

Sharing the Cost of the Crisis

Joaquín Urías

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At the end of July, the two political parties supporting the Spanish Government (the socialist party and the leftist Podemos) presented a [proposal](#) for approving a law on the windfall profits of banks and large energy companies in Parliament, which may be also an example for other European countries. The idea is to raise a 1.2 percent tax on the incomes of energy companies (electricity, gas and petrol) with a turnover of over 1000 million Euros in 2019. At the same time, banking companies making more than 800 million Euros should pay 4.8 percent of their net profits. This is supposed to tax companies earning extra profits from the recent price increase in energy and the financial sector which was slightly affected by the increase in inflation but will have a considerable profit from the rise of interest rates. According to Spanish officials, they are making profit off the crisis and should contribute to the country overcoming it.

Additional measures included in the draft will penalize companies trying to pass on the costs of the new taxes to their clients. A public body will monitor such attempts and impose fines of up to 150 percent of the tax value.

Ultimately, it will be for the Spanish lawmakers to properly justify the measure, but from a constitutional point of view, such a temporary obligation can be justified based on the economic capacity of the companies affected and the nature of the profits obtained. Their amount and their relationship with the general situation of crisis should be enough to dispel any accusation of discriminatory or unequal treatment.

Development of the initiative

With this proposal, the Government opted for a parliamentary proposal presented by the deputies of their political parties instead of presenting their own proposal in order to reduce formalities and simplify the legislative procedure. In this way, fewer complementary reports have to be elaborated and presented together with the proposal. The proposal avoids referring to the new obligation as “tax”. Instead, it is called a “public patrimonial obligation of non-tax nature” in an attempt to avoid claims of double taxation using a rare figure relatively new in Spanish law.

The Minister of Finance [announced](#) that the number of companies included in the scope of the new piece of legislation will be fewer than twenty. The affected companies consider the new tax discriminatory as they do not see any objective reason for being specifically targeted by a tax that no one else has to pay. Indeed, the straight delimitation of the contributors obliged to pay – the envisioned conditions easily allow to determine the names of the few companies that will be affected – will force the Government to undertake extra efforts to justify why the profits of these companies merit separate additional taxation; or whatever name their forced economic contribution to the state budget will end up having.

The political background

Politically speaking, two facts are relevant for this new tax. On the one hand, the bank rescue plan of 2012, when the Spanish Government spent 58.000 million Euros from the public budget on banks to save the financial sector. Only around 10 percent of the credits given during this banking bailout have been returned by the sector. So, a big part of Spanish society thinks that banks are in their debt. Banks are increasing their profits without ever returning the enormous amount of public money they received. On the other hand, with the arrival of the energy crisis, the government had repeatedly asked large companies to limit the rise of prices but without success. Far from it, in the last days of July, the three major energy companies of Spain [announced a profit](#) of 6.000 million Euros last year. Even if a big part of these profits is not obtained in Spain, the amount sounds disproportionated to a part of the population suffering from the energy crisis. During the same time, the six main banks [presented a profit](#) of more than 3.700 million Euros during the first half of this year.

In the perspective of the Government, the initiative aims at make up for the lack of social responsibility and empathy of companies. Taxing these extraordinary profits it intends to contribute to share the damages caused by the crisis and to cushion its effects among the less favored population.

Obviously, the companies in question [deny any windfall profits](#). For banks, the rise in interest rates does not necessarily result in extra profits. Similarly, some energy firms argue that they are not seeing any windfall profits, yet, while others say that the new profits are only compensating their losses from previous years.

Constitutional framework

It is still unknown what the final regulation of the tax after the parliamentary discussion will look like. The parties have room for improving details before the new law enters into force in order to avoid any judicial challenge posed eventually by the affected powerful companies. Article 31 of the Spanish constitution imposes that tax system should be inspired by the principle of progressive taxation which essentially means 'the more you have the bigger percentage you pay'. However, the same article speaks also about equality and bans any confiscatory scope.

There is no doubt that, in general terms, the measure is in line with the constitutional principle that everyone should contribute to public expenditure in accordance with their economic capacity. Indeed, the Spanish taxation system still has room for improving its progressive character, especially regarding corporate taxes. At the same time, the new financial obligation does not seem to be confiscatory. Recently, the Spanish [Constitutional court has annulled](#) taxes when the payment to be satisfied is bigger than the tax benefit but does not have case law on what should be considered 'confiscatory'. In other countries this category is used for cases when the tax is over 50 percent of the profit and the Spanish Supreme Court has indeed assessed as 'confiscatory' taxes where the tax amounts to close to the total profit.

However, the percentages foreseen in the new law do not reach that level, so that this constitutional limit does not play any role here.

Regarding the debate about equality, it will depend on the ability of lawmakers to justify the singularity of the profits earned by large banks and energy companies in the current economic context. It is possible to create a tax targeting only some companies as far as they do have a singularity justifying additional obligations to contribute to state budget. This would be the case if the official figures and data manage to show real windfall profits directly related to the economic moment rather than from the commercial activity of the companies.

An uncertain final regulation

Besides the debate on the legal forms and details, there is a bigger discussion on the effects of such taxes on the economy and on the status of large companies making profits during a crisis and from the crisis. While the opposition parties refuse any increase of taxes, recent opinion polls show that the majority of Spanish society supports taxing windfall profits. In any case, the final decision is still to be taken by the Spanish Parliament and probably territorial parties, Basques and Catalans, usually supporting the Government will play a relevant role in the final configuration of the new tax.

