

Renewable Energy

The Regional Administrative Court of Rome has submitted provisions on renewable energy incentives to the Constitutional Court for review

29 November 2019

With order no. 11258 dated 24 September 2019, the Regional Administrative Court ("TAR") of Rome raised the issue of the constitutionality of art. 42, paragraph 4-sexies of Legislative Decree no.28/2011. In particular, with respect to incentives for the production of renewable energy, the TAR challenged the part which allows the regularisation of non compliant statements, and the subsequent readmission of previously excluded operators, albeit exclusively with regard to wind farms.

The referral was made within the framework of a proceeding pending before the TAR Rome, filed by an operator – owner of a hydroelectric power plant – which challenged the “notification of the outcome of control activities through documentary checks” by the Verifications and Inspections Directorate of the Gestore dei Servizi Energetici - GSE S.p.A.

(the manager of energy services) to request its annulment.

In order to access the incentive mechanisms provided by Legislative Decree no. 28/2011 for renewable energy plants, the operator had filed with the GSE a request to enrol in the Online Register for the years 2013, 2014 and 2016, attaching the requested documents.

With respect to 2016, the operator was ranked in such a way as to allow it to access the incentives.

However, following documentary checks, the GSE found a discrepancy consisting in having mentioned the date of signing of the standard specifications of the concession for the use of public water, instead of the date of the concession authorisation.

Even though such discrepancy went to the detriment of

the operator, given that its ranking was lower as a result of the fact that the date on which the concession is issued represents a priority criterion, the GSE subsequently ordered its exclusion from the ranking, leading to the loss of the right to access the incentives.

Personal accountability versus safeguard provision: frictions and issues of constitutionality

Art. 42, paragraph 3 of Legislative Decree no. 28/2011 clarifies that “if the violations ascertained within the framework of the verifications under paragraphs 1 and 2 are of significance for the purposes of the issue of the incentives, the GSE shall order the denial of the application, forfeiture of the incentives, as well as the recovery of amounts already issued”.

This provision is clearly inspired by the principle of personal accountability when

Highlights

submitting statements and documents, regardless of whether or not the latter is done in good faith.

However, the same art. 42 of Legislative Decree no. 28/2011, under paragraph 4-*sexies*, contains a **safeguard provision** (*norma di salvaguardia*), which allows applicants to regularise their position and be readmitted to the relevant incentives. The readmission occurs provided that the incorrect information regarding the date of the authorization did not lead to an actual advantage to the plant in terms of its ranking position.

However, the above is subject to two requirements: an objective requirement and a subjective one.

With regard to the objective requirement, the provision clarifies that only an incorrect statement regarding the date of the authorization, and not just any important information, may be excused.

The subjective requirement, whose constitutionality is now being questioned, allows for regularisations of incorrect

statements only in the case of wind energy power plants.

Strength of the provision in light of the national and supranational legal framework

The subjective requisite is the one analysed by the TAR, leading to the issue of its constitutionality, and which will now have to be addressed by the Constitutional Court.

According to the referring court, by favoring one energy source over other ones, the provision under art. 42, paragraph 4-*sexies* of Legislative Decree no.28/2011 is in breach of the principles of equal treatment, reasonableness, sound administration and impartiality of the Public Administration, and thus of art. 3 of the Italian Constitution, combined with articles 97 and 117 of the Constitution.

As clarified in the referral order, the introduction of rules aimed at regulating the incentives mechanisms for the production of renewable energy – regardless of the energy source – was inspired not only by a common requirement (i.e., achieving the “*mandato-*

ry national targets for the overall share of energy from renewable sources in gross final consumption of energy”, see art. 1 Directive 2009/28/EC and art.1 of Legislative Decree no. 28/2011), but also by the need to establish uniform legislation to bring together the initiatives in this sector.

Indeed, regardless of which energy sources are used, the steps taken by EU laws were aimed at establishing, with regard to support schemes, a common framework to promote energy from renewable sources.

Hence the constitutionality issues underlined by the TAR.

The Constitutional Court will now have to verify whether the provision is compatible with the national and supranational legal framework, and if necessary, rewrite the safeguard provisions, leading to significant consequences for renewable incentive schemes.

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