

THE LEGAL FRAMEWORK OF THE MANDATORY CAP ON MARKET REVENUES FOR ELECTRICITY PRODUCERS AND THE SOLIDARITY CONTRIBUTION IN THE CZECH REPUBLIC AND SLOVAKIA¹

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Abstract: On 6 October 2022, the Council of the European Union adopted Regulation 2022/1854 on an emergency intervention to address high energy prices (Regulation 2022/1854). Regulation 2022/1854 establishes an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted, and time-limited measures aiming to ensure the necessary solutions and respond to the current energy situation. For this purpose, three groups of measures are introduced: (i) measures aiming to reduce energy consumption, (ii) introducing a mandatory cap on market revenues for electricity producers, and (iii) introducing a solidarity contribution to be imposed on crude petroleum, natural gas, coal, and refinery companies. In this paper, the authors focus on the legal framework adopted in the Czech Republic and in Slovakia to introduce the mandatory cap on market revenues to electricity producers as well as the solidarity contribution.

Keywords: cap on market revenues; energy, financial law; solidarity contribution

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INTRODUCTION

The energy market in the European Union (EU) has faced significant external influences in the recent period, which resulted in turbulent developments in the wholesale energy markets. The extraordinary and sudden increase in electricity prices and the imminent risk of further increases required a solution to be taken at the EU level in order to prevent serious distortions of the internal market. In October 2022,

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the Council of the EU adopted Regulation 2022/1854 that establishes an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted, and time-limited measures aiming to ensure the necessary solutions and respond to the current energy situation.

The primary goal of the paper is to define the legal framework of the mandatory cap on market revenues for electricity producers and the solidarity contribution in the Czech Republic and Slovakia, both introduced by Regulation 2022/1854. The secondary goal is a mutual comparison of the monitored national provisions.

In order to achieve these goals, standard scientific methods will be used, especially description, analysis, and synthesis. The description aims at the initial definition of the energy market in the EU, as well as at the definition of the background of Regulation 2022/1854. The analysis method will be used in the analysis of the conceptual features of the monitored legal provisions, and the subsequent synthesis will be used to define their characteristic elements. The paper will further use the comparative method when comparing the common and different features of the definition of the mandatory cap on market revenues for electricity producers and the solidarity contribution in the law of the Czech Republic and Slovakia. Regarding sources, literature on financial law, internet sources, and relevant legal regulations are used.

The electricity and gas markets in the EU are characterised by physically and commercially interconnected markets between Member States, so that price fluctuations in one market translate into price volatility in the markets of other Member States. This situation, which is how the gas and electricity markets are currently functioning, is the result of liberalisation tendencies that began in the late 1990s of the previous millennium.⁴ A consequence of the liberalisation of the electricity and natural gas markets in 2007 was the emergence of a market for the supply of electricity and natural gas to all customers. The entry of electricity⁵ and gas⁶ consumers into the so-called free market was prepared and gradually implemented. The liberalisation of the electricity and gas markets has brought consumers a choice of energy supplier, transparency, and easier access for energy suppliers to the markets of other Member States. On the other hand, however, customers were also often exposed to unfair practices by energy suppliers, as well as to greater risk resulting from market volatility and their low level of awareness of the risks of entering the free market. In most countries, therefore, the price regulation of the end supply of electricity and natural gas has remained in force, especially for the household and small business sectors⁷, or the free market and the regulated electricity

⁴ See in particular Council Directive 90/547/EEC of 29 October 1990 concerning the transit of electricity through transmission networks; Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas.

⁵ See Article 21 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

⁶ See Article 23 of Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas.

⁷ Further see ACER/CEER. *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2021: Gas Wholesale Markets Volume* [online]. European Union Agency for the Cooperation of Energy Regulators, the Council of European Energy Regulators, 2022 [cit. 2023-02-24].

and natural gas price market⁸ operated in parallel. For the purposes of this paper, it is also important to note that the supply side of the wholesale market consists of electricity producers and electricity suppliers,⁹ both of which can trade electricity bilaterally or on a centralised multilateral platform.

In 2022, EU countries faced three previously unprecedented and interacting factors, namely (i) significant fluctuations and price increases in the wholesale electricity market, (ii) extreme climatic conditions in the form of warm and dry weather which increased the demand for electricity for cooling and at the same time caused low water levels in rivers, (iii) significantly lower gas supply levels and increasing gas supply interruptions from Russia, with Russian gas supplies covering around 40% of the EU gas consumption in 2021.¹⁰

The interaction of the above three factors has negatively affected the EU economy. As a consequence of the increase in the wholesale price of electricity and natural gas, customers who did not enjoy the protection of regulated end-use prices saw their energy costs rise significantly in 2022. The increase in the price of energy was subsequently reflected in an increase in the price of goods and services.¹¹

The new situation required a response from Member States to mitigate the impact of rising energy prices on the economy.¹² The measures taken to protect energy consumers at the level of individual Member States did not prove to be sufficient, so the EU, respecting the principles of proportionality and subsidiarity,¹³ decided to adopt a single set of temporary emergency measures. In October 2022, the Council of the EU (the Council) adopted Regulation 2022/1854 to ensure a rapid and coordinated response by Member States to the current energy crisis, with the measures put in place to be of a temporary nature only. For the sake of completeness, in addition to the above Regulation, on 5 August 2022, in the context of the ongoing energy crisis, the Council adopted Regulation 2022/1369 on coordinated measures to reduce gas demand,¹⁴ which laid down rules to deal with situations of severe gas supply difficulties in order to ensure

Available at: https://www.acer.europa.eu/sites/default/files/documents/Publications/ACER_Gas_Market_Monitoring_Report_2021.pdf.

⁸ Further see e.g., DELIA VASILICA, R. A Glance at the European Energy Market Liberalization. *CES Working Papers*. 2013, Vol. 5, No. 1, pp. 100–110.

⁹ The electricity supplier carries out the sale of electricity to customers, including its resale – see further Article 2(12) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 concerning common rules for the internal market in electricity and amending Directive 2012/27/EU.

¹⁰ THOMSON, E. These charts show Europe’s reliance on gas before the war in Ukraine. In: *World Economic Forum* [online]. 10.11.2022 [cit. 2023-01-10]. Available at: <https://www.weforum.org/agenda/2022/11/europe-gas-shortage-russia/>.

¹¹ See further e.g., NAKHLE, C. Energy prices and inflation: Politics trump the economics. In: *GIS* [online]. 7.12.2022 [cit. 2023-01-20]. Available at: <https://www.gisreportsonline.com/t/energy-prices/>.

¹² For example, see CARBONARO, G. – HUET, N. Energy bills are soaring in Europe. This is what countries are doing to help you pay them. In: *euronews.next* [online]. 11.10.2022 [cit. 2023-01-02]. Available at: <https://www.euronews.com/next/2022/10/26/energy-bills-are-soaring-in-europe-what-are-countries-doing-to-help-you-pay-them>.

¹³ See further Recital (72) of Regulation 2022/1854.

¹⁴ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas. ST/11568/2022/INIT. In: *EUR-Lex: Acces to European Union Law* [online]. 8.8.2022 [cit. 2023-01-02]. Available at: <http://data.europa.eu/eli/reg/2022/1369/oj>.

security of gas supply in the EU. However, our paper does not deal with this regulation in detail and will focus exclusively on Regulation 2022/1854 below.

I. EMERGENCY INTERVENTION UNDER REGULATION 2022/1854

Before discussing the actual nature of the emergency intervention introduced by Regulation 2022/1854, let us briefly review the process that preceded the adoption of the source of law in question. As for the process of adoption of Regulation 2022/1854 itself, it should be noted that its adoption was decided by the Council by qualified majority, without the adoption of the legal act being subject to the approval of the European Parliament. The adoption of the legislation by the extraordinary legislative procedure undoubtedly made it quicker and easier to pass. The Council's power to adopt Regulation 2022/1854 derives from Article 122(1) of the Treaty on the Functioning of the European Union, according to which the Council may "[...] *on a proposal from the Commission, in a spirit of solidarity between Member States, decide on appropriate measures in view of the economic situation, in particular where there are serious difficulties in the supply of certain products, particularly in the field of energy*". The Preamble (7) of Regulation 2022/1854 refers to satisfaction of that condition: "*The current disruptions of gas supplies, reduced availability of certain power generating plants, and the resulting impacts on gas and electricity prices, constitute a severe difficulty in the supply of gas and electricity energy products within the meaning of Article 122(1) of the Treaty on the Functioning of the European Union ('TFEU').*"

The situation of crisis that indicated the need for the adoption of Regulation 2022/1854 was triggered by the reduction of gas supplies to the EU from Russia and the hybrid war.

Regulation 2022/1854 was not clearly agreed at Council level. The Slovak and Polish delegations opposed the adoption. The Slovak economy minister had the following to say on the topic: "*I was against what was approved. The proposal is inadequate from Slovakia's point of view, even though there have been modifications to it. But the measures do not primarily solve our problems.*"¹⁵ It should be noted that not every Member State that agreed to the adoption of Regulation 2022/1854 accepted the application of Article 122 TFEU. The delegations of Estonia, Latvia, Poland, Croatia, Slovenia, and Hungary presented differing views.^{16, 17}

¹⁵ Hirman after negotiations in Brussels: I voted against, our problems have not been solved yet. In: *Pravda.sk* [online]. 1.10.2022 [cit. 2023-01-15]. Available at: <https://ekonomika.pravda.sk/energetika/clanok/642210-hirman-po-stretnuti-v-bruseli/>.

¹⁶ Council of the European Union. Proposal for a Council Regulation an emergency intervention to address high energy prices, 2022/0289(NLE) of 6 October 2022 [online]. Brussels, 6.10.2022 [cit. 2023-01-10]. Available at: <https://www.consilium.europa.eu/media/59404/cm04715-xx22.pdf>.

¹⁷ At the time of writing this paper, ExxonMobil Producing Netherlands BV (Breda, Netherlands), Mobil Erdgas-Erdöl GmbH (Hamburg, Germany) challenged Regulation 2022/1854 before the Court of Justice of the European Union. Further details online at: Case T-802/22: Action brought on 28 December 2022 – ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council. In: *EUR-Lex: Acces to European*

Having introduced the legislative process for the adoption of Regulation 2022/1854, we will focus below on the actual wording of the approved emergency intervention. Regulation 2022/1854 introduces an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted, and time-limited measures. The measures introduced by the Regulation are defined in Article 1 of Regulation 2022/1854 and can be divided into two categories in terms of sectoral focus:

- i. Measures concerning the electricity market.
 - Reduction of the electricity consumption,
 - Introduction of mandatory cap on market revenues for the electricity producers.
- ii. Measures concerning the crude petroleum, natural gas, coal, and refinery sectors.
 - Introduction of a mandatory temporary solidarity contribution for EU companies and permanent establishments with activities in the oil, gas, coal, and refinery sectors to contribute to the affordability of energy for households and businesses.

II. ELECTRICITY MARKET MEASURES

Two measures concern electricity market.

- a) The first measure is a mandatory reduction of electricity consumption to be implemented in two aspects. The first is a reduction in gross electricity consumption, by reducing the total monthly gross electricity consumption by 10% compared to the average gross electricity consumption in the corresponding months of the reference period.¹⁸ The second aspect of the electricity consumption reduction relates to electricity consumption in peak hours.¹⁹ During peak hours, Member States are obliged to reduce their gross electricity consumption by at least 5% and 3% on average, respectively.²⁰
- b) The second measure concerning the electricity market is the capping on market revenues for electricity producers and the redistribution of surplus revenues and surplus congestion revenues to final electricity consumers. The market revenue cap is to be applied to electricity producers and, where relevant, to intermediaries.²¹ According to the Article 8(1a) of Regulation 2022/1854 the Member States may also: “*maintain or introduce measures that further limit [...] the market revenues of other market*

Union law [online]. 13.2.2023 [cit. 2023-04-03]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TN0802&qid=1680510916635>.

¹⁸ Art. 3(1) of Regulation 2022/1854.

¹⁹ The peak hours is legally defined in Article 2(4) of Regulation 2022/1854 as “*individual hours of the day where, based on the forecasts of transmission system operators and, where applicable, nominated electricity market operators, day-ahead wholesale electricity prices are expected to be the highest, the gross electricity consumption is expected to be the highest or the gross consumption of electricity generated from sources other than renewable sources as referred to in Article 2(1) of Directive (EU) 2018/2001 of the European Parliament and of the Council (7) is expected to be the highest*”.

²⁰ Art. 3(2, 3) of Regulation 2022/1854.

²¹ Intermediaries are legally defined in Art. 2(8) of the Regulation 2022/1854 like “*entities in wholesale electricity markets of Member States constituting an island not connected to other Member States with unit-based bidding where the regulatory authority has authorised those entities to participate in the market on behalf of the producer, excluding entities that transfer the surplus revenues directly to final electricity customers*”.

participants, including those active in electricity trading”; It is important to note that Regulation 2022/184 does not provide for an obligation at EU level to apply a price cap to electricity traders²² where they are not part of a vertically integrated undertaking.²³ As this paper mentions in the introduction, the supply in the wholesale market is represented by both electricity producers and electricity traders. In our view, this aspect (the possibility of different settings at EU level) contradicts the principles of Regulation 2022/1854²⁴ and creates an unbalanced position of electricity producer and electricity trader on the electricity market.

Market revenues of producers obtained from the generation of electricity from the sources referred to in Article 7(1) shall be capped at a maximum of € 180 per MWh of the electricity produced.²⁵ The market cap shall apply to all forms of electricity generation including the renewable sources electricity generation, however, Regulation 2022/1854 also directly provides for an exemption for demonstration projects as selected electricity producers²⁶ at the same time allowing Member States to apply the exemption from the market revenue cap to other producers, in particular ancillary service providers.²⁷ Given that Regulation 2022/1854 sets cap on market revenues, Member States can be expected to set the cap on market revenues at different levels for different forms of electricity generation. For the sake of completeness, we add that, according to Article 8(1)(b) of Regulation 2022/1854, Member States may also set the cap on market revenues exceeding € 180 per MWh for a specific source of electricity production if the investments and operating costs of the generator exceed this amount. When applying the cap on market revenues, Member States may decide not to apply the cap on market revenues to the full 100% of the exceeding revenues, but to 90% only.²⁸

The positive aspect of Regulation 2022/1854 is that it does not allow Member States to dispose freely of the proceeds generated by the application of the cap on market revenues but defines the underlying purpose of spending the allocated funds.²⁹ Member States are expected to ensure that all surplus revenues resulting from the application of the cap on market revenues are used to finance measures in support of final electricity customers that mitigate the impact of high electricity prices on those customers, in a targeted manner.³⁰ The Article 10(4) in Regulation 2022/1854 sets out examples of measures that Member States can finance from surplus revenue:

- Granting a financial compensation to final electricity customers for reducing their electricity consumption;

²² For the purposes of this paper, we consider a trader to be an entity that is not affiliated with an electricity generator and actively enters the wholesale market (Ed.).

²³ Art. 6(3)(s) of Regulation 2022/1854.

²⁴ Compare with Art.8(2) of Regulation 2022/1854.

²⁵ Art. 6(1) of Regulation 2022/1854.

²⁶ Art. 7(2) of Regulation 2022/1854.

²⁷ Art. 7(4) of the Regulation 2022/1854.

²⁸ Art. 7(5) of the Regulation 2022/1854.

²⁹ Compare, for example, the treatment of resources from the proceeds of greenhouse gas emission allowance trading under Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.

³⁰ Art. 10(1) of Regulation 2022/1854.

- Direct transfers to final electricity consumers;
- Compensation to suppliers who have to deliver electricity to customers below costs;
- Partial lowering the electricity purchase costs of final electricity customers;
- Promoting investments into decarbonisation technologies, renewables, and energy efficiency investments by final electricity customers.

With regard to the distribution of surplus revenues and in the spirit of solidarity, Regulation 2022/1854 also defines the procedure for the Member states whose net electricity imports equal or exceed 100%. In this case, the Member States concerned have the possibility to conclude agreements with the main exporting Member State on the sharing of the surplus revenue.

The temporary nature of the measure is established in Regulation 2022/1854 by limiting the time period within which the Articles 6, 7, and 8 in question should apply. The market revenue cap on electricity producers shall apply for the period from 1 December 2022 to 30 June 2023.³¹

III. MEASURE CONCERNING THE CRUDE PETROLEUM, NATURAL GAS, COAL, AND REFINERY SECTORS

In addition to the electricity market, Regulation 2022/1854 also targets the crude petroleum, natural gas, coal, and refinery sectors with a temporary measure in the form of a solidarity contribution. According to Article 14, Member States are obliged to introduce the obligation to pay a solidarity contribution on surplus profits generated by EU companies and permanent establishments with activities in the crude petroleum, natural gas, coal, and refinery sectors as of 1 December 2022. At the same time, Regulation 2022/1854 allows for an exemption from the application of the solidarity contribution if a Member State has already adopted equivalent national measures.³²

Pursuant to Articles 15 and 16 of Regulation 2022/1854, the rate applicable for the calculation of the temporary solidarity contribution shall be at least 33% of the taxable profits, determined in accordance with national tax rules, in the financial year 2022 or the financial year 2023, and for their entire duration, which exceeded a 20% increase in the average of the taxable profits determined in accordance with national tax rules in the period of four financial years starting on/or after 1 January 2018. If the average of the taxable profits in those four fiscal years is negative, the average taxable profits shall be zero for the purpose of calculating the temporary solidarity contribution.

Regulation 2022/1854 stipulates that the temporary solidarity contribution shall apply in addition to the regular taxes and levies applicable according to the national law of a Member State.³³ Regulation 2022/1854 does not provide for the answer to the question if the solidarity contribution should be treated as tax expense.

³¹ Art. 22(2)(c) of Regulation 2022/1854.

³² Art. 14(2) of Regulation 2022/1854.

³³ Art. 16(2) of Regulation 2022/1854.

The Member States shall use the proceeds allocated from the solidarity contribution to financial support measures which are defined as follows:³⁴

- Financial support measures for final energy customers, and in particular vulnerable households;
- Financial support measures to help reducing the energy consumption;
- Financial support measures to support companies in energy intensive industries;
- Financial support measures to develop the energy autonomy;
- Member States may assign a share of the proceeds of the temporary solidarity contribution to the common financing of measures to reduce the harmful effects of the energy crisis.

The use of the proceeds for the purposes defined above reflects the exceptional and temporary nature of the solidarity contribution. It is clear that the purpose of the measures is to reduce and mitigate the harmful effects of the energy crisis on households and companies.

The temporary nature of the solidarity contribution at EU level is established in Regulation 2022/1854 by the limitation of the fiscal year (2022 or 2023) to which it is to apply.³⁵

After an introduction of both institutes, the paper we will further focus on the financial standards that have been adopted in the Czech Republic and Slovakia for the introduction of the cap on market revenue and the solidarity contribution.

IV. NATIONAL LEGISLATION ON CAP ON MARKET REVENUES AND SOLIDARITY CONTRIBUTION IN THE CZECH REPUBLIC

For the purpose of introducing a cap on market revenues and the solidarity contribution, two national legal norms have been adopted in the Czech Republic, namely:

- Act 365/2022 Sb. of laws amending Act 458/2000 Sb. of laws on business conditions and the exercise of state administration in the energy sectors and on amendments to certain acts (Energy Act), as amended (Act 365/2022 Sb. of laws),
- Act 366/2022 Sb. of laws, amending Act 235/2004 Sb. of laws, on Value Added Tax, as amended, Act 586/1992 Sb. of laws, on Income Tax, as amended, and certain other acts (Act 366/2022 Sb. of laws).

First we will present the legislative framework on the cap on market revenues which is introduced by Act 365/2022 Sb. of laws as of 1 December. In the context of the Czech legislation, the cap on market revenue was introduced in the form of a levy on surplus revenue. According to Article 93(2) of the Energy Act, as amended by Act 365/2022 Sb. of laws, the surplus revenue is the positive difference between the market revenue and the cap on market revenue for the levy period. The method of determining the surplus revenue

³⁴ See further Art. 17(1) of Regulation 2022/1854.

³⁵ Art. 15 of Regulation 2022/1854.

was established by the Czech government by Decree 407/2022 Sb. Of laws on the method of determining the amount of surplus revenues from the sale of generated electricity.

It is noteworthy that the lawmaker applied the levy on surplus revenue at the lower limit allowed by Regulation 2022/1854. Act 365/2022 Sb. of laws stipulates that the levy on surplus revenue is levied on 90% of the surplus revenues.³⁶ The levy on surplus revenues shall be collected for December 2022 for the first time. It is important to note that the last levy period is 2023, and pursuant to Article 95(c) of the Energy Act, as amended by Act 365/2022 Sb. of laws, the provisions of Regulation 2022/1854 relating to the levy on surplus revenue will also apply after 30 June 2023. Thus, we are of the opinion that the application of a cap on market revenues for electricity producers after 30 June 2023 in the Czech Republic, assuming that other Member States do not do the same, may put the electricity producers at a disadvantage in the EU market.

In the context of the Czech legislation, it is important to note two specificities in relation to the cap on market revenues. The first peculiarity is that the cap on the market revenue is defined directly in Act 365/2022 Sb. Of laws and ranges from € 70–240 per MWh, depending on the type of source of generated electricity.³⁷ We consider that setting the cap on market revenue at the level of a law increases its transparency as well as the predictability of its level if compared to setting it, for example, in the form of a sub-legislative norm.³⁸ The second peculiarity is that in the case of electricity generation from gaseous biomass fuel, solid biomass fuel, and lignite in an electricity generation facility with an installed capacity of the largest generating source up to 140 MW the cap is set at an amount exceeding € 180 per MWh.³⁹ The Czech Ministry of Industry and Trade commented on the method of setting the individual cap on market revenue as follows: “*The caps on market revenue for producers are set to cover in principle normal operating costs and potential investments. The specific caps on market revenue were set by an interministerial working group on the basis of an analysis of data from selected producer.*”⁴⁰

Energy Regulatory Authority (Energetický regulační úřad) administers the levy from surplus revenues and the proceeds of the surplus revenue contribution itself are an income of the national budget of the Czech Republic.

The second financial legal instrument defined by Regulation 2022/1854 is the solidarity contribution. It was introduced into Czech legislation by Act 366/2022 Sb. of laws, in the form of a tax on windfall gains. The basic structural elements of any tax (including windfall tax – Edit.) include the subject of the tax, the object of the tax, the tax base and tax rate, the calculation of the tax, and the taxable period.⁴¹ The windfall

³⁶ § 95(a) of the Energy Act as enacted by Act 365/2022 Sb. of law.

³⁷ § 95(b)(1) of the Energy Act as enacted by Act 365/2022 Sb. of laws.

³⁸ Compare with Slovak national rules.

³⁹ Ibid.

⁴⁰ Ministry of Industry and Trade of the Czech Republic. The government approved a levy on excess income for electricity producers. In: *Ministry of Industry and Trade of the Czech Republic* [online]. 9.11.2022 [cit. 2023-01-15] Available at: <https://www.mpo.cz/cz/rozcestnik/pro-media/tiskove-zpravy/vlada-schvalila-odvod-z-nadmernych-prijmu-pro-vyrobce-elektřiny--270897/>.

⁴¹ KARFÍKOVÁ, M. – BOHÁČ, R. Daňové právo [Tax law]. In: KARFÍKOVÁ, M. a kol. *Teorie finančního práva a finanční vědy* [Theory of Financial Law and Financial Science]. Praha: Wolters Kluwer ČR, 2018, p. 158.

gains tax, effective from 1 January 2023, is to be applied to a wider range of entities than provided for in Regulation 2022/1854. Pursuant to § 17(c)(1) in conjunction with § (6) of Act 586/1992 Sb. of laws on Income Tax, as amended by Act 366/2022 Sb. of laws, the relevant activities for the windfall gain tax are, in addition to the crude petroleum, natural gas, coal, and refinery sectors, the following:

- Production, transmission and distribution of electricity with the exception of combined production of electricity and heat in a ratio of electricity produced and useful heat supply of less than 4.4;
- Financial intermediation, except for the exceptions referred to in the quoted paragraph.

Inclusion of the electricity producers in particular among the entities liable to pay tax on windfall gains was highly criticized. Electricity producers are also obliged anyway to pay the aforementioned surplus revenue contribution. The former Czech minister of the industry and trade also criticised in this context: “*It is contrary to the EU Regulation (Regulation 2022/1854 – Edit.), contrary to the case law of the Constitutional Court and contrary to the constitutional order.*”⁴² However, the current government and legislature is of a different view according to them the extension of the tax liability to electricity producers, despite their contemporaneous obligation to tolerate a cap on market revenues, is not inconsistent with Regulation 2022/1854.⁴³

In addition to its name, the essence and character of each tax is captured in particular by the subject of the tax.⁴⁴ The subject of the windfall gains tax is defined positively⁴⁵ as excess profits, which is defined as the difference between the 2023–2025 tax base and the average of the tax base over the last four years (2018–2021) plus 20%.⁴⁶ The tax on windfall gains is applied for the period of 2023–2025. The windfall gains tax rate is set at 60% (the minimum rate under Regulation 2022/1854 is 33% – Edit.) and applies in addition to the applicable income tax. In effect, the surplus revenues of the entities concerned are thus subject to a tax rate equal to the sum of the windfall gains tax and the income tax. It should be noted that the above state of affairs is not contrary to the spirit of the Regulation 2022/1854, which states in Article 16(2) that “*The temporary solidarity contribution shall apply in addition to the current taxes and levies applicable under the national law of the Member State.*”

In the Czech Republic, the windfall gains tax itself is an income tax, the Specialized Financial Office is its administrator.⁴⁷ The tax in question is a sub-category of corporate income tax and applies to a defined range of entities.⁴⁸ For the sake of completeness,

⁴² KLÍMOVÁ, J. OTÁZKY A ODPOVĚDI: Windfall tax a zastropování tržeb. Je Česko nejpřísnější v Evropě? [Q&A: Windfall tax and revenue capping. Is the Czech Republic the strictest in Europe?]. In: *iRozhlas* [online]. 24.11.2022 [cit. 2023-02-24]. Available at: https://www.irozhlas.cz/ekonomika/windfall-tax-co-je-2022-cr-odvody-z-nadmernych-trznich-prijmu_2211241144_ako.

⁴³ Ibid.

⁴⁴ BOHÁČ, R. Labutí píseň daně z nabytí nemovitých věcí [The Swan Song of the Real Estate Acquisition Tax]. *Acta Universitatis Carolinae Iuridica* [online]. 2022, Vol. LXVIII, No. 4, p. 8. [cit. 2023-01-17] Available at: https://karolinum.cz/data/clanek/10821/Iurid_68_4_0007.pdf.

⁴⁵ KARFÍKOVÁ – BOHÁČ, *c. d.*, p. 159.

⁴⁶ § 20(ba) of Act 586/1992 Sb. of laws on income tax as amended.

⁴⁷ § 21(5) of Act 586/1992 Sb. of laws on income tax as amended.

⁴⁸ § 17 of Act 586/1992 Sb. of laws on income tax as amended.

we would like to point out that the windfall gains tax is not subject to the obligation to file a windfall gains tax registration.⁴⁹

Summarizing the adopted national legal norms in the Czech Republic regulating the cap on market revenues and the solidarity contribution under Regulation 2022/1854, we can mention the following conclusions:

- Both institutes are, *de lege lata*, temporary, but the cap on market revenues is to be applied, beyond the period defined in Regulation 2022/1854, also for the second half of 2023;
- In case of the levy on the surplus revenue established, in the case of electricity production from gaseous biomass fuel, from solid biomass fuel, and from lignite in electricity production facilities with an installed capacity of the largest production source up to 140 MW, the legislature took advantage of the possibility to set a cap on market revenues above € 180 per MWh;
- Windfall gains tax is applied to a wider range of entities than those defined by Regulation 2022/1854. In the Czech Republic, banks and selected companies in the electricity and financial intermediation sectors are also affected by the tax in question.

V. NATIONAL LEGISLATION ON CAP ON MARKET REVENUES AND SOLIDARITY CONTRIBUTION IN SLOVAKIA

In Slovakia, in order to introduce a cap on market revenues and the solidarity contribution, two national legal norms have been adopted, namely:

- Act 433/2022 Sb. of laws amending Act 51/2012 Sb. of laws on energy as amended and amending and supplementing certain acts (Act 433/2022 Sb. of laws);
- Act 519/2022 Sb. of laws on solidarity contribution from activities in crude petroleum, natural gas and refinery sector supplementing certain laws (Act 519/2022 Sb. of laws).

Similarly, to the Czech Republic the cap on market revenues in Slovakia was introduced by an amendment to the energy legislation, namely Act 251/2012 Sb. of laws on energy on amendment and supplementation of certain laws as amended and amending certain laws (New Energy Act). The legal institution that introduces the cap on market revenue is the surplus revenue levy. The subject of the levy, which is terminologically denoted as the payer, is defined by reference to the directly applicable EU Regulation. It is worth noting that the Slovak national legislation does not consider an electricity trader as a payer of the surplus revenue, but it is part of an vertically integrated entity.⁵⁰ In the context of the subject of the levy, we further note that, on an extensive interpretation, it is possible to draw a partial conclusion that the legislature included certain hydroelectric

⁴⁹ See further draft decree amending decree 525/2020 Sb. of laws on income tax forms as amended [online]. [cit. 2023-01-16]. Available at: <https://www.komora.cz/legislation/3-23-novela-vyhlasaky-c-525-2020-sb-o-formularovych-podanich-pro-dane-z-prijmut17-1-2023/>.

⁵⁰ See § 25(a) of the New Energy Act.

power plants with a reservoir among the payers of the levy in question,⁵¹ for example the “Váh Cascade”⁵² while Regulation 2022/1854 states that in case of hydro power plant the cap on market revenues shall be applied on hydropower without reservoir.⁵³

Surplus revenue itself is legally defined in § 25(b)(2) of the New Energy Act as “*the positive difference between the market revenues and the cap on market revenues*”. It should be noted that the cap on market revenues is not directly determined in the cited law, but is determined by the Decree of the Government n. 38/2023 Sb. of laws which establishes the method of determining the amount of additional income from the sale of produced electricity, the cap on market revenues, costs of deviation, the scope of information necessary for monitoring and reporting to the European Commission, and the fixed electricity prices for determining the cap on market revenues of electricity produced from biogas, biomass, or highly efficient combined production (Decree 38/2023 Sb. of laws).⁵⁴

According to Article 25(f) of the New Energy Act, the cap on market revenues obtained from the sale of 1MWh of electricity will be set between € 50 and € 250 depending on the type of source. The government can only increase the cap on market revenues once it has been determined.⁵⁵ It is worth noting that the Slovak legislation also allows for a market revenue cap above the threshold set by Regulation 2022/1854, i.e., the government may set a market income cap even above € 180 per MWh in accordance with Article 8(1)(b) of Regulation 2022/1854. In our opinion, setting the cap on market revenues by a government decree, compared to its setting via primary legislation, creates the opportunity for its easier and faster modification, which on the other hand decreases the level of certainty for market participants.

The method of determining the surplus revenue is determined by Decree 38/2023 Sb. of laws.⁵⁶

The surplus revenue levy is to be applied in the levy period from 1 December 2022 to 31 December 2024. It should be noted that also in Slovakia the legislature exceeded the period that was directly required by Regulation 2022/1854. We are of the opinion that if other Member States do not apply the cap on market revenue to their electricity producers after the date specified in Regulation 2022/1854 (30 June 2023 – Edit.), the application of the cap on market revenue to electricity producers in Slovakia after 30 June 2023 may put them at a disadvantage vis-à-vis the EU market competition.

In Slovakia, the levy on surplus revenue is applied to 90% of it, i.e., the legislature did not use the possibility to charge the entire surplus revenue of obliged entities. According to the explanatory memorandum to the New Energy Act, the argument for applying the 90% share is to maintain incentives for the market and to ensure the availability of electricity producers in situations of high demand.⁵⁷

⁵¹ The aforementioned refer to so-called the Váh Cascade in the Slovak energy sector. Compare with Art. 7(1)(d) of Regulation 2022/1854.

⁵² Vážska kaskáda. In: javys: Informačný servis: Energetický slovník [online]. [cit. 2022-02-24]. Available at: <https://www.javys.sk/sk/informacny-servis/energeticky-slovník/V/vazska-kaskada>.

⁵³ Art. 7(1)(d) of Regulation 2022/1854.

⁵⁴ See § 2 of the Decree 38/2023 Sb. of laws.

⁵⁵ § 25(f)(5) of the New Energy Act.

⁵⁶ See § 1 of the Decree 38/2023 Sb. of laws.

⁵⁷ Online available at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=521531>.

The tax office competent for the administration of the income tax of the payer of the levy on excessive income pursuant to Act 563/2009 Sb. of laws on tax administration (Tax Code) and on amendments and supplements to certain acts administers the levy on surplus revenue. The explanatory memorandum to the New Energy Act says that the designation of the competent tax authority is justified by the fact that it is the authority which is the most competent from a procedural point of view.⁵⁸

We consider it necessary to point out also that the levy on surplus revenue is not the first specific financial obligation for electricity producers in Slovakia. Since 2012, electricity producers in Slovakia have been obliged to pay a special levy on business in regulated sectors, which was introduced by Act 235/2012 Sb. of laws on a special levy on business in regulated sectors and on amendments and supplements to certain acts, as amended. It is worth noting that this levy was also intended originally to be temporary in nature,⁵⁹ yet it is still applied today. It is worth noting, that the primary aim of the legislature in the case of this levy was also to share the burden of the effects of the global financial and economic crisis more fairly and economically.⁶⁰

The second measure under consideration is the national regulation of the solidarity contribution under Regulation 2022/1854. In terms of the Slovak legislation, the solidarity contribution was introduced by special Act 519/2022 Sb. of laws, terminologically referred to as the solidarity contribution in line with Regulation 2022/1854. In terms of Slovak legislation, the solidarity contribution was introduced by special Act 519/2022 Sb. of laws, while terminologically it is designated in accordance with Regulation 2022/1854 as a solidarity contribution.⁶¹ For better comparability of the Czech and Slovak national legislations, also in the case of the solidarity contribution, we will focus on its basic structural elements.

The obligation to pay the solidarity contribution applies to legal entities and permanent establishments of foreigners, provided that they generate at least 75% of their turnover from economic activities in the crude petroleum, natural gas, coal, and refinery sectors. The Slovak legislation does not extend the sectors subject to the solidarity contribution beyond the scope of Regulation 2022/1854.

Article 15 of Regulation 2022/1854, in combination with the provisions of § 3, 4, and 6 of Act 519/2022 Sb. of laws, shall be used to calculate the amount of the contribution. The amount of the solidarity contribution shall be determined as the product of the basis for the calculation of the solidarity contribution⁶² and the rate of the solidarity contribution specified in § 4 of Act 519/2022 Sb., at the rate of 55%.⁶³

⁵⁸ Ibid.

⁵⁹ Online available at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=368848>.

⁶⁰ Ibid.

⁶¹ We would like to draw your attention to the fact that in Slovakia the national legislation sticks to the term “solidarity contribution”, whereas in the Czech Republic the financial law institute in question is referred to as a windfall gains tax. (Edit.)

⁶² The basis for calculating the solidarity contribution is based on the income tax base less the tax loss deduction and after claiming the income tax base reduction for each income tax year of the contributor beginning in calendar year 2022 – for more details see § 3 of Act 519/2022 Sb. of laws.

⁶³ At the time of writing this paper, National Council of Slovakia received a proposal for change of the solidarity contribution rate to 70%. See the wording of the draft act – online available at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=9069>.

The legislation on the application of the solidarity contribution in the Slovak Republic explicitly provides that the solidarity contribution is treated as a tax expense in the tax period in which the taxpayer will bring it to book as costs.⁶⁴

Summarising the adopted national legal norms in Slovakia regulating the cap on market revenue and the solidarity contribution under Regulation 2022/1854, the following conclusions can be drawn:

- Both institutes are, *de lege lata*, of temporary nature, but the levy on the surplus revenue (cap on market revenue) is to be applied, going beyond Regulation 2022/1854, also for the second half of 2023;
- The cap on market revenues unlike in the Czech Republic, is not regulated in the rule establishing the legal framework of the cap on market income but will be regulated by a government decree. At the same time, it should be noted that the legislation in Slovakia also allows for the establishment of the cap on market revenues above the level set by Regulation 2022/1854;
- In the context of the solidarity contribution, the Slovak legislation does not deviate from the provisions of Regulation 2022/1854 in defining the sectors that are financially obliged by the introduction of the solidarity contribution. Furthermore, it is important to note that the legislation explicitly states that the solidarity contribution will be treated as a tax expense in the tax year in which the taxpayer books it as expense.

CONCLUSION

The aim of the article was to define the legal framework of the mandatory cap on market revenues for electricity producers and the solidarity contribution in the Czech Republic and Slovakia and to provide their comparison. We believe that the goal of the contribution has been successfully achieved. Below is a summary of our key findings.

In both the Czech Republic and Slovakia, the relevant national legislation was approved at the end of 2022, establishing the legal framework for the cap on market revenue for electricity producers as well as the legal framework for the solidarity contribution, with the basic legal framework for both institutes being regulated at EU level by Regulation 2022/1854.

The cap on market revenues for electricity producers has been reflected in the introduction of a surplus revenues levy in both countries. In the context of the cap on market revenues, both countries have introduced different levels of the cap on market revenue for electricity producers according to the form or source of electricity production, with the Czech Republic having caps regulated at the level of primary legislation and Slovakia having caps to be regulated by government decree, to the extent determined in the relevant primary legislation.

⁶⁴ § 19(3)(j) of Act 595/2003 Sb. of laws on income tax as amended by Act 519/2022 Sb. of laws.

The legislation of both countries also allows for caps on market revenue exceeding € 180 per MWh. Both countries apply a surplus revenue levy on 90% of the surplus revenue, i.e., neither country has used the option to levy the full amount of the surplus revenues of obligated entities. The legislation of both countries foresees the application of the surplus revenues levy also after 30 June 2023. In our view, application of the surplus revenue levy in the Czech Republic and in Slovakia after the period set by Regulation 2022/1854, in case that other Member States do not apply the cap on market revenue to their electricity producers after the date specified in Regulation 2022/1854 (30 June 2023 – Edit.), this may put electricity producers in the Czech Republic and Slovakia at a disadvantage vis-à-vis the EU market competition. Furthermore, the application of the surplus revenue levy on electricity producers in the Czech Republic and Slovakia beyond the period set by Regulation 2022/1854 will also decrease their disposable capital on new investments and hence put them at a disadvantage vis-à-vis the EU market competition. Generally, in our opinion this prolongation of the period of application of the surplus levy in both countries exceeds the primary goal of the Regulation 2022/1854.

With regards to the surplus levy, the difference between the countries can be identified in the determination of the administrator of the proceeds from the surplus revenue levy: it is administered by the Energy Regulatory Office in the Czech Republic or the competent tax office in Slovakia.

More significant differences between the national legislations under consideration can be observed in the definition of the solidarity contribution. Most significant differences include wider range of sectors subject to the solidarity contribution obligation in the Czech Republic, whereas the legislation on obliged entities in Slovakia does not deviate from Regulation 2022/1854. The second important difference is that the legislation in Slovakia explicitly governs that the solidarity contribution will be treated as a tax expense in the tax year in which the taxpayer books it as expense. Finally with regards to the solidarity contribution, one needs to note that at the time of writing this paper the part of Regulation 2022/1854 concerning the solidarity contribution is challenged in the Court of Justice of the European Union.⁶⁵

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⁶⁵ See Case T-802/22: Action brought on 28 December 2022 – *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council*. OJ C 54. In: *EUR-Lex: Acces to European Union Law* [online]. 13.2.2023 [cit. 2023-02-24]. Available at: <https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=CELEX:62022TN0802>.