.

II. LEGAL ANALYSIS

1. *Legal basis: Article 24(1) and (2) of Directive 96/92/EC*

- (35) The Dutch Government notified an application for a transitional regime with respect to alleged commitments and guarantees of operation pursuant to Article 24 of Directive 96/92/EC.

2. *Requirements of Article 24(1) and (2)*

Article 24 of Directive 96/92/EC provides as follows:

'1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This Decision shall be published in the *Official Journal of the European Communities*.

2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapters IV, VI and VII of this Directive. Applications for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive.'

- (36) Article 24(1) and (2) of the Directive, in the light of the EC Treaty, thus require the following elements to be examined by the Commission, when considering any application for a transitional regime.

A. *Requirements concerning the nature of the commitments or guarantees of operation in question*

- (37) (1) The existence of a commitment or guarantee of operation has to be proven.
 (2) The commitment or guarantees of operation must have been given before 20 February 1997.
 (3) A causal link between the entry into force of Directive 96/92/EC and the inability to honour the commitment must be established.

B. *Requirements concerning the measures proposed to achieve the objectives in question*

- (38) (1) The measures of the transitional regime must fall within the scope of derogations from Chapters IV, VI and VII of Directive 96/92/EC.
 (2) The transitional regime must be of limited duration and linked to the expiry of the relevant commitments or guarantees of operation in question.
 (3) The transitional regime must apply the least restrictive measures reasonably necessary to achieve the objectives, which themselves must be legitimate. In deciding on these issues the Commission must take into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry.

3. *Assessment of the Dutch transitional regime*

3.1. *District heating, and Demkolec*

- (39) In the present case, concerning the transitional regime with respect to district heating and Demkolec, as notified by the Dutch Government, it is not necessary to determine whether requirements A(1), (2), (3) or B(2), (3) are met, because the measures in question do not require a derogation from Chapters IV, VI or VII of Directive 96/92/EC and thus do not meet requirement B(1) above.
- (40) As stated above, in order to constitute a transitional regime within the meaning of Article 24 of Directive 96/92/EC, the regime chosen by the Member State must provide for a derogation from the requirements laid down by Chapters IV, VI or VII of Directive 96/92/EC.
- (41) The measures under consideration are based on a pure compensation scheme, i.e. a system of charges or levies

implemented by a Member State in order to compensate for stranded costs caused by the application of Directive 96/92/EC. The application of such levies in the present case does not require a derogation from the abovementioned chapters of the Directive and cannot therefore be regarded as a transitional regime within the meaning of Article 24 thereof.

(42) The fact that measures such as those under consideration in this case can result in very considerable distortions of the single market for electricity does not affect this conclusion. The Commission recognises that the payment of such levies can result in economic consequences substantially similar to those resulting from a total or partial derogation from some of the obligations contained in Chapters IV, VI or VII of Directive 96/92/EC. However, such distortions by their very nature do not result from such a specific derogation as envisaged by that Directive. The transfer of a compensation payment to certain electricity producers, financed through a levy or charge on the consumers is, therefore, a measure which is not directly addressed by the Directive but one which needs to be examined pursuant to the rules on competition, and in particular Article 87(3)(c) of the EC Treaty. Under these circumstances, it is understood that measures of similar economic effect will be treated in a consistent manner, regardless of the relevant procedure in each individual case.

(43) In the light of the non-applicability of Article 24 of the Directive, it is not therefore necessary to assess the abovementioned further requirements A(1), (2), (3) and B(2) and (3).

3.2. International commitments

(44) Article 24(2) of Directive 96/92/EC includes the following provision: 'Applications for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive'. This deadline passed on 20 February 1998. In the present case, no mention of the proposed transitional regime with respect to international commitments was made in the original notification dated 20 February 1998. They cannot therefore be examined for approval pursuant to Article 24 of Directive 96/92/EC. However, even if this transitional regime had been notified to the Commission within the deadline provided for in Article 24(2), it would not fall within the scope of Article 24(1), as no derogation from the requirements of Chapters IV, VI and VII of Directive 96/92/EC result from the scheme.

3.3. Protocol

(45) The Commission considers that, at present, the details of any possible action by the Netherlands in this respect are not yet sufficiently precise to permit the Commission to take a decision pursuant to Article 24(1) of Directive 96/92/EC. Thus, the possible imposition of such an agreement should be the subject of supplementary information provided to the Commission under Article 24 as soon as it is clear what form this measure will take. The Commission will then be able to judge whether the scheme constitutes a derogation from Chapters IV, VI and VII of Directive 96/92/EC and, if so, whether and to what extent it is compatible with the requirements of the Directive,

HAS DECIDED AS FOLLOWS:

Article 1

This Decision concerns the application of the Netherlands for a transitional regime pursuant to Article 24 of Directive 96/92/EC, notified to the Commission on 20 February 1998 and completed on 16 October 1998. This notification concerns:

- (a) commitments undertaken with respect to the Demkolec demonstration coal gasification plant at Buggenum;
- (b) commitments entered into by production companies regarding the price charged for district heating;
- (c) international purchasing commitments entered into by SEP;
- (d) a Protocol agreement concluded between Dutch producers and distributors in 1997.

Article 2

The transitional regime notified by the Netherlands with respect to commitments entered into by production companies regarding the price charged for district heating and commitments undertaken with respect to the Demkolec demonstration coal gasification plant at Buggenum contains no measures which would constitute derogations from Chapters IV, VI or VII of Directive 96/92/EC, as defined by Article 24(2) thereof. Article 24 is, therefore, not applicable to the transitional regime notified by the Dutch Government.

Article 3

Article 76 of the Dutch Electricity Act concerning the Protocol is not approved pursuant to Article 24 of Directive 96/92/EC. The Commission should receive supplementary information pursuant to Article 24 in the event of recourse to this provision.

Article 4

The scheme for the recovery of losses on international commitments contained in the letter of 16 October 1998 cannot be considered under Article 24 of Directive 96/92/EC,

because this scheme was notified to the Commission more than one year after the entry into force of the Directive.

Article 5

The decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 8 July 1999.

For the Commission
Christos PAPOUTSIS
Member of the Commission