

# Green Certificates: ongoing developments in applicable legislation

The Italian Government has approved Law Decree No. 78 of 31 May 2010, which contains urgent measures for financial stabilisation and economical competitiveness (the "**Law Decree**"). Article 45 of the Law Decree ("**Article 45**") repeals both Article 2, paragraph 149 of Law No. 244 of 24 December 2007 (the "**Budget Law 2008**") and Article 15 paragraph 1 of Ministerial Decree No. 35467 of 18 December 2008 (the "**Electricity Decree**"). The repeal of these provisions sets the basis for what may be a permanent abolition of the mandatory purchase regime (as described below) for Green Certificates ("**GCs**").

## Definitiveness of the Law Decree

The Law Decree, published in the Official Gazette on 31 May 2010, has been immediately applicable law since publication. The Law Decree must be converted into law within sixty days following its publication (i.e., by 30 July 2010), or it will become null.

This implies that a bill for the conversion into law of the Law Decree must be (i) submitted to the Italian Parliament, (ii) approved by each of the branches of the Italian Parliament, (iii) and approved and signed by the President of the Republic. As of today, the bill has been submitted to the Italian Senate. Discussions will begin shortly.

During the process of conversion into law, amendments may be made to the current provisions of the Law Decree and the end result of the conversion law could be significantly different from the Law Decree.

## Mandatory purchase regime under the Budget Law 2008 and the Electricity Decree

The Budget Law 2008 aimed at promoting and supporting the production of renewable energy and created the Mandatory Purchase Regime ("**MPR**"). The MPR provided for a mechanism whereby GCs could be sold by the holders to the GSE, who would be required to purchase them.

As a last resort purchaser, by 30 June each year the GSE would be required to purchase any unsold GCs that expired that year, at a price equal to the average price for GCs during the prior year.

The GSE's obligation to repurchase was to continue to exist until Italy produced 25% of its electricity demand using renewable energy.

In 2008, the entire GCs system was affected by an excess offer of GCs for sale, which caused (i) the collapse of GCs prices, and (ii) a back log of unsold GCs that were eligible for mandatory repurchase. The significant decrease in the prices of GCs raised concerns for developers and lenders of renewable energy projects, and producers holding GCs began to sell them at low prices.

## Key Issue

**Abolishment of the mandatory purchase regime for Green Certificates**

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### Modifications to the GCs system

The Electricity Decree attempted to address the excess offer of GCs, by setting up a transitional regime from 2009 to 2011 to guarantee a gradual transition from the regulation in force before the enactment of the Budget Law 2008<sup>1</sup> to the system established by the Budget Law 2008, as implemented by the Electricity Decree, in order not to damage the ongoing investment projects.

The transitional regime requires the GSE to purchase, on or before 30 June of each year, any GCs been issued no more than three years prior, for which purchase is requested, regardless of the year of expiry, at a price equal to the average market price paid for GCs over the last three years.

The calculation of the purchase price over a three-year period offset the good performance of GCs in 2006 and 2007 with the bad performance in 2008 and, therefore, had a positive impact on the stability of GCs prices. This led to a renewed stability and optimism in the system, to the extent that recently the Renewable Energy Producers' Association (*Associazione dei Produttori di Energia da fonti rinnovabili*, "APER") was hoping for a transformation of the regime provided under the Electricity Decree from a transitional regime to a standing regime.

### Article 45

For the time being, the MPR under Budget Law 2008 and the transitional regime under the Electricity Decree are abolished, unless by 30 July 2010, the Decree Law fails to become law or is converted into law with amendments that abolish, or significantly amend, the provisions of Article 45.

As of today, it is not possible to precisely assess the extent of the impact of Article 45 on the market. A sharp decrease in the prices of the GCs, currently purchased by the GSE at 88.91 €/MWh, is very likely. The decrease in the prices will adversely affect the business plans both of operators and lending banks. The price decrease will have an even more dramatic impact on the plants fuelled by expensive raw materials, such as biomass, because the price received for the GCs will not be able to offset the expense to the previous extent. Moreover, operators holders of GCs nearing maturity risk being unable to sell them to anyone, including the GSE, at any price. From a wider perspective, Italy's attractiveness for investment in renewable energy projects will be prejudiced, in terms of both sponsors and banks. As a consequence, it will be more difficult to achieve the target of producing 17% of total energy production from renewable energy sources by 2020, as set out by European energy policy and acknowledged by the draft Italian Action Plan for renewable energy (*Piano d'Azione per le Energie Rinnovabili*) to be submitted to the European Council of Ministries by 30 June 2010.

### Conclusions

By the expiry of the sixty-day term ending on 30 July 2010, three alternative scenarios are possible:

- (i) The Law Decree is not converted into law - the Law Decree will become null, retroactively from the outset and its immediate effects may be cured, at the Italian Parliament's discretion, by an indemnification law (*legge di sanatoria*);
- (ii) The Law Decree is converted, with amendments, into law - during the procedure for the conversion into law, Article 45 may be amended or even cancelled by the Italian Parliament; and
- (iii) The Law Decree is converted into law without any amendments - the MPR and the transitional regime will be definitively abolished.

If Article 45 of the Law Decree is converted into law without amendments, it will be applicable as is both to new projects yet to be developed, as well as to old projects holding GCs, even on maturity.

From a financing perspective, the MPR and the transitional regime were considered one of the most important mechanisms to guarantee that GCs could be sold and to limit fluctuations in the price of GCs. From a general perspective, the existence of a ultimate buyer like the GSE whose creditworthiness is very robust (since it is a government-controlled entity) was one of the factors able to mitigate the merchant risk.

Considering the claims already raised by all the energy sector associations, it cannot be excluded that the Italian Parliament, during the works for the conversion of the Law Decree into law, will consider to amend Article 45 of the Law Decree in the light of the purposes of the Electricity Decree not to damage the ongoing investment projects, or even to cancel it, bringing Italy in line with European energy policy.

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<sup>1</sup> For details on changes introduced by the Budget Law 2008 and the Electricity Decree to the GC system see our Client Briefings "Ongoing legal changes of interest for Italian wind farms" of November 2007 and "Italian renewable electricity power facilities: ongoing legal developments" of March 2009.

Finally, it is possible that the Italian Action Plan for renewable energy will not be submitted to the European Council of Ministries by 30 June 2010, because the current draft was drawn up on the basis of a series of assumptions, among which the existence of the MPR, that are no longer valid now that the Law Decree is applicable. Therefore, it is possible that the Italian Action Plan will be submitted only upon completion of the procedure for the conversion of the Law Decree into law, during which the Italian Government may choose to include amendments necessary to retain some of the assumptions in the current draft of the Italian Action Plan.

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