

Editorial Note on the Windfall Profit Tax

In December 2022, the EU Council adopted Regulation 2022/1854 (Regulation). This Regulation introduces a temporary solidarity contribution (known as a windfall profit tax) as a component of the emergency measures to mitigate the high-energy prices for vulnerable consumers resulting from the Ukraine war. Due to the controversies that the windfall profit tax raises from policy making, EU, and constitutional perspectives, this special issue aims to contribute to the debate on this type of tax.

Some articles herein published critically analyse the policy making aspects of this measure, i.e., the applicability of Article 122 TFEU by the EU Commission, the solidarity contribution as a windfall profit tax, the retroactivity implementation of this Regulation, and its compatibility with the objectives of the EU Green Deal. Three of the six articles provided in this special issue focus on the implementation of the Regulation in Germany, the Netherlands, and Spain illustrating debates raised in the Member States and handling cross-border implications.

From a policy making perspective, Tarcisio Diniz Magalhães and Francesco de Lillo analyse the features of windfall taxation. For the authors, these are not new to the world, but they have assumed a variety of shapes and formats under different names in each country and period. After providing an examination of the historic, economic, and policy rationales for windfall taxation, the authors argue that lawmakers could use the accumulated experience of the past to go beyond the attempts to tax current crisis-driven high returns to ultimately build corporate tax systems that are more progressive.

Another article by Bastian Lignereux addresses the use of Article 122 TFEU for the introduction of the EU solidarity contribution. Article 122 TFEU can be used as an emergency clause that does not require unanimity by the EU Council. Lignereux's article contends that this legal basis is appropriate even though the EU solidarity contribution has to be classified as a direct tax. The purpose was to react to an economic situation (inflation in the energy sector) through a temporary solidarity measure. However, this author warns to keep in mind the consequences of the use of this article on the debate on the qualified majority in direct taxation that still provides for harmonization of direct taxation based on the unanimity

rule. For this author, Article 122 TFEU cannot serve as a basis for far-reaching tax harmonization attempts.

In turn, Alvaro Antón Antón analyses the Regulation in terms of the impact and alignment with the objectives of the European Green Deal. Specifically, this article examines whether the 'windfall profit tax for energy providers' can be considered an environmental tax. Since this does not appear to be the case, the article also evaluates whether the remaining measures outlined in the Regulation can compensate for or mitigate the lack of a true environmental component in the 'temporary solidarity contribution'. This article finally evaluates whether the compensation mechanisms provided by the EU Regulation are sufficient to reconcile the social and redistributive objectives with the environmental objectives of the European Green Deal. For this author, the answer is negative and, therefore, he concludes with a number of recommendations. According to him, the revenue collected through this windfall tax should be earmarked, at least in part, to finance environmental programs and projects such as promoting renewable energies, conserving natural ecosystems, and implementing climate change mitigation and adaptation policies. In this way, windfall taxes could have a positive impact in environmental terms by directing additional resources towards the protection and preservation of the environment.

Tim van Brederode and Federica Casano focus on the implementation of this Regulation in the Netherlands. They examine the use of Article 122 TFEU and also include the analysis of the criteria of emergency, solidarity, and temporality as well as the consequences for EU law making, i.e., qualified majority instead of unanimity being required for direct taxes, and the limited role of the EU Parliament. The authors concluded that using Article 122 TFEU as a legal basis is appropriate due to the specific economic circumstances resulting from the energy crisis. The authors also analyse the implementation of this Regulation in the Netherlands including the elements of retroactivity and the interference with the right to property which, in both cases, are justified due to the specific and compelling reasons for this measure. It required an intervention by the legislature with exceptional measures in order to protect the public interest. This article concludes by admitting the legality of the EU Regulation.

Matthias Valta focuses on the implementation of this Regulation in Germany and provides an economic background on the taxation of excess profit. This article also analyses the competence of the EU, especially the applicability of Article 122 TFEU and the limited role of the European Parliament. The two German acts implementing this Regulation are also critically examined as well as the role of the Federal Constitutional Court. This author also assesses the compatibility of the provisions of this Regulation with the Freedom of Enterprise, Freedom of Occupation, and the Principle of Equality and Non-Retroactivity. The author concludes that some aspects of the Regulation still need to be carefully analysed by law makers and also the courts but, thus far, Germany has not registered any objection in the ECJ's database. There has been a ruling by the Federal Constitutional Court on the energy price relief for consumers, but the complaint was rejected on procedural grounds and does not refer to the solidarity contribution.

Fernando Serrano Antón analyses the implementation of this Regulation in Spain. Prior to its introduction, Spain already had a temporary levy (direct tax) on energy providers that will need to be adapted to the EU solidarity contribution provided in the Regulation. According to the author, the nature of the Spanish temporary levy has

already raised criticism from scholars regarding its compatibility with the Spanish Constitution. Furthermore, the adaptation of this temporary levy to adhere to the Regulation has created problems due to the former's nature and features, i.e., characterization as tax or non-tax property contribution. This article also analyses the compatibility of this temporary levy with the right to property, the principle of equality, and the principle of non-arbitrary action of the Spanish Constitution. Thereafter, the author compares the temporary levy with the solidarity contribution and concludes that the former can be seen as incompatible with Article 17 of the EU Regulation that provides the possibility for Member States to create their own solidary contribution. However, it should not deviate from the purposes for which this contribution is established. Therefore, the author concludes that there is a potential conflict between EU law and the Spanish temporary levy.

Enjoy your reading!

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