

## Newsalert

### Energy

The “on the run” amendment to the new compensation mechanism applicable to electricity supply contracts

With Decree-Law no. 13 of 25 February 2022, published in the Official Gazette last Friday (“*Urgent measures to counter fraud and for workplace safety in the construction sector, as well as on electricity produced from renewable sources*” also called “*Fraud Decree*”), the Government has once again intervened on the regulation of the revision of the sale price of electricity produced from renewable source plants, introducing changes to the text of the recent Article 16 of Decree-Law no. 4/2022, published in the Official Gazette on 26 January - not yet converted into law and now repealed.

In the aforementioned Fraud Decree (hereinafter also referred to as the “Decree”), in Article 5 (“*Further interventions on electricity produced from renewable sources plants*”) the legislator has actually rewritten from scratch the rules governing the so-called “*two-way compensation mechanism*”, which came into force only on 27 January 2022, and aimed at reducing the so-called “*extra profits*” resulting from the unexpected increase in energy prices, introducing a number of significant changes to the new mechanism, mainly aimed at remedying (at least in part) the strong criticism that had accompanied the entry into force of the new rules.

The main novelties and differences compared to the rules set out in the so-called “*Sostegni Ter*” decree can be briefly summarised as follows:

(a) the objective scope of the regulation with regard to non-incentivised plants has been amended.

While art. 16 of the Sostegni Ter decree applied to all non-incentivised solar, wind, hydroelectric and geothermal plants above 20 kw, the new regulation provides that plants of these types which do not benefit from incentives are subject to the mechanism only if they entered into operation before 1 January 2010:

(b) the mechanism through which the producers concerned will have to communicate the relevant data to the GSE has already been identified. In fact, the regulation states that

producers will have to communicate - upon request by the GSE - the necessary information for the purpose of the new regulation (according to the detailed rules to be issued by ARERA) in the form of a self-certification within 30 days of receipt of the request;

(c) the provision directly identifies (by referring to Table 1 attached to the new Decree) the minuend for calculating the reference price (previously identified as the average of the hourly zonal prices, reassessed by ISTAT, of the years between the start of operation of the plant and 31 December 2020 - with the limit of the oldest plants, for which the starting date of the reference period was in any case set at 1 January 2010) and articulates the subtrahend in more detail.

In the new wording the second computing element (the "market price") is identified in a differentiated way:

- for photovoltaic, wind, geothermal and flowing-water hydroelectric plants subject to the scope of the regulation, the market price, in line with what was already provided in the "Support Decree" (*Decreto Sostegni*), is identified in the hourly zonal market price of electricity or in the price (and no longer in the "average" price) specified in the sales contracts concerned.
- for plants subject to the regulation and different from the previous point and therefore, it seems to be understood, only for reservoir or storage hydroelectric plants, the market price is established *in the monthly arithmetic average* of the hourly zonal market prices, or the price - and no longer the average price - of the supply contracts.

(d) The new wording of the regulation also provides, in the new paragraph 5, for a (timely) specification with respect to plants subject to dedicated collection (*ritiro dedicato*) and, in particular, the ones which benefit from the minimum guaranteed prices. For such plants the legislator has in fact maintained the exception of the pre-existing annual remuneration, providing that the GSE will anyway recognise to the producers an annual economic remuneration "*not lower than that deriving from the guaranteed minimum prices*" where provided for.

In order to facilitate the identification of the time scope of the new rules (as reformed), Article 5 of Decree-Law 13/2022 establishes 27 January 2021 (the date on which Article 16 of the Sostegni Ter Decree comes into force) as the reference date for identifying the supply contracts subject to the regulation. The new two-way compensation mechanism will in fact apply (in continuity with the provisions of the Sostegni Ter) only to supply contracts entered into by 27 January 2022.

## **In conclusion:**

- i. the transitional period of applicability of the two-way netting mechanism has not changed (it is intended to apply from 1 February 2022 until the end of the current calendar year);
- ii. compared to the previous scope, non-incentivised plants that entered into operation after 1 January 2010 have been excluded;
- iii. the mechanism (necessary with reference to non-incentivised plants, in respect of which the GSE does not have information sources) for the GSE to obtain the relevant data for the purposes of carrying out the reference calculation has already been identified in the legislation (without waiting for the enactment provisions of ARERA);
- iv. the calculation formula has been rendered more precise (both for the pre-identification of the minuend and for the distinction in the value of the subtrahend between the different

- types of hydroelectric plants);
- v. the economic interests of owners of small-scale plants benefitting from dedicated collection (*ritiro dedicato*), and in particular from the minimum guaranteed price mechanism, have been safeguarded.

With the exception of the valuable change to the previous regulatory provision which resulted in (i) the exclusion from the scope of application of the new rules of the most recently built non-subsidised plants, and (ii) the protection of the revenues of producers already benefitting from minimum guaranteed prices, the systematic doubts persist (as already illustrated in the newsletter we published on 17 February and available at this link) as to the legitimacy of the new conferral of competences and powers to the GSE and, more generally, of the distorting effects that the regulation may have on energy prices in the future.

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