

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Thursday, October 26th, 2023

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Tarcísio Diniz Magalhães & Francesco De Lillo, *The Return of Windfall Taxation*

Windfall taxes are not new to the world, but they have assumed a variety of shapes and formats under different names in each country and period. Sometimes, they are designed to be applied on a one-time or temporary basis while, at other times, they coexist with classic forms of income taxation. Sometimes they are imposed on actual profits or net earnings while, at other times, they use alternative tax bases. In one way or another, imposing surtaxes on windfall-like gains has been repeatedly legitimized by society's frustration that well-positioned individuals and firms retain unearned, excessive financial rewards, especially under distorted market or regulatory conditions. With the current global energy and food prices crises, windfall taxes have once again risen to broad popularity. This article examines the historic, economic, and policy rationales for windfall taxation, arguing that lawmakers could use the accumulated experience of the past to go beyond attempts to tax current crisis-driven high returns to ultimately build corporate tax systems that are more progressive.

Bastien Lignereux, *Is the EU Contribution on Windfall Profits Based on the Right Treaty Provision?*

In the aftermath of the debate instigated by the 'windfall profits' generated by the inflation in the energy sector, the EU introduced a temporary 'solidarity contribution' in October 2022 acting as a redistributing mechanism to finance support measures for energy consumers. The rapidity of its adoption is directly linked to its legal basis as it is founded on an emergency clause (Article 122 TFEU) that does not require unanimity in the EU Council. This contribution argues that this legal basis is appropriate even though the EU solidarity contribution has to be classified as a direct tax. Indeed, it can be deduced from settled CJEU case law that such a measure has to be based on only this clause and not on the usual Article 115 TFEU used for the approximation of laws in the field of direct taxation as its purpose is to react to an economic situation through a temporary solidarity measure. That stated, the consequences on the debate on qualified majority voting (QMV) in taxation should not be overestimated; Article 115 TFEU cannot be circumvented for measures aiming at harmonizing direct tax legislations of Member States in order to improve the functioning of the internal market.

Álvaro Antón Antón, *Are the Windfall Profit Taxes Introduced by Regulation 2022/1854 Compatible with the Objectives of the European Green Deal?*

To alleviate the pressure on households and businesses in the European Union (EU) caused by the recent energy crisis, EU institutions and Member States have implemented exceptional measures aimed at reducing electricity costs for consumers, and redistributing excess revenue from the energy sector to end customers. At the EU level, these measures have been implemented through European Council Regulation 2022/1854 that establishes a temporary income cap for ‘inframarginal’ electricity producers and a temporary solidarity contribution on windfall profits in the oil, gas, coal, and refining sectors. This goal of this article is to analyse these measures in terms of their impact and alignment with the objectives of the European Green Deal. Specifically, it will examine whether the ‘windfall profit tax for energy providers’ can be considered an environmental tax. Since this does not appear to be the case, the study will also evaluate 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’. It will assess whether the compensation mechanisms provided by the EU Regulation are sufficient for reconciling the social and redistributive objectives with the environmental objectives of the European Green Deal.

Tim van Brederode & Federica Casano, *EU Public Intervention in the Energy Market: A Stroke of Good Luck or Misfortune?*

This contribution focuses on the legal analysis of Council Regulation (EU) 2022/1854 and on the implementation of the windfall profits tax in the Netherlands. The analysis takes into consideration constitutional and principle-based issues from levying this tax and potential litigation issues in the EU and in the Netherlands. The authors conclude by admitting the legality of the EU and Dutch measure.

Matthias Valta, *The Solidarity Contribution on Excess Profits of Regulation 2022/1584: German Implementation and Constitutionality*

This article gives an overview over the solidarity contribution of Regulation 2022/1584 with a focus on its implementation in Germany and provides economic background on the taxation of excess profits. In a second part, the competence of the EU is critically assessed, especially the applicability of Article 122 TFEU with its limited role of the European Parliament. Alternative competence norms are explored. Additionally, the competence under German law is explored. The third part scrutinizes, whether the solidarity contribution or similar excess profits taxes infringe the freedom of enterprise or occupation or equal treatment rights, both under European and German law. Finally, the retroactive application of the solidarity contribution is examined under EU and German constitutional law.

Fernando Serrano Antón, *The Implementation of the Windfall Profit Tax for Energy Providers in Spain: Its Contested Compatibility With European and Constitutional Law*

This contribution focuses (1) on the legitimacy of the temporary solidarity contribution approved by the Council Regulation (EU) 2022/1854, from a legal perspective considering the use of emergency law; and (2) the European law and jurisprudence in contrast with the Spanish implementation of the windfall profit tax on hydrocarbons providers to sort out its compatibility with the European law. The analysis carried out leads us to maintain some doubts about the legal mechanism used by the EU for its approval, as well as its compatibility with the fundamental

freedoms of the EU. We are also critical of the Spanish implementation of the Temporary Solidarity Contribution. Both the Court of Justice of the EU and the European Court of Human Rights (ECtHR) will have the last word.

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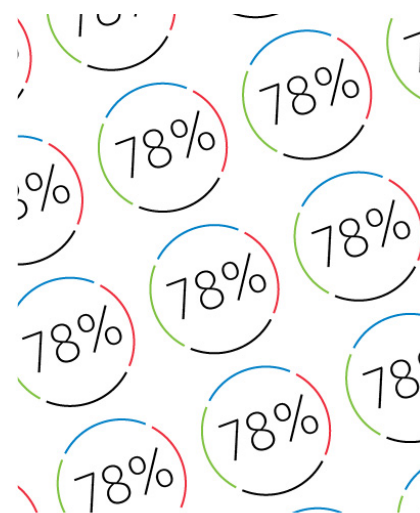
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