

Bird & Bird

# Energy Release 2.0

A complete analysis

*January 16, 2025*

# Development of new capacity for energy- intensive final customers

## Overview

On November 14, 2024, the first "*Tender notice for the allocation of electricity in the availability of the GSE - pursuant to Ministerial Decree No. 268 of July 23, 2024 (so-called Energy Release 2.0)*" pursuant to, respectively, Article 1(2), of Law-Decree No. 181 of December 9, 2023, converted, with amendments, by Law No. 11 of February 2, 2024, and Decree of the Ministry of Environment and Energy Security of July 23, 2024 No. 268 (*so-called DM Energy Release 2.0*) was published on the website of Gestore dei Servizi Energetici S.p.A. ("**GSE**").

The DM Energy Release 2.0 regulates the mechanism under which energy-intensive final customers will be able to contribute to the realization of new power generation capacity from renewable sources, making use, in the first stage, of a procedure for the advancement of electricity in the availability of the GSE, and then subsequently proceeding to its return following the completion of the realization of this new electricity capacity.

The deadline for submission of expressions of interest under the Tender Notice was recently extended to Feb. 14, 2025, h. 12:00 p.m.

Bird & Bird has set up a *task force* composed of professionals working in the *energy, regulatory, corporate* and *tax* fields in order to assist clients in evaluating the applicability profiles of the new regulation.



# DM Energy Release 2.0

## Regulatory framework

- Article 1(2) of Law-Decree No. 181 of December 9, 2023, converted, with amendments, by Law No. 11 of February 2, 2024 ("**DL 181/23**");
- Ministry of Environment and Energy Security (MASE) Decree No. 286 ("**DM Energy Release 2.0**" or the "**Decree**"), published on July 23, 2024 and effective from July 24, 2024;
- "**DM Energy Release 2.0 - Operating Rules**" published by Directorial Decree No. 11 of October 30, 2024, pursuant to the Decree (the "**Operating Rules**") and effective from October 31, 2024;
- first "**Tender notice for the Allocation of Electricity in the Availability of the GSE - pursuant to Ministerial Decree No. 268 of July 23, 2024 (so-called Energy Release 2.0)**" published on November 14, 2024 and **expiring on February 14, 2025 h 12:00 p.m.** (the "**Tender Notice**");
- ARERA resolution December 27, 2024 No. 583/2024/R/eel.

The DM Energy Release 2.0 governs the mechanism under which energy final customers will be required to contribute to the construction of new power generation capacity from renewable sources.

Operators admitted to the mechanism will sign an **anticipation contract** for renewable electricity availability from the GSE<sup>1</sup>. In a second phase, they will return the electricity **after completing the new power capacity** by entering into the appropriate **restitution contract**.

To regulate access to the mechanism, the GSE has issued the Operating Rules, specifying: the methods of access, the procedure for the allocation of electricity in advance, the advance contract, the contract and the methods for returning the advanced electricity, as well as the methods of recalculation (if needed) of the new capacity in accordance with the provisions of the Decree.

*Below is an analysis of the general rules provided in the Decree and the Operating Rules, followed by a review of the requirements specifically set forth in the Tender Notice for accessing the allocation mechanism.*

## Who is entitled to access the allocation process?

All energy-intensive **end-customers**, i.e., entities that, as of the date of publication of the Tender Notice, are registered and/or in the process of being considered for registration on the list of energy-intensive enterprises held by Cassa per i Servizi Energetici e Ambientali (CSEA), may participate in the mechanism.

## Modalities of participation

Energy end-customers will be able to participate:

- individually;
- In aggregate, after signing an aggregation contract between energy-intensive end-customers, under which an aggregator will be identified to act as an agent for energy-intensive customers to sign the anticipation contract and the restitution contract (*as detailed below*),

by submitting an expression of interest within 60 days from the opening date set by each tender notice.

In case of aggregate participation, the expression of interest should be submitted by the aggregator.

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<sup>1</sup> Pursuant to Article 1 paragraph 2 letter (e) of DL 181/23, the volume of renewable energy made available by the GSE is equal to the energy produced by plants that benefit from the following incentive mechanisms: (i) all-inclusive tariffs, (ii) dedicated withdrawal, and (iii) on-site exchange.

**N.B.** for the purpose of participating to the allocation procedure in aggregate form, the energy final customers and the aggregator shall enter into an **aggregation contract**.

The aggregation contract is not regulated under the above-mentioned regulatory framework. Therefore, besides granting a specific mandate (without representation) to the aggregator to participate in the procedure on behalf of the energy-intensive end customers, the parties can independently decide on the contract's content. If the aggregator also owns the plants, the contract should include the terms and conditions for signing the restitution contract.

Since the execution of the aggregation is a prerequisite for participation in the aggregation procedure and for the signing of the anticipation contract, as a first approximation, the aggregation contract should provide for the assumption by the energy-intensive end customers vis-à-vis the aggregator of undertakings of a specular nature to those to be assumed by the aggregator vis-à-vis the GSE.

The expression of interest should indicate:

- a **volume of electricity not exceeding the average annual consumption relevant for CSEA registration purposes** (in the case of aggregate participation, this requirement must be assessed for each of the aggregated energy-intensive end customers);
- (*optionally*) a minimum allocation threshold, below which the end customer waives to the allocation (*so-called minimum acceptance threshold*).
- the commitment of the energy end customer entity in order to:
  - (1) **realize new generation capacity from renewable sources – so-called obligation to realize - through:**
    - i new photovoltaic, wind and/or hydroelectric plants with a minimum capacity of 200 kW each;
    - ii interventions of upgrading or refurbishment of photovoltaic, wind and/or hydroelectric plants, with an increase in the relative power capacity of at least 200 kW,<sup>2</sup>  
**for a total power output of at least twice the power output subject to restitution.**<sup>3</sup>
    - The new generation capacity can be realized **on their own** by energy end customers **or through** the aggregator entity, **or by third parties** with which such companies may sign, even indirectly, a power purchase agreement from renewable sources subject to registration on the platform referred to in Article 28 of Legislative Decree 199/2021.
    - The new generation capacity must come into operation within 40 (forty) months from the date of execution the anticipation contract.<sup>4</sup>
  - (2) **sign** (either on their own or through an aggregator or third party) **the contract for restitution of the advanced electricity**, within 40 months after the date of execution of the anticipation contract;
  - (3) **post a bail** to guarantee the participation in the allocation procedure, according to the terms established by the GSE under the Operating Rules.  
**The security** will be released (i) upon signing of the anticipation contract, or (ii) upon submission of the declaration of waiver in case a volume of electricity is allocated below the minimum acceptance threshold, or (iii) in case of exclusion from the allocation procedure.<sup>5</sup>

<sup>2</sup> Please refer to Annex 1 of the Operating Rules for a detailed discussion of the allowable interventions.

<sup>3</sup> The energy-intensive end-customer shall undertake to build on its own and/or through third parties new plants and/or upgrading or refurbishing works having a capacity equal to twice the capacity required to produce the volume of electricity subject to restitution under the restitution contract.

<sup>4</sup> In the event of **delays referable to force majeure events and/or delays in the completion of the authorization procedures**, provided that the delay is not attributable or attributable to the final customer or third party, the final customer/aggregator will have **the right to request an extension, which in any case may not exceed the deadline of December 31, 2030**.

<sup>5</sup> The deposit will be returned within 15 days of the signing of the anticipation contract or in case of exclusion from the allocation process. If the anticipation contract is not signed within the agreed timeframe, the GSE will permanently retain the amount of the deposit.

## The anticipation contract

If the allocation process is successful, the GSE and each energy final customer/aggregator **will sign the anticipation contract** within 30 days of the publication of the results of the allocation process.

If the overall electricity volume requested by the participants exceeds the quota in the GSE's availability, the allocated electricity will be assigned proportionally to the volume requested by the relevant participants.

The allocated electricity will be spread over the different months of the year based on the monthly profile of electricity in the GSE's availability defined pursuant to the Operating Rules and the tender notice.

### Structure, object, and period of anticipation

The **anticipation contract** will be structured as a **two-way contract for difference**. This contract gives the final energy customer or aggregator the right to receive the allocated electricity and the relevant guarantees of origin for a period of 36 months from the date the anticipation contract is signed.

### Consideration

Specifically, the **consideration** for the quantity of energy allocated on a monthly basis ( $Q_{assigned_m}$ ) and the attribution of GOs related to this volume will be determined as the differential between (i) the transfer price determined under the tender notice ( $P_{transfer}$ ) and (ii) the average monthly sale price on the organized electricity wholesale market ( $P_{sale_m}$ )

$$\text{Consideration}_m = (P_{transfer} - P_{sale_m}) * Q_{assigned_m}$$

- if the differential is negative ( $P_{transfer} < P_{sale_m}$ ), the differential amount will be paid by the GSE;
- if the differential is positive ( $P_{transfer} > P_{sale_m}$ ), the differential amount will be adjusted or paid by the energy final customer to the GSE.

Guarantees of origin will be attributed by the GSE and automatically cancelled to the final energy customers on the relevant property account.

### Commitments

Pursuant to the anticipation contract:

- a the end-customer/aggregator will commit to realize the new generation capacity from renewable sources (see (1) above);
- b the parties will define the terms and conditions for the settlement of the price differential;
- c the final customers/aggregator will undertake to sign, or cause the third party that has realized the new generation capacity to sign, the restitution contract covering the allocated volume of energy and the related GOs within 40 (forty) months from the signing of the anticipation contract;<sup>6</sup>
- d **assignment of the anticipation contract** to other parties, or in case of aggregation, the share of the aggregated energy end customer, shall be expressly excluded;
- e the end-customer/aggregator shall have the **right to withdraw** from the agreement, subject to the return of all the benefits received by the end-customer/aggregator including the economic counter-value of the guarantees of origin;

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<sup>6</sup> Specifically, the energy end customer/aggregator will have to undertake to sign a restitution contract for each plant by means of which the new capacity has been built; these related contracts will have to provide, *pro rata*, for the restitution of electricity and related GOs for an overall volume equal to the volume being advanced to the final customer under the anticipation contract.

- f the energy-intensive end customer will be entitled to obtain an adjustment (by way of reduction) of the amount of electricity subject to anticipation and, subsequently, recalculation of the new generation capacity to be realized, according to the terms defined in the Operating Rules.<sup>7</sup>

**In case of non-compliance** with the obligations under (a) - (d) above, **the anticipation contract will be automatically terminated, and the energy final customer shall return all the benefits received.** In case of failure to make timely payment, the GSE will enforce the guarantee established in its favor.

Finally, the end customer or aggregator must promptly notify the GSE of any force majeure or delays in administrative procedures that are likely to affect the operation start date. This is to obtain a suspension of the deadline for the construction of the plant, subject to a maximum extension deadline of 31 December 2030.

## Warranties

To guarantee the fulfillment of the obligations undertaken under the advance contracts, a **mixed guarantee system** is planned, which will operate simultaneously:

- **Autonomous guarantee:** within 60 (sixty) days from the signing of the anticipation contract, each final energy customer/allocated aggregator shall establish in favor of the GSE a first request unconditional **autonomous guarantee** issued by banking institutions registered with the Bank of Italy or, alternatively, by insurance companies registered with IVASS, for the amounts set forth in the Operating Rules and in the text attached thereto, **to be released upon entry into operation of the new generation capacity.**
- **Collective warranty:** a portion equal to **€3/MWh** will be withheld from the differentials monthly due by the GSE to the final customer/aggregator. Such withholding will constitute the non-interest-bearing collective security deposit on which the GSE can recourse in case of default of one or more counterparties to the advance contracts. **The portion will be returned to the end customer/aggregator**, net of any amounts used and in proportion to the deductions, **following the commissioning of the new renewable capacity.**
- **Offsetting with other incentives:** the GSE is entitled to recover amounts due and not paid by **offsetting** with any incentives that the end customer receives from the GSE itself.<sup>8</sup>

In relation to the autonomous guarantee, ARERA Resolution No. 583/2024/R/eel published on December 27, 2024 defines the procedure for the recognition of contributions under Regulation (EU) No. 2831/2023 of December 13, 2023 on "*de minimis*" aid, to cover the costs incurred by end customers for the establishment of this guarantee, up to a total value not exceeding € 100,000,000.

In accordance with the provisions of Article 6 of the Decree, under the resolution it is provided that:

- the application for access to the subsidy must be submitted **to the GSE by June 30 of the reference year**, attaching appropriate documentation provided by the bank/insurance institution issuing the guarantee, certifying the costs incurred;
- the grant can be applied for **up to 50 % of the cost incurred for the issuance of the guarantee**, on an annual basis, up to a maximum amount of € 300,000 over 3 years;<sup>9</sup>
- in case of positive outcome of the verifications, the GSE shall disburse the contribution by **February 28 of the year following the year of competence.**

<sup>7</sup> Among the others, the beneficiary of the anticipation will be required to (i) submit an annual progress report in relation to the new capacity under realization; (ii) ensure the entry into operation of at least twice as much power as is required for the return of the energy advanced by the GSE; (iii) ensure the installation of metering equipment for the energy produced and fed into the grid; and (iv) notify the occurrence of any force majeure or delays in administrative procedures that are likely to affect the date of entry into operation.

<sup>8</sup> **In case of default, the guarantee system will be enforced in the following order: (i) autonomous guarantee; (ii) offsetting with other incentives; (iii) collective warranty.**

<sup>9</sup> The relevant contributions may not qualify as "*de minimis*" aid under Article 108 TFEU beyond such threshold.

## The restitution contract

Within 40 months from signing the anticipation contract, the final energy customer or aggregator, or a third party delegated for this purpose, must sign the restitution contract.<sup>10</sup>

Please note that the signatory of the restitution contract must also be the owner of the facilities. If a third party builds the facility, there is no contractual model provided under the current regulatory framework to govern the relationship between the energy end customer or aggregator and the third party. Therefore, the type of contract and the relevant contractual conditions will be entirely up to the parties, who may also enter into such a contract after the successful outcome of the bidding process.

The end customer, aggregator, or third party must notify the date of the plant's entry into operation within the next 30 days. If the energy restitution is performed using multiple plants with new renewable generation capacity, a restitution contract must be signed for each plant.

### Structure, object and period of return

- The restitution contract shall be structured as a **two-way contract for difference** signed by the GSE with energy end customers/aggregators/third parties, providing for **the obligation to return** all electricity advanced by the GSE and the countervalue of GOs under the anticipation contract for a period of 20 years starting from the date of commissioning of the plants.
- Specifically, pursuant to the restitution contract, the following shall be made available to GSE: (i) the share of electricity associated with the new generation capacity realized for the purposes of the restitution<sup>11</sup> and (ii) the economic countervalue of GO associated with the electricity, to be calculated in accordance with the criteria defined in the Operating Rules. The amounts are determined **monthly** based on a restitution schedule defined by the GSE, in accordance with the criteria set forth in the Operating Rules.
- The repayment period starts from the date of entry into operation of the plant(s) for a term of 20 years, net of any interruptions referable to force majeure events, to be eventually recovered at the end of the period.

### Consideration

The restitution consideration shall be due **on a monthly basis** and will be calculated by the GSE as the differential between **(i) the transfer price determined pursuant to the notice ( $P_{transfer}$ ) and (ii) the reference price identified in the MGP (*Mercato del Giorno Prima*) in the relevant period of transactions ( $P_{PGM}$ )**, based on the zonal price recorded in the zone where the contracted plant is located and the amount of energy subject to restitution:

- if the differential is positive ( $P_{transfer} > P_{MGP}$ ), the GSE shall disburse the restitution consideration in favor of the end customer/aggregator/third party,
- if the differential is negative ( $P_{transfer} < P_{MGP}$ ), the GSE will equalize or request payment of the restitution consideration by the final customer/aggregator/third party;<sup>12</sup>

without prejudice to the application of administrative fees for the coverage of the operating costs borne by GSE pursuant to Ministerial Decree of December 24, 2014, as amended.

<sup>10</sup> Where the electricity subject to restitution is self-consumed on site, the restitution contract shall be signed directly with the energy end customer for settlement between the energy end customer and the GSE of the amount equal to the product of the volume of energy produced and self-consumed and the differential between the organized market price and the restitution price.

<sup>11</sup> The power covered by the restitution contract or, in the case of a multiplicity of plants, by the restitution contracts, shall be equal - in expected value - to that covered by the advance payment. In the event that the restitution is for only a portion of the power of the facilities, the electricity transferred to the GSE shall be determined according to a restitution schedule by *pro rata* allocation in each relevant period on the basis of the contracted power.

<sup>12</sup> Please note that the mechanism for calculating the differential under the restitution contract mirrors the calculation mechanism under the anticipation contract.

By the 25<sup>th</sup> day of the following month - m+1 (“m” = month of fee accrual), GSE shall determine and notify the end customer/aggregator/third party of any amounts due to be invoiced to the GSE or, in case of negative differential, the amount to be invoiced by the GSE to the end customer/aggregator/third party.

## What is provided under the Tender Notice?

- **Subjective requirements:** energy-intensive end customers, *i.e.* enterprises registered in the list of energy-intensive enterprises established at the CSEA with respect to the **year 2024** (including companies in the process of preliminary investigation for the purpose of registration in the aforementioned list of enterprises) will be eligible for the mechanism.
- **Volume:** the volume of electricity in the availability of the GSE finalized to the mechanism (within the limits of expected production) is equal to **23 TWh/year** for each year of the validity of the anticipation contract, in relation to which the GSE will make available to the mechanism the guarantees of origin attributable to such anticipated energy.
- **Transfer price: €65/MWh**, determined by taking into account the average efficient cost of production from renewable plants using competitive technologies.
- **Contractual transfer profile** determined on a monthly basis, calculated on the basis of GSE availability.
- Criteria for determining the **new generation capacity from renewable sources to be realized by energy customers, including through third parties**, depending on the volume of electricity covered by the advance contract.
- Payment of a security deposit of €10,000.00 to guarantee the signing of the anticipation contract.

In addition to the above, please consider that the contractual schemes of the anticipation and restitution contracts to be signed at the end of the allocation process have been published as an annex to the Tender Notice.



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