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Newsletter

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Practical legal aspects of solar PV projects in the Netherlands

Content

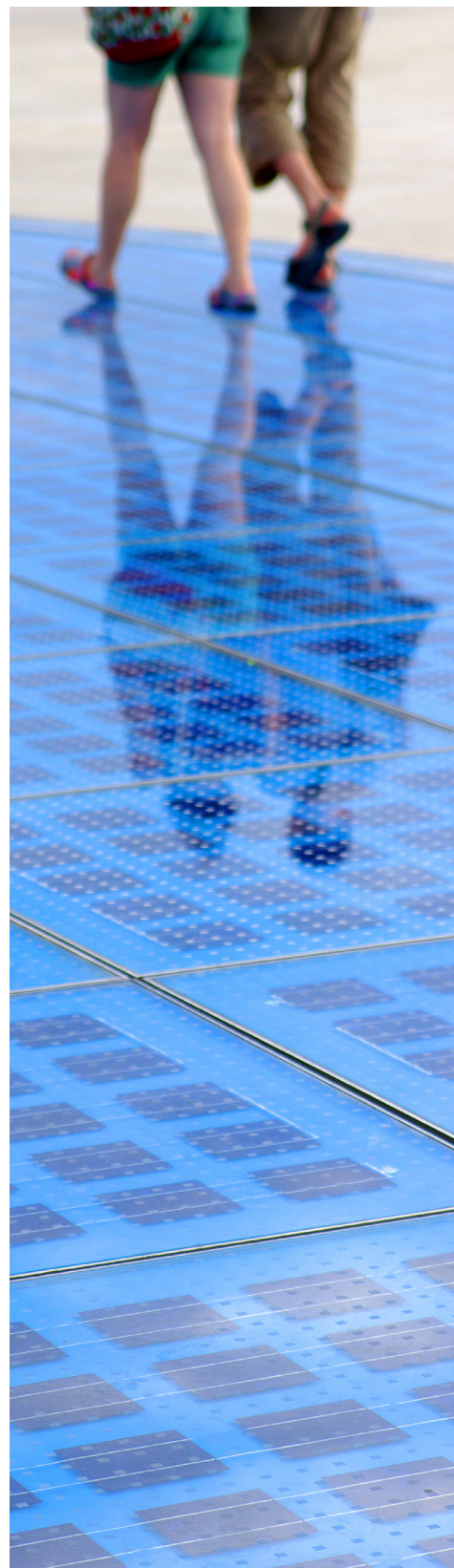
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Practical legal aspects of solar PV projects in the Netherlands

Although solar photovoltaic (PV) power plants currently represent a small part of global power generation, solar PV is becoming an increasingly important energy generation technology. In the Netherlands – admittedly not the first country that comes to mind when thinking of solar PV – several solar PV parks have been developed over the past years and the capacity of solar PV parks is rapidly increasing. The largest park that became operational in 2016, SunPort Delfzijl, has an installed capacity of 30 MWp. At this moment, projects with a capacity of 50 MWp and even 100 MWp are under development.

In the 2017 spring renewable subsidy round, a large majority of the subsidy applications was for solar PV projects. Factors accounting for this rise of solar PV projects include the relatively short development phase of solar PV plants, and the fact that these plants will generally encounter less opposition from residents than, for example, wind parks. Furthermore, due to the increased efficiency of solar technology and the applicable subsidy schemes, countries such as the Netherlands have become an attractive location for solar PV projects.

This publication aims to provide a practical overview of legal aspects and risks associated with the development of a solar PV project, that play an important role in the successful development, acquisition and financing of ground mounted solar PV projects in the Netherlands. We do not provide a complete overview of all relevant factors that will need to be addressed when developing, acquiring or financing a solar PV project, but focus on issues specific to the Netherlands.



Planning and consenting

For the construction and operation of a solar PV park, the following conditions apply for a planning and consenting perspective:

- The construction of a solar PV park (including any cables required) must be allowed under the applicable zoning plan, which regulates land use in a designated area.
- An environmental permit for building under the Environmental Permitting Act (*Wet algemene bepalingen omgevingsrecht*) is required for the construction of the solar PV park. Cables can usually be laid without a permit.
- Construction activities have to comply with the general rules set out in the Buildings Decree 2012 (*Bouwbesluit 2012*).
- No permit is required for operating a solar PV park, unless the park contains a substation with an electric capacity of 200 MVA or more.
- Operation of a solar PV park has to comply with the general rules regarding environmental control of the Activities Decree (*Activiteitenbesluit milieubeheer*).
- If a solar PV park is projected near protected areas or water ways, or if the construction or operation of a solar PV park impacts local flora and fauna, additional consents may be required.

If the applicable zoning plan allows for a solar PV park, the procedure for obtaining an environmental permit for building is relatively swift. The municipal executive has to decide on the permit application in principle within eight weeks and will assess compliance with the zoning plan, construction regulations and rules regarding the external appearance of structures. Interested parties may raise objections against the permit. If the municipal executive dismisses their objections, they can file an appeal with the court of first instance. Further appeal is possible with the Dutch administrative high court, the administrative jurisdiction division of the Council of State.

Most zoning plans, however, do not allow for substantial solar PV parks. In that case, an environmental permit for deviation from the zoning plan will have to be obtained. This permit will be integrated with the environmental permit for building (generally there will be one application procedure for both permits). The municipal executive will have to take national and provincial spatial planning rules and policies into account when assessing the permit application. The permit will first be published in draft form and made available for public inspection. Anyone can submit views on the draft permit. The municipal executive must take these views into consideration when preparing the final permit. The final permit has, in principle, to be issued within six months. Interested parties that submitted views on the draft permit can file an appeal with the Council of State.



Land agreements

Usually solar PV projects are constructed on plots of land owned by parties other than the developer. In that case, it is essential that the developer obtain appropriate land rights. These rights will mostly be in the form of a right of superficies and will in general have a duration equaling the term of the subsidy (ie 15/16 years from commercial operation), often with an option to extend if the project remains operational.

Under Dutch law, the owner of the land in question also takes ownership of the structures and appurtenances constructed on this land (vertical accession). Since the solar PV park (in most cases) qualifies as a work with permanent foundations, which by its nature and design are intended to be permanent, it will be subject to vertical accession. This can be prevented by the establishment of a right of superficies, which provides the party entitled (the superficiary/the project developer) with the right of ownership of the solar PV project that is built on land owned by a third party.

The right of superficies has to be established by notarial deed, followed by registration in the land registry. The deed describes the legal relationship between the superficiary and the land owner and includes the terms and conditions applicable to the right of superficies, such as the term (fixed or unlimited), (annual) fees payable by the superficiary, termination grounds, and whether or not compensation is due to the superficiary on termination of the right of superficies.

Under Dutch law a right of superficies is a 'real right', which means that it is binding to third parties. Consequently, if the land owner is declared insolvent, the right of superficies does not fall under liquidation. It continues to exist if the property is subject to an attachment order or a foreclosure, and it can be encumbered with a mortgage right, therefore providing for 'bankable' land rights. The right of superficies needs to be distinguished from a land lease, which provides a contractual consensus between the land owner and the lessee that does not constitute a right *in rem*, but a mere personal right that is not binding to third parties. A lease agreement can therefore be an obstacle if external funding is needed.



SDE+ subsidy

SDE+ subsidy plays an important role in financing solar PV projects. SDE+ subsidy is available for solar PV with a capacity of ≥ 15 kWp and a large-scale electricity grid connection (i.e. a connection $> 3 \times 80$ Ampere). Upon submission of the SDE+ application, the solar PV project should generally hold an environmental permit.

The SDE+ subsidy scheme offers a support premium, based on the difference between the average cost price for a renewable technology and the average market price. For solar PV this is the average annual APX price, corrected with a profile and imbalance factor. The period SDE+ subsidies are granted to solar PV parks is 15 years. If a park does not use the maximum production eligible for a subsidy in a certain year, the remainder can be used in the following year (forward banking). If in a certain year the maximum production eligible for subsidy is exceeded, the excess production can be used in a following year, up to a maximum of 25% of the annual production eligible for a subsidy (backward banking).

No SDE+ subsidy is granted if the electricity price is negative for six hours or longer. The SDE+ subsidy is capped at the floor. This means that if the market price drops below a certain price (the floor), the subsidy will not cover the difference between the floor and the market price. As a consequence, the project will be unable to recover all its costs.

Note that under the proposed recast of the EU Renewable Energy Directive, the system for attributing guarantees of origin might be amended. Guarantees of origin may no longer be attributed to subsidised renewable energy producers. Instead, they will be auctioned by the government and the revenues will be used to promote renewable energy. The Netherlands has expressed concerns about these auctions.

Power purchase agreement

In addition to the SDE+ subsidy, revenues from solar PV projects will consist of (i) the sales revenues of the generated electricity and (ii) the related guarantees of origin under the power purchase agreement (**PPA**) between solar PV project-companies and off-takers. Such off-takers can be electricity supply companies or large energy users (such as tech firms or the energy intensive industry) that are either located on-site (or on a neighbouring site) or supplied via the public grid (in which case the off-taker will often contract on behalf of a number of sites).

There is no standard PPA. The PPA will generally be a long-term contract, designed to offer the solar PV project company – in combination with the SDE+ subsidy – a steady revenue stream. Revenues under the PPA will have to be flexible and mirror the SDE+ subsidy mechanism as much as possible. This means that the PPA price shall, to a large extent, equal the market price. An example of a situation in which this may be different is when the market price drops below the floor price in the SDE+ subsidy (see above). Although parties may agree to mitigate this risk through a floor in the PPA price, this will come at a cost. It is therefore advisable to request expert advice to assess this risk.

Construction, operation and maintenance agreements

In general, construction contracts for a Dutch solar PV project will not be substantively different from construction contracts in other EU jurisdictions, as these projects are frequently procured under standardized construction contracts, such as FIDIC Silver Book.

The most common form of agreement for the construction of solar PV projects is an engineering, procurement and construction (EPC) contract, by which the contractor is engaged to carry out the detailed engineering design of the project, procure the equipment and materials necessary, and then construct, commission and deliver the plant for a guaranteed price, by a guaranteed date and performing to a guaranteed level of quality. Failure to comply with any of these requirements will usually result in the contractor having to pay financial compensation to the owner, in the form of liquidated damages.

Although a solar PV project has low maintenance and servicing requirements, the presence of an operation and maintenance (O&M) contract is essential to define the parameters for the operation and maintenance of a project during its lifetime. If an O&M contractor is being employed to undertake these tasks, it is important that all requirements relating to preventative and corrective maintenance, performance monitoring, and reporting, are clearly stated in the contract (along with the frequency with which these activities need to be carried out). It is normal for an O&M contractor to guarantee performance during the contract term. Typically, this is achieved through the presence of an availability- or performance-ratio warranty covering the entire solar PV project. If the contractor does not fulfil its obligations, which results in the solar PV project performing below the guaranteed value, the client would be entitled to claim for compensation to cover lost revenues.

Less common, is multi-contracting procurement which divides the project into distinct contractual packages. It is used where contractors will not accept full engineering, procurement and construction risks or where the client is able to manage the project and all contractual packages actively, which can reduce the costs. The multi-contract approach clearly offers opportunities for cost reduction, but it requires a client with very strong engineering expertise, tendering and negotiation skills, and experienced personnel. The number of packages ultimately depends upon the complexity of the project, the possibility to separate the project in different technical packages, and other commercial considerations (preferred suppliers, cross-border projects). Multi-contracting is less popular with financiers because less risk is passed to contractors and a greater risk remains with the client.

Grid connection and transmission agreement

The grid connection and transmission agreement is critical to enable the export of power generated by the solar PV park. Pursuant to the Electricity Act 1998, grid operators are in principle obligated to offer grid transport capacity. This is only different where no such capacity is available. In general, the grid connection and transmission agreement is a standard document.

In making the site selection, the proximity to the grid will have a significant influence on the grid connection costs. Since unforeseen grid connection costs can significantly impact the economics of the project, a grid feasibility study will need to be conducted at an early stage of the development process.



Tax

Income derived by a taxpayer with a solar PV project located in the Netherlands is in principle subject to Dutch income tax. The underlying tax base can, however, be lowered due to certain tax allowances.

The Netherlands provides for general tax allowances that stimulate investing opportunities. In addition, specific tax allowances are offered in case of investments in energy- and environmental-saving assets: the energy investment allowance (**EIA**), environmental investment allowance, and accelerated depreciation allowance.

Investments in solar PV projects fall within the scope of the EIA, provided certain conditions are met. One of these conditions is that the EIA and SDE+ subsidy cannot simultaneously be claimed. The tax allowance of the EIA amounts to 55% (54.5% from 2018) of the total amount of energy investments in a calendar year. The EIA can be deducted from the taxpayer's taxable result. In other words, the EIA will result in a material benefit of maximum 13.75% (25% times 55%).

Furthermore, it must be noted that a solar PV plant is qualified for municipal property tax purposes, as 'real estate' and is therefore subject to an annual municipal property tax under the WOZ Act (Valuation of Immovable Property Act). Nonetheless, it may be argued that parts of the solar PV plant can benefit from the equipment exemption (*werktuigenvrijstelling*). Pursuant to this exemption, equipment or parts that are involved in the production process may, under certain conditions, be omitted from the WOZ valuation.

Project financing

While project finance used to be more common for major infrastructure and energy projects, we now see smaller projects (including solar PV projects) increasingly being backed by financiers through project financing. When developing or acquiring a solar PV park, sponsors must (in advance of engaging with the lenders) carefully pay attention to the key elements of bankability, and ensure that risks are effectively mitigated and allocated.

To safeguard an uninterrupted cash flow from the project in order to repay the lenders, the lenders shall generally require the right to step in and remedy any defaults under the key project agreements, or to have the project transferred to a new entity. These rights shall usually be secured by a direct agreement that will be entered into in respect to all key project agreements. Given the importance of the direct agreements, it is advisable to discuss the direct agreements in the early stages of negotiation with the respective counterparties to avoid complications or a deadlock in later stages. Since Dutch grid operators are subject to a legal obligation to transport the power generated by the solar PV project (see above), lenders may take a different view on the necessity for a direct agreement in relation to the Dutch grid connection and transmission agreement.

M&A

Often the initial project developer will sell the project rights (in whole or in part) to another party with greater financial resources and/or technical expertise – who will then complete the project. Such acquisition may be structured as a share or asset transfer or legal merger. The choice for a transaction structure may be tax driven, but also other considerations may play an important role (such as the fact that a transfer of the SDE+ decision during the development phase of the solar PV park will require the consent of the Minister of Economic Affairs). Since there are no clear guidelines on the decision-making procedure in relation to this consent – and such consent is no longer required after the start of operation – it is generally advisable to avoid an asset transfer, and to consider the form and timing of a potential transaction in the early stages of the development of a solar PV project.

Experts in your World - Your CMS Contacts

CMS has been in the forefront of the developments in the energy sector, advising on a large number of ground-breaking deals over the past decade in a number of jurisdictions worldwide. Our expertise and experience includes legal counselling on projects in all fields of energy – particularly renewable energy. Our advice is underpinned by an in-depth understanding of the specific setting of each project or transaction.

We provide you with a one-stop-shop solution regarding all legal aspects of your solar PV business: from the acquisition of project rights, the permitting process and the construction agreements, to the grid connection agreement, the PPA and the (project) finance.

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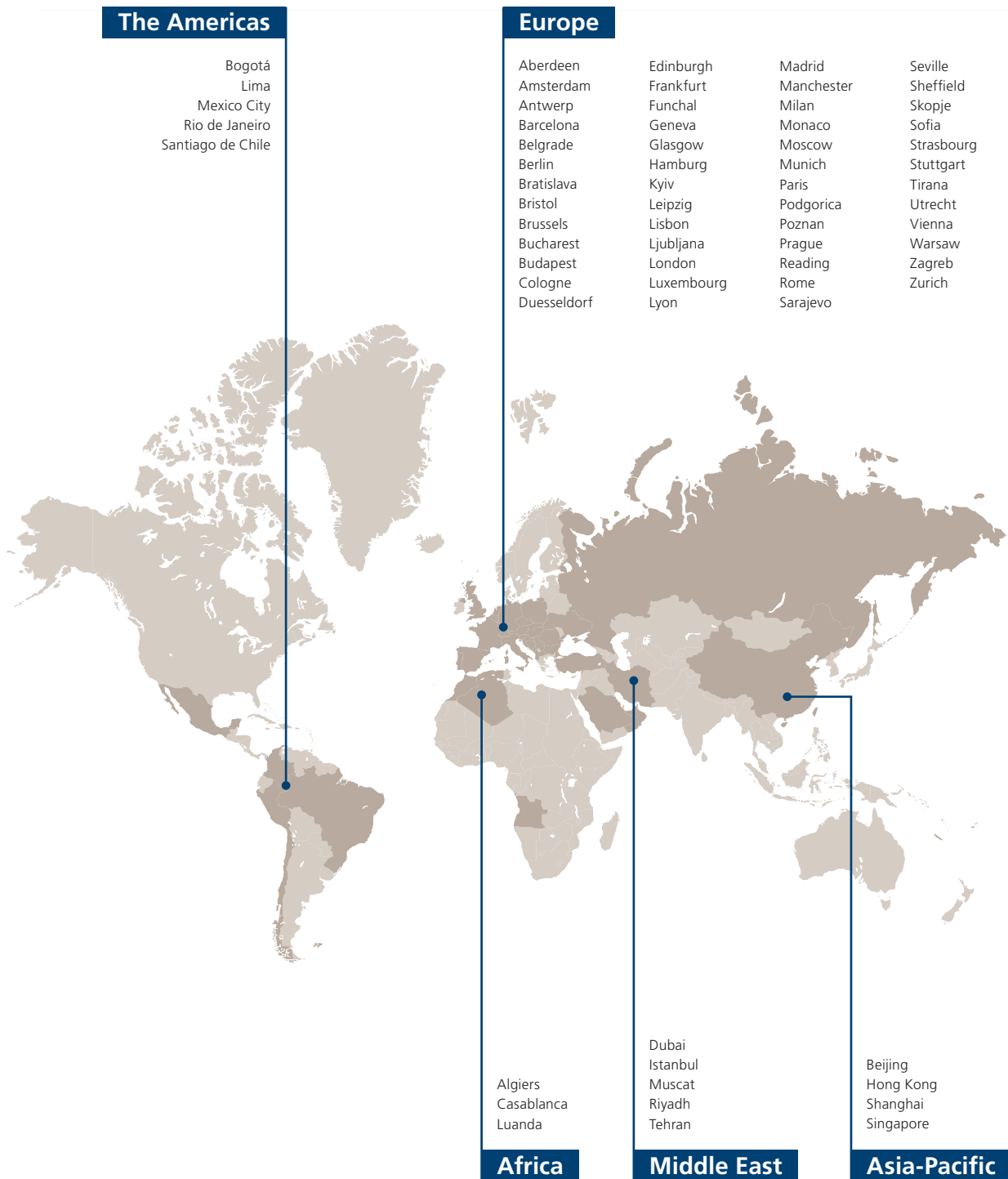
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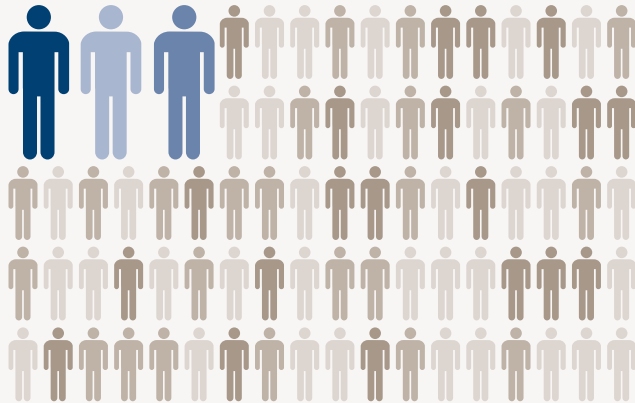
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CMS worldwide



Key facts & figures

48 new partners in 2017, taking the total to over 1,000



**Top rankings
in 2016**
M&A League Tables
(by deal count)

#1 Europe
(Bloomberg)

#3 Global
(Bloomberg
up to USD 500m)

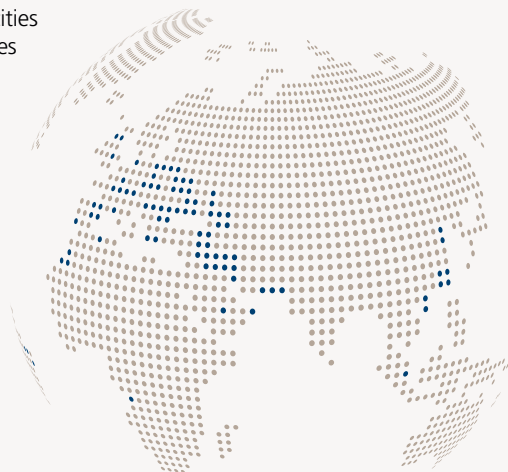
**Acritas
Sharplegal
Top 20**
Global Brand
Ranking

> 7,500 staff

> 4,500 lawyers

> 1,000 partners

Operating in 68 cities
across 42 countries



EUR 1.05bn

turnover for 2016*

* when currency
fluctuation is removed

19 practice
and sector
groups working
across offices



Ranked
3rd
most global
law firm
in the Am Law 2016
Global Top 100



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