Chapter 8
Who Guards the Guardians? Judicial Oversight of the Authority Consumer and Market's Energy Regulations in the Netherlands

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Contents

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Abstract Independent National Regulatory Authorities (NRAs) play an important role in the implementation and enforcement of European energy directives and regulation. The Dutch *Autoriteit Consument en Markt* (Authority for Consumers and Markets, hereafter: ACM) has been provided broad discretionary powers to regulate the energy market. This chapter examines the way in which the Dutch *College van Beroep voor het bedrijfsleven* (Appeals Tribunal for Trade and Industry, hereafter: CBB) has reviewed energy regulations. This chapter concludes that initially the CBB was very hesitant in reviewing the ACM's energy regulation, since it scrutinized administrative energy decisions of the ACM based on its discretionary powers very marginally in the period between 2002 and 2013. As a result of this marginal judicial review of the ACM's energy regulations, it has been extremely hard for appellants to realise effective judicial protection in the period between 2002 and 2013. However, in more recent judgements from 2014 and onwards, the CBB has become stricter in reviewing the ACM's energy regulations. The CBB has done this by reviewing the substance of decisions more intensely on procedural grounds. This chapter suggests that the CBB, when reviewing the ACM's energy regulations, should continue its recent intensification of the judicial review of regulatory decisions and favour the adoption of a procedural-proportionality review. By applying a procedural-proportionality review, courts will be given more instruments to ensure that energy regulations are made in a fair, well-informed, proportional and transparent way, which could enhance both the democratic legitimacy of energy regulations and the democratic accountability of the ACM.

Keywords Judicial review · energy sector · national regulatory authorities · discretion · marginal review · procedural-proportionality review

8.1 Introduction

In *The Spirit of Law*, Montesquieu introduced the separation of state powers into three branches of government: the legislator, the executive and the judiciary. However, the development of the modern administrative state gave rise to a new, fourth branch of government: the administrative bureaucracy.[1] Independent national regulatory authorities (NRAs),[2] such as the Dutch Authority Consumers and Markets (ACM), form a new, but highly important part of the administration.[3]

[1] McLean and Tushnet 2015, pp. 121–130.

[2] Independent national regulatory authorities are defined by Coen and Thatcher as "an unelected body that is organizationally separated from government and has powers over regulation of markets through endorsement or formal delegation by public bodies." Coen and Thatcher 2005, pp. 329–346.

[3] 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 (OJ 2009, L211/55); Directive 2009/73/EC of the European Parliament and of the Council of the European

The ACM was created due to a merger of three independent administrative authorities; the Netherlands Competition Authority (NMA), the Independent Telecommunications Regulator (OPTA) and the Consumer Authority (CA). The energy sector is a highly technical and rapidly changing field. The past decade, the use of complex economic evidence in energy regulation partly increased due to the introduction of method decisions to regulate the natural monopolies, the distribution and transmission networks, in the energy sector. This complexity of energy regulation, combined with the legislator's inability to ex ante anticipate on all regulatory issues that arrive in the complex regulation of the energy sector, has led to the rise of administrative rulemaking by the ACM in the energy sector. This shift in rulemaking competences from the legislator to the administration is usually justified with the claim that independent administrative agencies have several institutional advantages over the legislator. Administrative rulemaking by independent national regulatory authorities such as the ACM is claimed to be more efficient and effective, due to the ACM's expertise and experience in the energy sector.[4] The European legislator delegated significant regulatory powers directly to the ACM for the implementation of European energy regulations and directives.[5] Those regulatory powers are largely exercised by the ACM through the adoption of generally binding regulations:[6] the ACM can set the maximum price of network tariffs, the method of calculating network tariffs, and the rules for access to energy networks through

Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009, L211/94); Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation 1228/2003 (OJ 2009, L211/15); Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation 1775/2005 (OJ 2009, L211/36) and Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for Cooperation of Energy Regulators (OJ 2009, L211/1).

[4] Gilardi and Maggetti 2011, pp. 201–214.

[5] Rose-Ackerman and Jordao 2014, pp. 1–73.

[6] Generally binding regulations are rules issued by competent public bodies that have external effect and are binding on those to who it relates to. Generally binding regulations contain general, abstract rules that are suitable for repeated application in practice without further specification. Article 8:3 GALA prohibits administrative courts to directly examine the legality of generally binding regulations. The administrative judge can only indirectly scrutinize generally binding regulations: the applicant can indirectly challenge the legality of generally binding regulations when litigants question the administrative decision that has been taken by a public body on the basis of that generally binding regulation (exceptive judicial review). The underlying structural logical is a political and constitutional argument based on the Dutch understanding of the separation of powers: matters of policy and regulation should be dealt with by the executive and legislative power. This prohibition is currently heavily criticized and debated in the Netherlands. See Voermans 2017 and de Poorter and Capkurt 2017, pp. 84–95.

regulations and administrative decisions.[7] The broad rulemaking competences allow the ACM to weigh different regulatory options, come to unilateral decisions and intervene in the energy sector. As the ACM has gained broader regulatory powers to intervene in- and regulate the energy market, it is of key importance that the ACM can be controlled and can be hold accountable for the exercise of its regulatory powers, which is necessary to make sure that the ACM's market-interventions and regulations happen in a fair, transparent, and legitimate way.

Some authors have claimed that constitutional positioning of the ACM is in tension with the principle of separation of powers.[8] Those authors mainly hold on to the transmission belt theory to justify the democratic legitimacy of rulemaking. Within the transmission belt theory, the administration can be seen as a "mere implementer" of regulation that has ex ante been decided upon by the legislator within the legislative process.[9] However, the transmission belt theory of administrative law,[10] in which legislation serves as a transmission belt which transfers democratic legitimacy to the NRAs actions, is problematic in the field of energy regulation. The ACM is bound by law to stringent European independence rules, since Article 35 of the Electricity Directive obliges Member States to guarantee the independence of the regulatory authority.[11] These strict independence requirements aim to guarantee impartial and transparent regulation and administrative decision-making by NRAs.[12] The ACM is therefore held at arm's length of parliament and the responsible minister of Economic Affairs. This means that the ACM can exercise its regulatory powers without specific political interference, particularly from parliament and the responsible minister. The responsible minister is only allowed to give general policy guidance to the ACM. In this sense, the ACM cannot simply be qualified as "the executor of the political will", but instead has an independent role within the administration. Besides, even if these tight requirements regarding the ACM's political independency would not exist, it would still be problematic for parliament to effectively control and monitor the ACM's energy

[7] Article 41 Dutch Electricity Act 1998 and Article 81 Gas Act, Articles 27, 31 and 36 Dutch Electricity Act 1998 and Articles 12a, 12b and 12f Gas Act. Dutch Administrative law qualifies these regulations as generally binding regulations (algemeen verbindende voorschriften). Whereas Article 8:3 GALA prohibits the judicial review of generally binding decisions, an exception is made for energy regulations.

[8] Verhey and Verheij 2005, pp. 159, Zwart and Verhey 2003 and Caranta et al. 2004.

[9] Coglianese 2015, Van Gestel 2014 and Stewart 1975.

[10] See Van Gestel 2014.

[11] Article 35 of Directive 2009/72/EC and Article 39 Directive 2009/73/EC.

[12] This is particularly important, considering that the energy market is strongly intertwined with the government, since the Dutch Ministry for Financial Affairs is also a sole shareholder in TenneT, the transmission system operator in the Netherlands that operates the national electricity transmission. This Ministry is also the sole shareholder of the Dutch Gas Transmission Network (Gas Transport Services). See Hancher et al. 2003, pp. 361–362.

regulation. Parliaments often do not have the means, time and expertise to effectively scrutinize every regulation that the ACM issues.[13]

A central theme in the literature concerns the way in which this decrease in parliamentary control on the ACM's regulatory competences can somehow be counterbalanced in order to enhance the legitimacy of the ACM's delegated rule-making competences. Organizing stakeholder participation in the promulgation of regulations,[14] and judicial review of the ACM's regulatory decisions are two mechanisms that can be used to check and counterbalance the ACM's regulatory powers.[15] The focus of this chapter will be on the latter. The Dutch General Administrative Law Act (GALA) designates *het College van Beroep voor het bedrijfsleven* (the Dutch the Appeals Tribunal and Industry, hereafter: CBB) as a special court in appeal procedures regarding regulatory decisions taken on the basis of the Electricity Act and Gas Act.[16] As specialized court, the CBB acts in both first and only instance in reviewing regulatory decisions.[17] Consequently, the CBB holds an important position in reviewing regulations of the ACM taken on the basis of the Electricity Act and Gas Act,[18] In any event, there is no possibility to appeal after an appellant has reached the CBB. For this reason, it is of great importance that the CBB reviews appealed decisions in a correct manner.

The aim of this chapter is to review the role of the CBB in providing regulatory oversight in the energy sector. This chapter will therefore provide an analysis of key judgments of the CBB in energy cases. We will particularly focus on cases in which the CBB scrutinized generally binding regulations in the energy sector between 2002 and 2013, which covers the first regulatory periods in which the CBB had to judge on complicated regulatory matters in the energy sector for the first time. Finally, this chapter will reflect on some recent developments in judicial review of regulatory decisions in the energy sector between 2015 and 2018.

The research question that leads this chapter reads as follows:

> How does the highest administrative court in the Netherlands, scrutinize decisions that the ACM takes based on its discretionary regulatory powers within the energy sector – and how does the standard and intensity of judicial review relate to the principle of separation of powers and the need for subjecting the ACM regulatory decisions to adequate checks and balances?

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[13] Gilardi and Maggetti 2011, p. 201.

[14] Lavrijssen 2016, pp. 51–57.

[15] Meuwese et al. 2009.

[16] As provided in Appendix 2, Article 4 Awb (General Administrative Law Act).

[17] However, if there is a criminal charge, there should be the possibility of higher appeal. As provided in Article 14 para 5 of the International Convention for Civil and Political Rights, which holds that that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.

[18] *Parliamentary Documents II*, 2003/04, 29702, nr. 3, p. 123. If for instance a fine is issued on the basis of the Electricity Act or Gas Act, the appeal of first instance is the district court of Rotterdam, with the possibility for higher appeal at the CBB. In such cases, the CBB is the judge in second and final instance.

This question has political, theoretical, and societal relevance. First, judicial review can serve as a control mechanism for reviewing the soundness and fairness of the ACM's energy regulation.[19] The importance of having a well-functioning control mechanism that can counterbalance the ACM has greatly increased through the expanding regulatory competences and increased independence of the ACM towards the parliament. This shift of rulemaking competences from the legislator to the administration and the limited political control of the ACM could hence partially be counterbalanced by the possibility of effective judicial review by administrative judges.[20] Second, effective judicial review is also of key societal relevance, as a highly marginal review by judges leaves the actions of regulatory agencies effectively absent of control, which could negatively impact the consumer's right to effective judicial protection. To illustrate: if the judge does not assess all aspects of a regulatory decision or reviews the substantive parts of a decision in a restraint way, there is a great risk that inadequate decisions are left in place, which could then damage the interests of the energy consumers. Third, it is worthwhile from a scientific point of view to assess how the administrative judge deals with the review of regulatory discretionary powers of NRAs, and what effect this has on the judicial protection of, amongst others, consumers.[21]

The structure of this chapter is as follows. Section 8.2 presents the main regulatory principles that underpin energy regulation in the Netherlands. Section 8.3 examines the way in which the CBB has exercised judicial review in some landmark cases. An important question that will be assed concerns how the CBB's standard and intensity of review can be evaluated in light of the principle of separation of powers. Different cases will be analysed and assessed in order to illustrate in what way judicial review by the CBB has been carried out over the years. The selection of cases is focussed on cases in which the interests of the energy consumer were at stake. The reason for this selection of cases and focus on the consumer is that one of the core objectives of EU energy law is precisely to promote the interests of the consumer, by guaranteeing access to affordable, sustainable and secure energy supply. In this chapter the perspective of different types of consumers are researched, including household consumers, large business users and small and medium sized business users.[22] Section 8.4 analyses the current doctrinal positions in legal literature on the judicial review of generally binding regulations and will make suggestions as to how the legal review of regulatory decisions of the ACM could be improved. Finally, a conclusion will be presented that is formed on the basis of the results.

[19] Lavrijssen et al. 2016.

[20] Mak 2012.

[21] Lavrijssen and Kohlbacher 2018.

[22] On this, see Lavrijssen 2014. In the third energy directive, the term customer is used which encompasses various groups of customers: wholesale customers, household customers, non-household customers, vulnerable customers. See Pront-van Bommel 2010, p. 44.

8.2 Energy Regulation in the Netherlands

The operators of energy networks have a natural monopoly. To prevent abuse of the dominant position of these operators, a system of tariff regulation has been developed on the basis of which the ACM regulates the requirements and tariffs for access to the energy networks (connection and transportation of energy). This regulation encourages operators to work in a cost-efficient manner and to keep the tariffs affordable for energy consumers. European and national energy regulation further aims to secure a sustainable and secure energy supply.[23] Directive 2009/72/EC provides the goals national NRAs need to consider when conducting their work, such as the promotion of a competitive, secure and an environmentally sustainable internal market. However, the Directive leaves the Member States with considerable freedom to give further shape to such tariff regulation.[24] A core principle that applies is that regulation should be both transparent as well as non-discriminatory.[25]

In the Netherlands, the method of benchmark regulation has been implemented.[26] This means that the whole of in- and output of regional operators are assessed, of which the mean is then used as benchmark. For national operators, a comparison is made with other national operators.[27] This benchmark then sets the permissible income levels for the operator. If this income level is exceeded, the ACM will correct the operator in the subsequent regulatory period through an efficiency discount (also known as x-factor).[28] This way, efficiency from the operator's side is encouraged.[29] The efficiency discount is based on a method decision of the ACM, which provides how the costs of the system operators should be compared, which costs should be taken into account and which weight should be granted to certain elements of the costs.[30] Following the x-factor decision, every operator will propose a tariff. Subsequently, the ACM sets a maximum tariff.[31]

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[23] *Parliamentary documents II 2008/09*, 31901, no. 1–2, p. 44.

[24] Article 36(f) Directive 2009/72/EC. For Directive on gas, see Article 40(f) Directive 2009/73/EC.

[25] Article 35(5) Directive 2009/72/EC and Article 39(5) Directive 2009/73/EC.

[26] Articles 41b and 41c Electricity Act.

[27] It not always turned out to be feasible to establish a benchmark to compare different national network operators. As an example, for a long time the ACM used for the GTS a benchmark that was not based on the performance of other national operators. See: *Parliamentary documents II* 2008/09, 31901, no. 1–2, p. 48.

[28] *Parliamentary documents II 2008/09*, 31901, no. 1–2, p. 11; attached with consultation document 'STROOM'.

[29] Hakvoort et al. 2013, p. 5.

[30] *Parliamentary documents II 2008/09*, 31901, no. 1–2, p. 46.

[31] Lavrijssen et al. 2014, p. 26.

Note, in this context, that this system possible will be subject to changes in the near future with new proposals for modernisation of the *Electriciteitswet* and *Gaswet* (Electricity Act and Gas Act) to enable the facilitation of the energy transition.[32]

8.3 Judicial Review by the CBB Between 2002 and 2018

8.3.1 Traditional Standard and Intensity of Review of Policy- and Discretionary Powers

As many textbooks in administrative law have emphasized, the theory of the separation of powers prescribes that the administration should be given discretionary powers to enact administrative decisions and regulations. Each legal system interprets this theory differently, due to different historical developments in constitutional law. The Dutch interpretation of judicial review of administrative discretion is heavily influenced by German Administrative law.[33] The extent of judicial review depends on the standard of review as well as its intensity. The standard of review determines which elements of a decision can be held subject to review. The intensity of review is then a different matter, but one that is effectively connected to the standard used. After all, the elements that are held subject to review can in turn be either held subject to a full or marginal review.[34] Effective review of regulatory decisions by the administrative judge constitutes a key component of effective judicial protection. Both procedural as well as substantive elements of a regulatory decision must be held subject to effective judicial review. In principle, one could say that the more elements of a decision are subject to a judge's assessment—thus the more stringent the review—the more the principle of effective judicial protection is upheld.

It depends on the type of discretionary powers that the legislator has delegated to the ACM what types of standard and intensity of judicial review will be performed by the administrative courts.[35] According to Dutch Administrative law, the term *discretion* has at least three meanings: policy freedom (beleidsvrijheid), margin of appreciation (beoordelingsvrijheid), and objective margin of appreciation (beoordelingsruimte).[36]

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[32] Minister van Economische Zaken, Wetgevingsagenda en energietransitie, brief van 11 december 2017, met kenmerk DGETM-EI, 17192414.

[33] Duk 1988 and Schlössels and Zijlstra 2010, p. 164.

[34] Different standards of review can be distinguished. Lavrijssen and De Visser speak of a 'slippery scale', where basically four different standards of review can be discerned, from extremely limited to highly intensive. Lavrijssen and de Visser 2006; Stroink 1995.

[35] Wade and Forsyth 2014, pp. 308–310; and Van den Berge 2017a, b, pp. 204–233.

[36] It is important to note that the judge always has the last word in interpreting the law.

Policy freedom implies that the ACM can choose between possible actions within the circumstances of a specific situation.[37] The ACM has a margin of appreciation when a legal provision contains a vague and undefined term or norm, which needs to be clarified by the ACM in practice.[38] Administrative law then provides that, if the legislator has provided the ACM freedom to interpret and apply legal norms and concepts, the judge will only exercise a marginal review of the ACM's assessments of the facts, but remains to have the competence to fully review the law.[39] The ACM has an objective margin of appreciation if a legislative provision is vague as result of the inability of the legislator to ex ante enhance its clarity. As in this case it is not the legislator's explicit aim to attribute discretionary powers to a regulatory authority, but is forced to do so in the absence of other alternatives, the judge can carry out a full review of the law, the facts and the assessment.[40] In each specific case, the judge is to assess—on the basis of the wordings of the relevant provisions—whether it was the legislator's aim to attribute the ACM discretionary powers. If the ACM establishes in the assessment phase that the requirements for a lawful execution of powers with a margin of appreciation have been met, then it will be necessary in the consecutive policy phase to assess whether and how such discretionary powers can be exercised. In this phase, the ACM has discretion.[41] For this purpose, it needs to balance different interests. The assumption in administrative law is that the judge, in such cases, will carry out a marginal review of this balancing act.[42] In the following section, several judgments on important regulatory decisions by the ACM in the field of energy law (method-, tariff- and code regulatory decisions) will be discussed.

8.3.2 Case Law Analysis

The analysis of the case law will start by focusing on judgments of the CBB where a decision concerning the regulation of tariffs for access to the national gas transport network has been appealed.[43] In these cases, the CBB left the method decisions for establishing values for calculating the tariffs for access to the transmission network of Gas Transport Services (GTS),—namely the setting of starting costs, the opening RAB (regulatory asset base) and the Weighted Average Cost of Capital (WACC)-

[37] Schlössels and Zijlstra 2010, p. 164.

[38] Michiels 2011, p. 139.

[39] Schlössels and Zijlstra 2010, p. 161.

[40] Michiels 2011, p. 140.

[41] Van Wijk and Konijnenbelt 2005, pp. 141–151.

[42] Schlössels and Zijlstra 2010, p. 170.

[43] CBB 30 November 2006, ECLI:NL:CBB:2006:AZ3365; CBB 29 June 2010, ECLI:NL:CBB:2010:BM9470 and CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307.

intact. The ACM is required to establish the WACC on the basis of Article 82 of the Gas Act.[44] Indicators for the selection of the judgments are:

i. The appeal was initiated by a consumer interest group;[45]
ii. The decision that has been appealed has a significant effect on energy tariffs or the reliability of energy supply for consumers;
iii. The CBB in its judgement deals with the role, independence or competences of the ACM.

8.3.2.1 Starting Costs

In the first case, the appellant—the Organization for Energy, Environment and Water (hereafter VEMW), an association for (corporate) energy consumers—lodged objections against the way in which the starting costs that had been used as basis for the regulation of the energy tariffs had been calculated.[46] VEMW argued that the actual network costs of the previous regulatory period should not have been used as starting costs, as these were not actually the efficient costs. According to the appellant, using the actual network costs as a basis for regulation is in tension with Article 3 of Regulation 1775/2005/EC.[47] VEMW substantiated its arguments by

[44] Article 82 Gas Act provided as follows at that time:

1. In contrast to Article 80, the tariffs for exercising the tasks by the network operators of the national gas transport network, referred to in Articles 10 and 10a, first paragraph, section b, c, d and e, as well as the tariffs for services needed for transportation are established in accordance with this article.
2. For each of the tasks of the network operator of the national gas transport network, referred to in the first paragraph, the Board of the competition authority determines the method of regulation, for a period of minimally three and maximum five years, after consultation with the joint network operators and with organizations representing parties in the gas market and taking into account the importance of efficiency of business operation and the promotion of the most efficient quality of the operation of these tasks.
4. The Board of the competition authority determines an efficiency discount after consultation with the joint network operators and representing organizations. This decision applies in the same period as the decision on the basis of the second paragraph. The efficiency discount has as goal to promote efficient business operation.
5. The Board of the competition authority determines on a yearly basis the tariffs that can differ for the tariff carriers as distinguished. (own translation)

[45] Organizations representing parties on the energy market, including consumer organizations, have a privileged position. They are amongst others regarded as having an interest in all decisions made on the basis of the Dutch Electricity Act and the Dutch Gas Act, excluding administrative orders (beschikkingen). See Article 82 Dutch Electricity Act 1998 and Article 61 Dutch Gas Act.

[46] CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307.

[47] Article 3 para 1 of Regulation 1775/2005/EC holds as follows: "Tariffs, or the methodologies used to calculate them, applied by transmission system operators… shall be transparent, take into account the need for system integrity and its improvement and reflect actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent".

emphasizing that it follows explicitly from both Article 3, para 1, Regulation 1775/2005/EC as well as Article 13, para 1, Regulation 715/2009/EC that the actual, *efficient* costs need to be used as basis for the calculation of tariffs of access to the national gas transmission network operated by Gas Transport Services (GTS). Furthermore, VEMW held that although Article 25, para 4, of Directive 2003/55/EC does not explicitly mention efficient costs, the Notice of the European Commission 'Commission Staff Working Document on tariffs for access to the natural gas transmission networks regulated under 3 Article of Regulation 117/2005' does provide that the Directive should be understood as implying efficient costs. VEMW argued that by using the actual network costs as starting costs, while using efficient costs for GTS only over the course of the regulatory period, the tariffs for GTS where set higher than the efficient costs for a great part of the period. VEMW pointed thus that a transition period had been allowed for, while EU law does not provide any leeway in this regard. The establishment of a method decision for the regulatory period of 2006–2009 was, in consequence, in violation of EU law according to the VEMW.[48] The CBB provided the following judgment:

> (…) The main issue for the VEMW is that the Nederlandse Mededingingsautoriteit (NMA), when establishing the starting costs as of 1 January 2006, has not decided these on the basis of efficiency but has rather assumed the actual costs of GTS at that point in time to represent the efficient costs. VEMW has in this regard not been able to establish what other benchmark NMA could have used to establish the efficient costs at that point in time. NMA has rightly pointed out in this regard that on 1 January 2006 there was no benchmark with costs of other network operators available. NMA was thus not in the position to compare the costs with the performance of other operators. Furthermore, the NMA could assume that on 1 January 2006 the costs where efficient at least to a certain extent, as also prior to that date there was a form of regulation of GTS on the basis of the "Guidelines Gas transmission". VEMW has not substantiated why the NMA should have regarded the costs established at the end of 2005 as not sufficiently efficient to be used as a basis of a new regulation with a newly established level of efficiency at the end of the regulation period.[49] (own translation)

In other words, instead of assessing whether the starting costs could indeed be deemed as efficient, the CBB judged that appellant VEMW had not substantiated why the starting costs as of 1 January 2006 were not efficient and that the VEMW should have elaborated upon what other methods for the assessment of the efficiency of costs NMA could have used. This is striking, as the CBB stated in an earlier decision that the network operator is awarded a certain number of years to bring back the actual costs to the level of efficient costs. The CBB points at the method decisions and explains:

> In the method decisions the NMA has provided it seeks to achieve the goals set by the legislator by decreasing its tariffs over the course of the regulatory periods through application of the x-factor. By doing so, the tariffs gradually develop towards an estimated level of efficient costs in the final year of the regulatory period. The idea behind this is that,

[48] CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307, para 3.3.1.

[49] CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307, para 3.3.3.

> this way, a network operator is awarded with a certain amount of years to bring his costs down to the efficient level. The starting costs of 2006 have been set by the NMA, briefly put, on the basis of the actual costs of 2005 (the year prior the start of the regulatory period).[50] (own translation)

While VEMW thus had a solid argument by putting into question the efficiency of the costs applied, the CBB dismissed the action by stating that VEMW had not been able to prove that the starting costs were not efficient and that it had not provided an alternative way of calculating efficient costs. Critical remarks can be made on three points of the marginal review by the administrative judge.

First, the CBB is unclear about evidence gathering and the apportionment of the burden of proof. The CBB expected a type of evidence gathering from the VEMW that went significantly beyond the *sufficiently plausible* criterion. Dutch Administrative procedural law does not provide a single general evidence standard. Instead, it uses as criterion that if a party submits facts, these should be substantiated in a *sufficiently plausible way*, as long as they can to a reasonable extent create doubt as to the factual basis of a regulatory decision.[51] In this case the judge required the appellants not only to make their own arguments sufficiently plausible, but also to make plausible in what alternative ways the tariffs and the method decisions should have been established. In this context, one should note that in administrative procedural law, the civil law axiom 'who states should prove' does not apply.[52] Within administrative procedural law, the judge has the freedom to apprise the evidence provided,[53] where the basis of a decision, the weight of different interests at stake and the reliability of the evidence at hand are examined.[54] It is noteworthy that the CBB held that VEMW should have explained which benchmark should have been used. The appropriation of the burden of proof here goes beyond the sole duty to make it sufficiently plausible that the costs used were not efficient.

As explained before, in cases concerning discretionary powers of NRAs, the administrative judge is to respect the NRA's assessment of the facts, although the judge should also assess the question whether the establishment of the facts presented by an NRA is legally tenable.[55] This brings us to the second observation. The administrative judge in many cases follows the establishment of facts by the NRA, while this should in fact be reviewed intensively. This is paradoxical, as the judge in administrative law should take an active and thus non-passive approach to compensate the inequality between citizens and regulatory agencies that exists with regard to both expertise and factual power.[56] The CBB, later on in its judgment,

[50] CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307, para 3.3.1.

[51] Schlössels and Zijlstra 2010, p. 1121 and Damen 2013, p. 308.

[52] Schuurmans 2005, p. 213.

[53] Damen 2013, p. 308.

[54] Schuurmans 2005, p. 21.

[55] Damen 2006, p. 21.

[56] Damen 2013, p. 290.

seems to assume that the actual costs as starting costs were, to certain extent, efficient. However, it was in no way clear that these costs were actually efficient. After all, the CBB knew that network operators possess a statutory monopoly and consequently have a dominant position in the sense of Article 102 TFEU and Article 24 Mededingingswet ('Dutch Competition Act'). It was also known to the CBB that prior to the start of the regulatory period, the costs and tariffs for gas transmission had been barely scrutinized. The CBB had, after all, previously established that whilst the costs prior 2006 were regulated by the Gas Transport Guidelines, these directives were not binding upon the ACM and GTS.[57]

Third, the judge's reasoning concerning the interpretation and application of the concept of (efficient) costs in the Gas Act and Gas Directive is noteworthy, as this is factually a legal question, on which the judge has the final say. In this particular case, the judge has neglected to provide an interpretation of this unclear norm in EU law. The CBB held, without providing a substantial evaluation of the norm, that Article 3 Regulation 1775/2005 and the accompanying interpretative Notice of the Commission had not yet entered into force on 1 January 2006. Furthermore, the CBB held that although Directive 2003/55 was in fact in force at that time, this Directive did provide much more than that 'the tariffs should be proportionate and a reflection of the costs'. However, from the preamble of Directive 2003/55 it appears that in the context of the implementation of the Directive, efficient costs did actually play a role.[58] The judge has the duty to interpret national legislation in light of the goals and preambles of relevant EU law. In this case the court seems to have neglected to fulfil this duty, as he did not take into account the efficiency aims flowing from the preamble of the applicable Directive. Besides an incorrect interpretation of the law, the CBB also failed to substantially review the establishment and the qualifications of the provided facts in light of EU law. The only consideration made was that the VEMW had not sufficiently made clear that the actual costs were not, in fact, efficient costs. This whilst it was sufficiently plausible that the choice for actual costs as starting costs for the regulation of the energy tariffs had major consequences for the energy tariffs for the consumer.

8.3.2.2 Opening RAB

The second aspect examined in the cases under consideration is the determination of the opening regulatory asset base by the ACM. The ACM was obliged to determine this value on the basis of Article 13(1), Regulation 715/2009.[59]

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[57] CBB 10 September 2004, ECLI:NL:CBB:2004:AR2366 and CBB 23 April 2004, ECLI:NL:CBB:2004:AO9530.

[58] Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003, L176/57).

[59] Article 13 para 1 of Regulation 715/2009 reads "*Tariffs, or the methodologies used to calculate them, applied by the transmission system operators and approved by the regulatory authorities*

The CBB started its reasoning by pointing at a previous judgment in which it was held that the ACM has discretion when choosing the method of determining the opening RAB and the supposed length of depreciation period.[60] The opening RAB comprises the costs for the legal duties of GTS. These include the capital costs of the GTS assets. The value of the assets of GTS can be determined in different ways. The applicants held that the applied valuation method resulted in a situation in which consumers had to pay for certain costs twice. This also became apparent from a report of Oxera Consulting Ltd, commissioned for the ACM. Here, the following was stated:

> If this interpretation of the historical context is correct then, by construction, using the DHC methods (both nominal and real) to set the RAB would lead to customers paying again for costs previously factored into energy tariffs.[61]

A similar conclusion was drawn in a report by Brattle:

> On this basis, setting the GTS's RAB above €5.8 billion would appear even less fair. Gas users would pay not only the costs of maintaining the Dutch investment environment, but an additional cost for a network they have largely already paid for.[62]

The CBB again did not agree with the arguments of the applicants, and instead considered as follows:

> 3.4.6 (…) The tribunal concurs the stance of the NMA that the aforementioned Article 13 provides more opportunity for the balancing of different interests when deciding the method for determining the opening RAB than the VEMW pertains. Even when the method does not result in an exact compensation of the actual costs, other elements that can be taken into account, such as the interests of the network operators and its investors following a reasonable and predictable return on investment, if considered, can make the method acceptable. (own translation)

According to the CBB, the determination of the valuation method for the RAB fell within the ACM's margin of discretion. In holding so, the CBB failed to assess whether the valuation method complied with the rules and aims of the EU energy regulation, including the protection of consumer interests. The CBB only briefly

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pursuant to Article 41(6) of Directive 2009/73/EC, as well as tariffs published pursuant to Article 32(1) of that Directive, shall be transparent, take into account the need for system integrity and its improvement and reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner".

[60] CBB 23 December 2011, ECLI:NL:CBB:2011:BU9127, para 4.1: *"The Tribunal holds first and foremost that the NMA, in deciding how the NMA can most effectively realize the goals provided in the Gas Act, has a margin of discretion, in which context in principle different approaches would be legitimately possible." (own translation)*

[61] Oxera 2011, p. 15.

[62] Brattle 2007, p. 3.

discussed the question whether it is fair for the consumers who paid for certain costs twice. It held in this regard:

> 3.4.6 (…) the Tribunal holds that the NMA, contrary to the view of the GTS, does not exclude that the method decision for determining the opening RAB, including the length of the depreciation period for the pipe lines, can result in a situation where assets have been included for which already payments have been received in a previous period. NMA, however holds, as has been established before the Tribunal, that the aforementioned Article 13(1), has not been breached by the decision (…) VEMW has provided that the taking into account of a reasonable return of investment when determining the RAB results in a double counting of compensation of the WACC in the tariffs. The Tribunal follows the argumentation of the NMA that determination of the RAB and WACC are time-sequential. First the decision is made for the method of determination of the opening RAB. Here, the interests of investors are taken into account on a solid basis. Subsequently, the WACC is calculated while taking the aforementioned RAB into account. Here, the Tribunal concludes there is no case of unacceptable double counting. The question posed in the first paragraph of this section concerning whether the NMA has exceeded its margin of discretion can thus be answered in the negative. Henceforth the appeal by VEMW and Energie Nederland is dismissed. (own translation)

The judicial reasoning and review in this case was found wanting with regard to two main aspects. First, the judicial reasoning regarding the interpretation of EU law and the scope of the margin of discretion that can be exercised by the ACM was overtly brief. The CBB has here reviewed the interpretation of EU law by the ACM in a marginal fashion. To elaborate, it was unclear whether the approach adopted by the ACM was even in line with the wordings and substance of Article 13 of Regulation 715/2009. The administrative judge has the competence to conduct a full review of a regulatory authority's interpretation of a vague legal norm but failed to do so in the present case.[63] One could wonder whether it was not more to be expected from the CBB to instigate a preliminary reference procedure and ask the CJEU for guidance on how to interpret this vague legal norm. What is the meaning of the requirements that the "[t]ariffs, or the methodologies used to calculate them, applied by the transmission system operators… reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities" for the valuation of the assets and costs of the gas network in light of the aims of EU energy regulations. It seems the judge had not distinguished between the interpretation of laws by the ACM on the one hand, and the qualifying decision by the ACM on the other hand. With regard to the interpretation of laws, the judge always has the final say. If the CBB had subjected the legal arguments, the factual substantiation and the balancing of interests regarding the choice for the valuation method to a further and deeper investigation, providing throughout its judgment a well-motivated distinction between the establishment of facts, the assessment and the legal interpretation, it would have enhanced the right to effective judicial protection for users of energy networks to far greater extent.

[63] Schlössels and Zijlstra 2010, p. 161.

Second, the court was unclear in the judgment regarding the assessment of the margin of discretion and how exactly account had been taken of the different interests at stake. The CBB could, at the very least, have motivated in what ways the ACM had balanced the different interests at stake in a reasonable manner when making its decision.[64] Has the ACM justifiably come to the decision that the interests of network operators and investors hold greater weight than those of the consumers and, if so, on what basis? The reasoning of the CBB does not demonstrate in what way the interests of the consumers have been taken into account by its judgement and the decision under appeal.

8.3.2.3 WACC

Third and finally, the applicants challenged the valuation method of the WACC. Here as well, the CBB pointed towards the margin of discretion of the ACM and concluded, after a very marginal review of the decision at stake that the ACM had indeed acted within its margin of discretion. The CBB provided that:

> 3.5.4 First of all, the Tribunal holds that it follows from its established case law that the WACC constitutes a (weighted) average of the costs that a regulated enterprise makes for the attracting of own respectively foreign capital. This is a given and there is no margin of discretion for the relevant regulatory authority. This does omit, however, that for determining the different parameters of the WACC, different methods can be used and that regulatory authorities have broad discretionary powers in deciding on the methods to be used.
>
> Thus the Tribunal does not conclude from the abovementioned statement that the NMA has gone beyond its margin of discretion. (own translation)

8.3.2.4 The LUP Cases

The CBB has further issued different judgments relating to the national uniform producer tariffs (hereafter: LUP cases). In the Netherlands, the costs for feeding energy into the distribution network are allocated to the consumers of energy. The producers thus do not have to pay for these costs; they are exempted from paying transport tariffs.[65] Producers that feed in energy into the national high-voltage power lines traditionally had to pay 25% of the costs for transportation. Producers who fed in energy on regional grids did not have to pay any costs.

In different procedures regarding the LUP, the question arose whether this exemption aligned with the EU principles of non-discrimination and of costs reflectiveness of the network tariffs, which can be found in Electricity Directive

[64] As the CBB has considered in the case discussed below on the right to having a gas connection. See CBB 22 April 2014, ECLI:NL:CBB:2014:134.

[65] See, in this regard, Crespo and Lavrijssen 2013.

2009/72/EC and preceding directives.[66] In the first LUP case, the principle of non-discrimination was discussed.[67] The CBB was asked to interpret and apply (at the time) Articles 27[68] and 36[69] of the Electricity Act 1998 as well as Article 3.5.1. of the Tariff Code (TCE).[70] The applicants, *inter alia* Electrabel Nederland, Essent and E.ON Benelux, initiated their claim by holding that the exclusive levying of a producer transport tariff for Dutch producers infringed Article 36(1)c–d of the Electricity Act 1998. The producers that fed in energy into the national high-voltage power lines argued that the regulation pertained to a breach of the principle of non-discrimination, for establishing an illegitimate distinction between different producers. Second, the applicants held that there was discrimination between users, as decentralized (regional) suppliers did not have to pay the LUP costs, whereas central (national) suppliers were in fact obliged to do so. According to the applicants, Article 3.5.1. Tariff Code infringed upon Article 29 Electricity Act 1998, as the latter did not allow for such a distinction to be made. This, the applicants continued, constituted a breach of Article 7(5) of Directive 96/92/EC which states

[66] An exception to the prohibition of discrimination can only be made if an actual objective distinction can be made between the different situations. See, in this regard, Case C-17/02 *VEMW and others* [2005] ECLI:EU:C:2005:362, para 48. See also para 36 of Directive 2009/72/EC where the principle of cost reflectiveness is referred to. The European directives are grounded in the assumption that network tariffs should reflect the costs (fixed and variable costs along plus a reasonable return on investment).

[67] CBB 2 August 2002, ECLI:NL:CBB:2002:AE6773.

[68] Article 27 Electricity Act 1998.

1. The joined network operators send the director of the service a proposal concerning the tariff structures that lists the method of calculating the tariff for which users will be connected to a network, the tariff for which the transportation of electricity, including the feeding in, the consumption and transit of electricity, for the users will be carried out and of the tariff for which the system services will be conducted and the energy balance will be maintained. (…)
3. The tariffs the network operators of the national high voltage network charge for maintaining the energy balance are objective, transparent, non-discriminatory and reflective of the costs. (own translation)

[69] Article 36 Electricity Act 1998.

> "1. The director of the service establishes the tariff structures and conditions while taking into account:
>
> The proposal of the joined operators as referred to in Articles 27, 31 or 32 and the results of the consultation, referred to in Article 33, first paragraph, the importance of the secure, sustainable, efficient and environmentally sound functioning of energy supply, the importance of the promotion of the development of trade on the electricity market, the importance of promoting efficient operation of users and the importance of good quality of service provision by network operators." (own translation).

[70] Article 3.5.1. Tariff Code provides as follows: for producers with means of production that are connected to a network on EHS_ or HS_ level "a nationwide uniform producers transport tariff applies (LUP)." (own translation).

that grid operators must refrain from any form of discrimination between users or categories of users of the grid.

The CBB concluded however that the ACM, by determining the producer tariffs in this particular way, had not acted beyond the margin of discretion that it has been awarded pursuant Article 36 of the Electricity Act 1998. This is because the principle of cost reflectiveness (the costs must be compensated by the party that causes them) and the principle of efficient business operation were held to be a determinate factor in the decision made by the ACM.[71] Furthermore, the CBB held that the different producers have not been discriminated against, as the producers that feed energy into the national grid simply make use of a different service than producers that do so on the regional grid.

In the second LUP case, different parties appealed the decision by the ACM to set the transport tariff for feeding electricity into the national grid at 0%.[72] The rationale behind this decision was to create a level-playing-field by bringing the producer transport tariff more in line with the transport tariffs for producers abroad. The decision was controversial as the Electricity Act 1998 at the time provided that the tariff for transport of electricity was connected to the feeding of electricity into the network, as well as the consumption of electricity by the network users. The Electricity Act further provided that the tariff would be charged to every user connected to a network managed by a network operator. The tariffs for electricity could differ per user, depending on the voltage levels of the networks into which electricity was fed. The point of law of consideration here was whether the ACM was allowed to set the transport tariff for producers at 0%. In this context, most prominently Articles 27, 29 and 36(1) (old) of the Electricity Act 1998 were relevant.[73]

VEMW alleged that this decision breached the principle of cost reflectiveness. This principle, which according to VEMW followed from the (at the time effective) Article 29(2) Electricity Act 1998,[74] provided that the costs for feeding electricity into the network should be divided amongst the producers and the users of the network. By setting the transport tariff at 0%, producers were not required to compensate for the costs of feeding energy into the network. The CBB held that it

[71] CBB 2 August 2002, ECLI:NL:CBB:2002:AE6773, para 6.1 and Lavrijssen et al. 2014, p. 56.

[72] CBB 11 February 2005, ECLI:NL:CBB:2005:AS7083.

[73] See preceding footnotes.

[74] Article 29 Electricity Act 1998.

1. The tariff at which the transport of electricity will be carried out for the user, relates to the consumption of electricity by a user, regardless of the place of generation of the electricity and the connection where the electricity has been brought into the Dutch net, or the feeding in of electricity by a user, regardless of the place of receiving electricity.
2. The tariff, as referred to in the first paragraph, is charged to every user with a connection to a network that is administered by a network operator. The tariffs for the consumption of electricity can vary for the different users, depending on the voltage level of the network from which the electricity is taken, and the tariffs for the feeding in of electricity can vary for different users, depending on the voltage level of the network the electricity is fed into. (own translation)

was within the margin of discretion of the ACM to decide on the application of the principle of cost reflectiveness. The CBB held:

> 6.4 (…) Applicant further holds that the disputed decision is in breach with the so called principle of cost reflectiveness. The Tribunal first concludes that the Electricity Act 1998 does not explicitly hold that this principle always needs to be applied. It is apparent from the legislative history that the defendant is free to apply the principle. However, as mentioned above, the defendant can exercise discretion when establishing or amending the Tariff Code; when exercising this discretion the defendant is free to decide whether or not to assign transport tariffs to the party that causes the costs of transport. (own translation)

Contrary to the first LUP case, the CBB did not seem to require here that the principle of cost reflectiveness was actually complied with. The CBB held that it was up to the ACM to make its own deliberations and, by doing so, assess whether the strong competitive position of energy producers in the EU should be decisive, even where it is to be expected that the consumer will in the short term incur financial losses due to the decision. Finally the CBB concluded that there was no reason to assume that the ACM had balanced the interests at stake in an inappropriate fashion.[75] This observation is relatively remarkable. First of all, the principle of cost reflectiveness followed from the Electricity Directive in place at that time.[76] The CBB is required to guarantee a consistent interpretation of national laws in light of EU laws and regulations. The CBB should at the very least have referred to the relevant provisions in the Electricity Directive for its interpretation of national law. In doing so it should have motivated why the principle of cost reflectiveness would not apply in the case at hand.[77] As far as uncertainty still existed concerning the interpretation of this principle, it would have been reasonable to expect from the CBB to send a preliminary reference to the CJEU.[78] Second, the administrative judge has not elaborated in what way the balancing of interests has been reviewed in this case. Because the transport tariff was set at 0%, the users, i.e. the consumers, became responsible for the costs of feeding energy into the grid, resulting in a disadvantaged position for the consumer. After several general considerations that point to a very marginal review of the correctness and consistency of the legal and economic reasoning of the decision of the ACM, the appeal was dismissed.[79]

In an interlocutory judgment on tariff regulations, the applicants challenged that the tariff codes charged all costs for feeding in electricity to the end users, while 0% of the costs were attributed to the producers.[80] In this case, the applicants amongst others held that the method decision was in breach of Articles 29 and 41b sub a of the

[75] Lavrijssen et al. 2014, p. 57.

[76] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003, L176/37).

[77] See consideration 18 of Directive 2003/54/EC.

[78] Lavrijssen et al. 2014, p. 59.

[79] CBB 11 February 2005, ECLI:NL:CBB:2005:AS7083, paras 6.4–6.6.

[80] CBB 11 December 2011, ECLI:NL:CBB:2011:BU7936.

Electricity Act 1998, because the method decision regarding the decentralized feeding in of the joined output incorrectly did not distinguish between transport tariffs for consumption and tariffs for feeding in.[81] According to the applicants, Article 29 para 1 and 41b para 1 sub a Electricity Act 1998[82] provide that the consumption of and feeding in of electricity on the net should be separated. Accordingly, the principle of cost reflectiveness should be adhered to, which would mean that the costs of feeding in of electricity should be attributed to the producer, while the user should only have to cover the costs for the consumption of electricity.

The CBB decided in favour of the applicants and held that, indeed, on the basis of Article 29 para 1 Electricity Act 1998, a distinction should be made between the feeding in and consumption of electricity.[83] The costs thereof need to be attributed to the tariff carrier for these services as provided in Article 41b, para 1 under a, of the Electricity Act 1998. The CBB confirmed in a later judgment that the feeding in of electricity and the consumption of energy are two distinct services.[84]

In the final LUP case of 17 October 2013, the central question that was assessed concerned the issue whether the abovementioned also meant that the costs for the feeding in of electricity can constitute part of the user tariff. Article 29[85] and Article 41b, para 1, under a Electricity Act 1998 and Article 3.4.1. Tariff Code Electricity (TCE) are key here. VEMW held that, as the CBB had previously confirmed that the feeding in of electricity and the consumption of electricity are two separate services, the decision of 2009 in which the costs for the feeding in of electricity on the basis of Article 3.4.1. were allocated to the tariff for the supply of electricity breached Article 29 in conjunction with 41b para 1, under a of the Electricity Act 1998.

However, the CBB did not contend with the argumentation of the VEMW.[86] The CBB summarized its conclusion, while referring to the two abovementioned cases, as follows:

> 3.4.4 (…) in the judgement of 2 July 2013 the Tribunal has explained that the judgment of 16 December 2011 cannot be interpreted as providing that the costs for feeding in can in no way be allocated to network users via the transport tariffs. This does not follow from Article 29 of the Act. As VEMW has attested, the present situation is different to such extent that a tariff carrier is available. This is without prejudice to the starting point accepted by the Tribunal that Article 29 of the Act does not exclude the possibility for a different attribution

[81] CBB 11 December 2011, ECLI:NL:CBB:2011:BU7936, para 4.4.1.

[82] Article 41b provides as follows:

1. Every network operator every year sends, prior to 1 October, a proposal to the board of directors of the competition authority with the tariffs that the operator will apply at most for exercising the tasks referred to in Article 16, para 1, taking into account:

   a. The principle that costs are awarded to the tariff carriers for the services that give rise to these costs, (…)" (own translation)

[83] CBB 11 December 2011, ECLI:NL:CBB:2011:BU7936, para 4.4.3.

[84] CBB 2 July 2013, ECLI:NL:CBB:2013:52, paras 3.1 and 3.2.

[85] See Footnote 74.

[86] CBB 17 October 2013, ECLI:NL:CBB:2013:204, paras 3.4.1–3.4.4.

> of costs than what would follow from the application of the principle of cost reflectiveness. The tariff carrier is necessary to determine the extent of the relevant costs and can also be used to establish by what party they have been caused, but the presence of the tariff carrier plays no role in the decision to whom the costs are ultimately allocated. This decision requires a balancing of interests. The Tribunal points in this context to its judgment of 11 February 2005 on the setting of the LUP tariff at 0%. The Tribunal has held herein that it can be reasonable for the ACM to have attached greater weight to the promotion of a healthy European energy market with a level playing field than to the consequences of the allocation of costs to the consumer.[87] (own translation)

The ACM can thus derogate from the principle of cost reflectiveness, as it is free to attach a decisive weight to the attainment of a strong and healthy European energy market, even where this goes at the cost of the tariffs for net usage for end users.[88] The CBB reviewed the interpretation of EU law and the balancing of interests made by the ACM in a highly marginal fashion. The CBB and the ACM attributed, without a substantial explanation, less value to the interests of energy consumers than to those of energy companies. At the very least, the CBB could have motivated in a better and more transparent way why in this case the outcome of the balancing of interests was justified in light of the provisions and goals of the relevant European and national energy laws.[89]

8.3.2.5 The Negative X-Factor

Finally, the CBB has dealt with the negative x-factor in certain cases. The x-factor decision, which is taken on the basis of Article 81 Gas Act,[90] has as core goal to promote efficient business operations by network operators. For this reason, the efficiency discount corrects excessive incomes of a previous regulatory period by lowering tariffs in the subsequent period.[91] In 2010 the ACM attributed negative values to the x-factor decisions. In consequence, incomes of network operators did not decrease but increased, with higher tariffs for the energy consumer as a result.

In the first case on the negative x-factor, the applicant (FME, an organisation representing the interests of corporations active in the technology industry) held that the negative x-factor decision of the ACM infringed the law, as the x-factor here was labelled as a discount for consumers.[92] The CBB acknowledged however that

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[87] CBB 17 October 2013, ECLI:NL:CBB:2013:204.

[88] CBB 17 October 2013, ECLI:NL:CBB:2013:204.

[89] See e.g. consideration 16 of the preamble of Directive 2009/72/EC, which provides that tariffs should not be discriminatory and should be reflective of the costs.

[90] Article 81 Gas Act provides as follows: (…)

The discount to promote efficient business operation has as amongst others as goal to make sure that the network operator can in any case not attain higher returns than what would be usual in the economy and the promotion of equality in the efficiency of network operators.

[91] See also Article 41a para 1a of the Electricity Act 1998: "the discount to promote efficient business operation" (own translation).

[92] CBB 23 April 2013, ECLI:NL:CBB:2013:CA1052.

neither the law nor the parliamentary history anticipate a negative x-factor. However, this does not mean that the option of having a negative x-factor is henceforth excluded. As the CBB provided:

> 3.3 (…) More generally what has been held by the ACM justifies, looking at the text of Article 81, para 1, Gas Act and related legislative history, where a decrease in tariffs was practically continuously assumed, not without question the use of a negative x-factor. The Tribunal deems however that it cannot be assumed that there are no circumstances in which a negative x-factor can be suitably applied in a system of bench mark regulation. (own translation)

It remains unclear in what circumstances a negative x-factor can be justified. The CBB did not further elaborate this consideration in its judgment. In subsequent cases on the negative x-factor, the CBB referred to this specific case.[93] Here, the CBB demonstrated a highly marginal method of review of the interpretation of the Gas Act and the substantive elements of the decision of the ACM. It seemed to accept the negative x-factor without subjecting its legality and reasonability to a thorough substantive review in light of the provisions and goals of European and national energy laws.[94]

8.3.3 Is the CBB Heading Towards a More Intensive Judicial Scrutiny of the ACM's Regulatory Decisions Beyond 2013?

8.3.3.1 Right to Be Connected to the Gas Grid (Gas Connection Case)

More recently the CBB seems to have assessed the balancing of interests carried out by the ACM more critically in several cases. For instance, in the case concerning the right to be connected to the gas grid the CBB had a more critical look at the substance of the cases.[95] In this case, Article 12b, para 1, under f[96] and Article 12f,

[93] CBB 13 February 2014, ECLI:NL:CBB:2014:50; CBB 13 February 2014, ECLI:NL:CBB:2014:46. See also Sauter's case note for CBB 13 February 2014, ECLI:NL:CBB:2014:50, AB 2014/227.

[94] Lavrijssen et al. 2014, p. 60. See in this context also Articles 36 and 37 of Directive 2009/72/EC and Articles 40 and 41 Directive 2009/73/EC.

[95] CBB 22 April 2014, ECLI:NL:CBB:2014:134.

[96] Article 12b, first paragraph, section f Gas Act.

> 1. With due consideration of the rules referred to in Article 12 and the net codes provided in Article 6 of Regulation 715/2009 the joined network operators send a proposal to the Authority Consumers and Market for the conditions applied to users regarding: (…)
>
> f. The zoning of the network operators for exercising the task, referred to in Article 10, para 6, whereby certain areas can be excepted if the area is located in a district with a heat network, as meant in Article 1, section c, of the Heat Act or will be located in such an area

para 1[97] of the Gas Act played a key role. In principle, the rule was that every person has the right to be connected to the gas grid. This follows from Article 10, para 6 of the Gas Act (old). Excluded are people that are located in an area connected to a heating system, as provided in Article 1, under c of the Act on District Heating.[98] The ACM decided that the borders provided in the Zoning document are to be interpreted as being merely indicatory in the decision being under appeal. By doing so, the ACM gave the network operator the competence to decide on the specific borders in a specific area. Applicant VEMW held that this decision gave rise to uncertainty as it did not provide for exact borders. According to the VEMW, the fact that the ACM neglected to decide on the precise zoning borders infringed upon Article 12f, first paragraph, of the Gas Act and the interest laid therein of advancing the efficient operation of network users.[99] In this case, the CBB reviewed the substance of the decision in a more intensive way. The CBB concluded that the ACM had delegated its task of determining the relevant zoning details to network operators, while it did not have the required competences for doing so. As such, the ACM acted in infringement of Article 12f of the Gas Act. The CBB explains that:

> [T]his single reference to the definitions laid out in the Heat Act provides to the judgment of the Tribunal not sufficient evidence of an (identifiable) balancing of the interests at stake. Following the matters at stake the ACM, prior to taking the disputed decision, has taken no account of the consequences of zoning in this form for (future) users and for the operation of the network operators. Furthermore, it has not assessed the possibilities and difficulties that can come into play in relation to the applicable legislation in this domain. (own translation).

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or if it is an area where the network operator cannot have a functioning gas transportation network, nor maintain or develop one under economic conditions (own translation).

[97] Article 12f, first paragraph, Gas Act.

1. The Authority for Consumers and Markets establishes the tariff structures and conditions in due regard of:
   a. the proposal of the joined network operators as referred to in Articles 12a, 12b or 12c and the results of consultation, as provided in Article 12d;
   b. the importance of secure, sustainable, efficient and environmentally sound functioning of gas provision;
   c. the importance of the advancement of trade on the gas market;
   d. the importance of the promotion of efficient operation of network users;
   e. the importance of good quality service provision of network operators, and
   f. the importance of the objective, transparent and non-discriminatory balancing of the national gas transportation network, in a manner that reflects the costs;
   g. the rules referred to in Article 12;
   h. Regulation 715/2009;
   i. the Directive (own translation).

[98] Article 12b, first paragraph, under f Gas Act.

[99] CBB 22 April 2014, ECLI:NL:CBB:2014:134, para 3.2.1.

8.3.3.2 Method Decision Fourth Regulatory Period

Subsequently, the CBB provided another judgment in which it demonstrated a more intensive type of review of the substance of a decision, whilst it should be noted that several aspects of the decision were still annulled on procedural grounds.[100] This case concerned the method decisions for determining the x-factor, q-factor and the calculation volume for the period 2014–2016 (the fourth regulatory period). These elements are decisive for the determination of network tariffs.[101] The ACM took these decisions on the basis of Article 82, first and second paragraph of the Gas Act[102] and on the basis of Article 13 of the Gas regulation 715/2009 (provision concerning determination of tariff methods).[103] Network operators amongst others appealed the method decision regarding the calculation of own capital, the compensation arrangements in place, the amendment of the opening RAB and regarding the approach for dealing with the decentralized feeding in of energy. The applicants were successful on none of these points. The CBB did decide in favour of the applicants with regard to certain other points, in which it conducted a more intense method of review several times. In the subsequent section, the CBB's reasoning

[100] See the comparable cases for national and regional network operators respectively. CBB 5 March 2014, ECLI:NL:CBB:2015:44 and CBB 5 March 2014, ECLI:NL:CBB:2015:45.

[101] See Sauter's case note for the abovementioned cases, *AB Bestuursrechtspraak* 5 June 2015.

[102] Article 82 Gas Act.

1. In contrast to Article 80, the tariffs for exercising the tasks by the network operators of the national gas transportation network, referred to in Articles 10 and 10a, first paragraph, section b, c, d and e, as well as the tariffs for services needed for transportation are established in accordance with this Article.
2. For each of the tasks of the network operators of the national gas transport network, referred to in the first paragraph, the Board of the competition authority determines the method of regulation, for a period of minimally three and maximum five years, after consultation with the joint network operators and with organizations representing parties in the gas market and taking into account the importance of the efficiency of business operation and the promotion of the most efficient quality of the operation of these tasks, as well as the importance of a secure energy supply, sustainability and a reasonable return on investment.

[103] See Article 13, para 1 of Regulation 715/2009: "Tariffs, or the methodologies used to calculate them, applied by the transmission system operators and approved by the regulatory authorities pursuant to Article 41(6) of Directive 2009/73/EC, as well as tariffs published pursuant to Article 32(1) of that Directive, shall be transparent, take into account the need for system integrity and its improvement and reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities. The tariffs applied by transmission system operators, or the methods used for calculating tariffs that have been agreed upon by the regulatory authorities in accordance with Article 41, para 6, of Directive 2009/73/EC, as well as the tariffs that are published pursuant Article 32, para 1, of that Directive, are transparent, take into due regard the need for system integrity and the promotion thereof and reflect the actual costs. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner" (own translation).

concerning the compensation of foreign capital in the WACC and the dynamic efficiency parameter (the efficiency parameter) will be discussed.

8.3.3.3 Amount of Efficiency Parameter

In this interlocutory judgment of the CBB, the GTS appealed the method decision on gas of 1 January 2014 until 31 December 2016 and the resulting x-factor decision of the ACM. Through its method decision, the ACM decided on its method for determining the discount for efficient business operation (the x-factor) and the method for determining the calculation volume for every tariff carrier of each service for which a tariff is determined (calculation volumnia). The tariffs applied by the GTS are determined on the basis of this decision. The GTS has successfully appealed the application of the dynamic efficiency parameter for the period of 2014–2016 to the period of 2012–2013 in this case. According to GTS, there were no solid reasons for the ACM to use output price variations over the period of 1989–2007 as basis for the efficiency parameters. This differed from the way in which the ACM made such decisions in previous periods. For the method decision 2010–2013, the ACM had used a measuring period of four business cycles (1970–2007). Furthermore, GTS held that the amount of the efficiency parameter of 1.3% was incorrect, as it was not in line with the previous determination of productivity improvement in the period 2010–2013, which constituted 1%. GTS contended that they should be allowed to keep the additional yielded returns. As a result of the decision by the ACM, GTS was yet required to make up for the difference between 1.3 and 1%. Regarding the absence of explanation from the side of the ACM as to why this difference in method applied for determining the efficiency parameter, the CBB concluded that, indeed, the ACM had not fulfilled its duty to state reasons. Also with regard to the amount of the efficiency parameter the CBB followed the position of the GTS. The CBB concluded:

> 3.3.2. With respect to the method by which the ACM has determined the amount of the efficiency parameter, the Tribunal considers that, as follows from the explanatory note of the Gas Act, a key component of the system of tariff regulation is that corporations that perform better than the efficiency goals may keep any additional returns. By discounting the final incomes used for the x-factor decision in such a way that the GTS should also in 2010–2013 have satisfied a frontier shift of 1.3%, the ACM has acted in breach of the system of tariff regulation on the basis of the Gas Act. The Tribunal decides in favour of this aspect of the appeal by GTS.[104] (own translation)

[104] CBB 5 March 2015, ECLI:NL:CBB:2015:44, para 3.3.2. The administrative loop (bestuurlijke lus) enables the administrative judge to request the responsible public body to correct certain irregularities within the administrative decision-making procedure with regard to defects in the motivation of the administrative decision. The responsible public body can issue a new administrative decision or elaborate on its motivation for the already issued administrative decision. Backes et al. 2014.

Ultimately, the CBB annulled the part of the method decision relating to the application of the dynamic efficiency parameter. Doing so, the CBB demonstrated a more intensive review of the margin of discretion of the ACM. The ACM is not allowed to apply a so called 'catch-up' provision, as this would infringe upon an essential component of the system of regulations in place.[105] The CBB has however provided the ACM with the remedy to recover its faults through an administrative loop.[106]

8.3.3.4 Compensation for Foreign Capital in the WACC

With regard to a number of other considerations, the conclusion can be drawn that, although the CBB has reviewed the substance, formally it still annulled the case on the basis of a lack of the provision of adequate reasons. To provide an example, the CBB approved amongst others the complaint of the applicants concerning the way in which the ACM had included a compensation for costs of foreign capital into the WACC. The ACM determined the weighed average cost for foreign capital, in contrast to previous years, on the basis of the costs for new foreign capital. These did not cover the costs associated with current foreign capital, such as the interest on long-term loans. The CBB followed the position of network operators, but nonetheless concluded that the ACM had made its decision in a correct manner, but it had to provide sufficient reasons as to why it had changed its practice of the previous years. As the CBB explained:

> 1.5.4. Now the ACM is adjusting the weighed averaged costs for foreign capital in the WACC on the basis of costs for new foreign capital, we cannot exclude the possibility that the interest compensation for foreign capital as included in the final incomes does not fully cover the costs for foreign capital, as the costs of outstanding loans in the coming regulatory period – given the decrease of interest that we have seen in previous years – are higher than the estimated costs for attracting new foreign capital. In the previous regulatory period, the ACM has explicitly taken into account the (phased refinancing of) current loan portfolios of network operators. The choice to leave this practice has been accompanied with insufficient reasons.[107] (own translation)

In reality, the CBB reviewed the decision in a full manner, after which it agreed in light of the facts at hand that the ACM could not reasonably have come to its decision. The CBB concluded that indeed the costs for current foreign capital possibly are not covered. Nonetheless, in its annulment decision the CBB referred back to procedural grounds, namely a breach of the duty to provide reasons. Also in other parts of the judgment where complaints of the applicants were deemed

[105] W. Sauter, case note on CBB 5 March 2015, ECLI:NL:CBB:2015:45.

[106] CBB 5 March 2015, ECLI:NL:CBB:2015:44, para 6.1.

[107] CBB 5 March 2015, ECLI:NL:CBB:2015:45, para 1.5.4.

ill-founded, the CBB concluded, after a substantial review of the assessment, that the ACM had not provided sufficient reasons for its decision.[108]

An example is the challenge raised by regional network operators regarding the efficiency improvement (dynamic efficiency). Here, the applicants held that the ACM should have involved the cost development of the gas connection service when calculating the expected efficiency changes instead of merely basing this on the cost development of the transportation service. The CBB came to the conclusion here that "*the ACM was not obliged to involve the cost data of the connection service in the determination of efficiency developments and has made sufficiently clear that the cost data for transport services would suffice*"[109] *(own translation).* As the decision was deemed incorrect purely on procedural grounds, the CBB returned the decision to the ACM through means of an administrative loop. The ACM was required to amend the issues within six months or take a new decision.

8.4 Judicial Review in the Modern Regulatory Administrative State

8.4.1 Analysis Case Law Between 2002 and 2013 and Beyond

The abovementioned analysis of the CBB's case law shows that between 2002 and 2013, the CBB reviewed regulatory decisions by the ACM in a very marginal way. It illustrates that the CBB often limited its examination of the regulation, by only scrutinizing the *unreasonableness* of the ACM's energy regulations.[110] The criterion that courts use within the marginal unreasonableness test is that courts can only set aside regulations if: the administrative body could not reasonable have reached the contested regulatory decision, or if arbitrary action exists that was manifestly unreasonable or if the administrative body, in weighing the interests involved, could not reasonably have reached the contested action. The method of review of the CBB with respect to the interpretation of EU law and the application of the law, both regarding establishment and evaluation of facts, can in these cases be described as very marginal. The judicial reasoning regarding the (economic) evidence, the balancing of interests, the interpretation of relevant laws and the turning point in which parties have made their arguments sufficiently plausible, all remained very unclear

[108] Another example of this is the interlocutory judgment between the ACM and TenneT, CBB 11 August 2015, ECLI:NL:CBB:2015:272, para 2.5. Here, the ACM was awarded the discretion to either rectify the issues, or take a different decision in line with the guidance provided in the judgment.

[109] See also Lavrijssen et al. 2016.

[110] In landmark case Maxis and Praxis, the administrative court rules that courts should limit themselves to a restrained control of the use of administrative discretionary powers of the executive power. Dutch Council of State 9 May 1996, ECLI:NL:RVS:1996:ZF2153.

in this context. Additionally, our analysis has shown that the court rarely differentiates between the different types of discretionary powers that the ACM has according to Dutch Administrative law.[111]

This marginal standard of judicial review of the ACM's energy regulation is inherently intertwined with the existing Dutch interpretation of the separation of powers, and in particular, the place of administrative courts within the constitutional order and regulatory processes. Courts, in this view, should not operate as "regulatory watchdogs" by substantially reviewing the rationale and quality of regulations. The expert-regulator, it has been said, should focus on the substance of the regulation, whereas the court should instead focus on reviewing the procedure leading to the enactment of the regulation.[112] The refrained way in which the CBB scrutinized the ACM's energy regulations between 2002 and 2013 also seems to be based on these theoretical presumptions, since the CBB has frequently refrained from substantially scrutinizing the matter at hand by pointing at the margin of discretion of the ACM, without further going into the complaints brought forward by the applicants, while the applicants brought legal and factual arguments to the stage that deserved a more intense substantive review in light of the provisions and goals of EU and national law. As a result of this marginal judicial review of the ACM's energy regulations, it has been extremely hard for appellants to realise effective judicial protection in the period between 2002 and 2013.[113] It seems there is a risk that, by applying the standard of marginal review based on a strict application of the theory of separation of powers, the ACM falls between two stools in case both the legislator and minister as well as the judge act with great restraint in checking the ACM in the domain of energy regulation decisions.

8.4.2 Marginal Judicial Review Criticised

The question can be asked whether the traditional assumption in administrative procedural law on the marginal review of regulatory discretionary decisions still holds within the modern administrative state. Recently, many scholars have fiercely criticized the way in which judges marginally review (regulatory) discretionary powers of (independent) regulatory authorities and other parts of the administration.[114] Hirsch Ballin, the former chairman of the Administrative Jurisdiction Division of the Council of State and former Minister of Justice in the Netherlands, has argued that due the marginal judicial review, regulatory decisions that NRAs such as the ACM generate escape scrutiny from both parliament (due to the weakened parliamentary control) and the judiciary (due to the marginal judicial

[111] See § 3.1 for an overview of three types of discretion in Dutch administrative law.

[112] De Waard 2016.

[113] Lavrijssen et al. 2014, p. 62.

[114] See for example, Van den Berge 2017a, pp. 98–99 and Van den Berge 2017b, pp. 203–234.

review). Therefore, he and various other scholars have pleaded that the marginal judicial review in Dutch administrative law needs to be reconsidered and to be substituted by a more demanding judicial scrutiny.[115] A strict application of the theory of the *trias politica*, on which the marginal review by the administrative judge seemed to based, is untenable in light of the independent position of the ACM within the *Rechtsstaat*.[116] It has been argued that the sharp distinction that Dutch administrative law traditionally makes between three types of discretion (beleidsvrijheid, beoordelingsvrijheid and beoordelingsruimte), is very excessive. From a practical point of view, it has been argued that in practice often no differentiation is made between these three types of administrative discretion.[117] The intensity of the judicial control applied by administrative judges in the energy sector should therefore not follow these distinctive types of administrative discretion and the corresponding differentiated standard of judicial review. Instead, it has been argued that the intensity of judicial review should follow functional considerations. The Administrative Division of the Dutch Council of State, responding to this criticism, has stated in its annual report that it will refrain from using the term "marginal review" while reviewing the administration's actions.[118] Interestingly, as has been discussed in para 3.3., in some important recent judgments after 2013, the CBB has imposed a more heightened scope and intensity of judicial review than it did in the past when scrutinizing the ACM's regulatory decisions. It has annulled some important regulatory decisions after a critical review of the substance (the facts and the assessment) of the case, and requiring the ACM to take a new decision with sufficient motivation.[119] Recently the CBB even referred a preliminary question regarding the interpretation of the principle of cost reflectiveness of Article 13 Regulation 715/2009 to the European Court of Justice. The contested interpretation of Article 13 played a crucial role in previous court cases, but was somewhat circumvented by the ECJ by deferring to the discretion of the ACM. By bringing

[115] Hirsch Ballin 2015, pp. 42–43. See also de Poorter and Capkurt 2017, pp. 84–95; Lavrijssen et al. 2016, pp. 142–161; Voermans 2017. Barkhuysen 2015; Verhey 2015; Schuurmans 2015, pp. 19–20. See also the conclusion of Advocate-General R. Widdershoven written for the Administrative Jurisdiction Division of the Dutch Council of State on the scope and intensity of exceptive review of generally binding regulations in the Netherlands, ECLI:NL:RVS:2017:3557, accessed via https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=93494.

[116] Hirsch Ballin 2015, pp. 33–34.

[117] Schlössels and Zijlstra 2010, p. 165.

[118] Dutch Council of State 2017, p. 61.

[119] See also the judgement in case 14/291/, NornNed-kabel, 16 June 2016, ECLI:NL:CBB:2016:264 and see also CBB, 8 December 2016, Rendo et al. versus ACM, ECLI:NL:CBB:2016:374. See CBB, 24 July 2018, case numbers 16/886, 16/887, 16/888, 16/890, 16/905, 16/906, 16/907, 16/908, 16/909, 16/910, 16/911, 16/912, Stedin et al. versus ACM, ECLI:NL:CBB:2018:348, CBB, 24 July 2018, case number 16/902, 16/903, 16/904, TenneT versus ACM, ECLI:NL:CBB:2018:347 and CBB, 24 July 2018, case number 17/409 en 17/410, GTS et al. versus ACM, ECLI:NL:CBB:2018:346.

the case to the ECJ, the CBB has demonstrated more willingness so engage with the substance of regulatory decisions, while it tends to refer decisions back to the ACM to restore them on procedural grounds.[120]

8.4.3 Risks of Substantive Review

While it is agreed that administrative courts can play a more constructive role in reviewing the ACM's energy regulations, it is argued that the CBB should refrain from scrutinizing the ACM's energy regulations too substantively by replacing the assessment of the ACM with its own assessment. This would amount to an appeal on the merits, which is being conducted by the UK Competition Appeals Tribunal.[121]

Although the CBB is a specialized administrative court, it still suffers from several institutional disadvantages in reviewing the ACM's energy regulations substantively. First, the CBB has less personnel and financial resources and little economic expertise in regulatory matters in comparison to the ACM. So it would be undesirable for practical reasons if the judge would acts as a "regulatory watchdog". The problem with a too substantive judicial review then is that legally trained judges have little knowledge of technical subjects such as energy regulation and are not adequately trained to fully assess complex (economic) evidence.[122] Unlike, for example, members of the Competition Appeal Tribunal in the UK, the CBB does not have cross-disciplinary in house expertise on economics.[123] In fact, the past decade, the CBB has, partly for financial- and partly for pragmatic reasons, never appointed an economic expert itself.[124] When the CBB reviews the ACM's energy regulations, it needs to take into account that the ACM, who has special expertise on this matter, is better equipped to formulate regulations and that legally trained judges have less expertise than the ACM in assessing complex economic matters. Therefore the CBB is not in the best position to reconsider the economic assessments that the ACM has made. Secondly, Dutch administrative procedural law also does not provide the court with the appropriate tools for a full review of the merits of energy regulations. In principle, Article 8:3 GALA prohibits administrative courts to directly examine the legality of generally binding regulations; generally binding regulations issued by the ACM in the energy sector are exempted from this prohibition.[125] Due to this prohibition, Dutch administrative procedure law is

[120] See also CBB, 12 June 2018, Tarief besluit GTS, ECLI:NL:CBB:2018:283.

[121] Graham 2009, p. 250.

[122] Mak 2012; Kerkmeester 2016.

[123] Lowe et al. 2013, para 3.1.3.

[124] Kerkmeester 2016, p. 90.

[125] This prohibition is currently heavily criticized and debated in the Netherlands: de Poorter and Capkurt 2017; Voermans 2017; Schuurmans 2015; van Male 2016, pp. 127–129; Scheltema 2014, p. 242; Schueler 2015, p. 435; Schuurmans and Voermans 2010, p. 811.

mainly developed for administrative proceedings on an individual basis and offers the administrative courts little tools to exercise control on the merits over regulations. The underlying structural logical of this prohibition is a political and constitutional argument based on the Dutch understanding of the separation of powers, namely that matters of policy and regulation should be dealt with by the executive and legislative power. The procedural judicial tools and standard for judicial review as developed in Dutch Administrative Procedure Law are mainly developed in light of scrutinizing individual administrative decisions (beschikkingen). Administrative courts in the Netherlands are therefore not used to examine generally binding regulations. Consequently, it is difficult for courts to develop a substantive standard for the judicial review of energy regulation in the Netherlands. Thirdly, judges do not have the democratic legitimacy to substantially review the merits of energy regulations by the ACM. A (full) substantial review raises the danger that courts will substitute their own judgment for that of the ACM. Laws cannot anticipate on all issues that are relevant for energy regulations. Regulatory discretion is indispensable for the ACM: the ACM needs to have regulatory discretion in order to be flexible and responsive in regulating the energy market. This, however, should not mean that the administrative judge should fully refrain from reviewing regulatory decisions more substantively, by reviewing the correctness and the establishment of the facts.

Administrative courts in the Netherlands now are facing a dilemma when reviewing the ACM's generally binding regulations. On the one hand, they need to defer to the ACM's technical expertise and respect their discretionary powers by not reviewing the ACM's decisions on the merits. On the other hand, administrative courts somehow need to review ACM's regulatory powers in order to make sure that they are taken in a fair matter. Although various scholars have pointed out that the judiciary fails to provide effective regulatory oversight in controlling the administration marginally, they omit to provide a clear alternative for a suited review method of decisions made by these agencies.[126] In the following section, several suggestions are made as to which type of judicial review could be applied by the CBB in order to review the ACM's energy regulations. It will be explored how the administrative judge could provide regulatory oversight in these matters by balancing between the need for effective review on the one hand and the need for regulatory discretion for the ACM on the other hand.

8.4.4 The Scope and Intensity of Judicial Review: Procedural-Proportionality Review?

Based on a critical review of the abovementioned case law, it is suggested that the CBB continues its more recent thorough review of regulatory decisions and in

[126] Hirsch Ballin 2015, p. 43.

doing so applies a two-stage procedural proportionality test. This test allows the CBB to review the reasonableness of the ACM's energy regulations in a meaningful and transparent way.[127] Under this procedural proportionality test, courts should ideally apply the principle of proportionality in a procedural fashion. This allows courts to scrutinize both procedural as well as substantial aspects of administrative regulations, without intervening the ACM's discretionary powers. A limited procedural proportionality test allows courts to examine both the procedure (full procedural) and substance (limited substantive review) of the ACM's energy regulations, which allows the judge to make sure that regulations are made in an accountable and transparent way, without intruding the regulatory discretion of the ACM.[128] This test consists of two parts, namely procedural review and proportionality review.

Part 1: Procedural-Proportionality Test

The proportionality principle regulates the (causal) relationship between the purpose of an administrative action and the means used to achieve that purpose. The principle of proportionality has an important role and function in administrative law, as it is employed by (administrative) courts across the world as a tool to control the actions of the administration. In essence, the principle of proportionality asks the administration to justify its administrative actions on substantive grounds.[129] The proportionality test traditionally consists of a three-staged test.[130] The first test, the suitability test, refers to the causal relationship between the means and the end. It asks the question whether the chosen measure is suitable in order to achieve the given aim. The second test, the necessity test, implies that the courts reviews whether the chosen measure is necessary to achieve the aimed goal. The question asked is whether the chosen measure is least restrictive given the aim of the regulation. Finally, the third test, proportionality *stricto sensu*, the question is asked whether a necessary and suitable measure is disproportionate because it imposes an excessive burden on the individual.[131]

However, in order to determine whether a certain energy regulation is proportionate or not, the CBB needs to know the rationale that underpins energy regulations. Courts will not be able to review the necessity and the suitability of the measure if they are not informed of the policy choices that the regulator made

[127] In doing so, the CBB's standard of judicial review of regulations would also be in alignment with the standard of review that the Judicial Division of the Dutch Council of State applies while reviewing the (un)lawfulness of administrative regulations via exemptive review. See de Poorter and Capkurt 2017. See also the conclusion of Advocate-General R. Widdershoven written for the Administrative Jurisdiction Division of the Dutch Council of State on the scope and intensity of exceptive review of generally binding regulations in the Netherlands. Accessible via https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=93494.

[128] See, for a more detailed analysis, Eijkens 2015, p. 48.

[129] Cohen-Eliya and Porat 2011.

[130] Harbo 2010, p. 165.

[131] Harbo 2010, p. 165.

during the promulgation of the regulation. Article 2.3 of the Dutch 'Guidance document for drafting regulations' (Aanwijzingen voor de regelgeving) provides a framework which steps an administrative body must take before the promulgation of an administrative regulation:

(a) knowledge of the relevant facts and circumstances shall be acquired;
(b) the objectives being aimed at shall be defined in the most specific, accurate terms possible;
(c) it shall be investigated whether the objectives selected can be achieved using the capacity for self-regulation in the sector or sectors concerned or whether government intervention is required;
(d) if government intervention is necessary, it shall be investigated whether the objectives in view could be achieved by amending or making better use of existing instruments, or, if this proves impossible, what other options are available;
(e) the various options shall be compared and considered with care.[132]

This provision (informally) creates a right to justification of regulations. The rationale underpinning this justification is that, without this information, other actors involved in the regulatory process (such as parliament) are not able to form an (informed) opinion on the regulation. The problem in the Dutch context, is that courts cannot legally enforce these guidelines. These guidelines are, unlike, for example, the American Administrative Procedure Act, not formalized by law. Therefore, these guidelines do not have legally binding and judicially enforceable effect. Besides these guidelines, Dutch Administrative procedure law does not provide a procedural framework for the promulgation of regulations. Consequently, a general legally enforceable procedure for the promulgations of regulations does not exist in the Netherlands. Nevertheless, this procedural lacuna can be filled in another way. The CBB can review the procedure that has led to the promulgation of the regulation, in an indirect procedural fashion, by reviewing whether the ACM's energy regulations are in conformity with procedural requirements and general principles of good administration (algemene beginselen van behoorlijk bestuur), such as the principle of careful and impartial examination, the principle of transparency, the principle of due care, and the duty to provide reasons.[133] The duty to provide reasons and the principle of careful[134] and impartial examination[135] form the core of the principle of good administration and are particularly important in this sense. Both principles aim to ensure that administrative regulations are taken on the basis of a complete overview and assessment of the relevant facts of the case.

The duty to provide reasons is a key aspect of procedural review which can aid courts to scrutinize the ACM's energy regulations. In order to comply with the duty

[132] Translation provided by Van Gestel and de Poorter 2016.
[133] Articles 3:2, 3:46 and 3:47 GALA.
[134] Articles 3:46 and 3:47 GALA.
[135] Article 3:2 GALA.

to provide reasons, the ACM must reflect on the rationality of the reasoning of its regulations and, since the ACM must justify how it has exercised its regulatory discretionary powers, it must provide a reasonable explanation for its energy regulations. As part of the duty to provide reasons, the ACM should in particular motivate the factual, legal, and scientific considerations that underpin energy regulations in a transparent way.[136] Second, on the basis of the principle of careful and impartial examination, the competent public body is, first, required to examine all relevant elements of a case carefully and impartially. Additionally, the competent body should motivate whether different regulatory options have been examined and assessed by the regulator. This principle of sound administration is particularly interesting, since it has been developed by the CJEU as a procedural guarantee to counterbalance the wide discretionary powers that the European Commission has in the assessment of complex economic and risk regulations.[137]

Part 2: Limited substantive review

The duty to provide reasons and the principle of careful and impartial examination can be seen as an instrument that can institutionalize the principle of proportionality as a tool for administrative courts to review the relationship between the purpose and aim of an administrative regulation and the means to achieve that aim. This is beneficial for three reasons. First, applying a procedural means-end proportionality review can aid the democratic deficit of energy regulations. Applying the proportionality test has the potential to improve the quality of the regulatory process. It places a strong burden of proof on the ACM if it regulates the energy sector. Applying the principle of proportionality in a procedural fashion thereby structurally institutionalizes a right to justification, since it clearly incentivizes the ACM to motivate its regulations. It should motivate whether the means used in regulation are necessary and appropriate, what objective the regulation aims to achieve, which regulatory measure is chosen to achieve this objective, whether other regulatory measures have been considered. Applying a proportionality test can thereby strengthen the rationality of the ACM's energy regulations.

Secondly, applying this test can also strengthen the role that the CBB can play in monitoring the ACM's regulatory actions, while not intervening with its regulatory discretionary actions. The duty to provide reasons (which is a procedural requirement) also enables the CBB to scrutinize whether the substantive information underpinning the ACM's energy regulation is reasonable in light of the underlying national legislation/directive/regulation. This limited substantive review with the aid of the proportionality test can only be performed by the CBB if the CBB has sufficient background information on the relevant regulatory issue. Without this

[136] This is also in alignment with the standard of judicial review that the CJEU applies in competition law cases. See ECJ, Case C-12/03 *Commission v. Tetra Laval* [2005] ECLI:EU:C:2005:87, para 39.

[137] See Case C-269/90, TU München [1991] ECR I-5469, ECLI:EU:C:1991:438, at paras 13 and 14; Case C-525/04 P, Spain v Commission [2007] ECR I-9947, ECLI:EU:C:2007:698, at paras 58 and 59 and Hofmann et al. 2011, pp. 190–204.

information, the CBB cannot review the ACM's reasoning or evidentiary basis for energy regulations. In order words: if the ACM provides clear and understandable reasons for the promulgation of its energy regulations, the CBB will be in a better position to carry out the proportionality test and review the reasonableness of the ACM's energy regulations. Through the enforcement of the duty to provide reasons and the principle of careful and impartial examination, courts will be able to apply the first and second step of the three-staged proportionality test (suitability and necessity test) and review the suitability and the necessity of energy regulations, without intervening with the ACM's technical choices and regulatory discretionary powers. Thirdly and finally, the application of a procedural-proportionality test structures the information-flow between courts and regulators and decreases the information asymmetry between courts, regulators and citizens affected by the regulation.[138] In doing so, the principle of proportionality can pursue a dialogue function between the court and the regulator. Finally, this means-ends rationality also serves a broader goal, namely that of transparency and accountability. If the ACM regulates the energy market, citizens (and the scientific community) then will be better able to understand the reasons that underpin the ACM's energy regulations. This will not only strengthen the transparency of the ACM's regulatory decisions, but also strengthens the accountability of the ACM towards the public.

8.5 Conclusion

The question how a relatively novel constitutional player such as the ACM can be checked by the judge in an effective manner is very relevant for ensuring the ACM is subject to adequate checks and balances. This chapter has shown that in the large majority of CBB cases on energy regulatory decisions in the period between 2002 and 2013, the judge applied a doctrinal restraint when reviewing discretionary decisions by the ACM, which has had its effect on its judicial reasoning. The method of review of the CBB with respect to the interpretation of EU law and its application of the law, both regarding establishment and evaluation of facts, can in these cases be described as limited to such extent that the question arose whether one can actually still speak of effective review in light of the right to effective legal protection that EU citizens derive from EU law. The judicial reasoning regarding the applied/desired provision of evidence, the balancing of interests, the interpretation of relevant laws and the turning point in which parties have made their arguments sufficiently plausible, all remained very unclear in this context. Often the CBB set aside claims by pointing at the margin of discretion of the ACM, without further going into the complaints brought forward by the applicants, while the applicants brought legal and factual arguments to the stage that deserved a more intense substantive review in light of the provisions and goals of EU and national

[138] Mantzari 2015.

law. As a result of judges reviewing energy decisions in this way, it has been extremely hard for consumers to realise effective judicial protection.[139] It seems there is a risk that the control on the ACM falls between two stools in case both the legislator and minister as well as the judge act with great restraint in checking the ACM in the domain of energy regulation decisions. A strict application of the theory of the *trias politica*, on which the marginal review by the administrative judge is based, is untenable in light of the independent position of the ACM within the *Rechtsstaat*.[140]

The main question then remains how a relatively novel constitutional player such as the ACM can be checked by the judge in an effective manner without intruding the ACM's discretionary powers. This contribution provides several suggestions for the improvement of the effectiveness and the transparency of the standard and intensity of judicial review of energy regulatory decisions applied by the CBB. It is proposed that the procedural-proportionality judicial review provides a very practical and comprehensive interpretation of the requirement of effective review under the current legality test.[141] By applying a procedural-proportionality review, courts will be given more instruments, to ensure that energy regulations are made in a fair, well-informed and transparent way, which, could enhance both the democratic legitimacy of energy regulations and the democratic accountability of the ACM. Due to this kind of judicial review, the ACM can no longer hide behind its regulatory discretionary powers. Instead, it means that the ACM, on the basis of the duty to provide reasons, should justify its regulatory actions in a transparent and substantive way; It requires the ACM to make transparent the goals of the regulations, its reasons, the way these reasons relate to the will of the legislator and the proportionality of measures.

In its recent case law, in several recent judgements between 2015 and 2018, the CBB showed more willingness to review the substance of the regulatory decisions of the ACM, which led to the annulment of several key energy regulation on procedural grounds. These developments show that the tide may be turning at the CBB, though a more intensive research of recent case law will be needed to substantiate whether the CBB will really have a less restraint approach towards the substance of regulatory decisions of the ACM.

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[139] Lavrijssen et al. 2014, p. 62.

[140] Hirsch Ballin 2015, pp. 33–34.

[141] Lavrijssen 2014, p. 225.

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