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PV INSTALLATIONS: ACCORDING TO T.A.R. LAZIO THE AMENDMENT OF INCENTIVE SCHEMES OF THE SO CALLED CONTO ENERGIA BEFORE THE SCHEDULED DEADLINE IS LEGITIMATE.

Over the last two years three different systems of regulation of the so-called Conto Energia have been implemented. In particular, DM 6 August 2010 (Third Conto Energia), DM 5 May 2011 (Fourth Conto Energia) and, more recently, DM 5 July 2012 (Fifth Conto Energia). The newer regulation has always "shortened" the period of applicability of the former one. The Fourth Conto Energia has restricted the applicability of the Third Conto (originally due to expire on 31 December 2013) to PV installations which come into operation by 31 May 2011. In addition, the Fifth Conto Energia – with some exceptions – has succeeded the Fourth Conto Energia on 27 August 2012, notwithstanding that the original deadline of the latter was scheduled for 31 December 2016.

The anticipation of the deadline for the applicability of the Third and Fourth Conto Energia has obviously frustrated the hopes of those operators who, being not yet connected to the grid, were excluded from the application of more favorable incentive mechanisms – based on which the decision to make the investment had been made – and subject to less generous schemes (the fourth or fifth Conto Energia).

Most recently T.A.R. Lazio (decision no. 1167 of 4 February 2013) was examining the question of the legitimacy of such provisions.

In the specific case, the applicant, interested in maintaining the system introduced by the so-called Third Conto Energia, has opposed the provisions of the Fourth Conto – which anticipated the deadline for the applicability of the former – finding it in violation of EU Directive 2008/28/EC.

In particular, the applicant argues that EU Regulations establish a clear obligation for national governments to respect the principle of legal certainty. In fact, due to the fact that business ventures have been planned based on certain conditions, the early repeal of the third Conto Energia – which has affected those conditions (i.e. the incentives provided by the Third Conto) – is unlawful.

T.A.R. Lazio has dismissed the appeal as it did not consider violated, in this particular case, that principle.

The administrative judge has stressed the need to actually recognize *"that there must be a time when the expectation of one individual to gain from desired economic benefits is strengthened and becomes legally relevant"*, but *"this time must be identified on the basis of elements endowed with significant certainty"*.

That time is identified by the considered regulations at the moment the system goes into operation – thus beginning to take advantage of the incentives – and not when the authorization is granted (autorizzazione unica).

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According to T.A.R. Lazio there is no evidence to suggest that, being the plant not in operation, protection must be ensured to business decisions made at a time when they appeared advantageous and propitious; indeed, *"there is no evidence to assert the immutability of the contribution"*.

Moreover, according to T.A.R. Lazio, should the principle be accepted that these interests must be considered to be relevant, there would be no violation of EU Legislation.

Indeed, directive 2008/28/EC states that governments can control the effects and costs of incentive schemes, precisely in order to avoid speculative bubbles and imbalances in the so-called energy mix due to overcompensation. This is also proved by the fact that the Commission, noting a much more rapid development than expected (due to the sharp decline in investments), has not prevented national governments from reviewing such schemes.

Therefore, according to the administrative judge, the revision of the incentives (which are not eliminated but only reduced), does not detract from the promotion of the sector, but simply regulates it based on proportionality rules.

According to T.A.R. Lazio, the principle of legal certainty is not breached either, since – as taught by the European Court of Justice (case C-201/2008) – the latter does not postulate the absence of legislative changes, and the ability to rely on the protection of legitimate expectations is excluded when a prudent and circumspect operator is able to foresee the adoption of a measure likely to affect his interests.

Moreover, according to T.A.R. Lazio, a careful operator would have noticed the sudden changes in the sector and the achievement of the so-called grid parity between solar and conventional systems and, therefore, expect a change of discipline.

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Todarello & Partners provides legal assistance on all issues relating to topics covered in this article. The lawyers of the Firm have significant experience in the related field, regularly assisting some of the major market players and representing them in legal proceedings before all competent courts.

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