

REGULATORY CHALLENGES TO THE DUTCH HEAT TRANSITION

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Abstract

This chapter explains (a) how heat as an energy source may play an important role in the Dutch energy transition, (b) how that confronts the legislator and the sector with quite a few difficult challenges and (c) how it requires considerable legislative innovation.

1 Introduction

If I were to describe a unique person as Martha in three words, I would have a difficult time. Yet, at gunpoint I would choose: energetic, innovative and kind. Many readers who have known Martha for some time may think of other characteristics and describing Martha in three words by no means does her justice. But these are typically three characteristics that for me have stood out ever since I started as her student at Leiden University in 1999, and later on, when we became colleagues and friends.

Surely, as a professor of energy law, being ‘energetic’ is of the essence, not only because in such a position you must be imbued with energy, but also, because this field of law is so broad and it develops so incessantly and quickly. And indeed, Martha has always worked tirelessly researching, writing books, reviewing theses and articles and teaching. And she

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does all this with great success, if only measured by the way in which she has put energy law on the map, both nationally and internationally.

Affordable access to energy is a basic requirement in our society, and consequently the legislator has – ever since Napoleon’s 1810 Mining Act² – shown interest in structuring the energy sector. Energy legislation has gained further importance since the liberalisation of the sector was put on the European agenda in the late 1980s and early 1990s.³ Since then, many European energy directives and guidelines have been adopted and implemented, respectively, and triggered a surge in national energy legislation, at least in the Netherlands.⁴ The threat of climate change and the need to switch to clean energy sources have proven a catalyst of the (by that time already impressive) pile of energy legislation. And Martha did not just monitor these developments, she has always been ahead of developments, put topics on the agenda, initiated debate and started research projects before a proper regulatory framework was being developed. The examples are countless, but to name a few, I refer to Martha’s activities in the field of the liberalisation of the energy markets, renewable energy, regulating north sea cables, interconnectors and hubs and very recently: aggregators, energy communities, energy storage and hydrogen.

So, the chair of a professor in energy law is far from comfortable. Despite the pressure that may obviously come with such a challenging position, Martha has always been very kind. She is thoughtful, loyal, has an eye for the human factor and has a good sense of humor – she is renowned for her laughter.

These are a few notes of a more personal nature, but I will not dwell any further here and now like to switch to the more serious content of this contribution – as Martha would – no doubt – expect me to: the future regulatory framework that is to reshape the Dutch heat sector⁵. Thereto, below, I explain how heat as an energy source may play an important role in the Dutch energy transition, how that puts the legislator and the sector for quite a few difficult challenges and how it requires considerable – legislative – innovation.

2 Martha M. Roggenkamp, ‘Regulering van de aardgaswinning in Groningen’ (NJB 2015/1247).

3 Martha M. Roggenkamp, *Energieliberalisatie in Nederland* (Intersentia (Lefebvre Sarrut Belgium) 2001).

4 For instance: the “*Wet van 2 juli 1998, houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit (Elektriciteitswet 1998)*” (Electricity Act 1998), the “*Wet van 22 juni 2000, houdende regels omtrent het transport en de levering van gas (Gaswet)*” (Gas Act), and the “*Wet van 31 oktober 2002, houdende regels met betrekking tot het onderzoek naar en het winnen van delfstoffen en met betrekking tot met de mijnbouw verwante activiteiten (Mijnbouwwet)*” (Mining Act).

5 This contribution effects the legal and regulatory situation as per 26 June 2021.

But first, let me explain to you briefly how the heat sector is currently organised and why it may fulfill such a key role in the Dutch energy transition.

2 How the Dutch heat sector is currently organised

European and Dutch rules about metering and invoicing left aside,⁶ the regulatory framework structuring the Dutch heat sector is to a large extent concentrated in the Dutch Heat Act.⁷ The origins of the Heat Act can be traced back to a private members' bill.⁸ Some of the main reasons for the members of parliament concerned to introduce the bill were protecting – dependent – consumers against possible dominance of heat supply companies, fighting excessive heat supply tariffs and unreasonable conditions, as well as increasing transparency in respect of such tariffs.⁹ Before its adoption, the Heat Act has been debated for many years in parliament. Once it had been adopted, the then Minister of Economic Affairs, Agriculture and Innovation took the initiative to first have the newly adopted Heat Act amended before having it enter into force.¹⁰ Some years after its entry into force, the Heat Act has again been revised considerably for several reasons, notably to introduce more flexibility into the regulatory framework, as well as to give an impulse to the energy transition.¹¹

The Dutch Heat Act's scope currently is – to a considerable extent – limited to the regulation of heat supply to small end users, *i.e.* consumers with a heating grid connection with a capacity of not more than 100 kW.¹² Such end users can either be households

6 EU-Directives on energy end-use efficiency Implementation Act 2011 (*Wet Implementatie EG-richtlijnen energie-efficiëntie 2011*) implementing Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC.

7 *I.e.* *Warmtewet*; “*Wet van 17 juni 2013, houdende regels omtrent de levering van warmte aan verbruikers*”.

8 Legislative Proposal Heat Act (*Voorstel van wet van de leden Ten Hoopen en Samsom tot het stellen van regels omtrent de levering van warmte aan verbruikers (Warmtewet)*, Parliamentary documents, file 29048.

9 Explanatory Memorandum to the Legislative Proposal for the Heat Act, parliamentary documents 2002-2003, 29 048, no. 3.

10 Letter of the Minister of Economic Affairs, Agriculture and Innovation (*Brief van de minister van Economische Zaken, Landbouw en Innovatie*), Parliamentary documents, 2010-2011, 32 839, no. 5.

11 Explanatory Memorandum to the Legislative Proposal amending the Heat Act on the grounds of the evaluation thereof (*Memorie van Toelichting*), parliamentary documents, file 34 723 2016-2017, 34 723, no. 3.

12 Heat Act, art. 1.

or companies. The Heat Act *inter alia* stipulates that heat suppliers must apply reasonable terms and conditions towards small end users.¹³ Also, the Heat Act provides for the regulation of tariffs in respect of the different aspects of heat supply, such as connection to a heating grid, metering, heat delivery equipment,¹⁴ and actual heat supply.¹⁵ The Dutch Energy Regulator, the Dutch Authority for Consumers and Markets, ACM,¹⁶ is responsible for regulation and supervision of these tariffs.¹⁷ The actual heat supply tariffs are maximum tariffs and any heat supply tariffs in excess thereof are automatically corrected to such maximum.¹⁸

The Heat Act furthermore forbids heat suppliers to make unjustified distinctions between end users, *i.e.* they may not discriminate.¹⁹ Also a licence – by ACM – is required for heat supply to small end users. Moreover, the Heat Act contains rules to ensure emergency facilities if a heat supplier or producer intends to or must terminate supply or production.²⁰ Furthermore, the Minister of Economic Affairs may intervene in a heat supplier's activities if necessary.²¹

From case law it follows that the Heat Act covers all types of heat, so not just district heating, but also mid and low temperature heat supply, notably from heat and cold storage systems.²² In that regard, the Heat Act has a wide scope. Actually, the Heat Act also governs cold supply, albeit to a limited extent, where heat and cold supply are combined for technical reasons, notably in heat and cold storage systems.

A relevant issue which has been heavily debated in the heat sector is whether regulated or negotiated third party access to heating grids should be introduced. So far, the legislator has decided for a system of negotiated third party access.²³ This basically means that heat suppliers and heating grid operators – often the same entity – are required to negotiate with any producer interested in access to their grids. A refusal to grant access must be substantiated. Yet, there is no sanction attached to refusing access following negotiations.

13 Heat Act, art. 2.

14 *I.e.* 'Afleverst', Heat Act, art. 2(3)(b).

15 Heat Act, art. 5(2)(b).

16 *I.e.* Autoriteit Consument en Markt (ACM).

17 Heat Act, artt. 5 and 15.

18 Heat Act, art. 5(6).

19 Heat Act, art. 2(4).

20 Heat Act, art. 12b.

21 Heat Act, art. 12b.

22 *X a.o. vs ACM and Verantwoord Wonen B.V. h.o.d.n. Vestia Energie* [2016] ECLI:NL:CBB:2016:30.

23 Heat Act, art. 21(1).

The reader probably knows that Dutch Gas Act and Electricity Act 1998 provide for regulated third party access to gas and electricity grids, respectively. Such regulated third party access is consistent with European legislation and case law.²⁴ A reason given not to introduce regulated third party access to heating grids is that these are of a much smaller scale than gas and electricity grids, simply because heat cannot be carried over the same distances as gas and electricity can. Thereby, from an economical perspective third party access often seems infeasible, even more so, where margins are thin. However, technical developments in the heat sector are going fast and currently heat transmission systems are being developed through which heat can be transported over longer distances. Third party access to such transmission systems – or booking of capacity in such transmission systems by several parties – seems less of an issue. Still, end users tend to want to choose for themselves from which supplier they procure their heat, so that more debate about third party access may well be expected.

3 Why a new regulatory framework is being prepared

Even though the latest major amendment of the Heat Act has resulted in more flexibility in the tariff system with possibility to deviate from certain standardised tariff structures, the system is often considered somewhat rigid. Tariff regulation calls to a certain extent for rigid rules and formats. Yet, the heat sector is much more diverse than, for instance, the gas and electricity sectors. Not only are the heat projects of much smaller scale than gas and electricity grids, the heat sources used to feed these projects are diverse. Whilst district heating traditionally is fed from high temperature heat sources and used for existing building blocks, low temperature heating grids and sources are quite popular for heating newly developed housing. And where high temperature sources are not always sustainable, low temperature sources usually are to a much larger extent.

A wish for more flexibility in the regulatory framework in itself may not justify a new regulatory framework for the heat sector. However, the need to quickly expand and enroll heating projects may. That need may well follow from the energy transition that is also taking much more shape in the Netherlands.

The Netherlands have one of the densest gas distribution systems of Europe and the Dutch energy transition calls for the replacement of gas as a main heating source with more sustainable alternatives. Replacing such a dense and reliable gas infrastructure is quite a challenge and there are various – more sustainable – alternatives, notably biogas,

²⁴ *Citiworks A.G.* [2008] ECLI:EU:C:2008:298 case C-439/06 and *Julius Sabatauskas a.o* [2008] ECLI:EU:C:2008:551 case C-239/07.

hydrogen, all electric and – renewable – heat. Whereas at the time the development of gas grids to connect municipalities and industries all across the Netherlands could more easily be coordinated from a centralised level, the choice for and development of an alternative energy source to replace gas calls for a more decentralised approach. Which energy source is most efficient may vary from district to district and even from street to street. Economics, planning and logistics as well as technical aspects need to be considered. Removal of gas infrastructure and replacement thereof with an alternative may, furthermore, be more complicated for existing building blocks than newly developed ones. Moreover, there is the sociological factor, because the end users' support remains pivotal.

Heat is considered a very important alternative for gas. The current Heat Act, however, is generally considered not effective enough for these challenges and a more detailed regulatory framework seems therefore inevitable. Moreover, the current Heat Act does not provide for a system of regulated third party access for end users, and the other way around, the Heat Act does not require heat suppliers to offer end users connections to their grids, either. In some cases municipalities have tendered concessions for heat projects with additional conditions. Yet, the energy transition from gas to an alternative energy source, calls for a more structured approach, ascertaining end users can switch from connection to a gas grid to connection to a heating grid.

The Dutch Ministry of Economic Affairs and Climate Change²⁵ is currently preparing the Collective Heat Supply Act.²⁶ The Collective Heat Supply Act is meant to replace the Heat Act and contains a much more detailed regulatory framework than the latter. The Collective Heat Supply Act would be an important instrument to facilitate the energy transition. Last year, the Ministry has already published the draft bill for consultation, which has resulted in many different opinions from a wide variety of stakeholders and interested parties. Meanwhile, the Minister has announced that he has tried to reconcile certain of these views through amendment of the draft bill.²⁷ The revised draft bill has not yet been published or introduced to parliament. Since elections for the Dutch Second Chamber of parliament were held in March 2021, introduction of the bill will probably be one of the new government's actions.

25 Ministerie van Economische Zaken en Klimaat.

26 I.e. “*Wet houdende regels omtrent productie, transport en levering van warmte (Wet collectieve warmtevoorziening)*”.

27 Letter of the Minister of Economic Affairs of 14 December 2020 (*Kamerbrief over resultaten internetconsultatie Wet Collectieve warmtevoorziening*).

4 Some elements of the Collective Heat Supply Act

The Collective Heat Supply Act *inter alia* aims at ensuring reliable, sustainable heating against reasonable tariffs and conditions. Therefore, municipalities are left with a lot of initiative. Since the choice for a good alternative for gas supply is a rather local affair, the municipalities are to determine ‘heat plots’²⁸ in consultation with neighbouring municipalities and – where appropriate – taking into account directions from provincial authorities. For each heat plot, a municipality will select a ‘heating company’²⁹ through a transparent and nondiscriminatory procedure, likely by means of a type of public procurement. For such a heat plot the heating company is required to develop and operate a collective heating system for a period of twenty to thirty years.

The heating company will be responsible for the entire heating chain, from production to transportation and supply, albeit that it may – for instance – procure heat from a third party.

As a general rule, the heating company will have to connect all buildings located or erected within the boundaries of the heat plot. There are certain exceptions to this rule and end users also have a right to opt-out and connect to an alternative.³⁰

Development and operation of collective heating systems are closely monitored by the municipality and ACM, notably with a view to security of supply and costs.³¹ Also, ACM will supervise the implementation of the Collective Heat Supply Act and determine tariffs for the various aspects of heat supply.³² The tariff system still needs to be developed, but it is meant to be a lot more detailed than the current system. Also, the tariff system would allow ACM to opt for another reference fuel than gas to calculate tariffs.

Furthermore, the Collective Heat Supply Act would contain rules on metering, the role of lessors and owners’ associations, as well as heat transmission grids.³³ Also, the Collective Heat Supply Act would introduce more flexibility, by allowing for exemptions from the general regulatory framework applicable to heating companies for smaller heating projects.³⁴ Beyond this, worthwhile mentioning is that the Collective Heat Supply Act would not contain further reaching rules on negotiated third party access to collective heating systems than the current Heat Act does.³⁵

28 I.e. ‘Warmtekavels’, Collective Heat Supply Act, Artt. 1 and 2.1.

29 I.e. ‘Warmtebedrijf’, Collective Heat Supply Act, Artt. 1 and 2.3.

30 Collective Heat Supply Act, Art. 2.8 jo. 2.29.

31 Collective Heat Supply Act, notably Chapter 2.

32 Collective Heat Supply Act, Chapters 7 and 9.

33 Collective Heat Supply Act, Artt. 2.24 et seq., 4.1 – 4.6 and 5.1 – 5.19.

34 Collective Heat Supply Act, Artt. 3.1 – 3.4.

35 Collective Heat Supply Act, Art. 2.27.

Like the current Heat Act, the Collective Heat Supply Act would apply to all different types of heat and – thus – has a broad scope.³⁶ It actually has an even broader scope as it would also extend to heat supply to large customers. Since one of the Collective Heat Supply Act's main objectives would be facilitating the energy transition, it also provides for a 'CO₂ ladder', according to which the percentage heat that a heating company would need to procure from renewable sources would increase annually.³⁷

These are just a few elements of this very interesting and important legislation in development. Given the limitations set for this contribution, I will not elaborate on other interesting elements.

5 How does the Collective Heat Supply Act regulate existing heating projects?

The Collective Heat Supply Act would also provide for a transitional regime. Basically, this would entail that current heating projects will be considered as heat plots and the heating companies operating these will be allowed to continue doing so for the remaining duration of the project with a maximum of thirty years. However, the Collective Heat Supply Act would then apply to such projects, so that an obligation to connect end users within the boundaries of its transitory heat plot may apply, even if the heating company would currently not have such an obligation. Also, the new tariff system would then likely apply.

Such a transitional regime may give rise to discussion, because in practice it may be complicated to determine the boundaries of a heating plot. And discussions about such boundaries are far from theoretical, because municipalities are to a considerable extent responsible for realising our 2030 climate goals. Many municipalities feel they cannot await adoption of the Collective Heat Supply Act and have already developed or are developing heating projects of increasing scale. Upon adoption thereof, these projects will have to be fit within the regulatory framework of the Collective Heat Supply Act, and these different projects may then also coincide with the heat plots the municipalities would then have to establish. This may prove to be a complicated jigsaw puzzle to solve.

³⁶ Explanatory Memorandum to the Collective Heat Supply Act (*Memorie van Toelichting Wet collectieve warmtevoorziening*).

³⁷ Collective Heat Supply Act, Art. 2.16.

6 Conclusion

As follows from the foregoing, the heat transition is likely to affect the field of energy law, as the sector may face considerable restructuring. This inevitably will lead to many legal issues and questions. No doubt, a professor in energy law can play an important role in solving these.

Martha is unique, yet someone will have to succeed her as professor of Energy Law at Groningen University. No doubt, Martha's successor will set different accents and focus on different topics. In this, he or she can build on Martha's achievements and I wish he or she will – like Martha – remain innovative in researching and expanding this field of law. In particular, I hope he or she will give the heating sector the attention it deserves.