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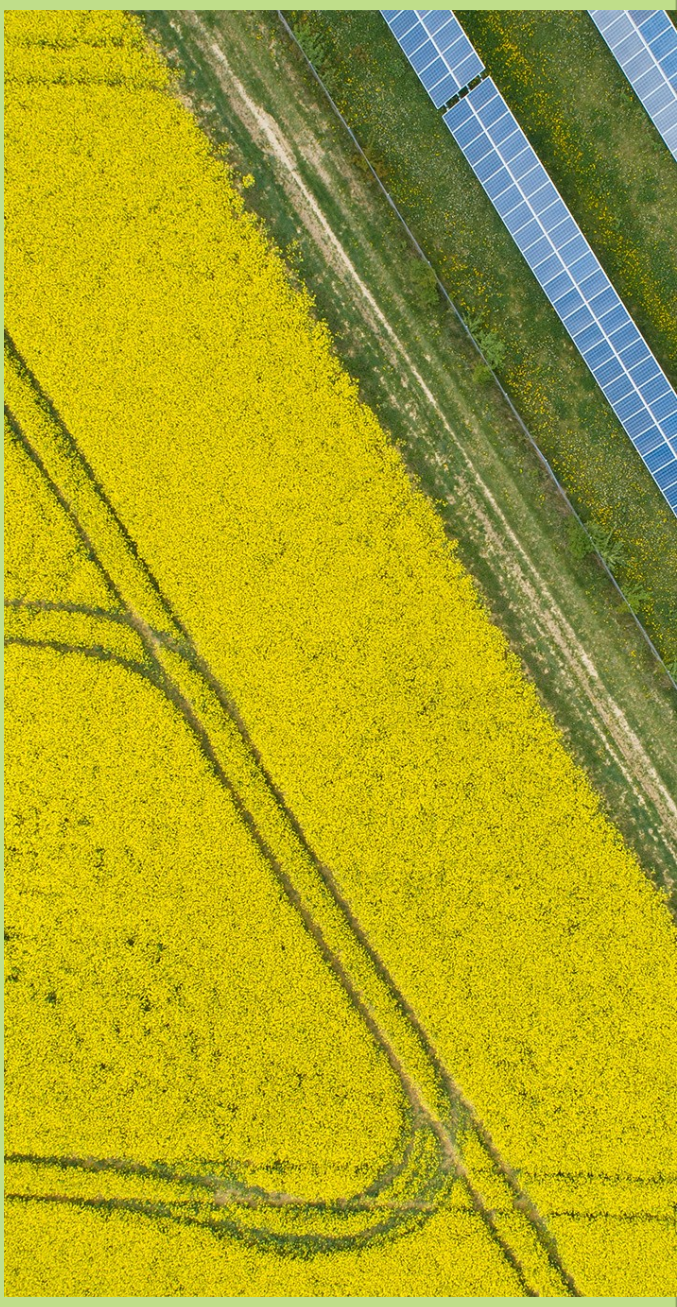
Structural and simplification measures in the renewables sector:

the new features of the Energy Decree and the Aid Decree



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The Decrees

Energy Decree:

Decree-Law No. 17 of 1 March 2022 (in the Official Gazette No. 50 of 1 March 2022, in force since 2 March 2022; converted by Law No. 34 of 27 April 2022, in the Official Gazette No. 98 of 28 April 2022, in force since 29 April 2022) containing "*Urgent measures for the limitation of electricity and natural gas costs, for the development of renewable energies and for the relaunch of industrial policies*".

Aid Decree:

Decree-Law approved by the Council of Ministers on 2 May 2022 on "*Urgent measures on national energy policies, business productivity and attracting investments, as well as on social policies and the Ukraine crisis*".

1. Introduction

The **Energy Decree** and the **Aid Decree**, of which there is only an incomplete draft approved by the Council of Ministers, contain interventions to reconcile and clarify the regulatory changes already introduced by the previous Simplifications Decrees (Decree-Law No. 76 "**Simplifications Decree**" of 31 May 2020 and Decree-Law No. 77 "**Simplifications-*bis*** Decree" of 31 May 2021) as well as to implement the RED II Directive (Decree No. 199 "**RED II Decree**" of 8 November 2021). Since these most recent decrees have been analysed in previous *alerts*, reference is made to them for a detailed analysis of the previous regulations.

Alert at the forefront

- The new features in the energy sector introduced by the Simplifications-*bis* Decree (updated to the conversion law)
- Renewable Energy Directive II: EU Renewable Energy Directive implemented in Italy

The following is a summary of the new provisions introduced in relation to the renewable energy sector, which can serve as a guide for reading, taking into account the additional changes resulting from the *conversion* into law that has just been completed.

Generally speaking, however, it cannot be ignored that, although partially constrained by the unforeseen evolution of the geopolitical context, the legislator continues to proceed by additions and stratifications, often returning to provisions introduced just a few months ago, where increasingly, however, in order to effectively pursue the goals of ecological transition and energy autonomy, there is a need for general reorganisation to make the already complex sector legislation intelligible as well as applicable. It also does not help that these interventions are carried out through the medium of the decree-law instrument, which is then open to extensive changes in parliament. While the *conversion* process often, as in the case of the Energy Decree, corrects oversights and errors of the emergency decree (e.g., the cancellation of size limits for agrovoltaic plants eligible for incentives), it lacks the organic structure and systemic order that, in this sector, only delegated legislation and the adoption of single texts has managed to provide.

The Energy Decree dedicates the whole of Chapter II of Title I (Art. 9-21) to simplification and reconciliation measures aimed at facilitating the location, development and installation of electricity production plants from renewable sources. In particular, these are:

- Measures that facilitate the location of plants by identifying new suitable areas *in law,* extending their size (especially with regard to photovoltaics) and also appropriately introducing transitional regimes that favour such location pending the identification of so-called suitable areas.

Appropriate acceleration through primary legislation of the identification of eligible areas, preventing possible delays in the introduction of implementing legislation of the RED II Decree.

- Procedural simplification measures that:
  - expand the scope of the authorisation simplifications for the so-called suitable areas already provided for in the RED II Decree (compulsory but not binding nature of the opinions of the administrations in charge of landscape protection - Superintendencies, in authorisation and environmental assessment procedures, reduction of procedural deadlines by one third);
  - extend the cases of recourse to municipal procedures such as the simplified authorisation procedure ("**PAS**") and the sworn notice of work commencement ("**DILA**"), increasing the technical parameters within which variants to wind power plants can be qualified as non-substantial;
  - confirm and extend the liberalisation of the installation of photovoltaic and thermal systems on buildings, including connection works outside the building.

Robust reinforcement of the use of the DILA and the PAS, the actual success of which, however, will depend on market confidence in these instruments. The liberalisation of installations on buildings is still held back by landscape protection.

The draft Aid Decree is still provisional and mostly focuses on support measures for businesses and consumers in connection with rising fuel and energy costs. The main provisions on renewable energy sources contained in Chapter I of Part I, devoted to Energy Measures, are summarised below. It contains provisions that, in their current wording:

- further accelerate the definition of the framework of the so-called suitable areas, by attributing to the State (Art. 6) the power to intervene in substitution pursuant to Art. 41 of Law no. 234 of 24 December 2012, and to proceed directly to the identification of suitable areas at a regional level, if the interested regions, once the relevant criteria have been set by the Ministry for the Ecological Transition, delay in selecting such areas or proceed in non-compliance with the ministerial criteria;
- identify all areas that are more than 1,000 metres (in the case of photovoltaic plants) or more than 30 times the height of each wind turbine, with a minimum of 3,000 metres (in the case of wind power plants) from areas protected under the cultural heritage code, as eligible areas in law;
- require (Art. 6) the Ministry of Culture to set uniform criteria and parameters for the assessment of projects for energy production plants from renewable sources, reinforcing the obligation to justify any refusals in relation to substantiated, strict and punctual requirements for the protection of cultural or landscape interests;
- determine (Art. 7) that in the case of a deliberation of the Council of Ministers in relation to the conclusion of an environmental impact assessment ("**EIA**") procedure falling within the competence of the State, the deliberation replaces the EIA measure, and that when such a deliberation, or a deliberation taken following opposition to the outcome of a services conference, forms part of a single authorisation procedure for the construction of a plant for the production of energy from renewable sources, if the single authorisation is not issued by the competent administration within sixty days of the deliberation of the Council of Ministers, it is nevertheless deemed to be issued. The Presidents of the regions and autonomous provinces concerned may participate in the meetings of the Council of Ministers aimed at adopting resolutions on EIAs or objections to the outcome of service conferences, without the right to vote;
- stipulate (Art. 10) that the representative of the Ministry of Culture in the EIA Commission for PNRR-PNIEC projects participates in the meetings without the right to vote; reduce the deadlines for requests for additions (which must not lengthen the procedure beyond 45 days); and prohibit the introduction of different or additional requirements to the original measure when extending EIA measures that have already been issued.

2. Location of renewable energy plants and expansion of so-called suitable areas (Arts. 10-bis, 11, 12, 13 and 18)

2.1 Identification of suitable new areas *in law* for the installation of renewable sources and "*solar belt*" for photovoltaics (Art. 12 and 18)

To the areas eligible in law under Art. 20 of the RED II Decree - which, although delegating the identification of eligible areas in general to an implementing measure, had in any case immediately identified some areas suitable for the installation of plants - Art. 18 adds, for all renewable sources, the sites and plants available to the Italian State Railways group and motorway concessionaires. The plants and connection structures to be constructed in these areas are declared to be of general public interest and are subject to accelerated administrative procedures, in which the administrations in charge of landscape and archaeological protection express their opinion, but with non-binding approval, during the authorisation process in accordance with Article 22 of the RED II Decree. Article 12 also adds the important clarification that the opinion of the Superintendence Offices is mandatory but not binding even during the environmental assessment procedure.

With reference to photovoltaic plants only, Art. 12 adds to the list of eligible areas in law already provided for by the RED II Decree, which, as has already been pointed out, benefit from procedural simplifications, a series of new areas that have been emphatically called "*solar belts*". These areas include: those in which there are already plants subject to substantial modifications, including those connected to the installation of storage plants of up to 3 MWh per MW of plant power; agricultural areas within 300 metres of areas designated for industrial, artisanal or commercial use, including SINs, quarries and mines; areas within industrial plants (including agricultural areas within 300 metres of such plants); and areas within 150 metres of motorway networks.

Art. 12 also adds areas for artisanal, commercial and service and logistics use to those that should be identified as suitable by the implementing legislation when the list of suitable areas is established in detail.

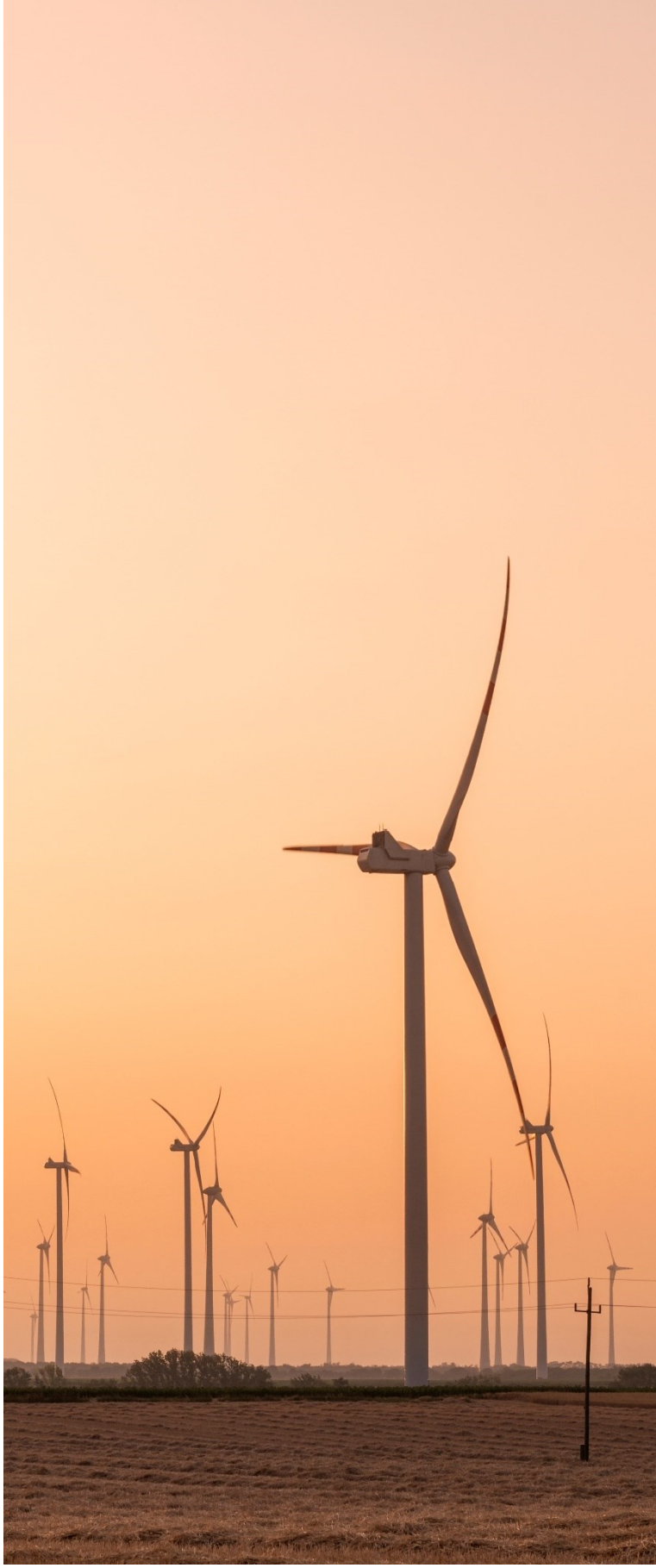
While the wording of the provision seems clear, the wording at some points makes it doubtful whether the limitations on the effectiveness of the opinion of the administrations in charge of the protection of cultural heritage are really extended, since, with reference to the suitable "added" areas, the provision is careful to emphasise that the competences of the Superintendencies "remain firm", a reminder that is actually superfluous since the discipline of the subject was already established by Article 22 of the RED II Decree, and therefore possibly subject to instrumental interpretations.

2.2 Photovoltaic systems on the ground or on structures in industrial areas (Art. 10-*bis*)

The provision - introduced by the conversion law - stipulates that, by way of derogation from urban planning instruments, photovoltaic or thermal plants covering up to 60% of the available surface area may be built.

2.3 Installations in agricultural and agrovoltaic areas (Art. 11)

The third intervention in less than nine months on Article 1, paragraph 65 of Decree-Law No. 1 of 24 January 2012 further modifies the regulation derogating from the general ban on incentives for photovoltaic systems with ground-mounted panels in agricultural areas established by paragraph 1 of the provision.



The initial introduction in favour of so-called agrophotovoltaics, which consisted of the apparently immediate possibility of accessing incentives, subject only to the adoption of techniques that allow for the continuity of agricultural and pastoral activities, as well as monitoring tools, introduced by the Simplifications-*bis* Decree, was followed, with the initial version of the Energy Decree, by the introduction of a very limiting requirement (the agrovoltaic plant or even an agricultural area with ground-based modules could access incentives, but only if it did not occupy more than 10% of the

farm's surface). The law converting the Energy Decree removed the surface limit and again excluded plants on agricultural land from the incentive (without prejudice to the exceptions already provided for SIN sites, landfills, and depleted and restored quarries), introducing a new exception for floating plants on wetlands and artificial reservoirs, again located on agricultural land.

With reference to agrovoltaic plants, the reference to the need for implementing provisions detailing the requirements of monitoring systems has been strengthened - effectively postponing the provision's operability - and a mechanism has been introduced that excludes land affected by the installation of agrovoltaic plants - and also different land that might be the result of their subdivision - from access to further incentives for a period of ten years.

Although the most restrictive measures towards agrovoltaics have been removed by the conversion law, the resulting regulation makes the forthcoming auction and registry procedures under FER 1 Decree inaccessible for agrovoltaic plants at present, at least until an implementing regulation defining the requirements for monitoring activities is adopted (and given the current very restrictive interpretation of the GSE (Gestore dei Servizi Energetici), which is also awaiting an implementing regulation of the Ministry of the Environment). The dissuasive measure that excludes the possibility of applying for incentives for plots of land already affected by the installation (or authorisation process) of an agrovoltaic plant for a period of ten years is also not very comprehensible - although more proportionate than the measures that limited initial access to plants occupying more than 10% of the farmland. This seems to confirm a fundamental mistrust towards ground-mounted installations in agricultural areas, even agrovoltaic ones, which no longer seems in line with the pressing needs for energy independence and ecological transition.

2.4 Offshore *installations* (Art. 13)

In this case too, the conversion law, noting the medium-to-long time required to identify suitable areas, provides for a series of temporary measures aimed at facilitating the location of energy production plants from renewable *offshore sources*.

In particular, it is envisaged that the authorisation facilities already provided for "when fully operational" by the RED II Decree for *offshore* plants in suitable areas (non-binding nature of the opinions of the Superintendencies; reduction of procedural time by one-third) must also apply, pending the identification of suitable areas, to all projects in areas that are not subject to constraints incompatible with the establishment of such plants, and that - similarly to what is provided for *inshore* plants - no moratoria may be issued for areas that are not subject to constraints incompatible with *offshore* installations. There is also provision for a reshuffling of the ministries involved in the process of adopting the guidelines that will have to regulate the authorisation procedure.

3. Simplification of authorisation procedures for the installation of photovoltaic plants and variant procedures for plants powered by renewable sources (Articles 9, 9-ter, 10, 10-bis, 12)

3.1 Authorisation regime for photovoltaic plants in eligible areas (Art. 12, para. 1-*bis*)

The conversion law introduced a general change to the hierarchy of authorisation measures that apply to the installation of photovoltaic systems in eligible areas (areas already partially identified in law), by inserting a paragraph 2-*bis* to Article 4 of Legislative Decree No. 28/2011. The change can be outlined as follows:

Power plant	Qualifying title
<= 1MW	**DILA** Art. 6-bis, Legislative Decree no. 28/2011
>1MW e <=10MW	**PAS** pursuant to Art. 6, Legislative Decree no. 28/2011
>10MW	**AU** pursuant to Art. 12 Legislative Decree no. 387/2003

The same provision, however, establishes that for proceedings in progress the private applicant may opt for the new discipline, and extends to such proceedings the procedural simplifications already provided for by Article 22 of the RED II Decree for suitable areas (non-binding opinion of the Superintendencies; reduction by one third of the terms for the conclusion of the authorisation and environmental assessment proceedings), provided that the proceedings do not concern areas subject to constraints or declared unsuitable at the regional level.

3.2 Deregulation of the installation of photovoltaic and thermal systems on buildings: clarifications and extension to related works (Art. 9 and 10)

The Simplifications-*bis* Decree had already deregulated, just a few months ago, the installation of photovoltaic systems on buildings and above-ground structures other than buildings, equating it to ordinary maintenance works, for which no permit or other act of consent is required, except in the cases of landscape constraints pursuant to Legislative Decree 22 January 2004, no. 42, Art. 136, paragraph 1, lett. b) (villas, parks and gardens of outstanding beauty) and c) (complexes of immovable property of particular aesthetic and traditional value, such as historical centres).

The provision has now been entirely rewritten by the Energy Decree, and then further amended on conversion. It should be noted that the deregulated regime **(a)** also applies to urban planning zones A - historic centres and to buildings included in ski resorts; **(b)** also covers the construction of connection works both inside and

outside the buildings on which photovoltaic and thermal systems are installed; **(c)** the installation of panels integrated in the roofs and not visible from external public spaces and panoramic viewpoints is liberalised also in listed historic centres, provided that they are not installed on roofs linked to local tradition. Art. 10 also provides that a future decree of the **MITE** will make use of a single simplified model applicable to such plants with a power between 50 and 200kW, allowing for the construction, connection and operation of such plants.

As has already been emphasised, the provision is potentially disruptive, but its actual scope will have to be verified when the facts come to light, also taking into account that in the various rewritings there has been no substantial reshaping of the relationship between interest in the development of photovoltaic installations and cultural interest.

3.3 Authorisation through the DILA for ground-mounted photovoltaic systems of up to 1MW (Art. 9, para. 1-*quinquies*)

In partial overlap with the amendment of Article 4 of Legislative Decree no. 28/2011, a significant simplification is introduced for the installation of photovoltaic plants with ground-mounted modules up to 1 MW (which in Italy have historically accounted for a very high share of the installed power), for which the use of the DILA is allowed, provided that **(a)** they are located in areas declared suitable by the sector regulations **(b)** they are not located in urban planning zones A - historic centres; **(c)** there are no landscape constraints on the area of the plant and related works; **(d)** no expropriation procedures are required.

3.4 Clarifications on the permit regime through the simplified municipal authorisation procedure (PAS) for photovoltaic plants in productive areas and raising the threshold for the verification of subjection to regional EIA for such plants (Art. 9, para. 1-*bis*).

This is another measure already introduced by the Simplifications-*bis* Decree in the summer of 2021, which Parliament returned to when converting the Energy Decree, rewriting it to broaden its scope and clarify its application modalities. It is confirmed that photovoltaic plants of up to 20MW in areas for industrial, production and commercial use can be authorised with the PAS, specifying that this procedure is applicable whether the plant is connected to medium or high voltage, and with reference to both the plant and the connection works.

Quite appropriately, it corrects the misalignment between the threshold-value for the PAS application and the threshold-value for environmental impact assessments (which entailed a state EIA for plants above 10 MW), by stipulating that these types of plants are subject to a regional EIA, but only for power above 20 MW. It also extends the applicability of this procedure to plants with a capacity of up to 10 MW located in suitable areas or agrovoltaic plants located within three kilometres of production areas.

The new wording of the provision certainly represents an improvement over that of the Simplifications-bis, even if it would have been appropriate to explicitly state that the raising of the threshold for the verification of subjectivity to a regional EIA excludes the competence and obligation of a state EIA, which is triggered for all photovoltaic plants above 10 MW.

3.5 Authorisation through the PAS of the installation of floating photovoltaic plants up to 10 MW (Art. 9-*ter*)

This provision, not contained in the Energy Decree and introduced during the parliamentary debate, extends the PAS regime to all plants floating on reservoirs and covering irrigation canals with a capacity of up to 10

MW. Nevertheless, this does not affect environmental competences (and therefore the application of the regional conformity assessment procedures, moreover according to criteria to be defined by inter-ministerial decree) and excludes the application of this procedure in areas subject to state landscape constraints, protected natural areas or Natura 2000 network sites.

3.6 Authorisation through the PAS of electrochemical storage plants (Art. 9, para. 1-*sexies*)

The provision again impacts on Art. 1, para. 2 of Decree-Law No. 7 of 7 February 2002, correcting certain aspects of the rules already amended by the Simplifications-*bis* Decree. In particular, it is foreseen that the application of the PAS to electrochemical storage plants to be built in areas where production plants with a capacity of less than 300 MW are already located concerns not only plants fuelled by fossil fuels but also those fuelled by renewable sources, provided that there is no increase in the area occupied and that no changes to urban planning instruments are required. It should also be noted that the authorisation procedure provided for in the Simplifications-*bis* Decree applies only to storage plants operated in connection with production plants powered by renewable sources (and not if *stand-alone*).

3.7 Extension of the regime of non-substantial variants (Art. 9)

3.7.1 Strengthening the Enforcement of the DILA (Art. 9, para. 1, lett. a)

By intervening on Art. 5, para. 3, of Legislative Decree No. 28/2011, by means of a provision integrally introduced at the time of conversion, it is established that "*non-substantial modification interventions that result in an increase of the installed power and the need for additional connected works without an increase of the occupied area*" are subject to the hyper-simplified municipal procedure of the DILA governed by Art. 6-*bis* of the same decree, which expressly excludes the acquisition of environmental and landscape assessments and any act of consent, already applied to the installation or modification of plants and projects. The provision specifies, however, that this is without prejudice to the verification of archaeological interest under Art. 25 of the Public Contracts Code (Legislative Decree 18 April 2016, no. 50).

3.7.2 Extension of the notion of "wind farm site" and of the calculation of the maximum height of wind turbines for the purpose of applying the authorisation regime of the PAS to non-substantial modifications of wind farms (Art. 9, para. 1, lett. b)

With technical changes to the methods for identifying the site of the wind farm and the maximum height of any new wind turbines to be installed, already introduced by the Simplifications-*bis* Decree last summer, which extend tolerances and limits, the applicability of the authorisation regime for non-substantial changes already provided for by Art. 5, paragraph 3 of Legislative Decree no. 28/2011 (PAS) is also further extended.

This change is undoubtedly in the direction of further facilitating re-powering and efficiency enhancement of wind power projects that were authorised a long time ago or of plants that have been in operation for some time. However, the question remains, which was already pointed out at the time, as to the need to acquire environmental assessments, which could also nullify the broadening of the scope of application of the simplified regulation.

4. Other provisions

4.1 Electricity infrastructure of the National Transmission Grid ("RTN") and RTN connection works (Art. 13-*bis*)

The law converting the Energy Decree intervenes on compulsory purchase procedures for the construction of portions of the national transmission grid, extending the deadline for adopting the expropriation decree from three to five years. The single authorisation process is also simplified, providing for greater margins of compatibility between civic uses, on the one hand, and the construction and reconstruction of power lines, on the other, also for the purposes of the regional assessment of the latter. It also provides for the possibility of authorising the burying of overhead lines belonging to the RTN by means of a declaration of initiation of activities, and for the fact that the special rules for the construction of the RTN also apply to grid works for the connection of renewable energy production plants, when the relevant authorisation has been turned over to the transmission grid operator.

4.2 Self-consumption (Art. 10-*ter*)

The conversion law intervened on the regulation of the notion of "self-consumer" of renewable energy contained in Article 30 of the RED II Decree, relaxing the criteria by which a final customer can be qualified as a "self-consumer" and access incentive mechanisms.

In particular, it is envisaged that the final customer may also be qualified as a "self-consumer" if they directly connect their own property to a production plant located on a site or on another property - to which they have access - within a radius of ten kilometres from the withdrawal point, or even by using the distribution network to take the energy fed in from the remote plant, without any dedicated connection between the feed-in point and the withdrawal point. The remote installation can be owned or operated by a third party. Lastly, it is envisaged that general system charges will be applied in the same measure to connections via direct connection and those via the distribution network.

4.3 The future system of withdrawal and sale of energy produced from renewable sources (Art. 16-*bis*)

While delegating the detailed regulation to future decrees to be issued by MITE, the conversion law has introduced a mechanism to foster the stable integration of renewable sources in the electricity market. The system provides for the GSE to offer owners of renewable energy plants in the country a power purchase and withdrawal service through long-term contracts of a duration of at least three years. This energy is then sold through sales contracts, concluded at no cost to the GSE, through the information and trading instruments set up by the Energy Market Operator (GME). The system, however, is in an absolutely primitive state.

5. *Concluding remarks*

Although there are numerous measures of effective simplification and procedural acceleration contained in the Energy Decree, and the improvements brought about by the conversion law are noteworthy, there are still unresolved issues already pointed out with reference to the previous legislation. In particular, we refer to:

1. the effective inclusion of so-called agrovoltaic plants, still subject to restrictive measures aimed at preserving agricultural land, which are not compatible with the pressing need to strengthen the country's energy independence and accelerate the ecological transition process;
2. to the full acceptance by the Superintendencies of the diminished role in the so-called suitable areas, even in the face of regulations formulated with some uncertainty with reference to interventions in neighbouring areas, and to the discontinuation of the use of the instrument of opposition as a means of extending protection;
3. with respect to re-powering interventions, the ongoing applicability of the environmental provisions (with the risk that variants qualifying as non-substantial in terms of authorisation may instead be considered substantial in terms of the environment, reducing or even nullifying the simplification of *the* authorisation procedures).

More broadly speaking, therefore, we would hope for a systematic reorganisation of regulations in the energy sector with clear indications on each area of reference both in terms of the administrative process and in terms of the responsibilities of the bodies in charge, in the event of undue delays or in the event of evident negligence in not proceeding to authorise projects that are now of vital importance for our country to move towards the long-awaited energy independence.

Simone Cadeddu

Partner

+390669667000
simone.cadeddu@twobirds.com

Pierpaolo Mastromarini

Partner

+390669667000
pierpaolo.mastromarini@twobirds.com

Jacopo Nardelli

Senior Associate

+390230356000
jacopo.nardelli@twobirds.com

Camilla Triboldi

Associate

+390669667000
camilla.triboldi@twobirds.com

Maddalena Was

Associate

+390230356000
maddalena.was@twobirds.com

twobirds.com

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dusseldorf • Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris • Prague • Rome • San Francisco • Shanghai • Singapore • Stockholm • Sydney • Warsaw