Italian Constitutional Court

Legal summary

Judgment No 111/2024

ECLI:IT:COST:2024:111

EXCISE DUTIES MUST NOT BE INCLUDED IN THE TAXABLE BASE FOR THE SOLIDARITY CONTRIBUTION IMPOSED ON ENERGY OPERATORS

In Judgment No 111/2024, the Constitutional Court held that **the solidarity contribution owed by energy operators was unreasonable, since it included in the taxable base the excise duties reflected in the sale invoices, which the operators paid to the State.**

The Court found that **the solidarity contribution, in itself, was constitutional, as it aimed to counter the surge in the price of electricity** by taxing the increased turnover of energy operators during the 2022 energy crisis. Using increased turnover as a benchmark for assessing ability to pay was legitimate, given the emergency context and the absence of more detailed data on the companies' profits.

However, **including in the taxable base the excise duties paid to the State was unreasonable**. These amounts do not represent increased wealth and cannot serve as indicators of improved economic performance. Their inclusion in the calculation of the taxable base therefore breached Articles 3 and 53(1) of the Constitution.

Main proceedings

To address the spike in energy bills in 2022, a special tax was introduced to collect a one-off solidarity contribution from companies in the energy sector. This contribution was established by Article 37 of Decree-Law No 21/2022[1] (the "**challenged provision**"). Several energy operators subject to this payment requested a refund from the Inland Revenue Agency (*Agenzia delle Entrate*) and subsequently challenged the Agency's refusal before the First Instance Tax Court of Milan (the "**referring court**").

The referring court agreed with the applicants that the challenged provision merely identified who should pay the solidarity contribution and how it should be calculated based on total turnover, while remaining otherwise generic and indeterminate as to the scope and purpose of this tax. Although the parliamentary preparatory works mentioned the "surplus" profits of energy operators as one motivation for the measure, the challenged provision does not reflect any connection to this aspect. Moreover, the generic identification of all energy operators as potential taxpayers seemed arbitrary.

[1] Decree-Law No 21/2022 on urgent measures to counter the economic and humanitarian effects of the Ukrainian crisis.

In light of these concerns, the referring court stayed the proceedings and referred the matter to the Constitutional Court (the "**Court**"), asserting that the challenged provision violated the Italian Constitution (**IC**).

Complaints

The referring court argued that the challenged provision breached **Articles 3 (Principle of equality and non-discrimination)**, **23 (Financial obligations must be established by act of parliament)**, **41 (Freedom of private economic enterprise)**, **42 (Protection of private property)**, **53(1) (Ability-to-pay principle) IC** and **117(1) (Compliance with international commitments) IC**, the latter in conjunction with **Article 1 (Right to property) of Protocol 1 of the European Convention on Human Rights** (**ECHR**).

According to the referring court, the challenged provision linked the solidarity contribution solely to the energy sector and to the companies' taxable income. In doing so, it failed to identify the essential rationale of the tax, in breach of Article 23 IC. Furthermore, it calculated the contribution arbitrarily based on the balance between purchases and sales, rather than on the taxpayer's ability to pay or an actual determination of "surplus" profits, thereby also violating Articles 3 and 53(1) IC.

On the one hand, the imposition of the solidarity contribution on energy companies that also engage in non-energy operations meant that the challenged provision extended beyond its intended scope. On the other hand, its focus on the energy sector created an unjustifiable disparity by sparing other sectors that arguably benefited from the same economic circumstances, such as banks and pharmaceutical companies.

The referring court further argued that the contribution established by the challenged provision amounted to an unreasonable interference with – if not an indirect expropriation of – the economic interests of the affected companies. In particular, it highlighted a conflict with the rights to property and economic enterprise, as protected by Articles 42 and 41 IC, and – through Article 117(1) IC – by Article 1 of Protocol No 1 to the ECHR.

Decision of the Court

The Court ruled that the challenged provision established a tax that did not amount to expropriation and pursued a legitimate purpose. However, **the failure to exclude excise duties paid to the State from the taxable base was unreasonable**, as it resulted in taxing amounts that were reflected in the sale invoices, but not in the purchase invoices. For this reason, **the Court declared that the provision breached Articles 3 and 53(1) IC**.

Reasons for the decision

The Court recalled that the challenged provision was adopted during a period of serious international crisis. Following Russia's invasion of Ukraine, Russia's supply of natural gas to the European Union progressively diminished, contributing to a dramatic increase in energy prices. Energy operators benefitted from this situation, reaping profits in excess of what was commercially typical.

In this context, the solidarity contribution was introduced to finance urgent policies aimed at reducing the increase in energy costs for businesses and consumers. It applied to operators in the extractive and production sectors, as well as to companies distributing and selling electricity, natural gas and oil products, provided that at least 75% of their 2021 revenues were derived from these activities. The tax base for the contribution was calculated on the increase in the balance between sales and purchases – excluding VAT – between October 2021 and April 2022, compared to the same period in the previous year. This information was extracted from the company's VAT returns, comparing sale and purchase invoices. The contribution was owed only if this increase exceeded both €5 million and 10%. Financial transactions unrelated to energy operations were excluded from the calculation.

The solidarity contribution was, in effect, a tax, and, as such, needed to comply with the constitutional requirement that taxes must be clearly established by law (Article 23 IC), including their essential rationale. The Court observed that the rationale of the solidarity contribution is not indeterminate. The challenged provision clearly links the tax to the VAT returns of the operators, thus targeting increased turnover, rather than windfall profits (as mistakenly suggested by the referring court). For this purpose, the calculation method described was deemed suitable to the contribution's aim.

Regarding the ability-to-pay principle, the Court recalled its flexible nature, noting that **the legislature can select various benchmarks, beyond assets and income, to determine a taxpayer's ability to pay a specific tax**. This flexibility aligns with the principles of solidarity and equality that inform the duty to contribute to public expenditure. In 2015, the Court had accepted that a temporary phase of exceptional profitability in the oil sector constituted a legitimate indicator of ability to pay, warranting a specific tax for the operators in that sector.[2] In this light, the solidarity contribution identified two legitimate benchmarks of the operators' peculiar economic strength: the extreme rise in energy prices and the structure of the energy market, characterised by oligopolistic conditions and inelastic demand. These circumstances resulted in the atypical financial strength of the affected operators, also targeted by Council Regulation (EU) 2022/1854, which required the taxation of "surplus profits" in 2022 and 2023.

The Court noted that, during the period concerned, energy operators experienced dramatic increases in business, far exceeding those of other sectors. In this scenario, **it was not arbitrary for the legislature to identify a relevant indicator of ability to pay within this sector**; the challenged provision therefore did not breach Articles 3 and 53(1) IC.

Likewise, the thresholds for eligibility for the solidarity contribution – based on a year-on-year increase in taxable income of at least €5 million and 10% – were not discriminatory. These thresholds were designed to distinguish minor variations (compatible with normal business patterns) from increases indicating greater economic strength warranting special taxation.

The Court then assessed the measure's proportionality, examining whether the solidarity contribution maintained a rational connection to its policy objective. This assessment

[2] Constitutional Court, Judgment No 10/2015.

ensures that the measure's disparate treatment of taxpayers does not undermine the principles of equality and ability to pay.

Typically, taxes on windfall profits use corporate income data from tax statements and target the surplus profits recorded therein. However, the challenged provision calculated the taxable base using turnover data from VAT returns, which can result in taxing increased turnover due to higher sales volumes rather than the price spikes driven by the energy crisis.

Under normal circumstances, this approach would fail the proportionality test and the rational connection requirement. However, **given that the provision formed part of emergency legislation to address extraordinary circumstances, urgent action was necessary to prevent inflation surges and protect the broader economy**. As VAT return data were the only data immediately available, it was acceptable for the legislature to rely on them to identify the taxable base for the solidarity contribution.

Nonetheless, even under extraordinary circumstances, the Court must ensure that the balancing of interests reflected in the law is not manifestly unreasonable. Taxes cannot amount to mere subjection to state power. From this standpoint, the inclusion of excise duties paid to the State in the taxable base was unreasonable.

Excise duties apply to specific products, such as energy products, and are owed only when these products are released for consumption from tax warehouses. Before this point, goods can be traded under a duty suspension arrangement without excise payment. Excise duties are typically passed on to consumers, leading to an increase in the sale price. Consequently, **the operator purchases products under excise suspension, with the excise not recorded in the purchase invoice, but the excise amount appears in the sale invoice to consumers or resellers when it becomes due**. Comparing these invoices for the tax base calculation was therefore unreasonable, because the taxable base included only the excise duties reflected in the sale invoices.

The inclusion of excise duties in the taxable income was unreasonable for two reasons: first, it significantly inflated the tax base without reflecting increased wealth, and second, it treated operators releasing products for consumption detrimentally, creating arbitrary discrimination against them compared to operators trading under duty suspension arrangements.

Conversely, the Court found no breach of Articles 42, 53 and 117 IC, the latter in conjunction with Article 1 of Protocol No 1 to the ECHR. The referring court's claim that the solidarity contribution amounted to an expropriation of assets was incompatible with the well-established principle that taxes do not constitute expropriation but impose an obligation to pay the State. The Court emphasised that Article 53 IC, which enshrines the principle of ability to pay, sets forth the relevant standard for assessing the legitimacy of fiscal measures, while Article 42 IC protects private property.

Similarly, the solidarity contribution did not breach Article 1, Protocol 1, ECHR. The European Court of Human Rights (**ECtHR**) grants States a wide margin of appreciation in

adopting fiscal policies[3] and has held that a hight tax rate alone does not constitute a breach.[4]

For these reasons, **the Court declared the challenged provision unconstitutional under Articles 3 and 53(1) IC insofar as it failed to exclude excise duties from the calculation of the taxable base**. To remedy this, the taxable income must be calculated based on total sales, excluding not only VAT but also all excise duties paid to the State.

All other issues of unconstitutionality were rejected.

Type of proceedings	Constitutional review by referral order
President of the Court	Augusto Antonio Barbera
Judge rapporteur	Luca Antonini
Composition of the Court	Augusto Antonio Barbera (President), Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco D'Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	27 June 2024
Challenged provisions	Article 37 of Decree-Law No 21 of 21 March 2022

[3] ECtHR, judgment of 24 June 2014, *Azienda Agricola Silverfunghi sas et al v. Italy* (Application No 48357/07); judgment of 7 December 2023, *Waldner v. France* (Application No 26604/14).
[4] ECtHR, judgment of 14 May 2013, *N.K.M. v. Hungary* (Application No 66529/11); judgment of 2 July 2013, *R.Sz. v. Hungary* (Application No 41838/11).