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BRIEFING

UPDATE  
ON THE ITALIAN  
"DECRETO ROMANI"

MARCH 2017

THE ITALIAN  
CONSTITUTIONAL COURT  
HAS RULED THAT THE 10-YEAR  
EXCLUSION FROM  
RENEWABLE ENERGY  
INCENTIVES IS  
UNCONSTITUTIONAL



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"ENTITIES... [THAT] HAVE  
HAVE PROVIDED  
UNTRUTHFUL  
INFORMATION OR  
DOCUMENTS OR  
HAVE MADE FALSE  
OR UNTRUTHFUL  
REPRESENTATIONS  
ARE NOT ENTITLED TO  
RECEIVE INCENTIVES FOR  
RENEWABLE ENERGY  
PRODUCTION."

The Italian Constitutional Court<sup>1</sup> has ruled that paragraph 3 of Article 23 and paragraph 1 of Article 43 of Legislative Decree no 28/2011, the so-called "*Decreto Romani*", are unconstitutional. Among other things, the two provisions banned persons or entities that had provided untruthful information or documents or made false or untruthful representations in order to obtain renewable energy production incentives from being able to receive incentives for 10 years.

The State Council decided to refer the question of the constitutionality of the two provisions after several photovoltaic companies and operators challenged the provisions in several pending proceedings.

**The provisions under challenge**

Paragraph 3 of Article 23 provides that: "entities in respect of which the competent authorities have ascertained that, in the context of the requests of plants qualification or incentives recognition, have provided untruthful information or documents or have made false or untruthful representations, are not entitled to receive incentives for renewable energy production, regardless of the law that provides those incentives. Without prejudice to the recovery of incentives unduly received, the ban on incentives payments has the duration of 10 years, as of the date of the assessment. The ban shall be applied to individuals or legal entities who have submitted the request, and to the following persons: a) legal representative who signed the request; b) person or entity in charge of the plant; c) technical director; d) members of companies incorporated as collective partnerships ("*società in nome collettivo*"); e) managing

<sup>1</sup> Judgment no 51/2017, of 10 March 2017.

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“IN THOSE CASES WHERE IT HAS BEEN ASCERTAINED THAT THE WORKS OF THE PHOTOVOLTAIC PLANTS HAVE NOT BEEN COMPLETED BY 31 DECEMBER 2010, THE GSE SHALL REJECT THE INCENTIVES REQUEST AND ORDER THE EXCLUSION FROM INCENTIVE OF ANY PLANTS THAT USES COMPONENTS OF PLANTS NOT ELIGIBLE FOR INCENTIVES.”

partners of companies incorporated as limited partnerships (“*società in accomandita*”); f) directors with representative powers in any other form of company or consortium”.

Paragraph 1 of Article 43 provides: “without prejudice to applicable criminal laws, in those cases where it has been ascertained that the works of the photovoltaic plants have not been completed by 31 December 2010, upon the examination of the incentive request, under paragraph 1 of Article 2-sexies of the Law Decree no 3 of 25 January 2010, converted with amendments by Law no 41 of 22 March 2010, the GSE<sup>2</sup> shall reject the incentives request and, at the same time, order the exclusion from incentive of any plants that uses components of plants not eligible for incentives. With the same order, the GSE excludes from incentives for the production of electricity, for ten years, as of the date of assessment, the individual or the legal entity who has submitted the request, as well as the following persons: a) legal representative who signed the request; b) person or entity in charge of the plant; c) technical director; d) members of companies incorporated as collective partnerships (“*società in nome collettivo*”); e) managing partners of companies incorporated as limited partnerships (“*società in accomandita*”); f) directors with representative powers in any other form of company or consortium”.

It should be noted that, while paragraph 3 of Article 23 deals with the sanctions regime for the entire renewable energy sector, paragraph 1 of Article 43 deals specifically with the sanctions regime specified under Law Decree no 3 of 25 January 2010, converted by Law no 41 of 22 March 2010, which extended the time limit in order to benefit from the incentives, under the Second Energy Account<sup>3</sup>, subject to certain conditions being met.

#### Reasoning of the Court

According to the judges, despite the two different contexts, the unconstitutional aspects of the two provisions are the same<sup>4</sup>.

First, the Court ruled that the two provisions do not comply with the principles of the delegating law (“*legge delegata*”)<sup>5</sup>, which required the adoption of administrative and pecuniary sanctions, but made no reference to the sanction introduced by *Decreto Romani*. The Court considered the sanction under *Decreto Romani* “an eccentric measure in respect of the perimeter drawn by the delegating law”.

Second, the 10-year exclusion measure, “by affecting the exercise of private economic freedom (in a business sector particularly linked to incentives support) by a broad range of interested parties and for a significant period of time and by setting up a rigid automatism and not a gradable instrument based on the variability of the harmful content of the punished violations, would be manifestly contrary to the

<sup>2</sup> The *Gestore dei Servizi Energetici*, the Italian Agency for Energy Services.

<sup>3</sup> The Second Energy Account is part of the programme known as the “Energy Account”, which, according to Decree 387/03 (which implements European Directive 2001/77/EC on the promotion of the electricity produced from renewable energy sources) provides for a specific feed-in tariffs programme for the production of electricity from photovoltaic plants.

<sup>4</sup> Both paragraph 3 of Article 23 and paragraph 1 of Article 43 are deemed unconstitutional under: (i) Article 76 of the Italian Constitution for introducing an exclusion measure that does not comply with the principles of the delegating law (Law no 96/2010), and that also violates the reasonableness and proportionality principles enshrined in Article 3 of the Italian Constitution; and (ii) paragraph 1 of Article 117 of the Italian Constitution with regard to the “legal obligations arising from European Law” in relation to the proportionality of sanctions. Paragraph 1 of Article 43 may also be in breach of Articles 25 and 117 of the Italian Constitution, as well as of Article 7 of the CEDU because of the retroactive effect of the sanction.

<sup>5</sup> Law no 96/2010.

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principles of proportionality and adequacy, which the delegating legislator required for the response to the violations committed by the operators of sector”.

#### Judgment’s effects

The two provisions that have been declared unconstitutional will cease to apply “*ex nunc*” (from now on), namely the day after the judgment has been published in the Italian *Official Gazette*, and this, without prejudice to the fact that the judgment contains the final assessment “*ex tunc*” (since the beginning) of the unlawfulness of the provisions. This means that the provisions will not apply in the future. However, interested parties that relied on the provisions to their detriment may take legal action to restore the status quo ante, within the limits of the so-called “*rapporti esauriti*” (concluded legal relationships).

Photovoltaic operators should therefore review the effects of the judgment on a case-by-case basis to determine whether legal action is appropriate.

It should also be added that the *Gestore dei Servizi Energetici* could also withdraw the measures that implemented the provisions.

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## FOR FURTHER INFORMATION

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