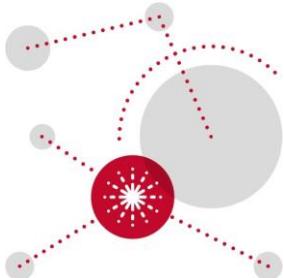


Energy & Ecological Transition Focus Team

23 March 2022

The Energy Decree and the contribution to tackle increases in utility bills

Energy & Ecological Transition Focus Team



Team leader

Catia Tomasetti
catia.tomasetti@belex.com
Tel. +39 02 771131



Catia Tomasetti
catia.tomasetti@belex.com
Tel. +39 02 771131

Gabriele Malgeri
gabriele.malgeri@belex.com
Tel. +39 02 771131

Giulio Mazzotti
giulio.mazzotti@belex.com
Tel. +39 02 771131

1. Introduction

Law Decree No. 21 of 21 March 2022, containing “Urgent measures to tackle the economic and humanitarian effects of the Ukrainian crisis”, came into force on 22 March (“**Energy Decree**”).

Under Art. 37, **energy producers** (inc. renewable energy producers) must contribute an **additional 10% out of their “excess profits”** to help to fund the measures to contain the effects of the price and tariffs increase for companies and consumers (“**Contribution**”).

2. Extraordinary contribution to tackle increases in utility bills

Below are the key provisions of Art. 37:

- **who it applies to:**

- electricity producers** in Italy that subsequently sell the electricity on the market;
- methane gas producers and natural gas extractors;**
- electricity, methane gas and natural gas **resellers**;
- producers, distributors and traders of petroleum products;** and
- importers of electricity, natural gas, methane gas or petroleum products that sell the products directly on the market, and entities that bring these products into Italy from other EU states for subsequent resale.

Organisers and managers of platforms for the sale and purchase of electricity, gas, environmental certificates, and fuels are not required to pay the Contribution;

- **tax base:** the Contribution applies to the increase in the difference between output and input transactions for VAT purposes (as specified in the periodic VAT settlement data sent to the Italian tax authority¹) in the period 1 October 2021–31 March 2022 compared

¹ Under Art. 37, para. 4, of the Energy Decree, to determine the differences attributable to entities required to pay the Contribution that are part of a VAT group, only the following are taken into

to the period 1 October 2020–31 March 2021 only if the increase is over EUR 5 million. The Contribution is not due if the increase is less than 10%. Based on the wording of Art. 37, any arrears on expected revenues, disputes relating to issued or received invoices, or other cost items not directly linked to VAT returns (e.g., amortisation and depreciation, provisions, write-downs and losses on receivables) do not appear to be included in the calculation. This could result in calculations of increases that do not correspond to the real figures;

- **payment deadline:** the Contribution is to be settled and paid by 30 June, in accordance with the procedures and fulfilments that will be specified in an order from the director of the Italian tax authority, after consulting the Italian Regulatory Authority for Energy, Networks and Environment;
- **consumer protection:** all those required to pay the Contribution – for the period 1 April–31 December 2022 – must send the Italian Competition Authority (“ICA”) monthly reports that detail the sale and purchase prices of their products. The ICA may, with assistance from the Italian tax police, intervene to protect consumers and avoid consumer prices of energy products and electricity being unduly affected.

3. Combination of contributions under Art. 37 of the Energy Decree and Art. 5 of the Anti-fraud Decree²

Based on Art. 37 of the Energy Decree and Art. 5 of the Anti-fraud Decree, it appears that the Contribution and the adjustment potentially due to the Italian Energy Services Manager (“GSE”) can be combined, given that:

- the Energy Decree sets out no exclusions for **renewable energy producers** in Italy that already fall within the scope of Art. 5 of the Anti-fraud Decree; and
- any contribution due to the GSE under Art. 5 of the Anti-fraud Decree does not appear to be included in the calculation of the Contribution’s tax base, considering that:
 - a) any contribution due should not be relevant for VAT purposes (and, therefore, for the difference between output and input transactions); and, moreover
 - b) the Anti-fraud Decree has formally been effective since 1 February, but the ‘cash’ effects have applied only since 1 March and, therefore, after the period taken into account for the Contribution.

account: (a) issued and received invoices that state the businesses’ tax codes; and, for transactions between members of the VAT group (b) data resulting from the accounting records kept in accordance with Presidential Decree No. 600 of 29 September 1973.

² Law Decree No. 12 of 25 February 2022, containing “Urgent measures to fight fraud and ensure safety at the workplace in the construction sector, as well as on electricity produced by renewable energy power plants”, came into force on 26 February 2022.

4. Application of Art. 37 of the Energy Decree also to entities that were not operational in 2020 and 2021

Art. 37 of the Energy Decree seems to apply also to entities that produced no energy from 1 October 2020 to 1 March 2021 because, for example, their plants were under construction or maintenance was being carried out (these entities seem to be the most heavily affected by the calculation mechanism).

Moreover, the minimum increase threshold (EUR 5 m) should limit the impact of the Contribution to larger operators. That said, companies with several small plants could be penalised and, by contrast, companies (*e.g.*, SPVs) created for a single plant could be favoured.

Lastly, the ‘indiscriminate’ application of the Contribution seems to affect also the increase in revenues deriving from new investments or M&A transactions.

5. Application of the Contribution to groups of companies

According to the current draft, the **Energy Decree**, like the Anti-fraud Decree, does **not set out specific methods for calculating the Contribution for groups of companies**. The Contribution must thus be calculated on a stand-alone basis for each group entity (however, the potential impact of intragroup transactions on the calculation of the tax base should be assessed case by case).

6. Tax aspects of the Contribution

Art. 37, para. 7, expressly states that **the Contribution is not deductible for the purposes of the corporate income tax (IRES) and the regional tax on production activities (IRAP)**.

However, as the Contribution is not structured as a corporate income tax surcharge, the related tax base cannot be:

- offset against any tax losses carry forward; or
- transferred to the tax consolidation (and therefore be offset against other tax assets at group level) or used according to the tax transparency regime set out in Art. 115 of the Italian Income Tax Law (TUIR).

Pursuant to para. 6 of the Energy Decree, provisions concerning VAT assessment, sanctions, and collection (and related litigation) should apply also to the Contribution.

7. Preliminary remarks on the constitutionality of the Contribution

From a substantive standpoint, the Contribution seems to reflect several aspects of the structure of the ‘Robin Hood Tax’³ (“RHT”), *i.e.*, the corporate income tax surcharge previously applied on the excess profits of various types of energy companies, introduced in 2008 and declared unconstitutional in 2015⁴.

For preliminary comparison purposes, the RHT breached the Italian Constitution in the following ways: (a) it substantially increased the corporate income tax rate, thereby unreasonably targeting taxpayers’ entire business income rather than the excess profits; (b) it had no time limit; and (c) it was impossible to devise effective assessment mechanisms to ensure that the RHT did not result in price increases for consumers.

The fact that the Contribution is a one-off measure applicable for a limited time and only on the increase in profits shows that the Government is keen to avoid potential breaches of the Constitution, as occurred with the RHT.

However, some doubts seem to remain at this stage:

- the mechanism to prevent the burden of the Contribution being shifted to consumers does not seem to have been effectively addressed: although Art. 37, para. 8, envisages certain forms of control over energy prices, it remains objectively difficult in a free market to identify the price component charged to consumers in an attempt to shift the Contribution’s economic burden;
- the methods of calculating the Contribution’s tax base (*i.e.*, the increase in the difference between VAT output and input transactions) could entail the taxation of excess profits that are not strictly connected to the current economic scenario or the energy market (*e.g.*, sales of assets or shareholdings)⁵; and
- two further aspects should be considered from a systematic standpoint:
 - a) renewable energy companies could end up incurring a sort of double charge on their excess profits, given that – as mentioned above – they are already subject to the adjustment under Art. 5 of the Anti-fraud Decree; and
 - b) the impacts deriving from the fact that the Contribution is not deductible for IRES purposes (under Art. 37), given that the Contribution is not a corporate income tax surcharge but rather affects the gross margin (the increase in the difference between output and input transactions for VAT purposes). The tax base would not thus include all the related production costs.

³ Art. 81, paras. 16–18, of Law Decree No. 112 of 25 June 2008.

⁴ Constitutional Court Decision No. 10 of 11 February 2015.

⁵ These transactions are included in the output transactions for VAT purposes to be specified in the related periodic declaration, and therefore technically need to be included in the Contribution’s tax base, despite not having contributed to an increase in profits. Similar concerns could be raised regarding the fact that proceeds from financial derivatives with cash settlements seem to be excluded from the Contribution’s tax base (*i.e.*, the Contribution tax base could result to be substantially different from the amount of excess profits).

8. Legislative process

The Energy Decree must be converted into law within 60 days from the date of its entry into force (*i.e.*, by **21 May 2022**) to avoid losing its effectiveness retroactively. However, if not converted, Parliament will still be able to issue a law to govern any legal relationships that arose based on the unconverted decree. **Substantial changes to the text cannot be excluded**, particularly considering business associations' initial reactions to the Energy Decree.



Energy & Ecological Transition Focus Team

The focus team is a constellation of skills in different practice areas with a focus on energy and ecological transition.

[Carla Tomasetti](#)
Banking & Finance

[Giuseppe Manzo](#)
Corporate

[Niccolò Baccetti](#)
Corporate

[Massimo Merola](#)
Antitrust

[Riccardo Biccato](#)
Banking & Finance

[Andrea Silvestri](#)
Tax

[Elena Busson](#)
Corporate

[Roberto Flammia](#)
Banking & Finance

[Paolo Daino](#)
Corporate

[Francesca Di Carpegna Brivio](#)
Corporate

[Gabriele Malgeri](#)
Banking & Finance

[Giovanna Zagaria](#)
Banking & Finance

[Chiara Mancini](#)
Litigation

[Giulio Mazzotti](#)
Tax