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Netherlands

Law and Practice

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Law and Practice

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1. General Structure and Ownership of the Power Industry

1.1 Principal Laws Governing the Structure and Ownership of the Power Industry

The Netherlands' electricity market has been fully liberalised pursuant to the applicable EU directives. This liberalisation process has led to heavy regulation, in particular of the electricity market, which largely depends on a sophisticated power transportation and transmission infrastructure, whereby third-party access to this network infrastructure had to be secured. The liberalisation process began with the introduction of the Electricity Act in 1998 (<https://wetten.overheid.nl/BWBR0009755/2019-01-01>).

Based on, and pursuant to, the Electricity Act, a large amount of secondary legislation such as codes, regulations and decrees has been adopted and implemented. The Third Energy Package Directive (2009/72/EG) and Regulation (EC) No 714/2009 have been implemented by an act of 12 July 2012 to amend the Electricity Act.

The Electricity Act makes a distinction between:

- the national High Voltage Network, being the network for transmission of electricity at 110 kV or higher, which is used for such purpose, as well as networks that cross national borders at 500 V or higher (the “High Voltage Network”); and
- the other regional low voltage – ie, up to 50 kV, electricity distribution networks (the “Distribution Networks”).

There is one transmission system operator (TSO) for the entire High Voltage Network – ie, TenneT. TenneT is responsible for operating the High Voltage Network, maintaining the (cross-border) interconnectors and balancing supply and demand, both on the High Voltage Network and the Distribution Networks. Seven regional distribution system operators (DSOs) operate the Distribution Networks.

The Electricity Act prescribes that, in order to be allowed to operate an electricity transmission or distribution network, a separate company must be appointed as electricity network operator by the owner of the transmission or distribution network, with approval by the Minister of Economic Affairs (MEA). The Electricity Act imposes several legal, managerial and accounting unbundling requirements on network owners and network operators. Consequently, management and operation of a network must be entrusted to a separate legal entity, the network operator, which has to keep separate accounts in respect of the management of the network.

Network operators are usually part of the same corporate group as the owner of the network. The network operators are subject to legal obligations imposed on them by the Electricity Act, in order to prevent them from abusing their dominant position.

In order to further increase the independent position of network operators, the Electricity Act provides for mandatory transfer of the economic ownership of the Distribution Networks to the relevant DSO.

Furthermore, network operators and the networks under their supervision may no longer belong to an energy company that also supplies or produces energy. Ownership of the network operator must be transferred to the public shareholders of the energy company. The legislator intended that, as such, network operators operate entirely independently in the Dutch market.

In this context, the Electricity Act imposes four key prohibitions on network operators:

- the grouping or integration prohibition – network operators (national or regional) are not allowed to undertake any energy supply activities;
- the prohibition to undertake any side-activities – network operators are not allowed to undertake any activities that may conflict with interests of the network management or operation; therefore, network operators can only undertake infrastructural activities;
- the non-compete prohibition – network operators can only undertake that which is prescribed by the law, and against regulated tariffs; and
- the privatisation prohibition – the shares in a network operator always need to be, directly or indirectly, owned by the state (local or national).

The aforementioned prohibitions underline the following differences:

- the distinction between a generation/supply company and a network operator;
- the distinction between network operators and other (group) companies;
- the distinction between a network operator and a network company; and
- the distinction between public and private.

1.2 Principal State-Owned or Investor-Owned Entities

As mentioned above, TenneT, the TSO, owns the electricity transmission network, while there are seven DSOs that own the Distribution Networks – Coteq Netbeheer, Enduris, Enexis, Liander, RENDO Netwerken, Stedin and Westland Infra.

Acquisitions of (i) Distribution Networks, or (ii) shares of a DSO, by non-public entities are prohibited pursuant to the Electricity Act. The Electricity Act does not contain an explicit prohibition on the (partial) privatisation of the TSO. However, in October 2013 the Dutch government decided not to initiate any (partial) privatisation of TenneT. This government policy is in line with the State Participation Policy.

The largest energy companies selling electricity to end-user consumers are Essent, Eneco, Vattenfall, Nuts Energie and Greenchoice. They are all privately owned, whereas the following companies only deliver green electricity, mostly generated in the Netherlands: Pure Energie, Om, Vandebroek, PowerPeers, Huismerk Energie and Greenchoice.

1.3 Foreign Investment Review Process

There are no specific incentives or protections to encourage foreign investment in the Dutch power generation industry. The Electricity Act does not contain restrictions or protections that apply to foreign investment in the Dutch electricity market. Any investment in power industry, whether Dutch or foreign, will be subject to mandatory merger control pursuant to the Competition Act (please see **2.4 Principal Laws Governing Market Concentration Limits** and **2.5 Agency Conducting Surveillance to Detect Anti-competitive Behaviour**). Two of the top three electricity supply companies (ie, Essent and Nuon, nowadays also referred to as Vattenfall, the name of its sole shareholder), are in the hands of foreign shareholders, (ie, RWE and Vattenfall respectively).

1.4 Principal Laws Governing the Sale of Power Industry Assets

Please see **1.3 Foreign Investment Review Process**, **2.4 Principal Laws Governing Market Concentration Limits** and **2.5 Agency Conducting Surveillance to Detect Anti-competitive Behaviour**, dealing with any relevant competition law legislation.

1.5 Central Planning Authority

The Netherlands Authority for Consumers and Markets (ACM) is the national regulatory authority for energy. The ACM regulates the energy markets in order to safeguard affordability, quality, continuity, and accessibility in these markets. Enforcement of the Electricity Act and secondary legislation is one of the ACM's core tasks. The ACM aims to prevent and resolve market and consumer problems.

The ACM has a specialised Energy Department, supervising the exercise of dominance in the electricity sector, including regulation of third-party access and tariffs related to the Distribution Networks.

Apart from the ACM, the MEA plays an important role. The MEA is responsible in the areas of security of supply, network access conditions and tariff structures (imposed by way of ministerial decree) in particular. He or she is accountable to Parliament for the performance of these duties.

Pursuant to the Electricity Act, the MEA has the authority to issue so-called ministerial regulations. Accordingly, the regulating influence of the MEA is substantial, which means that the MEA plays an important role in the power industry, in particular as regard to the cross-border transmission of electricity. The MEA uses the Energy Report, published every four years, to set out the government's medium and long-term energy policy. The Energy Report sets out guidelines for the government for the following four years regarding reliable, sustainable and efficient energy supply.

1.6 Recent Material Changes in Law or Regulation

In May 2019 the Climate Act (*Klimaatwet*) has been adopted by Parliament, establishing a long-term legal framework for government climate policies; please also see **3.1 Principal Climate Change Laws and/or Policies**.

Moreover, on 10 December 2019 the Act to phase out the use of coal for generating electricity (*Wet verbod op kolen bij elektriciteitsproductie*) has been adopted by the Senate; please also see **3.2 Principal Laws and/or Policies Relating to the Early Retirement of Carbon-Based Generation**.

The Netherlands Offshore Wind Energy Act (*Wet Windenergie op Zee*; <https://wetten.overheid.nl/BWBR0036752/2019-01-01>) was implemented in 2015 to simplify and accelerate the decision-making process for the realisation of offshore wind projects. Currently a bill to amend the act is being discussed in Parliament. With this bill, the procedures for granting licences are extended and adapted to deal with the situation in which wind energy at sea requires less or no subsidy. In view thereof this bill proposes to add auctions as an option to grant the permit for a wind farm at sea.

Finally, an important change regarding the renewable energy market has been implemented as of 1 May 2019 – ie, a modification of the Activities (Environmental Management) Decree. Under the new rules, owners of buildings and companies that use more than 25,000 m³ gas or 50,000 kWh per year are obliged to take measures to reduce this use, provided the costs of these measures can be recovered within five years. As of 1 July 2019, the owner/user needs to proactively inform the government which measures it took.

1.7 Announcements Regarding New Policies

The current coalition government, which consists of four parties, has been in power since 2017. These parties have agreed to conclude a Climate Agreement (*Klimaatakkoord*) with relevant stakeholders. This climate agreement is part of the Dutch climate policy and was concluded and presented in June 2019. The government's central goal with the Climate Agreement is to reduce greenhouse gas emissions in the Netherlands by 49% in 2030 compared to 1990 levels. The three key issues of the Climate Agreement are:

- in 2030, 70% of the electricity has to be generated from renewable sources;
- in 2050, seven million houses and one million buildings have to stop using gas as an energy source; and
- in 2050, the industry needs to be circular and thus should be CO₂-neutral.

Furthermore, as from 2013, the Energy Agreement is in place. Even though this is already in place, it includes arrangements that will impact the future of coal-based power stations. For further information, please see **1.8 Unique Aspects of the Power Industry** and **3.3 Principal Laws and/or Policies to Encourage the Development of Alternative Energy Sources**.

In relation hereto, the Energy Report – which lays down the government's vision for the period after the Energy Agreement up until 2050 – should also be mentioned. This has also been discussed in the Energy Dialogue, a platform organised by the government to discuss the energy transition with businesses, organisations and the general public. The output from the Energy Dialogue has been used as a building block for the Energy Agenda. The Energy Agenda is based on overarching themes for the entire energy transition and describes the choices to be made and the steps that must in any event be taken to reach the long-term 2050 objectives.

On 20 December 2019, the Dutch Supreme Court (*Hoge Raad*) upheld the previous decisions in the so-called Urgenda Climate Case. As a result, the court order to the state to reduce greenhouse gas emissions by the Netherlands by 25% by the end of 2020 remains in place. Following the Urgenda decision, the Dutch Cabinet presented on 24 April 2020 additional measures to comply with the judgment. An example of these measures is to limit electricity production with coal by the end of 2020. The aim is to achieve an additional CO₂ reduction of 5 to 7.5 megatons, while also keeping the coal-fired plants in a position to deal with any security of supply risks.

Furthermore, on 30 March 2020 the MEA issued the government's Hydrogen Vision, including medium and long-term policy objectives for the development of a green hydrogen

policy. The Hydrogen Vision fits well within the framework of the Climate Agreement which called for the launch of a national hydrogen programme by the Dutch government.

Finally, the Social and Economic Council (*Sociaal-Economische Raad*) is expected to advise the Dutch government to scale down subsidies on biomass for the production of electricity and heat. This conclusion is remarkable, because it is at odds with the government's policy. In accordance with existing arrangements with the European Union, the Dutch government sees biomass as a form of renewable energy. As a result, it has announced its intention to grant over EUR8 billion of subsidies for biomass plants and the wood burning in coal-fired power plants. The Social and Economic Council is an important advisory body in which employers, employees and independent experts work together to reach consensus on important social economic issues, and to advise the government accordingly.

1.8 Unique Aspects of the Power Industry

Currently, the transition of a traditional fossil fuel-driven energy market to a renewable energy market is a hot topic in the Netherlands. Also because of the ongoing problems pursuant to a series of earthquakes in the north-eastern part of the Netherlands where the largest natural gas field is located. As a consequence, the government has decided to stop the natural gas production within the next few years, but in any event by 2030. This has led to a different pace in working towards the original target to achieve an electricity market in the Netherlands that is driven by renewable energy. This all started with the Energy Agreement in 2013.

In September 2013, the Dutch government and a number of stakeholders reached a society-wide Energy Agreement for Sustainable Growth (the "Energy Agreement"), laying out the actions needed to reach certain targets for 2020. On the basis of the Agreement and the Climate Agenda of October 2013, the country reaffirmed its ambition to reduce carbon dioxide emissions in the transport sector by 17% by 2030 and by 60% by 2050. It also supports an EU-wide reduction in greenhouse gas emissions of at least 40% by 2030 and further reductions of between 80% and 95% by 2050, in line with international commitments. The government considers this 40% goal by 2030 a minimum commitment.

The Energy Agreement unites various organisations, including the Dutch central and local government, employers' associations, trade unions, environmental organisations, financial institutions and other civil society organisations. The Energy Agreement has the goal of aligning the interests of the various involved parties towards a more sustainable and secure energy supply, of creating additional jobs in the energy sector and lower prices for consumers. Two main targets of the Energy Agree-

ment are to achieve an average energy consumption saving of 1.5% per year and an increase of the renewable energy share to 14% by 2020 and 16% by 2023, with as its ultimate goal a fully renewable energy generation industry by 2050.

1.9 The Impact of COVID-19

The outbreak of COVID-19 and the subsequent contact measures has resulted in a substantial decline of worldwide emissions of greenhouse gases over the last few months. According to the World Meteorological Organisation, the fall of CO₂ emissions as a result of the COVID-19 pandemic could amount to approximately 6% in 2020. A short scenario study by the Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*) already shows that a similar decrease is conceivable in the Netherlands.

Although the precise effect of the COVID-19 crisis on the climate and energy policy remains uncertain, COVID-19 has had a negative impact on the Dutch energy transition and the sustainable energy sector. The direct consequences for implementation of the Climate Agreement and mitigating measures are discussed below.

The COVID-19 crisis has consequences for the implementation of the Climate Agreement (*Klimaatakkoord*). The discussion about this will take place, among others, in the sectoral implementation consultations and the overarching progress consultations of the Climate Agreement.

In the implementation, concerns have risen regarding three types of problems that may occur, depending on the duration of the pandemic and the scale of the ensuing economic recession.

First of all, there is a risk of delay in the lead times of processes. On the one hand, this concerns delays in the physical execution of projects due to limitations in the availability of personnel and/or material. On the other hand, decision-making processes are delayed because consultation moments are not possible as a result of contact-limiting measures.

A second type of problem concerns the building and maintaining the knowledge and capacity required for the transition. The consequences of a temporary drop in demand can last for a long time if it leads to bankruptcies and the dismissal of people who are needed again later.

Thirdly, problems are caused by the economic decline and changing market conditions. Declining incomes and revenues have consequences for the affordability of measures for households and businesses, respectively. Dropping prices of energy, fossil raw materials such as oil, coal and gas and CO₂ have a negative impact on the business case of sustainable alternatives.

As a result, sustainable alternatives may become less attractive in the short term.

The aforementioned consultations give a lot of thought to the consequences of COVID-19. Participants work on joint solutions to ensure that the implementation of the Climate Agreement continues, despite the current health crisis. The government is working with parties to mitigate the direct impact on implementation as much as possible. In addition, the government has already taken a number of specific mitigating measures in the climate and energy domain. Finally, the government states that it remains committed to the climate ambitions and to a swift implementation of the Climate Agreement.

2. Market Structure, Supply and Pricing

2.1 Structure of the Wholesale Electricity Market

The wholesale electricity market in the Netherlands is governed by the Electricity Act (<https://wetten.overheid.nl/BWBR0009755/2019-01-01>) and has various aspects. Electricity can be traded or exchanged via two official electricity exchanges, APX and ICE Endex. APX is an electronic exchange for spot market trading, offering day-ahead trading and intraday trading. It is part of the pan-European energy trading platform EPEX Spot. ICE Endex facilitates the trading in electricity in the form of futures.

Electricity is also traded directly between trading parties or via a broker on the over-the-counter market. Furthermore, the TSO, TenneT, operates an imbalance market for regulating reserve capacity, assuring that the balance between electricity injected into and taken from the Dutch electricity network is preserved. On this single buyer market, parties can offer regulating or reserve capacity to TenneT.

In order to be able to supply electricity to consumers and small businesses, a licence is required from the ACM. The ACM also establishes the tariff structures and conditions for the transmission of electricity and supervises TenneT, which has primary responsibility for the transmission of electricity from producers to consumers.

Moreover, TenneT is responsible for supervising and recognising each programme responsible party (PRP). Any party that has a connecting point to the electricity network bears programme responsibility for such connecting point. This means that the PRP is obliged to draw up programmes relating to expected electricity supply to, and expected consumption from, the electricity network. These electricity programmes have to be sup-

plied to TenneT on a daily basis. TenneT settles the differences between the volumes agreed and the actual measured volume.

To be able to trade on APX and ICE Endex, membership is required. Each of these platforms impose their own regulations on members. Exchanges for derivatives fall under the supervision of the Financial Markets Authority since derivatives may qualify as financial products within the meaning of the Markets in Financial Instruments Directive (MiFID), which has been implemented in the Financial Supervision Act.

Finally, in this context, corporate power purchase agreements (PPAs) should be mentioned. Both direct and virtual PPAs are allowed in the Netherlands. Direct PPAs are made between an energy generator and an end user and provide for physical supply to the end user by the generator. In virtual PPAs the electricity does not necessarily come from the energy generator's own generation facility. In the Netherlands an electricity producer can sell electricity at the meter from the point of exit of the generation facility to the end user, even in the absence of a direct physical connection. The end user purchases electricity through the virtual PPA, together with the associated guarantees of origin. The latter are most times used by the end user to set them off against its own electricity consumption or to trade them on the guarantees of origin market, which is facilitated by CertiQ, the Dutch authority issuing and supervising the guarantees of origin market.

2.2 Imports and Exports of Electricity

In respect of electricity, the Dutch government stimulates TenneT as TSO as well as DSOs to work cross-border, since an integrated North-West European energy market simplifies trade and enables network operators to invest elsewhere in Europe. Moreover, electricity can then be generated at the most cost-efficient location. TenneT, in its role of TSO, is responsible for the operation and construction of cross-border interconnections.

With four connections with Germany, two with Belgium, one with Norway (NorNed, 580 km long and with a capacity of 700 MW, the world's longest high-voltage subsea direct current link) and one with the UK (BritNed, a two-way 1,000 MW high-voltage direct current connection with a length of 260 km), the Dutch electricity network forms an important link in the North European electricity grid. Moreover, TenneT and Energinet.dk – the TSO of the Danish high-voltage electricity network – have installed a high-voltage direct current submarine cable (the COBRA cable) that interconnects the electricity grids of the two countries.

TenneT is able to recoup its investment costs by auctioning off the available transmission capacity on the interconnector to the highest bidder. Capacity at the interconnectors is made available

to the market through the Joint Allocation Office. This central European interconnection capacity auction office has been set up by 20 TSOs throughout Europe, including TenneT. The rules applicable to the auction have been included in the Network Code, a regulation issued by the ACM.

2.3 Supply Mix for the Entire Market

According to the Dutch national statistical office, Statistics Netherlands (*Centraal Bureau voor de Statistiek*) the following division of energy sources in the Netherlands applied in 2019 (see most recent statistics, dated from 2019):

- coal – 8.64%;
- oil – 36.38%;
- natural gas – 43.96%; and
- renewable energy – 11.01%.

However, the supply mix specifically for electricity is different. In February 2020, the Netherlands produced on average 10.3% of its final energy consumption in the form of renewables compared to 8% in the previous year, according to research by EnTranCe, Centre for Energy Expertise (see: <https://www.en-tran-ce.org/en/research/renewable-energy-in-the-netherlands/>). In February 2020, power consumption, including transmission losses, has been estimated at 10.2 TWh. This resulted in the following Dutch fuel supply mix for electricity:

- natural gas – 54%;
- coal – 9%;
- onshore wind – 4%;
- biomass – 7%;
- others – 4%;
- offshore wind – 4%;
- nuclear – 3%;
- solar-pv – 3%; and
- net imports – 2%.

2.4 Principal Laws Governing Market Concentration Limits

Next to European Union rules, the principal laws relevant for the Dutch electricity market are (i) the Competition Act (*Mededingingswet*; <https://wetten.overheid.nl/BWBR0008691/2019-01-01>), and (ii) the Electricity Act.

The principal merger control provisions are set out in Chapter 5 of the Competition Act. If a party or combination of parties have more than 40% of the market, a dominant position will generally be considered to exist. In case of a market share of more than 50%, dominance may be presumed. Undertakings with such market share must ensure they do not abuse their dominant position (the prohibition of abuse of a dominant position is laid down in Article 24 of the Competition Act).

While the prohibition of abuse of a dominant position does not provide for any exemptions, it does allow for the possibility of obtaining a waiver (Article 25 of the Competition Act). Undertakings entrusted with the supply of services of general economic interest may request such waiver.

The ACM is the authority for matters in relation to Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). The ACM is responsible for the enforcement of the Competition Act.

If the thresholds set out in Article 29 of the Competition Act are met, the filing of a notification is mandatory. These thresholds are as follows:

- the combined turnover of all undertakings concerned is more than EUR150 million in the calendar year preceding the concentration; and
- at least two concerned undertakings have each earned at least EUR30 million in the Netherlands.

Although there are further specific criteria regarding gas assets, no such further criteria exist for the Dutch electricity sector. If merger control rules are not observed, the ACM may impose an administrative fine of up to EUR900,000, or 10% of the annual turnover of an undertaking, whichever is higher. In case of an implementation of a concentration before approval or after prohibition, the same fines apply.

2.5 Agency Conducting Surveillance to Detect Anti-competitive Behaviour

The principal laws are (i) the Competition Act, and (ii) the Act Establishing the ACM (*Instellingswet ACM*; <https://wetten.overheid.nl/BWBR0033043/2019-01-01>).

As mentioned above, the authority responsible for the enforcement of competition rules in the Netherlands is the ACM. The ACM has investigative and enforcement powers. The ACM can perform dawn raids, either in its own name or on behalf of the European Commission. ACM officials are authorised to enter premises, ask for information, demand inspection of documents and copy data.

In addition to the administrative fines specified in **2.4 Principal Laws Governing Market Concentration Limits**, the ACM may impose fines on individuals of up to EUR900,000. Finally, the ACM may also impose an order that the undertakings concerned cease or reverse the infringement. This order may be subject to periodic penalty payments.

3. Climate Change Laws and Alternative Energy

3.1 Principal Climate Change Laws and/or Policies

To combat climate change, the Dutch government wants to reduce the Netherlands' greenhouse gas emissions by 49% by 2030, compared to 1990 levels. This follows from the coalition agreement (please see **1.7 Announcements Regarding New Policies**). In view thereof, the government submitted a bill for the Climate Act (*Klimaatwet*) to Parliament in June 2018. This Climate Act was adopted in May 2019 by Parliament, establishing a long-term legal framework for government climate policies. It calls for a 49% reduction in greenhouse gas emissions by 2030, compared to 1990 levels, and a 95% reduction by 2050. The act intends to provide individuals and businesses in the Netherlands with more certainty about the climate goals.

The Climate Agreement (*Klimaataakkoord*) has been concluded in June 2019 and contains agreements with industry sectors on what they will do to help achieve the climate goals. The participating sectors are: electricity, industry, built environment, traffic and transport, and agriculture.

The Netherlands have also committed to several international agreements on tackling climate change, like the 1992 UN Framework Convention on Climate Change and the Kyoto Protocol of 1997 which lays down different emission reduction targets for different countries and allows countries to trade in emissions. In 2015, the Netherlands signed up to the UN climate agreement at the Paris Climate Conference. The Dutch climate policy is based on the findings of the Intergovernmental Panel on Climate Change (IPCC).

Energy and carbon taxes in the Netherlands are levied within the framework of the 2003 EU Energy Tax Directive, which sets minimum rates for the taxation of energy products in member states. Within this framework, the main taxes on energy use in the Netherlands are the following:

- an energy tax on the consumption of oil products, natural gas and coal and coke; and
- electricity output is taxed (per MWh).

The tax rates at which these taxes apply differ across fuels and different users. Fuels used to generate electricity benefit from a full refund on the tax paid, if the installation has a capacity of more than 1 MW. It is assumed all users benefit from the full refund on the tax paid on fuels used for electricity generation. The government is currently considering the introduction of a carbon tax to tackle climate change. This may affect, in particular, the energy intensive industrial processes (metallurgic,

electrolytic and chemical reduction processes), which are currently exempt from the tax on electricity output.

3.2 Principal Laws and/or Policies Relating to the Early Retirement of Carbon-Based Generation

There are no incentives provided by the government to encourage the early retirement of carbon-based generation. However, on 18 March 2019, a bill was proposed to Parliament, subsequently adopted by the Senate on 10 December 2019, that targets the phasing out of the use of coal for generating electricity (*Wet verbod op kolen bij elektriciteitsproductie*). The bill prohibits the use of coal in power generation plants with in generating electricity. Pursuant to the bill, these power stations will be prohibited as from 1 January 2025. Power stations with less than a 44% yield in generating electricity will be prohibited as from 1 January 2030.

In the explanatory memorandum to the bill, the MEA explains that the substance of the bill has been foreseeable for the owners of the relevant power stations. Therefore, in principle, the owners of the power stations will not be compensated for their stranded assets. However, compensation will be possible if the owner of the power station can demonstrate that the measures will affect it disproportionately.

Of the five coal-fired power plants in use in the Netherlands in 2019, the Hemweg power plant has been shut down in December 2019. The next power plant designated to close down is the Amercentrale, in 2025. The remaining three plants have to follow within five years thereafter.

3.3 Principal Law and/or Policies to Encourage the Development of Alternative Energy Sources

Pursuant to the Energy Agreement, the Netherlands have set the targets of having in 2020 14% of the energy needed to be generated by renewable energy facilities; by 2023, this should be 16%. The Energy Agreement provides for a number of measures to scale up renewable energy generation, by means of a strong focus on onshore and offshore wind electricity farms and the closing down of coal plants.

The Energy Agreement also provides for tax incentives for consumers to generate their own renewable energy and for insulating their houses and other incentives such as the renewable energy incentive subsidy scheme (SDE++; <https://english.rvo.nl/subsidies-programmes/sde>; the abbreviation stands for Stimulation of Sustainable Energy Transition, previously known as the Stimulation of Sustainable Energy Production, or SDE+).

The SDE++ scheme is an operating subsidy aimed at businesses, institutions and non-profit organisations. While pursuant to the original SDE+ scheme, producers of renewable energy received

financial compensation for the energy they generate (effectively neutralising the difference between the generally lower cost price of energy derived from fossil fuels and the higher cost price of energy derived from renewable resources), under the SDE++ scheme various technologies compete on the basis of amounts of carbon dioxide (CO₂) and other greenhouse gases that have been avoided. The goal of the SDE++ scheme is to reduce CO₂ and greenhouse gas emissions by 49% by 2030 (compared with 1990 levels).

The Energy Agenda is a policy document that can be considered as a follow-up on the Energy Agreement. It discusses overarching themes for the entire energy transition and describes the choices to be made to implement the energy transition from a carbon-based energy system in the Netherlands to a renewable energy-based energy system.

The offshore wind electricity policy is laid down in the Offshore Wind Energy Roadmap 2030. This policy instrument intends to maintain continuity in the realisation of offshore wind energy to meet the goals set in the Energy Agenda and the Climate Agreement, and to provide a clear policy framework regarding the realisation of offshore wind farms for the market so as to ensure the confidence of wind farm developers, which may result in cost reduction and willingness to invest.

The Energy Transition Progress Act, which has been discussed in **1.6 Recent Material Changes in Law or Regulation**, obviously also plays a role in encouraging the development of alternative energy sources.

4. Generation

4.1 Principal Laws Governing the Construction and Operation of Generation Facilities

Regarding the construction of power plants, the Electricity Act does not impose a specific licence or permit requirement for generation facilities. Consequently, the generic permit framework applicable to construction of buildings in the Netherlands applies. This includes requirements pursuant to both planning and environmental legislation.

4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities

The National Co-ordination Regulation (*Rijkscoördinatiering*), which is laid down in the Spatial Planning Act (*Wet ruimtelijke ordening*) is applicable to energy construction projects. In this procedure, all rulings are to be made available for inspection at the same time. In summary:

- phase 1 – the initiator will make its plans known at an early stage to the MEA, using the standard form;
- phase 2 – if the project does not fit in the current zoning plan, the Ministry of Economic Affairs and the Ministry of Interior Affairs will prepare a spatial ruling (*ruimtelijk besluit*) in consultation with the initiator and the government authorities involved; often an environmental impact assessment will be prepared;
- phase 3 – the Department Energy Projects (*Bureau Energieprojecten*), together with the initiator, will review which permits and exemptions are necessary;
- phase 4 – the initiator will have to apply for all permits and discretionary exemptions with the applicable authorities; the co-ordinating minister will arrange a joint schedule;
- phase 5 – the involved authorities will jointly prepare a draft decision;
- phase 6 – the draft decision will be made available for inspection, together with an environmental impact assessment, in the event that that has been made;
- phase 7 – the authorities will process the advices provided and will give a definitive ruling;
- phase 8 – the definitive rulings will be made available for inspection; interested parties can appeal proceedings before the Administrative Jurisdiction Division of the Council of State (*Raad van State*); and
- phase 9 – if interested parties appeal against the definitive rulings, the Administrative Jurisdiction Division of the Council of State will give its ruling in one judgment, within six months of the appeal period.

4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities

Nowadays the focus in the Netherlands is on the construction of renewable energy generation facilities. Typically, these are wind and solar facilities. Therefore, we will focus on these facilities only, describing the requirement for constructing an onshore wind farm, an offshore wind farm, and a solar park, respectively.

In order to be able to install an onshore wind turbine in the Netherlands, the first step is to report this to the municipal authority in charge. Typically, the applicable zoning plan must allow for wind energy facilities. Wind turbines are subject to general rules for the protection of the environment and the surroundings. Prior to starting to build an onshore wind turbine or wind farm, the initiator must have a Permit for Physical Aspects (*omgevingsvergunning*). Sometimes there may also be a need for an environmental permit, as well as other permits and exemptions with respect to aspects of conservation, water management and soil protection. In addition, municipalities may have different additional requirements.

Building and operating an offshore wind farm requires a licence under the Offshore Wind Energy Act. The licence application procedure is combined with the application for the SDE++ subsidy. In order to obtain a licence, the applicant must be able to demonstrate that the construction and exploitation of the wind farm is financially and technically practicable and economically feasible within the term stated in the application. Once a licence pursuant to the Offshore Wind Energy Act has been granted, there is no need to obtain other separate licences under the Nature Conservation Act, the Flora and Fauna Act and the Water Act that might otherwise be required. A licence may be granted for a maximum period of 30 years (including construction and removal). The licence is transferable, subject to MEA's consent.

For the building and operation of a solar park, the following conditions apply:

- the construction of a solar park must be permitted under the applicable zoning plan;
- an environmental permit for building under the Environmental Permitting Act (*Wet algemene bepalingen omgevingsrecht*) is required for the construction of the solar park;
- construction activities must comply with the Buildings Decree 2012 (*Bouwbesluit 2012*);
- no permit is required for the operation of a solar park, unless the park contains a substation with an electric capacity of 200 MVA or more;
- operation of a solar park must, however, comply with the general rules regarding environmental control of the Activities Decree (*Activiteitenbesluit milieubeheer*);
- if a solar park is projected near protected areas or water ways, or if it impacts local flora and fauna, additional consents may be required.

4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

In the Netherlands, a private party does not have the authority to take land by eminent domain. Moreover, a Dutch government entity can only implement an expropriation order on the basis of public interest and if compensation of the parties involved has been agreed upon. Expropriations are always preceded by amendments to, or renewal of, the applicable zoning plan.

4.5 Requirements for Decommissioning

In order to demolish or decommission a generation facility under Dutch law, one must comply with the Buildings Decree 2012 (*Bouwbesluit 2012*). This decree contains the technical regulations that represent the minimum requirements for all structures in the Netherlands. The requirements relate to safety, health, usability, energy efficiency and the environment. Moreo-

ver, in most cases there will be a need for a Permit for Physical Aspects (*Omgevingsvergunning*).

In addition, when undertaking demolition activities regarding a generation facility that result in more than 10 m³ demolition waste or if removal of asbestos is involved, a demolition notification must be submitted to the relevant authority. Normally this is the municipality where the facility is located.

Specifically, in relation to the demolition of a generation facility containing asbestos, first a certified asbestos abatement company must be contracted to inspect the building. Then, after submitting a demolition notice, the certified asbestos company must remove the asbestos.

If the generation facility to be demolished is a protected monument, an all-in-one Permit for Physical Aspects is needed in addition to the demolition notification.

Apart from the above, specific municipal building rules may apply, relating for example to urban planning and to how to deal with contaminated land. Such building rules may differ from one municipality to another.

5. Transmission

5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities

5.1.1 Principal Laws Governing the Construction and Operation of Transmission Facilities

The Electricity Act prescribes that the High Voltage Network and the interconnector networks are built, extended, operated and maintained by a network operator appointed by the MEA (ie, the TSO). As pointed out above, the Dutch TSO is TenneT. Pursuant to the Electricity Act, the TSO must have ownership of the High Voltage Network it operates. The TSO also needs to secure safe, reliable and efficient electricity transport, provide a connection to the network and look after the safety of the use of electric installations. The TSO is also in charge of the operation of existing and future interconnectors. This task is likely to be expanded to the construction and operation of an offshore network.

Besides the Electricity Act, the Network Code is relevant since it sets out arrangements between the TSO and connected parties in order to enable the TSO to provide transmission services. Furthermore, it sets provisions regarding the High Voltage Network, as well as for determination and allocation of transport capacity on cross-border connections.

5.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Transmission Facilities

New high-voltage electricity transmission lines with a voltage level of 110 kV and 150 kV are in principle laid underground, while new transmission lines with a voltage level of 220 kV and 380 kV will be installed above ground. Quite often, a route of a new high voltage transmission line has not been included in the applicable zoning plan. In that case, the zoning plan must be either changed or deviated from by a new environmental permit. For connections from 110 kV and 150 kV, the municipality is the competent authority. The procedure as specified in **4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities** is applicable.

5.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate Transmission Facilities

If for a new transmission network connection, the zoning plan needs to be amended, the procedure as laid down in the Spatial Planning Act (*Wet ruimtelijke ordening*), as specified in **4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities**, applies. In addition to the procedure for the amendment of the applicable zoning plan, local municipal participation rights may apply. Pursuant thereto, interested parties may have the right to present their views on the proposed change of the zoning plan.

In addition to the amendment of an applicable zoning plan, there may be a need for the TSO (or the relevant DSO in case of electricity distribution lines) to apply for a Permit for Physical Aspects (*Omgevingsvergunning*). Such permit application has to be submitted to the competent authority (usually the municipality). Said competent authority will have to make an assessment of the permit application against the eligible policy framework, including applicable laws, zoning plans and regulations.

5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

For the construction of an electricity transmission line, an agreement has to be reached with all property owners concerned. However, in case parties are unable to come to such an agreement, the Minister of Infrastructure and Environment can impose upon the property owner an obligation to consent (*gedoogplicht*) under the Public Works Act (*Belemmeringenwet Privaatrecht*; <https://wetten.overheid.nl/BWBR0001936/2010-11-01>). Such an obligation to consent will only be imposed if the applicant that wishes to construct, (ie, the TSO, or the relevant DSO in case of electricity distribution lines) can prove that it is in the public interest to indeed have the transmission line con-

structured. A decision pursuant to the Public Works Act is subject to judicial review. The property owner may claim damages.

5.1.5 Transmission Service Monopoly Rights

Pursuant to the Electricity Act, TenneT is responsible for the transmission of electricity in the Netherlands to large companies and DSOs, who in turn pass it on to households, businesses and non-commercial organisations. The government has decided that TenneT is the only operator that is entitled to transmit high-voltage electricity. In other words, TenneT, which is a wholly state-owned enterprise, holds a monopoly in the electricity transmission market of the Netherlands.

The ACM supervises TenneT on behalf of the MEA. Its task is to ensure that TenneT does not make any unnecessary or needlessly expensive investments in the maintenance and expansion of the electricity network, and also that TenneT does not overcharge its customers for the transmission of electricity. The ACM is also responsible for setting standards for the network's quality and capacity.

The Minister of Finance manages TenneT as a state-owned enterprise, acting as the sole shareholder on the state's behalf.

5.2 Regulation of Transmission Service, Charges and Terms of Service

5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service

The Electricity Act and the Tariff Code, a regulation issued by the ACM, are the two principal sources of regulation of transmission charges, connection tariffs and service terms. The Tariff Code contains a description of the tariff structures governing connection, transmission and system services. In fixing the tariff structures and technical codes, the ACM takes into account the aim of securing a reliable, sustainable and effective electricity supply.

5.2.2 Establishment of Transmission Charges and Terms of Service

Pursuant to the Electricity Act, there are two regulated tariffs: the tariff for transport services and the tariff for supply services. The tariffs for the supply services have been liberalised, whereas the tariffs for transport services remain regulated.

For the regional Distribution Networks a yardstick regime is applicable. Pursuant to this regime, the allowed annual change in average industry charges is restricted to equal $CPI-x\%$, whereby "CPI" relates to changes in inflation and "x" refers

to expected efficiency improvements. $CPI-x$ is an incentive-based form of price/revenue control whereby the regulator sets a price-path for the utilities. Changes in price or revenues of controlled goods and services are limited to: (i) the increase in a general price index – ie, the consumer price index (CPI) minus (ii) a factor (x) determined by the regulatory authority, the ACM, to reflect anticipated efficiency gains that will lower the cost of producing the regulated goods and services. The ACM determines the anticipated efficiency gains.

In addition, there is an adjustment for quality of service performance possible. Such an adjustment is again to be established by the ACM, and is referred to as the "q-factor".

The tariffs set by the ACM include an appropriate return, based on a WACC-method ("weighted average cost of capital"). This WACC gives an allowance for both the cost of debt and the cost of equity. When setting the WACC, the ACM looks at the market return instead of the actual costs that the system operators face. By looking at the market return, the ACM ensures that the return is no higher than what would be appropriate in a competitive environment. If, according to the ACM, they looked at the actual costs of a system operator, they would have an incentive to drive up the costs for debt and equity.

The WACC (real, pre-tax), for all system operators, is set at 4.3% in 2016 and 3.0% in 2021. The method takes into account embedded debt. The ACM applies the same WACC for the TSO and the DSOs, because the reference group it uses for the WACC is representative for both TSOs and DSOs.

5.2.3 Open-Access Transmission Service

As the TSO, TenneT has a duty to provide non-discriminatory network access to any party; this duty has been enacted in the Electricity Act. Network capacity shortage and technical reasons are the only reasons for refusing transmission and/or a network connection. When implementing the first EU Electricity Directive, the Netherlands has chosen for regulated third-party access to the networks.

The technical terms and conditions to ensure regulated third-party access to the electricity transmission and distribution networks are laid down in the specific codes – ie, the Network Code, the System Code and the Metering Code. The substance of these codes can be modified by the ACM, on the basis of a joint proposal by the TSO and the DSOs.

The Network Code also provides for service level criteria for customer services to be met by the relevant network operator, for financial compensation of customers in case of a network failure.

6. Distribution

6.1 Regulation of Construction and Operation of Electricity Distribution Facilities

6.1.1 Principal Laws Governing the Construction and Operation of Electricity Distribution Facilities

On the basis of the Electricity Act the Distribution Networks are operated by seven regional DSOs. The Electricity Act prescribes that they only need to have economic ownership (ie, no legal ownership) of the Distribution Networks they operate. DSOs need to operate, maintain and extend existing Distribution Networks, and build new Distribution Networks. This duty is imposed by the Electricity Act. Moreover, the Network Code may be relevant in this context.

6.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Distribution Facilities

The procedure as specified in **4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities** is applicable.

6.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate

Please see **5.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate Transmission Facilities**, which also applies in regard to distribution.

6.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Please see **5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights**, which also applies in regard to distribution.

6.1.5 Distribution Service Monopoly Rights

DSOs have an exclusive right to construct and operate Distribution Networks in their defined geographical area. As previously pointed out, the Electricity Act prescribes that in order to be allowed to operate a Distribution Network, a separate company must be appointed as "electricity network operator" by the owner of the Distribution Network, with ministerial approval by the MEA. To further secure their independence, acquisitions of (i) Distribution Networks, or (ii) of shares of a DSO, by non-public entities are prohibited pursuant to the Electricity Act.

6.2 Regulation of Distribution Service, Charges and Terms of Service

6.2.1 Principal Laws Governing the Provision of Distribution Service, Regulation of Distribution Charges and Terms of Service

Please see **5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service**.

6.2.2 Establishment of Distribution Charges and Terms of Service

Please see **5.2.2 Establishment of Transmission Charges and Terms of Service**.

Fieldfisher aims to provide its clients with clear, focused, commercial advice wherever they operate internationally. Fieldfisher has been active in the energy and natural resources sector for over 50 years and its team of more than 100 lawyers is well placed to advise on clients' needs. The firm has acted for a diverse range of renewable clients across Europe and further abroad, including developers, operators, contractors, equipment suppliers, sponsors and institutional investors. Fieldfisher has worked on projects generating several thousand megawatts of electricity worldwide, and advised across all aspects of renewable energy, including wind, solar, tidal, energy from

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