

Italy: update on the legislative framework affecting solar plants

The Italian legislative framework governing renewable energies and, particularly, photovoltaic energy, is rapidly evolving. As we reported in a previous client briefing (July 2010), the approval of the Alcoa Decree, the much-awaited *"guidelines for the authorisation to construct and operate plants for the production of electric energy from renewable sources"* and the third *Conto Energia* have significantly contributed to shape the legislative environment governing the construction and operations of solar power plants, especially with regard to the authorisation procedures and the incentives available for the operators.

More recently, some new provisions have been discussed and approved, contributing, along with those mentioned above, to the ongoing evolution of the legislative framework. This client briefing offers an update to our July 2010 client briefing and gives a comprehensive overview of the most recent legislative developments.

1. The Alcoa Decree

Law No. 41/2010, converting into law the so-called "Alcoa Decree" and effective as of 28 March 2010, extended the "deadline" by which power plants could access the incentives available for 2010 under the *Conto Energia* incentive scheme, created by Article 6 of the Ministerial Decree dated 19 February 2007.

Article 2-sexies of the Alcoa Decree established that the 2010 incentives would be available to operators who, by 31 December 2010, had completed construction of a photovoltaic plant and had sent a request for interconnection to the grid in "due time" for the interconnection works to be completed by 31 December 2010.

On 13 August 2010, Law Decree No. 105 of 8 July 2010 ("**Law Decree 105/2010**") converted, with amendments, into Law No. 129/2010 ("**Law no. 129/2010**"), provided that the 2010 incentive tariffs would be available for plants that (i) complete construction as of 31 December 2010, (ii) by 31 December 2010, have informed the competent authorities (i.e. the issuing authorities, GSE and Enel) that construction has been completed by submitting an attestation (*asseverazione*) by an authorised technician, and (iii) start operations by 30 June 2011.

During the parliamentary works for the approval of Law Decree No. 225/2010 (so called "**Milleproroghe Decree**"), an amendment was proposed to postpone the 'deadline' to submit the attestation, from 31 December 2010 to 30 January 2011; however, in the final version of the *Milleproroghe* Decree, published in the Official Gazette on 29 December 2010, the amendment was not included. Therefore, the abovementioned term to benefit from the 2010 *Conto Energia* tariffs remain unvaried.

Key Issues

The Alcoa Decree

The "Salva-DIA" provision of Law No. 129/2010

The DIA under Directive 2009/28/CE: the new Simplified Authorization Procedure

The new incentives for PV plants

The national guidelines to carry out the procedure pursuant to Article 12 of Legislative Decree 387/2003 and the regional implementation guidelines

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2. The "Salva-DIA" provision of Law No. 129/2010

The Constitutional Court declared the unconstitutionality of the regional laws (e.g. R.L. No. 31/2008 of Regione Puglia) which allowed the authorisation, via a simple start of construction notice (*Denuncia di Inizio Attività*, "DIA"), of power plants with a capacity in excess of the national thresholds set forth by Legislative Decree No. 387/2003.

In light of these rulings, art. 1-*quater* of Law No. 129/2010 established that the effects of the DIAs commenced according to the regional provisions later declared unconstitutional should remain unprejudiced as long as the power plants start operations within 150 days from the enforcement of Law No. 129/2010 (i.e. by 16 January 2011).

On 15 December 2010, the Ministry for the Economic Development issued a circular ("**Circular**") to clarify the scope of application of the Article 1-*quater* of Law No. 129/2010.

The Circular states that Article 1-*quater* of Law No. 129/2010 is not intended to affect legal relationships that had "expired" before the ruling was published, meaning those DIAs that had become "definitive" because the terms for challenge thereof, both in court and with a petition before the President of the Republic, have expired¹. These DIAs, therefore, are not subject to the deadline for the start of operations set by Article 1-*quater* of Law No. 129/2010.

Considering the above described rationale for the provision at issue, as well as the well-established principles on the effects, over time, of rulings by the Constitutional Court, the safeguards created by Article 1-*quater* are applicable to: (i) DIAs which, on the date of publication of the relevant rulings of unconstitutionality, had not been perfected because the 30-day term set out in Article 23 of Decree of President of the Republic No. 380/2001 had not yet ended, or had been suspended; (ii) DIAs for which, on the date of publication of the relevant rulings of unconstitutionality, the terms within which a challenge could be submitted before the appropriate administrative court or an extraordinary challenge could be submitted by petition to the President of the Republic had not expired; or (iii) DIAs which, on the date of publication of the relevant rulings of unconstitutionality or thereafter, were or became the object of an action in self-defence by the appropriate public administration.

With ruling no. 366/2010, the Constitutional Court also declared the illegitimacy of another law issued by Regione Puglia: Regional Law 19 February 2008, no. 1, which, similarly to R.L. no. 31/2008, raised the threshold for the applicability of the DIA procedure to 1 MW. However, since the object of the unconstitutionality matter was limited to art. 27.1, letter *b*) (that only concerns wind power plants), the photovoltaic sector should be considered not affected by ruling no. 366/2010. Therefore, the DIAs for PV plants perfected under R.L. no. 1/2008 are to be considered valid and lawful.

In general, all the DIAs issued under regional laws that have not been declared unconstitutional yet, are out of the scope of application of Article 1-*quater*, assuming that they are grounded on a no-longer challengeable and perfected underlying permission.

About the so-called 'non consolidated' DIAs, that fall within the scope of application of Article 1-*quater* (like the DIAs issued under the Puglia Regional Law No. 31/2008), it is necessary to clarify that they do not automatically cease to have any effect if the plants do not start operations within the term. More simply, if operations are not started within the term, then – following expiry of the term itself – the DIAs will no longer have the protection for their effects set out in Art. 1-*quater* and will therefore be challengeable by a third party with standing, assuming the statutory terms for such challenge have not expired.

3. The DIA under Directive 2009/28/CE: the new Simplified Authorisation Procedure

The Italian Government is currently in the process of transposing the EU Directive 2009/28/CE of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources (the "**Directive**", which also forms the object of a separate Client Briefing).

¹ On the theory of "consolidated relationships", for administrative acts that are no longer challengeable. See Constitutional Court Ruling No. 139/1984.

According to the draft legislative decree for the transposition of this Directive (the "**Draft Decree**"), currently being discussed and due to be approved by the end of January 2011, the DIA will be replaced by a new 'Simplified Authorisation Procedure', which essentially consists of a simple notice filed with the Municipality at least 30 days prior to the commencement of works. In absence of objections from the Municipality, the works can be effectively commenced once the 30-day term expires.

The authorisation procedures still pending when the Legislative Decree comes into force will continue to be governed by the old legislative discipline, but with the possibility, for the applicant, to opt for the new Simplified Procedure.

The Draft Decree states that the Regions and Autonomous Provinces will be entitled to extend the applicability of this procedure beyond the values of power set forth by Legislative Decree no. 387/03, to include projects with a capacity of up to 1MW.

Regione Calabria has been the first region to implement a new discipline in compliance with this provision, approving Regional Law 29 December 2010, no. 34, that authorises the construction of plants with a capacity of up to 1MW by way of a simple DIA.

The ample margins of autonomy left to the regions seem to be a step back in the process of national harmonization of the authorisation procedures set forth in the national "*Guidelines to carry out the procedure pursuant to Article 12 of Legislative Decree 387/2003*", published in the Official Gazette on 18 September 2010 (the "**Guidelines**"), according to which all types of plants with a capacity below the national thresholds set out in Legislative Decree 387/2003 (notwithstanding their location on the national territory), are eligible for authorisation by DIA, while all the plants with a capacity above those thresholds have to be authorized by way of a Single Authorisation. While these provisions intended to harmonize the national framework, setting forth common rules for the whole national territory, the Draft Decree seems to go in the opposite direction, allowing different regions to set different thresholds.

For the same reason, the level of autonomy granted to the regions seems to be not particularly consistent with the aforementioned rulings of the Constitutional Court, which also require that the thresholds are uniform and fixed at a national level.

The discipline set forth by the Draft Decree, finally, also seems not entirely compliant with the principles set forth by Law no. 69/2010² (the "**European Law 2009**"), which require the implementation of a simplified authorisation procedure for all the projects with a capacity of less than 1 MW, on the whole national territory, without the possibility, for the regions, to set different thresholds. Particularly, art. 17.1, letter d) of the European Law 2009 provides that, in order "*to simplify [...] the processes to authorise the construction and operations of plants powered by renewable sources and the necessary network structure, [...] the authorisation*" has to be obtained "*by way of DIA, in accordance with Articles 22 and 23 of the Decree of the President of the Republic No. 380 of 6 June 2001, for plants for the production of electric energy with a capacity not in excess of 1 MW as described in Article 2(e), of Legislative Decree no. 387 of 29 December 2003, if powered by the sources listed at letter (a)*".

4. The new incentives for PV plants

The Draft Decree also establish new provisions regarding the incentive mechanisms available for photovoltaic plants. With reference to the electricity produced by renewable power plants that enter into operation after 31 December 2012, in fact, only two different incentives will be available: projects developing less than 5 MW will benefit from a feed-in tariff, predetermined but different for source and capacity, while the power plants developing more than 5 MW will benefit from an incentive assigned through descending-price auctions, managed by GSE.

Even though, on the positive side, this provision implies higher level of uniformity between the different forms of incentive available for renewable energies, its approval would entail, for the photovoltaic sector, the replacement of the existing incentive measures before their natural termination; particular reference is made to the third *Conto Energia*, which has recently been approved (DM 6 August 2010) and was due to be applicable until the end of 2013.

² The Law no. 69/2009 was approved by the Parliament on 12 May 2010, published in the Official Gazette on 25 June 2010 and has been effective since 10 July 2010.

As for the conditions needed to get access to the incentives, the Draft Decree states that, after one year from its entry into force, the incentives for the photovoltaic projects located on agricultural sites will only be granted if: (a) the capacity does not exceed 1 MW and (b) the ratio between the capacity and the surface of the area does not exceed 50 kW/hectare.

This provision seems capable of discouraging the installation of solar power plants with a capacity below 1MW on agricultural sites and substantially erases any incentive for those over 1MW. This will likely damage the total production of renewable energy and make it overall more difficult to comply with the Italian target set by the EU for the development of renewable energies (17% by 2020).

The industry has proposed to drop this provision, considering that the Guidelines already enable the regions to identify the areas (also agricultural ones) to be considered not suitable for the installation of plants (the regional provisions are reported below). That, according to the operators, would be sufficient to assure the preservation of the areas with a particular naturalistic or agricultural relevance (e.g. sites dedicated to d.o.c. or d.o.c.g. productions).

5. The national guidelines to carry out the procedure pursuant to Article 12 of Legislative Decree 387/2003 and the regional implementation guidelines

As early as 2003 (pursuant to Article 12, paragraph 10 of Legislative Decree 387/2003) national law contemplated the adoption of the abovementioned national Guidelines, to be approved by the State/Regions Conference upon proposal by the Ministry for Economic Development, in concert with the Ministry of the Environment and the Ministry for Cultural Heritage. The Guidelines should define the procedure for the authorisation for power plants generating electricity from renewable sources.

The Guidelines were approved by the State/Regions Conference on 8 July 2010 and published in the Official Gazette on 18 September 2010. Regions, Provinces and Municipalities were required to implement the Guidelines by 1 January 2011.

Puglia, Marche, Emilia Romagna, Toscana, Piemonte, Molise and Basilicata regions implemented the Guidelines by the term (even if, in most cases, the legislative procedure has not yet been perfected). The main purpose of the provisions set forth by the regions is to identify the areas where specific limitations to the installation of photovoltaic plants have to be established, for example with reference to agricultural sites or sites with a particular natural or architectural value. Listed below are the main provisions set forth by the various regions.

- *Toscana*: the regional guidelines (which are still in draft form and will be revised by the Regional Council in the coming weeks) prohibit the construction of PV power plants with a capacity in excess of 200 kW and a surface of more than 4000 square meters. Prohibited areas also include any Unesco sites, areas of particular cultural interest, protected areas and areas subject to hydro-geological risks. No restrictions are established, on the other hand, for installations upon roofs and buildings (e.g. houses, factories etc.);
- *Emilia Romagna*: the guidelines, which will be definitively approved in the coming weeks, prohibit the construction of PV power plants on sites with special natural or architectural value but set out no restrictions to installations on other areas or on buildings. On agricultural sites, the construction of power plants is allowed, provided they do not occupy more than 10% of the available surface and the capacity does not exceed 200 kW plus 10 kW for every hectare owned (with a maximum capacity of 1MW). Installation of PV modules is allowed in quarries, dismantled garbage disposal sites (provided it is compatible with the cadastral destination of the sites) and industrial sites;
- *Puglia*: according to the regional guidelines, the single authorization's request can only be submitted online, via the internet site www.sistema.puglia.it. The areas on which the installation of power plants will not be allowed are: protected areas, Unesco sites, culturally relevant buildings, areas of particular public interest, coastal areas, lakes, rivers and waterways, woods, caves and archaeological sites;
- *Basilicata*: the guidelines provide for a simplification of the procedures, allowing the use of the DIA to authorize photovoltaic plants up to 1000 kW; above that level of nominal power the guidelines require a single authorization. A simple notice is required, on the other hand, for the refitting of existing plants not entailing an increase of the capacity.

- *Piemonte*: the guidelines have identified the sites not suitable for the installation of renewable power plants, among which: the sites protected by Unesco, culturally relevant buildings, mountain peaks and crests, Natura 2000 sites, agricultural areas destined to d.o.c. and d.o.c.g. productions, areas subject to hydro-geological risks;
- *Marche*: The Region has put the municipalities in charge of identifying the areas to be deemed unsuitable for the installation of photovoltaic plants: the municipalities have to identify the sites and transpose them on maps within 60 days, in order to facilitate and accelerate the finalisation of investments by the operators;
- *Molise*: the prohibitions set forth by the guidelines only concern wind power plants, the installation of which will not be allowed upon sites of cultural or natural relevance.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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