# JUDGMENT NO. 10 YEAR 2015

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 81(16), (17) and (18) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Article 1(1) of Law no. 133 of 6 August 2008, raised by the Provincial Tax Board of Reggio Emilia in the proceedings pending between Scat Punti Vendita Spa and the Italian Revenue Agency – Provincial Directorate for Reggio Emilia by the referral order of 26 March 2011, registered as no. 215 in the Register of Referral Orders 2011 and published in the Official Journal of the Republic no. 44, first special series 2011.

Considering the entry of appearance by Scat Punti Vendita Spa and the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Marta Cartabia at the public hearing of 13 January 2015;

having heard Counsel Livia Salvini for Scat Punti Vendita Spa and the State Counsel [*Avvocato dello Stato*] Paolo Gentili for the President of the Council of Ministers.

[omitted]

*Conclusions on points of law*

1.– By the referral order issued on 26 March 2011 and filed on the same date, the Provincial Tax Board of Reggio Emilia raised a question concerning the constitutionality of Article 81(16), (17) and (18) of Decree-Law 25 June 2008, no. 112 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments

into Article 1(1) of Law no. 133 of 6 August 2008, with reference to Articles 3, 23, 41, 53, 77 and 117 of the Constitution.

The contested legislation provided – with effect from the tax period following that ending on 31 December 2007 – for an additional levy, which was classified as a "surcharge" of 5.5 percent on the income tax of the companies provided for under Article 75 of Presidential Decree no. 917 of 22 December 1986 (Approval of the consolidated law on income tax), as amended, on undertakings operating in specific sectors, including the sale of gasoline, petroleum, gas and lubricant oils that had achieved revenue in excess of 25 million euros during the period tax period, prohibiting the undertakings liable to the levy from passing it on to consumer prices and charging the Electricity and Gas Authority (which subsequently became the Regulatory Authority for Electricity Gas and Water) with the task of monitoring and of submitting a report to Parliament before 31 December of each year concerning the effects of the tax.

The question was raised during the course of proceedings involving an appeal against the implied refusal of an application for reimbursement filed by Scat Punti Vendita Spa of the amount paid to the tax collection body in relation to the "surcharge" on corporate income tax (IRES) due in accordance with the provisions under examination.

In particular – endorsing and reproducing verbatim the objections raised by the taxpayer's representative – the Provincial Tax Board of Reggio Emilia objects first and foremost that Article 77 of the Constitution has been violated on the grounds that the prerequisites of necessity and urgency, which were necessary in order for the Decree-Law to be adopted, were not met.

According to the referring body, the requirement enshrined in Article 23 of the Constitution that amendments may only be made through primary legislation is claimed to have been violated as it amounts to a payment required not under the terms of a law but of a decree-law.

Articles 3 and 53 of the Constitution are also claimed to have been violated because the "surcharge" was not associated with any indication of capacity to pay tax and results in an unjustified difference in treatment between the undertakings operating in sectors subject to the "surcharge" and other undertakings and, within the former class, between those with revenue higher than 25 million euros and those with revenue lower than that figure. A difference in taxation is also claimed to subsist between the producers and

distributors of petroleum as only the former are lawfully entitled to pass on the economic burden of the "surcharge" to other parties, whilst the prohibition on the transfer of the charge to consumer prices laid down by the contested Article 81(18) is applied to distributors only.

The provision is also claimed to violate Articles 3 and 41 of the Constitution by rendering more onerous any economic initiatives by undertakings operating in the hydrocarbons sector, including distributors which, in contrast to producer undertakings, are unable to transfer the burden of the tax.

Finally, the contested provisions are claimed to breach Articles 41 and 117(2)(e) of the Constitution because the above prohibition on transfer, which amounts to an authoritative imposition on prices, affects free competition and thus unlawfully limits private economic initiative.

2.– Scat Punti Vendita Spa intervened in the proceedings before this Court, filing written statements in support of the objections raised by the referring body.

The intervention is fully admissible as it was made by the applicant in the proceedings before the referring body, which is thus also a party to the constitutional review proceedings (see *inter alia* Judgments no. 304 of 2011, no. 138 of 2010 and no. 263 of 2009).

3.– As a preliminary matter, it is necessary to examine the impediments to admissibility averred by the State Counsel.

The President of the Council of Ministers has requested first and foremost that the case file be remitted to the referring body in consideration of the legislation enacted during the intervening period.

The request cannot be accepted.

It is indeed true that the legislator amended Article 81(16), (17) and (18) of Decree-Law no. 112 of 2008, converted with amendments into Article 1(1) of Law no. 133 of 2008 after the referral order was filed.

This occurred specifically by: Law no. 99 of 23 July 2009 (Provisions on the development and internationalisation of undertakings and in relation to energy); Decree-Law no. 138 of 13 August 2011 (Further urgent measures on financial stabilisation and development), converted with amendments into Article 1(1) of Law no. 148 of 14 September 2011; Decree-Law no. 69 of 21 June 2013 (Urgent provisions to relaunch the

economy), converted with amendments into Article 1(1) of Law no. 98 of 9 August 2013; and Decree-Law no. 101 of 31 August 2013 (Urgent provisions to pursue the objectives of rationalising the public administrations), converted with amendments into Article 1(1) of Law no. 125 of 30 October 2013. These measures did not alter the structure of the levy but increased the rate of the "surcharge" to 6.5 percent; the class of companies falling within the scope of the tax was expanded, as the legislator reduced the minimum revenue threshold above which companies operating in the sector become liable to the tax, reducing it from the original 25 million to 10 million and then to 3 million euros; a further income threshold of 1 million euros was introduced, which was subsequently lowered to 300 thousand euros; the control powers of the Regulatory Authority for Electricity Gas and Water were limited only to undertakings fulfilling the prerequisites for the application of the "surcharge".

However, these legislative changes do not make it necessary to remit the case file to the referring body, first and foremost because the tax year to which the implied refusal of the repayment request at issue in the proceedings before the lower body relates is 2008, with the result that the applicable law is that in force prior to the amendments. It should be added that the amendments introduced do not by any means remedy the grounds for unconstitutionality averred by the referring court, but if anything accentuate them, with particular regard to those raised with reference to Articles 3 and 53 of the Constitution, as they increase the percentage rate of the "surcharge", expand the class of companies required to pay it and render the tax permanent, so much so that it must be considered that – as will be noted below – some of the challenges raised by the referral order also relate to the subsequent amendments. There is therefore no reason to remit the case file to the referring body.

4.– The State Counsel then averred that the questions raised were inadmissible due to the failure to give reasons for the relevance of and the reasons underlying the challenges, as the referring body allegedly limited itself to endorsing the submissions made by the applicant.

It must be noted in this regard that the referring body provided a detailed description in the referral order of the case before it and, after setting out the applicant's arguments verbatim and at length, explained that "the Board agrees with the above argument and considers that the question concerning the constitutionality of the 'rule' on the grounds

averred by the applicant is relevant since the presence of the 'rule' within the legal order precludes the repayment requested, and that the question is also not manifestly unfounded".

The referring body did not state reasons for the referral order in the form of a mere reference to the arguments contained in the party's submissions, but set out the objections averred by the party in the proceedings before the lower court, and endorsed them. Since it is structured in this manner, the referral order does not by any means lack motivation, and does not violate the principle of self-sufficiency, which must be deemed to have been complied with when, as in the present case, "the arguments in support of the challenges are clearly stated in the referral order, without any reference to other external documents" (see *inter alia*, Judgment no. 143 of 2010). Therefore the grounds for challenge were not provided *per relationem* in this case, as the obligation which this Court considers to apply to the referring body to "render explicit and endorse the reasons why it is not manifestly unfounded" has been complied with in full (see *inter alia*, Judgments no. 7 of 2014, no. 234 of 2011 and no. 143 of 2010; Orders no. 175 of 2013, no. 239 and no. 65 of 2012).

As regards the reasons given in support of its relevance, whilst the referring court limited itself to observing that the contested provision precludes repayment, without specifying whether the applicant fulfils the further prerequisites for liability to the tax, which was at the time based solely on revenue earned, nevertheless – even leaving aside any consideration regarding the fact that the principle that the subject-matter of an action is delimited in the application initiating proceedings [*principio dispositivo*], which also applies in tax proceedings before the referring body, would deprive this fact of any relevance (as it was not averred by the interested party) – it is entirely implausible to consider that the company paid a tax of a significant amount without fulfilling the revenue-based prerequisites. Consequently, the referring body's assertion that only the contested provision precludes the request for repayment must reasonably be deemed to constitute sufficient motivation also in this regard.

5.– On the merits, the questions raised in relation to Articles 77(2) and 23 of the Constitution, focused on the unlawful use of the decree-law mechanism, are unfounded.

Whilst it is in fact true that "the prior existence of a factual situation entailing an urgent need to make provision through an exceptional instrument, such as the decree-law, is a

prerequisite for the validity of the adoption of such an act, non-compliance with which will render it unconstitutional, which cannot be remedied by the conversion law" (see Judgment no. 93 of 2011), nevertheless, according to the case law of this Court, the constitutional review of the adoption of a decree-law by the government must in any case be limited to situations involving the "evident failure to comply with" the prerequisites of extraordinary necessity and urgency required under Article 77(2) of the Constitution or "in which the relative assessment is manifestly unreasonable or arbitrary" (see *inter alia* Judgments no. 22 of 2012, no. 93 of 2011, no. 355 and no. 83 of 2010; no. 128 of 2008; no. 171 of 2007).

Indeed, in view of the widely known economic emergency which precipitated the issue of the contested Decree-Law no. 112 of 2008 on "Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation", it may be concluded that it was not adopted under circumstances in which the prerequisites of urgency and necessity were evidently not met; in addition, no arguments can be inferred from the referral order that are capable of establishing that the government's assessment that the prerequisites for an urgent decree were met was unreasonable or arbitrary. On the other hand, by introducing a "surcharge" with the aim of securing new tax revenue in order to deal with the emergency and to redistribute the tax burden, the contested provisions are consistent with the aims of the measure and with the principles of constitutional law on which it is based.

As regards the requirement stated in Article 23 of the Constitution that amendments may only be made through primary legislation, it must be deemed to be met without difficulty also by any other act with the force of law, as is the case for all reservations contained in other provisions of constitutional law, including those relating to fundamental rights (see *inter alia*, Order no. 134 of 2003, Judgments no. 282 of 1990, no. 113 of 1972 and no. 26 of 1966) and subject to those that require authorisation or approval by Parliament. This is both because decree-laws and legislative decrees are sources of law with effect equivalent to parliamentary laws, and also because the involvement of the representative body is guaranteed during the enactment process, or respectively upon conversion or during enactment of the parent statute (along with any opinions given during implementation of the grant of legislative authority). It follows that the parameter of constitutional law invoked, to which this Court must make

exclusive reference, is sufficiently complied with also when the tax legislation is introduced by a decree-law, provided that this occurs – as in the present case – in full accord with the prerequisites laid down under constitutional law.

6.– The question raised with reference to Articles 3 and 53 of the Constitution is well-founded subject to the limits specified below.

6.1.– The referral order starts from the consideration that the contested tax "surcharge" results in a qualitative discrimination between income on the grounds that it is applied solely to certain companies operating in the energy and hydrocarbons sector. Moreover, such discrimination is not supported by an adequate justification and is accordingly arbitrary. In particular, although a variety of indications contained in the text of the contested legislation and the relative preparatory works suggest that the intent of the legislator was to strike the "excess profits" earned by the said companies during an economic downturn, in actual fact the structure of the new tax is not consistent with that justificatory rationale.

Aspects of irrationality having regard to the purpose are apparent in the identification of the amount liable to the tax, which is comprised of the entire income, rather than only "excess profits", and in the permanent rather than temporary nature of the "surcharge", which does not appear to be limited in any way to one or more tax periods, or to be conditional upon the continuation of the economic downturn, which was however adduced as a reason for it.

The general tone of these justifications, and in particular the insistence on the structural and permanent nature of the "surcharge" [or more correctly: of the increase in the rate of corporate income tax] lead the Court to conclude that the challenges apply to Article 81(16), (17) and (18), also in the version resulting from the subsequent legislative amendments. In fact, under the terms of those amendments, the tax at issue in these proceedings, which was originally established on a permanent basis, was further stabilised by accentuating the aspects of the legislation on which the complaints brought by the applicant are based.

6.2.– The increase in the rate of corporate income tax due from certain operators in the energy, petroleum and gas sectors, as configured under Article 81(16), (17) and (18) of Decree-Law no. 112 of 2008, as amended, is not consistent with Articles 3 and 53 of the Constitution, according to its settled interpretation in the case law of this Court.

In fact, pursuant to Article 53 of the Constitution, capacity to pay tax amounts to a prerequisite for and limit on the state's power to tax, in parallel with the taxpayer's duty to contribute to public spending, as that principle must be interpreted as a sectoral specification of the broader principle of equality laid down by Article 3 of the Constitution (see Judgments no. 258 of 2002, no. 341 of 2000 and no. 155 of 1963).

Although this Court has repeatedly stated that "the Constitution by no means requires uniform taxation according to criteria that are absolutely identical and proportional for all types of taxation, it by contrast requires "an inseparable link with capacity to pay tax within the context of a system inspired by the principles of progressive taxation, as a further manifestation within the specific field of taxation of the principle of equality, which is related to the task of removing *de facto* financial and social obstacles to the freedom of and equality between people, within a spirit of political, economic and social solidarity (Articles 2 and 3 of the Constitution)" (see judgment no. 341 of 2000, followed on this point by Judgment no. 223 of 2012).

Therefore, according to the settled position of this Court, not every adjustment of the tax system for manufacturing sectors will amount to a violation of the principle of capacity to pay tax and the principle of equality. However, any treatment by the tax regime that provides for different treatment on the basis of economic area or type of taxpayer must be supported by adequate justification, failing which the different treatment will degenerate into arbitrary discrimination.

As regards the principles laid down in Articles 3 and 53 of the Constitution, the Court is therefore required to verify whether the distinctions made by the tax legislation, which also apply to economic sectors, are not unreasonable, arbitrary or unjustified (see Judgment no. 201 of 2014): accordingly, within this ambit the constitutional review must consider "whether or not the legislature has made reasonable use of its discretionary powers in relation to taxation with the goal of verifying the internal coherence of the structure of taxation with the circumstance establishing liability to taxation, and that the scale of taxation is not arbitrary" (see Judgment no. 111 of 1997; see *inter alia*, Judgments no. 116 of 2013 and no. 223 of 2012).

6.3.– There are abundant examples within Italian law of legislation requiring a higher contribution from certain companies.

There have been numerous cases in which taxation is temporarily increased – in relation to particular productive sectors or specific types of income and asset – which have been upheld by this Court as lawful by virtue of their limited duration: it is sufficient to mention the municipal tax surcharge on buildings (see Judgment no. 159 of 1985), the extraordinary real estate tax on the value of buildings (see Judgment no. 21 of 1996), the 0.6% levy on bank and postal deposits (see Judgment no. 143 of 1995), and the extraordinary contribution for Europe (see Order no. 341 of 2000).

There have also been cases in which the imposition of different taxes on different economic sectors or types of income has become structural in nature, yet has nonetheless passed muster before this Court. These include for example the surcharge on remuneration in the form of bonuses and stock options, which was held by this Court to be anything but unreasonable, arbitrary or unjustified in Judgment no. 201 of 2014; or the legislation examined in Judgment no. 21 of 2005, in which the Court held that the provision for a different rate of the regional business tax (IRAP) for certain manufacturing sectors and certain types of taxpayer was based on economic policy and redistributive motivations that were not unreasonable, consisting principally in the need to neutralise both the greater impact of the new tax on the agriculture and small-scale fishing sectors as well as its reduced impact on the banking, financial and insurance sectors which, not unjustifiably, were subjected to a higher rate.

6.4.– In the light of the principles laid down in the case law of the Constitutional Court – which, as noted above, do not require uniform taxation, yet nonetheless prohibit unjustified, arbitrary, irrational or disproportionate differences in treatment – it is hardly necessary to add that it cannot be excluded that the special characteristics of the petroleum sector in theory lend themselves to legitimising a special tax regime. As is clear from the inquiries and investigations carried out by the Italian Antitrust Authority, various economic indications suggest that there is very little competition between undertakings in this sector. On the other hand, due to the oligopolistic structure of the sector, which is populated by a low number of operators which often operate along the entire supply chain – from research through extraction to the refinery of petroleum and fuel distribution – along with the high costs and difficulties associated with building infrastructure, it is particularly arduous for new competitors intending to operate on a large scale to enter the market. Furthermore, it is difficult for ordinary market dynamics

to operate within the oil and energy sector, also because it is unlikely that an increase in prices may be countered by a corresponding fall in demand, which is inelastic in these areas. In summary, it is not entirely implausible to conclude that this market sector may be characterised by high profitability due to position rents, which is significantly higher than other sectors, thereby theoretically justifying ad hoc taxation, especially given the state's exceptional financial requirements.

6.5.– In view of the above, it must be noted that the possibility for different levels of taxation must still be based on an adequate objective justification, which must be consistently, proportionally and reasonably transposed into the structure of the tax (see Judgments no. 142 of 2014 and no. 21 of 2005).

In the present case, Article 81(16) provided – "[o]n account of the performance of the economy and the social impact of the increase in prices and rates in the energy sector" – for a "surcharge" of 5.5 percent (subsequently raised to 6.5 percent) on the rate of corporate income tax for companies operating in the said sector that have earned revenue in excess of a specific amount, the level of which has progressively fallen, thereby significantly expanding the class of operators subject to the tax rise, according to a trend which was only marginally offset by the introduction of another threshold relating to taxable income.

The factual premises adduced by the legislator in Article 81(16) as justification for increasing the taxation of sectoral companies consist first in the serious economic crisis which had broken out precisely during that period and the related unsustainability, in particular for weaker persons, of the prices of primary consumer products, and secondly in the parallel exceptional increase in the price of crude oil at precisely the same point in time which, from the perspective of the legislator, appeared to be liable to increase significantly the profit margins of the sectoral operators concerned and to incentivise opportunist or speculative market conduct.

The complex unfavourable economic circumstances thereby presented by the legislator, which revealed the contradictory dynamics of unsustainable prices for users and the exceptional profitability of the economic operations of petroleum operators could indeed be considered in theoretical terms, in the light of the case law of this Court referred to, as a potential justification for a special levy on any "excess profits", including those of speculative origin, within the energy and petroleum sector.

When interpreted in this manner, the aim pursued by the legislator appears without doubt to be legitimate.
It is thus necessary to verify whether the means used were appropriate and necessary in order to achieve it. Indeed, it can only be concluded that the sacrifice caused to the principles of equality and capacity to pay tax is not disproportionate and that the different level of taxation does not degenerate into arbitrary discrimination if its structure is consistently related to the relevant justification. If, as in the case under examination, the economic fact which the legislator intends to strike is comprised of the exceptional profitability of the activity carried out within a sector with privileged characteristics during a specific downturn, this fact should necessarily be reflected in the structure of the tax.
6.5.1.– This has not occurred in this case, given that by enacting Article 81(16), (17) and (18) of Decree-Law no. 112 of 2008, as amended, the legislator provided for an increase in the rate of corporate income tax, which is based on the undertaking's entire income, whilst entirely failing to put in place a mechanism capable of taxing separately and more heavily only that part of the additional income related to the privileged position of the activity carried out by the taxpayer within a particular economic climate.
In fact, leaving aside its designation as a "surcharge", the said tax amounts to an "increased rate" of corporate income tax, which is applicable under the same terms and to the same income as the latter, and does not operate as a tax on profitability, as has occurred in other legal systems.
6.5.2.– This first incongruence in the contested tax subsists alongside another even more serious aspect involving the duration over time of the "surcharge". In fact, according to the settled case law of this Court referred to, different rates of taxation that are temporary may be justified provided that their aim is to request a particular contribution based in solidarity from privileged persons under exceptional circumstances.
However, in contrast to the scenario set out above, the contested provisions were enacted and have remained in force without being subject to a specific temporary duration, and the legislator has not made provision to associate them with instruments capable of verifying whether the economic climate used as justification for the higher rate of tax still obtains. Article 81(16), (17) and (18) of Decree-Law no. 112 of 2008, as amended, which was enacted in order to deal with exceptional economic circumstances,

by contrast provided for structural taxation to be applied starting from tax year 2008 without any limit in time.

A logical conflict may therefore be identified within the contested provisions which, on the one hand, are intended to associate the increase in the rate to the continuation of particular factual circumstances, whilst on the other hand putting in place a structural levy intended to operate well beyond the temporal horizon of the specific economic circumstances.

6.5.3.– A further reason why it is inadequate and unreasonable lies in the fact that the tax initiative concerned is not suitable for achieving the goals rooted in solidarity, which it explicitly aims to achieve.

In fact, one of the stated objectives of the contested provisions is to mitigate "the social impact of the increase in prices and rates in the energy sector" (Article 81(16)). In keeping with this goal, paragraph 18 provided for a prohibition on the transfer of the burden of the increased rate of taxation to consumer prices. In this way, the legislator sought to avoid the tax rise imposed on economic operators deemed to be privileged from – paradoxically – ending up falling on consumers, that is precisely on those persons who should have benefited from the tax legislation under examination, which is characterised by a spirit of solidarity aimed at redistribution. However, the prohibition on the transfer of charges to consumer prices, as delineated in paragraph 18, is not capable of preventing the "surcharge" from being offloaded upstream from one of the operators in the oil supply chain onto another, with the result that it is ultimately borne by consumers in the form of a price increase. Without entering into the merits of the aspects of unjustified inter-sectoral discrimination between different operators in the oil "supply chain" as raised in the referral order, the provision appears to be irrational on the grounds that it fails to achieve its purpose.

It is difficult to subject the prohibition on transferring the burden onto consumer prices to effective controls capable of ensuring that it is not avoided.

Whilst the provision did indeed vest the Regulatory Authority for Electricity Gas and Water with the power to oversee "full compliance" with the prohibition on transfers, nevertheless, considering the manner in which the legislation in question has been framed, it would appear to be difficult for this mechanism to be implemented and it is in any case highly vulnerable since, as is stated in the reports by the control authority

itself, analyses carried out have "demonstrated that some of the companies monitored have continued to implement pricing policies that may constitute a breach of the prohibition on transfers, and in any case result in economic detriment for end consumers" (Report to Parliament no. 18/2013/I/Rht on the oversight activity carried out in 2012 by the Regulatory Authority for Electricity Gas and Water). Circumstantial evidence obtained from the pricing policies adopted by the companies being monitored, "which generate an insufficiently motivated increase in margins" (Report to Parliament, mentioned above) fuel the suspicion that the prohibition on transferring the burden onto prices has not in actual fact been complied with, and that it cannot be properly sanctioned due to the objective difficulty within a market economy in isolating the element of the price charged that is due to transfers motivated by the tax. This led to the administrative dispute which *de facto* paralysed the initiatives pursued to that effect by the Regulatory Authority for Electricity Gas and Water.

6.5.4.– Ultimately, the tax under examination may be deemed to be unreasonable by virtue of: its configuration as an increase in the rate applied to the company's entire income, rather than only to "excess profits"; the failure to subject it to a time limit or to associate it with mechanisms capable of verifying whether the economic climate used as justification still obtains; and the fact that it is impossible to put in place assessment mechanisms capable of ensuring that the obligations resulting from an increase in the tax do not translate into increases in consumer prices.

For all of these reasons, the increase in the rate of corporate income tax applicable to the petroleum and energy sector, as configured under Article 81(16), (17) and (18) of Decree-Law no. 112 of 2008, as amended, violates Articles 3 and 53 of the Constitution on the grounds of reasonableness and proportionality since the mechanisms put in place by the legislator are unsuitable for pursuing the aim pursued, even though this aim is in itself legitimate.

7.– As part of the ruling that the contested provisions are unconstitutional, this Court cannot avoid giving due consideration to the impact which such a ruling will have on other principles of constitutional law with the aim of assessing whether it is necessary to defer the temporal effects of its decision with regard to pending relations.

The role assigned to this Court as the guarantor of the Constitution as a whole requires it to avoid any declaration that a statutory provision is unconstitutional from resulting,

paradoxically, in "effects which are even more incompatible with the Constitution" (see Judgment no. 13 of 2004) than those that led it to challenge the legislation. In order to prevent this from occurring, it is the task of the Court to calibrate its decisions, also from a temporal perspective, in such a way as to ensure that the assertion of one principle of constitutional law does not result in the sacrifice of another.

This Court has already clarified (see Judgments no. 49 of 1970, no. 58 of 1967 and no. 127 of 1966) that the retroactive effect of a ruling that legislation is unconstitutional is a general principle valid in proceedings before this Court (and cannot be otherwise); however, it is not without its limitations.

First and foremost, it is clear that judgments ruling legislation unconstitutional cannot have retroactive effect to the point of overturning "legal situations that have in any case become irrevocable" or "relations that have been concluded". If this were not the case, the principle of certainty within legal relations would be compromised (see Judgments no. 49 of 1970, no. 26 of 1969, no. 58 of 1967 and no. 127 of 1966). Therefore, the principle of retroactivity "only applies to legal relations that are still producing their effects, and hence does not apply to those the effects of which have expired, which continue to be regulated by the law struck down as invalid" (see Judgment no. 139 of 1984, most recently cited by Judgment no. 1 of 2014). In these cases since the actual identification of the limit on retroactivity is dependent upon specific sectoral legislation – concerning for example the time limits applicable to forfeiture of rights, time barring or the exclusion of appeals against administrative acts – which precludes any further judicial action or remedy, it is a matter for ordinary interpretation under the competence of the ordinary courts (a principle which has been asserted, *inter alia*, since Judgments no. 58 of 1967 and no. 49 of 1970).

Moreover, since the limit of "relations that have been concluded" originates out of the need to protect the principle of legal certainty, further limits on the retroactivity of rulings that legislation is unconstitutional may result from the need to safeguard principles or rights of constitutional standing, which would otherwise be irreparably sacrificed. In these cases, they are to be identified by weighing up the values of constitutional standing with one another, and it is therefore the Constitutional Court – and this Court alone – which has competence over such matters.

Such a calibration of the temporal effects of a ruling that legislation is unconstitutional must be deemed to be consistent with the Constitution: the Court has also ruled to this effect in the past in certain circumstances, even though these are not entirely consistent with those under examination (see Judgments no. 423 and no. 13 of 2004, no. 370 of 2003, no. 416 of 1992, no. 124 of 1991, no. 50 of 1989, no. 501 and no. 266 of 1988).
The institutional task vested in this Court requires the Constitution to be guaranteed as a unitary whole in such a manner as to ensure "systematic and unfragmented protection" (see Judgment no. 264 of 2012) for all rights and principles affected by the decision. "If this were not the case, one of the rights would end up expanding and would thereby become 'dominant' over the other legal interests recognised and protected under the Constitution": for this reason, the Court normally strikes a reasonable balance between the values affected by the legislation brought before it for examination since "[t]he Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, requires an ongoing mutual balancing between fundamental principles and rights, none of which may claim to have absolute status" (see Judgment no. 85 of 2013).
It is precisely the requirements laid down by a reasonable balancing between the rights and principles involved that condition the choice of the decision making technique used by the Court: just as the ruling that legislation is unconstitutional may only be limited to certain aspects of the provision under consideration – as is the case for example in interpretative judgments – similarly the calibration of the Court's intervention may relate to the temporal dimension of the contested legislation by limiting the effects of the declaration of unconstitutionality over time.
Moreover, a comparison with other European constitutions – such as for example the Austrian, German, Spanish and Portuguese constitutions – shows that it is commonplace to constrain the retroactive effects of decisions that legislation is unconstitutional, including in interlocutory proceedings, irrespective of whether the constitution or the legislator explicitly vested the constitutional court concerned with such powers.
It must be concluded that a similar regulation of temporal effects must be deemed to be permitted also under the Italian system of constitutional justice.
It is not irreconcilable with the requirement to comply with the prerequisite of relevance within interlocutory proceedings (see Judgment no. 50 of 1989). It must be recalled in

this regard that this prerequisite only applies to the referring body for the purposes of the eligibility of the question to be raised, and not also to this Court for the purposes of the decision on that question. This explains why the Constitutional Court generally carries out a control merely of the plausibility of the reasons concerning relevance contained in the referral order, which must in any case occur with exclusive reference to the time and manner in which the question of constitutionality was raised. This perspective can for example account for the approach within the case law which acknowledged the eligibility for constitutional review of more favourable criminal legislation also in situations in which the ruling accepting a question of constitutionality only impinges "on the argumentative framework of the acquittal, modifying its *ratio decidendi* […], even though its practical effects remain unchanged" (see Judgment no. 148 of 1983, followed regarding this issue by Judgment no. 28 of 2010).

Moreover, it must not be forgotten that, by virtue of a declaration that legislation is unconstitutional, the interests of the applicant will in any case be partially satisfied by the removal, albeit only with future effect, of the provision ruled unconstitutional.

Naturally, considering the general principle of retroactivity resulting from Article 136 of the Constitution and Article 30 of Law no. 87 of 1953, decisions taken by this Court involving the regulation of the temporal effects of the decision must be assessed in the light of the principle of strict proportionality. They must therefore be rigorously subject to compliance with two clear prerequisites: the compelling need to protect one or more constitutional principles, which would otherwise be irremediably compromised by a decision simply accepting the question of constitutionality and the fact that the restriction on retroactive effect must be limited to that which is strictly necessary in order to ensure the balancing of the interests in play.

8.– Having clarified the above with regard to the Court's power to regulate the effects of its decisions and the relative limits, it must be observed that, in the present case, the retroactive application of this declaration of unconstitutionality would result first and foremost in a serious violation of the balanced budget requirement under Article 81 of the Constitution.

As this Court has previously asserted in Judgment no. 260 of 1990, this principle requires that constitutional values entailing significant burdens for the state exchequer are implemented gradually. This is all the more the case following the entry into force

of Constitutional Law no. 1 of 20 April 2012 (Introduction into the Constitution of the principle of a balanced budget), which reasserted the need to respect the principles of a balanced budget and sustainability of the public debt (see Judgment no. 88 of 2014).

The macroeconomic impact of the repayment of taxes associated with the declaration that Article 81(16), (17) and (18) of Decree-Law no. 112 of 2008, as amended, is unconstitutional would in fact result in a budgetary imbalance for the state on such a scale as to imply the need for additional financial corrective legislation, which would also be necessary in order to avoid a breach of the principles which Italy has obliged to abide by under EU and international law (Articles 11 and 117(1) of the Constitution), and in particular the annual and multi-year provisions laid down in stability laws, the revenue under which has been assumed to be structural.

Therefore, the overall consequences of the repeal of the contested provision with retroactive effect would end up requiring an unreasonable redistribution of wealth in favour of those economic operators that may by contrast have benefited from a favourable economic climate, during a period of enduring economic and financial crisis affecting the weakest in society. This would thus result in irremediable detriment to the requirements of social solidarity, and hence a serious violation of Articles 2 and 3 of the Constitution.

Moreover, the undue benefit that certain economic operators from the sector could obtain – by virtue of the retroactive application of the Court's decision within circumstances in which it is impossible to set apart and exempt from the repayment those operators that have transferred the charges – would result in a further unreasonable difference in treatment, in this case between the different companies operating within the petroleum sector itself, resulting consequently in a breach also of Articles 3 and 53 of the Constitution.

It is thus necessary as a matter of constitutional law for the effects of the provisions declared unlawful by this decision to terminate only from the date of publication in the Official Journal of the Republic in order to balance out all of the rights and principles in play such as to prevent any "financial changes to the detriment of certain taxpayers and to the benefit of others […] guaranteeing compliance with the principles of equality and solidarity which, due to their foundational character, occupy a privileged position within balancing operations with other constitutional values" (see Judgment no. 264 of 2012).

It also enables the legislator to act promptly in order to ensure compliance with the constitutional requirement of a balanced budget, also from a dynamic viewpoint (see Judgments no. 40 of 2014, no. 266 of 2013, no. 250 of 2013, no. 213 of 2008, no. 384 of 1991 and no. 1 of 1966), and the related obligations under Community and international law, as the case may be also remedying any deficiencies ascertained within the tax law under examination.

In conclusion, in the present case, due to the requirements of strict necessity set out above, the effects of the above declaration of unconstitutionality must commence from the day after publication of this decision in the Official Journal of the Republic.

9.– The further questions of constitutionality must be regarded as moot.

On these grounds

THE CONSTITUTIONAL COURT

declares that Article 81(16), (17) and (18) of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Article 1(1) of Law no. 133 of 6 August 2008, as amended, shall be unconstitutional with effect from the day after publication of this Judgment in the Official Journal of the Republic.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 February 2015.