

Incentives for renewable sources and protection of investors' legitimate expectations

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Abstract: *The paper aims to analyse the new energy market that has been created in the European economic area, with specific attention to the “internal” profile. Even if we limit our gaze to national borders, this is not a simple operation as it is all part of a more general transformation of the entire economic system, which requires the construction of new institutional, financial, and legal frameworks that should be innovative and efficient. From a financial point of view, the question is about allocating substantial public resources or encouraging private investments, through appropriate economic regulation tools.*

Contents: 1. Decarbonisation of the economy and climate neutrality: the key role of renewable energies - 2. The new renewable energy market - 3. The support of regulatory instruments: the economic incentives - 4. The experience of «Conto Energia» - 5. Contingencies and changes during the progress of incentive schemes. Is there a legitimate expectation of investors that has to be protected? The positions of the Constitutional Court and of the Court of Justice - 6. A reconsideration of the issue - 7. Incentive mechanisms for distributed generation, referring to energy communities - 8. The “premium rate” in the first experimental intervention - 9. Implementation of the European directive and the new frame of reference – 10. Final considerations

1. Decarbonisation of the economy and climate neutrality: the key role of renewable energies

The transition towards climate neutrality requires several changes across the entire spectrum of policy decisions and a collective effort from the different sectors of the economy and society.

It is noticeable that the entire planetary economic system is structured according to operating mechanisms which are antithetical to current priorities. Reversing this course is not a simple operation at all. It requires a gradual process and commitments on several fronts. Without any doubt, the increasing use of renewable sources, i.e. the implementation of non-fossil sources¹ for energy purposes, which have been used as a priority so far, represents a key role in guaranteeing the construction of a new model.

¹ As specified in the European directives on renewables, these are wind, solar (solar

Promoting the production of electricity from renewable sources has been on the European agenda for some time, considering both soft law and law provisions.

Undoubtedly, it has had a decisive start with the *Clean Energy for all Europeans* package, which also includes Directive (EU) 2018/2001 (RED II)².

Thanks to RED II, the European Union has achieved the aim of maintaining a global leadership role with regards to renewable energy sources, while keeping to the commitments arising from the Paris Agreement.

Since then, the picture has continued to change, with the most recent developments marked by the introduction of the *European Green Deal*³ and the *European Climate Act*⁴.

The objective is increasingly clear: decouple economic growth from greenhouse gas emissions, which means decarbonising the economy through the transition towards an innovative energy system. This transition should lead to energy neutrality by 2050, albeit through gradual stages. It is important to note that the emphasis on renewable sources has not solely revolved around environmental implications.

As the Commission highlighted in «a framework strategy for a resilient Energy Union with a forward-looking climate change policy»⁵, a further boost in favour of renewables lies on the concern that the European Union imports a too high percentage of its energy needs, placing itself as the top energy-importing area, despite playing a leading role in renewable energy investments. Moreover, it holds 40% of all patents related to the exploitation of new technologies.

Those considerations, as relevant as ever, ended up being absorbed by the increasingly pressing climate crisis, which has become the driving factor of European policies.

Likewise, the domestic legislator, when transposing RED II, pursued the acceleration of the country's sustainable growth path as a specific objective. In order to achieve these results, it dictated different provisions

thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.

² European Directive on the promotion of the use of energy from renewable sources.

³ Doc. COM 2019, 640 def. *Transforming the Eu's economy for a sustainable future*.

⁴ Reg. 2021/1119 establishing the framework for achieving climate neutrality.

⁵ COM (2015) 80 def., part of the Energy Union package. In the same terms doc. COM (2016) 860 def., *Clean energy for all Europeans*.

about energy from renewable sources, in line with the European decarbonisation objectives of the energy system. (art.1, c.1, d.lgs. 199/2021)

2. The new renewable energy market

The new regulatory framework outlines a roadmap that in the end affects Article 194 Tr. itself. In fact, general objectives (somehow considered as a priority), such as the functioning of the energy market and the European Union's security of energy supply, were separated from the more specific objectives (somehow more marginal), such as energy saving, energy efficiency, the development of renewable energy and the interconnection of networks.

It is now quite evident how the relation between the first and second part of the TFUE provision has been completely reversed, and the functioning of the energy market is strongly conditioned by the given prevalence to the use of renewables. There are many implications.

The new energy market is shaped around the aim of achieving percentages that can contain (or eliminate completely) CO₂ emissions and, following this, develops in multiple directions.

Indeed, it must be kept in mind that within the achievement of the established European objectives, the differences in territorial realities and the geographical conditions must also be considered. If it is true that all countries have domestic renewable energy sources to exploit, it is equally true that not all of them have the same characteristics; therefore, it will be a matter of using the different potentials in the best way possible.

Hence, under this perspective, a new energy market - relevant especially in the European economic area⁶ - has been created.

⁶ Up to this moment, the tools used to exploit the peculiarities of each region for the benefit of the entire community have been the so-called joint projects or the so-called statistical transfers, cooperation mechanisms that actually produced results as highlighted by S. MANSERVISI, *Energie rinnovabili e pianificazione energetica sostenibile. Profili europei ed internazionali*, Jovene, Napoli 2016. To these ones, a further tool is added: a financing mechanism, which also ends up acting as an incentive for economic operators. It connects countries that contribute to financing the projects (contributing countries) with countries that agree with the construction of new projects on their territory (host countries). Contributing countries can make voluntary payments to the system, and the resources (which can also come from EU funds or private individuals) will be committed to carry out projects in other countries. In this way, the former charge these projects to their compulsory portion; the latter have the advantage of seeing works carried out on their territory, with a consequent increase of available jobs.

We will only deal here with the, so to speak, “internal” profile. Even if we limit our gaze to national borders, this is not a simple operation as it is all part of a more general transformation of the entire economic system, which requires the construction of new institutional, financial, and legal frameworks that should be innovative and efficient.

From a financial point of view, the question will be about allocating substantial public resources or encouraging private investments, through appropriate economic regulation tools⁷.

Thus, supporting systems play a decisive role, meaning that all those instruments which aim at promoting the use of energy from renewable sources by reducing costs, increasing selling prices and intervening with investment mechanisms, aid, exemptions, tax relief, and so on, comply with European rules on aid.

An equally important role is also played by the opposite mechanisms, which abolish the incentives and benefits of the non-renewable sector, thus implementing different strategies that may assure a change of direction.

3. The support of regulatory instruments: the economic incentives

The encouragement of renewable energies, through specific incentive mechanisms, is nothing new. Within our legal system, the first incentives had already appeared by the end of the 1990s, alongside the first liberalisations introduced by the *Bersani* decree aimed at encouraging the major energy producers to feed into the grid at least a share of energy produced by renewables. At that early stage, the most used incentive instrument was the so-called «Green Certificates», tradable securities, representative of production quantities.

As soon as the energy market opened, other incentive instruments began to be used. These were not solely intended for large producers. Instead, they were based on energy price and operated through a payment structure that was proportional to the amount of energy withdrawn or the price of the energy produced.

⁷ The use of such tools, does not represent a novelty, see, for everybody, M. BRESSO, *Per un'economia ecologica*, Carocci, Roma 2002; B. POZZO, *Le politiche energetiche comunitarie. Un'analisi degli incentivi allo sviluppo delle fonti rinnovabili*, Giuffré, Milano 2009; M. CLARICH, *La tutela dell'ambiente attraverso il mercato*, in *Dir. Pubbl.*, 2007, p. 219 ff.; P. RANCI (ed.), *Economia dell'energia*, Il Mulino, Bologna 2011; M. CAFAGNO, *Strumenti di mercato e tutela dell'ambiente*, in G. ROSSI (ed.), *Diritto dell'ambiente*, Giappichelli, Torino 2011, p.181.

As we shall see, these mechanisms operate differently. In some cases, the GSE guarantees the collection of produced energy at a fixed price (*feed-in tariff*), and this economic burden is then transferred to the consumer through specific tariff components on their energy bill. In other cases, the mechanism provides the disbursement of an incentive rate, proportional to the energy produced by the power plants. This can be in addition to the revenue generated from selling the produced energy on the market (*feed in premium*).

In both cases, these mechanisms achieved better results and were more effective than those based on exchanges.

On one hand, these tools offer businesses more certainty on overall costs incurred and possible revenues. However, the proper functioning of these tools requires certainty and the amount offered should remain persistent over time. The only way to assure economic operators that certainty, the basis of progressive and constant development of renewables, will be achieved is by giving stability and continuity to the political and regulatory framework.

However, the «Conto Energia» (Energy account) issue tells a different story.

4. The experience of «Conto Energia»

The Energy Account mechanism, envisaged by an EU directive (2001/77/CE) and operating in Italy since 2005, is a state incentive, set up to provide compensation for the energy produced by photovoltaic plants. It is a *feed-in tariff* mechanism, managed by the GSE and designated for photovoltaic plants with minimum power standards and other specific requirements (newly constructed facilities, etc). It allows one to receive a cash remuneration for the energy produced by photovoltaic plants for a twenty-year period (on average). It was immediately adjusted in 2007, with some novelties regarding the incentive fee modulation and the means of access. However, during the first stage, this mechanism maintained the characteristic of a “blind” incentive, which was allocated under requested requirements but without it being proportional to the amount invested, and it did not impose any maximum constraint to the feasible generation capacity.

Undoubtedly, this instrument played a relevant propulsive function by pushing enterprises to accelerate their investments and, in some ways unexpectedly, assured important growth in the sector⁸.

⁸ With several plants that at the end of 2010 exceeded 155 thousand units, with a total capacity of 3,460 MW. Thanks to this surge, Italy has become the second largest market in the world, after Germany, since 2009. See GSE, Activity Report, 2010.

Hence, it ended up burdening consumers with a very high social cost, especially because the incentives were provided without considering the sector's technological progress, which would have reduced investment costs and therefore, over time, would have allowed the installation of less expensive plants with more favourable conditions for final consumers.

These considerations were at the basis of the legislator's subsequent actions, which caused a real "earthquake" for those who operated in the sector.

At first, Legislative Decree 28, March 3 2011, in regards to the Fourth Energy Account, redefined the incentive mechanism with the objective of aligning the amount of tariffs to the cost evolution of the technologies and introduced a limit to the annual cumulative cost of the incentives.

Even more traumatically, with the Fifth Energy Account, Legislative Decree 91/2014 (known as «*spalma-incentivi*» decree), the legislator, in order to optimise the timing management of the collection and disbursement of the incentives and to guarantee a better sustainability in the supporting policies of renewable energies, provided new ways of disbursing incentive rates for the electricity produced by photovoltaic plants.

Therefore, the legislative decree implies a remodulation through three different options, each one disadvantageous in comparison to the regimes regulated by the Convention with the GSE.

In other words, the provision of excessive incentives, which was not justified by the real cost investments and the increase of consumer fees, led the legislator to revise his initial choices. It should be kept in mind that these are the years of the economic crisis, and public expenses should be reduced⁹.

Consequently, the uncertainty and variability of the reference framework caused a drastic reduction of the sector's "appeal", which, until that time, had been a great success.

From a legal point of view, the matter provoked a great dispute. The focal question was if it could be justified to intervene with further legislative tools which would affect the legitimate expectations of economic operators, who, according to the previous regulations, had decided to invest.

At an even deeper level, the matter was whether, by facing the fulfilment of public authority, which was based on balancing different and

⁹ G. COZZOLINO, *Energie rinnovabili e tutela dell'affidamento: qualche riflessione a proposito degli incentivi al fotovoltaico alla luce dei recenti sviluppi normativi*, in www.rivistaaic.it, 2012; the issue was highlighted by N. RANGONE, *Fonti rinnovabili di energia: stato della regolazione e prospettive di riforma*, in *Giur. cost.*, 2010, 2, p. 1490 ff.

conflicting public interests between them, it was possible to identify and guarantee the protection of investors' legitimate expectations. This was particularly relevant for the investors who were beneficiaries of the incentive tools.

5. Contingencies and changes during the progress of incentive schemes. Is there a legitimate expectation of investors that has to be protected? The positions of the Constitutional Court and of the Court of Justice

As previously mentioned, the matter had great importance and also concerned foreign investors, giving rise to arbitration proceedings¹⁰. According to a previous doctrinal theory which had been proposed by several parties, the incentive laws would have a reinforced constitutional protection¹¹. In that way, any subsequent amendment *in peius* would infringe article 41 of our Constitution and the therein established principle of free economic initiative, which requires stable legal relations and predictable choices¹².

According to others, in the specific matter characterised by a contractual relation with the GSE (the incentives allocation requires a Convention, established with the Energy Services Manager), the investors' protection of legitimate expectations would be guaranteed by the principle of good faith, also applicable in relations between private individuals and public administration.

In this regard, within contractual relations, if the public administration could unilaterally change the already established conditions during the process, the risk of a more expensive commitment would burden private investors, exposing them to unstable relations and causing them to miss scheduled programs (the Convention agreement still contains the clause «The GSE reserves the right to unilaterally amend the Contract in accordance with any amendments and updates to the reference legislation...»).

It is undisputed in case law that the agreement does not give rise to a relationship between equals, since the GSE is included among private entities

¹⁰ F. SCALIA, *Incentivi alle fonti rinnovabili e tutela dell'affidamento*, in *Il dir. dell'economia*, 2019, p. 229 ff.

¹¹ G. GUARINO, *Sul regime costituzionale delle leggi di incentivazione e di indirizzo* (1961), now in *Scritti di diritto pubblico dell'economia e di diritto dell'energia*, Giuffrè, Milano 1962, p. 174 ff.

¹² See V. PAMPANIN, *Legittimo affidamento e irretroattività della legge nella giurisprudenza costituzionale e amministrativa*, in *Giust. amm.*, 2021, n.11, p. 2015 ff.

that carry out public functions¹³. The central matter remains whether the need to protect the private investors' trust can limit the exercise of public functions.

As it has been said regarding this matter, there has been a wide case study, which led the administrative courts to request the intervention of both the Constitutional Court and the European Justice Court¹⁴. Both, considering the legislator's reasons, recognised the authority and responsibility of the State to reconsider its own decisions under certain conditions.

According to the Constitutional Court, as a rule, the protection of legitimate expectation and legal certainty represents a fundamental principle of the rule of law. However, this does not mean that the legislator cannot intervene, modifying unfavourably long-term dealings. It only involves a necessary supervision of these intervention means, to assure they are not unpredictable and unreasonable¹⁵.

In this specific matter, the Court excluded that the legislator overstepped its powers.

On the contrary, in the economic picture - the view of the profitability of the incentive rates for solar energy produced by photovoltaics, which was progressively even more accentuate, both regarding production costs (due to the sudden technological development of the sector), and in relation to the overall European framework - the growing economic weight of these incentives on final electricity consumers was likewise pointed out, particularly on small and medium-sized enterprises, constituting the national productive infrastructure¹⁶.

According to the Court, the intervention is reasonable and guarantees the protection of the public interest, regarding the balancing of opposite

¹³ For all, Council of State, AP n. 9/2019 and n. 18/2020, albeit referring to the different problem of the forfeiture of the right to incentives and the consequent obligation to return.

¹⁴ In particular, the question of constitutional legitimacy under consideration, was raised by the Lazio Regional Administrative Court, Section III-Ter, with no less than 66 ordinances. The question was also raised by the Lazio Regional Administrative Court in an order of September 28th, 2018.

¹⁵ Constitutional Court, 24th January 2017, n.16.

¹⁶ E. MARIANI, *Stabilità degli incentivi alle fonti rinnovabili e potere rimodulativo del Legislatore: il punto di vista della Corte costituzionale*, in www.federalismi.it, 2017; F. PAGANO, *Disposizioni di natura incentivante e meritevolezza dell'affidamento ingenerato dal legislatore*, www.rivistaaic.it, 2017; S. MANICA, M. JIMENEZ PLAZA, *I principi della certezza del diritto e di legittimo affidamento tra Corte Costituzionale, giudice amministrativo e Corte di Giustizia: il caso degli incentivi al fotovoltaico*, in www.dirittodeiservizipubblici.it, 2019.

interests. The Court also did not consider it to be unpredictable, since incentives are not required to remain static and resistant to changes over time, which characterise long-term agreements themselves.

The Court also specifies that Conventions themselves are not contracts which are exclusively intended to guarantee benefits to economic operators, to whom the contracts initial conditions should be granted for twenty years even in the face of potential technological advancements over time. The Conventions are a proper regulation instrument. They are intended to incentivise the use of specific energy sources, but must always consider other public interests, such as limiting public expenditure or containing energy bill costs, which are disadvantageous for consumers.

The European Court of Justice followed the already mentioned interpretation of the matter. Indeed, the European Court of Justice was asked¹⁷ whether member states could reduce the incentive amount established within the support schemes provided for renewable energy sources usage, in accordance with the objectives of the European directives, or if this was prevented by European Union law.

The Court considered the *«spalma-incentivi»* decree modifications to be complying with the principles of legal certainty and legitimate expectations.

Furthermore, the Court highlighted that the “swing” of the whole sector could be predictable, and a cautious and prudent economic operator should have considered that the regime of incentives could be modified or even abolished by national authorities that must consider the evolution of the whole framework. From this perspective, the unilateral changes of the Convention’s legal terms had no relevance, since they were public law contracts, in which the power to unilaterally amend is strictly connected to the sector evolution norms.

6. A reconsideration of the issue

While the arguments of the national and supranational court might seem comprehensible, considering the historical context in which the support scheme modifications intervened, it does not mean that the matter should not be reconsidered under a more general view.

¹⁷ Judgement 15th April 2021, proceedings C798/18 and C-799/18.

Indeed, the argument suggesting that a prudent economic operator should have foreseen the future eventual “swing” of the incentive mechanisms seems to be very weak.

On the contrary, individuals who invest based on provisions finalised to remunerate those investments rely on the seriousness of the commitment taken by public powers and the maintenance of the relative predictions. In the same way, the importance of the sector and the development of employed technologies cannot justify a reduction in support measures that would damage economic operators, who have already borne all the costs.

From a different perspective, it is clear that the public administration power is justified in correcting their initial approval, based on wrong economic evaluations which cannot be passed on to the beneficiaries.

In particular, these reconsiderations end up negatively affecting not only private interests but also public ones in the fulfilment of the incentive mechanisms which were reserved, namely, to encourage the use of renewables.

Therefore, the issue must be reconsidered, bearing in mind that nowadays a more decisive objective guarantees the speeding up of the sustainable growth of the country, in accordance with the European decarbonisation objectives of the energy system.

Moreover, RED II has expressly incorporated the principle of incentive stability «in order to support Member States’ ambitious contributions to the Union target, a financial framework aiming to facilitate investments in renewable energy projects in those Member States should be established, including through the use of financial instruments» (Recital to regulation 12) in addition, «policies supporting renewable energy should be predictable and stable and should avoid frequent or retroactive changes. Policy unpredictability and instability have a direct impact on capital financing costs, on the costs of project development and therefore on the overall cost of deploying renewable energy in the Union».

Therefore, the matter will be reconsidered, with particular attention to incentive mechanisms related to distributed generation.

7. Incentive mechanisms for distributed generation, referring to energy communities

One of the main changes introduced by RED II is the increasing use of distributed generation, through the new schemes of collective self-consumption and energy communities. In short, it is about sharing

mechanisms of self-consumption and the usage of energy communities, which have proven successful in many countries, including those in Europe¹⁸. These sharing mechanisms span from small-sized systems benefitting entire buildings to more extensive projects involving entire communities.

These innovative instruments make sure that final customers become actual players of the energy transition by actively contributing to decarbonisation. The new distributed generation system revolves around the new *Prosumer*¹⁹ position, an individual who is at the same time both a producer and a consumer.

Therefore, within the new organisational system, citizens cease to be the weak part of a relationship (i.e a contractual relationship with the companies that operate in the energy distribution sector), and instead, become active in the management of their own needs.

It looks as though the third industrial revolution prophesied by Rifkin is taking shape. It is characterised, in this specific matter, by the shift from a centralised system to a «distributive and collaborative regime system», through actions that can encourage change²⁰.

In this new context, energy communities have a particular relevance.

They give rise to a real legal entity that citizens, public administrations, and local businesses can join (under certain conditions established by the legislator).

This new legal entity, besides producing energy for its own consumption, must pursue the objective of providing environmental, economic, and social benefits, at the community level, to its stakeholders, members or local areas in which it operates, rather than merely pursuing financial gains.

Thus, communities may give rise to social welfare projects, for example, sustaining urban regeneration programs, development of green areas, or other projects. In any case, among the specific functions assigned to the communities by the European directive, there is the fight against energy poverty, which is a particularly relevant matter.

Regarding the realisation of these new configurations, the European legislator underlines the importance of support measures.

¹⁸ See MANSERVISI, *Energie rinnovabili*, cit., p.140 ff.

¹⁹ As it is known the expression may be referable to A.TOFFLER, *The Third Wave*, and in the Italian version *La terza ondata*, Sperling & Kupfer, Milano 1987.

²⁰ J. RIFKIN, *La terza rivoluzione industriale*, Mondadori, Milano 2011.

Moreover, with a difference: while in the previous directives on renewables the national support schemes had an “internal” connotation, since each Member State could discretionarily decide what, how, and when to incentivise, RED II states that renewable self-consumers «receive remuneration, including, where applicable, through support schemes, for the self-generated renewable electricity that they feed into the grid», in the same way, it states that renewable energy communities, in accordance with the dispositions of the Treaty on State aid, are subjected to support schemes, implying their necessity as regulation tools, in order to facilitate the energy transition towards a distributed generation model.

8. The “premium rate” in the first experimental intervention

As it is known, article 42bis of decree-law «*milleproroghe*» (converted into law 8/2020, 28 February 2020), temporarily applied RED II, with reference to articles 21 and 22, in order to allow the “experimentation” of the new configurations of collective self-consumption and energy communities²¹.

The legislative action was followed by the implementation measures, from which the first experiences began.

From our standpoint, article 42bis, paragraph 7, to incentivise the configuration of renewable self-consumption, referred to a future provision of the Economic Development Minister to identify the appropriate measures. It specified that the new incentives, which cannot be combined with other incentive mechanisms, but only with tax deductions effective on renewable energy plants, would not represent an additional cost for the State and would replace the current “exchange on site” system.

In September 2020, the Ministry of Economy and Finance decree intervened, identifying the incentive tariff for remunerating renewable source plants included in the experimental configurations of collective self-consumption and renewable energy communities.

This tariff, which has always been disbursed by the GSE after the stipulation of a special agreement aimed at rewarding instantaneous self-consumption and the use of storage systems, was set at 110 and 100 E/MWh (higher for energy communities, because of the greater breadth and social utility that characterises this configuration), for a fairly long period of use (20

²¹ For a commentary on this interim implementation, refer to my *Self-Consumption of Renewable Energy and New Forms of Energy Sharing*, in *NLCC*, 3, 2020, p. 630 ff.

years), consistent with the useful life of the plants, mainly, at least in this first experimental phase, photovoltaics).

It is important to highlight here that the incentive tariff, even with its peculiarities, re-proposed the same old incentive mechanism already experienced with the Energy Account, which was thought to be a very generous action but lacked predictability. The new incentive tariff, indeed, has the same inflexibility and certainly cannot prevent future “reconsidering” interventions by the legislator. This is confirmed by the outline of the Agreement, which keeps the wording for which «The GSE reserves the right to unilaterally amend the Contract in accordance with any amendments and updates to the reference legislation, without prejudice to the Operator's right to withdraw from this contractual relationship...».

Once again, this mechanism does not protect the parties who benefit from it affecting their reliance and trust. This is even more evident if one considers the possibility, for new configurations, of assigning the credit accrued with the GSE (by virtue of art. 4.1 - «assignment and retrocession of credits» - in the contract attached sub. 5) of the GSE Technical Regulations).

In fact, on one hand this could probably constitute a concrete negotiating opportunity for the financing subjects, i.e. those who intend to acquire the entire share of the incentive, in exchange for the implants/accumulator's installation, or other services in any case related to the functioning of the CER. On the other hand, the persistent uncertainty regarding the stability of the incentive, ends up precluding this possibility. Who would stipulate an agreement knowing, upstream, that the balance of the negotiations could suddenly change due to an update of the conditions? From this point of view, providing the right to withdrawal as a protection tool means very little, since it does not allow the recovery of already lost opportunities.

9. Implementation of the European directive and the new frame of reference

It appears as if the legislator was more aware about the issues during the (final) implementation of RED II (Legislative Decree no. 199/2021).

It is uncertain, because, as usual, the new regulation refers to a future ministerial decree to identify the incentive measures. However, this has not yet been issued. Therefore, we are not yet able to know the actual evolution of the matter and the choices that the public administration will concretely make.

However, it is known that the reference framework in which the next implementing provision will be inscribed, has considerably changed.

The new legislative decree, indeed, underlines the importance of support systems to produce electricity through renewable sources, to which the entirety of Chapter II is dedicated.

In addition to this, it also gives clear indications regarding the general characteristics of incentive mechanisms (art. 5) and on those principles related to shared energy (art.8).

Referring to the incentive mechanisms, within the already known functioning schemes (tariff disbursed by the GSE, which is covered by the general charges relating to the electricity system), particularly innovative provisions are those according to which: 1) the incentive mechanism is proportionate to the cost of the measure, to guarantee the equitable remuneration (art. 5, let. c); 2) the same can be diversified, based on the dimensions and on the size of the plant, to take into account the “staircase” effect (art. 5, lett.d).

Indeed, it is evident the legislator has the intention to move in a different direction to the one that has been followed until now: moving away from undifferentiated support measures to ones that are proportionate to the effective cost of the plant and diversified depending on the power of the realised plant.

There is no doubt that this is the right attitude to have in making the principle of stability concrete; only by making incentive mechanisms more flexible will it be possible to realise a grading that considers the sector’s technological development and the transformation of the framework conditions. This would shelter the beneficiaries from subsequent and sudden corrective action.

However, not all of the introduced innovations were equally coherent. In the case of art. 8, letter f) in which, referring to the regulation of incentives for energy sharing, it has been stated that «access to the incentive is only guaranteed until the achievement of the established “power quotas”, on a five-year basis, in congruence with the achievement of the objectives referred to in art. 3».

The provision is doubtful, and its actual implementation shall be carefully monitored.

Indeed, the provision seems reasonable if what the legislator meant to say was that every five years, the opportunity of maintaining the incentives to

a certain measure should be evaluated based on the results achieved in the transition energy process.

However, considering the provision literally could lead to a different interpretation, conditioning the access to incentives at the expense of current beneficiaries.

Under these terms, the provision would end up once again undermining the principle of stability, as well as appearing completely unreasonable. Therefore, it would penalise those configurations that contributed the most to the realisation of the pre-established objectives.

As previously mentioned, only the implementing decree will clarify this and other unanswered questions on which, at this very early stage, there is no need to focus attention. Certainly, the wider general context in which it will have an impact appears to be more respectful of the principle of stability and legitimate expectation of investors.

10. Final considerations

Within this renewed context, there is still an open question concerning the latest incentive configurations of distributed generation, implemented by the transient regulation, which may be modified by new provisions that, as it has been said, are all based on a different logic.

Pending the adoption of the ministerial decree, the implementing provisions of the transient regulations will find application regardless. (art. 8, c.2). Whenever they become effective, should the legislator consider applying the new incentive mechanisms, also to new configurations, whether they are proportional and diversified? Consequentially, should the GSE unilaterally modify the already established terms of the Convention?

It is legitimate to have doubts about it. It would mean, once again, undermining the expectations for those who have relied on the promises made by public powers to encourage “pilot experiences”²².

Even if it is true, as the national and international Court have taught us, that the principle of stability of incentives cannot be considered as a dogma, it is equally true, in this specific case, that the reasonableness and predictability requirements, which could justify an amendment, are lacking in full.

²² A survey of the first renewable energy communities in Italy can be found in the volume L. DE VIOVICH-L. TRICARICO-M. ZULIANELLO, *Community Energy Map*, FrancoAngeli, Milano 2021. See also the publication of the RSE, *Le Comunità energetiche in Italia*, Alkes, Milano 2021.

Indeed, it is unpredictable that the legislator, having partially transposed the directive in order to guarantee the experimentation of new configurations, would completely modify the operating conditions, hence shifting the cost of his own distinct evaluation onto the beneficiaries.

Neither could such an intervention be justified by reason of general interest. Despite the current scenario where energy bills burden customers and small enterprises with significantly higher costs than before, this situation is not at all related to system charges²³.

Modifying the measure of the incentive, and disappointing those who have already experienced collective self-consumption and renewable energy communities, would go against the very own configurations that were supposed to contribute to the system's decarbonisation and the reduction of Italy's energy import.

²³ It should be considered that the legislator also considered this problem, providing (art. 15) from 2022 that, a portion of the annual revenues deriving from the CO2 emissions trading system, must be allocated to cover the costs of incentives for renewable sources.