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The EU Principles Inspire the Italian Excise Tax Reform

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The Italian legal system is about to launch the tax reform which will target both direct taxes on the income of individuals and companies, as well as indirect taxes including excise duties on energy products and green products. And in fact, the Council of Ministers has approved the draft enabling law for the tax reform, to be concluded within twenty-four months.

Especially with regard to excise duties, harmonized indirect taxes, the legislator has established various objectives: first of all, to favour the taxation of green energy products, remodulating the taxation and the rates according to the actual environmental impact of each product, thus contributing to a progressive decarbonisation in line with EU programmes; review the taxation system regarding excise duties on natural gas and electricity, providing for a tax linked to the quantities actually sold and invoiced; simplify the obligations for professional operators, also providing for a system of qualification of the same on the basis of their reliability and solvency which leads to the exclusion or significant reduction of the obligations such as the provision of deposits and excise guarantees; rewrite the regulation of the terms of forfeiture of the right to reimbursement and the prescription of the right to collect the excise duty; finally, review the taxation of lubricating oils, petroleum bitumen and other products.

This is a reform that is more necessary than ever for a tax harmonized at EU level such as the excise duty.

We cannot fail to mention how the integration of the economies and legal systems of the various Member States impose a convergence of national legal systems in order to avoid distortions of fiscal origin which could hinder the correct functioning of the single market; this, especially in a tax sector such as the indirect one which is able to affect the consumption of various products.

It is therefore necessary that there is a uniform application and interpretation of the rules and institutions throughout the Euro-unit territory.

The reform, therefore, in addition to the acclaimed objectives, will have to correct the “distorted” applications of excise duties at internal level, which are in contrast with EU law and harmonized standards: too often the general discipline of excise duties has been influenced by guidelines conflicting national jurisprudence, which have led to chronic uncertainty for the professional operators in the sector.

Take for example the constant violation of the principle of endoprocedural adversarial by the

Office for omissive conduct of the taxpayer: in such cases, the Administration usually notifies the tax deed together with the measures, not respecting the right to present observations and to be heard[1].

And, again, the Customs Office almost automatically abuses the precautionary suspension of refunds of excise duty due to disputes with the Customs Agency or the Revenue Agency, nullifying the EU principles of effectiveness of the right to reimbursement and proportionality.

These last principles are to be considered as general at European level and it's necessary respect them.

The principle of effectiveness guarantees that the national proceeding does not deprive the application of the rules regulated by the European Union Directives from effect: according to the Court of Justice: "*The requisites required by the internal legal system must not be devised in such a way as to make it practically impossible o extremely difficult to exercise the rights conferred by the European Union legal system*"[2].

The principle of proportionality takes the form of an assessment of the adequacy of the means adopted with respect to the end pursued, in the sense that national rules cannot prejudice the taxpayer's rights based on European rules[3]. On this point, the Court of Justice[4] has highlighted that the "automatic" of the precautionary protection in question does not comply with the principle of proportionality if "*the necessity and urgency are presumed in an incontrovertible way*" (therefore if it operates automatically) and if the taxable person is not recognized as having the possibility of requesting the replacement of the precautionary measure with the provision of a deposit or a bank guarantee limited in time and not excessively burdensome.

Therefore, the intervention of the legislator will have to correct this distorted application of national institutions so that it respects the higher European principles.

Even the individual indirect taxes additional to the excise duty, such as for example the Regional Tax on Petrol for Motor Vehicles (IRBA), show critical issues, given that these were instituted by the Italian legislator in violation of the EU principles on the subject.

The tax must be set aside and the right to reimbursement exists. The IRBA, introduced with Law no. 158/1990 and with Legislative Decree no. 398/1990, is a non-harmonized indirect tax typical of the Italian's Regions with ordinary statute, aimed at targeting the consumption of fuel supplied by distribution plants, including those intended for private use.

As this is an indirect tax, it falls within the scope of application of Directive no. 2008/118 /EC: this, in art. 1, par. 2, recognizes the possibility for Member States to apply other indirect taxes with specific purposes to products already subject to harmonized excise duty, provided that such taxes comply with the Community rules applicable to excise duties or VAT in the matter of determining the tax base, calculation , chargeability and control of the tax.

In other words, Member States can introduce an additional indirect tax on products already subject to excise duty only in the presence of a "*specific purpose*", configuring this additional tax as a sort of "*purpose tax*".

The CJEU courts found that the Italian legislator did not attribute any specific purpose to the tax in question[5]. And in fact, only a mere generic purpose of the general budget would be recognizable

which, as such, is not suitable for integrating the requirements of the Directive (*see*, among many others, CJEU's assertions[6]).

Moreover, already in July 2018, the European Commission started the infringement procedure n. 2017/2114, asking for clarification regarding the IRBA, as allegedly in conflict with the EU law: already at the time, the Commission did not detect any specific purpose attributed to the IRBA, with consequent incompatibility with the Union law.

On the basis of these considerations, the national jurisprudence[7] recognized the absence of a direct link between the use of the revenue and the purpose attributed to the IRBA; the result is the incompatibility of Italian legal order with EU Law.

The excise sector, let us remind you of harmonized taxes, will have to be reorganized in compliance with European principles, regulating in a timely manner the institutes, procedures and tax cases.

All this, taking into account the clear EU decarbonisation objectives: these oblige the Member States to undertake an update of the national legislation to identify the new taxable energy products, adapting the taxation to the level of pollution of the individual products. Thus, the various concessions and exemptions for energy products will have to be reviewed in order to tax the use of fossil fuels more and, at the same time, facilitate the use of renewable sources.

[1] *See* CJEU, Case C-349/07, 18 Decembre 2008, *Sopropè ECLI:EU:C:2008:746*

[2] *See* CJEU, Case C-35/05, 15 March 2007, *Reemtsma Cigaretten Fabriken ECLI:EU:C:2007:167*; in the same sense: CJEU, Case C-564 /15, 26 April 2017, *Tibor Farkas ECLI:EU:C:2017:302*

[3] *See* CJEU, Case C-311/08, 21 January 2010, *SGI ECLI:EU:C:2010:26* in which the Judges ruled that proportionality does not allow the use of "excessively burdensome" tools to protect the collection

[4] *See* CJEU, joined cases C-286/94, C-340/95, C-401/95 and C-47/96, 18 December 1997, *Molenheide and Others ECLI:EU:C:1997:623*

[5] *See*, CJEU, , Case C-255/20,9 November 2022, *Agenzia delle Dogane e dei Monopoli – Ufficio delle Dogane di Gaeta EU:C:2021:926*

[6] *See*, CJEU, Case C-553/13, 5 March 2015, S*tatoil Fuel & Retail, EU:C:2015:149*; CJUE, Case C-82/12, 27 February 2014, *Transportes Jordi Besora, EU:C:2014:108*

[7] *See*, Court of Cassation (Italian Supreme Court), order n. 6858/2023.

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