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## **RENEWABLE ENERGY: FINALITY OF CONCLUSION OF THE AUTHORIZATION PROCEDURE AND LIABILITY FOR UNDUE DELAY.**

Two recent, interesting rulings have taken place on the issue of finality of the period fixed by law (currently 90 days, following the amendment of Article 12 of Legislative Decree no. 387 of 2003 by L. 244 of 2007 – the original term was 180 days) for the conclusion of the authorization procedure for installations powered by renewable sources – the cases considered concerned two photovoltaic plants – and the consequent right of entrepreneurs to be compensated for the damage caused by failure to comply with this deadline.

The Council of State (Italian supreme Administrative Court) , in particular, with decision no. 5413 of 23 October 2012 has confirmed – on the basis of the advice given on the issue by the Constitutional Court (which, as known, considers that term to constitute a "fundamental principle", Decision no. 364/2006) the finality of that period, being of no consequence the circumstance that the competent Authority had – during the running of the term – ordered an additional investigation or the fact that the applicant had not autonomously initiated the evaluation procedure to submit the installation to the environmental impact assessment (correctly, the Council of State considers that, in the absence of the petitioner's action, it is the responsibility of the Authority competent for the authorization procedure to pass on all deeds to the Authority competent for the EIA).

In an earlier ruling by TAR<sup>1</sup> Puglia - Lecce (decision of 19 September 2012, no. 1544), the judges helped clarify the reason why the Administration late conclusion of the authorization procedure within the fixed terms, may give rise to compensation to the applicant.

Firstly, it is interesting to notice that the Apulian judges adhere to case-law orientation according to which time is an essential asset in the life of an entrepreneur and therefore the delay in the conclusion of the authorization procedure is compensable in itself, even regardless of the prior verification on the entitlement to the "primary" commodity (in the present case the authorization to create a photovoltaic plant).

However, according to TAR Puglia, the claimant must prove all elements of the case, first of all the actual loss incurred due to the failure to meet the deadline (damage, therefore, can not be presumed, by the mere expiration of the term), the administration's negligence and the causal link.

In this case, the TAR Puglia did not consider it proved neither damage nor the negligence on the PA part.

With regard to the negligence and, in particular, for the purposes of its exclusion, the TAR considered it relevant that the complexity of the procedure had required the intervention of several other public

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<sup>1</sup> T.A.R. – Tribunale Amministrativo Regionale = Regional Administrative Court

authorities (not summoned by the claimant, but which could be also considered, at least in part, responsible for the delay) as well as – and especially – the behaviour of the claimant that, due to the incompleteness of the documentation initially submitted, had to provide various supplements that greatly contributed to slowing down the procedure.

Therefore, when making a claim for damages, attention must be paid to initiating a case not only against the competent authority, but also against the other authorities that may have been involved in the authorization procedure, and to whom the delay could also be due, for the purposes of ascertaining the level of responsibilities.

It is also essential to assess the claimant's contributory negligence, who – during the authorization procedure – should be careful to avoid any behaviour that might, in some way, contribute to delay the procedure itself (e.g. guilty non-delivery of all necessary documentation and / or delay in delivering the latter), and, pursuant to art. 30 of the c.p.a., to make sure to carry out all means of redress available to them.

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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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