

# The Impact of the EU Energy Policy on Member States' Legal Orders: State of Art and Perspectives of Renewable Energy in Italy and Great Britain

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## Abstract

Recently, the European Union has adopted the "Climate and Energy Packet" (Directives 2009/28/EC, 2009/29/EC, 2009/31/EC) and the "Third Energy Packet" (Directives 2009/72/EC, 2009/72/EC, 2009/92/EC), aimed to create a whole competitive energy market, based on both the principle of perfect competition and that of high environmental sustainability. The environment, in fact, has become one of the elements that sensibly influence the EU policy, which for some time seems to have decisively shifted towards pursuing green economy objectives.

However, moving from the assumption that the effectiveness of the European legislation can be tested just when it is transposed in the Member States' legal orders, the article analyzes how Italy and Great Britain have complied with the above mentioned Directives. In so doing, it gives account of both the state of art and perspectives of the renewable energy policies in those Countries, looking for convergences and divergences, and concludes that sometimes the effective fulfilment of the European tasks could require, above all, a shift of perspective by Member States.

**Keywords:** renewable energy, European Union, "Climate and Energy Packet", "Third Energy Packet", sustainable development

## 1. The Role of "Energy" in the EU Law System

When in September 1946, talking to students of the University of Zurich, Winston Churchill highlighted the need "to build the United States of Europe..." (Note 1), he certainly also referred to the necessity to create a partnership in the energy sector (Note 2). The latter, in fact, has always played a substantial role in the Old Continent's economy, thus having a considerable impact on the dynamics between Member States and constituting a relevant issue in the ambit of international relations (Note 3).

Since the beginnings, Europe devoted two treaties to energy, the one founding the European Coal and Steel Community (ECSC), in 1951, and the one founding the European Atomic Energy Community (EURATOM), in 1957 (Note 4). In contrast, nothing was established with regards to energy in the EEC Treaty "neither from the perspective of market liberalization, nor with reference to the specific competences of the Community institutions" (Note 5).

Even though these latter - first based on the Article 235 TEEC [today Article 352 of TFEU] (Note 6) then as provided by Articles 174 – 176 TEEC [today Articles 191 - 193 TFEU] (Note 7) - have managed to carry out meaningful actions with this regard since the early 1970s, it was necessary to wait for the entry into force of the Maastricht Treaty before energy was explicitly referred to as a sector of competence of the Community (Note 8). However, it was only with the Lisbon Treaty that the normative basis for the intervention of the European institutions in this matter became more solid (Note 9), thanks to both the introduction of energy amongst the subjects of concurrent competence *ex* Article 4 TFEU (Note 10) and the establishment – always in TFEU – of an *ad hoc* title (Note 11), that is "Energy".

Therefore, nowadays the European institutions are adopting normative acts in the energy sector on the basis of the above mentioned Articles of the TFEU, aimed to the will of creating a uniform legal framework among Member States as far as management, quality and prices of the gas and energy services are concerned (Note 12).

This is also true for renewable energies, to which – for several years - Europe has devoted a great attention, as they are considered like a step to reach the goal of a sustainable development (Note 13).

Nevertheless, the effective fulfilment of such a task depends also on the Member States' inclination to meet the standards settled at EU level (Note 14). Thus, the present article is aimed to analyze how some of the most recent normative acts, adopted by the European institutions in the renewable energy field, have been performed by Member States. More specifically, the article compares the Italian and the British way to cope with the European requirements and by the way it gives account of both state of art and perspectives of the renewable energy policies in those Countries.

## **2. Europe towards Green Economy Objectives in the Energy Sector**

Getting to the core of the subject in the light of the aforementioned considerations, it is possible to affirm that today all sources of energy, including renewable ones – and with the sole exception of nuclear energy – are considered in general provisions within the European Treaties (Note 15). Here, in fact, the main points of the EU energy policy are clarified, amongst which are the promotion of energy saving; the energy efficiency; and the development of new and renewable energies (Note 16).

Therefore, as in other sectors (e.g., waste) (Note 17), also in this case at a certain point the demand linked to the development of the single market has met those related to the “need to preserve and better the environment” (Note 18). Thus – according to the doctrine – here more than anywhere else the environment has become one of the elements which sensibly influence the EU policy (Note 19), which for some time seems to have decisively shifted towards pursuing green economy objectives (Note 20).

Following this purpose, since the early 1990s, a series of measures (Note 21) devoted to renewable energies have been adopted, amongst which was last introduced the “Climate and Energy Packet” of 2009. This, composed of several documents, such as three relevant directives (Note 22), should be read in combination with the provisions of the Third Energy Packet – directives 2009/72/EC, 2009/73/EC and 2008/92/EC (Note 23) – as all of those legislative measures are aimed to create a whole energy market, based on both the principles of perfect competition and that of high environmental sustainability (Note 24).

Nevertheless, as it usually occurs, also in this case the effectiveness of the European legislation is tested when it is transposed to the legal orders of the Member States and, consequently, when it is applied to the everyday scenario (Note 25). In fact, among the domestic systems, there are often political, economic or substantial differences that are likely to undermine not only the homogeneity of the European legislation, but also its effectiveness (Note 26).

As far as renewable energies are concerned, for example, it has been noted that substantial progress has been made exclusively in those countries where the economic, environmental and social advantages linked to these kinds of energy have been included in such a way that a real will to support new forms of energy was instigated both at political and at social levels (Note 27).

## **3. Italy and Great Britain: A Comparison**

The cases of Italy and Great Britain are a good example of the aforementioned statements, since their history in the energy sector, together with large differences (Note 28), also presented surprising similarities.

Concerning Italy, it has to be pointed out that the European legislation has had an impact mainly on the regulatory aspect (Note 29), in order to modify the monopolistic system created by the Act 6 December 1962 no. 1643 (Note 30), which gave the service of production, shipment and supply of electric energy to a public entity, namely ENEL. In other words, the EU law prompted the national legislator to open the energy sector to the market, and therefore to the competition (Note 31). It is on this profile that also the doctrine has primarily focussed its attention (Note 32).

Moreover, it is in this direction that the legislative decree 1 June 2011 no. 93 (Note 33) attempts to move, as it was adopted for the purpose of receiving the “Third Energy Packet” directives, by which the European institutions would win the resistance of those Member States, including Italy, to warrant a full competitive structure to the energy markets (Note 34). However, it has been noted that, in practice, the Italian legislator has mainly focussed his attention on the security of networks and supplies, neglecting the real market competitiveness (Note 35). This is probably due to the issue (crucial to the Italian reality) of public services' liberalization, and therefore more broadly to choices of domestic policy (Note 36). In any case, the national legislator's self-restraint shows that, in Italy, the process of liberalization in the energy market is still in progress, although it begun in the mid-1990s (Note 37).

Furthermore, being primarily absorbed by the search for a prospective equilibrium between the pro-competitiveness requests made by the EU and the internal resistances, only recently the Italian legislator has begun to look at renewable energies. The latter, in fact, have received a complete discipline only in 2003 by the legislative decree no. 387 (Note 38) (which has long remained “orphan” of an essential integrative element that are the guidelines, arrived only in 2010 (Note 38), when the Ministry Decree 10 September 2010 was adopted), today replaced by the legislative decree n. 28/2011, by which Italy has transposed the directive 2009/28/EC.

Nevertheless, a first exam of these provisions shows the lack of a systematic legal framework capable of acting as a platform for the development of the energy sector (Note 40). In particular, two weaknesses emerge: a too complex permission system for the construction of installations and insufficient public policies for incentives.

With regards to the former point, it is first and foremost observed that the different institutional levels that are competent to the adoption of legislative (Note 41) and administrative (Note 42) decisions in this matter, result in a too complex bundle (Note 43), which even the Italian Constitutional Court (Note 44) sometimes does not seem to be able to unravel. For instance, it must be taken into account that the grant of not only administrative (already regulated by the legislative decree no. 112/1998) (Note 45), but also legislative and regulatory competences to the Regions gives rise to strongly different local energy policies (Note 46). And this leads also to undermine a homogeneous distribution of renewable energies across the national territory. Furthermore, it has been highlighted that recently the Article 12 of the legislative decree no. 28/2011, - regarding the grant of permissions - despite its accelerative purpose, in practice seems to notably lengthen the time for an authorization to be given (Note 47), in clear contrast with the principle of simplification *ex* Article 4 of the legislative decree no. 28/2011 (Note 48). Moreover, even though for different reasons, similar criticisms can be made regarding the “*procedura abilitativa semplificata*” (PAS) regulated by Article 6 of the legislative decree no. 28/2011 (Note 49).

Moving to the latter point, that is the incentives (Note 50), the Italian legislator has established that since 2013 the new installations should be subject to different regimes according to their dimension (Note 51). While for the smaller installations Article 24, p. 3, of the legislative decree n. 28/2011 has established a fixed incentive, to the installations of greater size the system of “*aste a ribasso*” *ex* Article 24, p. 4, of the legislative decree n. 28/2011 should be applied. However, in both cases the definition of the concrete operational rules of these incentive systems has been demanded to inter-ministerial decrees that should be adopted in the near future. This means that, in practice, a large part of the legislative reform has been put in the hands of the public administration, the discretion of which is likely to be an obstacle to investments as it does not guarantee the certainty of law (Note 52).

To testify the validity of this statement, it is sufficient to pay attention to the inter-ministerial decree 5 May 2011 about the “*Incentivazione della produzione di energia elettrica da impianti solari fotovoltaici*” (Quarto Conto Energia). In fact, this decree, showing a clear preference for the small photovoltaic installations (Note 53), has given rise to an unjustified treatment disparity amongst the operators of the energy sector (Note 54) at the expense of greater installations. That is of those economic subjects that have made relevant investments in the renewable energy sector and whose businesses risk to be jeopardized by the lack of economic support to the production (Note 55).

In conclusion, (also) with reference to incentives, the crucial problem remains the absence of a far-sighted policy, that is of the strategic direction fixed by the legislator to promote investments on renewable installations. Just in this way it will be possible to follow a virtuous path for the growth of renewable energies in national consumptions from now until 2020 (Note 56).

#### 4. Great Britain

Moving now to the analysis of Great Britain’s energy policy, first of all it can be noticed that for a certain period of time this was characterized by events – *mutatis mutandis* – similar to those that have characterized the energy sector in Italy.

Essentially, this is in reference to an initial phase when the functions related to electricity service were thought to have to be locally allocated (Note 57). But also to a second phase – the beginning of which coincides with the end of the World War II – when the energy sector was the object of a nationalization process (Note 58). In particular, the labour government that took the reins of the Country in 1945 rendered energy nationalization a key element in the precincts of a greater restoration plan of the public sector and more broadly of the whole national economy (Note 59). So, in 1947 the Electricity Act passed the powers and the structures that until then belonged to a plurality of scattered subjects to a single industry owned by the central State. While, ten years later, the Central Electricity Generating Board was established, with the purpose of creating a single system for the production and the supply of energy across the entire British territory.

However, towards the end of the 1970s, Italy and Great Britain took different directions. In fact, while in Italy the monopolistic system created in 1963 was still solid and would start to weaken only several years later under the external pressure of the EU (Note 60), in Great Britain internal factors moved the Nation towards a radical reform (Note 61).

Thus, already in 1979 the government promoted neo-liberalist policies, aimed to realize a highly competitive energy market. While, officially, the privatization occurred with both the British Gas Act of 1986 and the Electricity Act of 1989 (Note 62). Particularly the latter, together with starting the unbundling process (Note 63), gave local authorities the opportunity to contribute to the energy supply by using eco-sustainable sources (Note 64).

Since then Great Britain has officially discovered renewable energies. Nevertheless, experiencing this “Copernican revolution” over a decade prior to Italy, was not enough to make of Great Britain a real front-runner in this field, as the latter was unable to avoid a number of shortcomings quite similar to those above mentioned with regard to Italy.

On this point, the doctrine agrees that Great Britain was not able to put in place public policies useful to better take advantage of its enormous potentialities (especially those linked to wind power and biomasses) (Note 65). In particular, the “systemic problems” (Note 66) seem to concern the incentives, and more in general the actions aimed to improve the development of renewable energies (Note 67); the licensing procedure, often blocked by the Nimby effect (Note 68), and also the network access.

With special regard to incentives, most of the criticisms have been focussed on the Renewables Obligation system (Note 69). This, in fact, introduced in 2002, has not given the expected outcomes over the last ten years. According to the majority, this was due to the fact that this instrument was not thought specifically to reduce the economic risk that investors have to stand, but to increase the competition among technologies and, as a consequence, minimize final consumers’ costs. Nevertheless, neither the last mentioned task has been reached, as the Renewables Obligation has several shortcomings which factually have delayed the development of new projects for the production of energy from renewable sources. In fact, as it has been pointed out, “the mechanism was designed to be *technology neutral* – in other words, no single technology would be preferred” (Note 70) – and this prevents the “surfacing” of new forms of renewable energy as well as the development of start up projects, which risk to be excluded from energy market (Note 71). In sum, there is no a competitive market because there are no subjects provided for the competition.

Therefore, in the light of the aforementioned reasons, it is possible to posit that nowadays also the Great Britain seems to struggle in pursuing the European tasks for the use of renewable energy into 2020. Nevertheless, the most recent movements – even at legislative level (Note 72) - show that the awareness of the opportunity of adopting new policies, clearly oriented to guarantee a better balance between the market and the protection of the environment, is increasing among the British institutions. And this could be sufficient to instil a bit of optimism, even if – of course - it is necessary to wait for and verify the concrete goals that such policies will be capable to gain in the near future.

## 5. Final Remarks

In conclusion, if it is true that from immemorial time energy represents a sort of “fuel” for both the development and the growth of the European economy (Note 73), likewise it is true that today these objectives cannot be pursued separately from the protection of the environment and, consequently, from the safeguard of future generations (Note 74). The Directives which compose the “Climate and Energy Packet”, along with the “Third Energy Packet”’s provisions, clearly show the EU will of pushing the Member States towards such a direction, that is (as much as possible) a sustainable development (Note 75).

But, what is the impact of those provisions on the national legal orders? Or, in other words, are national legislators complying with the requirements settled in the last European directives by adopting *ad hoc* policies in the energy sector?

To answer this question, the article has analyzed how some of the most recent normative acts, adopted by the European institutions in the renewable energy field, have been performed by Italy and Great Britain. In so doing, the article has given account of both the state of art and perspectives of the renewable policies in those Countries, showing that, together with large differences, they also presented several similarities. In particular, it has been observed that nowadays both Italy and Great Britain are struggling in pursuing the European tasks for the use of renewable energy into 2020. Nevertheless, while in Italy the energy sector seems to be “trapped” because of the lack of a far-sighted policy, clearly oriented to pursuing a fair balance between market and environment, in Great

Britain a new “wind” is starting to blow. In fact, the British institutions are increasingly pointing out the opportunity of adopting new energy policies, aimed to reach the goal of a sustainable development according to the green economy’s standards settled by the EU.

Thus, those considerations seem to strengthen the initial assumption that the effectiveness of the European law is tested when it is transposed in the national legal orders and that, therefore, the effective fulfilment of the requirements settled at EU level mainly depends on the Member States’ inclination to meet them. Moreover, they also confirm that often it could require a shift of perspective to understand in depth (and appreciate) all the potentialities linked to the green economy policy pursued by the EU. As we tried to point out in the previous paragraph, this is exactly the case of the Great Britain, which recently seems to have understood the renewable energy’s potentialities especially with regards to both the environment and the economy.

In other words, the European Union has tried to spread a message, that is the principle of sustainable development entails to looking for a real balance between market and environment, also as far as the energy sector is concerned (Note 76). Now it is the time of Member States, which have to show they have got onto that idea.

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## Notes

Note 1. See, *amplius*, Tesauro, G. (2010). *Diritto dell'Unione europea*, Padova, Cedam.

Note 2. At that time (after the II World War), in fact, the energy sector was considered as a key element for the development of the European industry and, more in general, for the upswing of the European economy as a whole.

Note 3. This is still applicable today. See Negro, S. O., Alkemade, F. & Hekkert, M. P. (2012). Why Does Renewable Energy Diffuse so Slowly? A Review of Innovation System Problems, in *RSER* 16, 3836-3846.

Note 4. *Inter alia*, see, Gaja, G., & Adinolfi, A., (2012). *Introduzione al diritto dell'Unione europea*, Bari, Laterza.

Note 5. Quadri, S. (2011). L'evoluzione della politica energetica comunitaria con particolare riferimento al settore dell'energia elettrica rinnovabile, in *Riv. it. dir. pubbl. comunit.*, 3-4, 839.

Note 6. See Article 235, p. 1, TEEC: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after

obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament”.

Note 7. Introduced in the EEC Treaty in 1986 by the Single European Act (SEA), they have constituted an *ad hoc* title with regard to the Environment. See Craig, P., & De Burca, G. (2011). *EU Law. Text, cases and materials* (2011), Oxford, OUP; de Leonardis, F. (2010). Le trasformazioni della legalità nel diritto ambientale. In G. Rossi (Ed.), *Diritto dell'ambiente* (p. 117). Torino, Giappichelli; Stetter, S. (2001). Maastricht, Amsterdam and Nice: The Environmental Lobby and Greening the Treaties. *EELR*, 150 – 159; Tesauro, G. (2010). *Diritto dell'Unione europea*, Padova, Cedam.

Note 8. See, in particular, Article 3, lett. t) of the European Community Treaty. Furthermore, see also Article 3, lett. n) and 129, lett. b), c) and d). Among scholars, see Cameron, D. (2009). Energy: Efficiency, Security and the Environment. In Dougan, M., & Currie, S. (Eds.), *50 years of the European treaties. Looking back and thinking forward* (pp. 205 - 235). Oxford, Hart Publishing, and Napolitano, G. (2012). La politica europea per il mercato interno dell'energia e il suo impatto sull'ordinamento italiano. [www.federalismi.it](http://www.federalismi.it), [http://www.federalismi.it/ApplOpenFilePDF.cfm?dpath=document%5Ceditoriale&dfile=EDITORIALE\\_21022012210524](http://www.federalismi.it/ApplOpenFilePDF.cfm?dpath=document%5Ceditoriale&dfile=EDITORIALE_21022012210524).

Note 9. With regard to the relationship between the Lisbon Treaty and the environment see, *inter alia*, Lee, M. (2008). The Environmental Implications of the Lisbon Treaty. *ELR* 10, 131 – 138; Vedder, H. (2010). The Treaty of Lisbon and European Environmental Law and Policy. *JEL* 3, 285 – 299.

Note 10. Cfr. Article 4, p. 2, lett. i) of the TFEU. More specifically, Article 4 provides: “1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (...) (e) environment; (...) (i) energy; (...)”.

Note 11. Title XXI of the TFEU that contains just one article, that is Article 194. This provides: “1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks. 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such 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). 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature”.

Note 12. *Inter alia*, see Ammannati, L. (2011). L'agenzia per la cooperazione tra i regolatori dell'energia e la costruzione del mercato unico dell'energia. *Riv. it. dir. pubbl. comunit.*, 3-4, 675; Bruti Liberati, E. (2009). La regolazione dei mercati energetici tra l'Autorità per l'energia elettrica e il gas e il governo. *Riv. trim. dir. pubbl. comunit.*, 435-475; Bruti Liberati, E. (2010), La nuova governance europea dei mercati energetici, in AA., VV., *La regolazione dei mercati energetici nel “terzo pacchetto” comunitario* (p. 64). Milano, Vita e pensiero; Craig, P. (2009). Shared Administration and Networks: Global and EU Perspectives. *Legal Research Paper Series*, Oxford, OUP, 6; dell'Agli, L. (2007). L'accesso all'energia elettrica come diritto fondamentale per la dignità della persona umana. *Riv. giur. amb.* 5, 713.

With regards to the jurisprudence see, *inter alia*, CGUE 20 aprile 2010, *AEEG*, C-265/08, for a comment to which it may be seen Feliziani, C. (2011). Il rapporto tra liberalizzazione e regolazione al vaglio della Corte di Giustizia. *Foro amm. CdS* 3 2011, 786.

Note 13. The principle of sustainable development, introduced by the Amsterdam Treaty, is settled in Articles 3 of the EU Treaty and 11 of the TFEU even if here it is not expressly well-defined. However, according to scholars (Kramer, L. (2011). *EU Environmental Law*, London, Sweet & Maxwell) it can be described as “a development which meets the needs of the present without compromising the ability of future generations to meet their own needs”.

*Ex multis*, see Fracchia, F. (2012). Il principio dello sviluppo sostenibile, in Renna, M., & Saitta, F. (Eds.), *Studi sui principi del diritto amministrativo*. Milano, Giuffrè; Allena, M., & Fracchia, F. (2011). Globalization, environment and sustainable development, in global, european and italian perspectives. *Riv. it. dir. pubbl. comunit.*, 3-4, 781.

Note 14. *Inter alia*, see Ferrara, R. (2009). Modelli e tecniche di tutela dell'ambiente: il valore dei principi e la forza della prassi. *Foro amm. TAR*, 6, 1945; Tesauro, G. (2010). *Diritto dell'Unione europea*, Padova, Cedam.

Note 15. Kramer, L. (2011). *EU Environmental Law*, London, Sweet & Maxwell.

Note 16. Cfr. Article 194, p. 1, lett. c) TFEU.

Note 17. *Inter alia*, de Leonardis, F. (2011). I rifiuti: dallo smaltimento alla prevenzione. In G. Rossi (ed), *Diritto dell'ambiente* (303 – 317). Torino, Giappichelli; Kramer, L. (2011). *EU Environmental Law*, London, Sweet & Maxwell; and, finally, see also Feliziani, C. (2012). The Duty of Member States to Guarantee the Right to a Healthy Environment: a Consideration of European Commission v. Italy (C-297/08). *JEL* 24 3, 535 – 546.

Note 18. Cfr. Article 194, p. 1 TFEU.

Note 19. Kramer, L. (2011). *EU Environmental Law*, London, Sweet & Maxwell.

Note 20. de Vergottini, G. (2012). Il governo delle reti tra Unione europea, stato e regioni. In G. Napolitano, & A. Zoppini (Eds.), *Annuario di diritto dell'energia. Il regime giuridico delle infrastrutture dell'energia* (112- 134). Bologna, Il Mulino.

Note 21. See, *inter alia*, Council directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE); Council decision 93/500/EEC of 13 September 1993 concerning the promotion of renewable energy sources in the Community (Altener programme).

Note 22. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC; Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community; Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006. With this regard, see Quadri, S. (2011). L'evoluzione della politica energetica comunitaria con particolare riferimento al settore dell'energia rinnovabile. *Riv. it. dir. pubbl. comunit.* 3-4, 839.

Note 23. Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Directive 2008/92/EC of the European Parliament and of the Council of 22 October 2008 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (recast).

For a consideration about the previous provisions (Directives 96/30/EC and 98/39/EC as well as Directives 2003/54/EC and 2003/55/EC) see Napolitano, G. (2012), La politica europea per il mercato interno dell'energia e il suo impatto sull'ordinamento italiano, in [www.federalismi.it](http://www.federalismi.it), [http://www.federalismi.it/ApplMostraEdit.cfm?eid=240&content\\_auth=](http://www.federalismi.it/ApplMostraEdit.cfm?eid=240&content_auth=).

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Note 24. See de Leonardis, F. (2011). Le fonti energetiche rinnovabili tra strumenti di mercato e meccanismi pubblicistici. In J. A. Santamaria Pastor & R. Caballero Sanchez (Eds), *Las tecnica de regulacion para la competencia: una vision horizontal de los sectores regulados* (189 – 213). Madrid.

Note 25 With specific regard to the energy sector see Cameron, P. D. (2005). *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe*, Oxford, OUP.

Note 26. See Miccù, R. (2013). Implementation of the “Third Package” and development of renewable energy: European dimension and impacts of crisis at national level, forthcoming; Gratani, A. (2012). 2012: anno delle energie rinnovabili. Problematiche giuridiche vecchie e nuove. *Riv. giur. amb.* 5, 562; Quadri, S. (2011). L'evoluzione della politica energetica comunitaria con particolare riferimento al settore dell'energia rinnovabile.

*Riv. it. dir. pubbl. comunit.*, 3-4, 839.

Note 27. Quadri, S. (2011). L'evoluzione della politica energetica comunitaria con particolare riferimento al settore dell'energia rinnovabile. *Riv. it. dir. pubbl. comunit.*, 3-4, 839.

Note 28. Such as the production of nuclear energy. *Amplius* cfr. Cameron, P. D. (2005), *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe*, Oxford, OUP.

Note 29. See de Leonardis, F. (2013). Storia e caratteristiche della programmazione energetica nazionale in Italia. Il ruolo delle energie rinnovabili ~~History and conditions of the energy planning in Italy: what is the role of the renewable energy?~~, forthcoming.

Note 30. That law was the object of the famous case *Costa v ENEL* brought in front of both ECJ (15 July 1964, C-6/64) and the Italian Constitutional Court (7 march 1964 n. 14). For a comment of the ruling see the recent work of A. K. Mangold (2011). *Costa v. Enel (1964): On the Importance of Contemporary Legal History*. In E. Augusti.; N. Domeier, F. Georg von Graevenitz & Prutsch, M. J. (Eds.), *Inter- Trans – Supra ? Legal Relations and Power Structures in History* (220 – 234). Saarbrücken, Akademiker Verlag.

Note 31. See, for example, Carta, M. (2003). La liberalizzazione dei servizi di interesse economico generale nell'Unione: il mercato interno dell'energia elettrica. *Dir. un. eur.* 4, 771; Scotti, E. (2012). Servizi pubblici locali. *Dig. disc. pubbl.*, Roma, Utet; Scotti, E. (2008). Servizi pubblici locali e ordinamento comunitario. In S. Mangiameli, *I servizi pubblici locali* (35-45). Torino, Giappichelli.

Note 32. *Inter alia*, see Aicardi, N. (2007). Energia. In M. P. Chiti, & G. Greco, G., (Eds.) *Trattato di diritto amministrativo europeo*. Milano, Giuffrè; Ammannati, L. (2005). *Monopolio e regolazione pro-concorrenziale nella disciplina dell'energia*, Milano, Giuffrè; Bruti Liberati, E., & F. Donati, F. (2007). *Il nuovo diritto dell'energia tra regolazione e concorrenza*, Torino, Giappichelli; Carta, M. (2003). La liberalizzazione dei servizi di interesse economico generale nell'Unione: il mercato interno dell'energia elettrica. *Dir. un. eur.* 4, 771; Sottili, V. (1998). Il mercato dell'energia elettrica nella giurisprudenza della Corte di Giustizia. *Dir. un. eur.* 4, 927; Termini, V. (2005). La liberalizzazione nel settore dell'energia elettrica. *Riv. pol. eco.*, 7; F. Vetrò, F. (2005), *Il servizio pubblico a rete. L'empio paradigmatico dell'energia elettrica*. Torino, Giappichelli.

Note 33. Legislative decree 1 June 2011 n. 93, "Attuazione delle direttive 2009/72/CE, 2009/73/CE e 2008/92/CE relative a norme comuni per il mercato interno dell'energia elettrica, del gas naturale e ad una procedura comunitaria sulla trasparenza dei prezzi al consumatore finale industriale di gas e di energia elettrica, nonché abrogazione delle direttive 2003/54/CE e 2003/55/CE. (11G0136)" (G.U. 27 July 2011 n. 148).

Note 34. di Cristina, F. (2011). L'attuazione del "terzo pacchetto" e il nuovo assetto dei mercati energetici. *Giorn. dir. amm.* 9, 925

Note 35. di Cristina, F. (2011). L'attuazione del "terzo pacchetto" e il nuovo assetto dei mercati energetici. *Giorn. dir. amm.*, 9, 925.

Note 36. In this regards see, first of all, Corso, G. (2006). Liberalizzazione amministrativa ed economica. In S. Cassese (Ed.), *Dizionario di diritto pubblico*, Milano, Giuffrè; nonché D'Alberti, M. (2008). *Poteri pubblici, mercati e globalizzazione*. Bologna, Il Mulino, e Trimarchi Banfi, F. (2008) *Lezioni di diritto pubblico dell'economia*. Torino, Giappichelli. For a comment to the most recent events that involved public services in Italy, cfr. Di Gaspare, G. (2010). *Servizi pubblici locali in trasformazione*. Padova, Cedam; Fracchia, F. (2011). I servizi pubblici e la retorica della concorrenza. *Foro it.*, V, 106; Montedoro, G. & Tretola, L. (2012). La liberalizzazione dei servizi pubblici locali dopo la nuova "riforma" del decreto "Cresci Italia" 2012. [www.giustamm.it](http://www.giustamm.it); Oggianu, S. (2012). Liberalizzazioni, ambiente ed energia. [www.giustamm.it](http://www.giustamm.it); Rossi, G. (2011), Ricomporre il quadro normativo delle società di gestione dei servizi pubblici locali. Alla ricerca del filo di Arianna. [www.giustamm.it](http://www.giustamm.it); Scotti, E. (2012). Servizi pubblici locali. *Dig. disc. pubbl.*, Roma, Utet.

Note 37. Cameron, P. D. (2005). *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe*. Oxford, OUP.

Note 38. See de Leonardis, F. (2013). Storia e caratteristiche della programmazione energetica nazionale in Italia. Il ruolo delle energie rinnovabili ~~History and conditions of the energy planning in Italy: what is the role of the renewable energy?~~, forthcoming. For a consideration of that legislative decree see Nicoletti, F. (2004). Lo sviluppo e la promozione dell'energia elettrica prodotta da fonti rinnovabili alla luce del D. lgs. 29 dicembre 2003 n. 387. *Dir. eco.*, 367.

Note 39. Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.*, 5, 361.

Note 40. *Inter alia*, see di Cristina, F. (2011). L'attuazione del "terzo pacchetto" e il nuovo assetto dei mercati energetici. *Giorn. dir. amm.* 9, 925; Ragazzo, M. (2011). *Le politiche sull'energia e le fonti rinnovabili*. Torino, Giappichelli.

Note 41. Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.*, 5, 361, observes that the difficulty is due to the fact that the subject is regulated by several kinds of provisions: international and European Union provisions as well as those adopted at both national and regional level.

Note 42. Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.* 5, 361.

Note 43. As de Leonardis, F (2005). Criteri di bilanciamento tra paesaggio ed energia eolica. *Dir. amm.*, 4, 899, pointed out this is due to the fact that usually several interests converge in this matter, such as business and landscape. Moreover, see also Amorosino, S. (2013). Energy installations, Landscape and land, forthcoming; Amorosino, S (2012). *Beni naturali, energie rinnovabili, paesaggio. Studi "in itinere"*. Napoli, Jovene; Carpentieri, P. (2008). Eolico e paesaggio. *Riv. giur. ed.*, 1, 326; Lombardi, P. (2007). La realizzazione degli impianti di produzione di energia eolica tra ponderazione degli interessi e cooperazione istituzionale. *Riv. giur. ed.* 6, 1650; Massone, A. (2009). La (difficile) convivenza tra governo del territorio, tutela dell'ambiente e produzione di energia elettrica da fonti rinnovabili. *Foro amm. TAR* 3, 654; Oggianu, S. (2012). Liberalizzazioni, ambiente ed energia. in [www.giustamm.it](http://www.giustamm.it).

Note 44. With regards to the legislative and administrative competences cfr., *inter alia*, C. Cost. n. 6/2004; n. 383/2005; n. 165/2011; n. 308/2011. While, as far as concerns the balance between different interests, see C. Cost. n. 116/2009; n. 282/2009; n. 119/2010; n. 124/2010; n. 67/2011, 205/2011. Among scholars, with regards to C. Cost. n. 6/2004 see de Leonardis, F. (2004). La Consulta tra interesse nazionale ed energia elettrica. *Giur. cost.*, 145 – 153; Fracchia, F. (2004). Dei problemi non (completamente) risolti dalla Corte costituzionale: funzioni amministrative statali nelle materie di competenza regionale residuale, norme statali cedevoli e metodo dell'intesa. *Foro it.*, 2004, I, 1014. While, with regards to C. Cost. n. 119/2010 see Di Dio, F. (2010). Il "paradosso fotovoltaico" dopo la Consulta: criteri di bilanciamento tra impatto paesaggistico ambientale e sviluppo delle energie rinnovabili. *Riv. giur. amb.* 5, 774; Rangone, N. (2010). Fonti rinnovabili di energia: stato della regolazione e prospettive di riforma. *Giur. cost.* 2, 1490. Finally, with regards to C. Cost. n. 308/2011 see de Lucia, M. (2012). La localizzazione degli impianti da fonti di energia rinnovabile. *Giorn. dir. amm.* 6, 637; Maestroni, A. (2012). La questione della localizzazione di impianti di produzione di energie rinnovabili a valle delle linee guida ministeriali. Coste costituzionale e Corte di Giustizia arbitri tra esigenze di tutela paesaggistica e di sviluppo economico. *Riv. giur. amb.*, 5, 569; Rossi, B. (2012). Aree e siti non idonei: spunti di riflessione sulla normazione regionale in tema di impianti alimentati da fonti rinnovabili. *Giur. merito* 10, 2004. Moreover, see also Quadri, S. (2012). *Energia sostenibile*. Torino, Giappichelli.

Note 45. Legislative Decree 31 March 1998 n. 112 "Conferimento di funzioni e compiti amministrativi dello Stato alle Regioni e agli altri enti locali, in attuazione del Capo I della L. 15 marzo 1997 n. 59 (G.U. 21 April 1998 n. 92).

Note 46. Cuocolo, L. (2013). Renewable energy law between State and Regions in Italy, forthcoming; Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.* 5, 391. Moreover, cfr. Cerulli Irelli, V. & Montani, A. (2010). In tema di procedure autorizzative ad impianti eolici. [www.giustamm.it](http://www.giustamm.it).

Note 47. Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.* 5, 391. Moreover with regards to the permission to build energy installations see, *inter alia*, Amorosino, S (2012), *Beni naturali, energie rinnovabili, paesaggio. Studi "in itinere"*. Napoli, Jovene; Corti, L. (2010). Una nuova pronuncia del TAR Piemonte in tema di autorizzazione alla costruzione e all'esercizio degli impianti di produzione di energia elettrica alimentati da biomasse: legittimazione a ricorrere, contenuto e presupposti per il rilascio dell'autorizzazione unica ex art. 12 del d. lgs. 387/2003 e questioni procedurali. *Riv. giur. amb.* 2, 388; Magnani, L. (2008). Procedimenti autorizzatori per la realizzazione di impianti eolici. *Giur. merito* 9, 2378; Santoro, P. (2010). Impianti eolici: tra regime autorizzatorio e concessioni di bene collettivo. *Riv. giur. amb.* 2, 334;

Note 48. See the official document, published on <http://www.gazzettaufficiale.it>. More in general, with regards to the principle of simplification see, *inter alia*, Amorosino, S. (2006). *Achille e la tartaruga. Semplificazione amministrativa e competitività del "sistema Italia"*. Milano, Giuffrè; Lazzara, P. (2012). Il principio di semplificazione del procedimento, in Renna, M. & Saitta, F. (Eds.), *Studi sui principi del diritto amministrativo*.

Milano, Giuffrè; Lazzara, P. (2008). La semplificazione dell'azione amministrativa e il procedimento tra diritto interno e diritto comunitario. *Nuove autonomie* 3-4, 475.

Note 49. The “Procedura abilitativa semplificata” (PAS) has taken the place of the old “Dichiarazione d’inizio attività” (DIA).

Note 50. *Inter alia*, cfr. D’Auria, M. (2009). La finanza pubblica e le energie rinnovabili. *Riv. giur. amb.* 6, 876; Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.* 5, 391; Veronese, A. (2011). Gli impianti di produzione di energia elettrica da fonti rinnovabili tra misure di compensazione tipiche e atipiche. *Riv. giur. amb.* 1, 81.

Note 51. See Sandulli, M. A. (2011). La SCIA e le nuove regole sulle tariffe incentivanti per gli impianti di energia rinnovabile: due esempi di “non sincerità” legislativa. [www.federalismi.it](http://www.federalismi.it), <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=17793&dpath=document&dfile=23032011130909.pdf&content=>

See, for example, Cuocolo, L. (2013). Renewable energy law between State and Regions in Italy, forthcoming; Cozzolino, G. (2012). Energie rinnovabili e tutela dell'affidamento: qualche riflessione a proposito degli incentivi al fotovoltaico alla luce dei recenti sviluppi normativi. [www.rivistaaic.it](http://www.rivistaaic.it), <http://www.rivistaaic.it/articolorivista/energie-rinnovabili-e-tutela-dell-affidamento>.

Note 53. Cfr. Articles 3 and 6 of the decree.

Note 54. Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.* 5, 391.

Note 55. With this regard see Cozzolino, G. (2012). Energie rinnovabili e tutela dell'affidamento: qualche riflessione a proposito degli incentivi al fotovoltaico alla luce dei recenti sviluppi normativi. [www.rivistaaic.it](http://www.rivistaaic.it), <http://www.rivistaaic.it/articolorivista/energie-rinnovabili-e-tutela-dell-affidamento>.

Note 56. Marzanti, A. (2012). Semplificazione delle procedure e incentivi pubblici per le energie rinnovabili. *Riv. giur. amb.* 5, 391.

Note 57. As well as in Italy L. 29 march 1903 n. 103 established the nationalization of the local public services, in Great Britain since 1835 the local authorities got the task of supply energy services.

Note 58. With this regard cfr. *amplius* Wollaman, E. & Marcou, G. (2010). *The Provision of Public Services in Europe. Between State, Local Government and Market*. UK, Cheltenham.

Note 59. Wollaman, E. & Marcou, G. (2010). *The Provision of Public Services in Europe. Between State, Local Government and Market*. UK, Cheltenham. Moreover, see Prosser, T. (2005). *The Limits of Competition Law: Markets and Public Services*. Oxford, OUP.

Note 60. More in general, for a deep analysis of the influence that the European legislation (and jurisprudence) had on the decline of the monopolistic approach in Italy, see Scotti, E. (2012). Servizi pubblici locali. *Dig. Disc. Pubbl.*, Aggiornamento, UTET, and Scotti, E. (2008). Servizi pubblici locali e ordinamento comunitario. In S. Mangiameli, *I servizi pubblici locali* (pp. 35 – 45). Torino, Giappichelli.

Note 61. See Prosser, T. & Boeger, N. (2009), United Kingdom. In M. Krajewski, G. Neergaard, & J. Van de Gronder, (Eds.), *The Changhind Legal Framework for Services of General Economic Interest in Europe* (pp. 357 – 382). Asser Press.

Note 62. With this regard cfr. Cameron, P. D. (2005). *Legal Aspects of EU Energy regulation. Implementing the New Directives on Electricity and Gas Across Europe*. Oxford, OUP, who points out that both the Electricity Act and the Gas Act (as amended) have represented the cornerstone for the building of the gas and electricity industry in Great Britain. Moreover, he underlines also the great importance of the Utilities Act (2000) which has founded the Gas and Electricity Markets Authority (GEMA). Moreover, see Prosser, T. (2005). *The Limits of Competition Law: Markets and Public Services*. Oxford, OUP.

Note 63. See Cameron, P. D. (2005). *Legal Aspects of EU Energy regulation. Implementing the New Directives on Electricity and Gas Across Europe*. Oxford, OUP, especially p. 359.

Note 64. Wollaman, E. & Marcou, G. (2010). *The Provision of Public Services in Europe. Between State, Local Government and Market*. UK, Cheltenham.

Note 65. *Inter alia*, see Connor, P. M. (2003). UK Renewable Energy Policy: a Review. *RSER* 7, 65 – 82, who points out that in 2003 the production of renewable energy reached just 3% of the whole national demand.

Note 66. Negro, S. O., Alkemade, F., & Hekkert, M. O. (2012), Why Does Renewable Energy Diffuse so Slowly? A Review of Innovation System Problems. *RSER* 16, 3836 – 3846.

Note 67. With this regard, some scholars (Negro, S. O.; Alkemade, F., & Hekkert, M. O. (2012), Why Does Renewable Energy Diffuse so Slowly? A Review of Innovation System Problems. *RSER* 16, 3836 – 3846) underline the lack of adequate support by the institutions during the so called “valley of death”, that is the phase of the technology’s life cycle which predates its entrance in the market.

Note 68. See Negro, S. O.; Alkemade, F., & Hekkert, M. O. (2012). Why Does Renewable Energy Diffuse so Slowly? A Review of Innovation System Problems. *RSER* 16, 3836 – 3846; Woodman, B., & Mitchell, C. (2011). Learning from Experience? The Development of Renewables Obligation in England and Wales 2002 – 2010. *Energy policy* 39, 3914 – 3921.

Note 69. *Amplius*, see Woodman, B., & Mitchell, C. (2011). Learning from Experience? The Development of Renewables Obligation in England and Wales 2002 – 2010. *Energy policy* 39, 3914 – 3921.

Note 70. Woodman, B., & Mitchell, C. (2011). Learning from Experience? The Development of Renewables Obligation in England and Wales 2002 – 2010. *Energy policy* 39, 3914 – 3921.

Note 71. See Woodman, B., & Mitchell, C. (2011). Learning from Experience? The Development of Renewables Obligation in England and Wales 2002 – 2010. *Energy policy* 39, 3914 – 3921.

Note 72. In fact scholars point out that there are some proposal for modify the legal framework of incentives. *Amplius*, Woodman, B., & Mitchell, C. (2011). Learning from Experience? The Development of Renewables Obligation in England and Wales 2002 – 2010. *Energy policy* 39, 3914 – 3921.

Note 73. See Negro, S. O., Alkemade, F., & Hekkert, M. O. (2012). Why Does Renewable Energy Diffuse so Slowly? A Review of Innovation System Problems. *RSER* 16, 3836 – 3846.

Note 74. With the regard to the protection of future generations see, *inter alia*, Allena, M., & Fracchia, F. (2011). Globalization, environment and sustainable development, in global, european and italian perspectives. *Riv. it. dir. pubbl. comunit.*, 3-4; Bifulco, R., & D’Aloia, A. (2008), *Un diritto per il futuro, Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*. Napoli, Jovene; de Leonardis, F. (2009), Tutela delle generazioni future e organismi preposti alla tutela. V. Parisio (Ed.), *Diritti interni, diritto comunitario e principi sovranazionali* (pp. 75 – 89). Milano, Giuffrè; Fracchia, F. (2010). Sviluppo sostenibile e diritti delle generazioni future. *Riv. quad. dir. amb.*, <http://www.rqda.eu/f-fracchia-sviluppo-sostenibile-e-diritti-delle-generazioni-future/#more-29>; Fracchia, F. (2002). Sulla configurazione giuridica unitaria dell’ambiente: art. 2 Cost. e doveri di solidarietà ambientale. *Dir. econ.* 1, 216.

Note 75. *Inter alia*, Fracchia, F. (2012). Il principio dello sviluppo sostenibile. In Renna, M., & Saitta, F. (Eds.), *Studi sui principi del diritto amministrativo*, Milano, Giuffrè; Quadri, S. (2012). *Energia sostenibile*. Torino, Giappichelli.

Note 76. See Fracchia, F. (2013). Sviluppo sostenibile ed energie rinnovabili. In AA. VV., *Studi in onore di Paolo Stella Richter*, forthcoming.

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