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Editorial

'Windfall Taxes' under Regulation (EU) 2022/1854: Soon Gone With the Wind?

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Regulation (EU) 2022/1854 obliged Member States to introduce, on a temporary basis, a cap on market revenue of certain electricity producers, and either a 'mandatory temporary solidarity contribution' or 'equivalent national measures' for enterprises in the oil, coal, gas and refinery sectors. Meanwhile, both the Regulation as such and the different types of domestic measures have come under fire before the European and the domestic courts. There is a good chance that neither the Regulation nor the measures taken by the Member States will survive closer legal scrutiny, and that this first-ever attempt of the EU to let Member States introduce 'windfall taxes' may turn out to be a failure.

Keywords: windfall tax, excess profits tax, electricity producers, cap on market revenue, solidarity contribution, equivalent national measures, crude petroleum, natural gas, coal and refinery sectors, Regulation (EU) 2022/1854, freedom to conduct a business, right to property

1 Introduction

On 3 March 2022, less than two weeks after the outbreak of war in Ukraine, the International Energy Agency (IEA) published a report in which it proposed measures to bring down the gas import from Russia. The IEA estimated that, for 2022 alone, current market conditions could lead to 'excess profits' of up to 200 billion euro in the EU for electricity production from gas, coal, nuclear or hydropower and other renewables, and it suggested 'temporary tax measures to raise rates on electricity companies' windfall profits' and the redistribution of the tax receipts to consumers to partially offset higher energy bills.[1] Only a few days later the European Commission presented the first outline of its REPowerEU initiative for a common EU approach to establish independence from Russian fossil fuels, addressing inter alia immediate measures to mitigate retail prices and support heavily exposed enterprises and suggesting that Member States might consider 'temporary tax measures on windfall profits' of electricity producers in order to finance such emergency measures.[2]

And while the Commission in its actual REPowerEU Plan of May 2022 then focused on tax measures aimed at incentivizing energy savings or reducing fossil fuels consumption,[3] some Member States decided to follow the example of others which had already introduced domestic 'windfall' (or 'excess profits') taxes[4] on energy producers after the beginning of the global energy crisis in late summer/early autumn 2021.[5] In particular, the introduction of an 'extraordinary solidarity tax' on excess profits of companies producing or trading with energy in Italy in March 2022[6] triggered much attention and even led to the submission of a legislative proposal for a similar tax by the left-wing party *Die Linke* in Germany in May 2022.[7] In the same month a levy on windfall profits of certain energy producers was introduced in Greece.[8]

On 14 September 2022 the Commission then tabled a proposal for a Council Regulation on 'an emergency intervention to address high energy prices' and, emphasizing the pressure put on private households and enterprises by dramatically increasing energy prices,

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1 International Energy Agency, A 10-Point Plan to Reduce the European Union's Reliance on Russian Natural Gas (3 Mar. 2022), para. 6.

2 Communication 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy', COM(2022) 108 final of 8 Mar. 2022, para. 1.1.

3 Communication 'REPowerEU Plan: Joint European Action for more affordable, secure and sustainable energy', COM(2022) 230 final of 18 May 2022, para. 4.3.

4 *See* generally on such taxes, e.g., T. Diniz Magalhães & F. De Lillo, *The Return of Windfall Taxation*, Vol. 51, Intertax 722–731 (2023).

5 *See* in particular, Romania (Oct. 2021), and for a temporary measure skimming off profits of certain energy producers also Spain (Sep. 2021). For an EU-wide overview, *see* M. Alvarado, *Windfall Profit Taxes Across Europe: Have They Proved to Be Effective for Taxing Windfall Profits in the Energy Sector?*, 63 Eur. Tax'n 413–422, at 414 et seq. (2023). A veryx early bird in this context was Hungary which had already introduced a special energy surtax (known there as 'Robin Hood tax') as of 2009; *see* G. Erdós & G. Czoboly, *New Legislative Tool for Introducing EU-Wide Windfall Taxes*, 63 Eur. Tax'n 36–41, at 40 et seq. (2023).

6 Decreto-Legge no. 21 of 18 Mar. 2022, Gazzetta Ufficiale no. 67 of 20 Mar. 2022, at 1.

7 *See* Drucksachen des Deutschen Bundestags 20/1849 of 17 May 2022.

8 Bill no. 4936/2022 of 26 May 2022, Official Government Gazette no. A 105 of 27 May 2022.

demanded a rapid and coordinated EU-wide response.[9] The intention was to lower electricity demand across the EU, and to redistribute some of the revenues garnered by companies in the different energy sectors. In this respect the Commission was oncerned about the fact that some Member States had already adopted redistribution measures, as there was a risk of uneven conditions for companies operating in the EU energy market. Aiming at a level playing field, the Commission proposed 'two complementary instruments so as to cover the full energy sector': A measure temporarily targeting and reducing the revenues of electricity producers, and a measure temporarily establishing a solidarity contribution on surplus profits in the fossil sector.[10]

When only three weeks later, on 6 October 2022, the Council passed the proposed Regulation (with minor amendments) in a written procedure,[11] the aforementioned two instruments formed its main pillars: Chapter II on 'Measures concerning the electricity market' (*see infra* 3.), and Chapter III on a 'Measure concerning the crude petroleum, natural gas, coal and refinery sectors' (*see infra* 4.).

2 A REGULATION NOT JUST LIKE ANY OTHER

Regulation (EU) 2022/1854 is a rather atypical legal instrument, both from a general EU law perspective as well as regarding its fiscal elements. It has been based on Article 122(1) TFEU which allows for 'measures' to be taken by the Council (on a proposal prepared by the Commission) and, therefore, opens the way to all types of legal acts mentioned in Article 288 TFEU. In the present case, the Council (following the Commission´s proposal) has opted for a regulation, which pursuant to Article 288(2) TFEU 'shall have general application' and 'be binding in its entirety and directly applicable in all Member States'. The typical case of a regulation is, therefore, a full-fledged piece of EU legislation which does not have to be transposed into domestic legislation. And more than that, the Court of Justice of the EU (CJEU) even obliged Member States not to transpose regulations domestically where this might conceal the EU law nature of the relevant provisions and affect the Court´s jurisdiction to rule on questions concerning the interpretation or validity of the regulation.[12]

There are exceptions, of course, and one may also note that Article 291(1) TFEU, stating that, 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts', does not explicitly exclude regulations. In fact, the CJEU already recognized that some provisions of a regulation may necessitate, for their implementation, the adoption of measures of application by the Member States.[13] Such regulations requiring national implementation measures are referred to as 'limping regulations' in legal doctrine.[14] The typical example is a regulation granting Member States a certain discretion concerning their domestic implementation measures, and in such situations the CJEU obliges Member States to specify that this discretion is being exercised.[15]

Yet, in the field of EU rules related to taxation, such a 'limping regulation' is an oddity. The area of direct taxation is dominated by directives since Article 115 TFEU does not provide for any other type of legislative instrument to achieve the approximation of domestic laws.[16] And despite the fact that Article 113 TFEU is not in the same way limited when it comes to the adoption of 'provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation', substantive measures in the area of indirect taxation can usually be found in directives whereas regulations generally comprise procedural rules.[17] By their very nature, directives form the first step of a two-step legislative process, as they are 'binding, as to the result to be achieved', upon the Member States, but 'shall leave to the national authorities the choice of form and methods' (Article 288(3) TFEU). Regulation (EU) 2022/1854 and, in particular, its Chapter III which will be addressed in more detail below (at 3.), resembles much more a directive in this respect.

Finally, another odd element flows from the choice of Article 122(1) TFEU as the legal basis for Regulation (EU) 2022/1854, and this concerns the exact nature of the Regulation as a legal instrument. As mentioned above, Article 122(1) TFEU allows the Council – upon a proposal submitted by the Commission, but without any participation of the European Parliament – to decide on 'measures'. In other words, this means that neither

9 Commission proposal for a Council Regulation on an emergency intervention to address high energy prices, COM(2022) 473 final of 14 Sep. 2022, at 2.

10 *See ibid.*, at 3.

11 Council Regulation (EU) 2022/1854 of 6 Oct. 2022 on an emergency intervention to address high energy prices, OJ 2022 LI 261/1.

12 CJEU, 10 Oct. 1973, Case 34/73, *Fratelli Variola SpA*, ECLI:EU:C:1973:101, para. 11; 31 Jan. 1978, Case 94/77, *Fratelli Zerbone S.N.C.*, ECLI:EU:C:1978:17, para. 22/27.

13 *See* e.g., CJEU, 24 Jun. 2004, C-278/02, *Herbert Handelbauer GmbH*, ECLI:EU:C:2004:388, para. 26; 21 Dec. 2011 Jan., C-316/10, *Danske Svineproducenter*, ECLI:EU:C:2011:17, para. 40.

14 *See* e.g., M. Ruffert, in *EUV/AEUV* (C. Calliess & M. Ruffert eds, 6th ed. 2022), Art. 288 AEUV para. 22 with further references.

15 CJEU, 21 Dec. 2011, C-316/10, *Danske Svineproducenter*, ECLI:EU:C:2011:17, para. 41.

16 For the (very) exceptional case of a tax rule in a company law regulation (based on the predecessor of Art. 352 TFEU), *see* Art. 40 of Council Regulation (EEC) No 2137/85 of 25 Jul. 1985 on the European Economic Interest Grouping (EEIG), OJ 1985 L 199/1.

17 *See* in this respect, in particular, Council Regulation (EU) No 904/2010 of 7 Oct. 2010 on administrative cooperation and combating fraud in the field of value added tax (recast), OJ 2010 L 268/1 (with subsequent amendments); Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties, OJ 2012 L 121/1 (with subsequent amendments).

the ordinary legislative (codecision) procedure under Article 289(1) TFEU nor the special legislative procedure under Article 289(2) TFEU has been followed at EU level here. As a consequence, Regulation (EU) 2022/1854 is in any case not a 'legislative act' under Article 289(3) TFEU,[18] since this provision is understood to refer to the two types of legislative procedures under Article 289(1), (2) TFEU.[19] And legal doctrine indeed describes the procedure under Article 122(1) TFEU as a non-legislative one.[20] So the precise legal character of this Regulation is somewhat obscure.

3 A quick glance at Chapter II of the Regulation

As mentioned above, Chapter II of Regulation (EU) 2022/1854 provides for 'Measures concerning the electricity market'. These (temporary) measures are aimed at demand reduction (Articles 3 to 5), at the introduction of a cap on market revenues of electricity producers and the distribution of surplus revenues to final electricity consumers (Articles 6 to 11), and at allowing certain retail measures (Articles 12 to 13) deviating from current EU rules on public interventions in price-setting.[21] The core provision is Article 6(1) which provides for a mandatory cap on market revenues of (certain) electricity producers set at a maximum of EUR 180 per MWh of electricity produced.[22] As the Commission´s report of June 2023 on the review of Chapter II shows, this so-called 'inframarginal revenue cap' has been implemented in a very heterogeneous manner by the Member States.[23] Corresponding with this heterogeneity are the diverse types of litigation which, in addition to an action for annulment (Article 263 TFEU) brought against Chapter II of the Regulation by a Bulgarian enterprise before the General Court (GC) of the EU,[24] have started before the domestic courts in different Member States. While some cases on the correct interpretation of Regulation (EU) 2022/1854 have already reached the CJEU,[25] others focus on the validity of the domestic implementation measures:

In Germany, for example, producers of energy (in particular, from renewable or nuclear sources or lignite[26]) were required to pay 90% of their excess profits (determined by means of a rather complicated calculation) for the period between 1 November 2022 and 30 June 2023 to the operators of the power grid to which they are connected.[27] In a recent decision, the Higher Regional Court of Düsseldorf briefly addressed the question of whether the domestic legislation was to be tested against non-discrimination and freedom rights under the EU Charter of Fundamental Rights (EU ChFR) or under the German Constitution. The court tended towards the latter approach but did not delve into further details as it was only asked to decide on an interlocutory application leading to a mere summary evaluation; however, the court indicated that the payment may not be considered a public 'levy' due to the fact that it was paid to the grid operator, rather than the German State.[28]

Other Member States, however, chose a domestic implementation that comes much closer to a 'windfall tax'. Austria, for example, had introduced a special 'energy crisis contribution electricy', skimming off 90% of the excess profits generated by electricity producers covered by the Regulation beyond a ceiling of (initially) EUR140 per MWh (as of 1 June 2023 reduced to EUR 120 per MWh), as an exclusive federal levy (initially) for the time between 1 December 2022 and 31 December 2023 (meanwhile extended until 31 December 2024).[29] The Austrian Federal Tax Court, as the competent court of first instance, already rejected a considerable number of actions where plaintiffs argued that the domestic legislation violated the EU ChFR and the Austrian Constitution,[30] and some of these cases are now pending before the Austrian Constitutional Court.[31]

18 Pursuant to this provision, 'Legal acts adopted by legislative procedure shall constitute legislative acts'.

19 *See* e.g., F. Schmidt, in *Europäisches Unionsrecht* (H. von der Groeben, J. Schwarze & A. Hatje eds, 7th ed. 2015), Art. 289 AEUV paras 8 et seq.

20 *See* B. Smulders & Keppenne, in der Groeben, Schwarze & Hatje *supra* n. 19, Art. 122 AEUV para. 3.

21 These rules are laid down in Directive (EU) 2019/944 of the European Parliament and of the Council of 5 Jun. 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ 2019 L 158/125 (with subsequent amendments).

22 Pursuant to Art. 7(1) of the Regulation, this cap on market revenues applies to 'the market revenues obtained from the sale of electricity produced from the following sources: (a) wind energy; (b) solar energy (solar thermal and solar photovoltaic); (c) geothermal energy; (d) hydropower without reservoir; (e) biomass fuel (solid or gaseous biomass fuels), excluding biomethane; (f) waste; (g) nuclear energy; (h) lignite; (i) crude petroleum; (j) peat'. 'Surplus revenues' are defined in Art. 2 No. 9 of the Regulation as 'a positive difference between the market revenues of producers per MWh of electricity and the cap on market revenues of 180 EUR per MWh of electricity provided for in Article 6(1)'.

23 Report from the Commission to the European Parliament and the Council on the review of emergency interventions to address high energy prices in accordance with Council Regulation (EU) 2022/1854, COM(2023) 302 final of 5 Jun. 2023, at para. 5.

24 Case T-759/22, *Electrawinds Shabla South EAD v. Council*, OJ 2023 C 71/32.

25 *See* Case C-423/23, *Secab Soc. coop.*, OJ 2023 C 321/20 et seq. (referred from Italy by the Tribunale Amministrativo Regionale per la Lombardia); Case C-633/23, *Electrabel SA* et al., OJ C/2024/1082 (referred from Belgium by the Court d´appel de Bruxelles).

26 *See supra* n. 22.

27 On this 'Abschöpfungsbetrag', *see* §§13–19 of the Law on the introduction of an electricity price break (Strompreisbremsegesetz) of 16 Dec. 2022, Federal Gazette 2022 I, at 2512.

28 Oberlandesgericht Düsseldorf, 29 Apr. 2024, 3 Kart 459/24, ECLI:DE:OLGD:2024:0429.3KART459.24.00, paras 32 et seq.

29 Law on the energy crisis contribution electricity (Energiekrisenbeitrag Strom), Federal Gazette No. 220/2022 of 29 Dec. 2022, with subsequent amendments, inter alia Federal Gazette No. 13/2024 of 27 Mar. 2024.

30 *See* e.g., Bundesfinanzgericht, 16 Feb. 2024, RV/7100521.2024, ECLI:AT:BFH:2024:RV.7100521.2024; 5 Apr. 2024, RV/7100705/2024, ECLI:AT:BFG:2024:RV.7100705.24; 16 May 2024, RV/7100295/2024, ECLI:AT:BFG:2024:RV.7100295.2024; 9 Sep. 2024, RV/7102957/2024, ECLI:AT:BFG:2024:RV.7102957.2024.

31 *See* e.g., Cases E 1287/2024, E 1817/24, and E 2203/2024.

Belgium had likewise introduced federal legislation on an 'inframarginal electricity levy' for the period between 1 August 2022 and 30 June 2023, skimming off 100 % of the surplus profits beyond EUR 130 per MWh.[32] These domestic provisions have been attacked by energy producers and associations of enterprises before the Belgian Constitutional Court which very recently sent a request for a preliminary ruling (Article 267 TFEU) to the CJEU with no less than fifteen (!) questions, most of which aimed at clarifying whether the core rules of Chapter II of Regulation (EU) 2022/1854 on a cap on market revenues are in line with the EU ChFR and general unwritten principles of EU primary law (such as legal certainty and non-retroactivity).[33]

Romania, finally, is one of the countries which had introduced a 'windfall tax' on (parts of) the energy sector already long before Regulation (EU) 2022/1854 was passed (*see infra* 1.), and the relevant legislation has been amended several times. A number of questions on the compatibility of these domestic rules with EU primary and secondary law, including the Regulation but also, for instance, the prohibition of state aid under Article 107 TFEU, have been referred to the CJEU in several preliminary ruling procedures initiated by the Court of Appeal of Bucharest.[34]

4 A closer look at Chapter III of the Regulation

This brief sketch of current developments regarding Chapter II of Regulation (EU) 2022/1854, which not necessarily requires Member States to introduce a tax (or more generally, a levy) on excess profits, already gives a foretaste of what to expect within the framework of Chapter III (Articles 14 to 18) which is much more explicit in this respect. Article 14(1) demands that, 'Surplus profits generated by Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors shall be subject to a mandatory temporary solidarity contribution, unless Member States have enacted equivalent national measures'. Hence, the provision actually addresses two types of domestic measures: In principle, Member States are obliged to introduce a 'mandatory temporary solidarity contribution' (respecting the specific requirements of Articles 14 to 18, and therefore here referred to as 'EU solidarity contribution'), but 'equivalent national measures' may likewise be sufficient.

4.1 Framework for the EU Solidarity Contribution

In a nutshell, the Regulation provides the following parameters as regards the EU solidarity contribution: It applies to companies which are tax-resident in the Member State concerned,[35] or permanent establishments (PEs) located in that Member State but belonging to non-resident companies, if these resident companies or PEs generate at least 75% of their turnover from extraction, mining, refining of petroleum or manufacture of coke oven products.[36] The assessment base consists of 'surplus profits' generated by the aforementioned companies and PEs, which arise as far as the taxable profits determined under national tax rules for the full fiscal years 2022 and/or 2023 exceed the average of the taxable profits in the four fiscal years starting on or after 1 January 2018 plus 20 % of that average.[37] The applicable rate to be set individually by each Member State must be 'at least 33%' of the assessment base, and Member States remain free to apply a higher rate.[38]

The EU solidarity contribution is to be applied next to the ordinary domestic taxes and levies of the Member States,[39] but only on a temporary basis and only to the surplus profits generated in the fiscal years 2022 'and/or' 2023,[40] so that Member States have the option to implement the Regulation either only for one year (2022 or 2023) of for both years (2022 and 2023). From the Regulation´s Preamble it can be derived that Member

[32] Law of 16 Dec. 2022 on (inter alia) the introduction of a cap for market revenue of electricity producers, Moniteur Belge of 22 Dec. 2022, at 98819.

[33] *See* Grondwettelijk Hof/Court constitutionnelle, judgment no. 67/2024 of 20 Jun. 2024, Cases 8031, 8032, 8033, 8034, 8035 and 8037, https://www.const-court.be/public/f/2024/2024-067f.pdf (last accessed 9 Nov. 2024), Case C-467/24, *2Valorise Ham NV* et al., OJ C/2024/6073.

[34] *See* with respect to Regulation (EU) 2022/1854, Case C-251/24, *Axpo Energy Romania SA*, OJ C/2024/4443 (third and fourth question); C-261/24, *Alizeu Eolian SA*, OJ C/204/4572 (first and fourth question); and C-392/24, *PPC Renewables Romanian SRL*, OJ C/2024/5600 (fourth and fifth question). Concerning the period before the introduction of Regulation (EU) 2022/1854, *see* Case C-391/23, *Brăila Winds SRL*, OJ 2023 C 321/28. In other Member States, 'windfall taxes' on energy producers predating the Regulation have likewise come under attack: For Greece, *see* Council of State (14 Feb. 2024), no. 188/2024, IBFD Tax News Service of 9 Apr. 2024, at 2 et seq.; for Italy, *see* Corte Costituzionale (27 Jun. 2024) no. 111/2024, *Engycalor Energia Calore srl* et al., https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST::2024:111 (last accessed 9 Nov. 2024), and also Tribunale Amministrativo Regionale per il Lazio (16 Jan. 2024) no. N. 06710/2023 REG.RIC, *Tamoil Italia S.P.A.*, https://www.osservatorio-giustiziatributaria.it/wp-content/uploads/2024/01/TAR-Lazio-ord.-767_2024.pdf (last accessed 9 Nov. 2024); for Spain, *see* on the acceptance by the Constitutional Court in Mar. 2023 of a motion by the regional government of Andalusia to scrutinize the constitutionality of the Spanish 'windfall tax' (on energy producers and banks), https://www.law360com/tax-authority/articles/1588786/spain-s-top-court-to-hear-challenge-to-windfall-profits-tax (last accessed 9 Nov. 2024).

[35] Under Art. 2(15) of the Regulation, this requires tax residence according to the domestic tax law of the Member State concerned, while there must be no situation of dual residence with primary residence in a third country under a double tax treaty between the Member State concerned and that third country.

[36] *See* Art. 2(17) of the Regulation, referring to (EC) No 1893/2006 of the European Parliament and of the Council of 20 Dec. 2006 establishing the statistical classification of economic activities NACE Revision 2, OJ 2006 L 393/1.

[37] *See* Art. 2(18) and Art. 15, first sentence, of the Regulation. The second sentence of the latter provision stipulates that, in case the average of the taxable profits in those four fiscal years is negative, the average taxable profits are considered to be zero.

[38] *See* Art. 16(1) of the Regulation and recital (54) of its Preamble.

[39] *See* Art. 16(2) of the Regulation.

[40] *See* Art. 18 of the Regulation.

States have further options when implementing the EU solidarity contribution domestically, inter alia with respect to its deductibility from the assessment base of other domestic taxes, or to the treatment of losses incurred in previous fiscal years.[41] Furthermore, the Regulation leaves the revenue raised by the EU solidarity contribution to the Member States, but obliges them to use the proceeds timely for certain financial support measures (for final energy customers, for the reduction of energy consumption, to support companies in energy intensive industries, and to develop an energy autonomy in line with the REPowerEU plan); a part of the proceeds may also be used for the common financing of measures to reduce the harmful effects of the energy crisis, and for the promotion of investments in energy efficiency and renewable energy.[42] All financing measures must be 'clearly defined, transparent, proportionate, non-discriminatory and verifiable'.[43]

4.2 Framework for 'Equivalent National Measures'

As already indicated, Article 14(1) of Regulation (EU) 2022/1854 obliges Member States to introduce the afore-mentioned EU solidarity contribution unless they have enacted 'equivalent national measures'. Regarding the latter, the Regulation only sets a rough framework, defining a measure in this sense as 'a legislative, regulatory or administrative measure adopted and published by a Member State by 31 December 2022 which contributes to the affordability of energy'.[44] Article 14(2) obliges Member States to ensure that their relevant domestic measures 'share similar objectives and are subject to similar rules as the temporary solidarity contribution under this Regulation and generate comparable or higher proceeds to the estimated proceeds' from the EU solidarity contribution. Furthermore, the Preamble of the Regulation states that a national measure:

> should be deemed subject to similar rules as the solidarity contribution where it covers activities in the crude petroleum, natural gas, coal and refinery sectors, determines a base, provides for a rate, and ensures that the proceeds of the national measure are used for purposes that are comparable to those of the solidarity contribution.[45]

4.3 Domestic Measures Taken by Member States and Pending Litigation

In November 2023, the Commission released a report on the review of Chapter III showing a wide spectrum of domestic measures: Fifteen Member States[46] implemented the EU solidarity contribution, eight Member States[47] enacted 'equivalent national measures', three Member States (Latvia, Luxembourg and Malta) were allowed to refrain from any domestic measures since they had no enterprises with relevant activities in the crude petroleum etc. sectors within their territory, and (despite the fact that domestic measures were supposed to be introduced until the end auf 2022[48]) one Member State (Cyprus) was still in the process of adopting legislation.[49]

As was to be expected, the domestic measures chosen by Member States differ considerably. This is already the case regarding the EU solidarity contribution, due to the various options it contains: From the fifteen Member States which implemented that contribution, six decided to apply it only to the fiscal year 2022, three limited its application to the fiscal year 2023, and the remaining six opted for an application for both fiscal years; furthermore, while ten out of these fifteen Member States only installed the minimum rate of 33%, the other five made use of the possibility to go higher and set their domestic rate at 40% (Austria), 55% (Slovak Republic), 60% (Romania), 75% (Irland), and even 80% (Slovenia), respectively.[50] Concerning the eight Member States which enacted 'equivalent national measures', the picture is even more diverse: This concerns both the assessment base and the applicable rate, and in additional also the temporal scope of application which one Member State (Czech Republic) even stretched from 2022 to 2025.[51]

Quite obviously the introduction of such domestic measures, which for the sake of simplicity will be referred to as 'windfall taxes' in the present context, triggers significant financial burdens for the industries concerned. Not surprisingly, therefore, several representatives of the latter, with EU subsidiaries of US giant ExxonMobil in the forefront,[52] immediately brought actions for annulment against Chapter III of Regulation (EU) 2022/1854 before the GC.[53] And while these cases

41 *See* recital (55) of its Preamble.
42 *See* Art. 17(1) of the Regulation, referring inter alia to Art. 33 of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 Dec. 2018 on the Governance of the Energy Union and Climate Action, OJ 2018 L 328/1.
43 *See* Art. 17(2) of the Regulation.
44 *See* Art. 2(21) of the Regulation.
45 *See* recital (63) of the Preamble of the Regulation.
46 Austria, Bulgaria, Croatia, Denmark, Finland, France, Germany, Greece, Ireland, Lithuania, Netherlands, Poland, Romania, Slovak Republic and Slovenia.
47 Belgium, Czech Republic, Estonia, Hungary, Italy, Portugal, Spain and Sweden.
48 *See* Art. 14(3) of the Regulation für the implementation of the 'solidarity contribution', and Art. 2(21) of the Regulation for 'equivalent national measures'.
49 Report from the Commission to the European Parliament and the Council on Ch. III of Council Regulation (EU) No 2022/1854 of 6 Oct. 2022 on an emergency intervention to address high energy prices – Solidarity contribution and enacted equivalent measures: stocktaking, COM(2023) 768 final of 30 Nov. 2023, para. V.
50 *See* Commission report COM(2023) 768 final, *supra* n. 49, para. V.5.1.
51 *Ibid.*, para. V.5.2.
52 *See* https://www.politico.eu/article/exxon-sues-european-council-over-eu-fossil-fuel-windfall-tax/ (last accessed 9 Nov. 2024).
53 Cases T-775/22, *TJ and Others v. Council*, OJ 2023 C 54/19; T-795/22, *TV and TW v. Council*, OJ 2023 C 54/19; T-802/22, *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v. Council*, OJ 2023 C 54/23; T-803/22, *TZ v. Council*, OJ 2023 C 63/64.

have been pending in Luxembourg for almost two years now, further cases have come up before the domestic courts and partly already reached the CJEU via preliminary rulings.

This concerns, first of all, Belgium, which had enacted 'equivalent national measures' in the form of a temporary solidarity contribution by the petroleum industry[54] and an extraordinary solidarity contribution imposed on the operator of the natural gas transmission network.[55] While the latter simply obliged the only existing operator to make a one-off payment of EUR 300 million in January 2023, the former covers the period from 1 January 2022 until 31 December 2023 and is more complex: It subjects petroleum companies registered in Belgium to a levy fixed at EUR 6.9 per ton of crude oil processed if the company is active in the refinery section, and to a levy of 7.8 euro per cubic meter of products released for consumption if the company has been designated as primary participant for diesel oil, gas oil or petrol. Current payments of the levy were be made already during the years 2022 and 2023, while after the end of each year a sort of shadow calculation has to take place along the lines of Articles 15 and 16 of Regulation (EU) 2022/1854 (*supra* at 4.1); should this calculation lead to an even higher amount, the difference is still to be paid by the petroleum company (while in the reverse case no refund will be made). This petroleum levy has been attacked by several companies before the Belgian Constitutional Court which, after having refused to grant interim measures in interlocutory proceedings,[56] referred altogether nine questions to the CJEU, mostly concerning the validity of Chapter III of Regulation (EU) 2022/1854, but partly also concerning the compatibility of the domestic provisions with EU primary law, inter alia the prohibition on state aids.[57]

A similar development has recently taken place in Ireland, which is one of the countries which implemented the EU solidarity contribution, but chose to go for a very high tax rate (75%), and this even for both years 2022 and 2023 (*see supra* at 4.1).[58] Upon an action brought before it by several companies belonging to a corporate group with activities in the development and production of natural gas in Ireland and therefore subject to the contribution, the Irish High Court referred five rather elaborated questions on the validity of Chapter III of Regulation (EU) 2022/1854, and partly also on the compatibility of the domestic implementation measures with EU primary law, to the CJEU.[59]

In a nutshell, the key points of discussion in the proceedings before the GC and the CJEU, just like in legal doctrine,[60] are the following: First of all, there are considerable doubts as to whether Article 122(1) TFEU could be used as a proper legal basis for Regulation (EU) 2022/1854, and in particular for its Chapter III (and even more precisely, its core rules in Articles 14 to 16). Secondly, the question is whether the provisions in Chapter III are compatible with the EU ChFR (which via Article 6(1) TEU forms part of EU primary law, and which via the first alternative of its Article 51(1) is 'addressed to the institutions and bodies of the Union'). This concerns, on the one hand, the compatibility with the freedom rights guaranteed by Articles 16 (freedom to conduct a business) and 17 (right to property) and, on the other hand, the compatibility with the equality rights guaranteed by Articles 20 (equality before the law) and 21 (non-

[54] Part of the Law of 16 Dec. 2022 on (inter alia) the introduction of a cap for market revenue of electricity producers, *supra* n. 32.

[55] *See* Ch. 2 of the Programme Law of 26 Dec. 2022, Moniteur Belge of 30 Dec. 2022, at 102925, 102929. Strangely, neither the text of the law nor the legislative materials (Exposé des motifs/Memorie van toelichting of the Projet de Loi-Programme/Ontwerp van Programmawet of 24 Nov. 2022, Chambre des répésentants de Belgique/Belgische Kamer van volksvertegenwoordigers, DOC 55 3015/001 (2022/2023), at 4, 8 et seq.) refer to the Regulation.

[56] Grondwettelijk Hof/Court constitutionnelle, judgment no. 97/2023 of 15 Jun. 2023, Case 7942, https://www.const-court.be/public/f/2023/2023-097f.pdf (last accessed 9 Nov. 2024).

[57] Grondwettelijk Hof/Court constitutionnelle, judgment no. 46/2024 of 25 Apr. 2024, Cases 7942, 8030, 8036 and 8040, https://www.const-court.be/public/f/2024/2024-046f.pdf (last accessed 9 Nov. 2024), Case C-358/24, *Varo Energy Belgium* et al., OJ C/2024/5076.

[58] For details concerning the Irish Energy (Windfall Gains in the Energy Sector) (Temporary Solidarity Contribution) Act 2023, *see* K. Matikonis & C. Garavan, *Post-Brexit Legislation: Windfall Taxes in the United Kingdom and the European Union*, 63 Eur. Tax'n 522–529, at 524 et seq. (2023).

[59] Case C-533/24, *Vermilion Energy Ireland Ltd.* et al.

[60] *See* e.g., J. Lüdicke, *Die sogenannte* 'Übergewinnsteuer' *– Ein neuer Fall für die Aufhebung eines Steuergesetzes?*, 75 Der Betrieb M4-M5 (2022); G. Erdős & G. Czoboly, *New Legislative Tool For Introducing EU-Wide Windfall Taxes*, 63 Eur. Tax'n 36–41, at 38 et seq. (2023); T. Hackemann & D. Weiler, *Vereinbarkeit der EU-NotfallVO mit Art. 122 Abs. 1 AEUV und mögliche Auswirkungen auf das EU-EnergieKBG*, 12 Internationale SteuerRundschau 70–80, at 73 et seq. (2023); F. Schumacher, *Übergewinnsteuer für Energieunternehmen verabschiedet – Erste Überlegungen zum EU-Energiekrisenbeitragsgesetz*, 16 Die Unternehmensbesteuerung 79–87, at 84 et seq. (2023); M. Valta, *Unions- und verfassungsrechtliche Rahmenbedingungern für eine Übergewinnsteuer am Beispiel des Engergiekrisenbeitragsgesetzes*, 100 Steuer und Wirtschaft 72–81, at 73 et seq. (2023); *id.*, *The Solidarity Contribution on Excess Profits of Regulation 2022/1854: German Implementation and Constitutionality, 51 Intertax* 771–780, at 773 et seq. (2023); J. Lammers & B. Kuźniacki, *The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law*, 51 Intertax 451–471, at 453 et seq. (2023); Alvarado, *supra* n. 5; A. P. Dourado & I. Mosquera Valderrama, *Editorial Note on the Windfall Profit Tax*, 51 Intertax 720–721 (2023); B. Lignereux, *Is the EU Contribution on Windfall Profits Based on the Right Treaty Provision?*, 51 Intertax 732–740, at 736 et seq. (2023); T. van Brederode & F. Casano, *EU Public Intervention in the Energy Market: A Stroke of Good Luck or Misfortune?*, 51 Intertax 754–770, at 755 et seq. (2023); F. Serrano Antón, *The Implementation of the Windfall Profit Tax for Energy Providers in Spain: Its Contested Compatibility With European and Constitutional Law*, 51 Intertax 781–800, at 784 et seq. (2023); D. Keuper & M. Zeck, Rechtsunsicherheit durch die neue Übergewinnsteuer im Energiebereich? – Eine rechtliche Würdigung des EU-Energiekrisenbeitrags, 61 Deutsches Steuerrecht 1297–1303, at 1299 (2023); D. J. van Bergen, *Solidariteitsbijdrage of solidariteitsbelasting?*, 152 Weekblad fiscaal recht 2023/232; M. Ellerbusch, R. Nonnenmacher & A. Thoß, *Besteuerung nach dem Zufallsprinzip? – Die Zufallsgewinnbesteuerung durch das EU-EnergieKBG im JStG 2022*, 76 Der Betrieb 344–349, at 347 (2023); T. Meickmann, *Taxing Powers of the European Union*, 52 Intertax 522–532 (2024); *id.*, *Unionsrechtliche Grundlagen und Grenzen von Sondersteuern am Beispiel des EU-Solidaritätsbeitrags*, 32 Europäisches Wirtschafts- und Steuerrecht 241–247 (2024).

discrimination). And last but not least, the question has to be answered whether Chapter III of the Regulation violates general principles of the rule of law such as, in particular, the principles of legal certainty and protection of legitimate expectations against retroactive legislation.

5 A SHORT EVALUATION

The present contribution does not intend to solve all the afore-mentioned legal issues. Rather, it aims at creating awareness for the fact that, within a period of merely two years, a complex legal battlefield has developed around the 'windfall taxes' imposed by EU Member States on the energy sector. This concerns individual taxes which had already been introduced before Regulation (EU) 2022/1854 was passed, and it likewise concerns all possible variations of taxes which were introduced within the framework of that Regulation: The EU solidarity contribution and 'equivalent national measures' on the crude petroleum, natural gas, coal and refinery sectors (*see supra* at 4.1 and 4.2), and even cases where Member States have implemented the cap on market revenue for producers of energy from (inter alia) nuclear or renewable sources by way of a 'windfall tax' (*see supra* at 3.).

For the different taxes covered by the framework of Regulation (EU) 2022/1854, in particular, the current situation has developed into a prime example of legal protection in multi-layered legal systems: Far beyond the limited area of compatibility of domestic implementation measures with their basis in EU secondary law (which is a standard issue in the field of EU tax law, typically when it comes to the transposition of directives), more fundamental questions are lying on the table with respect to, on the one hand, the compatibility of the EU secondary law framework as such with EU primary law (inter alia, the EU ChFR, which has recently gained importance as a benchmark for measures of a procedural nature,[61] but will now have to prove its value as a yardstick for substantive tax provisions) and, on the other hand, the compatibility of domestic implementation measures with possibly both the EU ChFR (via the second alternative of its Article 51(1)) and domestic constitutional law.

For the enterprises confronted with 'windfall taxes' within the framework of Regulation (EU) 2022/1854, this complex multi-layered system leads to complex procedural situations, as these taxpayers will have to decide whether to attack the domestic implementation or the EU framework itself – or both. Their decision may also depend on how a domestic Constitutional Court, if it exists, perceives its function for the protection of fundamental rights guaranteed at national or at EU level.[62] And as if the afore-mentioned situation was not complicated enough, there are always taxpayers who think 'outside the box' and start surprising secondary theaters of war.[63]

Altogether, Regulation (EU) 2022/1854 has created a microcosm for 'windfall' (or 'excess profits') taxes on the energy sector which presents itself as a perfect playground for the application, and further development, of fundamental principles of EU law in the area of taxation. The European Courts, above all the CJEU, have the opportunity to set clear limits to the legislative powers of the Council, and to strengthen the role of the EU ChFR even more. Domestic courts, above all the Constitutional Courts, may likewise come into the situation that they have to test domestic implementation measures against the EU ChFR. Whether the various types of 'windfall taxes' introduced within the framework of the Regulation will survive the strong headwind they are currently facing, remains to be seen.

[61] *See* e.g., CJEU (Grand Chamber), 16 May 2017, Case C-682/15, *Berlioz Investment Fund*, ECLI:EU:C:2017:373; CJEU (Grand Chamber), 6 Oct. 2020, Joined Cases C-245/19 and C-246/19, *Luxembourg v. B* et al., ECLI:EU:C:2020:795; CJEU (Grand Chamber), 22 Dec. 2022, Case C-694/20, *Orde van Vlaamse Balies* et al., ECLI:EU:C:2022:963; CJEU, 29 Jul. 2024, Case C-623/22, *Belgian Association of Tax Lawyers* et al., ECLI:EU:C:2024:639.

[62] For the rather complicated German perspective, *see* Constitutional Court, 13 Mar. 2007, 1 BvF 1/05, Entscheidungen des Bundesverfassungsgerichts 118, 79 (greenhouse gas emissions); 6 Nov. 2019, 1 BvR 16/13, Entscheidungen des Bundesverfassungsgerichts 152, 152 (right to be forgotten I) and 1 BvR 276/17, Entscheidungen des Bundesverfassungsgerichts 152, 216 (right to be forgotten II).

[63] A Jersey-based oil refining company is currently sueing Denmark (Case no. ARB/23/48), Germany (Case no. ARB/23/49) and the European Union (Case no. ARB(AF)/23/1) in arbitration proceedings before the International Centre for Settlement of Investment Disputes (ICSID), arguing that (Ch. III of) Regulation (EU) 2022/1854 and its implementation in Germany and Denmark are in breach of the multilateral Energy Charter Treaty of 17 Dec. 1994 (from which the EU withdrew in 2024). On 23 Jul. 2024, the ICSID Tribunal took a decision on provisional matters in case ARB/23/49, *Klesch Group Holdings Limited & Raffinerie Heide GmbH v. Federal Republic of Germany*, https://www.italaw.com/sites/default/files/case-documents/italaw182337.pdf (last accessed 9 Nov. 2024), obliging Germany to refrain from requesting any immediate payments from the second applicant. *See* on this topic also Report from the Commission to the European Parliament and the Council on the operation of Regulation (EU) No 912/2014 on the financial responsibility linked to investor-to-state dispute settlement under international agreements to which the European Union is party, COM(2024) 305 final of 22 Jul. 2024, at para. 3.5 and CJEU (Grand Chamber), 2 Sep. 2021, Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 para. 65.