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## **RENEWABLES / WIND POWER: IT IS UNLAWFUL TO IMPOSE MAXIMUM LIMITS TO PRODUCTION.**

A new ruling – this time from the Consiglio di Stato, the highest administrative Court (hereinafter, the “CdS”) – has established the unlawfulness of set quotas for the production of electricity from renewable sources.

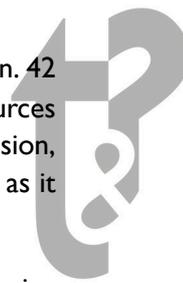
With its recent pronouncement of 10 September 2012, n. 4768, in fact, Section V of the CdS (repealing what previously decided by the Regional Administrative Court of Basilicata) has annulled the resolution with which the Regional Council of Basilicata had refused to authorize the construction of a wind farm, on the basis of the provisions of Article 3 of L.R. 26 April 2007, n. 9. These provisions had fixed to 128 MW the limit for the maximum installable power from wind farms, prohibiting the authorization of additional plants until the approval of the regional energy plan (Piano di Indirizzo Energetico Ambientale Regionale, “PIEAR”).

The CdS, in the wake of previous case law, strongly reiterated how such provisions are contrary – in addition to the agreements referred to in the Kyoto Protocol – to Directive 2001/77/EC, which promotes the development of renewable energy sources and requires Member States to remove any regulatory (or otherwise) barriers to the increase in electricity production from these sources (Article 6 of the above mentioned Directive). The CdS, therefore, has set aside the regional provisions supporting the contested measure.

The work of demolition – by the Judges – of the many snares and constraints posed by the local authorities to the production of energy from renewable sources carries on.

Even the Constitutional Court, as one may recall, has already, on several occasions, been able to establish the unlawfulness of similar legislation.

Indeed, the same region of Basilicata was the subject of a recent ruling by the Constitutional Court – 3 March 2011, n. 67. With this ruling, the Court declared L.R. 30 December 2009, n. 42 to be unconstitutional where it prohibited the construction of power plants from renewable sources, which did not fall within the limits set by the Regional Energy Plan, until the approval of the “PIEAR” (Piano di Indirizzo Energetico Ambientale Regionale). According to the Court, a provision so designed would have implicitly entailed an unreasonable and unjustified “general moratorium” in relation to the installation of facilities of primary interest, in blatant violation of the law – national and international – governing the matter.



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Similarly, with decision 1 April 2010, no. 124, the Court had excised Article 2 of L.R. of Calabria n. 42 of 29 December 2008, which provided a limit to the production of energy from renewable sources pending the establishment of the Regional Environmental Energy Plan (PEAR). Such provision, according to the Court, violated the fundamental principles of Community and international law, as it disregarded the general trend permeating the subject.

By the same token, the decision of the Constitutional Court of 7 November 2010, n. 344, concerning Regional Regulation 4 October 2006, n. 16 by the Region of Puglia with regard to wind power plants. The aforesaid Regulation, in fact, was characterized by the presence of a number of preliminary "conditions" that needed to be met, under threat of an indefinite stop to the construction of new wind farms. In particular, the Regulation provided for the approval of municipal planning instruments (PRIE) – without establishing a deadline for their introduction – and the establishment of a maximum index of crowding. Predictably, the Court held such legislation contrary to Article 12 of Legislative Decree no. 387/2003 for introducing new and different requirements to those specified by state regulations, thus violating the most important cornerstone: the need to simplify and speed up the process to build plants powered by renewable sources.

In the presence of such a well-established line of decisions – at all levels – one would expect a consistent change of direction on the part of the local authorities.

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The authors of this article are Massimo Colicchia and Ciro Rolando.

For further information or clarification on the issues discussed herein, please contact Mr Massimo Colicchia in our Milan office.

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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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