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Concept of a so-called windfall tax in the Polish tax system pursuant to Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices – outline of the issue

Abstract: The subject of the article is the concept of a so-called windfall tax in the Polish tax system pursuant to Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices. It presents an analysis of the structure of the solidarity contribution governed by Council Regulation (EU) 2022/1854, referred to as the so-called windfall tax. It then examines the possibility of introducing such a levy into the Polish tax system. In particular, it addresses concerns about the principle of *lex retro non agit* and the principle of proportionality, as well as concerns about the possibility of double taxation. Furthermore, there are doubts about the nature of such a levy as a tax.

Keywords: tax, solidarity contribution, windfall tax, Council Regulation (EU) 2022/1854.

Introduction

The aggression of the Russian Federation against Ukraine has contributed to an increase in the price of energy commodities, such as electricity, crude oil and coal. As a result, the European Council¹ decided to intervene by issuing Council

¹ Hereinafter referred to as: EU Council.

Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.²

In Regulation 2022/1854, the EU Council clearly highlights the energy crisis that has affected all Member States³ caused by an increase in the price of gas and electricity. However, it should be pointed out that energy prices have varying degrees of impact on the overall level of inflation in the euro area, which is contributing to an economic slowdown in the European Union. In the light of the above, the EU Council decided to initiate a swift and coordinated response at EU level. The intention of the EU Council was to establish an extraordinary instrument that would temporarily mitigate the risk of electricity prices and the cost of electricity for final customers becoming more unpredictable. Furthermore, this instrument aims to limit the use by Member States of uncoordinated measures that could jeopardize the security of supply at EU level and could impose additional burdens on industries and end customers.⁴ In the recitals to Regulation 2022/1854, the EU Council emphasizes that it is important to coordinate actions between Member States based on the spirit of solidarity during the 2022–2023 heating season⁵ in order to protect individual consumers and the entire economy from the negative effects of rising electricity prices, while maintaining the stability of public finance.

In addition, in Regulation 2022/1854, the EU Council highlights that, in the current situation, it seems appropriate to take action at European Union level by introducing a solidarity contribution from EU companies and permanent establishments operating in the crude petroleum, natural gas, coal and refining sectors to mitigate the immediate economic impact of soaring energy prices on the budgets of public authorities, end users and businesses across the European Union. As the EU Council points out, such a solidarity contribution should be an exceptional and strictly temporary measure.⁶ In the opinion of the EU Council, the proceeds from the solidarity contribution should be used for:⁷

1. measures of financial support for end users of energy, in particular households facing difficulties, in order to mitigate the effects of high energy prices;
2. measures of financial support intended to reduce energy consumption;
3. measures of financial support to assist energy-intensive sectors of industry; and
4. measures of financial support for developing energy autonomy in the European Union.

² Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261 1/1) (hereinafter referred to as “Regulation 2022/1854”).

³ Item 5 of the recitals of Regulation 2022/1854.

⁴ Item 6 of the recitals of Regulation 2022/1854.

⁵ *Ibid.*

⁶ Item 13 of the recitals of Regulation 2022/1854.

⁷ Item 56 of the recitals of Regulation 2022/1854.

Member States should also be able to allocate part of the proceeds from the temporary solidarity contribution for joint financing. These measures require considerable flexibility to accommodate the budgetary processes of the Member States.

This article attempts to present an outline of the concept of the so-called windfall tax in the Polish tax system (more broadly, the levy system) on the basis of Regulation 2022/1854, which would be a measure that is appropriate for the solidarity contribution provided for in this regulation of the EU Council. The purpose of this analysis is primarily to examine whether, from a systemic point of view, it is possible to implement and apply a public levy modelled on the solidarity contribution under the Polish tax system, and to evaluate regulations already introduced into the Polish levy system. The specified research area is significant because of the binding force of the EU regulation. The relevant literature points out that the EU regulation is “an instrument of the deepest intervention by the EU legislator in the legal orders of Member States.”⁸ This thesis is directly reflected in Article 288 TFEU,⁹ where the EU legislator states that “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.” As of writing this article, the Polish legislator has not established a public levy that would be a clear equivalent of the solidarity contribution – the Polish legislator limited itself to regulating the levy on the basis of the model of the solidarity contribution from natural gas suppliers as part of the gas-related allocation to Fundusz Wypłaty Różnicy Ceny (Price Difference Payment Fund).¹⁰ The main research method used in this study is the dogmatic-legal method.

1. European Union concept of a solidary contribution

In Regulation 2022/1854, the EU Council indicated that a solidarity contribution is an appropriate measure for dealing with supernormal profits arising from unforeseen circumstances.¹¹ Interestingly, the EU Council highlights that these profits are only temporary and do not correspond to any permanent profit that EU companies and permanent establishments operating in the crude petro-

⁸ A. Szachoń, “Akty prawodawcze,” [in:] *Prawo Unii Europejskiej z uwzględnieniem traktatu z Lizbony*, ed. A. Kuś, Lublin 2010, p. 182.

⁹ Treaty on the Functioning of the European Union (OJ C 326/47).

¹⁰ Articles 24–25 of the Polish Act on special protection of certain consumers of gas fuels in 2023 in connection with the situation on the gas market of 15 December 2022 (Journal of Laws of 2022, item 2687) (hereinafter referred to as “the Act on special protection of certain consumers of gas fuels”).

¹¹ Item 14 of the recitals of Regulation 2022/1854.

leum, natural gas, coal and refining sectors would or could expect under normal circumstances if they there were no unforeseen events on the energy markets.¹² Therefore, the introduction of a solidarity contribution constitutes a common and coordinated measure which, in the spirit of solidarity, enables the generation of additional revenues for the national authorities to provide financial support to households and businesses which are severely affected by the drastic increase in energy prices, while ensuring a level playing field across the European Union.¹³

It is noteworthy that, in Regulation 2022/1854, the EU Council states that the solidarity contribution should be applied in parallel with ordinary corporate taxes imposed by each Member State on given enterprises.¹⁴ As a result, the EU Council expects an increase in tax (levy) burdens for legal persons. The EU Council also highlights that, in a situation in which consumers are exposed to unusually high prices that also damage the EU economy, the supernormal market revenues of producers with lower marginal costs need to be temporarily reduced by capping the market revenues obtained from the sale of electricity in the European Union.¹⁵

Pursuant to the recitals of Regulation 2022/1854, the solidarity contribution is exceptional and temporary in nature and has the objective of reducing and mitigating the harmful effects of the energy crisis for households and companies across the Union with the objective of protecting the internal market.¹⁶ In general, the proceeds from this levy are to help households and protect employment because of the negative impacts of the energy crisis.¹⁷

Pursuant to Regulation 2022/1854, the solidarity contribution should only apply to the 2022 and/or 2023 fiscal years.¹⁸ According to Article 15 of Regulation 2022/1854, the entities on which the solidarity contribution will be imposed will be Union companies and permanent establishments operating in the crude petroleum, natural gas, coal and refinery sectors, including those, which are part of a consolidated group purely for tax purposes. According to the wording of this provision, the basis for calculating is the taxable profits, as determined under national tax rules, in the fiscal year 2022 and/or the fiscal year 2023 and for their full duration. These profits will be subject to a contribution if they exceed a 20% increase over the average of the taxable profits determined under national tax rules in the four fiscal 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.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Item 25 of the recitals of Regulation 2022/1854.

¹⁶ Item 57 of the recitals of Regulation 2022/1854.

¹⁷ Item 58 of the recitals of Regulation 2022/1854.

¹⁸ Article 15 of Regulation 2022/1854.

In Article 16 of Regulation 2022/1854, the EU Council regulated the rate of the solidarity contribution at a minimum of 33% of the contribution tax base. Importantly, pursuant to Article 16(2) of this regulation, the solidarity contribution is to be applied in addition to the regular taxes and levies that are applicable in accordance with the national law of the Member State.

A solidarity contribution regulated in this way takes the form of a so-called tax on windfall profits, the implementation of which is urged by the European Commission.¹⁹ In the recitals of Regulation 2022/1854, the EU Council clearly states that the solidarity contribution should be applied in parallel to ordinary corporate taxes imposed by each Member State on given enterprises.²⁰ Therefore, the EU Council states that the solidarity contribution is a tax, but one of a special nature, which appears in addition to ordinary taxes.

2. Theoretical concept of the so-called Polish windfall tax as an equivalent of the solidarity contribution

In the recitals of Regulation 2022/1854, the EU Council clearly indicates that Member States should apply the solidarity contribution set by this Regulation in their respective territories unless they have enacted equivalent national measures.²¹ In general, the obligation to apply Regulation 2022/1854 arises from the nature of the EU regulation – direct application and automatic inclusion in the Member State’s legal system.

Up to the date of this article, Poland has not collected a solidarity contribution under the so-called tax on windfall profits in full, namely from the entities referred to in Regulation 2022/1854 which operate in the crude petroleum, natural gas, coal and refining sectors.²² Therefore, any deliberations about the collection of a tax on windfall profits can only be theoretical.

First of all, the question to ask is whether it is possible to conduct and apply tax law regulations that would apply to the previous and current fiscal year. Pursuant to Regulation 2022/1854, the solidarity contribution, Poland’s equivalent of

¹⁹ The effectiveness and distributional consequences of taxes on supernormal profits or windfall taxes in the light of the Commission’s recommendation to the Member States. [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740076/IPOL_STU\(2023\)740076_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740076/IPOL_STU(2023)740076_EN.pdf) (accessed: 20.05.2023)

²⁰ Item 14 of the recitals of Regulation 2022/1854.

²¹ Item 63 of the recitals of Regulation 2022/1854.

²² An exception to this is the allocation from natural gas suppliers for the gas price from the Price Difference Payment Fund.

which would be a tax on windfall profits, would apply to the 2022 and/or 2023 fiscal years.²³

The literature on the subject states that, when creating tax regulations, certain standards of proper legislation must be met.²⁴ In particular, the doctrine on tax law emphasizes the importance of the requirement of specificity of tax law, i.e. the creation of understandable and logical provisions.²⁵ In addition, the provisions of tax law may not come as a surprise to taxpayers. Taxpayers must be able to conduct their tax planning appropriately.²⁶ The EU concept of the solidarity contribution provided for in Regulation 2022/1854 would apply retroactively to 2022, because this regulation entered into force in October 2022. Therefore, the introduction of a tax on windfall profits in Poland would apply to the taxation of income of certain entities retrospectively. This solution could breach the principle of the inadmissibility of the retroactive effect of a normative act (*lex retro non agit*). This principle is an obligation on the legislator to specify legal regulations that do not link legal effects to past situations (economic events). In other words, it is forbidden to create legal norms that apply to events before the new legal regulations entered into force. *Lex retro non agit* is the foundation of the legal culture of modern countries, especially in the case of criminal law.²⁷ It is worth emphasizing that tax law is similar to criminal law in terms of interference in the individual's rights and freedoms.²⁸ As a result, the principle of non-retroactivity is also important to the taxpayer's rights and relationship between the state and the taxpayer. In its ruling of 22 August 1990, the Constitutional Tribunal pointed out that: "The principle of non-retroactivity of laws is one of the essential elements of the principle of the rule of law (Article 1 of the Constitution). In accordance with the existing case law of the Constitutional Tribunal, the principle of citizens' trust in the state arising from the principle of the rule of law requires that legal norms which would require the application of newly established legal norms to events (understood *sensu largo*) that took place before the newly established norms entered into force, and to which the law had not yet attached the legal consequences provided for by these standards, are not created."²⁹

The principle of *lex retro non agit* for tax law is not an absolute principle. In the doctrine of tax law, based on the case law of the Constitutional Tribunal, it is pointed out that the retroactive effect of the law is admissible "unless it results in

²³ Article 15 of Regulation 2022/1854.

²⁴ R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie*, Warszawa 2016, p. 40.

²⁵ *Ibid.*, pp. 40–41.

²⁶ *Ibid.*

²⁷ S. Kaźmierczyk, "Lex retro non agit," [in:] *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, ed. A. Bator, Warszawa 2010, p. 316.

²⁸ See: B. Brzeziński, "Rozstrzygnięcie wątpliwości na korzyść podatnika jako zasada wykładni prawa podatkowego. Próba analizy," [in:] *Ex iniuria non oritur ius. Księga ku czci Profesora Wojciecha Łączkowskiego*, eds. A. Gomułowicz, J. Małecki, Poznań 2003, p. 255.

²⁹ Ruling of the Constitutional Tribunal of 22 August 1990, Case reference K7/90, OTK 1990/1/5.

the deprivation or limitation of the rights of citizens, and therefore in increasing public burdens.”³⁰ This principle has a protective function with respect to the interests of taxpayers.³¹

In the case of a tax on windfall profits, it seems that there could be a breach of the principle of non-retroactivity because of the taxation of income for 2022. In addition, in the case of taxation in 2023, the principle of sufficient specificity of tax law could be breached.

Another questionable matter is whether a tax on windfall profits could constitute *de facto* double taxation of income? In Regulation 2022/1854, the EU legislator defines the terms “surplus profits”, which is key with regard to the solidarity contribution. Pursuant to Article 2(18) of Regulation 2022/1854: “surplus profits” means taxable profits, as determined under national tax rules in the 2022 fiscal year and/or the 2023 fiscal year and for their full duration, generated from activities performed at the level of Union companies and permanent establishments operating in the crude petroleum, natural gas, coal and refinery sectors which are in excess of a 20% increase over the average of the taxable profits in the four fiscal years starting on or after 1 January 2018. The EU legislator simultaneously draws attention to “taxable profits under national tax rules”. In the Polish tax law system, income is taxed on the basis of the Act on Personal Income Tax³² and the Act on Corporate Income Tax.³³ Under Article 15 of Regulation 2022/1854, the solidarity contribution is to be imposed on Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors, including those that are part of a consolidated group purely for tax purposes. Therefore, with the tax on windfall profits introduced on the basis of Council Regulation (EU) 2022/1854, the income that is subject to taxation with this levy was the income regulated in Article 7 of the Act on CIT, because this levy is to be applied in parallel with ordinary corporate income tax.³⁴ This analysis shows that entities on which the windfall profit tax is imposed would be taxed twice. First, their income would be taxed in accordance with Article 7 of the Act on CIT, which would apply to their income in the current tax year. Then, the income they generated in the part exceeding the 20% increase over the average taxable income determined in accordance with the relevant CIT provisions in the four tax years starting 1 January 2018 or later³⁵ would be taxed with a tax on windfall profits.

³⁰ R. Dowgier, “Zasada lex retro non agit w prawie podatkowym – uwagi na tle sprawy K 4/19,” *Przeгляд Prawa Konstytucyjnego* 56, 2020, no. 4, p. 302.

³¹ B. Brzeziński, *Wprowadzenie do prawa podatkowego*, Toruń 2008, p. 187.

³² Polish Act on Personal Income Tax of 26 July 1991 (consolidated text, Journal of Laws of 2022, item 2647 as amended).

³³ Polish Act on Corporate Income Tax of 15 February 1992 (consolidated text, Journal of Laws of 2022, item 2587 as amended); (hereinafter referred to as “the Act on CIT”).

³⁴ Item 14 of the recitals of Regulation 2022/1854.

³⁵ The reference time for the increase in income depends on the Polish legislator’s decision.

The literature on the subject shows that there cannot be a phenomenon of double taxation in the national tax system because of the structural assumptions to the tax system.³⁶ In the situation under review, the tax on windfall profits would contribute to the double taxation of income, resulting in the phenomenon of double taxation. In its judgment of 8 October 2020, the Supreme Administrative Court highlighted that the prohibition of double taxation of identical values with the same tax arises from constitutional norms.³⁷ In such a case, the regulation of the tax on windfall profits would breach the constitutional principle of equality understood as a requirement to maintain equality in taxation by introducing universal and proportional taxation.³⁸ In its judgment of 18 November 2014, the Constitutional Tribunal³⁹ held that: “the Constitution does not introduce a principle prohibiting double taxation. The Tribunal’s judgments referred to by the applicant, which apply to this phenomenon, cannot constitute a basis for the conclusion that a breach of the prohibition of double taxation directly (“in a way automatically”) leads to a breach of the Constitution. Potential non-compliance with the Constitution may only arise from the fact that double taxation is, for example, excessive (disproportionate) interference in the taxpayer’s property rights (breach of Article 64, para. 1 and 3 in conjunction with Article 21, para. 1, Article 31, para. 3 and Article 2 of the Constitution – see the ruling of the Constitutional Tribunal of 25 October 2004, Case reference SK 33/03, OTK ZU No. 9/A/2004, item 94) or a breach of the principle of fair taxation (see A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2011, p. 696).” It seems that the levy – the tax on windfall profits – specified in this way could raise questions about its compliance with the principle of proportionality.

The doctrine of tax law indicates that the principle of proportionality arises from Article 31, para. 3 of the Constitution of the Republic of Poland,⁴⁰ as well as from Article 2 of the Polish Constitution.⁴¹ Pursuant to Article 31, para. 3 of the Polish Constitution, “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.” At this point, doubt arises as to whether the imposition of a so-called windfall

³⁶ B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, p. 67.

³⁷ Ruling of the Supreme Administrative Court of 8 October 2020, II FSK 1610/18, LEX No. 3116852; similarly, see ruling of the Supreme Administrative Court of 21 July 2017, II FSK 2485/15, LEX No. 2354929.

³⁸ *Ibid.*

³⁹ Ruling of the Constitutional Tribunal of 18 November 2014, K 32/12 OTK-A 2014/10/113.

⁴⁰ Constitution of the Republic of Poland of 2 April 1997 (consolidated text, Journal of Laws of 1997, item 483) (hereinafter referred to as “the Polish Constitution”).

⁴¹ B. Brzeziński, *Prawo podatkowe*, p. 368.

tax with retroactive effect on a specific group of entities is the least onerous or burdensome measure for them “to an extent that is no greater than necessary to achieve the planned and constitutionally justified objective.”⁴² It seems that the correct answer here is in negative. In the proposed tax on windfall profits, it would be difficult to properly balance the state’s interests with the fiscal burden imposed on a group of entities.⁴³ It should be emphasized that, in Article 31, para. 3 of the Polish Constitution, the legislator refers, among other things, to environmental protection as a justification for restrictions on the exercise of constitutional freedoms and rights. However, in the case of the so-called tax on windfall profits and its formula, namely the solidarity contribution provided for in Regulation 2022/1854, it is difficult to refer to environmental protection as the main reason for the application of this levy. According to an interpretation of the intent, the solidarity contribution is intended to solve the problem of surplus profits arising from unforeseen circumstances primarily caused by the war in Ukraine.

In the light of the above, the phenomenon of double taxation of income through the introduction of a tax on windfall profits, together with its retroactive nature, could lead to a breach of the principle of proportionality. The last issue that should be addressed is whether it is possible to call a tax a levy similar to the solidarity contribution regulated in Regulation 2022/1854. In Article 17 of Regulation 2022/1854, the EU legislator stipulates the objectives to be financed by the solidarity contribution, listing them *expressis verbis*. The definition contained in Article 6 of the Tax Code⁴⁴ is noteworthy: “Tax shall be a public law, gratuitous, compulsory and non-refundable monetary performance to the State Treasury, voivodship, county or municipal budget resulting from the Tax Act.” The doctrine of tax law clearly shows that tax is a gratuitous benefit, i.e. the payment of the tax is not accompanied by a specific expense (benefit) on the part of the state or local government unit.⁴⁵ This is why a solidarity contribution governed by Regulation 2022/1854 cannot be classified as a tax because of its link to a specific public expenditure.

Therefore, a levy similar to the solidarity contribution regulated by Regulation 2022/1854 will not be a tax, but a separate public law levy. An example of this is the allocation to the Price Difference Payment Fund, which must be paid by entities extracting natural gas.

⁴² Ibid.

⁴³ See: A. Mudrecki, *Zasada proporcjonalności w prawie podatkowym*, Warszawa 2020.

⁴⁴ Polish Tax Code of 29 August 1997 (consolidated text: Journal of Laws of 2022, item 2651 as amended) (hereinafter referred to as the “Tax Code”).

⁴⁵ W. Nykiel, “Pojęcie i konstrukcja podatku,” [in:] *System Prawa Finansowego*, ed. L. Etel, vol. 3, Warszawa 2010, p. 28.

3. A tax on windfall profits in the Polish tax system. The current situation

According to Article 24 of the Polish Act on Certain Consumers of Gas Fuels, the natural gas extraction company transfers the gas-related allocation to the Price Difference Payment Fund. However, pursuant to Article 25, para. 2 of this Act, the Council of Ministers shall specify, by way of a regulation, the way in which the amount of the gas-related allocation to the Price Difference Payment Fund is determined, taking into account the need to balance the interests of the participants of the natural gas market.

§ 1 of the Regulation of the Council of Ministers of 30 December 2022 on the Method of Determining the Amount of Gas Allocations to the Price Difference Payment Fund⁴⁶ specifies the formula for the amount of this allocation to the Fund.

The legislator did not decide to impose a levy based on the model of the solidarity contribution specified in Regulation 2022/1854 on other energy industries related to crude petroleum, coal and refining. Therefore, Poland has not implemented Regulation 2022/1854. It should be emphasized that Poland has limited itself to only one energy sector – natural gas – and has chosen another measure which is equivalent to the solidarity contribution, which may be considered sufficient.

The solution adopted by the legislator should be assessed negatively due to the binding nature of the EU regulation. It is worth recalling that the EU regulation is binding in its entirety and should be directly applicable in all Member States. It does not require implementation into the law of a Member State and is directly effective.

4. Conclusions

Pursuant to Regulation 2022/1854, Member States have been obliged to submit reports to the European Commission on the application of the solidarity contribution and the use of its proceeds.⁴⁷ Poland has not fulfilled the obligation to implement the regulations contained in Regulation 2022/1854. An allocation was introduced to the Price Difference Payment Fund, which can be linked to the solidarity contribution, but only in the case of entrepreneurs extracting natural gas.

⁴⁶ Regulation of the Council of Ministers of 30 December 2022 on the method of determining the amount of the gas-related allocation to the Price Difference Payment Fund (Journal of Laws of 2022, item 2868).

⁴⁷ Items 61 and 62 of the recitals of Regulation 2022/1854.

However, there are still no regulations on the achievement of supernormal profits by entities from the energy industries related to crude petroleum or coal.

When planning to implement the solidarity contribution to a greater extent than the allocation to the Price Difference Payment Fund by entities extracting natural gas, the legislator should consider the nature of this public levy. If it assumes that it has the nature of a tax, this is inconsistent with both the above constitutional principles and with the feature of the tax, being of a gratuitous nature. On the other hand, accepting a different type of public tribute may be dubious from the point of view of retroactivity, as this tribute would be payable on income earned in 2022 and 2023.

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