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*Planning and regulating the renewable electric energy*



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1. *Research hypothesis and the shape of the renewable energy public policy*

According to the *Climate Action Plan* that President Barack Obama presented at the Georgetown University (Washington), he will provide enough renewable energy electricity to power 6 million homes by 2020. Namely, he planned to achieve this goal mainly through the development of the wind and solar energy on public land. The President is committed to pursue his objectives even without Congress' approval, via executive orders.

Similarly, in the *White paper for secure, affordable and low-carbon electricity* of 2011, the UK government for the first time agrees to play a central role in leading the English market towards the 80% harmful emissions reduction target by 2050 (“there is a broad consensus that current market arrangements will not deliver the scale of long-term investment needed, at the required pace, to meet these challenges. Nor will they give consumers the best deal”).

Therefore, it is spreading the idea that the fulfillment of Kyoto Protocol objectives – regarding the reduction of the emissions in order to contrast climate change – can be no longer devolved upon the almost exclusive promotion of renewable energies and energy efficiency measures, but it requires public intervention in the production and distribution of the renewable energy.

This essay questions this idea by understanding the objectives and the boundaries of the renewable energy public policy, as well as its interaction with

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the European and national regulatory policies, which aim to preserve free competition and consumers protection within the energy market<sup>1</sup>.

Namely, the goal is to examine which objectives and tools justify the finalistic use of the public policy, which is not restrained to the setting of the conditions for the economic initiative of producers, suppliers and sellers, but aims at the fulfillment of the main public interests involved, such as the protection of the environment, the preservation of the free competition and the security of supply.

Therefore, it is important to establish if this kind of public policy is legitimate and to set the boundaries of its exercise, according to the liberalization of the energy market by Directive 96/92/EC – which includes sustainable energies<sup>2</sup> – and to the building of a European integrated energy market.

Besides, the liberalization of the market has been confirmed recently within Directive 2009/28/EC; according to art. 13, the installation of plants must be done on the grounds of a public authorization, concession or certification only when it is strictly necessary, and only with “proportionate” administrative burdens<sup>3</sup>.

More generally, the elimination of great monopolies in the area of public services, thanks to the liberalization Directives of the last century during the transition to the Regulatory State, seems to jar with dirigisme and indicative planning public policies<sup>4</sup>. Besides, liberalizations had a strong impact on the system of European law authorizations, thanks to the affirmation of the general

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<sup>1</sup> See E. BRUTI LIBERATI, *Il livello nazionale*, nel Rapporto, *La governance dell'energia*, (edited by) N. BASSIÈ. BRUTI LIBERATI-F. DONATI, for the Osservatorio sulla politica energetica della Fondazione Einaudi, Sala delle Colonne - Luiss Guido Carli, 20<sup>th</sup> November 2012.

<sup>2</sup> See P.D. CAMERON - M. BROTHWOOD, *Competition in Energy Markets: Law and Regulation in the European Union*, Oxford, 2002; si v. anche T. SALONICO, *Liberalizzazione e sviluppo delle reti. Un difficile equilibrio fra concorrenza e regolamentazione*, in *Il Diritto dell'Unione Europea*, 2001, fasc. 2-3, p. 443.

<sup>3</sup> See F. GUELLA, *Modelli di disciplina delle fonti rinnovabili a livello sovrastatale*, in F. CORTESE-F. GUELLA-G. POSTAL, *La regolamentazione della produzione di energie rinnovabili nella prospettiva dello sviluppo sostenibile*, Padova, 2013, p. 176. More generally, see A. MAESTRONI-M. DE FOCATIIS (ed.), *Politica energetica, regolazione e mercato: il nuovo diritto dell'energia tra libertà e limitazioni concorrenziali e ambientali*, Milano, 2012.

<sup>4</sup> See, for example, directives 54/2003/EC and 55/2003/EC.

principle (which is applicable beyond Directive 2006/123/EC) of the preference of bound authorizations, against the use of discretionary ones<sup>5</sup>.

At the same time, the European Directive 2009/28/EC – within the 2020 “Climate Package”- has promoted a European movement in the area of sustainable energy, with the adoption of two “Packages” of measures, directed at the creation of an internal energy market<sup>6</sup> and at the promotion of renewable energies.

These measures confirm the European relevance of the renewable energy policy, which, according to the Lisbon Treaty, has now an independent legal basis in art. 194 TFEU; indeed, the sustainable energy policy has acquired a European relevance because it is expected to meet environmental sustainability and supply safety objectives.

European institutions promotes the employment of renewable energies in order to primarily reduce greenhouse gas emissions, contrast climate change and, thus, improve the quality of the environment<sup>7</sup>; this would also help to comply with the Kyoto Protocol, which EU entered in within the UN framework agreement, on 7 December 1997. The differentiation of the sources of energy would also help Member States to reach the supply safety, since it would reduce the dependence from fossil fuel foreign imports, which now represent the main share of energy production<sup>8</sup>.

The reduction of national dependence from foreign supplies and of greenhouse gas emissions is – as the essay will further explain – the main reason that justifies European intervention in the renewable energy area.

The idea that renewable energies are the best way to contrast climate change effects and to increase the global market energy demand has recently launched international cooperation in this area; however, compared to Europe, the process is more recent and has implemented softer rules, so far. The International Renewable Energy Agency has been set to support international

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<sup>5</sup> On the impact of the liberalization directives on authorizations see M. CLARICH, *Manuale di diritto amministrativo*, Bologna, il Mulino, 2013, p. 185 ss.

<sup>6</sup> See P. RANCI - O. TORRANI - E. BRUTI LIBERATI, *La regolazione dei mercati energetici nel terzo Pacchetto comunitario*, Quaderno dell'Osservatorio sulla regolazione amministrativa, Milano, 2010.

<sup>7</sup> See F. FRACCHIA, *Sviluppo sostenibile ed energie rinnovabili*, in F. CORTESE - F. GUELLA - G. POSTAL, *op. cit.*, p. 6.

<sup>8</sup> See D.H. MEADOWS - D.L. MEADOWS - J. RANDERS - W.W. BEHRENS III, *I limiti dello sviluppo*, Milano, 1972 and A. CLÒ, *Il rebus energetico*, Bologna, 2008.

cooperation and, mainly, to help States with the building up of proper infrastructures for the integration of renewable energies in the electricity grid, through the utilization of advanced technologies and proper incentive mechanisms<sup>9</sup>.

According to Directive 2009/28/EC on the promotion of renewable energies, those goals are pursued along with the enhancement of free competition and integration of the energy market, on the ground of art. 194 TFEU. Indeed, the reinforcement of the sustainable energy policy is strictly connected with the enhancement of the economic growth - caused by the demand for technological innovation for the diffusion of renewable energies - the presence of new stakeholders in the market and the development of specialized supply chain. Therefore, there is a common belief that the increase of renewable energies do not encumber, but it enhances competitiveness within the EU<sup>10</sup>.

The current challenge involves the complete integration of this kind of energy in the European market, with the progressive creation of the same production and distribution conditions of the traditional electric energy. The goal should also foster environmental protection objectives, which the promotion of renewable energies pursues as well<sup>11</sup>.

Moreover, pursuant to the subsidiarity principle, the energy sustainability must be balanced with other national interests (such as free competition, landscape preservation and the conditions and limits to the freedom of economic initiative). The protection of those interests still justifies the preservation of national prerogatives for what concerns the choice between the different sources of supply and the localization of production plants.

## 2. *The rise of the European renewable energy policy and the national jurisdiction*

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<sup>9</sup> On this specific topic, see C. SISLER, *L'Agenzia internazionale per le energie rinnovabili*, in F. CORTESE - F. GUELLA - G. POSTAL, *op. cit.*, p. 171.

<sup>10</sup> See Third Whereas of Directive 28/2009/EC: «*The opportunities for establishing economic growth through innovation and a sustainable competitive energy policy have been recognised. Production of energy from renewable sources often depends on local or regional small and medium-sized enterprises (SMEs). The opportunities for growth and employment that investment in regional and local production of energy from renewable sources bring about in the Member States and their regions are important*».

<sup>11</sup> See G. CARTEI, *Tutela dell'ambiente e mercato energetico europeo nella disciplina delle energie rinnovabili*, in *Dir. dell'economia*, n. 3/2013, pp. 589-618.

The last paragraph has explained the different objectives of public intervention in the renewable energy industry. Therefore, it is now possible to understand the importance of the European energy policy, for what regards the scope of European institutions' jurisdiction and their methods of intervention. In addition, this paragraph will draw the line between European and national jurisdictions, namely the limits of the European Commission's power of coordination. The main objectives of the European renewable energy policy (supply security, environmental sustainability and market competitiveness) can be crucial in the enhancement of the European intervention within the energy industry. Indeed, they have been the main driving force behind the attraction of the energy policy at European level; on the other hand, these objectives affect national prerogatives, since they let progressively faint Member States' exclusive power to choose the proper mix of energy sources.

Actually, the absence of an independent legal basis has never questioned the relevance of the energy policy within the European integration process; however, this has been firstly intended as "negative integration", namely its suitability with the protection of fundamental economic freedoms and the preservation of the free market.

Despite the recent incorporation of the energy policy within the European jurisdiction, this matter has played a crucial role in building up the European Union, especially with the establishment of the European Coal and Steel Community and, later, of the European Atomic Energy Community in 1957<sup>12</sup>.

Nonetheless, the Treaty Establishing the European Community, signed in Rome on the 25 March 1957, did not rule specifically on energy, neither for what regards the liberalization of Community exchanges nor about the limits of the European jurisdiction. Initially, this gap was filled by art. 308 (before art. 235 of the EU Treaty), according to which the Community could exercise implicit powers to the fulfillment of its objectives, in case of no explicit jurisdiction on the matter<sup>13</sup>.

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<sup>12</sup> P. RANCI, *La strategia energetica del Paese*, in ID. (ed. by), *Economia dell'energia*, Bologna, 2011, p. 238.

<sup>13</sup> See G. MORBIDELLI, *Il principio di legalità e i cd. poteri impliciti*, in *Dir. amm.*, 8, 2007, p. 703; N. BASSI, *Principio di legalità e poteri amministrativi impliciti*, Milano, 2001.

This legal basis has allowed, in the early '70, a progressive intervention of the European institutions, which has invested all the traditional sources of energy and even, with a minor impact, renewable energies<sup>14</sup>.

Furthermore, the EU took a considerable action towards the liberalization of national gas and electricity markets, thanks to the progressive erosion of domestic monopolies, even without frustrating those public interest that were not influenced by market rules<sup>15</sup>. Therefore, renewable energies gradually helped in creating the balance between the national duty to provide public services and the fulfillment of former art. 86 (now art. 106 TFEU), concerning the operation of services of general economic interest.

Currently, the European intervention in the area of renewable energies rests on art. 194, set in Title XXI, Part III of TFEU; this arrangement preserves the functioning of the internal market and the environment. Therefore, according to it, the EU can act with the ordinary legislative procedure, in order to “promote energy efficiency and energy saving and *the development of new and renewable forms of energy*”.

Since it now exists a specific Title and an independent legal basis, EU shall no more take advantage of its implicit powers and can strengthen its jurisdiction in the area of energy policy. Therefore, the European energy policy is no more bound by the rules on fundamental freedoms and free competition, but can set the existing body of rules in a wide, integrated and independent legal framework.

The latest energy policy – Directive 2009/28/EC - also rests on art. 11, 191 and 192 TFEU, which vest the Union with the power to rule on environmental quality, protection of human health and rational utilisation of natural resources, within the principle of sustainable development; these provisions underline the integration, at European level, between two interests: the enhancement of renewable energy and the protection of the environmental quality. Namely, they prove that the integration between energy and environmental protection policies is one of the most crucial and innovative

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<sup>14</sup> See M. MARLETTA, *Energia. Integrazione europea e cooperazione internazionale*, Torino, 2011.

<sup>15</sup> D. SORACE, *Il servizio di interesse economico generale dell'energia elettrica in Italia tra concorrenza ed altri interessi pubblici*, in *Dir. pubbl.*, 2004, p. 1009.

challenges for EU institutions: these interests must not be conceived as opposite or mutually alternative, but they must interact towards the same objectives<sup>16</sup>.

The explicit inclusion, within EU competences, of the energy policy derives from the transnational approach required by the need to preserve the environment and assure security of supply. Therefore, the pursuit of these goals demands for policies going beyond national borders.

In other words, the dynamic interpretation of the subsidiarity principle has recognized the presence of transnational interests, whose protection is hardly achievable via national policies and requires, on the contrary, an intervention at European level. Interestingly, this confirms that the subsidiarity principle, which was firstly created to restrain EU areas of intervention, currently facilitates the development of the European integration process. On the other hand, the Treaty, while providing an independent legal basis for the determination of the European energy policy, it also assign to Member States some exclusive powers, concerning the allocation and the security of supply. In particular, according to art. 194(2), EU measures shall not affect “a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)”. Therefore, any policy intervention on the grounds of art. 192 usually requires unanimity, since every Member State can exercise the power of veto. Indeed, without any rule allowing restrictive interpretation of Member States' exclusive competences, this would prevent EU energy policy from improving. Member States' right to determine the choice between different energy sources has been constricted by Directive 2009/28/EC, according to which States must reach the 20 % target for the overall share of energy from renewable sources (and a 10 % target for energy from renewable sources in transport)<sup>17</sup>. The Directive is based on art. 175 TEC (now 192 TFEU), which requires a qualified deliberative majority and not unanimity. Indeed, the increase of the share of renewables, does not affect significantly the choice of Member States between the different sources, but only their inner ratio. Since each Member State had already chosen between

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<sup>16</sup> P. THIEFFRY, *Le politiques européennes de l'énergie et de l'environnement: rivales ou alliées*, in RAE - LEA, 2009-2010, p. 783 ss.

<sup>17</sup> A. JOHANSSON - G. RESCH - D. FOUQUET - K. NEUHOFF - M. RAGWITZ, *The propose new EU renewables directive: interpretation, problems and prospect*, in *European Energy and environmental law review*, vol. 17, Issue 3, 2008, p. 126.



different renewable sources, the determination of the share of the renewables could follow a majoritarian criterion.

However, Member States' obligations regard only a general increase of the renewable energy share: the choice between different kind and technologies is devolved upon States individually, with respect to their orographic, economic and weather conditions.

The residual competence of Member States, however, is also shaped by art. 192, according to which the Council – within the special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions – adopts measures "significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". Therefore, EU institutions – within the environment protection competence and narrow conditions of exercise - can erode national exclusive competences within the energy sector.

From this perspective, art. 194 might not be interpreted – as it might appear – as limiting the scope of the European energy policy, by setting Member States' right to determine the general structure of their energy supply; on the contrary, it displays the European energy policy objectives, which set impassable limits to national competences<sup>18</sup>.

Specific attention must be given to preferential methods for the exercise of the European renewable energy policy.

Indeed, the subsidiarity principle determines not only the legitimacy of European intervention but also the way it is performed<sup>19</sup>. Therefore, subsidiarity derives from the constitutional principle of proportionality, pursuant to the creative interpretation of the Court of Justice, stabilized in art. 3B (3) of the Maastricht Treaty. According to this principle, "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". Therefore, subsidiarity can modulate the intensity, the nature and the choice of

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<sup>18</sup> See M. MARLETTA, *Il Trattato di Lisbona e gli sviluppi nel settore dell'energia*, in *I quaderni europei*, Centro di documentazione europea dell'Università di Catania, Online Working Paper 2012, n. 1.

<sup>19</sup> On the ability of the subsidiarity principle to shape powers, see S. CASSESE, *L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea*, in *Foro it.*, 1995, V, p. 373 and M.P. CHITI, *Principio di sussidiarietà, pubblica amministrazione e diritto amministrativo*, in *Dir pubbl.*, 1996, p. 789; in *ID.*, *Mutazioni del diritto pubblico nello spazio giuridico europeo*, Bologna, 2003, p. 153.

the appropriate measure, in order to respect the limits set by the policy objectives.

From this point of view, the Directive seems the most appropriate measure to enhance the promotion of renewable energies; despite it set mandatory objectives, it leaves Member States the right to decide how to reach them, according to the specific national needs. As Directive on energy efficiency was accompanied by national enforcement measures, even in the field of renewable energies controlled harmonization of objectives was considered more suitable than policy uniformity<sup>20</sup>.

Besides, the European promotion of renewable energies is strictly linked with the increase of the energy efficiency, pursuant to the secure supply and environmental protection objectives; indeed, they are both considered as necessary, at European level<sup>21</sup>.

Despite the rules on energy efficiency did not fall within the Climate-Energy Package, it has a great influence on the renewable energy policy and on the related environmental protection objectives. Significantly, *Whereas* 1 of Directive 2012/27/EU defines Energy efficiency as a valuable means to address increased dependence on energy imports and climate change. Measures affecting the energy supply must be coordinated with policies directed to affect the Demand, namely the overall energy consumption<sup>22</sup>.

Another element indicating the new European relevance of the energy policy is the enforcement, in 2009, of mandatory rules towards Member States, in contrast with prior Directive 2001/77/EC, providing only general guidelines. Indeed, it remarks the need to regulate the energy market at European level, in order to fulfill transnational interests by contrasting climate change and ensure energy supply. The intent is also confirmed in Directive 2009/28/EC - regarding administrative procedures, regulation and codes (art. 13), the access and functioning of the electricity grid – which aims at affecting national legislative and administrative activity, in order to reach European objectives. Moreover,

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<sup>20</sup> See P. DE CRUZ, *Comparative Law in a Changing World*, London, 1999 and P. CIRIELLI, *L'armonizzazione tecnica nello spazio giuridico globale*, in *Riv. trim. dir. pubbl.*, 2, 2008, p. 703.

<sup>21</sup> See COM, 19 October 2006, Piano d'azione per l'efficienza energetica: concretizzare le potenzialità. On the 25 October 2012 the European Union has adopted the new Directive on Energy efficiency (27/2012/EU).

<sup>22</sup> See S. QUADRI, *L'evoluzione della politica energetica comunitaria con particolare riferimento al settore dell'energia rinnovabile*, in *Riv. it. dir. pubbl. comunit.*, 2011, 3-4, p. 839 and ID., *Lineamenti di diritto internazionale delle fonti di energia rinnovabile*, Napoli, 2008.

pursuant to the Commission's communications, the European renewable energy policy shall promote the creation of an integrated European energy market, in which renewables shall play a leading role<sup>23</sup>.

The Third Energy Package of 2009 has also influenced the development of the energy policy and the distribution of powers. The package consists in a body of rules which enhance EU guidance power in this field, in order to help with the creation of a single energy market, in which renewable energies can play a crucial role<sup>24</sup>.

On this ground, the Union will put to the test its intention to use these new powers to act more strongly towards the process of integration. Indeed, the correct functioning of general services strictly hinge upon a good development of the grid infrastructures, which affects, on turn, the fulfillment of the European objectives of energy security and integration of the renewables.

The progressive integration of renewable energies in the market and in the electricity grid, along with a reduction or elimination of the related subsidies, might also foster renewable energy ability to stabilize the general electricity system, in conditions of grid parity (that is, equal purchasing price and conditions). EU intervention must assure the consistency and transparency of Member States' policies, in order to avoid market fragmentation and maintain free competition.

In order to allow the integration of renewable energies within the internal market, the technological development shall level the economic cost of national subsidies, in order to safeguard investors' confidence<sup>25</sup>. At the same time, technology must improve, in order to reduce costs and make subsidies for renewable energies unnecessary; moreover, subsidies for fossil fuels must be

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<sup>23</sup> See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Renewable Energy: a major player in the European energy market*, 6 June 2012, COM (2012) 271. See also COM (2011) 885/2, *Energy Roadmap 2050* and COM (2011) 112, *Roadmap for moving to a low-carbon economy in 2050*.

<sup>24</sup> E. CIARALLI, *I mercati europei dell'elettricità e del gas - Il terzo Pacchetto legislativo presentato dalla Commissione*, in *Mercato concorrenza e regole*, n. 1, 2008; A. DE HAUTECLOCQUE - V. RIOUS, *Reconsidering the Regulation of Merchant Transmission Investment in the Light of the Third Energy Package: the Role of Dominant Generators*, European University Institute, Firenze, 2009.

<sup>25</sup> On the possible steps towards the elimination of subsidies see G. LANDI - C. SCARPA, *Il livello ottimale degli incentivi verso la grid parity*, in G. NAPOLITANO - A. ZOPPINI, *Annuario di diritto dell'energia*, Il Mulino, Bologna, 2013, p. 79 ss.

scaled down and negative externalities on the environment must be included within the costs.

The EU policy shall reinforce European competitiveness at international level, which can be strengthened as well through the creation of a single internal energy market. Energy, indeed, is one of the main components of companies' production costs; thus, it influences the competitiveness within industries and sectors. The enhancement of EU competitiveness, through the reduction of energy costs, is also an essential condition to increase employment during the world crisis.<sup>26</sup>

Last but not least, heightened competitiveness shall be accompanied by the enhancement of the duty to provide public general services; it is not by chance that the third step of the energy services liberalization process stresses on consumers protection measures.

### 3. *The European enforcement of national measures*

Directive 2009/28 envisages an ongoing revision to the national renewable energy action plans, in order to reshape measures for the fulfillment of European objectives, and to adapt them to the unpredictable economic scenario. The enforcement plan lead by the Commission serves this purpose, acting both before and after the adoption of the national action plans. Namely, the Commission adopts a template for the

national renewable energy action plans (art. 4, part 2) and defines an indicative trajectory (Annex 1, part B), to guide the implementation of national objectives. Pursuant to its supporting role, the Commission reviews the forecast document that each Member State has to notify six months before the national action plans (art. 4, part 3, letter a and b). This deed estimates the excess production of energy from renewable

sources compared to the indicative trajectory, in order to activate transfers towards other Member States. In addition, it quantifies the demand for energy from renewable sources to be satisfied by means other than domestic production, so that national action can be coupled with international cooperation plans.

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<sup>26</sup> See Communication de la Commission Européenne, 10 Novembre 2010, COM (2010), *Énergie 2020. Stratégie pour une énergie compétitive, durable et sûre.*

The indicative trajectory should also adjust national plans, since, according to art. 4 of dir. 2009/28, the Member State whose share of energy from renewable sources fell below the indicative trajectory shall submit an amended national renewable energy action plan to the Commission. The new plan shall set out adequate and proportionate measures to rejoin, within a reasonable timetable, the indicative trajectory.

In addition, the control over national plans entails also the analysis of a report on progress in the promotion and use of energy from renewable sources every two years, according to art. 22. As per art. 23, the Commission's control mainly focuses on the origin of biofuels and bioliquids consumed in the Community. The results of the assessment are included both in a report on biofuels and bioliquids - submitted to the European Parliament and the Council every two years – and in a general report to be issued before 2014. In particular, the latter provides a review of the minimum greenhouse gas emission, on the basis of an impact assessment taking into account technological developments, available technologies and the level of cooperation within the sector.

The Commission can also send Recommendations (art. 4, part 5) on the ground of the evaluation of the adequacy of the measures envisaged by the Member State to fall within the trajectory.

The drafting of National Plans can also facilitate virtuous cycles of mutual imitation of other Member States measures, since the plans are published on the Transparency Platform which, according to art. 24, shall serve to increase transparency and promote cooperation between them.

What is remarkable is the intensity of these enforcement measures, since the Commission can even assess the merit of national choices, in order to evaluate the level of implementation and its prospective utilization, especially with respect to the future rearrangement of the European policy. In particular, according to art. 23 part 9, the Commission shall present a Renewable Energy Roadmap for the post-2020 period, taking into account the experience of the implementation of the Directive. The effects of the Commission's assessment are harsher than those activated for the open method of coordination on employment and social policies; in this field, the adoption of Plans is not constrained by any normative power of the European institutions<sup>27</sup>. Therefore, it is more evident the tendency to obtain results and evaluate the adequacy of

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<sup>27</sup> See S. DEL GATTO, *Il metodo aperto di coordinamento*, Napoli, 2012, p. 174.

national measures using parameters that can be considered both by EU institutions and stakeholders<sup>28</sup>.

On the contrary, the heightened level of efficiency reached by the oversight power of the Commission rests on the possibility to assess the merit of the plans and to force Member States to amend them, which derives indeed from a specific competence of the Union in the energy sector (art. 194 TFEU).

Therefore, Member States' residual ruling power in the sector is highly affected by the Commission's coordination regarding the adequacy of national measures to reach European objectives<sup>29</sup>. The coordination is justified by the need to assure that global benefits be achieved via their national implementation<sup>30</sup>. However, the Commission's intervention does not aim at the complete harmonization of policies, since significant discretion is still left to Member States' sovereignty. Thus, differences are not removed but preserved, within their compatibility with European objectives. However, in the future it is likely that European institutions will rule on more and more aspects of the renewable energy policy, which currently fall within Member States' competence, such as that of the structure and the forms of energy supply.

Besides, the assumption is confirmed by the fact that States' power to plan in the energy sector is narrower than their discretion in a contiguous field, namely the swap system of greenhouse gas provided by directive 29/2009/EC of Parliament and Council.

In order to understand this tendency, some technical premises are necessary.

The emission trading is a system for trading greenhouse gas emission allowances among States. The aim is to reduce greenhouse gas emissions, pursuant to the Kyoto Protocol, not only through the direct commitment of industries, but also through the trade of emission allowances. Therefore, the system establish an emissions cap for each State, which is allocated to firms in the form of emissions permits, which represent the right to emit or discharge a

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<sup>28</sup> See R. DEHOUSSE, *Il metodo aperto di coordinamento quando lo strumento prende il posto della politica*, in P. LASCUMES - P. DE GALÈS (ed. by), *Gli strumenti per governare*, Milano, 2009, p. 241.

<sup>29</sup> See F. GIGLIONI, *Governare la differenza. Metodi europei di coordinamento*, Jura, Temi e problemi del diritto, Pisa, 2012. See also S. DEL GATTO, *op. cit.*

<sup>30</sup> See F. CORTESE, *Il coordinamento amministrativo*, Milano, 2012, p. 118.

specific volume of the pollutant. The total number of permits cannot exceed the cap.

Quotas exchange mechanism represent a way to achieve the pollution reduction at the lowest cost. Each firm can assess if it is cheaper to directly achieve the imposed emissions reduction or to purchase the equivalent number of permits, each one representing a ton of carbon dioxide emission within a certain period.

At the beginning, Member States used to have a great discretion in establishing the limits and the allocation of permits in the National Allocation Plans. Member States had to assess NAPs for compliance with criteria laid down in art. 10 and annex III to the Emissions Trading Directive. The plan indicated the total amount of national emissions as well as their distribution.

The new Directive aims at harmonizing the greenhouse emission trade market, since the Commission directly establishes a standardized limit for all States, introducing equal parameters for the allocation of allowances, which decrease in function of the share to be distributed by auction. The free allocation of permits, through harmonized EU rules, aims at the best reduction of market distortion within the Community. For the same reason, the Directive envisages the adoption of a regulation for the monitoring, reporting and verification of greenhouse gas emissions.

Moreover, the Energy efficiency Plan 2011 (COM/2011/109) enhances the European coordination, since it divides in two part the process towards the target of 20% reduction of energy consumption by 2020<sup>31</sup>. Firstly, States have to define objectives and National Efficiency Plans, within the general purposes of the Union. In particular, States have to balance these objectives with the national factors that influence the energy consumption, like the possibility to efficient energy savings and the development of renewable sources.

Secondly, the Commission assesses the ability of the targets to meet the Union's general objective and to respond to the common aim. In addition, the Commission shall monitor the implementation of national plans and support States by offering the proper tools to reach that purpose. The review of the Commission can also introduce national mandatory objectives if a State has scarce possibility to meet its targets.

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<sup>31</sup> See L. AMMANNATI, *Le politiche di efficienza energetica nel quadro del pacchetto europeo clima-energia*, in *Amministrazioneincammino*, 16<sup>th</sup> July 2013.

Therefore, the relationship between the national and the European level of policy intervention is inspired by an ongoing monitoring of the Commission towards the adequacy of national measures with respect to European objectives. Member States' discretion, however, is progressively reducing, whereas in the area of renewable energy measures are devolved upon Member States, even within the control of the merit exercised by the Commission. In the emission swap system and in the field of energy efficiency, on the contrary, national objectives are gradually set at European level, thanks to a progressive power of substitution of the Commission, if Member States do not comply with European objectives.

#### 4. *European regulatory power in the area of renewable energy*

The Agency for the Cooperation of Energy Regulators (ACER) should ensure a better coordination among national regulators<sup>32</sup>.

ACER was set up as an evolution of European Agencies<sup>33</sup>, even if more insulated from national governments and the Commission; in addition, it was seen as a solution to overcome the difficulties faced by the European Energy Group<sup>34</sup> in developing a shared approach on the technical conditions necessary for enhancing the electricity market through international trades<sup>35</sup>.

As well as the other Agencies, ACER is the result of a balance between the integration of EU institutions with national administrations and State sovereignty in some areas of intervention; however, the Agency's role goes beyond the typical information and fact-finding coordination of the other agencies. Indeed, ACER stresses on its power to orient national regulatory agencies.

Its heightened independence, indeed, should strengthen the role of national regulators with respect to the possible political intrusion of elected

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<sup>32</sup> See Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators and L. AMMANATI, *L'Agenzia per la cooperazione tra i regolatori e la costruzione del mercato unico dell'energia*, in *Riv. it. dir. pubbl. comunit.*, 3-4, p. 675.

<sup>33</sup> On this topic, see E. CHITI, *The emergence of a Community administration: the Case of European Agencies*, in *CML Rev.*, vol. 37, 2000, 309- 343; ID., *Le agenzie europee: unità e decentramento nelle amministrazioni comunitarie*, Padova, 2002.

<sup>34</sup> Established pursuant to the Commission's decision 2003/796/EC.

<sup>35</sup> On the reasons underlining the establishment of the Agency, see the communication of the Commission "An Energy policy for Europe" of 10 January 2007.



bodies. From this point of view, the most recent directives on the energy market has strengthened national regulators insulation, both from elected bodies and stakeholders. For example, according to art. 39 of dir. 73/2009 “Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently”. For this purpose, Member States shall ensure that “do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks” (letter *ii*).

It is not by chance that its main purpose is to ensure the orientation and the reinforcement of national regulators’ tasks, the enhancement of cooperation between them, in order to eliminate regulatory differences for what regards international trade rules and make rulemaking more stable and predictable.

However, the Agency has mainly advisory powers, in the shape of opinions and recommendations to broadcasting system managers, national authorities and EU institutions. If it deem necessary the adoption of mandatory rules, can only send a recommendation to the Commission and favour the share of good practices between national regulators and stakeholders (art. 7, part 2). The Agency, if the Commission or a national agency demands it, can also express opinions on the conformity of a decision to the objectives of the Third Package of 2009, relying on objective data.

Moreover, it can decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure, art. 7).

However, its establishment represent the intention to shift the administrative regulation of the sector at European level, In order to harmonize the different national contexts<sup>36</sup>.

It is possible now to underline the specificity of the renewable energy policy compared to the conventional energy one, for what regards the desirable function of the national policies and the scope of their intervention.

For what regards the renewable energy supply, it is important to assure the appropriate development of the national energy supply chain, in order to grant the functioning of the power plants. Therefore, it is essential that the coordination at European level influence the choice on infrastructural investments stressing on the importance of environmental protection and supply

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<sup>36</sup> Consistent with this idea, see L. AMMANATI, *op. cit.*, p. 675.

security objectives, rather than on the rise of the energy Demand. Thus, Member States shall be guided towards the implementation of the technical pre-conditions for the integration of renewable energy plants in the national electricity grid.

At the same time, European administrative regulation shall avoid that national subsidies, set for those conventional power plants that can supply the contingent lack of renewable energy, alter free competition at the electric energy supply stage.

##### *5. The re-emergence of national energy planning.*

The challenges set, at both an international and European level, by the fight against climatic change and the need to ensure that European states have a secure energy supply, require an increase in public input to the process of the production and distribution of renewable energy<sup>37</sup>. These are demanding objectives, over and above the public service obligations already imposed on the activities of generation and energy supply (understood as a universal service) by the need to ensure the supply of energy to all users irrespective of their economic means (through the setting of reasonable charges and the guarantee of the continuity and quality of energy supply throughout the national territory)<sup>38</sup>.

The intensification of the financial crisis has indeed, increased doubts as to the ability of the market alone, without public planning, to guarantee the reduction of emissions damaging the climate and the security of energy supply through the increase in electricity generation using renewable sources<sup>39</sup>. The achievement of these objectives cannot be assured, contrary to what was hoped during the 1980s, by the adoption of conditional rules without the statement of an end, that is, directed essentially at setting the essential conditions for the free development of economic initiative laid down by independent regulators<sup>40</sup>.

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<sup>37</sup> See M. POLLIT, *Lo stato delle liberalizzazioni nel settore elettrico europeo. A che punto siamo?*, in *Mercato conc. regole*, 2009, p. 497.

<sup>38</sup> See R. CAIAZZO, *Obblighi di servizio pubblico nei settori dell'elettricità e del gas in Italia*, in *Rass. giur. en. elettr.*, 2004, p. 1 ss.

<sup>39</sup> See G. NAPOLITANO (a cura di), *Uscire dalla crisi - Politiche pubbliche e trasformazioni istituzionali*, Bologna, il Mulino, 2012.

<sup>40</sup> see S. CASSESE, *Fondamento e natura dei poteri della Consob relativi all'informazione del mercato*, in AA. VV., *Sistema finanziario e controlli: dall'impresa al mercato*, Milano, 1986.

Proof of this can be found in the fact that energy “plans” or “strategies” have even had to be introduced in economic systems, such as that of the United States or systems of English origin<sup>41</sup>, undeniably oriented towards the competitive market.

The stringent character of the goals set by the European Union in the renewable field requires public intervention precisely aimed at guaranteeing the achievement of the quantitative standards fixed at a European level (for example, 20% of energy consumed to be derived from renewable sources by 2020). These goals constitute, in their turn, the means for obtaining the necessary satisfaction of the public interests indicated above. The only form for such public intervention to take is through the laying down of guidelines, restrictions and controls on the exercise of economic free enterprise. These restrictions are not to be understood as ends in themselves but in the name of the achievement of general interests entrusted to public, national and European powers in the sector<sup>42</sup>.

The ultimate goal of grid parity, meaning the supply of renewable energy under the same conditions as conventional energy, is even now, still difficult to achieve in concrete terms. The provision of such energy sources, still representing a high proportion of end prices, cannot be entrusted solely to competition dynamics.

Restrictions on free enterprise imposed by public authorities are necessary to ensure the achievement of such objectives. Even so, such restrictions must be compatible not only with the process of the liberalisation of the electricity market but also with its progressive integration at the European level. The above compatibility in reality though, is difficult to achieve in practice because of the evident contrast, almost an oxymoron, between a liberalised economic activity and its necessary subjection to a form of public planning.

The need to find a balance between these two types of activity explains why both European and domestic legislators have relied, for the most part, on the setting up of incentive regimes characterised by market mechanisms (such as the negotiation of certificates representing production shares) to ensure the

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<sup>41</sup> On the English system, see *Department of Energy § Climate Change, Planning our electric future: a White Paper for secure, affordable and low-carbon electricity*, July 2011.

<sup>42</sup> See G. NAPOLITANO, *L'energia elettrica e il gas*, in S. CASSESE (a cura di), *Trattato di diritto amministrativo*, II ed., Milano, 2003, p. 2190.

achievement of a particular level of supply by renewable sources, even though such regimes have been introduced and supported by public intervention. Only recently has the need to reduce the social cost of incentives paid for by end-consumers of electricity induced legislators to review the mechanisms used for incentive provision. As a result the centralised planning power of the political authority has had to be recognised by its setting of the maximum threshold of incentives which can be provided for each type of plant<sup>43</sup>.

As has been acutely observed, the semantic change noticeable over recent years in Italy from the word “planning” to “energy strategy” represents a neat expression of the difficulty in reconciling these two aspects in the political sphere<sup>44</sup>.

The continuing value of planning activities in the energy sector derives from the fact that energy supply by a number of different operators must satisfy and be reconciled with the guarantee of significant public interests. Such interests are no longer confined solely to those embodied in the concept of a universal service (continuity of supply, sustainable prices and general access) but those, essentially transnational in dimension, relating to ecological issues and European states’ geo-political dependency on the security of supplies.

It is thus a type of planning with a wider and more complex meaning than that which has generally been implemented in Italy from the mid-1970s onwards<sup>45</sup>. Such planning initially had the essential purpose of legitimising recourse to nuclear power generation (subsequently placing reliance on coal and renewable sources following the 1987 referendum requiring the elimination of the nuclear option) when faced by the dramatic manifestation of the energy crisis, without any ambition to satisfy possible additional public interests<sup>46</sup>.

The re-emergence of the need for guidance and planning activities by public authorities in the energy field under the new name of a “national energy strategy”, starting from Article 7 of Legal Decree no. 112 of 25 June 2008

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<sup>43</sup> See LANDI - C. SCARPA, *Il livello ottimale degli incentivi verso la grid parity*; in G. NAPOLITANO - A. ZOPPINI (a cura di), *op. cit.*, p. 79

<sup>44</sup> See F. DE LEONARDIS, *Il ruolo delle energie rinnovabili*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 234.

<sup>45</sup> See Ivi, pp. 141-142. See also R. RANCI, *op. cit.*; and M. RAGAZZO, *Le politiche sull'energia e le fonti rinnovabili*, Torino, Giappichelli, 2011, p. 59.

<sup>46</sup> See R. PEREZ, *Crisi energetica e amministrazioni pubbliche*, in *Pol. Dir.*, 1983, 325; P. TESTORE - M. G. CASTALDI, *L'intervento dei pubblici poteri nel governo della politica energetica*, in *Riv. trim. dir. pubbl.*, 1985, p. 185.

converted into law by Law no. 133 of 6 August 2008, derives, for the first time, from the conviction that market mechanisms cannot guarantee the achievement of fundamental general interests, environmental sustainability and self-sufficiency of supply indicated by European legislation in this sector, neither can they suggest the operational measures required for the achievement of such aims in practice.

It is no accident that the recent public consultation document of March 2013, entitled “National Energy Strategy: for more competitive and sustainable energy”, drawn up precisely from the above perspective, includes among the main objectives of general energy planning (at point 2.2): the reduction of energy costs for consumers and business, the achievement and surmounting of the environmental goals envisaged by the European package Climate-Energy 2020, the security and independence of energy supplies and the contribution of the energy sector to sustainable economic growth.

At the same time this transverse planning should act as a kind of general guide, identifying the co-ordinates within which sector plans can be developed.

Although the Fukushima accident (11 March 2011) and the results of the repealing referendum of 12-13 June 2011<sup>47</sup> have resulted, for the moment, in a halt to the political process directed at the elaboration of national energy planning, with the repeal of the rules acting as the basis for its creation, even now a fully legitimate platform can be found in the legislation transposing the related European law into Italian legislation<sup>48</sup>. Such legislation moreover, expresses the meaning to be attributed to planning of this kind, giving concrete form to, and seeking to pursue the priorities set out by, the European legislation, indicating the procedures, operational measures and localised decisions appropriate to achieve them.

## 6. *The place of sector planning*

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<sup>47</sup> See B. CARAVITA DI TORITTO, *Questioni inerenti gli effetti del referendum tenutosi il 12 e 13 giugno 2011 per l'abrogazione delle norme in materia di nuove centrali per la produzione di energia elettrica nucleare*, in *Rass. giur. dell'en. elettrica*, 2011, p. 13; G. DE VERGOTTINI, *Il nucleare dopo il referendum del giugno 2011*, *ivi*, p. 55.

<sup>48</sup> Namely, art. 1, part 2, and art. 3 of d.lgs. 1 June 2011, n. 93.

So far as the specific sector under consideration is concerned, the most significant document is undoubtedly the *Piano di azione nazionale per le energie rinnovabili* ("PAN" – the national Action plan for renewable energy)<sup>49</sup>, first issued on 30 June 2010 in implementation of EC Directive 2009/28. The plan is supposed to offer analytical information on the objectives to be achieved in the different areas (transport, electricity and heating) and on the intervention required to achieve them taking account of the contributions made in reaching the same ends by energy efficiency measures.

It is, for all intents and purposes, a planning instrument which produces direct effects within the Italian legal system in that the plan is addressed not only to the Commission but also to all parties whose roles in the legal system gives them the power to adopt of the measures contained within it<sup>50</sup>.

The national action plans represent a preliminary to the subsequent, practical action of public authorities and their adoption should tend, according to a model given authoritative backing by legal doctrine,<sup>51</sup> towards the conciliation of different interests according to a substantially unitary framework<sup>52</sup> constituted by the achievement of the goals laid down by the European institutions.

The discretionary powers of the administrations vested with such functions through the drawing up of the national plans are thus limited by the requirement to achieve the goals set by Europe. More specifically, the restrictions imposed on national administrations through the national action plans descend directly from European legislation and the co-ordination exercised by the Commission to ensure their implementation.

This is the justification behind the Commission's subsequent assessment of the adequacy of the measures indicated to ensure the achievement of the European objectives. The Commission can require Member States to reformulate such measures if it considers them to be inappropriate.

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<sup>49</sup> See C. D'ORTA, *La programmazione energetica*, in S. CASSESE (a cura di), *Il governo dell'energia*, Rimini, Maggioli, 1992, p. 119.

<sup>50</sup> See M.S. GIANNINI, *Lezioni di diritto amministrativo*, I, Milano, 1950, p. 117; S. CASSESE, *Le pianificazioni amministrative di settore e le Regioni*, in *Riv. trim. dir. pubbl.*, 1971, p. 429 ss.

<sup>51</sup> See M. Nigro, *L'azione dei pubblici poteri. Lineamenti generali*, in G. AMATO - A. BARBERA (a cura di), *Manuale di diritto pubblico*, Bologna 1984, p. 725.

<sup>52</sup> See M. S. GIANNINI, *Diritto pubblico dell'economia*, Bologna, 1985, p. 299; S. CASSESE, *Tipologia della programmazione economica*, in F. GALGANO (ed. by), *Trattato di diritto commerciale e di diritto pubblico dell'economia*, I, Padova, 1977, p. 301 ss.

The first draft of such plan however, neither uses nor gives sufficient weight to the entire spectrum of discretionary powers recognised by European law as coming within the sphere of competence of individual Member States in the sector (the choice of source types to be exploited the most, infrastructure elements, the improvement of the national transmission grid and the location of plant) even though the exercise of the powers is expertly directed by the Commission's co-ordination activities. This activity indeed, is limited for the most part to the recognition of what already exists<sup>53</sup> and, above all, it does not appear to be able to influence subsequent compliance in the field. In effect, it does not take precise notice of the legal restrictions to be imposed on energy supply in order to promote the achievement of European goals in relation to renewable sources.

The plan faithfully reproduces the European strategy of strict convergence between the promotion of renewable sources (particularly for heating/cooling from air conditioning and the use of bio-fuels in the transport sector) and the increase in energy efficiency with a consequent reduction of energy consumption, but it does not provide a convincing description of the practical legal measures required for their achievement, remaining essentially declamatory in character.

The autonomy of national planning is not made explicit particularly in the crucial areas where national intervention is essential for an effective implementation of European policy promoting renewables. Thus mention is made to the need to adapt the national electricity transmission grid to allow the full integration of distributed energy production sources which are generally unpredictable and volatile in supply, as is normally the case for so-called "new" renewables. Such characteristics, as has been noted<sup>54</sup>, cause problems in relation both to the adequacy of the system, in the sense of its capacity to provide electricity at peak demand, and to security of supply because the volatility of generation requires the grid to absorb energy discontinuously.

On this front European law requires national energy planning to ensure the setting up of a national transmission grid capable of dealing with the ingress of energy sources whose supply and continuity are strongly conditional on the weather (such as concentrated solar power, wind, solar photovoltaic,

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<sup>53</sup> F. DE LEONARDIS, *op. cit.*, p. 153.

<sup>54</sup> See M. GRILLO, *Il mercato delle energie rinnovabili: aspetti economici*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 67.

hydroelectricity and wave and tide power),<sup>55</sup> that is, it must be sufficiently secure to be able to absorb energy whose production is highly variable and unpredictable.

The grid's distribution over national territory must thus be spread sufficiently wide to be able to meet electricity demand when it is at its highest while also avoiding the formation of situations of congestion. At the same time it must be fitted with reserve capacity (such as the presence of particularly flexible combined cycle plant) capable of starting up whenever renewable sources are not available (because of the absence of sun or wind) or energy generation unexpectedly reduces or ceases altogether (if they stop without warning).<sup>56</sup>

It will thus be necessary to make provision for a wider-spread distribution of generation plant throughout the country and delineate grid infrastructure in any case able to absorb unpredictable energy produced by the new generation of renewable sources without the occurrence of congestion<sup>57</sup>. The fact that the supply from non-renewable sources cannot be planned increases the costs supported by the electricity system because of the need on the one hand, to balance the energy produced in real time and on the other, to have flexible traditional plant available with sufficient reserve capacity.

The new grid development project, aimed at the creation of the so-called smart grid, is seeking to overcome such critical problems. These smart electricity grids use electronic devices to manage electricity transport deriving from all generation sources. These grids indeed, allow the greatest possible exploitation of the renewable energy distributed over the country and from unpredictable supply, permitting its full integration into the system<sup>58</sup>. On this basis, Article 18 of Legislative Decree 28/2011, transposing EC Directive 2009/28, provides for an increase in returns on invested capital for the distribution service<sup>59</sup> to be paid to electricity distributors which modernise their grids in accordance with the smart grid concept<sup>60</sup>.

Finally, it will be a priority to reduce the uncertainty and instability of the regulatory framework characterising the renewable energy sector in Italy both with respect to the constant introduction of new structures for the incentive

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<sup>55</sup> See D. BOBBIO - M. CIRILLO, *Le fonti di energia rinnovabili*, in P. RANCI, *op. cit.*

<sup>56</sup> See F. DE LEONARDIS, *op. cit.*, p. 131.

<sup>57</sup> See M. GRILLO, *op. cit.*, p. 67.

<sup>58</sup> Ivi, p. 68.



mechanisms and, above all, with respect to the complexity of the division of responsibilities between state and region in this field<sup>59</sup>. The low quality of the legislation indeed, itself represents one of the main “risks” threatening the success of the regulatory intervention in the sector<sup>60</sup>.

The difficulties experienced by Italy in achieving the national goal of 17% of renewable sources out of total gross end-consumption of energy, notwithstanding the high level of incentives dedicated to it, as to be attributed more to the shortfalls and delays occurring in the national legislation governing the field to the defects in the simplifications introduced into the authorisation procedures. These shortfalls involved both the delay in introducing national energy planning and the delay in issuing guidelines for the correct integration of new plant in the country as a whole<sup>61</sup>.

It has been these shortfalls above all which have resulted in the slowing down and suspension of authorisation processes for the installation of plant and hence hindering the achievement of the European objectives<sup>62</sup>.

#### *7. The division of powers between political power and regulatory agencies*

After having considered the current understanding of public policy on renewable sources and its radius of action, it will now be necessary to examine those public authorities with responsibility for the development of such plans based on their current powers. This should be in accordance with a development which is as consistent as possible with the specific roles of the political powers and the sector regulatory authority involved, combined with the

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<sup>59</sup> See S. CASSESE, *L'energia elettrica nella legge costituzionale n. 3 del 2001*, in *Rass. giur. en. el.*, 1998, p. 673; R. GALBIATI - G. VACIAGO, *Il governo dell'energia dal decentramento alla riforma costituzionale: profili economici*, in *Mercato, concorrenza e regole*, 2002, p. 367; G. NAPOLITANO, *L'energia elettrica*, cit., p. 2198 ss.; L. PERFETTI, *Il governo dell'energia tra federalismo e liberalizzazione. Profili di ricomposizione del quadro delle competenze*, in *Mercato concorrenza e regole*, 2002, p. 376 ss.; F. DONATI, *Il riparto delle competenze tra Stato e regioni in materia di energia*, in E. BRUTI LIBERATI, *op. cit.*, p. 35; E. PICOZZA - A. COLAVECCHIO, *Energie*, in G. CORSO - V. LOPILATO, *Diritto amministrativo dopo le riforme costituzionali*, Pt. spec., vol. II, Milano, 2006, p. 84 ss.; C. BUZZACCHI (a cura di), *Il prisma energia. Integrazione di interessi e competenze*, Milano, 2010.

<sup>60</sup> See G. M. ROBERTI, *Le politiche dell'Ue*, in G. VESPERINI - A. ZOPPINI, *op. cit.*, p. 37.

<sup>61</sup> The guidelines can be found in D.M. 10 settembre 2010, in GU 18 September 2010, n. 219.

<sup>62</sup> See M. COCCONI, *Promozione delle energie rinnovabili e semplificazione*, in *Rqda*, n. 2/2012.

process, already described, of upwards reference to the European level by both the political powers and the administrative regulators concerned with sustainable energy<sup>63</sup>.

After a survey of the existing legislative structure concerned with the division of powers between political and regulatory authorities, we will move on to describe what the author of this paper considers to be the structure best suited, in view of the different aspects involved, to the supporting system and what areas of competence in the sector are most suited to the regulatory authority's role as regulator.

It is well-known that Italy's energy governance system, including the renewables sector<sup>64</sup>, is divided in two in the sense that its formulation and implementation are distributed for the most part between the Ministry of Economic Development (hereinafter to be referred to as the "MED") and the sector regulatory authority - The Authority for Electricity and Gas ("Aeg"). Indeed, the criteria for this division have progressively moved away from the model of independent regulation laid down by the law setting up the Authority, Law no. 481 of 14 November 1995<sup>65</sup>.

In fact the above development was the cause of concern not only because of the departure from the model of independent regulation laid down by the law setting up the Aeg but, above all, because of problems of compatibility with European law in that Article 35 of EC Directive 2009/72, required the regulatory function to be entrusted to a single authority which is not only independent of the businesses being regulated but also from the related political body<sup>66</sup>.

The legislation coming into force following the initial law however, introduced progressive changes to the balance of powers originally established, giving the Ministry general powers over the definition of energy policy

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<sup>63</sup> See A. L. MONNET, *The role of independent regulators in policy making: Venue-shopping and framing strategies in the EU regulation of old wives cures*, in *European Journal of Political Research*, Vol. 52, 2013.

<sup>64</sup> see E. BRUTI LIBERATI, *La regolazione dei mercati energetici fra l'Autorità per l'energia elettrica e il gas e il governo*, in *Riv. trim. dir. pubbl.*, 2009, 4, p. 435.

<sup>65</sup> See D. SORACE, *La desiderabile indipendenza della regolazione dei servizi di interesse economico generale*, in *Mercato concorrenza e regole*, 2003, p. 337 ss.; M. DE BELLIS, *L'erosione dei poteri dell'Autorità per l'energia elettrica e il gas*, in *Rass. En. Elettr.*, 2004, p. 401.

<sup>66</sup> See A. ARGENTATI, *Il principio di concorrenza e la regolazione amministrativa dei mercati*, Torino, Giappichelli, 2008.

decisions in the renewable sources sector (in the original model, the political authority was only responsible for the generalised regulation of the incentive mechanisms set up by the legislature) – and thus relegating the Regulatory Authority to a distinctly residual role<sup>67</sup>.

The progressive erosion of the regulatory powers initially given to the Authority has recently been confirmed in the legislation transposing Community into national law in Legislative Decree no. 28 of 16 March 2009, with powers transferred not only to the Ministry but also to the Energy Services Manager (hereinafter to be referred to as the “Esm”).

The Regulatory Authority’s role has, in the meantime, been redrawn as that of an agency, endowed with essentially administrative powers and no longer able to take decisions of a policy nature. Thus the Authority’s powers in the field of net metering have been transferred to the Ministry<sup>68</sup>, the supervision of beneficiaries of incentives is now the responsibility of the Esm and powers concerned with energy efficiency have passed to the Esm and Enea<sup>69</sup>.

At the same time, so far as supervisory powers are concerned, the Authority has been given the role of ensuring compliance with regulations issued by the Ministry such as the obligation to buy green certificates<sup>70</sup> and white certificates, it must enforce compliance with the bar against transferring the increases in Italian Corporation Tax (IRES)<sup>71</sup> (the so-called “robin Hood tax”) and it has the power to impose sanctions in the case of breach of the provisions governing incentives for the production of electricity from renewable sources<sup>72</sup>. Even the possession of the latter powers is not fully consistent with the original model used by the law founding the Authority because they cannot be considered completely symmetrical or ancillary to the exercise of a regulatory function.

It does appear, however, to be entirely reasonable that the elaboration of the policy concerning the structure to be used for incentives for renewable sources (deciding whether it is to be administrative or market-based in nature<sup>73</sup>),

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<sup>67</sup> See M. CLARICH - F. SCLAFANI, *La regolazione dei mercati energetici*, in Conferenza di impostazione del Rapporto 2011 sull’energia, cit.

<sup>68</sup> See art. 24, part 5, lett. e of d.lgs. n. 28/2009.

<sup>69</sup> See artt. 29 and 30 of d.lgs. n. 28/2009.

<sup>70</sup> See art. 4, part 2, of d.lgs. 29 dicembre 2003, n. 387.

<sup>71</sup> Art. 81 of d.l. 25 July 2008, n. 112, now in l. 6 August 2008, n. 133.

<sup>72</sup> Art. 42 del d.lgs. n. 28/2009.

<sup>73</sup> See M. CLARICH, *La tutela dell’ambiente attraverso il mercato*, in *Dir. pubbl.*, 2007, p. 219 ss.

the identification of the renewable sources to be given greatest support and finally, the choice of who should bear the related financial charge – the consumer of the service or society at large (through general taxation) should be the responsibility for the most part of the legislature and the Ministry.

It has been rightly pointed out<sup>74</sup> that current incentives are designed to influence today's operators' decisions while the environmental benefits expected from the increase in renewable sources will be enjoyed mainly by society as a whole in the future. The positive external effects expected from their promotion are thus to be found at a considerable distance into the future and it is difficult to quantify the actual value of the resources transferred to operators now on the basis of purely technical and economic criteria.

Furthermore, the current macro-economic conditions, characterised by high taxes, exclude the payment of the incentives from the public purse. The charging of these costs to the consumer also appears justified, up to a given degree of economic sustainability, by the application of the polluter pays principle, that is, those causing environmental problems should be the ones to pay the related costs<sup>75</sup>.

It is only a body of a political, representative nature and not one whose powers are purely technical in nature, which should be charged with decisions of such sensitivity. They are decisions which cannot be determined by parameters of purely economic rationalism, relating to the economic resources to be invested in the sector, where such resources should come from and the specific uses to which they should be applied.

It is equally to be hoped however, that the challenges laid down by European law in relation to the diversification of sources of energy supply with an increase in renewable sources, can be pursued without having to sacrifice the principles underlying the process of sector liberalisation<sup>76</sup>, of consumer protection and of the effective separation of the infrastructure from other stages in the production cycle, the so-called unbundling process.

The maintenance of the different aspects of this compatibility can only be ensured by independent regulatory authorities which, precisely because of

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<sup>74</sup> See M. GRILLO, *op. cit.*, p. 69.

<sup>75</sup> See G. BORTONI, *Il regolatore come un «Giano bifronte»*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 266.

<sup>76</sup> See G. PITRUZZELLA, *Energie rinnovabili e concorrenza: la prospettiva dell'Autorità antitrust*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 277.

their independence, are more likely to encourage competitive dynamics, act on the basis of technical/economic principles and ensure the stability of their decisions over time<sup>77</sup>.

A number of the powers already possessed by the Aeg under Italian law could already be used as means to begin to achieve these ends.

The Authority is required, for instance, to ensure compliance with the so-called public service obligations of renewable energy (in common with conventional energy but in practice their achievement is more problematic in the renewables sector). Such obligations include ensuring charges are accessible to consumers and businesses and that the safety, quality and continuity of the service is maintained in the primary interest of user protection. On this point it is useful to recall that Article 3.2 of EC Directive 2009/72 includes among the public service obligations that states are required to impose on business operators “the protection of the environment including energy efficiency, energy from renewable sources and climate protection”.

The definition and compliance with the above obligations is also relevant, in the case of renewables, to setting the amount of the incentives to be accorded to the production of such energy sources, their application over time and the criteria for their maintenance and updating, because of their undeniable effect on the accessibility of electricity charges.

Under current legislation Aeg also has regulatory duties relating to the setting of conditions for connection of plant to the transport and distribution grids, a duty which of necessity includes an incentive-definition aspect.

It is thus hoped that some of the more specific segments of the support regime will be entrusted to the sector regulatory authority because of their direct relevance to the regulatory function<sup>78</sup>.

It is well-known that Italy has sought to achieve the objective of 17% renewables out of gross end-consumption of energy through an excessive increase of photovoltaic energy generation as compared with an increase in energy efficiency or increased recourse to other renewable sources. This arose from a disproportionate level of public subsidy with respect to the actual investment costs over the period 2007-2011. The excessive increase produced effects which distorted the competitive dynamics of the electricity market as

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<sup>77</sup> Accordingly, see B. LIBERATI, *Governo e Autorità per l'energia*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 52.

<sup>78</sup> *Ivi*, p. 53.

identified recently by the *Council of European Energy Regulators ("Ceer")*<sup>79</sup> prejudicing the end-consumer by the excessive increase in traditional energy prices<sup>80</sup>.

The regulatory Authority's duties must thus include that of avoiding excessive prejudice to the consumer from unsustainable increases in energy prices or a weakening of competition on the electricity generation market deriving from incentive-based distortion to competitive forces. The imposition of such service obligations must thus be consistent with the guarantee of free economic enterprise, avoiding effects causing unreasonable distortion of the competitive dynamics of the electricity market so far as the supply of conventional energy is concerned.

From this point of view, although the regulatory model adopted for the electricity market at the European level is undoubtedly characterised by the need to guarantee the general interest in the service, this need must necessarily be met in a context also guaranteeing the freedom of initiative for business enterprises and must not preclude the possibility of providing the service on an economic footing<sup>81</sup>.

The Authority will also need to put the technical conditions in place to make it possible for renewable energy plant to have full access to the national grid while also ensuring that this does not distort competition at the energy generation stage.

This objective is moreover, assisted by the fact that the strengthening and modernising of the national grid appear for the most part to be oriented by the European and national legislatures towards the satisfaction above all of the general interests of the national and European energy system as a whole, including, without doubt, that of the promotion of renewable sources, rather than towards the particular interests of the infrastructure manager. The powers

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<sup>79</sup> See Ceer position paper on the European Commission's Communication «*Making the internal energy market work*», May 2013.

<sup>80</sup> See G. LANDI - C. SCARPA, *Il livello ottimale degli incentivi verso la grid parity*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 79.

<sup>81</sup> See A. TRAVI, *Produzione e vendita di energia elettrica e gas e obblighi di servizio pubblico*, in M. DE FOCATIIS - A. MAESTRONI (a cura di), *Libertà di impresa e regolazione nel nuovo diritto dell'energia*, Milano, Giuffrè, 2011, p. 16.

attributed to the Regulatory Authority in this context are, for the most part, consistent with a command and control model<sup>82</sup>.

This is how the grant of regulatory powers to the Aeg “over interventions reinforcing the grid necessary to allow the emission and full collection of the energy produced by already running generation plant from renewable sources” should be read, pursuant to Article 17, paragraph 4, of Legislative Decree no. 28 of 3 March 2011. These initiatives include “systems for the accumulation of electrical energy designed to assist the dispatching of unpredictable interventions”.

The same need to promote the integration of renewables plant is a matter of great concern to other European countries. In Germany for instance, there is an urgent need to install new grids and improve existing ones to adapt to the production capacity of renewable sources which are highly unstable as a result of their dependence on climatic conditions. In the meantime the priority is assured for renewable sources bringing conventional power stations to a stop whenever there is an excess of wind or solar power. Finally, the grid connection of plant using renewables also presents particular complexities in this context especially when, for example, it is necessary to make provision for cabling for the connection of turbines sited in the open sea<sup>83</sup>.

Nonetheless, in order to avoid the situation where the administrative regulations intended to integrate generation plant from renewables into the national grid has a disproportionate effect on the functioning of competition at the electricity generation stage, support from public finances for the traditional thermo-electric reserve capacity to be used when the contribution from renewable energy is absent, must be provided in the form of circumscribed and limited capacity payments.

To the same end it will also be necessary for the Aeg to use its powers relating to the drafting of technical/economic conditions for the connection of plant to the transmission and distribution grid, to ensure the priority of plant using renewables in the connection to the electricity

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<sup>82</sup> See E. BRUTI LIBERATI,  *Mercati dell'energia e regolazione finalistica: la disciplina delle reti di trasporto nel Terzo Pacchetto energia*, in M. DE FOCATIIS - A. MAESTRONI (a cura di),  *Libertà di impresa*, cit., p. 13 ss.

<sup>83</sup>  *Si v., amplius, S. RUPPRECHT, Disciplina delle energie rinnovabili in Germania*, F. CORTESE - F. GUELLA - G. POSTAL,  *op. cit.*, p. 309.

transmission grid and that they are given precedence in dispatching. Both are provided for in the legislation<sup>84</sup>.

It is important to emphasise, from a comparative perspective, that the same priority is included in the regulatory provisions of many national states. Under Austrian legislation for instance, transmission of energy produced by renewable sources has to be given priority over that produced by conventional sources but only when grid capacity is not sufficient to cover all access requests at the same time (§ 20 *EIWOG*)<sup>85</sup>. German regulations too, apply a “priority principle” in relation to the connection of energy sources in that the renewables-based systems must be connected to the grid before the systems supplying energy from traditional sources (§ 5 I *EEG*)<sup>86</sup>.

#### 8. Conclusions.

The importance of European and international interests of environmental sustainability and the security of energy supply has given rise at one and the same time, both to reference upwards to the European level of a significant part of the sector legislation and a reinforcement of public intervention in this field.

First the occurrence and then the worsening of the financial crisis have indeed, undermined confidence in the capacity of competitive dynamics to guarantee on their own, without any public intervention, the reduction in harmful emissions and the security of energy supply through increase in energy sources. Even the economic systems more open to the competitive market option such as that of North America are no longer convinced that the reduction of such negative external effects can be ensured solely by the adoption of rules which are conditional and not imposing final objectives, imposed by independent regulators and aimed exclusively at establishing the essential conditions for the untrammelled exercise of economic private initiative in the sector.

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<sup>84</sup> see artt. 17 ss of d.lgs. n. 28 del 2011.

<sup>85</sup> SEE E. ORLANDO, *Energie rinnovabili: l'esperienza austriaca*, in F. CORTESE - F. GUELLA - G. POSTAL, *op. cit.*, p. 267.

<sup>86</sup> SEE S. RUPPRECHT, *Disciplina delle energie rinnovabili in Germania*, in F. CORTESE - F. GUELLA - G. POSTAL, *op. cit.*, p. 303.



On the contrary, the need for public intervention has become clear, aimed specifically at guaranteeing, both in Europe and at the level of individual states, the achievement of European objectives of an environmental and policy/strategic nature.

In this new context, the significance of national planning, even though mitigated by its description as a “National Energy Strategy” and taking the form, for the part involving renewable sources, in sector planning – should consist in concrete measures to be taken at a national level to achieve the objectives defined by the European legislature on the increase in renewable sources. Even so, these measures must not be merely declamatory in nature – they must impose effective restrictions, capable of influencing subsequent administrative procedures implemented by national administrative authorities<sup>87</sup>.

The optimum boundary between sector planning and protection of the freedom of economic initiative depends entirely on the decision to implement adequate national support regimes capable of achieving the required share of energy from renewable sources out of end consumption of energy (imposed at the European level), without an excessive compression of the exercise of economic initiative.

The residual legislative powers reserved to national states in this area is concentrated, above all in the definition of practical strategies to be implemented at a country level to encourage the balanced development of such sources in their territory in the light of Article 194 of the European Union Founding Treaty.

It is undoubtedly an area which has by now been restricted to the narrow path delineated by the European Commission’s constricting activities of co-ordination which, under EC Directive 2009/28 anticipates the related trends and assesses the outcomes with care from both the quantitative and qualitative point of view. Community enforcement indeed, is substantive in nature given that it is able to make an assessment of the merits of the national measures identified by each Member State. The trans-national dimensions of the interest to be pursued indeed, such as those of geo-political security and combating climate change, means that any planning that only takes account of the national horizon will be decidedly inadequate and leads to the expectation that there will

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<sup>87</sup> See G. NAPOLITANO, *Energie rinnovabili: un problema di governance*, in G. NAPOLITANO - A. ZOPPINI, *op. cit.*, p. 283.

once again be a reference upwards in a further round of regulations at the European level.

The national context nonetheless remains a strategic area for discretionary political powers in the light of the subsidiarity principle, above all in relation to the issues involved in the adaptation of the national transmission grid in such a way as to make possible a full integration of those sources which, like renewables, possess specific characteristics of volatility and unpredictability.

The restrictions imposed by public authorities as a result of such planning must however, be compatible not only with the process of liberalisation of the electricity market but also with its progressive integration at the European level, guaranteeing at one and the same time, the protection of the consumers of the services and openness to competition. Both production and energy dispatching must be open to such competition through the reinforcement of the unbundling process.

The various aspects of this compatibility can only be guaranteed, including on the basis of the developments in European law contained in the approval of the third package, by the powers exercised by the national sector regulatory authorities which, as a result of their independence from political bodies and their predominantly technical composition, are more prepared to encourage market dynamics, to base their actions on technical/economic criteria and to guarantee the stability of their decisions over time. Moreover, the third European package itself adumbrates a future development characterised by a strengthening of the role of national regulatory authorities with regard both to their institutional structure and to an increase in the powers they will be able to exercise.

It is thus for these regulatory authorities to avoid a situation where the support regimes set up by national states to encourage a quantitative increase in such sources both in relation to supply and adaptations to the transmission grid, prejudices the consumers of the service and introduces dynamics tending to distort competition in the production stage as also that of energy distribution.

**ABSTRACT**

Monica Cocconi - *Planning and regulating the renewable electric energy.*

L'articolo si propone di affrontare un tema da tempo dibattuto e ancora al centro di numerose e contrastanti analisi: l'energia rinnovabile e il suo utilizzo.

L'Autrice evidenzia che il vantaggio che scaturisce dall'utilizzo delle fonti rinnovabili è da ricercarsi non solo nel contenimento dei danni ambientali ma anche nella riduzione della dipendenza commerciale degli Stati ad altre nazioni in materia di combustibili. Tale scopo sembra però non aver raggiunto ancora la sua completa realizzazione, a causa del fatto che la politica ambientale comunitaria, se da una parte può favorire l'introduzione della Green Energy all'interno di tutti gli Stati, dall'altra sembra inibire il potere di scelta degli stessi per quanto riguarda la selezione del tipo e della quantità di energia da adottare, con l'effetto di poter influenzare non positivamente anche determinati settori industriali. In altre parole, sembra esserci incompatibilità fra quanto stabilito dalla Commissione Europea e le diverse realtà nazionali.

Per questo motivo, l'articolo propone una panoramica del progetto europeo in materia di risorse rinnovabili e delle legislazioni degli Stati membri (Italia inclusa). Segue una descrizione di come l'attuazione del progetto può influire sugli Stati stessi. Alla luce di ciò, l'Autrice propone di riconoscere agli Stati membri la possibilità di scegliere e di adottare misure volte alla difesa dell'ambiente nonché il diritto di sfruttamento energetico, consentendo agli stessi di realizzare gli obiettivi europei.

*The article introduces a long-standing topic of discussion: renewable energy and its use.*

*The main advantage of exploiting renewable energy is not only the reduction of environmental pollution but even the reduction of the dependence from fossil fuel foreign imports. However, this aim has not been fulfilled yet because, on the one hand, European environmental policy encourages the*

*introduction of Green Energy in all Member States but, on the other, it faints their power to choose the proper mix of energy sources. For this reason, European laws seems to badly affect even the industry. In other words, there is a quite great incompatibility between what is established by the European Commission and States' legislations; which doesn't allow a right implementation of EU laws.*

*Thus, the article provides a wide description of the European environmental project and Member States' legislations (even Italian one) and of the main effects that the European policy can have on Member States. Assuming this, the Author finally proposes to give States the opportunity to choose and to take measures aimed to the defense of the environment and the right exploitation of energy. In this way, States could fulfill European goals.*