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THE EXTRAORDINARY CONTRIBUTION ON EXTRA PROFITS OF ENERGY COMPANIES: CRITICAL ISSUES AND DOUBTS OF CONSTITUTIONALITY

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1. *Foreword*

Following the European Commission's communication of 8 March 2022, *"RePowerEU: Joint European Action for Safer, More Sustainable and Affordable Energy",* which provided for *"emergency measures"* in favour of businesses and consumers, stating that *" member states may consider temporary fiscal measures on extraordinary revenues ",* Italy, in order to cope with the energy crisis caused by the Russian-Ukrainian conflict, adopted a series of measures.

Among these, it is worth mentioning the extraordinary contribution on extra-profits for companies operating in the energy sector, introduced with Article 37 of Decree-Law No. 21 of 2022 , concerning *"Urgent measures to counter the economic and humanitarian effects of the Ukrainian crisis "* (the so-called Price Cutting Decree or also the so-called Ukrainian *bis* Decree).

The subsequent Aid Decree (Decree-Law No. 50/2022 converted into Law No. 91 of 15 July 2022), by virtue of the need to find adequate coverage to finance the other measures contained in the Aid Decree itself, made a number of changes to the original text of the provision, including the increase in the rate of the extraordinary contribution from 10% to 25% and the extension by one month of the time interval relevant to the taxable base of the contribution[1] . The

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[1] Initially, the taxable base of the levy was determined in an amount equal to the increase between the balance of active and passive transactions for VAT purposes of the six-month period between 1 October 2021 and 31 March 2022 compared to the balance of active and passive transactions for VAT purposes of the six-month period between 1 October 2020 and 31 March 2021; Article 55 of Decree-Law no. No. 50/2022 (the "Aid Decree"), on the other hand, provided that the taxable base is determined in an amount equal to the increase between the balance of the active and passive transactions for VAT purposes realised in the period between

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latter, which is only due if the increase meets the double condition of being more than EUR 5 million and more than 10%, exempts small entities and/or profits considered to be of an ordinary nature .

Subsequently, the Budget Law 2023 (Law No. 29 December 2022 no. 197) instituted, for the year 2023, an extraordinary solidarity contribution , in the form of a temporary levy, the taxable base of which is determined by applying the rate of 50% to the portion of total income, determined for corporate income tax (IRES) purposes, relating to the 2022 tax year that exceeds by at least 10% the average total income, determined for IRES purposes, earned in the four tax years preceding the one in progress on 1 January 2022. In this way, the Italian legislature intended to implement Articles 14 et seq. of Regulation (EU) No. 2022/1854, aimed at implementing *"an emergency intervention to address high energy prices"*[2].

Undoubtedly, the Legislator, mindful also of the Constitutional Court's Sentence No. 10/2015, attempted to shelter both the contribution pursuant to Article 37 Decree-Law No. 21/2022 and the contribution introduced by the Budget Law 2023 from the Court's censure, emphasising its extraordinary nature and its delimitation in time.

The so-called *Robin Hood Tax*, introduced by Article 81, paragraphs 16 et seq. of Decree-Law No. 112 of 2008, converted with amendments by Law No. 133 of 6 August 2008, in a similar context of rising prices and tariffs in the energy sector, had in fact been censured in 2015 by the Constitutional Court also because of the permanent and non-transitory nature that it had taken on in the meantime[3].

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1 October 2021 and 30 April 2022 with respect to the balance of the same transactions in the period between 1 October 2020 and 30 April 2021.

[2] On 7 October 2022, Regulation No. 2022/1854 was published in the Official Journal of the European Union, containing a package of measures aimed at coping with rising energy prices. This Regulation, in particular, provided for a temporary solidarity contribution, of an exceptional nature, on profits exceeding a certain threshold generated by activities in the oil, gas, coal and refining sectors. Specifically, this contribution applies to companies and permanent establishments resident in the EU - including those that are part of a group consolidated for tax purposes only - that generate at least 75% of their turnover in the sector of oil extraction, oil refining or the manufacture of coke oven products covered by Regulation (EC) No. 1893/2006.

The basis for calculating the contribution -which is temporary in nature- is equal to the portion of the taxable profit of the financial years 2022 and 2023 that exceeds the average taxable profit of the previous four financial years (2018, 2019, 2020 and 2021) by more than 20%. The rate of the contribution, which applies in addition to the taxes and levies ordinarily payable in each Member State, is 33%.

Regulation 2022/1854 allows Member States to maintain - instead of the European solidarity contribution - equivalent domestic measures that pursue the same aims. This is only possible if the domestic measures share similar objectives, are subject to similar rules and generate comparable or higher proceeds than the estimated proceeds of the contribution (recital 63 and Art. 14 of the Regulation).

[3] By order issued on 26 March 2011, the Provincial Tax Commission of Reggio Emilia raised a question of the constitutionality of the provisions establishing the surtax introduced in 2008. In its ruling No. 10 of 2015, the Constitutional Court declared the illegitimacy of the provisions

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By instituting the *Robin Hood Tax*[4], the legislature had not only introduced a levy on the entire business income (and thus not able to hit only the extra-profits), but, by not providing for a predetermined time frame, commensurate with the permanence of the economic situation, it had also disregarded the very *rationale of* the tax, which was to counter *"the social impact of the increase in prices and tariffs in the energy sector",* without any guarantee that the market conditions that were a source of extra-profits would be repeated in subsequent tax periods.

Pointing out that *" the exceptional nature of the economic situation facing the State is [...] undoubtedly susceptible of allowing the legislature also to have recourse to exceptional instruments"*[5] and that *"the temporary nature of the taxation does not constitute a sufficient argument to provide justification for a tax, which could in any case be disjointed from constitutional principles"*[6], *"...it is the task of the State to guarantee, even under these conditions, respect for the fundamental principles of the constitutional order, which, admittedly, is not indifferent to economic and financial realities, but with equal certainty cannot allow exceptions to the principle of equality, on which the constitutional order is founded "*[7].

Moving from these premises, once the - tax - nature of the contributions under examination has been investigated, it is necessary to verify their legitimacy, *first of all* in terms of their compatibility with the principles of constitutional rank and, in particular, with Article 53 of the Constitution, examining the critical points that appear to emerge.

2. *The nature of the extraordinary contribution pursuant to Article 37 of Decree-Law No. 21/2022 and the solidarity contribution introduced by Law No. 197/2022*

The first reflections on the nature of the two contributions at hand originate from a further and primary consideration, namely that related to the substantive

establishing the IRES surcharge, asserting that the economic situation characterised by an exceptional rise in the prices of energy products, unsustainable for users and capable of significantly increasing the profit margins of operators in the sectors concerned, may constitute *"an element capable of justifying a differentiated levy that affects any cyclical 'over-profits'"*. However, *"so that the sacrifice made to the principles of equality and ability to pay is not disproportionate and the differentiation of the tax does not degenerate into arbitrary discrimination, its structure must be consistent with the relevant justifying* ratio*"*. This is not the case when, as in the case of the IRES rate increase provided for by Decree-Law No. 112 of 2008, the tax *"is applied to the entire business income, instead of only to 'over-profits'"* and there is no *"delimitation of its scope in temporal perspective or mechanisms to verify the continuation of the economic situation that justifies its application*".

[4] Specifically, it was a 5.5 per cent IRES surcharge to be applied to entities operating in the sectors of hydrocarbon exploration and cultivation, oil refining, and the production and marketing of petroleum products and electricity, which had revenues in excess of EUR 25 million in the previous tax period.

[5] See Constitutional Court, Sentence no. 223/2012 on the reduction of special judicial allowances and economic treatment of magistrates and civil servants.

[6] Constitutional Court, Judgment No. 288 of 23 December 2019 and Judgment No. 262 of 19 November 2020.

[7] See Constitutional Court, sentence no. 223/2012.

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definition of the tax obligation itself and, more specifically, to the definition of new tax assumptions or to the different method of determining taxable amounts linked to tax assumptions already known in our tax system.

The suggestion for this topic stems from some observations both on the evolutionary trajectories that tax systems - not only the Italian one - have been following in recent decades and on some recent regulatory interventions aimed at identifying new taxable bases for 'extraordinary' taxes linked to emergency situations.

From a general point of view, it is easy to observe that tax systems, still mainly based on traditional taxes, such as those on income and wealth, are 'collapsing' and wandering in search of a new equilibrium point in a profoundly changed economic context, in which it has become increasingly difficult to intercept certain taxable bases, such as wealth linked to intangibles or crypto-assets, and in which new wealth indices are emerging, sometimes 'unintentionally' traceable precisely to data made available by Internet users. The situation has become particularly fluid for corporate profits: over the last few decades, the expansion of digital has induced a profound change in the business methods of internationally operating corporate entities and has led to the emergence of new super-taxpayers able to operate, often in oligopolistic positions, in a virtual space above the territories[8] . In order to effectively tax these new super-taxpayers and distribute the revenue among the different jurisdictions in which their income is produced, there is now talk of the need to identify 'value production chains': a new concept, instrumental not so much in defining value as a measure of the result of productive activity, but rather in ensuring the correct distribution of taxable bases - and thus of revenue - among the different jurisdictions in which these super-taxpayers operate.

More in general, as already mentioned above, the economic crisis brought about first by the pandemic, and then by the war of aggression against Ukraine, has pushed tax systems even more to evolve along two lines that had been 'karstically' emerging for some time: on the one hand, the introduction of new taxes - such as the recent forms of emergency taxation on undefined corporate 'extra-profits' (on which we will dwell in this work) or environmental taxes, characterised by taxable bases decidedly further removed from the classic notion of contributory capacity, to the point of legitimising a theoretical reconstruction that excludes them from the category of taxes in order to emphasise their different indemnity nature -; on the other hand, in the sphere of traditional income taxes and particularly for business income - typically less 'stable' and more reactive to the evolution of the economic context and to tax competition between jurisdictions - the reflection on the possible transition to new forms of

[8] On the topic, see L. CARPENTIERI, *La crisi del binomio diritto-territorio e la tassazione delle imprese multinazionali*, in *Riv. dir. trib.,* 2018, 4, I, p. 351 ss.; ID, *La tassazione delle imprese al tempo dell'economia digitale*, in L. Carpentieri (ed.) *Profili fiscali dell'economia digitale*, Collana del Dipartimento di Studi Economici e Giuridici dell'Università degli Studi di Napoli Parthenope, sezione giuridica, vol. XIII, Torino, 2020, p. 1 ff.; ID, *Nuovi presupposti d'imposta e nuovi criteri di determinazione delle basi imponibili: riflessioni* de iure condito *e* de iure condendo*,* in *Riv. Tel. Dir. Trib.,* 11.01.2024, p. 2.

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determining taxable income capable of taking a more effective snapshot, also in terms of time, of the results of economic activities.

Now, the issue of identifying new tax bases that are better suited to hitting the manifestations of wealth linked to the changed economic and business environment and/or aimed at hitting taxable bases that no longer correspond to traditional forms of wealth reopens a much-debated topic: whether and to what extent these new taxes respond or should respond to the principle of contributive capacity[9].

The answer to the question clearly depends on the meaning and weight attributed to the principle of contributory capacity outlined in Article 53 of the Constitution. 53 of the Constitution: if this principle is interpreted as a mere criterion of fair distribution of public burdens, it is possible to consider constitutionally legitimate even forms of taxation that the doctrine[10] defines as lacking a self-sufficiency in assets of the taxable event (such as, for example, environmental taxes); if, on the other hand, the principle of contributive capacity is considered to impose the necessary self-sufficiency of taxable events, then we return to the more traditional sphere of income and wealth taxes.

Perhaps on this issue the current context requires us to try to take a step forward, breaking away from the traditional approach of constitutional limits to taxation. As has already been pointed out for years[11] , if we continue to read taxation as a limitation of property rights accepted and acceptable only in function of the financing of public services that the taxpayer avails himself of, that is, if we read the ability to pay as the ability to fulfil the tax obligation by planning the constitution of liquid assets, we cannot disengage ourselves from the traditional taxes on income or wealth; if, on the other hand, we frame the theme of constitutional limits to taxation in the current economic and social context and reconnect the principle of ability to pay to the principle of substantial equality, it becomes possible to open up new perspectives: that is, we can read the principle of contributive capacity as a criterion for the reasonable distribution of contributions to public expenditure and, from this perspective, also legitimise taxes linked to economically assessable positions of advantage and to assumptions that are not necessarily self-sufficient in terms of assets[12].

[9] In the direction of the impact of data on new forms of taxation, there remains a completely open prospect that cannot be examined in depth here: that of environmental taxes, anchored to data - those of future pollution - that are not necessarily economic and expressive of contributory capacity; a circumstance that makes one doubt their classification as indemnities rather than as taxes. Admittedly, not classifying them as taxes would greatly simplify their introduction at Community level, because it would avoid recourse to unanimity; but it is doubtful that they really represent compensation, since there is no criterion for the quantitative predetermination of the harm caused to the community and/or individuals.

[10] See, A. FEDELE, *Intervento sulla rilevanza dei dati nella determinazione degli imponibili nell'era digitale,* in *Riv. Tel. Dir. Trib.*, 19 settembre 2023, p. 1 ff.

[11] See, F. GALLO, *Il dovere tributario nella Costituzione*, in *Riv. trim. dir. trib.*, 2022, 4, p. 759 ff.

[12] On the subject, recently, see for all A. FEDELE, *Nuove ricchezze ed elementi essenziali della capacità contributiva nella dimensione postmoderna*, in *Riv. dir. trib.*, 2023, I, p.1 ff., par. p. 7 ff.

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On closer inspection, forms of levies of this kind have long been present in our legal system, in which it cannot be ruled out that the taxpayer called upon to fulfil his tax obligation does not have the necessary means to do so: Suffice it to think, in income taxation, of the taxation of income in kind or of the cases of income recognition of allocations to purposes extraneous to the enterprise[13] or, more generally, of all the hypotheses of taxation 'on accrued income' (both in business income and, in part, in income of a financial nature). These taxation cases, albeit limited to certain fractions of the taxable base of income taxes, have never raised particular theoretical objections in terms of compliance with the principle of contributive capacity and have been considered reasonable, both if assessed in light of the criterion of 'functional congruity to the *ratio*'[14] and if assessed in light of the principle that, with the interpretative lens of the Court of Justice and EU law, we would call proportionality.

In this perspective, the assessment of the ability to pay therefore changes contours; in order to verify compliance with the principle of contributive capacity, it is no longer necessary to ascertain that the ability to pay is always present, but it is sufficient that such presence takes on the contours of a reasonable possibility. On the other hand, the whole subject of payments on account - that is, of taxes the payment of which is due, albeit partially, before the fulfilment of their prerequisite - debases the subject of the ability to pay, reducing it to a mere possibility of scheduling the aforesaid payment; and the same thing, on closer inspection, may occur in the case of VAT, a tax in which the turnover, as is well known, does not necessarily coincide with the amount collected.

Traces of this evolution in assessing the constitutional legitimacy of forms of tax levies in which the definition of the taxable event does not guarantee its patrimonial self-sufficiency emerge, on closer inspection, even in the rulings of the Constitutional Court, if we read them in their diachronic development. Despite the fact that the Court has always identified 'absolute unreasonableness' as the only limit to the legislator's discretion in identifying new tax bases,[15] in less recent times, a more defensive attitude was evident in the judges of the Supreme Court on the subject of the ability to pay[16] and which we could define as 'of suspicion' towards taxes that tried to disengage themselves from the classic indexes of taxpaying capacity and, first and foremost, from income. The attitude was one of "*hic sunt leones*"; income and assets (even though a true 'general' wealth tax has never been introduced in our system) were the pillars of Hercules beyond which one entered a 'minefield' in terms of the possible violation of the principle of contributive capacity. In this sense, it can be said that the limit of the ability

[13] On these profiles, see, L. CARPENTIERI, *Redditi in natura e valore normale nelle imposte sui redditi,* Milan, 1997.

[14] Cf. again A. FEDELE, *Intervento sulla rilevanza dei dati nella determinazione degli imponibili nell'era digitale,* op. cit.

[15] With the arbitrariness emphasised again by A. FEDELE, cit., since the tax interest ended up paralysing the reasonableness check of the taxing rule.

[16] In Judgment No. 45/1964, the Constitutional Court held, for example, that "*by 'ability to pay' must be understood the taxpayer's economic suitability to pay the imposed compulsory benefit*".

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to pay has long been present in the constitutional jurisprudence on the positive declination of Article 53 of the Constitution; until the beginning of the 1980's, in the jurisprudence of the Constitutional Court, it was frequent to affirm that the ability to pay had to be translated into the presence of assets that concretely revealed wealth and such as to allow the tax to be paid without having to resort to debt. More recently, however, the Constitutional Court itself seems to have developed a different interpretation of the principle of contributive capacity, giving greater weight to arguments linked to the control of functional congruity and proportionality, combining the principle of contributive capacity with the principle of equality to assess the conformity to the Constitution of taxes even those that are decidedly dissimilar from the traditional ones. In this new perspective, cases that are in any case capable of expressing economic strength or potential can also be considered expressive of contributory capacity[17] , even if they do not concretely guarantee the means to pay the tax[18].

This fluctuation between traditional taxes and new tax assumptions, based on wealth indices different from the typical ones, is also evident in the most recent legislation, which is why the issue of the constitutional compatibility of new forms of taxation appears destined to attract the attention of scholars; For these reasons, briefly outlined herein, the constitutional legitimacy of the two extraordinary solidarity contributions, which are being discussed herein, introduced into our legal system, respectively for the years 2022 and 2023, to be borne by companies operating in the energy and oil sector in relation to the alleged extra profits that such companies would have made as a result of the increase in raw materials caused by Russia's war of aggression against Ukraine, is still being challenged. It should be recalled, as already noted, that the first of these contributions - the so-called extraordinary contribution against high utility bills - was anchored, with many objections, to the data of the periodic VAT settlements (so-called LIPE); the second contribution - known as the

[17] To tell the truth, even in some of its most recent rulings, the Constitutional Court had shown that it was able to identify a contributory capacity even in the absence of income; one remembers sentence no. 16/1965, in which it recognised the constitutional legitimacy of the cadastral system for determining land income, precisely by attributing relevance to the potentiality of the asset to produce income, even in the absence of its actual receipt.

[18] The issue, as is well known, still divides the scholars who have tackled it. For a more guarantor-oriented approach to the constitutional principle of the ability to pay and, therefore, opposed to reducing this principle to a mere criterion of reasonableness of legislative choices, given that this would mean "*even uprooting the specific rule from the constitutional fabric (and) ignoring an entire general philosophy of social relations (of which it was and is an expression), which forms the ribbing of the entire first part of the Charter*" [thus F. MOSCHETTI, *Il principio di capacità contributiva, espressione di un sistema di valori che informa il rapporto tra singolo e comunità*, in L. Perrone- C. Berliri, (a cura di), *Diritto tributario e Corte costituzionale,* Napoli, 2006, 50] see also F. MOSCHETTI, "*Interesse fiscale" e "ragioni del fisco" nel prisma della capacità contributiva,* in *Atti della giornata di studi in onore di Gaspare Falsitta*, Padua 2012, p. 157 ss. and G. FALSITTA, *Il principio della capacità contributiva*, Milan, 2014. For the different thesis see, for all, A. FEDELE, *Ancora sulla nozione di capacità contributiva nella Costituzione italiana e sui "limiti" costituzionali all'imposizione*, in *Riv. dir. trib.*, 2013, 11, I, p. 1035 ss. and F. GALLO, *Le ragioni del Fisco. Etica e giustizia nella tassazione*, Bologna, 2nd ed., 2011, p. 79 ss.; ID, *L'evoluzione del sistema tributario e il principio di capacità contributiva,* in *Rass. trib.*, 2013, 3, p. 499 ss.

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extraordinary solidarity contribution - wishing to comply with the indications of the European legislator, has instead returned to being anchored to income, almost as if to testify to the fact that income is, and still remains, the surest index of contributory capacity to which to link a tax in order to guarantee its resilience in terms of compliance with constitutional and perhaps even Union principles.

It therefore seems appropriate, with reference to the contribution under Article 37 of Decree-Law No. 21/2022 on the extra profits of energy companies, which, moreover, seems to recall the extraordinary tax on war profits[19], sharing the same purpose (to hit the extra profits generated by favourable economic events[20]), to investigate, first of all, its nature.

Despite the *nomen* "contribution", *" regardless of the qualification that is (...) attributed to it in national law*"[21], there is no shortage of discussion in the doctrine as to whether the contribution is a tax or not.

According to a first orientation[22] the aforementioned contribution has the characteristics of a tax and, in particular, of a purpose tax, given the indicated specific allocation of the revenue to measures to combat the crisis[23]. It is not a synallagmatic consideration of a counter-performance, but a coercive patrimonial performance, sanctioned by law - the genesis of which is independent of the will of the obligated parties - conceived and oriented to contribute to public expenses[24].

[19] The Extraordinary Tax on War Profits instituted both during World War I by d.lt. 9 June 1918, no. 857, with *"Approvazione dei testi unici dei tributi diretti straordinari imposti durante la guerra"*, and during the Second World War, with Law no. 813 of 1 July 1940, entitled *"Istituzione di una imposta straordinaria sui maggiori utili relativi al stato di guerra"*, was applied at a progressive rate on the part exceeding the profits made by commercial or industrial activities in order *"not to let a dramatic event such as a war turn into a business for someone"*. In these terms, D. CANNATA, *Imposizione straordinaria sui sovrapprofitti di guerra e definizione della nozione di 'sovraprofitto'*, in *Analisi giuridica ed economica della c.d.* Robin Hood Tax, Viterbo, 2014, p. 222. On this point, see L. EINAUDI, *La guerra e il sistema tributario italiano*, Bari, 1927.

[20] The extraordinary tax on war profits, in fact, was characterised by the aim of hitting the extra-margins of profit due to the wartime situation, in the conviction that these proceeds derived from morally execrable speculation. This taxation, therefore, manifested its dual nature, being characterised both by a fiscal matrix and a moral matrix, as it was inconceivable that certain categories of subjects profited and earned extra profits as a consequence of the war itself.

[21] Court of Justice, 18 January 2017, Case C-189/15, IRCCS, paragraph 29. The *nomen of* a levy is not, in fact, a decisive factor in affirming or excluding its tax nature. On this point, see L. DEL FEDERICO, *Tasse, tributi paracommutativi e prezzi pubblici*, Turin, 2000.

[22] The following support the tax nature of the contribution under examination: M. EMMA, R. RINALDI, *Il contributo straordinario sugli extra-profitti energetici: lineamenti e problematiche*, in *Il fisco*, no. 24/2022, p. 2334; F.S. MARINI, G. MARINI, *Profili di dubbia costituzionalità del contributo sugli extra-profitti energetici*, in *Il fisco*, no. 39/2022, p. 3746; L. SALVINI, Sugli *Extraprofitti prelievo a rischio costituzionalità*, in *Il Sole 24 Ore*, 23 March 2022, p.14; S. DE MARCO, *Riflessioni in tema di tassazione degli utili extraprofitti delle imprese energetiche*, in *Dir. Prat. Trib.*, no. 6/2022, p. 2093.

[23] L. SALVINI, *The extraordinary contribution against high bills to be paid by energy companies,* in *Energy Taxation*, www.fiscalitadellenergia.it , 29.03.2022.

[24] In these terms, R. IAIA, *Prime riflessioni sistematiche in ordine al contributo straordinario sul c.d. "caro bollette" (art. 37 D.L. n. 21/2022)*, in *Riv. Tel. Dir. Trib.*, 24 June 2022, p. 1 ff.

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A number of factors would point in this direction, including: the reference, in the first paragraph, to "a contribution by way of an extraordinary solidarity levy"; the explicit reference, in the second paragraph, to "the taxable base" of the contribution itself, the determination of which is made by means of an index of contributory capacity, such as the balance between active and passive transactions relevant for VAT purposes the reference to the provisions on VAT, in so far as they are compatible, to regulate the assessment, penalties, collection and litigation; in the parliamentary files, the explicit reference to the contribution under consideration as a "tax" and to the persons required to pay it as the "taxable persons" of the tax itself.

On this point, it is also possible to point out some recent pronouncements of the administrative jurisprudence on the merits, which confirmed the tax nature of the levy in question, since all the indicators currently indicated by doctrine and jurisprudence existed: the legislative matrix; the dutifulness of the service towards the entity; the obligatory nature of the service; the direct link with public spending; the circumstance that the contribution affects an index of contributory capacity; the purpose of containing price and tariff increases[25].

Recently, it has indeed been emphasised[26] that it is quite evident that the contribution against high utility bills, as it was designed by the emergency legislator, is a vicious circle: it is not an income tax but at the same time it is non-deductible from IRES and this non-deductibility is also combined with a 'undue' (but penalty-free) charge to other parties. Nor does it lend itself to being assimilated to a consumption tax or to a VAT surcharge, given that, to put it bluntly, in VAT the contributory capacity that is intended to be affected is that of the final consumer and that, precisely from this perspective, in the Community perspective, the charge back to the taxpayer is configured as a duty;

[25] The Lazio-Rome Regional Administrative Court, in its judgment no. 15278/2022, in reference to the extraordinary contribution pursuant to Article 37 of Law Decree no. 21/2022, considers that all the elements typifying the tax exist: "*In the case under examination - as correctly deduced by the parties - the recurrence of the requirements just mentioned is, in the opinion of the Board of Lawyers, evident, inasmuch as:*

-the levy is ordered by a rule having the force of law;

-there is no doubt as to the finality of the patrimonial benefit, which is not subject to any form of repayment or repeatability, not even partial, in favour of the taxpayers: pursuant to paragraph 5 of Article 37, the contribution is liquidated and paid in an amount equal to 40 per cent, by way of advance payment, by 30 June 2022 and for the remaining part, by way of balance payment, by 30 November 2022, in accordance with the procedures set forth in Article 17 of Legislative Decree No. 241 of 9 July 1997and the possibility of reimbursement contemplated by the rule concerns, as usual, only any excesses self-assessed and paid by taxpayers;

-there is no counter-performance in a synallagmatic relationship with the contribution payments;

-The latter -at least in the intentions of the regulatory framework, and without this constituting a judgement on the various censures put forward by the appellant companies on this point- is intended to strike at an index of taxpaying capacity, identified by Article 37(2) in the increase in the balance between receivable and payable transactions referred to a precise and determined period of time;

-the purpose of the levy is fully expressed in the opening words of the first paragraph of Article 37, and is the containment, for businesses and consumers, of price and tariff increases in the energy sector".

[26] Cf. L. CARPENTIERI, *Nuovi presupposti d'imposta e nuovi criteri di determinazione delle basi imponibili: riflessioni* de iure condito *e* de iure condendo*,* in *Riv. Tel. Dir. Trib.,* op. cit., p. 9.

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whereas the contribution against high utility bills should remain at the expense of the energy companies, which should be the actual taxpayers (even if in its regulatory structure there is no way of sanctioning its transfer to the final consumer).

Precisely in terms of the subjective perimeter, several critical issues could be raised, such as to render the levy in conflict with both the principle of equality under Article 3 of the Constitution and the principle of freedom of private economic initiative enshrined in Article 41 of the Constitution.Suffice it to say that those affected by the levy often resorted to hedging derivatives, as recalled, to protect themselves against fluctuations in energy prices and that, in these cases, any extra profits may potentially have been passed on to the counterparties to the relevant financial contracts. The consequence is that, in these cases, the extra profits were taxed in the hands of the wrong party, while excluding from taxation the financial entities that benefited from them[27].

In the face of the noted systemic criticalities, such as to undermine the constitutional legitimacy of the levy[28], it is no coincidence that the Budget Law for 2023 has once again intervened on the subject of the taxation of extra-profits in two respects: on the one hand, by making changes to the regulation of the contribution against high bills in order to eliminate some inconsistencies (although not the most relevant[29]); on the other, by instituting for 2023 a new levy, called the "*temporary solidarity contribution*", with the same subjective scope of application as the previous levy, but with an entirely different tax base and again 'based' on income. Abandoning the data of periodic VAT settlements, rightly considered to be scarcely expressive of the real contributory capacity of companies or of their extra-profits, the solidarity contribution for 2023 took as its taxable base the portion of income determined for IRES purposes for 2022 that exceeded by at least 10% the average total IRES income earned in the

[27] Still from a subjective standpoint, another critical situation is related to the inclusion, within the scope of the contribution, of the economic operators already affected by the measures set forth in Article *15-bis of* Decree-Law No. 4/2022 (the so-called Support Decree), which introduced, as from 1 February 2022 until 31 December of the same year, a two-way compensation mechanism for the price of energy produced by photovoltaic plants with a capacity of more than 20 KW that benefit from fixed premiums, not linked to the market, through the Energy Account, and by plants with greater capacity powered by solar, hydroelectric, geothermal and wind sources that do not access incentive mechanisms, which came into operation before 1 January 2010. Under this compensation mechanism, producers had to retrocede to the energy services manager (GSE) the difference between the revenues they obtained at the prices applied from February to December 2022 and the revenues they would otherwise have obtained by applying a reference price equal to the average energy price recorded between 2010 and 2020 in the different market zones; therefore, this compensation mechanism overlapped with the contribution and duplicated the solidarity sacrifice required of the entities in question on the same extra-profits, especially when it is considered that the retrocessions to the GSE could be considered financial movements not relevant for VAT purposes due to the absence of a synallagma and, as such, irrelevant to the taxable base of the contribution.

[28] Cfr. R. IAIA, *Prime riflessioni sistematiche in ordine al contributo straordinario sul c.d.d. 'caro bollette'*, in *Riv. tel. dir. trib.*, op. cit., p. 9 ss.; F. S. MARINI, G. MARINI, *Profili di dubbia costituzionalità del contributo sugli extraprofitti energetici*, in *Il Fisco*, op. cit., p. 3745 ss.

[29] See, ASSONIME Circular No. 8/2023.

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previous four financial years (the four-year period 2018-2021). The rules governing this second extraordinary contribution also present, in reality, important systemic criticalities: suffice it to think that the taxable base of the contribution, even though it is commensurate with the total IRES income and no longer with the balances of the periodic VAT returns, is measured with reference to the data of 2022, i.e. to the data of the same period to which the taxable base of the contribution against the high cost of tax bills, which was applied on the difference of the data emerging from the periodic VAT returns, referred. In essence, two different levies substantially fulfilling the same function have thus been imposed on the data of the same tax period; the accumulation of two extraordinary contributions on the same year is realised. Here, too, there is a regulatory constraint linked to the data available at the time of the introduction of the levy in order to make reasonable revenue assessments: the decision to link the 2023 levy to the 2022 IRES taxable base clearly meets the need to achieve sufficiently reliable estimated revenue by June 2023; however, it seems clear that in this way the levies - the 2022 levy against the high cost of utility bills and the 2023 temporary solidarity levy - overlap, essentially duplicating the levy over the same time period[30].

Moreover, once again the taxable base of the extraordinary contribution for 2023 does not distinguish the nature of the profits, i.e. it does not only affect the extra business profits actually attributable to the increase in the price of energy products, but also the profits from, for example, investments made in the meantime by operators. Not to mention the further critical profile connected with the failure to provide, for the 2022 IRES income, an exemption intended to safeguard the normal profitability of the business even in cases where the company has made very small losses or profits in the four tax periods prior to 2022[31].

Against the backdrop of the aforementioned reflections, it is now necessary to verify the legitimacy of the levy (or, rather, of the levies) under review (investigating the reasonableness or otherwise of the Legislator's choice), with reference both to the taxable persons and to the tax base.

3. *The extraordinary contribution ex art. 37 of Decree-Law no. 21 of 2022 : critical issues*

Ever since its introduction, the extraordinary contribution on the so-called 'high utility bills' (Article 37 of Decree-Law No. 21 of 2022) has raised several

[30] Duplication aggravated by the sustained 2022 accrual of this contribution, in Assirevi's opinion; but to the contrary, see Assonime Circular No. 8/2023.

[31] Let us also dwell on the provisions of Article 1, paragraph 119 of the Budget Law 2023, which provides that *"for the purposes of the assessment, penalties and collection of the solidarity contribution, as well as litigation, the provisions on income tax shall apply"*. On this point, R. IAIA, *La disciplina del contributo di solidarietà temporaneo nel settore energetico (art. 1, comma 115 ss., L. n. 197/2022) nella prospettiva sistematica e comparatistica*, in *Riv. Tel. Dir. Trib.*, 13.06.2023, p. 2.

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uncertainties, in relation to the taxable persons identified, the taxable base and the time period taken into consideration by the Legislator for the purposes of determining the taxable base itself, as mentioned above.

With regard to the persons liable for the levy, they are not all operators who have produced extra-profits, but only those operating in the energy sector. The solidarity levy, in fact, applies to persons who, in the territory of the State, engage in the activity of producing electricity, natural gas or extracting natural gas for the subsequent sale of goods; resellers of methane gas, natural gas or electricity; persons who produce, distribute or trade in petroleum products; and those who, for subsequent resale, import electricity, natural gas or methane gas, petroleum products or who bring these goods into the territory of the State from other EU States[32].

Although, with regard to the identification of taxable persons, other European States have opted for different choices[33], in Italy the application of the contribution in question implements a sectorial selective measure against companies operating in the energy sector with respect to other entities which, despite having realised cyclical overprofits, are not subject to the extraordinary contribution. In addition, the rule does not seem to distinguish between producers of raw materials, who make a higher profit margin, and distributors, who suffer the increase in the purchase cost of the products sold, without in fact having any reflection on their profit margins, thus leading to a twofold discrimination one, internal, between entities operating within the same sector that realise different profit margins, the other, external, between entities operating in different sectors and, although generating different sources of income, still realise extra profits by enjoying a competitive advantage.

The sectorial nature of the contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 leads one to question the reasonableness or arbitrariness of this choice, also in relation to the principle of contributory capacity.

In this regard, the Constitutional Court, in Judgment No. 10/2015, before arriving at declaring the illegitimacy of the *Robin Hood Tax*, dwells in detail on the function of Article 53 of the Constitution, as a sectorial specification of the broader principle of equality set forth in Article 3 of the Basic Law.

According to the Court's thinking, its application allows for diversified taxation in the abstract, as long as this is not arbitrary.

[32] Article 37(1) of Decree-Law No. 21/2022 expressly excludes persons who carry out the activity of organising and managing platforms for the exchange of electricity, gas, environmental certificates and fuels. On the other hand, subjects participating in a VAT Group are also included in this category. Therefore, the VAT Group is not identifiable as a party directly affected by the extraordinary contribution, but each participant for whom the conditions have been met.

[33] As an example, in Hungary, the extraordinary contribution does not only apply to energy companies, but also to financial institutions, pharmaceutical companies, large retail chains, telecommunication companies and airlines that have generated extra profits. For an examination of the measures introduced in Spain, Hungary, Romania and Belgium, see C. FONTANA, *La tassazione dei sovraprofitti delle imprese energetiche tra indirizzi europei, prospettive di riforma e persistenti dubbi di legittimità costituzionale*, in *Riv. Dir. Trib. Inter.,* no. 3/2022, p. 169.

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The Constitutional Court, in particular, recognising in the tax case examined a hypothesis of qualitative discrimination of income *"due to the fact that it applies only to certain economic entities operating in the energy and hydrocarbons sector",* reiterates an important principle of law already set forth in other rulings[34]: *"the Constitution does not in any way impose uniform taxation, with absolutely identical and proportional criteria for all types of taxation",* requiring rather *"an indefectible connection with the ability to pay, within a framework of a system informed by criteria of progressivity, as a further development, in the specific tax field, of the principle of equality, linked to the highest task of removing the economic-social obstacles that exist in fact to the freedom and equality of citizens-human beings, in a spirit of economic, political and social solidarity".* For this reason, a diversification of the tax system on the basis of the economic areas of interest and the type of taxpayers would be legitimate, if supported by adequate justification, so much so that *"it cannot be ruled out that the peculiarities of the oil sector lend themselves, in theory, to legitimising a special tax regime".*

In other words, *"any diversification of the tax regime, by economic area or by type of taxpayer, must be supported by adequate justification , in the absence of which the differentiation degenerates into arbitrary discrimination"*[35].

The Court, therefore, expressly states that not every modulation of the tax system by production sectors constitutes a violation of the principle of the ability to pay and the principle of equality, provided that such differentiations are not unjustified, arbitrary, unreasonable or disproportionate.

In this regard, considering that the oil and energy sectors (also in the Court's opinion) are "oligopolistic", as they are characterised by *"little competition between undertakings"*, with high barriers to entry and being a market accompanied by *"inelastic demand" it is not entirely implausible to consider that this market sector may be characterised by a profitability, due to rents of position, which is significantly higher than in other sectors, so as to be able in abstract terms to justify, especially in the presence of exceptional financial needs of the State,* ad hoc *tax treatment".*

Having established, therefore, the possibility, clearly deemed legitimate by the Constitutional Court in its aforementioned Judgment No. 10/2015, of providing for a diversification of the tax regime by economic areas or by type of taxpayer - especially with reference to the oil and energy sectors - provided that it is

[34] See Constitutional Court, sentence no. 341 of 2000; Constitutional Court, sentence no. 223 of 2012.

[35] On sentence no. 10/2015 of the Constitutional Court, see G. BIZIOLI, *L'incostituzionalità della Robin Hood tax fra discriminazione qualitativa dei redditi ed equilibrio di bilancio,* in *Rass. trib*, no. 5/2015, p. 1079 ff.; L. CARPENTIERI, *La Corte costituzionale e i tributi al tempo della crisi; l'autogoverno degli effetti delle declaratorie di incostituzionalità e la prospettazione di una incostituzionalità solo pro futuro*, in *Riv. dir. trib.*, no. 3/2017, I, p. 223 ff.; G. MARONGIU, *Robin Hood tax: taxation without 'constitutional principles'?* in *Rass. trib.*, no. 5/2008, p. 1335 ff.; L. CARPENTIERI, *Un sistema fiscale in bilico tra tassazioni punitive per settori economici e categorie di contribuenti e nuovi tentativi di discriminazione qualitativa: la navigazione a vista della Corte costituzionale*, in AA.VV., *Saggi in ricordo di Augusto Fantozzi*, Collana *L'ordinamento tributario italiano*, Pisa, 2020, p. 292 ff.

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supported by adequate justification, it is the taxable base[36] of the extraordinary contribution that is most perplexing.

In this regard, it is necessary to question whether or not, thus devised, it is suitable for the timely interception of extra profits, linked to an extraordinary economic situation.

The taxable base of the extraordinary solidarity contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 -represented by the increase in the balance between the active and passive transactions recorded in the periodic VAT settlements (LIPE), taking as a reference the period between 1 October 2021 and 30 April 2022 and comparing it with the balance of the period between 1 October 2020 and 30 April 2021- appears rather questionable[37], as it is not suitable for intercepting the cyclical extra-profits.

Not only, in fact, the taxable base determined by the VAT balance frequently also includes the remuneration of other factors of production, such as, for example, those attributable to extraordinary transactions, such as the purchase or sale of shareholdings (as is well known, exempt transactions must also be indicated in the periodic VAT settlement, unless the taxpayer has requested exemption from fulfilment pursuant to Article 36 *bis Presidential* Decree No. 633/1972), in addition, companies subject to the payment of the contribution pursuant to Article 37 may also perform other activities or services, the data of which, since they do not have separate accounts for VAT purposes, flow into the LIPE, thus contributing to determining the taxable base of the contribution[38].

However, the reasons why the "balance" between the transactions for the two reference periods may have fluctuated significantly may be manifold and not

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[36] The taxable base of the contribution under examination, in particular, is reminiscent of that of IRAP, differing from it insofar as it does not attribute importance to the added value per se, but to a qualified increase thereof. In these terms, G. ZIZZO, *La costituzionalità dubbia dell'imposta sugli extraprofitti,* in *Il Sole 24 ore,* 30 June 2022.

[37] Cf. B. SANTACROCE, *Caro energia, l'imponibile IVA non certifica gli extraprofitti*, in *Il Sole 24 Ore*, 4 May 2022; M. EMMA, R. RINALDI, *Il contributo straordinario sugli extra-profitti energetici: lineamenti e problematiche*, op. cit. p. 2334. The authors maintain that "*it is quite evident that the design of the Contribution, and in particular the coarse flat rate of the taxable base based on VAT data, for a number of reasons, does not concretely restore the measure of the cyclical extra-profits that the rule intends to tax";* C. FONTANA, *La tassazione dei sovraprofitti delle imprese energetiche tra indirizzi europei, prospettive di riforma e persistenti dubbi di legittimità costituzionale*, op. cit. p. 173, where the Author considers that *"The very criteria for determining the taxable base represent one of the main critical profiles of the discipline under examination"*.

[38] In this regard, see Revenue Agency Circular No. 22/E of 23 June 2022, which expressly provides that *"Given the literal wording of the provision set forth in paragraph 3 of Article 37, in the event a person carries out multiple activities, only one (or more) of which falls within those indicated in reply no. 1.1, the data to be referred to in order to verify whether the extraordinary contribution is due and for the quantification of the taxable base is the total amount of the active and passive transactions, net of VAT, deducible from the LIPE for the periods 1 October 2020 - 30 April 2021 and 1 October 2021 - 30 April 2022. The data reported in the LIPE, therefore, according to the provisions of the rule, cannot be amended by extrapolating the values referring to the activities not affected by the contribution, but must be taken in their entirety, it being understood that they must be VAT-relevant transactions"*.

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all indicative of a speculative advantage realised by making the most of altered market situations: the increase in the balance, for example, may depend on the increase in volumes, independently of the increase in prices.

On the other hand, transactions outside the scope of VAT, for example, although they affect the positive or negative surplus differential, are not included in the recognition of LIPE.

The main problem lies in the fact that, according to the indications of the Internal Revenue Service, for the purposes of determining the tax base, the data reported in the LIPE must be assumed in full, without any corrections and without any exclusions of data that might not be relevant for determining the contribution[39].

In spite of these critical issues, which, moreover, have been promptly pointed out by the doctrine and the operators in the sector, Article 55 of Decree-Law No. 50 of 2022 - in making certain amendments to Article 37 - has neglected to rectify this crucial aspect, leaving substantially unchanged the method for determining the taxable base. The latter, therefore, as it has been conceived, does not appear suitable to intercept in a targeted - and exclusive - manner the extra profits on which the introduction of the extraordinary contribution is justified, since values are used that do not express the profitability of a business activity and that fail to isolate and quantify the actual increase in profits generated by the increase in the prices of energy products[40].

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[39] On this point, the Budget Law 2023, with the provision set forth in subparagraph (c) of paragraph 120, introduced - through the new paragraphs *3-bis* and *3-ter* added to Article 37 of the Ukraine Decree - two significant changes to the determination of the taxable base referred to in paragraphs 2 and 3 of the same article. In particular, the persons liable for payment of the extraordinary contribution must recalculate the taxable base, considering that *" Transactions involving the sale and purchase of shares, bonds or other securities not representing goods and company shares occurring between the persons referred to in paragraph 1"* (new paragraph *3-bis*, introduced in Article 37 by Article 1, paragraph 120, letter c), of the Budget Law 2023*) do not count towards the determination of the total assets and liabilities transactions referred to in paragraph 3; "Active transactions not subject to VAT due to the lack of the territorial prerequisite, pursuant to Articles 7 to 7-septies of* Presidential Decree *of 26 October 1972, no. 633 of 26 October 1972, if and to the extent that the related purchases are territorially irrelevant for VAT purposes'* (new paragraph *3-ter* of Article 37, introduced by Article 1, paragraph 120(c) of the Budget Law 2023).

As a result of these amendments, the amounts resulting from the communications of periodic VAT settlements (LIPE), which are used to determine the taxable base to which the levy is to be applied, must be adjusted, upwards or downwards, by the amounts attributable to the purchases and/or disposals of shares, bonds or other securities not representing goods and shares, if these transactions had as counterparty a person exercising an activity referred to in Article 37(1).

[40] On this profile, see D. STEVANATO*, Extra-profits: an unfair, useless and harmful tax*, in *IBL Focus*, 2022, p. 354. The author argues that *"The increase in value added is too coarse an indicator, if one wants to infer from it the achievement of extra-profits: it may in fact depend on a multiplicity of factors"*.

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3.1 *The extraordinary contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 and a parallelism with the* Robin Tax *affair.*

In reference to the taxable base, therefore, one glimpses the same pathology of the *Robin Hood Tax*[41], censured by the Constitutional Court, in words that are particularly topical, lacking *" altogether the predisposition of a mechanism that would allow for the separate and more severe taxation of only the possible portion of 'supplementary' taxable income connected to the privileged position of the activity exercised by the taxpayer when a given conjuncture continues"*[42].

The *Robin Hood Tax,* in fact, despite having as its *target* the hypothetical extra-profits deriving from a favourable trend in the price of raw materials, ended up, in reality, by applying a higher rate to the entire profits of the companies reached by the measure, without caring to distinguish between ordinary profits, to be taxed with the basic rate of IRES, and extra-profits, to which the higher rate should be applied. Thus, no mechanism was perceived to tighten the levy only on the additional income, if any, related to the privileged position of the economic activity exercised by the taxpayers when the favourable economic situation continues.

It was not, therefore, as the Constitutional Court points out, *"a tax on profitability"*.

In addition, the time frame taken into consideration by the Legislature for the purposes of determining the taxable base of the contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 (the period from October 2021 to April 2022 as opposed to the period from October 2020 to April 2021) also gives rise to perplexity.

Firstly, it does not correspond to the annual duration that is inherent in a financial year and which is assumed for the main taxes (VAT, IRES, IRPEF) as the necessary time frame for determining taxes due.

Secondly, this comparison, which does not make it possible to clearly identify the excess profits realised with respect to the threshold of normal income, appears entirely illogical: in fact, the legislator does not take into consideration a period of physiological profitability, but, on the one hand, a six-month period marked by the contraction of consumption and sales volumes and, on the other

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[41] Constitutional Court, Sentence No. 10 of 11 February 2015. In this context, the Constitutional Court found a violation of the principles of Articles 3 and 53 of the Constitution, on the assumption that the corporate income tax surcharge, introduced in 2008 for energy companies: a) constituted a surcharge on the entire business income and not only on 'excess profits'; b) had become structural, even though its introduction was due to the economic crisis and the simultaneous rise in the price of raw materials; c) did not provide for mechanisms to verify that operators did not pass on the tax burden to consumers. On this point, without any claim to exhaustiveness, F. AMATUCCI, *La complessa verifica di legittimità costituzionale della Robin Hood Tax*, in *Riv. Trim. Dir. Trib.*, IV, 2015, p. 981 ff.; P. BORIA, *L'illegittimità costituzionale della "Robin Hood Tax" e l'enunciazione di alcuni principi informatori del sistema di finanza pubblica*, in *GT- Riv. Giur. Trib.*, 2017, 3, I, p. 223; D. STEVANATO, *'Robin Hood Tax': an unconstitutionality in future memory*, in *Dial. Trib.,* I, 2015, p. 50.

[42] Corte Cost., Sent. no. 10/2015, par. 6.5.1. of the '*Considerato in diritto*'.

hand, a six-month period in which any excess profits realised by energy companies could have arisen from their return to a situation of normality and from the impact on sales prices due to the Russian-Ukrainian crisis.

The seven months of the first time frame (1 October 2020 - 30 April 2021) were, in fact, at the heart of the pandemic emergency, which led to sharp contractions in turnover. An 'increase in the balance' in the following similar period (1 October 2021 - 30 April 2022) may be the result of a principle of economic recovery, in the face of months of deep economic recession[43].

4. *The new extraordinary contribution pursuant to Article 1, Law 197/2022*

Article 1 -sections 115 to 119- of the Budget Law 2023 (Law No. 197 of 29 December 2022) instituted, for the year 2023, *"in order to contain the effects of the increase in prices and tariffs in the energy sector for businesses and consumers"* a temporary solidarity contribution, implementing Articles 14 et seq. of Regulation (EU) No. 2022/1854[44] .

With regard to taxable persons, the contribution in question is foreseen for those operators who carry out in the territory of the State, for the subsequent sale of the goods, the activity of electricity production, those who carry out the activity of methane gas production or natural gas extraction, those who resell electricity, methane gas and natural gas, and those who carry out the activity of production, distribution and trade of petroleum products. The contribution is also due by those who, for subsequent resale, permanently import electricity, natural gas or methane gas or petroleum products or who introduce into the territory of the State such goods coming from other States of the European Union. The contribution is not due by persons carrying out the activity of organising and managing platforms for the exchange of electricity, gas, environmental certificates and fuels, as well as by small enterprises and micro-enterprises carrying out the activity of retail trade in motor fuel identified by ATECO code 47.30.00[45].

The Budget Law 2023 has, moreover, provided for a materiality threshold above which the new levy applies. In fact, it is due if at least 75% of the revenues of the tax period prior to the one in progress on 1 January 2023 derive from 'relevant' activities, removing, through this corrective, one of the most

[43] In these terms, D. STEVANATO*, Extra-profits: an unfair, useless and harmful tax*, op. cit., p. 354.

[44] This contribution, as stated in the explanatory memorandum to the draft budget law *2023, 'constitutes, for the year 2023, a national measure equivalent to the temporary contribution established pursuant to Council Regulation (EU) 2022/1854 of 6 October 2022 on emergency action in response to high energy prices'.*

[45] With regard to this last aspect, the Circular of the Revenue Agency no. 4/E of 23 February 2023, specifies that *"in view of the definitions of 'microenterprises' and 'small enterprises' laid down in the Decree of the Minister of Productive Activities of 18 April 2005, the following two size requirements are therefore excluded from the payment of the solidarity contribution: enterprises -executing the activity falling under the above-mentioned ATECO code- which, in the same financial year, meet the following two size requirements - less than 50 employees; - annual turnover or annual balance sheet total not exceeding EUR 10 million".*

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problematic aspects of the previous contribution[46]. The latter, in fact, being characterised by an excessively broad subjective scope, ended up including, de facto, also persons who carried out in a completely marginal and occasional manner one of the activities considered[47]. In this way, the application of the extraordinary contribution is reasonably limited to companies that carry out the activities in question on a prevalent basis.

With regard to the modalities inherent to the determination of the extraordinary contribution, the Budget Law 2023 (Law No. 197 of 29 December 2022) introduced a significant change with regard to the taxable base, providing that it is to be identified in the increase of the total income achieved in 2022 with respect to the average of the previous four years and that the tax rate is set at 50%.

Specifically, the new extraordinary contribution for the year 2023 is determined by applying the rate of 50 per cent to the portion of total income determined for corporate income tax (IRES) purposes for the tax year 2022 that exceeds by at least 10 per cent the average of total income determined for IRES purposes earned in the four tax years prior to the tax year current on 1 January 2023 . If the average taxable income of such four tax periods is negative, the average taxable income is zero for the purpose of calculating the temporary solidarity contribution.

Accordingly, the contribution is not payable by persons whose total IRES income in 2022 exceeds the average total IRES income of the preceding four-year period (2018-2021) by less than 10%. Therefore, the criteria for determining the taxable base of the new contribution differ from the calculation system of the previous contribution introduced by Article 37 of Decree-Law No. 21 of 2022 for the obvious reference to the total IRES income (instead of the balances resulting from the LIPE).

Again for the purpose of calculating the contribution, a limit was also introduced, specifying that the amount due may in no case exceed 25% of the value of the net assets of the taxpayer at the end of the financial year preceding the one in progress on 1 January 2022.

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[46] In this regard, the national legislator was inspired by the criterion adopted by Regulation (EU) No. 2022/1854 which considers as subject to the solidarity contribution the *" companies or permanent establishments in the Union that generate at least 75% of their turnover from economic activities in the extraction, oil refining (...)"*. On this topic, A. PICA, *Il contributo straordinario sull'extraprofitto per il settore energetico e petrolifero introdotto dalla legge di bilancio 2023*, in *Eutekne, La gestione straordinarie delle imposte*, 2023, 1, p. 48, where the Author observes that *"having circumscribed the subjective scope of the rule to those entities that, on a prevalent basis (on the basis of the criterion mentioned above) carry out the identified activities, undoubtedly corrects one of the major distortions already highlighted with reference to the previous contribution"*.

[47] On this topic, see M. EMMA, R. RINALDI, *Il contributo straordinario sugli extra-profitti energetici: lineamenti e problematiche*, op. cit, p. 2334, who, with reference to the contribution pursuant to Article 37 of Decree-Law no. 21 of 2022, agree that *"for example, a company that has not opted* pursuant to *Article 36 of Presidential Decree no. 633/1972 for the separation of the different activities carried out, could also see any greater profits that have nothing to do with the energy sector taxed by the contribution"*.

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Finally, unlike the contribution pursuant to Article 37 of Decree-Law No. 21 of 2022, in relation to which it was provided that no amount was due if the increase did not exceed €5 million, the determination of the taxable base of the contribution provided for by the 2023 Budget Law is not subject to any franchise or absolute limit.

However, despite the improvements made to the taxable base of the extraordinary contribution provided for in the 2023 Budget Law, compared to the previous contribution, the Legislature, once again, does not seem to have taken into account the main profile that had led the Constitutional Court to declare unconstitutional the so-called Robin Hood Tax in its sentence no. 10/2015, continuing to lack re " the provision of a mechanism that would allow for the separate and stricter taxation only of the possible 'suppletive' portion of taxable income.so called *Robin Hood Tax* in Judgment No. 10/2015, continuing to miss re *"the provision of a mechanism that would allow for the separate and more severe taxation only of the possible portion of 'supplementary' taxable income connected to the privileged position of the activity exercised by the taxpayer when a given conjuncture persists"*.

Although, in fact, the purpose pursued by the Legislator is to subject to the levy in question profits in excess of the ordinary profits[48], in accordance with the purposes set forth in Regulation (EU) No. 2022/1854, with reference to the basis of calculation, the same potential distortions, already highlighted in relation to the contribution pursuant to Article 37 of Decree-Law No. 21 of 2022, are found.

On the one hand, the total income is, in fact, influenced by events other than those that generated the extra profit[49]; on the other hand, the net assets also include items that are not related to the activity carried out[50], which risk distorting the reference data. Not to mention, in addition, that since there may also be entities operating under the simplified accounting regime, the amount of net assets is not immediately available from the accounting records.

[48] This is also expressly stated in the Circular of the Revenue Agency No. 4/E of 23 February 2023, which provides: *"In adherence to the purpose set by the EU regulation of subjecting to the contribution in question profits in excess of ordinary profits, the rule provides that the solidarity contribution is to be applied "on the amount of the portion of total income determined for corporate income tax purposes relating to the tax period prior to the one in progress on 1 January 2023, which exceeds by at least 10 per cent the average of the total income determined for corporate income tax purposes earned in the four tax periods prior to the one in progress on 1 January 2022"*.

[49] Examples include provisions for risks and charges or capital gains/losses on the disposal of participations.

[50] Just think, for example, of the revaluation reserves recorded following the voluntary revaluation under Decree-Law 104/2020 only by OIC entities.

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5. *Concluding remarks also prompted by the affair connected with Order No. 767/2024 of 16 January 2024 of the Regional Administrative Court of Lazio, which has fuelled doubts as to the constitutional tightness of this provision, the uncertainty of which will further increase litigation.*

Leaving aside the further critical aspect - which unites the extraordinary contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 and the contribution provided for by the 2023 Budget Law - represented by the express non-deductibility of the taxes in question for the purposes of income tax and IRAP (despite the fact that the Constitutional Court has already ruled on the censurability of this choice, pursuant to Article 53 of the Constitution, in relation to IMU[51] and IRAP), the real *punctum dolens* is the criterion chosen to determine the taxable base.

Starting both from the assumption that the principle of the ability to pay pursuant to Article 53 of the Constitution must be placed in the context of other constitutional values, with a view to their coordination, and from the undisputed primacy of the solidaristic and redistributive function of Article 53 of the Constitution, it is possible to affirm that the introduction of an extraordinary contribution on extra-profits can find its legitimacy to the extent that its introduction implies the protection of fundamental principles pertaining to the economic-social sphere. In this regard, in accordance with Judgement No. 10/2015, which legitimises a diversification of the tax system on the basis of the economic areas of interest and the type of taxpayer, provided that it is supported by adequate justification, the possibility of providing for a heavier tax burden for certain production sectors that, on the basis of a discretionary but reasonable assessment, are in a privileged position in the current economic framework, as holders of extra profits deriving from cyclical events, is not considered objectionable.

If, then, it is considered that the greater revenue obtained is used in favour of those who, on the other hand, find themselves in a disadvantaged position, the extraordinary contribution on extra-profits could find its justification in the context of the constitutional principles of substantial equality pursuant to Article 3, paragraph 2, and the limit of social utility in the function of which an economic activity can take place, *pursuant to* Article 41, paragraph 2, of the Italian

[51] Constitutional Court, sentence no. 262//2020, in which the Court, with reference to the IMU for the 2012 period, declared the constitutional illegitimacy of Article 14, paragraph 1 of Legislative Decree no. 23/2011 (as originally drafted) in the part in which it states that *"also for instrumental properties the IMU is non-deductible from corporate income taxes"*, in relation to Articles 3, 41 and 53 of the Constitution, highlighting its decisiveness in the case brought by a joint-stock company operating in the real estate sector that had paid the local tax on some instrumental goods without being able to deduct it for IRES purposes. Being a tax not commensurate with income nor subject to recourse, the IMU must be qualified as a 'tax burden' governed by Article 99 of the TUIR and, considering its nature as an indispensable productive factor for the entrepreneur, with full deductibility for IRES purposes.

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Constitution, for which the extra-tax and redistributive function of the tax is activated .

However, just as the *Robin Hood Tax* was contrary to the principle of the ability to pay in that, despite the declared purpose of taxing the sector's extra-profits, the surcharge in question was applied to the entire profit made by the companies, the method of determining the taxable base of the contribution pursuant to Article 37 of Decree-Law No 21 of 2022 appears to be entirely questionable, since it is unsuitable for intercepting extra-profits in a targeted - and exclusive - manner.

On the other hand, the taxable base of the extraordinary contribution introduced by the Budget Law 2023 also raises the same perplexities. Although, on the one hand, the Legislator's choice not to identify the taxable base of the contribution in the increase of the balance determined between the active and passive transactions recorded in the periodic VAT settlements (LIPE) is shareable, on the other hand, the potential distortions already raised in reference to the contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 remain, at least in part.

In conclusion, differentiated taxation must be supported by adequate justification, which must be reflected, in a reasonable and proportional manner, in the structure of the levy. And it is precisely the structure of the latter, when it does not allow to intercept the so-called And it is precisely the latter's structure, when it does not allow for the interception of the so-called cyclical overprofit - notwithstanding the improvements introduced by the Budget Law 2023 - that exposes the levy itself to the censure of unconstitutionality, bearing in mind that 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 entity of the taxation* "[52].

If, in fact, the Constitutional Court admits that *"the provision of differentiated rates for production sectors and for types of taxable persons is fully within the legislature's discretion, if supported by not unreasonable reasons of economic and redistributive policy"*[53], it is necessary that such a provision allows for a distinction to be made, punctually, between the ordinary taxable base, taxable when fully operational, and the taxable base deserving supplementary taxation.

On this point, the Tax Court of First Instance of Rome, section 27, with five articulated ordinances[54], raised the issue of constitutional legitimacy in relation to the contribution pursuant to Article 37 of Decree-Law No. 21/2022 for several profiles of violation of Articles 3, 23 and 53 of the Constitution. These

52 Constitutional Court, Sentence No. 111 of 1997.

53 Constitutional Court Sentence No. 21/2005.

54 CGT I Rome Order No. 2437-27-2023. And, with an Order dated 4 December 2023, also the Tax Court of First Instance of Milan (section 12) raised a question of legitimacy (appeal brought by Meltemi Energia srl against Ag. entrate Direzione Provinciale II of Milan) on the extraordinary contribution against the high utility bills provided for by Article 37 of Decree-Law no. 21 of 2022.

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include the vagueness, indefiniteness and unreasonableness of the taxable base of the contribution, which is completely unsuitable for identifying the conjunctural extra-profits. The Court of Justice for Taxation, quoting and adopting, almost in their entirety, the applicants' arguments, emphasised how the contribution, hypothetically aimed at targeting excess profits, would prove, in fact, to be inadequate for the purpose, because it was wholly unsuitable for selectively identifying such economic quantities.

Moreover, the Regional Administrative Court of Lazio[55] also referred the question of the constitutional legitimacy of the 2023 solidarity contribution on extra-profits in the energy sector to the Constitutional Council, under numerous profiles. Ultimately, this, together with those, a few months ago, of the first-degree Tax Courts of Rome and Milan on the 2022 solidarity contribution, confirm the strong doubts of many experts and operators as to the suitability of such levies, albeit different from each other, to recognise economic magnitudes actually capable of justifying higher taxation.

Pending the Court's pronouncements, some aspects of the lengthy and valuable orders of the TAR deserve to be highlighted.

The first relates to jurisdiction. While the Tax Courts had been seized of the matter following the appeal of tacit denials of reimbursement of the 2022 contribution paid, before the administrative court the annulment of Circular 4/E of 2023 commenting on the rule on the 2023 contribution and the act, of the Director of the Agency, approving the 2023 income tax return form, in the part in which it provides for the indication in the return of certain elements relating to the contribution, was requested. Examining the issue in order to establish the relevance in the judgment (and therefore the admissibility of the referral to the Constitutional Court) of the constitutionality defects, the Regional Administrative Court of Appeal recalls the judgment of the Supreme Court of Cassation in SS.UU. no. 29103/2023 in which it was established that there is administrative jurisdiction on the appeal of the measures and circulars of the Agency implementing and commenting on tax rules (in this case, precisely of the 2022 extra-profits contribution) deemed unlawful. The issue is of great systematic relevance, because such an appeal provides the taxpayer with a protection - which, in the event the appeal is upheld, takes the form of a declaration of nullity of such general acts - that is additional, and above all preventive, with respect to that which is asserted in tax proceedings by challenging individual tax acts, i.e. the denial of refunds (and therefore a form of negative assessment of the tax debt). According to the Court of Cassation - contrary to the action before the tax court, aimed at the protection of subjective rights - (also) in this case before the TAR a situation that must be defined as legitimate interest is protected, because it would otherwise be deprived of any protection.

Another aspect to be emphasised is that the Regional Administrative Court finds the illegitimacy of the 2023 contribution, inter alia and in general terms, in

[55] With a plurality of rulings including, in particular, Order No. 767/2024 of 16 January 2024.

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the evident divergence of its rules from those set forth in EU Regulation No. 1854/2022, which is also relevant, in the medium term, as a breach of Article 117 of the Constitution. Therefore, a question of double jeopardy arises, in the sense that this dissimilarity can be invoked, insofar as it is within the mutual competence, both before the Constitutional Court and before the EU Court of Justice.

The Tar, in accordance with constitutional case law, opts for the referral to our Court. However, it is clear that - in the event that the question of constitutionality is not upheld - referral to the EU Court is still possible. Deviation from the Regulation is identified in the well-known circumstance that the latter limits the application of the solidarity contribution to the production and refining of energy products, whereas our contribution applies to the entire chain up to the downstream. The reason for the limitation lies in the fact that - it has been argued in the EU - only price makers would actually be able to profit from rising energy product prices. But this discrepancy - and herein lies the point of interest of the Tar's orders - determines not only and not so much the unreasonableness and non-responsiveness to the principle of contributory capacity of the levy on extra-profits, but a direct violation of the constraints deriving from the European system. The Regulation in fact requires the adoption of a solidarity contribution on the upstream and only on it, with the consequence that our contribution 'integrates a sort of *aliud pro alio* whose perception does not require any exegetical effort'.

The Constitutional Court will therefore find itself on two separate occasions, but within a short period of time, dealing with issues that are highly relevant in legal and economic terms. The extraordinary and non-recurring nature of the two solidarity contributions does not diminish - and indeed amplifies - the need to protect taxpayers, calling on the legislature to adopt measures that are actually consistent with the intention of redistributing wealth formed in exceptional market circumstances.

Yet, the theme of the search for 'extra profits' or, more generally, 'extra income' remains topical and very much on the minds of policy-makers[56], as demonstrated by the taxation of banks' extra profits. We do not wish to go into the merits of this new form of taxation here, which in fact intends, more appropriately, to hit the profits that banks make on their customers' current accounts; accounts that have rather high management costs for savers even though they represent the primary instrument of the banks' business, which should therefore remunerate depositors in a congruous manner. In fact, a bank deposit is an irregular deposit pursuant to Article 1782 of the Italian Civil Code, i.e. a contractual relationship in which, unlike in the case of an ordinary deposit,

[56] And not only that; think of the recent revirement with which the Supreme Court, contradicting its own previous orientation, 'extended', to managers of industrial holding companies, the application of the 10 per cent surtax on *bonuses* and *stock options*. On this issue, see L. CARPENTIERI, *Alla ricerca degli "extraredditi:* il revirerement *della Cassazione sull'applicabilità dell'addizionale del 10 per cento sui bonus e sulle* stock option *riconosciuti ai dirigenti delle* holding *industriali (... con buona pace della certezza del diritto)*, in *Riv. Telem. Dir. Trib.,* 31 July 2023, p. 1 ff.

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the depositary acquires ownership of the deposited assets and can dispose of them in the conduct of its business, except for the obligation to return the sum received at maturity; precisely for this reason, banks should pay depositors - which is not the case - a fair remuneration in the form of interest. This is the phenomenon that the new levy is likely to hit, even if it is a levy that is bound to boomerang on account holders. In any case, the 'narrative' of extra-profits remains open, i.e. the idea that any company that is able to do its job well - that is, to make considerable profits - can enter the crosshairs of new, almost 'punitive' forms of taxation, because they are linked to the idea that profits above certain thresholds (thresholds that are, moreover, arbitrarily determined) can be considered extra-profits, almost 'unjust' or illicit gains deserving, precisely for that reason, of taxation in addition to the ordinary taxation, whereas the truth is that in a market economy there are no extra-profits, only profits; profits at most deriving from monopoly or oligopoly positions on which, given that competition cannot act as in a competitive market, it should be the government that intervenes with instruments other than taxation, to induce institutions to remunerate depositors in a congruous manner, without excessively increasing interest rates on loans.

In conclusion, while we await the replies of the Judge of the Laws, a further reflection is in order: if the legislator considers that energy companies have a greater ability to pay taxes due to the achievement of greater earnings that are completely undeserved - i.e. *windfall profit* or *excess profit* as a consequence of fortuitous circumstances, 'carried by the wind', which do not reflect any entrepreneurial merit - it must, necessarily, identify a taxable base that is actually suitable to intercept this undeserved extra-profit. If, in fact, the objective pursued is to subject exceptional income to increased taxation, it is appropriate to define precisely the threshold of normal income, providing *"a rigorous mechanism that allows for the separate (and more severely) taxation only of the possible portion of supplementary profit connected to the privileged position of the activity exercised by the taxpayer when a given situation (structural or cyclical) persists"*[57]. Undoubtedly, this is a far from simple analysis: it is not easy, in fact, to identify the limit between profitability considered physiological - due to investments, innovation capacity, research, etc. - and pathological profitability, due solely to cyclical events.

On the contrary, the risk is to hit even 'deserving' incomes: this would have a disincentive effect on research, innovation, technological progress, etc. On the other hand, even in the same communication *"RePowerEU: Joint European Action for Safer, More Sustainable and Affordable Energy"* (following which, in Italy, the extraordinary contribution on extra-profits was introduced pursuant to Article 37 of Decree-Law no. 21 of 2022), the European Commission dwells on the need for state legislators to work to identify, correctly, " *excessive returns* " speculative matrix, through the use of "*objective and verifiable criteria and events*"

[57] In these terms, G. MORO, *Il contributo straordinario per il caro bollette: profili di legittimità costituzionale,* in *Rass. Trib.*, no. 4/2022, p. 832.

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capable of excluding, from the taxable base, structural components of the increase in the prices of energy resources.

Given the need to isolate the extra-profit, although aware of the difficulties that such an operation entails, the Italian legislator, in the provision of the new levy introduced in the Budget Law 2023, could have at least instituted a tax as structured by the provisions of Article 14 et seq. of Regulation (EU) 2022/1854[58]. Although the aforesaid Regulation expressly attributes to the Member States the twofold possibility of instituting the tax as structured by the provisions of Article 14 et seq. or, alternatively, of creating their own tax by following the "*guidelines*" set forth in the European Regulation[59], the Italian legislator, opting for the second of the alternatives illustrated[60], by providing for a 10% exemption for the purposes of calculating the taxable amount, departed from the European legislation. In addition to the critical issues, examined in paragraph 4, from which the taxable base of the new contribution introduced by the Budget Law 2023 is affected, the 10% exemption provided by the domestic legislator, unlike the European contribution - which has established *"a revealing boundary of 'extra-profits', equal to 20% of the average income of the four-year period preceding 2022"*[61] - ends up attracting to taxation also incomes that are excluded under the European Regulation.

Ultimately, if the tax base is not suitable for identifying and isolating the extra profits and 'excessive returns' due to cyclical events, such innovative taxes inevitably turn out to be defective in their structure, running the risk of being at odds with the principles set forth in Articles 3 and 53 of the Constitution, ending up, albeit inspired by just intentions[62] , in becoming 'unfair' taxes. And this is precisely the risk that seems to manifest itself both for the contribution under

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[58] Cf. P. SELICATO, *La tassazione delle nuove forme di ricchezza nel* Next Generation EU, in *Riv. Dir. Trib. Inter.*, no. 3/2022, p. 64, where the author argues that *"The new own resource proposed by the NGEU Project presents remarkable similarities, in its mechanism and purposes, with the Italian so-called* 'Robin Hood Tax'*"*.

[59] See Art. 14 of Regulation No. 1854/2022: *"Surplus profits generated by undertakings and permanent establishments in the Union engaged in activities in the crude oil, natural gas, coal and refining sectors are subject to a compulsory solidarity contribution, unless Member States have adopted equivalent national measures.*

[60] For the sake of completeness, it should be emphasised that other European states, such as Italy, have also followed the second of the alternatives provided for by Regulation (EU) No 1854/2022, opting for their own definition of the tax and distancing themselves, as far as possible, from the European contribution. Among them: France, Greece and Portugal. On this point, M. BETTONI, *Panoramica sul recepimento da parte degli stati membri del regolamento n. 1854/22 e profili critici (prima parte),* in *Fiscalità dell'energia*, www.fiscalitadellenergia.it, 24.03.2023, p. 1 ff. Regarding Germany, Spain and the Netherlands, see M. BETTONI, *Panoramica sul recepimento degli Stati membri del Regolamento n. 1854/22 e profili critici (seconda parte),* in *Fiscalità dell'energia*, www.fiscalitadellenergia.it, 16.06.2023, p. 1 ff.

[61] In this view, R. IAIA, *La disciplina del contributo di solidarietà temporaneo nel settore energetico (art. 1, commi 115 ss., L. n. 197/2022) nella prospettiva sistematica e comparatistica*, op. cit.

[62] In this perspective, P. SUPINO, *Non solo l'Italia tassa i sovraprofitti energetici: le misure adottate o proposte negli altri paesi europei*, in *www.fiscalitadellenergia.it,* 13.09.2022, p. 1.

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Article 37 of Decree-Law No. 21 of 2022 and for the new contribution introduced by the Budget Law 2023.

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ABSTRACT

A seguito della comunicazione della Commissione Europea dell'8 marzo 2022, l'Italia, come altri Stati europei, tra cui la Spagna, il Belgio e l'Ungheria, per fronteggiare la crisi energetica determinata dal conflitto russo-ucraino, ha adottato una serie di misure, tra cui il contributo straordinario sugli extraprofitti nei confronti delle imprese che operano nel settore energetico, introdotto,

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dapprima, con l'art. 37 del D.L. n. 21 del 2022 e, successivamente, con la legge di Bilancio 2023 (Legge 29 dicembre 2022 n. 197).

Il presente lavoro è finalizzato, in primo luogo, ad esaminare la natura dei contributi in esame: nonostante il *nomen* (che probabilmente riflette sia la volontà del Legislatore di configurarli come prelievi più spiccatamente solidaristici, sia la difficoltà di inquadrarli in altre forme di prelievo fiscale), si ritiene che essi abbiano natura tributaria. Al riguardo, basti pensare, per ciò che concerne il contributo straordinario *ex* art. 37 del D.L. n. 21 del 2022, al rinvio alle disposizioni in materia IVA e, per ciò che concerne il contributo introdotto dalla Legge di bilancio 2023, al rinvio alle norme in materia di imposte sui redditi. A ulteriore conferma della natura tributaria, è sufficiente considerare le caratteristiche che contraddistinguono entrambi i prelievi: non si tratta, infatti, di corrispettivi sinallagmatici di una controprestazione, ma di prestazioni patrimoniali coattive, sancite per legge, la cui genesi prescinde dalla volontà degli obbligati. Sul punto, è possibile segnalare alcune pronunce della giurisprudenza amministrativa di merito, che, in riferimento al contributo *ex* art. 37 del D.L. n. 21 del 2022, ne hanno espressamente confermato la natura tributaria, sussistendo tutti gli indicatori correntemente indicati dalla dottrina e dalla giurisprudenza (sent. TAR Lazio-Roma n. 15278/2022). In secondo luogo, una volta appurata la natura di tali prelievi, ci si prefigge l'obiettivo di analizzarne gli elementi essenziali, ponendo in luci le potenziali criticità, con particolare attenzione: alla base imponibile; ai soggetti passivi individuati (non tutti gli operatori che hanno generato extraprofitto, ma solo quelli che operano nel settore energetico); alla scelta del lasso di tempo preso in considerazione per individuare la base imponibile. Infine, partendo dal presupposto che tali prelievi presentano le caratteristiche di un'imposta, è doveroso analizzarne i possibili profili di illegittimità costituzionale, in riferimento, in particolare, all'art. 53 Cost., individuando anche le affinità e le differenze rispetto alla *Robin Hood tax*, dichiarata incostituzionale con la sentenza n. 10 del 2015. Nell'anzidetta sentenza, la Corte Costituzionale lascia presagire la possibilità di introdurre un nuovo tributo che consenta di colpire gli extraprofitti, per un tempo limitato, purché le distinzioni settoriali poste in essere dal Legislatore tributario non risultino arbitrarie o irragionevoli, in ossequio al dettato dell'art. 53 Cost. Difatti, il giudizio di legittimità costituzionale si focalizza «sull'uso ragionevole, o meno, che il legislatore stesso abbia fatto dei suoi poteri discrezionali in materia tributaria, al fine di verificare la coerenza interna della struttura dell'imposta con il suo presupposto economico, come pure la non arbitrarietà dell'entità dell'imposizione» (Corte cost., sent. n. 111 del 1997). Un focus conclusivo sarà acceso sul recentissimo intervento del TAR Lazio che ha rimesso alla Corte Costituzionale la questione di legittimità dell'art. 1, commi da 115 a 119, della L. n. 197/2022 (legge di Bilancio 2023) che ha introdotto il richiamato contributo di solidarietà straordinario sugli extraprofitti derivanti da attività svolte nel settore energetico.

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Following the European Commission's communication of 8 March 2022, Italy, like other European states, including Spain, Belgium and Hungary, in order to cope with the energy crisis brought about by the Russian-Ukrainian conflict, adopted a series of measures, including the extraordinary contribution on extra-profits for companies operating in the energy sector, introduced, first, by Article 37 of Decree-Law No. 21 of 2022 and, subsequently, by the Budget Law 2023 (Law No. 197 of 29 December 2022).

The present work is aimed, first of all, at examining the nature of the contributions under review: notwithstanding the *nomen* (which probably reflects both the Legislator's desire to configure them as levies that are more distinctly solidaristic and the difficulty of framing them within other forms of tax levies), it is believed that they are of a tax nature. In this regard, suffice it to think, with regard to the extraordinary contribution pursuant to Article 37 of Decree-Law No. 21 of 2022 , of the reference to the provisions on VAT and, with regard to the contribution introduced by the 2023 Budget Law, of the reference to the rules on income tax. As further confirmation of the tax nature, it is sufficient to consider the characteristics that distinguish both levies: they are not, in fact, sinallagmatico consideration of a counter-performance, but rather coercive patrimonial performances, sanctioned by law, the genesis of which is independent of the will of the obligated parties. On this point, it is possible to point out a number of rulings of the administrative courts of merit, which, with reference to the contribution pursuant to Article 37 of Decree-Law No. 21 of 2022, have expressly confirmed its tax nature, since all the indicators currently indicated by doctrine and jurisprudence exist (Lazio-Rome Regional Administrative Court ruling No. 15278/2022). Secondly, once the nature of these levies has been ascertained, the objective is to analyse their essential elements, highlighting potential critical issues, with particular attention to: the taxable base; the taxable persons identified (not all operators that generated extra-profits, but only those operating in the energy sector); the choice of the time period taken into consideration to identify the taxable base. Finally, starting from the assumption that these levies have the characteristics of a tax, it is necessary to analyse their possible profiles of constitutional illegitimacy, with reference, in particular, to Article 53 of the Constitution, also identifying the similarities and differences with respect to the *Robin Hood tax*, declared unconstitutional by Judgment No. 10 of 2015. In the aforementioned ruling, the Constitutional Court hints at the possibility of introducing a new tax that would allow for the targeting of extra-profits, for a limited time, as long as the sectoral distinctions made by the tax legislator are not arbitrary or unreasonable, in compliance with the provisions of Article 53 of the Constitution. On this point, in fact, 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 entity of the taxation" (Constitutional Court, sentence no. 111 of 1997). A concluding *focus* will be on the very recent intervention of the Regional Administrative Court

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of Lazio that referred to the Constitutional Court the question of the legitimacy of Article 1, paragraphs 115 to 119, of Law No. 197/2022 (Budget Law 2023), which introduced the aforementioned extraordinary solidarity contribution on the extra-profits deriving from activities carried out in the energy sector.