

Bird & Bird

Biomethane Decree 2022

Legal Framework and Application
Procedures

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1. Background

On July 13, 2021 the European Union Council finally approved the Italian National Recovery and Resilience Plan ("N.R.R.P.") by an implementing decision.

The N.R.R.P. is a national plan detailing how Italy intends to invest the financial resources of Next Generation EU, the European program to support a green and digital recovery of the economies of Member States following the Covid-19 pandemic. One of the three main objectives of the N.R.R.P. is to drive the Country towards a comprehensive ecological transition.

Specifically, the N.R.R.P. under mission 2 ("*Green revolution and ecological transition*"), component 2 ("*Renewable energy, hydrogen, grid and sustainable mobility*") provides, among others, for the development of biomethane according to criteria to promote the circular economy by reserving 1,7 billion euros for the purpose of incentivizing the reconversion and efficiency of the existing agricultural biogas plants and the construction of new biomethane plants¹.

2. The provisions of Decree of September 15, 2022

The Decree of the Ministry of Ecological Transition ("**MITE**") No. 340 of September 15, 2022 (the "**Decree**") was published in the Official Gazette No. 251 on October 26, 2022.

In order to support the biomethane production in accordance with the investment support measures provided for in the N.R.R.P., the Decree regulates the modalities for the allocation of incentives to biomethane injected into the natural gas network and produced - in accordance with the criteria laid down in the EU/2018/2001 ("**RED II Directive**") - by newly built plants or plants undergoing reconversion, so as to define the biomethane production promotion plan from 2022 to 2026.

3. The incentives

Newly built biomethane production plants, fueled by agricultural matrices and organic waste, or agricultural biogas plants undergoing reconversion, that comply with the requirements of the Decree are eligible for an incentive that consists of:

- A capital grant on the eligible expenses of the investment occurred, up to the maximum eligible investment cost and according to the values indicated below (Annex 1 to the Decree):

Types of biomethane production plants	Biomethane production capacity (C _p)	Maximum specific investment cost [€/Smc/h]	Maximum specific investment cost [€/Smc/h]	Capital contribution percentage [%]
		New plants	Reconversion	
Agricultural plants	C _p ≤ 100 Smc/h	33.000	12.600	40%
	100 Smc/h < C _p ≤ 500 Smc/h	29.000	12.600	40%

¹ A detailed overview of the content of the N.R.R.P. can be found at the following link:
<https://www.governo.it/sites/governo.it/files/PNRR.pdf>

	$C_p > 500 \text{ Smc/h}$	13.000	11.600	40%
Plants powered by organic waste	Whatever	50.000		40%

The payment of the capital contribution is made by the *Gestore Servizi Energetici* ("GSE") following the evaluation of the documentation submitted in order to verify that the expenses incurred to carry out the intervention meet the maximum costs indicated in the table above.

The expenses considered eligible for disbursement are:

- the costs for the construction and efficiency of the plant such as the infrastructure and machinery required for the management of biomass and the anaerobic digestion process, digestate storage, the construction of the biogas purification plant, the processing, compression and storage of biomethane and CO₂ and the construction of the plants and equipment for the company's own consumption of biomethane;
- the biomethane, flue gas and fugitive emission monitoring and oxidation equipment;
- the costs of connecting to the natural gas grid;
- the costs for the purchase or acquisition of computer programs functional for the management of the facility;
- expenses for design, construction management, testing, consultancy, feasibility studies, purchase of patents and licenses related to the implementation of investments, to the maximum total extent of 12% of the total eligible expenditure;
- the costs for the digestate composting phase.

Eligible expenses must be substantiated by payments made through traceable payment instruments, showing the Single Project Code (project's "CUP").

Failure to carry out the works eligible for financing and failure to bring the plant into operation by June 30, 2026 will result in the forfeiture of the capital grant.

- b. An incentive tariff applied to the net production of biomethane, paid from the date of entry into operation of the plant and for a duration of fifteen years, calculated as follows (Annex 2 to the Decree):

Types of biomethane production plants	Biomethane production capacity (C _p)	Benchmark tariff [€/MWh]
		New agricultural and organic waste-fed plants and reconversion for agricultural plants only
Small size agricultural plants	$C_p \leq 100 \text{ Smc/h}$	115
Other agricultural plants	$>100 \text{ Smc/h}$	110
Organic waste-fed plants	Whatever	62

Pursuant to Article 7 of the Decree, Agricultural biomethane plants and organic waste-fed biomethane plants located in a useful position in the relevant ranking list shall come into operation, respectively, no later than 18 and 24 months from the date of publication of the rank list. Failure to meet the abovementioned deadlines will result in a reduction of the incentive tariff of 0.5 percent for each month of delay, up to a maximum of 9 months

of delay (deadlines are to be considered net of downtime in the construction of the plant and related works, resulting from force majeure or calamitous events ascertained by the competent authorities).

The date of the entry into operation of the plants shall be notified by the owners within 30 days. In the event of failure to notify within this deadline, the incentive tariff to be recognized between the date of entry into operation of the plant and the first day of the month following the date of communication will be forfeited.

It should be considered that plants with a production capacity of **250 Smc/h or less** that feed biomethane into the grids with the obligation to connect third parties may apply for the disbursement of the tariff in the form of an **all-inclusive tariff**. Therefore, in such cases, guarantees of origin are issued and simultaneously transferred free of charge to the GSE.

Notwithstanding the above, the producer shall alternatively apply for a premium tariff as described below.

For plants with a production capacity of **more than 250 Smc/h**, as well as production plants that feed biomethane into natural gas networks other than networks with the obligation to connect third parties, the tariff payable shall be disbursed in the form of a **premium tariff** (to be calculated in accordance with the procedures set forth in Article 2, paragraph 1, letter v) of the Decree). In such a case, guarantees of origin are assigned to the producer.

Incentives are recognized monthly by the GSE, subject to the signing of the relevant contract with the applicant, on the basis of the measurement data of biomethane injected into the natural gas grid, as recorded and transmitted to the GSE by the grid operators to which the plant is connected or directly by the applicant in other cases.

4. The requirements

To be eligible for incentives, plants shall be compliant with certain requirements set out in the Decree.

As a general rule, newly built plants fueled by agricultural matrices and organic waste and agricultural biogas plants for electricity generation undergoing reconversion are eligible for incentives if:

- a the construction works have not been started (*i.e.* the moment of the first firm commitment - for example, order equipment or construction beginning - that makes the investment irreversible) before the publication of the raking list of the relevant competitive procedure;
- b plants shall entry into operation by June 30, 2026.

Even plants located in EU Member States other than Italy and other third states bordering Italy, with which the European Union has a free trade agreement and that physically export their biomethane to Italy are eligible for the incentive. In particular, those plants are eligible for the incentive provided that (i) they have entered into an agreement pursuant to Legislative Decree no. 199/2021 with the member state or the neighboring third state where the plant is located; (ii) the agreement under point (i) set forth a reciprocal system; (iii) the plants are compliant with all the subjective and objective requirements set forth by the Decree for plants located in Italy.

In addition to the general requirements, Article 4 of the Decree set forth the following special requirements:

- a possession of the permit for the construction and operation of the plant;
- b in case of plants to be connected to gas transmission and distribution grid with a third-party connection obligation, connection estimate issued by the relevant network operator and accepted by the applicant;
- c biomethane compliant with the criteria set forth in the EU RED II Directive in compliance with the principle of "not causing significant harm," as well as one of the following sustainability requirements:
 - 1. the plant produces biomethane for the transportation sector from feedstock that can be used for the production of advanced biofuels, resulting in at least a 65% reduction in greenhouse gas emissions through the use of biomass;
 - 2. the plant produces biomethane for other uses, resulting in at least an 80 percent reduction in greenhouse gas emissions through the use of biomass;
- d in case of reconversions, the intervention shall be carried out on existing agricultural plants;
- e in case of plants located in areas affected by EU infringement procedures in order to improve air quality and combat air pollution, biomethane production from biomass must comply with the prescribed emission limits;

- f in case of applicants carrying out industrial activities, where biomethane production takes place on an industrial scale, compliance with the directive 2010/75/EU ("**IED Directive**") shall be ensured;
- g in case of agricultural plants located in nitrate-vulnerable zones with nitrogen load of livestock origin exceeding 120 kg/ha, at least 40 percent by weight of livestock manure must be used in the overall feeding plan;
- h projects must provide for plant digestate storage tanks, with a volume equal to the production of at least thirty days, covered gas-tight and equipped with gas capture and recovery systems to be reused for the production of electricity, thermal energy or biomethane (requirement not required if digestate is directly sent to the composting process).

5. The allocation of incentives

Incentives are allocated through competitive procedures for annual production capacity quotas expressed in standard cubic meters/hour.

Specifically, the annual quotas are:

	2022	2023	2024	Totale
Totale (Smc/h)	67.000	95.000	95.000	257.000

At least two procedures per year - with the exception of 2022 where only one procedure has been held - shall be launched, providing for a sixty-day opening period.

Each individual procedure shall be conducted online, in accordance with the principles of transparency, publicity, protection of competition, and adopting non-discriminatory methods.

Within ninety days of the closure of each procedure, the GSE evaluates the projects and publishes the ranking list - on its website indicating the criteria applied - containing the projects admitted and giving evidence of the projects placed in a useful position to be eligible for incentives.

The ranking list is prepared within the limit of the available annual quota and is based on the percentage discount offered to the reference tariff.

If the applications for participation in the procedure result in exceeding the available quota for the individual procedure, with the same percentage rebate offered, the GSE shall apply the priority criterion of compliance with requirement c) set forth in Section 4 (*Requirements*) above and, subordinately, the criterion of the earliest date of completion of the date of participation in the procedure.

The incentives provided by the Decree cannot be cumulated with other public incentives or support schemes, however denominated, intended for the same projects; without prejudice to the possibility of access to the dedicated energy withdrawal mechanism (*it. "Ritiro dedicato"*) provided by Legislative Decree 29 December 2003, No. 387, with reference to the eventual production of electricity.

6. Fulfilments for the implementation of the Decree

Among the fulfilments envisaged for the purpose of fully implementing the Decree, the one still pending is the identification of an independent entity to which MITE (now the Ministry of Environment and Energy Security "**MASE**") entrusted the evaluation of the measure according to the criteria set forth in the Evaluation Plan approved by the European Commission (C (2022) 5831 of August 8, 2022).

The MITE shall provide within 180 days from the date of entry into force of the Decree (*i.e.* April 26, 2023).

The evaluating subject must be compliant with the following requirements:

- be independent from the MITE and the GSE and not be in conflict of interest with potential beneficiaries of the measure;
- be equipped with the relevant experience in economic/quantitative analysis, also with the reference to the energy and environmental sector.

The evaluating subject identified will be asked to refine a detailed evaluation plan, prepare at least an interim evaluation report by December 31, 2024, and a final evaluation report by September 30, 2025. By the same deadlines, these documents must be submitted to MITE, which will make them public on its website.

7. *The Enforcement Rules of the Decree*

Following the approval of the MASE, by means of directorial decree No. 23 of January 13, 2021, the GSE published the enforcement rules of the Decree (the “**Application Rules**”).

The Application Rules regulate, among others, the modalities of conducting the public tenders as well as, in detail, the subjective requirements, related to applicants, and objective requirements, related to plants, necessary for the incentive allocation pursuant to the Decree.

In particular, the GSE shall verify the compliance with the requirements at the time of the application request submission and at the time of the entering into operation of the plant. The requirements must be respected throughout the incentive period and any amendment must be promptly reported to the GSE.

A. Subjective Requirements:

The “applicant” is the subject, natural person or legal entity, who (i) bears the expenses for the plant construction or reconversion, (ii) has obtained the required authorization for the plant construction/reconversion and operation and (iii) has obtained the grid connection with the obligation to connect third parties, if applicable.

- To be compliant with the subjective requirements, the applicant:
 - shall not be a company in difficulty²;
 - no grounds for exclusion pursuant to Article 80 of Legislative Decree No. 50 of 18 April 2016 shall apply (e.g. final judgement or penal conviction order for, among others, crime of criminal conspiracy, mafia association, corruption, bribery, etc.);
 - shall not be included in the list of enterprises for which a recovery order is pending on a decision of the European Commission that has declared one or more incentives provided to the applicant to be unlawful or incompatible with the internal market; should the company be included in the aforementioned list, access to the incentives is suspended until the applicant has repaid or paid the full amount of the aid deemed unlawful and incompatible.

B. Objective Requirements:

Plants that meet the following objective requirements (listed non-exhaustively) shall have the faculty to participate to the public tenders and access to incentives once they entered into operation:

- the required authorization for plant construction and operation shall provide:
 - in case of biomethane plants for the transportation sector, the exclusive use for biomethane production of “advanced” feedstock and a reduction of at least 65% in greenhouse gas emissions;

² A company is deemed to be in difficulty if at least one of the following circumstances is met: (i) should it be a limited liability company, whether it has lost more than half of its quota capital due to cumulated losses; (ii) should it be a company where at least some partners have unlimited liability for company’s debts, whether it lost more than half of the equity funds shown in the company’s accounts due to accumulated losses; (iii) whether the company is subject to insolvency bankruptcy proceeding or met the requirements provided by Italian regulation for beginning against the company such proceeding at its creditors’ request; (iv) should be a company different from small and medium-size enterprises, whether during the last two years the company’s debt/equity ratio was higher than 7,5 and the company’s interest coverage ratio was less than 1,0.

- b.** in case of biomethane plants for other uses, a reduction of at least 80% in greenhouse gas emissions.
- 2. construction works can't start before the ranking list publication of the relevant competitive procedure for which the applicant applied for and the plant was admitted in a useful position;
- 3. in case of new construction plant, all components regarding production, purification, refining and grid connection must be newly built, while in case of plant undergoing reconversion all components regarding refining and grid connection must be newly built;
- 4. only agricultural biogas plant already existing shall be plant undergoing reconversion;
- 5. upon the date of application to the competitive procedure, the applicant must have obtained the required authorization, also as a result of transfer (*voltura*);
- 6. should be required the grid connection with the obligation of third-parties connection, the applicant must have obtained and definitely accepted the grid connection offer; and
- 7. the incentive pursuant to the Decree must not be cumulated with other incentive.

The GSE has also analyzed some aspects that each applicant should take into consideration when accessing incentives (e.g., verification of the absence of conflict of interest, prohibition of "double financing," requirements inherent in the principle of Do No Significant Harm, criteria for identifying raw materials, etc.), reserving to publish any further fulfilments regarding monitoring and reporting on the N.R.R.P. measures.

Following the Application Rules publication, the GSE hold the first 2023-year public tender to access to incentives. The application for participation shall be submitted online, through an application form available on the GSE website, during the period from January 30, 2023 to March 31, 2023.

On 29 June 2023, *i.e.* ninety days following the tender closing, the GSE shall publish the ranking list indicating the plants placed in useful position respecting the following criteria: (i) percentage reduction on the reference tariff, (ii) reduction in greenhouse gas emissions than the minimum percentage values specified under paragraph B (*Objective Requirements*) above, (iii) priority in the completion of the application for participation in the procedure.

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