

# LEGAL FRAMEWORK FOR DEVELOPING RENEWABLE PROJECTS IN ROMANIA UNTIL 2030. A REAL ESTATE LEGAL PERSPECTIVE

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## **Abstract**

Romania has an installed capacity in electrical power production units of 19,581.543 MW<sup>2</sup>. Romania has undertaken under European Green Deal to increase significantly its production capacity until 2030. As per the public available data, Romania's renewable energy contribution to the 2030 EU level target is 30.7% of gross final energy consumption in 2030. The estimated amount of investment is EUR 150 billion for 2021 to 2030 (annually around 7% of current GDP).<sup>3</sup> This investment plan implies developing of many new renewable energy power production capacities. The hereby article offers a brief analysis of the main legal institution in real estate to be applied in developing such renewable energy projects. Depending on the type of the real estate property where the renewable energy projects will be developed on, there are several significant issues that any investor should consider before commencing the development of its projects.

**Keywords:** renewable energy, Romania, greenfield projects, gross final energy consumption in 2030, European Green Deal, second wave of RES projects.

**JEL Classification:** K25

## **1. Introduction**

Romania has an installed capacity in electrical power production units of 19,581.543 MW<sup>4</sup>. Romania has undertaken under European Green Deal to increase significantly its production capacity until 2030. As per the public available data, Romania's renewable energy contribution to the 2030 EU level target is 30.7% of gross final energy consumption in 2030. The estimated amount of investment is EUR 150 billion for 2021 to 2030 (annually around 7% of current GDP).<sup>5</sup> Thus, Romania needs to develop 6 GW of wind power and solar capacities need until end of 2030. This challenge translates in two type of business models. On one side, the developing of green field energy capacities and on the other side, acquisition of ready-to-build<sup>6</sup> or operational and functional renewable projects developed during the first wave of RES<sup>7</sup> in Romania (i.e. between 2007 and the current date). The investment plan, the commitment Romania undertook in front of the E.U. may lead to the prediction that this is going to be the second wave of RES development in Romania.

The idea born from the mere fact that „one million of the eight million species on the planet are at risk of being lost. Forests and oceans are being polluted and destroyed”<sup>8</sup>. The European Green Deal aims to obtain a net emissions of greenhouse gases in 2050 in Europe. Moreover, the ”well-

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<sup>2</sup> Source: ANRE website ([www.anre.ro](http://www.anre.ro)), according to data available as of March 2021.

<sup>3</sup> [https://ec.europa.eu/energy/sites/default/files/documents/staff\\_working\\_document\\_assessment\\_necp\\_romania\\_en.pdf](https://ec.europa.eu/energy/sites/default/files/documents/staff_working_document_assessment_necp_romania_en.pdf), consulted on 1.10.2021.

<sup>4</sup> Source: ANRE website ([www.anre.ro](http://www.anre.ro)), according to data available as of March 2021.

<sup>5</sup> [https://ec.europa.eu/energy/sites/default/files/documents/staff\\_working\\_document\\_assessment\\_necp\\_romania\\_en.pdf](https://ec.europa.eu/energy/sites/default/files/documents/staff_working_document_assessment_necp_romania_en.pdf), consulted on 1.10.2021.

<sup>6</sup> A ready to build project is a RES project that has all the permits required to commence the construction.

<sup>7</sup> According to <https://www.emissions-euets.com/internal-electricity-market-glossary/1313-renewable-energy-sources-res>, RES means renewable energy source, such as ”renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas”.

<sup>8</sup> [https://ec.europa.eu/info/sites/default/files/european-green-deal-communication\\_en.pdf](https://ec.europa.eu/info/sites/default/files/european-green-deal-communication_en.pdf) evokes this information from the following sources: (i) Intergovernmental Panel on Climate Change (IPCC): Special Report on the impacts of global warming of 1.5°C; (ii) Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: 2019 Global assessment report on biodiversity and ecosystem services; (iii) The International Resource Panel: Global Resources Outlook 2019: Natural Resources for the Future We Want; (iv) European Environment Agency: the European environment — state and outlook 2020: knowledge for transition to a sustainable Europe.

being of the citizens from environment related risks and impacts”<sup>9</sup> are also targeted.

Leaving aside the political part of this ambitious plan, the present article is aimed to focus mainly on most relevant legal topics on the real estate related to such developments and investments. The land securization is one of the first steps one investor should do in order to develop a RES project. Such securization process implies carrying out many legal steps, such as: due diligence, acquisitions, obtaining the required permits, erecting the RES projects, taking over of the project, compensating the damages caused to the crops of the landowners, etc. The above mentioned examples can be made only if the investor will have a good legal guidance. It is worth mentioning that lack of land securization makes a RES project impossible.

## 2. Legal framework

Although not exhaustive, we shall further enumerate the main real estate legal norms applicable in developing such RES projects:

a) Law No. 287/2009 regarding the Civil Code, republished in the Romanian Official Gazette, Part I, no. 505 of 15 July 2011 ("**Civil Code**");

b) Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Romanian Official Gazette, Part I, no. 555 of 5 July 2019 ("**Administrative Code**");

c) Law No. 123/2012 on electricity and natural gas, published in the Romanian Official Gazette, Part I, no. 485 of 16 July 2012 (the "**Energy Law**");

d) Law No. 50/1991 on the authorization of construction works, republished in the Romanian Official Gazette, Part I, no. 933 of 13 October 2004 ("**Law 50**");

e) Law No. 350/2001 on land development and urbanism, published in the Romanian Official Gazette, Part I, no. 373 of 10 July 2001;

f) Regulation dated 2014 for approval, reception and registration in the cadastral and land book records, approved by Order no. 700 of 2014 issued by the president of the Agency for Cadastre and Real Estate Publicity;

g) Law No. 10/1995 regarding the quality in constructions, republished in the Romanian Official Gazette, Part I, no. 765 of 30 September 2016;

h) Law no. 17/2014 regarding some measures for the regulation of the sale-purchase of agricultural lands located outside the built-up area and for the amendment of Law no. 268/2001 for the privatization of the companies that hold in administration lands which are in the public or private property of the state and for the establishment of the State Property Agency, published in Official Gazette, Part I, no. 178 from 12.03.2014;

i) Order No. 700/2014 on approving the Regulation for approval, reception and registration of cadastre and land registry records, published in the Romanian Official Gazette, Part I, no. 571 bis of 31 July 2014;

j) Law No. 18/1991 on land resources, published in the Romanian Official Gazette no. 1 of 5 January 1998;

k) Law No. 1/2000 regarding the reinstatement of the ownership right over agricultural lands and forest lands, requested as per provisions of Law No. 18/1991 and Law No. 169/1997 published in the Romanian Official Gazette no. 8 of 12 January 2000;

l) Law No. 10/2001 on the legal regime of immovables abusively taken over in the period between 6 March 1945 and 22 December 1989, republished in the Romanian Official Gazette no. 798 of 2 September 2005 ("**Law 10/2001**");

m) Law No. 422/2001 on protection of historical monuments, republished in the Romanian Official Gazette, Part I, no. 938 of 20 November 2006 ("**Law 422/2001**");

n) Governmental Decision No. 135/20113 ("**GD 135**");

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<sup>9</sup> [https://ec.europa.eu/info/sites/default/files/european-green-deal-communication\\_en.pdf](https://ec.europa.eu/info/sites/default/files/european-green-deal-communication_en.pdf), consulted on 1.10.2021.

- o) Law No. 544/2001 on free access to information of public interest, published in the Romanian Official Gazette, Part I, no. 663 of 23 October 2001;
- p) Law No. 7/1996 regarding cadastre and real estate publicity, republished in the Romanian Official Gazette, Part I, no. 720 of 24 September 2015 ("**Law 7/1996**");
- q) Law No. 255/2010 regarding the expropriation for public utility required for developments of national, county and local interest, published in the Romanian Official Gazette, Part I, no. 853 of 20 December 2010;
- r) Law No. 246/2020 regarding the use, preservation and protection of soil, published in the Romanian Official Gazette, Part I, no. 1057 of 10 November 2020;
- s) Law No. 165/2013 regarding the measures to complete the process of restitution, in kind or by equivalent, of buildings improperly taken over during the communist regime in Romania, published in the Romanian Official Gazette, Part I, no. 278 of 17 May 2013;
- ș) Law No. 190/2018 on implementing measures to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), published in the Romanian Official Gazette, Part I, no. 651 of 26 July 2018.

### **3. Analysis securing the land where the RES project will be erected on**

#### **3.1. Legal requirement to secure project land**

The first stage when implementing a project is obtaining the location for erecting the energy plant. The investor must secure land for all components of the energy plant; not only the turbines, panels, distribution station, but also the connection cables, transformer station, etc. Under art 1 Law 50 a building permit is needed to build any facility for the production of energy. The building permit is granted only if a specific real right (*in rem* right) to the land on which the energy plant is to be erected is proved. Under Romanian law there are generally two main ways for investors to hold the specific right required for a building permit, namely (i) an ownership title to the land or (ii) a superficies or concession right to the land. With a view to develop, maintain and operate the energy plant other real rights to the land, such as right of usage, right of easement, usufruct right, etc. might be required.

Prior to securing the project land, it is advisable to conduct a legal due diligence with respect to the plots of land, in order to verify the ownership title over the property and any encumbrances over the property, as well as to identify the legal risks (red flags) arising from the above-mentioned, so as to protect the investor against pre-existing claims over the property. Such claims could either effect the ability of the transferor to transfer the property or could attach themselves to the property even after it is transferred and may hinder the development and even to block/suspend the takeover of the plant. This standard is specific for a professional who acts diligent and intends to avoid any unpleasant surprise from a potential eviction<sup>10</sup> case. The eviction means that the title holder either (i) loses its ownership right over the land or (ii) the use of the project land becomes improper/restricted, etc.

Furthermore, according to the market standard practice, a due diligence is also prerequisite for the financing the project. The bank/ financial institution/ lender may require the investor to submit a legal due diligence report of the property or may conduct such diligence on its own.

Apart from the obvious elements that are usually examined while conducting a due diligence (such as, but not limited to, legal capacity of the current owner of the property, nature of current

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<sup>10</sup> For more details about eviction, please see Fr. Deak, *Contracte speciale*, Ed. Universul Juridic, Bucharest, 2001, p. 74; D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român*, tom III, part I, 2<sup>nd</sup> ed, Bucharest, 1909, p. 121; C. Bîrsan, *Drept civil. Drepturile reale principale*, Ed. Hamangiu, Bucharest, 2013, p. 214; Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu, *The Basics of Civil Law*, Vol. IV. Special Contracts. Bucharest 2009, p. 163.

owner's right over the property, whether such right is transferrable, encumbrances/ liens, etc.), under Romanian law, the following aspects would also require to be examined with utmost priority and importance:

**a) Restitution claims.** The property should be free of any litigations/notifications or any other encumbrances related to restitutions from third persons entitled to claim the reinstatement of the same property. Since it is impossible to track down all expropriations/nationalisations made in the period 1945 through 1989, when the Romanian State confiscated/nationalised/expropriated real estate property without paying adequate compensation to the owners (e.g. due to the lack of proper records, partitioning and unifications of concerned plots, etc.), in order to avoid risks that might delay the investment process, official inquiries with the relevant local and central authorities are recommended. Thereby, the owner should request the competent authorities to provide an updated status of the restitution claims filed/ submitted by any third parties pursuant to laws nos. 18/1991, 1/2000 and 10/2001 and the outcome of such claims, namely if there are any pending litigations having as object such claims. The existence of a pending litigation or notification triggers the impossibility to enter into a valid acquisition. Hence, according to art. 21 (5) of Law 10/2001, the real estate transaction (sale purchase, concession, partnership, establishing of a mortgage, establishing several encumbrances of whatsoever nature, lease/sublease, etc.) having as objects such property with a pending litigation/notification, is sanctioned with the absolute nullity of such legal deed. The aforementioned article provides that until the legal and/or administrative proceedings are solved, such transactions are forbidden.

**b) Archaeological and historical monuments.** The real estate properties that are listed as historical monuments may be sold only if the Romanian State will decline to exercise its preemption right to acquire such land. Attention should be given to the issue that the Romanian State will be firstly entitled to acquire, but on the same price level. Non observance of the preemption procedure triggers the absolute nullity of the transfer. In order to avoid the risk of irremediable nullity of transfer documents concluded in breach of the Romanian State's pre-emption right to purchase properties listed as a historical monuments, as per Article 4, paragraph 4 of Law No. 422/2001, an official inquiry from the competent Directorate for Cultural Heritage and the Romanian Ministry for Culture is recommended. The nullity of such transfer documents may be brought up in court at any time, by any interested person and it is not time barred.

**c) Litigation.** In order to verify whether the lands are affected by litigations that might have a potential impact on the development of the renewable energy plant (such as, but not limited to, property boundaries claims), it is recommended to submit official inquiries with the relevant local and central authorities (with a view to claims filed in respect of such lands). This inquiry includes among others the check of the official websites of the courts. In case the litigation is/will be registered with the corresponding land register, it should be known that the city halls will refuse issuance a building permit until the litigation is finally solved. The reasoning behind resides in the fact that as long as the legal regime of the land is not clear, the city hall cannot issue a permit for developing such property. In this respect, one solution to mitigate such risk is to amicably solve the litigation and to execute a corresponding settlement agreement. However, this solution cannot always be used as some parties may refuse to enter into such settlement agreement. They may believe that their chances are higher to win the litigation on court.

As stated above, following the due diligence process, the investor must secure the necessary plots of land for building the energy plant. In order to obtain the building permit necessary for erecting the energy plant, the investor must hold a real right over the land on which the plant shall be located. For this purpose, the Romanian law provides a series of rights that may enable the investor to obtain a building permit for the energy plant, as well as other real rights that may be required in order to develop and operate the energy plant, which shall be further detailed.

### 3.2. Conventional rights

**Ownership right.** Under the Romanian law, the ownership right offers the owner an absolute

right to use, encumber and sell the owned property without limitation in time. This also includes the right to build on the property any building or other type of structure, either permanent or temporary.

The ownership right is usually established by way of agreement executed in authentic form for validity purposes. Nevertheless, after completion of cadastral works for each administrative-territorial unit and opening of Land Registers for the relevant lands, the ownership right to lands shall be transferred between the parties, as well as towards third parties, only upon registration of the ownership right with the Land Register based on the agreement for the transfer of the ownership right.

**i. Agricultural lands outside buildable areas – specific sale procedure.** In most cases, renewable energy plants are located on agricultural lands, whose designation is changed to non-agricultural land, as a condition for obtaining the building permit for the plant.

As regards the sale of agricultural lands located outside the built-up area, Law No. 17/2014, as further amended by Law No. 175/2020, provides some special rules. Thus, the sale of agricultural lands located outside the built-up area can be performed only with the observance of the legal pre-emption right to purchase the lands. Currently, there are seven categories of pre-emptors, as follows: (I) co-owners, relatives, spouses; (II) owners of agricultural investments over agricultural land; (III) owners/lessees of the agricultural neighbouring lands; (IV) young farmers; (V) the Academy of Agricultural and Forestry Sciences «Gheorghe Ionescu-Șișești» and the research-development units in the fields of agriculture, forestry and food industry; (VI) natural persons with domicile/residence located in the administrative-territorial units where the land is located or in the neighbouring administrative-territorial units; (VII) the Romanian state (in this order, under equal price and conditions). Additionally, Law No. 17/2014, as further amended and supplemented, also imposes tighter conditions to be met by certain pre-emptors.

Furthermore, the new provisions establish a series of conditions to be met by the natural/legal persons who do not qualify as pre-emptors, conditions related to (i) domicile/residence/registered office/secondary office in Romania for at least five years prior to the registration of the sale offer, (ii) performing agricultural activities in Romania for a period of at least five years prior to the registration of the sale offer, (iii) for natural persons, fiscal registration in Romania for a period of at least five years/for legal persons, obtaining at least 75 % of the annual income of the last five fiscal years from agricultural business, etc.

Once purchased, the farmland must continue to be used exclusively for agricultural purposes. Notwithstanding, this provision does not prevent the removal of such plots of land from outside of the built-up area, based on Zonal Urban Plan, for the development of renewable energy projects.

The sale of agricultural lands located outside the built-up area is regulated by a strict procedure. Hence, the owner of the land shall file with the city hall of the territorial-administrative unite where the land is located the sale offer regarding such land. The sale offer shall be displayed for 30 days at the city hall seat and on the city hall's website. The pre-emptors must exercise their pre-emption right during such period in order to acquire the land. In case none of the pre-emptors exercises its right, the owner may freely sell the land, but not for a lower price or under more favorable conditions than the ones provided in the initial sale offer.

In addition to the above-mentioned requirements, for the sale of some categories of agricultural lands located outside the built-up area, it is necessary to obtain some specific permits issued by the Ministry of National Defense and Ministry of Culture.

According to Law No. 17/2014 (as further amended and supplemented), the sale of farmland located outside built-up areas without observing the pre-emption procedure or without obtaining the approvals provided therein will be sanctioned with absolute nullity. Also, the fines for non-compliance with this law have doubled, ranging from RON 100,000 to RON 200,000.

**ii. Other statutory pre-emption rights to be considered.**

#### **4. Preemption right to acquire historical monuments**

Law No. 422/2001 on protection of historical monuments defines historical monuments as constructions and lands situated in Romania that are significant for Romanian and universal history,

culture and civilization.

In accordance with Article 4, paragraph 4 of Law No. 422/2001, the ownership right over a private property listed as a historical monument may be transferred only with the observance of the Romanian State's pre-emption right.

Law No. 422/2001 regulates a detailed procedure to be followed in case of sale of properties listed as a historical monument. Please note that such procedure must be observed for all properties listed as historical monument (lands and/or buildings), even if such properties are not mentioned in the list of historical monuments issued by the authorities. The pre-emption right procedure is quite similar to the procedure to be followed in case of sale of agricultural lands located outside the built-up area as described under above.

The agreements having as object the transfer of the ownership right over a property listed as a historical monument concluded in breach of the Romanian State's pre-emption right are null and void.

#### 4.1. Tenants' preemption right

The pre-emption right of the tenants is regulated by the Civil Code and Law No. 17/2014, as further amended by Law No. 175/2020.

The tenants benefit from a pre-emption right regarding the leased agricultural lands. Such pre-emption right must be exercised under the conditions set by Articles 1.730 – 1.739 of Civil Code.

While the Civil Code provides general regulations regarding the pre-emption right of the tenant, the special provisions of Law No. 17/2014 must be observed (as such provisions shall apply with priority).

Law No. 17/2014, as further amended by Law No. 175/2020, regulates a detailed procedure to be followed in case of sale of agricultural lands located outside the built-up area. The sale of agricultural lands located outside the built-up area without observing the pre-emption right provided by Law No. 17/2014, triggers the annulment of the sale agreement.

**Acquisition of municipality land.** Under Romanian law, real properties held by the State and local authorities can be of two categories: real properties held in public ownership that belong to the public domain and real properties held in private ownership that belong to the private domain (*domeniul public sau privat*). The importance of knowing in which category the land needed for an energy plant falls into lays with the type of agreement the land can be secured under, as land in public domain can't be subject to a sale agreement. According to the Administrative Code, only the lands in private domain can be subject to a sale agreement.

The question of "how" the local authorities can choose their contract partners when granting rights over land has always been a controversial matter. However, the amendments brought by the Emergency Ordinance No. 57/2019 regarding the Administrative Code clarified this matter.

The sale of the plots of land, part of the private domain of the state or administrative units are subject to a public tender procedure. The details of such procedures are provided by the Administrative Code.

The Administrative Code provides an exception from the public tender procedure in case of sale of lands part of private domain on which constructions are erected. In such case, the bona fide constructors benefit from a preemption right to acquire the land plot subject to the construction. The sale price is established based on an evaluation report, approved by the local or county council, as the case may be.

**Superficies right.** A superficies right consists of: (i) the right to have or to erect a building on, under or above the land owned by another person; (ii) the ownership right to the building; and (iii) the right to use the land pertaining to the building (*drept de folosință*). The superficies right allows for delimitation between the ownership to the land and the ownership to the building erected on, under or above the land owned by another person.

There is no restriction regarding the beneficiary of the superficies right under the Romanian law, therefore foreigners are in no way restricted from directly holding superficies rights to lands in

Romania. The Civil Code (art. 694) limits the duration of a superficies right to a maximum of 99 years, with a prolongation option. A superficies right may be established by way of agreement executed in notarized form for validity purposes.

## 5. Conclusion

Regardless of the type of the real right used by the developer/investor to secure the land, the duty of care is similar. Each professional should act diligent and should carefully verify the "cleanliness" of the property. By this, the more the legal security is guaranteed, the safer is the transaction. This would lead finally to a bankable project that will trigger also the increase of the economic value of such the RES project. Should any of the above risks be materialised during the development, this may lead to delays or event to a deadlock of the project. The above mentioned risks and recommendation are not meant to be exhaustive. On a case by case basis, there may be also other types of issues that may impede the development (i.e. challenge of the project by some NGOs, neighbours, etc.).

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