ORDER NO 21 YEAR 2025

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

issues the following

ORDER

in proceedings concerning the constitutionality of Article 1(115) to (119) of Law No 197 of 29 December 2022 (State budget for financial year 2023 and multi-year budget for the 2023-2025 period), initiated by Section II-*ter* of the Regional Administrative Court (*Tribunale amministrativo regionale*) of Lazio with seven referral orders of 16 January 2024, by Section 14 of the First Instance Tax Court (*Corte di giustizia tributaria di primo grado*) of Messina with referral order of 9 October 2024 and by Section 1 of the First Instance Tax Court (*Corte di giustizia tributaria di primo grado*) of Trieste with referral order of 13 November 2024, registered respectively as Nos 65 to 71, 208 and 239 in the 2024 Register of Referral Orders and published in *Official Journal of the Italian Republic* Nos 18, 19, 46 and 50, first special series 2024.

Having regard to the entries of appearance filed by Acea Produzione spa, Andromeda Pv srl and others, Esso Italiana srl, Engie Italia spa and others, Tamoil Italia spa, Engycalor Energia Calore srl, Energie spa, B&G Servizi Rete ed Extrarete srl and Som spa;

having regard to the statements in intervention filed by Olimpia srl a socio unico and Verona Service srl, and by the President of the Council of Ministers;

after hearing Judge Rapporteurs Luca Antonini and Giovanni Pitruzzella at the public hearing of 10 April 2024;

after hearing Counsel Nico Moravia for Engycalor Energia Calore srl, Counsel Fabio Cintioli for Acea Produzione spa, Counsel Aristide Police for Engie Italia spa and others, Counsel Giulio Enea Vigevani for Tamoil Italia spa, Counsel Giorgio Fraccastoro for Andromeda Pv srl and others, Counsel Germana Cassar for Energie spa, Counsel Antonio Lirosi for Esso Italiana srl, Counsel Giuseppe Pizzonia for Acea Produzione spa, Counsel Marco Miccinesi for Tamoil Italia spa, Counsels Livia Salvini and Davide De Girolamo for Esso Italiana srl and others, and State Counsels Salvatore Faraci, Roberta Guizzi and Mattia Cherubini for the President of the Council of Ministers;

after deliberation in chambers on 10 February 2025.

The facts of the case

1.– By referral order of 16 January 2024, registered as No 65 in the 2024 Register of Referral Orders, Section II-*ter* of the Regional Administrative Court of Lazio raised questions as to the constitutionality of Article 1(115) to (119) of Law No 197 of 29 December 2022 (State budget for financial year 2023 and multi-year budget for the 2023-2025 period), with reference to Articles 3, 53 and 117(1) of the Constitution.

1.1.– The referring court states that Acea Produzione spa, a company that carries on in the territory of the State the business of producing electricity for the subsequent resale thereof, has challenged three administrative acts: Inland Revenue Agency Circular

No 4/E of 23 February 2023 providing initial clarifications following the introduction of the solidarity contribution under Article 1(115) to (119) of Law No 197/2022; Inland Revenue Agency Resolution No 15/E of 14 March 2023 establishing the tax reference number relating to the payment of the solidarity contribution; and Inland Revenue Agency Director Order No 55523/2023 of 28 February 2023 approving the "Redditi 2023-SC" tax return form.

1.2.– Before illustrating the relevance and non-manifest groundlessness of the questions, the referring court points out that the proceedings involve questions both of constitutionality and of compatibility of domestic law with European Union law, in theory capable of giving rise to a reference for a preliminary ruling from the Court of Justice of the European Union (CJEU), pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU).

1.3.– After rejecting the pleas of lack of jurisdiction and inadmissibility of the action for want of standing submitted by State Counsel, the referring court argues as regards relevance that without the introduction of the solidarity contribution into the domestic legal system, the applicant company would not have been affected by the tax obligation concerned and, above all, the Inland Revenue Agency would not have issued the circular and the other acts challenged.

1.4.– As regards non-manifest groundlessness, the referring court considers, first and foremost, that the challenged provision violates Article 117(1) of the Constitution, in that it conflicts with Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (hereinafter, also referred to as the Regulation).

It is argued that the Regulation specifically identifies the persons covered by the various measures of a cap on market revenues imposed on renewable energy producers (Articles 6 and 7) and a temporary solidarity contribution imposed on Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors (Article 14).

The referring court states that Recital 45 of the Regulation explains the grounds for the differentiation in the persons to whom the measures are addressed, reasons that lie in the diversity of the commercial and trading practices as well as of the regulatory framework of the respective sectors.

By contrast, the Italian legislation, allegedly in open conflict with the Regulation, applies the solidarity contribution to additional persons.

1.5.– According to the referring court, it could not be held that Italy had, in any event, adopted an equivalent national measure, as permitted by Article 14(2) of the Regulation.

Indeed, Recital 63, in stating that "[a] national measure should be deemed subject to similar rules as the solidarity contribution where it covers activities in the crude petroleum, natural gas, coal and refinery sectors", is claimed to have made it clear that equivalent national measures are solely those "falling within the same specific extraction and refining sector, characterised by its own business dynamics which justify the measure".

1.6.– The referring court considers that the challenged provision is also contrary to Articles 3 and 53 of the Constitution on the grounds that it infringes the principles of equality, proportionality, reasonableness and ability to pay.

1.7.– First, the referring court maintains that the extraordinary contribution also includes, in the basis of calculation, items unrelated to the surplus profits resulting from the increase in the prices of energy products.

1.8.– Again with reference to identifying the taxable base, the rules governing the extraordinary contribution are alleged to be contrary to the principle of the ability to pay, insofar as they do not consider that part of the increase in profits achieved in 2022 compared to the average in the preceding four years is not the result of a greater income-generating capacity but is due to the rebound in energy consumption, which had contracted in 2020 and 2021 because of the COVID-19 pandemic.

1.9.– Another aspect at odds with Articles 3 and 53 of the Constitution according to the referring court is the duplication of taxation stemming from the simultaneous application, for four months (from January to April 2022), of the extraordinary contribution under Article 37 of Decree-Law No 21 of 21 March 2022 (Urgent measures to counter the economic and humanitarian effects of the Ukrainian crisis), converted with amendments into Law No 51 of 20 May 2022, as amended by Article 55 of Decree-Law No 50 of 17 May 2022 (Urgent measures on national energy policies, business productivity and investment attraction, as well as on social policies and the Ukrainian crisis), converted with amendments into Law No 91 of 15 July 2022.

It is alleged that there is a further duplication of tax, but limited to the month of December 2022, for operators of plants powered by non-renewable sources subject to the cap on revenues under Article 1(30) Law No 197/2022.

1.10.– The referring court maintains that Articles 3 and 53 of the Constitution are infringed in another respect owing to an absence of correlation between the definition of the taxable base and the purpose pursued by the solidarity contribution, since the latter, imposed on persons whose turnover derives, at least for 75%, from the activities specified in Article 1(115) of Law No 197/2022, also covers a part of the profits deriving from activities that have no connection with the premise of the tax.

1.11.– Finally, the referring court argues that a further and distinct conflict with Articles 3 and 53 of the Constitution arises in relation to Article 1(118) of Law No 197/2022 pursuant to which "[t]he solidarity contribution is not deductible for the purposes of income tax and the regional tax on production activities". This is because the said provision is alleged to be at odds with constitutional case law "according to which the costs incurred in the carrying on of a business – if inherent thereto – must be deductible for the purposes of business income".

2.– By six further referral orders (registered as Nos 66, 67, 68, 69, 70 and 71 in the 2024 Register of Referral Orders), the Regional Administrative Court of Lazio raised identical questions as to the constitutionality of Article 1(115) to (119) of Law No 197/2022.

2.1.– It appears from the referral orders that the following companies brought action in the main proceedings: a) fourteen companies (Andromeda PV srl, Breva Wind srl, Calabria Solar srl, Conza Wnergia srl, Erg Wolica Adriatica srl, Erg Eolica Faeto srl, Erg Eolica Ginestra srl, Erg Solar Piemonte 3 srl, Isab Energy Solare srl, Lucus Power srl,

San Mauro srl, Spv Parco Eolico Aria del Vento srl, Taca Wind srl and Windcap srl), which are part of an industrial group that engages in the production of wind and solar energy (referral order registered as No 66 in the 2024 Register of Referral Orders); b) Esso Italiana srl, operating in the oil sector (referral order registered as No 67 in the 2024 Register of Referral Orders); c) Engie Italia spa, Engie Global Markets and Meltemi Energia srl, engaged in the production of electricity and gas as well as the resale or import of electricity or gas (referral order registered as No 68 in the 2024 Register of Referral Orders); d) Tamoil Italia spa, engaged in the wholesale trade of petroleum products and lubricants as well as heating fuels (referral order registered as No 69 in the 2024 Register of Referral Orders); e) Engycalor Energia Calore srl, engaged in marketing and distributing petroleum products as well as operating a bitumen storage and transit plant (referral order registered as No 70 in the 2024 Register of Referral Orders); f) Energie spa, a company operating in the electricity market sector, as owner of six hydroelectric plants and a photovoltaic plant (referral order registered as No 71 in the 2024 Register of Referral Orders).

2.2.– The arguments in support of the questions of constitutionality raised are identical to those put forward in the referral order registered as No 65 in the 2024 Register of Referral Orders, subject to the following distinctions.

According to the referring court (referral orders Nos 66 and 71 in the 2024 Register of Referral Orders), in the specific sector of companies producing renewable energy, domestic law had already provided for a cap on revenues through a "'two-way' compensation" mechanism in Article 15-*bis* of Decree-Law No 4 of 27 January 2022 (Urgent measures in support of businesses and economic operators, labour, health and local services, related to the COVID-19 emergency, as well as for the containment of the effects of price increases in the electricity sector), converted with amendments into Law No 25 of 28 March 2022.

The referring court argues that that underscores even more how the Regulation has been infringed as regards those persons since the "EU legislator intended [...] to introduce two distinct measures, in terms of purpose and premises, which do not overlap with each other, identifying the revenue cap of 180 €/MWh as the tool 'best suited to preserve the functioning of the internal electricity market, as it maintains price-based competition between electricity producers based on different technologies, in particular for renewables' (Recital 27)".

According to the referring court, the application of both the solidarity contribution and the two-way compensation mechanism, provided for in Article 15-*bis* of Decree-Law No 4/2022, as converted into law, to operators of incentivised photovoltaic plants and to renewable plants in operation since before 2010 entails double taxation in breach of Articles 3 and 53 of the Constitution.

3.– The President of the Council of Ministers, represented and defended by State Counsel, has intervened in all of the proceedings, claiming that the questions of constitutionality are inadmissible on various grounds and that they are unfounded.

4.– In all of the constitutional proceedings, the private parties to the main proceedings have entered an appearance, adducing arguments supporting the submissions of the referring court and with essentially similar content.

4.1.– In summary and to the extent that is most relevant here, the private parties claim that the Regulation seeks to impose a solidarity contribution only on undertakings operating in the oil and gas sector and in particular in upstream extraction and refining activities.

It is argued that the EU wished to implement differentiated measures: the revenue cap for undertakings operating in the "inframarginal" power generation sector and the solidarity contribution for those operating in the crude petroleum, natural gas, coal and refinery sectors.

This so as not to create distorting effects on competition and to preserve and incentivise investments in the renewable energy sector, which are necessary to achieve the decarbonisation and system reliability targets set by the EU's energy policy.

It is maintained that, by disregarding the provisions of the Regulation, domestic law introduced the solidarity contribution also at the expense of electricity operators (in addition to the cap on revenues under Article 1(30) of Law No 197/2022) and downstream entities in the oil and gas sector.

4.2.– The private parties further argue that it cannot be held that the measure adopted is "equivalent" to the one imposed by the Regulation, since, according to Recital 63, equivalence must be limited to activities in the crude petroleum, natural gas, coal and refinery sectors.

Moreover, it is alleged that the domestic law broadened the taxable base and increased the applicable tax rate, thereby introducing a heavier and more burdensome levy than that provided for in the Regulation.

4.3.– Engycalor Energia Calore srl (referral order No 70 in the 2024 Register of Referral Orders), in its appearance in the proceedings, raised a number of claims of invalidity of the Regulation, postulating the need for a preliminary reference to the CJEU pursuant to Article 267 TFEU.

5.– Section 14 of the First Instance Tax Court of Messina, with referral order of 9 October 2024, registered as No 208 in the 2024 Register of Referral Orders, and Section 1 of the First Instance Tax Court of Trieste, with referral order of 13 November 2024, registered as No 239 in the 2024 Register of Referral Orders, also raised questions as to the constitutionality of Article 1(115) to (119) of Law No 197/2022 on the grounds of infringement of Articles 3 and 53 of the Constitution.

5.1.– In both of the main proceedings in question, the Inland Revenue Agency's implied rejection through silence of the applicants' requests for a refund of the solidarity contribution paid was challenged.

5.2.– The referring courts doubt the constitutionality of the challenged provisions, maintaining that they infringe Articles 3 and 53 of the Constitution for reasons identical to those put forward by the Regional Administrative Court of Lazio.

It is also argued that that there is a breach of the principle of equality of the taxpayers involved since the solidarity contribution was imposed on the entire energy sector, including not only producers (price makers) but also distributors (price takers), even though the increase in the prices of energy products favoured only the former.

6.– The President of the Council of Ministers, represented and defended by State Counsel, has intervened in both proceedings, claiming that the questions of constitutionality are inadmissible and unfounded, with arguments identical to those submitted with reference to the referral orders of the Regional Administrative Court of Lazio.

7.– In the respective constitutional proceedings, appearances have been entered by the applicants in the main proceedings, namely, B&G Servizi Rete ed Extrarete srl, which operates in the petroleum products sector, and Som spa, which operates in the market for the road distribution of gasoline and diesel for motor vehicles.

Clarifying that they are not engaged in the business of extracting gas or oil let alone refining, the parties have adopted as their own the referring courts' submissions, requesting that the challenged provisions be declared unconstitutional.

8.– In the proceedings various entities have filed amicus curiae briefs, which develop arguments in support of the referring courts' submissions. In the proceedings concerning the referral orders registered as Nos 65, 66, 68 and 71 in the 2024 Register of Referral Orders, Olimpia srl a socio unico and Verona Service srl have also filed interventions in support.

9.– The appearing parties and the intervening State Counsel have filed written pleadings, in which they have further illustrated their respective positions.

10.– Pursuant to Article 10(3) of the Rules of Procedure of the Constitutional Court, specific questions were put to the appearing parties, who replied orally at the public hearing.

Conclusions on points of law

1.– The referral orders referred to above relate to the same provisions and raise largely overlapping issues, so the proceedings should be joined to enable them to be considered together.

2.– This Court must rule, inter alia, on the question raised by the Regional Administrative Court of Lazio as to whether Article 1(115) of Law No 197/2022 is unconstitutional to the extent that it imposes a temporary solidarity contribution for 2023 also on persons other than those covered by Regulation (EU) 2022/1854, namely, Union companies and permanent establishments that "carry out, in substance, the majority of their activity in the extraction and refining sectors".

The aforementioned paragraph 115 of Article 1 of Law No 197/2022 states that: "[i]n order to contain the effects of the increase in prices and tariffs in the energy sector for businesses and consumers, a temporary solidarity contribution, determined in accordance with paragraph 116, shall be established for the year 2023, to be borne by persons carrying on in the territory of the State, for the subsequent resale of goods, the business of producing electricity, persons carrying on the business of producing methane gas or extracting natural gas, persons reselling electricity, methane gas and natural gas, and persons carrying on the business of producing, distributing and trading in petroleum products. The contribution shall also be payable by persons who, with a view to subsequent resale, definitively import electricity, natural gas or methane gas or petroleum products or who bring such goods into the territory of the State from other States of the European Union. The contribution shall not be payable by persons carrying on the

business of organising and managing platforms for the exchange of electricity, gas, environmental certificates and fuels and by small enterprises and micro-enterprises engaged in the retail trade of automotive fuel identified by ATECO code 47.30.00. The contribution is due if at least 75% of the turnover in the tax period preceding the one in progress on 1 January 2023 derives from the activities indicated in the preceding sentences".

3.– The Regional Administrative Court of Lazio maintains that, by extending the range of taxable persons identified by Articles 2(17) and 14 of the Regulation, the challenged provisions are contrary to the Regulation and consequently to Article 117(1) of the Constitution, which, together with Article 11 of the Constitution, requires that domestic law comply with European Union law.

More specifically, according to the referring court, the Regulation – introduced to address the serious crisis in the energy market which affected the entire European Union between 2021 and 2022 – was conceived as a necessarily unitary response. This is because "'[u]ncoordinated national measures could affect the functioning of the internal energy market, endangering security of supply and leading to further price increases in the Member States most affected by the crisis' (Recital 9)".

Starting from that premise, the Regional Administrative Court of Lazio takes the view that the solidarity contribution – including in light of Recitals 14, 45, 50 and 51 of the Regulation as well as the European Commission's Proposal for a Council regulation on an emergency intervention to address high energy prices, COM(2022) 473 final, 14 September 2022 – cannot be extended to persons in the energy supply chain other than those specified in Articles 2(17) and 14 of the Regulation. This because that measure, in the logic of the Regulation, applies solely to upstream operators in the oil and gas extraction and refining sectors.

It is argued that only those operators recorded windfall profits, i.e. surplus profits linked to the particular economic situation occasioned by the energy crisis, against a background of unchanged costs.

It is maintained that that position is reflected in Recital 45, which states as follows: "Commercial and trading practices as well as the regulatory framework in the electricity sector are markedly different from the fossil fuels sector. Given that the cap on market revenues aims to mimic the market outcome that producers could have expected if global supply chains would function normally in the absence of gas supply disruptions since February 2022, it is necessary for the measure concerning electricity producers to apply to the revenues resulting from the generation of electricity. Conversely, as the temporary solidarity contribution targets the profitability of Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors which has significantly increased compared to prior years, it is necessary for it to apply to their profits."

Again according to the Regional Administrative Court of Lazio, the national measure cannot be considered equivalent since, as can be inferred from Recital 63, "equivalence exists between measures falling within the same specific extraction and refining sector, characterised by its own business dynamics which justify the measure".

4.– The President of the Council of Ministers argues, on the other hand, that the solidarity contribution introduced by the challenged provisions is an equivalent national measure.

Specifically, according to State Counsel, in referring to equivalence in relation to solely the upstream portion of the energy supply chain, Recital 63 introduces a rebuttable "presumption". Consequently, measures that target different persons, where the latter were found to have enjoyed surplus profits linked to the particular economic situation in the same way as those taken into account by EU law, can be considered to be equivalent.

It is argued that that conclusion is supported by the very legal basis of the Regulation, namely Article 122(1) TFEU, which legitimises "exceptional" and "emergency" intervention in a matter, such as tax policy and, in particular, taxes and levies on income (direct taxation), that would otherwise fall within the "exclusive" competence of the Member States.

For anything not expressly falling within the scope of the Regulation, that competence would therefore not be or could not have been affected in any way.

5.− The various appearing parties (and amici curiae) have adopted as their own the submissions of the referring court, in substance following the same line of interpretation.

6.– An examination of the merits of the question is not precluded by State Counsel's assertion that the Regulation has direct effect.

As recently reiterated (Judgments Nos 1/2025 and 7/2025 as well as 181/2024 and 210/2024), a court may, if it finds that national law is incompatible with directly effective applicable EU law, decide not to apply the domestic legislation, as the case may be after making a preliminary reference to the Court of Justice (Article 267 TFEU), or raise a question as to constitutionality for violation of Articles 11 and 117(1) of the Constitution.

In general, the jurisdiction of this Court cannot in any way hinder or limit the power of the ordinary courts to seek a preliminary ruling from the Court of Justice and not to apply domestic law that is incompatible with EU law (CJEU, Grand Chamber, judgments of 22 February 2022, Case C-430/21, *RS*, and 22 June 2010, Joined Cases C-188-10 and C-189/10, *Melki and Abdeli*).

If, however, an ordinary court decides to raise a question as to constitutionality, the Constitutional Court may not refrain from responding, using its own tools, which include a wide range of decision-making techniques, to complaints concerning the infringement of a European rule (contained in the Charter of Fundamental Rights of the European Union, in the Treaties or even in secondary law, as in the present case), which has a connection with interests or principles of constitutional importance, so as to ensure the "constitutional dimension" of the question raised.

In this case, as the Court of Justice itself has pointed out, "the referring court itself is not the court called upon to rule directly in the disputes in the main proceedings, but rather a constitutional court to which a question of pure law has been referred, independent of the facts raised before the court adjudicating on the substance of the case. It must answer that question in the light both of the rules of national law and of the rules of EU law, in order to provide not only to its own referring court but also to all the Italian courts a decision having *erga omnes* effect, which those courts must apply in any relevant dispute upon which they may be called to adjudicate. In those circumstances, the

interpretation of EU law sought by the referring court bears a relation to the object of the dispute before it, which concerns exclusively the constitutionality of national provisions having regard to national constitutional law read in the light of EU law" (CJEU, Grand Chamber, judgment of 2 September 2021, Case C-350/20, *OD and Others*).

The existence of a constitutional dimension, in the present case, is undeniable, also because all of the referring courts raise, with reference to the "domestic" provisions of Articles 3 and 53 of the Constitution, questions involving the constitutional principles of equality, proportionality, reasonableness and ability to pay.

7.– Reserving for the final ruling the decision both on the remaining preliminary objections raised by State Counsel and on the questions raised by all of the referring courts with reference to Articles 3 and 53 of the Constitution, it is necessary to seek a preliminary ruling from the Court of Justice on certain interpretative aspects of Regulation (EU) 2022/1854 in order to resolve the claim of infringement of Article 117(1) of the Constitution.

With regard to the claim of invalidity of the Regulation raised by the private party Engycalor Energia Calore srl (referral order No 70 in the 2024 Register of Referral Orders), a number of requests for a preliminary ruling in that regard have been filed with the Court of Justice by various national courts (C-358/24, *Varo Energy Belgium and Others*, and C-533/24, *Vermillon Energy Ireland Ltd and Others*). Further preliminary questions concerning both the validity and the interpretation of the Regulation have been filed (C-467/242, *Albron Catering BV*), and in some of those references the national courts question, as in the present case, the compatibility of the national implementing rules with the Regulation itself (C-462/24, *Braila Winds srl*).

Without prejudice to the exclusive jurisdiction of the Court of Justice to rule on the invalidity of the Regulation (CJEU, judgment of 22 October 1987, Case C-314/85, *Foto-Frost*), this Court, in compliance with the Union's case law, proceeds on the basis of the presumption of legality of the Regulation (CJEU, judgment of 5 October 2004, Case C-475/01, *Commission v Greece*, paragraph 18; as well as, Grand Chamber, judgment of 21 June 2022, Case C-817/19, *ASBL*, paragraph 86) and reserves the right to assess the effects of a possible declaration of invalidity (CJEU, Grand Chamber, judgment of 8 September 2010, Case C-409/06, *Winner Wetten GmbH*, paragraphs 53 to 69).

8.− In order to carry out the assessments required in relation to the compatibility of the challenged provisions of national law with those of EU law, it is now appropriate to focus on Regulation (EU) 2022/1854 and, in particular, on the historical context in which it came into being (8.1 below), on its purpose (8.2 below), on the provisions most immediately relevant to today's question as to constitutionality (8.3 below) and on the room for manoeuvre left to the Member States (8.4 below).

8.1.− As it is clear from reading the recitals, by adopting the Regulation the European Union wished to address the exceptional crisis in the energy sector that occurred at the end of 2021 and during 2022, when the price of electricity, throughout the Union, soared dramatically, far exceeding the highest levels ever reached.

That crisis, as can be inferred from the recitals, was triggered not only by the increase in consumption resulting from the end of the pandemic and the exceptionally high temperatures recorded during the summer of 2022, which led to an increase in the demand for electricity for cooling, but also and above all by the reduction in gas supplies

from Russia, following the invasion of Ukraine, in a situation in which the Union's dependence on supplies from Russian sources was well known.

The drastic increase in the price of gas affected all energy sector products, including fossil fuels, and, above all, the final price of electricity also produced by gas-fired power plants, which are often needed to meet demand, as extensively illustrated in the Report from the Commission to the European Parliament and the Council on the review of emergency interventions to address high energy prices in accordance with Council Regulation (EU) 2022/1854, COM/2023/302 final, 5 June 2023.

To deal with the emergency situation, which affected the entire European energy market, drastically affecting households and businesses, some Member States, including Italy, had adopted various anti-crisis measures. These included, in particular, the solidarity contribution against so-called high bills, introduced by Article 37 of Decree-Law No 21/2022, as converted into law, which was the subject of the proceedings that culminated in this Court's Judgment No 111/2024.

At the same time, to address the emergency, the European Union intervened initially with the Commission's Communication of 8 March 2022, REPowerEU: Joint European Action for more affordable, secure and sustainable energy. That was followed up by the Commission's Proposal for a Council Regulation of 14 September 2022, COM(2022) 473 final. And finally with the previously mentioned Regulation (EU) 2022/1854, adopted on the legal basis of Article 122(1) TFEU.

The latter provision, to be found in Chapter 1 (Economic policy) of Title VIII (Economic and monetary policy) of Part Three of the Treaty, allows the Council to adopt, in exceptional circumstances, by an absolute majority and without consulting the Parliament, any regulatory and administrative measure appropriate to the emergency situation, "in a spirit of solidarity between Member States […], in particular if severe difficulties arise in the supply of certain products, notably in the area of energy".

8.2.− The Regulation in its recitals sets out, at several points and in depth, the objectives that it pursues, which may be summarised as follows:

– mitigate the effects of unsustainable increases in energy prices on consumers and businesses (Recitals 6, 8, 9, 11, 12, 14, 25, 46, 47, 56, 57, 58, 59 and 64);

– bolster the public finances of Member States, so as to enable them, and in particular those with less room for budgetary manoeuvre, to have sufficient funds to ensure that the impact of the increases on households and businesses is mitigated, by targeting those who have made unexpected surplus profits from the energy crisis in question (Recitals 6, 11, 12, 14, 46, 50 and 51);

– establish a homogeneous and coordinated framework for interventions throughout the Union, in order to ensure the security of supply of gas and energy products, and to avoid, in a spirit of solidarity between Member States, unequal treatment of European citizens and businesses as well as the fragmentation of the structurally interconnected internal energy market (Recitals 6, 7, 9, 10, 11, 12, 14, 25, 46, 57 and 72);

– avoid a situation whereby the sharp increase in energy prices leads to an increase in general inflation in the euro area and a slowdown in the Union's economic growth (Recitals 5, 8, 12 and 25) affecting, in essence, its financial and macroeconomic stability.

8.3.– The most important tools provided for by the Regulation to achieve the aforementioned objectives are – in addition to the adoption of measures to reduce gas demand (Articles 3 to 5) – a so-called cap on market revenues (Articles 6 to 11) and a temporary solidarity contribution (Articles 14 to 18).

Under the Regulation, the revenue cap, set at € 180 per MWh of energy produced, applies to so-called inframarginal generators (Recitals 11, 23 and 24), in other words, producers of electricity generated from sources with lower marginal costs (identified in Article 7(1) as: wind energy; solar thermal and solar photovoltaic energy; geothermal energy; hydropower without reservoir; solid or gaseous biomass fuels, excluding biomethane; waste; nuclear energy; lignite; crude petroleum products; and peat).

By contrast, the solidarity contribution, characterised as a temporary measure "intended to […] mitigate exceptional price developments in the energy markets for Member States, consumers and companies" (Article 2(no 19)), applies to "Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors (Article (14)(1), mirroring Article 2(no 19)), i.e., pursuant to Article 2(17), to "Union companies or permanent establishments generating at least 75% of their turnover from economic activities in the field of the extraction, mining, refining of petroleum or manufacture of coke oven products".

More specifically, the Regulation required (Article 14) Member States to adopt the solidarity contribution, "in the fiscal year 2022 and/or the fiscal year 2023", calculated on the taxable profits above a 20% increase of the average of the taxable profits, as determined under national tax rules, in the four fiscal years preceding its introduction (Article 15). The Regulation also set a "rate" of at least 33% of the taxable base and provided that the contribution was to apply in addition to the regular taxes and levies applicable under the national law of Member States (Article 16).

The Regulation left Member States free to adopt, as an alternative to the contribution, equivalent national measures, i.e. any measures that "contribute to the affordability of energy" (Article 2(no 21)) and that "share similar objectives and are subject to similar rules as the temporary solidarity contribution [...] and generate comparable or higher proceeds to the estimated proceeds from the solidarity contribution" (Article 14(no 2)).

Regarding the concept of equivalent measure, Recital 63 states that "[t]he objective of the national measure should be deemed similar to the overall objective of the solidarity contribution set by this Regulation when it consists of contributing to the affordability of energy. A national measure should be deemed subject to similar rules as the solidarity contribution where it covers activities in the crude petroleum, natural gas, coal and refinery sectors, determines a base, provides for a rate, and ensures that the proceeds of the national measure are used for purposes that are comparable to those of the solidarity contribution."

Finally, Article 17 specifies multiple ways to use the proceeds from the temporary solidarity contribution.

8.4.– It should be noted right from the start that the Regulation, although directly applicable and binding, grants Member States a wide degree of autonomy in its implementation.

Indeed, with respect to the solidarity contribution, Member States: (a) may choose the taxable year, which may be either 2022 or 2023, or both; (b) are free to set the applicable rate, provided that it is not less than 33%; (c) may choose the method of determining taxable profits under "national tax rules"; (d) are entitled to introduce equivalent national measures, the taxable base and rate of which are not predetermined; and (e) may use the proceeds of the contribution and equivalent measures, respectively, for any of the purposes set out in Article 17 or for similar purposes.

As for the revenue cap, in force from 1 December 2022 to 30 June 2023 (Article 22(2)(c)), Member States may: a) exclude certain categories of persons from its scope of application (Article 7(3) and (4)); b) apply it only to 90% of market revenues exceeding the threshold provided for in the Regulation (Article 7(4)); c) maintain or introduce additional national crisis measures, including by extending the persons covered by it (Article 8(1)(a), (c) and (e)); d) set a higher cap (Article 8(1)(b)) or a specific cap for producers of electricity produced from hard coal (Article 8(1)(d)); and e) identify the specific measures in support of final electricity customers to be adopted with the proceeds of the cap (Article 10).

9.– Through Article 1(30) of Law No 197/2022, Italy introduced a cap on revenues, declaredly implementing the Regulation and complying with its provisions, including in terms of delimiting the range of persons covered and the duration of the cap.

As for the solidarity contribution, Article 1(115) to (119) of that same Law No 197/2022 introduced, for 2023 only, an equivalent tax measure, as expressly stated in the explanatory report to the 2023-2025 Budget Bill, A.C. 643 19th legislature (page 122).

In order to determine the surplus profits to be subject to taxation, the taxable base is identified (Article 1(116) as the taxable profits of fiscal year 2022 that exceed the average of the taxable profits in the four previous fiscal years by 10% (the criterion used for the previous extraordinary contribution for 2022 under Article 37 of Decree-Law No 21/2022, as converted into law, has thus been abandoned). The legislation also provides that the contribution is payable if at least 75% of the turnover derives from the stated activities covered by it (Article 1(115)).

The rate applied is 50% of the amount of the portion of the total income determined for corporate income tax purposes relating to the tax period preceding the one in progress on 1 January 2023. In any case, the extraordinary contribution payable may not exceed a portion equal to 25% of the value of the net assets at the end of the financial year preceding the one in progress on 1 January 2022 (Article 1(116)).

As for the use of the proceeds raised through the equivalent national measure, Law No 197/2022 does not earmark them for a specific purpose given that Italy (like other Member States) applies the principle of universality of the budget, as noted, moreover, by the Commission itself in its Report of 30 November 2023 on Chapter III of Council Regulation (EU) No 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, COM (2023) 768 final.

State Counsel, in replying at the hearing to specific questions put by this Court, reported that the revenue raised by Italy through the measure in question amounted to between € 3,745,760,579.00 and € 3,870,512,410.22, whereas, if the range of taxpayers covered by the provision had coincided with that specified in the Regulation, an estimated

sum of between € 1,701,971,599.16 and € 1,912,000,000 would have flowed into the public purse.

State Counsel further asserted that the measures to mitigate the effects of the energy crisis on households and businesses had an impact on the State budget for 2022 of approximately € 47 billion and for 2023 of approximately € 26 billion.

These data, although not actually checked by the Court at the oral hearing, are confirmed, as far as 2022 is concerned, by the report of the Studies Department of the Senate of the Republic of March 2023 on the "[e]ffects for the 2022 financial year of the measures adopted against 'high energy prices'". Therein it is stated that the impact on the State budget of the various legislative initiatives aimed at mitigating the effects of the energy crisis on households and businesses amounts to approximately € 60 billion, of which € 46.43 billion for measures directly aimed at curbing expenditure on electricity, gas and fuel (and € 14.04 billion for further measures to safeguard the purchasing power of workers and households and to support businesses).

9.1.– Insofar as it is more specifically relevant to the question as to constitutionality in relation to which the interpretative doubts to be submitted to the Court of Justice arise, Article 1(115) of Law No 197/2022 imposed the equivalent measure not only on persons carrying on business in the crude petroleum, natural gas, coal and refinery sectors, i.e. so-called "'upstream operators' in the chain of manufacture and distribution of products derived from hydrocarbons", but also on so-called "'downstream operators'", i.e. the persons "who are at the terminal stage of that same chain, operating in the marketing and distribution of the finished products and of the electricity generated with them" (to quote the President of the Council of Ministers in the intervention filed).

At issue, in particular, is the inclusion in the list of persons on which the solidarity contribution under Article 1(115) of Law No 197/2022 has been imposed:

– on the one hand, producers (including inframarginal generators) and resellers of electricity, as well as importers and those who bring into the territory of the State that same energy coming from other States of the European Union;

– on the other hand, distributors, resellers of petroleum products, resellers of methane gas and natural gas, as well as importers and those who bring into the territory of the State such goods coming from other States of the European Union.

With specific reference to electricity producers already subject to the revenue cap, it is worth noting, finally, that they were simultaneously liable to pay the solidarity contribution solely in the month of December 2022.

It should also be noted that if the revenue cap is exceeded, the amounts returned first to the State-owned company Gestore dei Servizi Energetici (GSE) and then transferred to the State budget constitute negative components of the company's income and as such do not count for the purposes of determining the taxable base of the solidarity contribution, which excludes a duplication of taxation.

10.– It is therefore a question of understanding whether the aforementioned provisions of the Regulation preclude, as the referring courts and the parties claim, the extension of the range of persons to which the equivalent measure introduced by Article 1(115) of Law No 197/2022 can be applied.

10.1.– It is true that wording of the Regulation imposes the solidarity contribution only on Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors (Articles 1, 2(no 17) and 14) while providing for the cap on revenues solely for inframarginal generators (and not for others) (Articles 1, 2(no 5), 2(no 9), 6, 7 and 8).

It is also true that the recitals seem to support the separation of the different measures from a point of view of whom they apply to (Recitals 11, 13, 14, 15, 23-49, 50-59 and 64-65), justifying it by the diversity of the commercial and trading practices and by the regulatory framework of the sectors covered by the measures (Recital 45).

Recital 63, for its part, states that equivalence (in terms of "similar rules") of possible national measures "should" only apply in relation to "activities in the crude petroleum, natural gas, coal and refinery sectors".

The recitals repeatedly refer to the need for a united and coordinated effort of the Union to protect the integrity and the functioning of the interconnected internal energy market (Recitals 6-9, 10, 11, 14 and 15), to avoid significant distortions (Recital 11) and to maintain a level playing field (Recital 14).

In the light of those points it could be maintained that the uniformity required is essential in order not to fragment the internal market and that therefore the Regulation leaves no room for manoeuvre for the Member States in extending the range of persons covered by the measures equivalent to the solidarity contribution, or at least does not permit its extension to the persons taken into consideration for the purposes of imposing the cap on revenues. Hence, the Italian legislation's extension of the range of persons covered could well be incompatible with the Regulation.

10.2.– There are, however, several significant indications that could, on the contrary, suggest that the challenged national provisions are compatible with Union law.

At the outset it should be borne in mind that the Regulation has its legal basis in Article 122(1) TFEU, which it is common ground does not enable the EU legislator to adopt measures harmonising domestic law.

The Regulation did not therefore intervene to harmonise national legislation affecting the proper functioning of the internal market (Article 115 TFEU), or to adopt tax measures in the exercise of the Union's competence in the field of energy (Article 194(3) TFEU), which, in both cases, would have required unanimity and prior consultation of the Parliament.

On the contrary, the EU legislator intervened with the sole purpose of addressing, in a spirit of solidarity between the Member States, an emergency economic situation involving the entire euro area. Thereby leaving intact the general competence of the Member States themselves in matters of direct taxation, a competence that, however, must be exercised in a manner consistent with Union law and, in particular, in such a way as not to impede the achievement of the single market (CJEU, Grand Chamber, judgment of 12 September 2006, Case C-196/04, *Cadbury Schweppes plc and Others*).

Accordingly, although justified by the need to adopt an urgent and coordinated Union response, the Regulation does not seem to prejudice the Member States' powers to adopt measures also of a fiscal nature, as illustrated in point 8.4 above. This is because it provides, albeit in Section 2 of Chapter II devoted to the revenue cap (Article 8 and

Recitals 40 and 41) that additional "national crisis measures" may be maintained or introduced vis-à-vis inframarginal generators as well as vis-à-vis persons in the energy supply chain other than those identified by the Regulation itself.

Therefore, the Regulation is an example of concrete implementation of the solidarity values on which the European Union is founded (Articles 2 and 3 TEU). Indeed, its ultimate purpose is to protect businesses and households exposed to the energy crisis.

In particular, unlike other legislative provisions that regulate the energy market and are addressed only to the EU institutions and the Member States, the Regulation extends its scope of application to private enterprises, citizens and consumers, with the aim of sustaining, in a logic of redistribution, the public finances of the Member States – in particular those with less budgetary room for manoeuvre – with the surplus profits of the undertakings in the energy supply chain (Recitals 6, 11, 12, 14, 46, 50 and 51).

On that basis, in the first place, in this Court's view, the need to ensure exceptional coordination in relation to tax measures in the energy supply chain in order to avoid (further) distortions to the internal market, however important, should be balanced against the principle of solidarity and the other general interests of the European Union that the Regulation itself takes key account of, such as the protection of consumers, businesses and households, and the economic stability of the public finances of the Member States and of the euro area as a whole.

Moreover, the Court of Justice has always recognised the power of the Member States to adopt measures that may further facilitate the achievement of the objectives set by Union law (CJEU, judgment of 11 July 2000, Case C-473/98, *Kemikalieinspektionen*, paragraph 30; Grand Chamber, judgment of 19 November 2019, Case C-609/17, *TSN*, paragraphs 34 et seq.), provided that they are applied in a non-discriminatory manner and respect the principle of proportionality.

In the second place, in this Court's view, the particular aspects of the national energy context cannot be disregarded.

First, Italy is among the Member States most dependent on natural gas in the national energy mix (accounting for 48.6% in the year 2022) and, as a result, in that same year, the increase in the price of that same gas (which constituted 37.6% of the gross energy supply) and electricity for final consumers was among the highest recorded in Europe, despite national interventions to support businesses and households.

As stated in the July 2023 report of the Ministry of the Environment and Energy Security on the national energy situation in 2022, "regarding the prices paid by businesses, the price of electricity compared to the average European price rose from 114.2 percentage points in 2020 to 118.8 points in 2021, finally reaching 145.8 percentage points in 2022, while for natural gas the gap rose from 86 percentage points in 2021 to 115 points in 2022. Compared to the average prices in the 27-nation European Union, Italian households pay a significant premium (125.9 percentage points) for electricity. For natural gas, the differential with the average European price has remained high (115 percentage points) but slightly decreasing over the last four years (in 2018 it was 125). In 2022, large price increases were recorded for businesses in particular: for electricity an increase of 72.8% compared to 2021, for natural gas an increase of 163.6%". High price increases were also recorded for fuel prices.

Second, there are no particularly important oil extraction and coal mining activities in Italy (in the year 2022, according to GSE, such activities covered, respectively, only 1.16% and 8.34% of the national energy mix), from which to draw sufficient resources to finance the measures for the protection of businesses and households deemed necessary by the Union itself to deal with the exceptional crisis situation (as reported by State Counsel, the revenue that would have been raised by taxing the range of persons envisaged by the Regulation would have been equal to approximately half of that raised by the measure envisaged by the Italian provision).

It follows that the choice of imposing the equivalent measure on additional persons that also benefited from surplus profits linked to the particular economic situation during the energy crisis is linked to the special features of the national energy context and is consistent with the aforementioned ultimate purpose of the Regulation to finance national measures aimed at contributing to the affordability of energy.

In light of those elements, the broadening of the range of persons targeted by the national legislation in order to address surplus profits linked to the particular economic situation could be considered, in the national economic and energy context, an equivalent measure or, at any rate, an application of the general competence of the Member States in the field of direct taxation exercised in compliance with the principle of solidarity and the objectives of the Regulation.

11.– It follows from all of the foregoing considerations that it is necessary to ask for the Court of Justice's interpretation of the provisions of Union law that affect the resolution of the questions as to constitutionality.

The proceedings should therefore be stayed and the following question submitted to the Court of Justice pursuant to Article 267 TFEU:

"Do Articles 1, 2 and 14 of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, also read in the light of the relevant recitals (in particular, Recitals 6 to 12, 14, 15, 40, 41, 45, 46, 50, 51 and 63), preclude the adoption of a national measure which is equivalent to the solidarity contribution, such as that provided for in Article 1(115) to (119) of Law No 197/2022 (State budget for financial year 2023 and multi-year budget for the 2023-2025 period), insofar as that measure is also imposed on producers and resellers of electricity, distributors, resellers of petroleum products, resellers of methane gas and natural gas, and those who import electricity, natural gas, methane gas or petroleum products or who bring those goods into the territory of the State from other EU Member States, where they have earned surplus profits linked to the particular economic situation in 2022?"

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

1) *directs* that the following question be referred for a preliminary ruling to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union:

"Do Articles 1, 2 and 14 of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, also read in the light of the relevant recitals (in particular, Recitals 6 to 12, 14, 15, 40, 41, 45, 46, 50, 51 and 63),

preclude the adoption of a national measure which is equivalent to the solidarity contribution, such as that provided for in Article 1(115) to (119) of Law No 197/2022 (State budget for financial year 2023 and multi-year budget for the 2023-2025 period), insofar as that measure is also imposed on producers and resellers of electricity, distributors, resellers of petroleum products, resellers of methane gas and natural gas, and those who import electricity, natural gas, methane gas or petroleum products or who bring those goods into the territory of the State from other EU Member States, where they have earned surplus profits linked to the particular economic situation in 2022?";

2. *stays* the present proceedings pending the outcome of the abovementioned preliminary ruling procedure;

3) *orders* that a copy of this order together with the case file be forwarded to the Registry of the Court of Justice of the European Union.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 10 February 2025.

Signed: Giovanni AMOROSO, President

Luca ANTONINI and Giovanni PITRUZZELLA, Judge Rapporteurs