

Financing of renewable energies: a false start for citizens' investment?

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A fact that has already been established for several years is unrelenting: whereas renewable energies have never been as popular among the French¹ and although the government has declared ambitious targets for 2030, the large majority of projects concerning electricity or biogas production systems using renewable energy sources ("RE projects") are challenged in court, thus extending their implementation periods, and the courts are presently occupied with increasingly complex litigation concerning illegal involvement, of which certain elected municipal representatives, who are also property owners, would have rendered themselves guilty by voting for decisions favouring an RE project.

It is this problem regarding local acceptance of the RE projects that public authorities wish to tackle – both by encouraging an environmental dialogue and by involving the local population financially in the organisation and life of the projects.

Article 111 of law no. 2015-992 dated 17 August 2015 "*concerning the energy transition in favour of green growth*" ("TECV Act") subscribes clearly to this path of bringing the public closer to RE projects through the creation in the Energy Code of an article L. 314-27. Under the terms of this article, joint-stock companies and cooperatives, formed to carry a "*project for the production of renewable energies*", "*can, at the time of their formation or when evolving their capital, offer part thereof to natural persons, in particular to the residents living close to the site of the project as well as to the local authorities and to their groups in the area in which the project is located. They can also offer these same persons financial participation in the project for the production of renewable energy.*"

¹ According to a survey conducted by OpinionWay on 7 and 8 January 2015 on behalf of the professional organisation Qualit'EnR, 89% of the French population consider it necessary to support the use of renewable energies in the production of heat and electricity

Under the new article L. 314-27 III of the Energy Code (*"Code de l'Energie"*), project carriers have the possibility of making their offers of participation or financing *"directly"* to the residents and local authorities, or of choosing funds or specialist intermediaries (social entrepreneurship funds, funds specialising in investment in renewable energies, companies whose purpose is the development of renewable energies and who enjoy the status as *"social enterprise for common benefit"* (*"entreprise solidaire d'utilité sociale"*), providers of investment services, participatory investment advisors and participatory investment intermediaries).

Implementation of these provisions is conditional on the publication of a decree submitted to the *"Conseil d'Etat"* (French highest administrative jurisdiction) which must define *"the amounts of the offers, the nominal value of securities, the categories of securities and the categories of investors"*, for which the offers of participation in the capital or in the financing will not constitute a *"public offer of financial securities"* (previously *"public offering"*) as defined in article L. 411-1 of the Monetary and Financial Code (*"Code monétaire et financier"*).

The problem faced by the government is to create an innovative framework taking account of the specific aspects of projects in the field of renewable energies, by derogation from the provisions of the Monetary and Financial Code, while nevertheless complying with those of the Community Directive 2003/71 dated 4 November 2003 as amended, applicable to public offerings of securities², known as the *"Prospectus"* Directive, thus protecting the interests of the investors³.

The first draft text currently under discussion incorporates precisely the criteria laid down by the Monetary and Financial Code and the General Regulations of the *"Autorité des Marchés Financiers"* (French financial markets regulator) (articles L. 411-2 of the Monetary and Financial Code and L. 211-2 of the General Regulations of the AMF), in order to exclude certain offers made directly by the project carriers from the regulatory framework of public offerings of securities. Consequently, the following offers are exempt from the regulations of the Monetary and Financial Code concerning public offerings of securities:

- (i) Offers whose total amount is less than 100,000 euros
- (ii) Offers whose total amount is between 100,000 and 5,000,000 euros and that comprise financial securities representing not more than 50% of the issuer's capital
- (iii) Offers aimed at investors acquiring these financial securities for a total amount acquired per investor and via an individual offer in excess of 100,000 euros
- (iv) Offers aimed exclusively at qualified investors (as defined in article L. 411-2 of the Monetary and Financial Code)
- (v) Offers aimed exclusively at a restricted group of investors whose number is fixed at less than 150, subject to these investors acting for own account.

² Directive 2003/71 dated 4 November 2003 *"concerning the prospectus to be published when making public offers for securities or when admitting securities for trading, and in amendment of Directive 2001/34/EC"*.

³ See for example the *"Prokon"* case in Germany.

The thresholds of the Monetary and Financial Code, referred to in points (i) and (ii) above, could evolve under the effect of the next Community Regulation which must replace the “*Prospectus*” Directive. This is currently under negotiation and envisages raising the threshold from 100,000 euros to 500,000 euros, and makes it possible for offers with a total amount not exceeding 10,000,000 euros over twelve months to be exempt from the obligation to issue a prospectus.

The offers can emanate either from joint-stock companies or from cooperatives, a company form created by Law no. 47-1775 dated 10 September 1947 “*concerning the statute for cooperative companies*”, in which any person performing an activity for the benefit of the company can, as compensation, acquire a share in the company and benefit from a voting right. It should be noted that, as regards simplified joint-stock companies that are the traditional vehicle of RE projects, article L. 227-2 of the Commercial Code stipulates that they can only offer their securities to the public in the cases quoted in points (iii), (iv) and (v) above.

With regard to the modalities of participation in RE projects, citizens can be involved either in the constitution of the share capital of the “*project company*” or via an “*evolution*” of this capital, i.e. essentially an increase in capital.

Even if the related legal mechanisms are well known, it is interesting to note that, regarding offer, the lawmaker appears to have remained deliberately vague as regards the form of participation or investment, thus opening up almost infinite perspectives for the carriers of projects (loans, donations...).

In addition, neither the law nor the initial draft decree provides any specification as regards the form in which the carriers of RE projects can specifically approach the residents and local authorities, thus leaving the RE players considerable flexibility, subject to the reserve of specifications that could be added later.

Regarding the addressees of participation or financing offers, it should be noted that article L. 314-27 of the Energy Code stipulates that the carrier of projects can approach natural persons, “*in particular the residents living close to the site of the project*”. Thus, on the one hand the text does not exclude the possibility of natural persons, not living close to the projects, also subscribing to an offer of participation in the capital or to an offer of financing; on the other hand, neither the law nor the draft decree provides a definition of the “*residents living close to the project site*”.

In conclusion, even if initiatives, characterised to a major extent by an ambition towards the citizens and using the traditional project financing tools, have already flourished in recent years, they have been very restricted, in particular by the rules on the public offering of financial securities which oblige the project carrier to create, and if applicable to have approved by the AMF, a – frequently complex - financial information prospectus, a constraint that constitutes a source of risk and costs for players who are frequently of a relatively modest size.

The first draft decree, envisaged in the 3rd paragraph of Number III of article L. 314-27 of the Energy Code, does not appear to release project carriers from the obligation to comply with this framework, while the government claims to wish to promote the “citizen” component of RE projects. Thus, the terms of reference for future tenders concerning open-space photovoltaic installations will provide for a “bonus” for candidates choosing participatory financing.

The introduction of adjustments would therefore be desirable.

Certain questions also remain unanswered:

- Does the project carrier have any flexibility as regards determining the “persons” it wishes to address, and could it be reproached for any limiting of the group of addressees of the offer?
- The government has not reformed articles 199 terdecies-0 A and 885-0 V bis of the General Tax Code which prohibit any tax deduction, either in terms of income tax or wealth tax, by holders of company shares *“performing an activity generating revenue guaranteed through the existence of a regulated production-repurchase tariff”*, a fact that appears regrettable as regards wind-farm projects that would be the subject of participation or financing offers aimed at citizens. Furthermore, one can wonder about the deductibility of the amount of the investments made by citizens in electricity production installations covered by the mechanism of supplementary remuneration. This is designed to replace the feed-in tariff mechanism for almost all electricity production installations based on renewable energy sources, other than, for the moment and as per the announcements made by the Minister for the Environment, Energy and Seas, wind power.