

Bird & Bird

# The changes in the energy sector introduced by the "PNRR-ter Decree" and the Draft "Suitable Areas" Decree

(Decree Law No. 13/2023, converted into Law No. 41/2023)

*September 2023*



# Summary

The changes in the energy sector introduced by the "PNRR- <i>ter</i> Decree" and the Draft "Suitable Areas" Decree	3
1. Simplifications and innovations in permitting procedures	3
2. New thresholds and exemptions for environmental assessments	5
3. Interventions on suitable areas and their authorization regimes	7
5. Electrochemical storage systems combined with RES systems	9
7. Simplifications for Energy Communities	9
8. Draft of the Decree on Suitable Areas	10
Contacts	14

# The changes in the energy sector introduced by the "PNRR-ter Decree" and the Draft "Suitable Areas" Decree

Law Decree No. 13 of 24 February 2023 (published on Official Gazette No. 47 of 24 February 2023) on "*Urgent provisions for the implementation of the National Recovery and Resilience Plan (NRRP) and the National for Complementary Investments Plan to the NRRP, as well as for the implementation of cohesion policies and the Common Agricultural Policy*", converted by Law No. 41 of 21 April 2023, published on Official Gazette No. 94 of 21 April 2023, entered into force on 22 April 2023.

Law No. 41 of 21 April 2023, converting, with amendments, Law-Decree No. 13 of 24 February 2023, on "*Urgent provisions for the implementation of the National Recovery and Resilience Plan (NRRP) and the National Plan for Complementary Investments to the NRRP, as well as for the implementation of cohesion policies and the common agricultural policy*" (the "**Decree**") was published in Official Gazette No. 94.

The Decree, which contains a series of interventions aimed at fostering the implementation of the National Recovery and Resilience Plan ("**NRRP**") and the National Plan for Complementary Investments ("**NRRP Complementary Plan**"), entered into force on 25 February 2023, the day following its publication in Official Gazette No. 47. It is from that date that the provisions of the Decree, which Law No. 41/2023 confirmed without amendment, are effective. On the other hand, new provisions (including those amending previous ones) added during conversion are applicable from 22 April - the day following its publication in Official Gazette No. 41/2023.

The Decree brings a major overhaul of governance related to NRRP implementation, providing measures to strengthen the capacity of NRRP measure-holding administrations and implementing entities, and to speed up and streamline procedures, to simply the system.

Recent news in the energy sector includes the long-awaited draft decree aimed at indicating the criteria for the identification, by Regions and Autonomous Provinces, of eligible areas for the installation of renewable energy plants ("**Draft Decree Suitable Areas**"), which has been in circulation since 12 July 2023, more than a year late concerning the delegation contained in Art. 20, paragraph 1 and 2 of Legislative Decree No. 199/2021, the Ministry of the Environment ("**MASE**") has prepared the draft decree, to be submitted to the Unified State-Regions and Cities and Local Autonomies Conference for consideration, which also contains the new burden sharing quotas allocated among the Regions for the achievement of the national RES target to 2030.

With this contribution we intend to provide a brief overview of the main novelties introduced in the field of energy and the environment, with particular reference to the simplifications of the authorization procedures for plants from renewable sources and the identification of suitable areas. After an overview of the novelties introduced by the Decree, a little mention will then be devoted to an analysis of the contents of the Draft Decree Suitable Areas currently in circulation and to some issues that have already emerged regarding especially the transitional rules.

## 1. *Simplifications and innovations in permitting procedures*

Some simplifications were made, by Art. 47 of the Decree, to the **sole authorisation** procedure, **which is regulated** by Art. 12 of Legislative Decree No. 38 of 7 December 2003.

In particular, paragraph 4 was entirely replaced, with the introduction of the single procedure, including environmental assessment measures and the setting of new deadlines for the conclusion of the procedure.

The following predictions are noted:

- the Sole Authorisation is issued "*following a single procedure, including, where provided for, environmental assessments, in which "all the administrations concerned participate"*";
- the Sole Authorisation "*constitutes a title to build and operate the plant in accordance with the approved project and must contain the obligation to the restoration of the state of the site at the expense of the operator following the decommissioning of the plant, or, for hydroelectric plants, "the obligation to the implementation of environmental reinstatement and recovery measures"*";
- the maximum time limit for the conclusion of the Sole Authorisation is **ninety days** for the projects referred to in paragraph 3-bis, which provide for the participation of the Ministry of Culture with respect to projects located in areas subject to protection, including in itinere, pursuant to Legislative Decree No. 42 of 22 January 2004;
- for all other projects, the maximum time limit for the conclusion of the proceedings is **sixty days**, net of the time required for environmental assessment procedures where required;
- in the case of environmental assessment proceedings in progress on the date of entry into force of the Decree, it is possible to initiate the single procedure "*even pending the proceedings for the issuance of the measure of verification of subjectivity to EIA or the measure of EIA*".

The intervention, which is to be favorably evaluated, undoubtedly has the merit of having sped up the single permit procedure, reducing its maximum duration (moreover, further reduced during conversion), and simplified its conduct, limiting the intervention of the Ministry of Culture and integrating environmental assessments. The decision to also bring environmental procedures into the context of the building permit procedure - as, moreover, already happens at the regional level with the Sole Regional Procedure ("**PAUR**") - will allow a joint and contextual assessment of all the interests involved with a significant reduction in time and also in litigation, given that the appeal can now be made exclusively against the single final measure and no longer separately against the environmental measure first and then the authorization measure.

Additional changes that also affected Article 12 of Legislative Decree No. 387/2003 are:

- the provision for the issuance of the concession for the purpose of water use, within the single permit process, "*for hydroelectric storage facilities through pure pumping*";
- the removal from paragraph 3-bis of the reference to so-called conterminous areas<sup>1</sup> when it comes to the cases in which the participation of the Ministry of Culture in the single procedure is envisaged, a participation that is thus limited to "*projects concerning plants powered by renewable sources, including related works and infrastructures indispensable to the construction and operation of the same plants, located in areas subject to protection, even in itinere, pursuant to Legislative Decree No. 42 of 22 January 2004, if not subject to environmental assessments*".

Also, with reference to bordering areas, paragraph 3 of Article 47 of the Decree sanctioned their definitive irrelevance through the repeal of paragraph 2 of Article 30 of Law-Decree No. 77 of 31 May 2021 ("**Simplification-bis Decree**"). This provision stated that for electricity production plants powered by renewable sources, located in areas bordering those subject to landscape protection, the Ministry of Culture would be called upon and express, as part of the Services Conference, a mandatory but non-binding opinion. Thus, in the future, the Ministry of Culture will no longer participate in the authorization process if the project is located in an area that is not directly constrained but is only bordering to a constrained area.

Some novelties also affected the Simplified Authorization Procedure ("**PAS**") under Article 6 of Legislative Decree No. 28 of 3 March 2011:

- Article 49 of the Decree amended paragraph 7-bis of Article 6, establishing that, after the expiration of thirty days from the submission of the PAS, **the party interested in** the implementation of the intervention shall **transmit the** copy of the **declaration**, showing the date of its receipt, **for publication in the Regional**

---

<sup>1</sup> These are understood to be the areas adjacent to those directly subject to protection under Legislative Decree No. 42 of 22 January 2004, calculated-according to the definition in Article 14.9 of the Decree of the Ministry of Economic Development of 10 September 2010-for a distance equal, as the crow flies, to fifty times the maximum height of the nearest wind turbine for wind power plants or the maximum height above the ground for all other plants.

**Official Bulletin ("ROB")** to the Region on whose territory the intervention is located, which shall do so within the next ten days. **From the day of publication, the terms of appeal provided by law run.**

The legislator has thus expressly provided for the publication in the BUR of the proponent's declaration-to be valid as an authorizing title under the PAS in the event of the Administration's silence within 30 days of its filing, making it clear that, from that date, the time limit for appealing begins. The novelty certainly has the merit of providing clarity on the correct identification of the *dies a quo* from which the time limit for appeal starts. However, the opportunity has also not been taken to clarify, once and for all and resolving the jurisprudential contrasts that have arisen in recent years, which action is actually exercisable against the PAS by the third party who considers himself aggrieved: whether the action for annulment<sup>2</sup>, within the term of sixty or one hundred and twenty days; or the action against silence<sup>3</sup>, within the term of one year. Clarification of the exact time limit for appeal would have undoubtedly resolved any doubts also about the nature of the PAS perfected by the Administration's silence. The uncertainty of the jurisprudential framework, on the other hand, does not allow ruling out the possibility that any judicial initiatives, proposed after one hundred and twenty days have elapsed from the publication of the PAS in the BUR, can be considered timely.

In addition, Articles 47, paragraph 6 and 49, paragraph 1, lett. B) of the Decree amended Article 7-bis of Legislative Decree No. 28/2011, on "*Simplification of authorization procedures for the implementation of energy efficiency interventions and small renewable energy plants.*" The changes are summarized below:

- Paragraph 5-bis was introduced, which adds **wind farm with a total capacity of up to 20 kW, located outside protected areas or belonging to the "Natura 2000 Network,"** to those to which the discipline of paragraph 5, first sentence, applies, in which it is stated that "*they are considered **ordinary maintenance interventions and are not subject to the acquisition of permits, authorizations or administrative acts of consent however denominated***" (so-called "mini-wind farm");
- **for plants that present the characteristics referred to in paragraph 5** (photovoltaic and thermal on buildings in historic centers) and whose implementation is considered as ordinary maintenance activities (to which have now been added, as just mentioned, also "mini-wind farm"), located in areas characterized by landscape constraints, the mechanism of **silence-consent** is expected to operate with **respect to the opinion of the landscape authority**. The mechanism operates if, within the term of **forty-five days** from the date of receipt of the application, the reasons preventing its acceptance have not been communicated, whereby the permit shall be deemed to be issued and is immediately effective. The aforementioned period may be suspended once and for a maximum of thirty days if, within fifteen days from the date of receipt of the application, the Superintendence represents, in a timely and reasoned manner, the need to carry out in-depth investigations or to make changes to the installation project.

## 2. New thresholds and exemptions for environmental assessments

The Decree also introduced significant innovations, especially during its conversion, on the subject of environmental assessments and, in particular, environmental impact assessment ("**EIA**") and strategic environmental assessment ("**SEA**") for certain types of plants. Again, with the intent of speeding up and simplifying authorization procedures, the reference thresholds for the activation of environmental assessments have been modified (Article 47, paragraph 11-bis of the Decree) and total exemptions - even for plants with significant overall power - have been temporarily provided (Article 47, paragraph 1-bis of the Decree).

First, the thresholds in Annex II to Part II and Annex IV to Part II of Legislative Decree No. 152 of 3 April 2006 ("**Environment Code**") were raised for **photovoltaic systems and**, therefore, the **thresholds for EIA at the national level and EIA at the regional level** were raised to **20 MW** and **10 MW** respectively provided that:

- the facility is located in the so-called "**suitable areas**" identified pursuant to Article 20 of Legislative Decree No. 199 of 8 November 2021; or

<sup>2</sup> See most recently Administrative Regional Court for Latina, sec. I, 29 March 2023, no. 203; Council of State, sec. IV, 31 Oct 2022, no. 9429.

<sup>3</sup> See, *ex multis*, Council of State, sec. IV, 4 January 2023, no. 130; Administrative Regional Court for Calabria, Catanzaro, sec. I, 16 June 2021, no. 1243; Council of State, sec. IV, 8 July 2020, no. 4383; Council of State, sec. IV, 19 June 2014, no. 3112.

- the plant is located in areas of **industrial, artisanal and commercial use** as well as in closed and restoring **landfills or quarries** not susceptible to further exploitation. (new Art. 22-*bis* of Legislative Decree No. 199/2021); or
- outside of the previous two hypotheses, the facility **is not located within "non-suitable" areas** included among those specifically identified pursuant to letter f) of Annex 3 of Ministerial Decree of 10 September 2010 (e.g., UNESCO sites, areas and properties of significant cultural interest, properties and areas declared to be of significant public interest, areas near archaeological parks, areas included in the Natura 2000 network and *Important Bird Areas*).

For reasons of reorganization of the regulations hitherto in force, the third sentence of paragraph 9-*bis* of Art. 6 of Legislative Decree No. 28/2011, which provided different thresholds for photovoltaics located in "suitable areas" and in areas for industrial, artisanal and commercial use, landfills and quarries (Art. 47, paragraph 11-*ter* of the Decree), was therefore deleted.

The new thresholds apply in place of the current ones for photovoltaic plants (10 MW for national EIA and 1 MW for regional EIA *screening*), which remain in place, however, in cases other than those considered above.

In addition, Article 47, paragraph 11-*quater* of the Decree subjected to regional EIA *screening* **hydroelectric plants with a capacity greater than 1 MW** provided that they are built on existing pipelines without increasing either the existing flow rate or the period in which the withdrawal takes place and built on existing buildings, provided that they do not alter the volumes and surfaces, do not involve changes in intended use, do not affect structural parts of the building, and do not involve an increase in housing units.

Lastly, **until 30 June 2024**, certain types of projects are **exempt from any environmental assessment under Title III of Part II of the Environment Code** that:

- fall within the so-called "**suitable areas**" identified pursuant to Article 20 of Legislative Decree No. 199/2021; and
- Are covered in plans or programs that have **already undergone positive SEA**.

The projects include:

- **photovoltaic** plants with a total capacity of **up to 30 MW**, including related works, storage systems and infrastructure essential for the construction and operation of plants;
- **facilities for the storage of** energy from renewable sources, including the works and infrastructure essential for the construction and operation of such facilities;
- **projects for the refurbishment**, upgrading or complete reconstruction of existing **photovoltaic plants**, possibly including storage systems, which do not involve a change in the area occupied and with a total capacity, as a result of the aforementioned interventions, of **up to 50 MW**;
- **repowering projects** of existing **wind farms**, which do not involve a change in the area occupied and with a total capacity, because of the intervention, of **up to 50 MW**.

Add to this the exemptions provided, again **until 30 June 2024**, and again in the case of projects considered in plans **already positively submitted to SEA**, for:

- **offshore wind farms** with a total capacity not exceeding **50 MW**, which fall, pursuant to Article 23, paragraph 2, of Legislative Decree No. 199/2021 in the areas identified by the Maritime Space Management Plan;
- **electrical infrastructure projects for the connection of renewable energy production facilities or the development of the national transmission electricity grid**, necessary to integrate renewable energy into the electricity system, or projects for renewable energy storage facilities falling within the areas covered by the Plan referred to in Article 36 of Legislative Decree No. 93 of 1 June 2011.

These exemptions were provided when the Decree was converted, implementing Article 6 of EU Regulation EU/2022/2577 establishing the framework for accelerating the deployment of renewable energy. The provision of a total - albeit temporary - exemption is certainly to be read positively with a view to simplifying and speeding up procedures, given that it is usually the environmental ones that require more in-depth assessments. However, the effect pursued is undoubtedly weakened by the provision of the necessary prior SEA submission of the plans in which the projects are included.

At the choice of the proponent, the described exemptions may also apply in cases of projects with the described requirements that, at the time of the entry into force of the law converting the Decree, are already subject to pending EIA proceedings.

### *3. Interventions on suitable areas and their authorization regimes*

Article 47 of the Decree also introduced several changes to the regulation of areas suitable for the installation of renewable energy plants, contained in Article 20 of Legislative Decree No. 199/2021.

First, changes were introduced to the list of *legally* identified suitable areas in Article 20, Paragraph 8 of Legislative Decree No. 199/2021:

- **subsection (a)** has been replaced in its entirety, which now refers to sites where "systems of the same source are already installed and where alterations, including substantial ones, for refurbishment, upgrading or complete reconstruction are carried out, possibly combined with storage systems, which do **not result in a change in the occupied area of more than 20 percent.** The aforementioned limit of 20 percent of the occupied area does not apply to photovoltaic plants, in relation to which the change in the occupied area is subject only to the limit in paragraph *c-ter*), number 1), referring to "areas classified as agricultural, enclosed within a perimeter whose points are no more than 500 meters away from areas of industrial, artisanal and commercial use, including sites of national interest, as well as quarries and mines." This provision has the clear objective of facilitating, from a permitting point of view, the rebuilding, upgrading or reconstruction of existing facilities;
- in **subparagraph c-quater**) it was specified that areas among are included subject to the protection provided for cultural and landscape heritage by Legislative Decree No. 42/2004 and which, therefore, cannot be considered eligible, those "encumbered by civic uses referred to in Article 142(1)(h) of the same decree." The relevant distance for determining the buffer zone (determined by considering a distance from the perimeter of property subject to protection) was also changed, which, for wind power plants was changed from seven kilometers to "three kilometers" and for photovoltaic plants was changed from one kilometer to "five hundred meters."
- in **(c-bis 1)** is inserted a reference to "airport grounds, including those within the perimeter of relevance of airports in the smaller islands."

In relation to suitable areas referred to in Article 20, paragraph 8, letter *c-bis*) - i.e., sites and plants in the availability of companies of the Italian State Railways group and managers of railway infrastructures as well as freeway concessionary companies - the obligation of the tender to award the relevant concession for the construction of plants from renewable energy has been expressly provided for. In fact, Article 47 of the Decree introduced a new paragraph *8-bis* to Article 20 of Legislative Decree 199/2021 in which it states that:

- highway concession companies, after determining the relevant fees, are obliged to initiate - even at the request of a party - public procedures for entrusting the availability of such areas;
- proceed by publication of a notice defining:
  - object of the subgrant;
  - participation requirements;
  - application selection criteria;
  - duration of the sub-concession (which may exceed the duration of the highway concession, subject to the possibility for the sub-concessionaire to terminate the sub-concession with compensation equal to the investments made that have not been fully amortized);
- if the public bidding process is unsuccessful or no appropriate bids are submitted, the highway concessionaire may entrust the areas in question directly to subsidiaries or affiliates. This provision clearly could be of particular advantage if there is nevertheless an ultimate willingness on the part of the concessionaire to build such facilities by taking advantage of the areas deemed suitable.

Paragraph *1-ter* was added to Article 22 of Legislative Decree No. 199/2021, pursuant to which "*The regulations set forth in Paragraph 1 shall also apply, regardless of their location, to the underground electrical connection infrastructures of the plants referred to in the same Paragraph 1.*" The **underground electrical**

**connection infrastructures of plants falling within suitable areas follow the authorization regime of the plant** due to the referral to the regulations in paragraph 1, the applicable regime can be summarized as follows:

- expression of a compulsory but non-binding opinion by the competent landscape authority, and in the event that the time limit has expired to no avail, the competent administration shall nonetheless act on the permit application;
- The reduction by one-third of the time limits for permitting procedures.

Further intervention worth mentioning concerns the addition of paragraph *1-bis* to Article 11 of Decree-Law No. 17 of 1 March 2022, converted into Law No. 34 of 27 April 2022 ("**Energy Decree**"), regarding photovoltaic plants located in agricultural areas. The new provision stipulates that **photovoltaic plants located in agricultural areas**, if placed outside protected areas or those belonging to the Natura 2000 Network, **subject to the definition of suitable areas** under Article 20, paragraph 1, Legislative Decree no. 199/2021 and within the limits allowed by any prescriptions where placed in areas subject to direct or indirect landscape constraints, **are considered to be artifacts instrumental to the agricultural activity and are freely installable if they are built directly by agricultural entrepreneurs** or by joint venture companies with electricity producers - to which the business or branch of the business is conferred by the same entrepreneurs - to which the entrepreneurial management activity is reserved except for the technical aspects of plant operation and energy transfer. *This provision thus introduces the possibility for agricultural entrepreneurs to exploit their own areas, including through joint business ventures with power producers, facilitating the construction of the same plants from a permitting point of view. There remain, however, application uncertainties about bankability profiles in the implementation of such projects in the absence of suitable titles that crystallize the risks of challenge and intervention by third parties.*

However, the standard requires the following conditions to be met: (a) the solar panels be placed on top of plantations at a height of two meters or more above the ground, without concrete foundations or difficult to remove; b) the implementation methods provide for their effective compatibility and integration with agricultural activities as a support for plants or for parceled irrigation systems and partial or mobile protection or shading of the crops below for the purpose of the simultaneous implementation of monitoring systems, to be implemented on the basis of guidelines adopted by the Council for Research in Agriculture and Analysis of Agricultural Economics, in collaboration with the Gestore Servizi Energetici - GSE S.p.A. ("**GSE**").

In any case, installation is subject to the prior consent of the owner and cultivator, in any capacity as long as it is onerous (thus providing for a fee), of the fund.

#### *4. Photovoltaic plants in industrial areas, landfills and quarries*

Another important innovation in terms of simplification concerns **ground-mounted photovoltaic plants and related connection works** located in **areas of industrial, artisanal and commercial use as well as in closed and restoring landfills or quarries that are not susceptible to further exploitation**.

The Decree included in Legislative Decree No. 199/2021 the new Article *22-bis*, which considers the installation of these plants, by whatever means, as **extraordinary maintenance activities**. In particular, the implementation is not subject to the acquisition of permits, authorizations or acts of consent however named **except, if provided for, the environmental assessments referred to in Title III of Part II of the Environment Code** (aside added during the conversion of the Decree)<sup>4</sup>.

If the area is affected by a landscape constraint, prior notification will be required to the competent Superintendency, which has a thirty-day deadline to issue, in the case of lack of the necessary requirements, a reasoned decision to deny the construction of the plant.

The provision introduces, therefore, the rule of free installation without any power limit, with the obvious aim of speeding up the authorization processes and encouraging the spread of plants and related connection works in the indicated areas. For the purpose of coordination with respect to the regulations in force until now, the Decree then provided for the repeal of the first sentence of paragraph *9-bis* of Article 6 of Legislative Decree

---

<sup>4</sup> Consider that, as discussed in Section 2, up to the 10 MW threshold for this type of plant as of today, not even regional EIA screening is required anymore.



No. 28/2011, which provided for the PAS regime for the same types of plants up to 20 MW (Article 47, paragraph 3 of the Decree).

*While recognizing the important opening of the Legislature in favor of the installation of renewable energy plants in these specific areas, it is nevertheless worth taking into consideration that, in these hypotheses, **there will no longer be any building permit** - even for high-power photovoltaic plants, since no threshold is envisaged - that will be consolidated nor any deadline for the Administration to intervene also by exercising inhibitory powers. Therefore, only **ex post** sanctioning interventions will now be possible <sup>5</sup>and this, as also reported above with regard to installations located in agricultural areas, does not help with the mere purpose of consolidating the situation from the standpoint of bankability and certainty that is usually required for these types of installations.*

## 5. Electrochemical storage systems combined with RES systems

Article 47 of the Decree then amended Article 1, paragraph 2-*quater* (c), of Decree Law No. 7 of 7 February 2002, replacing what was stipulated in point 3). The new provision stipulates that the **construction of electrochemical storage systems functional to the needs of the electricity sector**, including energy conversion systems, connections to the electricity grid and any related and ancillary works, **to be operated in conjunction with power generation plants powered by renewable sources**, are considered works related to the aforementioned plants, pursuant to current regulations, and are authorized through PAS pursuant to Art. 6 of Legislative Decree 28/2011, if the power generation plant powered by renewable sources is in operation or authorized, but not yet in operation.

## 6. Incentivization of biomethane plants

The Decree, in its version defined at the time of conversion, also provided in Article 47, paragraph 6-*bis*, for the **ultra-activity of the biomethane incentive system**, providing that, *"in order to increase the capacity of energy production from renewable sources necessary to achieve energy independence and to achieve the objectives of the PNRR, the provisions of the Decree of the Minister of Economic Development 2 March 2018, published in the Official Gazette no. 65 of 19 March 2018, shall continue to apply to projects related to the construction or conversion of biomethane and biofuel production facilities other than biomethane for which, as of 31 December 2022, a favorable environmental impact assessment decision has been issued, or a decision not to be subject to such a procedure, as well as projects that are subject to a public evidence procedure, provided that, as of 31 December 2022, the contract with the contracting authority has been signed."*

To date, the first announced procedure, pursuant to the Ministerial Decree of 15 September 2022, took place at the end of January, the ranking list of which was published on 10 July 2023, and for the second procedure the deadline for submitting participation requests has recently expired. The next procedure is expected in December.

## 7. Simplifications for Energy Communities

Significant changes have also been introduced, in various respects, with reference to energy communities.

Article 47, paragraph 10, of the Decree provides for the possibility for energy communities to **access**, in compliance with current state aid regulations, **the incentives referred to in Article 8 of Legislative Decree No. 199/2021** for renewable source plants, including agri-voltaic plants, even for power outputs above 1 MW, provided that:

---

<sup>5</sup> On this point, see Administrative Regional Court for Toscana - Florence, sec. III, decision. 10 November 2016, no. 1625: *"The regime of free building as per art. 6 of D.P.R. 380 of 2001, unlike that of the scia, does not provide for a phase of subsequent control (to be carried out within a peremptory deadline) that - in case of negative outcome - closes with a measure of an inhibitory nature. Interventions that fall within the sphere of "freedom" defined by the aforementioned norm are in fact not subject to any tacit or express building permit (...). Any advance pronouncements of the authority regarding the admissibility of the communicated interventions (...) do not, therefore, have a legal but merely informative character, as they do not respond to a legislatively typified power"*; Administrative Regional Court for Sicilia-Catania, sez. I, decision. 16 July 2018, no. 1497: *the third party "may urge the municipality to the exercise of the verifications due to the same and, in case of inaction, activate the procedure of silence; the administration, for its part, in the face of a complaint-demand by the third party, has the obligation to proceed with the verifications that could also justify its repressive intervention, and this is different from what happens in the presence of a 'normal' power of self-protection that is connoted by the existence of a discretion that concerns not only the content of the act but also the an of proceeding, the exercise of which is unenforceable from the outside through the institution of silence-imposition (Council of State, sez. V, no. 2237, 22 May 2015)."*

- They are **energy communities whose powers of control are exercised exclusively by small and medium-sized agricultural enterprises**, in individual or corporate form, including through their trade organizations, agricultural cooperatives carrying out activities referred to in Article 2135 of the Civil Code, cooperatives or their consortia referred to in Article 1, paragraph 2, of Legislative Decree No. 228 of 18 May 2001;
- subject to the **payment of grid charges**, for the share of energy shared by plants and consumer utilities not connected under the same primary cabin, notwithstanding the requirements of paragraph 1 (a) and (b) of the same Article 8 of Legislative Decree No. 199/2021.

The second sentence of Paragraph 10 states that electricity produced and fed into the grid by facilities included in energy communities remains in their possession.

According to the provisions of Paragraph 11 below, the same provisions and exemptions shall also apply to other **configurations of diffuse self-consumption from renewable sources** referred to in Legislative Decree No. 199/2021, **implemented by**:

- **Agricultural entrepreneurs, whether in individual or corporate form**;
- **agro-industrial enterprises**, operating in the food industries (Ateco code 10), beverage industries (Ateco code 11) and cork processing;
- **agricultural cooperatives** carrying out activities referred to in Article 2135 Civil Code and cooperatives or their consortia referred to in Article 1, paragraph 2, of Legislative Decree No. 228 of 18 May 2001 regardless of their members.

Further regulatory intervention affecting energy communities can be found in Article 47, paragraph 4, of the Decree, in which it is established that until 31 December 2025, by way of derogation from Article 12, paragraph 2, of Legislative Decree No. 28/2011, **local authorities in whose territories are located renewable source plants** financed from the resources under Mission 2, Component 2, Investment 1.2, of the **NRFP**, may, in compliance with the principles of competition, transparency, proportionality, publicity, equal treatment and non-discrimination, grant **concessions for areas or surfaces in their availability for the construction of the plants aimed at meeting the energy needs of renewable energy communities**.

To this end, local authorities, also on the basis of model notices or notices adopted by the National Anti-Corruption Authority (ANAC), shall provide for the publication of appropriate notices, bearing an indication of the areas and surfaces likely to be used for the installation of the plants, the minimum and maximum duration of the concession and the amount of the concession fee requested, in any case not less than the market value of the area or surface. Where more than one renewable energy community requests the concession of the same area or surface, the number of participants in each renewable energy community and the amount of the concession fee offered shall be considered in identifying the concessionaire.

## 8. Draft of the Decree on Suitable Areas

As of 12 July 2023, the long-awaited draft of the decree aimed at indicating the criteria for the identification, by Regions and Autonomous Provinces, of suitable areas for the installation of renewable energy plants ("**Draft Decree Eligible Areas**") is in circulation. More than a year late with respect to the delegation of authority contained in Article 20, paragraphs 1 and 2, of Legislative Decree No. 199/2021, the Ministry of the Environment ("**MASE**") has prepared the draft decree, to be submitted to the Unified State-Regions and Cities and Local Autonomies Conference for review, which also contains the new *burden sharing* quotas allocated among the Regions for the achievement of the national RES target to 2030.

Specifically, the **80 GW of new renewable capacity** expected by the end of the decade, to meet the new clean energy targets arising from the European "*Fit for 55*" package and in light of the *EU Repower* package<sup>6</sup>, have been allocated among Regions and Autonomous Provinces, according to the table in Article 2 of the

---

<sup>6</sup> The European "*Fit for 55*" package is a set of 12 directives and regulations aimed at reducing EU carbon emissions by at least 55 percent by 2030, with the ultimate goal of achieving climate neutrality by 2050. The "*Repower EU*" package, on the other hand, is the plan presented on 18 May 2022 by the European Commission in response to energy market disruptions resulting from the Russian invasion of Ukraine in 2022. This plan is helping the European Union save energy, produce clean energy and diversify energy supply, thus accelerating the energy transition.

Draft Suitable Areas Decree. Sicily appears to be the region called upon to contribute the most with more than 10 GW allocated.

It is permitted to reach agreements among regions to statically transfer certain amounts of power as long as this does not jeopardize the achievement of the target of the region making the transfer. In the case of failure to achieve the target, the defaulting region shall transfer to the other regions, in proportion to the greater result achieved by the latter, economic compensation aimed at carrying out interventions in favor of the environment, cultural heritage and landscape, of a value equivalent to the cost of realizing renewable source plants that can be built in the defaulting Region or Autonomous Province, as identified by the GSE on the basis of the costs of the most efficient technology.

The Draft Decree provides for a monitoring system by the Ministry of the Environment, supported by the Energy Services Manager, by 31 July each year.

To achieve their objectives, the regions will have to identify by regional law "**to be adopted within one hundred and eighty days from the date of entry into force of this decree, the areas and areas suitable for the installation of renewable source plants with the aim of making available the maximum potential of the same.**"<sup>7</sup> . If the regional law (or acts of the autonomous provinces) on suitable areas are not adopted, the MASE as a last resort "shall propose to the President of the Council of Ministers outlines of regulatory acts of a substitutive nature to be adopted in the Council of Ministers," after assigning a deadline of at least six months to provide<sup>8</sup> .

To facilitate the regions in their task and to ensure homogeneity in application at the national level, the MASE has identified specific principles and criteria for defining "suitable surfaces and areas." From (a) to (e), Article 8 sets out general provisions, valid for any type of facility, to guide the work of the Regions and Provinces. More specifically, the following is established:

- the general characteristics and objective requirements that suitable areas must possess must make clear and obvious the possible classification, i.e., the conditions for its attribution (subsections a and b);
- requirements for classifying an area or area as suitable may be differentiated according to the source, size, and type of facility (subpara. c);
- in the identification of suitable surfaces and areas, the principles of minimization of impacts on the environment, territory, cultural heritage, landscape and agri-food production potential shall be respected and, to this end, specific criteria shall be identified to define as surfaces and areas suitable for the installation of renewable energy systems the following areas: areas occupied by artificial water storage reservoirs and artificial canals for the hydraulic defense of the territory; brownfield and other impaired areas and industrial areas, abandoned and marginal areas such as, but not limited to, unclassified areas, subject to illegal activities, unproductive land, mines and quarries, landfills, contaminated areas, former military areas (lett. d and e).

Under (f), Article 8 lists in ten points the types of surfaces and areas to be considered suitable. These are the areas already considered suitable under Article 20(8) of Legislative Decree No. 199/2021, to which are added:

- assets in the military domain or in any capacity in use by the Ministry of Defense according to Article 20, Law-Decree No. 17/2022;
- state property or in any capacity in use by the Ministry of the Interior, the Ministry of Justice and judicial offices, according to Art. 10 Law-Decree No. 144/2022;
- real estate assets identified by the State Property Agency, in consultation with the Ministry of Economy and Finance, owned by the State and not included in redevelopment or divestment programs under its jurisdiction, as well as state assets, identified in consultation with the administrations, in use by them, according to Article 16, paragraphs 1 and 2, Law-Decree No. 13/2023;
- the surfaces of buildings, structures and artifacts on which photovoltaic systems are built, as well as areas for the construction of works functional to the connection to the electricity grid, if they fall among the types

---

<sup>7</sup> Art. 3(1)(a) of the Draft Decree Suitable Areas.

<sup>8</sup> Art. 6 of the Draft Decree Suitable Areas.

for which the ordinary maintenance regime is applicable under Article 7-bis, paragraph 5, Legislative Decree No. 28/2011.

In subsection (g), however, Article 8 establishes the use criteria that apply to agricultural areas, which are not among the areas identified as unsuitable:

- for *standard* photovoltaic plants built on agricultural land, the maximum percentage of agricultural land use at the disposal of the developer, however, is not less than 5 percent and not more than 10 percent. It is worth mentioning how the provision of such a modest percentage limit has been the subject of heavy criticism by Elettricità Futura<sup>9</sup> and by Italia Solare<sup>10</sup>;
- for agri-voltaic plants under the June 2022 Guidelines on Agri-Voltaic Plants, and which comply with the operating requirements set forth therein, the maximum percentage of the above point is doubled. This percentage was also considered too low and penalizing by Elettricità Futura and Italia Solare;
- For agri-voltaic plants built in accordance with Article 65, Paragraph 1-*quater*, of Decree Law No. 1/2012, the limitations on use in the first point do not apply;
- For plants falling within areas referred to in (e) - i.e., reservoirs, industrial areas, unproductive land, mines, quarries, contaminated areas - and therefore not usable for agricultural activities, no restrictions on the use of agricultural land affected by the intervention apply;
- for land classified as agricultural, but not practically usable for such purposes, higher percentages of use may be established than in the first point;
- upon reaching the maximum percentage of land use - indicated for each Region in the Table in Annex 1 of the Draft Decree Suitable Areas bearing the so-called. Utilized Agricultural Area - UAA in minimum percentage and in maximum percentage - according to the values indicated in Annex 1, there is the possibility of assigning to the remaining agricultural areas the classification of areas unsuitable for the construction of photovoltaic plants, in order to protect the agricultural use of land, except in the case of agrivoltaic systems pursuant to Article 65, paragraph 1-*quater*, of Decree Law No. 1/2012.

Article 8 then dictates in subsection (h) specific criteria that apply instead to the identification of suitable areas for installation of wind farms:

- areas assessed with adequate windiness, such as to guarantee a producibility greater than 2,250 hours equivalent to 100 meters in height, taking as reference sector-specific analyses or wind maps available in the Wind Atlas pursuant to Art. 21 Legislative Decree No. 199/2021;
- areas and areas included in the perimeter of assets subject to protection under Legislative Decree No. 42/2004 are excluded, and with reference only to assets of special value, such as, by way of example, sites included in the UNESCO heritage, in the FAO GIHAS list and in those registered in the National Register of Historic Rural Landscapes, buffer strips of up to 7 kilometers may be introduced, provided that the total suitable areas identified in the regional or provincial territory have an area equal to at least 80% of that identifiable considering the specific windiness criteria referred to in the previous point.

The Draft Decree Suitable Areas basically introduces a **tripartition in the classification of areas** between (i) areas classified as **suitable** according to the above criteria in Article 8; (ii) **unsuitable** areas, according to the definitions developed at the regional level in implementation of the criteria in Annex 3 of the Guidelines issued by Ministerial Decree 10 September 2010 and now to be updated; and (iii) areas subject to ordinary regulations that do not fall into the previous two categories, in which ordinary permitting regimes will apply.

Based on the current wording of Article 10 of the Draft Decree on Suitable Areas, which governs the transitional regime, it seems reasonable to conclude that the new indications on suitable/unsuitable areas dictated by the Regions **will not apply to projects started<sup>11</sup> prior to the entry into force of the regional measures if the plant is located in an area already now defined as suitable pursuant to Article 20, paragraph 8, of Legislative Decree No. 199/2021**. The possibility remains, if necessary, for the proponent - within 3 months of the entry into force of the regional measures - to request instead the application of the new regional

<sup>9</sup> [https://www.elettricitafutura.it/News-/News/Appello-di-Elettricit-Futura-ai-Partiti-politici-necessario-correggere-il-DM-Aree-Idonee-pena-il-blocco-delle-rinnovabili-e-di-\\_5404.html](https://www.elettricitafutura.it/News-/News/Appello-di-Elettricit-Futura-ai-Partiti-politici-necessario-correggere-il-DM-Aree-Idonee-pena-il-blocco-delle-rinnovabili-e-di-_5404.html)

<sup>10</sup> <https://www.qualenergia.it/articoli/decreto-aree-idonee-preoccupazione-italia-solare/>.

<sup>11</sup> "Started projects" is reasonable to mean projects for which the application for the construction title has already been submitted.

regulations. Conversely, the superseded regional directions will apply in the event that the plant is not located in the areas considered.

*The forecast is generating some initial criticism, especially with reference to the case of photovoltaic parks to be built on agricultural areas for which the Draft Suitable Areas Decree provides much stricter limits than the current ones. Despite the investments made and the projects developed, in fact, these plants could see the new rules applied if they are located in areas not already classified as suitable today or, even if located in areas that are suitable today, in the case where the authorization process has not yet begun with the submission of the application, but negotiations for land acquisition and connection procedures have nevertheless begun.*

*Therefore, it remains to be seen whether and to what extent the regions and autonomous provinces will ask for changes on the text of the future decree in the unified conference to date.*

# Contacts



*Pierpaolo Mastromarini*

Partner

+390669667000  
pierpaolo.mastromarini@twobirds.com



*Simone Cadeddu*

Partner

+390669667000  
simone.cadeddu@twobirds.com



*Jacopo Nardelli*

Counsel

+390669667000  
jacopo.nardelli@twobirds.com



*Chiara Nuzzo*

Associate

+390669667000  
chiara.nuzzo@twobirds.com



*Camilla Triboldi*

Associate

+390669667000  
camilla.triboldi@twobirds.com