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REAL ESTATE NEWSLETTER

Dossier on
Renewable Energy

News

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Editorial

Defending the environment is most certainly one of the major themes fuelling debate today, and its applications will be, in the opinion of all experts, the, if not one of tomorrow's main areas of economic development and orientation of investments. We have chosen to devote this new issue of the Real Estate Newsletter to the topic of renewable energy and more specifically to wind parks and to the energy produced by photovoltaic cells, even though we have devoted an article to electric vehicles, to the extent where this sector should also be a key area with strong potential for technical innovation and therefore a breeding ground for wealth and economic activity. One can but acknowledge the significant development of wind parks and of photovoltaic cell energy production facilities and, as is often the case, the development of such an activity has been introduced into a quite complex legal and tax framework, in that this blends various aspects of urban planning law, property law, financing law and tax law. Of course an issue of the Real Estate Newsletter could not go without taking a look at the constraints and specificities which are tied to the installation and development of such activities from a real estate standpoint. We will thus focus on the issues related to site control within the framework of wind park developments, certain particularities related to urban planning law, in particular to the display of planning permissions to build wind turbines and the starting point of the time limit on legal action, or yet still to the constraints related, in matters of construction of wind plants, to the protection of fauna and flora. But an issue devoted to renewable energy would not be complete without a section on the particularities related to the financing and to acquisitions/sales of wind parks. Finally, and as always, tax aspects will not be overlooked. There is not yet a specific set of tax rules in the field of the environment or of renewable energy – we will not be dealing here with the future carbon tax – but, as is often the case, there is a corpus of technical rules which aims either to take the specific nature of the activity into account, or to encourage it. We will thus take a look at the treatment of wind parks and of photovoltaic cell facilities with regard to local taxes, business tax and real estate tax on property, at the depreciation regime of wind parks and at the specific rules that are to be applied. We will examine the VAT regime on sales of utilities, the rules of taxation of producers and owners of such facilities, and the existence of a tax system intended to encourage the investment of private individuals in this sector.
Yours ecologically■

Richard Foissac, Partner

Acquisition of a wind company: main aspects to be grasped

By JACQUES ISNARD, *Partner specialized in corporate law.*
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The acquisition of a company developing wind parks requires not only a good command of the usual legal rules that apply to acquisitions of the stock of any company, but also and above all sound knowledge, according to the development stage of the wind farms held by the target company, of a great many other aspects of the law such as public law, construction law, real estate law, energy law, commercial law, the law of contracts….

Analysing risks will improve valuation

Depending on the development stage of park projects, any lack of expertise in all of these areas would inevitably lead to a poor analysis of the risks at the stage of the project survey, consequently entailing a poor standard of valuation; this is the main reason why certain investors turn their backs on this type of investment, due to the fact that – should one lend an ear – "wind turbines are too complicated!" or alternatively should only be acquired once the core risks have been excluded, that being, in fact, once the planning permission has been issued, or even cleared of all legal action; nevertheless various other investors, in particular industrial investors "take the plunge". The development of a wind project includes several aspects. We set out below the main aspects:

- site control;
- feasibility and technical surveys (winds, environment…) ;
- planning permission ;
- electricity purchase agreement ;
- procurement of the turbines ;
- construction ;
- financing.

The assessment of risks and thus valuation will depend on the progress status of the wind farm project, the core element of which is the planning permission, including site control. Indeed, thorough analysis of the planning permission application is essential, as it is most likely in this regard that the major risk lies: the non issuing of the planning permission will entail the cancellation of the project or alternatively an amendment to the planning permission with, for instance, alterations to the number of turbines which will have an obvious and material effect on the profitability of the project; likewise, in view of the rise in the number of legal actions, it will be appropriate to have sound knowledge of the pleas which are usually put forward by opponents, in order to appraise planning permission applications in light of these judicial experiences. These preliminary analyses are all the more important that regarding certain aspects, such as planning permission applications, feasibility surveys…, warranties are generally not granted, and the investor will be obliged to take an industrial risk. Once the project has secured a planning permission which has been issued and cleared of all legal actions, or at least cleared of main legal actions, the management will be considerably less problematic than with any other type of company with, in fact, a single supplier, the God Aelous, and often just the one client, EDF for instance. In fact the only issues which remain, are related to maintenance on the turbines (or their construction) and to the acquisition, and therefore the valuation in this ultimate stage is a lost easier as the major part of the risks will have been cleared. As a consequence, depending on the development stage of a project, an acquisition in the field of wind energy requires multidisciplinary teams in the tax and legal fields, in addition of course to the technical aspects.

"Thorough analysis of the planning permission application is essential."

Financing

Traditionally, one will attempt to lodge liabilities within the closest vicinity of the asset so as to secure the debt with greater efficiency. Given that it is not possible for a target company to pledge its assets in order to secure the financing of the acquisition of its own stock, "bottom up" financing would seem to remain the only type conceivable in certain cases, in particular in the presence of existing indebtedness (bank or shareholder loan) which can then be refinanced. ■

Tax incentives for the development of renewable energy

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The income which comes from the production of electricity with a wind or photovoltaic source is considered, from a tax standpoint, as the product of an activity which is commercial by nature within the meaning of article 34 of the Tax Code and thus taxable under the category of commercial and industrial income, to the extent that the sale of energy is an act of commerce within the meaning of article L. 110-1 of the Commercial Code. This analysis will of course only have an effect with regard to private individuals or to partnerships which are not subject to corporate income tax and having, as their partners, private individuals, because undertakings subject to corporate income tax and developing such activities remain in any event subject to corporate income tax. The same analysis must be conducted, according to us, for the activity which consists, for the same private individuals or partnerships, of granting rentals over wind parks or over facilities which are equipped with photovoltaic cells, to operators, to the extent that, also constitutes a commercial activity, from a tax standpoint, the rental of movable property and thus of items of equipment as well as the rental of immovable property deemed equipped. In order to take into account the fact that the items of equipment in question and their operation are often located on agricultural land, the legislator has provided for a specific regime for farmers. Thus the revenue drawn from the production of electricity with a photovoltaic or wind source realized by an agricultural operator subject to a tax regime based on effective bookkeeping can be integrated into agricultural income if the amount thereof, marked up by any other ancillary revenue, does not exceed either 50 % of the revenue drawn from the agricultural activity, or 100,000 euros (device which is codified under article 75 A of the Tax Code). Other tax measures are intended to encourage the renewable energy sector. Thus, for several years now, expenditure which is likely to encourage energy savings and sustainable development, which are listed under article 200 quater of the Tax Code, give rise to a tax credit. This is a device intended for private individuals which has been amended on several occasions and the application period of which was extended until 2012 by article 109 of law 2008-1425 of 27 December 2008 which also amended the list of expenditure concerned. The expenditure in question is understood in particular to be expenditure on energy production equipment using a renewable energy source or heat pumps other than the air-air variety, and expenditure on equipment for the connection to a district heating system, powered essentially by renewable energy or by a cogeneration facility. However another measure would appear to carry significant weight in the development of renewable energy, that contemplated by the TEPA law (law in favour of work, employment and purchasing power) of 21 August 2007 which put into place a mechanism for the reduction of Wealth Tax in respect of investments in Small and Medium Sized Enterprises. This mechanism, codified under article 885-0 V bis of the Tax Code, grants a tax rebate with respect to Wealth Tax, subject to certain conditions, to tax payers who invest (directly or indirectly through the agency of holding companies) in SMEs or subscribe shares in mutual funds such as *fonds d'investissement de proximité* (FIP), *fonds communs de placement dans l'innovation* (FCPI) or *fonds communs de placement à risques* (FCPR). The tax rebate is in particular equal to 75 % of the amount of payments made in respect of the subscriptions, whether directly or indirectly, to the share capital of the SME, within the annual limit of 50,000 euros, and the benefit of the Wealth Tax rebate is reserved to contributions made at the time of incorporation or on the occasion of share capital increases of SMEs (as well as to subscriptions of equity interests in cooperative corporations) which satisfy the following criteria: which exercise exclusively an industrial, commercial, crafts, agricultural or independent professional activity; which correspond to the Community definition of the SME; which has its place of effective management in a Member State of the European Union, in Iceland or Norway; which is not listed on a French or foreign regulated market; finally, which is subject to profit based tax on standard terms. Such criteria can be easily satisfied by companies developing activities in the renewable energy sector. ■

"One measure would appear to carry significant weight in the development of renewable energy."

The slow revolution of electric transportation

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Whereas two Japanese automobile manufacturers have achieved a head start by marketing "hybrid" vehicles, ecological awareness, the automobile industry crisis and, in France, the "*Grenelle de l'environnement*" (French multi-party debate on the Environment), have sparked enthusiasm around the electric car, which should ultimately lead to a "revolution of mobility". The engines of the first vehicles were not all internal combustion engines: one might even recall that it was an electric car which, for the first time, in 1899, crossed the 100 kph barrier. In the interwar period, tramways, trolleybuses and electro buses were in service throughout major French urban areas, whilst a great many municipalities opted for electric dustcarts. However, slowly but surely, the low cost of petrol, the performance of the combustion engine and the expansion of the car as part of the consumer dream and as a mass product shut out the potential of electric vehicles. Has this model come to an end? The appeal for electric propulsion, at least in industrialized countries, hangs on the inescapable depletion of fossil fuel reserves, on the expansion of environmental preoccupations and on the crisis of the automobile industry on mature markets, which conveys in itself a different relationship towards the car ("speed is a thing of the past"; half of Parisians no longer own a car). The rebirth of the electric vehicle concerns both the rechargeable hybrid (vehicles with an internal combustion engine and an electric motor, the batteries of which are recharged on the electric network), which enables to ensure a more smooth transition, and the purely electric car, more ambitious, but which currently has a limited autonomy. Its development has indeed come up against several restricting factors.

"The engines of the first vehicles were not all internal combustion engines"

Technical restrictions: above all the experimental character and the low capacity of batteries, compared to those afforded by a "full" tank of petrol, which handicap electric heavy duty trucks and which confine purely electric vehicles to the urban environment; the need for specific facilities for battery recharging; road safety and safety during the recharging process. Economic restrictions, it is now documented that the cost of owning (purchasing, servicing, fuelling, replacing batteries) is under all circumstances higher than that of current internal combustion vehicles, and this is so even with much higher oil prices. In Europe and in particular in France, various legal restrictions: for instance the regime of regulated tariffs in the electricity sector, which is oblivious to "on the go modes of consumption", or condominium law, which imposes majority rules for the equipping of parking spaces, even when at the expense of the applicant, whereas users of electric vehicles will be a minority for quite some time to come. In the medium term, there is a sensitive question related to the density of public recharging terminals to be made available to users. In Europe, electricity is available in almost every building: the main part of the recharging process will be ensured there, which introduces a substantial difference of this

economic model in relation to that of internal combustion vehicles. But certain users (residing in collective buildings
without an equipped parking space or using in between recharging processes a vehicle beyond its battery autonomy) will require a self service access to the electric grid (in car parks, on the streets, on hypermarket parking spaces, etc.) ; and others may require this. Due to its cost, the dimensioning of this public infrastructure will most certainly be an extremely political choice. The challenges in the short term are threefold. First of all with respect to the modalities for the launching and development of an alternative economic model, in parallel with the internal combustion model which will only be phased out slowly: on account of the current lack of competitiveness, all things being equal, of electric vehicles, this sector will have to be heavily subsidised (especially if one is to install "fast" self-service charging points or battery swapping stations, which facilities are extremely expensive). From which stems the second challenge: the sharing out of the insourcing effort of environmental externalities, negative for internal combustion vehicles, positive for electric vehicles. Who will have to pay, in particular for the public charging infrastructure, and on what terms (public or private financing ? principle of polluter pays ? or solidarity? Deduction or tax on certain forms of mobility? Local or national public funds? Relationship with the carbon tax and the taxation of electricity?). The last challenge is related to norms, that can be but European, or international: behind the issues related to performance, reliability and safety, their choice, from battery cells to wall sockets, conceals various industrial challenges, encouraging or discouraging each of the numerous operators on this market. In France, the government has decided to stimulate the process via three initiatives. First of all, various experiences as the law stands, similarly to London, Berlin or Tokyo : one will associate Toyota with EDF, in the Strasbourg region and during a three year period, with rechargeable hybrids; a second will be conducted by EDF and Renault in the Yvelines county (near Paris), to test purely electric vehicles. Moreover, the government grouped, during the Spring of 2009, all interested parties into four task forces: economic models, normalization, experimentations, legal issues. Finally, a Franco-Germany coordination authority was set up (with the Italians, the main automobile manufacturers and the main electric companies in France and Germany). In all likelihood we are on the eve of a slow but profound change in our relationship to the private vehicle, which will lead at least to a triple transformation. First of all, the progressive phasing out of the multi-purpose vehicle (currently for short or long trips, for daily or exceptional use, for use alone or for more than one) : rechargeable hybrids, electric urban vehicles and internal combustion vehicles will undoubtedly coexist for quite some time, rechargeable hybrids and corporate fleets developing faster than purely electric vehicles and the mass market. The first vehicles should be available on the market in 2011 or 2012. Then, the dissociation of the components of the economic object which is the "vehicle" (one may for instance be the owner of the platform, but rent the battery, that may be able to be recharged alternatively from home, at the workplace or on a hypermarket parking space). Finally, the appearance of a new logic of electric mobility in the urban area: one will use successively a rented vehicle, public transport, self-service vehicles "Autolib"… without having to concern oneself with issues of servicing or parking, thus reducing *ipso facto* the space dedicated to this latter function. ■

"In all likelihood we are on the eve of a slow but profound change in our relationship to the private vehicle"

Application of the 5.5 % VAT rate to the acquisition of solar panels for housing

By PHILIPPE TOURNES, *Partner, specialized in VAT issues, and in particular with respect to real estate matters.*
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The works carried out in an accommodation unit benefit from the reduced VAT rate. However, the building must not be used for the exercise of an economic activity which is subject to VAT. In this regard, has arisen the question regarding the VAT rate applicable to the supply and installation of solar panels for a private individual when these panels are not used exclusively, or are not used at all, for the production of electricity in favour of the accommodation, as the major part or the totality of the energy is sold to EDF. The tax authorities drew the following distinction. If the electricity produced is entirely used up on a personal basis, the facilities installed are eligible to benefit from the reduced rate applicable to works in an accommodation which has been completed for more than two years. When all or part of the electricity is sold to EDF, as a forbearance, the tax authorities have indicated that it is assumed that there is no economic activity, and therefore no liability under the tax, to the extent that the installed capacity does not exceed 3 kWp (peak output of the solar roof, i.e. 30 sq m of solar roof) and thus, whatever the nature of the purchase agreement (in collective buildings, this threshold of 3 kWp is appraised as per accommodation unit). The acquisition and installation of panels therefore continues to benefit from the 5.5 % rate. The tax authorities also allow for the reduced rate to apply even when the panels are not installed on the roof of the accommodation but within the vicinity of the latter. On the other hand, as soon as this threshold of 3 kWp is exceeded, or when the producer/consumer decides to claim the benefit of his tax payer status:
– the purchase and installation works no longer fall within the scope of application of the reduced rate mechanism;
– there will be grounds to tax all energy produced at the standard rate, that is to say both deliveries occurring within the framework of purchase agreements by EDF and any levy of energy conducted by the individual who will become a producer/consumer in respect of his own consumption (self delivery mechanism).
In this case scenario, will the individual be able, in return, to recover the VAT borne at the rate of 19.6 % on the acquisition and the installation of the solar panels? To this end, he will have to identify himself at his local tax office to obtain the various VAT returns and collect revenues upwards of 80,000 euros per annum. Indeed, failing which he will come under the ambit of the exemption, which is a mechanism intended, on the one hand, to provide an exoneration from VAT in favour of tax payers who have an economic activity but which collect less than 80,000 euros in revenue (which thus prevents them from exercising their right to deduct), and on the other hand, to place them under the regime of micro-enterprises. In waiving the benefit of the exemption, the private individual will thus retrieve the possibility to recover VAT on these works. Finally, we would note that the administrative authorities do not allow, as regards facilities with a scope of more than 3 kWp and even if a detailed breakdown appears on the invoice, the installation works corresponding to the fraction which is inferior or equal to 3 kWp to be subject to the reduced rate (only the works corresponding to the fraction which exceeds a capacity of 3 kWp would have been invoiced at the standard rate).■

Aspects of the financing process of wind parks

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Financing facilities for wind parks generally require a great many covenants on the part of the project companies or their shareholders in favour of the lenders. This situation can be explained by the fact that the projects concerned require substantial leverage ratios, placing bankers under the obligation to monitor with particular care the setting up and management of wind parks. Among these covenants and without purporting to be comprehensive, one can quote those of a financial nature:

"Financing facilities for wind parks generally require a great many financial covenants (…) very often coupled with various legal warranties."

– various covenants to make equity contributions (including additional ones when this reveals to be necessary during the project), whether in the form of share capital or of a bond issue – the repayment of the latter being necessarily coterminous with the bank debt and subordinated in relation to the lender's debt;
– strict control over or the requirement of the shareholding – or even of the bondholding - structure to be maintained in relation to the project companies by the lenders;
– compliance with a debt service ratio securing in favour of the lenders a satisfactory cash flow situation in relation to debt servicing;
– the implementation of reserve accounts (debt service reserve account, maintenance reserve account, reserve account for dismantling) for each project company;
– a lock-up on dividends ;
– a pooling of cash assets when the financing facility is granted to several project companies – the implementation thereof can for that matter reveal to be intricate due to restrictions on banking monopolies. These financial covenants are very often coupled with legal warranties that project companies or their shareholders/bondholders grant lenders in an exclusive respect:
– a collateral over the wind turbines, with the obligation to maintain the latter in good working order – the project companies can be induced to manage together the stocks of wind producing equipment necessary to its maintenance via joint ownership agreements;
– *Dailly* assignments, as security for all existing and future receivables of the project companies – with the necessity to identify to the fullest extent possible any future receivables which already exist in embryo (insurance, supplier warranty, maintenance, electricity purchase agreement, grid connection obligation, civil engineering, rate hedging) ;
– the pledging of the share account of each project company (whatever the nature of the shares) ;
– the pledging of the business undertaking of each project company;
– the pledging of the balance on the bank accounts of the project companies;
– a mortgage security over emphyteutic leases (*baux emphytéotiques*) entered into by the project companies;
– in certain cases, the reference shareholders standing surety.

The establishment of the legal documentation pertaining to these legal warranties can be a lengthy and tedious process, to the extent where such will be established for each project company. Above all, such will be the subject of negotiations regarding the scope of the *pacte commissoire*, which will enable the lenders to organise contractually the transfer of title to the pledged property in the event of the debtor's default. Finally, this legal documentation will imply on the part of the managers of the project, the existence of a structure which will be able to ensure the compliance of the numerous obligations which result from the various warranties, whether these result from the loan covenants or more specifically from the legal warranties mentioned above.■

The regime of new energy production facilities having regard to local taxes

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The production of renewable energy generally involves significant investments, which require that the tax qualification thereof be determined and that their mode of valuation be handled as best possible in view of controlling the tax expense that they generate, and thus on the eve of the reform on business tax. With respect to real estate tax on property, the installation of a wind park requires the construction of facilities which are assimilable to property subject to real estate tax on developed property. Generally speaking, the concrete plates on which the masts of the wind turbines are anchored will be included in this category. On the other hand, the land, other than that part which is used directly as a base, will remain taxable under real estate tax on non-developed property. Taxation will be based on a rental value determined generally according to the method which is specific to industrial use buildings, having regard to the means implemented for the production of electricity. This method consists of withholding 8 % on the cost price of the constituent parts of said construction. In addition, in certain cases, the question can arise as to the property valuation of other adjoining facilities such as the creation of roadways or of buildings which house various items of equipment. As for photovoltaic facilities, article 1382-12° of the Tax Code exempts fixed assets intended for the production of energy with a photovoltaic source, from real estate tax on developed property. This exemption, however, only concerns the material and equipment which produce the energy, that being in the case at hand, the solar panels, but which form a corpus with the buildings on which they are installed. If the latter are placed on buildings which are used for a rural operation, the exemption specific to these buildings will not be called into question. In the event of installation of ground-based panels, the land and its developed appurtenances will come under real estate tax on developed property. As concerns business tax, wind parks and photovoltaic facilities, come under the ambit of facilities producing electrical energy as referred to in article 1478 III of the Tax Code, making them taxable right from their month of connection to the grid. As for wind turbines, the turbines *per se* as well as the masts of the wind turbines are generally taxable under the category of equipment and movable assets (EBM). In application of the provisions of articles 1469-2° of the Tax Code (exemption for the lines and ducts located outside the establishment), these cables benefit for the major part from this device and are therefore not taxable. In addition, these types of facilities will benefit from a reduction of the taxable value in accordance with the mechanism contemplated in article 1518 A of the Tax Code. It should be noted, finally, that the announced withdrawal of the fraction of EBMs from the taxable base of business tax will not be likely to lead to a full exemption of wind and photovoltaic facilities. Indeed, the new economic contribution for local authorities *cotisation économique territoriale* (CET) should be composed of a local activity contribution *cotisation locale d'activité* (CLA), contemplating the maintaining of taxation on property rental value and an additional contribution *cotisation complémentaire* (CC) based on added value. One can only hope that the draft reform which was recently published includes an error, as currently, it would seem that photovoltaic facilities have been retained within the taxable base under the CLA. ■

Taxing income of wind producing entities: various opportunities in terms of depreciation

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Wind facilities do not benefit, as such, from any specific beneficial systems in terms of income taxation. On the other hand, their assets are liable to be eligible under various depreciation systems, some of which are incentive based. First of all, similarly to photovoltaic facilities, wind facilities naturally come within the ambit of the exceptional depreciation mechanism open to materials which are designed to save energy and to equipment which produces renewable energy, codified under article 39 AB of the Tax Code, and which was renewed at the end of 2008 for assets acquired or manufactured prior to 1st January 2011. This mechanism consists of an exceptional tax depreciation according to the straight line method applied over a 12 month period and to the materials and equipment appearing on a list drawn up by a ministerial bylaw (codified under article 02 of annex IV of the Tax Code). The following are in particular mentioned on this list, if they are combined with other materials, provided that they can be separated from such without being made definitively unusable (and that they may therefore be depreciated autonomously):

– materials for the capture and use of energy sources other than hydrocarbon oil or gas, solid mineral fuel and electricity;

– the material enabling the use of hydraulic, wind based or geothermal energy, its storage and its connection to the electric grid or to a district heating system.

The exceptional depreciation will be calculated on a pro rata basis as from the date at which the materials concerned are put into service. This will have to be recognised in the accounts: the additional share (in comparison to the depreciation for wear and tear calculated over the normal period of use) will be entered as a liability in a regulated reserve account for excess tax depreciation over normal depreciation, heading which is included in equity capital. This “reserve” will be added back as from the second year, progressively as depreciations for wear and tear calculated over the normal period of use are booked, of which it thus neutralizes the deduction from the net and tax income or loss. This exceptional depreciation is thus liable to generate substantial start-up losses and to burden, in the short and medium term, the distributional capacity of the entity operating the wind facility.

Alternatively, in order to mitigate this impact whilst retaining a tax benefit in terms of accelerated depreciations, another option may be favoured, that of the reducing depreciation method, which will enable to anticipate the deduction of the depreciation of fixed assets less massively than the exceptional depreciation. The reducing depreciation deduction, obtained by multiplying the straight line depreciation by an appropriate coefficient depending on the depreciation period, benefited from a reinforcement of its incentive character for assets acquired or manufactured between 4 December

2008 and 31 December 2009, via an increase of the applicable coefficients.

The reducing depreciation mechanism applies to assets which are acquired new or manufactured by an enterprise having a normal period of use of at least three years falling within certain categories, among which are included in particular the materials and tools used for industrial manufacturing or transformation processes and energy producing facilities. However, the scope of the reducing depreciation deduction excludes in principle immovable items (save the specific case of industrial buildings, the period of use of which does not exceed 15 years), and likewise for the cables and networks for the transportation of the electrical energy produced. More globally, it is defined less precisely than that of exceptional depreciations, which can give rise to uncertainties regarding its application to certain components of the wind facilities. Secondly, an entity operating a wind facility is obligated to book in its assets, in addition to the tangible assets of the facility *per se*, an asset representing the cost of future dismantling of the facility. The provisions of article L. 553-3 of the Environmental Code contemplate indeed an obligation to dismantle and to reinstate the site, at the expense of wind turbine operators. This legal obligation entails the requirement to record a reserve, on the liabilities side, for an amount encompassing the totality of the estimated cost of the dismantling, of the removal of the facilities and of the reinstatement of the site. As due consideration for this reserve, lies the constitution of a depreciable asset for an equivalent amount, booked as an addition to the cost price of the tangible fixed asset or assets concerned. Therefore, what is concerned is an asset which will increase the entry cost of the main fixed asset, and not a component of the fixed asset. During the period of use of the facility concerned, the enterprise must depreciate this contra-asset. From an accounting standpoint, article 321-10 of the National Accounting Code provides expressly that the dismantling cost included in the acquisition costs of the fixed asset is to be the subject of a specific asset depreciation plan, both as regards the period (which must be matched with the operating period or the producing period of the asset) and as regards the method, which must be the straight line method. From a tax standpoint, the terms of depreciation contemplated in the first subparagraph of article 39 ter C of the Tax Code are compliant with accounting recommendations. It is important to underline that the depreciation period referred to in this article is not a reference to the period of use contemplated in article 39, 1-2° of the Tax Code, and that only a depreciation according to the straight line method must be practiced, including in the event where the underlying tangible fixed asset could benefit from a reducing depreciation or from an exceptional depreciation regime. The appraisal of the operating period of wind facilities, purely prospective to date, thus represents without doubt a stake to be reckoned with. As a conclusion, an entity operating a wind facility will benefit, in matters related to the taxation of income, from accelerated or anticipatory deduction capacities with regard to the investments or costs inherent in these facilities. These benefits are not definitive, but can represent appreciable opportunities in terms of management of tax income/loss and of cash flow. These accelerated deductions are however likely to generate significant start-up losses and their implementation must therefore be considered having regard to the constraints and objectives of their partners, both from a tax, accounting and financial perspective.■

"Wind facilities can benefit from accelerated tax deductions, the accounting and financial impact of which will need to be appraised with care"

Photovoltaic plants: legal status and site control

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The expansion of photovoltaic electricity production will require the development of plants, the scale of which poses the problem of their legal status; the institutions financing these projects are keen to hold effective real securities, or *in rem* rights (financial lease or *crédit-bail*). Case law, rendered in construction matters (removable greenhouses, construction based on a framework of metallic girders)[1,2], reveals that qualification as an "immovable by nature" is independent from whether the construction is temporary or not, from whether or not it is removable or transportable. Only the degree of incorporation into the ground thereof is decisive: the facility must not merely be placed on the ground and be maintained there simply due to its own weight, an effective anchoring or foundation system is required. To this extent, concerning ground-based photovoltaic panels, their anchorage must be sufficiently elaborate in order to confer status as an immovable by nature. Of course, movable property assigned to the service and operation of an estate may be considered as "immobilised" as a result of its intended use[3] but this will only be if the facility is developed by the owner of the land or of the immovable. When these panels are not installed by the owner of the land, the question arises as to the legal title, which is necessary or adequate, in order to enable this installation and above all to confer *in rem* rights. If the developer of these facilities wishes to revert to a mortgage, or to involve a financial lessor, in both cases it will be necessary to hold a temporary *in rem* property right and thus to benefit from an emphyteutic lease (Article L. 451-1 of the Rural Code) or from a building lease (Article L. 251-1 of the Housing and Construction Code). Emphyteutic leases, for a term comprised between more than 18 and 99 years, vest their holders with extremely broad prerogatives: free execution of construction and demolition works, effective possibility to build, free choice of intended use, right to freely assign and to mortgage. Building leases on the other hand can restrict the lessee's freedom to build, but can also restrict intended use. But above all article L. 251-1 of the Housing and Construction Code implies that "the building lessee covenants, in a principal respect, to develop constructions". Of course, the text does not define the notion of development; the installation of photovoltaic panels can not be qualified, to any degree of certainty, as the "development of a construction" and thus be carried out within the framework of a building lease. Finally, let us recall that in the absence of mortgage financing or of a financial lease or if the lessor intends to monitor closely the intended use of the site, a lease transfer, a standard long term lease, which do not vest *in rem* rights, is also conceivable. Such may provide for the deferment of the accession of a property right over the facilities until the end of the lease, but also the possibility to impose on the lessee the reinstatement of the site. Entered into for a term upwards of 12 years, such leases must be executed by notarised deed in order to be published on the land tenure records and thus to be made enforceable against any subsequent owner of the site.■

"If the project owner of a photovoltaic plant reverts to a mortgage facility, he will be able to obtain an in rem property right, in particular via the conclusion of an emphyteutic lease over the facility site"

1. Cour de cassation, Commercial chamber, 10 June 1974, Bull. IV. No. 183), Commercial Chamber, 1st February 1984 ;Bull. civ. IV no.53 ; RTD civ. 1985.738, observations, Giverdon et Salvage-Gerest
2. Court of Appeals of Aix-en-Provence, 3 May 2005, N. v. SA Financo-Sofemo : Juris-Data no.2005-277696 ; Contrats, conc. Consom. 2005, comments 211, observations, G. Raymond
3. Article 524 of the Civil Code "….those objects that the owner of an estate has placed there to service and to operate this estate are immovable as a result of their intended use."

Display of planning permission and wind turbines: guidelines to the new wording of article A. 424-18 of the Planning Code

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Wind parks are often established, due to their very nature, in the heart of rural land, which is generally cut off from any public roadways. The issue related to the display of planning permission is central for beneficiaries who are concerned at making sure that the time limit on third party actions runs, so as to confer a final character on said planning permission. Before the reform on planning authorisations, the former wording of article A. 421-7 of the Planning Code provided that the items of information appearing on the display panel had to remain "legible from a public roadway". However, the service lanes bordering a great many projects not being public roadways, the display along such lanes was not susceptible to trigger the time limit on third party actions. To anticipate this difficulty, beneficiaries of such planning permissions had the habit of fixing a "summary" panel by the side of the public roadways leading up to the lanes and passageways, which did not qualify as "public roadways", and around the plots of land on which the wind turbines were established. Case law validated this practice, specific to wind turbine projects[1]. Since then the new wording of article A. 424-18 of the Planning Code[2] amended certain conditions of display and now specifies that the "display panel must be installed so that the items of information that it contains remain legible from the public roadway or from areas open to the public throughout the whole duration of the building site". Is a service lane liable to qualify as an "area open to the public? Article L. 162-1 of the Rural Code defines such lanes as private roads which can be closed off to the public; *a contrario*, they can remain open to the public. Therefore, display from a service lane which is not closed off to the public, and which due to this fact offers free access to the display panels would seem compliant with the wording of the text. However, the difficulty related to effective information of third parties, which is the very objective of the requirement to display planning permissions, can not be overlooked. Indeed, and even where service lanes should not be physically closed off to the public, they are not, by definition, "pass by" areas. Contrarily to rural lanes, they are deemed to be used only by the farmers working the plots of land which border them, to the exclusion of members of the public, which in this regard, would have no natural purpose for wandering along such lanes. In addition, service lanes which are not closed off to the public are physically extremely diversified, some may be muddy, others covered with long grass for instance, which makes the assessment of whether or not such are open to the public, intricate, or even wrong from a legal point of view. To this extent, only a concrete assessment on site will enable to assess whether the display of a planning permission on a service lane enables the time limit on third party legal action to start running. Before various clarifications are provided by the administrative courts, beneficiaries of planning permissions to build wind turbines would be well advised to reasonably continue applying the cautious practice of installing "summary" panels along the public roadways which lead themselves up to the service lanes running along the land base of wind parks.■

1. Conseil d'Etat, 23 February 2004, Sté Juwi Énergie éolienne et al, Application no. 262430.
2. Applicable as from 1st October 2007.

Can a bylaw granting planning permission to build a wind turbine prohibit works during the nesting period?

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Mayors or prefects are entitled to issue planning permission including various specific prescriptions which are binding on the builder(1) ; these can be related, as the case may be, to the dimension, to the situation or to the intended use of the construction (such as the aspect of a construction, its volume, its fittings) ; they can also, for illustrative purposes, take the form of compensatory measures, such as the development of an area intended to receive protected organic greenery, the creation of water holes for fauna, or measures intended to make good any noise annoyance that has been identified. Article R. 111-15 of the Planning Code, as resulting from order no. 2007-18 of 5 January 2007, provides thus that "planning permission or the decision enacted on the basis of a prior declaration must respect the environmental preoccupations defined under articles L. 110-1 and L. 110-2 of the Environmental Code. The project may be accepted only on the condition of the observance of specific prescriptions if, due to its significance, its situation or its intended use, it is likely to have consequences which are harmful to the environment". This article stands as an instrument for the prevention of nuisance and the protection of the natural environment. On the grounds of this provision, certain bylaws granting planning permission to build wind turbines are today coupled with prescriptions prohibiting the execution of works during a period of several months corresponding to the bird nesting period such as defined by a prefectural bylaw. The issue as to the validity of such a prescription has not yet been settled by the courts(2). The question however remains all the more acute that the Planning Code and case law seem, at first sight, only to allow those prescriptions which are aimed at countering the harmful consequences of the constructions on the environment, and not of the terms of execution of the works. However, in the presence of such a prescription, it is not the constructions which are at stake ; it is the works themselves, on account of the noise and movement that they involve, which are susceptible to disrupt bird reproduction. The Planning Code3 lays down a general objective to protect animal species the function of which is, *a priori*, to govern the entire field of planning law. In addition, quite obviously, courts tend to be more eager in dealing with issues related to environmental preoccupations. Therefore, in a recent ruling4, the Administrative court of appeals of Bordeaux applied itself to examining whether construction works on wind turbines could have an impact on the environment or not (dismissing this plea in view of the exhibits of the brief). It is too early on to say whether this decision will be followed by other cases. Nevertheless, it is obvious that the latter is in line with a trend of profound evolution of planning law, embodied by the "*Grenelle de l'environnement*" (French multi-party debate on the Environment). It should be recalled in this regard that certain legal authors agree to consider that there is a ecological public order, and that the national planning regulations, which are intended to protect public order, as construed traditionally, could according to this conception, have in the future, the function of protecting the environment. ■

1. Articles R. 111-1 to R. 111-24-2 of the planning Code
2. In the absence of any cases being referred to them.
3. Articles L 110-1 and L. 110-2 of the planning Code
4. 17 February 2009

A framework for ground-based photovoltaic plants is scheduled

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An order, the function of which is in particular to define a framework for the installation of ground-based photovoltaic plants, should be published shortly. Indeed, let us recall that the installation of ground-based solar panels is not to date subject, legally, save exception (1), to any formality having regard to planning law (whether to a planning permission, an impact survey or yet still to a public enquiry). This situation, encountered several years ago at the time of the installation of the first wind turbines, is perceived by project developers, financiers and investors, as a source of uncertainty. This text should enable them to benefit from explicit legal footing, which will contribute, in a slightly paradoxical manner, to the development of this type of project. This draft text contemplates classifying photovoltaic plants into three categories:

– facilities with a peak output inferior to 36 kWp and a height inferior to 1.80 metres should not be subject to any formality (neither planning authorisation, nor impact survey, nor public enquiry) ;
– facilities with a peak output inferior to 36 kWp but with a height superior to 1.80 metres as well as facilities, the peak output of which is comprised between 36 kWp and 250 kWp would be subject to a prior declaration;
– facilities with a peak output superior to 250 kWp (without any condition related to height) should be subject both to planning permission, an impact survey and a public enquiry.■

1. And save in the event of facilities accompanying such a plant and which, alone; satisfy the criteria whereby a planning permission is required.

NEWS

Wealth tax: some useful clarifications regarding the notion of exempted property

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It is well established that debts entered into by a Wealth Tax payer are deductible from his taxable estate, with the exception of those pertaining to exempted property (Article 769 of the Tax Code). In a ruling dated 31 March 2009 (no.08-14645), the *Cour de cassation* qualified the notion of exempted property in the presence of a subdivided asset, bearing in mind that such an asset is, as a matter of principle, taxable at the level only of the usufructuary, for its value as undivided property (Article 885 G of the Tax Code). In the case at hand, a tax payer had deducted from his Wealth Tax a loan entered into to finance the purchase of the bare title of a building. The usufruct of the property being held by a party who was not taxable under Wealth Tax (i.e. a legal person), a liability was thus deducted whereas the corresponding asset was not taxed. The administrative authorities took a view on this and dismissed this deduction on the grounds that the bare title of the property concerned constituted at the level of the bare title holder an exempted asset. The Supreme Court did not follow the tax authorities and confirmed the deductible character of the debt at the level of the bare title holder. It considered in doing so that the rule defining the usufructuary as the Wealth Tax payer for the value thereof as undivided property did not constitute in any way a rule entailing the exemption of property affected by a usufruct at the level of the bare title holder. The non taxation of the usufructuary in the case at hand (private estate inferior to the threshold of taxation) did not alter the rationale behind this solution. This solution is likely to be of interest to investors who can, save unreasonable exercise, subdivide the title of a property in favour of a non liable party, whilst retaining their right to deduct the corresponding liability. Be careful however, its scope can not be extended to debts pertaining to professional property, which are not taken into account for the taxable base of Wealth Tax (Article 885 A of the Tax Code). Indeed, the non taxation under Wealth Tax of professional property is not dependant on the situation of the liable party but on the very nature of the property concerned. A ruling of 7 April 2009 (Commercial Chamber of the *Cour de cassation* no.08-16008) confirmed that bank overdrafts having financed professional assets are not deductible from Wealth Tax.■

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