

# "DECRETO SOSTEGNI-TER": EXTRAORDINARY BURDEN ON RENEWABLE OPERATORS

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The so-called "Decreto Sostegni-ter" (Decree-Law no. 4 of 27 January 2022), published in the Italian Official Gazette no. 21 of 27 January 2022, sets out *"urgent measures to support businesses and economic operators, employment, health and territorial services, related to the COVID-19 emergency, as well as to limit the effects of price increases in the electricity sector"* which entered into force the day after its publication.

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The Decreto Sostegni-ter contains a series of measures aimed at mitigating the effects of increases in the cost of electricity. One of these measures, introduced in Article 16, is a two-way compensation mechanism on the price of electricity produced by plants powered by renewable sources.

This measure aims to both recover any extra profits earned by electricity producers during 2022 and compensate unprofitable renewables-powered plants.

The compensation mechanism will be in force from 1 February 2022 until 31 December 2022 for the following types of plants:

(i) *"photovoltaic plants with a capacity of more than 20 kW which benefit from fixed premiums deriving from the Conto Energia mechanism, not subject to market prices"*; and

(ii) *"plants with a capacity of more than 20 kW powered by solar, hydroelectric, geothermal and wind energy sources which do not benefit from incentive*

*mechanisms"*.

The Gestore dei Servizi Energetici ("GSE") is responsible for implementing the compensation mechanism, including calculating a fair remuneration price for electricity. This will be calculated as the difference between two values:

1. average electricity prices up to 2020, i.e. the average reference price set, equal to the average of the hourly prices in that zone recorded from the date of entry into operation of the plant until 31 December 2020, revalued in proportion to the annual rate of change of consumer prices connected with the families of manual and clerical workers recorded by ISTAT. If the plant entered into operation before 1 January 2010, the average reference price set will be equal to the average of the hourly zonal prices recorded from 1 January 2010 to 31 December 2020, also revalued in the same way; and
2. current electricity prices, i.e. the hourly market price of electricity in that zone, or, for supply contracts executed before the date of entry into force of the Decreto Sostegni-Ter, the average price indicated in such contracts.

**"At first glance, the rule in question appears to conflict with certain provisions of the Italian Constitution, as well as with the principles of equality, rationality and proportionality, and of legitimate expectations and legal certainty."**

The above mechanism is not applicable to agreements which provide for fixed price (provided that this price is not 10% higher of the average reference price set as per point 1 above).

If the difference between the above values is negative, the GSE will request the producer to pay back to it the relevant amount; if the difference is positive, the GSE will pay the producer that difference.

At first glance, the rule in question appears to conflict with certain provisions of the Italian Constitution, as well as with the principles of equality, rationality and proportionality, and of legitimate expectations and legal certainty.

Imposing such an extraordinary burden on operators of renewable energy sources seems to infringe the principle of equality set out in Article 3 and the principle of

economic freedom of initiative set out in Article 41 of the Italian Constitution, in so far as such a rule: a) alters the economic-financial balance of the relationships in place, in contravention of the principles of legal certainty and protection of expectations; b) does not comply with the essential conditions for the legitimacy of an amendment affecting long-term relationships, thus frustrating and eliminating the trust placed by operators in legal certainty; c) is arbitrary because it entirely shifts the cost of the increase of energy prices upon the producers of energy from renewable sources; and d) is in any case unreasonable as it lists 2020, an anomalous year as far as energy prices were concerned due to the Covid-19 pandemic, as the reference parameter for the value of compensation.

**"It is crucial for operators and trade associations to strongly and collectively oppose this provision, requesting its cancellation or amendment before the Decreto Sostegni-ter comes into force."**

Furthermore, the provision leads to profoundly unequal situations such as treating both operators that benefit from incentive measures (owners of photovoltaic plants with a capacity of over 20 kW that benefit from fixed premiums deriving from the Conto Energia mechanism) and operators that do not (owners of solar, hydro, geothermal and wind power plants with a capacity of over 20 kW that do not have access to incentive mechanisms) in the same way.

For all these reasons, it is crucial for operators and trade associations to strongly and collectively oppose this provision, requesting its cancellation or amendment before the Decreto Sostegni-ter comes into force.

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If this cannot be achieved, operators should consider individual (albeit coordinated) legal initiatives against the Article 16 measure in question. As soon as ARERA regulates the implementation arrangements under which the GSE will adopt the (possibly) unfavourable measures, it will be possible to challenge them all before the courts of administrative justice. Possible courses of action include bringing a challenge against Article 16 on grounds of breach of the Italian Constitution, as well as pursuing further judicial remedies before the supranational courts in order to protect the operators' legitimate expectations of obtaining economic benefit from their entrepreneurial initiatives.

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