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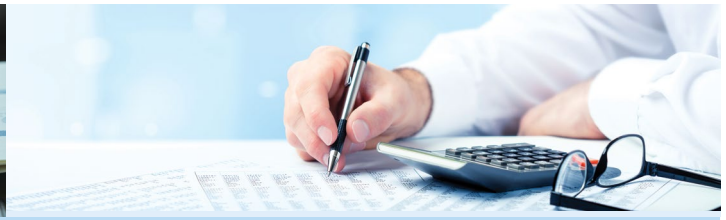


In this edition

Grid congestion and (leasing of) real estate

Introduction

For decades, obtaining a grid connection with sufficient transport capacity was not a concern for property owners (and developers). As a rule, grid operators met the deadlines for delivering grid connections, and there was sufficient capacity on the grid itself. However, for quite some time now, we have been reading reports about overcrowded electricity grids in the Netherlands on an almost weekly basis. Construction plans are getting stalled, business expansions are uncertain, and solar farms are not being completed, all because the current electricity system cannot handle the required increase in electricity demand. If market players have not adequately considered this grid congestion, plans end up being "put on hold," or sometimes are abandoned altogether.

Although significant efforts are currently being made to 'unclog' the electricity grid as much as possible, our message to real estate stakeholders is quite simple: grid congestion will not (and cannot) be easily resolved in the coming years (either). Therefore, it is of paramount importance for both owners and users of existing real estate or real estate yet to be developed to be aware of this and to explicitly address it when drawing up contracts.

Against this backdrop, in this article, we will examine what congestion actually is and how the associated rights and obligations are regulated. We will also discuss how market players, grid operators, and governments are seeking solutions. In doing so, we will focus in particular on the Energy Act, which came into force on January 1 of this year, and we will highlight some of the most relevant tenancy law aspects using two 'case studies.'

First, the Energy Act: a new legal framework for electricity (and gas and heat)

On January 1 of this year, the Energy Act came into force. This Act is the comprehensive successor to the Electricity Act 1998 (**E-Act**) and the Gas Act and aims, among other things, to modernize the regulation of energy grids and better align it with the energy transition and EU regulations. With this in mind, the necessary key terms from the old legislation have been updated: for example, the Energy Act refers to a "system" instead of a "grid," and to a "system operator" instead of a "grid operator." From now on, regional grid operators are referred to as "distribution system operators" (**DSOs**), and the national grid operator (TenneT) as the "transmission system operator" (**TSO**).

Although it may take some time getting used to for those less familiar with the subject, and while some of the terms may never enter common usage, we will use the new legal terms as much as possible in the remainder of this article. At the same time, the impact of these changes in terminology should not be overestimated.

In practice, the parties involved and their (statutory) duties have remained largely the same; therefore, property developers still deal with Liander, Enexis, and Stedin as regional DSOs (and TenneT as the nationally responsible TSO), and the core obligations of these parties - including connection and transport obligations - have been largely retained, even if in some cases formulated slightly differently. As we will explain below, this is particularly true with regard to the ability to explicitly refuse offers for a connection in the event of a demonstrable lack of transport capacity. Before we address this, we will first consider the question of what exactly congestion is. After all, a proper understanding of the nature of

this phenomenon is important in order to be able to accurately assess its (potential) legal implications.

What is congestion?

In short, the term “congestion” refers to a situation in which the electricity grid does not have sufficient transport capacity to meet current and expected demand for transport capacity. The relevant regulations refer to ‘existing,’ ‘required,’ ‘available,’ and ‘requested’ transport capacity. The total transport capacity that an electricity grid can provide is the “existing” capacity. This capacity consists, on the one hand of the ‘required’ capacity (the portion already used by connected parties) and, on the other hand, of the ‘available’ capacity (if there is still room). The requested capacity refers to the capacity that is not yet being used but has been requested. Congestion occurs when the requested capacity exceeds the available capacity.

In this context, it is important to distinguish between contractual (also referred to as “paper-based”) congestion and physical congestion. In essence, this distinction boils down to whether the required transport capacity is actually consumed or is only contractually committed. To illustrate: in its connection and transport agreement (CTA) with the system operator, a bicycle factory has contracted a transport capacity of 100 kW. In reality, however, the maximum consumption of this factory does not exceed 80 kW. In that case, therefore, 20 kW of the contracted transport capacity (**CTC**) remains unused. However, given its contractual obligation under the CTA to make the full 100 kW of transport capacity available, the system operator is required to take that total contracted capacity of 100 kW into account when calculating the available transport capacity.

In short: the 20 kW ‘reserved’ for the factory is relevant to determine whether, ‘on paper,’ sufficient capacity will be available for new entrants to the system. “Real” congestion only exists in the case of “physical” congestion.

This distinction is extremely relevant when considering the obligations of system operators (such as Liander, Enexis, Stedin, and Rendo). Indeed, pursuant to Article 3.46 of the Energy Act, they have a legal obligation to make an offer ‘upon request’ to provide electricity transport. 3.46 of the Energy Act, they have a legal obligation to make an offer ‘upon request’ to provide electricity transport. However, this obligation does not apply ‘if and for as long as, based on objective and technical criteria, it can be demonstrated that there is insufficient transport capacity available on the relevant system for the requested transport.’ When interpreting the criterion of ‘insufficient transport capacity,’ physical - and therefore not contractual - congestion is the determining standard.

Practical factors that have contributed to (the development of) congestion

The current congestion problem is the result of a combination of factors. The energy transition plays a very important role in this (possibly the most important). Indeed, this transition largely entails a far-reaching electrification of the energy system that previously existed in the Netherlands: natural gas-free homes, electric vehicles, large-scale decentralized generation of solar and wind energy, and the electrification of industrial processes. The existing systems in the Netherlands were designed decades ago for a much more limited and more constant and predictable electricity demand. Therefore, given the continued increase in demand for electricity transport, it is expected that, in the coming years, the expansion of the system will structurally lag behind what is needed to address existing problems.

Apart from the legal “fine print” to be discussed below, a number of practical and factual obstacles play a significant role. For example, there is a structural shortage of technical personnel, lengthy zoning procedures, and international competition for high-quality materials. Even basic logistics components have become scarce. All of this means that grid congestion is not a temporary phenomenon, but rather a structural problem that is expected to continue to affect us (significantly) until at least 2030.

The so-called 'Status of Implementation as of March 2025'[1] already revealed that the physical challenge is exceptionally significant: by 2050, approximately 50,000 additional transformer substations will need to be installed, over 670 high- and medium-voltage substations will have to be added, and more than 62,000 miles of cables will have to be laid. This task is complicated by structural bottlenecks such as lengthy permitting procedures, spatial integration, land acquisition, and a structural shortage of technical personnel, for which approximately 30,000 additional technicians will be needed by 2030.

The statutory duty of system operators in addressing grid congestion

As we explained above, if there is only contractual congestion on a particular part of a system (because some customers are not fully utilizing their GTVs), the system operator should simply carry out the requested transport.

When carrying out transport, the system operator may not discriminate, but it may (or: must!) distinguish between existing connections and new entrants. The contracted rights of existing customers remain in effect, and therefore, customers with an existing connection cannot be required to 'give up' capacity for the benefit of new entrants. This was the outcome of a dispute between the system operator Enexis and Energiepark Pottendijk, in which Energiepark Pottendijk demanded that all available transport capacity be redistributed (on a *pro rata basis*) among all connections on that grid section, including the new applicant.[2]

From the system operator's perspective, invoking congestion means that, in a specific case, it is released from its transport obligation. However, that does not mean that the system operator can sit back and relax. After all, the system operator also has a legal duty to expand and build its system. In doing so, it must develop an understanding of the future electricity demand in a given area. Based on this, system operators are required to prepare an investment plan every two years and submit it to the ACM for approval. The system investments outlined in that approved investment plan then serve as the basis for the maximum transport tariffs that the system operator is permitted to charge. Therefore, it is the system operator's legal duty to ensure that sufficient transport capacity is available to meet transport demand (and to make the necessary investments in the system to that end). However, the law does not stipulate a specific timeframe for this obligation.

From the perspective of market participants, the latter may be unfortunate, as the absence of a firm deadline contributes to the uncertainty faced by participants who are "on the waiting list" regarding when sufficient transport capacity will (in fact) be available to accommodate their transport capacity requests.

At the same time, the absence of a firm statutory deadline can be easily explained by the complexity of the statutory duty that system operators are required to fulfill. After all, in many cases, the construction (or expansion) of systems involves miles-long routes that run under public roads, through private property, along or through water management facilities, and/or densely built-up areas. The relevant work must first be permitted before it can be scheduled. This involves not only the cables but also the ancillary equipment necessary to operate the system: transformer stations, control stations, and power supply points. This makes the implementation of expansions a complex process, in which system operators are also (partly) dependent on how other stakeholders respond (or fail to respond). For example, when cables are installed, the street is closed again after the work is completed, but a transformer station always remains visible and therefore occupies (public) space. Consequently, the placement of such infrastructure typically triggers more (procedural) third-party backlash than the installation of cables.

1 Publications | Netbeheer Nederland

2 See Den Bosch Court of Appeal, July 28, 2020, ECLI:NL:GHSHE:2020:2411.

At the low-voltage level, the above is primarily a local zoning issue: does the local municipality prefer parking spaces or a transformer station at the designated location? At the high-voltage level, there is also the additional factor that the construction of the necessary infrastructure can generally expect significant resistance. After all, many people do not find the idea of living next to or under high-voltage power lines appealing. As a result, it can take many years to find a suitable location and to complete all the associated environmental law objection and appeal procedures.

With regard to the right to have utility facilities located in or on the property of third parties and to operate them, the Environment and Planning Act provides system operators (in line with the options under the previously applicable Private Law Obstacles Act) with the option, in specific cases, of obtaining a tolerance order to enforce the use of third-party plots of land. Although this is an effective tool, experience has shown that even in such proceedings, they can easily take a year or a year and a half (and sometimes longer).

A further complicating factor is that pursuant to Section 6.12(1) of the Energy Act, local authorities such as municipalities and provinces are not permitted to establish their own regulations regarding the generation, transport, storage, and supply of electricity. As is the case under the Electricity Act (Section 83), in practice, this makes it difficult for local and regional authorities to establish 'spatial' regulations that provide (sufficient) control over (the limitation of) the demand for grid capacity. As a result, especially in the recent past, the impact that new spatial developments - for example, initiatives to build solar or wind farms or new business parks - (may) have on the load placed on the system has not always been sufficiently taken into account. This limited control sometimes presents system operators with unpleasant surprises, where new initiatives place a greater demand on grid capacity than anticipated in their grid expansion plans.

In respect of the above, some more room has however been created when the Environment and Planning Act entered into force on January 1, 2024. Under the Environment and Planning Act, the legal basis for decision-making has been broadened from classical 'spatial aspects' to include all aspects of the physical environment. In practice, we are therefore increasingly seeing area developments that are designed in a 'grid-conscious' (or, or now, 'system-conscious') manner. This means that developments are designed, phased, and managed in such a way that the available grid capacity, both now and in the future, is (also) taken into account. However, the regulations intended to make such an approach mandatory have not yet been 'tested' very thoroughly from a legal standpoint, and their application in already developed areas will generally be more complex.

Congestion in legal practice

The congestion issue is a multi-headed monster. Partly as a result, in practice, it has proven very difficult for market players to enforce sufficient (timely) transport capacity through the courts. The *Enexis/Pottendijk* case was already discussed above. Pottendijk requested a connection with transport capacity from Enexis, but Enexis informed Pottendijk that it could offer the requested connection but not the transport capacity because the grid was 'full.' After it was established that there was indeed physical congestion, Pottendijk argued that the only non-discriminatory way to address this transport scarcity was to redistribute the available transport capacity among existing and new connected customers. However, the Den Bosch Court of Appeal held that Enexis was justified in distinguishing between existing customers with a connection and new customers without an existing connection, and that the prohibition of discrimination did not extend to the point where existing entitlements to transport capacity would be forfeited in favor of new entrants.

Although the line of case law outlined below is fairly clear, we believe it is important to point out that, (initially), there has been considerable debate in the literature and in case law regarding the admissibility of the so-called *first-come-first-served* principle on which the current 'waiting lists' for transport connections are based. For example, it has been argued that this principle is not always compatible with the principle of non-discrimination and that

alternative allocation methods, such as a comparative assessment, would be more in line with the objectives of the European Electricity Directive.[3] Even Advocate General Drijber argued in one of his opinions to the Supreme Court that the *first-come-first-served* principle does not automatically derive from (or, under certain circumstances, could even be contrary to) the EU law prohibition of discrimination.[4] However, the rulings discussed below show that such arguments - at least for the time being - do not lead to different conclusions.

For example, a similar approach to that in the *Enexis v. Pottendijk* case can be seen in the dispute between Liander and a senior citizens' complex in Noordwijk, in which the Court of Appeal in The Hague ruled that Liander did not have to connect the project on a priority basis.[5] Despite the fact that the senior apartments in question were already ready for occupancy, the court of appeal determined that the local grid had reached its capacity limit and that expansion would take time due to dependence on third parties. Therefore, based on the principle of equality under the (then) E-wet, these applicants were not allowed to be given priority over other, earlier-submitted applications.

Another example involves the dispute between system operator Liander and Zonnepark Zevend. In that case, the preliminary relief judge of the Gelderland District Court ruled that Liander could not be ordered to perform an obligation that was *de facto* impossible. Indeed, the planning of the connection depended on TenneT and was subject to significant uncertainties, while no final deadline had been agreed upon in the CTA from which rights could be derived. In this context, the invocation of the 'reasonable period' under Article 23 of the E-wet did not provide the preliminary relief judge with grounds to nevertheless set a firm deadline.[6]

More recently, on February 11, 2026, the District Court of The Hague reached a similar conclusion.[7] In that case, which was published anonymously, it concerned the owners of a newly built home in Hillegom who - despite a timely request for transport - could not be connected because the low-voltage grid and the underlying medium-voltage substation no longer had capacity, as a necessary expansion of the main grid would not be completed until the third quarter of 2027. In this case as well, the preliminary relief judge ruled that the grid operator could not be expected to adjust the schedule or to bypass earlier applications in the queue. Significantly, the preliminary relief judge also held, among other things, that, given the well-known congestion issues, the customers in question could not reasonably have expected to be connected, or to be able to be connected, within the 40-week period they had specified. Partly in light of this, the preliminary relief judge also dismissed claims for an advance on damages and for the provision of an emergency power supply.

Often, the congestion does not exist at the level of the (local) grid to which the connection is requested but in the connected grid with a higher voltage level. For example, in a specific case, there may still be available capacity on the low-voltage ring in the street, but the medium-voltage grid that supplies the low-voltage ring, or the transformer station between the two grids, may be congested. The same problem can occur on the medium-voltage or intermediate-voltage grids of the regional system operator that are connected to the high-voltage grid of the national system operator, TenneT. In such cases, too,

3 See, for example, M.A.M. Dieperink and M. de Wit, *Van non-discriminatie tot gelijke kansen: spelregels voor de verdeling van transportcapaciteit in tijden van schaarste,* in: Nederlands Tijdschrift voor Energierecht, 2023(1), pp. 4–15.
4 See the opinion of Attorney General Drijber of October 23, 2020, ECLI:NL:PHR:2020:987.
5 The Hague Court of Appeal, May 14, 2024, ECLI:NL:GHDHA:2024:773.
6 District Court of Gelderland, June 10, 2025, ECLI:NL:RBGEL:2025:5433.
7 District Court of The Hague, February 11, 2026, ECLI:NL:RBDHA:2026:3413.

the regional system operator cannot offer electricity transport, even though the congestion is not at the requested voltage level but at the associated higher voltage level. This was the case, for example, in proceedings between Stedin and Gunvor, where the preliminary relief judge agreed with Stedin that it did not reasonably have transport capacity available. The proceedings are also enlightening because they provide insight into the information that a customer may request from the system operator if its transport request is denied. For example, this ruling shows that a customer has the right to know their position in the queue and (also) how much transport capacity has been requested by the parties ahead of them. The Arnhem-Leeuwarden Court of Appeal reached a similar conclusion in proceedings between Liander and Jumbo.[8]

Another issue arises when a user of a property - for whatever reason - has reduced the transport capacity it contracted in the past and requests the system operator to restore that capacity to a previous, higher level.

Suppose a data center has a 20-MVA connection and a connection and transport agreement that specifies a contracted transport capacity of 20 MW. However, because it is expected that the data center will gradually grow to its maximum capacity, in practice, the transport capacity has been reduced to 4 MW (and the associated cost savings have been reflected in the transport tariffs). Subsequently, the data center contracts a new customer and wishes to expand to 10 MW, but the system operator refuses this increase, citing congestion. In the case of Liander v. NorthC, the ACM ruled that Liander was indeed entitled to refuse this transport request.[9] Therefore, in the current situation, it is important to always bear in mind that, when it comes to transport capacity, once granted, it remains granted.

Congestion can also be the reason why the delivery of a connection takes longer than desired. If, in a residential area, the existing transformer cannot meet the electricity demand of ten new homes to be built, the grid will have to be upgraded before the connections can be made. This issue is still very frequently the subject of summary proceedings, with the ruling almost always being that a plaintiff has no interest in an interim injunction requiring that the connections be completed within a certain period that expires before the grid has been installed.

Regulatory options for addressing congestion

The case law cited above shows that system operators can (continue to) apply their existing connection policy - based on the *first-come-first-served principle* - with relative confidence, and that, in practice, it is very difficult to compel them, through the courts, to provide a faster connection and/or to make transport capacity available. For market participants, this means that they appear to have to place their hopes primarily on the technical interventions being carried out now and in the coming years to increase the existing capacity of systems and, in the shorter term, to utilize them more intelligently where possible.

Since 2023, the National Approach to Grid Congestion (**LAN**) has served as the central policy framework through which the national government, system operators, and local authorities are seeking to accelerate the expansion and reinforcement of the necessary infrastructure. Under this approach, investment and implementation efforts have visibly increased. For example, more than 70 high-voltage projects are currently under construction, and there has been a significant scaling up of medium-voltage and local grid initiatives. Nevertheless, the waiting lists for transport capacity continue to grow at present, with over 14,000 applications for offtake and over 8,500 applications for feed-in as of

8 Arnhem-Leeuwarden Court of Appeal, November 12, 2024, ECLI:NL:GHARL:2024:6926.

9 See the ACM decision of July 19, 2024, case number ACM/24/188835.

mid-2025. For this reason, the Jetten Cabinet has announced that it will introduce a Grid Congestion Crisis Act, which will provide for temporary, exceptional legislative measures to accelerate electricity infrastructure projects of national importance. The proposed act is intended to supplement the existing tools of the LAN by, among other things, shortening permit and appeal procedures, consolidating decision-making, and strengthening the central government's oversight role when projects become stalled in decentralized decision-making.

In the words of the Cabinet, the Crisis Act marks a shift from a purely facilitating approach to a more prescriptive, centralized management logic, in which speed and security of supply take precedence over procedural safeguards in certain cases. At the same time, in our view, the LAN Monitor underscores that, even with far-reaching legal measures aimed at acceleration, some of the fundamental constraints - such as personnel capacity, land use, and the long lead times of high-voltage projects - cannot be fully addressed. Therefore, in our view, the proposed legislative intervention will, at best, be able to provide marginal relief.

The context outlined above explains why all parties are giving serious thought to measures and practical solutions to address congestion in the interim. These various parties include the government/regulatory authority, the system operators, and the customers.

Starting with the latter group: it is becoming increasingly common for customers to explore smart ways to circumvent congestion. This is often done in coordination with the system operator. For example, a bakery that needs more power for its electric ovens at night but cannot obtain that power from the grid might be able to connect to a nearby wind turbine via a "direct line." As a result, the grid does not experience additional load, and the bakery is assured of an off-take of nighttime wind power. It is also conceivable that, in coordination with the system operator, medium-voltage customers could install a generation facility on their premises to meet their own additional electricity demand (and possibly also that of other customers on the same grid who are experiencing congestion on the high-voltage grid). Such solutions help ensure that the exchange of electricity on the medium-voltage grid is still possible without placing an additional burden on the high-voltage grid.

In recent years, the government - represented by the ACM - has announced and implemented a series of measures to combat congestion. One of these measures is GOTORK, which stands for "Gebruik Op Tijd of Raak het Kwijt" (Use it in Time or Lose it). In other words: *use it or lose it*. The idea is that if a customer does not use a significant portion of its contracted transport capacity for an extended period (more than 12 months), the system operator may reclaim the unused portion and make it available to other customers. As will be discussed in more detail below, the withdrawal of contracted transport capacity is subject to various safeguards for the customer.

A second measure is 'social prioritization,' which allows for deviations from the '*first come, first served*' principle that transport system operators generally apply when allocating transport capacity. Certain types of customers are given priority in the allocation of transport capacity based on a prioritization table. Under this approach, priority is primarily given to so-called 'congestion mitigators'; these are customers who, by using their connection, help to reduce congestion. The second and third categories consist of customers who serve a specific public interest. The second category, 'security,' includes the police, fire departments, hospitals, the military, the judiciary, etc. The third category, 'basic needs,' includes housing, schools, drinking water, and heat supply (gas and heating).

A third measure introduced by the ACM involves a regulatory change that makes it possible to contract flexible transport capacity. In short, this means that options are no longer limited to contracting a fixed transport capacity for the entire year. It is now possible to make advance arrangements with the system operator regarding the use of that transport capacity. Under a so-called Capacity Limitation Contract (CLC), the customer agrees in advance on the times when it will not (fully) utilize its contracted transport capacity and therefore consents to that capacity being used elsewhere. Another option is

the flex-CTA, under which the customer can access transport capacity at times specified by the system operator the day before. TenneT now offers the TO85, under which a customer can use the contracted transport capacity 85% of the time in exchange for (significantly) lower rates.

Finally, a completely different ACM measure concerns the planned (re)introduction of the producer transport tariff. Currently, producers are exempt from transport tariffs. Therefore, for a wind or solar farm, there is not the same disciplinary effect of the transport tariff that applies to consuming customers. As a result, these producers currently do not contribute to the costs of congestion (and its mitigation), even though they themselves (partly) cause it. In November 2025, the ACM launched a consultation on the introduction of a feed-in tariff for electricity producers, such as solar and wind farms. The idea is that this tariff will ensure a fairer distribution of grid costs. The feed-in tariff is intended to incentivize producers to use the grid more efficiently; indirectly, it also ensures that foreign consumers contribute to the costs through higher export prices. In March of this year, in response to parliamentary questions, among other things, the government expressed concern about the potential impact and effects of introducing a feed-in tariff.[10]

Impact of grid congestion on real estate leasing

The fact that grid congestion will persist over the next decade also has an impact on the real estate market. In recent years, electricity supply has become one of the more important considerations both when entering into construction contracts and when leasing and selling real estate. In this context, we will now examine, using two real-world examples, some of the ways in which grid congestion can play a role in (the conclusion of) lease agreements. It should be noted that this area of tenancy law is still evolving, and that there is only very limited case law available to clarify the issues in the two cases.

Case study: Grid connection with sufficient transport capacity not available on time

The first case involves a lessee who leased a distribution center (under construction). The lease agreement stipulates that the lessor must provide a connection to the grid via a 1,750-kW transformer. The lessor did so (through the system operator). It was also agreed that the lessee would contract directly with the grid operator and the energy supplier for electricity. The lessee then requested a CTA of 1,750 kW from the grid operator, but was offered a CTA for a capacity of 112 kW. Partly due to its large electric vehicle fleet, the lessee requires much more (peak) power than the 112 kW offered. However, the system operator states that, for the time being, it cannot offer more than 112 kW and that it cannot be obliged to offer more power due to grid congestion.

The first question that arises is whether the limited power that can be drawn qualifies as a defect of the leased property. A defect is a condition or characteristic of the leased property, or another circumstance not attributable to the lessee, that prevents the lessee from enjoying the use that a lessee may expect, at the time of entering into the agreement, from a well-maintained property of the type to which the lease relates.[11] These expectations include, at a minimum, that the leased property possesses the characteristics necessary for normal use (in accordance with its intended purpose). In this case, therefore, as a distribution center (with an electric vehicle fleet).

The question, therefore, is whether, when entering into the lease agreement, a lessee may expect to be able to connect the leased property to the grid at a power capacity of 1,750 kW, or at least well in excess of 112 kW.

Six or seven years ago, congestion was a minor issue, and, in principle, a lessee could expect to obtain a 1,750 kW connection to the grid. If, in reality, this is a maximum of

10 Annex to Proceedings II, 2025 – 2026, 1117.
11 Section 7:204(2) of the Dutch Civil Code

112 kW, then there is a defect. The limited availability of grid capacity in the area where the leased property is located would then qualify as a "circumstance not attributable to the lessee, as a result of which the leased property cannot provide the lessee with the benefit that a lessee may expect when entering into the agreement." The fact that the congestion cannot be attributed to the lessor either is irrelevant for the determination of a defect.

The lessor is obligated to remedy defects in the leased property.[12] However, the landlord is unable to remedy the defect (only the system operator can do that). The existence of the defect for the period it persists will then have to be reflected in a rent reduction.[13]

If the parties[14] have entered into the lease agreement based on the ROZ model, the possibilities for claiming a rent reduction are severely limited. A claim against the landlord can only be brought if, at the time the agreement was entered into, the landlord knew or should have known about the defect and did not inform the tenant of its existence[15]. In this context, it may be relevant whether the system operator has issued an "advance notice of structural congestion" for the area in which the leased property is located. In this notice, the system operator may specify the date from which a maximum (e.g., 112 kW) will be imposed due to grid congestion and may indicate the expected date from which more capacity will become available on the grid.

Another option is for the lessee to terminate the agreement (out of court). Any breach (which need not be attributable) by one party in the performance of an obligation shall entitle the other party to terminate the agreement in whole or in part, unless, given its specific nature or minor significance, the breach does not justify termination and its consequences[16]. A breach of an obligation could consist in the lessor's failure to provide the lessee with the full benefit of the lease, given the lessee's limited ability to purchase electricity. The ability to use alternative means of power supply, for example, through a generator and/or solar panels, could lead a court to consider full termination to be too severe. However, the court could allow a partial termination of the agreement, combined with a reduction in the lease price due to a diminished benefit from the lease, in order to account for the fact that the lessee must meet part of its energy needs through alternative means at a higher cost (generator).

As explained above, grid congestion is now the rule rather than the exception.[17] In case law, grid congestion is even referred to as a generally known fact.[18] In light of this, as a tenant, you cannot automatically assume that you will be able to connect the leased property to the grid at a capacity of 1,750 kW, or at least well in excess of 112 kW. The benefit you, as a tenant, can expect in terms of transport capacity when entering into a lease agreement is influenced by the capacity available in the relevant area, and in most areas, there is a waiting list. Therefore, as a tenant, it is advisable to determine your electricity needs before entering into a lease agreement and to verify that the required power can be supplied by the system operator. If you fail to do so, the limited availability of capacity on the grid will likely not qualify as a defect and therefore will not give rise to any possibility of rent reduction or termination of the agreement.[19]

12 Section 7:206 of the Dutch Civil Code
13 Section 7:207 of the Dutch Civil Code
14 ROZ Office Space 2015
15 Article 10, General Provisions, ROZ 2015
16 Section 6:265 of the Dutch Civil Code
17 On Netbeheer Nederland's national capacity map, there are only a few small areas where there are no congestion problems.
18 District Court of The Hague, February 11, 2026, ECLI:NL:RBDHA:2026:3413
19 Claims based on error or unforeseen circumstances are not discussed here, but at first glance, they do not appear to have a strong chance of success.

The fact that the above can be highly relevant is evident from one of the few examples of this issue found in case law. This concerns a dispute between ASR and Aldi, in which the Court of Appeal in The Hague issued a judgment on September 2, 2025. The judgment focuses on the costs that the tenant, Aldi, should have incurred in connection with a temporary power supply pending an upgrade of its grid connection by the system operator.[20] According to the Subdistrict Court, the tenant, Aldi, had to bear these costs of EUR 25,000 itself because Aldi had rented the retail space on a shell basis. However, on appeal, the Court of Appeal took a different view. In doing so, the Court of Appeal first stated that a power connection is a utility service which, in view of the provisions of the lease agreement and the general provisions thereto, was included in the 'shell' space that ASR was to lease to Aldi. In the Court of Appeal's view, ASR, as the lessor, should have assumed that the grid connection to be installed would be suitable for Aldi's intended use of the leased premises as a supermarket. In this context, the Court of Appeal attached great importance to the factual course of events, from which, in the Court of Appeal's view, it could be inferred that ASR also saw it that way, given that, among other things, ASR had applied for the grid connection requested by Aldi and had borne the associated costs. ASR had also leased the diesel generators that were necessary to supply power to the supermarket for five months, until sufficient transport capacity became available. In the Court of Appeal's view, ASR had never expressed any reservations in that regard, so its subsequent claims that these were non-obligatory efforts did not hold up. Therefore, the Court of Appeal inferred from ASR's actual actions that, at the time the lease agreement was entered into, it had clearly been the parties' intention that the extension of the grid connection would be ASR's obligation. Based on these facts, the Court ruled that the failure to provide a timely, sufficiently high-capacity grid connection constituted a defect within the meaning of Section 7:204 of the Dutch Civil Code, and therefore, ASR was liable for the additional costs of the diesel generators.

Case study: Maintaining transport capacity; better to share than to be left out

A different issue arises when a landlord has its affairs in good order and has a grid connection for its building with a contracted transport capacity of 1,750 kW. However, a new tenant indicates that a 112 kW connection is sufficient and that they do not wish to pay for the additional contracted capacity that they will not use.

Suppose the CTA is in the landlord's name, and as the landlord, you want to pass on the connection costs to the tenant via the service charges. As the landlord, this gives you control over the situation. However, the tenant is unwilling to pay the connection fees for the unused capacity and argues that the landlord should either bear those fees or reduce the contracted transport capacity to 112 kW. The landlord does not want to do the latter because they may then no longer be able to offer a subsequent tenant 1,750 kW (unless the congestion has been resolved by then, but that is, of course, not certain). The parties will then have to negotiate with each other on how to share the costs for the unused capacity, for example on the basis of a 50/50 split.

As a landlord, you have less control over the situation if - as we often see in practice - the tenant has entered into a CTA with the system operator on its own. Nevertheless, even in such a case, the CTA is important for the lessor, because grid operators are generally willing to transfer the existing contracted capacity for a site to a subsequent lessee. Therefore, if, as the lessor, you want to prevent the lessee from unilaterally reducing the contracted transport capacity, you will need to include a clause in the lease agreement stating that the lessee is not permitted to do so without the lessor's prior written consent. If the tenant accepts this, the problem in the lease relationship with the tenant is resolved. If not, you will need to enter into negotiations on this matter and reach a mutually acceptable solution.

20 Court of Appeal of The Hague, September 2, 2025, ECLI:NL:GHDHA:2025:1773.

Even if, as the landlord, you have reached a favorable agreement with the tenant to maintain the contracted 1,750 kW, you cannot be permanently assured of this. After all, it is possible for the system operator to unnecessarily limit the contracted transport capacity of connected customers and make it available to other grid users by applying GOTORK to it.

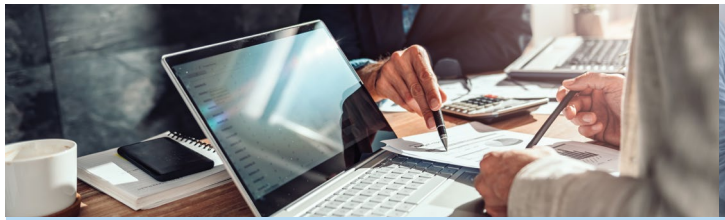
Reducing a connected party's GTV constitutes a restriction of the connected party's rights. For this reason, the ACM allows the application of GOTORK only under specific conditions. For example, it can only be applied to customers connected to the medium-, high-, or extra-high-voltage grid. Furthermore, it can only be applied in congestion areas and in the case of substantial amounts of unnecessarily held GTV. Before the system operator can apply GOTORK, it must first consult with the connected party to determine the extent to which there is unnecessarily contracted transport capacity. In this process, the connected party is given the opportunity to demonstrate that the GTV held is needed or will be needed within a reasonable period of time. The system operator may only limit GTCs for which it has not been demonstrated that they are needed or will be needed within a reasonable period of time.[21]

In short, in the contractual relationship with the lessee, you, as the lessor, can maintain the existing GTV, but the system operator may, under certain conditions, reduce the GTV by applying GOTORK. With this in mind, it is important to include in the lease agreement not only provisions on which party is responsible for obtaining sufficient transport capacity, but it is also advisable, for example, to stipulate in the lease agreement that the lessor must be involved in such discussions between the lessee and the system operator, including the obligation to notify the lessor in writing of any correspondence with the system operator in connection with the possible application of GOTORK. In this context, it could even be considered - whether or not in exchange for reimbursement of costs - that the lessee be obliged, upon request (several times a year), to utilize the full GTV in order to prevent the risk of the lessor losing GTV. After all, if you lose your contracted capacity, it could easily take years before it becomes available again, with all the associated consequences for the usability of the property in question. Therefore, in nearly all cases, the following will apply to 'over-contracted' capacity: it is better to have too much than not enough.

In conclusion

We began this article by noting that significant efforts are currently being made to 'unlock' the electricity grid as much as possible. However, for market players, the availability of sufficient transport capacity will not be a certainty in the coming years. Our message is therefore simple: both owners and users/tenants of existing real estate or real estate yet to be developed will always need to be aware of this and explicitly consider it when negotiating contracts.

21 See link: https://www.acm.nl/system/files/documents/codebesluit-niet-gebruikte-transportrechten-gotork_3.pdf



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