

## KEY REGULATORY UPDATES

### ➤ **DL Agricoltura: publication of the final version in the Official Gazette**

On May 16, 2024, Law Decree no. 63/2024 (so called DL Agricoltura) came into force and it was published in the Official Gazette under no. 112 of May 15, 2024. Attached to this newsletter is a more detailed information note on the changes introduced.

### ➤ **Friuli-Venezia Giulia: identification of «presumed non-suitability» areas**

On May 14, 2024, Regional Law No. 3 of Friuli-Venezia Giulia, published in ordinary supplement No. 13 of the Region's BURL, came into force. This law will be effective until the regional law for the identification of suitable areas under Art. 20, para. 4, of Legislative Decree 199/2021 comes into force. Among the major changes, this measure introduces the so-called areas of «presumed non-suitability» for the construction of photovoltaic plants subject to single authorisation. These areas are divided according to their intended use and the specific form of protection to which they are subject (cultural heritage and landscape; environment; agricultural activities). In addition, the law also identifies certain elements for the evaluation of projects, such as, for example, the location in the areas of presumed unsuitability, the size of the area, the type of plant, etc.

### ➤ **Photovoltaics in agricultural areas: new regulations of Emilia-Romagna**

On May 8, 2024, Emilia-Romagna Regional Council Resolution No. 693, approved on April 22, 2024, was published in Burert No. 139. This measure contains the criteria for the identification of areas affected by certified cultivation – where exclusively advanced agrivoltaic systems are allowed – and the control procedures for the purpose of installing photovoltaic systems in agricultural areas. With reference to the latter point, photovoltaics are allowed in the absence of agricultural management of the land and if, after verification, the areas have not been affected by certified cultivation in the three years preceding the application for the installation of the plant.

### ➤ **New EU recommendations on permitting, acceleration areas and auctions**

On May 13, 2024, the EU Commission adopted Recommendations 2024/1343 and 2024/1344, which were published in the Official Journal of the EU on May 21:

- the first (2024/1343) concerns the acceleration of permit-granting procedures for renewable energy and related infrastructure projects, in which the Commission states that Member States should minimize «exclusion zones» for their development and in any case provide clear information and reasoned justification;

- the second (2024/1344) concerns the so-called «auction design» for renewable energy, whereby the Commission requires Member States to include, as soon as possible, criteria other than price, such as quality, ability to implement the project

on time, sustainability, innovation.

➤ **Approval and update of the new operating rules for agrivoltaic systems**

On May 17, 2024, the operating rules of the Agrivoltaic Ministerial Decree (MASE Decree No. 436/2023, which came into force on February 14, 2024) were published, setting out provisions for incentivizing the implementation of agrivoltaic systems of an experimental nature (ex Art. 14, para. 1, lett. c), Legislative Decree 19/2021). These rules provide the information to ensure compliance with the provisions of the decree, regulating the procedures for accessing the incentives provided (incentive tariff and capital contribution payment). On May 31, the MASE subsequently adopted Departmental Decree No. 251, by which it approved the update of these rules and published the public notices for registering and participating in the auctions. The opening of the procedure is set for June 4 with closing set for September 2, 2024.

➤ **Update of application rules for PNRR calls for biomethane**

Following the entry into force of Decree-Law No. 104/2023 (so-called DL Omnibus) and the Decree-Law No. 181/20123 (so-called DL Energia), MASE Directorial Decree No. 238/2024 updated the application rules for accessing the incentives provided by the PNRR for biomethane plants. The main changes include the updating of the values for the tariffs set for auction and the maximum eligible costs, based on the national consumer price index. In addition, the possibility to participate in the auctions has also been expanded to include organic waste plants newly built or undergoing conversion.

➤ **Guarantees of Origin: the updates to P-GO Regulation enters into force**

On May 6, 2024, the amendments to the P-GO Regulation, which governs the rules of operation of the organized market and the bilateral transaction registration platform for the exchange of guarantees of origin, as well as the amendments to the same platform and its Technical Operating Provisions (DTF), aimed at introducing the GO Notice Board within the P-GO systems, came into force.

➤ **Capacity market: developments on auctions 2025-2028**

With a decree dated May 9, 2024, the MASE approved Terna's regulations for the 2025/2028 capacity market. Among the main changes were the introduction of an anti-drought mechanism and interventions on withdrawal, default and penalties. On May 24, Arera then published its own Resolution No. 199/2024 on economic parameters, which represented the last step before the calling of the auctions: the upward requests of operators have been accepted.

➤ **CER: presented the vademecum for the Municipalities and the CEI**

On May 21, 2024 the Anci vademecum, prepared with the help of the GSE (*Gestore Servizi Energetici* – Energy Services Operator) and aimed at guiding municipalities in implementing new energy communities, was presented at the headquarters of the Association of Italian Municipalities. The following day, instead, the GSE presented a similar vademecum at the headquarters of the Italian Bishops' Conference (CEI), with the aim of promoting the development of CER and a culture of sustainability also within the Church.

➤ **Electric Market design: approval of the EU Council**

With Hungary voting against only, the EU Council on May 21, 2024 finally approved the directive (which Member States will have to implement within six months of its publication in the OJ) and the regulation (which will enter into force on the 20th day after its publication in the OJ) on «improving the Union's electricity market framework». Among the main new features are: a strong promotion of Contracts for Difference (Cfd), which Member States will also be able to use for investments aimed at repowering existing plants; the introduction of PPA market development tools; the opening to the possibility of introducing Europe-wide Fer auctions; and the establishment of protection measures in favor of consumers.

➤ **Terna launches «Terra», the new portal for Fer and storage development**

Starting next June 7, 2024 Terra (Territory, Networks, Renewables and Storage) Portal will be online, joining the already existing "Econnexion" platform to provide industry operators with a huge wealth of information on the status of connection requests and geolocation of Italian generation plants. An overview of necessary and planned development interventions and currently existing power lines will also be available.

➤ **Offshore: Italy referred to EU Court of Justice**

Although more than three years have elapsed since the deadline of March 31, 2021, Italy has still not drafted the maritime spatial management plans required by Directive 2014/89. Thus, the European Commission referred Italy to the CJEU, stressing in a note that transposition of that directive is an «essential step to achieve the objectives of the European Green Deal».

## **CASE LAW**

➤ **TAR Palermo: the opinion of the Superintendence is not binding**

At the conference of services, the opinion of the Superintendence shall not be binding, even if the project falls within restricted areas. This has been expressed by the Palermo Regional Administrative Court (TAR) in its ruling No. 1508/2024, in which it annulled a partially negative EIA (Environmental Impact Assessment) measure of the Sicily Region implementing the opinion of the Superintendence. Therefore, the preponderance judgment on the positions that emerged at the conference remains under the responsibility of the proceeding authority.

➤ **Council of State: assimilation of PAS to the Scia**

In its ruling No. 3989/2024, the Council of State clarified that the PAS (simplified enabling procedure) is ascribable to the *genus* of the Scia (certified notice on commencement of activity) and should be qualified as an objectively and subjectively private act. Therefore, the «effect of making a given private activity lawful» is determined 30 days after the submission of the relevant declaration and in the absence of explicit denial, as for the Scia; this mechanism responds to a true liberalization, resulting in «*the release of private activity from the prior control administration regime*», so that the realization of the photovoltaic plant should be considered as finally permitted.

## REGULATIONS IN THE PIPELINE

### ➤ **Offshore wind farms: joint application of the ports of Taranto and Brindisi**

In response to the MASE notice provided for in the DL Energia, a joint application has been submitted for the ports of Taranto and Brindisi as shipyard hubs to serve offshore wind farms. Expected within 120 days the MASE and MIT (Ministry of Infrastructure and Transport) approval of the decree, identifying the selected state-owned areas.

### ➤ **Publication of a new draft of the decree on suitable areas: main insights**

On May 30, 2024, a new draft of the decree aimed at establishing uniform principles and criteria for the identification by the Regions and Autonomous Provinces of suitable and non-suitable areas for the installation of renewable energy plants was circulated, and it is expected to be finally approved within the end of the month. The new draft takes into account the changes introduced by the DL Agricoltura and grants the Regions a primary role in identifying these areas. It is provided that the Regions will identify in their territories: (a) suitable areas; (b) non-suitable areas; (c) ordinary areas (other than letters a) and b) in which the authorization regimes under Legislative Decree 28/2011 applies); and (iv) areas in which the installation of photovoltaic systems with ground-mounted modules is prohibited (pursuant to the provisions of paragraph 1-*bis*, Article 20, Legislative Decree 199/2021, introduced by DL Agricoltura).

In order to identify the suitable areas, without prejudice to the provisions introduced by DL Agricoltura, Regions must take into account: (i) the maximization of the areas to be identified for the achievement of targets to be met by 2030 (Art. 2, Table A), (ii) the possibility to establish the suitability on the basis of the source, size and type of plant, and (iii) the immediately suitable areas pursuant to Art. 20, para. 8 of Legislative Decree 199/2021. Finally, areas included in the perimeter of assets subject to protection under the Code of Cultural Heritage and Landscape would be considered unsuitable, and the Regions would be able to establish a buffer zone from the perimeter of such assets of 3 km for wind power plants and 500 meters for photovoltaic plants, and, by way of derogation, even up to 7 km for the protection of assets of special value.

### ➤ **Publication of the draft of the Fer Consolidated Act**

On May 31, 2024, a draft of the «Consolidated Act of regulatory simplification of procedures concerning the production of energy from renewable sources» circulated, defining the administrative procedures for the construction and operation of production plants and renewable energy storage systems, as well as for repowering and revamping of the same plants, and for the related works and infrastructures necessary for their construction and operation. The primary purpose of the measure is to rationalize, reorganize and simplify procedures in the field of renewable energy and bring them in line with the European Union regulations, in the pursuit of maximum spread of Fer plants.

### ➤ **Publication of a new draft of Fer X decree: key new features**

On May 31, a new draft of the Fer X decree circulated, having the purpose, through the definition of an incentive mechanism, to support the production of electricity

from Fer plants (photovoltaic, wind, hydroelectric, treatment of residual gas from purification processes). A first analysis shows a difference in the total quota to be auctioned (57.15 GW), compared to the one provided in the previous version. This decrease is due to the smaller quota provided for photovoltaics.

#### **DISCLAIMER**

This Client Alert is solely intended to provide general information. Consequently, it does not constitute legal advice and cannot be considered a substitute for specific legal consultation.

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## D.L. AGRICOLTURA: NEW LIMITS ON THE INSTALLATION OF GROUND-MOUNTED PHOTOVOLTAIC PLANTS IN AGRICULTURAL AREAS

Following the discussions that took place between the MASAF (Ministry of Agriculture, Food Sovereignty and Forestry) and the MASE (Ministry of Environment and Energy Security), on 16 May 2024 Decree-Law No. 63 of 2024 (the so-called "DL Agricoltura"), published in the Official Gazette No. 112 of 15 May 2024, came into force.

With reference to the renewables sector, Article 5, paragraph 1 of the decree has introduced a new paragraph 1-bis to Article 20 of Legislative Decree 199/2021 (implementing Directive 2018/2001/EU, so-called Red II), which regulates the identification of surfaces and suitable areas for the installation of renewable energy plants.

The provision under examination, aimed at «limiting the use of agricultural land» (as per its title), identifies the areas classified as agricultural by the urban plans in force in which the installation of photovoltaic plants with ground-mounted modules, as per Article 6-*bis*, letter b), of Legislative Decree 28/2011, is permitted, introducing, with reference to the same, a more restrictive discipline.

### Photovoltaic plants with ground-mounted modules

In order to precisely identify the type of photovoltaic plants with ground-mounted modules to which the provision refers, the reference to Article 6-*bis* of Legislative Decree 28/2011 does not seem to be of any help to the interpreter since the provision does not have, as its object, any definition of such plants.

A first definition of «photovoltaic plant with ground-mounted modules» was included in Article 2.1, letter c) of the Ministerial Decree of 4 July 2019 (so-called FER 1) where it is defined as *«a plant whose modules are not physically installed on buildings, greenhouses, noise barriers or rural buildings, nor on pergolas, canopies and shelters»*. In this context, the definition was intended to exclude photovoltaic plants with ground-mounted modules in agricultural areas from the right to receive the incentives provided by the decree in question. This definition has been further specified in the *«Operational Regulation for access to the incentives of the DM 4 July 2019»* of the GSE (*Gestore Servizi Energetici* – Energy Services Operator), version 2.4. updated on 17 October 2023, whose point 3.1.7 specifies that *«plants installed with a distance from the ground of less than 2 metres will in any case be considered with modules placed "on the ground"»*, and therefore, as such, where placed in agricultural areas they will not be entitled to the incentives under the FER 1. To date, this definition seems to us to be the most reliable one.

For an assessment of the applicability of the new regulation of DL Agricoltura to agri-voltaic plants, please refer to the following section.

### Non-suitable areas

As anticipated, Article 5 of the decree substantially introduces a more restrictive regulation than the previous one.

First of all, it should be specified that under Article 5 only the areas indicated therein are to be considered suitable for the installation of photovoltaic plants with



ground-mounted modules, thus excluding all others.

This approach appears diametrically opposed to the one set forth in Article 20 of Legislative Decree No. 199/2021, where paragraph 7 provides that the areas not expressly included among the suitable areas are not to be considered «non-suitable areas» merely because they are not included in the list of suitable areas. That said, this paragraph will therefore not apply to plants with ground-mounted modules in agricultural areas, which may therefore only be built in areas expressly indicated as suitable.

Under the new regulation, moreover, photovoltaic plants with ground-mounted modules can no longer be considered suitable for installation in:

- the areas covered by reclamation sites (letter b, Article 20, Paragraph 8, Legislative Decree No. 199/2021); and
- the agricultural areas enclosed within a perimeter whose points are no further than 500 metres away from areas for industrial, artisanal and commercial use, including sites of national interest, as well as quarries and mines other than those to which, as we shall see below, the prohibition does not apply (letter c-ter, no. 1, Article 20, paragraph 8, Legislative Decree 199/2021).

The limitation provided for by the provision in question will also apply if such areas are not included in the perimeter of the assets subject to protection pursuant to the Code of Cultural Heritage and Landscape (Legislative Decree No. 42/2004), including the areas not encumbered by civic uses pursuant to Article 142, paragraph 1, letter h) of the same Code, or that do not fall within the buffer zone of the assets subject to protection pursuant to Part Two or Article 136 of the Code of Cultural Heritage (defined as 500 metres for photovoltaic plants) (letter c-quater, Article 20, Paragraph 8, Legislative Decree 199/2021).

### **Suitable areas**

As mentioned above, areas suitable for the installation of photovoltaic plants with ground-mounted modules is a closed category and such areas can be considered only the following:

- the areas where plants of the same source are already installed, limited to re-vamping and repowering works, provided that they do not entail an increase in the occupied area (letter a), Article 20, Paragraph 8, Legislative Decree 199/2021);
- ceased, unrecovered or abandoned quarries and mines or those in an environmentally degraded condition, or in the portions of quarries and mines that are not susceptible to further exploitation (letter c, Article 20, Paragraph 8, Legislative Decree 199/2021);
- in sites and facilities at the disposal of the companies of the Italian State Railways Group and of the managers of railway infrastructures and motorway concessionary companies (letter c-bis, Article 20, Paragraph 8, Legislative Decree 199/2021);
- in the sites and facilities at the disposal of the airport management companies within the airport premises, subject to the necessary technical verifications by ENAC (Italian Civil Aviation Authority) (letter c-bis.1, Article 20, Paragraph 8, Legislative Decree 199/2021);
- in the absence of constraints under Part Two of the Code of Cultural Heritage and Landscape:
  - the areas contiguous to the motorway within a distance of no more than 300 metres (letter c-ter, no. 3, Article 20, Paragraph 8, Legislative De

cree 199/2021);

➤ the areas inside industrial plants and establishments, as well as in those classified as agricultural enclosed within a perimeter whose points are no more than 500 metres from the same plant or establishment (letter c-ter, no. 2, Article 20, paragraph 8, Legislative Decree 199/2021).

With reference to this last provision, it should be noted that the MASE has defined as «industrial plants» also the plants producing energy from renewable sources such as photovoltaic or wind power plants. Following this interpretation, it could be assumed that agricultural areas enclosed within a perimeter whose points are no more than 500 metres away from other photovoltaic and/or wind power plants are also considered suitable areas for the construction of new photovoltaic plants with ground-mounted modules. However, this provision must be read in conjunction with the provisions of Article 20, Paragraph 8, letter a) of Legislative Decree 199/2021 cited above.

Lastly, it is provided that the new discipline, and thus the restriction of suitable areas, does not apply in the case of photovoltaic plant projects with ground-mounted modules in agricultural areas:

- aimed at establishing a Renewable Energy Community (so-called CER);
- implementing the other investment measures of the PNRR (National Recovery and Resilience Plan) and the National Plan of Complementary Investments to the PNRR (PNC);
- necessary to achieve the objectives of the PNRR.

The new discipline is therefore not applicable to the so-called «advanced agri-voltaics», which fall into the last category above.

### **Simple agri-voltaic plants**

A question arises as to whether or not the rule in question is applicable to so-called «simple» and non-advanced agri-voltaic plants.

Certain arguments can be made in support of the fact that the rule does not apply to simple agri-voltaic plants, so that they are excluded from the applicability of the new restrictions.

On the one hand, the reference made by the new regulation to Article 6-*bis* of Legislative Decree 28/2011 seems to want to take into consideration only «ground-mounted photovoltaic plants»; consider that the most recent decisions of the Council of State has clearly distinguished between the two types of systems, emphasising the structure of agri-voltaic plants which, unlike that of photovoltaic plants with ground-mounted modules, would allow a “hybrid” use of agricultural land, between agricultural production and electricity production, thus safeguarding normal agricultural needs. This practical difference would substantiate the non-assimilability, from a legal point of view, of agri-voltaic plants with photovoltaic plants with ground-mounted modules (Council of State, Sez. IV, judgment no. 8263/2023). Following this line of argument, it can be pointed out that agri-voltaic plants, even simple ones, would be in line with the purpose of the new regulations, which is to limit the use of agricultural land by photovoltaic plants.

On the other hand, it is possible to put forward arguments in support of the applicability of the new limitations also to simple agri-voltaic plants. Indeed, the failure to expressly provide for such plants within the list of those excluded from the scope of the new rules could lead one to believe that they are subject to the new limitations; moreover, and as anticipated in the initial part of this informative note, the



difficulties in defining «photovoltaic plants with ground-mounted modules» may give rise to doubts as to the scope of application of the new provision. In this case too, it is hoped that the legislator shall clarify these points during the conversion phase of DL Agricoltura.

## Entry into force

Paragraph 2 of Article 5 of the DL Agricoltura states that the new discipline will be applicable to the enabling, authorising or environmental assessment procedures that have already commenced at the date of entry into force of the decree, thus excluding from the application of the new limitations those commenced by 15 May 2024.

As it is formulated, it cannot be confirmed whether the request of connection can be considered as proof of the start of the procedures, as the MASE Minister claimed during the press conference of the Council of Ministers for the presentation of the DL Agricoltura.

On a hierarchical level, it is pointed out that any regional regulations that are less restrictive and possibly contrary to the new prohibition, even if adopted earlier, should not be applicable, since the latter is contained in a primary legislation based on sources of law.

Finally, we consider relevant to point out that, being a decree-law, the DL Agricoltura must be converted into law by Parliament within 60 days of its publication or, if not, it will lose its effectiveness from the moment it enters into force; in this stage, the decree could be converted with or without amendments.

Therefore, it now remains to be seen whether the decree will be definitively converted into law and, if so, whether it will undergo certain amendments aimed at mitigating its scope of application.

For the purpose of exhaustiveness, Article 5 of DL Agricoltura is reproduced below:

## Article 5 - Provisions to limit the use of agricultural land

1. In Article 20 of Legislative Decree No. 199 of 8 November 2021, the following paragraph is added after paragraph 1: «1-bis. *The installation of photovoltaic plants with ground-mounted modules referred to in Article 6-bis, letter b), of Legislative Decree No. 28 of 3 March 2011, in areas classified as agricultural by the urban plans in force, is exclusively allowed in the areas referred to in letters a), limited to the interventions for the modification, refurbishment, upgrading or complete reconstruction of the plants already installed, provided that they do not entail an increase of the occupied area, c), c-bis), c-bis.1 ), and c-ter) n. 2) and n. 3) of subsection 8. The first sentence shall not apply in the case of projects that envisage photovoltaic plants with ground-mounted modules aimed at establishing a Renewable Energy Community pursuant to Article 31 of Legislative Decree 8 November 2021, No. 199, as well as in the case of projects implementing the other investment measures of the National Recovery and Resilience Plan (PNRR), approved by the decision of the ECOFIN Council of 13 July 2021, as amended by the decision of the ECOFIN Council of 8 December 2023, and by the National Plan of Complementary Investments to the PNRR (PNC) referred to in Article 1 of Decree-Law No. 59 of 6 May 2021, converted, with amendments, by Law No. 101 of 1 July 2021, or projects necessary to achieve the objectives of the PNRR.*».

2. The enabling, authorising or environmental assessment procedures already commenced at the date of entry into force of this decree are concluded in accordance with the previous legislation.

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