



# Sustainable Energy Projects

**How to arrange legal, tax and other matters  
for a sustainable energy project**

**Dirkzwager**  
legal & tax

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# Introduction

Everyone is now convinced of the benefits of and need for an energy transition. Fossil resources are being depleted and climate change has numerous adverse effects. Many major and minor steps are required to reduce CO<sub>2</sub> emissions and other greenhouse gases while simultaneously satisfying the growing demand for energy.

One of the solutions lies in the sustainable generation of electricity. It is sustainable, because wind and sun are available in abundance. The Dutch government encourages the production of sustainable energy with the aid of subsidies. These subsidies serve as a financial incentive to invest in sustainable energy.

It would therefore be a good idea for a collective or business to set up a sustainable energy project. However, its execution would involve numerous legal, tax and other regulations. Moreover, every decision may have major implications at a later stage and could have an impact on any subsidies or funding, for example. From the outset it is therefore important to consider the legal and tax impact of the steps that are required to launch a project.

Dirkzwager has established an Energy Team (you can find our details on page 46). This manual provides an insight into the decisions which a project initiator needs to take and the implications they may have in the short and longer term. We have experience and expertise, which we are happy to share with you, so as to ensure that your sustainable energy project is a major success.

## **Dirkzwager Energy Team**

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# Chapter 1.

## Which legal structure is appropriate?

**The scope and nature of a project may also affect its legal structure. Choosing an unsuitable legal structure may have adverse effects and produce unnecessary expenses (additional or otherwise), whereas an appropriate structure could offer greater potential to a possible investor and/or the financing bank, for example. In order to consider the matter properly, we explain several options and alternatives below which are frequently employed for the purposes of solar and wind energy projects.**

In the case of a sustainable energy project, a private company with limited liability, a limited partnership or a cooperative are generally chosen to serve as the legal framework. The choice often depends on the type of project, the underlying investor or investors, the preferred subsidy and the scope of the project. In the case of funding, for instance, it is relevant whether the requisite investments can be made by the company itself and its existing shareholder(s) or whether an external investor or financier is needed. In general, a cooperative is an appropriate structure for resident initiatives.

### *A private company with limited liability*

A private company with limited liability is the most common, well-known legal structure in the Netherlands. It is an independent entity with legal persona and capital that is divided into shares. In principle, the shareholders of a private company with limited liability are not liable for its debts. The company's directors or any other party may hold the company liable if they fail to fulfil their duties as directors properly.

A private company with limited liability can only be incorporated by means of a notarial deed. A notary registers the private company with limited liability in the commercial register maintained by the Dutch Chamber of Commerce on behalf of its director(s). As of 2012 more relaxed corporate legislation has made it easier to incorporate a private company with limited liability. In the past capital amounting to €18,000.00 was required. Now the minimum capital is only one euro cent. Naturally, it is nevertheless important to have

sufficient funds available. In addition, one no longer requires a 'certificate of no objection' from the Ministry of Justice, with the result that the incorporation process can generally occur quite fast.

A private company with limited liability is a legal structure that is often used to conduct business. There are at least two corporate bodies: the general meeting of shareholders (the GMS) and the management board (the management board under the company's articles of association). It is also possible to appoint a supervisory body (the supervisory board). An entrepreneur who has already chosen a legal structure for their existing business frequently serves as the foundation for the start of a new sustainable energy project. With a view to securing funds but also because of potential liability and other risks, it may, for instance, not be desirable to situate the new project in the existing legal structure.

It may be advisable to incorporate a separate private company with limited liability for each individual project. This often produces a structure with a holding company whose sole objective is to hold shares in private companies with limited liability that are specific to various projects which serve as operating companies for them. Every project-specific private company with limited liability may have different investors, co-investors and financiers. In the case of large sustainable energy projects, a foreign or other investor is regularly involved and in general a decision is made in favour of a project-specific private company with limited liability or a limited partnership and a private company with limited liability serving as a managing partner and the foreign or other investors acting as silent partners.

The deed of incorporation includes the articles of association of the relevant private company with limited liability. Among other things, the articles of association stipulate:

- the objects of the private company with limited liability;
- the manner in which the profit of the private company with limited liability is divided among its shareholders;
- whether the shares in the capital of the private company with limited liability may be freely transferred to other shareholders or whether, for instance, they first have to be offered to the other shareholders before they can be transferred to another party;



- which body appoints the management board, the amount of members the management board will consist of and which director or directors can represent the private company with limited liability when contracts need to be signed;
- whether certain board resolutions require the GM's approval;
- the majority with which the various bodies can pass resolutions;
- whether there will be a supervisory board and what powers this supervisory body will have.

The articles of association must be published in the commercial register maintained by the Chamber of Commerce and anyone may request them. In order to amend the provisions of the articles of association, a notarial deed of amendment is required, which means that you will need to consult a notary. Highly detailed agreements and arrangements that should preferably not be made public are generally agreed to by the shareholders in a private shareholders agreement.

### *A limited partnership*

It may be worthwhile structuring a project as a limited partnership, particularly for tax reasons (in respect of which we refer you to Chapter 2). A limited partnership is a partnership without legal personality. In general, a limited partnership has a managing partner and one or more limited partners, also referred to as 'participants'. They may be legal entities, businesses without legal persona or natural persons. The arrangements between the partners are laid down in a private or a notarial limited partnership agreement.

The limited ('silent') partners are only involved in financial terms.

The managing partner has the right to act on behalf of the limited partnership and as such, they are jointly and severally liable (in addition to the limited partnership and any other managing partners) for compliance with any agreements entered into on behalf of the limited partnership. In principle, a limited partner is not liable for the debts of the limited partnership (unless they act as though they were a managing partner, for instance, if they are involved in the situation prevailing within the business or their name is used in the limited partnership). As such, in principle, only the limited partnership may call upon a limited partner internally to contribute to its debts or losses subject to

the amount which that partner has contributed or was required to contribute (unless agreed otherwise).

### *A cooperative*

A cooperative is a special form of association. The general meeting of members is the most senior body within a cooperative. A cooperative also has an executive board. A cooperative's constitution may stipulate that a supervisory board oversees the cooperative's executive board and business.

A cooperative must be established by means of a notarial deed. In addition, private or other membership agreements need to be drawn up with its members. The investors in the relevant sustainable energy project will become members of the cooperative and they will invest in the project through their membership.

The directors of a cooperative may also be held to account if they fail to fulfil their duties correctly. If a cooperative has a deficit when it is dissolved or becomes insolvent, its members are liable for this deficit in principle. However, a cooperative's constitution may limit or preclude its members' liability. In case of sustainable energy projects, a decision is usually taken to preclude member liability.

A cooperative may avail itself of the so-called Postcoderoos scheme (Reduced Rate Scheme). Under this scheme the members of a cooperative are eligible for an energy tax discount on their energy bill for sustainably generated local electricity. This scheme assumes that collaboration occurs between residents in a certain postcode area. Entitlement to avail oneself of this scheme will only occur where the project is launched by a cooperative or an association of owners. This scheme may be financially favourable for sustainable local resident projects (see Chapter 5 for more information). In short, the nature of one's collaboration and the funding method will affect the choice of legal structure. The scope of the project also often plays a role.

## Chapter 2.

# What aspects need to be considered for tax purposes when choosing a legal structure?

**Control and liability are not the only important aspects when opting for a certain legal structure. The choice of legal structure may also inevitably have implications and offer alternatives for the purposes of tax, thereby affecting one's financial results.**

Furthermore, the choice of legal structure may also be relevant to the potential sale of a project in the future in relation to tax. It is therefore advisable to address this together with a tax specialist in timely fashion. The type of legal structure that is the most appropriate depends on the prevailing situation. We mention a number of the general tax-related aspects below of the legal structures mentioned in Chapter 1. Then we discuss the tax implications in the case of shareholders and partners.

### *Tax aspects of the legal structures*

Any net income achieved through the activities undertaken by the entities mentioned in Chapter 1 are subject to corporation or income tax. Whether tax is levied on the entity itself or directly on its shareholders, partners or members depends on the legal structure which has been decided on.

### *A private company with limited liability*

A private company with limited liability is subject to corporation tax in its own right. The corporation tax regime has two tax brackets. As of 1 January 2020 the corporation tax rate for the first €200,000 of taxable profit amounts to 16.5%. Any excess profit is taxed at the rate of 25%. According to legislative proposals, the first tax bracket will be increased to €245,000.00 and the corporation tax rate for the first bracket will be lowered to 15% as of 1 January 2021. The shareholders of a private company with limited liability are only taxed when they receive any income (dividends issued) from it. How a shareholder

is taxed depends on their position for the purposes of taxation and the value of their shareholding within the private company with limited liability.

Dividend issued by a private company with limited liability are subject to a dividend withholding tax. A private company with limited liability withholds any dividend tax that is payable from the dividends which it issues. In a number of cases an exemption from dividend tax may apply, for example, in the case of the issue of dividends to any business which is entitled to a participation exemption (see also below) or would have been had it been registered in the Netherlands.

#### *A limited partnership*

A limited partnership may be 'open' or 'closed' and the applicable tax regime is related to this. The qualification of a limited partnership depends on the transferability of the participating interests in the limited partnership. If limited partners can join or be replaced without the consent of all partners in the partnership, the limited partnership is an open one. If not, then the limited partnership is a closed one.

An open limited partnership is subject to corporation tax in its own right. As such, the results which are achieved are taxed almost identically as in the case of a private company with limited liability. As in the case of dividend issues by a private company with limited liability, any earnings distributed by a limited partnership to its partners is subject to dividend tax, although an exemption may apply in certain circumstances.

A closed limited partnership is not subject to corporation in its own right but is 'transparent for tax purposes'. Every partner is taxed in their own right on their income from the limited partnership in proportion to their interest in it.

#### *A cooperative*

A cooperative is subject to corporation tax in its own right. However, because of the specific features of this legal structure, a special tax regime applies. On the one hand, a cooperative may be viewed as an extension of the business conducted by its members (the so-called 'extension model' and, on the other hand, as a business in its own right. As such, in the case of a cooperative its overall net income is first determined for the purposes of corporation tax as though it were a 'normal' taxpayer. The law stipulates a formula which

determines the extent to which there is any question of 'extension earnings'. In so far as such earnings are distributed to those members who are natural persons, they are deducted from the cooperative's taxable income. The members are liable for tax in their own right to the extent of this extension component.

### *Taxation of shareholders, partners and members*

The shareholders of a private company with limited liability, partners of a limited partnership and members of a cooperative may have income distributed to them by the above-mentioned entities where the latter secure net earnings. The taxation of such income depends on the position of the entities and the shareholders, partners and members for tax purposes.

### *Shareholders in a private company with limited liability and partners of an open limited partnership*

Dutch natural persons are subject to income tax on their earnings from a shareholding in a private company with limited liability or from a participating interest in an open limited partnership. The Dutch personal income tax regime features a tax box system. If the stake held is at least 5%, income tax is levied in Box 2 at a fixed rate of 25%. Smaller interests are treated as the assets of the natural person concerned in Box 3. In Box 3 a notional (fixed) yield on assets is taxed at a rate of 30% (31% as of 2021). This notional yield depends on the value of the assets minus liabilities in Box 3 and varies from 1.789% to 5.28% as of 1 January 2020.

In the case of legal entities that are subject to Dutch corporation tax (such as private companies with limited liability), income from a shareholding of 5% or more is normally exempt thanks to the participation exemption. Corporation tax is payable on earnings in the case of smaller shareholdings. In the case of a foreign natural person or legal entity the manner in which income (in the form of dividends or otherwise) from a private company with limited liability or an open limited partnership is taxed depends on the tax regime applicable in their country of domicile or in which it has its registered office for tax purposes respectively. The potential application of a tax treaty between the Netherlands and the relevant country may also have an effect. In most cases any dividend tax withheld by a private company with limited liability or an open limited partnership may be credited against any income or corporation tax payable

by Dutch shareholders or partners. Setoff (partial or otherwise) may frequently also be possible based on a tax treaty, for example, in the case of foreign shareholders or partners.

#### *Partners of a closed limited partnership*

As already indicated, a closed limited partnership is not subject to tax in its own right but is 'transparent for tax purposes'. Each partner is independently taxed on their income from the limited partnership in proportion to their interest in it. Where a partner is a Dutch natural person who conducts a business (which is often so in the case of the development of solar and wind farms), in principle, they are subject to income tax on their share of any profit in Box 1 (as 'profits from business activities'). It is self-evident that the earnings received by a partner subject to Dutch corporation tax (as is a Dutch legal entity) will have such tax levied on it.

A foreign limited partner in a closed limited partnership is normally subject to Dutch income or corporation tax in accordance with Dutch tax legislation. However, entitlement to levy Dutch tax may be limited in accordance with a tax treaty.

#### *Members of a cooperative*

In the case of a cooperative any extension profit is distributed to those members who are natural persons in proportion to their performance as a member. How income tax is levied on these members depends on the relevant situation. Where membership is part of a natural person's business, it is subject to income tax in Box 1 as profit from business activities. Where a natural person does not conduct business themselves, any income from a cooperative is taxed in Box 2 or 3.

Where a cooperative distributes any profit to those of its members who are not a natural person, they are normally subject to corporation tax at the level of the cooperative. Normally speaking, a participation exemption applies where income is derived from membership in the case of such members.

## Chapter 3.

# Where will the project be located and how do you arrange this?

**A great deal of space is required especially for the execution of sustainable energy projects, such as those involving wind turbines and solar panels (on rooftops), on the ground (in solar farms) or in the water. Usually, someone else owns (or still owns) the location. The location and the potential for the execution of a project in a particular location will determine its success. This is why we will now explain the different avenues that are available to acquire the right to execute a project in a specific location.**

The land can be purchased for the purposes of executing a project. However, this is not always necessary. You may also conclude an agreement with the owner of a location to allow you to use it. In many cases, therefore, there is no need to acquire full ownership and creating one or more real rights will suffice. Leasing is usually not recommended where major investments are involved, because you will not become the owner.

### *Right of superficies*

A real right is a right to goods or property in contrast with a personal right, which entitles to performance (from a person). A real right of superficies is often used in practice. This means that you may own buildings, works or plants (the so-called improvements) in, on or above immovable property owned by another person, for instance, on someone's land. Wind turbines can be erected on agricultural land, for example. The farmer remains the landowner and grants a right of superficies to the developer of wind turbines in return for compensation, of course, and subject to certain conditions.

In the case of a real right of superficies, the landowner will not become the owner of any improvements. The party that has been granted a right of superficies is the owner of the object for which the right of superficies was created for as long as this right is valid.

### *Independent or dependent right of superficies*

There are two types of right of superficies. One is an independent right, the other a dependent right. In the latter case the right of superficies may be dependent on a lease, for instance. If the lease ends, the right of superficies automatically terminates too. The disadvantage of this is that the right of superficies cannot be encumbered with a mortgage (on its own or otherwise). Hence, a wind turbine may not be mortgaged in order to finance it.

However, if a right of superficies is made to depend on another real right, such as a leasehold, the latter may be mortgaged together with the right of superficies that depends on it. An independent right of superficies may be mortgaged. Nevertheless, practice shows that financeability strongly depends on the conditions agreed between the landowner and the superfiary. For instance, the amount of the compensation (fee), the period for which the right has been created, and the conditions subject to which the right may be cancelled all have an impact on whether a financier is willing to accept a mortgage of the right of superficies.

The Dutch Banking Association has developed a standard contract for rooftop energy projects. It is called the Solar Energy Systems Right of Superficies Model [Model Opstalrecht Zonnestroomsystemen]. By creating such a right of superficies, ownership of the solar panels is separated from that of the building on which the panels are installed. This model may also be used where a commercial building has been mortgaged, while the energy project is executed by a party that wishes to retain and commercially exploit its ownership of the solar energy system itself.

### *Right of leasehold*

Apart from the option of creating a right of superficies for sustainable solar and wind energy projects, it is also possible to encumber land with a right of leasehold. In this case the leaseholder acquires the right to use another party's land as though they are the owner. A right of leasehold may also be encumbered with a mortgage.

### *Conditions governing leaseholds and superficies*

The real rights of leasehold and superficies are closely related to each other. The provisions of the law governing leaseholds have largely been declared



applicable in relation to rights of superficies *mutatis mutandis*. Nevertheless, there are some differences. In the case of a right of superficies, the emphasis mainly lies on the interruption of the accession (the owner of the land is not the owner of the superficies), while in the case of a leasehold, the emphasis lies on enjoyment of the property (unlike a superficiary, a leaseholder does not become the owner of any improvements). A deed of establishment may be used to ensure that virtually identical legal consequences are attached to a right of superficies and a leasehold. This is because one enjoys a large measure of discretion when drafting the conditions governing a leasehold and a right of superficies. The conditions governing a leasehold and right of superficies set out what the holder of a real right may and may not do, among other things. Other subjects include the designated use, term and fee. Restrictions on use are also often imposed on the landowner. For instance, they may not do anything that would jeopardise the property of the holder of a real right to it (or its use).

The term of a real right of superficies and/or leasehold is important not just for reasons of financeability. It is also important to consider the term of the relevant integrated environmental permit in this respect. More information is provided about this in Chapter 4.

### *Agreements*

Whether full ownership is transferred or a real right is established, it is important that the arrangements between the parties are properly recorded. Examples include warranties pertaining to the designated use, the condition (in environmental terms and otherwise) in which any registered property is transferred and the existence of any third-party charges and restrictions. A purchase agreement forms the basis for the notarial deed of transfer or that establishing a real right. You should therefore ensure the timely engagement of a specialist.

### *Value added tax (VAT) and real estate transfer tax (RETT) in relation to immovable property*

In principle, the acquisition of immovable property that is located in the Netherlands is subject to RETT. This applies to both the acquisition of full ownership and that of a real right (a right of superficies or leasehold). RETT is calculated on the value of the immovable property or the capitalised value of

the right to that property. Its value is deemed to be at least equal to that of the counter-performance. The tax rate is 6% (8% as of 2021).

When land is purchased or a real right is established, value added tax may also be levied. In principle, transferring and letting immovable property are exempt from VAT. However, there are exceptions. The transfer of a building site is subject to VAT, for example. Where immovable property is either transferred or let one may also opt for VAT to be levied on such transfer or lease provided that the conditions governing this are satisfied.

In the case of land-based projects this is of particular relevance, because a VAT taxed supply or lease would apply, if the appropriate conditions were met in relation to the application of the concurrent RETT exemption. This means that no RETT may be levied in connection with the acquisition. This is beneficial because the purchaser or tenant is usually entitled to deduct any VAT incurred on costs including the VAT on the purchase price rental payments. In this case, the VAT incurred would not constitute an expense item, whereas the RETT would.

VAT and RETT are important points requiring attention when setting up legal structures and when drawing up agreements for the purposes of wind and solar farms. It is possible to reduce one's tax burden significantly with the appropriate structure. Timing is also important in this respect, for example, by transferring property once it qualifies as a construction site.

### *Cables and pipes*

Cables and pipes are required for the connection of a sustainable energy project to the public grid so as to be able to transmit and sell energy. The cables and pipes of a wind or solar farm often form their own grid and do not constitute part of the public grid. As such, these cables and pipes are the property of the owner of the energy project.

As such, there is no need to create a right of superficies on the grid in order to establish ownership. The authorised installer automatically becomes the owner, also where a grid is installed in land owned by others. Nevertheless, a right of superficies is often created as well. The reason for this is to document the arrangements between the cable owner and the landowner. These agreements will then also apply to any successive owners.

The installer of a grid can register any cables and pipes with the land registry. This also makes it clear to other parties that the installer is the owner of this grid. Another advantage is that the grid may be encumbered with a mortgage. If a bank is the co-financier of a wind or solar farm, it often also demands that the grid be registered so that it can be encumbered with a mortgage.

### *Capacity-dependent obligations and perpetuity clauses*

Even though the division of ownership between the landowner and the owner of the energy project has been established, this is not yet the end of it. Arrangements also frequently need to be made with the surrounding landowners, for example, to arrange access, or in relation to the rotor blade encroachment and wind capture of a wind turbine. In order to ensure that these arrangements also apply to successive landowners, it is useful to document them with the aid of easements or capacity-dependent obligations. A capacity-dependent obligation may only entail a wayleave or restraint of action and needs to be documented in a notarial deed.

If this is impossible (because it requires active action on the part of the landowner), any arrangements may be documented with the aid of a perpetuity clause. A perpetuity clause always needs to be imposed on every subsequent owner. It does not pass automatically as in the case of a capacity-dependent obligation. Penalty provisions are usually also attached to a perpetuity clause. They stipulate that a penalty will be imposed both in the event that any arrangements are not complied with and where a perpetuity clause is not passed onto a subsequent owner.

### *Wayleaves*

It is not always possible to reach agreement with all of the landowners involved concerning the establishment of a right of superficies or a capacity-dependent obligation (or the fee payable for it). Under the Public Works (Removal of Impediments in Private Law) Act [Belemmeringenwet Privaatrecht], an initiator or operator of a wind farm may ask the minister to render it mandatory for an owner to grant a wayleave for the installation and maintenance of an asset.

This usually occurs, in particular, where expropriation is too drastic a measure. In 2016 the Electricity Act [Elektriciteitswet] 1998 was amended to stipulate that a wind farm with a capacity of at least 5 MW would be deemed to

constitute public works of general utility. This has facilitated the application of the Public Works (Removal of Impediments in Private Law) Act.

The Minister of Infrastructure and Water Management may impose a wayleave where the following criteria, amongst others are satisfied:

- the use of the land does not create more impediments than reasonably necessary (proportionality);
- the rightsholder's interests do not require expropriation;
- no ready agreement has been reached in spite of an attempt to achieve this.

A wayleave is realistic where relatively minor parts of another party's land (adjacent or otherwise) are required. Even in the case of relatively minor infringements, such as an underground pipe, a wayleave holds appeal as an alternative to expropriation proceedings. The major advantages are that a wayleave procedure may also be resorted to in the case of parties other than public authorities (for example, grid managers). Moreover, such a procedure is significantly faster than expropriation proceedings. The compensation for the landowner is not related to the loss of ownership but to the impediment experienced.

Cooperation may also be secured for the purposes of establishing a solar farm. A wayleave may be imposed depending on the surface area and usability of the relevant plot of land after the project has been set up. Where a solar farm excessively impacts a landowner's ability to use a plot of land, it is not possible to impose a wayleave. In this case the land would need to be expropriated. The landowner would be entitled to full compensation in either case. Nevertheless, a landowner cannot count on compensation at the outset, as would be paid for the establishment of a right of superficies. This is because such compensation is often linked to the earnings generated by the wind turbines or solar farm. A landowner usually suffers less of a loss in the case of expropriation. This may serve as a means of pressure during the negotiations concerning the creation of a right of superficies or a capacity-dependent obligation. After all, a landowner usually receives more in the way of compensation where a right of superficies or a capacity-dependent obligation is established.

# Chapter 4.

## What permits are required?

**The legal structure has been established, and the location has been selected and arranged. Now the energy project can finally be launched. Actually, no it cannot. One or more permits or licences are usually required in order to launch an energy project. Applying for and obtaining such permits or licences is a time-consuming matter. In some cases, such as in the case of the construction of a wind farm, there may be objections that are sometimes taken as far as the Administrative Law Division of the Council of State. This chapter contains an overview of the permits and licenses which may be required and other regulations.**

### *Integrated environmental permit for 'construction' activities*

You will need an integrated environmental permit for the construction of a wind or solar farm. It is only for the installation of solar panels on an existing roof that this is often not the case. In most cases the municipal executive board is the competent authority (the administrative body that can issue a permit or licence). The provincial executive board may be the competent authority for wind farms with a capacity between 5 MW and 100 MW.

A building plan is verified against the relevant zoning plan, the building decree, the building regulations and the reasonable requirements regarding the external appearance of buildings.

### *Integrated environmental permit for 'use derogating from the planning policy'*

If the plan for the wind or solar farm conflicts with the zoning plan (and this is regularly the case), an integrated environmental permit for 'use derogating from the planning policy' will also be required. In order to secure an SDE++ subsidy (in respect of which we refer you to Chapter 5) where there is a conflict with a zoning plan, an applicant will need a comprehensive integrated environmental permit for 'use derogating from the planning policy', along with spatial supporting documents. Such a permit often requires a 'certificate of no objections' from the municipal or provincial executive board.

This means that this administrative body does indeed have no objections to the planning derogation. Without this certificate, the municipal or the provincial executive board may not issue an integrated environmental permit.

There is also a less comprehensive integrated environmental permit, the so-called temporary minor exemptions permit. It applies for a maximum of ten years. The procedure to obtain this permit is considerably shorter. This permit is an option when no SDE++ subsidy is needed for a project. The reason for this is that in September 2018, the legislator amended the subsidy regulation. Based on the minor exemptions permit, no further subsidies are granted.

### *Revision of zoning plans*

Another way of fitting in a wind or solar farm for planning purposes lies in amending the relevant zoning plan. A coordination scheme is in place for this. It ensures that the preparations for and the announcement of a zoning plan and the integrated environmental permit for 'construction' activities occur simultaneously. One advantage of this scheme is that a potential, later expansion of a farm, for example, can already be included in the zoning plan at this time. This enables one to achieve flexibility and speed. Decisions about wind farms with a minimum capacity of no less than 100 MW are subject to the national government's coordination scheme. This goes beyond the municipal or provincial approach and is managed by the Ministry of Economic Affairs and Climate Policy.

### *Integrated environmental permit based on a limited environmental impact assessment or an integrated environmental permit for environmental purposes*

An integrated environmental permit based on a 'limited environmental impact assessment' is required for onshore wind farms (with three wind turbines or more). No regulations may be attached to this permit. The competent authorities may only decline an integrated environmental permit based on a limited environmental impact assessment if an environmental impact report is pertinent. In this case a wind farm would need a 'real' integrated environmental permit. In any case this does not apply to wind farms with more than 20 turbines, because the Environmental Impact Reporting Decree stipulates that an environmental impact assessment must be carried out for such farms.

### *Permit or exemption pursuant to the Nature Conservation Act*

Sometimes an environmental permit is required for the construction of a wind or solar farm. This is relevant where a wind or solar farm is located in or near a Natura 2000 area. Natura 2000 is a European network of nature conservation areas. The permit is required if the development of a project could significantly harm or degrade the natural habitat of the flora and fauna in the area. A permit will not be issued until it is certain that the project will not have an adverse effect on the natural features of the Natura 2000 area.

If it is impossible to provide such certainty, an environmental permit may only be obtained in the absence of any alternative. In addition, there must be a compelling reason in the general interest and compensation measures will have to be adopted for the area.

In addition, during the construction of a solar or wind farm, it may be necessary to obtain an exemption, so as to contravene any prohibition in order to kill, wound or disturb birds or other animals. Examples include disturbing the breeding season or birds that fly into wind turbines.

### *Water permits*

The national government, the provincial authorities or the water board may stipulate rules which require a water permit for the construction of a solar or wind farm. This may be the case when construction intersects a river or if there are any dikes in the vicinity.

### *Other permits or licences*

Other permits or licences may be required, depending on the project in question. Examples include an integrated environmental permit for construction work (earth moving), the felling of trees or the construction of a driveway. Such permits are mainly issued by the municipal authorities.

### *The time factor*

The process of applying for and obtaining permits often takes considerable time. Many permits are subject to an 'extensive public preparatory procedure'. This means that the relevant authorities first have to publish a draft permit. Stakeholders then have six weeks to submit their 'views' or lodge objections.

When a permit is issued or declined, the authorities have to explain why. Sometimes an objection may render further investigation necessary. This can take a long time. Officially a decision must be made within six months of receiving an application in the case of a permit that is subject to an extensive public preparatory procedure. Practice has shown, however, that this term is not always achieved and it may take up to a year or more for a permit to be issued. The applicant may force the authorities to make a decision, but this does not make sense if further studies are needed.

In addition, any other party who believes that the project could prejudice their interests (usually local residents) may file an objection against a permit or permits with a court of law and may lodge an appeal with the Administrative Law Division of the Council of State. It can easily take a year and a half to two years before a final decision is made. However, only actual stakeholders may lodge an appeal. In general, anyone who lives or works too far from the project does not qualify as such. Environmental organisations may also lodge an appeal. They are usually recognized as stakeholders.



# Chapter 5.

## What is an SDE++ subsidy and how do you qualify for it?

Without a subsidy, sustainable energy projects are not yet profitable. A great deal of money is available in the way of subsidies every year. In the case of a larger project you can apply for an SDE++ subsidy from the Netherlands Enterprise Agency [Rijksdienst voor Ondernemend Nederland] (RVO). SDE++ stands for Stimulering Duurzame Energieproductie en Klimaattransitie ['Sustainable Energy Production and Climate Transition Incentive']. An SDE++ subsidy pays the difference between the cost price of grey energy and that of sustainable (green) energy for a number of years. The period for which a project is granted a subsidy depends on the technology used. It is fifteen years in the case of solar and wind.

### *CO2 reductions*

The SDE++ does expand on the former Stimulation of Sustainable Energy Production (SDE+) scheme. This new scheme will not only stimulate sustainable energy production but also CO2 reductions. In this way the government wants to ensure that the energy transition remains feasible and affordable in the Netherlands.

### *How does the subsidy work?*

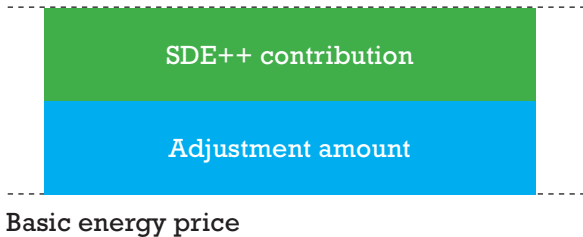
SDE++ is an operating subsidy. As a producer you may receive a subsidy for the sustainable energy which you generate. This subsidy provides compensation for the difference between the cost price of the technology that reduces the CO2 (the 'base amount') and the market value of the product giving rise to the technology (the adjustment amount'). The base amount will be fixed for the entire duration of the subsidy and the correction amount will be determined annually. If the market value rises, the operating shortfall will decrease and the subsidy decrease accordingly as well.

The value of the SDE++ contribution depends on energy price movements. If the energy price is higher, you will receive less in the way of an SDE++ but

you will earn more from the energy customer whom you supply. If the energy price is lower, you will receive a larger subsidy but less from your energy customer. The amount is determined on the basis of a specific base energy price. That amount is set when the subsidy is provided. The basic energy price is the lower limit of the adjustment amount. The maximum subsidy for the amount of energy produced will be reached where the adjustment amount is equal to the base energy price in any one year. If the energy price drops further, the amount that you will receive in the way of a subsidy will no longer rise.

Maximum SDE++ contribution = base amount

**Basic amount** (the cost price of the technology that reduces the CO2)



### *Conditions*

In order to be eligible for the SDE++ scheme, several conditions must be met. There are general conditions and category-specific ones.

Permits: Chapters 3 and 4 explain which permits are needed for an energy project and which agreements must be made with the owner of the land or roof. This process must have been completed before an application may be submitted for a subsidy.

Feasibility study: if you are applying for subsidy for more than 500 kWp, you are also obliged to carry out a feasibility study and include this in your application. Wind projects also require a wind report. The wind report contains a wind energy revenue calculation.

Transmission capacity indication: all applications for the generation of renewable electricity must be accompanied by a transmission capacity indication prepared by the grid manager. If you wish to submit an application, you must also send a transmission capacity indication demonstrating that sufficient transmission capacity is available for the location your application relates to. You can obtain a transmission capacity indication from your grid manager.

Approval from the location owner: if you are not the owner of the intended location, then you are required to submit a statement from the owner with your application stating that the latter has given you permission to install and operate a production plant at the location for the duration of the subsidy.

#### *When can you apply for a subsidy?*

The government makes a budget available every year. In 2020, the budget for SDE++ is €5 billion. You may apply for an SDE++ subsidy during the opening rounds.

In 2020 the opening round of the SDE++ will start on 24 November 2020 and is divided into stages. During the first stage you can only apply for a subsidy for projects with a subsidy requirement up to a certain subsidy amount per tonne of CO<sub>2</sub>. During the following stages this maximum subsidy amount per tonne of CO<sub>2</sub> is increased step by step. You may also submit projects with a lower subsidy requirement than the maximum set for the technology in question. In this way market parties are encouraged to submit projects for a lower price and thus have a better chance of obtaining a subsidy.

The ranking method of the SDE++ has changed with respect to that of the SDE+:

1. applications are ranked on the basis of the expected subsidy requirement per tonne of CO<sub>2</sub>;
2. to allow for comparison of all options, the ranking takes into account the CO<sub>2</sub> emission factor for each class of production plant. This concerns the cost per tonne of CO<sub>2</sub> emissions avoided. In the case of the technologies that use or generate electricity to reduce CO<sub>2</sub>, the expected effects on emissions in the electricity sector are taken into account.

The subsidy intensity is calculated on the basis of the following formula:

**base amount – long-term product price/CO2 emission factor**

Applications are processed in the order in which they are received until the entire budget is allocated. Then you wait for the next round.

*What can you do after receiving an SDE++ ruling?*

You will receive a subsidy decision within 13 weeks of submitting your application. If it is positive, it will state how much subsidy you will receive. Once a subsidy is granted, you will have certain obligations. The RVO (which grants the subsidy) expects to receive a copy of the instructions to construct the plant within one year. The plant must have been put into service by the deadline stipulated for this purpose. You will also need to register with a certification authority. In the case of renewable electricity and heating, that would be CertiQ, a subsidiary of the grid manager, TenneT. In conclusion, the grid manager (or in the case of heating, the measuring company) has to confirm that you are a producer of renewable energy.

From the moment the subsidy starts, an advance payment will be made every month. Every year the RVO makes an adjustment every year based on a predetermined adjustment amount and the certified meter readings which it receives. Any unused annual production that qualifies for a subsidy can be deferred to subsequent years (forward banking). This may be done for up to a year after the expiry of the subsidy period.

If production exceeds the maximum annual qualifying amount, the excess may be carried over to a subsequent year (backward banking). You may use such production in the event of a shortfall in a subsequent year. Backward banking is subject to a maximum of 25% of the annual subsidizable production with the exception of wind.

*Postcoderoos scheme (Reduced Rate Scheme)*

Would you like to establish a wind or solar collective with your district or town, for example? You may do so with the Reduced Rate Scheme, also referred to as the 'Postcoderoos' scheme. In this case the members of a cooperative or an owners' association receive an energy tax rebate on their energy bills for

locally and sustainably generated electricity. This is subject to the condition that the participants live within the postal code area (the 'postcoderoos') of the solar or wind energy facility. The 'postcoderoos' consists of the four-digit postal code of the central postal code, plus all postal code areas immediately adjacent to it. The production facility must be located in one of the postal code areas within a predetermined radius [the 'roos'].

The future of the 'postcoderoos' scheme is uncertain. The energy tax rebate may be replaced with a reverse supply fee in 2021. In addition, the energy tax on electricity was lowered on 1 January 2019. Such a reduction will have implications for the return on this scheme. The basic principle, however, to produce a profitable and largely, similar scheme.

# Chapter 6.

## What are the alternatives in relation to tax?

**Besides subsidies, a number of tax incentive facilities are made available by the national government for investments in sustainable energy or environmental friendly business equipment and for the pursuit of innovative activities. These facilities are responsible for a reduction of companies' taxable earnings or remittable salary tax and, as such will have an impact on their financial results.**

### *Research and development rebate*

Businesses engaged in the development of a product, a production process, software or the pursuit of technical and scientific research may qualify for a salary tax reduction (the research and development rebate). Applications for this subsidy should be submitted to the RVO. In the event that a research and development rebate is granted, the relevant business will receive a research and development statement. Amongst other things, it will mention the value of the available salary tax relief.

In principle, the research and development rebate amounts to 32% (40% as of 2021) of the relevant labour costs and expenses for research and development. Where such expenditure and spending exceed €350,000.00 per year, the research and development rebate amounts to 16%. Qualifying start-ups receive a larger rebate of 40% (50% as of 2021) to cover research and development costs of up to €350,000.00.

### *Innovation box*

The innovation box is a research and development corporation tax facility and, as such, is not available to any business that is subject to income tax. As a result of the application of the innovation box, income from qualifying innovative activities is taxed at an effective corporation tax rate of 7% (9% as of 2021).

The conditions for applying the innovation box vary, depending on the size of the taxpayer. A smaller taxpayer would need to undertake research and

development work for which a research and development statement (see above) is required. As such the above-mentioned research and development statement is of great importance for the purposes of the innovation box. Larger taxpayers are subject to additional requirements.

A taxpayer is deemed to be a smaller taxpayer for the purposes of the innovation box where less than €37.5 million is achieved in the way of benefits from intangible assets and a net turnover of less than €250 million is achieved at the group level for five consecutive years.

The innovation box can produce considerable tax savings. The application of an innovation box is normally discussed with the Tax and Customs Administration office (in advance) and any arrangements are recorded in an agreement.

#### *Energy and environmental investment credit*

The energy investment credit [energie-investeringsaftrek] ('EIA') and the environmental investment credit [milieu-investeringsaftrek] ('MIA') are incentives aimed at encouraging business to invest in energy-efficient and environmentally-conscious business equipment. In practice, this may produce an additional tax credit for investments in 'qualifying' business assets (or some of them). The qualifying business assets are listed on an energy list (in the case of an EIA) and environment list (in the case of a MIA). These lists are published at <https://www.rvo.nl/> every year.

In 2020 the energy investment credit amounts to 45% for investments up to a maximum investment of €124 billion. The environmental investment credit varies from 36% to 13.5% of the investment amount, depending on the category to which the environmental business assets belong. The relationship between the business assets in terms of the law governing ownership and property are relevant for the purposes of claiming an EIA or MIA. In addition, certain business assets do not qualify for an investment credit at all because they are specifically excluded, such as investments in residential dwellings. It is therefore advisable to ensure the proper identification of the relationship between the business assets in terms of the law governing ownership and property beforehand.

# Chapter 7.

## How do you fund a project?

**The execution of a sustainable energy project requires a great deal of time and money. Some of this money may be obtained through subsidies but often, this is usually not enough. The largest investments are needed during the start-up and development stages. The costs during the operating stage are relatively low. In general, sustainable energy projects are financed with borrowed money. Various options are available for this, such as bank loans through regional and other energy funds or crowdfunding. Here is a breakdown of the ins and outs.**

### *What is project funding?*

Project funding differs from corporate financing and, put simply, it means that a financier does not necessarily finance all kinds of processes and activities for a business, but a single, separate project. Project funding is usually involved in the case of energy projects. The only risk the financier runs is related to the energy project and not to any other activities undertaken by an organisation.

Suppose that a farmer has an agricultural business as part of a partnership. In addition to their agricultural business the farmer decides to generate and sell energy themselves as well. They erect solar panels on a fallow plot of land for this purpose. To make it financeable it is wise to incorporate this new activity into an entity which has been especially established for this purpose (see also Chapter 1) and which is separate from their agricultural business. In this case the financier only runs a risk in relation to the energy project and not to the agricultural business' other operations.

### *What conditions need to be satisfied for the purposes of such funding?*

The project is funded on the basis of the energy project's future cash flows (its profit). When assessing a project, a financier devotes a great deal of attention to the technology that is used (is it a proven technology or not?). The project contracts are also important. To what extent is the consumption of energy guaranteed, what arrangements are set out in the EPC (engineering,



procurement and construction agreement – see Chapter 8), and what about warranties and so forth?

Furthermore, the quality of the materials used, the suppliers, and project management are important for the purposes of a financier's assessment. Finally, a financier will devote attention to their security (collateral or mortgage). All in all, it is important for a project to be properly prepared before it is presented to a financier and that future earnings be identified as far as possible.

### *Bank finance*

Bank finance is the most self-evident. A bank is usually prepared to fund an energy project. However, it does have to involve proven technology, positive cash flows (enough profit) and appropriate professionalism in any agreements and amongst management.

However, a bank will never assume responsibility for funding an entire project. This is why you need to invest your own money (equity capital) or the shareholders should provide a subordinated loan (subject to conditions that are acceptable to the bank). A subordinated loan only qualifies for repayment once any other obligations (banking or otherwise) have been fulfilled.

During its assessment of the ratio between loan capital (the bank) and equity (the shareholders), the bank will generally take the debt service coverage ratio (DSCR) into account. This is a key indicator which shows the extent to which financing costs (interest and repayment) can be paid from available cash flows (any money which is earned and which remains after fulfilling all obligations, such as paying taxes). If the DSCR is low (hence, if less money is earned to pay the financing costs), more equity will be needed than in the case of a sound DSCR.

### *Regional and other energy funds*

In various regions, local government (local and provincial authorities) has set up funds that focus on the funding energy projects. These energy funds usually work on the basis of equity funding (by subscribing to shares) or the provision of loans (or a combination of the two). An overview of the available funds can be found at <http://www.publiekeenergiefondsen.nl/>.

These funds tend to be geographically oriented and an energy fund from province X will prefer not to invest in a project in province Y. This is a considerable limitation. Experience has taught us that energy funds mainly fund projects and that they apply conditions similar to those of the banks.

#### *Crowdfunding (bonds or shares)*

If bank or energy fund is impossible or insufficient, there is a third option. It is funding through the issue of bonds, shares or depositary receipts for shares. This can be organised via a platform that brings the initiator of the energy project and investors together, through crowdfunding, for instance. When bonds, shares or depositary receipts for shares are issued, one may have an obligation to make an approved prospectus available prior to the offer. This is not always required, however, because the issue in question may be subject to an exception or exemption.

Nevertheless, it is important for a business to seek expert advice. Put briefly, a business has to provide all the information that is essential to an investor and this information should not be incorrect or misleading.

# Chapter 8.

## How do you arrange implementation and maintenance?

**The location has been selected, a subsidy and funding have been arranged and now the actual implementation of the energy project can start. This usually concerns a major project that involves considerable money and that is constructed or built for the long term. This is why a solid, comprehensive agreement is required for construction and service with suppliers and/or contractors is consequently also essential. What follows is an explanation of the components which are regulated in such an agreement.**

### *EPC agreements*

An assignment to build a production plant is often documented in an engineering, procurement and construction agreement. Among other things, such an agreement stipulates the work that is to be carried out, what will be provided, the fee payable for this, when each instalment of the purchase price is to be paid, any warranties, and how and when the handover is to occur.

### *Date of handover*

It is often important for a production plant to be handed over by a certain date. A late handover may have implications for any subsidy, for example. The operating period may also be reduced as a result. In such a situation it would be wise to agree on a deadline for handover subject to a duty to provide compensation if that deadline is not met.

### *Performance guarantees*

The capacity of solar panels is expressed as watt peak (W<sub>p</sub>) under ideal circumstances. Their yield is expressed as kWh (kilowatt hour) per kW<sub>p</sub>. It is customary for a contractor to warrant a certain performance ratio. The performance ratio is expressed as a percentage and it refers to the ratio between the measured and theoretical yield of a solar panel plant. The ideal measuring period for the calculation of the performance ratio is at least one

year. In the case of that long a period the environmental conditions would not have an excessive impact on the calculation.

In the case of wind turbines, a decision is often made in favour of a minimum performance guarantee expressed as kWh per annum at a certain average wind speed. In this respect it is also possible to issue an uptime guarantee expressed as a percentage over a number of years. Such arrangements usually go hand in hand with the conclusion of a service contract.

#### *Ownership and the passing of risk*

An agreement also stipulates when ownership of the production plant is to be transferred. Ownership of specific components may pass at such time as they are handed over and paid for. Alternatively, it may be agreed that ownership will only pass once the entire agreed contract fee has been paid. Usually, it is agreed that any risks will only pass upon handover.

#### *NEN standards*

An EPC agreement often refers to standards that need to be observed. Standards are criteria for assessment purposes. They may relate to the quality and safety of products, services and processes. NEN is the abbreviation for a Dutch Standard. EN stands for a European Standard. ISO and IEC are international standards. Most standards are not mandatory by law and will therefore have to be agreed on. It is also possible that standards are rendered mandatory by an insurance company or pursuant to warranty conditions.

#### *Service contracts*

The service contract (also referred to as an operation and maintenance agreement) is entered into with the party who is going to manage and maintain the solar panel plant or wind turbine. Details about which kind of maintenance is carried out, and how the plant is monitored, secured and inspected are stipulated in this contract. The contract also stipulates the term within which repairs are to be made, what the guaranteed plant uptime is to be, and what fee is payable for the work undertaken. Another important subject is what compensation is due when the service cannot be provided (in time).

# Chapter 9.

## How do you arrange a grid connection?

**Before an energy plant is constructed, it will also be necessary to arrange its connection to the electricity grid. In this way it will be possible to transmit and sell the electricity as soon as the energy plant is ready. There are also rules and options that apply in this respect. We have listed them below. TenneT is the manager of the national high-voltage grid in the Netherlands. The regional grids are managed by regional grid managers. Every area has its own regional grid manager.**

### *Regulated or open domain?*

In the case of a grid connection of up to 10 MVA (10 mega volt ampere) the grid manager will establish the connection. The fees payable for this are regulated (laid down). You are entitled to connect your energy project to the nearest point on the 10 kV grid (the medium-voltage grid, which supplies the transformer stations). The fee for a connection is based on one at that point, even if the connection capacity is insufficient and a different connection point must be used. If a grid connection of more than 10 MVA is needed, a third party may also install it. However, this must occur in accordance with the grid manager's requirements.

### *Connection deadline*

The Electricity Act stipulates that a grid manager must establish an electricity connection within a reasonable period of time. This is a maximum of 18 weeks for connections of up to 10 MVA. This term must also be observed for the connection of a production plant of more than 10 MVA, unless the grid manager cannot reasonably be reproached for requiring more time. This period starts the moment the offer for the connection is accepted.

### *Available capacity*

The existing electricity grid does not have enough capacity everywhere in the Netherlands to process all the new solar and wind farms which are to be

constructed. It is therefore important to make arrangements about this with the grid manager beforehand.

### *Cable pooling*

When the wind is strong, the sun usually does not shine and vice versa. Operators of solar and/or wind farms that are close to each other can now use the same grid connection. This saves the operator money. In addition, it ensures better use of the electricity grid.

The operator with the primary allocation point remains responsible for the connection as a whole, including the secondary allocation points. That operator enters into the connection and transmission agreement with the grid manager. The secondary allocation points are part of that contract. The operators of a wind farm and a solar farm that opt for cable pooling should lay down their mutual arrangements concerning the joint use of the connection in an agreement. This can be done in a so-called grid sharing agreement. Such an agreement may set out the arrangements made between the wind and solar farms concerning, among other things, the maintenance of the connection, the distribution of operating costs, production losses due to curtailment and the conditions subject to which the capacity of the solar or wind farm may be expanded. In addition, the operators' interests must be safeguarded as far as possible by means of real rights. Step-in rights may also be stipulated with regard to, for example, the connection and transmission agreement concluded with the grid manager.

### *Single or standard connection?*

A standard connection has two cable connections. If one of the cables does not work due to maintenance or a malfunction, it will normally not result in a loss of power supply. In that case electricity will continue to be supplied through the intact cable.

Single cable connections are regularly selected in the case of wind and solar farms. They are much cheaper but they do come with a risk.

### *Connection and transmission agreement*

A connection and transmission agreement is a contract that is concluded with a grid manager for a connection to the electricity grid and the transmission

of electricity. If the connection to the grid is 110 kV or higher, a connection and transmission agreement must be concluded with TenneT, the national grid manager. In the case of a connection to the distribution grid of a regional grid manager, a connection and transmission agreement must be concluded with that particular grid manager.

### *Measuring firms and equipment*

Apart from a connection, appropriate measuring equipment is also required. A recognised measuring firm will install and manage the measuring equipment. A separate contract is concluded with a recognised measuring company to take meter readings.

In order to be able to receive an SDE++ subsidy, a gross production meter is required for every production plant in addition to a main meter. A gross production meter enables you to demonstrate how much electricity has been generated. As soon as a gross production meter is connected to the main connection, you may ask the grid manager for a so-called green EAN code for the sustainable production plant. Every sustainable production plant requires its own EAN code.

The purpose of the green EAN code is to be able to draw a distinction between multiple sustainable production plants using the same EAN main connection. If only one production plant is connected, you can choose to use the EAN code of the main connection. As soon as you receive the EAN code, the production plant will be registered with CertiQ, the certification body. A separate application is required for each production plant.

# Chapter 10.

## How do you sell energy?

**The final stage has started. The electricity is being generated and can be used or sold. In order to supply electricity to consumers or small commercial customers, you need a permit from the Dutch Authority for Consumers and Markets. You do not need one if you supply to an energy supplier or directly to a large-scale energy consumer. What the sale of energy involves is dealt with below.**

### *Power purchase agreement*

In the Netherlands a purchase agreement concluded between a producer and a purchaser of electricity is often referred to by its English name, power purchase agreement (PPA). It sets out all the arrangements concerning the sale and supply of electricity, for example, the kWh price, the term of the agreement, the supply point, and the terms of payment.

Many energy suppliers are prepared to link the level of the kWh price to the SDE++ adjustment amount. The advantage of this is that the kWh price keeps pace with the SDE++ subsidy. As long as the adjustment amount does not fall below the base energy price, you are guaranteed the maximum base amount for the electricity supplied. The way in which the SDE++ subsidy works is explained in Chapter 5.

### *Guarantees of origin*

A guarantee of origin is a digital certificate that makes it possible to prove where and how green power is generated. It is also referred to as a green certificate. One guarantee of origin can be used for 1000 kWh of electricity. A guarantee of origin is valid for one year and in the Netherlands they are issued by CertiQ, a subsidiary of TenneT.

The guarantees of origin for electricity that is reverse-supplied to the electricity grid are freely marketable. After all, this energy has not yet been consumed. These guarantees of origin may be sold together with sustainable electricity but it is also possible to sell them separately. In that case the physical electricity



goes to a company (such as the EPEX (APX) power market) and the guarantees of origin go to another party (for example, a local authority that wants to switch to green energy consumption by purchasing separate guarantees of origin). This is because using a guarantee of origin gives you the guarantee that 1000 kWh of green energy has been generated somewhere and by purchasing a guarantee of origin, you contribute to sustainability.

#### *Multiple suppliers on a single connection*

As of 24 March 2018 one may conclude a contract with more than one supplier for the same electricity connection. This freedom of choice is particularly interesting for any customer that not only purchases energy but also reverse-supplies it to the grid. This reverse-supplied electricity can then be sold to a supplier other than the one from whom you purchase your electricity.

#### *Leasing arrangements*

A lease arrangement is often used in the case of rooftop solar panel projects. Under this type of arrangement the investor is the one that maintains the production plant. The investor leases the system to the occupant of a building, who uses that system to generate electricity at their own risk and expense. In this way the parties seek to ensure that the investor can claim an SDE++ subsidy and the occupant of the building qualifies for the self-generated power exemption, with the result that no energy tax is payable for the energy consumed by the building's owner.

#### *Energy tax*

When energy is supplied to a consumer, energy tax is due, in principle. When appropriate, any energy tax can be mitigated.

# Chapter 11.

## What risks do you need to cover?

**Nature provides sustainable energy projects with the requisite solar and wind energy but, unfortunately, it also brings risks such as storms, hail and lightning strikes, which may damage the plants. Another risk lies in the lack of sufficient sun or wind. Human error or defects in a plant also remain risks in the case of sustainable energy projects. These risks pose a threat to the investment and revenue. By taking out insurance contracts, you can protect that investment and secure your revenue. The risks can be covered in various ways.**

### *Construction all risks cover (CAR insurance)*

Various parties are involved in the construction stage of a wind or solar farm and sometimes things can go wrong. CAR insurance covers the material damage that may occur on or around the construction site. It is advisable to take out CAR insurance for the construction stage (and is often required by contract). CAR insurance covers risks during the construction stage such as liability, damage to the works or to existing property belonging to a client and any loss due to the disruption of business.

### *Operational all risks cover*

Once a wind or solar farm has been constructed, the operational stage starts. During the operational stage the project is exposed to other risks, such as mechanical and/or electrical malfunctions, an irradiation deficit, defects in the plant itself or damage caused by natural disasters or violence. These risks may result in a loss of production. Operational all risks insurance provides cover for risks during the operational stage.

### *Other types of cover*

Apart from construction and operational all risks insurance policies, there are other insurance products that protect a project against various risks. Examples include liability, transport and warranty insurance.

In every project risks play a role to some extent. This is why taking out insurance for sustainable energy projects is tailored work. A specialist consultant (an insurance agent or broker) can help draw up tailored insurance contracts.

# Chapter 12.

## What rules apply in the market?

**Within the European Union (EU) there are rules governing market integrity and transparency in the wholesale energy market. These rules are laid down in the Regulation on Wholesale Energy Market Integrity and Transparency or 'REMIT Regulation'. The REMIT Regulation applies directly in every member state of the European Union, which therefore includes the Netherlands. You will be dealing with these rules as soon as the production plant has an installed capacity of more than 10 MW (electricity) or 20 MW (gas).**

### *Oversight*

Under the REMIT Regulation a European body was appointed to oversee compliance with it. This is the Agency for the Cooperation of Energy Regulators, or ACER. In order to perform its oversight duties, ACER works closely together with a national body that has been mandatorily appointed in every member state. The Dutch Authority for Consumers and Markets is the national regulatory authority for the Netherlands.

### *When does the REMIT Regulation apply?*

The REMIT Regulation applies to the trade in energy products intended for wholesale market. This includes the contracts for the supply of natural gas or electricity. An explicit exception is made in the case of contracts for the supply of natural gas or electricity to end users.

### *The core of the REMIT Regulation and its implications*

Businesses that are active in the wholesale market are not permitted to act on the basis of inside information. These businesses are also subject to a duty of disclosure. This means they have to:

- 1) register with the Dutch Authority for Consumers and Markets;
- 2) notify ACER of the transactions they conduct in the wholesale market;
- 3) notify ACER of the availability of their production capacity; and
- 4) disclose information about the misuse of inside information or market manipulation.

Re 2) Regarding the obligation to notify ACER, there is an exception for any business that produces energy with a maximum installed capacity of 10 MW (electricity) or 20 MW (gas) and that only concludes supply contracts outside the market.

Re 4) Trading on the basis of inside information in the wholesale energy market is not permitted because such trading is unfair and, according to the European Union, it undermines market confidence. According to the EU, unfair trading can be prevented if market parties disclose important information.

As the fines for violating the REMIT Regulation can be hefty, businesses operating in the wholesale market are advised to be aware of the REMIT Regulation and their obligations pursuant to it.

# Meet the Dirkzwager Energy Team

Dirkzwager has a versatile team of lawyers, notaries and tax consultants who specialise in sustainable energy projects. These specialists offer knowledge and experience in various fields of law, such as energy, administrative, corporate, property and tax law, and the fields of funding and securities. As Dirkzwager has a versatile team that offers a wide range of specialisms and disciplines, it is able to anticipate all legal needs that may arise when setting up and financing such projects.

[www.dirkzwager.nl/expertises-sectoren/energierecht](http://www.dirkzwager.nl/expertises-sectoren/energierecht)

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