

Rivista di contabilità pubblica riconosciuta di carattere culturale dal Comitato interministeriale di cui al d.P.C.M. 9 marzo 1957

Amministrazione e Contabilità dello Stato e degli enti pubblici

Rivista scientifica riconosciuta dall'ANVUR nell'area 12 - ISSN 0393 - 5604

Fondata e diretta da Salvatore Sfrecola

2021 - Anno XLII

Environmental protection through the market: The Italian Security package between the Green Certificates and the Recovery Decree 2020¹

di Luigi Maria Pepe, ² PhD candidate in Comparative Law and Processes of Integration at the University of Campania Luigi Vanvitelli.

Abstract It: *In Italia il project finance è un meccanismo sempre più utilizzato per garantirsi un flusso economico costante che riesca a supportare investimenti in settori strategici. Il garantire un flusso economico specialmente se esso proviene da banche richiede la prestazione di idonee garanzie. Questo articolo approfondisce gli aspetti del security package nel settore delle rinnovabili alla luce di una delle garanzie principali, ossia la cessione degli incentivi. Questo sistema ha dato vita ad un mercato di cessione degli incentivi che ha visto e vede sempre nuove forme e metodi di innovazione. Non c'è dubbio che questo sistema costituisca anche una forma di tutela ambientale e valorizzazione delle energie sostenibili attraverso tecniche di mercato.*

Abstract Eng: *In Italy, project finance is an increasingly popular mechanism for securing a steady cash flow to support investments in strategic sectors. The guarantee of an economic flow, especially if it comes from banks, requires the provision of suitable guarantees. This*

¹ This research is the outcome of a speech given in a conference at the University of Dundee, Scotland on the topic: "Environmental Protection and Project Finance: The New Dialogue between Public and Private Interests".

* Luigi Maria Pepe is a PhD candidate in Comparative Law and Processes of Integration at the University of Campania Luigi Vanvitelli. Previously, he attended his academic education at the University of Naples "Suor Orsola Benincasa" and at the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee (Scotland) where he has achieved a LLM in International Energy Law and Policy.

article explores the aspects of the security package in the renewable sector in the light of one of the main guarantees, namely the transfer of incentives. This system has given rise to a market for the transfer of incentives which has seen and continues to see new forms and methods of innovation. There is no doubt that this system also constitutes a form of environmental protection and enhancement of sustainable energy through market techniques.

Summary: 1. Introduction. 2. The security package. 3. The security package in the Italian framework. 3.1 The assignment of credits from government subsidies. 3.1.1 The credit trading system: The Green Certificate. 3.1.2 The Recovery Decree and the tax credit system. 4. The assignment of credit between the Civil Code and the Italian Supreme Court. 5. Conclusions.

1. Introduction

Within civil law legal systems, the structuring of a project finance operation becomes an exercise in the search for legal institutions capable, in a harmonious and systematic combination, of achieving the aims proper to project finance. This exercise is not easy, as it requires the use of instruments and concepts born in contexts far from the civil law legal tradition, both from the economic and financial point of view and from the point of view of the legal culture³. Nevertheless, the introduction of project finance into the civil law systems represents the acknowledgement of the several benefits that this mechanism can provide to the market and to the development of

³ Cfr. S. Gatti, *Manuale del project finance* (2006) Bancaria Editrice. The study of a common law instrument and the attempt to transplant it into a different, or one might even say opposite, legal system, such as that of civil law, is a complex operation that cannot disregard the exegetical techniques of legal comparison. This is because before transplanting an institution from a different legal tradition it is necessary to study the properties of that legal system itself and identify convergences and differences. The comparative investigation thus conducted will then facilitate the introduction of that legal institution since the study of assonances and divergences has already been carried out and has already traced the guidelines for harmonising that legal instrument in the new system in order to allow the full expression of its legal potential. On comparative law see Gorla G., *Comparison involves history in Diritto comparato e diritto comune europeo*, Milano 1981, pp. 14 ss; Monateri P.G., *Morfologia, Storia e Comparazione. La nascita dei "sistemi" e la modernità politica*, in *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, Max Planck Institute For European Legal History, 2018, 267-290; Frosini T.E., *Diritto Comparato e Diritto Globale in Brutti M., Somma A., Diritto: storia e comparazione. Nuovi propositi per un binomio antico. Global Perspectives on Legal History*, Max Planck Institute for European, 2018, 207-218.

a particular market field. This is happened without any doubts in the energy sector, especially in the renewables one where project finance contributed to addressing the issues of climate change, the promotion of renewable energy investments and energy efficiency. Moreover, it is crucial to give much space to the analysis of the energy market through a private point of view, since one of the aims of environmental markets is to reconcile the different - and not always converging - interests of economic actors, implemented through the use of private law institutions and negotiations. Reading and analysing renewable energy generation through the lens of project finance is an important acknowledgement of how this mechanism has contributed to increase the number of green generation plants and how its internal mechanisms such as the security package makes this system efficient and attractive to banks and lenders. The key focus of this research will be on the position of guarantees and protection to be given to lenders in order to improve project bankability and secure them from third-party creditors' aggression. In the renewable sector, this protection package considers the position of public incentives as an assurance that can be transferred to lenders as a key element. Their transferability has given rise to an energy credit trading scheme that blends the carbon mitigation goals with the market's growth and competition. As evidenced by the more recent Recovery Decree, Italian experience has proven and continues to be innovative in the combination of market and environmental security, often also in anticipation of European energy policies, as in the case of Green Certificates.

2. The security package

“Security is a shield, not a sword”. One of the essential features of project finance is the security package, generally understood as the

set of typical and atypical "guarantees" that allow, through a detailed and in-depth risk analysis, an allocation of a specific portion of risk among all project participants. The security package is designed to "defend" the project from aggression by third party creditors as well as to control the project by the lenders who, together with the sponsors, share the risks of the project. The purpose of the security in project financing is to imprint a bond of intangibility and destination on the realisation of the project with the aim of excluding any action by third party creditors. The purpose of this bond is to prevent a third-party creditor from seizing and attacking the assets of the project, which, if that were to happen, might jeopardise any possibility of the project⁴. As stated above, if the first aim of the security package is to protect the project asset from third-party aggression, the second is to allow incisive and pervasive control by the financiers who, although formally not taking on the business risk relating to the project, they in fact participate, together with the sponsors, in the risks of the project itself. With the earmarked assets, the main purpose of the security package found in financing is achieved i.e. making the supervision exercised over the project by the lenders effective.⁵ This "participatory" nature of financing of the lenders leads to the crisis of the distinction between credit capital and risk capital that we have heard so much about, and of which we are all spectators⁶. But thanks to the security package, a creditor ensures for himself a privileged status, either "by establishing real rights over one, some, of all debtor's assets (real security) or by having recourse to a third party who has undertaken responsibility to the lender for

⁴ R. A. Brealey, A.I. Cooper, M.A. Habib, Using Project finance to fund Infrastructure Investment (1996) 9 in "Journal of Applied Corporate Finance", 3.

⁵ P Fletcher and others, Approaching Legal Issues in a Project Finance Transaction. in J Dewar (ed), International Project Finance (Oxford University Press 2011) 18

⁶ P. Ferro-Luzzi, I patrimoni "dedicati" e i gruppi nella riforma societaria, (2002) in "Rivista del Notariato".

payment if the debtor defaults (personal security)"⁷. In fact, the security package in favour of the lenders normally includes the shares or quotas representing the capital of the project company, as well as the other rights that the sponsors have towards the project company by way of equity contribution; security can also exist in the following ways: charge over assets, trust account to capture revenues, assignment of key arrangements to lenders, assignment of key agreements to lenders, assignment of insurance, completion guarantees, contractor performance bonds, fixed price contracts, cash deficiency agreements. In addition to the foregoing, it should be noted that in a project finance transaction involving the construction of energy power plants, the standard security package may be further strengthened by the granting of specific guarantees such as, for example, in the renewable energy sector, the contract for the assignment of credits rate arising from the incentives and subsidies granted by the Government⁸. The establishment of all those securities is normally considered and provided for in the financial documentation as a *condition precedent* to the allocation of the financing by the lenders, thus requiring the borrower to fulfil all the constitutive formalities required by law before the first disbursement of the financing. The reason why banks need all the formalities to be met before disbursing the loan is to ensure that the guarantee clause is enforceable against third parties.

3. Security package in the Italian legal framework

⁷ S. R. Goode, E. McKendrick, *Commercial Law* (2010) London 4th ed.

⁸ C. Groobey and others, *Project Finance Primer for Renewable Energy and Clean Tech Projects* (Wilson Sonsini Goodrich & Rosati 2010) www.wsgr.com accessed 25 January 2021. The authors state that clean technology sector investments also combine capital intensity with emerging technologies. Project finance model in the clean energy sector apart from benefiting from public subsidies, it must secure long-term off-take arrangements with quality-credit counterparties (such as power purchase agreements), but commodity-based projects that sell to open markets can also benefit from project finance.

Among the main guarantees embedded in a security package we can mention: the pledge on the SPV's shares and bank accounts, the assignment of project credits, the mortgage on real estate and the assignment of credits arising from government subsidies. All these guarantees aim at protecting the project and its asset from third-party aggression because those parties may be creditors of the project's sponsor and, for this reason, the sponsor may prefer to constitute a hedge in favour of lenders. As a matter of fact, the pledge on the SPV's shares is one of those securities that is always required by lenders. This is due to the fact that the presence of a pledge on the capital of the project company is equal to getting control over the entire project, as there is a total overlap between the project company and the project itself.⁹ The pledge of shares gives the creditor the right to proceed, in the event of default, in compliance with Article 2797 of the Civil Code, to the compelled execution of the asset. Therefore, the lender can sell the shares on which the pledge exists and be satisfied with the proceeds if the debtor fails to pay the amounts. Article 2352 of the Civil Code then provides that the borrower is entitled to vote at the meeting of shareholders and that is one of the reasons for which this type of protection is generally placed in place¹⁰. In the same way it operates the structure of the pledge on current bank accounts, which in a project finance operation are quite numerous. However, the option given to the project company is to leave a single account free of guarantees to which the income flows and which, after all the expenses have been charged, are transferred to the sponsors in

⁹ P.R. Wood, *The Law of Subordinated Debt* (1990) Sweet & Maxwell.

¹⁰ Gabrielli, *Il Pegno in Trattato di diritto civile* (2005) Utet.

terms of the allocation of the profits created by the project (distribution account)¹¹.

Then there is the assignment of the project credits. Project finance relies solely on the cash flow created by the project's commercial activity as the sole source of income for the SPV; it seems entirely reasonable to take over the guarantee on the SPV's current assets so that the revenue flow from the project is constantly regulated. These are simply the current and future revenues resulting from the contracts negotiated by the company of the project. This guarantee consists not only of the amounts owed by the SPV in relation to the project, but also of the guarantees earned from the different service providers involved in carrying out the operation, i.e., the performance bonds and warrant bonds provided by the contractor in the EPC and O&M contracts¹². A mortgage on the real estate of the project also constitutes an important feature of the security package. It is not uncommon for a situation to occur where the construction project has not yet started or is either in a preliminary state at the time the mortgage is signed. In such a case, only with the completion of the construction of the work, the purpose of the mortgage will be accomplished and completed (art. 2885 et seq. Civil Code); indeed, any mortgage deed created in relation to a single project must clearly and punctually specify the extensibility of the mortgage to all future constructions (art. 2886 Civil Code). An interesting issue arose in the context of mortgages in the renewable energy plants concerns the possibility or not of qualifying a photovoltaic plant as an immovable asset for the purposes of establishing a mortgage. Despite initially the Italian literature considered a photovoltaic plant a movable property and so, the mortgage loan was not possible, nowadays it appears to

¹¹ Bernier and Couso, *Typical Security Arrangements for a Single Source Project Financing*, D.F. Asmus (ed.) *The Project Finance Law Review* (Law Business Research 2020) 81.

¹² *Ibid.*

be correct to classify photovoltaic plants with a power of over 20 kW as an immovable property¹³. In fact, the real estate case law has reinforced this consideration that a photovoltaic device must be classified as an immovable asset because it is connected to the electricity grid and, accordingly, there is a connection to the location where it is built, functional for the permanent use of the asset in that place and functional for the real estate qualification.¹⁴

3.1 The assignment of credits from government subsidies

A special and precise review reserves the transfer of credits resulting from government subsidies. If the key guarantees of a security package for general project financing have been mentioned so far, this form of security covers the energy sector because it concerns and includes government subsidies to boost production and investment in renewable energy sources. This credit trading system based on energy *securities* derived from incentives is one of the most important innovations in the trading market, especially in the light of the new objectives of environmental sustainability and the mitigation of climate change. Thus, credit trading based on government incentives is not only a mechanism to implement the security package, the protection of lenders and the bankability of the project, but also it manages to combine these private interests with the public

¹³ National Notary Council, *Alcune questioni civilistiche connesse alla realizzazione di un impianto fotovoltaico: prime note* (2011) Study No. 221-2011/C

¹⁴ On the basis of the criteria that have emerged in doctrine and jurisprudence concerning the distinction between movable and immovable property pursuant to Article 812 of the Civil Code, it appears correct to classify photovoltaic plants (i.e. large plants with a total power exceeding 20 kW) in the category of immovable real estate since the possible precariousness of the material element of anchorage to the ground is compensated for by considerations relating to the functional profile. In fact, an installation of appreciable size, including the integration of the various elements and their connection to the national electricity grid, presupposes a connection with the place where it is installed which is functional for the long-term use of the asset in that place, Supreme Court n. 16824 del 21 July 2006; Constitutional Court n. 162 del 20 May 2008; Supreme Court n. 3500 del 20 February 2015.

interest of the energy transition¹⁵. As a matter of fact, to promote the bankability of financial transactions related to the construction of renewable energy plants, the Energy Services Operator (GSE) has given the possibility for the owners of the plants concerned to allocate their credits (subsidies) towards the GSE as an additional guarantee to third parties (lenders). The GSE, in fact, releases the GRIN tariffs, a new mechanism which ensures a subsidy in euro by the GSE on net energy production, in addition to the revenues from energy generation¹⁶. Logically these subsidies provided concern only the energy generation from renewable power plants. This is an atypical security, and it represents an additional guarantee to the standard ones which form part of the security package. This guarantee can only be issued by the SPV at a later stage than the period when the loan is released by the banks because it is necessary, first of all, to sign an agreement with the GSE for the recognition of the incentive tariffs which may take place only after the completion of the plant and its connection to the electricity grid.

3.1.1 The credit trading system: The Green Certificates

Despite nowadays is the GRIN tariffs scheme that represents the main subsidy for renewable generation, this research will instead focus on the system of the Green Certificates and on the effects and impacts of the new Recovery Decree. This represents a methodological choice because it is through the Green Certificates model that it has been given rise to the credit trading system in the

¹⁵J. Freeman – C. Kolstad, *Prescriptive Environmental Regulations versus Market-Based Incentives in Moving to Markets in Environmental Regulation: Lessons After Twenty Years of Experience*, (2006), Oxford University Press, 6-7.

¹⁶ For the transition to the new incentive mechanism, the owners of plants powered by renewable sources that have accrued the right to benefit from green certificates will have to sign an agreement with the GSE through the application GRIN created to allow the GSE to fully manage all the steps necessary for the recognition of the incentive tariff and the owners of the plants to perform all the activities necessary to qualify for the incentive. GRIN tariff (GSE) <https://www.gse.it/servizi-per-te/fonti-rinnovabili/impianti-a-fonti-rinnovabili-grin> accessed 23 January 2021.

renewable sector. As a matter of fact, the GRIN tariff system has been borrowed by the Green Certificate model. And the Italian scenario is of particular interest since it has anticipated the European energy policies in this matter. In fact, given the European legislator's conscientious silence on incentive schemes for the production of green energy, it should be stressed from the outset that Italy has proceeded in a very timely, if not pioneering, manner, approach to this matter: the market for Green Certificates (GCs) has its origins before the first harmonisation of energy markets, when European energy policy was still in its embryonic stage¹⁷. First of all, the Law No 9/1991 of 170, with which it was introduced the liberalisation of the electricity market with the incentive prices for electricity produced by plants powered by renewable. Secondly, the *Bersani* Decree (n.79/1999) in order to transpose Directive 1996/92/EC into Italian law which marked the gradual abandonment of the tariff method, in favour of a method close to the idea of the *Renewable Portfolio Standard* already adopted in the United States a few years earlier¹⁸, considered ideal for combining the growth of renewable energy production with market competitiveness. Article 11 of the Decree, imposed on electricity producers and importers the obligation - starting in 2002 - to place on the market a certain amount of energy produced from renewable sources, also providing that this obligation could be fulfilled by purchasing "*the equivalent quota or the relative rights*" from other energy producers¹⁹. The Decree laid the basis for a mechanism of renewables certificate trading, made up on the supply side, by the owners of renewable energy plants and, on the demand

¹⁷ F. R. Aune and others, Implementing the EU renewable target through green certificate markets (2012) 92 *Energy Economics*, 4, 992-1000.

¹⁸ S. Espey, Renewables portfolio standard: a means for trade with electricity from renewable energy sources? (2001) 29 in *Energy Policy*, 557-566.

¹⁹ A. Lorenzoni, The Italian Green Certificates market between uncertainty and opportunities (2003) 31 in *Energy Policy*, 37. The author argues that in the Italian legal system, the green certificates are classified as credit instruments and their transactions are governed by articles of the Italian Civil Code from 1992 to 2027. They are deemed to be goods covered by law and their transactions will come under the laws regulating sales transactions.

side, of producers, importers or distributors obliged to place on the market a certain amount of green energy. Therefore, it was introduced the green trading mechanism represented by the Green Certificates, released by the GSE once the suitability of the plants to produce the required green energy (100 MWh) had been established²⁰. This meant that there had to be a certain overall share of energy produced by renewable sources in the national electricity system, regardless of who actually injected that share. So, through this system it may happen that a producer who is obliged to feed a certain amount of energy from renewable sources into the system, does not have it or does not have enough of it. In order to fulfil his feed-in obligation, he can then purchase electricity produced from renewable sources with the corresponding green certificates, both (the actual electricity and the relative green certificates) being sold to him by producers or importers who have them. The energy from renewable sources is then fed into the system by the buyer and the fulfilment of the obligation is demonstrated by means of the green certificates obtained at the same time. But green certificates can also be sold without a corresponding transfer of energy from renewable sources. In other words, if a producer or importer has more energy from renewable sources than he needs in order to meet his individual obligations, he can feed energy from renewable sources into the system in excess of his mandatory quota and sell the corresponding green certificates (which are then superfluous) without selling the energy²¹. Therefore, he feeds into the electricity system an extra quota of green energy and sell on a spot market the relative green certificate to that extra quota. This is possible because each of the green certificates constitute a proof and evidence that the mandatory quota of electricity by renewables has been released into the system.

²⁰ Bersani Decree No. 79/1999.

²¹ A. Lorenzoni, n (18).

As a matter of fact, a producer who does not have energy from renewable sources, he may buy only the green certificates (which constitute evidence of having feed green energy into the system), and feeds only energy from non-renewable sources into the electricity system²². Thanks to its autonomous negotiability, unrelated to the sale of energy, the green certificate is therefore an instrument that provides an incentive due to its possibility to be monetised and, at the same time, it implements the system of credit trading of renewables portfolio²³. Moreover, the sale of green certificates provides a profit to the producer that encourages the production or import of energy from renewable sources. Their main feature is represented by their negotiability disconnected from the actual energy they are related to. It is up to the energy producer, who is obliged by law to meet certain targets for the use of renewable energy, to decide whether to invest in technologies to produce energy from renewable sources or to import green energy from abroad, and thus to receive the relevant GCs from GSE²⁴. Despite the fact that the GCs market was permanently closed by G.S.E. on 30 June 2016²⁵ with the aim of fulfilling the definitive transition to the feed-in tariff mechanism introduced by Legislative Decree no. 28/2011, the GCs issued up to 2016 are still in circulation and they still constitute an

²²The advent of a new public consciousness of environmental issues, and the momentum generated by environmental movements and alliances, have led most countries at different times to adopt environmental policies. The author suggests some considerations concerning the taxonomy of environmental policies, the existence of artificial markets, the quotas for the emission of greenhouse gases and green and white certificates. The public regulator first establishes new legal assets in the pursuit of environmental protection goals in the form of abstract titles incorporating the power to certify to a public authority the fulfillment of a statutory duty to restrict pollution to a pre-established ceiling in M. Clarich, *La tutela dell'ambiente attraverso il mercato* (2007) 1, *Diritto Pubblico*, 219-240.

²³ M. Voogt, MG Boots, GJ Schaeffer, JW Martens, *Renewable Electricity in a Liberalised Market – The Concept of Green Certificates* (2000) 11 *Energy & Environment* 1, 65-79.

²⁴ V. Colcelli, *The problem of the legal nature of Green Certificates in the Italian legal system* (2012) 40 *Energy Policy*, 301-306, The author explains the regulatory approach of the Green Certificates scheme. Indeed, since they reflect a blend of private and public characteristics, "green" items are regarded as impure public goods. The choice to apply private laws, however, typically varies from the use of public rules, including licensing, prohibition or prior authorisation, quality requirements, compulsory disclosure. The use of private transaction rules, on the other hand, exposes the industry to potential speculative pressures that typically impact market segments in which financial intermediation plays a crucial role, as is the case with the Green Certificate.

²⁵ Certificati Verdi (Gestore Mercati Energetici) <http://www.mercatoelettrico.org/it/mercato/cv/cosasonocv.aspx> accessed 23 January 2021.

important example of credit trading for incentivising the production of renewable energy and for setting up a mechanism of credit guarantees through public incentives which can become part of the security package by perfecting the bankability of a project in renewable energy generation.

3.1.2 The Recovery Decree and the tax credit system

The energy sector is now experimenting with a new incentive tool alongside the credit trading scheme, which can also be counted in the examples of credit allocations to banks to improve the security package. The Decree introduced a revolutionary system of tax credits in the energy efficiency market, which would be useful for the economic recovery of the country, with its transferability to third parties being peculiar. The Recovery Decree No. 34/2020 contains health, economic and social measures to redeem the country after the Covid-19 pandemic. The aim of the Decree is to give life to an economic rebirth of the country through environmental protection and the achievement of climate targets as outlined in the Integrated National Energy and Climate Plan²⁶. The Decree provides incentives for energy and seismic upgrading of residential buildings, therefore energy efficiency and investments in solar panels with a 110% tax deduction. The State provides an incentive for these interventions releasing a 110% tax credit on the overall amount of the expenses and those who benefit can decide to transfer this credit/incentive to the company carrying out the works, so that the company obtains

²⁶The aim of this plan is to contribute to a broad-based transformation of the economy. In this context, the convergence of decarbonisation, the circular economy, sustainability and the rational and reasonable use of natural resources are priorities and tools for an economy that is more respectful of people and the environment. The system is one of convergence into the single market of the national energy markets and of due consideration for affordable pricing and protection of supply, Integrated National Energy and Climate Plan (Ministry of Economic Development 21 January 2020) <https://www.mise.gov.it/index.php/it/198-notizie-stampa/2040668-pniec2030> accessed 24 January 2021.

this tax credit for 110% of the amount of the works²⁷. The initial beneficiary sees these works carried out free of charge because it pays the company through the tax deduction received by the State as an incentive²⁸. In this way, a mechanism of expenditure and investment is created that reinvigorates the economic flow of a country. Although it would seem that the state is giving this gift without anything in return, it manages to address issues of reduction of emissions through energy efficiency but it also creates a new economic flow in the country. In fact, the company called in to carry out the work will hire, buy materials and pay taxes. The question that arises is how the Recovery Decree impacts on project finance, especially concerning the package of guarantees that the SPV must provide to the lenders. The special feature of the Recovery Decree is the transfer of the tax credit by the company carrying out the works. The tax deduction that the State gives to the individual beneficiary of the energy efficiency works can be transferred to the company carrying out the work, which, in turn, can transfer it back to its lenders as a guarantee and security. This model seeks to replicate the recently adopted US tax credit model for the renewables sector. In fact, the US Congress approved an economic intervention package, including \$900 billion in aid against COVID-19²⁹. A gigantic manoeuvre in which energy has a dedicated place. The package includes: \$35 billion in energy research and development programmes; the extension of various tax credits allocated to photovoltaics, onshore and offshore wind plants; and new levers for the clean energy industry. In detail, under the new legislation, the

²⁷ Superbonus e Sismabonus 110% - Decreti attuativi (Ministry of Economic Development) <https://www.mise.gov.it/index.php/it/incentivi/energia/superbonus-110> accessed 24 January 2021.

²⁸ S. Brunello and others, La cessione delle detrazioni fiscali e dei crediti d'imposta nel c.d. "Decreto Rilancio", (2020) <http://www.dirittobancario.it/approfondimenti/fiscalita/la-cessione-delle-detrazioni-fiscali-e-dei-crediti-d-imposta-nel-cd-decreto-rilancio> accessed 24 January 2021.

²⁹ B. Bhattacharyya, Renewable Energy Tax Credits: The Case for Refundability (Center for American Progress) 28 May 2020 <https://www.americanprogress.org/issues/green/reports/2020/05/28/485411/renewable-energy-tax-credits-case-refundability/> accessed 24 January 2021.

Government provides for the solar investment tax credit (at 26% for projects that begin construction in 2021 and 2022).³⁰. Wind power will also benefit from the tax extensions in the new law. The production tax credit, usually claimed by onshore developers, will remain at 60 per cent for plants starting construction before the end of 2021. This package of measures in the US for the green energy production, provides for a tax credit that companies can turn around and transfer to lenders as contract guarantees to increase the bankability of the projects. The difference with the Recovery Decree is that this latter does not provide this incentive directly to the energy companies but to private citizens, who will however call-in companies specialised in energy efficiency and solar panels. The tax credit generated will be 110% of the overall amount of the work and the commissioned company will be able to convert this tax credit into a special guarantee for the financing banks. A system that would seem complicated and articulated, but instead makes building economic recovery and energy conservation ventures bankable for banks and funders with guarantees that come, in simple terms, from government incentives, a bit like green certificates.

4. The assignment of credit between the Civil Code and the Italian Supreme Court

At this point, the question arises whether it is possible to assign a future tax credit because the system created by the Recovery Decree is made of incentives which are not immediately monetizable. To this end, it is useful to provide a civil law framework for the assignment of

³⁰ The US seems to be the first country to experiment the tax credit into the renewable field in order to boost the investments in renewable plants and into the decarbonisation of the energy sources. With the Biden administration it has been shown to keep up this set of policies even trying to implement them, USA: esteso il credito d'imposta per fotovoltaico ed eolico (Rinnovabili, December 2020) <https://www.rinnovabili.it/energia/eolico/credito-d-imposta-usa-fotovoltaico-eolico/> accessed 24 January 2021.

a tax credit and the perspective of the jurisprudence and case law in regard. The assignment of a tax credit is one of the main types of modification of the obligatory relationship among private entities especially on the creditor side. It is a bilateral contract by virtue of which the original creditor (the "assignor") transfers the ownership of its right to another person, who is called the "assignee". Since the assignment contract has immediate transferee effects (i.e., in accordance with the consensual principle, the right is immediately transferred by virtue of the consent legitimately given by the parties, art. 1260 Civil Code et seq.), it is necessary to analyse this contractual case in relation to Art. 1346 of the Civil Code, on the requirements of the object of the contract, which requests not only for its possibility and lawfulness but also for its determinability. Does a future credit (as the tax credit one) include the contractual object of the determinability as requested by the Italian Civil Code?³¹ In this respect, the jurisprudence of the Supreme Court has argued that the regulation of the assignment of a tax credit may include future credits through an extensive interpretation of Article 1384 of the Civil Code, where, with reference to "future things", future credits may also be included³²; it follows that not only those relating to a certain source, but also all those situations of expectation concerning the coming into existence of a credit may be included in the category of future credits³³. In this regard, a more recent ruling clears up any doubts as

³¹ Cfr. S. Troiano, *La cessione dei crediti futuri*, Padova, 1999; F. Caringella, *Le modificazioni soggettive del rapporto obbligatorio*, Milano, 2010, 103; G. Finazzi, *La cessione del credito*, in *La circolazione del credito. Cessione "factoring" cartolarizzazione*, in L. Garofalo L., M. Talamanca (diretto da), "Trattato delle obbligazioni", volume IV, tomo I, a cura di R. Alessi- V. Mannino, Padova, 2008, 172-173.

³² Supreme Court No. 5141/2002. In this sentence, the Supreme Court From showed the need to re-expand the boundary of the assignment of credit, stating the importance of enhancing the rule of Art. 1348 of the Civil Code, where the reference to "future things" could well include credit rights, employing an evolutionary reading of it. It follows, therefore, that not only those inherent in a source which is certain, outlined in its essential components, but also, and more importantly, all those situations of expectation inherent in the coming into existence of a credit, can be included in the group of future claims. Therefore, an assignment of future claims can be considered both in the presence of an abstract and a concrete possibility.

³³ M. Villani, *Superbonus 110%: la pignorabilità del credito fiscale dei condomini* (Diritto.it, 2020) <https://www.diritto.it/superbonus-110-la-pignorabilita-del-credito-fiscale-dei-condomini/> accessed 24 January 2021.

to the interpretation, stating that "*there is no rule prohibiting the availability of future rights because they are merely contingent, it being sufficient that, in the dispositive transaction, the source of the credit is identified or determined (or determinable) so that those which will derive from that source are automatically included in the transfer (and not only in the case where the object of the transaction is a single future credit, but also in the case where the object is a plurality of them)*"³⁴. As a matter of fact, the Supreme Court allowed the legitimacy of the future credits in bilateral negotiations. The tax credit, as a form of future credit, has been admitted and covered by the Supreme Court hedge.

5. Conclusion

As pointed out by the 2018 Nobel Prize in economics, William Nordhaus - what is urgently needed, in the face of the global warming emergency, is not so much a response in terms of technical-scientific elaboration, but rather the adoption of legal solutions that are as close as possible to the empirical - evidence on the trend in greenhouse gas emissions into the atmosphere³⁵. The credit trading and the tax credit systems may represent the innovation and the legal solution Prof. Nordhaus was referring to. Not only for the single purpose of project finance and the security package to provide to lenders but also for the wider objectives of increasing competitiveness in a challenging market by boosting the stakeholders to convert to these new immaterial properties. Tax credits, for example, may help mitigate the private sector financial constraints of investment in renewable energy projects by reducing uncertainty and

³⁴ Supreme Court n. 31896/2018. So, as stated in the above ruling, the Supreme Court affirmed that in our legal system, the assignment of future credits, including credits for damages, is possible without regard to the likelihood of the claim being realised.

³⁵ W.D. Nordhaus, Projections and Uncertainties about Climate Change in an Era of Minimal Climate Policies, (2016) National Bureau of Economic Research Working Paper No. 22933, Cambridge (MA).

making market entry more profitable. Those systems applied to the energy sector might represent the solution for governments on how to implement their public energy policies and subsidies schemes. A public policy to encourage the creation of transferable renewable energy portfolios, negotiable within all market stakeholders, including banks. Supporting market forces and implementing mechanisms of public incentives that might attract market stakeholders can only support the achievement of global climate change goals.