

The Uncertainty Regarding the Price Cap Levy of Regulation 2022/1854

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1. Introduction

On 6 October 2022, the Council of the European Union adopted [Council Regulation 2022/1854](#) (the Regulation) as an “emergency intervention” to address high energy prices. The Regulation was based on article 122(1) of the [TFEU](#) and was adopted by application of article 16’s qualified majority. It entered into force on 8 October 2022 and remained effective until the end of 2024.

The Regulation constituted an emergency intervention aimed at mitigating the impact of rapidly increasing energy prices on EU citizens and companies through exceptional, targeted and time-limited measures. Practically, the Regulation introduced (i) a solidarity contribution across the European Union for the crude oil, natural gas, coal and refining sectors payable by companies established in the Union; and (ii) an obligation for Member States (MS) to set a cap on market revenues for electricity producers with lower marginal costs. Despite the fact that all measures stemming from the Regulation have been phased out, this update will focus on the price cap levy introduced therein, as there are ongoing judicial cases concerning the Regulation and national implementation measures.

2. The Price Cap Levy

The Regulation provided for a cap on the market revenue for electricity producers to a maximum of EUR 180 per MWh of electricity produced (articles 6 and 7), where the surplus revenue above that cap needs to be surrendered to MS. The price cap levy applied to market revenues from producers that generated electricity from the following sources:

- wind energy;
- solar energy (solar thermal and solar photovoltaic);
- geothermal energy;
- hydropower without reservoir;
- biomass fuel (solid or gaseous biomass fuels), excluding biomethane;
- waste;
- nuclear energy;
- lignite;
- crude petroleum products; and
- peat.

The price cap applied from 1 December 2022 until 30 June 2023 (article 22(2)(c)). Practically speaking, during the period in which the price cap applied, if a wind energy farm sold electricity at EUR 300 per MWh, it could keep EUR 180 per MWh but had to pay the remaining EUR 120 per MWh to the national government.

3. Implementation by MS

The Regulation did not prescribe how MS must implement the cap but rather provided them with decisional discretion regarding certain aspects of the application of the cap on market revenues:

- MS may choose not to apply the cap to producers generating electricity with production installations with an installed capacity of up to 1 MW if imposing the levy on these producers would entail significant administrative burdens (article 7(3)).
- MS may also disapply the cap to revenues from the sale of electricity on the balancing market and to revenues from compensation for re-dispatching and countertrading (article 7(4)).
- MS may apply the cap on market revenues to only 90% of the relevant market revenues (article 7(5)).

Finally, articles 8 and 9 allowed MS to implement stricter or more comprehensive national crisis measures to achieve the Regulation's objectives. These national measures may include further limiting the market revenues from the sources listed in article 7(1) of the Regulation, including the option to differentiate between technologies. MS may also set higher caps justified by higher investment or operating costs and introduce caps for technologies not covered under article 7(1). In addition, MS may use surplus congestion revenue arising from the allocation of cross-zonal capacity to finance measures supporting final electricity customers in accordance with article 1 of the Regulation.

4. Judicial Proceedings

Since the adoption of the Regulation, its far-reaching intervention in electricity markets in combination with the level of discretion given to the MS for the implementation of the price cap levy has led to uncertainty. As a result, several national courts have referred preliminary questions to the Court of Justice of the European Union (CJEU), seeking clarification on the interpretation of various provisions of the Regulation. Some examples of the pending cases are Cases [C-467/24](#), and [C-187/25](#). As of the date of this update, the CJEU has given judgment in two preliminary rulings, in Cases [C-423/23](#) and [C-633/23](#).

Case C-423/23

- In its judgment of 22 January 2026, the CJEU clarified the scope of MS' discretion under the Regulation when introducing national revenue-capping measures for electricity producers. The case concerned an Italian mechanism that imposed a stricter price cap that was implemented in Italian law prior to the implementation of the Regulation.
- The CJEU emphasized that the Regulation applies only from 1 December 2022 to 30 June 2023, meaning that the Regulation cannot preclude national legislation for a period during which the Regulation was not applicable.
- Within its period of application, the CJEU confirmed that the Italian cap, although stricter and set below the EU ceiling, was not automatically incompatible with EU law. Article 6 of the Regulation established a Union-wide maximum cap of EUR 180 MWh for inframarginal technologies, but article 8 of the Regulation expressly allows MS to adopt more restrictive national crisis measures, provided that the safeguards in article 8(2) of the Regulation are met.

- The CJEU also clarified that the Regulation grants MS the possibility to allow producers to retain 10% of revenues above the cap, but that this is not a requirement. Consequently, the absence of such a mechanism does not, in itself, render a national cap unlawful.
- The CJEU further confirmed that the Regulation does not prescribe any specific methodology for calculating national caps under article 8. The Italian cap, based on long-term historical averages, was therefore considered permissible, provided it does not undermine investment signals and ensures that costs are covered.
- Finally, the CJEU held that MS are not required to impose caps on technologies not listed in article 7(1), such as hard coal, nor must they differentiate caps across renewable technologies. These steps remain optional under article 8(1), and the uniform application of a cap does not contravene the Regulation.

Case C-633/23

- In its judgment of 18 December 2025, the CJEU provided clarification on how MS may determine “market revenues” and apply the mandatory revenue cap under the Regulation. Electrabel and several other electricity producers challenged the Belgian levy that implemented the Regulation. Belgian law defined market revenues largely through presumptive calculations, some of which were irrebuttable, while others could only be rebutted through burdensome evidentiary requirements. The producers argued that these presumptions distorted their actual earnings and conflicted with the Regulation.
- The Court confirmed that the Regulation does not require MS to calculate market revenues exclusively on the basis of producers’ actual realized revenues; national methodologies may rely on presumptions, provided they are proportionate and that it is possible to obtain reasonable estimates of those revenues, which are representative of the reality of the market during the period in question.
- The CJEU also stressed that national measures may not undermine the structure or objectives of the Regulation, including the requirement that the cap applies only from 1 December 2022 to 30 June 2023. MS may not apply revenue-capping measures before this period if such measures are presented as an implementation of the Regulation itself. The CJEU therefore drew a clear distinction between national measures adopted independently and national measures intended to implement the Regulation.
- With regards to whether a national cap is in breach of the principles of primacy and effectiveness of EU law, the CJEU stated that national measures may not undermine the structure or objectives of the Regulation. However, if the introduction of a measure to cap revenue is similar to that provided for in the Regulation and pursues objectives that are compatible with those of that regulation, and if such a measure at the national level is implemented before it is imposed at the EU level, a MS would not be in breach of that principle.

It is important to note that several direct actions for annulment of the Regulation are currently pending before the General Court of the European Union (GC), among them Cases [T-775/22](#) and [T-759/22](#). For example, in case [T-775/22](#), the applicants entered a plea in which they seek annulment of part of the Regulation based on the argument that there was lack of competence under article 122(1) of the [TFEU](#), a focus on the legal basis (an alleged fiscal nature requiring unanimity and a special procedure rather than article 122(1)) and a retroactive application over 2022, violating EU law principles like legal certainty.

5. What to Expect?

Given the Regulation’s temporary nature, its economic impact and the diverse national implementation methods, further litigation is expected. As many cases are pending before the CJEU, it seems that further clarifications of the implementational discretion given to MS will be provided. In addition to this, the annulment actions against the price

cap levy with the GC will ensure that the legal framework surrounding the Regulation will remain a highly dynamic topic.

IBFD references:

- EU tax law developments are reported on the daily IBFD [Tax News Service](#).