

Recent developments concerning renewable energy plants

In December 2013 the Italian Parliament has approved certain amendments to the legal framework regarding plants fed by renewable sources. The following is the summary of the main changes recently introduced.

1. Law Decree “Destinazione Italia”

On 23 December 2013 a law decree so called “Destinazione Italia” has been published on the Italian Official Gazette (the “Law Decree”). The Law Decree, entered into force on 24 December 2013, provides, *inter alia*, for new regulations in relation to the incentives to the production of electricity by means of plants fed by renewable sources (the “Renewables Incentives”).

According to Italian Law the Law Decree is immediately effective but will then have to be converted into law by the Italian Parliament (which is entitled to make amendments and integrations) within the following 60 days.

The most relevant measures included in the Law Decree in relation to the Renewables Incentives are: (i) the introduction of an optional new incentives regime for the producers that currently benefit from the Renewables Incentives; and (ii) the limitation of the Guaranteed Floor Prices regime (as defined below).

1.1. New optional Incentives Re-modulation

The most significant measure included in the Law Decree in relation to the Renewable Incentives is the possibility offered to producers owning plants fed by renewables currently in operation to opt – at their own discretion – for an alternative incentives scheme (the “Alternative Incentives”).

In this respect, the Law Decree specifies that producers owning plants currently benefitting from:

- (i) all-inclusive incentive tariffs (*tariffe onnicomprensive*); or
- (ii) the green certificates regime; or
- (iii) premium tariffs (*e.g. the Conto Energia regime*);

shall decide whether:

- (a) to continue benefitting from the currently applicable Renewable Incentives, until their natural expiry. In such case, nothing would change for such producers as they will continue benefitting from the Renewable Incentives currently applicable to the relevant plants until the original expiry date of such Renewable Incentives. The only constraint would be that, after the expiry of the applicable period of the Renewable Incentives, any re-vamping and/or other works realized on the site where the relevant plants are located would not be eligible for being incentivized with public incentives (including the so called *ritiro dedicato* and *scambio sul posto* regimes) for a period of ten years; or
- (b) to accede to the Alternative Incentives. The Alternative Incentives would consist of a re-modulation of the Renewable Incentives, through (i) a reduction of the relevant Renewable Incentive; and (ii) an extension of the incentivized period of additional 7 years.

Contents

1. Law Decree “Destinazione Italia”

- 1.1. New optional Incentives Re-modulation
- 1.2. Abolition of the Guaranteed Floor Prices for certain plants
- 1.3. New Guaranteed Floor Prices for 2014

2. Capacity Payment

3. Tax regime for photovoltaic plants

- 3.1. Qualification of photovoltaic plants as immovable or movable property for tax purpose
- 3.2. Clarifications on the tax depreciation of plants qualifying as immovable property
- 3.3. Clarifications concerning “non-operating companies” regime procedures
- 3.4. Conditions for Clarifications concerning the taxation of plants under the “Quinto Conto Energia”

The percentage of reduction of the Renewable Incentives will be detailed in a ministerial decree to be issued by the Ministry for Economic Development (the “MSE”) within 60 days. In any case, the Law Decree already specifies that the percentage of reduction will be defined on the basis of the specific features of the plants and the residual time to the original expiry of the relevant Renewables Incentives, taking also into consideration (a) the costs connected with the re-modulation of the Renewable Incentives, and (b) a premium to be granted to producers that opt for the re-modulation of the Renewable Incentives. This premium will be higher for the plants that, after the expiry of the incentives period, will not benefit from other forms of incentives (other than the so called *ritiro dedicato* and *scambio sul posto* regimes).

Pursuant to the Law Decree, producers will have to communicate to the Gestore dei Servizi Energetici (“GSE”) their choice among the two options within 90 days after the date of enactment of the MSE’s ministerial decree mentioned above.

The possibility to accede to the Alternative Incentives is granted to producers owning the larger part of plants fed by renewables that currently benefit from the Renewables Incentives. In fact, the plants excluded from the applicability of such measures are only:

- (i) plants that benefit from the incentives set out in the act No. 6 dated 29 April 1992 issued by the *Comitato Interministeriale dei prezzi* (so called “CIP 6”); and
- (ii) plants that benefit from the incentives set out in the MSE decree dated 6 July 2012 (i.e., plants fed by renewables other than photovoltaic plants, such as wind farms, entered into operation starting from 1 January 2013). In this respect, however, plants falling under the application of the temporary regime provided for under article 30 of the same decree (e.g. wind farms entered into operation between 1 January 2013 and 30 April 2013, meeting certain specific requirements set out in the above mentioned MSE decree) are not excluded, and therefore owners of such plants will be allowed to opt for the Alternative Incentives.

1.2. Abolition of the Guaranteed Floor Prices for certain plants

Another significant measure included in the Law Decree in relation to the Renewable Incentives is the partial abolition of the so called “guaranteed floor prices” (*prezzi minimi garantiti*).

Until 2013, plants that have entered into the dedicated off-take regime by the GSE (the so called “*ritiro dedicato*”) which:

- (i) are fed by renewable energies; and
- (ii) have an installed capacity lower than 1 MW;

(the “**Eligible Plants**”) have benefited, for the first 2,000,000 kWh of electricity produced during each year, from a guaranteed off-take price (the “**Guaranteed Floor Price**”) established for each year by the Italian Authority for Electricity and Gas (“AEEG”), irrespective of the fluctuation of the electricity price on the market.

Pursuant to the Law Decree, starting from 1 January 2014 the Guaranteed Floor Prices are abolished for Eligible Plants that, in addition to the Guaranteed Floor Prices, benefit also from other forms of incentives on the electricity produced (e.g. the *Conto Energia* regime) (the “**Excluded Plants**”).

In fact, pursuant to the Law Decree, the price to be paid by the GSE for the withdrawal of the electricity produced by the Excluded Plants is aligned, starting from 1 January 2014, to the price paid by the GSE for the withdrawal of the electricity produced by larger plants, i.e., the hourly prices registered on the market in the area where the relevant plant is located (so called *prezzo zonale orario*).

In light of the foregoing, notwithstanding that the Guaranteed Floor Prices have been confirmed for 2014 by AEEG Resolution No. 618/2013/R/FER of 19 December 2013 (see below), their applicability has been limited. In particular, since most of the small plants fed by renewable sources (e.g. photovoltaic plants and wind farms with capacity lower than 1MW) benefit also from other forms of incentives on the electricity produced (e.g. the *Conto Energia* regime) they will not have the benefit of the Guaranteed Floor Prices from 2014 onwards.

On the other side, nothing will change for, among others, photovoltaic plants and wind farms with capacity exceeding 1 MW, as they already do not benefit from the Guaranteed Floor Prices.

1.3. New Guaranteed Floor Prices for 2014

By means of resolution No. 618/2013/R/EFR of 19 December 2013, the AEEG has determined the Guaranteed Floor Prices for 2014 under the off-take regime by the GSE.

In this respect the main changes that came into force on 1 January 2014 are the following:

- (i) a reduction of the Guaranteed Floor Prices. Such reduction is more significant for some sources, (such as solar) and less for others (hydro and biomass);
- (ii) the limitation of the applicability of the Guaranteed Floor Prices to the first 1.5 million kWh of electricity produced, rather than to the first 2 million kWh (with the exception of biogas, biomass and bio liquids for which the limit of 2 million kWh is confirmed for 2014);
- (iii) the application of the Guaranteed Floor Prices even in cases where the electricity fed into the grid "is intended for a trader or directly marketed on the organized electricity markets".

In particular the following Guaranteed Floor Prices have been determined by the AEEG for 2014:

- (i) for photovoltaic plants, up to 1,500,000 kWh of electricity produced, Euro 38.5/MWh;
- (ii) for wind farms, up to 1,500,000 kWh of electricity produced, Euro 48.4/MWh;
- (iii) for hydro power plants, up to 250,000 kWh, Euro 151.8/MWh, from 250,000 kWh up to 500,000 kWh, Euro 104.5 MWh, from 500,000 kWh up to 1,000,000 kWh, Euro 66 MWh, from 1,000,000 kWh up to 1,500,000 kWh, Euro 57.2 MWh; for solid and liquid biomass plants, up to 2,000,000 kWh Euro 91.3 MWh.

According to resolution No. 618/2013/R/EFR, starting from 2014 the GSE shall not pay the Guaranteed Floor Prices on the electricity actually produced month by month, but will rather pay to the producers, at the end of each calendar year, a balance equal to the difference, if positive, between:

- (i) the applicable Guaranteed Floor Price multiplied by the electricity actually produced (within the limits indicated above); and
- (ii) the applicable *prezzo zonale orario* (as defined above) multiplied by the same amount of electricity indicated above.

Furthermore, the GSE will apply to producers benefitting from the Guaranteed Floor Prices an amount aimed at covering the administrative costs borne by the GSE.

In extreme essence, in light of the foregoing, plants still benefitting from the Guaranteed Floor Prices for years 2014 and following will actually gather the benefits of such scheme only at the end of each calendar year, when the GSE will pay the applicable balance.

However, due to the fact that the Law Decree has abolished the Guaranteed Floor Prices for the Excluded Plants (*i.e.*, Eligible Plants that, in addition to the Guaranteed Floor Prices, benefit also from other forms of incentives on the electricity produced, such as the *Conto Energia* regime), the application of the AEEG's resolution no. 618/2013/R/EFR of 19 December 2013 is very much reduced.

2. Capacity Payment

On 23 December 2013 the Italian Parliament has approved the Italian budget law for 2014 (the "**Budget Law**") which includes among others a capacity payment mechanism in favour of fossil-fuel generation plants.

In the last few years, electricity produced by plants fed by renewables (and in particular photovoltaic plants) has increased significantly in Italy.

This circumstance, together with the dispatching priority granted to electricity produced by renewables, has forced fossil-fuel generation plants to produce only during evening and night hours – when photovoltaic plants cease generating electricity – in order to avoid possible risks for the grid.

Now, Budget Law for 2014 aimed at compensating the loss of production suffered by fossil-fuel generation plants (the so called "capacity payment"). In this respect, the Budget Law for 2014 delegates the MSE to issue a regulation – on the basis of a proposal from the AEEG – to determine terms, conditions and amounts of the capacity payments, within the limits of the amounts strictly necessary for ensuring safety of the grid, and "without increasing electricity bills of end customers, within the framework of the electricity market, taking into account the evolution of the same and in coordination with the measures provided for by Legislative Decree 19 December 2003 no. 379". The regulation will have to be issued within the end of March 2014.

3. Tax regime for photovoltaic plants

On 19 December 2013 the Italian Tax Authorities ("ITA") have issued circular letter No. 36/E 2013 (the "**Tax Circular**") concerning the tax regime applicable to photovoltaic plants.

The Tax Circular deals, *inter alia*, with (i) the qualification (movable/immovable property), for Italian tax purposes, of photovoltaic plants (ii) the application of direct and indirect taxes in relation to the transfer of photovoltaic plants (iii) the scope of application of the "non-operating companies" regime to companies owning photovoltaic plants.

3.1. Qualification of photovoltaic plants as immovable or movable property for tax purposes

According to the Tax Circular, the photovoltaic plants - which shall be registered in the Italian Cadastral Register - qualify as immovable properties for Italian tax purposes. Moreover, the Tax Circular clarifies that the following must be deemed as immovable property: (i) photovoltaic plants that qualify as "electricity generation plants" and as such must be registered in the Italian Cadastral Register, class D/1 or D/10; (ii) photovoltaic plants located, *inter alia*, on the roof of a property the value of which is increased of 15% or more due to the construction of such photovoltaic plants (in this case the photovoltaic plants shall be indicated in the Italian Cadastral Register).

The Tax Circular also clarifies the requirements to be met by a photovoltaic plant to be qualified as movable property (*inter alia* the possibility of moving the plants without losing their functional characteristics and in a manner which is not uneconomical).

3.2. Clarifications on the tax depreciation of plants qualifying as immovable property

The qualification of photovoltaic plants as movable or immovable property has a significant importance for Italian tax purposes, because of their different tax treatment.

For instance, if a plant qualifies as immovable property, the Tax Circular states that, in the absence of a special classification in the ministerial tables, the value of the asset will be amortized using as depreciation rate the one used for industrial buildings, equal to 4%. On the other hand, if the plant qualifies as movable property, the value of the asset will be amortized using a 9% depreciation rate. Furthermore, the Tax Circular clarifies that, in case of photovoltaic plants which are integrated to other immovable property and "capitalized on the basis of the correct application of the accounting principles", the depreciation rate is the one corresponding to the immovable property which includes them.

These clarifications included in the Tax Circular are relevant, since on the basis of another tax circular in 2007, certain owners of photovoltaic plants had adopted higher depreciation rates on the assumption that such plants would not qualify as immovable property. For the future, photovoltaic plants qualifying as immovable property will have, in principle, to be amortized using a 4% depreciation rate, with the consequence that a 25 years amortization period will apply. On the other hand, the Tax Circular states that any higher amortisation rates adopted for the past on the basis of the old tax circulars, will not need to be rectified.

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3.3. Clarifications concerning “non-operating companies” regime procedure

The Tax Circular provides for clarifications concerning the “non-operating companies” regime.

The “non-operating companies” regime is aimed at preventing the abuse of the corporate veil for tax purposes, *i.e.*, at discouraging the creation of companies with the sole purpose of holding assets and benefiting from the tax rules applicable to companies, rather than carrying out an actual business activity.

In particular, the “non-operating companies” regime provides for a revenues test (“**Revenue Test**”) based on certain parameters in order to assess whether a company is deemed to be “non-operating” (a “**Non-Operating Company**”). In summary, according to the Revenue Test, a company is deemed to be a Non-Operating Company if in a given fiscal year its actual revenues and inventory increases are lower than the minimum revenues determined by applying certain parameters set forth by the law.

In this respect, ITA has clarified that for photovoltaic plants qualifying either as movable or immovable property, the coefficient to be applied to the value of the assets for purposes of verifying the Revenue Test is equal to 6%. The clarification is important because in the past certain offices of the ITA adopted a more aggressive approach and applied to photovoltaic plants a coefficient equal to 15% (*i.e.*, instead of the coefficient applicable to immovable properties, the coefficient applicable to the category of “other assets”), which made it more difficult for companies passing the Revenue Test.

If the Revenue Test is not met, and to the extent that none of the exclusion conditions contemplated by the law applies, the company is deemed to be a Non-Operating Company and shall therefore declare a minimum income for Italian income tax purposes determined according to the criteria set out by Law No. 724/1994. Furthermore, if certain additional conditions are met, Non-Operating Companies may suffer also limitations regarding the possibility to recover VAT credits.

Non-Operating Companies may, however, avoid such negative consequences by giving evidence of the circumstances that have prevented them from passing the Revenue Test”. To this end, a company can obtain a tax ruling by filing an appropriate ruling request to the ITA (*istanza di interpello*).

In this respect, the Tax Circular states that a ruling request may be evaluated favorably if it evidences with adequate explanations and appropriate documentation that the Revenue Test has not been passed due to level of the prices paid by the GSE.

3.4. Conditions for Clarifications concerning the taxation of plants under the “Quinto Conto Energia”

The Tax Circular also deals with the tax treatment applicable with respect to the revenues deriving to photovoltaic plants from the application of the “*Quinto Conto Energia*” (pursuant to Ministry Decree 5 July 2012).

In this respect, in the Tax Circular ITA clarifies that:

- (a) the “*tariffa premio*” paid to individuals or corporates engaged in commercial activities and professional associations (i) is subject to income tax (the payer shall apply a withholding at 4% as a provisional tax); (ii) does not fall within the scope of Italian VAT; and (iii) is subject to Italian regional tax on productive activities;
- (b) the “*tariffa omnicomprensiva*” paid to individuals or corporates engaged in commercial activities and professional associations (i) is subject to income tax; (ii) is subject to Italian VAT; and (iii) is subject to Italian regional tax on productive activities;
- (c) the tax treatment under (b) above applies also to the price (equal to the difference between the “*tariffa omnicomprensiva*” and “*prezzo orario zonale*”) paid by GSE to individuals or corporates engaged in commercial activities and professional associations and owning photovoltaic plants with capacity exceeding 1 MW.

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