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THE LEGALITY OF THE 2022 EU WINDFALL TAX

Bachelor's thesis

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is (expected length, 10,000-14,000) words from the introduction to the end of the conclusion.

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Glossary;

TFEU – Treaty of the functioning of the Europe Union

EP – European Parliament

EC – European Commission

The resolution - Procedure: 2022/2830(RSP) “The EU’s response to increase in energy prices in Europe)

The earlier resolution – Procedure: 2022/2653 (RSP) “The social and economic consequences for the EU of the Russian war in Ukraine - reinforcing the EU’s capacity to act“

Imputable – being assigned or credited to

ABSTRACT

This thesis examines whether the legal circumstances under which this article (EU) windfall tax of 2022 has passed are correct, considering the fact that there is no specific EU or TFEU article or law dealing with Windfall taxation or otherwise a solidarity contribution, but much can be made use of to justify it, of solidarity, in both conceptual form and practical application plays no small part in, exploring the policy objectives, legal frameworks, and practical implications associated with the introduction of such a tax, including comparing previous, or similar cases. The author will evaluate the compatibility of a windfall tax with the EU's existing legal and economic framework, focusing on the impact on internal market integration, competition, and state aid rules. It also presents a comparative analysis of windfall taxes in other jurisdictions and considers the design and implementation challenges associated with the introduction of a windfall tax in the EU.

Keywords: Solidarity, Windfall Tax, Crisis, Energy, TFEU

INTRODUCTION

The author will analyze whether legal mechanisms that EU levied were justifiably used to implement the Windfall Tax of 2022. The major problem is this is an unorthodox event, which called for an unorthodox solution, to levy not only a tax, but also a subsequent solidarity contribution. There is some vagueness to it that would be in need of being resolved and under an article that may „Bend the rules“ slightly. The hypothesis that, yes, not only is it legal, but the justification for such a unique thing, during unprecedented circumstances, requires not only adequate legal understanding of the resolution, the directives mentioned in it, and the supporting TFEU articles, but to also analyze, thus understand what does solidarity entail, what situations would typically require it . The concept of a windfall tax has gained traction in the European Union in recent years, driven by concerns about the need for green energy, climate change, and economic unpredictability, the largest and most recent „shakeup“ having of been caused by the Russian invasion of Ukraine, resulting in high energy prices, resulting in high windfall profits¹. A windfall tax is a one-time, emergency tax levied on firms or individuals who experience unanticipated or exceptionally high profit levels. Windfall tax supporters argue that a windfall tax could generate significant revenue, promote fairness, and contribute to public policy goals such as the aforementioned „greening“ of Europe, while opponents question its legal viability and economic efficiency The legal problem, and research problem too is that the contribution is with the characteristics of tax, passed as a regulation, in some ways, depending upon interpretation even breaching certain TFEU articles such Article 110 that prohibits discriminatory taxation, and are not sure whether the exceptional circumstances the EU finds itself in warrant a use of Article 122 that uses the concept of solidarity, something not very well defined, as a justification for the EC deciding to call upon appropriate measures, whatever they may be, if it is economic, with particular focus given to the energy sector.

The author has decided to use an analytical research method for this bachelor thesis, with our hypothesis and research problem that were stated above, The focus will be to go through previous cases of when there was a need, and/or an implementation of a Windfall tax, or a Solidarity tax, both in the EU, typically on the national level, or outside the EU, in the US if not for legal comparisons such as the TFEU provisions then to see parallels between justifications used by those who proposed them, if any, such as those due to crisis, or need of solidarity, or both. The author

¹ (The EU’s response to the increase in energy prices in Europe, 2022) (33)

also will cover academic debates of what constitutes the concept of solidarity, and a crisis due to the need to understand past reasonings, a solidarity tax would be a misnomer otherwise, if it is tax, with no need for solidarity or is proposed during something that does not resemble a crisis situation that therefore does not require solidarity in the first place. The Author draws parallels between those of the past and our new Windfall Solidarity Tax of 2022, and will interpret them, apply them to our current context, and after examining them, The Author will apply them to our research problem, and assess whether similar historical instances provide a valid conceptual basis for the implementation of a similar tax.

Due to the Russian invasion of Ukraine, or as dubbed by the Russian government, the Special Military Operation „SMO“, has caused the EC to claim that the case for a rapid clean energy transition has never been stronger or clearer², due to a need to not only achieve energy independence, the important caveat being from Russia as it is a multi-dimensional bid ramp up not only the production of green energy but also diversify supplies, as up until that point the EU was the largest importer of Russian energy commodities, with 111 Billion Dollars worth of imports, with 22 percent of the EU’s gas imports coming from Russia, and another 36% in terms of petroleum pre-war³. Without delving much deeper into the numbers, it is easy to see why sanctioning and cutting supplies resulted in a large price spike, generating windfall profits for multiple companies, while simultaneously causing economic hardship for European citizens, going from 36 million Europeans being unable to keep their homes adequately warm, to more than 50 million households⁴.

That is not to say some EU countries have not taken the initiative on their own, albeit it varies substantially with the introduction of new taxes or other economic methods to deal with windfall profits, such as Greece imposing a simple 90% levy on the energy companies for a defined period ending in March of 2022, though the lengths and methods have varied greatly of national implementations of a windfall tax, Hungary’s windfall tax for example lasts up until 2023, a similar length, though the exact rates were segregated depending from which „world markets“ such as the

² (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 2022)

³ (Mensbrugge, 2022)

⁴ (The EU’s response to the increase in energy prices in Europe, 2022)

tax applying on revenue generated imports of oil products from Russia due to the difference between world market oil prices and actual prices paid on import, being at 40%.

With Britain's, even though not a EU member by comparison lasting much longer, only expiring by the end of 2025, with once again different methods of approach, though just a 25% additional tax on oil and gas profits, with some additional methods to aid the economy.⁵

This would appear problematic due a disjointed effort of all these different EU national governments, doing their own best to combat the issue, all mentioned national windfall taxes starting before the resolution got passed. It establishes the barebones, if not even somewhat basic logic that if so many EU nationals feel the need to tax these windfall profits, and as mentioned earlier, the sheer amount of European households struggling due to the energy prices. It could be safely said, that instead of having a free for all of sorts, with every EU national choosing not only what sectors to tax, but also how much to tax these sectors, its an expected development, and in order to unify the EU's response and stabilize the situation EC stepped in to propose a resolution, and thus a windfall tax to somewhat harmonize the approach, and spending. It helps us see the, as of now in the thesis, the surface level necessity for it.

Eventually, of course the EU passed the resolution and to go over the relevant parts of it, that will be analyzed later on. Naturally the EP in the the resolution has regards to many directives, and the TFEU, in point 33 making explicit mentioned of using Article 122 of the TFEU, which amounts to making use of the „spirit of solidarity“ between member states to take measures appropriate to the ongoing economic situation, especially if there are difficulties. Article 107 of the TFEU however does warrant some analyzing as well if applied to the current situation, as purely theoretically this Windfall taxation can be seen as „state aid“ in the form of disadvantaging certain firms, such as if members are selective about who has to pay them.

Additionally, there are some „exceptions“ used by the resolution, that of Directive (EU) 2019/944, also known as „The Electricity Directive, Article 5, mentioned explicitly in the „Communication from the Commission to the European Parliament, The European economic and social committee of the regions“. The Electricity Directive's stated objective is to use the advantages of an integrated

⁵ (Thomas Baunsgaard, 2022)

market to ensure affordability to consumers.⁶ With Article 5 recognizing that it might be necessary under certain circumstances stray from the principles of The Electricity directive, those being (3), (6), and (7), which in simple terms allow for interventionist policies to be used by states to deal with high retail prices, whether through regulation, or protecting poor and vulnerable consumers.

⁶ (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Annex 1, 2022)

1. POLICY OBJECTIVES AND RATIONALE FOR A WINDFALL TAX

The analysis of the policy objectives and rationale behind the introduction of a windfall tax in the EU, as the reasoning behind doing so, is important to understand the justification, in a roundabout way. To see the potential benefits and drawbacks of such a tax, explore issues of fairness, revenue generation, legality, proportionality, and solidarity.

Firstly, how has life in Europe been impacted to warrant a need for such a tax? European cost of living in 2022 has increased by almost 7% on average, resulting in policymakers in the Summer of 2022 responding with broad, general measures, aimed at combatting at largely having the average citizen live cheaper, and businesses operate cheaper, whether through tax cuts or subsidies⁷. Before the EU as a wider entity mobilized into action, several governments have, or already had existing laws to combat such extreme cases of windfall profits, or high energy prices, such as a legal amendment that allowed the German government to, in simple terms, allow the raising of prices on customers by companies⁸ and that, as a matter of fact, most EU countries both energy regulation and levies are set at the national level⁹, not that supra national, or sub-national regulations don't exist or aren't impactful, it is important to know that during times of crisis, typically, the consensus is solidarity, thus the will to fix problems, typically comes nationally first¹⁰, thus typically EU-wide second, therefore making the initial effort to combat it as a matter of fact different per-country basis until the proposed Windfall Tax of 2022 during October that finally gave a more unified goal for the EU and a boon.

Naturally, there are some disagreements about the efficacy of such methods, and there have been a myriad of researches, and findings, and suggestions of what would be the best method to combat growing energy prices.

The council eventually agreed on measures to reduce energy prices, with a comment from Jozef Sikela, Czech minister of industry trade including „Member States will redistribute surplus profits from the energy sector to those who are struggling to pay their bills“¹¹, with the council agreeing

⁷ (Ari, 2022)

⁸ (Ari, 2022)

⁹ (Giovanni Sgaravatti, 2022)

¹⁰ (CICCHI, 2020)

¹¹ (Store, 2022)

on a overall reduction of 10% gross electricity consumption, with more fiscal policies related to caps on market revenues at 180 euros/MWh for electricity generators, with member states agreeing to use best perceived methods of choice of where to redirect surplus revenues resulting from the windfall tax, and most importantly, member states agreeing to set „A mandatory temporary solidarity contribution on the profits of businesses active in the **crude petroleum, natural gas, coal, and refinery sectors.**“¹² With the regulation being formally adopted by written procedure in early October.

There is some geo-political rationale behind the windfall taxes as well, besides merely surviving the crisis in a decent shape, but to also wean off energy dependence off Russia. In addition to it being an attempt to deprive Russia of funds for its war machine, and to accelerate the movement to clean energy¹³.

Thanks to the myriad of justifications and „green“ directives, with an emphasis on a greener Europe, it is accepted that there would be some short-term economic pain, for the sake of long-term economic viability. Especially as during Winter the EU which is increasingly a green-energy producing Union, is challenged by „dark doldrums“, causing the extreme price hikes of the time, as not only was it cut off from Russian gas, but that too highly renewable energy systems are challenged for a time due to solar and wind generation being low, while electricity demand was high¹⁴

1.1. Solidarity

How to define solidarity, and why? There is a call for the need of greater and unprecedented solidarity among the EU member states¹⁵. It matters to our research question as the fine language, and understanding of what solidarity truly is and whether this crisis did indeed require a „solidarity“ tax. As mentioned in the EU’s response to the increase in energy prices, it gets called

¹² (Store, 2022)

¹³ (Mensbrughe, 2022)

¹⁴ (Tim Tørnes Pedersen, 2022)

¹⁵ (The EU’s response to the increase in energy prices in Europe, 2022) Introductory Considerations/Impact on Citizens and the Economy

a „solidarity contribution“¹⁶ on the fossil fuel sector. Due to excess windfall profits of companies during the period.

Solidarity comes in many forms in the EU, even when not expressly stated so, as the European Stability Mechanism (ESM) and the refugee quota programs have been considered as forms of „Institutionalized“ solidarity¹⁷. Ciornei, whose work the Author will be mainly referring to in this section unless sourced otherwise, from **„Solidarity in Europe: from crisis to policy?, by Irina Ciornei, Malcolm G. Ross“** asks the questions of „Is solidarity intrinsically linked to crisis situations? Are crises the terrain upon which solidarities flourish“, with the varying answers the Author gets from many other being of relevance to us. Banting and Kymlicka defining it as „Mutual acceptance, cooperation and mutual support in times of need“, which is reminiscent of the current situation of the EU, with the EP describing the dramatic rise in energy and food prices as having a significant impact on the EU’s citizens¹⁸ with further definitions being given such as „Tools with which to reapportion and moderate the effects of national and manmade misfortune“ Baldwin (1990)¹⁹, which seems to be the most suiting definition yet due to our „solidarity contribution“ being the reapportion and the effort to moderate the effects of national and manmade misfortune which would be the aforementioned high energy and food prices, albeit largely referring to energy prices.

Solidarity, can also be viewed as a „cause and effect“ type of movement within the EU, as it is broken down into 3 dimensions by Ciornei, „The Trigger“, „Outreach“, establishing who the solidarity actors are. With the third dimension being that of „level of Inquiry“, locating transnational solidarity on a multi-level scale, now as Ciornei establishes the definitions for each of these dimensions of solidarity, the Author can draw parallels with the current situation of the EU, to gauge the validity of the current case for EU-wide solidarity in the form of a windfall tax

The trigger, as can be inferred from a surface level observation is, what triggers the need for solidarity, or to be particular, where a sharing of resources is called upon, or, four domains, fiscal to refugee solidarity²⁰, fiscal being appropriate due to the nature of this being an EU-Wide windfall

¹⁶ (The EU’s response to the increase in energy prices in Europe, 2022)

¹⁷ (Ciornei, (2021))

¹⁸ (The EU’s response to the increase in energy prices in Europe, 2022) (A)

¹⁹ (Ciornei, (2021))

²⁰ (Ciornei, (2021))

tax, it is sufficient to say that, our trigger, the Russian war of aggression against the state of Ukraine and the subsequent economic fallout is an adequate candidate to be considered a trigger. Outreach refers to the recipients of European Solidarity, from EU, to EU citizens, with the EP urging member states to ensure access to affordable and clean heating and electricity, to avoid people making the choice of choosing food, or heat, avoid home evictions, and many more²¹ all goals that become much more achievable thanks to the Windfall Tax in question. The levels of which are first of, on the macro-structural levels, At the macro-structural level, EU solidarity is based on a set of principles that emphasize the importance of cooperation, mutual assistance, and social justice. These principles are enshrined in various EU treaties and policies, such as the TFEU and Charter of Fundamental Rights, in this case by the fact that this is an EU-Wide Windfall tax. Unfortunately, the meso-level of European solidarity has been insufficiently studied so far²².

Lastly on the micro-levels are the average people, citizens of EU countries, where it seeks to explain individual support for EU solidarity principles, as per Ciornei. After all, if the people are unwilling, so too typically are governments. It comes in several forms, whether through monetary support, attitudes, sharing resources and the kind. Albeit two things of note for micro-level solidarity, is for one, Ciornei states that there is „virtually no linkage between the popular support for European solidarity and institutional principles and policies aimed at sharing goals, resources and risks on the territory of the EU“ in other words, surprisingly, popular support for solidarity rarely has an influence on the institutional principles, that on paper should be there. Still, micro-level solidarity is perhaps the least important in that case, due to the nature of Windfall taxes largely affecting, companies, who employ an ultimately limited amount of people, neither having a micro-level negative effect, that being, not that the average citizen has to give up his own wealth, nor that as Ciornei concluded, popular will or not, there would of been likely, though not certainly been any cause and effect between the Windfall tax and any alternatives of whether there was popular support for it or not. Ciornei thus states, that a citizen-centered solidarity route could be a future pressing field to pursue given the existing shortcomings of the member-state focus of solidarity.

The slight, non-legal problem perhaps is that researchers have found that typically national solidarity comes first to that of the EU²³ and once again the concept of solidarity has been divided

²¹ (The EU's response to the increase in energy prices in Europe, 2022) (5-17)

²² (Ciornei, (2021))

²³ (CICCHI, 2020)

into 3 dimensions, though in comparison to Ciornei it has been classified into facts, those being 1) Solidarity is costly, 2) Solidarity is uneven, 3) Solidarity breeds moral hazard²⁴, due to the costly nature of it, and the expansive size of the EU, ranging from Spain, to Poland, to Greece, causing imbalance, as perhaps some benefit more than others, but, there are comparisons still to be drawn between these dimensions and that of Ciornei, that being of contributors, and recipients, as one can see much in the same a member state's contribution as that of a contribution of its citizen to those who are less fortunate in times of crisis.

Overall, it can be said that under these circumstances, among valid concerns, real troubles, and a real need for unity to properly overcome this manmade disaster, Europe is both in need of solidarity to overcome it, and fulfills for the criteria listed by Ciorni for it to be considered a situation that needs it, according to all the varying definitions explored.

1.2. What constitutes a crisis & Fiscal sovereignty

Policy scholars have identified a crisis as a critical moment which contributes to policy innovation²⁵, a large part of this chapter makes use of „Crisis, uncertainty and urgency: processes of learning and emulation in tax policy making“by Matthew Lesch & Heather Millar and will be talking about points made there, unless sourced otherwise. One of the biggest critiques towards policy making during crisis in the paper is that during high intensity crises, policy makers are spurred to act first, think later, or perhaps, even cause issues in the rush of making resolutions such as that of our EU Windfall tax. Additionally in broad terms, when attempting to address social and economic crisis, both annual net wealth taxes, and capital levies have been attempting with the goal of raising revenue²⁶.

There is typically an element of uncertainty present during crisis situations as well that contributes to something being classified as a crisis, such as an Ontario VAT tax reform, resulting from high uncertainty, and due to moderate urgency due to the financial crisis of 2008²⁷, or how some scholars mention the COVID-19 Pandemic that resulted in both a political and economic crisis²⁸

²⁴ (CICCHI, 2020)

²⁵ (Millar)

²⁶ (Klug, 2022)

²⁷ (Millar)

²⁸ (Klug, 2022)

and that solidarity was conceptualized and applied within the EU during the Refugee crisis, with TFEU Article 80 playing a role

TFEU Article 80

„The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.“

So, the author has gathered that only there are criteria for crisis, uncertainty, and a rush to adapt legal policy to combat it, that would fulfill all the check-marks for the on-going situation at the time or when the resolution got

Also that, in the past, the EU has made of the solidarity clause, with plenty of theoretical solidarity during a crisis being talked about, some more practical applications to implement solidarity have come too that the reader can reflect on, with solidarity being interpreted as a principle in EU's migration policies, a typical example of it operating in the form of welfare, though it is admittedly a bit of a stretch, a good example would be systems of social welfare, when member states under EU law are required to include foreigners who come from other member states who are in the process of finding employment, are included in the system of social security²⁹. Even though in the human rights realm, solidarity is reflected in the, if not concern of all states to protect human rights³⁰, which does establish the fact that solidarity can be perceived differently not only on a national, and EU-international level, but also in a more global sense and taking within its scope something as fundamental as basic human rights, including those of refugees³¹. The Author can therefore, draw parallels between the purpose of the windfall taxes, to be akin of a social security as excess profits are raked in from companies, and are then adequately redistributed to other member states, such as the Baltics, were ones who were not only more dependent on energy imports from Russia, but also spend a proportionally higher percentage of their income/budget on heating, energy, and transport³².

²⁹ (Bast, 2016)

³⁰ (Karageorgiou, 2016)

³¹ (Karageorgiou, 2016)

³² (Mensbrughe, 2022)

Though there does exist tension between sovereignty and a legal principle of international solidarity³³ that would, even if on an EU members level, would need to be dealt with gently, and reviewing of the EU's legal mechanisms and how it interacts with state sovereignty. As mentioned earlier, national solidarity typically comes first, then international solidarity. Unless of course, it will come at a great general benefit to one side, upon which division is common. There was distinctive argumentation in favor, and against of a rationale of greater fiscal risk pooling. Two of the most common arguments against Northern executives (such as Finland, Sweden) is that they opposed any form of a 'debt union', and a strong belief in a so called national responsibility, expressed as a defense of budgetary sovereignty, interestingly, quoting Finnish Finance Minister Katri Kulmuni „We are a cooperative EU member state, but even in exceptional circumstances, the countries' own responsibility for the management of their economic policy should not be revoked or joint and several debt should not be increased.“ (STT, 19 May 2020)³⁴.

Sovereignty, both classical, and when it comes to solidarity and economic matters is taken seriously, so much so that, as with the recently mentioned complaints of the Northern executives that it almost seems, emotive in a way, member states placing other member states up to standards. It introduces an interesting new dimension, even if small, that solidarity contribution must be done under the right circumstance, and method, so no national EU members feels isolated, or that they're being lead into a „debt union“ of sorts, betrayed the sense of solidarity, institutionalized or not. It is once again, due to its more emotive nature, is moderately harder to grasp, deal with, and understand as it is more than legality. In conclusion, for solidarity contribution taxation to be truly effective it would under normal circumstances, unfortunately need a crisis that with some urgency, and some uncertainty, requires the quick draft of new taxes, as a resolution, or law, yet to still treat the fine line of being adequate enough to help, yet not over-stepping boundaries as to feel the solidarity forced. It is not a purely scientific or regal matter in this case, as it would seem its partially influenced by national pride, reading that particular vocabulary of „debt union“ and „national responsibility“ so, under specific circumstances, it may be better to have certain members pull their own economic weight. That being said, due to the unexpectedness of the Russian invasion, so far it seems there were no EU members who has a quarrel with the resolution proposed. So despite a troubled history, in this case, the energy price spike and bleak situation was enough to make European solidarity work, even if that comment may seem somewhat cynical.

³³ (M.T. Kotzur, 2014)

³⁴ (Miró, 2022)

1.3. Other cases of Social solidarity tax & alternative takes

The need for a social solidarity tax is commonly two fold, as mentioned previously it typically requires, adversity, or a trigger, of some kind, generate the necessary political will, and thus to an extent, legality. As needing and urgent solidarity contribution tax, may be viewn as redundant, or unnecessary if there no situation that calls for it.

Starting off, theoritcal, a design of a social solidarity tax, would need to consider to whom should the newly generated revenue flow to, or in more specific terms, whether it'll just go into the treasury of the government, or would it be more wisely spent for whatever is most needed at the moment, or other specific needs, Such as the case this paragraph is working with Healthcare, should it, as a USA case of the time, should it flow to Sentaor Bernie Sanders' 2020 Healthcare for all plan, to fight to COVID-19 epidemic, or a national wealth fund limited to funding social needs, ranging from education, to general health, housing, and such. A good social solidarity tax should correctly designate how these new funs be allocated³⁵, thus a justifiable, therefore by extension legal, even if by going off general values and laws, putting the funds earned though to good use. Alternatively, it is important too to question how will companies react to a large loss of their profits, even if excessive, as typically money used to pay a windfall tax such as in the UK 2 decades ago, cnnot be also used to finance investment spending, thus increasing borrowing³⁶.

The EU-Russia relationship is complicated, in no small part due to the relatively high autonomy of EU member states, in particular, though not relvantly Hungary. But a take on the situation that can influence the perception of social solidarity, in perhaps that some name the current status of EU-Russia relations at that of a hybrid war, that has costs³⁷, and interestingly argues against rushing regulation³⁸, despite a crisis situation typically requiring some level of bureacratic speed and 20. It is an interesting, contrarian statement that has been made, giving an already serious situation a rigid tone.

³⁵ (Klug, 2022)

³⁶ (CHENNELLS, 1997)

³⁷ (Rosembuj, 2022)

³⁸ (Rosembuj, 2022)

2. THE TFEU

A windfall tax required by the EU is an interesting approach in that according to treaties EU has no right to levy taxes and has to respect national fiscal policies, seems akin to a conundrum, but to immediately resolve the issue, the EC has the existing legal framework to the „Own Resource Decision“ to establish the own resource, which allows approximation or harmonization of existing national indirect taxation, if it is for the good of the Single Market, or to achieve energy-related objectives³⁹.

The resolution adopted by the council, that introduced the windfall tax, and the solidarity contribution was based on **Article 122 (1) of the TFEU**⁴⁰

Article 122 (1) of the TFEU

„1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy“

Subsequently, the EC argued that the resulting disruption of natural gas supplies, and reduced availability of power plants that affected the member states creates a situation that falls under the meaning of Article 122(1) TFEU⁴¹. Importantly, it also tackles the previously mentioned „free for all“ issue of disjointed and uncoordinated measures of national governments of the EU to combat it, avoid significant distortions between generators, and importantly it will help finance relief measures to electricity consumers⁴². The council’s justification was that co-ordinated effort like that was done so in order to not lead to lasting damage to public finances and the economy⁴³. The proposed regulation is still relatively general, allowing member states plenty of leeway, including containing optional measures⁴⁴.

³⁹ (SCHWARCZ, 2022)

⁴⁰ (Katharina NICOLAY, 2023) pp 24 footnote 28

⁴¹ (European Commission , 2022) p.4(7)

⁴² (Katharina NICOLAY, 2023)

⁴³ (European Commission , 2022)p. 4(6)

⁴⁴ (Katharina NICOLAY, 2023)

The regulation being so general, and containing optional measures are stated earlier, is in fact a great thing that works well, due to not infringing on national fiscal sovereignty. The regulation treads a fine line with only doing the bare minimum, to not so much force, as a guide and coordinate the EU effort successfully, without lasting damage escape a potential economic quagmire and disunity, via not only co-ordinating the aforementioned windfall tax, but also relieving consumers, especially those in vulnerable member states, or formerly heavily reliant on Russian energy imports, such as the Baltic states.

Although the principle of legitimate expectation is not expressly mentioned in EU laws nonetheless it is regarded as a general principle of EU law as well as member states⁴⁵, but why bring it up? It perhaps may not be a major piece of the metaphorical chessboard, however it was still a concern, due a previous Windfall Tax that was in Britain, and some, uncertainty behind it. Due to the problem of taxation being retro-active directly or indirectly. But it seems this minor case is of no concern to the EU as not only was this windfall tax retroactive in any way, it was neither abstract and would, observe a reasonable balance between an individual's expectations, and interests, additionally, „according to reports, the principle is directed at protecting the individual rights, legal interests, in legal relationships, between private parties and institutions of public authority, as mentioned in the reports of Lithuania, Finland Hungary, Latvia, Bulgaria, and Montenegro and is in particularly stressed by the rapporteur from Estonia“⁴⁶ To address this issue is to handle anything problematic that could cause problems with that principle, for one, it largely benefits citizens all the same at best, at worst it makes little to no difference, so it cannot be that the principle fails to take into account the interests and expectations of individuals. It was described as a legal relationship with legal interests. It can be ascribed to the situation of the windfall profits of energy companies reaching high levels, by definition windfall profits, are, excessive profits, and energy companies, typically, though not always are private companies that can expect fair and reasonable treatment, with their interests in mind, as lawmakers in the EU are typically long-term minded, and to secure the energy supply and demand, to make sure households do not go cold, and even potentially prevent a massive recession, it can be argued that short-term windfall profit taxes levied by the EU and redistributed efficiently through a coordinated resolution, are just as much in their own interest, as they are in the interest of the energy companies, as an economically depressed EU is by default, a less economically vibrant and active market, with devalued currencies, and the myriad of other negatives that come with economic depression, likely causing

⁴⁵ (Waelde, 1999)

⁴⁶ (ACA-Europe, 2016)

a long term decline in profits for the energy companies. Therefore by taxing energy companies of their short-term excessive profit, the EU not only improves its own economic well-being longterm, it also secures the same long-term interests of the energy companies in terms of long-term profit, despite the fact that the EU is moving towards a greener future, although one would be hard pressed to call that as that always was a long-term legal interest of the EU as well.

3. LEGAL FRAMEWORK OF IMPLEMENTATION OF THE WINDFALL TAX

This chapter presents a thorough analysis of the EU's legal framework governing taxation, focusing on the principles of subsidiarity, proportionality, non-discrimination, and the free movement of capital. The author discusses the EU's competence in the field of taxation, highlighting the delicate balance between the harmonization of tax policies and the preservation of national fiscal sovereignty, and whether the resolution infringes upon it. It also assesses the Treaty provisions on the coordination and harmonization of tax policies among the EU Member States.

The EU has given the green light that in order to finance emergency tax measures, member states can consider temporary tax measures on windfall profits, including profits of up to 200 Billion⁴⁷, with further support of the Electricity Directive, using the advantage of an integrated market, and with **Article 5 from within the electricity directive** „Market-based supply prices“. Not to give too much attention to this directive, but it is none the less part of the regulation's framework as a mentioned directive, and being a case of guidance on the application of infra-marginal profit fiscal measures, encouraging care however to not only redistribute revenues from the aforementioned fiscal measures but to also a, well, general guide on the whole approach, including the staying within the existing legal framework⁴⁸

⁴⁷ (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 2022)

⁴⁸ (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Annex 2, 2022)

4. WINDFALL TAX AND STATE AID RULES (SIMILAR TO 3, BUT HOW IT WOULD NOT BE A BOON TO BUSINESS EITHER, SUCH AS STATE AID)

How would the resolution and subsequent Windfall tax impact EU state aid rules, focusing on **Article 107 of the TFEU**. It assesses whether a windfall tax might constitute state aid by selectively benefiting certain sectors or companies and explores the potential justifications for such a tax under the EU's state aid framework.

State aid rules play an integral role in energy regulation within the European Union, specifically in relation to the provision of state aid to undertakings involved in the generation, transmission, and distribution of energy in the internal market⁴⁹. These rules, encompassed in

Article 107 of the TFEU

It is rather long, however, it can be summarized as referring to largely state aid, in any form whatsoever, that specifically distorts or threatens to distort competition by favoring undertakings. But more importantly are the exceptions under which it is allowed

Of those applicable to the situation

- a) Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination..
- b) Aid to make good the damage caused by... exceptional occurrences
- 3) b) Aid to promote execution of common European interest or to remedy a serious disturbance in the economy...
- e) Such other categories of aid as may be specified by decision of the Council from the Commission, which, it did in the regulation, nothing of note to add to this

We can go through them as a practical checklist of sorts, to keep it relatively simple and understandable

- a) As per the resolution, point Q, their decision for the solidarity contribution, in other words the aid in question that gives both legitimacy and a logical need for the Windfall taxation

⁴⁹ (Herrera Anchustegui, 2019)

- b) As per “Introductory considerations” of the resolution 1), 2), 3) All make mention of aid making good the damage, from “Members states to tackle the impact... particularly for the most vulnerable people” to directly making mention of the exceptional occurrence in 3) “Believes that exceptional times require exceptional emergency measures”
- 3) b) With having regards to the electricity directive, the green deal, using Article 122 of the TFEU, all existing legal frameworks and thus fulfillments of obligation

Article 14 of the TFEU plays a vital role, allowing for some certain wiggle room, though interestingly it is not mentioned in the resolution, which in my opinion would have been useful, as to quote it (with no prejudice to article 107 of the TFEU)

“The Union and Member states.. within their respective powers and scope of the application..shall take care that services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfill their missions.. The council acting by means of regulations”

It recognizes the importance of services of general economic interest, and, essentially allows them to operate on principles and missions to achieve their objectives. It could have been mentioned in the resolution, the windfall tax, and the solidarity contribution had aims to protect consumers, and promote the greening of Europe, as the regulation made mention and had regard of Directive (EU) 2018/200 “On the promotion of the use of energy from renewable resources” . It can be said it both gives the right for EU member states to use the newly acquired resources as they see fit gained from windfall tax profits, as long as it is within the scope of the application and works in favor of the guidelines outlined by the resolution, and in respect of all its various directives

Article 108 of TFEU,

Aim to prevent Member States from granting undue advantages to certain entities, unless such benefits are compatible with the internal market and have been notified to and approved by the Commission. The importance of state aid rules in the energy sector is evident, with a significant portion of approved state aid spending being attributed to environmental and energy-related measures, including support for renewable energy.

This article works as a simple preventative measure to stop any member states from attempting to unfairly profit, or have their private or public entities gain an unwarranted advantage, thus putting solidarity at risk, as with the state aid being discussed. Such as selectively not taxing the windfall profits of a company that has its headquarters in said member state. But other types of state aid are permitted, if done for practical purposes, such as maintaining the stability of the market or economy, there in the case of state aid being provided to citizens, thanks to the excess profits of the Windfall taxes, would be a benefit and allowed, as it gives no inherent advantage, and it can be said that it was approved by the EC in the regulation, such as point 13 of the regulation “ the impact of the energy crisis on the labor market by supporting workers who are temporarily in ‘technical unemployment’ because employers were forced to limit or suspend their activity“,

The State Aid rules take an active role in the energy sector with several grounds to explain as to why that is the case⁵⁰, With some specifics of when it is deemed legal or not, typically under, such with the latest regulation, specific types of state aid being permitted that do not with the energy sector commonly being characterized by various market failures that market forces alone cannot fully. Such as natural monopolies, public service obligations, and the need for substantial investment in renewable energy markets at a high rate, etc⁵¹. Additionally, there are three major circumstances that explain the extensive state aid presence in energy markets. Member States have political and legal duties, interests, and obligations to meet energy security and environmental targets set by EU rules on renewable energy and national policies.⁵² Consequently, state aid has been increasingly present in the energy sector in recent years due to the sector's significant financial investment requirements, the role of Member States in meeting energy-related goals, and the need for state support.⁵³

Determining whether a measure qualifies as state aid involves several criteria. First, the measure must have a state origin, meaning it must be imputable to the state, in other words, credited to the state, and state resources must be involved. Imputability is established when the aid is granted by a public authority, whether it is the state itself or one of its organs, or by a public or private body

⁵⁰ See also: Falk Schöning and Clemens Ziegler, ‘What is State Aid?’ in Leigh Hancher, Adrien de Hauteclouque and Francesco Maria Salerno (eds), *State aid and the energy sector* (Hart 2018) 4; Hans Vedder and others, ‘EU Energy Law’ in Martha Margrethe Roggenkamp and others (eds), *Energy law in Europe: national, EU and international regulation* (3rd ed. edn, Oxford University Press 2016) para 4.169.

⁵¹ Kim Talus, *Introduction to EU Energy Law* (OUP 2016) 106

⁵² (Herrera Anchustegui, 2019)

⁵³ (Herrera Anchustegui, 2019)

entrusted with such a task by a public authority, as clarified in *PreussenElektra*⁵⁴. Though the origin of state aid is of no particular issue, as the regulation that proposed the Windfall tax also gave the green light to use the funds in a few sanctioned methods, making it irrelevant where the state aid came from, as long as it does not fulfill the other criteria.

Another criterion for state aid classification is that the aid must be granted to an undertaking, which refers to an entity engaged in economic activity regardless of its legal status or financing method. Economic activity is defined as offering goods and services on a given market, regardless of whether the activity is for profit. Non-profit entities that do not offer goods and services on a market fall outside the scope of state aid regulations⁵⁵. However, entities engaged in economic activities, even if they exercise public powers or act as authorities in certain areas, may still be subject to state aid rules as long as the economic activities are separable from their public functions. This means that entities such as transmission system operators entrusted with security functions or other infrastructure providers are not exempt from state aid rules, as their economic activities can be distinct from their public responsibilities. On the other hand, certain institutions such as public healthcare, education, research systems, and certain cultural, heritage, and nature conservation activities are generally considered non-economic and fall outside the scope of state aid regulations due to them, not quite being, profiteering business investments so to say, as opposed to, for example, a state-run theme park that requires payment to enter, it's providing services, for a fee, much like a private enterprise, and therefore it could be considered economic and fall within the scope of state aid regulations, though as mentioned profit is not necessary for something to fall within the scope as well.

The advantage criterion is a fundamental element of state aid law. To qualify as aid, a measure must confer an advantage with a state origin to an undertaking that it would not have received under normal market conditions. An advantage is defined based on its effects, rather than its cause or intention, and can be direct or indirect. It encompasses various forms, including net payments, subsidies, loans, and direct investments, as well as the relief from the payment of taxes or fiscal charges.⁵⁶ This is perhaps the most important factor which typically determines whether state aid was warranted/should be regulated or not, as if, it exactly as it is read confers an advantage, no

⁵⁴ (Judgment of 12 March 2001, *PreussenElektra* See more recently: Opinion of A.G. Sharpston of 22 June 2017 in *Farrell*, C-413/15, EU:C:2017:745, 2001)

⁵⁵ (Herrera Anchustegui, 2019)

⁵⁶ (Herrera Anchustegui, 2019)

difference what the original intention was. It is relevant in terms of the energy crisis that the regulation addresses, as taxing all excess profits, and redistributing them in such a manner as to merely avoid prolonged economic damage, suffering, or otherwise poverty or lack of heating. Is not giving anyone any particular advantage, merely can be said it is a temporary affair to weather the economic fallout of the unprecedented event.

There are two exceptions to the scope of Article 107(1) of the TFEU, where the granting of a benefit to an undertaking does not constitute an advantage. Firstly, if the benefit is compensation for the provision of Services of General Economic Interest SGEIs, or secondly, if the state acts as a private investor would⁵⁷. These exceptions have significant implications for the energy sector, as they allow for the financing of socially sensitive services and enable the state to engage in economic activities in a manner consistent with private investment.⁵⁸

Additionally, in the latest case, the EU has clarified in guidance for the implementation of the exemptions from windfall taxes of 2022⁵⁹ that would lead to selective advantages in specific undertakings and would lead to state aid rules applying.

In conclusion, state aid rules play a crucial role in energy regulation within the European Union. The determination of state aid involves assessing the state origin of the measure, which acts as a safeguard with definitions given to us to make sure in whatever form the state aid comes, direct or indirect, it will go through the same “filter” to to speak, the status of the recipient as an undertaking engaged in economic activities, and the presence of an advantage conferred to the undertaking. While the energy sector presents specific challenges and considerations, such as the need for substantial investments, renewable energy targets, and public service obligations, state aid rules provide a legal framework to ensure fair competition and prevent distortions in the energy market, such as knowing the difference when providing state aid is needed or when it distorts the market, which is partially what the regulation uses to prevent selective taxation that would result in an unfair market otherwise.

⁵⁷ (Herrera Anchustegui, 2019)

⁵⁸ (Herrera Anchustegui, 2019)

⁵⁹ (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Annex 2, 2022)

4.1. Article 122

As part of the economic policy chapters of the TFEU, **Article 122** was directly invoked in the regulation in particular **Article 122 (1)**

“Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.“

There is some, admitted stigma of sorts when it comes to Article 122 as there are situations such as fiscal crises brought about by the country’s own behavior⁶⁰ which echoes aforementioned issues of solidarity brought out by „the northern bloc“ of nations, which had a certain expectation of nations to pull their own weight, in some respects, it can be interpreted that, using some improper politics, that it was the folly of Eastern European countries, such as the Baltic states, for growing dependent on Russian energy imports and not doing enough to diversify their energy income, thus causing the price hike in the energy sector to hit them the hardest. However, luckily, this time around it did not seem to be the case as overall EU member states accepted the resolution with no major resistance. That is important as once again the definition of crisis, solidarity, and unprecedented situation, these events that led to the energy spike are something no one could of foreseen with any genuine certainty. Even with the occasional political analysts making varying predictions, it is still a fact that the invasion of Ukraine and the resulting economic fallout caught the EU by surprise.

Which redirects us to **Article 120 of the TFEU**

„Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favoring an efficient allocation of resources, and in compliance with the principles set out in Article 119

It sets up this roundabout motion of an Article of the TFEU mentioning another article, which overall is a good thing as it leads to tight-knit legislation, that despite perhaps being considered

⁶⁰ (PANASCI, 2022/04)

expensive, is at least without any errors. To briefly go over the mentioned Article 119 in the article 120 of TFEU, is, simply economic precautions, setting up the euro, free competition, setting general principles to abide by, and some standard statements that known as EU principles.

The rest of Article 121 plays a role too

2) „The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council.“ Being the legal foundation from which upon the regulation was based on, setting in motion the chain of events that initiated, eventually leading to the start of the EU Windfall solidarity contribution tax of 2022. The rest of the sections of Article 121, such as 3), 4). 5). 6) is essentially giving The President, the Council, the Commission, and EP

CONCLUSION

„Was the 2022 Windfall Solidarity Contribution tax legal“, the starting research question, as well as the legal problem is that the, was it legal? With more depth the solidarity tax contribution is with the characteristics of tax, passed as a regulation, in some ways, depending upon interpretation even breaching certain TFEU articles such Article 110 that prohibits discriminatory taxation? Or does it constitute as a form of state aid? Before TFEU articles could be addressed it was an important step in the author’s mind to assess what exactly constituted a case of „solidarity“ as well as a need for it, typically a crisis. This is due to the fact that there are multiple academic sources debating on what was

Yes, is the answer in the end, it was legal, the argument and reason for the author’s positive answer is multi-dimensional as the author has found the definition of a crisis, an event with uncertainty, and the need for rapid change, then once again looking for what constitutes solidarity, something that is typically re-active, unfortunately, rather than pro-active. That it must be finely balanced as pushing too hard for solidarity can cause certain member states to feel like they are being forced, or are in some kind of „debt union“ if the matter comes to funds and money.

That is something that the resolution successfully avoids, by not creating something, out of nothing so to say, extensively supported by the existing legal infrastructure, and using a TFEU clause that called for solidarity as a legal basis for the resolution during an unprecedented moment in history that inflicted significant economic pain upon the EU. Establishing basic guidelines for EU member states to follow, as well as establishing a valid trigger, and those that the solidarity contribution tax would support, in addition, it does not infringe on any state aid laws or unfair business practices, making valid points and use of exception clauses within relevant TFEU articles

However, it would be prudent to mention that it has some minor weaknesses, such as not making adequate use of TFEU Articles, and only making explicit mention of **Article 122 of the TFEU** in the resolution, which, while not a critical mistake considering the wide variety of directives, and

other supporting legalities, seeing as how it went through regardless thanks to its rather laissez fair approach of more so suggesting and setting up basic guidelines. With a strong legal basis for it. It still could have been, perhaps drafted better, bringing more TFEU articles to the forefront of the resolution, making use of TFEU article of 122.

Eventually, through going through many interpretations, and TFEU articles, enough conclusions have been drawn to settle and answer the original question of this thesis with a yes.

SUMMARY

The Legality Of The 2022 EU Windfall Tax

Denis Chernov

To summarize, after the introduction, The Author first tackled the issue of what exactly constitutes a crisis, and what is solidarity according to academics and how comparable was it to the circumstances under which the Windfall tax of 2022 was proposed, and passed, as a warmup of a kind before delving into the associated TFEU articles mentioned in the resolution that implemented said Windfall EU tax. Then beyond that, the Author inspects further whether the taxing methods are not only justifiable, due to the unorthodox and extraordinary situation they were passed under, but also whether, if there were any potential conflict with other existing TFEU articles or the previously gained insights on solidarity and crises, eventually arriving at the conclusion.

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