

RENEWABLE ENERGY COMMUNITIES IN ITALY: THE CHALLENGES OF PUBLIC GOVERNANCE

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Synopsis: The Renewable Energy Directive (Directive (EU) n. 2018/2001, RED II as amended in 2023) sets a central role for public authorities in the transition towards renewable energy produced from (*inter alia*) renewable energy communities. From a legal point of view, it may be argued that the challenges faced by local public authorities that may want to set up or actively participate in renewable energy communities, at least in the Italian legal context (which can be regarded as an interesting case-study of a European country where these initiatives are having widespread diffusion), are multifaceted. From a private law perspective, regulating control powers by local authorities inside the governance structure of a renewable energy community is crucial in order to ensure the strategic control of the essential resources of a renewable energy community remains within the community (and not to private companies).

If these issues may be regulated through the use of contracts and bylaws, the challenges faced by local authorities become even more complex within the public law framework (which, in this case, is represented by Legislative Decree No. 175/2016).

Consistently, this article suggests that a reflection should be made over the initiatives to be implemented in order to provide “*regulatory and capacity-building support*” to public authorities that may want to set up and participate directly to renewable energy communities, in the spirit of article 22, paragraph 4 of the Renewable Energy Directive.

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I. INTRODUCTION

As the European Commission has underlined, renewable energy communities (RECs) can be regarded as grassroots initiatives that offer a unique opportunity to build an energy-oriented identity and social bond tied to the industrial production of energy.¹ In fact, renewable energy communities are usually associated with an open and voluntary governance that reflects a common identity and sense of cohesion.² The Renewable Energy Directive (Directive (EU) n. 2018/2001, RED II as amended in 2023) sets a central role for public authorities, both through intensive planning and in terms of regulation. Significantly, the amending Renewable Energy Directive (EU) 2023/2413 provides that:

*Member States shall ensure that their competent authorities at national, regional and local level include provisions for the integration and deployment of renewable energy, including for renewables self-consumption and renewable energy communities, and for the use of unavoidable waste heat and cold when planning, including early spatial planning, designing, building and renovating urban infrastructure, industrial, commercial or residential areas and energy and transport infrastructure, including electricity, district heating and cooling, natural gas and alternative fuel networks.*³

Public authorities play an active role by adopting measures to foster citizen participation and involve local stakeholders to collectively develop, own, and manage renewable energy installations.

The participation of public authorities, especially at the local level, is all the more crucial for the democratic management of the resources (e.g., solar panels, the public grid, and the revenue from the sale of energy) owned by the community. Such a decentralized model of energy production which, according to the European Directives included in the Clean Energy Package,⁴ is at the core of the renewable energy communities' design needs to be confronted with concentration on the energy market and the risk of dominant influence over RECs being exerted by a small minority of their members (only those with a certain degree of professionalization and expertise in the energy sector).⁵

1. EUR. COMM'N, ENABLING ENERGY COMMUNITIES - A TOOLKIT FOR JUST TRANSITION REGIONS 5 (Nov. 2023), https://ec.europa.eu/regional_policy/sources/funding/just-transition-fund/toolkit-enabling-energy-communities.pdf.

2. *Id.*

3. Directive 2023/2413, of the European Parliament and of the Council of 18 October 2023 Amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as Regards the Promotion of Energy from Renewable Sources, and Repealing Council Directive (EU) 2015/652, at 30, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302413 [hereinafter Directive 2023/2413].

4. The Clean Energy for all Europeans Package, adopted in 2019, is the latest update in the European energy policy framework, aiming to facilitate a clean energy transition. It consists of eight legislative acts (four directives and four regulations) which lay the ground for establishing a new electricity market design. For the purpose of this article, reference is made to Directive 2018/2001, of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources, 2018 O.J. (L 328) 82 [hereinafter RED II] and to Directive 2019/944, of the European Parliament and of the Council of 5 June 2019 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU, 2019 O.J. (L 158) 125 [hereinafter IMED].

5. Björn Hoops, *Two Tales of the Energy Commons Through the Lens of Complexity*, GLOB. JURIST, Apr. 22, 2024, at 6.

This article aims at shedding a light on the challenges that most authorities-driven energy communities face in the Italian legal context.⁶ In fact, especially in Italy, the growth of renewable energy communities can be regarded as the result of cooperation between the public and private sectors, and the involvement of public authorities, especially at the local level, in the promotion and expansion of RECs is considered undeniable.⁷ From a legal perspective, it is therefore necessary to consider what legal forms may be adopted by local public authorities (e.g., municipalities) that may want to set up or participate in renewable energy communities. As a result of the legal framework currently in force in Italy, it can be observed that, despite a general consensus over the need to promote such bottom-up initiatives, there are still significant limits, both from the private law and the public law perspective, that public authorities may face when involving in an energy community project.

II. LEGAL FORMS AND GOVERNANCE STRUCTURES FOR LOCAL PUBLIC AUTHORITIES-DRIVEN ENERGY COMMUNITIES

As remarked by Hoops (2024), the definition of “*renewable energy communities*”⁸ revolves around their primary purposes (environmental and social, rather than economic in nature) and the governance requirements needed to pursue them.⁹

In compliance with European legislation, Italy transposed the Renewable Energy Directive through Legislative Decree n. 199/2021, whose article 31 defines what a renewable energy community is and what its normative requirements are. According to this definition, the renewable energy community is a legal entity that is controlled exclusively by natural persons, small and medium-sized enterprises (SMEs), local authorities including municipalities, research and training entities, religious entities, third sector and environmental protection associations, as well as local administrations included in the list of public administrations published by National Institute of Statistics — ISTAT.¹⁰ Those members should be located under the same primary substation, which corresponds to the relevant geographical

6. In literature, sometimes, the term public authorities and public administrations are used interchangeably. European Directives always refer to “public authorities” (from national to local levels), while the term “public administration” refer, more broadly, to all the bodies that are in charge of the management of government policies and public affairs.

7. Elisa Moretti & Ettore Stamponi, *The Renewable Energy Communities in Italy and the Role of Public Administrations: The Experience of the Municipality of Assisi between Challenges and Opportunities*, SUSTAINABILITY, Aug. 2, 2023, at 3.

8. RED II, *supra* note 4, art. 2, para. 16 (“‘renewable energy community’ means a legal entity: (a) which, in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity; (b) the shareholders or members of which are natural persons, SMEs or local authorities, including municipalities; (c) the primary purpose of which is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits.”).

9. Hoops, *supra* note 5, at 4.

10. For the definition of small and medium-sized enterprises, see Commission Recommendation 2003/361/EC of 6 May 2003, Concerning the Definition of Micro, Small, and Medium-Sized Enterprises, annex, art. 2, 2003 O.J. (L 124) 36, 39 [hereinafter Commission Recommendation 2003/361/EC]. The SME definition

perimeter to access the economic incentives recognized by the Italian government.¹¹

Recently, the provisions contained in Legislative Decree n. 199/2021 were implemented with the entry into force of the Ministerial Decree No. 414 of 7 December 2023, which defines incentive tariffs¹² dedicated to shared energy among the members within the community's perimeter for the development and widespread diffusion of renewable energy communities.

Although the approval for the Ministerial Decree on incentives for RECs has been considered a significant regulatory change for sector operators, it has recast attention to the need to comply with EU State aid rules set by the European Treaties also for these economic activities.¹³ In fact, it has been clarified that only small and medium-sized enterprises can take part in renewable energy communities, with the exclusion of large enterprises. Accordingly, the economic benefits that SMEs may have access to cannot overcome a precise threshold.¹⁴

The exclusion of powerful, large enterprises and the need for effective control being exerted only by members located in the proximity of the renewable energy projects (both essential requirements in order to access economic incentives) clearly influence the governance structure of RECs, which sees at its core the role of public local authorities.

In particular, the legal framework currently in force in Italy allows local public authorities to be members of the associative or corporate community contract (as founding partners or active participants). Due to the fact that, according to the European Directives, each Member State is free to adopt a different discipline to establish which legal form the energy community may adopt, it is generally underlined that local public authorities should opt for legal structures characterized by limited liability so that only the company is liable for obligations with its assets.

Provided that each governance structure should be tailored to the specific needs of the renewable energy community, within the Italian legal framework, the legal forms that may be used by public authorities in order to establish RECs are the following:

- Cooperatives, which are defined by article 2511 of the Civil Code as companies with variable capital based on mutualistic, solidarity,

takes into account three criteria: staff headcount, annual turnover, and annual balance sheet total. *Id.* “The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.” *Id.*

11. Decreto Ministeriale 7 dicembre 2023, n.414, G.U. Feb. 7, 2024, n.31 (It.).

12. In Italy, renewable energy communities can benefit from a premium tariff on the quantity of electricity consumed by renewable energy communities, paid over a 20-year period and an investment grant of up to 40% of eligible costs for projects located in municipalities with less than 5.000 inhabitants.

13. European Commission Press Release IP/23/5787, Commission Approves €5.7 Billion Italian State Aid Scheme Under the Recovery and Resilience Facility to Support Renewable Energy Communities and Self-Consumers (Nov. 22, 2023).

14. The premium tariff is granted up to 55% of the electric energy fed into the grid by power plants of the REC; the premium tariff in excess of the financing cap may only be granted to non-enterprise consumers or to the territories where the power plants are located for social purposes.

and democratic principles.¹⁵ This legal form is particularly interesting as it is considered the most democratic business organization that can best reflect¹⁶ all the requirements set by the European Directives¹⁷ for renewable energy communities.

- Community cooperatives that can be defined as “a specific type of cooperative that has been emerging in the Italian socio-legal context and which, more than other forms of legally recognized grassroots initiatives, is characterized by a very strong connection with the territory where the activities are located.”¹⁸ In particular, community cooperatives have not been uniformly regulated in Italy, and only some regions, so far, have adopted a specific regional law.
- Recognized associations are non-profit organizations with altruistic purposes (e.g., religious, political, ideals, trade unions, sports, or cultural). These entities are made up of their members, which can be natural or legal persons. In particular, recognized associations can be suited for small-scale projects of RECs since they have perfect patrimonial autonomy, and, therefore, the assets of the organization are always and only liable for the association’s debts and are separate from those of its members. Nonetheless, it has been observed¹⁹ that associations (and the same applies for participatory foundations) were not designed in the Civil Code as entities that normally exercise entrepreneurial activities, and, as a consequence, their structure may not be suited for large renewable energy communities which, for instance, promote integrated home automation interventions, energy efficiency interventions, as well as electric vehicle charging services to their members.²⁰
- Participatory foundations combine the collective aspect of the association with the patrimonial aspect of foundations. Under Italian law, participatory foundations are not defined by any specific provision since their features gradually emerged from case-law (especially from the decisions of Courts of Auditors). It is believed that

15. See Anna Grignani et al., *Community Cooperative: A New Legal Form for Enhancing Social Capital for the Development of Renewable Energy Communities in Italy*, ENERGIES, Oct. 27, 2021, at 2.

16. Emanuele Cusa, *Sviluppo sostenibile, cittadinanza attiva e comunità energetiche – Sustainable development, active citizenship and energy communities*, in ORIZZONTI DEL DIRITTO COMMERCIALE [HORIZONS OF COMMERCIAL LAW] 71, 120 (2020).

17. At the European scale, RESCOOP is the European Federation of energy communities, in the form of cooperatives. See *The REScoop Model*, RESCOOP, <https://www.rescoop.eu/the-rescoop-model> (last visited Jan. 15, 2025).

18. Grignani et al., *supra* note 15, at 2.

19. Cusa, *supra* note 16, at 120 (The author observes that associations and foundations were not designed in the Civil Code as entities that normally exercise entrepreneurial activities, while the renewable energy community should be an entrepreneur. Therefore, it is suggested that if the renewable energy community was in an associative or foundational form, it would risk being governed by rules incapable of adequately protecting the various interests involved in its economic activities and, particularly, the interests of its creditors.)

20. Examples of some of the activities covered by RED II, *supra* note 4, art. 22, para. 2 and, more specifically, by its national transposition in Decreto Legislativo 8 novembre 2021, n.199, art. 31, para. 2(f), G.U. Nov. 30, 2021, n.285 (It.).

the very absence of a strict legislative discipline allows for the drafting of statutes characterized by flexible forms of governance, which, unlike associations, recognize greater control to the founding members and owners of the renewable energy plants that become part of the foundation's assets.

Given that, from practical experience,²¹ some of the most common and fastest-growing legal forms for establishing large projects of public authorities-driven energy communities (at least in Italy) are cooperatives and participatory foundations, it is relevant to understand by which provisions local authorities may maintain a pivotal role in the decision-making process while respecting the need for a democratic governance of energy communities.

According to the Italian Civil Code, the corporate bodies of a cooperative are the General Assembly of Members,²² the Board of Directors,²³ and the Supervisory Board.²⁴

Since cooperatives are based on democratic governance and decisions are made on a “*one member — one vote*” principle²⁵ apparently there is limited possibility for public authorities to effectively control the energy community. Nonetheless, the Civil Code provides an exception to the “*one member — one vote*” rule, so that legal persons may have the right to a maximum of five votes in the General Assembly.²⁶ Therefore, public authorities could then use this provision, considering the representation of the community they exercise.

In addition, the Civil Code states that public bodies can appoint one or more members of the Board of Directors, even if the majority of its members shall be nominated by the General Assembly.²⁷ The Statute of the Cooperative may attribute the right to vote in the election of the Supervisory Board in proportion to the quotas or shares held or by reason of participation in the mutual exchange.²⁸

From the analysis of the applicable provisions of the Italian Civil Code concerning the governance of cooperatives, it is possible to argue that there are limited possibilities for recognizing, at least formally, significant control powers to legal persons (including enterprises and public authorities).

The same conclusion does not entirely apply for participatory foundations.

In fact, these legal entities are based on a patrimony (which, in the case of RECs, may be represented by renewable energy installations, for instance) aimed

21. Fondazione Diocesi Treviso Energy, a participatory foundation a participatory foundation that has the aim of coordinating the energy communities that will arise in the approximately 30 primary cabins. CER Italia Participatory Foundation expanded from the area surrounding the primary cabin of the municipality of Montevarchi to a national level, thus making it possible for new members from all over Italy to join. See *Chi siamo* [Who we are], FONDAZIONE CER ITALIA [CER FOUNDATION ITALY], <https://www.fondazioneceritalia.it/chi-siamo> (last visited Jan. 15, 2024). Based on the first decisions of the Courts of Auditors on RECs, many municipalities opted for the legal form of cooperatives.

22. Art. 2538 c.c. (It.).

23. *Id.* art. 2542.

24. *Id.* art. 2543.

25. *Id.* art. 2538, para. 2.

26. Art. 2538, para. 3 c.c. (It.).

27. *Id.* art. 2542, para. 6.

28. *Id.* art. 2543, para. 2.

at accomplishing a specific purpose identified by the founder. As a consequence, more powers are attributed to the President of the Foundation and the Board of Directors. The main difference here with cooperatives is that the General Assembly of Members is not the supreme organ. In other words, as it has been previously observed, the governance structure can be atypical precisely because of the absence of a strict legal discipline that conform participatory foundations.

When drafting the statutes of RECs, it is therefore of utmost importance to consider the territorial dimension of the project and a governance structure with a vision to the future balance of all the relevant organs (including, for instance, in the perspective of its expansion, some provisions that would allow the decentralization of the decision-making process, especially for large communities).

In fact, when a renewable energy community expands beyond the boundaries of a municipality,²⁹ the risk is that territorial communities may feel under-represented in a large project that may lose its primary purposes (which are primarily of a social and environmental nature, with the exclusion of financial profits).

III. THE CHALLENGES OF PUBLIC GOVERNANCE: CONTROL BY LOCAL AUTHORITIES

One of the key challenges faced by local authorities willing to engage in energy-communities projects is the need to ensure some degree of control over the “*common pool*”³⁰ of RECs’ resources (such as the renewable energy installations and the distribution of economic incentives recognized to the community by GSE³¹). To a certain extent, some degree of control may be even necessary in order to align heterogeneous interests and guarantee the pursuit of social and environmental benefits, other than economic interests. From the experience gained from legal assistance provided to the first energy community projects, it can be observed that when public authorities join or establish renewable energy communities, most times they do provide renewable energy installations and invest public resources in the project (since citizens may have not the means to do so). In this perspective, it is somehow natural that they may want to know how these resources will be managed, especially considering the heterogeneous members that could join the community.

At the same time, this top-down approach may reduce direct participation of citizens and their involvement in the community. In fact, as the geographic dimension of the project expands,³² control over the community may be exerted by

29. According to the Italian framework, the geographical dimension of a REC may cover entire market areas. In Italy, there are around seven market areas that correspond almost to entire regions (North, Centre-North, Centre-South, South, Calabria, Sicily and Sardinia) identified by Terna – Italy’s primary transmission and dispatching operator.

30. Hoops, *supra* note 5, at 5.

31. GSE - Gestore dei Servizi Energetici S.p.A. [Energy Services Manager] is a state-owned company that promotes and supports renewable energy sources and, specifically, is in charge of acknowledging the incentives provided by the legal framework to the renewable energy communities.

32. Renewable energy communities may be constituted in forms of legal entities that encompass entire market areas even if, in order to access economic incentives, each configuration within the REC must be composed of members that are located under the same primary substation. *See* GESTORE DEI SERVIZI ENERGETICI (GSE) [ENERGY SERVICES MANAGER], DECRETO CACER E TIAD – REGOLE OPERATIVE PER L’ACCESSO AL

public authorities not in the sense of decisive influence on the decision of its organs but through the management of the energy communities' assets.

Therefore, increasing complexity in the REC's technical management may reduce its members to passive members rather than active participants.³³

In this perspective, especially when companies and private actors become members of a renewable energy community alongside local authorities, it becomes even more important to regulate (through bylaws) the control of data, the digital platform used for the management of the community,³⁴ the ownership of renewable energy installations, and liability for the maintenance of community infrastructures for the community. The role of local public authorities here is strategic³⁵ since municipalities can offer areas or rooftops (e.g., public buildings such as town halls and schools) for the installation of solar plants and collaborate with other prosumers in energy production.

Nonetheless, as it has been already observed, the risk of this model is that it introduces “*a strict division of ownership and control*”³⁶ so that citizens may view their role as passive investors rather than active community participants.

The second legal challenge has to do with the exclusion of large enterprises and companies for which the energy sector constitutes a primary area of economic activity from membership of renewable energy communities.³⁷

As it has been remarked, the reason behind the exclusion of large enterprises can be linked to the danger of abuse by established corporate players³⁸ and the consequent risk that RECs could not be autonomous entities if controlled by only some of their members.

At the same time, “*an enterprise cannot be considered an SME if 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.*”³⁹

SERVIZIO PER L'AUTOCONSUMO DIFFUSO E AL CONTRIBUTO PNRR [CACER AND TIAD DECREE – OPERATIONAL RULES FOR ACCESSING THE DIFFUSE SELF-CONSUMPTION SERVICE AND THE PNRR CONTRIBUTION] (2024), <https://www.mase.gov.it/sites/default/files/ALLEGATO%201%20Regole%20operative%20CACER%20def.pdf>.

33. Hoops, *supra* note 5, at 29.

34. With the awareness that a well-functioning electricity market design is the key factor for enabling the uptake of renewable energy, the Internal Market for Electricity Directive (EU) 2019/944 (or IMED Directive) has highlighted the crucial importance of data and new technologies for active consumers participation (in the perspective of a more decentralized and democratic energy market), such as smart metering systems that provide consumers with near real-time access to consumption data. IMED, *supra* note 4. Great emphasis at the European level is also placed on Internet of Things (IoT) technologies for energy management and on the use of Artificial intelligence for smarter grid management that may allow to predict energy consumption and production patterns. See EUR. COMM'N, AI AND GENERATIVE AI: TRANSFORMING EUROPE'S ELECTRICITY GRID FOR A SUSTAINABLE FUTURE (Sept. 25, 2024), <https://digital-strategy.ec.europa.eu/en/library/ai-and-generative-ai-transforming-europes-electricity-grid-sustainable-future>.

35. Gianluca Ruggieri et al., *Key Economic Drivers Enabling Municipal Renewable Energy Communities' Benefits in the Italian Context*, BUILDINGS, Nov. 25, 2023, at 7.

36. Hoops, *supra* note 5, at 19.

37. RED II, *supra* note 4, art. 22, para. 1.

38. Hoops Björn, *EU Directives on the internal governance of energy communities and their exclusionary effects*, 17 J. WORLD ENERGY L. & BUS. 147, 150 (2024).

39. Commission Recommendation 2003/361/EC, *supra* note 10, annex, art. 3, para. 4.

Consequently, this provision poses a problem for local authorities that may want to participate in renewable-energy-communities projects through their municipal energy utilities which, despite their expertise in the field, cannot become members of RECs either because they are controlled by public bodies or because they normally act in the energy sector as energy service companies (ESCOs).

Participation in renewable energy communities and control powers that can be exercised by local authorities are, furthermore, influenced by the regulatory framework represented by Legislative Decree n. 175/2016.

IV. ITALIAN LEGISLATIVE DECREE N. 175/2016 AND THE CASE-LAW OF THE COURTS OF AUDITORS ON RECS

In Italy,⁴⁰ national law controls the circumstances in which “*public administrations*⁴¹ can take part in and/ or control private companies for their institutional purposes with the aim to safeguard market competition and rationalize and reduce (or at least keep under control) the use of public money.”⁴²

The efficiency and cost containment of public participation constitute one of the pillars of the Legislative Decree of 19 August 2016 n. 175 (the Italian Consolidated Act/framework for the participation of public administration in subsidiary companies⁴³), and the external control exercised by regional Courts of Auditors becomes even more relevant when public administrations are involved in economic activities that entail risks of public money expenditure.

According to the procedure set by article 5 of the Consolidated Law,⁴⁴ public administrations need to ask for permission by the Court of Auditors⁴⁵ if they want to set up or acquire shareholdings in a company (even in the form of cooperatives). Generally, during this procedure, the Court of Auditors may ask local authorities to produce a business plan of a renewable energy community project,⁴⁶ examining the objectives of the newly established (or acquired) company and its relevance to the attainment of institutional goals pursued by public authorities.⁴⁷

40. In Italy, there are jurisdictional divisions and review divisions for each of the sixteen jurisdictional territories of audit: Piedmont, Lombardy, Venetia, Liguria, Emilia-Romagna, Tuscany, Latium, Marche, Umbria, Abruzzo, Molise, Campania, Puglia, Basilicata, Calabria, and Valle d’Aosta.

41. The reference made by Legislative Decree n. 175/2016 is not specifically to local public authorities but, more broadly, to public administrations.

42. EUR. COMM’N - ENERGY CMTYS. REPOSITORY, BARRIERS AND ACTION DRIVERS FOR THE DEVELOPMENT OF DIFFERENT ACTIVITIES BY RENEWABLE AND CITIZEN ENERGY COMMUNITIES 27 (2024), <https://circabc.europa.eu/ui/group/8f5f9424-a7ef-4dbf-b914-1af1d12ff5d2/library/22055ff9-1f49-41f8-a321-cbf20ca3d316/details>.

43. This expression results from the translation of “*Testo unico in materia di società a partecipazione pubblica.*” *Id.*

44. Pietro Algeri, *I controlli esterni collaborativi della Corte dei Conti sulle società partecipate: tra autonomia negoziale ed esigenze di contenimento della spesa pubblica* [*The External Collaborative Controls of the Court of Auditors on Investee Companies: Between Negotiating Autonomy and the Need to Contain Public Spending*], FEDERALISMI [FEDERALISMS], May 27, 2020.

45. Here, the singular form is used to refer to the institution (Court of Auditors) which is in charge of controls according to the law, without regard to its regional divisions.

46. Corte dei Conti, Sezione Regionale di Controllo per l’Emilia-Romagna, 25 Gennaio 2023, Deliberazione n. 32/2023/INPR.

47. Decreto Legislativo 19 Agosto 2016, n.175, art. 4, G.U. Sept. 8, 2016, n.210 (It.).

At the core of this procedure, public administrations send the deliberative act with which they set up a new company or acquire direct or indirect participations in it to the Competition Authority (known in Italy as “AGCM”) and to the Court of Auditors, which decides, within sixty days of receipt, regarding the conformity of the act with particular regard to financial sustainability and the compatibility of the choice with the principles of efficiency, effectiveness and cost-effectiveness of administrative action.⁴⁸ If the Court does not rule within this deadline (sixty days), the public administration may proceed to establish the company or the purchase of the shareholding.

Even if the pursuit of a service of general interest could justify the acquisition of shares in companies whose corporate purpose is energy production from renewable sources,⁴⁹ the creation of a renewable energy project is not automatically excluded from a strict control over the company’s financial sustainability, especially in a long-term perspective.⁵⁰

In addition to this, the deliberative act of establishing a publicly held company or acquiring shareholdings, even indirect, in already established companies must be analytically motivated by public administrations with specific reference to the compatibility of the financial intervention envisaged with the rules of the European treaties and, in particular, the European rules on state aid to companies.⁵¹

The approval of Ministerial Decree No. 414 of 7 December 2023 on incentives for RECs by the European Commission has reminded that renewable energy projects are not automatically exempted from compliance with state aid rules. As clarified at the time of approval of the scheme of the Ministerial Decree:

The Commission assessed the scheme under EU State aid rules, in particular Article 107 (3)(c) of the Treaty on the Functioning of the European Union (‘TFEU’), which enables Member States to support the development of certain economic activities subject to certain conditions, and the 2022 Guidelines on State aid for climate, environmental protection and energy.⁵²

Nevertheless, at a local scale, it may not always be clear whether, for instance, the provision of public funds (or public resources in other forms) for renewable energy community projects infringe, or not, state aid rules. In fact, for the purpose of state aid rules, “*The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.*”⁵³ Consequently, provided that all the requirements set by the Commission Notice are fulfilled, renewable energy communities participated by the public authorities can also be, at least in theory, regarded as undertakings engaged in economic activities.

48. D.Lgs. n.175/2016, art. 5, para 3.

49. D.Lgs. n.175/2016, art. 4.

50. This assumption was made clear in the decision of Corte dei Conti, Sezione Regionale di Controllo per la Toscana, 30 Marzo 2023, Deliberazione n. 77/2023/PASP.

51. D.Lgs. n.175/2016, art. 5.

52. European Commission Press Release IP/23/5787, Commission Approves €5.7 Billion Italian State Aid Scheme under the Recovery and Resilience Facility to Support Renewable Energy Communities and Self-Consumers (Nov. 22, 2023).

53. Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 1, 3.

From the regulatory framework depicted, case-law from Italian Courts of Auditors has stressed the need to guarantee the efficiency and good performance of the public administration in the corporate management of a public service even when local authorities engage in initiatives aimed at pursuing energy and climate targets and objectives.⁵⁴ In this perspective, the role of the Courts of Auditors can be considered new and unprecedented in that it involves a strict control over the financial management of RECs and their financial sustainability (also) in the future perspective, through an in-depth investigation into costs, revenues, and financial flows generated by a renewable energy community.

At the same time, some doubts may arise regarding the strict approach that characterize the motivational burdens of public administrations (especially as concern the application of European state aid rules to local projects).

V. CONCLUSION

The challenges of public governance of renewable energy communities are multifaceted from a legal point of view, since designing the internal governance of RECs implies a complex analysis of a local project and, more importantly, of its mission and vision for the future. While the role of local authorities in Italy is certainly strategic for the wide expansion of these initiatives, some legal issues have already emerged, proving the difficulty of adapting the model of a decentralized and democratic energy community to the energy sector.

If local authorities do not involve in renewable energy communities, the risk that can be envisaged is that these projects may not be sufficiently implemented in the whole territory⁵⁵ (at least not to the extent that is necessary in order to accomplish the ambitious targets that have been set out by the European Directives⁵⁶). In fact, considering that renewable energy communities cannot be regarded as profitable projects for the private sector,⁵⁷ the involvement of local authorities becomes crucial for pursuing social and environmental targets that could be implemented within wider climate and energy policies. In a costs-benefits perspective, private companies that may want to produce renewable energy

54. Corte dei Conti, Sezione Regionale di Controllo per la Toscana, 30 marzo 2023, Deliberazione n. 77/2023/PASP, para. 4.1.3.2, <https://banchedati.corteconti.it/documentDetail/SRCTOS/77/2023/PASP> (Among the first decisions on renewable energy communities, the court significantly underlined that the meritorious goals aimed at by the renewable energy communities cannot be considered in themselves sufficient to justify the establishment of a new company.).

55. In Italy, according to data reported from GSE, there were around 154 forms of shared energy that have been created (including renewable energy communities and collective self-consumption configurations). See GSE, *COMUNITÀ ENERGETICHE RINNOVABILI - RAPPORTO 2024: IL PUNTO DELLA SITUAZIONE IN ITALIA [RENEWABLE ENERGY COMMUNITIES - 2024 REPORT: THE POINT OF THE SITUATION IN ITALY]* (2024), https://www.legambiente.it/wp-content/uploads/2021/11/Comunita-energetice_report_2024.pdf. Many more RECs are expected after the approval of Ministerial Decree No. 414 of 7 December 2013 on incentives for RECs. 168 initiatives have been identified for the creation of configurations for self-consumption between energy communities and collective self-consumption, approximately double compared to 2023. See POLITECNICO DI MILANO, *ELECTRICITY MARKET REPORT 2024* (Nov. 13, 2024), <https://www.energystrategy.it/download/1044124/?tmstv=1738816470>.

56. See Directive 2023/2413, *supra* note 3, at 26 (“Member States shall collectively ensure that the share of energy from renewable sources in the Union’s gross final consumption of energy in 2030 is at least 42,5 %.”).

57. RED II, *supra* note 4, art. 2, para. 16.

benefitting from state-recognized economic incentives can make use of other configurations (such as, for instance, renewable self-consumption, as provided by art. 21 of RED II) that do not involve an engagement with the whole community and that do not provide benefits to the most vulnerable households.

To this aim, it is especially important that the law does not act as a barrier but, rather, as an “action driver”⁵⁸ for local authorities’ direct participation into these projects, finding a proper balance between the need to monitor the management of public resources with a more “lenient” approach for initiatives aimed at pursuing energy and climate targets (particularly as regard the analytical motivational burdens set by Legislative Decree No. 175/2016). Consistently, the Renewable Energy Directive states that “*Member States should provide an enabling framework to promote and facilitate the development of renewable energy communities.*”⁵⁹ That framework should ensure, in particular, that “*regulatory and capacity-building support is provided to public authorities in enabling and setting up renewable energy communities, and in helping authorities to participate directly*”⁶⁰ In addition to that, “*Without prejudice to Articles 107 and 108 TFEU, Member States shall take into account specificities of renewable energy communities when designing support schemes in order to allow them to compete for support on an equal footing with other market participants*”⁶¹

In this light, in accordance with the European legal framework, specific provisions that promote the direct involvement of local authorities in renewable-energy-communities projects should be envisaged. In fact, despite the challenges underlined in this contribution, the role of local public authorities is regarded as crucial in order to ensure the achievement of the mission of renewable energy communities (which also reflect national and European goals): providing social, environmental, and economic benefits to the whole community in which they operate.

58. Referencing the same expression used in EUR. COMM’N - ENERGY CMTYS. REPOSITORY, *supra* note 42.

59. RED II, *supra* note 4, art. 22, para. 4.

60. *Id.* art. 22, para. 4(h).

61. *Id.* art. 22, para. 7.