

# **Energy transition: the role of tax and excise leverage. The necessary revision of Directive 2003/96/EC**

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## **ABSTRACT**

The current climate crisis means that there is an urgent need to intervene in energy matters, at national and EU level, encouraging the use of renewable energy sources: taxation can also play a significant role, promoting environmentally friendly production and behaviour.

Among the possible interventions aimed at energy transition, it is worth mentioning the modification of excise duties: by abandoning their application for mere revenue reasons, their aptitude for pursuing extra-fiscal demands of environmental interest emerges.

In this regard, it can no longer be postponed to amend Council Directive 2003/96/EC, which, by providing for minimum rates of taxation on energy products, does not adequately promote greenhouse gas emission reductions and favours the use of fossil fuels, allowing for widely divergent national rates and a wide range of exemptions and reductions. This was recently reflected in the proposal for a directive COM (2021) 563 final — not yet approved by the Council — which, by rewriting the text of Directive 2003/96/EC and providing for higher taxation of the most polluting fuels, promotes the use of clean fuels.

The need to steer excise duties on energy products towards green objectives is also discernible in the Italian scenario: the enabling act No. 111/2023 envisages a remodulation of rates calibrated to the

‘environmental impact of each product’, going beyond the current setting independent of the harmful emissions they release.

In conclusion, having established the need for excise reform, it is worth examining its effects and the underlying social issues. Increased taxation on the most polluting products will in fact have a significant economic and social impact, potentially causing energy poverty problems. These effects could be stemmed through the remodulation of taxation on labour and through specific subsidies or incentives (social tariffs or bonuses) in favour of the economically weaker.

**KEYWORDS:** Energy taxation - Energy transition - Excise duties - Directive 2003/96/EC - Economic and social effects.

## **SOMMARIO**

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### **1. Foreword**

Excise duties constitute a harmonised levy aimed at affecting widely consumed and highly induced goods and services such as electricity, gas or transport. In the process of European

harmonisation, however, excise duties suffer from a contradiction linked to their very nature, being at the same time the subject of harmonisation at EU level but also a fundamental instrument of each Member State's internal taxation and revenue for each country's budget. For Italy, they represent the third largest levy in terms of revenue after direct taxes and VAT (amounting to over EUR 35 billion for energy products alone).

The regulatory framework was outlined by a series of Directives for the reorganisation and rationalisation of the entire matter stratified over time until the issuing of Directive 2003/96/EC,<sup>1</sup> implemented in Italy by Legislative Decree No. 26 of 2 February 2007.<sup>2</sup>

The latter broadened the scope of 'products subject to' excise duty, replacing 'mineral oils' with the broader category of 'energy products'

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<sup>1</sup> Directive No. 2003/96/EC of 27 October 2003, so-called 'energy taxation', introduces important principles of energy taxation, "*energy taxation*", introduces important principles on the subject of energy taxation, extending the list of products, other than mineral oils, to be subjected to the harmonised excise duty system, among which, in addition to petroleum derivatives, also coal and petroleum coke, as well as oils of vegetable origin, are included: the purpose of the directive is to reduce carbon dioxide emissions in order to obtain positive environmental effects, to encourage a more efficient use of energy, so as to reduce dependence on its importation. To pursue these objectives, it is considered to further affect the divergence of rates applied by Member States on the products in question by recalibrating the minimum levels, so as to mitigate the resulting distorting effects on competition, by extending harmonised taxation to energy products other than mineral oils and electricity, and to set more appropriate Community minimum levels of taxation. Among the main innovations is the extension of the scope of the aforementioned Directive 92/12/EEC and the repeal of Directives 92/81/EEC and 92/82/EEC, with the replacement of the category of excisable products 'mineral oils' by a much broader category of 'energy products', which is linked to the capacity to produce heat or motion in relation to its energy content rather than its commodity characteristics. In addition, electricity is added to this category, for which excise duty now applies in place of the former (non-harmonised) consumption tax.

<sup>2</sup> Legislative Decree No. 26 of 2 February 2007, in transposing Council Directive 2003/96/EC, implementing the delegation referred to in Law No. 62 of 18 April 2005, so-called "Community Law 2004", with art. 21 Legislative Decree No. 504/1995, broadened the list of '*Products subject to excise duty*', referring to the category of energy products, which included vegetable oils, methyl alcohol, products under code 3824 90 99 (which includes biodiesel), coal, lignite, coke, and natural gas. In implementing the option of taxing the aforementioned products for reasons of environmental policy, paragraph 9 of the new Article 21 of the TUA establishes that, as a general rule, all energy products referred to in paragraph 1 of the same article and intended for the production of electricity are subject to excise duty with the application of the rates provided for in Table A annexed to the TUA.

(vegetable oils, methyl alcohol, coal, lignite, *coke* and natural gas) for which minimum levels were set for the first time.

Community taxation, in order to enable the current differences between national levels of taxation to also be reduced.

The Directive also harmonises at European level the taxation of electricity and thus also that of coal and petroleum *coke*; this means that these products, already provided for in Italy as products subject to non-harmonised excise duty, become subject to harmonised excise duty (so called 'out-of-field'), even though they are intended for carburation or combustion, without prejudice, however, to the application of the provisions relating to the circulation of such products. Directive No. 2008/118/EC (transposed in Italy by Legislative Decree No. 48 of 29 March 2010<sup>3</sup>) also brought about major changes in the regime of the intra-community movement of products subject to excise duty and in the identification of new entities obliged to pay the tax (and to provide the relevant guarantee), which are added to the figure already provided for by the holder of the tax warehouse, they are: the authorised warehousekeeper and the consignor.<sup>4</sup>

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<sup>3</sup> The decree implementing Council Directive 2008/118/EC, issued under the delegated power conferred by Law No. 88 of 7 July 2009, the so-called "2008 Community Law", simplifies procedures and increases transparency in intra-Community trade, introducing for the movement of products subject to excise duty under excise-duty suspension arrangements the Excise Movement and Control Computerised System ("EMCS").

<sup>4</sup> Directive 2018/2002 of the European Parliament and of the Council or amending Directive 2012/27/EU "*establishes a common framework of measures to promote energy efficiency within the Union in order to ensure the achievement of the Union's headline target for energy efficiency of 20 per cent for 2020 and the achievement of the headline target for energy efficiency of at least 32.5 per cent for 2030*". Environmental quality protection is also the subject of COM (2018) 773 final, entitled '*A Clean Planet for All. Europe's long-term strategic vision for a prosperous, modern, competitive and climate-neutral economy*', in which it is denoted that energy is of paramount importance in the transition to a net-zero greenhouse gas-emitting economy and that, with a view to making this transition, the benefits from energy efficiency, which should play a primary role in zero emissions by 2050, should be maximised, renewable energies should be deployed as much as possible, with a view to having an energy system in which primary energy will have to be derived mainly from renewable sources.

It was transfused into a new Council Directive (EU) 2020/262 of 19 December 2019 in the Official Journal of the EU L 58 of 27 February 2020, with effect from 13 February 2023. The issuance of a new Directive (recasting and reordering the text) corresponds, on the one hand, to reasons of clarity due to the changes that have occurred over time and, on the other hand, to requirements to allow the EU Commission delegated and implementing powers in accordance with Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) introduced following the Lisbon Intergovernmental Conference.

As clarified, 'the conditions for levying excise duty on products covered by Directive 2008/118/EC must remain harmonised in order to ensure the proper functioning of the internal market'. Furthermore, the Directive considers 'it is appropriate to specify the excise goods to which the same Directive applies and to refer for this purpose to Council Directives 92/83/EC, 92/84/EC, 2003/96/EC and 2011/64/EU'.

It also states that 'excise goods may be subject to other indirect taxes for specific purposes', but in such cases 'in order not to jeopardise the useful effect of the Union's rules on indirect taxes, Member States should respect certain essential elements of those rules'. In implementing the aforementioned Directive, Legislative Decree No. 180 of 5 November 2021 was adopted, which provides for the first time a definition of 'taxable event', entirely absent in the past. It also marks the alignment of excise duties with customs procedures, in respect of which the EU Parliament by Decision No. 2020/262 of 15 January 2020 enshrined new rules to ensure the effectiveness of computerised movement controls and shorter customs time for excise goods.

The domestic regulations, contained in the 'Testo Unico delle disposizioni legislative concernenti le imposte sulla produzione e sui Consumi' (TUA), enacted by Legislative Decree No. 504 of 26 October 1995 (in Suppl. ord. to G.U. No. 279 of 29 November), reorganised a series of uncoordinated regulatory provisions that had been stratified

over time until then, thus achieving the objective of coordination and harmonisation in the field of excise duties following the completion of the single internal market. The TUA was amended several times over the years to meet the necessary requirements dictated by the European integration process and the new rules that emerged from the new market. One thinks, in fact, of the enlargement of the number of obliged parties, the extensions on the tax concessions for mineral oils and Liquefied Petroleum Gas, better known by the acronym LPG, the changes made to the terms of payment, and the introduction of an ecological and environmental contribution.

## **2. The taxation of energy products in our Country**

As is well known, the level of taxation on energy products is among the highest in Europe (we are the country with the highest taxation on petrol among the 27 EU members, and the second highest on diesel after the Netherlands).

In addition to the economic effects on production and consumption, it is evident how high taxation makes evasion, smuggling and other illicit practices particularly convenient in order to offer the end consumer cheaper conditions at the pump.

In this context, next to interventions on the levy measure, of particular importance is the proposal for a Directive No. 563 *final of* 14 July 2021 redefining the Union's regulatory framework for the taxation of energy products, which marks a change of perspective<sup>5</sup> in

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<sup>5</sup> As clarified in the preamble of the directive, "the new reform aims to realign energy taxation with the EU's green policy objectives, with incentives for energy efficiency, less polluting energy sources and cleaner technologies. Furthermore, as in the current directive, the objective of ensuring fair tax competition between operators in the energy market is maintained upstream of the revision. The aim is also to encourage Member States to increase their revenues from green taxes, which the Commission considers less harmful to growth than taxation on labour. According to the *Taxation Trends in the European Union 2021*, published last June and reporting data for 2015, revenues from environmental taxation account for 5.5 % of the total tax revenue collected in the EU'. In the national sphere, see Legislative Decree no. 387 of 29 December 2003, which transposed Directive 2001/77/EC, and then Legislative Decree no. 28 of 3 March 2011, which transposed the 2009 Directive, as a framework law on energy sources. See R. SANTI, *Energy*

adherence with the climate-energy framework<sup>6</sup> and the “FIT 55” programme, adopting a scale of rates based on the environmental performance of different energy products. The reform is driven by the profound evolution of technologies in the field of energy production, storage and supply, a consequence of the profound transformation of energy markets. The proposal for a directive therefore abandons the apparent neutrality of taxation mechanisms (in fact incentivising the consumption of fossil fuels), replacing the levy model anchored to volume with one linked to energy content. It is precisely the modulation of rates, to be arranged gradually so as to avoid effects.

devastating in the economy, is the right way to pursue the goal of zero emissions, appreciating the close interpenetration between energy transition and taxation, by grouping energy products, used as motor or heating fuels, and classifying them according to their environmental performance, moreover defined in relation to the European *Green Deal* document and the ‘FIT 55’ proposals. According to this modulation, higher rates will apply to conventional fossil-based fuels (transport) and household fuels, while lower rates (2/3 of the maximum rates) will apply to less harmful fuels (LPG and hydrogen of fossil origin) and again to conventional biofuels.

Lower rates may apply to advanced biofuels, bioliquids, biogas and hydrogen from renewable sources. Fundamental to this change of perspective is the concept of ‘environmental performance’, the latter defined with regard to the specific characteristics of the different products also in the light of technological developments and in line with the other proposals of the ‘Fit for 55’ package (revision of the EU ETS and the new Renewable Energy Directive II).

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and the Environment, in B. CARAVITA - L. CASSETTI -A. MORRONE (eds.), *Environmental Law*, Bologna 2016, p. 245.

<sup>6</sup> It sets three main targets to be achieved by 2030: at least 40 per cent reduction in greenhouse gas emissions compared to 1990 levels, at least 27 per cent share of renewable energy, at least 27 per cent improvement in energy efficiency.

This manoeuvre on tax rates should be accompanied by a set of incentives for zero-emission energy production that should make it worthwhile for companies and even individual consumers to choose clean energies also in order to take into account specific needs. In this sense, it is clarified that “different minimum levels of taxation” should be established for motor fuels used for transport,<sup>7</sup> for motor fuels used for meritorious purposes (e.g. in the primary sector), for heating fuels and electricity or for households in economic difficulties (all according to a harmonised EU definition of vulnerability that could also allow for a 10-year exemption from the date of entry into force of the directive under Art. 17(c)). With regard to certain sectors (agricultural, horticultural or aquaculture work as well as forestry), reductions in the level of taxation would be applicable at no less than the minimum values for energy products used for heating and electricity (cf. Art. 17(d)). In line with the objectives of the proposal,

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<sup>7</sup> See Explanatory Memorandum to the proposed Directive, which states that ‘without prejudice to international aviation agreements, energy products and electricity supplied for intra-EU air navigation (with the exception of those supplied for cargo-only flights) and for intra-EU waterborne navigation, including fishing (see Articles 14 and 15) should be taxed. A different level of taxation would apply to the use of energy products and electricity for non-business aviation and intra-EU non-freighter flights. Energy products and electricity used for business aviation and intra-EU pleasure flying should be subject to the *standard* levels of taxation applicable to motor fuels and electricity in the Member States. In order to ensure a smooth implementation of the provisions for non-business aviation and intra-EU non-fleet flights, minimum levels of taxation for the use of motor fuels would be reached during a transitional period of ten years, while sustainable alternative fuels (including sustainable biofuels and biogas, low-carbon fuels, advanced sustainable biofuels and biogas, and renewable fuels of non-biological origin) and sustainable electricity would have a minimum tax rate of zero for ten years. Energy products and electricity used for intra-EU air navigation for the transport of cargo only should be exempt with the possibility for a Member State to tax these fuels for domestic cargo-only flights or under bilateral or multilateral agreements with other Member States. For *extra-EU air navigation*, without prejudice to international obligations, Member States may exempt or apply the same levels of taxation as for intra-EU air navigation, depending on the type of flight. As regards waterborne navigation, considering the risk of refuelling outside the EU, a different level of taxation would apply to the use of energy products and electricity for regular intra-EU maritime and inland waterway navigation services (from an EU port to another EU port), fishing and transport of goods. Energy products and electricity used for other intra-EU waterborne navigation (including inter alia navigation by private pleasure craft) should be subject to the *standard* levels of taxation applicable to motor fuels and electricity in the Member States’.

no distinction should be made between the commercial and non-commercial use of gas oil as motor fuel and the commercial and non-commercial use of heating fuels and electricity. In this sense, the new directive enhances the environmental nature of excise duties, not by chance defined as green, to which should be added *green premiums*, i.e. *bonuses* for the direct use of mini-green energy production and storage plants at the place of use (think of low-enthalpy geothermal, mini-wind, solar and hydrogen mono plants). At the same time, *green premiums* could also be granted for widespread clean energy storage infrastructures and instruments (which tend to be intermittent) such as new-generation flow bacteria, thermal storage systems, storing heat generated during the day or during periods of irradiation to convert it into energy when needed, etc. By balancing taxation instruments on fossil fuels and *green* incentives, fiscal policies can be effective if they are appropriately inserted and coordinated with strategic energy planning that consciously takes on an environmental and value-oriented purpose.

### **3. The environmental impact of energy products**

Given these primary specifications and classifications, it is emphasised that not all energy products have the same impact on the environment, since some of them (such as fossil fuels) produce harmful emissions capable of altering the planet's temperature and climate: the seriousness assumed by the climate crisis makes a cohesive approach in the fight against global warming necessary and no longer procrastinable, not only at the EU level, but also at the global level.<sup>8</sup> Repeating what the Commission stated in COM(2020) 562final, 'well-designed tax reforms can promote economic growth, job creation and resilience, and foster a just transition', it is

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<sup>8</sup> G. TREMONTI, *La paura e la speranza*, Milan, 2008, p. 25, where the author considers that '*if the world is unique, policies cannot be different. If the world is unique, the rules cannot be partial. Either they are general or they are not. In the present time, if they are not general, rules are just nonsense*'.

undeniable that, in this context, tax leverage and financial instruments assume a particularly significant role, as they can promote environmentally friendly production and behaviour.

In line with the 17 goals to be achieved by 2030 (*Sustainable Development Goals*), set out in the Agenda 2030 document<sup>9</sup> for sustainable development approved in 2015 and, subsequently, taken up by the EU institutions, with communication COM(2016)739, *The Sustainable Future of Europe*, through the document called the *European Green New Deal*<sup>10</sup> and, most recently, with communication COM (2021), 550 *final, Fit for 55*,<sup>11</sup> the urgency of an ecological transition that is also an opportunity for economic and social growth is manifested.

In this scenario, the need to intervene in energy matters, encouraging the use of renewable sources and disincentivising waste and pollution, in order to favour the gradual transition from a linear economy, based on maximising production and consumption, to a circular economy, capable of regenerating itself. In fact, as is well known, energy production takes place through combustion processes

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<sup>9</sup> Resolution No. 70/1, adopted by the UN General Assembly on 25 September 2015, *Transforming our world: The 2030 Agenda for Sustainable Development*. This is an Agenda for Action for People, Planet and Prosperity, signed by the governments of the 193 UN member states. Officially launched in 2016, the Agenda aims to guide action up to 2030 by incorporating 17 *Sustainable Development Goals* (SDGs) - a total of 169 *targets*.

<sup>10</sup> COM(2019) 640 *final*. See T. ROSEMBUJ, *Climate Change and the New Green Deal*, in *Rivista giuridica ambiente diritto.it*, no. 4/2019, p. 8; A. GIANNETTI, *Il Green new deal americano e europeo e il Green new deal per l'Italia*, in *Finanziamenti su misura news*, no. 11/2019, p. 8; S. MORATTI, *Green Deal europeo: nuove prospettive per la fiscalità dell'energia nelle politiche di gestione dei rischi climatici*, in *Riv. dir. fin. sc.*, 2020, p. 439.

<sup>11</sup> COM(2021) 550 *final*, Communication from the Commission of 14 July 2021 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *'Fit for 55': realising the EU's 2030 climate target on the path to climate neutrality*. See M.T. MONTEDURO, *Climate change and fiscal policies: social impacts and economic effects of the European 'Fit for 55' package*, in *Riv. dir. fin. sc.*, 2021, p. 447; G. CAVALIERI, B. CELATI, S. FRANCA, M. GANDIGLIO, A. R. GERMANI, A. GIORGI, G. SCARANO, *The 'Fit for 55' unpacked: a multi-disciplinary analysis of the instruments and objectives of sectoral proposals for the decarbonisation of the European economy*, in *Rivista della Regolazione dei Mercati*, 2022, pp. 409 and ff.

of energy raw materials (fossil fuels), mainly consisting of wood, oil and coal. This combustion process results in excess emissions of CO<sub>2</sub>, a climate-altering gas that, produced in excessively high doses to be absorbed naturally, accumulates in the atmosphere causing an abnormal rise in temperature, representing the primary cause of pollution of the planet and the greenhouse effect.

In order to implement a concrete energy transition, among the possible interventions, it is worth mentioning the modification of excise duties on energy products and electricity:<sup>12</sup> in this regard, the

<sup>12</sup> On the subject of excise duties, without any claim to exhaustiveness, see: M. MARESCA, *Le imposte di fabbricazione e le sovrimposte di confine rispetto ai diritti doganali: gli equivoci di una ricostruzione sistematica*, in *Dir. Prat. Trib.*, no. 2/1984, pp. 1104-1105; N. FORTE, *IVA, accise e mercato comune*, Milano, 1990; E. PACE, *Il mondo delle accise: le imposte di fabbricazione. The fiscal monopolies. Le imposte doganali*, in A. Amatucci (ed.), *Trattato di Diritto Tributario*, Padova, 1994, p. 267; V. UCKMAR, *Projects and Possible Solutions of EU Tax Harmonisation*, in *Dir. Prat. Trib.*, no. 1/1995, pp. 9-18; M. CERRATO, *Spunti intorno alla struttura e ai soggetti passivi delle accise*, in *Riv. Dir. Trib.*, no. 1/1996, pp. 215 and ff.; R. SCHIAVOLIN, *Accise*, in *Enc. dir.*, IV agg, Milano, 2000, p. 22; F. PADOVANI, *Le imposte di fabbricazione e di consumo*, in P. Russo (a cura di), *Manuale di diritto tributario*, Milano, 2002, pp. 307 e ss.; F. CERIONI, *La disciplina delle accise in Italia*, in F. CERIONI, E.P. FORTE, T. PALACCHINO (a cura di), *Il diritto tributario comunitario*, Milano, 2004, pp. 745 e ss.; A.F. URICCHIO, *Delega al governo per la riforma dei sistemi tributario: la riforma delle accise*, in G. Marino (ed.), *I profili internazionali e comunitari della nuova imposta sui redditi delle società*, Milano, 2004, pp. 147 e ss.; G. CIPOLLA, voce *Accise*, in *Dizionario di dir. pub*, directed by S. Cassese, Milano, 2006, pp. 72 e ss.; C. VERRIGNI, *Le accise*, in A. Di Pietro (coordinato da), *Lo stato della fiscalità nell'Unione Europea. L'esperienza e l'efficacia dell'armonizzazione*, II, Roma, 2003, pp. 485 e ss.; ID, *Le accise nel mercato unico europeo*, in *Riv. Dir. Fin. Sc. Fin.*, 2007, I, p. 251; ID, *Le accise nel sistema dell'imposizione sui consumi*, Torino, 2017; M. SCUFFI, *Diritto doganale e delle accise. Gli orientamenti della giurisprudenza di legittimità*, in *Il Fisco*, no. 19/2008, pp. 211 e ss.; A. ELIA, *L'accisa come imposta dalla natura unitaria e di preminente competenza statale*, in *Dir. Prat. Trib.*, n. 5/2010, pp. 1083 e ss.; L. PEVERINI, *Presupposto, soggettività passiva e capacità contributiva nelle accise: riflessioni a margine di una recente sentenza della Corte Costituzionale*, in *Riv. Dir. Trib.*, n. 5/2011, pp. 449 e ss.; G. FALSITTA, *Le accise (imposte di fabbricazione e di consumo)*, in G. FALSITTA, *Manuale di diritto tributario - Parte speciale. Il sistema delle imposte in Italia*, Milanofiori Assago (MI) - Padova, 2018, pp. 1071 e ss.; M. LOGOZZO, *Le accise: inquadramento sistematico e questioni aperte*, in *Riv. Dir. Trib.*, no. 2/2018, pp. 129-159, where the author qualifies such indirect taxes as 'an enigmatic sector and therefore difficult to understand'; N. DIMITRI, *Il riordino del sistema unico di tassazione sul consumo: brevi cenni sulla Direttiva 2020/262/UE*, in *Innovazione e Diritto*, no. 1/2022, pp. 82-86. With particular regard to excise duties on energy products and electricity, see F. CERIONI, *I prodotti energetici utilizzati dalle imprese*, in *L'IVA*, 2004, pp. 520 e ss.; ID, *Il d.lgs. 2 febbraio 2007, n. 26: la riforma della tassazione dei prodotti energetici e dell'elettricità*, in *Riv. Dir. Trib.*, 2008, pp. 49 e ss.; P. ORSINI, *La tassazione indiretta*

European Commission's document of 11 December 2019 No. 640 (*European Green Deal*) expressly reiterates their central role in the transition towards a greener and more sustainable Europe, in compliance with the climate targets to be achieved by 2050.<sup>13</sup>

#### **4. The European excise matrix and the harmonisation process: profiles of misalignment between Member States**

Before proceeding to examine their role in the energy transition, it should be pointed out that excise duties are a set of specific indirect taxes of a special nature — because they affect only certain products identified in advance by the legislature — that apply to the manufacture or consumption of certain categories of goods, the economic burden of which is usually shifted to the final consumer through the mechanism of reclaiming the tax.<sup>14</sup>

These taxes have been involved, over the years, in a gradual process of harmonisation<sup>15</sup> which, by introducing a common regime to

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*dei prodotti energetici*, in *Trib. loc. reg.*, 2004, p. 684 ss.; L. SALVINI, *Questioni attuali sulla fiscalità del settore energetico*, in *Rass. Trib.*, 2007, p. 1670 ss.; B. SORRENTINO, E. PASCA, *Le accise. Prodotti energetici ed elettricità*, Milano, 2008; U. SIRICO, *Le accise sui prodotti energetici e sull'elettricità*, Torino, 2014; A. ELIA, *Accise su prodotti energetici ed elettricità (2010-2013). Parte 1*, in *Dir. Prat. Trib.*, no. 2/2014, pp. 331 and ff; *id.*, *Accise su prodotti energetici ed elettricità (2010-2013). Parte seconda*, in *Dir. Prat. Trib.*, no. 4/2014, pp. 676 and ff.

<sup>13</sup> In these terms, A.F. URICCHIO, *Riordino della disciplina di contrasto dell'evasione di iva e accise sulla cessione di carburanti*, in *Riv. Tel. Dir. Trib.*, 28 March 2024.

<sup>14</sup> On the mechanism of recourse in the matter of excise duties, see F. RANDAZZO, *Le rivalse tributarie*, Milan, 2012. See also M. ALLENA, *Gli effetti giuridici della traslazione delle imposte*, Milan, 2005, pp. 15 and ff.

<sup>15</sup> Based on the assumption that already in Article 99 of the Treaty of Rome, signed in 1957, establishing the European Economic Community (EEC Treaty), it was provided that 'the Commission shall examine how the laws of the individual Member States concerning turnover taxes, excise duties and other forms of indirect taxation may, in the interest of the common market, be harmonised', the first step towards the harmonisation of excise duties was taken by Council Directive 72/464/EEC of 19 December 1972 (in OJ No 303 L of 31 December 1972, p. 1) on tobacco products.), concerning tobacco. Twenty years later, Council Framework Directive 92/12/EEC of 25 February 1992 (OJEC No 76 L of 23 March 1992, p. 1), laying down general rules on excise duties; Directives 92/78/EEC, 92/79/EEC and

be applied to different products — tobacco and tobacco products, mineral oils, gas, electricity, petroleum, alcoholic beverages — and by unifying the national laws of the Member States, at the same time leaves wide discretionary powers with regard to the definition of substantive aspects, such as rates<sup>16</sup> and facilitating regimes,<sup>17</sup> and procedural aspects, such as assessment, collection and refunds.

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92/80/EEC on manufactured tobacco; and Directives 92/81/EEC and 92/82/EEC on mineral oils were issued. Also in the process of harmonisation, reference is made to Directive 2008/118/EC -subsequently amended by Directive No. 2010/12/EU of 16 February 2010- which repealed Directive 92/12/EEC, as of 1 April 2010. Lastly, in addition to EU Regulation No. 389/2012 (concerning administrative cooperation in the field of excise duties), it is worth mentioning Directive 2020/262/EU of 27 February 2020, which, transposed in Italy by Legislative Decree No. 180/2021, provides for a further general reorganisation of the harmonised excise system, envisaging an increasingly broader use of information technology in the fight against transnational frauds and in the implementation phase of the tax. Finally, it is necessary to emphasise that the tax harmonisation process finds its basis in Article 113 TFEU (ex Article 93 TEC): this article provides that the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, shall adopt provisions for the harmonisation of national tax laws. This process, in particular, does not only concern excise duties, but also other indirect taxes (customs duties and VAT), since these, by affecting trade, affect the founding aims of the EU, i.e. the creation of a free trade area with the elimination of tax obstacles to internal trade transactions and the realisation of a uniformly regulated common market in relations with third countries. Heterogeneous indirect taxation, in fact, would have been a danger to the EU integration process, as individual member states could favour domestic production to the detriment of foreign production. For an examination of excise harmonisation, without any claim to being exhaustive, see: E. GERELLI, *Il problema dell'abolizione delle frontiere fiscali*, in AA.VV., *Problemi fiscali della Comunità economica europea*, Milan, 1961, pp. 45 and ff.; M. NALDINI, *L'armonizzazione delle accise: problemi strutturali e normativi*, in A. Majocchi, G. Tremonti (eds.), *Le imposte del 1992, aspetti fiscali del completamento del mercato unico europeo*, Milano, 1990, pp. 153 e ss.; A. RAIMONDO, *L'armonizzazione delle accise*, in *all. Fisco*, no. 1/1991; A. MAJOCCHI, *L'armonizzazione europea in campo fiscale*, in *Il politico: Rivista di scienze politiche*, Vol. 58, No. 166.3 (Jul-Sept. 1993), pp. 395-414; M. MARÈ, G. VITALETTI, *La tassazione dei consumi nell'Unione europea*, in *Il Fisco*, 1996, pp. 3927 and ff.; F. FICHERA, *L'armonizzazione delle accise*, in *Riv. dir. fin.*, no. 1/1997, p. 216; S. CARMINI, *Il diritto tributario e la sua attuazione in Italia*, Padova, 2002, pp. 327 e ss.; P. BORIA, *Diritto tributario europeo*, Milano, 2015, pp. 215 e ss.

<sup>16</sup> On this point, see the clear observations of M. LOGOZZO, *Le accise: inquadramento sistematico e questioni aperte*, op. cit.: “as far as rates are concerned, a very attenuated harmonisation has been carried out (in application of the principle of subsidiarity, which guarantees autonomous room for manoeuvre to the Member States), based on minimum rates set at a very low level, from which the Member States are free to make their own choices, without prejudice to the

Therefore, while there is a need to introduce common and shared regulations, mitigating obstacles to the free movement of goods and services — with a view to ensuring the proper functioning of the economy and the market — the provision, at EU level, of the option for individual Member States to introduce or maintain different excise taxes or to provide for specific tax exemptions and reductions — in order to pursue domestic objectives or implement specific economic-financial manoeuvres<sup>18</sup> — justified by the purpose of reducing the negative effects that the approximation of these taxes would have on the budgets of the States, only confirms how these indirect taxes, despite the harmonisation process, remain a fundamental instrument of each Member State's domestic taxation and budget revenue: in this regard, suffice it to say that, for Italy, they represent the third largest levy in terms of revenue after direct taxes and VAT.

While recognising the high revenue, guaranteed to the individual Member States by these taxes, which hinders full homogeneity in regulation -which would probably result in a decrease in national revenue — by abandoning the application of excise duties solely for revenue reasons — where the possible disincentive effect with respect to harmful environmental behaviour was only indirect with respect to the tax requirement — the environmental connotation — also confirmed by the case law<sup>19</sup> — and the aptitude of these indirect

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*possibility granted to them to provide for tax exemptions and reductions, taking into account the need to minimise the negative effects on the budget. However, significant differences remain, especially with regard to rates and relief schemes, which affect product prices and competition. In this respect, we are far from a true single market'. See also S. WEATHERILL, *The Fundamental Question of Minimum or Maximum Harmonisation*, in S. Garben and I. Govaere (eds), *The Internal Market 2.0* (Oxford: Hart Publishing, 2020).*

<sup>17</sup> Cf. P. SELICATO, *Agevolazioni fiscali in materia di accise su prodotti energetici. Problematiche applicative*, in *Ultra Limes*, 2014, pp. 1 and ff.

<sup>18</sup> On this point, F. FICHERA, *L'armonizzazione delle accise*, *op. cit.*, p. 218, and F. PADOVANI, *Le imposte di fabbricazione e di consumo*, *op. cit.*, pp. 307 and ff., according to whom excise duties constitute the main instrument to counter possible fluctuations in the finances of States, linked to the need to cope with contingent expenses.

<sup>19</sup> CJEU, 18 January 2007, Case C-313/05, *MaciejBrzeziński and DyrektorIzbyCelnejWarszawie*, [2007] ECR I-00513, concerning excise duties on

taxes to pursue extra-taxation instances of sustainability in production and consumption and to combat climate change increasingly emerges.<sup>20</sup>

Therefore, starting from the assumption that States are called upon to adopt harmonised legal instruments at a European level that modulate the tax levy in accordance with the well-known 'polluter

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second-hand cars; CJEU, 17 July 2008, Case C-226/07, *FlughafenKöln/Bonn GmbH v HauptzollamtKöln*, [2008] ECR I-05999; CJEU, 10 September 2009, Case C-201/08, *PlantanolGmbH & Co*, I-05999; CJEU, 10 September 2009, Case C-201/08, *PlantanolGmbH & Co. KG v Hauptzollamt Darmstadt*, [2009] ECR I-08343. Most recently, see CJEU, Section V, Judgment C-833/21, 23 June 2023 where the Court acknowledges that: "...national legislation providing for the taxation of coal used for the production of electricity satisfies the condition laid down in that provision, according to which the tax must be introduced 'for reasons of environmental policy' if there is a direct link between the use of the proceeds of the tax in question and its purpose or if that tax, without pursuing a purely budgetary objective, is designed, as regards its structure, in particular the taxable matter or the rate of tax, to influence the behaviour of taxpayers in a way which makes it possible to ensure better protection of the environment ...". In other words, taxation (consumption tax, excise duty) of a polluting source of energy is possible provided that the tax levy in question is based on: (a) a direct link between the use of the revenue from the tax in question and its purpose, or (b) if that tax is designed, with regard to its structure, in particular the taxable matter or the tax rate, in such a way as to influence the behaviour of taxpayers. In particular, concerning the 'direct link' between tax revenue and environmental purpose and the ability to influence taxpayers' behaviour, see CJEU, Judgment 5 March 2015, *Statoil Fuel & Retail*, C-553/13, paragraph 38; CJEU, Order 7 February 2022, *Vapo Atlantic*, C-460/21, EU:C:2022:83, paragraph 24.

<sup>20</sup> In these terms, R. PERRONE CAPANO, *L'imposizione e l'ambiente*, in A. Amatucci (ed.), *Trattato di Diritto Tributario*, annuario, 2001, p. 168, where the Author states that excise duties assume "through a remodulation of the levy that orients consumption in the direction of favouring the least polluting energy sources, both the characteristic of environmentally oriented taxes and, through appropriate adjustments in relation to the taxable capacity affected, that of real environmental taxes"; P. PURI, *Breve esame delle scelte tributarie italiane per favorire le produzioni energetiche di minore impatto ambientale*, in G. Bonardi, C. Patrignani (ed.), *Energia, fiscalità, incentivi, agevolazioni*, Milano, 2013, pp. 203 e ss.; *id.*, *La produzione dell'energia tra tributi ambientali e agevolazioni fiscali*, in *Dir Prat. Trib.*, no. 2/2014, pp. 10309 and ff.; R. ALFANO, *Le accise sull'energia: quadro europeo e prospettive nazionali*, in *Riv. Dir. Trib. Inter.*, 2015, p. 138; C. VERRIGNI, *Le accise nel mercato unico europeo*, *op. cit.* p. 251, where the author emphasises that "... excise duties, by virtue of their structure, characterising the taxable event, fully lend themselves to configure environmental taxes, given that the European Union has identified taxes on pollutant emissions and pollutant products as typical environmental taxes"; A. ELIA, *La Carbon tax e la sua applicazione proporzionale al potere inquinante dei combustibili*, in *Dir. Prat. Trib.*, no. 1/2012, pp. 101 and ff, where the A. argues that: "...excise duties, with their nature as taxes on

pays' principle,<sup>21</sup> in pursuit of the environmental objectives recognised by the Treaties and the case law of the Court of Justice, the connection between excise duties and *green-oriented* policies deserves attention.<sup>22</sup> Excise duties, in fact, despite the tendency of inelasticity of the relative demand,<sup>23</sup> through the assumption, represented not by the manufacture/consumption per se, but by the manufacture/consumption of highly polluting products — in which the

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*consumption and production harmonised at community level and endowed with a unitary and state structure at national level, can be conceived as functional to the joint achievement of fiscal and environmental policies, while remaining within the framework traced by the European legal systems and those of the member countries; as a result, this category of taxes requires an assessment always characterised by the effort to consider the peculiarities of the production cycle to which it refers and, likewise, constantly assessed with respect to the environmental taxation objectives that may be attributed...";* A.F. URICCHIO, *Italy. Le politiche tributarie in materia ambientale*, in A. Di Pietro (ed.), *La fiscalità ambientale in Europa e per l'Europa*, Bari, 2016, pp. 491-492; L. DIBILIO, *Le accise quale strumento di tassazione dell'energia in funzione ambientale*, in A. Bonomo, L. Tafaro, A.F. Uricchio (eds.), *Le nuove frontiere dell'eco-diritto*, Bari, 2021, pp. 393 and ff. See also S. CNOSSEN, *Excise Taxation to Preserve Health and to Protect the Environment: A Review*, in *Canadian Tax Journal*, no. 70/2022, pp. 159-184.

<sup>21</sup> The "polluter pays" principle, which has great relevance in the context of European environmental policy, can be formulated as follows: the party or parties responsible for the pollution are obliged to pay for the costs of dealing with the pollution produced by reducing, preventing or eliminating the pollution caused. On this principle, without any claim to exhaustiveness, see: M. MELI, *Le origini del principio chi inquina paga e il suo accoglimento da parte della CEE*, in *Rivista Giuridica dell'Ambiente*, 1989, pp. 217 and ff.; G. BUTTI, *L'ordinamento italiano e il principio chi inquina paga*, in *Contratto e impresa*, 1990, p. 561; A. VENCHIARUTTI, *Il Libro Bianco sulla responsabilità civile per danni all'ambiente*, in *Quaderni della rivista giuridica dell'ambiente*, no. 12/2002; F.M. PALOMBINO, *Il significato del principio "chi inquina paga" nel diritto internazionale*, in *Rivista Giuridica dell'Ambiente*, no. 5/2003, pp. 871 e ss.; C. VERRIGNI, *La rilevanza del principio europeo "chi inquina paga" nei tributi ambientali*, in *Rass. Trib.*, 2003, pp. 1621 e ss.; P. SELICATO, *Imposizione fiscale e principio "chi inquina paga"*, in *Rass. Trib.*, 2005, pp. 1160 e ss.; M. P. GIRACCA, *Il danno ambientale e il diritto comunitario*, in R. Ferrara (ed.), *La tutela ambientale*, Turin, 2006, pp. 216-222.

<sup>22</sup> A.F. URICCHIO, *Le politiche tributarie in materia ambientale*, in A. Di Pietro (ed.), *La fiscalità ambientale in Europa e per l'Europa*, Bari, 2016, pp. 491 and ff., where the author underlines that 'excise duties are well suited to hit polluting emissions or the consumption of products with a high environmental impact while pursuing the protection of the ecosystem. Harmonised taxation by means of excise duties, in fact, makes it possible to pursue an extra-tax purpose such as environmental protection through exemption measures or a tightening of the rate applied'; *id.*, *Capacità contributiva e "agenda" del terzo millennio: dalla tutela dell'ambiente all'economia circolare*, in V. Mastroiacovo, G. Melis (eds.), *Il diritto costituzionale tributario nella prospettiva del terzo millennio*, Turin, 2022, pp. 131-137.

harmful effect becomes the parameter for determining the *quantum* of the tax — and through a system of differentiated, but well-designed, rates, lend themselves to the protection of environmental instances, to orient consumption in an environmentally friendly manner.

## **5. The role of excise duties in the European energy transition: the necessary revision of Directive 2003/96/EC**

In order to achieve the European Union's ambitious climate, energy policy and anti-pollution goals, it seems no longer possible to postpone the amendment of Directive No. 2003/96/EC (*Energy Taxation Directive* - ETD)<sup>24</sup> of the Council that provides for minimum

<sup>23</sup> R. SCHIAVOLIN, *voce Accise*, *op. cit.*, pp. 22 and ff.

<sup>24</sup> On this point, M. VILLAR EZCURRA, *State Aids and Taxation in the Energy Sector: Looking for a New Approach*, in M. Villar Ezcurra, *State aids, taxation and energy sector*, Navarra, 2017, where the author points out that “the ETD does not consistently help pursuing environmental (and, in particular, climate change) objectives. Minimum tax rates and exemption clauses do not always follow an environmental logic. For instance, minimum rates are not defined by taking into account the emissions intensity of energy products. Consequently, higher taxes may be imposed —counterintuitively — on renewable energy sources than on fossil fuels”; A. COMELLI, *La tassazione ambientale, nella prospettiva europea, oltre la crisi economica e sanitaria innata dal Covid-19*, in *Dir. Prat. Trib.*, no. 3/2022, pp. 791 and ff.; ID, *Profili europei della tassazione ambientale*, in *Dir. Prat. Trib.*, no. 6/2023, pp. 2264 and ff.; A.F. URICCHIO, *Crisi energetica, transizione ecologica e ruolo della fiscalità*, in *Rass. Trib.* no. 4/2022, pp. 883-884. The Directive of 27 October 2003, no. 2003/96/EC, the so-called ‘Energy Taxation Directive’, introduced important principles in the field of energy taxation, expanding the list of products, other than mineral oils, to be subject to the harmonised excise system, among which, in addition to petroleum derivatives, also coal and petroleum coke, as well as oils of vegetable origin. The aim of the directive is to reduce carbon dioxide emissions, in order to achieve positive effects on the environment and to encourage a more efficient use of energy, so as to reduce dependence on its importation. Among the main innovations is the extension of the scope of Directive 92/12/EEC and the repeal of Directives 92/81/EEC and 92/82/EEC, with the replacement of the category of ‘mineral oils’ within the excise products by a much broader category consisting of ‘energy products’ (vegetable oils methyl alcohol, coal, lignite, coke and natural gas), for which Community minimum levels of taxation were set for the first time, in order to also reduce the existing differences between national levels of taxation. In addition, electricity is added to this category, for which excise duty now applies in place of the former (non-harmonised) excise tax. In Italy, this directive was transposed, belatedly, by Legislative Decree No. 26 of 2 February 2007, which, implementing the delegation referred to in Law No. 62 of 18 April 2005, so called “Community Law 2004”, with Art. 21 Legislative Decree No. 504/1995, broadened

rates of taxation on energy products and electricity, within the Union, with a view to “ensuring the proper functioning of the EU single market for energy and avoiding distortions of trade and competition that could result from large differences between national tax systems”. It is no coincidence, on the other hand, that the programmatic points of the European *Green New Deal* also include the revision of the aforementioned Directive, and that the European Commission itself,<sup>25</sup> while recognising the positive effects produced when it came into force, has highlighted its profound inadequacy with respect to the environmental commitments set at EU level.

Through Directive 2003/96/EC, in order to introduce a system of taxation of energy products that was more compatible with environmental protection, also in light of the ratification of the Kyoto Protocol, on the one hand, a broadening of the range of products subject to taxation was implemented, and on the other, a substantial increase (approximately 25%) of the minimum rates of excise duty compared to those provided for by the repealed Directive 92/82/EEC.

To date, however, this directive no longer appears to be in line with the climate and energy objectives of the EU because, on the one hand, it does not adequately promote the reduction of greenhouse gas emissions and, on the other hand, it favours the use of fossil fuels, allowing for widely diverging national rates and a wide range of exemptions and reductions even below the minimum rate. This

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the list of ‘Products subject to excise duty’, referring to the category of energy products, which includes vegetable oils, methyl alcohol, products under code 3824 90 99 (which includes biodiesel), coal, lignite, *coke*, and natural gas. For a more in-depth discussion of Directive No. 2003/96/EC and energy taxation, see P. ORSINI, *L’armonizzazione dell’imposizione indiretta sulla produzione e sui consumi*, in S. CIOTTI, R. GALDI, P. ORSINI, A. PIRI, M. SEBASTIANI, U. SIRICO, *Le accise sui prodotti energetici e sull’elettricità*, Torino, 2014, pp. 9 e ss.; E. TRAVERSA, S. WOLFF, *Energy Tax Policy in An EU Context: Non-discrimination, Free Movement and Tax Harmonization*, in M. Villar, P. Pistone (eds.), *Energy Taxation, Environmental Protection and State Aids*, Ibfd, 2016, pp. 397 and ff.; L. DEL FEDERICO, S. GIORGI, *State Aid for Eco-friendly Energy Sources: The Balancing Test Applied to Energy Taxes*, in M. Villar (ed.), *State Aids, Taxation and the Energy Sector*, Aranzadi, 2017, pp. 297 and ff.

<sup>25</sup> SWD (2019) 329 final of 11 September 2019, *Restructuring the Community framework for the taxation of energy products and electricity*.

misalignment, in the determination of rates by Member States, not only undermines, to a large extent, the smooth functioning of the market for energy products and electricity,<sup>26</sup> but, above all, leads to a significant lack of homogeneity, which can no longer be reconciled with the climate objectives pursued in the European landscape.

In fact, the first sore point of the directive under review is the excise tax base, which is made up of the quantity of energy consumed: the current legal framework implies that the measure of excise duties on energy products is set entirely independently of the characteristics in terms of harmful emissions. Secondly, the aforementioned directive, pursuing a clear intent of facilitation, grants Member States the right to set rates lower than the ordinary rate, provided that distinctions are made according to the commercial or non-commercial use of the goods subject to excise duty, and the reductions envisaged favour certain production sectors (such as agriculture and fishing), but are not intended to promote virtuous consumption in environmental terms.<sup>27</sup>

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<sup>26</sup> Cf. A.F. URICCHIO, *L'impiego della leva fiscale a sostegno dello sviluppo sostenibile*, in AA.VV., *Elaborazione di un modello di applicazione dei principi e degli strumenti dell'ecologia industriale ad un'area vasta*, Bari, 2012, p. 245, where the author argues that: "The progressive growth of EU harmonisation in the area of indirect environmental taxation seems therefore desirable, because it will probably be able to combine important effects of implementing the principle of non-discrimination (through the affirmation of the right of equal treatment to all production factors and the prohibition of differentiations aimed at favouring national factors over those from other member states) with the same effects of environmental protection (thanks to the generalised and uniform introduction of targeted indirect taxation interventions that affect harmful and polluting products or industrial processes)".

<sup>27</sup> In these terms, L. SALVINI, *La tassazione dell'energia*, in *Atti dei convegni lincei, Una nuova politica economica e tributaria per l'Unione europea*, Atti del convegno del 27 maggio 2022, Roma, 2022, p. 190; M.C. FREGNI, *Politiche fiscali ambientali, osservazioni tra pandemia e crisi geopolitiche*, in *Rass. Trib.*, no. 1/2022, pp. 165-166. On this point, R. ALFANO, *Le accise sull'energia: quadro europeo e prospettive nazionali*, *op. cit.*, p. 141, where the author observes how from the outset Directive 2003/96/EEC already considered the volume of the product, instead of its energy content, as the parameter for calculating excise duty, and did not differentiate the rates for renewable sources from those for ordinary fuels, fuels and energy products.

In other words, the European legislator expressly provides that a reduced rate, determined by the individual Member State, is applicable to energy products if they are intended for commercial use or if the use is necessary to carry out a stage of the economic cycle of production and/or exchange of goods and services. Conversely, if the use relates to final consumption, the applicable rate is the standard rate.

While the intention to mitigate the intensity of the tax levy in the phases of the economic cycle that precede final consumption, by emphasising the instrumentality of the use of the energy product, seems appreciable, the distinction between the two levels of taxation does not appear to be in line with the climate objectives pursued.<sup>28</sup>

Only by calculating the minimum levels of taxation by grouping energy products and electricity into categories and classifying these products according to their respective environmental performance, will it be possible to achieve the goals the Commission set itself in the European *Green Deal*, by allowing Member States to tax the most polluting fuels, making them less and less cost-effective due to the higher tax burden. Thus, the rates applied at national level, in addition to taking into account the minimum values, will have to reflect the differentiation scales introduced by the European framework. In addition, it is likely that a different configuration of the assumption would constrain the discretion of the national legislator, whose margins of manoeuvre in providing for tax exemptions would be stricter than an environmental excise duty ‘in the strict sense of the word’.

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<sup>28</sup> As pointed out by Assessment Document No. 6, Office of Impact Assessment of the Senate of the Republic, *Polluters, do they pay?* of December 2017: ‘The comparison of environmental tax revenues paid by residents and external costs shows that: - households pay 70% more of their external environmental costs; businesses pay 26% less. Within economic activities, the agriculture and industry sectors pay 93% and 27% less of their environmental external costs, respectively; the service sector pays 57% more.’

Applying taxation commensurate with the harmfulness of the product would, consequently, imply that tax concessions would also be arranged taking into account the polluting capacity of the product.

The need to amend Directive No. 2003/96/EC was recently reflected in proposal for a directive COM (2021) 563 *final*, put forward by the Commission on 14 July 2021<sup>29</sup> — not yet approved by the Council to date — which largely rewrites the text of Directive No. 2003/96/EC and by providing for higher taxation of the most polluting fuels (in particular fossil fuels) promotes and encourages the production and use of clean fuels, such as renewable hydrogen and biofuels.<sup>30</sup>

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<sup>29</sup> It should be noted that the European Commission had already presented, on 13 April 2011, COM(2011), p. 169, a proposal to amend the Energy Taxation Directive in order to make the necessary additions to ensure greater uniformity in taxation and to ensure the achievement of the goals of reducing energy consumption in the EU and the increased use of alternative energies. The 2011 proposal, however, after much resistance at the institutional level, was not followed through as the Member States could not find the political agreement necessary for its approval and, in 2015, it was withdrawn. In 2017, the Commission decided to launch a new process of evaluation of the directive, initiating a broad public consultation to try to identify a set of solutions, which could be agreed upon as much as possible. The consultation ended in September 2019 with the Commission producing the document *Evaluation of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity*.

<sup>30</sup> The preamble of the directive states that “*the new reform aims to realign energy taxation with the EU’s green policy objectives, with incentives for energy efficiency, less polluting energy sources and cleaner technologies. Furthermore, as in the current directive, the objective of ensuring fair tax competition between operators in the energy market is maintained upstream of the revision. The aim is also to encourage Member States to increase their revenues from green taxes, which the Commission considers less harmful to growth than taxation on labour. According to the Taxation Trends in the European Union 2021, which was published last June and shows figures for 2019, revenues from environmental taxation account for 5.9 per cent of the total tax revenue collected in the EU*”. Again, according to the explanatory memorandum, the existing framework ‘*on energy taxation contributes only to a very limited extent to the broader economic, social and environmental policy objectives of the EU. The Energy Taxation Directive is at least partly consistent with policy efforts to promote the use of renewable energy and increased energy efficiency, but is less consistent with regard to the reduction of greenhouse gas and other gas emissions, energy diversification or energy independence and security. The main reasons identified for this lack of consistency include the failure to take into account the energy content and CO2 emissions of energy products and electricity, (too) low minimum levels of taxation and (too) numerous exemptions. For the same reasons, the Energy Taxation Directive does*

## **6. Excise duties and the fight against climate change in the Italian legal system: the enabling Act for tax reform of 9 August 2023, no. 111**

The need to orient excise duties on energy products and electricity towards the realisation of the objective of penalising the use of fuels likely to produce greenhouse gases and, correlatively, favouring the production of clean energy, can be seen not only in the European panorama, but also in the Italian national context.<sup>31</sup> In this regard, already the enabling act for the reform of the national tax system of 7 April 2003, No. 80 — partially implemented — provided, as the first guiding criterion for the reorganisation of excise duties ‘the protection

*not contribute to the decarbonisation of transport and the reduction of air pollution emissions... The Energy Taxation Directive also does not distinguish between renewable and carbon-intensive sources of electricity and does not take into account the environmental performance of biofuels. The provisions of this directive on the taxation of biofuels are therefore not in line with EU energy, climate change and environmental policies’.*

<sup>31</sup> It is necessary to specify that the national regulations on excise duties are contained in Legislative Decree No. 504 of 26 October 1995, *Consolidated Text of Legislative Provisions Concerning Taxes on Production and Consumption and Related Criminal and Administrative Sanctions* (T.U.A.). The Consolidation Act, enacted on the basis of the delegation contained in Law No. 427/1993, is divided into four titles: the first is dedicated to the general regulation of excise duties (Articles 1-51); the second deals with electricity (Articles 52-60); the third with rules on other indirect taxes (Articles 61 and 62b); the last, on the other hand, contains miscellaneous and final provisions (Articles 63-68). Finally, there follows an annex, listing the products subject to excise duty and the rates in force, as well as a table, indicating the uses of energy products that entail exemption from excise duty or the application of a reduced rate. Over the years, the TUA, having to adapt to regulatory changes in Europe, has undergone numerous amendments and updates. Among the most important changes are those made by Legislative Decree No. 26 of 2 February 2007, which, in transposing Directive 2003/96/EC, amended Articles 21 and 22 (energy products subject to excise duty) and 26 (special provisions for natural gas), so as to bring all energy products, including natural gas, into the area of harmonised taxation, instead of only mineral oils, which were previously covered, and by Legislative Decree No. 26 of 5 November 2021, which amended Articles 21 and 22 (energy products subject to excise duty) and 26 (special provisions for natural gas), so as to bring all energy products, including natural gas, into the area of harmonised taxation, instead of only mineral oils, which were previously covered. Legislative Decree No. 180 of 5 November 2021, transposing Directive 2020/262/EU, by means of which the cases giving rise to the chargeability of the tax were broadened and various hypotheses were provided for in order to comply with the guidelines expressed by the Court of Justice of the European Union.

of health and the environment by favouring the use of environmentally friendly products'. Again, in 2014, the delegated tax reform law No. 23 of 11 March contemplated a revision of the regulation of excise duties on energy products according to carbon content. Article 15<sup>32</sup> of the aforementioned law, in particular, delegated the Government to revise the regulation of excise duties on energy products and electricity, also according to carbon content and nitrogen and sulphur oxide emissions. This, however, only followed a reform of the sector at the EU level, anchoring the entry into force of the delegated decrees to the transposition of the EU legislation set out in the proposal for a directive COM (2011) 169*final* of 13 April 2011<sup>33</sup> that aimed to restructure the EU framework for the taxation of

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<sup>32</sup> Art. 15 of the Tax Proxy Law (L. 11 March 2014, No. 23): 1- In view of the policies and measures adopted by the European Union for sustainable development and the *green economy*, the Government is delegated to introduce, by means of the legislative decrees referred to in Article 1, new forms of taxation, in connection with the taxation already in force at regional and local level and in compliance with the principle of fiscal neutrality, aimed at orienting the market towards sustainable modes of consumption and production, and at reviewing the regulation of excise duties on energy products and electricity, also according to carbon content and nitrogen and sulphur oxide emissions, in accordance with the principles that will be adopted with the approval of the proposal to amend Directive 2003/96/EC referred to in Commission Communication COM (2011) 169 of 13 April 2011, providing, in pursuit of the purpose of the double dividend, that the increased revenue be allocated as a priority to the reduction of taxation on income, in particular on labour generated by the *green economy*, to the dissemination and innovation of low-carbon technologies and products, and to the financing of sustainable production and consumption models, as well as to the revision of the financing of subsidies for the production of energy from renewable sources. The starting date of the effects of the provisions contained in the legislative decrees adopted to implement this article shall be coordinated with the date of transposition of the harmonised framework established by the aforementioned proposal for a directive in the Member States of the European Union.

<sup>33</sup> The proposal for a directive COM (2011) 169 *final* of 13 April 2011 envisaged, *firstly*, the taxation of energy sources not only on the basis of their energy content, but also according to the carbon dioxide emissions released into the atmosphere. Specifically, it provided for a levy consisting of two components: the first concerning carbon dioxide emissions calculated in euro/tonne of CO<sub>2</sub> released into the atmosphere (20 €/t of CO<sub>2</sub>) and the second calculated in *euro/Gigajoule* based on the calorific value of energy products (9.6 €/Gj for motor fuels and 0.15 €/Gj for heating fuels). *Secondly*, the aforementioned draft directive envisaged an expansion of the scope of renewable energy sources to include certain biofuels and bioliquids. The draft also mentioned the possibility of repealing both the distinction between commercial and private uses of energy products, and the possibility for

energy products and electricity. This choice, specifically, had become necessary in order not to penalise Italian companies compared to European ones in terms of competitiveness. The 2011 proposal for a directive, however, despite the positive opinion of the European Parliament and the European Economic and Social Committee, after four years of negotiations, was not followed up due to the lack of political agreement, necessary for its approval, among the Member States and, consequently, Article 15 of the tax delegation did not find concrete implementation in the delegated decrees.

Lastly, Article 12 of the enabling act for the tax reform of 9 August 2023, No. 111,<sup>34</sup> which expresses a wide-ranging reform design, with reference to the excise duty on energy products and electricity, provides for a remodulation of the rates,<sup>35</sup> so as to overcome their current setting independent of the harmful emissions resulting from their production. More specifically, Article 12 under consideration contemplates a new determination of the rates, calibrated on the ‘environmental impact of each product’, with a view to progressively

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Member States to set taxation at zero in agriculture, horticulture, fish farming and forestry.

<sup>34</sup> Article 12 of Delegated Law no. 111/2023, entitled *Principles and guiding criteria for the revision of the provisions on excise duties and other indirect taxes on production and consumption*, provides, therefore, for a multi-pronged intervention, the main points of which are (a) remodelling the excise duty rates on energy products and electricity in order to reduce the emission of climate-changing gases, taking into account the environmental impact of each product; b) promote the production of electricity, methane gas or natural gas or other gases obtained from biomass or other renewable resources, respecting the provisions of the European Union on exemptions or reductions in excise duty; c) encourage the use of more environmentally friendly energy products by remodelling the taxation on energy products used for electricity production d) reorganise and revise the excise tax concessions on energy products, with particular reference to harmful environmental subsidies; e) simplify the formalities concerning the possession, sale and circulation of alcoholic products subject to the excise tax regime, also by resorting to the gradual computerisation of the system of the relative State markings; f) revise the rules for the application of the consumption tax on lubricant oils with particular reference to the products that constitute its taxable base.

<sup>35</sup> With regard to Article 12 of Delegated Law No. 111/2023, the illustrative report of the tax delegation states that: “...It is then envisaged that, for the same environmental purposes, the rates of excise duty on energy products used for the production of electricity will be redefined, always in relation to the impact of each fuel on the environment...”.

reducing greenhouse gas emissions and, positively, promoting 'the use of energy products obtained from biomass or other renewable resources'. In addition, with reference to the excise tax on energy products and electricity, the enabling act provides for the reorganisation and amendment of the discipline of tax concessions,<sup>36</sup> highlighting the need to intervene on 'environmentally harmful subsidies',<sup>37</sup> particularly impacting on the environment, to be gradually eliminated or, at least, to be revised, while respecting European regulations on compulsory excise tax exemptions.<sup>38</sup> On the

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<sup>36</sup> Article 24 of the TUA, *Concessionary Uses*, in particular, provides that 'Without prejudice to the provisions laid down in Article 17 and the other Community rules concerning the concessionary regime, energy products intended for the uses listed in Table A annexed to this Consolidated Text are admitted with exemption or at the reduced rate to the extent provided for therein'. The aforesaid Table A provides for particular exemptions from excise duty, including that relating to energy products used 'as fuel for air navigation other than private pleasure flying and for educational flights and for navigation in Community marine waters, including fishing, with the exclusion of private pleasure craft, and uses as fuel for navigation in inland waters, limited to the transport of goods'.

<sup>37</sup> Pursuant to Article 68 of Law No. 221 of 2015, the Ministry of the Environment and Energy Security publishes -generally annually- a catalogue of environmentally harmful subsidies (SAD) and environmentally favourable subsidies (SAF). The latest catalogue, now in its fifth edition, refers to data from 2021 and considered 168 incentives with an environmental impact. The subsidies were divided into five categories: agriculture and fishing; energy; transport; subsidised VAT and other subsidies. For 2021, SAF of EUR 18.6 billion and SAD of EUR 22.4 billion were identified. With reference to fossil fuels, in 2022, through Art. 18 of Law Decree No. 4 of 27 January 2022 (Decree 'Sostegni *ter*'), converted, with amendments, by Law No. 25 of 28 March 2022, under the heading '*Reduction of environmentally harmful subsidies*', the Government repealed 5 SADs in the energy category of the catalogue. These include the reduction of excise duty for fuels used in the rail transport of persons and goods (which previously enjoyed a reduced rate of thirty per cent of the ordinary rate), the exemption from excise duty on energy products used for the production of magnesium from seawater (previously exempt from excise duty), and the reduction of excise duty on energy products for ships that only carry out in-port handling and manoeuvres instrumental to the transshipment of goods within the port. See European Commission document COM(2017) 63 *final* which highlights how fiscal measures, such as environmental taxation and the removal of environmentally harmful subsidies, offer an effective and efficient way to achieve environmental *policy* goals.

<sup>38</sup> For an overview of the main innovations provided for, with reference to customs and excise duties, by Delegated Law No. 111/2023, see B. SANTACROCE, E. SBANDI, C. MILANI, *Verso un sistema doganale più moderno*, in *Il Fisco*, No. 41/2023, pp. 3875 and ff.; G.E. DEGANI, *Riforma di imposte doganali e accise: un'occasione per risolvere criticità e armonizzare l'imposizione*, in *Il Fisco*, No. 18/2023, pp. 1712 and ff.

other hand — confirming the crucial nature of this latest revision — it is no coincidence that the reorganisation of environmentally harmful subsidies is explicitly included among the goals of the UN 2030 Agenda (*target 12c*).

## 7. Concluding remarks

Having ascertained the centrality of excise duties in the pursuit of the Union’s environmental policy objectives, the amendment of Council Directive 2003/96/EC appears necessary and urgent, as it is totally inadequate to the times: the energy market has, in fact, profoundly changed with the entry of new products — from hydrogen to new synthetic gas mixtures — in recent years, and, moreover, most of the facilitating regimes now envisaged, even for extremely polluting production sectors, do not reward more sustainable forms of energy consumption.

What is needed, therefore, is a fundamental harmonisation of the different regulations on the taxation of various forms of energy and fuels based, however, not on the quantity of consumption but on the degree of harmfulness to the environment of the taxed product and the environmental consequences in terms of greenhouse gases produced.<sup>39</sup>

If it is true, in fact, that excise duties, through the mechanism of translation, burden the consumer and not the polluter, it is equally true that, registering a contraction in the demand for its goods, caused by the increase in taxation — an increase that, inevitably, leads the consumer towards goods and services with low harm to the

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<sup>39</sup> A good example of environmentally oriented configuration and application of excise duties can be found in the Belgian tax experience, which commensurate the tax levy “*en fonction du type d’énergie et de la quantité d’énergie*”. See J. MALHERBE, M. VAN VYVE, *Environmental taxation: the Belgian experience*, in *Riv. Dir. Trib. int.*, No. 1/2005, p. 62.

ecosystem — the producer is led to intervene on its production system, implementing a company reconversion in an *environmentally friendly* vision.

Unfortunately, the Commission's failure to reach political agreement on the proposal for a directive COM(2021) 563 *final*, on the elimination of exemptions with regard to aviation and maritime fuels is, without any doubt, an obstacle to the realisation of the climate objectives set out in the European *Green Deal*.

It is also true that should the states succeed, by unanimity,<sup>40</sup> in reaching this necessary agreement, the effects of the planned reform will subsequently have to be examined and the underlying social issues, identified, moreover, in the proposal for a directive COM(2021) 563 *final* itself, addressed.

While for high-income households the increase in environmental taxation might be insignificant in view of their income level, an increase in specific taxation on the most polluting energy products or an increase in the prices of products with low environmental performance will, on the other hand, have a significant economic and social impact not only on economic operators but, above all, on low-income households, as it may cause an energy poverty problem<sup>41</sup> for

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<sup>40</sup> Article 194(3), which is part of Title XXI of the TFEU — explicitly dedicated to energy — deals with fiscal measures, providing that the Council may, by unanimity and after consulting the Parliament, establish possible measures of a fiscal nature. The stalemate involving the proposal for a directive COM(2021) 563 *final* brings the long-standing issue of abandoning the principle of unanimity in favour of qualified majority voting through the involvement of the European Parliament back to the fore. In this regard, the EU Commission itself, through its Communication COM(2019) 8 *final*, *Towards more efficient and democratic decision-making in EU tax policy*, pointed out that “new challenges in the EU and worldwide have revealed the limits of unanimity in tax policy both at EU and national level”.

<sup>41</sup> On this point, S. SUPINO, B. VOLTAGGIO, *La povertà energetica, Strumenti per affrontare un problema sociale*, Bologna, 2019; H. THOMSON, C. SNELL, C. LIDDELL, *Fuel poverty in the European Union: a concept in need of definition?*, in *People, Place and Policy*, 10(1), 2016, pp. 5-24. The authors point out that only a limited number of the -at present- twenty-eight EU member states have adopted an official definition of energy poverty (United Kingdom, France, Ireland, Slovakia); D.J., BEDNAR, T.G., REAMES, *Recognition of and response to energy poverty in the United States*, in *Nature Energy*, No. 5/2020, pp. 432-439, where the authors point out that the United States lacks a federal recognition of energy poverty and a common strategy. In Italy, in the 2017 National Energy Strategy, drafted by the Ministry of Economic

the economically weaker.<sup>42</sup> In view of the fact that expenditure on energy products weighs relatively more heavily on the budgets of poorer households than on those of higher-income households, any price increase will affect vulnerable households proportionately more. Undoubtedly, the reduction of SAD will also have to be gradual over time and accompanied by subsidies for the economically weaker, depending on the impact — direct or indirect — that such measures will have on consumer prices.<sup>43</sup>

These effects could be stemmed — in the short term — by earmarking the increased revenue generated by the tax reform in favour of the most vulnerable population groups.

In fact, the so-called ‘double dividend’ should not be overlooked: with the revenue obtained, it would be possible, on the one hand, to implement actions to improve the environment (*green dividend*) and, on the other hand, to reduce other levies, such as the traditionally high labour levy (*blue dividend*) in the EU.<sup>44</sup> In this way, shifting the tax burden from people to things, i.e. from a form of direct taxation (labour taxes) to an indirect one (*green taxes*), would have a double positive effect — both in terms of improving the quality of life and the environment, and reducing taxation on labour — without any burden

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Development and the Ministry for the Environment and Protection of Land and Sea, energy poverty is understood as “difficulty in acquiring a minimum basket of energy goods and services, or alternatively, in a sense of energy vulnerability, when access to energy services implies a distraction of resources (in terms of expenditure or income) above a normal value”.

<sup>42</sup> G.E. METCALF, *Designing a carbon tax to reduce US greenhouse gas emissions*, in *Review of Environmental Economics and Policy*, 2009, pp. 63-64, where he argues that “[...] any policy to raise the price of energy will disproportionately impact poor households” and, again, “one of the major concerns that always arises when energy taxes are discussed is equity”.

<sup>43</sup> In these terms L. SALVINI, *La tassazione dell’energia*, in *Atti dei convegni lincei, Una nuova politica economica e tributaria per l’Unione europea*, *op. cit.*, p. 191.

<sup>44</sup> See G. MERCURI, *European strategies to mitigate climate change: from labour to pollution taxation*, in *Riv. Tel. Dir. Trib.*, 14 September 2023.

on public finances.<sup>45</sup> In other words, the de-taxation of employee and professional income could be ‘financed’ by energy taxation itself.

In the long run, on the other hand, bearing in mind that all taxes that have (also) the purpose of discouraging environmentally harmful production and consumption are inevitably destined to see their taxable base and, therefore, their revenue reduced over time, the social effects could be stemmed through specific subsidies or incentives in favour of the economically weaker (social tariffs, bonuses and payment programmes).<sup>46</sup> It cannot be overlooked, in fact, that such forms of taxation, when they achieve their (extra-fiscal) purpose — when the presupposition is not integrated — operating as a ‘disincentive’ towards a given conduct on the part of taxpayers, result in the erosion of the tax base, due to the reduction of products with a greater environmental impact.

Looking at the stimuli coming from the European and national scenario, one can say, in conclusion, that the time is ripe for an energy transition, under the banner of innovation and *green* technologies: excise duties, for the reasons outlined *above*, can also play a central role.

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<sup>45</sup> On this point, COM (2019) 177 *final* explicitly states that: “revenues from energy and environmental taxation could be used to facilitate the transition of economic sectors and/regions towards better environmental performance and by allowing for a reduction in labour taxation, as a result of the increased revenues received from environmental taxes”.

<sup>46</sup> In this regard, Regulation (EU) 2023/955 established the ‘Social Climate Fund’ aimed at redistributive purposes in favour of vulnerable persons (households, micro-enterprises, transport users). This is done through ‘direct and temporary’ forms of income support, as well as through investments to ensure the energy efficiency of buildings, the decarbonisation of heating and cooling systems in buildings, and better access to ‘zero- and low-emission’ mobility and transport. For these reasons, each Member State is required to prepare a ‘social climate plan’, through which concrete measures and the amount of investment required to combat ‘energy poverty’ can be identified.