Questionable constitutionality of Royal Decree-law approving a temporary energy levy previously rejected by the Spanish Parliament

By way of Royal Decree-law 10/2024, of 23 December, for the establishment of a temporary energy levy during 2025, the Spanish government has 'reintroduced' a levy whose extension had just been rejected by Parliament, an unprecedented and dubiously constitutional move.

BLANCA LOZANO CUTANDA
Professor of Administrative Law
Academic Counsel, Gómez-Acebo & Pombo

CARLOS VÁZQUEZ COBOS
Coordinating Partner, Public Law Practice,
Gómez-Acebo & Pombo

On 24 December, the Official Journal of Spain published Royal Decree-law 10/2024, of 23 December, for the establishment of a temporary energy levy for the year 2025, to which the media have drawn attention due to the unprecedented circumstance that a levy whose extension had just been repealed by Parliament has been 'reintroduced' by way of executive legislation.

The temporary energy levy on companies was regulated by Act 38/2022 of 27 December, which established it as a non-tax contribution for public benefit consisting of the obligation for large companies in the energy sector (those with a turnover of more than 1 billion euros) to pay 1.2% of their turnover. The levy was justified as a measure aimed at redistributing the 'extraordinary profits' obtained by these companies due to price rises in such a way that, as the

explanatory notes to the law stated, "the costs that inflation causes in society must be shared out equitably by means of an income pact".

The temporary contribution was planned for 2023, but was extended to 2024 by the fifth additional provision of Royal Decree-law 8/2023 of 27 December.

The temporary energy levy was to be extended to 2025, in this case as part of a broader tax reform contained in the bill for the establishment of temporary energy taxes and taxes on credit institutions and financial credit establishments. However, in its parliamentary passage, the lower house rejected the extension of the levy when an amendment submitted by the *Partido Popular* party in the upper house was approved with the support of *PNV*, *Junts per Catalunya* and *Vox*. As a result, the act of parliament that was finally passed (Act 7/2024 of 20 December) included a final provision repealing the article of Act 38/2022 that regulated the temporary energy tax.

In short, the lower house rejected by majority vote the extension of the levy to 2025 and the government, seeking to fulfil its pledge with *ERC*, *Bildu* and *BNG*, took it upon itself to 're-create' the levy by means of a Royal Decree-law.

Royal Decree-law 10/2024 (the 'Royal Decree-law') avoids the term 'extension' and states that it "creates a new temporary energy levy", but the truth is that its configuration remains exactly the same but for the provision that the amounts of the levy to be paid in 2025 will be reduced, by up to 60%, by the amount credited to a reserve for the execution of essential strategic investments for the ecological transition and decarbonisation created by the Royal Decree-law itself. With this, the government is trying to gain the support of *Junts per Catalunya* (with whom it had initially agreed this relief) for validation of the Royal Decree-law in the lower house within the 30-day period from approval, as set out in Article 86 of the Constitution, but with the *PP* and the *PNV* against it, it is very likely that such validation will not be obtained.

Without engaging in any other type of assessment, from a strictly legal point of view, the Royal Decree-law raises serious doubts as to its constitutionality. The Royal Decree-law's compliance with the Spanish Constitution can be checked either in the political arena, in the validation procedure, or before the Constitutional Court. In this regard, as this regulation has the force and effect of an act of parliament, those who have standing to do so can appeal on constitutionality "as of publication thereof" (Constitutional Court Judgment no. 29/1982).

There are, in principle, two grounds of unconstitutionality that could affect the Royal Decree-law:

a) The absence of the 'extraordinary and urgent necessity' required by Article 86 of the Constitution. There is no justification for this in the explanatory notes when it states that "the regulation of the new tax must be fully adapted to the current context. In this respect, the fact that the obligation to pay will come into force on 1 January 2025 means that this adaptation cannot be postponed". But, above all, however much deference the Constitutional Court shows towards the executive with regard to the enabling circumstances for the Royal Decree-law, it is difficult to consider the urgency legislation justified when not only has there been time to go through the ordinary legislative procedure, but also when the procedure has been followed and has

ended with an express pronouncement of law repealing the levy.

Therefore, there are no such enabling circumstances of urgency and, as the Constitutional Court has declared, a "desire or interest of the government in the immediate entry into force of the law does not constitute a justification of its extraordinary and urgent necessity" (Constitutional Court Judgment no. 68/2007, Point of Law 9). If this is true in general, it is even more so in a case as singular as this one, where the government seeks to bring a law into force against the will of Parliament, which, if allowed, would allow the executive to use a royal decree-law to place itself in a position of pre-eminence over the legislative branch. In short, it constitutes an abusive or arbitrary use of a regulatory instrument where the appropriate course of action, in the words of the Constitutional Court judgment cited, would be "to declare a decree-law unconstitutional on the grounds of non-existence of the enabling circumstances for assumption of the powers reserved to Parliament by the Constitution".

b) It exceeds the subject-matter limit for royal decree-laws in Article 86(1) of the Constitution by affecting the general duty to contribute to the support of public expenditure in Article 31(1). According to the doctrine established by the Constitutional Court, a royal decree-law "may not alter either the general scheme or those essential elements of taxes that impinge on the determination of the tax burden" and, in order to assess this effect, one must take into account, among other factors, "the nature and scope of the specific regulation in question" (Constitutional Court Judgment no. 11/2024, citing previous case law).

In this case, we are dealing with the creation by royal decree-law of a levy that is ostensibly a tax in nature, even if said decree-law describes it as a "non-tax contribution for public benefit" and avoids using expressions typical of taxes in its regulation. The best proof of this is that the Royal Decree-law itself provides (in an attempt to gain the support of the *PNV* in its validation) that 'the Government will review the configuration of the temporary energy tax for its integration into the tax system in the 2025 fiscal year, which will be agreed, respectively, with the Basque Country and Navarre' (second additional provision).

The explanatory notes to the Royal Decree-law acknowledges that the creation of "measures of a similar nature to tax measures that could affect the duty to contribute under Article 31 of the Constitution" is forbidden according to the doctrine established by the Constitutional Court, but it attempts to get round this limitation by stating that the "specific modifications linked to the drafting of tax legislation" it introduces do not affect this duty to contribute "insofar as they affect few and very specific taxpayers, who are the ones who must pay the tax". This is not, however, an exception that finds support in constitutional doctrine. It matters little, in fact, whether there are many or few who are obliged to pay the tax if it affects the duty to contribute, understood as "the position of the person obliged to contribute according to his ability to pay in the tax system as a whole" (see, for example, Constitutional Court Judgment no. 11/2024). Moreover, the Royal Decree-law does not say why the levy should be applied only to those "specific taxpayers" whose profits are already taxed by corporate income tax, so that the introduction

of this purely revenue-raising levy seems to violate the principle of equality before the law (Art. 14 of the Constitution).

Non-validation of Royal Decree-law 10/2024, considering the foreseeable dates on which the vote on its validation will take place (end of January or beginning of February), would give rise to the curious situation that, by ceasing to produce effects from the moment of non-validation, but without voiding the effects produced during its validity, the Royal Decree-law would have been in force on 1 January 2025, when, according to paragraph 4 of its sole article, the levy liability accrues. However, it would not be in force at the time when, in accordance with paragraphs 4 and 6 of the said article, the advance payment (the first 20 days of June 2025, which in the previous regulation was in February) and the final payment (the first 20 days of September 2025) obligations exist. Legal rationality can only lead to the conclusion that no one can be obliged to pay a levy if on the dates when such payment should be made, the levy will have been removed from the legal system in the absence of validation.