

## Implementation of the “tertiary decree”: at last, something concrete!



**Sébastien CANTON**

Partner, Avocat au Barreau de Paris

Carrying on from decree no. 2019-771 of 23 July 2019 “relating to obligations to take action to reduce energy consumption in buildings for tertiary use” (known as the “tertiary decree”), a recently published order should make it possible for the parties concerned to obtain concrete data to implement their final energy consumption reduction targets. Here is a brief reminder of the applicable framework and the obligations that operators will soon have to fulfil.

It would be an understatement to say that the order of 24 November 2020 *“amending the order of 10 April 2020 relating to obligations to take action to reduce final energy consumption in buildings for tertiary use”*, published in the Official Journal of the French Republic on 17 January 2021, marks an essential step for all operators to which the “famous” “*tertiary decree*” applies.

As a reminder, Article L. 111-10-3 of the French Construction and Housing Code lays down the obligation to implement, within tertiary buildings and tertiary parts of “mixed-use” building complexes, measures that aim to reduce the final energy consumption by 40% in 2030, 50% in 2040, and 60% in 2050, with respect to the final energy consumption of the building(s) in question during a so-called “*reference*” year, which cannot be earlier than 2010. Alternatively, the operators concerned may decide to submit to “*absolute-value*” reduction targets set by means of orders and calculated on the basis of the final energy consumption of new buildings of the same category.

This obligation applies to buildings or parts of buildings where “tertiary” activities – a category defined in the order of 24 November 2020 by contrasting it with primary and secondary activities – are carried out, as long as the floor area of these buildings is greater than or equal to 1,000 m<sup>2</sup>. It thus applies, in particular, to logistics warehouses, office buildings, public authority buildings, health establishments, and shops.

Moreover, under the terms of Article L. 111-10-3 of the French Construction and Housing Code, the targets may be modulated after taking into account, for example, technical or architectural constraints, or *“clearly disproportionate costs of actions with respect to their expected benefits in terms of final energy consumption”*.

Following the order of 10 April 2020, the order of 24 November 2020 exhibits the feature of defining the reduction targets for final energy consumption *“in terms of absolute values”* for several categories of activity, thus enabling operators to move on to the concrete phase of taking reduction-oriented actions.

In a nutshell, the maximum final energy consumption target is expressed in kWh/year/m<sup>2</sup>, and is the sum of two “energy use” components:

- The component of the *“energy consumption related to the general thermal environment and the ventilation of premises”* (“HVAC”), which mainly depends on the climatic zone and the altitude of the building or part of the building concerned;
- The component of the *“energy consumption related to uses of energy that are specific to the activity, as well as to other property-related purposes, such as the production of domestic hot water and lighting”* (“SEC”).

In concrete terms, the implementation of the *“tertiary decree”* is primarily based on an obligation to report assigned to the operators concerned, whether lessors or tenants.

It will be in the interest of the latter to define, in the lease contract or by means of an amendment to it, the specific person or persons responsible for these declarations, with it being specified that the

“tertiary decree” (provisions codified in Articles R. 131-41 and R. 131-41-1 of the French Construction and Housing Code) refers to the “lessor and, where applicable, the lessee” as the authors of the declaration, and encourages them to adjust their contractual relationship regarding this matter, while also giving them the option of delegating this responsibility to a third party, such as the energy distribution network operator.

The content of this declaration, which is to be made each year on the online platform OPERAT (set up by the French Environment and Energy Management Agency, ADEME), is important, but two elements in particular should be kept in mind:

- The declaration must indicate “the annual energy consumptions per type of energy, for buildings, parts of buildings, or building complexes”;
- For operators who have decided to set “absolute-value” reduction targets for themselves, this declaration must also contain the reference year chosen and the reference energy consumption.

As most of the regulatory texts have already entered into force, the attention of operators is hereby drawn to the fact that they have until 30 September 2021 to submit their data for the year 2020.

An important clarification was made regarding this point by the order of 24 November 2020: in view of the health situation over the previous calendar year, it specified that the reference energy consumption may be declared until 30 September 2022, “on the basis of a full year of operation between 2010 and 2020, comprising 12 consecutive months”, with 2020 not being considered as a reference year.

On the other hand, the order does not make any chronological changes to the obligation to declare the energy consumption of the building concerned, with the result that a double deadline will apply:

• Observatoire de la Performance Energétique, de la Rénovation et des Actions du Tertiaire [Energy Performance, Renovation, and Tertiary Actions Observatory].

- Until 30 September 2021 for the declaration of the building's energy consumption;
- Until 30 September 2022 for the declaration of the reference year and the energy consumption of that reference year.

While the “financial” sanctions associated with a failure to comply with these reporting obligations and, more broadly, a failure to meet the final energy consumption reduction targets may appear to be limited, it should be noted that a “*name and shame*” mechanism has been provided for in the “*tertiary decree*”.

More generally, and especially given the complexity of the method of calculating the final energy consumptions “*in terms of absolute values*”, it is advisable to set up the necessary measuring tools in good time; in addition, operators who do not have dedicated administrative personnel should contact, in good time, individuals or firms that can provide the legal and technical solutions necessary to meet the objectives of the “*tertiary decree*”.

- A maximum administrative fine of 1,500 euro for natural persons, and 7,500 euro for legal persons.