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Amsterdam, 9 December 2021

Re: Letter and notification before action regarding capacity charge

Dear Addressees,

1. We are writing to you on behalf of our client, Stichting Nuon Claim, a foundation established under the laws of the Netherlands (the **Foundation**), acting in the collective interest of all persons and legal entities whose interests have been negatively affected (the **Wholesale Customers**) by unlawful practices committed by Vattenfall Sales Nederland N.V. and/or Vattenfall Energy Trading Netherlands N.V. and/or Vattenfall N.V. and their legal predecessors (jointly: **Vattenfall**) in relation to certain tariff components charged to Wholesale Customers in the electricity market in the Netherlands. Since the unlawful practices result in an apparent noncompliance by Vattenfall with Vattenfall Group's business ethics policies, we include Vattenfall's parent company Vattenfall AB and its former parent company N.V. Nuon as addressees of this letter.

Introduction

2. This letter is a notification to Vattenfall of liability for damages caused by unlawfully charging a capacity charge (*gecontracteerd vermogen*) to wholesale users (*grootverbruikers*) in the Netherlands throughout the period starting from the liberalisation of the Netherlands commercial wholesale electricity supply market as of 2002 until today (the **Unfair Practice**). The persistence of Vattenfall's behaviour and its unequivocal denial of any wrongdoing demonstrate that the underlying issue lies at the core of Vattenfall's business model: enlarging margins and profitability at the expense of its long-term and most faithful and loyal customers. Solely by way of example, we point to Vattenfall's incorrect statements it made as a follow-up to the broadcast by the Dutch TV program *EenVandaag* on 11 December 2020 and in Vattenfall Sales' letters to the Foundation dated 24 July 2020 and 3 November 2020.
3. In addition to being a notification of liability, this letter serves several other purposes. It constitutes a last and final invitation to commence settlement negotiations within the meaning of Art. 3:305a(3)(c) Dutch Civil Code (**DCC**). Additionally, this letter serves as a formal notice interrupting the limitation period

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(*stuitingsbrief*, Art. 3:317 DCC) for any and all claims against Vattenfall and which result from the Unfair Practices.

4. In this letter, we first briefly describe the relevant facts; secondly explain the legal grounds for liability and, lastly, address potential ways forward.

The Foundation

5. The Foundation was established on 12 June 2020. It promotes and furthers the interests of the Wholesale Customers in relation to the Unfair Practices. The authority of the Foundation to act in the Wholesale Customers' interest is based on Art. 3:305a(a) DCC and the means and objects laid down in the Foundation's articles of association.
6. The Foundation's means and objectives empower the Foundation to represent all those affected by the Unfair Practices.
7. To enforce the Wholesale Customers' claims against Vattenfall, the Foundation has secured adequate third-party litigation funding from renowned litigation funder Bench Walk Advisors. The budget will help securing the litigation of the matter throughout all stages of litigation, if needed. We refer to the Foundation's website for further information about the key terms of the litigation funding agreement.

Facts

8. Before 2002, N.V. Nuon was a vertically integrated energy company active in the field of electricity production, grid operation, and energy supply. Starting as early as 2002 and following the separation of N.V. Nuon's activities in the field of grid operation (*netbeheer*), and the production and supply of power, Vattenfall charged to the Wholesale Customers what is known as a kW charge or capacity charge. In return for this capacity charge, Vattenfall provided no services or goods. However, it indicated otherwise in its earliest customer contracts. In its standard electricity supply contract template, Vattenfall specified the capacity charge as "*Kilowatt Vergoeding €/kW/jaar*". In its invoices, it specified the capacity charge as "*Vergoeding gecontr. Vermogen*". At the same time, the electricity grid operator specified a charge for *actual* transport capacity services as "*Vergoeding gecontracteerd transportverm.*," or: "*Gecontracteerd transportverm.*" which transport capacity services belonged to the exclusive responsibility of grid operators. This indicates that the supplier took advantage of the unfamiliarity of most Wholesale Customers with the new and complex market structure enacted pursuant to the First Energy Liberalisation Package¹ by maintaining a line item on its invoices and putting a price tag on it, notwithstanding the fact that it had become obsolete due to the mandatory separation of grid operations. For this reason, Vattenfall as supplier should no longer have charged the capacity charge.
9. Against this backdrop, the Foundation considers the following legal entities as supplier for the purpose of this letter and its subsequent actions:
 - a. n.v. Nuon Energy Trade & Wholesale, named Vattenfall Energy Trading Netherlands N.V. as of December 2009 and which occurs in contracts and invoices as supplier until, at the earliest, 2002;
 - b. N.V. Nuon Business (acting as contracting party between at least from 2004 to 2010, although it merged and disappeared into N.V. Nuon Energie in 2009 which currently exists as Vattenfall Sales Nederland N.V.;
 - c. n.v. Nuon Energie, acting as supplier until 2009 and for a brief period renamed as N.V. Nuon Energie in 2009, renamed as N.V. Nuon Sales Nederland in December 2009 and currently existing under the name Vattenfall Sales Nederland N.V.;

¹ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

- d. N.V. Nuon, currently existing as N.V. Vattenfall, the parent company of the parties described under a., b. and c. above and responsible for these parties' day-to-day business and overall commercial strategy.
10. As of that time, the relevant Vattenfall entities continued to charge some of their long-term wholesale customers for non-existent capacity services. Internally, Vattenfall described these customers as "sleepers", because they would simply pay the invoice. The continued charges bore a resemblance to services provided and charged by the electricity grid operator by virtue of its statutory task and responsibility. Most Wholesale Customers did not ask questions at that time about the nature of these charges, since the relevant legislation is very technical, and these customers lacked the necessary knowledge and expertise to grasp the fact that they were dealing with unlawful behaviour on the part of Vattenfall. These Wholesale Customers' good faith was exploited shamelessly by Vattenfall for years. Vattenfall continued its behaviour despite the nationwide media attention concerning the issue in December 2020, despite complaints by individual customers and despite the Foundation's letters. Meanwhile, Vattenfall failed to provide adequate justification. Rather, Vattenfall argued that the charge did not interfere in the grid operator's activities and relied on contractual freedom. According to Vattenfall, in the absence of any relevant regulations, it was free to contract on whatever terms its wholesale customers would prove to agree or .

Causes of action

11. The Foundation takes the position that, by pursuing the Unfair Practices, Vattenfall acted in breach of its statutory and contractual obligations, as is corroborated by several witness statements in possession of the Foundation and an internal audit report of Vattenfall's sales department.
- a. The use of language resembling the grid operator's statutory tasks and responsibility in the invoices and the contract is unlawful, as is the apparent use of the Wholesale Customers' unfamiliarity with the new structure of the wholesale electricity market and the invoicing of the capacity charges. Both constitute deceit (*bedrog*) and an abuse of circumstances (*misbruik van omstandigheden*, Art. 3:44(1) DCC) by Vattenfall, a violation of its professional duty of care (*zorgplicht*) towards its customers and a wrongful act in general (Art. 6:162 DCC), as it did not cover any real service provided by Vattenfall. Vattenfall was aware of this last fact. This is evidenced by the fact that Vattenfall deliberately continued the Unfair Practice, even though it was put on notice of this unfairness by various individual customers and the Foundation.
 - b. Moreover, the Unfair Practice qualifies as a misleading trade practice within the meaning of Art. 6:194 DCC. This is because Vattenfall engaged in misleading and/or incorrect statements and failed to make a proper representation in relation to current and future contracts regarding the services it provided under the electricity supply agreements, resulting in an unlawful capacity charge. By concealing that the said charge did not pertain to any real service, Vattenfall's announcements were misleading in relation to their nature, composition, quantity and characteristics. The same applies to its statements relating to the calculation of the electricity price, the grounds for the charge, and the fact that the services in question were actually provided and invoiced by the grid operator and not by Vattenfall. By virtue of Art. 6:195 DCC, the burden of proof with respect to the correctness and completeness of Vattenfall's advertising rests with Vattenfall.
 - c. In view of the fact that all of the aforementioned causes of action support the Wholesale Customers' entitlement to damages and the electricity supply agreements constitute business to business contracts, the Wholesale Customers are also entitled to payment of commercial statutory interest over all unduly charged and paid capacity charges during the entire relevant period (Art. 6:119a DCC).
 - d. The absence of any service by Vattenfall Sales to the Wholesale Customers also implies that all payments that the Wholesale Customers made to Vattenfall in relation to the capacity charges

lacked a legal basis. Consequently, the Wholesale Customers are entitled to reclaim the amounts of kW Charges paid from Vattenfall as an undue performance (Art. 6:203 DCC, *onverschuldigde betaling*) or based on unjust enrichment (Art. 6:212 DCC). As Vattenfall acted and continues to act in bad faith, it is in default of receipt of payment of each of the capacity charges and therefore, commercial statutory interest has become due to the Wholesale Customers also on this basis.

- e. The Unfair Practice qualify as a default (*wanprestatie*, Art. 6:74 DCC) while performance can no longer be considered possible in light of, amongst others, the nature of the contract and the services and goods provided under it, and the services Vattenfall can provide to the Wholesale Customers. Since Vattenfall is the defaulting party, it is liable for all damages resulting from the default.
 - f. The above applies to all Wholesale Customers, irrespective of the characteristics of their individual contractual relationship with Vattenfall.
12. Vattenfall's behaviour is also incompatible with its own Code of Conduct and Integrity (the **Code**), applicable to Vattenfall's employees since its acquisition by Vattenfall AB. By exploiting its customers' trust in Vattenfall, it acted contrary to its asserted "position as an ethical, trustworthy and responsible company".² Although the Code refers to openness as a matter of principle, Vattenfall's opaque treatment of the capacity charge indicates it acted contrary to its promise: "When we communicate we are proactive, transparent, straight-forward and relevant".³ Since Vattenfall and its employees through their bonus structure profited from the capacity charge, the company and its employees did use their "inside knowledge for personal gain": unequivocally bad behaviour for any responsible enterprise.⁴ By refusing to come forward and openly disclose the background of the Unfair Practice, Vattenfall has continued to evade its accountability⁵. This sheds an entirely new light on Vattenfall AB's statement of being "passionate about our customer, our business and our reputation". The same goes for the company's promise to "not carry out financial activities in an unethical way", since invoicing the capacity charge is fundamentally unethical. Although Vattenfall AB's encourages its employees that: "It is every employee's responsibility to report anything that does not seem appropriate or safe",⁶ the Foundation has it from good sources that Vattenfall suppressed critical remarks regarding the Unfair Practice from its employees and, in fact, encouraged its employees to trespass the "blush test"⁷. Although the Code may be perceived as an instrument to incentivise employees to: "Speak up immediately if you feel pressured to compromise integrity to reach business targets", it has come to the Foundation's knowledge that former employees only appear prepared to comment on the Unfair Practice in strictest confidentiality. Similar principles can be derived from N.V. Nuon's annual reports before it was taken over by the Vattenfall Group. For instance, in its Annual Report 2008 (p.8) mention is made of sustainable business conduct, which is realised by, amongst others, "procuring the business is conducted responsibly"⁸. In its annual reports, N.V. Nuon referred to its own code of conduct which, it seems, is no longer available on Vattenfall's website.

Next steps

13. The Foundation voiced its concerns in its letters of 14 July 2020 ([Annex 1](#)) and 18 October 2020 ([Annex 2](#)) and these concerns are hereby repeated once again. The Foundation demands that Vattenfall should agree to repay the amounts paid to it as a result of the Unfair Practice, with the addition of statutory commercial interest. The Foundation would welcome the opportunity to enter into settlement discussions

² https://group.vattenfall.com/siteassets/corporate/who-we-are/corporate-governance/doc/code_of_conduct_180819_en2.pdf, introduction by Vattenfall AB's CEO Anna Borg.

³ Code, p. 4.

⁴ Code, p. 4.

⁵ Code, p. 5.

⁶ Code, p. 5.

⁷ Code, p. 6.

⁸ P. 8: "Wij brengen duurzaam ondernemen op drie manieren in de praktijk: (...) • Door het zorgdragen voor een verantwoorde bedrijfsvoeren; en • Door een maatschappelijk betrokken bedrijf te zijn."



with Vattenfall aimed at a full and final resolution of the matter, subject to the conclusion of a tolling letter guaranteeing the Wholesale Customers' legal right if negotiations render the litigation to be postponed.

14. If needed, however, the Foundation will vigorously pursue litigation under the new Dutch collective actions regime empowering it to sue for compensatory damages for the benefit of the Wholesale Customers.
15. In order to enable the Foundation to further review and assess the matter, it requests that Vattenfall provides it, **within 10 working days as of today**, with full particulars of:
 - a. the number of wholesale customers who were invoiced for capacity charges from 1 January 2002 up until now, including the number of 'sleepers' during this period;
 - b. the amounts invoiced and paid as contracted capacity; and
 - c. the number of settled disputes with customers complaining about the capacity charge.
16. In addition, the Foundation requests Vattenfall to provide it with:
 - a. the version of Nuon Sales internal manual '*Helderheid In Eenduidige Processen en Helder Op Internet (Hiephoi)*' of October 2005, including its versions updated from time to time in order to further assess Vattenfall's sale processes and
 - b. the Nuon Code of Conduct (*Nuon Gedragscode*), as applicable and amended from time to time as of 2001.
17. During our further conversations and/or litigation, the Foundation may seek disclosure pursuant to Art. 843a Dutch Code of Civil Procedure (**DCCP**) of further relevant data in the possession of Vattenfall. For this reason, we request Vattenfall to take such action as may be necessary to preserve all evidence relating in any way to the Wholesale Customers' identities, contract details, phone call notes and recordings, invoices and payments and all further evidence surrounding or relating to it. Even without a court order, Vattenfall should anticipate being obliged to inform the court truthfully and to provide evidence when obliged to do so pursuant to Art. 21 and 22 DCCP and therefore, we urge Vattenfall to cease all routine deletion and further clean-up measures.

We look forward to receiving your response.

Yours faithfully,

Birkway B.V.



Quirijn Bongaerts
Advocaat

De Haan Advocaten en Notarissen B.V.



Pieter Huitema
Advocaat

