Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XVI, 2023, no. 2, pp. 267-278
https://doi.org/10.32084/tkp.8029

THE NEW HORIZONS OF TAX LAW BETWEEN ENERGY POLICIES AND ECOLOGICAL TRANSITION: THE CASE OF ENERGY COMMUNITIES

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Abstract. In view of the objectives of environmental sustainability and climate neutrality, advocated by the Paris Agreement and the "European green deal", energy taxation represents a fundamental tool for the gradual replacement of traditional fossil fuels with renewable ecological sources in a cost-saving manner. Moreover, it enables us to rethink energy supply models. The reflection considers measures developed at both EU and domestic levels, examining tools, mechanisms and tax incentives designed to facilitate an environmentally-friendly energy transition. Particular focus is given to energy communities – a form of energy system democratization allowing users to become producers, consumers and managers simultaneously, transforming the energy market, still reliant on fossil fuels and organized around centralized production and distribution networks, from a "green" perspective.

Keywords: new horizons of tax law; energy policies; ecological transition; energy communities

1. ENERGY TAXATION BETWEEN THE EUROPEAN GREEN DEAL AND THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT

In view of the objectives of environmental sustainability and climate neutrality [Gratani 2014, 535; Carducci 2021, 51; Comelli 2021a, 1969], advocated by the Paris Agreement [Nespor 2016, 81; Savaresi 2016, 16; Ari and Sari 2017, 175; Aristei 2017, 73; Klein, Carazo, Doelle, et al. 2017; Tomoaki 2018, 42; Blasizza 2021, 642] and the "European green deal" [Claeys, Tagliapietra, and Zachmann 2019; Rosembuj 2019, 1; Majocchi 2020a, 203; Padoa-Schioppa and Iozzo 2020, 3; Comelli 2021b, 44], energy taxation represents a fundamental tool for the gradual replacement of renewable ecological sources to traditional fossil fuels [Chomsky and Pollin 2020, 100], also in order to achieve cost savings and rethink energy supply models in a promotional dimension of the tax authorities [Uricchio 2015, 19], to progressively reduce greenhouse gas emissions through the use of renewable and environmentally friendly energy sources [Moratti 2020, 439].

ISSN 1899-7694
e-ISSN 2719-7379

The strategy – adopted within the EU with the "Clean energy package" (set of measures consisting of four regulations and four directives approved between 2018 and 2019) and implemented by the domestic laws of the Member States – intends to transform the economic system according to a circular [Soncini 2019, 325; Cocconi 2020, 1; Greggi 2020, 25; De Leonardis 2021, 161; Uricchio 2022a, 185], efficient, competitive, sustainable and inclusive paradigm [Uricchio, Chironi, and Scialpi 2020, 1], through the implementation of clean technologies, favored by the provision of incentive fiscal policies, in order to promote, in the long term, the production of completely decarbonised energy with a consequent zero climate impact.

As part of the program called "Fit for 55" [Monteduro 2021, 447; Fregni 2022, 161], the European Commission has presented a series of proposals aimed at achieving the objectives expressed by the European Green Deal, consisting of a 55% reduction in net carbon dioxide emissions by 2030 (compared to previous levels) and energy neutrality to be achieved by 2050 through a series of regulatory interventions aimed at modifying or revising the European framework for the taxation of energy products [Salvini 2007, 1670; Verrigni 2007, 251; Cerioni 2008, 49; Puri 2013, 191; Orsini 2014, 9; Traversa and Wolff 2016, 397; del Federico and Giorgi 2017, 297; Giorgi 2017, 58; Verrigni 2017, 67; Pirlot 2020, 359; Dibilio 2021, 393].

According to the objectives, acquire further importance the Directives on energy efficiency and renewable sources, those on the emissions trading system, on transport, as well as on the creation of a new EU own resource, called the "Carbon Border Adjustment Mechanism" [Majocchi 2020b, 275; Idem 2020a, 91; Letizia 2021, 561; Santacroce and Sbandi 2021, 3942; Letizia 2022, 199].

The 2030 Agenda for Sustainable Development [Montini and Volpe 2016, 19; Niklasson 2019; Karlsson and Silander 2020], an ambitious action program for people, planet and prosperity, signed in September 2015, also deals with issues relating to the energy sector, setting 17 objectives and 169 targets that address the dynamics of the sustainable development in an economic, social and environmental dimension [Moratti 2020, 439].

In this context, the theme of energy is divided into multiple objectives, the common feature of which is the need to increase the diffusion of clean energy to counteract environmental degradation and reduce the risk of catastrophic events[1]: objective number 7 intends to ensure access for all to affordable, reliable, sustainable and modern energy systems to significantly increase the share of renewable energies by 2030 and double the global rate of improvement in energy efficiency [Moratti 2020, 439].

[1] More generally, on the tools developed to prevent natural disasters resulting from climate change, see Pistone and Traversa 2015, 27.

Almost simultaneously with the preparation of the 2030 Agenda, with the Communication entitled "A framework strategy for a resilient Energy Union, accompanied by a forward-looking climate change policy" COM (2015) 80 final, which can be considered the prodromal act to the adoption of the "climate package", in relation to the energy policies adopted within the EU [Pozzo 2009, 841; Quadri 2011, 839; Marletta 2014, 465; Roggenkamp, Redgwell, Rønne, et al. 2016, 8; Talus 2016, 4; Leal-Arcas and Wouters 2018, 3; Sbrescia 2020, 819], concerns were expressed deriving from the fact that the Union still imports too high a percentage of its energy needs and highlighted the role that they could have played individual citizens in the energy transition process [Meli 2020, 633].

2. THE ITALIAN LEGISLATION AND THE *DE IURE CONDENDO* PERSPECTIVES. THE "ENERGY COMMUNITIES"

Even at the domestic level [Quadri 2012, 1031; Mainardis 2020, 1329; Manno 2023, 19], the legislative acts adopted to transpose EU directives, with repercussions in tax matters, are many: Article 24, legislative decree 3 March 2011, n. 28, implementing Directive 2009/28/EC, in the formulation resulting from the changes made by Article 20, law 20 November 2017, n. 167, which defines methods and criteria for the incentive of electricity from renewable sources; the decree of the Ministry of Economic Development of 4 July 2019, containing incentive measures for electricity produced by on shore wind, solar photovoltaic [Vitiello 2008, 835], hydroelectric and gas plants residual from purification processes; Article 65, paragraph 1, decree law 24 January 2012, n. 1, converted by law 24 March 2012, n. 27, which, in relation to solar photovoltaic systems with modules placed on the ground in agricultural areas [Marchianò 2020, 96], precludes access to state incentives recognized by legislative decree March 3, 2011, n. 28.

From a *de iure condendo* perspective, there was no shortage of proposals aimed at adopting tax exemptions for electricity from renewable sources, as well as reductions for energy sources used by "vulnerable families" or by energy-intensive companies [Santacroce and Sbandi 2021, 3943].

Focusing attention on the *de iure condito* aspects relating to "energy communities", it is appropriate to recall the "Clean Energy Package", which includes, among other things, Directive 2018/2001/EU of 11 December 2018, on "promotion of the use of energy from renewable sources" (so-called RED II), and Directive 2019/944/EU of 5 June 2019, concerning "common rules for the internal electricity market".

These sources have been incorporated, initially partially with Article 42 *bis*, decree law 30 December 2019, n. 162, converted by the law 28 February

2020, n. 8, and subsequently definitively with the legislative decree 8 November 2021, n. 199 (which implemented Directive 2018/2001/EU) and with legislative decree 8 November 2021, n. 210 (which transposed Directive 2019/944/EU), in order to promote the energy transition from an ecological point of view and give the citizen/taxpayer a central role in the energy sector.

In this way, the domestic system has given entry to the figures of collective self-consumption from renewable sources, renewable energy communities and energy communities of citizens, mechanisms of cooperation, aggregation and sharing of self-production and consumption of renewable energy, endowed with particular flexibility, successfully used for some time in other jurisdictions, thanks to which even small users, in the past only consumers, can take an active part in the energy market, becoming producers [Bevilacqua 2020, 1; Cusa 2020, 287; Romeo 2021, 1; Sokołowski 2020, 1].

3. THE FIGURE OF THE "PROSUMER" AND THE TRANSITION TOWARDS A LOW CARBON ECONOMIC MODEL

These institutes represent a form of democratization of the energy system, achieved through the co-ownership of the means of production of renewable energy and the shared management of distribution tools, to allow users to become producers, consumers and managers at the same time, in order to transforming the energy market into a "green" perspective, which is still fueled mainly by fossil fuels and organized according to a centralized production and distribution network [Meli 2020, 632].

Regardless of the various declinations assumed, a unifying element can be found at the basis of the "energy communities": the aggregation of a certain number of prosumers (understood as self-producers and self-consumers of energy from renewable sources) willing to share the plants of production to facilitate the adoption of eco-sustainable behaviors.

In this context, there is no shortage of differentiations. In fact, while the "renewable energy communities" are based on the principle of autonomy between the members and on the necessary proximity to the generation plants, being able to produce and manage the energy generated from renewable sources in different forms (electricity, heat, gas), the "energy communities of citizens" are not inspired by the principles of autonomy and proximity, being able to produce and manage only electricity generated from both renewable sources and fossil fuels [Giobbi 2021, 64].

The phenomenon, which evokes (but overlaps with) that of the energy cooperatives [Cusa 2015, 663; Tarhan 2015, 104; Capo 2021, 616] present in our system from an era dating back and, for some time, also widespread

in the renewable energy sector, revolves around the figure of the "prosumer"[2], whose headword, composed from the phrases "producer" and "consumer" (sometimes considered a "professional consumer"), it identifies a subject who at the same time assumes the role of producer and consumer or who, by consuming, contributes to production [Meli 2020, 630].

In Directive 2018/2001/EU, self-production and consumption of renewable energy become a priority tool for the transition to a low-carbon economy, through forms of aggregation that stimulate change and encourage citizens to use renewable energy sources, making them protagonists of the ecological renewal of the energy sector.

This objective is pursued more explicitly with Directive 2019/944/EU, which, by providing an even more detailed regulatory framework, recognizes the right to citizens who operate individually or within the "Citizen Energy Communities" to become an active part of the energy system, acquiring the ability to produce, consume, accumulate and distribute self-produced energy, through a decentralized and competitive model [ibid., 634-35].

4. NON-FISCAL INCENTIVE MECHANISMS AND TAX BENEFITS IN FAVOR OF RENEWABLE ENERGY COMMUNITIES

This reflection, taking its cue from the measures developed at EU and domestic level, intends to focus attention on the tools, mechanisms and tax incentives aimed at operating the energy transition from an ecological point of view [Kogels 2019, 2; Uricchio 2020, 13; Clò 2018, 102; Muratori 2021, 255; Uricchio 2021, 327], also from a *de iure condendo* perspective [Parente 2022, 129].

In a promotional dimension, to implement the spread of "energy communities", in addition to the tax incentives recognized in the field of energy efficiency by sector legislation (Article 16 *bis*, paragraph 1, letter h, Presidential decree 22 December 1986, n. 917; Articles 119 and 121, decree law 19 May 2020, n. 34, converted by the law 17 July 2020, n.7), the domestic legislator, transposing the 2018/2001/EU Directive, previously provided, on an experimental and transitional basis (Article 42 *bis*, legislative decree n. 162/2019, converted by law n. 8/2020 and decree of the Ministry of Economic Development of 16 September 2020), then, definitively (legislative decree 8 November 2021, n. 199), specific non-tax incentive measures, applicable at no additional cost to the State.

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[2] Expression coined by Toffler 1987.

In addition to these last measures, the economic advantages and the *favor* fiscal instruments which renewable energy communities can enjoy are of specific relevance.

From an economic point of view, an energy community that uses renewable sources benefits from multiple advantages, both in terms of cost savings, not having to bear costs for the purchase of energy, and in a lucrative key, being able to make a profit through the sale of the energy produced and use the incentive mechanisms described above.

From a tax point of view, the benefits reserved for energy communities are limited to the direct taxation sector and, although placed in an alternative relationship, are manifold.

On the one hand, Article 16 *bis*, paragraph 1, lett. h), Presidential decree n. 917/1986 [Forte 2013, 2072; Lamedica 2013, 2961; Milan 2013, 1711; Forte 2014, 3397; Fanelli 2017, 3606; Forte 2018, 655; Basilavecchia 2017, 146; Uricchio 2017, 206; Melis 2020, 591; Uricchio 2020], in the formulation resulting from the changes made by Article 119, paragraph 16 *bis*, decree law 19 May 2020, n. 34, converted by the law 17 July 2020, n. 77, provides, with regard to income tax, a deduction equal to 50% of documented expenses, up to the threshold of 200 kW and a total amount of expenditure not exceeding 96,000 euros, for interventions relating to the construction of works aimed at achievement of energy savings with particular regard to the installation of systems based on the use of renewable energy sources.

On the other hand, Articles 119 and 121, decree law 19 May 2020, n. 34, converted by the law 17 July 2020, n. 77, as resulting from the changes made by law 30 December 2020, n. 178,[3] increased the deduction rate for expenses incurred from 1 July 2020 to 30 June 2022 [Balzanelli and Valcarenghi 2021, 4327] to 110%, in the face of specific energy efficiency measures, the reduction of seismic risk, the installation of photovoltaic systems [Bordolli 2021, 149] and infrastructures for electric vehicle charging.[4]

For the latter measure, as an alternative to the use of the tax deduction, it is possible to exercise an option for the assignment of the credit corresponding to the deduction due or to benefit from an advance contribution in the form of a discount from the suppliers of the goods or services on the consideration due, for a maximum amount not exceeding the amount itself (so-called discount on the invoice).

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3 On which, see Friscolanti 2021a, 19; Idem 2021b, 34.

4 See Agenzia delle Entrate, *Superbonus 110%*, marzo 2021, p. 2.

5. CRITICAL CONSIDERATIONS

Although it emerges from the regulatory framework that, in the intentions of the EU legislator, in the near future, energy communities should play a crucial role in the production and market of "clean" energy, tax breaks and economic incentives developed at domestic level, at present, still appear inadequate.

In fact, while the incentive tools (i.e. those of a non-fiscal nature) constitute a peculiarity of the reward system reserved for energy communities, despite the perplexities and antinomies that emerge on the application level due to the complexity of the regulatory provision, the same singularity is not found. for tax concessions[5] applicable to energy communities: the latter do not present particular differences with respect to those benefiting, in the presence of the legal requirements, those who carry out energy redevelopment interventions.

By emphasizing the promotional dimension of the tax authorities, within a more advanced model of assessment and taxation of the energy sector, it would have been preferable to seize the opportunities offered by EU legislation, enhancing, through more incisive tax measures, the role assumed by energy communities for the pursuit of collective interests of absolute importance, such as, for example, the implementation of renewable energy sources, environmental protection and the fight against climate change [Bernardi and Miccù 2021, 89].

This profile would have made it possible to reduce the tax burden and enhance environmental interests, encouraging investments for energy efficiency to implement an "effective" ecological transition [Uricchio 2022b, 867; Idem 2023, 83].[6]

The hope, then, is that, by reviewing the legislative choices with a view to the use of adequate incentive tax models, energy communities can be conceived "in a functional sense", becoming a driving force for the promotion of renewable energy sources and an effective tool of consumer protection.

In this way, the phenomenology of energy poverty would be limited, access to "clean" energy would be favored and a "truly" sustainable development achieved, allowing environmental interests to be combined with the recovery of the economic system, severely compromised by the COVID-19 pandemic and war crisis.

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5 On tax concessions, see Fantozzi 2004, 91-92; d'Amati 2015, 25; Fiorentino 2017, 69; Stevanato 2019, 52; Paparella 2021132.

6 More generally, on the main preordained incentives for the implementation of environmental investments in Italy, see Maruccia 2021, 367.

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