Italian Constitutional Court

Legal summary

Order No 21/2025

ECLI:IT:COST:2025:21

THE CONSTITUTIONAL COURT ASKED THE COURT OF JUSTICE WHETHER THE ITALIAN SOLIDARITY CONTRIBUTION IMPOSED ON ENERGY OPERATORS COMPLIES WITH EU LAW

In Order No 21/2025, **the Constitutional Court referred a preliminary question to the Court of Justice of the European Union**, seeking clarification on whether the solidarity contribution imposed on energy operators under Law No 197/2022 complies with Council Regulation (EU) 2022/1854.

The Italian solidarity contribution scheme requires a broad range of energy operators – including distributors, resellers and importers – to pay an additional tax on surplus revenues generated during the 2022 energy crisis. By contrast, EU law's requirement to introduce such a scheme refers, on its face, only to operators involved in the extraction and refining of raw energy sources, such as oil, gas and coal.

Accordingly, **in order to assess the constitutionality of the Italian scheme under Articles 11 and 117 of the Italian Constitution, it is first necessary to determine whether it complies with EU law**. To this end, the Constitutional Court stayed proceedings and submitted a request for preliminary ruling to the Court of Justice, centred on the correct interpretation of Regulation (EU) 2022/1854.

Main proceedings

In December 2022, Italy adopted Law No 197/2022, which regulates the State budget for financial year 2023.[1] Among its provisions, Article 1, paragraphs 115 to 119 (the "**challenged provisions**") introduced a so-called solidarity contribution – a one-off tax levied on certain entities operating in the energy sector, both in the "upstream" and the "downstream" segments (the "**Italian solidarity contribution**"). [2] This temporary measure has the aim of mitigating the difficulties faced by businesses and households due to the surge in energy prices by extracting revenues from energy operators – producers, resellers, distributors and importers of raw sources and energy – who generated unusual or "surplus" profits during the crisis.

Several companies operating in the downstream segment of the energy sector, and therefore subject to the solidarity contribution, were issued with payment demands by the Inland Revenue Agency (*Agenzia delle Entrate*) under the challenged provisions. These companies contested the Italian solidarity contribution before domestic courts. Some sought judicial review of the Inland

[1] Law No 197 of 29 December 2022 (State budget for financial year 2023 and multi-year budget for the 2023-2025 period).

[2] The upstream sector involves the exploration and extraction of raw energy sources? (oil and gas exploration, drilling and extraction). The downstream sector involves the distribution and sale of energy products to end users. For the purpose of this decision, refining operations are considered upstream.

Revenue Agency's implementing decisions before the Lazio Regional Administrative Court, while others challenged the Agency's refusal to refund payments made under the challenged provisions before the First Instance Tax Courts of Messina and Trieste (collectively, with the Lazio Regional Administrative Court, the "**referring courts**").

According to the applicants, the law of the European Union (**EU**) specifies that only extraction and refining operators may be subjected to a cap on market revenues or to a solidarity contribution. They argue that the challenged provisions unduly extend the Italian solidarity contribution to all other downstream operators like sellers, importers and distributors, thereby violating EU law. Furthermore, the applicants claim that the challenged provisions impose a discriminatory and excessive burden on them, contrary to the principles of equality, proportionality and reasonableness, and that they create a risk of double taxation.

As a result, the referring courts stayed the respective proceedings and referred the matter to the Constitutional Court (the "**Court**"), claiming that the challenged provisions violate the Italian Constitution (**IC**). Given the similarity of these referrals, the Court joined them into a single set of proceedings.

Complaints

The referring courts argued that the challenged provisions significantly expanded the range of operators subject to the solidarity contribution listed in Council Regulation (EU) 2022/1854 (the "**Regulation**").[3] Specifically, while the Regulation requires the imposition of a solidarity contribution on operators engaged in the extraction and refining of raw energy sources, the Italian solidarity contribution also applied to other operators within the energy value chain, including sellers, importers and distributors. For this reason, they alleged a violation of **Articles 11 (Limitations of State's sovereignty and promotion of international organisations)** and **117(1) (Compliance with international obligations) IC**, according to which Italian law must comply with EU law.

In addition, the referring courts contended that the Italian solidarity contribution breached **Articles 3 (Principle of equality and non-discrimination)** and **53(1) (Ability-to-pay principle) IC**. In support of this argument, they claimed that the challenged provisions relied on an incorrect tax base – one that included revenues unrelated to the policy objectives of the measure – and that they overlapped with existing charges, resulting in duplication.

Decision of the Court

The Court held that, in order to determine whether the challenged provisions complied with the Constitution, **their compatibility with the Regulation was first to be assessed**. If the Italian solidarity contribution is found to breach the Regulation, the Court may declare it unconstitutional for violating Articles 117 and 11 IC, without needing to examine the other challenges.

[3] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

For this reason, the **Court stayed proceedings and referred a preliminary question to the CJEU**, asking whether the Regulation allows for the application of a measure equivalent to a solidarity contribution to a broader range of subjects compared to those expressly listed in the Regulation.

Reasons for the decision

The Court rejected the objection of inadmissibility. According to the Government, since the Regulation has direct effect, the referring courts could have applied it directly, thereby obviating the need to raise a constitutional question. Instead, the Court reiterated the approach affirmed in recent decisions: national courts may, when domestic law appears incompatible with directly applicable EU law, choose between two options: they can either disapply the conflicting national legislation – potentially after making a preliminary reference to the CJEU to ascertain the precise meaning of the EU norm,[4] or they can raise a constitutional question for potential violations of Articles 11 and 117(1) of the Constitution.

Generally, **the jurisdiction of the Court does not and cannot hinder the power of ordinary courts to request a preliminary ruling from the Court of Justice or to disapply national law** that conflicts with EU law.[5] However, **if an ordinary court chooses to raise a constitutional question instead, such question is admissible and the Court cannot decline to address it**. The Court will deploy its decision-making techniques to assess the compatibility of Italian law with a rule of EU law engaging values of constitutional relevance. This ensures the "constitutional dimension" of the question is duly considered.

In such a scenario, as the CJEU itself noted, "the referring court 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 before the court deciding the substance of the case. It must answer that question in light of both national and EU law, providing not only a decision to its referring court but also a ruling with *erga omnes* effect for all Italian courts, which must apply it in any relevant dispute. In these circumstances, the interpretation of EU law sought by the referring court relates directly to the object of the dispute before it, which concerns only the constitutionality of national provisions, assessed under national constitutional law read in light of EU law".[6]

The constitutional dimension of the current case is undeniable. The referring courts raised constitutional questions regarding Articles 3 and 53 IC, invoking the principles of equality, proportionality, reasonableness, and citizens' contribution to public expenditure according to their wealth. For these reasons, the Court deemed it necessary to request a preliminary ruling from the CJEU concerning the interpretation of Regulation (EU) 2022/1854[7] in order to resolve the question of constitutionality under Article 117(1) IC.

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[4] Constitutional Court, Judgments Nos 7/2025, 1/2025 and 181/2024.

[5] CJEU, Grand Chamber, judgments of 22 February 2022 in Case C-430/21, *RS*, and 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*.

[6] CJEU, Grand Chamber, judgment of 2 September 2021 in Case C-350/20, *OD and Others*, paragraph 40.

[7] As for the validity of the Regulation, the Court took note of various pending questions relating to it (in Cases C-358/24, *Varo energy Belgium and others*; C-533/24, *Vermillon energy Ireland Ltd and others*; C-467/242, *Albron Catering BV*; C-

The Court then reviewed the merits of the referral. Regulation (EU) 2022/1854 was adopted in response to a spike in energy prices between 2021 and 2022, caused by a combination of factors: a surge in consumption following the COVID-19 pandemic, high temperatures and reduced Russian supply. As early as March 2022, Italy introduced a "solidarity payment" through Decree-Law No 21/2022 to address rising utility bills. In parallel, the EU pursued similar objectives and adopted Regulation (EU) 2022/1854 of 6 October 2022.

The Regulation's purpose is to mitigate the effects of the energy price surge by enabling Member States to collect surplus profits from certain entities and use the funds to support affected households and businesses. These measures have an anti-inflationary effect and must be coordinated across the Union to prevent unequal treatment and fragmentation of the internal energy market.

To this end, the Regulation establishes three tools: a reduction in gas demand, a revenue cap of €180/MWh for inframarginal energy generators[8] and a temporary solidarity contribution. The solidarity contribution applies to companies engaged in the extraction, mining, refining of petroleum or manufacture of coke oven products. It consists of an additional tax – of at least 33% – on surplus profits exceeding by more than 20% the average profits of the previous four fiscal years.

The Regulation also allows Member States to adopt equivalent measures, provided they serve the same purpose (ensuring energy affordability) and generate at least a comparable revenue. Law No 197/2022 introduced both a revenue cap and a fiscal measure equivalent to the solidarity contribution – i.e. the Italian solidarity contribution. This measure generated approximately €3.8 billion in revenue – significantly more than the estimated €1.8 billion that would have been collected under the Regulation's standard solidarity contribution, from which it differs in intensity and scope of application.

The Italian solidarity contribution applies to surplus profits from the 2022 fiscal year, defined as profits exceeding by at least 10% the average profits of the previous four years. The tax rate is set at 50%, and the measure applies to companies whose turnover derives at least 75% from the specified activities. In addition, **the Italian solidarity contribution applies not only to upstream operators in the energy production and distribution chain but also to downstream operators involved in distributing finished energy products and electricity**. At issue in this case is precisely the application of this measure to importers, producers and resellers of electricity, as well as distributors, resellers and importers of petroleum products and gas.

The applicants contended that the Regulation precluded extending equivalent measures to this broader group of subjects. **The Court referred this question to the CJEU and offered an analysis of the Regulation and the contested provisions to assist in its assessment**.

On the one hand, the Regulation explicitly limits the solidarity contribution to upstream operators and imposes the revenue cap on inframarginal energy producers, thereby seemingly establishing

462/24, *Braila Winds srl*), and reserved the power to take into account the CJEU decisions in those cases at a later stage, including a potential declaration of invalidity of the Regulation.

[8] Inframarginal operators are those electricity producers whose marginal costs (the cost of producing one more unit of electricity) are below the market price.

separate measures for distinct categories. Recital 63 also states that equivalent measures "should" apply only to upstream operators. These provisions could support the argument that the Regulation prohibits applying equivalent measures to entities already subject to the revenue cap, particularly in light of the objective of maintaining a uniform operation of the EU energy market.

On the other hand, the Regulation is based on Article 122(1) TFEU, which does not authorise the harmonisation of Member States' tax laws. Rather, it enables temporary measures to address emergencies without impinging on national sovereignty in direct taxation. The Regulation advances EU solidarity and aims to protect vulnerable households and businesses during the energy crisis.

In the Court's view, coordination of national fiscal measures in the energy sector must be balanced with the principles of solidarity, consumer and business protection and financial stability. As the CJEU has consistently held, Member States may adopt measures that advance the objectives of Union law further, so long as they are non-discriminatory and proportionate. Italy's heavy dependence on natural gas led to a significant spike in energy prices in 2022, and the lack of domestic oil and coal production required alternative measures to support households and businesses. **Given this specific context, extending the Italian solidarity contribution to other entities – though not expressly covered by the Regulation but still benefiting from surplus profits – is consistent with the Regulation's aims**.

For these reasons, the Court stayed proceedings and submitted the following preliminary question to the CJEU under Article 267 TFEU:

- **Does Regulation (EU) 2022/1854 preclude adoption of a national measure which is equivalent to the solidarity contribution, 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?**

Type of proceedings	Constitutional review by referral order
President of the Court	Giovanni Amoroso
Judge rapporteurs	Luca Antonini, Giovanni Pitruzzella
Composition of the Court	Giovanni Amoroso (President), 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	20 February 2025
Challenged provisions	Article 1, paragraphs 115 to 119, of Law No 197/2022