Newsletter JANUARY 2018

SANCTIONARY POWERS: THE CHANGES TO ARTICLE 42 OF THE SO CALLED 'ROMANI' DECREE SUBSEQUENT TO THE APPROVAL OF THE NEW ITALIAN BUDGET LAW 2018 AND THE NEW MEASURES RELATED TO PV PANELS (SALVA-PANNELLI)

1. GSE sanctionary powers in case of "material infringements"

Article 42 of Legislative Decree no. 28/2011 ("**Romani Decree**") has been modified by some legislative measures adopted in the 2017: (i) the Italian Budget Law for 2018 ("**Budget Law 2018**") approved on 23rd December 2017, (ii) the Law no. 124 dated 4th August 2017 and (iii) the Law no. 96 dated 21st June 2017 (the so called "**Salva-Pannelli measures**").

In particular, Budget Law 2018 introduces an exception to the forfeiture of the right to perceive the Feed-In-Tariff ("FIT"), by providing a FIT reduction.

The Salva-Pannelli measures, contained in the abovementioned laws sub points (ii) and (iii) above, exclude the forfeiture of the FIT in case of infringements of the rules pertaining to the PV panels certification, by providing, also in this case, a FIT reduction.

The aim of this newsletter is to summarize the legislative news as regards the powers of the GSE as resulting from the amendments to Article 42 of the Romani Decree and to highlight the operational aspects that would need to be better clarified by the upcoming implementing measures or, at any rate, by the future approaches of the GSE.

2. The Budget Law 2018

Following the modification introduced by Budget Law 2018, now Article 42, paragraph 3, of the Romani Decree provides that, in derogation to the FIT forfeiture measure, where material infringements for the purposes of the FIT have been ascertained following to an inspection carried out by the GSE, the latter orders the FIT reduction between 20% and 80%, on the basis of the severity of the infringement itself. Such a reduction is diminished by one third, should the infringement be spontaneously reported outside a verification proceedings started by the GSE.

The modification of Article 42 entered into force on the 1st January 2018. However, pursuant to Article 42, paragraph 5, let. c-*bis* (as modified by the Budget Law 2018), the Ministry of Economic Development will issue a decree that will set out the violations implying a FIT reduction on the basis of the elements that the GSE will provide.

The new wording of Article 42 of the Romani Decree introduces a relevant innovation on GSE's powers. This modification is a step towards the direction of solving the uncertainties that stem from the ex post evaluation of the authorizations and the other requirements to benefit from the FITs. Budget Law 2018, moreover, qualifies itself as an amnesty measure, by expressly providing that the provision of the reduction measure, instead of the forfeiture measure, aims to preserve the energy production of plants that still benefit from the FIT.

It is crucial to understand how the new legislative provision will actually be implemented and, for this purpose, it is essential that the Ministerial Decree is adopted as soon as possible.

However set out below are some preliminary comments.

Some interpretative and systematic evaluations by our Law Firm are as follows.

1. Article 42, paragraph 3, seems to suggest that the reduction measure should apply to all the infringements that were previously sanctioned through the forfeiture measure pursuant to the so called Supervision Decree (*i.e.* D.M. 31 January 2014). This interpretation appears to be supported by the wording of the provision that refers to all the plants that still benefit from the FIT and by the fact that the first comments on the new provision welcomed it as the complete overcome of FIT forfeiture power. Our Law Firm holds that this interpretation is reasonable, considering the *ratio* of the legislative amendment. However, while we are waiting the clarifications deriving from the implementing Ministerial Decree, it must be kept in mind that a different interpretation cannot be excluded. In particular, the wording of paragraph 5 let. c-*bis*) of Article 42 (also considering the parliamentary debate on the point) might mean that the forthcoming Ministerial Decree will not only indicate the reduction range between 20% and 80%, but also the infringements which will be sanctioned with the mere FIT reduction. Therefore, following this interpretation, the other infringements will continue to be subject to the forfeiture measure. It is worth noting that as a first consequence of the Budget Law 2018, the *Consiglio di Stato* has issued an interim measure suspending the enforcement of the GSE decision for the pay back of the feed in tariff also with respect to a case of artificial split, based on the need to take into account the effect of the new Budget Law 2018 (*inter alia*, *Consiglio di Stato*, 19 January 2018, no. 221).

2. The adoption of the implementing Ministerial Decree is essential for the application of the reduction measures. However, it is our belief that until the issuance of such a Decree, the GSE is prevented from ordering the FIT forfeiture (as confirmed by the recent decision of the *Consiglio di Stato* referred above). Indeed, as mentioned above the new provision entered into force on the 1st January 2018 and, thus, it is already applicable. On the basis of the interpretation that excludes the possibility to adopt forfeiture measures, given the new wording of Article 42, until the issuance of the Ministerial Decree the GSE should only wait for the criteria for the FIT reduction. This finding would not change even in the case in which, is considered to confirm limited circumstances in which the revocation is applicable. In any case, until the adoption of the Ministerial Decree, the GSE cannot take decision that could result inconsistent with the new Article 42, paragraph 3. For the sake of completeness, it must be considered that the new wording of Article 42 does not produce any effect on forfeiture measures already adopted by the GSE before the entrance into force of the Budget Law 2018, except being made for the power of self - annulment of the GSE.

3. Article 42 does not specify whether the FIT reduction should apply only for the future or also for the past by determining, in this latter case, the restitution (or compensation) of the FIT already obtained. From a literal and formal perspective, there may be arguments to allege that the reduction pertains only to the FITs subsequent to the reduction measure. Indeed, as regards the FIT reduction, the legislator did not set forth the restitution of the FIT already obtained. On the contrary, the legislator expressly set out an obligation to pay back the FIT already received as a result of a forfeiture measure or of a Salva-Pannelli measure (see below). However, in our opinion the meaning of the

reduction power given to the GSE together with the systematic interpretation of the Supervision Decree lead to deem that the reduction should be referred to the entire FIT period and, accordingly, part of the FITs already received should be paid back or compensated with the FITs due in the future, except for the time–barred rights. However, considering the provision in light of which the reduction percentage must depend on the severity of the infringements, it could be advisable for the Ministerial Decree to leave to the GSE the flexibility to apply greater percentage of reduction for the future avoiding (or limiting to the extent possible) the pay back of the incentive already cashed in by the relevant companies.

3. The so called "Salva- Pannelli measures"

The Law no. 124 dated 4th August 2017 introduced paragraph 4-*quater* in Article 42 of the Romani Decree that pertains to the sanction regime which applies in case of lack of the PV panels' certification, or in case in which such certification does not comply with the relevant provisions. Under the said new paragraph 4-*quater*, a reduction of **30%** of the FIT is applied, **since the date of the FIT agreement execution**, to plants with a power capacity between 1 and 3 kW when, following an inspection, the GSE verifies that their PV panels are non compliant with the relevant provisions.

The abovementioned provision follows the same line set out by Article 57-*quater* of the Law no. 96 of 21st June 2017 that provides a similar sanction measure for PV plants with a power capacity higher than 3 kW. Such a provision, indeed, provides that a reduction of 20% of the FIT is applied, **since the date of the FIT agreement execution**, to plants with a power capacity higher than 3 kW when, following to an inspection, the GSE verifies that their PV panels are non compliant with the relevant regulation. Furthermore, this latter provision sets forth also the obligation to prior bring legal action against those subjects who are responsible for the non compliance of the PV panels' certificates.

Additionally, the FIT reduction is halved (*i.e.* **10%**) where the non-compliance is spontaneously communicated to GSE, outside its survey activity.

These sanction regimes aim, as expressly stated by the Law in question, to preserve PV plants' energy production.

4. Conclusions

The Budget Law 2018 and the so called Salva-Pannelli measures in principle increase the certainty and stability of the renewable energy sector. The provisions have the purpose to strengthen, for the benefit of the energy production, those plants that are no longer compliant with the relevant law, in many cases due to the evolution of the interpretation of the law evolution.

The enforcement of the FIT reduction measures must abide to the proportionality principle already acknowledged by the case law with respect to PV panels' certification (see *Consiglio di Stato* 2006/2016). The implementing Ministerial Decree, hence, will have to calibrate the reduction sanction by specifying the implementing criteria the GSE will be bound to.

As regards the coordination of the new sanction regime provided by Article 42 of the Romani Decree, as modified by Budget Law 2018, and the so called Salva-Pannelli measures, it must be held that the FIT reduction between 20% and 80% constitutes the general provision, while the FIT reduction between 20% and 30% (on the basis of the plants power capacity) provided by the so called Salva-Pannelli measures should be considered as a special provision – and hence derogatory – that applies in case of lack/non compliance of the PV panels' certification – and solely with respect to this infringement.

Newsletter JANUARY 2018

The Energy Project & Infrastructures and the Administrative Departments of Legance are available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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Newsletter JANUARY 2018

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