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Does the solidarity contribution under the Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices infringe the protection of property guaranteed by the European Convention of Human Rights?

by

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Summary

This thesis discusses the legality of the solidarity contribution relative to Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR). As such, this paper aims to provide an answer to the question "*Does the solidarity contribution under the Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices infringe Article 1 of Protocol 1 of the ECHR*."

In coming up with an answer to the above-mentioned question, this thesis first determines whether the solidarity contribution is a tax measure. This first step is essential to determine whether Article 1 of Protocol 1 of the ECHR may be used as a legal basis to question the legality of the imposition of the solidarity contribution. After such determination, the thesis then discusses whether the solidarity contribution complies with the principles underlying the ECHR, namely: (1) it must be imposed according to law, (2) it must serve a valid purpose in the public or general interest, and (3) the provisions adopted must be a reasonable and proportionate means to achieve that end.

Preface

First of all, I would like to thank the Swedish Institute for making my study of the Master's Programme in European and International Tax Law possible.

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Abbreviation list

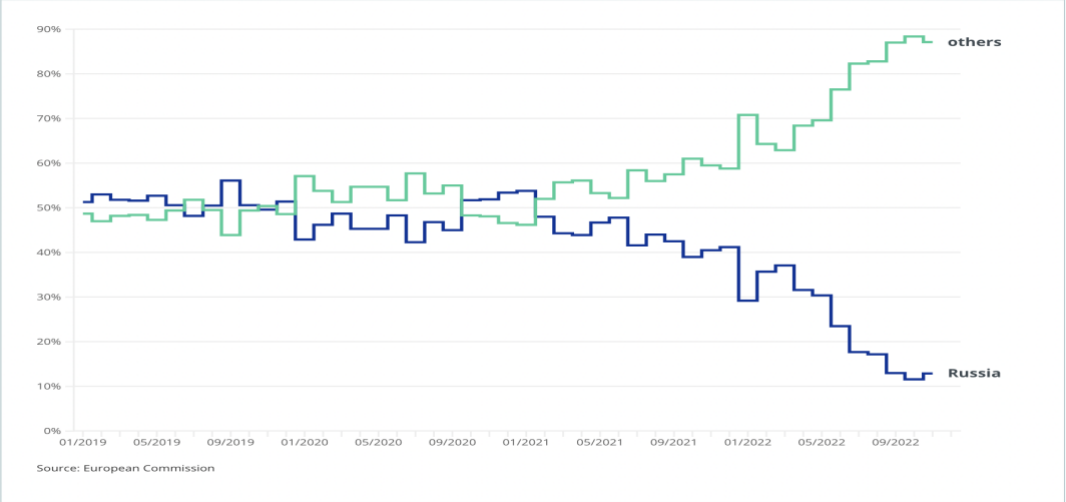
CFR	- Charter of Fundamental Rights of the European Union
CJEU	- Court of Justice of the European Union
Covered companies	- EU companies and permanent establishments, including those that are part of a consolidated group merely for tax purposes, engaged in the crude petroleum, natural gas, coal, and refinery sector
ECHR	– European Convention of Human Rights
ECnHR	– European Commission of Human Rights
ECtHR	– European Court of Human Rights
EU	– European Union
EUR	– Euro
IMF	- International Monetary Fund
LNG	– Liquified Natural Gas
MWh	– Megawatt per hour
OECD	- Organization for Economic Co-operation and Development
Regulation	– Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices
Surplus Profits	– Taxable profits that exceed the 20 percent increase as computed from the 4-year average taxable profits from 2018 to 2021
TEU	- Consolidated Version of the Treaty on European Union
TFEU	– Consolidated Version of the Treaty on the Functioning of the European Union

1. Introduction

1.1 Topic

In an Infographic released by European Council in February 2023, it disclosed that 83 percent of the European Union's (EU's) natural gas in 2021 was imported.[1] It is noteworthy that until the first half of 2021, Russian gas in the EU market was around 50 percent (see Figure 1).[2] However, after the Russian invasion of Ukraine in February 2022, the EU's imports from Russia of natural gas fell to 12.9 percent in November 2022. This resulted in the EU resorting to the importation of liquified natural gas (LNG) and sourcing the other supply by increasing the imports to other suppliers of natural gas, with the UK and Norway as the largest.[3] These changes in the energy supply, however, caused problems to the EU citizens and companies as evidenced by the spike in the gas prices in the EU to EUR 300/MWh in August 2022 from the prices in the last decade which averaged between EUR 5/MWh and EUR 35/MWh.[4]

Figure 1: EU's gas market share[5]



[1] European Council, 'Where does the EU gas come from?' (*European Council*, 7 February 2023) <https://www.consilium.europa.eu/en/infographics/eu-gas-supply/#:~:text=While%20the%20EU%20remains%20dependent,higher%20on%20the%20EU's%20agenda.> accessed 17 May 2023.

[2] *Ibid*, Footnote 1, Where does the EU gas come from?.

[3] Pamela Campa and Elena Paltseva, 'Exploring the impact from the Russian gas squeeze on the EU's greenhouse gas reduction efforts' (*Stockholm School of Economics*, 15 March 2023) <https://www.hhs.se/en/about-us/news/site-publications/2023/exploring-the-impact-from-the-russian-gas-squeeze-on-the-eus-greenhouse-gas-reduction-efforts/> accessed 25 May 2023

[4] European Council, 'Infographic - A market mechanism to limit excessive gas price spikes' (*European Council*, 15 February 2023) <https://www.consilium.europa.eu/en/infographics/a-market-mechanism-to-limit-excessive-gas-price-spikes/#:~:text=What%20is%20the%20market%20correction,the%20stability%20of%20financial%20markets.> accessed 25 May 2023.

[5] *Supra*, Footnote 1, Where does the EU gas come from?.

Because of these events affecting the energy supply and prices within the EU, the European Council, through the proposal of the European Commission, decided to adopt the "*Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices*" (the Regulation) to temporarily address the issues on energy. As such, this paper will seek to determine whether the Regulation's solidarity contribution complies with the protection of property under Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR).

1.2 Background

The European Commission proposed the Regulation due to the observed rapidly increasing trend in energy prices coupled with the Russian invasion of Ukraine in 2022.[6] The Regulation aims to reduce electricity consumption, introduce a cap on market revenues that certain producers receive, and establish rules for a mandatory temporary solidarity contribution, among others.[7]

To achieve these aims, the Regulation introduces two measures, namely:

a. *Measures concerning the electricity market* – this measure involves demand reduction, the cap on market revenues, and the distribution of surplus revenues and surplus congestion income revenues to final electricity customers and retail measures.[8]
b. Measures concerning the crude petroleum, natural gas, coal, and refinery sectors – this measure affects the EU companies and permanent establishments engaged in the natural gas, coal, and refinery sectors. These companies shall be subject to mandatory temporary solidarity contribution.[9]

Note, however, that this paper will only tackle the second measure above, and from that only the mandatory temporary solidarity contribution.

Solidarity contribution is a temporary EU measure to address surplus profits of EU companies and permanent establishments, including those that are part of a consolidated group merely for tax purposes, engaged in the crude petroleum, natural gas, coal, and refinery sector (covered companies) to mitigate exceptional energy price developments in the energy markets for the Members States, consumers, and companies.[10] Due to its nature, some authors referred to it as a windfall profit[11] tax. However, for this paper, solidarity contribution will be used to reflect the name used in the Regulation.

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[6] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ 2 261/I/1 (Regulation), Preamble (1).
[7] Regulation, Article 1 (Subject Matter and Scope).
[8] Regulation, Chapter 2.
[9] Regulation, Chapter 3.
[10] Regulation, Article 2(19).
[11] Congressional Research Services in its article "Crude Oil Windfall Profits Taxes: Background and Policy Considerations dated 23 March 2022" defines windfall profits as

The Regulation provides that the solidarity contribution shall be calculated based on the taxable profits of the companies in the fossil fuel sector, as determined under national tax rules, for the years 2022 and 2023 only. If the companies' profits in the said years are more than 20 percent of the four-year average profits from 2018, the profit that exceeds the said threshold (surplus profits), the tax rate applicable will be at least 33 percent. When the four-year average profit is negative, the average profit should be considered zero for the purpose of calculating the temporary solidarity contribution.[12]

1.3 Aim

This study aims to analyze the solidarity contribution to be imposed on covered companies. To achieve this aim, this thesis answers the question "*Does the solidarity contribution under the Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy infringe the protection of property guaranteed by the European Convention of Human Rights?*

1.4 Method and material

This paper will follow the legal dogmatic research method.[13] This method strives to assess the legality of the regulation based on the existing law affecting the fundamental rights of EU citizens. In assessing, EU legislation, case laws, and academic literature will be used. However, considering that the subject regulation is fairly new, and due to the scarcity of books or academic articles, this investigation may use some commentaries from known law firms.

1.5 Delimitation

Article 6 (paragraphs 2 and 3) requires the EU to accede to the ECHR and the fundamental rights guaranteed by the ECHR shall form part of the EU laws' general principle. In that regard, possible infringement in the implementation of the Regulation may be covered by either Article 1 of Protocol 1 of ECHR or Article 17 of the Charter of Fundamental Rights of the European Union (CFR).[14] While these two provisions have different wordings, Article 17 is based on the ECHR provision as stated in the CFR Explanations.[15] Moreover, Article 52.3 of the CFR provides that CFR rights with correspondent ECHR rights shall have the same meaning and scope.[16] The CJEU likewise sees the

profits from commodity prices exceeding their expected price over the course of an investment. This generally represents the excessive, unearned, or unfair gain of the business sector, which is oftentimes related to the oil markets.

[12] Regulation, Articles 15 and 16.

[13] Sjoerd Douma, Legal Research in International and EU Tax Law (Kluwer 2014) 17-20

[14] Dr. T.C. Gerverdinck, 17.1 Summary, Eigendomsgrondrecht en belastingen (Kluwer 2020).

[15] *Explanation (*) Relating to the Charter of Fundamental Rights (2007)* OJ 1 303/23.

[16] Charter of Fundamental Rights of the European Union [2016] OJ 1 202/289, Article 52.3.

relevance of not only the text of the ECHR but also the case laws of ECtHR.[17] As such, this investigation will focus on the application of the ECHR provision as Lock determines, which the author of this thesis agrees, that the European Court of Human Rights (ECtHR) has extensive case laws relevant to the interpretation of the protection of property.[18]

Further, Member States' implementation of the Regulation will not be covered by this paper.

1.6 Outline

Chapter 2 summarizes the protection of property under the ECHR. To proceed to the discussion of the principles underlying the ECHR, this Chapter first determines whether the solidarity contribution is a tax measure.

Chapters 3 (Legal Basis of the Regulation), 4 (General or public interest), and 5 (Proportionality of the solidarity contribution) serve as the core of this paper as they will encapsulate the discussion on the validity of the solidarity contribution. Chapter 3 discusses the three different TFEU provisions that may be used as the appropriate anchor for the adoption of the Regulation (i.e., Articles 115, 122(1), and 194(3) of the TFEU). Chapter 4 includes a discussion on whether the actions of the Member States should be taken into consideration to determine if the solidarity contribution is adopted on a reasonable foundation. Finally, Chapter 5 tackles whether the means employed are not disproportionate to the objective of the Regulation.

2. Protection of Property in ECHR

It is important to discuss the European law on which this paper will be anchored to give the proper context of the analysis. As mentioned in Chapter 1.1 above, principles underlying the ECHR promulgated in the decided cases by the ECtHR, particularly regarding Article 1 of Protocol 1 of the ECHR which pertains to the protection of property, will be used as it is the only Article in the ECHR with express provision on taxation[19]. For reference, this Article provides that:

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

[17] DEB v Bundesrepublik Deutschland, C-279/09, para. 35.
[18] Tobias Lock, Article 17 CFR. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 2149.
[19] Philip Baker, 'Taxation and the European Convention on Human Rights' [2000] 40(8) European Taxation 301.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Before delving deeper into the Regulation's compliance with the above-mentioned Article, it is important to first determine whether the solidarity contribution is a tax. Lammers and Kuźniacki concluded that the solidarity contribution is a tax measure and in particular, they classified it as an excess profit tax. This conclusion is based on whether the solidarity contribution met the following criteria for a tax measure: (i) is a law, (ii) that imposes liability on classes of persons, (iii) to pay money to the State, and (iv) for public purposes.[20] The article indicates that these criteria are met by the solidarity contribution since it is imposed through an EU Regulation[21]; it specifically targets EU companies and permanent establishments engaged in the energy supply of crude petroleum, natural gas, coal, and refinery sector; these companies will be taxed based on their surplus profits[22]; and the collection will be redistributed[23] to counteract the effects of high energy prices.[24]

Also, D.J. van Bergen defines taxes as "*compulsory payments without individual consideration which are collected – other than by way of punishment – from non-government households to and for the benefit of government households under public law rules."* He concluded that the solidarity contribution qualifies as a tax based on this definition which he breaks into five (5) elements, as follows:[25]

1. Compulsory payments without individual consideration – this element is met when the involuntary payment to the government is not reciprocated by individual consideration. Bergen's analysis disclosed that the solidarity contribution is compliant with this element since the income is transferred (through the payment of the solidarity contribution) but the covered companies do not receive anything in exchange for the transferred income.

   The author of this thesis agrees with the abovementioned analysis as the Regulation provides that the proceeds of the solidarity contribution collected will be used for the welfare of the citizens. The solidarity contribution is a form of confiscation of income and no just compensation is expected to be received by the covered companies.

[20] Jeroen Lammers and Błażej Kuźniacki, 'The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law' [2023] Volume 51(6/7) Intertax 4.
[21] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ 2 261/I/1.
[22] Regulation, Articles 15, 16, and 18.
[23] Regulation, Article 17.
[24] Jeroen Lammers and Błażej Kuźniacki, 'The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law' [2023] Volume 51(6/7) Intertax 5.
[25] D.J. van Bergen, Solidariteitsbijdrage of solidariteitsbelasting? Weekblad fiscal recht 2023, forthcoming (version translated by Google translate), Chapter 3.3.

2. Other than a way of punishment – Bergen opined that from a legal point of view, the solidarity contribution is not a form of criminal or administrative fine even though the Regulation provides that it was imposed to deal with excess profits. Such opinion is based on the way the solidarity contribution is levied which is in the form of a state tax (for the Netherlands).

   The Organization for Economic Co-operation and Development's (OECD's) definition of the following types of penalties likewise supports the opinion of Bergen:[26]

   Administrative penalties - are imposed for tax offenses, such as failure to make a timely return or payment, negligence, and making a false return or statement. They take the form of additions to the tax and are assessed as part of the tax

   Criminal penalties – are enforceable only by prosecution. A prison sentence may be imposed for serious tax fraud.

   Moreover, the ECtHR, in its jurisprudence, determines the following, among others, as penalties:

   - A confiscation order in respect of the proceeds of a criminal offense following a finding of guilt, in view of its punitive purpose, in addition to its preventive and compensatory nature;[27] and
   - An administrative fine imposed in an urban development case equivalent to 100% of the value of the wrongfully erected building, which fine had both a preventive and a punitive function;[28] and an administrative fine imposed for market manipulation contrary to the stock exchange law.[29]

   It may be noticed that in the above ECtHR cases, both penalties are in the context of criminal and administrative offenses which is in line with the definition of the OECD.

   These definitions of penalties and ECtHR cases as compared by the author of this thesis to the characteristics of the solidarity contribution disclosed that the latter will not fit in any of them. Solidarity contribution is not imposed for any tax offense and no prosecution is necessary for its imposition. Hence, not a penalty or punishment for the covered companies.

3. By non-government households – Bergen provides that to fulfill this element, the payment must not come from government entities.

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[26] OECD, 'Glossary of Tax Terms' (*OECD*, 2023) <https://www.oecd.org/ctp/glossaryoftaxterms.htm#P> accessed 25 May 2023.
[27] Welch v The United Kingdom, App no 17440/90 (ECtHR, 9 February 1995), paras. 29-35.
[28] Valico SLR v Italy, App no 70074/01 (ECtHR, 21 March 2006).
[29] Georgouleas and Nestoras v Greece, App nos 44612/13 and 45831/13 (ECtHR, 28 August 2020), paras. 33-43.

As discussed in Chapter 1.2, the covered companies of the Regulation are the energy companies, hence, they shall be considered non-government households. Although there are government agencies that are engaged in energy services (e.g., Nederlandse Aardolie Maatschappij), they are considered business households and not government households since they are engaged in the business of energy supply. This is similar to levying a value-added tax on government agencies.[30]

4. Towards and for the benefit of public sector bodies as such – this element may be fulfilled according to Bergen if the public administrations of the Member States are benefited and the payment was received by the government, not in the capacity of a shareholder or creditor.

   The author of this paper agrees that this element is likewise met by the Regulation as the redistribution of the proceeds through specific purposes are indicated therein.[31] Also, the Member States are required to submit reports relative to the actual usage of the proceeds for the check and balance.[32]

5. Under public law rules – this element will be fulfilled through a national law by the Member States.

   This thesis also agrees that this element is met since the Member States are required to transpose the Regulation into national law before its implementation.[33]

Prof. Dr. Lang likewise interprets the term tax through the following six (6) criteria following Article 2 of the OECD Model Tax Convention:[34]

a. Imposition on behalf of a contracting state or its political subdivisions or local authorities;
b. Manner in which the taxes are levied;
c. Ordinary and extraordinary taxes;
d. Fees paid for certain benefits;
e. Taxes must be collected in accordance with domestic law; and
f. Taxes on income and on capital.

These criteria are somehow embodied as well in the elements enumerated by Bergen, as discussed above. However, it may be worthy to elaborate on the two (2) criteria, as follows:

[30] Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax [2006] OJ 2 347/1, Article 13**.**
[31] Regulation, Article 17.
[32] Regulation, Article 19(3).
[33] Regulation, Article 14(3).
[34] M. Lang, 'Taxes Covered" – What is a "Tax" ' [2005] 59(6) Bulletin for International Taxation 216-220.

- Ordinary and extraordinary taxes – Prof. Lang concluded that the nature of the tax should not matter for as long as it is imposed on the income or capital, it shall be considered a tax; and
- Taxes on income and capital – Prof. Lang opines that the distinction on whether the tax is imposed on income or capital is a crucial point as the rules to be applied may differ according to its classification.

The author of this paper opines that it is not difficult to classify the solidarity contribution as a tax on income considering the wording of the Regulation wherein it provides that it shall be imposed on the surplus profits of the covered companies. Moreover, the solidarity contribution is seen by the author as an extraordinary one since it will not be collected regularly (i.e., limited only for the years 2022 and 2023) and it shall be imposed on the covered companies on their excess profits as determined by the Regulation (discussed in Chapter 1.2 above). However, as suggested by Prof. Lang, the nature of the solidarity contribution is not important in determining whether it may fall under the definition of tax since both are covered by the term tax.

It is also worth noting that the OECD's definition of tax as a "compulsory unrequited payment to the general government or a supranational authority" supports the abovementioned elements/criteria of Bergen and Prof. Lang.[35] The author of this thesis divides this OECD definition into two elements, namely: (1) tax is a compulsory unrequited payment, and (2) it is a payment to the general government or supranational authority. OECD explained that the taxes are unrequited since the taxpayers cannot expect proportional benefits as compared to their payment.[36] Lammers and Kuźniacki explained that the term compulsory means that it is a requirement of law.[37] The author views that the solidarity contribution likewise meets the OECD definition of a tax. As earlier discussed, the solidarity contribution is a requirement of the law (i.e., Member States are required to transpose the Regulation into national law). There are no direct benefits for the covered companies but instead, it will be redistributed for the interest of the public.

Foregoing considered, the author of this paper believes that the solidarity contribution should not be treated other than tax. While its name may be confusing, how the solidarity contribution shall be imposed on the covered companies shows that it meets the elements/characteristics of tax, as discussed above.

Having concluded that the solidarity contribution is a tax measure, this paper may now proceed to discuss the compatibility of the imposition of the solidarity contribution with the principles underlying the ECHR.

As a backgrounder, Article 1 of Protocol 1 of the ECHR consists of three distinct rules. These rules are, however, connected, meaning they are to be

[35] OECD, Revenue Statistics INTERPRETATIVE GUIDE (OECD 2021) 6.
[36] OECD, Revenue Statistics INTERPRETATIVE GUIDE (OECD 2021) 6.
[37] Jeroen Lammers and Błażej Kuźniacki, 'The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law' [2023] Volume 51(6/7) Intertax 4.

construed with reference to the other rules. Moreover, the first rule is particularly important as the second and third rules are required to be interpreted in light of the first rule.[38]

The first rule which is found in the first paragraph of the provision pertains to the general nature of the provision as well as the principle of the peaceful enjoyment of property. The second rule is also in the first paragraph, which covers the deprivation of possessions subject to certain conditions. The third rule is in the second paragraph which recognizes the right of the Contracting State to control the use of the property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[39]

The third rule is particularly important in this paper because it expressly mentioned taxation.

However, these rules will not be discussed further except for the third rule which specifically mentioned taxation as one of the exceptions to the fundamental right of protection of property.

As stated in the previous paragraph, taxation is an exception to the fundamental rights guaranteed by Article 1 of Protocol 1 of the ECHR as it interferes with the enjoyment of possession since the state takes part of the income or property of the taxpayers. While Article 1 of Protocol 1 of the ECHR guarantees the protection of property, the draftsmen of the ECHR did not intend to deprive the governments of their taxing power. Thus, a provision preserving the power to tax was included.[40]

Nonetheless, to ensure that such power is not abused, Contracting States must ensure that the following principles underlying the ECHR are satisfied or observed in the exercise of such power: (1) it must be imposed according to law, (2) it must serve a valid purpose in the public or general interest, and (3) the provisions adopted must be a reasonable and proportionate means to achieve the objective.[41]

Compatibility of the Regulation with these three (3) principles will be discussed separately in Chapters 3 (*Legal Basis of the Regulation*), 4 (*General or public interest*), and 5 (*Proportionality of the solidarity contribution*).

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[38] Registry of the European Court of Human Rights, Guide on A1/P1 of ECHR (Council of Europe 2022) 19/98, paras. 78 and 79; William Schabas, The European Convention on Human Rights: A Commentary (Oxford 2015) 967.

[39] Registry of the European Court of Human Rights (ECtHR), Guide on A1/P1 of ECHR, 31 August 2022, page 19/98, paras. 78 and 79; William Schabas, The European Convention on Human Rights: A Commentary (Oxford 2015) 967.

[40] Philip Baker, 'Taxation and the European Convention on Human Rights' [2000] 40(8) European Taxation 301-302.

[41] L. Lester and others, Human Rights Law and Practice (3rd edn, LexisNexis 2009) 247-253.

3. Legal basis of the Regulation

3.1 Introduction

Lawfulness is one of the essential requirements for any interference with the guaranteed rights of the ECHR to succeed.[42] Solidarity contribution is a tax measure that in principle is an interference to the guaranteed right under Article 1 of Protocol 1 of the ECHR. As such, it must comply with the requirement of lawfulness.

However, the existence of the legal basis is not enough to meet the lawfulness requirement as it must be compatible as well with the rule of law, and freedom from arbitrariness must be guaranteed.[43] While taxation as interference is generally justified by the second paragraph of Article 1 of Protocol 1 of the ECHR, the measures taken by the EU must still be checked as the correct application of the said provision is subject to ECtHR's supervision.[44]

ECtHR in its jurisprudence requires that to observe the principle of lawfulness, the applicable provisions of the law must be sufficiently accessible, precise, and foreseeable.[45] The provisions of the law are said to be accessible when it is published in the official gazettes in the form provided for by law, however, a regulation may still be considered accessible if it was made known to the public by any other means.[46] It shall be considered sufficiently precise if the law in question contains the field it is designed to cover, and the number and status of whom such law is addressed.[47] Lastly, the law is foreseeable when the citizens are provided the opportunity to regulate their conduct by foreseeing, to a reasonable degree, the consequences of their actions. However, absolute precision is not necessary to attain foreseeability as excessive rigidity is undesirable as the law must be flexible enough to keep pace in changing environment.[48]

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[42] Registry of the European Court of Human Rights, Guide on A1/P1 of ECHR (Council of Europe 2022) 25/98, para. 114; Vistiņš and Perepjolkins v Latvia, App no 71243/01 (ECtHR, 25 October 2012) para. 68.

[43] East West Alliance Limited v Ukraine, App no 19336/04 (ECtHR, 23 January 2014) para. 167; Hentrich v France, App no 33202/96 (ECtHR, 5 January 2000) para. 42; Ünsped Paket Servisi san. Ve Tic. A.Ş. v Bulgaria, App no 3503/08 (ECtHR, 13 October 2015).

[44] Burden v the United Kingdom, App no 13378/05, (ECtHR, 29 April 2008), para. 59.

[45] Hentrich v France, App no 33202/96 (ECtHR, 5 January 2000) para. 42; Lithgow and Others v United Kingdom, App nos. 9006/80;9262/81;9263/81;9265/81;9266/81;9313/81; and 9405/81 (ECtHR, 8 July 1986) para. 110.

[46] Špaček, s.r.o. v the Czech Republic, App no 26449/95 (ECtHR, 9 November 1999) para. 49.

[47] RTBF v Belgium, App no 50084/06 (ECtHR, 29 March 2011) para. 104.

[48] Centro Europa 7 S.R.L. and Di Stefano v Italy, App no 38433/09 (ECtHR, 08 June 2012) para. 141.

Out of the three requirements of lawfulness, the author of this paper sees the importance of discussing foreseeability due to the somehow retroactive effect of the Regulation for the year 2022. It is not without saying that the other two requirements (i.e., accessible and precise) are not important because it is the opinion of the author of this thesis that these two requirements are met by the Regulation. The Regulation was accordingly published in the Official Journal of the European Union and it provides adequate guidance on how the solidarity contribution shall be imposed by the Member States to the covered companies.

The Regulation provides that solidarity contribution shall be assessed for the income in the years 2022 and 2023.[49] However, it is worth noting that the Regulation was only passed on 6 October 2022, hence, the covered companies may not be ready to regulate their actions. In several cases[50], the ECnHR and ECtHR ruled that the retrospective application of laws is still compatible with Article 1 of Protocol 1 of the ECHR. Baker concludes that while the ECHR did not provide for a general principle against retroactive application of tax, such interference must be justified by legitimate purpose as well its proportionality. He further declares that states have a wide margin of appreciation in this aspect.[51] The author of this paper views that the requirement of foreseeability as regards legitimate purpose and proportionality is met by the solidarity contribution. Further discussion on legitimate purpose and proportionality are in Chapters 3 and 4 of this thesis, respectively.

In adopting the Regulation, the European Commission anchored its proposal solely on Article 122(1) of the TFEU which states that "*Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between the 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*".[52] However, concern was raised by several Member States on the use of Article 122 of the TFEU which only requires qualified majority voting as the legal basis of the Regulation. Instead, they suggested that the legal basis should be anchored on either Articles 115 (i.e., Estonia) and 194(3) (i.e., Poland) of the TFEU which requires unanimity (i.e., Hungary) voting since the Regulation involves fiscal or tax measure.[53] Now, this concern raises the question of the propriety of Article 122(1) of the TFEU as the basis of the Regulation particularly since a case was filed in the General Court of the Court of Justice of the European Union (CJEU) by ExxonMobil, a US company engaged in energy supply with subsidiaries in Germany and the Netherlands. ExxonMobil argues that the European Council has no

[49] Regulation, Article 15.
[50] ABCD v United Kingdom, App no 8531/79 (ECtHR, 23 October 1997) para. 77; Voggenberger Transport GmbH v Austria, App no 21294/93 (ECnHR, 12 October 1994); and Nap Holdings UK Ltd v United Kingdom, 27721/95 (ECnHR, 12 April 1996).
[51] Philip Baker, 'Taxation and the European Convention on Human Rights' [2000] 40(8) European Taxation 305.
[52] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ 1 202/47 (TFEU), Article 122(1).
[53] General Secretariat, CM 4715/22, Communication (European Council 2022) 3, 5 and 6.

ground to use the emergency procedure under Article 122 of the TFEU without a unanimity vote.[54] It is worth noting that the Regulation was not adopted unanimously with Poland and Slovakia voting against it.[55]

This Chapter will revolve around the discussion of Articles 115, 122(1), and 194(3) of the TFEU and determine which among these Articles is the most appropriate provision to anchor the adoption of the Regulation.

3.2 Article 122(1): the appropriate legal basis for the Regulation?

The legality of the Regulation may change if it is proven that the European Commission erred in neglecting other legal bases. As such, it is important to determine the applicability of the different provisions of the TFEU to check whether the European Commission erred in using Article 122 of the TFEU as the sole legal basis for adopting the Regulation.

3.2.1 Article 115 – Harmonization of Direct Tax[56]

Article 115 of the TFEU, which requires unanimity voting, may be used as a legal basis when Article 114 of the TFEU is not prejudiced. It means that before Article 115 may be applied, it must be ensured first that no provision from Article 114 is applicable. For context, it is important to tackle first the functions of these two Articles, as follows:

Article 114 of the TFEU is treated as the central provision for the harmonization of the laws of the Member States.[57] Article 114 is the tool being used to achieve the goal of Article 26 of the TFEU which is to establish and ensure the functioning of an area without internal frontiers on the guaranteed rights of free movements (i.e., goods, persons, services, and capital).[58] To easily understand the content of this lengthy and complex Article, Kellerbauer suggests that Article 114 is structured, as follows:[59]

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[54] Jannica Robles Santos, 'Exxon Challenges 'Windfall Tax' in Lawsuit Against European Union' (*IBFD*, 29 December 2022) <https://research-ibfd-org.ludwig.lub.lu.se/#/search?N=0&Ne=7487&Nr=AND(3,10)&Nu=global_rollup_key&Np=2&Ntk=Text&Ntt=Exxon%20Challenges%20'Windfall%20Tax'%20in%20Lawsuit%20Against%20European%20Union&Nty=1&Ntx=mode+matchallpartial> accessed 25 May 2023.

[55] General Secretariat, CM 4715/22, Communication (European Council 2022) 1.

[56] "*Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.*"

[57] Manuel Kellerbauer, Article 114 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1236.

[58] Manuel Kellerbauer, Article 114 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1236.

[59] Manuel Kellerbauer, Article 114 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1237.

Paragraph 1 – legislative empowerment of the European Parliament and the European Council;
Paragraph 2 – exclusion of sensitive area (i.e., fiscal measure, free movement of persons, and rights and interest of employed persons);
Paragraph 3 – in the fields of health, safety, environmental protection, and consumer protection, the European Commission will take as a base a high level of protection;
Paragraphs 4 to 6 – substantive and procedural conditions when the Member States can request authorization to derogate from the harmonization measures;
Paragraph 7 – the European Commission's obligation to immediately examine the necessity of the derogation requested by the Member States;
Paragraph 8 – the European Commission shall likewise immediately examine a problem on public health raised by Member States which was previously been a subject of harmonization measures;
Paragraph 9 – the European Commission or the Member States may, through an abbreviated procedure, a case before the CJEU for non-compliance with Article 114; and
Paragraph 10 – inclusion of a safeguard clause to authorize the Member States to provisionally derogate from harmonization measures subject to the EU control procedures.

Article 115 of the TFEU (previously Article 100 in the Treaty of Rome) was the central provision for the harmonization but has been replaced by Article 114 of the TFEU (introduced as Article 100 by the Single European Act). This is evidenced by putting "*Without prejudice to Article 114 xxx"* in the wording of Article 115.[60]

One of the basic differences between both provisions is the voting requirements. On one hand, Article 114 does not require any voting requirement, thus, Article 16(3) of the Treaty of the European Union (TEU) shall apply which pertains to qualified majority voting. Article 115, on the other hand, specifically provides that unanimity voting should be achieved.[61] In practice, however, Article 115 is only relevant for the harmonization of direct taxes.[62] This is another basic difference since Article 114(2) of the TFEU specifically excludes sensitive areas such as fiscal measures which Article 115 of the TFEU may cover. For example, several directives on direct taxation were based on Article 115 of the TFEU as the legal basis, particularly on corporate taxation (e.g., Parent-Subsidiary Directive, Merger Directive, and Interest Royalty Directive).[63] To determine whether Article 115 of the TFEU is the appropriate legal basis for the Regulation, it is important to test whether the solidarity contribution is a direct tax and a harmonization of such.

[60] Manuel Kellerbauer, Article 115 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1256.
[61] Georg Kofler, Research Handbook on Taxation Law, Chapter 2: EU power to tax: Competences in the area of direct taxation, 17 January 2020, page 18.
[62] Manuel Kellerbauer, Article 115 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1256.
[63] Georg Kofler, Chapter 2: EU power to tax: Competences in the area of direct taxation. in Panayi and others (eds), Research Handbook on European Union Taxation Law (Edward Elgar Publishing 2020) 11-12.

The OECD defines direct tax as "*taxes imposed on income, capital gains, and net worth*."[64] Given this definition, the author of this paper views the solidarity contribution as a direct tax. Moreover, this conclusion is based on Articles 15 and 16 of the Regulation which provides that the solidarity contribution will be collected from the covered companies when it was determined that they have recorded surplus profits. The surplus profits will be taxed at a rate of at least 33 percent.

The IMF defines tax harmonization as a "*process of adjusting the system of tax by different jurisdictions to achieve a common policy objective*."[65] In the context of the EU, although direct tax is not directly governed by EU rules, tax directives, and CJEU case laws provide harmonized standards to remove tax distortion and bring about a more efficient allocation of resources within an integrated market.[66] Using this definition and how EU laws and CJEU cases intervene with the system of direct taxation, it is necessary to determine whether there is a distortion in the internal market that necessitates the adoption of the Regulation. When is there a distortion? Articles 116 and 117 are the provisions in the TFEU that deal with the distortion in the EU's internal market. Article 116[67] of the TFEU deals with the distortion of competition due to existing differences between national laws.[68] Article 117[69] is likewise intended for the competition, however, this provision is a preventive one. As such, the Member States are required to consult the European Commission

[64] OECD, 'Glossary of Tax Terms' (*OECD*, 2023) <https://www.oecd.org/ctp/glossaryoftaxterms.htm#D> accessed 30 April 2023.

[65] George Kopits, Tax harmonization in the European Community Policy Issues and Analysis (International Monetary Fund 1992) 3.

[66] George Kopits, Tax harmonization in the European Community Policy Issues and Analysis (International Monetary Fund 1992) 3; Jost Angerer, 'Direct taxation: Personal and company taxation' (*European Parliament*, August 2022) <https://www.europarl.europa.eu/factsheets/en/sheet/80/direct-taxation-personal-and-company-taxation> accessed 18 May 2023.

[67] "*Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.*
If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted."

[68] Manuel Kellerbauer, Article 116 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1258.

[69] "*1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 116, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.*
2. If a State desiring to introduce or amend its own provisions does not comply with the recommendation addressed to it by the Commission, other Member States shall not be required, pursuant to Article 116, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the recommendation of the Commission causes distortion detrimental only to itself, the provisions of Article 116 shall not apply."

when it contemplates adopting national law provisions which may distort competition.[70]

The author of this paper argues that these Articles do not apply to the Regulation. First, the Regulation is not adopted to address competition (more so its distortion). Second, there is no competition to address since the issue that the European Commission wants to address in proposing the Regulation is the rising energy prices. Third, the surplus profits were recorded not because of competition but due to some events such as war and climate, among others.

Moreover, as the European Commission reasoned in its proposal, the Regulation is temporary, proportionate, and extraordinary, that it complements existing EU initiatives and legislations, and the Regulation will not create fundamental change in the policy.[71] As such, it is the view of the author of this paper that the Regulation is not a harmonization tool but only an emergency tool as the title of the Regulation suggests.

3.2.2 Article 194(3) – Primarily of a fiscal measure in energy[72]

Article 194 of the TFEU is dedicated to the EU's policy on energy which aims to preserve and improve the environment. Paragraph 3 of the said Article requires that when the energy measure to be adopted is primarily fiscal, it shall require a unanimity vote of Member States. Because of this paragraph, it is important to determine whether the solidarity contribution is a fiscal measure as well as whether the intent of the Regulation is primarily for the establishment of the said contribution.

EU law does not define the term "fiscal nature". However, the International Monetary Fund (IMF) defines "fiscal policy" as the use of government spending and taxation to influence the economy. IMF further provides that policymakers seek to influence the economy by changing the level and types of taxes, among others. The objective of fiscal policy may include "*raising taxes to combat rising inflation or to help reduce external vulnerabilities*."[73] Article 194(3) of the TFEU is yet to be a topic of any EU case law. However, in a case referring to Article 192(2)(a) which also contains the phrase fiscal in its nature, Advocate General Campos Sánchez-Bordona formulated the

[70] Manuel Kellerbauer, Article 115 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1256.

[71] European Commission, 'Proposal for a COUNCIL REGULATION on an emergency intervention to address high energy prices' COM(2022)473 final [2022] 12.

[72] *"3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature."*

[73] Mark Horton and Asmaa El-Ganainy, Fiscal Policy: Taking and Giving Away (International Monetary Fund) <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Fiscal-Policy> accessed on 15 April 2023

following criteria when a measure may be considered primarily of a fiscal nature:[74]

1. Compulsory and unrequited payments to the government;
2. Structured as environmental taxes (meaning they have a tax base on which a certain tax rate is applied);
3. That can be collected by tax authorities, which can exercise the usual prerogatives of the public treasury; and
4. That the aim is to raise revenues that form part of the state budget.

The author of this paper believes that these formulated criteria may likewise be used in the context of energy, particularly for solidarity contribution. Although the second criterion may not apply to the solidarity contribution since it is not structured as an energy tax, solidarity contribution has the characteristic of a definite tax base and tax rate. As regards the compulsory and unrequited payments to the government, the covered companies are mandated to pay tax to the government of at least 33 percent of its surplus profit for 2022 and 2023 to be collected by the tax authorities and shall be used for the definite purpose as enumerated in Article 17 of the Regulation.

However, the more important issue now is whether the solidarity contribution may be considered the primary aim of the Regulation. The exact definition of the phrase "primarily fiscal in nature" does not exist.[75] Moreover, a study of the said term in the context of Article 194(3) is yet to be done. However, similar to the mentioned Advocate General's opinion on the fiscal nature in Article 192(2)(a), the same may be applied to the term "primarily" by analogy. In the study of Article 192(2)(a) of the TFEU, Scuderi interprets the term "primarily" as an "*inherent center of gravity test*", meaning the monetary consideration should be the primary goal of the measure undertaken.[76] The CJEU likewise requires that when a measure involves twofold purposes or components and one of those may be identified as the main or predominant purpose or component, and the other is merely incidental, such measure may be founded on a single legal basis.[77] In other words, in the context of the solidarity contribution, the raising of the revenue must be the secondary aim of the Regulation. If the estimates by the European Commission would be looked into on how much revenue will be generated by the solidarity contribution, it amounts only to EUR25 billion or 17 percent of the total revenue to be generated through the implementation of the Regulation.[78] It is worthy to note, however, that the European Commission states that the

[74] Opinion of Advocate General Campos Sánchez-Bordona delivered on 21 April 2016, Case C-189/15, Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) - Fondazione Santa Lucia v Cassa conguaglio per il settore elettrico and Others, paras. 58, 59, 60, and 62.

[75] Erika Scuderi, ''Provisions Primarily of a Fiscal Nature': Time To Dispel Doubts' [2022] 31(5) EC Tax Review 276.

[76] Erika Scuderi, ''Provisions Primarily of a Fiscal Nature': Time To Dispel Doubts' [2022] 31(5) EC Tax Review 280.

[77] Commission v. Council, C-377/12, para. 34.

[78] European Commission, 'Questions and Answers on an emergency intervention to address high energy prices' (*European Commission*, 14 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_5490> accessed on 4 May 2023).

solidarity contribution is not just a secondary measure but an integral part of the package measure.

3.2.3 Article 122(1) – Emergency Situation in Energy Supply[79]

As mentioned earlier, three Member States (i.e., Estonia, Hungary, and Poland) raised their concern about the use of Article 122 (1) of the TFEU as the sole legal basis used by the European Commission in proposing the Regulation. Estonia believes that Article 115 of the TFEU should be used, Poland suggests that Article 194(3) of the TFEU is the more appropriate legal basis, and Hungary relays that Article 122(1) of the TFEU cannot serve as the sole legal basis for the Regulation since the solidarity contribution includes fiscal measure which requires unanimity voting. The future of the Regulation may be affected if Article 122(1) is proven not to be the appropriate legal basis since Articles 115 and 194(3) of the TFEU both require unanimity voting while Article 122(1) of the TFEU only requires qualified majority voting under Article 16(3)[80] of the TEU. As such, a deeper study of the purpose of Article 122(1) should be looked into.

Article 122(1) of the TFEU is equivalent to Article 100 European Community (Article 103a of the European Economic Community) which aimed of granting Member States of Community assistance in exceptional circumstances. In the current form of the Article, it is still closely linked with the aim of the previous version, however, this time it refers to severe difficulties in the supply of certain products with special mention of the energy supply.[81] Given that Article 122 is inspired by Article 103a of the European Economic Community, it will be helpful if both provisions are compared side by side:

Article 122 of the TFEU	**Article 103a of the European Economic Community[82]**
1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between the 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.	1. Without prejudice to any other procedures provided for in this Treaty, the Council may, **acting unanimously** (*emphasis supplied*) on a proposal from the Commission, decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products. 2. Where a Member State is in difficulties or is seriously threatened

[79] "*Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between the 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*".

[80] "*3. The Council shall act by a qualified majority except where the Treaties provide otherwise*."

[81] Leo Flynn, Article 115 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 1282.

[82] Treaty Establishing the European Community, 8 August 1992 (EUR-Lex).

Article 122 of the TFEU	Article 103a of the European Economic Community[82]
2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.	with severe difficulties caused by exceptional occurrences beyond its control, the Council may, **acting unanimously** (*emphasis supplied*) on a proposal from the Commission, grant, under certain conditions, Community financial assistance to the Member State concerned. Where the severe difficulties are caused by natural disasters, the Council shall act by **qualified majority** (*emphasis supplied*). The President of the Council shall inform the European Parliament of the decision taken.

It would be noticed that the voting requirements in Article 103a were removed in Article 122. As such, it would seem that the qualified majority voting embodied in Article 16(3) of the TEU would apply if not for the existence of Article 194(3) which require unanimity voting. Now, there is a dilemma on which voting methodology should apply. It is a generally accepted principle of international law that general provision will only apply when there is no specific provision or the *lex specialis*[83] rule. However, this does not mean that Article 122(1) may not be interpreted using Article 16(3) of the TEU. As such, it is likewise important to determine what is the intention of Article 122(1) for stronger interpretation.

Three main interpretation approaches may be used in determining the meaning of the provision, namely: textual, subjective, and teleological. The textual approach ascertains the meaning of the provision through the examination of the terms used therein. This approach may not be appropriate in this case since there is no confusion as regards the terms used in the Article. Meanwhile, the subjective approach considers the intention of the parties. This approach, however, is controversial as it is prone to manipulation and is considered very artificial since the parties' intentions may depend on several criteria (e.g., events, political motives, and different cultural and legal backgrounds, etc.). Finally, the teleological approach indicates that the individual provision should be taken to give effect to the object and purpose of the convention. Previously, the teleological approach was considered the mix of the earlier two approaches but the "emergent purpose" school of thought gives this approach a different take since it will now consider not only the text and purpose but also the time of interpretation.[84] Given the several TFEU provisions involved, the author of this thesis deemed the teleological approach as the best approach to interpret these TFEU provisions in determining the appropriate legal basis of the Regulation. The different TFEU

[83] Aaron X Fellmeth and Maurice Horwitz, Guide to Latin in International Law (2nd edn, Oxford 2021).

[84] Andres Gonzales Becerra, 'International - The Interpretational Approaches to the Vienna Convention - Application to (Tax) Treaty Analysis' [2011] 65(10) Bulletin for International Taxation Chapter 2.2.

provisions will be taken individually to check which is the most compatible with the object and purpose of the TFEU.

A comparison of Articles 122 and 194 of the TFEU shows that the former guides emergency situation on certain products while the latter provides the EU's general policy on energy. It is the opinion of the author that while both Articles may apply to the policy on energy, Article 122 should not be tied with Article 194. It only happens that Article 122 particularly mentioned the area of energy as an example of supply. If, for example, the difficulty in supply is not related to energy, the question of the qualified majority voting will not arise as an issue. In that case, the application of Article 122(1) will be different depending on the subject which is not a good practice in interpreting a provision of law.

Moreover, as noted by Lammers and Kuźniacki, Article 122 is worded broadly giving the European Commission a wide margin of discretion.[85] Given the emergency nature of the Regulation, the author of this paper opined that this wide margin of discretion should be interpreted more liberally to consider the removal of the voting requirement when the Article 122 of the TFEU was adopted from its previous version in the EEC, the nature of the Regulation where the solidarity contribution is not its primary driver, and the emergency nature of the measure needed to be undertaken.

Going back to the *lex specialis* rule, considering the foregoing, Article 194(3) of the TFEU may not prevail over Article 122(1). Although Article 122(1) of the TFEU uses the voting requirement under Article 16(3) of the TEU, Article 122(1) is a special provision that deals with the emergency situation while Article 194(3) may be considered a general provision dealing with EU's general policy on energy.

Bergen, however, does not agree that Article 122(1) of the TFEU is the correct legal basis for the Regulation. He opined that in order for the wide range of discretion carried by Article 122(1) of the TFEU to be used, the following conditions must be met:[86]

1. There must be an emergency situation or exceptional circumstances leading to serious difficulties in the supply of certain products, particularly in the field of energy, in the economic situation of the Member States, which cannot be remedied by ordinary Union measures addressed;
2. The measures must be of a temporary nature; and
3. The measures must be of an economic nature.

[85] Jeroen Lammers and Błażej Kuźniacki, 'The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law' [2023] Volume 51(6/7) Intertax 6.

[86] D.J. van Bergen, Solidariteitsbijdrage of solidariteitsbelasting? Weekblad fiscaal recht 2023, forthcoming (version translated by Google translate), Chapter 2.1.1, para. 2.

He believes that neither the proposal nor the Regulation addresses the above conditions.[87] The author of this paper, however, disagrees with the observation of Bergen. The Regulation as the title suggests is the European Commission and European Council's response to the EU's emergency situation in energy prices. It is noteworthy that the existence of an emergency situation is not questioned by any of the Member States which impliedly shows that they recognize the emergency on energy prices. This is also evident in item 1 of the Preamble of the Regulation which narrates the situation of the energy supply and prices within the EU.[88] Moreover, the Regulation is likewise clear as regards the duration of the solidarity contribution which applies only to the surplus profits for the years 2022 and 2023. Furthermore, the economic nature of the solidarity contribution may be found in the usage of the proceeds to be collected.[89]
Moreover, Bergen reasoned that Article 122(1) of the TFEU, despite its broad scope, does contain a basis for fiscal measure introduction. Hence, the introduction of solidarity contribution using Article 122(1) of the TFEU, determined as fiscal nature in Chapter 3.2.2 above, is a violation of the principle of conferral. Principle of conferral[90] provides that the EU may only act within the powers conferred to it by the Member States in the treaties.[91]

Indeed, the EU does not possess exclusive competence concerning the internal market (where direct taxation is included), energy, and economic policy (where Article 122 of the TFEU belongs).[92] The internal market and economic policy are under shared competence.[93] It is then important to discuss the concept of shared competence. Under this competence, the EU and the Member States may legislate and adopt legally binding acts in the area enumerated in Article 4 of the TFEU.[94] Kellerbauer describes shared competence as a dynamic one because once the EU regulates a particular area, the Member States cannot regulate the same unless the EU has not exercised its competence or explicitly ceased to do so.[95] It can therefore be said that the European Commission and the European Council have the power to adopt the solidarity contribution. The question now is in which shared competencies it may be anchored whether on the internal market, energy, or economic policy? As discussed in Chapter 3.2.1, the solidarity contribution may not be passed through the use of Article 115 of the TFEU as this Article refers to the harmonization of direct taxation. Solidarity contribution as concluded in the said Chapter is not a harmonization tool but an emergency tool to mitigate the

[87] D.J. van Bergen, Solidariteitsbijdrage of solidariteitsbelasting? Weekblad fiscaal recht 2023, forthcoming (version translated by Google translate), Chapter 2.1.1, para. 4.
[88] Regulation, Preamble (1).
[89] Regulation, Article 17.
[90] Consolidated Version of the Treaty of the European Union [2016] OJ 1 202/13, Article 5(2).
[91] D.J. van Bergen, Solidariteitsbijdrage of solidariteitsbelasting? Weekblad fiscaal recht 2023, forthcoming (version translated by Google translate), Chapter 2.1.3.
[92] TFEU, Article 3.
[93] TFEU, Article 4(2.a and 2.c).
[94] Marcus Klamert, Article 4 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 355.
[95] Marcus Klamert, Article 4 TFEU. in Kellerbauer and others (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford 2019) 355.

increasing energy prices. Hence, the author of this thesis opines that the only possible way to introduce solidarity contribution is through economic policy (Article 122 of the TFEU) and energy (Article 194 of the TFEU). However, Article 194(3) of the TFEU requires that for this provision to be used, the fiscal measure to be adopted must be the primary purpose of the policy. In the case of the solidarity contribution, it was concluded by the author of this thesis in Chapter 3.2.2 that the fiscal nature of the solidarity contribution is not the primary goal of the Regulation.

As regards Article 122(1) of the TFEU, the author of this thesis disagrees with the comment of Bergen that this Article lacks the capability of introducing fiscal measures. As he commented, this Article contains a wide range of discretion, hence, the author of this paper believes that the exercise of the power should not be limited. Otherwise, the exercise of this power may not meet its full potential to address the needs of the emergency situation.

3.3 Conclusion

While the solidarity contribution is a fiscal measure, in particular a direct tax, this is not, however, considered a harmonization of direct tax as this will not bring fundamental change in the EU taxation policy and this is not a solution to any distortion in taxation. As such, Article 115 of the TFEU may not be the appropriate legal basis for the Regulation.

As regards Article 194(3) of the TFEU, while it may seem that this is the applicable provision since this is the specific policy for energy by the EU, the fiscal measure being mentioned in this Article requires it to be the primary driver of the policy to be adopted. In the case of the Regulation, although the European Commission states that the solidarity contribution is not a secondary measure but an integral part of the total measures, the projected proceeds from the solidarity contribution of 17 percent may pass as not the primary objective of adopting the policy. Moreover, as discussed above, Article 194(3) is only a general provision dealing with policy on energy. Similar to Article 115, Article 194(3) may not likewise pass as the legal basis of the Regulation.

However, as discussed above, Article 122(1) is considered a special provision of the TFEU dealing with emergency situations of certain products. Given the wide margin of discretion given to the European Commission and European Council, this Article may be interpreted liberally. This liberal interpretation, however, is not lacking critical analysis considering the above-mentioned reasons why Articles 115 and 194(3) will not apply.

Foregoing considered, the use of Article 122(1) as the legal basis of the Regulation is deemed appropriate.

4. General or public interest

4.1 Introduction

ECtHR requires that for the interference in the enjoyment of possessions by the public authority to succeed, it "*must be justified by a legitimate public or general interest or purpose.*"[96] Serment opines that "*public interest is a very broad concept, its beginning and end are hard to determine*."[97] In the context of Article 1 of Protocol 1 of the ECHR, the public interest is much wider than the necessity test prescribed in the ECtHR jurisprudence. It encompasses not only essential measures but goes beyond preferable or advisable measures. As such, it is the responsibility of the European Commission on Human Rights (ECnHR) to review whether the actions of the contracting states in enacting tax measures are done reasonably and in good faith for the public or general interest.[98]

4.2 Solidarity contribution: for the general or public interest?

As laid down in Chapter 1.1, the change in the natural gas supply within the EU brought problems in energy prices which create difficulties for the EU citizens and companies, and drive inflation higher. In the decided case of ECtHR, it provides that taking of property may be considered of general or public interest if it is made in pursuance of legitimate social, economic, or political.[99] Is the crisis in energy supply in the EU a legitimate social and economic issue? The author of this paper answers in the affirmative. The crisis is not only limited to the EU as there was a global energy crisis that started in 2021 due to several factors that escalated further in 2022.[100]

It is worthy to note as well that the ECtHR leaves the judgment to the national authorities, the European Commission, and the European Council in this case, the determination of the existence of the necessity of deprivation of possession for public interest as it is in the better position to assess such circumstance. ECtHR will not intervene with the assessment of the national authorities unless its action manifestly lacks reasonable foundation.[101]

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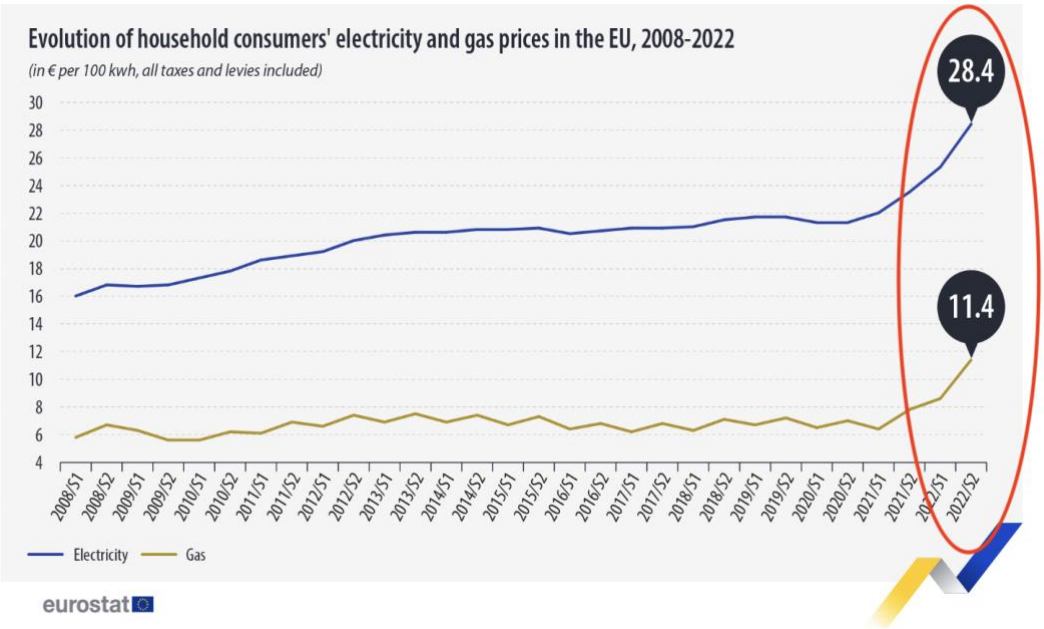
[96] Béláné Nagy v Hungary, App no 53080/13 (ECtHR, 13 December 2016) para. 113.
[97] Council of Europe, The European Convention on Human Rights and property rights (3rd revised edn, Council of Europe Publishing 1998) 33.
[98] William Schabas, The European Convention on Human Rights: A Commentary (Oxford 2015) 975.
[99] James and Others v The United Kingdom, App no 8793/79 (ECtHR, 21 February 1986) para. 46; Gasus Dosier- und Fördertechnik GmbH v the Netherlands, App no 15375/89 (ECtHR, 23 February 1995) para. 61.
[100] International Energy Agency, Global Energy Crisis, 2023 (IEA). https://www.iea.org/topics/global-energy-crisis#:~:text=to%20record%20highs-,What%20is%20causing%20it%3F,exporting%20countries%20to%20reduce%20investments
[101] James and Others v The United Kingdom, App no 8793/79 (ECtHR, 21 February 1986) para. 46; Gasus Dosier- und Fördertechnik GmbH v the Netherlands, App no 15375/89 (ECtHR, 23 February 1995) para. 60.

Now, it is important to determine whether the European Commission employed a reasonable foundation in proposing the solidarity contribution. It may seem so if the worldwide effect of the Russia-Ukraine war would be looked at in silo. However, statistic shows that Member States' attitude toward gas storage may contribute to the increase in energy prices as the steeper spike (see Figure 2) in the gas and energy prices may be observed during the second half of 2022 which likewise correspond to the noted overfilling of gas storage of the Member States (except for Latvia) in a much faster phase than the European Commission prescribed trajectory (see Figure 3) under Regulation 2022/1032.[102] A comparison of the 2021 and 2022 aggregate gas storage inventory would also show that Member States stored much higher natural gas in 2022 (see Figure 4) and in a much faster.

Figure 4: Energy prices in the EU from 2008 to 2022[103]



[102] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage (Text with EEA relevance) [2022] OJ 2 173/17, Annex 1a.

[103] Eurostat, 'Electricity & gas hit record prices in 2022' (*Eurostat*, 26 April 2023) <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230426-2#:~:text=In%20the%20second%20half%20of,€28.4%20per%20100%20kWh.> accessed 4 May 2023 (***oval shape supplied***).

Figure 3: Over/Underfilling of Natural Gas (Actual vs. Prescribed Trajectory)[104]

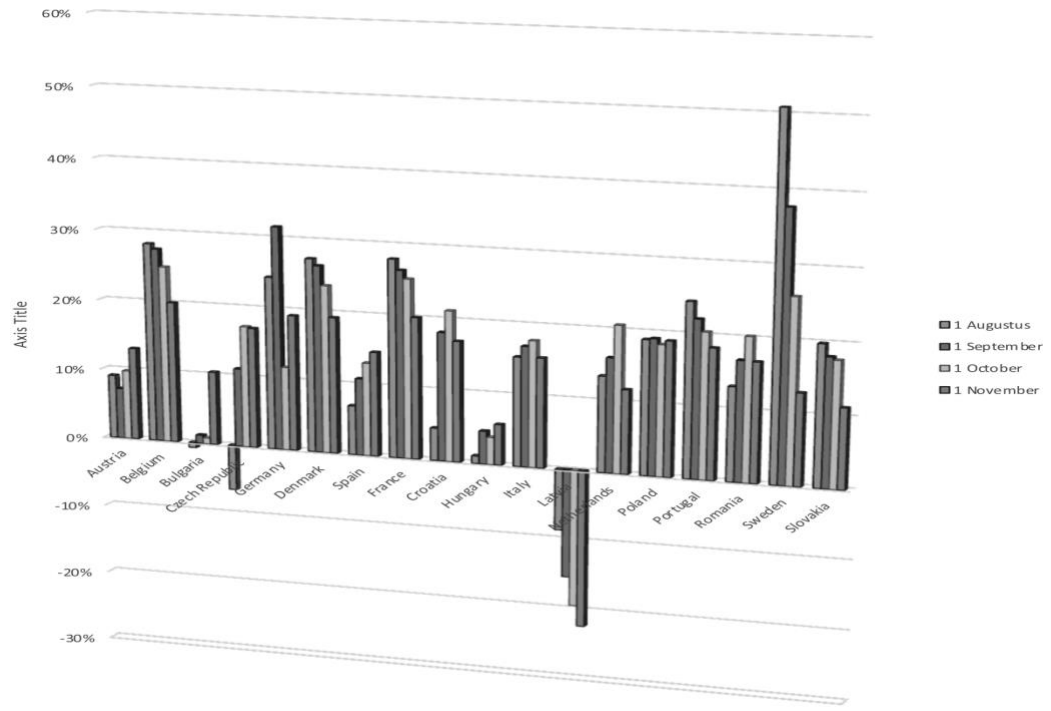
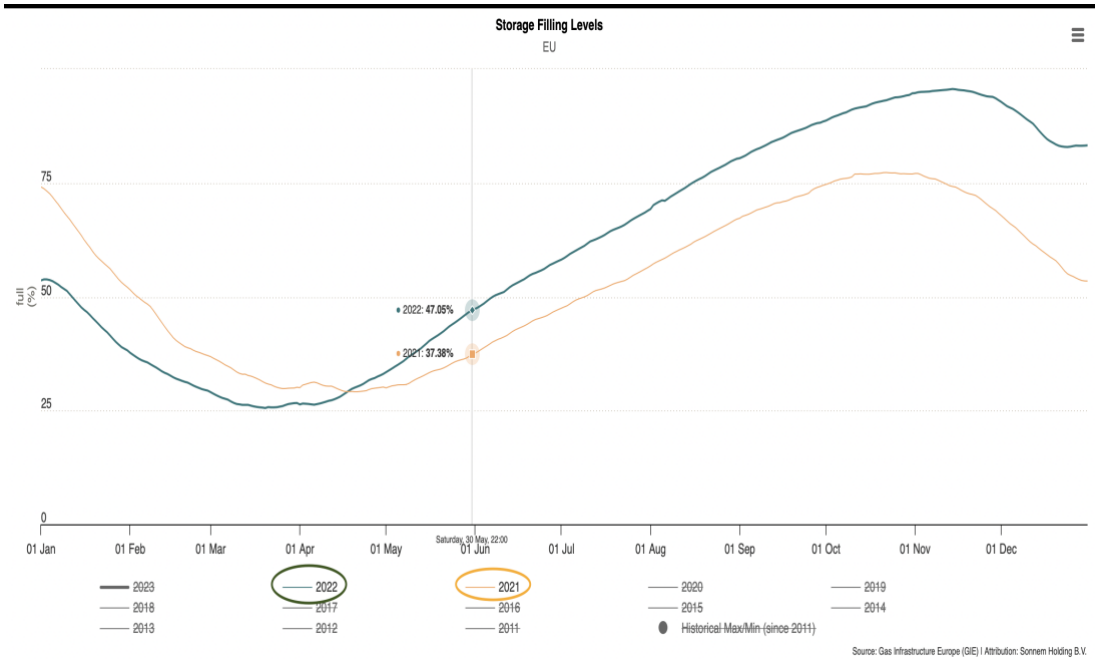


Figure 2: Storage Filling Levels (2021 vis-à-vis 2022)[105]



[104] Ibid, Footnote 103 'Electricity & gas hit record prices in 2022'.
[105] AGSI, 'Gas Infrastructure Europe' (*GIE - AGSI*, ongoing) <https://agsi.gie.eu> accessed 8 May 2023.

It was argued that while it is true that the Russia-Ukraine war escalated the high energy price, the actions of the Member States in overfilling their storage should not be ignored as one of the causes why the sudden increase in the energy prices. Considering this, a question of whether there was an emergency situation as envisioned in Article 122 or whether the overfilling of the storage by the Member State was the cause of the severe difficulties in the energy supply may arise. If the latter is the case, is the solidarity contribution a case of transferring the effect of the surges in prices to the energy companies for the failure of the Member States to exercise caution in controlling the energy supply? If the answer is in the affirmative, Lammers and Kuźniacki believe that the company will bear the consequences of the inability of the Member States to manage its energy supply properly.[106]

However, to achieve an answer to the said question a further study is necessary taking into consideration all aspects that contribute to the spike in prices (e.g., Russia-Ukraine War, climate, etc.). As of this thesis, no study has been conducted to accurately pinpoint the causes of the energy price increase.

4.3 Conclusion

At the outset, the determination of whether the Regulation complies with the requirement "it should be supported by a legitimate purpose for general public interest" seems so easy considering the ultimate beneficiary of the Regulation. The Regulation's objective and usage support seem to support such a conclusion.

However, the findings on the action of the Member State in filling their storage may serve as a stumbling block to achieving such a conclusion as it is also a requirement that a policy should be made reasonably and in good faith. If proven that such action contributed to the spike in energy prices, the validity of the Regulation may be greatly affected considering that the fundamental right to property of the covered companies is not properly protected. While the European Commission and European Council are bestowed with a wide margin of appreciation in determining the needs of the citizens and companies, they are likewise expected to exercise such privilege with great caution.

[106] Jeroen Lammers and Błażej Kuźniacki, 'The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law' [2023] Volume 51(6/7) Intertax 11-12.

5. Proportionality of the Solidarity Contribution

5.1 Introduction

An interference must present a strike of a "fair balance" between the requirements of the public or general interest and the protection of fundamental rights.[107] Achievement of fair balance, however, is relevant only when it is established that the interference served the public or general interest, the principle of lawfulness is satisfied and arbitrariness is not present.[108]

The purpose of the proportionality test is to determine the adverse effects of the restriction against the rights of the applicants.[109] The issue of proportionality plays an important role in determining whether Article 1 of Protocol 1 of the ECHR was violated.[110] ECtHR "*normally conducts an in-depth analysis when it determines compliance with the requirement of proportionality unlike the analysis made for the presence of public or general interest which is usually done through limited analysis*."[111]

This Chapter will discuss whether the means employed are not disproportionate to meet the ends.[112] It is noteworthy that Article 5(4) of the TFEU relative to proportionality is not discussed in this thesis as the ECtHR did not refer to this Article when discussing the proportionality test.

5.2 Whether the solidarity contribution is proportional to its objective

As a solution to the cry of the citizens and companies on the effect of high energy prices, the European Commission proposed measures to temporarily intervene through the introduction of different measures (e.g., solidarity contribution). The European Commission provides that the temporary measures of the Regulation will allow Member States to have a coordinated approach to protecting consumers without compromising the protection of the internal energy market.[113] The imposition therefore of the solidarity

[107] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium, App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; and 2126/64 (ECtHR, 23 July 1968) page 40.
[108] Iatridis v Greece, App no 31107/96 (ECtHR, 25 March 1999) para. 58; Beyeler v Italy, App no 33202/96 (ECtHR, 5 January 2000) para. 107.
[109] Registry of the European Court of Human Rights, Guide on A1/P1 of ECHR (Council of Europe 2022) 31/98, para. 147.
[110] Registry of the European Court of Human Rights, Guide on A1/P1 of ECHR (Council of Europe 2022) 31/98, para. 146.
[111] Registry of the European Court of Human Rights, Guide on A1/P1 of ECHR (Council of Europe 2022), para. 146.
[112] "Bulves" AD v Bulgaria, App no 3991/03 (ECtHR, 22 January 2009) para. 62.
[113] European Commission, 'Proposal for a COUNCIL REGULATION on an emergency intervention to address high energy prices' COM(2022)473 final [2022] 14.

contribution in the Regulation is aligned with the ECtHR case law wherein tax authorities are given a wide margin of appreciation.[114] The margin of appreciation is defined as the space for maneuver that the ECnHR and ECtHR are willing to grant national authorities, in fulfilling their obligations under the ECHR.[115] Due to this margin of appreciation, ECtHR respects the national authorities' assessment of why the measure is introduced unless the same lack a reasonable foundation.[116]

The European Commission likewise anchored its proposal on the high profits recorded by the covered companies which were achieved "*due to favorable external market factors caused by the Russian war and not by companies' own additional efforts or investments*."[117] Avi-Yonah mirrored the same argument that the companies should not amass enormous profits from extraordinary circumstances that have nothing to do with the company's efforts in doing business.[118] The ECtHR, however, states that the guaranteed right of the taxpayer may be "*adversely affected if the resulting financial liability will place an excessive burden on the citizens*."[119] In this case, it is essential to analyze whether the imposition of the solidarity contribution will serve as an excessive burden or will fundamentally interfere with the financial position of the covered companies. In a decision of ECnHR, it concludes that if the tax affects the guarantee of ownership or interferes with the taxpayer's financial position to such an extent that it could be considered disproportionate or an abuse of the right of the state to levy taxes, it may be ruled as an excessive burden that interferes with the right to enjoy possessions.[120] It is now therefore appropriate to answer whether the solidarity contribution is an excessive burden to the covered companies. The author of this thesis' opinion is negative as the imposition of the solidarity contribution is only temporary and shall be limited only to the surplus profits earned in 2022 and 2023.[121] Although the 2023 planning process of the covered companies may have been affected since they may have already done their strategic planning (wherein the data used were the result of the eight or nine months of operations in 2022 without considering the solidarity contribution) when the Regulation was adopted. Still, despite some

[114] Gasus Dosier- und Fördertechnik GmbH v the Netherlands, App no 15375/89 (ECtHR, 23 February 1995) para. 60.
[115] Council of Europe, 'The Margin of Appreciation' (*Council of Europe*, publication unknown) <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#:~:text=The%20term%20"margin%20of%20appreciation,Rights%20(the%20Convention)1.> accessed 16 May 2023.
[116] Gasus Dosier- und Fördertechnik GmbH v the Netherlands, App no 15375/89 (ECtHR, 23 February 1995) para. 60.
[117] European Commission, 'Proposal for a COUNCIL REGULATION on an emergency intervention to address high energy prices' COM(2022)473 final [2022] 3.
[118] Reuven Avi-Yonah, 'Time to Tax Excessive Corporate Profits' (*The American Prospect*, 18 April 2022) <https://prospect.org/economy/time-to-tax-excessive-corporate-profits/> accessed 26 April 2023
[119] WASA Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse, a group of approximately 15000 individuals v SWEDEN, App no 13013/87 ECtHR, 14 December 1988) page 19.
[120] Svenska Managementgruppen AB v Sweden, App no 11036/84, (ECnHR, 2 December 1985).
[121] Regulation, Article 15.

operational inconvenience, it is the author of this thesis' opinion that the covered companies' future will not be jeopardized as a result of this imposition by confiscating only a portion of the unexpected surplus profits earned during the extraordinary situation. Further, the confiscation will not be done on the sole basis that these companies earn more than what they should have earned but with the goal of extending the contribution for the benefit of the public or general through redistribution.

Moreover, the Member States, except for the determination of tax rate, the Regulation provide guidance on how to exercise this temporary measure by providing the manner on how to compute the taxable base, the minimum tax rate they may impose, and how the proceeds of collection may be used.[122] Further, to ensure compliance, the Member States are required by the European Commission to report how the proceeds were used to ensure that the actions of the Member States are still aligned with the purpose of the Regulation.[123]

5.3 Conclusion

To conclude, it is important to go back to the ECtHR's rule on how to achieve proportionality which is the means should not be disproportionate to achieve the ends. On one hand, the means employed, i.e., the solidarity contribution, is only temporary (applicable only for the surplus profits recorded for the years 2022 and 2023) and is only imposed to covered companies that recorded surplus profits which are based on a computation provided by the Regulation, hence, will not serve as a severe burden to the covered companies. On the other hand, the ends that the Regulation wanted to achieve in introducing the solidarity contribution (i.e., mitigating the increasing energy prices) will be met by the specific purposes where the proceeds may be used as specifically indicated in the Regulation. The Member States are required to submit reports, for transparency purposes, on the usage of the proceeds of the collection of the solidarity contribution.[124]

[122] Regulation, Articles 15, 16, and 17.
[123] Regulation, Article 17.
[124] Regulation, Article 19(c).

Conclusion

This thesis gives its author a little uncertainty on whether the solidarity contribution violates Article 1 of Protocol 1 of the ECHR. In answering the question "*Does the solidarity contribution under the Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices infringe Article 1 of Protocol 1 of the ECHR?*", the author of this thesis investigated the Regulation's compliance with the underlying principles of the ECHR, namely: (i) legal basis, (2) general or public interest, and (3) proportionality.

Before digging further into these underlying principles of the ECHR, it has been determined first that the solidarity contribution, despite its name, is a "tax". The definition and elements/characteristics of tax are all met by the solidarity contribution.

As regards compliance with the underlying principles of ECHR, the following were concluded:

Investigation of the use of Article 122(1) of the TFEU as the sole legal basis resulted that the same is the most appropriate provision which the Regulation may be anchored with. Considering the broad scope of the said provision, the European Commission and European Council are given a wide margin of discretion. Hence, given the emergency situation the EU is facing, Article 122(1) calls for liberal interpretation. Article 115 of the TFEU, as suggested by Estonia and Hungary, was concluded not to be the appropriate legal basis for the Regulation. While the solidarity contribution is considered a direct tax which is covered by Article 115 of the TFEU, the same is not a harmonization tool since the solidarity contribution is not addressing any distortion of the internal market. Lastly, Article 194(3) of the TFEU, as endeavored by Poland to be the proper legal basis, was likewise determined not to be the appropriate legal basis. Article 194(3) of the TFEU indicates that the fiscal measure to be adopted should be the primary aim of the law. In this case, it was concluded that while the solidarity contribution is an integral part of the total measures of the Regulation, the expected collection only amounts to 17 percent of the total proceeds to be achieved. Hence, it cannot be said that it is the primary goal of the Regulation. Moreover, Article of the Regulation deals with the general power to adopt policies on energy while Article 122(1) refers to a special power to adopt emergency measures when faced with difficulties in certain products, particularly energy supply.

Relative to the principle that the measure should be supported by a legitimate purpose for the general or public interest, the Regulation's objective and usage of the proceeds were determined to be supportive of positive compliance with such requirement. However, the finding that the Member States overfilling of their gas storage may have contributed to the spike in energy prices, may affect the validity of the solidarity contribution given that the ECtHR requires that a measure should be made reasonably and in good faith. It would be nice if a further study on the causes of energy price hikes

will be conducted to consider other factors such as war, climate, and other contributory events.

Finally, regarding proportionality, it was concluded that the solidarity contribution as a means is proportionate to achieve the objective of mitigating the increasing energy prices. The temporary nature and well-defined covered companies as well as the usage of the proceeds support the said conclusion.

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