

Energy Efficiency: the new Standard Contract for the issue of White Certificates

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With specific reference to the most relevant provisions of the new Standard Contract of White Certificates, we would like to highlight: (i) the introduction of joint and several liability of the Owning Entity and the Offering Entity; and (ii) the express prohibition of the pledging the White Certificates and the sale of energy efficiency projects.

1. Main initiatives and most relevant provisions of the Standard Contract

In the light of the above, we set out below our initial comments and observations on the most important clauses of the new standard contract for the issue of white certificates for energy efficiency projects (the "**Standard Contract**"):

- a. The introduction of joint and several liability of the Owning Entity and the Offering Entity (as defined below) to the "*energy services operator*", "*Gestore dei Servizi Energetici GSE S.p.A.*" (the "**GSE**") solves many problems that previously arose in the relationships between the Parties but some uncertainty remains relating to:
 - i. on the one hand, it is an advantage for the Offering Entity, which is less exposed to the possible risk of revocation of the White Certificates than in the previous system;
 - ii. on the other hand, it could introduce an element of rigidity into the system, resulting in greater control and regulation of the relationship. Furthermore, with the exception of the issue of liability to the GSE, there is still a need for a further contractual regulation between the Owning Entity and the Offering Entity regarding the other obligations of the parties;
- b. Article 6 of the Standard Contract regulates the obligations and responsibilities of the GSE. Under this clause, the GSE is responsible for the management of the incentive system in general, as well as for all phases of the process awarding the White Certificates, from their issue to their eventual revocation or cancellation. This clause also sets out limitations on the GSE's liability, which could prove to be a critical issue for operators in the sector;
- c. The Standard Contract (article 8) and the TEE Decree 2017 (article 7) set out, in detail, the regulations relating to monitoring, inspections, controls and on-site inspections carried out by the GSE in relation to the Owning Entity and the Offering Entity. A first analysis suggests an increase in timing and procedural complexities compared to the previous regulatory framework;
- d. Another innovation is an express provision setting out the prohibition on pledging the White Certificates (article 9), an aspect that could present problems in terms of the bankability of energy efficiency projects;
- e. Finally, the Standard Contract, pursuant to article 10, regulates in a highly restrictive manner, as well as prohibiting in some cases, the sale of energy efficiency projects, as well as the transfer by the Offering Entity of its right to receive the White Certificates awarded to it by the Owning Entity.

2. The definition of Standard Contract and TEE Decree 2017

On 25 July 2017, the Standard Contract was published on the website of the GSE, as approved on 19 July 2017 by the Italian Ministry of Economic Development ("MiSE"). It consists of 19 articles and may be modified, including unilaterally by the GSE, in the event of changes and updates to the relevant legislation mentioned in its introduction¹.

The provisions of this Standard Contract were introduced into our legislation by the new decree on White Certificates ("**White Certificates**" or "energy efficiency certificates" (*titoli di efficienza energetica*) ("**TEE**") issued by MiSE in agreement with the Ministry of the Environment and Protection of the Sea on 11 January 2017 and published in the Official Journal on 3 April 2017 (the "**TEE Decree 2017**")².

Under article 2, (e) of the TEE Decree 2017, the Standard Contract is a "*contract which, for the purpose of the issue of White Certificates, governs the relationship between the offering party, the owner entity, if different from the proposing party, and GSE*". It should be noted that, again in accordance with the TEE Decree 2017, "**Offering Entity**" means the person who meets the eligibility requirements and submits an application for an incentive to the GSE; while "**Owner Entity**" means the person who supports the investment for the realisation of the energy efficiency project (also defined in the Standard Contract as the "**Operator**").

3. The potential tripartite structure of the Standard Contract

Under article 5 of TEE Decree 2017, the White Certificates are awarded, in a number which is proportional with the additional energy saving achieved by the relevant energy efficiency project, by the GSE and in the absence of an express regulation to the contrary between the parties involved, directly to the Owning Entity by entering into the Standard Contract. In derogation from the provisions of this paragraph, in fact, under paragraph 4 of the same article, the Owning Entity can "*expressly request the recognition of the White Certificates the Offering Entity is entitled with, as a delegated person and within the limits of the delegation*". In such a case, the Offering Entity will also be required to enter into the Standard Contract and will be jointly and severally liable with the Owning Entity for the performance of all obligations arising from the TEE Decree 2017, as well as for the obligations to the GSE arising from the Standard Contract.

In this case, the Standard Contract will create a trilateral relationship between the Owning Entity, the Offering Entity and the GSE, with obligations on each party towards the others. Specifically:

- a. the GSE has obligations to both the Owning Entity and the Offering Entity, if so delegated and within the limits of the delegation;
- b. the Owning Entity and Offering Entity have the same, joint and several, obligations to the GSE; and
- c. the Offering Entity will be liable to the Owning Entity, within the limits of the delegation conferred on it.

¹ Legislative Decree no. 79 of 16 March 1999 (the "Bersani Decree"), Legislative Decree no. 164 of 23 May 2000 (the "Letta Decree"), Legislative Decree no. 28 of 3 March 2011, Legislative Decree no. 102 of 4 July 2012 and the TEE Decree 2017 (as defined below).

² The TEE Decree 2017, in addition to setting the new quantitative energy savings targets for the 2017-2020 period, introduces significant initiatives and simplification in procedural terms (e. g. regarding the type of projects). For further information on the features and initiatives of the TEE 2017 Decree please refer to our previous newsletter at this [link](#).

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It does not constitute a reference for agreements and/or commitments of any nature.

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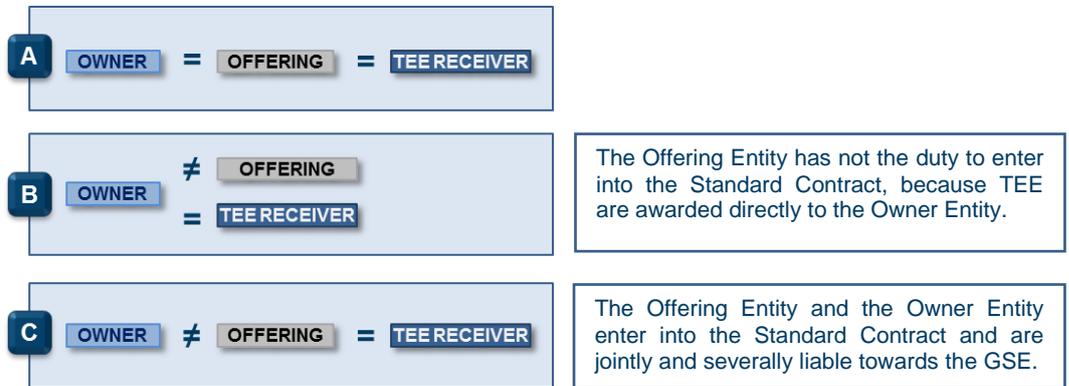
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In summary, there are three different situations that are regulated by the Standard Contract as illustrated in the following diagram:

Possible Scenarios



The A and B cases represent the normal situation, in which the White Certificates are directly and exclusively awarded to the Owning Entity of the energy efficiency project. The difference between the two cases concerns the classification of the Owning Entity which, in case A, as well as providing the investment for the realisation of the relevant energy efficiency project, also meets the eligibility requirements and can therefore submit the application for an incentive to the GSE. In such a situation, therefore, the qualifications to meet the eligibility requirements of the Offering Entity and the Owning Entity are held by the same legal entity.

In contrast, in case B the Owning Entity, not meeting the eligibility requirements, will have to use the services of a separate Offering Entity to submit the application to the GSE for the White Certificates.

In case C, the White Certificates are awarded by the GSE to the Offering Entity within the limits of the delegation granted by the Owning Entity; in this case, both parties sign the Standard Contract and are jointly and severally liable for the obligations to the GSE.

4. Conclusions

We are following carefully the developments relating to White Certificates and incentives for energy efficiency and will update you on any future regulatory changes in this area of regulation.

If you would like any further information please contact our energy efficiency desk in our Energy & Infrastructure and Environmental Law departments or your usual GOP contact.