ENERGY | NEWSLETTER

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Public consultation of new Dutch Heat Act

On 22 June 2020 the Dutch Ministry of Economic Affairs and Climate Policy published the draft new Dutch Heat Act (*Wet collectieve warmtevoorziening*), for public (online) consultation. All interested parties are invited to submit input until 3 August 2020. While the current Heat Act is primarily a consumer protection act, containing provisions ensuring fair terms and tariffs for consumers and on security of supply, the envisaged new Heat Act will significantly alter the regulatory framework for collective heating systems and heat infrastructure.

Background and purpose

In the 2019 Dutch Climate Act a 95% carbon reduction goal for 2050 compared to 1990 was laid down. For the built environment, this translates to the ambition of almost complete carbon neutrality, as was agreed in the 2019 Dutch Climate Agreement between governments and various stakeholders. An important part of the plans for the built environment is the phasing out of natural gas for heating purposes and replacing it by renewable means of heating. The draft new Heat Act aims at contributing to this goal. Specifically, the draft new Heat Act aims at:

- enabling the growth of collective heating systems through new rules;
- more transparency as regards tariffs;
- stricter requirements safeguarding security of supply; and
- ensuring sustainable energy supply.

Municipalities will have a leading role in shaping the regional energy transition. Under the proposed new Heat Act supply and transport of heat cannot take place without a prior municipal decision demarcating a “heat plot” and designating a responsible heat company.

In this newsletter:

The appointed heat company will have the exclusive right to supply heat in the specific area and will have responsibility for the entire heat chain (from source to end user). Exceptions are made for small collective heating systems (and owners’ associations and landlords) and a different regulatory regime applies to regional heat transportation networks, under conditions.

Under the proposed new Heat Act all tariffs (for both small consumers and large users) will gradually become cost-based. Currently this is not the case as only tariffs for small consumers are regulated (linked to the price of natural gas). For small consumers, the new tariff regulation will be implemented in phases. In the last phase small consumer tariffs will be based on costs and allowed revenues, enabling heat companies to recoup costs and a reasonable profit on invested capital. Allowed revenues are determined by regulator ACM in a method decision (including efficiency incentives). Heat companies are required to send a tariff proposal to ACM based on the method decision and ACM subsequently sets maximum tariffs.

For large users, the tariffs must reflect the costs and the calculation method and tariffs must be transparent, non-discriminatory and based on a reasonable return. Calculation methods could be subject to ACM assessment, following a request by a user.

The new Heat Act is intended to enter into force in January 2022.

Grid connection solar projects

On 2 June 2020, the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) issued its judgment in the dispute between electricity grid operator Liander and the Authority for Consumers & Markets (ACM) with respect to the complaint of solar project developer NAEN. Our February 2020 newsletter already highlighted the legal opion issued by Advocate-General Wattel in this case. The Tribunal's judgment is in line with Mr Wattel's opinion and puts an end to the standard practice that one electricity grid connection is granted to each immovable property object as defined by the municipal tax authority.

The Electricity Act provides that a grid operator must realize a grid connection for each immovable property object. As to the demarcation of such immovable property object, the Tribunal how has now ruled that the municipal tax decision under the Valuation of Immovable Property Act (*Wet waardering onroerende zaken, WOZ*) is no longer decisive.

In the case of NAEN, the municipality had identified three separate immovable property objects (on the basis of three separate building rights), but grid operator Liander successfully argued that it in fact concerned one and the same solar energy project, which therefore justified only one grid connection instead of three.

According to the Trade and Industry Appeals Tribunal, the municipal WOZ decision merely constitutes a refutable presumption which can be deviated from if circumstances so require. The burden of proof lies with the party that advocates such deviation.

The demarcation of the immovable property object will then be conducted in four steps on the basis of tax case law:

- Which immovable property objects can be identified within the meaning of article 3:3 of the Dutch Civil Code?
- Is the ownership (or legal entitlement) to these objects vested in several parties?
- Can these objects be split into parts that are clearly intended to be used separately?
- Do the immovable property objects form an assembly?

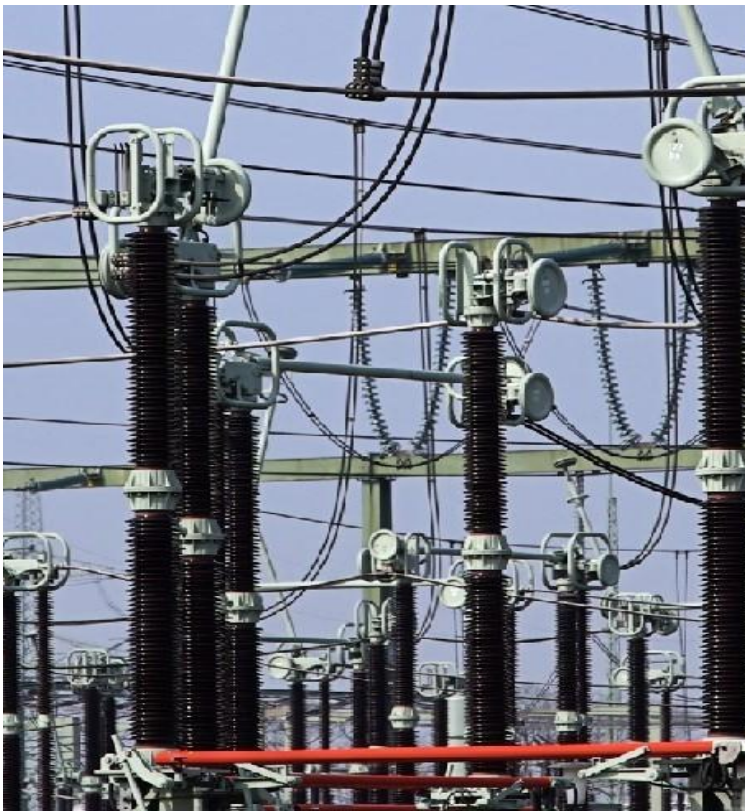
In the case of NAEN, the Tribunal ruled (i) that in spite of the three separate building rights, there is only one legal owner thereof: NAEN, (ii) that NAEN is also the rightful user thereof, (iii) that there is no split-up in parts, and (iv) that the building rights for the solar panels should be deemed to belong together in view of the criteria developed by the Supreme Court: a (geographical) coherent ensemble with one organizational goal (whereby the coherency may not be perceptible for third parties).

Amendment of the Electricity Act

The judgment of the Tribunal is in line with the upcoming amendment of the Electricity Act, which was adopted by the Senate on 9 June 2020. Under the current Electricity Act, it is already prohibited to artificially "split up" onshore wind projects for grid connection purposes and this will now be extended to solar projects. Onshore wind and solar installations are deemed to have only one grid connection if:

- the installations belong to the same enterprise or institution; and
- the installations have mutual technical, organizational or functional connections and are located in immediate vicinity of one another.

It is to be expected that, following the judgment of the Tribunal and the change of the Electricity Act, new case law will be established to further detail the relevant grid connection criteria.



New SDE++ subsidy round open in November 2020

The Dutch government is in the process of transforming the current SDE+ renewable energy production incentive scheme into a new SDE++ scheme. The new scheme stimulates reduction of CO_2 emissions as well as the production of renewable energy. The new scheme maintains a number of elements of the SDE+ scheme, such as subsidizing the non-profitable portion, phased opening and competition between the various techniques. An important new starting point in the SDE++ scheme is the ranking of subsidy applications based on expected subsidy requirements per tonne of avoided CO_2 emissions.

The new scheme broadens the scope of projects eligible for subsidy to CO_2 reducing techniques, such as Carbon Capture and Storage (CCS). Other new categories are electric boilers and heat pumps, aquathermal energy from surface and wastewater, heat utilization from champost, sustainable greenhouse, geothermal energy in the built environment, industrial residual heat and hydrogen production via electrolysis.

In 2021 more categories of techniques are expected to be added, these are currently being calculated by the PBL Netherlands Environmental Assessment Agency.

The first application round for the new SDE++ scheme is expected to open on 24 November 2020 until 17 December 2020. These dates have already once been postponed with eight weeks as a result of the COVID19 pandemic. The maximum subsidy that techniques can claim is EUR 300 per tonne of avoided CO_2 emissions. The application round has four phases, with phase limits in EUR per tonne of avoided CO_2 emissions of: 70, 85, 180 and 300, respectively. A total budget of EUR 5 billion is available in this round.

The actual amendment of the SDE decree has not yet been published, but interested parties can already prepare applications based on the information provided by ministerial letters of 17 February 2020 (Letter to Parliament 17 February 2020) and 24 June 2020 (Letter to Parliament 24 June 2020) and the website of the Netherlands Enterprise Agency (RVO) (Website RVO) and its recent webinar (Webinar RVO 30 June 2020).

Recent projects HVG Law

Recent projects HVG Law has worked on include:

- Cooperation Netherlands Climate Fund (Klimaatfonds Nederland) and YARD Energy
- Legal unbundling Naftogaz of Ukraine
- Acquisition wind park Eemshaven by Pondera and Rebel
- Power Purchase Agreement Windpark SwifterwinT

Publications HVG Law

Our lawyers puslished articles in the latest edition of the Netherlands Energy Law Journal NTE (*Nederlands Tijdschrift voor Energierecht*) and in The Energy Regulation and Markets Review.

About us

HVG Law is a trusted partner in the energy sector. We are an independent quality-driven *full-service* law firm with over 200 lawyers and civil-law notaries in the Netherlands and Belgium, a unique partnership with EY Tax and a global international network (EY Law) with 2,500+ lawyers in over 75 jurisdictions worldwide.

The HVG Law Energy & Utilities Team is closely involved in projects, transactions and proceedings in the energy sector, covering all areas of law. Our experts have broad experience in regulation, M&A, development, structuring and financing of renewable energy projects, including solar, wind, biogas and geothermal.

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