

Relevant practical aspects of setting up superficies rights for wind farms

by Andrada Haranguş, LL.M. Avocat (Attorney at law RO)

The construction of a wind farm in Romania first requires the securing of the land necessary for this purpose.

While the classic approach in this respect is to buy the land in question, in the case of wind farms many investors prefer to secure the land by setting up so-called superficies rights (*drepturi de superficie*).

The superficies right enables its beneficiary to erect his own construction on another person's land. This actually leads to the separation of the ownership of the land from that of the construction.

There are important practical aspects and challenges to be considered when drafting superficies agreements.

Flexibility in planning required

In order to verify the feasibility of a wind farm, the investor must obtain, on the one hand, the grid connection consent (*aviz tehnic de racordare*, "**ATR**") and, on the other hand, the building permit (*autorizatia de construire*). However, this requires securing the land on which the wind turbines ("**WTs**") and their accessories (substation, parking spaces, stations, access roads, cables) are to be erected.

The land is thus secured in the initial phase of the project, in which the exact configuration of the wind farm (i.e. the exact number and location of wind turbines along with accessories) has not yet been finally determined.

In the permitting process it often happens that this configuration has to be changed, e.g. because the ATR does not cover the entire installed capacity applied for and the number of wind turbines (WTs) has to therefore be reduced, or the location of certain WTs is not approved, so that they have to be relocated on other plots of land.

Considering the above, superficies agreements must be drawn up in such a way that they secure extensive rights for the beneficiary, but also the necessary flexibility, such as the right to subsequently determine the exact part of the secured land on which the components of the WTs are to be erected, or the option to withdraw from the superficies agreement if the wind farm is not approved.

Pricing, notary and Land Book fees

The exact configuration of the wind farm will be finally determined by the building permit. It is only at this point that it becomes clear whether or not its components will be erected on the land secured by superficies rights.

For this reason, most investors agree on different prices for the superficies rights: on the one hand, a lump-sum price is usually agreed for the period between the conclusion of the contract and the issuance of the building permit (or until the start of construction works or even commissioning) and, on the other hand, a (significantly higher) price is convened upon for the period from issuance of the building permit/ start of construction/ commissioning until the expiry of the contract term. Such pricing makes perfect sense, as the wind farm's chances of success are gradually increased as the building permit is obtained, construction begins and the wind farm is commissioned.

However, this flexible pricing also presents practical challenges, as the fees for the notarization of the superficies contract as well as those for the Land Book registration of the superficies right and the taxes payable by the owner on the income derived from the superficies contract must be calculated on the basis of the contract value over its entire term and paid in advance when the contract is notarized. Since the exact contract value depends on numerous variables (number of WTs to be erected on the site, time of issuance of building permit/ start of construction/ commissioning), it often happens in practice that the above-mentioned costs are calculated and paid based on a contract value estimated (very generously) by the notary public. This is particularly disadvantageous for the investor, especially since it may also happen that the superficies agreement is subject to an early termination.

A skillful and flexible drafting of the superficies contract enables the calculation and payment of the above-mentioned costs at the conclusion of the contract only for its first phase, while the costs related to the second phase of the agreement are calculated and paid only after this phase is actually reached. However, such a solution requires coordination with notaries and Land Book offices.

Conclusion

Securing the necessary land for the realization of a wind farm by means of superficies rights provides the investor with the necessary flexibility for the (often necessary) redesign of the wind farm in the context of the permitting procedure, but requires careful and flexible regulation in the superficies contracts in order to provide the investor with the necessary rights and adaptability and to keep the costs in a reasonable proportion to the contract value and the risk allocation.

Contact and further information:



STALFORT Legal. Tax. Audit.
Bucharest – Bistrița – Sibiu

Office Bucharest:

T.: +40 – 21 – 301 03 53

F: +40 – 21 – 315 78 36

M: bukarest@stalfort.ro

www.stalfort.ro