Made to Last ?

Windfall Profit Taxation in Europe (and Beyond)

Doctoral Seminar at the University of Ferrara, March 9th 2023

Introduction

In the latest months several European states have introduced (or are discussing about possible introduction of) a Windfall Profit Tax (in Italian *Imposta sugli extraprofitti*).
This extraordinary fee is charged on the (allegedly) exorbitant profits realized by qualified businesses (essentially active in the Oil and Gas sector) due to the war in Ukraine, and is supposed to restore equality, raise more money for welfare and to grant means to tackle the pending emergencies.
So far, the debate about such a tax has been monopolized by economists, who are arguing on its consistency with the principles of efficiency, neutrality and fairness *inter alia*.
We argue that it is necessary to analyze the concept of "extra profit" to set the limits for such a tax to be applied, and to investigate the conditions for a common approach to it in the EU. Strategies pursued in other countries might help in understanding the phenomenon.
This seminar at the University of Ferrara, Department of Law is the first step in this direction.
We are grateful to the Associazione Italiana dei Professori e degli studiosi di diritto tributario and to the ELI - Italian Hub for the invaluable support.
THese are the abstract of the presenattion delivered during the event and that constitute the basis for the discussion.

Marco Greggi

Programme of the Seminar

9.00 - 09.30 Welcome and Introduction to the Seminar
Serena Forlati, University of Ferrara (TBC)
Giovanni De Cristofaro, University of Ferrara (TBC)
Marco Greggi, University of Ferrara
09.30 - 10.00 An inquiry into the Nature of Windfall Profit Taxation
Dario Stevanato, University of Trieste
10.00 - 11.00
Elena Briguglio and Anna Miotto, *Extraordinary tax policies for extraordinary times: Windfall Profit Taxation in Europe*
Filippo Luigi Giambrone, *Windfall Profit Taxes*
11.00 - 11.30 Windfall Profit Taxation and EU Law
Fabrizio Amatucci, University of Naples "Federico II"
11.30 - 12.30
Gabriella Csűrös and Lovas Dóra, *The windfall tax compatibility with the EU law, especially with regard to Hungarian rules*
Francesco Bertocco, *EU Energy Windfall Tax(es), Between Doubtful Legal Basis and National Measures. An Italian Perspective*
12.30 - 13.30 Lunch
13.30 - 14.00 What is a Windfall profit ? A "Extraordinary Tax" for "Extraordinary Times"?
Reuven Avi Yonah, University of Michigan
14.00 - 15.00
Aurora De Roma, *The (tax) nature of the extraordinary contribution against high utility bills: critical issues and possible doubts of constitutional legitimacy*
Eleonora Addarii and Valentina Passadore, *Comparing Windfall Profit Tax with Robin Hood Tax*
Mateusz Kaźmierczak, *Digital Economy - the birthplace of permanent windfall?*
15.00 - 15.30 Windfall Taxation and International Tax Treaties
Pietro Selicato, University of Rome "La Sapienza"
15.30 - 16.30
Jasna Bogovac, *Windfall tax in Croatia - a new illusion about fair redistribution of income?*
Francesco Paolo Schiavone, *Windfall profit tax and compatibility with the principle of non tax discrimination: what is not right?*
16.30 - 17.00 Addressing inequalities via Windfall Profit Taxation
Yoseph Edrey, University of Haifa
17.00 - 18.00
Maria Viscolo, *Inequality: regulating the extra-profit tax, a hypothetical remedy*
Costanza Lugli, *Constitutional Profiles of the Windfall Profits Tax in the Light of Electricity Pricing Methods*
18.00 - 18.10 Concluding Remarks
Marco Greggi, University of Ferrara

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Windfall Profit Taxation and the redistributive Issue: Past, Present and Future

by Eleonora Addarii and Valentina Passadore

The Italian government in office in 2008 had introduced the so-called “Robin Hood tax” through article 81, paragraphs 16-17-18 of D.L. 112/2008 and subsequent amendments, in order to help the people in need. It was introduced via an IRES surcharge for the oil and energy sectors to be borne by entities identified by parameters relating to the volume of revenues achieved and the declared taxable income.

The idea sounded promising; the legislator intended to “steal from the rich” (the energy oligopoly). The fate of art. 81, paragraphs 16-17-18 of DL 112/2008 was similar to that of Robin Hood. It was ruled as in violation of the Constitution and the tax was declared unconstitutional with judgment 10/2015.

The reasons for the decision of the Constitutional Court were mainly based on the violation of articles 3 and 53 of the Constitution, from the point of view of reasonableness and proportionality, for the inconsistency of the means provided by the legislator with the objective, legitimate and pursued. One of the main issues was represented by the fact that the rate increase affected the company’s entire income and not only the extra-profits, in the absence of a mechanism which provided that only the supplementary income could be taxed more severely.

The prohibition on passing on the tax burden to prices did not prevent the additional IRES from being discharged downstream by taxpayers and then borne by consumers in the form of price increase.

In deciding on the incompatibility with the Constitution of the contested provisions, the Court considered the impact that such a decision might have on other constitutional principles, in particular the general principle of retroactivity resulting from art. 136 of the Constitution and art. 30, Act n. 87/1953. With regard to the retroactive effects of its decision, the Court justifies its choice in the light of the principle of strict proportionality: “as the limit of ‘exhausted relationships’ arises from the need to protect the principle of legal certainty. ”

In the face of the current energy crisis, the Act passed on 29 December 2022 was included in the 2023 financial, n. 197 establishes in art. 1 co 151 measures against “expensive energy”.

The budget maneuver introduces a temporary "solidarity contribution" of 50% on income produced in 2022, which is at least 10% above the average of total income achieved in the period 2018-2021. The amount of the contribution may not exceed 25% of the equity at the end of the financial year preceding the one in progress on 1 January 2022.

The excess profits tax will apply to companies that generate at least 75% of their revenues from activities in the production and resale of energy, gas and oil products sectors.

The wording of the act n.159 apparently mirrors the decree law n. 112/2008.

Is it likely that the same reasons that prompted the Constitutional court to declare in 2015 the unconstitutionality of the so called “Robin Hood Tax” could also be raised for this new one. Yet in this case, given the critical situation of the period, questions will not arise, also in relation to the fact that the “solidarity contribution” was implemented against the EU Regulation 1854/2022.

EU Energy Windfall Tax(es), Between Doubtful Legal Basis and National Measures. An Italian Perspective

by Francesco Bertocco

The research reflects upon Reg. (EU) 2022/1854 ("the Regulation") legal basis, on the one hand, dealing with the relationship between European and national windfall taxes, on the other, with a focus on the interplay between the EU "temporary solidarity contribution" (TSC) and the Italian "contributo straordinario contro il caro bollette", as well as its updated version introduced by the 2023 Budget Law.

The contribution reports on a story of reciprocal betrayal. The relationship between the EU Institutions and Member States (MSs) is one based on competencies. Within its attributions, EU law has primacy over national ones, and MSs have to comply with it. The EU, on the other side, cannot exceed its mandate, nor the European Institutions, in the exercise of their powers, are allowed to diverge from the rules and procedures set out in the Treaties. Both statements are far from reality, however, as far as Reg. (EU) 2022/1854 and the two Italian taxes mentioned above are concerned.

On the EU side, the Council has adopted the Regulation by qualified majority, under Article 122(1) TFEU. The paper is skeptical about this choice, considering that the Regulation introduces two taxes, one – the TSC – explicitly, the other – a market revenues cap - implicitly. Even though the decision of eluding the unanimity requirement at the Council seems reasonable from a practical point of view, it is actually not the case, and this not only from a practical perspective, but also from a legal one. As far as the latter is concerned, the use made by the Council of Article 122 does not take into account the history and the institutional context of the provision. What is more, Article 194(3) TFEU could have been a more sound legal basis, being more closely linked to the considered content of the Regulation. Furthermore, Article 194(3), requiring the consultation of the European Parliament and a unanimity vote within the Council, would have given stronger democratic legitimation to the two taxes, being in the meantime faithful to the constitutional arrangement designed by the Treaties drafters, who kept fiscal policy still on the intergovernmental track. Besides, the failure to identify the appropriate legal basis produces practical consequences: the illegality of the resulting act can be brought before the CJEU, both under Article 263 and 267 TFEU. Moreover, as established by Article 277 thereof, defendants can invoke such invalidity.

On the Italian side, despite the introduction of the two aforesaid taxes, the country has failed to comply with the Regulation, because none of the two can be qualified as an implementation of the TSC, nor an equivalent national measure as described by Recital 63 of the Regulation. The personal scope of the Italian measures is, indeed, wider than the one of the EU tax. What is more, the former does not provide any specific information about the proceeds allocation, whilst the Regulation has to be interpreted as compelling MSs to transparently earmarking their energy windfall profit taxes incomes.

In principle, by breaching the obligations a Regulation establishes, a MS puts itself at risk of an infringement procedure. In this case, Italy has also violated the principle of sincere cooperation enshrined in Article 4(3) TEU. However, the country could defend itself from both accusations by invoking the illegality of Reg (EU) 2022/1854, motivating it as above. It is clear, then, that the two stories of betrayal are intimately linked. The real takeaway, yet, does not relate to the Regulation or the Italian windfall taxes for themselves. These measures, rather, highlight the inadequacy of the Treaties, whose need for reform seems obvious to everyone, but to their Lords.

Windfall tax in Croatia - a new illusion about fair redistribution of income?

by Jasna Bogovac

Tax on extra profits was introduced into the tax system of Croatia with many controversies. Although many objections can be found to such a tax and the method of its introduction and calculation, it can still be considered a good move by the Government based on some characteristics. However, over all the positive consequences of its introduction, there is a shadow of distrust in the fiscal policy, which should effectively use the collected funds. The article discusses all the arguments for and against this tax and the limitations of fiscal instruments in Croatia.

The (tax) nature of the extraordinary contribution against high utility bills: critical issues and possible doubts of constitutional legitimacy

by Aurora De Roma

Following the European Commission's communication of 8 March 2022, Italy, like other European States, including Spain, Belgium and Hungary, has taken a number of measures to tackle the energy crisis caused by the Russian-Ukrainian conflict, including the extraordinary contribution on extraprofits against companies operating in the energy sector, introduced by Art. 37 of Decree-Law No. 21 of 2022, subsequently amended by Article 55 of Decree-Law No. 50 of 2022, converted into Law No. 91 of 15 July 2022.

The purpose of this paper is, first of all, to examine the nature of the contribution under review. Despite the nomen 'contribution', which probably reflects both the Legislator's desire to configure it as a more distinctly solidaristic levy, and the difficulty of framing it within other forms of tax levies, it is believed that it has a fiscal nature. In this regard, it is sufficient to consider, for example, the reference to the provisions on VAT, in so far as they are compatible, to regulate assessment, penalties and collection. This contribution has the characteristics of a tax and, in particular, of a levy. It is, in fact, a coercive pecuniary benefit, sanctioned by law, the genesis of which is beyond the control of the persons liable. It is not, therefore, a synallagmatic consideration for a counter-performance and is designed to contribute to public expenditure. On this point, it is also possible to point out a number of recent rulings by the administrative Courts of merit, which have confirmed the tax nature of the levy in question, since all the indicators currently indicated by doctrine and jurisprudence are present (Lazio-Rome Regional Administrative Court Judgement No. 15278/2022).

Secondly, once the nature of this levy has been ascertained, the present work aims to analyse its critical aspects, with particular regard to: the tax base (which is reminiscent of IRAP, but differs from it insofar as it does not attach importance to the added value in itself, but to a qualified increase); the taxable persons identified (not all operators that generated extra profit, but only those operating in the energy sector. In this regard, by way of example, in Hungary the extraordinary levy applies not only to companies in the energy sector, but also to financial institutions and pharmaceutical companies); the choice of the time frame taken into account to identify the tax base (i.e. the difference between the balance of the receivable and payable transactions of the period 1 October 2020/30 April 2021 and the balance of the period 1 October 2021/30 April 2022). Moreover, starting from the assumption that such levy can be considered a tax, it is necessary to analyse its possible

profiles of constitutional illegitimacy, with reference, in particular, to Article 53 of the Italian Constitution, also examining the similarities and differences with respect to the Robin Hood tax, declared unconstitutional by the Constitutional Court. In particular, the Court, with judgment No. 10 of 2015, suggests the possibility of introducing a new tax that would allow for the targeting of extra-profits, for a limited time. However, in relation to Article 53 of the Constitution, the sectoral distinctions made by the tax legislature must not be arbitrary or unreasonable; therefore, the judgement of constitutional legitimacy focuses on 'the reasonable use, or otherwise, that the legislature itself has made of its discretionary powers in tax matters, in order to verify the internal consistency of the structure of the tax with its economic premise, as well as the non-arbitrariness of the extent of the taxation' (Constitutional Court, no. 111 of 1997). In addition, the contribution is not deductible for the purposes of income tax and IRAP, despite the fact that the Constitutional Court (sentence no. 262 of 2020) has already ruled on the censurability of this choice, pursuant to Article 53 of the Constitution, in relation to IMU and IRAP.

The windfall tax compatibility with the EU law, especially with regard to Hungarian rules

by Lovas Dóra and Gabriella Csűrös

As a result of the crisis caused by the COVID-19 epidemic and the Russian-Ukrainian conflict, the Hungarian government introduced a number of measures, in order to increase budget revenues and to keep the price of basic foodstuffs at an affordable level. It set maximum prices for fuel and some basic foodstuffs, and introduced sector-specific special taxes. Both sets of measures have been subject to numerous criticisms, but their assessment is more complex, so we cannot ignore their advantages either.

According to the Hungarian Basic Law, the Government can create a decree in a special legal order, with which it can suspend the application of certain laws, deviate from legal provisions, and take other extraordinary measures. Based on this rule, the Government introduced some windfall tax affecting eight sectors (banking, insurance, energy, retail, telecommunications, aviation, pharmaceutical distribution, and advertising sectors) in No. 197/2022. (VI. 4.) by Government Decree, which entered into force on July 1, 2022. At the end of the year, the rules were extended to the sector of pharmaceutical manufacturers as well. According to the law, the special extra-profit tax was imposed on top of the special sectoral taxes currently in force, and with it a significant part of the extra profit is taken from certain businesses, in order to finance the energy overhead defense and national defense funds. The government created the former fund in order to reduce residential energy costs, while the latter was created to finance national defense expenses. Among the main criticisms of the introduced measure is that companies can pass on the tax burden, and that it can also have an inflationary effect, while its revenue-generating power is negligible. It is also questionable whether there is extra profit during the recession caused by the COVID-19 epidemic and the Ukrainian-Russian conflict, which can be deducted from the targeted taxpayers.

Hungary is also a member of the European Union, and must take into account the EU rules. It is true that the tax issue is still the sovereign right of the member states and unanimity is necessary for the introduction of any common rules, but the measures taken within their own discretion must also comply with EU law. In recent times, the action against harmful tax competition and aggressive tax planning has become a key issue in the European Union, let's think here, for example, of the effort to introduce a minimum tax on corporate tax or special taxes, or the government's action against the union regarding special taxes, which often serve to discourage foreign companies. The hardest part is

determining how to strike a balance between respecting national tax discretion and protecting fair competition in the internal market. With regard to special taxes and thus the extra profit tax, it can be argued that multinational companies pay too little tax compared to their ability to pay, which is - from the point of view of the values of the EU internal market - questionable and harmful to the European economy. The tax issue should also be approached from above the state aid rules of the European Union, since there the committee has a wide range of maneuver to filter out selective tax rules that disable certain companies, which in certain cases can be classified as prohibited state aid. However, according to many, state aid law is not suitable for controlling and sanctioning the use of tax loopholes created by national measures. This is especially true for the last few years, when the Commission eased its strict control system as a result of the crises and supports fair taxation, as it is of the view that it will become increasingly important in the coming years, as it enables a quick recovery from the crisis. In addition, crises do not affect all countries in the same way, so economically leading countries with a larger GDP have an easier time fighting recession (e.g. Germany, France). This may cause further distortion of competition in the internal market. Due to the crises, tax revenues are significantly reduced, while the member states have more public expenditure. To mitigate the negative effects, the member states act with different tools, which therefore becomes simpler due to the permissive policy of the Commission, while also raising the problem of the medium and long-term fiscal sustainability of the public finances.

Hungary has introduced a special tax for certain sectors, which does not conflict with the Union's state aid rules, but its effectiveness (in addition to the introduction of the food or fuel price cap) raises questions. In my presentation, I therefore want to examine the compatibility of the windfall tax introduced in Hungary, which currently affects 9 sectors, with EU law, while also trying to draw the foreseeable consequences for the economy.

Windfall profit taxes

by Filippo Luigi Giambrone

The profound financial crisis that has invested and still strikes the global and European economy has provoked particularly heavy consequences on the public finances of many States, producing social and political lacerations. Some countries such as ours have more heavily warned of the effects of the crisis also due to the expansion of debt, employment tensions and the increase in inequalities between territorial areas and social groups. The use of extraordinary finance tools to cope with financial emergencies has been the subject of extensive attention to the doctrine committed by time in the research and experimentation of extraordinary tributaries (better if destined to strike manifestations of undeserved or unexpected wealth — so called windfall taxes) or in the currency of the preferability of extraordinary tributes with respect to the forced loan or other debt reentry measures. Of particular importance is the art. 53 of the Italian Constitution which contains in itself several important principles: the contributory capacity, the universality of the tax and the progressiveness of the tax system. Among these, one of the most interesting is undoubtedly that of the contributory capacity, because it expresses the constitutional choice aimed at selecting the economic capacity of the individual, as a prerequisite on which to measure the competition to the public expenses (to the loads). In accordance with this principle, all are required to contribute to public expenditure on account of their ability to contribute. Then a tribute must comply with the provisions of art. 53, linking it with an action combined with the other principles guaranteed by the Constitution, among which, in particular, the right to health ex art. 32 Cost. By Judgment No 134 of 7 July 1982, the Constitutional Court established, on the subject of the deductibility of medical expenses from taxable income, that such deduction cannot be general and unlimited, but must be materied and commensurate with the ordinary legislator according to a criterion that reconciles the financial needs of the State with those of the citizen called to contribute to the needs of the collective life, no less pressing than those of individual life. a) The concept of contributory capacity expressed in the first subparagraph of art. 53 seems from the conceptual point of view considerably sound and has been assimilated and implemented by the case-law of the Court which now interprets it in a constant manner; b) Otherwise, its effectivity in ordinary legislation still seems far away, but this is part of the policy of the executives that have succeeded in the course of these years; finally, the so-called “fiscal federalism” could be an excellent opportunity, not to be missed, to apply the concept, already sufficiently determined, of contributory capacity, enriching it, perhaps, with some legal “fantasy”, but always within the constitutional framework. The so-called environmental

tributes, while not dissetting its own “fiscal” purpose of obtaining revenue, achieve extra-fiscal purposes of promoting environmentally friendly behaviours or processes, disincentivation of polluting productions or consumption of scarce resources. In such a broad vision, the relationship between politics and taxation becomes central, having to both contribute to environmental protection as a common good, value, right, end, through the exercise of government powers and the definition of regulatory frameworks and Impositives, the retrieval of the necessary means to cope with it and the granting of incentives for the meritorial behaviour. In the Commission communication of 2 June 2016, COM (2016) 356 final, entitled “A European Agenda for the collaborative economy”, It defines with “collaborative economy” the complex of entrepreneurial models in which activities are facilitated by collaborative platforms that create an open market for the temporary use of goods or services often provided by private individuals. The spread of the sharing economy can encourage more efficient sharing and utilization of resources, thus contributing to the transition to a circular economy.

Digital Economy - the birthplace of permanent windfall?

by Mateusz Kaźmierczak

It is often noted that with new budgetary needs new ideas for taxation arise. The current difficult economic situation caused, among other things, by the war between Russia and Ukraine is no exception. This crisis has resulted in significant increases in the price of raw materials on the energy market and a (sometimes disproportionately higher) increase in the price of energy itself. Shortly thereafter the idea of a windfall profits tax has resurfaced in many countries, i.a. in Poland, where the planned tax would cover all non-small and medium-sized companies that in 2022 show a profit margin higher than the average margin from 2018, 2019, and 2021.

Apart from the obvious question of how low the bar can be suspended for profits to be considered extraordinary, I believe that it is also worth noting some similarities to the previous idea of taxing of the so-called digital giants. Although the digital economy poses many problems for modern tax systems, the most popular proposals for income taxation in the digital economy, including the European Commission's 2018 proposal, referred precisely to the extra profits obtained due to the use of user data (treating users essentially as free labour) or exploiting automation or economies of scale. This notion is also present in the currently negotiated OECD Pillar 1 Proposal, which Amount A is to be taxed on so-called residual profits.

In the first part of my presentation, I will analyse the similarities and differences between windfall taxation in the classical sense and extra (or residual) profits as used within the digital economy. The main hypothesis of my presentation is that the concept of windfall profits is not necessarily linked to its rarity of occurrence over time, nor to its randomness. In fact, the main objective of the entire Venture Capital sector is to capture such extra profit and preserve it for as long as possible. In the second part of the presentation, I will focus on the practical problems of introducing such additional income taxation by states under the EU and international law. In particular, I will analyse the extra profits tax in the light of the notion of selectivity: both in terms of whether such a measure would be selective by its very nature and in view of the requirement proposed in Poland for such a tax to cover only non-SMEs.

The presentation will be based on research carried out using the method of analysis and discussion of the literature, the dogmatic-legal method, an analysis of international and EU law, and an analysis of CJEU case law (in particular, a case study on Poland's dispute with the European Commission concerning Polish retail sales tax).

Constitutional Profiles of the Windfall Profits Tax in the Light of Electricity Pricing Methods

by Costanza Lugli

Article 37 of Law Decree No. 21/2022 has introduced a one-off extraordinary solidarity contribution to the so-called "caro bollette" (high utility bills) to be paid by companies in the energy sector.

The doctrine has strongly argued that the provision is constitutionally unlawful, in particular with regard to the method used to determine the tax base, which seems unsuitable to reflect the real contribution capacity of the energy operators and to identify any extra profits realised by them.

The adoption of EU Regulation No. 2022/1854 and the subsequent amendments to the modalities for the determination of the national contribution foreseen for the year 2023 (Law No. 197/2022 - Budget Law 2023) did not put an end to the criticism, as they did not seem suitable to avert the profiles of constitutional illegitimacy for violating Articles 3 and 53 of the Constitution.

In particular, with regard to Article 3, although the constitutional jurisprudence considers a differentiated tax levy on certain persons and on certain production activities to be permissible in the abstract, the fact that this tax is to be levied for the second consecutive year, and only on operators in the energy sector, makes it necessary to examine whether the exceptional national contribution provided for in 2023 violates the principle of equality.

With regard to the compatibility of the contribution with Article 53 of the Constitution, it does not appear to be undisputed that it is actually possible to identify an increase in the taxpayer's ability to pay on account of extra-profits and the question remains as to whether the taxable base identified by the national legislation is capable of intercepting such extra-profits.

The solidarity levy for the year 2023 takes as its tax base the amount of the portion of the total income determined for corporate income tax purposes for the tax period prior to the one in progress on 01.01.2023 that exceeds the average total income determined for corporate income tax purposes for the four tax periods prior to the one in progress on 01.01.2022 by at least 10%.

However, in order to assess the compatibility with Article 53 of the Constitution, it seems necessary to take into account the regulation on the determination of electricity prices (Integrated Text of the Electricity Market Regulations, approved by Ministerial Decree of 19 December 2003 and subsequent amendments and additions), with which there still seems to be a lack of coordination.

The consideration on the need for coordination between the legislation on the tax on extra profits and that on the determination of electricity prices stems from the fact that the mechanism used in most European exchanges to determine the cost of electricity is the so-called Marginal Price System.
Under this system, accepted bids are valued at the system's equilibrium price, which is equal to the value of the last accepted bid (the most expensive), and each operator receives revenue equal to the price of the marginal bid multiplied by the total volume of energy sold on the market.
This system, introduced with the aim of incentivising investment in renewable energy, has led to a levelling of prices for the currently most expensive component - gas - with the consequent generation of extra profits precisely in the hands of the companies selling renewable energy, rather than the energy companies operating in the fossil fuel sector.
Such an effect was (and still is) not unknown to the national legislator, who had already provided for a compensatory measure in Article 15-bis of the so-called "Decreto Sostegni ter", Decree-Law No. 4/2022, with further profiles of the unfairness of the levy for operators who could find themselves taxed twice.
For the fossil fuel sector, therefore, the additional revenues would be lower than expected, as seems to be confirmed by the data on advances paid as at 30.06.2022 (although the figure does not necessarily appear to be indicative). On the other hand, for the renewable energy sector, there would be significant additional profits, but they would be inappropriately taxed twice.
The above problems therefore highlight the need to analyse the profiles of constitutional illegitimacy of the contribution provided for in the 2023 Finance Act, with particular attention to the violation of the principles of equality and ability to contribute.

Extraordinary tax policies for extraordinary times

Windfall Profit Taxation in Europe

by Anna Miotto and Elena Briguglio

As the war in Ukraine, and Covid-19 aftermaths, are progressively eroding household wealth and business development, states are trying to find ways and means to support the welfare and grant an acceptable level of public services.

Rampant inflation (in Europe and the US) and the energy shock caused by the Russian aggression have moved the clock backwards to 1973, or so it seems. Just like in the seventies the economic shock states are suffering from is asymmetric. While most of the business sectors are suffering from the global situation, a few ones are experiencing unprecedented prosperity.

Amongst these, oil, gas, pharmaceuticals industries and those connected to digital services are those whose performance appear to be outstanding in terms of profits made, as they record unprecedented levels of growth.

Such an asymmetry has brought several states (including the UK and Italy) to consider the introduction of Windfall profits taxes, to be applied to businesses which have, in some respect, proliferated despite the crisis or whose profits have increased exorbitantly due to the war.

Different as they are from a legal point of view, these extraordinary levies follow a common pattern. They target profits exceeding the fair amount that would be otherwise expected. Some authors have argued that these taxes are to hit the “exceeding”, the “unfair”, the “unjust” profits. On the one hand, it is difficult not to agree with this position in general terms, but on the other hand the way to calculate the exceeding profits is always questionable, and uncertain by nature. Some countries have used the VAT base for this purpose, others have considered balance sheets instead, others eventually use an hybrid approach.

All the states declared solemnly that Windfall taxation is to be considered exceptional and to be charged for one tax year only. Yet the history of tax law is full of episodes where exceptional taxes have been stabilized and made permanent by Governments, once introduced for one year.

Irrespective of the methodology used to assess the “excessive” profits, such a policy has met several theoretical questions: is this tax consistent with the ability to pay principle? Is it discriminatory by design? What about non resident companies exposed to windfall profit tax in the countries where they do trade or business? Is there any interaction with the double taxation conventions already in force?

Windfall Profit Tax and compatibility with the principle of tax non-discrimination: what is not right?

by Francesco Paolo Schiavone

The purpose of this abstract is to reflect on the compatibility of the Italian discipline of the sector, such as Article 37 of Decree-Law no. 21/2022 as amended by Article 55 of Decree-Law no. 50/2022, with EU law, in consideration of the fact that the extraordinary contribution, although similar in purpose, differs substantially from EU Regulation 2022/1854 of October.

In terms of the recipients of the extraordinary measures and the way in which any extra profits are identified, the domestic legislation appears to introduce unreasonable distortions of competition and the market.

On this point, entering into the merits of the intervention, the doctrine has highlighted numerous critical profiles, both on the side of constitutional legitimacy, specifically with respect to Articles 3 and 53 of the Constitution, cardinal principles of the tax system, and on the subject of fundamental EU freedoms.

In the literature, reference is made to the possibility of the extraordinary contribution being configured as indirect state aid (Pane-Foderà), the dubious adherence to the calculation of the tax base (Salvini) and violations of the principle of non-discrimination in taxation are debated.

That being said, from reading the illustrative report on Law Decree No. 21/2022, it appears unquestionable that the Italian legislator's intention was to strike at the extra profits of energy companies, directly related to the increase in prices and tariffs.

In particular, the aforementioned report states that 'Article 37 introduces a contribution by way of an extraordinary solidarity levy to be paid by producers and resellers of electricity, gas and petroleum products who have benefited from extra profits'.

However, underlying the domestic legislation, which predates the EU regulation in time, is an erroneous assumption, namely that operators belonging to the aforementioned industries are the only ones, by far, to generate the taxable extra-profits.

In doing so, no account is taken of the fact that other entities would benefit from the extraordinary levy in question, in the case, for example, of companies operating in production sectors other than energy, such as e-commerce and the pharmaceutical industry, which have nevertheless seen the demand for their products increase exponentially.

These persons will not be affected by an additional levy in any way, which is clearly unequal treatment, contrary to EU law.

In the writer's opinion, one could elaborate on the violation of the principle of non-discrimination in taxation under the Treaty on the Functioning of the European Union, as it aims to prevent the differential treatment of identical situations not justified by imperative requirements (rule of reason). Transposed at the level of economic relations, the equal treatment referred to in the principle of non- discrimination, guarantees the development of competition between economic operators, factors of production and products, an essential element and indispensable prerequisite of fair transnational trade relations.

In support of this, reference should briefly be made to the judgment of 16 April 2015 in Case C-591/13, in which the CJEU reiterated that this principle does not only apply to natural persons but is also to be extended to companies operating in the EU market; it would therefore be crucial to verify whether or not energy companies are in a non-comparable situation that justifies such higher taxation. In conclusion, these substantive considerations aim to highlight how necessary it is to adapt domestic legislation in order to comply with European principles protecting citizens, the single market and the European institutions, and to concretely put into practice the objectives of solidarity and fair redistribution advocated by the Union.

Inequality: regulating the extra-profit tax, a hypothetical remedy.

by Maria Viscolo

The energy crisis caused by the war in Ukraine has affected European states, and not only them, generating a steady increase in the gap between rich and poor with wealth inequalities even more marked than those of income already marked by the pandemic crisis.

While Europe has the lowest levels of wealth inequality in the world, the World Inequality Report 2022 paints a bleak global picture.

In this context, it appears necessary for the state to intervene in order to protect the poorer sections of the population by seeking a fair and effective approach through a redistribution of wealth resulting from taxation on the extra profits of energy companies that have seen their revenues unexpectedly increase by many billions.

Anthony Atkinson -the father of inequality studies- implicitly called for more attention to be paid to the concept of disposable income and thus redistribution in order to curb economic inequality.

The hypothesis of redistribution of extra profits is applicable in the short term by transferring money from those who are benefiting from the energy blockade to the end consumers on whom the costs are passed on.

Collecting revenue from the energy sector to address the main conditions on which an individual's poverty depends is a dutiful act that satisfies a principle of fairness; in this regard, the tax system of each European country in establishing clearly and in advance how such revenue will be taxed would not incur internal and European regulatory violations also by virtue of the extraordinary nature of taxation.

In the writer's humble opinion, there is a need for a uniform and equal application of this extra-profit tax in all European countries, so as not to have a negative impact on the principle of fair competition, all the more so because of the nature of the network services inherent in energy supply.

A European policy of sharing taxes on extra-profits could be directed towards regulating both the forecasting and the allocation of the revenue, constituting a valid instrument to operate whenever there are unexpected profits (extraordinary nature), also completing the process of European tax harmonization, which has been blocked for too long.

In support of what has been argued on the need for homogeneity in the provision of the tax on extra profits, it would seem right to refer to the poor result obtained in Italy by the application of the one-off 25% tax by the Draghi government, which immediately appeared ill-conceived and weak. In fact, only a minimum percentage was acquired by the State, which provided for a restricted distribution with arbitrary criteria. Well, it is clear that these applications, already in the initial phase, haven't given the hypothesized result despite responding to a need for redistribution linked to the crisis, a solution could be the provision of an automatic mechanism that intervenes once the established poverty threshold has been exceeded.

We are aware that a direct link from which it can be proven that higher energy prices directly influence inequality is not known, but the effect of higher windfall profits and consequently a greater ability to pay on the part of energy companies can lead to a legitimate redistribution in favor of the poorest by considering it appropriate that part of the revenue from the tax measures on companies in the sector should go to the poor end-customers who have borne the burden.
