

The Fourth Conto Energia

Italy has recently approved, with Ministerial Decree 5 May 2011 (the "DM"), the new incentives that will be applicable to photovoltaic plants entering into operations after 1 June 2011. The DM was published in the Italian Official Gazette No. 109 of 12 May 2011, and sets out the tariffs available under, and the terms and conditions to be admitted to, the new incentive system: the *Fourth Conto Energia*.

This briefing discusses the criteria for admission to the Fourth Conto Energia, the new registration requirement applicable to large plants, and the caps that will apply to the incentives for the first years of the incentive system.

Scope of application

The DM applies to all photovoltaic plants with a capacity exceeding 1kW that start operations after 31 May 2011 and (on or) before 31 December 2016. The incentives available under the DM, however, are different for the period until 31 December 2012, from those available for the period thereafter. Further, as described below, the DM creates distinctions on the basis of the size of the plant, and the date on which the plant is admitted to the incentive system. The incentive to be received by a plant will be determined primarily on the basis of the date on which the plants begins operations and will remain unvaried for the entire incentive period of 20 years.

Distinction on the basis of size

The DM creates a basic distinction between "small" plants and "large" plants. Small plants are defined as (i) integrated plants with a capacity of up to 1 MW (ii) non integrated plants with a capacity of up to 200 kW which sell their electricity through the net metering service (*scambio sul posto*) and (iii) plants installed on buildings and areas belonging to the public administration¹, irrespective of their capacity.

Key Issues

The Fourth Conto Energia

Scope of application

Incentive limits

The registration and ranking process

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¹ The technical guidelines issued by the GSE on 15 May 2011 use the extremely broad definition of public administration set out in Article 1 of Legislative Decree No. 165 of 30 March 2001 that includes: all the administrative entities of the State, including schools, autonomous public entities, Regions, Provinces, Municipalities, Mountain Communities and their associations, universities, chambers of commerce and their associations et alia.

Under a strict reading of the law, this last category could encompass all plants on public buildings or land, including those developed and operated by a private entity; given the benefits that classification as a small entails, we will monitor if and how the wording is eventually interpreted at the legislative level.

All plants that are not classifiable as small plants are considered large plants.

The classification as a "small plant" entails significant advantages for the operator, among which the most important is likely to be the right to be admitted to the incentive system without any limitation, as described below. Moreover, generally, the incentive tariffs tend to favor plants with a smaller capacity. As a consequence, the DM includes restrictions to prevent operators from partitioning a single photovoltaic plant into smaller plants to benefit from an incentive, or from an incentive that is higher than that theoretically applicable to the plant taken as a whole.

Plants on the same or contiguous parcels

The DM specifies that if two or more photovoltaic plants are realised by, or referable to, the same person, and are realised on the same parcel of land or on contiguous parcels of land, then all of such plants must be deemed to be one single larger photovoltaic plant. In accordance with the DM, the GSE has 30 days after the DM's enactment to issue additional rules and criteria to prevent photovoltaic plants from being partitioned with the aim of receiving higher incentives.

It is not entirely clear whether smaller plants that are reclassified as a larger plant for purposes of the incentives will also be affected in relation to the net metering system (applicable to plants with a capacity of up to 200 kW) and the mandatory purchase regime with minimum guaranteed prices (available for plants with a capacity of up to 1 MW). Since the DM's provision is applicable only "with respect to the attribution of the incentives", it could be argued that the other aspects should not be prejudiced.

Incentive limits

For the period between 1 June 2011 and 31 December 2012, small plants will be admitted to the Fourth Conto Energia without limitations. Admission of large plants, on the other hand, will be restricted by incentive caps. Therefore, large plants will be admitted following the registration and ranking process described below - which aims to monitor the incentives payable to the admitted plants - to ensure the available incentive caps are not exceeded.

The amount of incentives imputable to large plants admitted to the Fourth Conto Energia will be calculated *ex ante* in accordance with the guidelines issued by the GSE on 15 May 2011 (the "**Guidelines**"), taking into account estimates of (i) the quantity of electricity the plant will produce and (ii) the commissioning date of the plant. The maximum incentives available for the first three semesters of the Fourth Conto Energia are set out in the table below:

	1/06/2011-31/12/2011	First semester 2012	Second semester 2012	TOTAL
Maximum incentive	300 ML€	150 ML€	130 ML€	580 ML€
Capacity	1,200 MW	770 MW	720 MW	2,690 MW

The DM also establishes that, should the cap for year 2011 be reached, the exceeding amount will be paid, but deducted from, the cap set out for the second semester of 2012. In light of this provision, the "real" cap available for 2011 could be regarded as the sum of (i) the cap fixed for 2011 and (ii) the cap fixed for the second semester of 2012 (€300ML + €130ML = €430ML). Clearly, should this threshold be reached, no resources would be left for the second semester of 2012 and incentives would de facto no longer be available after the cap for the first semester 2012 is reached, until 1 January 2013.

The registration and ranking process

To monitor the caps in terms of capacity installed and incentives payable, all large plants seeking admission to the Fourth Conto Energia for a date after 31 August 2011 and on or before 31 December 2012 will need to become registered with the national electronic registry managed by the GSE. The registration requirement applies to:

- (i) large plants already commissioned as of the date of the application ("**Commissioned Plants**");
- (ii) large plants already constructed as of the date of the application ("**Constructed Plants**");
- (iii) large plants already authorised but in relation to which the construction has not yet been completed ("**Plants Being Developed**").

The registration process starts with the submission, to the GSE, via electronic means, of a registration application, along with specific documents listed in the Annex 3 of the DM.

Plants Being Developed have to submit the documents listed in Annex 3-A, which include:

- (i) the definitive designs of the plant,
- (ii) copy of the applicable permit,
- (iii) for a plant authorised by way of a start-of-work notice (*denuncia di inizio attività*) or other simplified procedure, a declaration from the Municipality that this was the proper authorisation procedure for the plant,
- (iv) copy of the technical solution for the connection of the plant to the power grid proposed by the grid operator and accepted by the plant operator,
- (v) for free standing plants, the zoning certificate for all the parcels of land where the plant is to be installed,
- (vi) for plants to be realised on abandoned agricultural areas pursuant to LD 28/2011, the documents certifying the availability of the agricultural land where the plant is to be installed and, if two or more plants are installed on agricultural areas belonging to the same person, the documents showing that these plants are at least 2 kilometres apart,
- (vii) for plants to be realised on abandoned agricultural areas pursuant to LD 28/2011, the documents certifying that the agricultural site where the plant is to be installed is abandoned, and
- (viii) the prospected commissioning date of the plant.

Constructed Plants have to submit to the GSE all the documents listed above plus the documents certifying that works have been actually completed.

Commissioned Plants have to submit the documents listed in Annex 3-C, which include:

- (i) the application for the grant of the incentives,
- (ii) the definitive technical sheet of the plant;
- (iii) the list of the modules and inverters installed in the plant;
- (iv) five pictures of the plant;
- (v) electrical scheme of the plant;
- (vi) the communication from the grid operator specifying the interconnection code (POD) of the plant;
- (vii) minutes of the installation and activation of the meters;
- (viii) for plant higher than 20kW, the document submitted to the Customs Office;
- (ix) for plant higher than 6kW, a general technical report of the plant and a planimetry.

The applications for registration must be submitted to the GSE during specifically designated registration periods (the "**Registration Sessions**") and using a specific form made available by the GSE on its website. The currently designated Registration Sessions are:

- (i) from 20 May to 30 June 2011 (inclusive), for the second semester of 2011;
- (i) from 1 to 30 November 2011, for the first semester of 2012; and
- (ii) from 1 to 28 February 2012, for the second semester of 2012.

If the applications received during each Registration Session do not cause the applicable incentive caps to be reached, the GSE may opt to launch one further Registration Session per semester.

The ranking

Once a Registration Session has closed, to determine which plants can be admitted to receive the incentives up to the incentive caps limits, the GSE ranks of all the plants admitted to the registry, on the basis of the following priority factors, to be applied in order:

- (i) Plants already operational as at the date of the application;
- (ii) Plants already completed at the date of the application;
- (iii) Chronological priority of the authorisation;
- (iv) Lower capacity of the plant;
- (v) Chronological priority of the application.

Plants that start operations before 31 August 2011 will not be included in the GSE ranking and will gain direct access to the incentives. However, the financial funds corresponding to the tariffs granted to such plants will be counted towards the cap. It seems advisable that an application for registration be filed also in connection with plants that expect to start operations on or before 31 August 2011; as protection in case of any delay. Any registered plant that actually commences operations by 31 August 2011 will be deleted from the ranking by the GSE, and the rankings will

scroll to move up in ranking lower ranked plants. This is the only instance of scrolling allowed. In all other cases, if a plant is not admitted to the incentive system in the semester for which it sought admission, the estimated incentives amount allocated to it will be carried forward and will increase the cap for the following semester.

The end of works communication

The proponent of a Plant Being Developed that is admitted to the registry is required to communicate the end of works of the plant to the GSE within 7 months from the publication of the ranking (or 9 months for plants with a capacity above 1 MW), together with a sworn affidavit by a qualified expert. Otherwise, its right to be included in the ranking will expire.

Please note that the end of works does not require interconnection to the grid, or any active intervention by the grid operator: as a consequence, the risk of delays caused by the grid operator is to be deemed irrelevant. On the other hand, it is crucial that the end of works communication is filed in compliance with the criteria provided under Attachment 3B of the DM.

The communication should be filed with the GSE and with the grid operator, which then verifies, within 30 days, the consistency of the project with the sworn asseveration, communicating the outcome of its inspection to the GSE.

In case the end of works communication is not filed within the 7/9 months term, the plant will be excluded from the registry and penalised, should it gain access to the incentives in a subsequent semester, with a 20% reduction of the applicable tariff. This provision should prevent operators from filing applications when they are not reasonably certain about managing to complete the works in due time.

Commissioning and compensation

According to the DM, "commissioning date" means the date when the following conditions are concurrently met: (i) the plant is connected to the power grid, (ii) the meters for calculating the electricity produced and injected into the power grid are installed, and (iii) all the requirements concerning the connection to the power grid have been duly fulfilled.

Please note that no specific term is fixed for the commissioning date, so it will be possible, for a plant admitted to the registry in a certain semester, to be commissioned in a following semester. Anyway, the commissioning date remains undoubtedly crucial, since the applicable tariff is the one set out for the semester in which the plant is commissioned.

In case of delays in the interconnection procedure, attributable to the grid operator, preventing the proponent from gaining access to a certain tariff, a compensation shall be paid to the proponent, in accordance with Attachment A of AEEG's deliberation ARG/elt 181/10.

Such indemnities seem, on one hand, not sufficient to compensate the proponent for the loss of the tariff; on the other, though, they seem high enough to heavily burden the grid operator, especially if a considerable number of operators will have to be remunerated.

Within 15 days from the plant's commissioning, the proponent must submit to the GSE the formal request for the tariff.

All the plants: (i) admitted to the ranking in a position not sufficient to gain access to the incentives, (ii) commissioned between 31 August 2011 and 31 December 2012 and (iii) for which the developer submits the application in order to be admitted to the incentives in 2013, will be assigned with a conventional commissioning date, corresponding to the first day of the semester for which

the application is submitted, following 1 January 2013. Within 15 days from such conventional date, the proponent must submit to the GSE the formal request for the tariff.

Such provision, set forth by the Guidelines, raises two fundamental questions:

- Will it be possible for plants fulfilling the conditions under points (i) and (ii) above to seek admission to the incentives before 2013?
- In affirmative case, which would be the applicable tariff? The one corresponding to the date of admission to the registry or the one corresponding to the commissioning date?

A request of clarification on this issues was submitted to the competent authorities.

Another clarification should be provided with respect to multi-section plants. The Guidelines, in fact, only explain that the qualification of every section as a "small plant" or "large plant" depends on the total capacity of the entire plant, but it is not clear which should be the tariffs applicable to multi-section plants. Also, it is not clear whether the fact that some sections are commissioned before 31 August 2011 entails the exclusion of the entire plant from the need to be admitted to the ranking.

Incentive limits after 1 January 2013

For the period 2013-2016, the DM sets out gradually decreasing cost limits, as illustrated in the following table; however, the circumstance that such limits are reached will not imply a limitation in the access to the tariffs, but only a reduction of the tariffs themselves for the subsequent period.

	First semester 2013	Second semester 2013	First semester 2014	Second semester 2014	First semester 2015	Second semester 2015	First semester 2016	Second semester 2016	TOTAL
Cost levels	240 ML€	240 ML€	200 ML€	200 ML€	155 ML€	155 ML€	86 ML€	86 ML€	1,361 ML€
Capacity	1,115 MW	1,225 MW	1,130 MW	1,300 MW	1,140 MW	1,340 MW	1,040 MW	1,480 MW	9,770 MW

The incentive levels

The plants that are admitted to benefit from the Fourth Conto Energia will receive a fixed incentive for twenty years from their commissioning date. As anticipated, each eligible plant is awarded the incentive applicable under the DM on the plant's commissioning date.

Annex 5 of the DM specifies the amount of the incentives that will be in turn applicable to photovoltaic plants on the basis of their commissioning date, from the second semester of 2011 through 2016. For each semester, the incentive levels vary depending on the following criteria: (a) the type of plant (photovoltaic plants/plants with innovative features/solar concentration plants), (b) the category of the plant (integrated/not integrated), and (c) the installed capacity of the plant.

With regard to the capacity criterion mentioned at (c) above, the DM identifies the following capacity brackets:

- $1 \leq P \leq 3$
- $3 < P \leq 20$
- $20 < P \leq 200$

- (d) $200 < P \leq 1000$
- (e) $1000 < P \leq 5000$
- (f) $P > 5000$,

where "P" means the capacity of the plant measured in kW.

The tariffs are higher for small-sized and integrated plants, which should then be particularly promoted by the new rules.

The amount of the applicable incentive can be increased (i) by 5%, for plants installed within industrial areas, quarries, mines, dumps, polluted sites, and areas relating to dumps and polluted sites; (ii) by 5 eurocent per kW for integrated plants installed to replace asbestos and eternity roofing, or (iii) by 10% for plants whose investment costs are represented, for at least 60%, by the cost of products realised within the European Union. The definition of "investment costs" includes all the costs (except employee costs) strictly necessary to realise a photovoltaic plant in compliance with the good engineering and operating practices (*a regola d'arte*).

The definition of "products realised in the European Union" can raise some interpretative doubts (e.g. with reference to components build in non-European countries but later assembled in the EU) and, while the DM provides some indications in this respect for the period subsequent to 30 June 2012, nothing is provided for the previous period. As a consequence, interpretations may vary: from a formal viewpoint, the "Made in" mark could be deemed sufficient; on a substantial lever, the GSE could be granted more verification powers and more discretionary autonomy.

The "bonus" increases described above are not cumulative, so a plant can benefit only from one exclusively.

Sanctions

Submission of the GSE of untrue documents and information or false declarations are punishable with the loss of the right to receive the incentive, the reimbursement of any incentive already obtained, and the prohibition from applying to any incentive system available to renewable energy plants for ten years from the date when the misconduct is ascertained.

These sanctions apply to: (i) the natural or legal person that filed the application for the incentive, (ii) the legal representative who signed the application, (iii) the technical director of the plant, (iv) all the shareholders, in case of companies in the form of *società in nome collettivo*, (v) the general partner/unlimited shareholder, in case of companies in the form of *società in accomandita semplice*, and (vi) the directors who have the power to represent a company.

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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