

Energy & Ecological Transition Focus Team

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The “Aiuti Decree” and the main changes regarding the authorisation of plants powered by renewable sources

1. Introduction

Law Decree No. 50 of 17 May 2022 regarding “*Urgent measures on national energy policies, business productivity and investment attraction, social policies and the Ukrainian crisis*” (“**LD 50/2022**”) came into effect on 18 May 2022 and was converted into Law No. 91 of 15 July 2022 (“**Law 91/2022**” and, together with Law Decree 50/2022, “**Aiuti Decree**”), which came into effect on 16 July 2022.

The Aiuti Decree introduces measures (Title I, Chapter I) to simplify and accelerate the administrative procedures to obtain the authorisation to construct plants powered by renewable sources (“**RES Plants**”).

2. Main changes concerning authorisation to construct and operate RES Plants

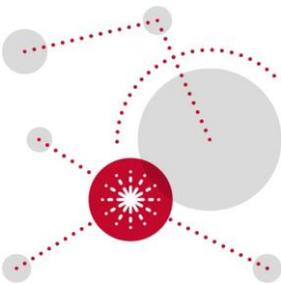
The Aiuti Decree introduces the following main changes:

- (i) **Modification of the regulation of eligible areas** set under Legislative Decree No. 199 of 8 November 2021 (“**RED II Decree**”), which implements EU Directive 2018/2011/EU (“**RED II Directive**”).

More specifically, Art. 6 of the Aiuti Decree:

- (a) grants the Government’s Department of Regional Affairs and Autonomies (“**Dip. Aff. Reg. PCdM**”) an **active role** with the aim of: (1) **drafting decrees that establish the principles and criteria for identifying**

Energy & Ecological Transition Focus Team



Team leader
Catia Tomasetti
catia.tomasetti@belex.com
Tel. +39 02 771131



Authors

Catia Tomasetti
catia.tomasetti@belex.com
 Tel. +39 02 771131

Giovanna Zagaria
giovanna.zagaria@belex.com
 Tel. +39 02 771131

Giulio Mazzotti
giulio.mazzotti@belex.com
 Tel. +39 02 771131

Simone Schiavini
simone.schiavini@belex.com
 Tel. +39 02 771131

Lorenzo Tringali
lorenzo.tringali@belex.com
 Tel. +39 02 771131

Marilù Martoriello
marilu.martoriello@belex.com
 Tel. +39 02 771131

Alberto Cominetti
alberto.cominetti@belex.com
 Tel. +39 02 771131

eligible and non-eligible areas¹ to construct RES Plants, and (2) exercising at state level the power of substitution if the Regions fail to adopt the laws² necessary to identify eligible areas within the provided terms;

- (b) **extends the objective scope of eligible areas** pending implementation of laws and decrees referred to point (a) above.

Eligible areas are: (1) **areas not included in the scope of the assets subject to protection** under Legislative Decree No. 42 of 22 January 2004 (“**Cultural Heritage Code**”); and (2) **areas not included in the buffer zone** of cultural heritage referred to in Part II of the Cultural Heritage Code, and buildings or areas of significant public interest under Art. 136 of the Cultural Heritage Code, which for the purpose of application of this provision are **7 km for wind power plants and 1 km for photovoltaic plants**.³

This is without prejudice to the rules on the Ministry of Culture’s participation in the authorisation procedure, in accordance with Art. 12, para. 3, of Legislative Decree No. 387 of 29 December 2003, regarding the construction of RES Plants in areas subject to protection and in conterminous areas;⁴

- (c) **extends the applicability of the authorisation procedures for eligible areas also to connection works**: (1) pertaining to RES Plants, or (2) necessary to develop the national transmission electric grid, on condition that doing so is strictly functional to increasing producible energy from renewable sources;
- (d) modifies the provision that qualifies existing photovoltaic plants as eligible areas (“**PV Plants**”) where substantial modifications are made with the addition of storage systems by **raising the system capacity from 3 to 8 MWh**; and
- (e) **extends also to biomethane production plants** the provision whereby the following are classed as eligible areas if no constraints exist, unlike the previous

¹ Art. 20 of the RED II Decree requires that these decrees be adopted within 180 days from the entry into force of the RED II Decree (i.e., by 13 June 2022) by the Ministry of Ecological Transition in consultation with the Ministry of Culture, and the Ministry of Agriculture, Food and Forestry. However, they have not been adopted yet.

² Art. 20 of the RED II Decree requires that these laws be adopted by the regions within 180 days from the entry into force of the decrees mentioned in footnote 1.

³ These areas are additional to those eligible under Art. 20, para. 8 of the RED II Decree and include: sites where plants of the same source are already installed and where non-substantial modifications are carried out in accordance with Art. 5, paras. 3 et seq., of Legislative Decree No. 28 of 3 March 2011; and quarries and mines that have ceased production, have not been remediated, are abandoned, or are in an environmentally degraded condition.

⁴ In these cases, the Ministry of Culture is **required** to give **its opinion, which is not binding**, and if the deadline for doing so has expired, the **competent authority may also issue the relevant authorisation**.

provision, which referred only to PV plants: agricultural areas within **500 metres** from industrial, artisanal and commercial areas, including sites of national interest (“SIN”), quarries and mines; areas within **500 metres** from industrial plants and establishments; and contiguous areas within **300 metres** of the motorway network.

The modifications are clearly to accelerate the identification of eligible areas by centralising the identification of eligible areas at state level and to extend their objective scope, thereby increasing the cases in which simplified authorisation procedures apply.

When RES Plants fall in eligible areas, the authorisation procedure timeframe is reduced by a third, including those for the environmental procedure. In these cases, the competent landscape authority is required to give its opinion, which is not binding, and if the deadline for doing so has expired, the competent authority may also issue the authorisation.

Conversely, Art. 7 of the Aiuti Decree clarifies that **also portions of quarries and mines that are not eligible for further exploitation** should be considered eligible for the installation of RES Plants;

- (ii) Intervention on **geothermal** energy, *i.e.*: (1) inclusion of geothermal cultivation among the sectors for which the Government may exercise special veto powers (“Golden Power”); (2) **contribution of EUR 0.05 for each kW of electricity produced by the geothermal cultivation field**, due annually by holders of concessions of geothermal energy source plants as of 1 January 2023, for the social, economic and production development of the municipalities on whose territories the concessions are granted;⁵ and (3) **establishment of a joint table** to update the regulations on research and geothermal cultivation;
- (iii) Introduction of **measures to simplify the authorisation procedure** for RES Plants.

More specifically, Art. 7 of the Aiuti Decree states the following:

- (a) Resolutions **adopted by the Council of Ministers in order to settle any conflicting assessments between authorities** differently competent for the definition of the environmental impact assessment (“EIA”) in the context of steering committee

⁵ In this case, a ministerial decree determines the manner of disbursement, allocation and use of the above resources.

substitute EIA decrees for all intents and purposes.

The resolutions – together with resolutions adopted by the Council of Ministers if no agreement is reached to resolve opposition from dissenting authorities against the resolution that concludes the steering committee works – **are included in the single authorisation procedure**, which must be **completed within 60 days**. If the Council of Ministers comes to a decision on the issuance of the EIA decree after the 60-day term has expired, **the authorisation is considered granted**.

The abovementioned measures appear to provide a concrete remedy for the aspects that have proven most problematic in the authorisation procedures (e.g., conflicting assessments between the different entities involved and opposition filed by conflicting entities) and have historically delayed final measures being issued;

- (b) The **Council of Ministers’ positive opinion** under Art. 7, regarding the issuance of the EIA, essentially stipulates that authorisation will be **automatically granted** if the 60-day term expires without the competent entity (usually the Region) having decided.

In our opinion, this is the most important change but perhaps also the most controversial. Indeed, although operators cannot view the provision negatively as it gives them certainty and speeds up the feasibility assessment of a proposed action, Regions could argue that the above provision is unconstitutional because it will have the effect of substituting regional competence with governmental competence in cases of inaction;

- (c) Art. 7 also specifies that applicants, when applying for a single authorisation to construct plants other than new biomass, biogas and biomethane plants and photovoltaic plants, may request that a **declaration of public utility be issued and the resulting pre-expropriation constraint be established** for the areas affected by works to construct the plants and the related works. This clarifies the previous wording, in line with well-established related caselaw and case history;

- (iv) Introduction of a broader scope of application of the *procedura abilitativa semplificata* (“PAS”). Art. 7 states that the PAS applies to: (1) the construction and operation of PV Plants of up to **20 MW in quarries or quarry lots that are not eligible for further exploitation**, with the specification that the

provision includes **portions of quarries** on the understanding that they are not eligible for further exploitation; and (2) the installation of PV Plants of up to **10 MW** in floating mode on the body of water of reservoirs and water basins, **be they disused or operating quarries;**

- (v) Application in Art. 6 of the sworn commencement of works declaration (“**DILA**”, *dichiarazione di inizio lavori asseverata*), for 24 months from the date of entry into force of the conversion law, for projects for new PV Plants with modules placed on the ground and not exceeding 1,000 kWp (peak kilowatts) in areas: (1) used by thermal or tourist facilities, (2) intended to give thermal/tourist facilities priority use of the self-generated energy, and (3) located outside historical centres and not subject to protection under the Cultural Heritage Code;
- (vi) Introduction in Art. 7-*bis* of an **extension of the deadline for the start of works** carried out under a single authorisation issued in accordance with Art. 12 of Legislative Decree No. 387 of 29 December 2003. Specifically, Art. 7-*bis* modifies Presidential Decree No. 380 of 6 June 2001 by setting **a deadline of three years from issuance of the single authorisation.**

This provision risks lengthening the timeframe for constructing RES Plants and seems to contradict the reasoning for accelerating the timeframe underlying the Aiuti Decree and the efforts of the last two years to simplify and speed up authorisation procedures;

- (vii) Introduction of **new measures to help businesses in the agricultural, livestock and agro-industrial sector for the construction of RES Plants.**

Art. 8⁶ of the Aiuti Decree envisages the granting of aid to help businesses in the agricultural, livestock and agro-industrial sector for the construction of RES Plants on the roofs of their production facilities.⁷

These measures might serve to support businesses in the above sectors both in terms of reducing production costs as a result of the partial self-consumption of the energy produced and in terms of new revenues from the sale on the market of the remaining share of energy produced. The measures also seem most relevant in view of the need to make Italy independent from third-country

⁶ Art. 8 of the Aiuti Decree is subject to the European Commission’s authorisation of State aid under Art. 108, para. 3, of the Treaty on the Functioning of the European Union (“TFEU”).

⁷ These support measures are cumulative with:

- (a) the support measures in place on the date the Aiuti Decree came into effect (i.e., 18 May 2022), including those under the National Recovery and Resilience Plan (“NRRP”); and
- (b) revenues from the sale of electricity to the grid.

suppliers of agri-food raw materials.

However, the need for authorisation under Art. 108 of the TFEU makes it uncertain as to whether this rule can be implemented;

(viii) **Expansion of authorities eligible to set up renewable energy communities.**

Art. 9 of the Aiuti Decree allows renewable energy communities to be set up by:

- (a) the **Ministry of Defence**⁸ with other public central and local authorities **for RES Plants exceeding 1 MW**, including in derogation from the requirements under the general framework on energy communities;⁹ and
- (b) **Port System Authorities**. RES Plants included in energy communities set up by Port System Authorities **can benefit from the incentives under the RED II Decree even if their power exceeds 1 MW.**¹⁰

*The above measures show that the legislator is keen to promote the use of renewable energy communities by expanding the authorities eligible to set them up. However, the conversion law stipulated that the possibility of constructing plants in protected natural areas (under the Framework Law on Protected Areas, Law No. 394 of 6 December 1991) **is, in any case, excluded;***

(ix) **Modification of the EIA regulation.**

Art. 10 of the Aiuti Decree:

- (a) **eliminates the voting rights of the Ministry of Culture representative**, who, under the framework of EIA procedures at state level for projects included in the NRRP, has only the right to attend the meetings of the Technical Commission set up for the NRRP/Energy and Climate Plan (“**NRRP/NECP Technical Commission**”);
- (b) **stipulates that no requirements other than/additional** to those in an original EIA decree may be included **in the related EIA extension decree**, with

⁸ And third parties to which the Ministry has granted a concession of military assets or any other assets in use by the Ministry to construct RES Plants under Art. 20, para. 1, of Law Decree No. 17 of 1 March 2022, converted with amendments by Law No. 34 of 27 April 2022.

⁹ Specifically, Art. 31, para. 2, points (b) and (c), of the RED II Decree.

¹⁰ Art. 5 of the RED II Decree stipulates that RES Plants that have a max. capacity of 1 MW and are part of energy communities or collective self-consumption configurations can access a direct incentive that rewards self-consumed energy instantaneously by means of a specific tariff, which can also be graduated based on/proportional to the power of the RES Plants. The incentive is awarded directly, and applications are to be made on the date of the relevant entry into operation.

the sole exception of when a change occurs to the environmental situation (*contesto ambientale di riferimento*). Moreover, the conversion law stipulated that **applicants' applications** for the extension mentioned above must be accompanied by an **explanatory report regarding the pertinent findings, the environmental situation, and any changes, including to projects**;

- (c) **excludes from projects subject to an EIA at state level overhead power lines** with a nominal operating voltage exceeding 150 kV and a route length exceeding 15 km and **alternating current underground cable power lines** with a route length exceeding 40 km;
- (d) specifies, with reference **to PV Plants with a total capacity of more than 10 MW** and **onshore wind plants with a total capacity of more than 30 MW**, that the plants' capacity must be calculated based on the project submitted for assessment only, **without taking into account any plants or projects in contiguous areas with the same centre of interest or the same connection point and for which an EIA is already underway or an environmental compatibility measure has already been issued**;
- (e) enriches the EIA application, which must include, in addition to the documentation already specified in the provision: (1) **a landscape report**¹¹ or a **simplified report**,¹² and (2) **an measure issued by the competent superintendent of the Ministry of Culture concerning the prior verification of archaeological interest** (*verifica preventiva di interesse archeologico*);
- (f) modifies the rules regarding the verification that the documentation submitted at the beginning of the EIA procedure is complete by placing the obligations currently on the competent authority to the Technical Commission for the Verification of Environmental Impact EIA and SEA the NRRP/NECP Technical Commission and the competent Directorate General of the Ministry of Culture. Art. 10 also stipulates that the authorities mentioned above are to start the investigation not within the same deadline but within the next 15 days; and
- (g) modifies the rules for convening the decision-making steering committee competent to adopt the EIA measure with the stipulation that, when requesting

¹¹ As set out in Prime Ministerial Decree of 12 December 2005 on the "identification of the documentation necessary to verify the landscape compatibility of proposed works, in accordance with Art. 146, para. 3, of the Cultural Heritage and Landscape Code under Legislative Decree No. 42 of 22 January 2004".

¹² As set out in the regulation under Presidential Decree No. 31 of 13 February 2017.

additions, the competent authority may take into account also what is indicated by the competent directorate general of the Ministry of Culture.

This modification confirms the general direction of coordination between environmental authorities (particularly the Ministry of Ecological Transition) and the Ministry of Culture reinforced by the two recent Simplification Decrees.¹³

The changes to the EIA regulation on the one hand point to an intent to simplify and streamline the procedures but on the other denote a greater level of detail required from operators for some procedural requirements.

With particular regard to point (b) above, a clear line has been drawn on the number/type of cases in which the competent entity may impose additional burdens to those originally envisaged, thereby significantly reducing the risk of sector operators incurring additional costs or delays in implementing their projects in order to meet the competent entity's demands. However, the same point stipulates that applicants must provide additional documentation. Despite the greater level of detail, these measures seem aimed at facilitating the understanding of the environmental situation and, therefore, at streamlining the procedure;

(x) **Simplification of the authorisation procedures for power lines.**

Under Art. 11 of the Aiuti Decree, works involving improvements to the operating performance of existing lines, or works enabling the operation of existing direct current lines functional for the transport of renewable energy, can be carried out by filing a declaration of commencement of activities,¹⁴ in the following cases:

- (a) **Existing area lines (*linee aree*):** the works: (1) are carried out on the same route or deviate from it by a max. 60 linear metres, and (2) do not result in a change in the useful height of the supports of more than 30% compared to the existing lines.
- (b) **Existing underground cable lines:** the works are carried out on the same route, or within the edge of the committed road (*strada impegnata*) or within 5 metres from the outer edge of the laying trench (*trincea di*

¹³ Law Decree No. 76 of 16 July 2020, converted with amendments by Law No. 120 of 11 September 2020, "Urgent measures for simplification and digital innovation", and Decree Law No. 77 of 31 May 2021, converted with amendments by Law No. 108 of 29 July 2021, "Governance of the National Recovery and Resilience Plan and initial measures to strengthen administrative structures and accelerate and streamline procedures".

¹⁴ Under Art. 1-*sexies*, para. 4-*sexies*, of Law Decree No. 239 of 29 August 2003, converted with amendments by Law No. 290 of 27 October 2003.

posa).

The above simplified procedure also applies to works to enable direct current lines' operation involving **building new electric stations** or upgrading/expanding existing stations, **provided that** the stations are in discontinued, or partially discontinued, industrial areas/sites or eligible areas under Art. 20 of the RED II Decree.

The introduction of this simplified procedure shows that the legislator wishes to **fast-track works involving the improvement of existing lines** and, in doing so, promote the maintenance of existing facilities;

- (xi) Extension in Art. 11 of the application of the PAS to works related to new PV Plant projects.

3. Main tax changes introduced by the Aiuti Decree

The Aiuti Decree has also amended several tax provisions introduced in recent months to address rising energy costs.

Specifically, the Aiuti Decree has:

- (i) **strengthened the extraordinary subsidies granted in the form of tax credits for businesses most affected by gas and electricity price increases** by providing:
 - (a) an increase from 20% to 25% of the tax credit for gas-intensive businesses ("gasivore"),¹⁵
 - (b) an increase from 20% to 25% of the tax credit for businesses other than gas-intensive businesses ("gasivore"); ¹⁶ and
 - (c) an increase from 12% to 15% of the tax credit for businesses other than energy-intensive businesses ("energivore"); ¹⁷ and
- (ii) **introduced an extraordinary subsidy granted in the form of a tax credit for gas-intensive businesses ("gasivore")**, corresponding to 10% of the expenditure incurred to purchase natural gas consumed in the first quarter of 2022.

Finally, the Aiuti Decree has significantly amended the contribution to tackle increases in utility bills (*contributo contro il caro bollette*) introduced under Art. 37 of Law Decree No. 21 of 21 March 2022 ("**Extraordinary**

¹⁵ Art. 5 of Law Decree No. 17 of 1 March 2022 regarding the expenditure incurred in natural gas consumed in the second quarter of 2022.

¹⁶ Art. 4 of Law Decree No. 21 of 21 March 2022 regarding the expenditure incurred in natural gas consumed in the second quarter of 2022.

¹⁷ Art. 3 of Law Decree No. 21 of 21 March 2022 regarding the expenditure incurred in the purchase of energy in the second quarter of 2022.

Contribution”).¹⁸ More specifically, the Aiuti Decree has:

- (i) extended the reference period for tax base purposes to include the month of April (i.e., instead of the difference in data concerning the periods 1 October 2021–31 March 2022 and 1 October 2020–31 March 2021, the periods now to be considered are 1 October 2021–30 April 2022 and 1 October 2020–30 April 2021);
- (ii) increased the rate of the Extraordinary Contribution from 10% to 25%; and
- (iii) changed the payment of the Extraordinary Contribution to be in two instalments (a 40% down payment by 30 June and the remaining 60% by 30 November of the current year/2022).

The conversion law of the Aiuti Decree made no changes to the rules governing the Extraordinary Contribution. The Italian tax authority (*Agenzia delle Entrate*) issued some rulings in June and July concerning certain operational aspects. However, the measure leaves several critical aspects open, which will be discussed in depth in an upcoming special newsletter.

4. Conclusion

The Aiuti Decree, issued after a long series of legislative interventions to simplify and speed up the authorisation procedures for RES Plants, and converted into law after a complex parliamentary procedure, could really mark a change of pace (also to comply with the European objectives set by the NECP in the construction of RES Plants. This is above all thanks to the Council of Ministers’ substitutive intervention on all the occasions that, to date, have been the most delicate steps in the authorisation process of RES Plants and the provision regarding the tacit granting of single authorisations (under certain conditions).

In contrast, an opportunity to change and clarify the Extraordinary Contribution in order to make its application clearer (and possibly fairer) has unfortunately been missed.

¹⁸ For further details, see our previous newsletter “*The “Energy Decree” and the contribution to tackle increases in utility bills*” published on 23 March 2022 and available [here](#).



Energy & Ecological Transition Focus Team

The Focus Team is a constellation of skills in different practice areas with a focus on energy and ecological transition.

Catia Tomasetti
Banking & Finance

Niccolò Baccetti
Corporate

Riccardo Biciato
Banking & Finance

Elena Busson
Corporate

Paolo Daino
Corporate

Gabriele Malgeri
Banking & Finance

Chiara Mancini
Litigation

Giuseppe Manzo
Corporate

Massimo Merola
UE law and Antitrust

Andrea Silvestri
Tax

Roberto Flammia
Banking & Finance

Francesca Di Carpegna Brivio
Corporate

Giovanna Zagaria
Banking & Finance

Giulio Mazzotti
Tax