



# RENEWABLE ENERGY LEGAL FOCUS



ENERGY TEAM

FEBRUARY 2022

## INTRODUCTION

During the last few months several new measures have been introduced to promote the production of energy from renewable sources.

The main innovations concern, among the others:

- ✓ **the authorization procedures for:**
  - the construction of new plants
  - the modification of the existing plants
- ✓ **the assessment procedures regarding the environmental impacts**
- ✓ **the identification of suitable areas for the construction of the plants**
- ✓ **The public support mechanisms related to the production of electric energy**
- ✓ **Updating models for the development of distributed generation and the new models of local aggregation for the production, transmission, consumption, storage and sale of green energy.**

To follow are some “snippets” regarding the main innovations that have been introduced by Law Decree no. 76/2020 (the so-called Simplification Decree, converted in Law no. 120 of 11 September 2020), by Law Decree no. 77/2021 (the so-called Simplification Decree-bis, converted in Law no. 108 of 29 July 2021) and by Legislative Decree 199/2021 which has transposed the EU Directive 2018/2001 (the so-called RED II Directive). Lastly, Law Decree no. 4/2022, the so-called "Support Decree-ter", was introduced and on which, until its conversion, we are interrupting any evaluations.



## INNOVATIONS REGARDING THE AUTHORIZATION OF THE PLANTS

### New plants

The construction and operation of new plants is currently regulated according to the following authorization procedures:

<i>Procedure</i>	<i>Type of plant</i>
Single Authorisation pursuant to art. 12 Legislative Decree 387/2003	> 60 kW wind power > 50 kW photovoltaic > 100 kW hydroelectric > 200 kW biomass
Simplified Permit Procedure (SPP) under municipal jurisdiction	Plants having power: < 50 kW Can be increased by the Regions up to < 1 MW
Simplified Permit Procedure (SPP) under municipal jurisdiction	Photovoltaic plants with power < 20 MW connected to the medium voltage grid and located in an area for industrial, production, or commercial use, in closed or restored landfills, quarries not suitable for further exploitation. The plants with power > 10 MW are subject the verification of EIA eligibility
Communication relating to free building activities	Plants with power < 20 kW Can be increased by the Regions up to > 50 kW.
Communication relating to free building activities	New photovoltaic plants with modules placed on the roof of rural buildings, buildings for productive use and residential buildings, with modules installed to replace the roof of rural buildings and buildings on which the complete removal of Eternit or asbestos is operated.

Legislative Decree 199/2021, article 19, subject to prior implementation of a specific Ministerial Decree, provides for the setting up of a unique digital platform -to be managed by GSE - for the requests for authorization (for the first time



application for the Single Authorization) and the implementation of single models.

***Non-substantial variations on existing plants and on authorized projects that were not constructed***

If non-substantial variations want to be introduced, the new guidelines briefly illustrated below, shall be considered.

<b>Procedure</b>	<b>Type of intervention</b>
SPP under municipal jurisdiction	Modifications
Declaration of commencement of works	It applies to specific technical interventions regulated according to the type of plant (wind plant, ground photovoltaic, photovoltaic on buildings, hydroelectric). A common factor to all types is that modifications must not lead to an increase in the area occupied by the plant and the connected works.
Communication relating to activities on buildings that are exempt from permissions	It applies to specific categories of technical intervention regulated according to the type of plant (wind power, photovoltaic, hydroelectric).



**THE CONSTRUCTION OF PLANTS IN SUITABLE AREAS**

Legislative Decree 199/2021 inverts the perspective in spatial planning to host RES plants.

Unlike the Guidelines adopted with the Ministerial Decree 10/9/2010, Legislative Decree 199/2021 provides for (article 20 ff.) the

identification of suitable areas for the construction of the plants (also offshore).

Therefore, three different categories can be considered:

- one related to eligible locations, where the development of plants is facilitated
- one related to the locations not included that of areas not included in the suitable areas (with the standard permitting procedures)
- the (residual) category for ineligible locations (for example due to environmental and landscape constraints)

Within the suitable areas, the development of the plants becomes a primary objective. This priority is pursued through a set of favourable rules for the plants to be built on site:

- reduction of one third of the duration of the authorization process
- mandatory non-binding opinion of the landscape authority
- preferential access to the incentives with the same economic offer
- access to Dutch auction mechanisms for photovoltaic plants built on unused agricultural areas
- differentiated power contingency for Dutch auctions

The time required for a planning framework at national and regional level will probably be of medium-long duration (at least 12 months for the implementation of the Ministerial Decrees and the regional measures).

The Ministerial Decrees shall pay particular attention to the identification criteria for

- suitable areas for the construction of wind and photovoltaic plants
- surfaces, abandoned industrial areas and compromised areas suitable for the installation of RES systems

The principles and criteria contained in the Ministerial Decrees, as well as the Regions' decisions, will have to take into account the need

to reconcile the protection of the landscape, cultural, agricultural, forest and environmental heritage with the other characteristics of the areas, such as the availability of resources, electricity demand, grid constraints and its potential development, all without forgetting the PNIEC targets.

## NEW DEVELOPMENTS IN ENVIRONMENTAL PROTECTION MATTERS



### **Environmental assessment procedures**

Several environmental measures have been introduced in the guidelines to ensure the acceleration of the procedures : the adoption of substitute powers in the event of inaction, the approval of a refund in case of non-compliance with the procedural deadlines, the reduction of procedural timeframes and providing more certainty to the terms by conferring peremptory value. In addition, as indicated in the table below, changes were made to the scope of application of the various procedures and jurisdiction (state / regional) based on the plants' characteristics .

<b>Procedure</b>	<b>Type of plant</b>
State EIA	Onshore wind plants with power > 30 MW
Verification of eligibility under regional jurisdiction	Onshore wind plants with power > 1 MW
State EIA	Offshore wind plants
State EIA	Photovoltaic plants with power > 10 MW
Verification of	Photovoltaic plants within areas

eligibility under regional jurisdiction	of national interest, in areas affected by industrial plants for the production of energy from conventional sources, or in areas classified as industrial with power > 10 MW
State EIA	Hydroelectric plants with power > 30 MW
Verification of eligibility under regional jurisdiction	Hydroelectric plants with power > 100 kW

- The EIA under state competence for new plants for the production of electricity from renewable sources is carried out by the Technical Commission PNRR-PNIEC at MITE
- The EIA under regional competence is carried out according to the procedure of the Single Regional Authorization Measure (art. 27bis Legislative Decree 152/2006) that includes the Single Authorization pursuant to art. 12 of Legislative Decree 387/2003 and has been partially amended in order to ensure greater clarity of content for the proposer, a reduction in the procedure's timeframe and more responsibility for the P.A.

### **Environmental assessment of non-substantial variations**

For non-substantial variations (which do not involve significant and negative impact on the environment) relating to affecting existing plants or authorized projects which have not yet been constructed, the proposer may request a preliminary evaluation in order to identify the eventual procedure to be started (whether or not to apply for Verification of EIA eligibility or EIA).

### **The environmental ruling**

When Law Decree 77/2020 was converted, art.3-septies of the Environmental Code introduced the environmental ruling, an institution that provides the possibility to submit general requests to the Ministry for Ecological Transition regarding the application of environmental legislation.

This institution is available to regions, provinces, including the autonomous provinces of Trento and Bolzano, metropolitan cities, municipalities, trade associations represented in the National Economy and Labor Council, national environmental protection associations and those present in at least five regions or in the autonomous provinces.

The Ministry's indications constitute the interpretative criteria for the execution of the activities in environmental matters falling under the responsibility of the P.A. without prejudice to the possibility for the aforementioned Administration to rectify the interpretative solution, with effect being limited to the future conduct of the applicant.

Art. 3-septies of the Environmental Code also specifies, that the submission of the ruling has no effect on the deadlines imposed by environmental legislation, does not affect the expiry of the time limits nor does it involve the interruption or suspension of the statute of limitations.

## NEW DEVELOPMENTS IN LANDSCAPE PROTECTION MATTERS



The so-called Simplification Decree-bis provided for the formation of a **"special" Superintendence** (at the Ministry of Culture which will be operational until 2026) for the operations envisaged under the PNRR subject to the state EIA or which fall within the territorial jurisdiction of at least two peripheral offices of the Ministry.

Furthermore, in areas close to areas subject to landscape protection pursuant to Legislative Decree 42/2004 (the so-called **neighboring areas**), the Ministry of Culture shall express a **mandatory non-binding opinion**. It will therefore not be able to activate the procedure (provided by art. 14-quinquies of Law no. 241/1990) which provides the involvement of the President of the Council of Ministers to oppose the final decision relating to the procedure (art. 30 of Simplification Decree-bis)

## THE "AGRIVOLTAICS" TREND



Art. 31 of Law Decree 77/2021 makes an exception to the general prohibition concerning access to state incentives for ground-mounted solar photovoltaic plants in agricultural areas that are integrated with agricultural production. The aim is, in fact, to contribute to the environmental and economic sustainability of the companies involved, thus avoiding that such energy production compromises the agricultural activity.

The plants must have the following characteristics:

- shall be characterized by 'innovative' solutions
- the modules shall be elevated from the ground, even providing for the rotation of the modules themselves
- the modules must not compromise the continuity of agricultural cultivation and pastoral activities
- shall also enable the application of digital and precision farming tools.

The incentive (for which the interruption is envisaged in the event of violation of the aforementioned criteria) is subject to the contextual implementation of monitoring systems that allow to verify the impact on crops, water savings, agricultural productivity for the

various types of crops and the continuity of the activities of the farms concerned.

## THE INNOVATIONS ON INCENTIVE INSTRUMENTS



The tariff incentive mechanisms for the production of energy from renewable sources will have the following general characteristics:

- The rate will be proportionate to the size and scale of the plant for a period equal to the conventional average useful life of the type of plant used.
- The incentive, established on a five-year basis, will be allocated as follows:
  - o **Large-scale plants, with power greater than > 1 MW** through Dutch auction procedures carried out with reference to power quotas that can be differentiated by geographical area

Access to this incentive is allowed also for:

- photovoltaic plants built on unused agricultural areas identified by the Regions as suitable areas;
- plants being part of collective self-consumption configurations or energy communities
- o **small plants with power <1 MW**, applicable to:
  - plants with generation costs closest to market competitiveness: the incentive will be awarded through an application requesting access

submitted on the date of the plant's entry into operation; self-consumption and combination with storage systems will be favored

- innovative plants and having higher generation costs: the incentive is awarded through a call for proposals within the limits of power quotas, having as priority criteria the protection of the environment and the territory as well as the percentage reduction of the base rate.

The following specific criteria will also apply:

- promotion of the combination with storage systems
- definition of priority access for plants built in suitable areas, with the same economic offer
- definition of the conditions for cumulation between the support schemes and the PNRR resources
- prohibition of artificial fractioning
- bonus benefits for the installation of photovoltaic plants following the removal of asbestos

## THE INNOVATIONS TO PROMOTE THE DISTRIBUTED POWER GENERATION



### *The collective self-consumption model*

The model provides that:

- more end customers through association shall produce through their own or common plants or those owned by third parties, accumulate or sell surplus renewable



- energy, but primarily use self-produced energy for the needs of self-consumers
- self-consumers must be in the same building / condominium
  - the plants must use the distribution network to share the energy produced, also by resorting to storage facilities
  - private enterprises cannot list participation in the self-consumers group as their main activity

### ***The model of energy communities***

The energy community is an autonomous legal entity, whose power of control lies with individual persons, SMEs, territorial bodies and local authorities including municipal administrations, research and training institutions, religious entities, those belonging to third sector and environmental protection organizations, as well as the local administrations indicated by ISTAT.

The purpose of such configurations is to provide community-wide environmental, economic, social benefits to its associates or members or to the local areas where the community operates and not to create financial products.

The model is based on the principle of virtual self-consumption and therefore the use of the electricity distribution network, without direct physical connection between the plant and the consumption unit.

Industrial districts, rural areas, agricultural areas, portions of municipal territory, parking areas could for instance constitute the perimeter of an energy community.

Communities shall operate in compliance with these conditions:

- the consumer who participates in a community can have renewable energy production plants directly interconnected with the final user, that he either owns or which are managed by a third party, but for the purposes of shared energy only

detects the production of RES energy produced by the plants that are available to and under the control of the community

- the community's self-produced energy must be used primarily for instant self-consumption in the place of production or for sharing with community members. The excess energy can be sold through agreements directly or through aggregation.

ARERA is entrusted with the task of adopting measures relating to self-consumption and energy communities, by March 2022.

ESCOs, SMEs, utilities, investors and the P.A. can be active subjects in the configuration, planning, investment, design, development and management phase of the initiatives as a whole, of the plants, of the energy flows and of the relationship between the community members.

### ***What are the incentives for shared energy?***

The RES plants inserted in the configuration of collective self-consumption and renewable energy communities

- can access the incentive when they **individually** have a power <1 MW and have entered into operation after 15/12/2021
- the energy quota shared by plants and utilities that are connected under the same primary power cabin is incentivized
- the application to access the incentive shall be submitted at the plant's date of entry into operation and prior registration in calls for tenders or registers is not required
- alternatively, plants with power > 1 MW can access incentive provided mechanisms provided for plants that are not part of self-consumption configurations/energy communities
- For instantly self-consumed energy, a direct incentive is provided for plants with power <1 MW upon request and without registration in tenders or registers.



## Energy Team

ROMA

Via M. Mercati, 39  
Tel: +39 06 362141

[roma@macchi-gangemi.com](mailto:roma@macchi-gangemi.com)

VERONA

Via G. Garibaldi 17  
T: +39 045 49360

[verona@macchi-gangemi.com](mailto:verona@macchi-gangemi.com)

MILANO

Via G. Serbelloni, 4  
Tel: +39 02 763281

[milano@macchi-gangemi.com](mailto:milano@macchi-gangemi.com)