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New Legislative Tool for Introducing EU-Wide Windfall Taxes

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In this note, the authors describe and comment on the Commission's proposal to introduce a new regulation implementing emergency measures with the aim of mitigating high energy prices and the risk of supply shortages in Europe, as agreed to by the European Council on 30 September 2022. The authors also examine the legal compatibility of the planned EU windfall tax measures, comparing them to the existing Hungarian windfall taxes.

1. Introduction

On 30 September 2022, the European Council agreed on the Commission's proposal to introduce a new regulation implementing emergency measures with the aim of mitigating high energy prices and the risk of supply shortages in Europe. The Regulation introduces new means of funding that, although not called taxes, are tax-related measures: an EU-wide windfall tax and a revenue cap[1] that targets companies in the energy sector that benefitted disproportionately from the current high energy prices. The Commission's proposal, introduced on 14 September, did not arrive unexpectedly; on 9 September, the EU Energy Ministers met in an extraordinary Council meeting to exchange views on possible emergency measures. It also requested that the Commission propose appropriate measures.

The Regulation is unique because it introduces sectoral, temporary tax measures on "extra profits" in the form of a Council regulation agreed by Energy Misters without the requirement of the unanimous support of the Member States. To make the situation more complex, during the summer, some countries – including Hungary – already introduced national windfall taxes, which may be maintained if they are considered comparable to the new EU solidarity contribution.

This note examines the operation and legal compatibility of the new EU windfall tax-measures, comparing them with the existing Hungarian windfall taxes and providing comments on possible scenarios as the issue moves forward.

2. Revenue Cap and Solidarity Contribution

2.1. Introductory remarks

The Regulation introduces a revenue cap to tax the extra profits of certain low-cost electricity generating companies (like solar, wind and nuclear), which are indirectly benefitting from increased energy prices without facing increased costs. The market revenue of energy producers will be capped at a maximum of EUR 180 per MWh of electricity produced.[2] The Regulation provides wide flexibility regarding the means to implement the revenue cap. It merely sets out the requirements but leaves the creation of the actual rules to the Member States. National governments even have some flexibility to deviate from the rules by increasing the revenue cap or excluding certain electricity producers.[3]

It also introduces a solidarity contribution on fossil fuel companies, as they are benefitting directly from the increased fuel prices.[4] They will be subject to at least a 33% "solidarity contribution" calculated on the same tax base as national corporate income taxes. The name is different, but this measure functions effectively as a windfall tax, targeting the extraordinary profits of companies that fall within its scope.

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1. European Commission, Proposal for a Council Regulation on an emergency intervention to address high energy prices, COM(2022) 473 final (14 Sept. 2022), available at https://data.consilium.europa.eu/doc/document/ST-12249-2022-INIT/en/pdf [hereinafter the Regulation].
2. Art. 6(1) Regulation.
3. Arts. 7(3)-(5) and 19a Regulation.
4. Art. 13 Regulation.

Governments are bound to use the additional revenue from the energy intervention measures to reduce energy bills for vulnerable households and (energy-intensive) businesses, to promote investment in renewables and to develop energy autonomy through investments in line with REPowerEU objectives. Although neither measure is called a tax, both target the profits of participants in the energy sector.

2.2. Policy reasons behind an EU-wide windfall tax and the revenue cap

The extreme increase in energy prices is causing Member States various challenges. One is obtaining the necessary funding for the measures introduced by the governments to protect their citizens and economies from increased energy costs.

The Commission's intent is to collect the necessary tax revenue from those entities that directly, or indirectly, benefit from the current situation. The Regulation targets those entities that are in the best position to pay additional taxes without facing severe economic consequences, since they are generating additional profits due to the energy crisis.

Oil and gas companies are, therefore, in the crosshairs of the Regulation because they can sell their products at a higher profit margin. Electricity producers who can sell electricity at higher prices without facing increased costs are also a natural target of the new Regulation.

Since both measures target profits that exceed what is considered "normal", the policy intent of the windfall tax is understandable. Notwithstanding, one could argue that the years during which quarantine measures were in effect due to COVID-19 were anything but normal for oil companies. As crude oil prices were even in negative territory during the benchmark years, this calculation could lead to unexpected results for these companies. The significant changes in exchange rates also bring into question the comparability of previous years to the current one.

Some countries applied different measures to limit prices in this sector, leading to uneven situations for companies operating in different Member States. The possibility, however, for countries to apply different windfall taxes, if they are considered equivalent, could balance out this uneven situation. But the high level of flexibility to deviate from the rules and the significant reliance on existing corporate tax rules applicable to the windfall tax calculation may raise the question of whether it was even necessary to levy an EU-wide windfall tax in the form of a council regulation.

2.3. Personal scope of the EU windfall tax

Companies considered tax resident in any of the EU Member States will be subject to the solidarity contribution if at least 75% of their turnover is generated from economic activities in the field of the extraction, mining and refining of petroleum or the manufacture of coke oven products.[5] The same applies *mutatis mutandis* to permanent establishments (PEs). The Regulation requires taxpayers to calculate the ratio both on a company and PE level, which could cause unintended non-taxation situations in certain scenarios but – due to the surplus tax calculation – cannot result in double taxation.

The Regulation does not require resident companies to have the necessary turnover ratio within one Member State. They would fall within the scope if their aggregate turnover derived from different jurisdictions is above the necessary rate. This means that companies may fall within the scope of the tax due to their business activities through a PE in other Member States or in third states. The rules, however, explicitly name PEs as taxable entities and require them to calculate their own turnover ratios.[6] According to international tax standards and national tax legislation, PEs must carry out dealings with their headquarters at a fair market price. This approach results in a complex legal situation in which the PE's turnover must be calculated on two levels, regarding the PE's own activity and the company's overall activity.

This note now turns to some examples as to how this bi-level ratio calculation works in situations in which the headquarters and the PE are involved in different types of businesses and therefore their turnover ratios differ.

In the first example, the author examines a situation in which both the overall company's and the PE's turnover ratio is above 75%. In this scenario, the PE provides services in the oil refinery sector and the headquarters provides different services. A company resident in one Member State, having a PE in another, will fall within the scope if its overall turnover ratio is above 75%, even if the turnover ratio of the headquarters' own activity is below the necessary threshold. Since the activity of the PE will be included in the turnover of the legal entity, its overall ratio may be above the necessary rate. For example, assume a company has overall turnover of 1000 with 750 from oil refining and does business in two EU Member States. If its PE has 750 in turnover, 100% of which is in-scope revenue, and the headquarters generates 250 in non-fossil fuel-related turnover, both the overall company and the PE will be considered to be within the scope of the new rules. The headquarters' activity alone would fall outside the scope of the Regulation; however, the turnover is measured separately only at the PE level and not at the

5. Art. 2(17) Regulation
6. Art. 2(17) Regulation requires that "permanent establishments generating at least 75% of their turnover from economic activities" shall fall within the scope of the Regulation.

headquarters' level. If the overall turnover of the legal entity - which includes both the PE's and headquarters' income - is above the threshold, both the overall turnover of the legal entity and the qualifying turnover of its PE will fall within the scope of the windfall tax in the legal entity's and the PE's country, respectively.

Therefore, both countries are required to levy a solidarity contribution on the surplus profits. The PE will be subject to the levy due to its own activity and the company because of the overall activity of the legal entity. In theory, double taxation can be eliminated in accordance with the respective domestic laws and/or tax treaty rules.

In the following examples, the authors examine a situation in which the overall turnover ratio falls below the 75% threshold, but the turnover ratios of the different parts of the company exceed it. The company, in this example, has an overall turnover of 1000, from which only 740 is fossil fuel-related. In this scenario, it does matter which part of the company earns the fossil fuel-related revenue.

Let us say, in the second example, that the PE only provides services in the oil refinery sector and the headquarters provides different services outside the energy sector. As the PE has a ratio above 75%, it will be subject to the rules in its own right, but the overall company does not reach the threshold; therefore, only the PE's country will apply the windfall tax.

In the third example, the headquarters provides all of the 740 fossil fuel-related turnover with a 100% ratio in that country and the PE has 260 in turnover from other business activities not related to fossil fuel extraction or refinery. Should this be the case, both the PE and the overall company fall outside the scope of the regulation. This seems to be an unintended scenario, where none of the countries end up levying the windfall tax. It is arguable perhaps that the company here is below the threshold, therefore the Regulation intentionally leaves them out of the scope. If, however, the 740 in turnover – at a 100% ratio – had been generated by the PE instead of the headquarters, the country of the PE would have been required to levy the windfall tax, as seen in the second example above.

2.4. Tax base of the solidarity contribution

The in-scope companies and PEs will be subject to at least a 33% "solidarity contribution" calculated on the same tax base as the national corporate income taxes. The surplus profits subject to the tax are the current year's profits that exceed, by at least 20%, the benchmark tax base, calculated as the average of the last four years' profit.[7]

As the tax base is calculated according to the national rules, a significant part of the profits of an MNE group in the oil extracting businesses may fall outside the scope of the windfall tax. In respect of a European oil company with several subsidiaries outside of the European Union extracting oil and gas, transfer pricing rules will require that the parent company determine the prices on an arm's length basis. This may result in a situation in which the group, as such, has exceptional profits but will be subject to windfall taxes on the profits earned by its EU group members. Companies that engage in extracting activities within the European Union, therefore, may face significantly higher windfall tax costs than those with third-country operations.

Although reliance on national tax bases would seem to be an easy approach to adopt, it may result in very significant differences with regard to various unilateral or tax treaty rules on eliminating double taxation. In the event that a Member State eliminates double taxation on a PE's profits by exempting them, the foreign business profit will remain outside of the tax base and, therefore, will not be subject to the windfall tax. This result would resemble a situation comparable to that of subsidiaries because those profits will also fall outside the net of the windfall tax. If, however, the country applies the credit method for eliminating double taxation of a PE, the tax base will include both the headquarters' and the PE's profits and apply both the normal profit tax and the EU windfall tax on the same or a similar profits tax base. This would not cause a problem if both the headquarters and the PE are in the European Union, provided that both Member States use the minimum 33% tax rate on the profits and the country of residence can credit the foreign windfall tax. But this will not be the case with regard to a PE outside of the European Union. In any event, it is questionable whether the solidarity surcharge will be covered by tax treaties.

The regulation's approach to using national tax bases makes it easy to apply but, as tax bases differ significantly in the European Union, this solidarity contribution will not be uniform. As one of the reasons to have an EU-wide measure was to protect the Internal Market from distortions, the application of a fragmented tax base will be unlikely to achieve that goal.

On a separate note, since the EU windfall tax is levied only on profits above a 20% increase in the benchmark taxable profits, companies will be incentivized to utilize every possible tax base allowance and loss carry-forward to decrease their 2022 tax bases. Countries providing loss carry-back rules may face even more tax planning in subsequent years.

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7. Arts. 2(20) and 14 Regulation.

3. The Chosen Legal Form and Legal Basis

The EU-wide windfall tax was agreed to based on article 122(1) of the Treaty on the Functioning of the European Union (2007)[8] and introduced in the form of a regulation. As such, it is considered to be directly applicable in the Member States. One could question whether or not the Commission applied the appropriate legal basis and form to introduce an EU-wide windfall tax. Article 122 of the TFEU provides that "[w]ithout 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".[9]

From a political point of view, it certainly seems to be a practical legal basis to adopt a solidarity contribution because a qualified majority is enough to implement a Council regulation under this legal basis, whereas unanimity is required with regard to tax measures.

It is generally accepted that tax measures can normally only be adopted by means of unanimity based on articles 113 and 115 of the TFEU, although the Commission has some flexibility in choosing the appropriate legal form. According to Terra and Wattel (2019), "the unanimity requirement can be 'circumvented' by using the market distortion provision (Articles 116 and 117 TFEU […]) or the provisions on 'enhanced cooperation' in Article 20 TEU and Articles 326-334 TFEU".[10] The Commission, however, was previously very careful about applying "innovative" legislative solutions in the field of taxation. The Commission even failed, in *Commission v. Council*,[11] to get the Court to decide that article 114(1) of the TFEU, rather than articles 113 and 115, should be the legal basis for amending the EU Recovery Assistance Directive (2010/24).[12] Also, the failure of enhanced cooperation in respect of the proposed financial transaction tax has led to caution in introducing a new tax. Notwithstanding this, with regard to energy crisis measures, the Commission boldly applied article 122 of the TFEU in adopting the two EU-wide tax-related measures, while being careful not to label them as "taxes".

It is difficult to argue with the fact that the European Union is facing "severe difficulties [with regard to] the supply of certain products, notably in the area of energy", but it is questionable whether or not a windfall tax is necessary and appropriate to resolve these difficulties. Since the nature of the current energy crisis is partly financial, i.e. it is due to the fact that gas prices skyrocketed in 2022, a windfall tax increasing state revenues may be the way to finance national measures. Therefore, although the measures might be an appropriate response to the crisis, issues remain regarding whether or not they were adopted in line with the principle of subsidiarity as set out in article 5 of the Treaty on European Union (2007).[13]

Given that some Member States have already implemented windfall taxes in their domestic legislation, it is questionable whether or not a common application of windfall taxes was even necessary, in particular considering the subsidiary principle.

The Regulation only regulates the personal scope and tax rate regarding the windfall tax. It establishes a minimum requirement for Member States but does not limit the taxing rights of the Member States with regard to implementing additional taxes or even higher tax rates. In fact, the Regulation provides that it shall be applied in addition to the regular taxes and levies applicable under the national legislation of a Member State. Also, the Regulation provides for the possibility to apply different windfall taxes, as long as they are considered equivalent measures. Therefore, it seems that the Regulation only requires a minimum standard of taxation across the European Union but leaves it to the Member States to implement specific rules.

Another aspect that could assist in determining the necessity of the common approach is the limitation on the utilization of the tax revenues from the windfall tax. The Regulation provides a list of purposes for which the additional revenue should be used. Since, however, the list is broad, it may be considered more of a direction than a limitation on EU Member States. From a legal point of view, these limitations are not even applicable if countries choose to apply different, but equivalent, windfall taxes.

In light of the above, it could be argued that the Council has established a low bar on measuring the subsidiarity requirements by declaring, in the preamble to the Regulation, that "the objectives of this Regulation cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level".

The heavy reliance on existing national rules, the significant differences in domestic corporate income tax rates and the high degree of flexibility granted to Member States in respect of implementation beg the question as to whether or not the legislation is really a directive in substance rather than a regulation.

8. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD.
9. 122(1) TFEU.
10. *See* P.J. Wattel, H. Vermeulen & O. Marres (updated and elaborated on by R. Szudoczky & D. Weber), *Constitutional Foundations*, in *European Tax Law*, vol. 1, p. 37 (7th ed., Kluwer Law International 2018).
11. ECJ, 29 Apr. 2004, Case C-338/01, *Commission of the European Communities v. Council of the European Union*, EU:C:2004:253.
12. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L84 (2010), Primary Sources IBFD. *See* Wattel, Vermeulen & Marres, *supra* n. 10, at p. 36.
13. Treaty on European Union of 13 December 2007, OJ C 306 (2007), Primary Sources IBFD.

From a formal legal point of view, the answer is obvious. The Council adopted a regulation, which will be directly applicable in every Member State, without the necessity to implement it under domestic rules. Going beyond the legal technicalities, however, it seems obvious that Member States need to implement detailed technical rules to make the Regulation effective. With regard to revenue caps, Member States have the obligation to choose the appropriate means to adopt them under domestic regulations. But even the windfall tax, which is designed so as to minimize the necessity of implementation rules by relying heavily on domestic corporate income tax rules, requires countries to choose the applicable tax rate.

4. Issues Regarding the National Constitutional Basis of Non-Traditional Taxes

The windfall tax and the revenue cap approved by the Regulation are sector specific and, therefore, may give rise to challenges from a constitutional point of view in some Member States based on the principle of fair burden-sharing and contribution to public finances (the ability-to-pay principle). To demonstrate the potential issue, the note turns to an example of how the Hungarian Constitution evolved in respect of non-traditional taxes.

Hungary currently employs more than a dozen non-traditional taxes. Most of them are sectoral taxes. Some are levied on profits but many are turnover taxes. They usually started out as temporary measures but remained part of the tax system. Such taxes were enacted to address urgent cash needs at the time of an economic crisis when the tax revenues of the state had dropped dramatically. The idea was to obtain extra financing to help those most effected by the crisis. It is not by accident that the first serious wave of non-traditional taxes was in 2010. Some were windfall taxes, but many simply targeted businesses where money was likely to be found. In 2021, tax revenue collected from non-traditional taxes in Hungary exceeded corporate tax revenues.[14]

The new constitution,[15] which came into force in 2011, contains a modified ability-to-pay principle in the sense that the following new phrase was added: "everybody shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy". In other words, contribution to public finances is not only to be based on capability but also on one's business role and activities. Businesses that have the ability to contribute more to public finances because of their economic success have a greater liability to help create funds to finance common needs. This new wording forms the constitutional basis for levying sectoral and windfall taxes.

Early on, the constitutional court also dealt with the constitutionality of sectoral taxes.[16] It ruled that the constitutional term "income" should include revenue, as well as profits; therefore, the tax base may be different from or independent from net profits. It also said that different rules applicable to taxpayers operating in different sectors may not be considered as discrimination if part of the regulatory framework.[17] Discrimination can only be analysed in respect of taxpayers in a comparable situation. The Constitutional Court, in this sense, effectively declared that sectoral taxes were already in line with the ability-to-pay principle under the "old" constitution (which did not contain the additional phrasing regarding the economic role). The third statement that may have relevance regarding the future implementation of an EU windfall tax on the energy sector is retroactivity. The Constitutional Court was very clear that the establishment of the tax base, with reference to previous years (the financial institutions' sectoral tax was, at first, a set year's balance sheet total but was later changed to a rolling average over three years), is not considered a retroactive measure.

The Hungarian Constitution also provides that fundamental rights and obligations can only be established by law.[18] As taxes are fundamental obligations, they can only be levied by a law passed by parliament. There is, however, an important exception to this rule: during a period of declared emergency, the government may rule by decree without involving parliament.[19] These decrees are strictly temporary measures; their validity expires at the latest by the end of the emergency period. The most recent windfall taxes decree[20] is a prime example of this method. Although this is considered a temporary measure, given that it establishes defined periods of tax liability in respect of the extra-profit taxes covered, if the emergency period ends sooner than the tax period established by the windfall taxes decree, the tax liability may need to be re-established by law. The use of emergency legislation has serious drawbacks. Although such legislation can be quickly enacted, there is a lack of thorough preparatory work and discussion with other legislative branches and stakeholders, which may lead to codification errors and unintended effects. In order to become a permanent fixture of the tax system, the measures should be properly

14. Hungarian Central Statistical Office, *21. National Accounts, GDP*, available at https://www.ksh.hu/stadat_eng?lang=en&theme=gdp (accessed 13 Dec. 2022).
15. HU: Fundamental Law of Hungary, 25 Apr. 2011.
16. HU: Constitutional Court, 29 Nov. 2006, Ruling No. 6/2006 (XI.29.)
17. The European Union took a similar stance in its Commission Notice on the notion of State aid (European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), Primary Sources IBFD) in stating that measures should be interpreted in the context of the reference system, i.e. the system itself cannot constitute State aid.
18. Art. 1(3) Fundamental Law of Hungary, *supra* n. 15.
19. Id., at art. 53(3) and HU: Law No. 194 of 2011 on the economic stability of Hungary, Ch. V.
20. HU: Government Decree No. 197/2022 (VI.4.) on extra-profit taxes.

enacted and approved by parliament as new legislation. It is possible, however, that parliament will assume that because the legislation is working, no substantial changes are needed. This is what happened, for example, in respect of the retail tax that was first introduced during the 2008-2010 crisis[21] and was repealed in 2012. An almost identical tax resurfaced as an emergency measure in 2020 as part of a COVID-19 emergency decree.[22] It was later approved, without substantial changes, by parliament as a new law[23] on the same day the state of emergency with regard to COVID-19 was cancelled.

The Hungarian Constitution also regulates the relationship between EU and national law.[24] EU law may establish generally binding rules of conduct but only to the extent necessary for Hungary to exercise its rights and fulfil its obligations deriving from the founding treaties. As a result, the binding effect or the implementation of the Regulation is likely to be in line with national rules within the boundaries outlined in both the Constitution and the law on making legislation.[25]

5. The Various Features of Energy Taxes in Different Member States

Due to the general nature of the Regulation, some Member States, including Hungary, may successfully argue that their existing national energy income tax or other windfall tax is equivalent to a solidarity contribution, is compatible with the objectives of the regulation and generates at least comparable proceeds;[26] therefore, no further implementation of the Regulation is necessary.[27]

Hungary is one of the few EU Member States that has already had an energy surtax[28] (popularly known as a “Robin Hood tax”) since 2009.[29] The surtax is levied at a rate of 31% on a tax base equal to profits before taxation as shown in the annual profit and loss account and as adjusted by certain items including, among others, any available investment tax credits that could not be fully utilized to offset corporate income tax. Thus, the tax base is very similar to that of corporate income tax and the rate is comparable to the 33% minimum rate established by Regulation. The tax base, however, is not limited to extra profits, although it may be reduced by certain corporate tax incentives up to 50% of the tax base.

An emergency decree on extra-profit taxes was introduced in Hungary in mid-2022 that affected a significant number of industries, including the banking, pharmaceutical, telecom, natural resources and air transportation industries. In this note, the focus is only on those taxes that relate to energy,[30] as they are the ones that potentially collide with the scope of the EU windfall tax proposal.

One of the windfall tax amendments has extended the personal scope of the Robin Hood tax from transitional miners, energy producers and traders to bioethanol, sunflower oil, starch and starch product producers. The extension has no time limit. According to the new decree, petroleum product manufacturers are to pay an equalization tax of 25% on the difference between the average daily quotation of Platts Crude Oil Marketwire Brent and the monthly average purchase price of crude oil originating from the Russian Federation, multiplied by the number of barrels of Russian crude oil purchased. The tax is temporary, being applicable in the 2022 and 2023 tax years.

Electricity generators producing electricity using renewable energy sources and entitled to participate in the off-take/feed-in tariff schemes may become subject to an equalization tax of 65% on the difference between the net revenue from energy sold and the set subsidized state price. This measure (revenue cap) could possibly be considered to be in line with the EU proposal, but this is currently not clear.

The mining royalty for crude oil and natural gas exploitation in the 2022 and 2023 tax years has also been increased. The decree also increased excise taxes related to crude oil, natural gas, LPG, electricity and coal.

As a result of the changes, windfall taxes now have to be paid in addition to corporate income tax and the Robin Hood tax, and license fees and excise taxes have also been increased. The system continues to levy higher taxes on the energy industry and now it is siphoning off its extra profits that are arising due to external circumstances. As both the energy surtax and the windfall taxes are income taxes, they are not deductible for corporate income tax purposes.

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21. HU: Law No. 94 of 2010 on sectoral taxes.
22. HU: Government Decree No. 109/2020 (IV.14.)
23. HU: Law No. 45 of 2020 on retail tax.
24. Fundamental Law of Hungary, *supra* n. 15, at Foundation, art. E.
25. HU: Law No. 130 of 2010 on making legislation, art 2(4)(c).
26. *Supra* n. 1, at art. 13(2).
27. This was the opinion expressed by the Hungarian Minister of Foreign Affairs in an interview given on 30 Sept. 2022 to the weekly journal, HVG, available at https://hvg.hu/eurologus/20220930_Szijjarto_lehutotte_a_kedelyeket_az_unios_energiaarkompenzacio_nem_erinti_Magyarorszagot (accessed 13 Dec. 2022).
28. HU: Law No. 67 of 2008 on the Energy Surtax.
29. Italy also had a similar surtax, which was levied at 6.5% on profits but was declared as being in breach of the equality and ability-to-pay principles by IT: Constitutional Court, 11 Feb. 2015, Decision No. 10/2015 and, thus, abolished.
30. *See* G. Erdős, *Hungary - Corporate Taxation* sec. 3.4., Country Tax Guides IBFD (accessed 8 Nov. 2022).

Other Member States have tried different approaches to controlling energy prices and creating subsidies to benefit the most affected energy users.[31] For example, in Spain, according to the proposal submitted to parliament on 28 June 2022, a 1.2% tax will be levied on turnover on domestic power utility sales. The new tax will be applicable for a period of two years starting in 2023. France introduced energy price caps until the end of the year but the windfall profit tax proposal was voted down by the senate on 1 August 2022. The proposal would have introduced a 25% tax on windfall profits. Although the proposal failed, France backed the EU windfall tax proposal, so the question may be back on the table. On 1 September 2022, Romania adopted an amendment to its legislation according to which all participants in the electricity and natural gas market should pay a 98% tax (as opposed to the previously approved 80%) on net revenue from deliveries between 1 April 2022 and 31 March 2023. Serious doubts have been raised regarding the constitutionality of the legislation due to its retroactive nature. Greece employed a similar solution, applying a 90% one-off levy on the gross profit margin relating to electricity production between 1 October 2021 and 30 June 2022, as compared with the same months of the previous year. Italy introduced a 10-25% windfall tax on the increase in profits of energy companies between October 2021 and March 2022 compared to the same period of the previous year.

This very brief overview indicates the range of tax measures being implemented by Member States, from turnover taxes, to windfall profit taxes, to profit surtaxes. The EU Regulation will likely help to consolidate a common form of tax base and tax rate in the different Member States but the relationship between the existing national rules and the EU windfall tax framework is somewhat muddy.

6. Conclusions

The energy crisis required a swift and uniform response from European countries. Due to the short timeframe to draft rules and the difficultly in determining a common tax base for a windfall tax, the Regulation relies on national rules. This was a pragmatic choice. As a result, there are only a few provisions in the Regulation regarding the windfall tax. There are, however, some valid criticisms of the initiative. On the one hand, the benchmarking method seems a bit arbitrary due to COVID-19 shutdowns and therefore may result in unfair situations. On the other hand, the two-level turnover ratio calculation may lead to unintended results. Although it is not expected that companies will easily escape the scope of the Regulation due to shortfalls in the two-level turnover ratio calculation rule, this does open the gate for tax planning.

The Regulation may also be interesting for academics due to its special legal basis and majority voting mechanism. The Regulation may open up a new chapter in EU tax legislation, potentially allowing the Commission to use a different legal basis in the TFEU to avoid unanimity requirements.

The policy intent and the necessity of this EU-wide temporary windfall tax seems to be well reasoned by the Commission and the emergency clearly required a bold and innovative legal basis for its approval. The intent to circumvent unanimity is not a new phenomenon; the Commission has been consistently trying to do this. It can achieve this by simply outlining a framework for certain tax measures, leaving implementation to the Member States, using a legal tool that does not require unanimity. The resulting tool may give rise to both national and EU constitutional questions, implementation difficulties, as well as lead to very different national rules despite the common approach.

31. This sec. is based on information provided by the IMF in T. Baunsgaard & N. Vernon, *Taxing Windfall Profits in the Energy Sector*, Note 2022/002, p. 9 (IMF 2022), available at https://www.imf.org/-/media/Files/Publications/IMF-Notes/2022/English/INSEA2022002.ashx (accessed 13 Dec. 2022) and on various newspaper articles.