

Case C-360/19

Request for a preliminary ruling

Date lodged:

3 May 2019

Referring court:

College van Beroep voor het bedrijfsleven (Netherlands)

Date of the decision to refer:

23 April 2019

Appellant:

Crown Van Gelder B.V.

Respondent:

Autoriteit Consument en Markt

Judgment

COLLEGE VAN BEROEP VOOR HET BEDRIJFSLEVEN

(ADMINISTRATIVE COURT OF APPEAL FOR TRADE AND INDUSTRY)

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order for reference of the meervoudige kamer (full bench division) of 23 April 2019 in the case between

Crown Van Gelder B.V., of Velsen-Noord, appellant ...

and

the Autoriteit Consument en Markt (Consumer and Market Authority; ‘the ACM’), respondent

...

Participating as third party in the proceedings:

TenneT TSO B.V., of Arnhem (‘TenneT’)

...

Procedure

By decision of 30 April 2018 (‘the contested decision’), the ACM ruled, pursuant to Article 51(2) of the Elektriciteitswet 1998 (Electricity Law; ‘E-wet’), on the appellant’s dispute resolution application of 22 December 2017.

The appellant lodged an appeal against the contested decision.

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Grounds

1. On 27 March 2015, a large-scale power failure occurred due to an outage at the 380-kV Diemen substation. That substation is part of the Dutch 380-kV high-voltage grid, of which TenneT is designated as the national grid operator. The outage led to a complete failure at the substation, whereby a large part of the province of Noord-Holland and a small part of the province of Flevoland were left with no power. This affected around one million households, a number of large consumers and vital infrastructure such as Schiphol national airport and parts of the rail network. After approximately an hour, the Diemen substation was reactivated, and the power supply was restored in phases thereafter.
2. The appellant operates a paper factory in Velsen-Noord which is connected to the 50-kV grid that is operated by the grid operator Liander N.V. ... and fed by the national high-voltage grid operated by TenneT. The power failure interrupted the transmission of electricity to the appellant for part of 27 March 2015. The appellant claims that it has suffered damage as a result and has asked the ACM to determine that TenneT had not done everything reasonably within its power to prevent interruption of the transmission service and that the grid design of the Diemen substation did not meet the statutory criterion of single-fault capacity.
3. In the contested decision, the ACM declared the appellant’s complaint against TenneT inadmissible. To wit, the appellant could not be a party to a dispute with a grid operator since it does not have a (single) direct relationship with TenneT. Its paper factory is not connected to TenneT’s grid, it has no contract with TenneT and receives no invoices from TenneT.
4. Legislative background

Under Article 51(1) of the E-wet, a party which is in dispute with a grid operator about how it performs its duties and exercises its powers under that Wet or how it fulfils its obligations under that wet may lodge a complaint with the ACM.

By that provision, the Netherlands legislature implemented Article 37(11) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ('the Third Electricity Directive'), the English-language version of which, in so far as is relevant here, reads as follows:

'Any party having a complaint against a transmission ... system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision'

The preamble also states the following:

'Energy regulators should have the power to issue binding decisions in relation to electricity undertakings Energy regulators should also be granted the power to contribute to ensuring high standards of universal and public service in compliance with market opening, to the protection of vulnerable customers, and to the full effectiveness of consumer protection measures.'

6. Reasons for the reference for a preliminary ruling

The parties disagree on the interpretation of the term 'any party having a complaint'. They are in agreement that those words limit the group of persons that are entitled to complain, but differ as to how that group might correctly be limited. Particularly at issue is the question of whether a complaint may be lodged by a legal entity which operates an undertaking that has a connection (only) to a regional grid the power delivery of which has been interrupted as a result of a power cut on the national grid that feeds the regional grid.

The meaning of Article 37(11) of the Third Electricity Directive is not so clear as to exclude all reasonable doubt about its interpretation. That lack of clarity means that the College is required under Article 267 of the Treaty on the Functioning of the European Union to request a preliminary ruling in that regard from the Court of Justice. The College will therefore refer the question formulated below for a preliminary ruling.

The College has noted that on 14 September 2018 a Finnish court (Korkein hallinto-oikeus; the Supreme Administrative Court) also asked a question about the interpretation of Article 37 of Directive 2009/72/EC. That case (C-578/18) concerns the position of a domestic customer in the monitoring procedure initiated by the regulatory authority as a result of contact with that customer and the relationship between that customer's right of appeal before a competent court against the decision of the regulatory authority and its possible status, based on the Directive, as a party to the administrative procedure before the regulatory authority. That case relates to Article 37(17) of Directive 2009/72/EC and the College proceeds on the assumption that the answers to the Finnish questions will

not provide it with sufficient guidance on the application of Article 37(11) of Directive 2009/72/EC in the present case.

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Decision:

The College:

- requests the Court of Justice to give a preliminary ruling on the following question:

‘Must Article 37(11) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC be interpreted as meaning that that provision also makes the right of complaint with regard to the operator of the national grid (transmission system operator) available to a party if that party has no connection to the grid of that national grid operator (transmission system operator) but has a connection only to a regional grid (distribution system) to which the transmission of electricity is interrupted as a result of a power cut on the national grid (transmission system) that feeds the regional grid (distribution system)?’

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