

TSO/DSO LIABILITY

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Agenda

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I. Crown TeneT Case

I.1. Facts

I.2. Decision of 30 april 2018

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I.1. Facts

- **Cause of dispute :**

On 27 March 2015, **a large-scale power failure** at the Diemen substation (Netherlands) interrupted the transmission of electricity to the paper factory Crown Van Gelder BV for several hours.

- **Crown Van Gelder BV**

- is connected to the distribution system managed by Liander NV and is fed by the system operated by Tennet TSO.
- has filed a complaint for damages following the breakdown with the Autoriteit Consument en Markt (ACM)
- sought a declaration that
 - TenneT TSO had not done everything reasonably within its power to prevent power failures
 - the grid design of the Diemen substation did not meet the legal requirements.

I.2. Decision of 30/4/2018 (ACM)

Crown Van Gelder's complaint is **inadmissible**

Reasons :

- Crown Van Gelder's factory was only connected to Liander's grid.
- Crown Van Gelder had not concluded a contract with Tennet TSO and it received no invoices from that operator.

Crown Van Gelder brought an action against that decision before the College van Beroep voor het bedrijfsleven (the referring court).

I.3. Judgement of the Court : Case C-360/19, 8 October 2020

I.3.1 Legal Context

I.3.2. Request for preliminary ruling

I.3.3. Consideration of the question referred

I.3.4. Conclusion of the Court

1.3.1. Legal context

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

“This Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the European Union

[...]

It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.”

According to Article 12 of that directive,
'Each transmission system operator shall be responsible for :

- **ensuring the long-term ability of the system** to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment;
- **ensuring adequate means** to meet service obligations”

According to Article 32 of that directive,

“The transmission or distribution system operator **may refuse access** where it lacks the necessary capacity.”

According to Article 37 (1) of that directive,

The regulatory authority shall have the following **duties**:

- ensuring compliance of transmission and distribution system operators with their obligations under this directive and other relevant [EU] legislation;
- monitoring compliance with
 - the performance of network security and reliability rules
 - setting or approving standards and requirements for quality of service and supply
- monitoring the time taken by transmission and distribution system operators to make connections and repairs;
- helping to ensure that the consumer protection measures are effective and enforced.

According to Article 37 (11) of that directive,

“Any party having a complaint against a transmission or distribution 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 within a period of two months after receipt of the complaint.

This period may be extended by two months where additional information is sought by the regulatory authorities.

That period may be further extended with the agreement of the complainant.

The regulatory authority’s decision shall have binding effect unless and until overruled on appeal.”

1.3.2. Request for preliminary ruling

Administrative Court of Appeal for Trade and Industry (Netherlands) asks about **the interpretation of the Directive 2009/72, Article 37(11)** :

*'Must Article 37(11) of Directive 2009/72 ... 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)?'*

I.3.3. Consideration of the question referred

- The Court recalls, **the two conditions of the competence of ACM** handling a complaint against DSO/TSO
 - the complaint must concern a transmission or distribution system operator.
 - the complaint must relate to obligations imposed on the system operator by Directive 2009/72.

- **ACM's competence is not conditional** on the existence of a direct relationship between the complainant and the system operator.

- **Notion of “party”**
 - as the Advocate General noted the term ‘party’ may be understood as referring to persons with an interest in having recourse to the regulatory authority.

The Directive gives a direct right against the TSO, regardless of whether or not there is a direct contractual relationship

→ it is sufficient to have an interest in acting in the sense of procedural law.

- the Court notes that Directive 2009/72 :
 - aims to grant energy regulators the power to ensure the full effectiveness of consumer protection measures
 - requires Member States to ensure high levels of consumer protection, particularly with respect to dispute resolution mechanisms

TSO Liability

TSOs are required to :

- Operate, maintain and develop under economic conditions secure, reliable and efficient transmission systems ;
- Meet service obligations ;
- Contribute to security of supply through adequate transmission capacity and system reliability ;
- Manage electricity flows on the system, taking into account exchanges with other interconnected systems.

I.3.4. Conclusion of the Court

- **Limiting the right to refer a complaint** to the regulatory authority in accordance with Article 37(11) exclusively **to final customers** with a direct link to the system operator **restricts** the task consisting in ensuring that transmission system operators comply with their obligations under that directive.
- **The tasks and obligations imposed on transmission system operators** by Directive 2009/72 do not concern only those entities whose installation is connected to their network.
- **The concept of ‘party having a complaint’** cannot be interpreted as involving a direct relationship between the complainant and the transmission system operator concerned by the complain.
- **ACM is not entitled to dismiss a complaint from a final customer** alleging non-compliance with obligations imposed on transmission system operators by Directive 2009/72 on the ground that the installation of that final customer is connected not to that transmission system directly, but only to a distribution system fed by it.

II. BELGIAN LAW

II.1. Court of Cassation (7 February 2020) :

Facts

- The company Recybois owns an installation that allows it to produce the electricity necessary for the operation of its business from wood waste.

The surplus electricity is sold to the company S.P.E.

Recybois has also concluded a contract with DSO, the distribution network operator, to feed the electricity produced back into the network.

S.P.E. and I. use the services of TSO.

Recybois and E.S.O. are not contractually bound.

- As a result of a handling error by an T.S.O. employee, a voltage dip occurs on the the electricity distribution network, which caused considerable damage to the Recybois installations.

Recybois wanted to hold E.S.O. liable.

- T.S.O. claims that it enjoys quasi-immunity as a performing agent "*because the transmission of electricity by T.S.O. is the sine qua non*" for the performance of the contracts concluded between Recybois, S.P.E. and I.

Conclusion

Recybois' claim for compensation against T.S.O. was accepted by the court.

The Court considered that, by ensuring the transport of electricity from the place of production to the distribution network, T.S.O. was performing a service that was essential to the public interest.

The performance of their own contractual obligations by Interlux and S.P.E., but did not act as a contractual obligations, but was not acting as an subcontractor agent for the performance of these obligations.

T.S.O. appealed against it.

This was an opportunity for the Court of Cassation to rule on the concept of a performing agent.

II.2. Notion of subcontractor agent

"The subcontractor agent is a person whom a contractor has substituted to perform a contractual obligation."

It is a person who wholly or partly performs a contractual obligation of the main contractor, the latter remaining a party to the contract.

The subcontractor may perform this obligation :

- on his own account and in his own name

or

- for the account and in the name of the debtor

II.3. Contractual liability for the acts of others

Application of Article 1797 of the Civil Code and the case law
:

When a contractual debtor resorts to a third party for the performance of his obligations,

- The main contractor may be held contractually liable even if the non-performance, improper performance or delay is due to the fault of the subcontractor agent ;
- He cannot invoke this fault as an exonerating foreign cause to free himself from his responsibility ;
- He has recourse against the subcontractor agent.

II.4. The quasi-immunity of the subcontractor

- The principle of the relativity of the internal effects of agreements (Article 1165 C. civ.):

The subcontractor agent is not a party to the original contract

→ the main creditor could not seek to engage the contractual liability of the subcontractor

- The extra-contractual liability of the subcontractor can only be incurred under the strict conditions of concurrent liability.

The principal creditor **will have to show that** :

- the subcontractor agent committed a breach of contract ;
- the contractual fault constitutes a breach of the general duty of care and diligence,
- this fault has caused damage other than that resulting from the improper performance of the contract.

III.5. The different compensation schemes at regional level

- The Walloon Decree of 12 April 2001 on the organisation of the regional electricity market :
- The Flemish Decree of 8 May 2009 laying down general provisions on energy policy
- the Brussels Ordinance of 19 July 2001 on the organisation of the electricity market

- The network operator is obliged to compensate the end customer in the event of interruption, non-compliance or irregularity in the supply of electrical energy (in Wallonia and Brussels) and only in the event of a cut-off (in Flanders)
- The Decrees and Ordinance refer to connected final customers
- Compensation does not apply in case of force majeure
- Indirect material damage does not have to be compensated (Wallonia and Brussels)
- The amount of compensation is limited to €2,000,000 per damaging event
- Direct personal injury must be compensated in full.

The network operator is also obliged to compensate end customers on a lump-sum basis, regardless of any damage:

- In the event of an outage lasting more than six hours (Wallonia and Brussels)
- In the event of an outage of more than four hours (in Flanders)

In Wallonia, the network operator will also be obliged to compensate end customers:

- In the event of damage caused by work carried out by the network operator during the establishment or operation of its installations
- The compensation will be fixed amicably or by the judge.

II.6. Reform of the Civil Code

The Civil Liability Reform Commission's draft did not enshrine the strict conditions of concurrent liability.

Consequence :

This quasi-immunity could be challenged and the principal creditor could freely engage the extra-contractual liability of the subcontractor

Nevertheless, thanks to Article 5.92 § 2 of the proposed law of 16 July 2019, the subcontractor agent could be protected :

"If the debtor uses auxiliary persons for the performance of the contract, they may invoke against the principal creditor the liability exemption clause agreed between the latter and the debtor."

III. Some thoughts

Some thoughts

Quid of the liability of the DSO in this case? Quid in case of coliability?

Quid if the national law limits the cap of liability?

Quid if the national law introduces a recourse against the DSO only?

Quid agreements between TSO and DSO concerning the liability?

Should a distinction be made between consumers and undertakings?