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ARTICLE

The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law

Jeroen Lammers* & Błażej Kuźniacki**

This paper reviews the EU Solidarity Contribution that was recently introduced by the Council Regulation on Emergency Intervention to Address High Energy Prices and proposes a more proportional alternative. It is argued that the legitimacy of the EU Solidarity Contribution might be disputed. The role that Member States have played in driving up energy prices by filling their natural gas storages much more than the EU's filling trajectory prescribes raises questions as to whether the EU Solidarity Contribution could be in conflict with the proportionality principle and whether all formal requirements of Article 122(1) Treaty on the Functioning of the European Union (TFEU) have been fulfilled. Furthermore, it is argued that the EU Solidarity Contribution may compromise protection of investments under international investment agreements (IIAs) as the current design might entail elements that violate fair and equitable treatment (FET). As an alternative to the EU Solidarity Contribution, the article proposes the following. First, a legal commitment should be introduced for fossil fuel companies to invest 100% of their realized excess profit for decarbonizing the economy under the threat of taxing away those excess profits in their entirety should it become apparent that the investments are not actually realized. Second, in lieu of the EU Solidarity Contribution, the incidental financial support measures for vulnerable households could be financed with the excess (windfall) revenue collected from Value Added Tax (VAT) and excise due to the high inflation in the EU in 2022.

Keywords: EU tax policy, EU law, international investment law, EU solidarity contribution, proportionality, emergency intervention, energy prices, fair and equitable treatment.

1 Introduction

Inflation skyrocketed in 2022.[1] This, to a large degree, is the result of increasing energy costs[2] partially caused by the Russian invasion of Ukraine as it threatened the security of supply.[3] Furthermore, extreme weather conditions in 2022 also contributed. For example, low water levels affected how much hydroelectric energy could be generated in 2022. Additionally, in the summer of 2022, there was significantly less wind than average which means that windfarms generated much less energy than expected. Likewise, the extreme heat led to energy demands being higher than normal.[4]

Central banks and national governments have been taking measures to address the micro- and macro-economic effects of the inflation. Due to the rapid rise in energy costs, many governments have introduced aid schemes to ensure that households can pay their energy bills. To finance these aid schemes, several countries have opted to introduce some form of an excess profit tax for fossil fuel companies,[5] effectively skimming the windfall

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1 *2022 Has Been a Year of Brutal Inflation*, The Economist (21 Dec. 2022), https://www.economist.com/finance-and-economics/2022/12/21/2022-has-been-a-year-of-brutal-inflation (accessed 29 Mar. 2023).

2 Energy inflation has not been the only factor contributing to soaring levels of inflation. Core-inflation rates have also been rising. The core inflation in the EU remained under 3% until Q2 in 2022 while increasing up to 5% by the end of 2022. In contrast, in the United States, it was already over 3% in Apr. 2021 and was at approximately 6% throughout 2022. *See* Trading Economics, *Euro Area Core Inflation (2023)*, https://tradingeconomics.com/euro-area/core-inflation-rate (accessed 5 Jan. 2023); and Trading Economics, *United States Core Inflation Rate (2023),* https://tradingeconomics.com/united-states/core-inflation-rate (accessed 5 Jan. 2023).

3 In 2020, the EU imported just over 58% of the energy that was consumed in the EU. The EU's energy mix consisted of 35% oil and petroleum products, 24% natural gas, 17% renewables, 13% nuclear energy, and 11% solid fossil fuels (mostly coal) in 2020. Russia was the EU's main supplier of natural gas and coal as 46% of the EU's import of natural gas and 54% of the EU's import of coal came from Russia. *See* Eurostat, *The EU Imported 58% of Its Energy in 2020,* Press Release (28 Mar. 2022), https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220328-2 (accessed 29 Mar. 2023).

4 *See* Council Regulation (EU)2022/1854 of 6 Oct. 2022 on an emergency intervention to address high energy prices. Consideration (3), http://data.europa.eu/eli/reg/2022/1854/oj (accessed 29 Mar. 2023).

5 *See* T. Baunsgaard & N. Vernon, *Taxing Windfall Profits in the Energy Sector,* IMF Note no. 2022/02, (2022), at 9 for an overview of examples of excess profit taxes on the energy sector that have been imposed (or announced) in 2021 and 2022.

profit that these companies managed to secure as a result of the (artificially) inflated energy prices.

Several scholars have expressed support for the application of windfall profit taxes.[6] Furthermore, there appears to be strong political support for an additional tax targeting excess profits in the fossil fuel sector.[7] However, designing windfall taxes is not straightforward, particularly when companies have global earnings and investment in new, greener sources of energy are needed. Accordingly, the International Monetary Fund's (IMF's) experts warn that, in particular, temporary taxes on windfall profits shall be used with caution because they 'tend to increase investor risk, may be more distortionary (especially if poorly designed or timed), and do not provide revenue benefits above those of a permanent tax on economic rents' while '[i]nvestors prefer a stable, predictable tax regime over the risk of future temporary taxes when prices rise'.[8]

Nevertheless, the EU Council recently agreed on a proposal for a Council Regulation to address high energy prices.[9] This regulation includes a measure – a solidarity contribution – that is meant to siphon excess profits from fossil fuel companies in order to contribute to the financing of fiscal aid packages in the Member States.

This contribution examines whether there are possible legitimacy issues regarding the solidarity contribution in Council Regulation (EU) 2022/1854 (hereinafter: the EU Solidarity Contribution). It is argued that it is, in fact, an excess profit tax and that its legitimacy can be disputed. Although the qualification of the EU Solidarity Contribution as an excess profit tax does not automatically imply that Article 122 Treaty on the Functioning of the European Union (TFEU) does not provide a sufficient legal basis for its introduction, such a tax might be legally problematic. Notably, there could be conflicts with the proportionality principle under EU law, specific requirements of Article 122(1) TFEU, and fair and equitable treatment (FET) under international investment law (international investment agreements, hereinafter also IIAs).[10]

In light thereof, an alternative course of action is being offered to more effectively deal with the windfall profits that fossil fuel companies have realized because of inflated energy prices and to fundamentally strengthen the sustainable development of the economy. It entails fossil fuel companies being required to invest the realized excess profits in the fundamental decarbonization of the economy. Moreover, it is contended that, instead of the EU Solidarity Contribution, the excess (windfall) revenue collected from the Value Added Tax (VAT) and excise due to high inflation in the EU can be used to finance the necessary financial support measures for vulnerable households that struggle to pay their energy bills.

2 EU EMERGENCY INTERVENTION TO ADDRESS HIGH ENERGY PRICES

On 30 September 2022, the EU Council agreed on a proposal for a Council Regulation to address high energy prices.[11] The regulation was subsequently formally adopted in the Council by a written procedure on 6 October 2022 based on Article 122 TFEU despite several Member States issuing statements on the legal basis for adopting it.[12] The Council Regulation entered into force on 7 October 2022.[13] It has the objectives to mitigate the impact of high electricity prices and protect consumers while preserving the benefits of the internal market and a level-playing field.[14] It consists of several measures that are temporary and extraordinary in nature.[15]

Firstly, the measures include a voluntary reduction target of 10% of the gross energy consumption, including

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6 For example, M. François, C. Oliveira, B. Planterose & G. Zucman, *A Modern Excess Profit Tax (Vol. 5)*, *EU Tax Observatory Working Paper* (2022); C. Hayes & C. Jung, *Prices and Profits After the Pandemic.* IPPR and Commonwealth (2022); R. Avi-Yonah, *Taxes in the Time of Coronavirus: Is It Time to Revive the Excess Profits Tax?* , U. of Michigan Public Law Research Paper No. 671, U. of Michigan Law & Econ. Research Paper No. 20-008 (19 May 2020); For a more critical view, *also see* Bundesministerium der Finanzen, Übergewinnsteuer, *Wissenschaftlicher Beirat Beim Bundesministerium der Finanzen* (2022), at 19 (2023), https://www.bundesfinanzministerium.de/Content/DE/Downloads/Ministerium/Wissenschaftlicher-Beirat/Gutachten/uebergewinnsteuer.pdf (accessed 29 Mar. 2023).

7 *See* e.g., T. Wilson, M. MacDougal, N. Thomas & D. Bower, *Windfall Taxes: Good Politics, Tricky Policy,* Financial Times (4 Nov. 2022), https://www.ft.com/content/bab495e0-ec4d-4026-a13d-1aad9fcc0805 (accessed 29 Mar. 2023). The article features several recent statements of support from Joe Biden, the president of the United States, Rishi Sunak, the chancellor of the Exchequer of the United Kingdom (currently the UK Prime Minister), as well as references to recent proposals for a windfall profit tax in the EU, Italy, and Spain.

8 Baunsgaard & Vernon, *supra* n. 5, at 1.

9 Council Regulation (EU)2022/1854, *supra* n. 4.

10 It has been recently suggested by scholars that the principle of proportionality, constituting general principle and a cornerstone of EU law, plays an important role for the purposes of the FET in a sense that the proportionality of legal measures should be seen as a requirement for the FET under IIAs – this suggestion is based on a reference to IN: PCA, 21 Dec. 2020, PCA Case 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, para. 1787. *See* P. Pistone & I Lazarov, *The Fundamental Right to Fair and Equitable Treatment in the Cross-Border Recovery of Taxes Within the EU: A Need for a Common Minimum Standard,* 15(1) World Tax J. (2023), s. 4. For an in-depth analysis of *Cairn v. India* case, *see* B. Kuźniacki & Stef van Weeghel, *Cairn Energy: When Retroactive Taxation Not Justified by Prevention of Tax Avoidance Is Unfair and Inequitable*, Arbitration International 2023 (published by Oxford University Press on behalf of the London Court of International Arbitration), publication freely available at https://doi.org/10.1093/arbint/aiad003 (accessed 29 Mar. 2023).

11 Council of the European Union, *Proposal for a Council Regulation on an Emergency Intervention to Address High Energy Prices,* 12999/22 (2022), https://data.consilium.europa.eu/doc/document/ST-12999-2022-INIT/en/pdf (accessed 29 Mar. 2023).

12 *See* Council of the European Union, *Communication on the Written Procedure With Reply by Thursday 6 October 2022 at 18:00 CET,* CM 4715/22 (2022). The specific statements by several Member States are further discussed in s. 3.

13 *See* Council Regulation (EU)2022/1854, *supra* n. 4.

14 European Commission, Proposal for a Council Regulation on an emergency intervention to address high energy prices, COM(2022) 473 final (2022), at 1.

15 Council Regulation (EU)2022/1854, *supra* n. 4. Art. 20 ensures their temporary nature, stating that the regulation will (only) apply from 1 Dec. 2022 to 31 Dec. 2023.

a mandatory reduction of 5% in peak hours. Each Member State is free to choose which measures are most appropriate for realizing these targets.

Secondly, a mandatory measure is included to apply a cap on market revenues for electricity producers that use inframarginal technology of 180 EUR/megaWatt hour (mWh).[16] This level should ensure, on the one hand, that extreme and lasting price increases that extend far beyond normal market situations of occasional price peaks are maxed out while, on the other hand, future investments in renewable energy sources do not suffer.[17]

Thirdly, it imposes a solidarity contribution on those companies that generate at least 75% of their turnover from economic activities in the field of the extraction, mining, refining petroleum, or manufacturing coke oven products.[18] Much like inframarginal energy producers, the fossil fuel sector has managed to secure exceptional levels of profit as the wholesale prices of natural gas increased dramatically while the sector's operating costs largely remained the same.[19] Accordingly, the EU Solidarity Contribution targets excess profits of the fossil fuel sector and aims to tax those at a rate of at least 33%.[20] Its base includes the parts of taxable profits for 2022 and 2023 that exceed the average of the taxable profits of 2018, 2019, 2020, and 2021 with 20%.[21]

The European Commission estimates that the cap on market revenues would raise approximately EUR 117 billion in revenue (on an annual basis) while the EU Solidarity Contribution would raise about EUR 25 billion.[22] The regulation states that Member States should use these revenues to finance measures to compensate final customers for the high energy prices and reduce energy demand, financial support measures to help energy intensive companies invest in decarbonization of their processes, and measures to develop energy autonomy.[23]

This article focuses on the EU Solidarity Contribution. The overall voluntary reduction target and the mandatory cap on market revenues are therefore not further discussed in it. Likewise, the implementation and application of the EU Solidarity Contribution by EU Member States are beyond its scope.

3 Article 122 TFEU as the Legal Basis for the EU Solidarity Contribution

The analysed EU Regulation did not receive full support of EU Member States. Slovakia and Poland voted against it in the written procedure. Moreover, several Member States issued statements pointing out that it was adopted under a qualified majority while the EU decision-making procedures on taxation require unanimity.[24]

As such, Estonia insisted that future tax matters be on the proper legal basis (Article 115 TFEU) and the requirement of unanimity it prescribes. Poland stated that, in particular, the EU Solidarity Contribution should be viewed as a measure of a fiscal nature. Thus, legislative action should be carried out in accordance with a special legislative procedure, unanimously, and after consulting the European Parliament and not by qualified majority voting. Finally, Hungary indicated that Article 122 TFEU cannot be the sole basis for the EU Solidarity Contribution as such measures should be adopted unanimously.

These statements raise two questions: (1) Is the EU Solidarity Contribution a tax measure? (2) If so, can Article 122 TFEU be the sole (sufficient) legal basis for the EU Solidarity Contribution?

3.1 *Is the EU Solidarity Contribution an Excess Profit Tax?*

The concept of a tax is usually very broadly defined as payments to governments that are required by law and finance public goods.[25] The Organization for Economic Co-operation and Development(OECD) classifies the term 'tax' as: '[C]ompulsory unrequited payments to the general

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[16] Electricity production using inframarginal technology includes essentially any electricity production that does not rely on natural gas as the main energy source. Because of the merit-order-principle – which determines the electricity prices in the EU – these inframarginal producers have greatly benefitted from the increased spot prices for electricity.

[17] The cap on market revenues is set above average peak prices as they were expected before Feb. 2022. This should mean that the market cap does not negatively affect investment decisions as the margins on these investments would still be equal or higher than expected before the Russian invasion of Ukraine took place. *See* Council Regulation (EU) 2022/1854, *supra* n. 4, considerations 27 and 28.

[18] Council Regulation (EU)2022/1854, *supra* n. 4, Art. 2 (17) and Art. 14.

[19] *Ibid.*, consideration 50.

[20] *Ibid.*, Art. 16.

[21] *Ibid.*, Art. 15.

[22] The market cap, however, should only apply from 1 Dec. 2022 until 31 Mar. 2023. This means that it is in place for four months rather than one year. It is therefore likely that the revenue collected does not equal EUR 117 billion. Moreover, as the revenue is ultimately fully dependent on the development of the market price for natural gas, the revenue collected might also differ from these estimates. *See* European Commission, *Questions and Answers on an Emergency Intervention to Address High Energy Prices* (14 Sep. 2022), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_5490 (accessed 29 Mar. 2023).

[23] Council Regulation (EU)2022/1854, *supra* n. 4, considerations 47 and 56, Arts 10 and 17.

[24] Council of the European Union, *supra* n. 12.

[25] *See* e.g., R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice,* McGraw-Hill Book Co 236–237 (1989).

government or to a supranational authority'.[26] The term 'compulsory' should be understood that the payments are required by law while the term 'unrequited' means that these payments cannot not be viewed as voluntary payments for acquiring specific goods or services provided by the state.[27] Consequently, the aim of a tax measure is to raise revenue for the state to finance public goods.

From a slightly different perspective, Vanistendael adheres to similar logic in defining a fundamental legal framework for taxation that must accord with the rule of law. This means that '(1) a tax can be levied only if a statute lawfully enacted so provides, (2) a tax must be applied impartially, and (3) revenue raised by a tax can be used only for lawful public purposes'.[28]

Moreover, case law regarding IIAs, mainly bilateral investment treaties (BIT), suggests that what constitutes a tax measure are its legal characteristics and not its economic effects.[29] Legally speaking, a tax measure should be determined under domestic law and an applicable tax treaty. The TFEU, however, does not include a comprehensive definition of what constitutes a tax measure while, for example, the Dutch Constitution only suggests that a tax measure is a measure that is included in a tax law.[30] In the absence of such a definition, international judicial decisions should be examined.[31] International arbitral case law subsequently supposes that a tax measure is a measure that is '(i) a law, (ii) that imposes a liability on classes of persons, (iii) to pay money to the State, (iv) for public purposes'.[32]

Before applying these criteria to the EU Solidarity Contribution, it is warranted to mention that several authors have pointed out that excess profit taxes are not a new phenomenon.[33] Additionally, there are currently at least thirty-two countries that have excess profit taxes in place that focus on the extractive sector.[34] It is clear from the literature – even though it is not necessarily explicitly considered as such – that authors consider both the historic and current excess profit taxes as tax measures complying with the four criteria as indicated above.[35]

Moreover, the historic and current excess (or windfall) profit taxes share several characteristics. First, their enactment stems from a notion that there should be no benefit from '*trading on the world's misery*'.[36] Companies should not be able to secure enormous (windfall) profits as a result of extraordinary circumstances – such as war – that have nothing to do with the company's efforts in doing business.[37] Second, all excess profit taxes aim at not applying to normal or routine profits and only target (a portion of) the excess profit.[38] The reason for this is that excess profits are not subject to competition. This means that a tax on them should not influence (future) investment decisions nor would the tax incidence of such a tax be passed on to labour or consumers. This also means that an excess profit tax can be levied at a much higher rate than the corporate income tax on routine profits.[39] Third, the main goal of excess profit taxes is to raise revenue. This is subsequently meant to be used to compensate those that have been most adversely affected by the price effects resulting from the extraordinary circumstances. There is little to suggest that these might (also) serve as a stepping-stone tax reforms that are more fundamental, especially when it concerns temporary excess profit taxes.[40]

The EU Solidarity Contribution as presented in Council Regulation (EU) 2022/1854 appears to align with the characteristics of an excess profit tax, as outlined above. The objective of the EU Solidarity Contribution is to specifically target net business income in excess of what is deemed normal income.[41] An imposition of taxes on that income is justified according to the European

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26 OECD, *Revenue Statistics: Interpretative Guide* (2021), para. 1, https://www.oecd.org/tax/tax-policy/oecd-classification-taxes-interpretative-guide.pdf (accessed 29 Mar. 2023).

27 *Ibid.*, para. 12.

28 F. Vanistendael. *2 Legal Framework for Taxation,* in *Tax Law Design and Drafting* vol. 1, USA: International Monetary Fund 15 (1996).

29 *Encana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (3 Feb. 2006), paras 141–142.

30 Nederlandse Grondwet, Art. 104.

31 *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (2020), paras 511–512.

32 *Ibid.*, para. 514; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 Jun. 2010), para. 165.

33 *See supra* n. 6. *Also see* S. Hebous, D. Prihardini & N. Vernon. *Excess Profit Taxes: Historical Perspective and Contemporary Relevance,* IMF Working Paper WP/22/187, 9–10 (2022) for a historical overview of examples of excess profit taxes.

34 Hebous et al., *supra* n. 33, at 11.

35 Baunsgaard & Vernon, *supra* n. 5.

36 Hebous et al., *supra* n. 33, at 3.

37 R. Avi-Yonah, *Time to Tax Excessive Corporate Profits*, The American Prospect (18 Apr. 2022).

38 Hebous et al., *supra* n. 33, at 13–14. *Also see* Carl Shoup, *The Taxation of Excess Profits I*, 55(4) Pol. Sci. Q. 535–555 (1940); Carl Shoup, *Excess Profit Taxes. Proceedings of the Annual Conference on Taxation Under the Auspices of the National Tax Association*, 33, 419–426, at 423 (1940); Carl Shoup, *The Taxation of Excess Profits II*, 56(1) Pol. Sci. Q. 84–106 (1941) for considerations that separating routine profits from excess profits is by no means an easy feat.

39 *See supra* n. 6; Baunsgaard & Vernon, *supra* n. 5.

40 Hebous et al., *supra* n. 33, at 15.

41 As such, it also complies with the OECD definition of a corporate income tax. *See* OECD, *Glossary of Tax Terms*, https://www.oecd.org/ctp/glossaryoftaxterms.htm (accessed 29 Mar. 2023).

Commission because companies 'that generate excess profits need to contribute a portion of them in the spirit of solidarity'.[42] Moreover, it is an exceptional and temporary measure for which its revenues are meant to be redistributed to counteract the economic effects caused by the very high energy prices. Accordingly, the Regulation very specifically defines both a tax base that is directly linked to the taxable profits of the relevant companies, as well as a tax rate that should be applied. Additionally, the rate of the EU Solidarity Contribution is established with the specific aim that the affected companies contribute 'in proportion to the profits generated by the crisis situation'.[43]

The EU Solidarity Contribution, therefore, (1) is based on a legal statute,[44] (2) is meant to generate revenues and, as such, requires payments from legal persons to the Member States,[45] (3) these payments are unrequited as they not made in order to receive certain goods or services, and (4) the revenue from the EU Solidarity Contribution can only be used for a specific set of lawful public purposes.[46] As it meets all criteria, this article thus holds that the EU Solidarity Contribution, for all intents and purposes, should be considered as a tax measure and specifically as an excess profit tax.

3.2 *Is Article 122 TFEU a Sufficient Legal Basis?*

Article 122 (1) TFEU gives the Council the authority – without prejudice to any other procedures and in the spirit of solidarity between Member States – to decide on measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.[47] However, Article 122(1) TFEU cannot be used to regulate something on a permanent basis as recourse to Article 122 TFEU may not undermine or circumvent the use of other legal bases in the TFEU for use in *normal times.*[48] Moreover, even though Article 122(1) TFEU does not mention 'the exceptional occurrences beyond its control' as 122(2) TFEU does and also that Article 122(1) and 122 (2) TFEU apply to different situations, both paragraphs are to be read in the context that the article can only be applied in an emergency.[49]

The European Commission justifies Article 122(1) TFEU as the legal basis for adopting the cap and market revenue and the EU Solidarity Contribution as follows[50]:

(1) The Commission argues that the measures do not constitute a fundamental change in policy. The regulation includes temporary, proportionate, and extraordinary measures that complement existing relevant EU initiatives and legislation, and they are complementary to the initiatives already taken in earlier stages.[51]
(2) The Commission argues that the urgent need for additional measures in itself justifies using Article 122(1) as the legal basis for the regulation. It points out the timeline to implement the measures is short as the '[s]oaring electricity prices are putting a significant burden on consumers and businesses, and if no action is taken, they risk reaching unsustainable levels, which could have significant wider social and economic implications'.[52]
(3) The Commission states that the temporary measures in the regulation allow Member States to have a coordinated approach for protecting consumers without compromising the functioning of the internal electricity market, and that this embodies the principle of solidarity in the area of energy. Moreover, the Commission asserts that the EU Solidarity Contribution 'adds an element of fairness to the package of measures to be launched in the context of the emergency intervention on energy'.[53] With this, the Commission seems to imply that the EU Solidarity Contribution is an integral part of the entire package of measures in the regulation.

The Court of Justice of the European Union (CJEU) case law states that the choice of the legal basis for any EU legislation may not depend simply on the Commission's

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[42] European Commission, *supra* n. 14, at 11.

[43] *Ibid.*

[44] With regard to the question of whether EU Solidarity Contribution is a tax measure, it will be assumed here that Council Regulation (EU)2022/1854 has been legally adopted based on Art. 122 TFEU.

[45] Council Regulation (EU)2022/1854, *supra* n. 4, Arts 14 to 16.

[46] *Ibid.*, Art. 17 gives a limitative list of purposes for which the Member States can use the proceeds.

[47] *Consolidated version of the Treaty on the Functioning of the European Union (TFEU)*, Art. 122(1), http://data.europa.eu/eli/treaty/tfeu_2012/oj (accessed 29 Mar. 2023).

[48] Opinion of the Commission Legal Service on proposals on Next Generation EU, 9062/20 (24 Jun. 2022), para. 121, https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf (accessed 29 Mar. 2023).

[49] *See supra* n. 48, paras 119–121.

[50] European Commission, *supra* n. 14, at 13–19.

[51] *Ibid.*, at 12.

[52] *Ibid.*, at 14.

[53] *Ibid.*, at 16.

conviction as to the objective pursued but must be based on objective factors that are amenable to judicial review, in particular the aim and content of that measure.[54] Most importantly, the CJEU stated that:

> [i]f examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases.[55]

Article 122(1) TFEU does not provide an exhaustive list of situations where it can be applied as the notion of solidarity does not have a single defined meaning in EU law. It is more of a fundamental principle than a single concept that underpins the entire architecture of the European Union.[56] In fact, the concept of solidarity has arguably taken on a wider meaning over the years. The CJEU appeared in earlier case law to see solidarity predominantly as *solidarity between Member States.*[57] However, Article 122(1) TFEU recently served as a legal basis for the Emergency Support Instrument (ESI) for the provision of humanitarian aid in response to natural or man-made disasters giving rise to severe wide-ranging humanitarian consequences within the European Union.[58] In this context, solidarity takes on a wider meaning than that between Member States; it approaches the concept as *solidarity between people.*[59]

Moreover, the measures that can be adopted under Article 122(1) can include a broad range of instruments. There is no reason to assume that tax measures would be excluded as long as they are part of the '*emergency intervention*'.[60] Therefore, the above conclusion that the EU Solidarity Contribution should be viewed as a tax measure does not automatically mean that there can be no proper legal basis for adopting it outside of Article 115 TFEU.

The Commission properly points out that the measures are temporary and that they do not fundamentally deviate from existing policies. It is also clear that there is a time constraint for adopting them. In addition, the broad wording of Article 122 means that the European Commission has a wide margin of discretion when acting on the legal basis of Article 122(1) TFEU.[61] Given the remarks of the CJEU in Case C-377/12, this would mean that, if the EU Solidarity Contribution is a secondary measure, no further justification would be necessary. It could be argued that this is the case as it would amount to approximately 17% of the total revenue of the package.

On the other hand, the Commission states that the EU Solidarity Contribution is an integral part of the package of measures and not just a secondary or incidental measure. However, even if it is argued that the EU Solidarity Contribution is inseparably linked to the other measures in the regulation without one being secondary to the other because of the broad margin of discretion and the gradual expansion of the concept of solidarity, its aim and content might still be considered to fall within the scope of Article 122(1) TFEU.

Finally, it should be noted that, under Article 293 TFEU, the Council has the power to amend a proposal by the Commission, but it must act unanimously. Since the regulation was adopted under the written procedure, it might be assumed that the objections of the Member States that issued statements as to the validity of the legal basis of the regulation were not able to convince the other Member States to unanimously agree to amend the proposal in a manner that would satisfy these objections.

4 The Proportionality of the EU Solidarity Contribution

The use of the EU competences are governed by the principles of proportionality and subsidiarity. Thus, EU legislation must comply with both of these principles to be legitimate.[62] For the purpose of this contribution, only

Notes

54 *See* inter alia *Commission v. Council ('Titanium dioxide')*, C-300/89, EU:C:1991:244, para. 10; *United Kingdom v. Council*, C-81/13, EU:C:2014:2449, para. 35.

55 *Commission v.* Council, C-377/12, EU:C:2014:1903, para. 34.

56 A. Miglio, *The Regulation on the Provision of Emergency Support Within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis*, European Papers, Vol. 1, 2016, No 3, European Forum, Insight of 26 Sep. 2016, 1171–1182, at 1180 (2016).

57 *Commission v. France*, Joined Cases 6 and 11/69, ECLI:EU:C:1969:68, para. 16; *Benzine en Petroleum Handelsmaatschappij BV and others v. Commission*, Case 77/77, ECLI:EU:C:1978:141, paras 14–15.

58 Council Regulation (EU) 2016/369 of 15 Mar. 2016 on the provision of emergency support within the Union, http://data.europa.eu/eli/reg/2016/369/oj (accessed 29 Mar. 2023).

59 *Ibid.*, at consideration (1).

60 European Commission, *supra* n. 14, at 16.

61 *Supra* n. 48, para. 121; Miglio, *supra* n. 56, at 1172.

62 TFEU, Art. 5; TFEU Protocol (no 2) on the application of the principles of subsidiarity and proportionality.

the question whether the EU Solidarity Contribution complies with the principle of proportionality is discussed. It is assumed that the former already complies with the subsidiarity principle.

The proportionality principle is established in Article 5(4) TFEU and essentially consists of three separate tests[63]:

(1) Suitability test: the measure must be suitable for realizing the intended objective.
(2) Necessity test: the measure must be necessary for achieving the intended objective.
(3) Proportionality test *in strictu sensu*: even though the measure is deemed suitable and necessary, it must not impose a burden on the individual that is excessive in relation to the objective it seeks to achieve.

If a measure does not comply with the principle of proportionality, the validity of relevant measures can be challenged before the CJEU. Conform Articles 263 and 264 TFEU the CJEU can subsequently rule that the act concerned is void.

The CJEU can assess the proportionality of both EU (horizontal) and national measures (vertical),[64] however, it appears to be less stringent in the horizontal test than in the vertical test. This is demonstrated by the fact that it is unlikely to find EU legislation in conflict with the proportionality principle unless the measure is *manifestly inappropriate* to achieve its objective.[65] However, the CJEU could also find national measures in conflict if there are *less restrictive alternatives.*[66] The manifest error test was also applied by the CJEU (grand chamber) in respect of one of the EU tax related directives (Directive 2006/112/EC):

> it is understood that, when the EU legislature *adopts a tax measure*, it is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. Consequently, it should, in that context, be accorded *a broad discretion*, so that judicial review of compliance with the conditions set out in the previous paragraph of this judgment must be limited to review as to *manifest error.*[67] (emphasis added).

Moreover, the CJEU has said with regard to horizontal assessment under the EU regulations that:

> where the evaluation of a *complex economic situation* is involved [… [in reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses *manifest error* or constitutes *misuse of powers* or a clear disregard of the limits of its discretion on the part of that institution.[68] (emphasis added).

Finally, the horizontal proportionality test in *strictu sensu* focuses on questions of whether there has been encroachment upon individual rights – which could also include that economic rights have been infringed.[69] Notably, the CJEU stated in the *Digital Rights Ireland* case that 'where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited'.[70] This means that the interests of those whose rights (e.g., respect for private and family life) are violated should be weighed against the interests of those that the measure aims to protect in order to assess the limits of the discretion of the EU Commission. It is interesting in this regard that Denmark, for example, has elected in their national implementation to apply the EU Solidarity Contribution only to fiscal year 2023. This is because general principles of legal certainty prescribe that tax increases can only be prospective and, thus, the temporary solidarity contribution should not apply to 2022 excess profits.[71] Retroactive taxation may deprive taxpayers of their ability to plan their business activities with any certainty relative to tax consequences.[72] Therefore, the discretion of the EU Commission, as exercised to submit the proposal of the EU Regulation imposing the EU Solidarity Contribution, could face stricter scrutiny under the proportionality principle by the CJEU than under the manifest error test. Ultimately, it is not inconceivable that the retroactive effects of the EU Solidarity Contribution will interfere with fundamental rights[73] and notably with the right to conduct business and

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63 T. Harbo, *The Function of the Proportionality Principle in EU Law,* 16(2) Eur. L.J. 165 (Mar. 2010).

64 T. Tridimas, *The General Principles of EC Law,* (2d ed., Oxford University Press 2006), Ch. 3.

65 *Fedesa,* Case C-331/88, ECLI:EU:C:1990:391, para. 14.; *see* Harbo, *supra* n. 63, at 172–180 for a more comprehensive analysis.

66 *Commission v. Italy.* C-518/06. ECLI:EU:C:2009:270, para. 84. Additionally, it is demonstrated that the burden of proof does not require Member States to prove that no other conceivable measure could realize the same objective.

67 PL: CJEU, 7 Mar. 2017, *RPO* Case C-390/15, ECLI:EU:C:2017:174, para. 54.

68 *Atipesca v. Commission*, Case T-180/00, ECLI:EU:T:2002:249, para. 79.

69 Harbo, *supra* n. 63, at 178. Harbo also contends that the CJEU is not necessarily consistent in applying the proportionality principle in its case law. *Ibid.*, at 185.

70 C-293/12, paras 47–48.

71 *See* Forslag til Lov om Midlertidigt Solidaritetsbidrag, J.nr. 2022-13539 (2023), at 42–43, https://hoeringsportalen.dk/Hearing/Details/67154 (accessed 29 Mar. 2023).

72 Compare *Cairn*, *supra* n. 10, paras 1757 and 1816.

73 All fundamental (human) rights – whether civil, political, economic, social, or cultural – are interlinked. United Nations, *What Are Human Rights? Economic, Social and Cultural Rights*, https://www.ohchr.org/en/human-rights/economic-social-cultural-rights (accessed 15 Feb. 2023).

freely engage in economic activity.[74] Whether this interference is serious enough to prompt the CJEU to strictly scrutinize the proportionality of the EU Solidarity Contribution instead of a manifest error test is uncertain.

The Commission is rather brief about the proportionality of the EU Solidarity Contribution.[75] It states that it does not exceed what is necessary to achieve the Council Regulation's objectives. The Commission claims that the EU Solidarity Contribution does not unnecessarily impede future investment or fossil fuel companies' future viability because (1) the excess profits are only partly impacted by it, and (2) the measure is temporary, thus only the excess profits of 2022 will be affected. In other words, the Commission appears to make the case that while the economic rights of these companies are infringed, the degree to which this infringement occurs is justifiable in light of the objectives of the measure and the interests of end-consumers that are confronted with high energy prices. Thus, in this context, the EU Commission argues implicitly that they have acted within their discretion regarding the EU Solidarity Contribution. This raises the question of to what extent the measure is effective in protecting consumers against high energy prices.

Figure 1 illustrates the development of the price for natural gas over the last two years. In order to determine the best policy instrument to address the effects of the high energy prices in 2022, it might be wondered why the (European) energy prices surged as they did in the first place.

According to the Bruegel think tank,[77] the primary causes for the rapid increase in energy prices in 2022 is because Russian natural gas deliveries to Europe decreased by 80% while countries and companies accelerated their purchases of natural gas to raise the volumes of storage before winter to ensure delivery security.[78] The increase in demand meant that a portion of this extra requirement needed to be fulfilled by the import of liquefied natural gas (LNG) which is much more expensive than Russian natural gas. For example, the LNG from mainly Nigeria,

Figure 1 Natural Gas EU Dutch TTF, EUR/MWh Since 2021

Source: Trading Economics[76]

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[74] This right was recognized in early CJEU case law as a fundamental right protected by the European legal order. ECJ, 14 May 1974, Case C-4/73, *Nold KG v. Commission*, EU:C:1974:51; CJEU, 27 Sep. 1979, Case C-230/78, *Eridania*, EU:C:1979:216. It is also reflected in Art. 16 of the Charter of Fundamental Rights of the European Union, OJ EU 2012/C 326/02 (26 Oct. 2012), which is, in turn, connected with the fundamental freedoms under the EU Treaties. CJEU, 30 Apr. 2014, Case C-390/12, *Pfleger*, EU:C:2014:281, paras 57–60. In literature *see* M. Everson & R. Correia Goncalves, *Article 16 – Freedom to Conduct Business*, in *The EU Charter of Fundamental Rights: A Commentary* 448 (S. Peers, T. Hervey & A. Ward eds, Hart Publishing 2014), para. 16.07; I. Lazarov, *Anti-tax Avoidance in Corporate Taxation Under EU Law: The Internal Market Narrative*, IBFD 2022, s. 5.1.2. Thus, in addition to the principle of proportionality as applied under EU Treaties, the EU Solidarity Contribution may be examined under the proportionality used in Art. 52(1) of the EU Charter. Cf. CJEU, 22 Jan. 2013, Case C-283/11, *Sky Österreich GmbH*, EU:C:2013:28, paras 41–68.

[75] European Commission, *supra* n. 14, at 18–19.

[76] *See* Trading Economics, *EU Natural Gas*, https://tradingeconomics.com/commodity/eu-natural-gas (accessed 05 Jan. 2023).

[77] C. Heussaff, S. Tagliapietra, G. Zachmann & J. Zettelmeyer, *An Assessment of Europe's Options to Reduce Energy Prices,* Policy Contribution 17/2022, Bruegel (2022).

[78] *Ibid.*, at 2.

Qatar, and the United States accounted for over 25% of the EU gas imports in the first half of 2022. In addition to these reasons, however, a policy related cause of why prices of natural gas rose as sharply as they did can also be identified as can be deduced in the section below.

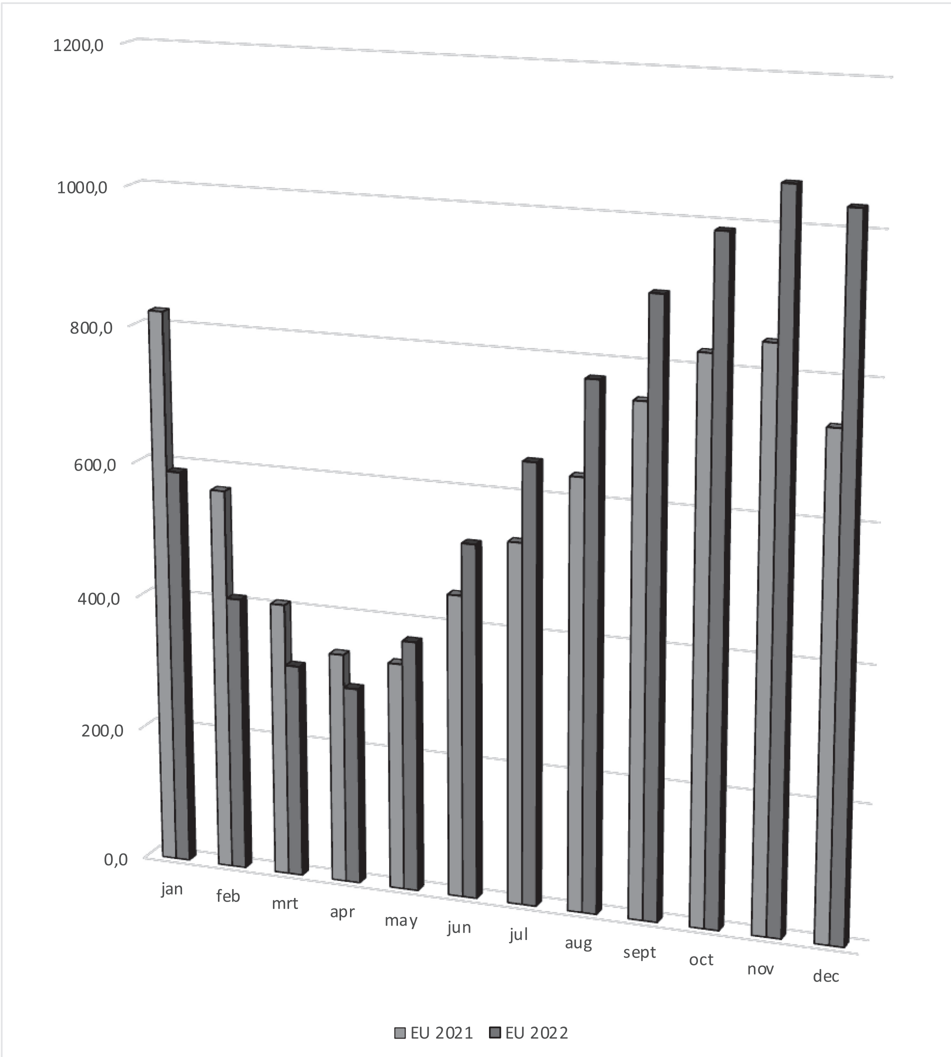
4.1 *Overfilling of the EU's Natural Gas Storages*

Figure 2 shows the total aggregate storage levels of natural gas in the EU in TeraWatt hour (TWh) for 2021 and 2022. The graph demonstrates that the storage levels at the beginning of 2022 were lower than in 2021 while they ended up much higher by the end of 2022 compared to 2021.[79]

Moreover, Figure 3 shows that, month-for-month, more natural gas was added to the Member States' storages in 2022 than was the case in 2021.[80] This means that, cumulatively over 2022, the EU storage levels of natural gas increased with 530,8 TWh more than they did in 2021.[81]

Not only was more natural gas added to the national storages, but the Member States also increased their

Figure 2 Total Storage Levels of Natural Gas in the EU (in TWh)



Source: Aggregate Gas Storage Inventory

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[79] *See* AGSI GIE, *Aggregate Gas Storage Inventory*, https://agsi.gie.eu/ (accessed 05 Jan. 2023).

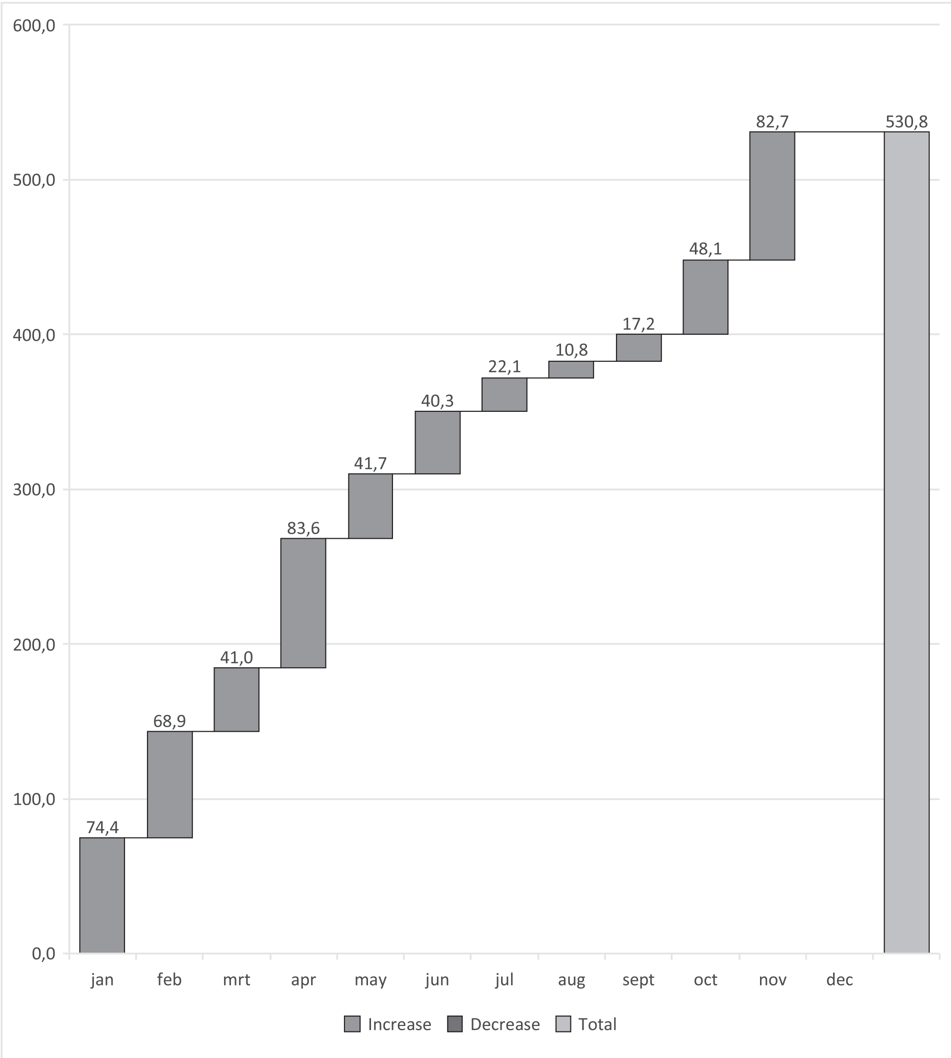
[80] *Ibid.*

[81] This corresponds to approximately 16% of the total of the EU's natural gas imports in 2021.

storage levels in 2022 much faster than the filling trajectory that the European Commission prescribed in EU Regulation 2022/1032.[82] Figure 4 demonstrates that, except for Latvia, every Member State significantly exceeded the filling trajectory on each of the four intermediate target dates. This resulted in having significantly more natural gas in their storage facilities per 1 November 2022 than the 80% filling target in the EU Regulation.

Correcting for the fact that the storage levels were about 230 TWh lower in the start of 2022 than in the beginning of 2021, about 300 TWh more natural gas was added to storage in 2022 than in 2021. Furthermore, this extra added volume of 300 TWh is almost the same as the volume amount with which Member States exceeded the EU filling trajectory. To put this in perspective, the EU imported about 960 TWh in LNG between January and September 2022 which is approximately 380 TWh more than in 2021.[83] As 300 TWh in natural gas has been placed into storage in excess of the EU's filling trajectory, it appears that approximately 79% of these additional

Figure 3 Difference in Natural Gas Storage Levels in the EU Per Month in 2022 Compared to 2021 (in TWh)



Source: Aggregate Gas Storage Inventory

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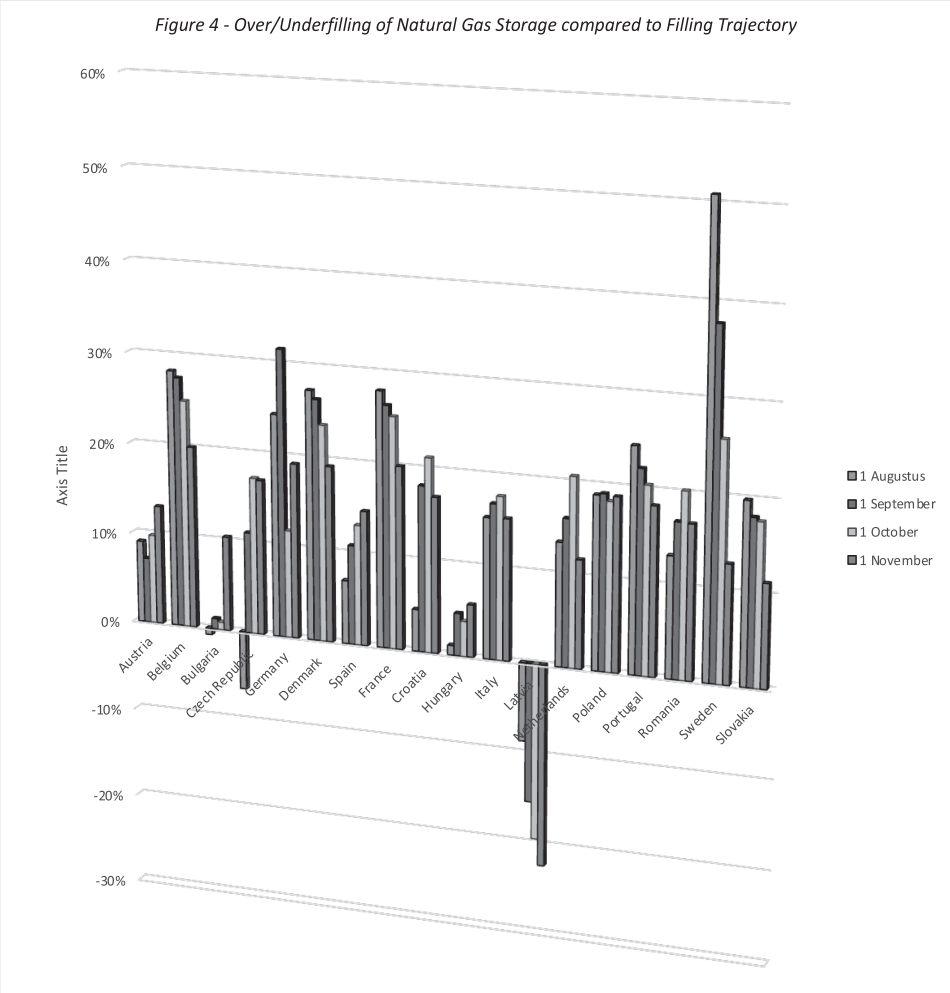
82 Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 Jun. 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage, Annex 1a, http://data.europa.eu/eli/reg/2022/1032/oj (accessed 29 Mar. 2023).

83 *See* European Commission, *Liquefied Natural Gas* (2022), https://energy.ec.europa.eu/topics/oil-gas-and-coal/liquefied-natural-gas_en#:~:text=From%20the%20beginning%20of%202022,time%20record%20year%20(2019) (accessed 29 Mar. 2023).



Source: Aggregate Gas Storage Inventory

LNG imports went directly into (overfilling) European natural gas storages. It could therefore be argued that the Member States could have chosen not to import the (more expensive) LNG in excess of the EU filling trajectory or at least could have decided to import it at not quite the same pace and magnitude as they have done.

The above suggests that different policy decisions regarding the strategy of acquiring natural gas in excess of the EU filling trajectory could have had a significant impact on the development of consumer energy prices.[84] For those who would argue that these policy choices have all been made under the cloud of an impending energy crisis and massive uncertainty, it might be good to draw parallels with the recent Covid-19 crisis. To ensure that the health care system would not be overwhelmed, many of the measures to fight the pandemic were aimed at *flattening the curve.* A similar approach would have been sensible regarding the rising energy prices. In fact, this also seems to have been the intention of at least one of the emergency measures as the Czech minister of industry and trade has quoted that the agreement to reduce energy use in peak hours by 5% is meant to *flatten the price curve.*[85] However, it appears that the Member States did not apply the same logic to filling their natural gas storages.

In conclusion, the rise in the spot price for natural gas over 2022 was initially effectuated by the Russian invasion of Ukraine, the fear and uncertainty of security of supply, and the subsequent shift away from Russian gas

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[84] It is acknowledged that a direct causal relation in this regard is difficult to prove. However, the argument that the purchasing in excess of the EU filling trajectory in a relatively brief period of time pushed EU prices even higher than they would have been absent such excess buying is partly supported by the fact that, in 2022, the EU natural gas prices were almost a factor seven higher than in the United States and almost a factor two higher than in Japan. *See* Statistica, *Natural Gas Price Forecast by Region 2020-2024*, https://www.statista.com/statistics/444286/natural-gas-price-forecast-by-region/?locale=en (accessed 29 Mar. 2023).

[85] *See* European Council, *Council Agrees on Emergency Measures to Reduce Energy Prices,* Press Release 30 Sep. 2022, https://www.consilium.europa.eu/en/press/press-releases/2022/09/30/council-agrees-on-emergency-measures-to-reduce-energy-prices/ (accessed 29 Mar. 2023).

imports to other, more expensive sources. However, this contribution contends that a more careful and better coordinated buying strategy could have had a significant effect on the amplitude of these price developments. This is even more so as it is demonstrated that the demand for natural gas in excess of the EU filling trajectory in 2022 could only be met by importing large amounts of (more expensive) LNG.

4.2 *Legitimacy of the EU Solidarity Contribution*

The above arguments regarding the EU Member States' buying strategies might have consequences for legitimacy of the EU Solidarity Contribution. As argued above, Article 122(2) specifies that EU financial assistance can be granted if a Member State is 'seriously threatened with severe difficulties caused by […] exceptional occurrences beyond its control'.[86] Additionally, it was argued that, even though this state of emergency is not explicit in Article 122(1) TFEU, both paragraphs are to be read in the context that the article can only be applied in an emergency situation.

If it is assumed that the Russian invasion of Ukraine was the primary cause of the increase in energy prices, this could certainly qualify as an exceptional occurrence beyond the Member States' control. However, if it is presupposed that the Member States' policy choices exceeding the EU's filling trajectory were the cause of the severe difficulties, it could be argued that the exceptional occurrences leading to the increase of energy prices were – at least in part – within the control of the Member States.[87] In this context, the EU Solidarity Contribution appears to be a shift of responsibility from the Member States to the fossil fuel companies for the failure in properly exercising control in the hands of the Member States to stabilize energy prices.

Moreover, if this argument is accepted, the assertion that no other less intrusive measures are available and that the emergency measures are proportional for that reason might no longer be true. As argued above, a much less intrusive measure could have been that Member States slow down the pace at which they were filling their natural gas storages thereby reducing upward pressure on the price of energy. In fact, such a course of action might have resulted in a situation in which fossil fuel companies would not have had – or would have had far smaller – unexpected windfall profits. This would eliminate the fundamental reason why the EU Solidarity Contribution is even thought to be necessary.

It is observed that CJEU case law allows significant discretion for EU measures and that their legality will likely only be affected if a measure is manifestly inappropriate for achieving the objective and/or if the Commission clearly exceeds the limits of its discretion unless the measure interferes with fundamental rights of taxpayers.[88] This would suggest that the observation that a less intrusive measure was available, on its own, might not be sufficient for challenging the legality of the EU Solidarity Contribution. However, if the argument that the increase in energy prices did not originate from *exceptional occurrences beyond its control* holds, there may be combined objections of the availability of a less intrusive measure and the disputability of the occurrence of an emergency situation in the sense of Article 122. These might be compelling enough for the CJEU in considering whether the Commission overstepped the limits of their discretion with regard to the EU Solidarity Contribution.

Moreover, there is the question of whether the EU Solidarity Contribution is a suitable measure for achieving the objective of the EU Regulation. Arguably, the EU Solidarity Contribution would be relatively ineffective for lowering energy prices as the fossil fuel sector also did not influence the increase in prices. Moreover, on its own, it is inadequate for protecting consumers against high energy prices. In fact, it might be argued that financial support to households might increase upward pressures on (core) inflation. Additionally, the EU Solidarity Contribution might deter fossil fuel companies from large scale investments needed to decarbonize the economy.[89] In the longer term, this could lead to the EU remaining dependent on energy suppliers from outside of the EU longer thereby prolonging the exposure of EU consumers to risks of high energy prices. The implicit argument of the Commission that the infringement on the fossil fuel sector's economic rights is justifiable in light of the interests of the end-consumers thus might be vulnerable.

However, the Commission does not necessarily argue that the EU Solidarity Contribution should achieve this overarching goal of the regulation. The Commission states that: '[i]n order to financially support the measures that are necessary to react to current crisis situations for households and businesses, those that generate excess profits need to contribute a portion of them in the spirit of solidarity'.[90] The EU Solidarity Contribution, therefore, appears to also have a retributive character to a certain

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86 TFEU, Art. 122(2).

87 *See supra* n. 82.

88 *See supra* s. 4.

89 *See infra* s. 6.

90 European Commission, *supra* n. 14, at 11.

degree. This may lead to speculation, however, if this specific goal alone warrants an infringement of the economic rights of the fossil fuel sector to the extent of the EU Solidarity Contribution.

In conclusion, it is demonstrated above that there are legal arguments that might challenge the legitimacy of the EU Solidarity Contribution. In addition, there are other concerns such as its possible retroactivity or that it (also) targets routine profits that have not been addressed here.[91] In fact, an individual taxpayer has already filed a legal challenge against the EU Solidarity Contribution at the General Court of the EU.[92]

5 The EU Solidarity Contribution May Violate IIAs

In this section, the analysis of EU legal issues is supplemented with the analysis concerning a potential clash between the EU Solidarity Contribution and IIAs. Such consideration should be of importance not only for EU Member States (potential violation of their obligations under IIAs) but also the EU legislature. It primarily follows from the fact that IIAs, to a large extent, ensure protection of foreign investments that arise out of the rule of law and its derivatives such as *pacta sunt servanda*, FET, and the principle of legal certainty. The rule of law must be respected not only under IIAs but also EU law and EU Member States' constitutional law.[93] It would be detrimental to the reputation of the EU legislature to expose itself to ignorance in relation to the risk of potential incompatibility between EU secondary law and IIAs ratified by EU Member States.[94]

For the purposes of the analysis of a controversial interplay between the EU Solidarity Contribution and IIAs, it is of value to refer to two likely investments in the fossil fuels sector in the EU Member States. This is due to the identification of and reliance on the IIAs that are in force and can be applicable to protect investments against adverse effects of the EU Solidarity Contribution.

The first investment could be a US fossil fuel company in Denmark for purposes of exploitation of oil and gas via a wholly owned company in the Netherlands which, in turn, fully owns the local Danish subsidiary. Considering that the United States is one of the world's leaders in the oil and gas sector and has enormous bilateral trade and investment relationship with the EU,[95] this investment scheme is very realistic. Although US does not have BITs with the Netherlands or Denmark, the Energy Charter Treaty (ECT)[96] can protect US indirect investment in Denmark because both the Netherlands and Denmark are still members of the ECT[97] and the IIAs cover both direct and indirect investments such as that in this scenario.[98]

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[91] In addition to the concerns presented here regarding the legal basis and the proportionality of the measure, it might be argued that the legitimacy of the measure could also be disputed because the calculation of the tax base might not align with principles of legality. The manner in which the tax base is designed means it includes a measure of retroactivity. Moreover, its calculation might not actually reflect above-routine returns on investment on a more longitudinal basis. This is because particularly investments by the extractive industry are typically capital intensive, have fewer choices in investment locale and, as a result, have much longer time horizons than other industries. Moreover, whether the profits in 2022 would qualify as excess profits is completely dependent on the reference period that is chosen. For example, compared to the oil prices between 2011 and 2015, the profits that fossil fuel companies are reporting in 2022 would – based on the design of the solidarity contribution – have to be considered as routine profits and therefore would have remained unaffected. *See* Bundesministerium der Finanzen, *supra* n. 6, at 9–10.

[92] *See* America Hernandez, *Exxon Sues Over EU Fossil Fuel 'Windfall Tax'* (Politico 28 Dec. 2022).

[93] *See* B. Kuźniacki, *European Union Law and Global Investment Regime: Unshell Proposal as a Next (Mis)Step of the EU Against Investment Treaty Arbitration?*, Intertax 11/2022, at 794 and the case law cited therein.

[94] *Ibid.*, s. 4 for the analysis of the distinction between intra- and extra-EU IIAs and the consequences of such distinction for compatibility and complication between EU law and international investment law. From the EU law angle, *see* Art. 351 TFEU which differentiates relations between EU treaties and other international agreements concluded by EU Member States. In that regard, *see also* K. von Papp, *Solving Conflicts With International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited*, 42(4) Legal Issues Econ. Integration 337 et seq. (2015).

[95] European Commission, *EU Trade Relations With the United States. Facts, Figures and Latest Developments*, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states_en (accessed 29 Mar. 2023). N. Sönnichsen, *Leading Oil and Gas Companies in the United States Based on Market Capitalization as of October 2022* (17 Oct. 2022), https://www.statista.com/statistics/241625/top-10-us-oil-and-gas-companies-based-on-market-value/#:~:text=Leading%20U.S.%20oil%20and%20gas%20producers%20based%20on%20market%20cap%20Oct%202022&text=ExxonMobil%20ranks%20first%20among%20United,of%20410.22%20billion%20U.S.%20dollars (accessed 29 Mar. 2023).

[96] Energy Charter Treaty, *Signatories/Contracting Parties*, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/ (accessed 29 Mar. 2023).

[97] In this article, the issue of potential withdrawals from the ECT of several EU Member States, including the Netherlands, is not discussed. *See* more E. Sánchez Nicolás, *Why Are EU Countries Leaving the Energy Charter Treaty?*, EU Observer (19 Oct. 2022), https://euobserver.com/green-economy/156308 (accessed 29 Mar. 2023). It is of value to point out here that, in the envisaged scenario, the investment will most likely be protected under the ECT because it already existed in 2022 and earlier. Thus, as per Art. 47(3) of the ECT (known as the sunset clause), such investment will continue to be protected under the ECT after the withdrawal of a state from it for a period of twenty years. *See* more on sunset clauses in IIAs: C. Schreuer, *The ICSID Convention: A Commentary* 202–203 (2d ed., Cambridge University Press 2009), paras 416–420; A. Lauvaux, *Towards a Bumpy Ride into the Sunset: On the Mutual Termination of IIAs and Their Sunset Clauses*, Arbitration International 5 (2022); A. Reinisch & S. Mansour Fallah, *Post-Termination Responsibility of States? – The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors*, 37(1-2) ICSID Rev. 111 (2022). Finally, this article does not analyse the issue of effectiveness of intra-EU treaty arbitration in light of a crises of that arbitration after the *Achmea* case (6 Mar. 2018, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, ECLI:EU:C:2018:158) and following developments at the level of the EU as a whole, including the CJEU's case law and multilateral agreement between EU Member States to terminate all intra-EU BITs. For such analysis, *see* inter alia: K. Georgaki, *Conflict Resolution Between EU Law and Bilateral Investment Treaties of the EU Member States in the Aftermath of Achmea*, Yearbook of European Law (2023); P. Paschalidis, *Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in Republic of Moldova*, European Investment Law and Arbitration Review Online (21 Dec. 2022); B. Böhme, *The Future of the Energy Charter Treaty After Moldova v. Komstroy*, 59 Common Mkt. L. Rev. 3 (2022); J. Odermatt, *Is EU Law International? Case c-741/19 Republic of Moldova v. Komstroy LLC and the Autonomy of the EU Legal Order*, 6(3) Eur. Papers – J.L. & Integration (2021); B. Stern, *Investment Arbitration and State Sovereignty*, 35 ICSID Rev. – Foreign Inv. L.J. (2020).

[98] *See* Art. 1(6) of the ECT. Indeed, the concept of investment as defined by the ECT is particularly broad. *See* E. Gaillard, *Investments and Investors Covered by the Energy Charter Treaty*, in *Investment Arbitration and the Energy Charter Treaty* 59 (C. Ribeiro ed., Jurisnet LLC, New York 2006).

Another likely investment is that of an Oman fossil fuel company in the Netherlands.[99] As an example, this is realistic as the selected third country – Oman – is an important trade and investment partner for the EU with experience in the oil and gas industry.[100] It is therefore likely that Oman companies realize investments in the territory of EU in fossil fuel sector which subsequently may be affected by the EU Solidarity Contribution in one or more EU Member States. For example, an IIA that could be applicable for the protection of Oman investments in EU is that protecting the investments in the Netherlands i.e., the IIA in force between Oman and the Netherlands (the Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Sultanate of Oman, Netherlands (NL)-Oman BIT (1987))[101] because Oman is not a signatory state of the ECT, the EU, or the European Atomic Energy Community (EUROATOM).

The sections below briefly present and analyse the possibility to rely on respective IIAs by investors from the United States and Oman to ensure their compensation for negative effects of the EU Solidarity Contribution. It is a high-level analysis only to highlight the potential clash between that legal measure and IIAs without examining its implementation by the Netherlands and Denmark.[102] Although the analysis regards the mentioned IIAs and Member States, it is relevant, *mutatis mutandis*, to all other applicable IIAs with similar wording and structure as well as to all Member States.

Before delving into the analysis below, it is of value to mention that the investment promotion is to be achieved by the host state respecting the protection standards that should subsequently lead to a stable legal environment that favours foreign investments. By far, the IIA's most important and powerful enforcement tool is the right of individual investors to initiate arbitration against host states or what is known as the investment treaty arbitration or investor-state dispute settlement (ISDS) mechanism. It is usually included in the provision under the heading 'Submission of a Claim to Arbitration'.[103] This tool ensures that host states will respect the standards of investment protection under the IIAs.[104] Otherwise, they may bear significant costs of defending and losing ISDSs which will negatively affect their investment climate.[105] This shows that, even if certain constituencies of the standard of investment protection under IIAs can be invoked under domestic, EU law or international law, for example, the principle of proportionality, the lack of an IIA applicable to an investment significantly matters because it deprives investors a right to initiate an ISDS against a state allegedly violating standards of investment protection.

5.1 *The Investment Protection Under the ECT: Focus on Prevention of Indirect Expropriation*

Determining a scope of the potential application of the ECT to protect foreign investment against an adverse impact of the EU Solidarity Contribution first requires verifying whether it constitutes a 'taxation measure' under its broad definition in Article 21(7) of the ECT.[106] Then, if the answer is positive, it must be ascertained whether it

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[99] This is again a realistic element in this scenario since the Netherlands has one of the largest networks of IIAs and tax treaties in the world and is therefore considered as treaty shopping friendly in the sphere of international taxation and international investments, i.e., this EU Member State attracts many foreign investors to establish investment vehicles within its territory. *See* J. Baumgartner, *Treaty Shopping in International Investment Law* 249, 563 (Oxford University Press 2016). Additionally, the Netherlands is the most frequent home state of claimants in investment treaty arbitration just after the United States. *See* The United Nations Conference on Trade and Development (UNCTAD), *Facts on Investor–State Arbitrations in 2021: With a Special Focus on Tax-Related ISDS Cases*, IIA Issues Note 3 (Jul. 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf (accessed 29 Mar. 2023).

[100] The EU is Oman's sixth trading partner with a total of EUR 1.9 billion with 4.2% of Oman's global trade. *Oman and the EU* (27 Apr. 2022), https://www.eeas.europa.eu/delegations/saudi-arabia/oman-and-eu_en?s=208 (accessed 29 Mar. 2023).

[101] Done in duplicate at Muscat in the English language on this nineteenth day of Sep. 1987 (entered into force on 1 Feb. 1989), https://investmentpolicy.unctad.org/international-investment-agreements/countries/148/netherlands; https://wetten.overheid.nl/BWBV0002338/1989-02-01#Verdrag_2 (accessed 29 Mar. 2023). Although a new NL-Oman BIT was signed on 17 Jan. 2009, it has still not entered into force, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2637/netherlands—oman-bit-2009- (accessed 29 Mar. 2023). Hence, the only IIA currently in force between the Netherlands and Oman is the NL-Oman BIT (1987).

[102] They are, by no means, conclusive views of the authors of this article as this would require a detailed and in-depth legal and factual analysis.

[103] From the tax and investment policy-oriented analysis of the United Nations Conference on Trade and Development (UNCTAD) follows that '[a]bout 95 per cent of IIAs provide for States' advance consent to international arbitration proceedings between an investor claimant and the respondent State. Investors can directly challenge State measures before an ISDS tribunal. Recourse to domestic courts or the exhaustion of local remedies is not required under most IIAs. Tax matters are generally not excluded from ISDS entirely'. *See* UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know* 5 (2021).

[104] J. W. Salacuse, *The Law of Investment Treaties* 111 (3d ed., Oxford University Press 2021).

[105] *Ibid.*, at 161.

[106] 'For the purposes of this Article: (a) The term "Taxation Measure" includes: (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound. (b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation. (c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorised representatives. (d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties'.

indirectly expropriates the investment.[107] These questions arise due to a very broad and complicated taxation carve out in Article 21 of the ECT which means taxation measures may be targeted by the ECT only if they lead to direct or indirect expropriation.[108] As observed in section 3.1 above, the EU Solidarity Contribution could be considered as an excess profit tax. Presumably, it therefore could also be considered a taxation measure under the ECT, in particular a tax imposed on elements of income or substantially similar tax.[109] It is thus justified to verify whether the EU Solidarity Contribution may lead to an indirect expropriation of an investment.

Beyond the egregious investment treaty arbitration cases, such as *Yukos*,[110] arbitral tribunals do not accept that taxation may lead to an indirect expropriation. In particular, in case law concerning profits resulting from oil prices in excess of the price of oil on the date where the production sharing contracts (PSC) for oil fields were executed (the windfall profits), the extraordinary taxation of such profits (windfall taxes) had not been considered expropriatory.

For example, in the case *Burlington Resources v. Republic of Ecuador*, the arbitral tribunal concluded that a tax of 99% on windfall profits was not tantamount to expropriation insofar as it only 'considerably diminished Burlington's profits, but does not prove that Burlington's investment became unprofitable or worthless'.[111] Similarly, in the *Perenco v. Ecuador* case, the arbitral tribunal observed that 'the financial burden of paying 99% of the revenues above the reference price, while disadvantageous to Perenco, did not bring its operation to a halt or, to revert to the tests previously cited, effectively neutralise the investment or render it as if it had ceased to exist'.[112] In *EnCana v. Ecuador*, the tribunal observed that '[o]f its nature all taxation reduces the economic benefits an enterprise would otherwise derive from the investment; it will only be in an extreme case that a tax which is general in its incidence could be judged as equivalent in its effect to an expropriation of the enterprise which is taxed'.[113] The tribunal further observed that:

> *From the perspective of expropriation, taxation is in a special category.* In principle a tax law creates a new legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes. In itself such a law is not a taking of property; if it were, a universal State prerogative would be denied by a guarantee against expropriation, which cannot be the case. *Only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised.*[114] (emphasis added)

This demonstrates that it is highly unlikely that the EU Solidarity Contribution would be considered as expropriatory for investments of fossil fuel companies in the EU. Considering that even 99% of taxation on windfall profits of fossil fuel companies has not been seen as indirect expropriation by arbitral tribunals, there is very little room to effectively argue that at least 33% of the EU Solidarity Contribution could amount to an indirect expropriation. It would therefore be very difficult to prove that it indirectly expropriates investment in Denmark or any other Member State. It would be the case only if the Danish version of the EU Solidarity Contribution resulted in a substantial deprivation of US investment via a Dutch company in Denmark, thereby rendering it worthless and unviable, i.e., deprived capacity to generate a commercial return.[115] Such a result of the EU Solidarity Contribution in Denmark, or in any other EU Member State is highly unlikely.

The above conclusion is germane also to the alternative solution that is described in section 6.1 below. Although it compels fossil fuel companies to invest 100% of the excess profits in decarbonization technologies within a period of five years, it does not take over their profits to the EU Member States at all which is in contrast to at least a 33% takeover in the case of the EU Solidarity

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[107] Answering those questions precisely would require an in-depth and separate analysis that goes beyond the scope of this article. However, the further analysis will at least further elucidate on this and provide initial answers.

[108] *See* more on interplay between the ECT and taxation measures in C. Marian, *The State's Power to Tax in the Investment Arbitration of Energy Disputes: Outer Limits and the Energy Charter Treaty* 1–292 (Kluwer Law International 2020).

[109] Article 21(7)(b) of the ECT.

[110] *See* a series of *Yukos v. Russia cases – Yukos Universal Ltd (Isle of Man) v. Russian Federation,* PCA AA 227 (Final Award) (18 Jul. 2014); *Veteran Petroleum Ltd (Cyprus) v. Russian Federation,* PCA AA 228 (Final Award) (18 Jul. 2014); *Hulley Enterprises Ltd (Cyprus) v. Russian Federation,* PCA AA 226 (Final Award) (18 Jul. 2014).

[111] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 Dec. 2014), paras 422, 450.

[112] *Perenco Ecuador Ltd v. The Republic of Ecuador and another*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 Sep. 2014), para. 685.

[113] *EnCana Corporation v. Republic of Ecuador*, (LCIA Case No. UN3481), Award (3 Feb. 2006), para. 173.

[114] *Ibid.*, para. 177.

[115] *Burlington*, *supra* n. 111, para. 456. Cf. the notion of 'full deprivation of the economic value' of an investment in: *Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Poland*, (PCA Case No. 2014–31), Final Award (16 Feb. 2017), para. 197. *See* more on taxation as expropriation under IIAs in: A. Lazem & I. Bantekas, *The Treatment of Tax as Expropriation in International Investor – State Arbitration*, 38 Arb. Int'l 85–130 (2022). *See* more on reasons why a measure labelled as a tax is not always a tax in light of international arbitral case law in: F. Balcerzak, *Horthel v. Poland: Fair and Equitable Treatment Embodies the Rule of Law, Whereas 'Tax' Is Not Always a Tax*, ICSID Review – Foreign Investment Law Journal 11–12 (published online: 21 Nov. 2022).

Contribution. Hence, there will be no substantial deprivation of the investment in fossil fuel in the EU.[116] In fact, such an investment would not be deprived capacity for generating a commercial return at all. Rather, their capacity to generate more profits in the green energy sector would be enhanced.

5.2 *Investment Protection Under the NL-Oman BIT (1987): Focus on Proportionality, Legitimate Expectations, and Legal Certainty Under FET*

Just as the ECT, the NL-Oman BIT (1987) protects investments against an indirect expropriation via taxation.[117] In contrast to the ECT, however, taxation measures are carved out from the protection under the FET.[118] Since this standard of investment protection does not require a substantial deprivation of investment, investors have a greater chance of success for relying on the claim of violation of the FET by the EU Solidarity Contribution applicable to them than by claiming that it led to an indirect expropriation. Indeed, in some cases regarding taxation measures in the energy sector, even though investors fail in respect to claims regarding alleged expropriation, they prevail based on the merits concerning the alleged violation of the FET.[119] Hence, in this section, the analysis will regard only its relevant constituencies.

In the case law of the arbitral tribunals, '[a] consensus emerges as to the core components of FET, which encompass *the protection of legitimate expectations*, the protection against conduct that is arbitrary, *unreasonable*, *disproportionate* and lacking in good faith, and the principles of due process and transparency'.[120] At least the emphasized core components of the FET seem to be suppressed insofar as its provisions appear to be insufficiently tailored to stabilize energy prices in the EU and thus may frustrate the legitimate expectations of foreign investors. Likewise, they seem to be disproportionate, and their reasonableness does not appear to be definitely guaranteed.

First of all, the EU could impose less intrusive and therefore more proportional emergency measures than the EU Solidarity Contribution and still achieve its goals.[121] This implies that the EU Solidarity Contribution is not a proportional measure to do so insofar as there are much less intrusive and more precise and balanced measures available to achieve this. Hence, the EU Solidarity Contribution seems to compromise the requirement of reasonableness and proportionality under the FET.

The Oman company may also rely on legitimate expectations as one of the core elements of the FET. In general, this may be a valid claim whenever 'a State makes clear commitments to induce an investor to invest, and the investor relies on those commitments'.[122] It will be a case, for example, when an investor obtains an advance ruling from the authorities of an EU Member State (e.g., Danish tax authorities) concerning stable taxation of fossil fuel profits for a given period of time.[123] This will also occur when an investor operates in an industry (e.g., fossil fuel) based on permission issued by an EU Member State (e.g., Denmark) that allows the permitted activity for a specified period of time and, within that period, taxation measures change significantly thereby rendering the investment inviable as a matter of economics.[124] Since fossil fuel companies typically must obtain special permission or a licence to operate in the fossil fuel sector in EU Member States,[125] the legitimate expectations could arise in investors from that sector that rules such as these would not apply to adversely affect their further profits within the period for which they obtain permissions or licenses. Such claims may also be valid in situations in which a clear and specific commitment follows from the domestic laws of EU Member States for the purpose of inducing

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[116] Taxation would only follow after a fossil fuel company refuses to invest the excess profit without a reasonable explanation.

[117] Article 4 of the NL-Oman BIT (1987).

[118] Article 2(2) and Art. 7 of the NL-Oman BIT (1987). National treatment (NT) and most favourite nation treatment (MFN) are not applicable in respect of any special fiscal advantages accorded by the Netherlands under a tax treaty by virtue of its participation in a customs union, economic union, or similar institution (e.g., EU) or on the basis of reciprocity with a third state.

[119] *See* e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company *v.* Republic of Ecuador, ICSID Case No ARB/06/11, Award (5 Oct. 2012), paras 196, 200.

[120] *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5, Award (3 Jun. 2021), para. 355. More broadly, the arbitral tribunal in *Cairn*, *supra* n. 10, para. 1722 cited scholarship to sum up the following core principles of the FET standard in the arbitral tribunal's case law: '(1) the requirement of stability, predictability and consistency of the legal framework, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) substantive due process or protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the requirement of reasonableness and proportionality'. *See* S. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law*, 3(5) Transnat'l Disp. Mgmt. 11 (Dec. 2005).

[121] *See supra* s. 4 and *infra* s. 6.

[122] J. Biggs, *The Scope of Investors' Legitimate Expectations Under the FET Standard in the European Renewable Energy Cases*, 36(1) ICSID Rev. 100 (2021) and arbitral case law cited therein. *See* for more analysis of 'specific commitment' in the cited article as well at 109 et seq.

[123] Compare *Cairn*, *supra* n. 10, para. 1770.

[124] Compare *Horthel Systems*, *supra* n. 115, paras 254–259.

[125] For example in the Netherlands, investors need a permit to explore for and extract mineral resources like oil and gas, https://www.government.nl/topics/renewable-energy/the-future-of-fossil-fuels (accessed 29 Mar. 2023). Similar rules apply in other EU Member States, including Denmark (https://ens.dk/en/our-responsibilities/oil-gas/licences-oil-and-gas) (accessed 29 Mar. 2023).

investments in fossil fuel. If such a commitment succeeded in attracting the foreign investment and, once made, resulted in losses to the investor because of later changes in law, it may constitute a violation of an investor's legitimate expectations.[126] The *Enron v. Argentina* case regarded legislative incentives introduced by Argentina in the 1990s to encourage foreign investment in natural gas. The tribunal stated that the incentives 'contain[ed] specific guarantees to attract foreign capital to an economy historically unstable and volatile' which created 'reasonable grounds to rely on such conditions' for Enron.[127] This a means that EU Member States can provide benefits to investors via domestic legislation without having to enter into individual contracts with each of them separately.[128] If some investors decided to operate in the fossil fuel sector in EU Member States because of such 'state promises' in the legislation and then their investments were impacted by the EU Solidarity Contribution, the investors may rely on the legitimate expectations of the FET.

The FET standard has also been examined by arbitral tribunals in tax related cases together with the principle of legal certainty in the context of retroactive taxation.[129] Article 15 of the EU Regulation states that the EU Solidarity Contribution:

> shall be calculated on 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, which are above a 20 % increase of the average of the taxable profits, as determined under national tax rules, in the four fiscal years starting on or after 1 January 2018.

Accordingly, the construction of the EU Solidarity Contribution may lead to a taxation of profits in 2023 generated in an EU Member State in 2022. This creates a tax burden on profits that have already been earned by an investor in an EU Member State and thus concerns the scenario in which there was no tax burden under that Member State at the time that profits were earned. Such taxation appears to be retroactive.[130] Indeed, in some of the EU Member States, the governments openly admitted that the implementation of the EU Solidarity Contribution will inevitably lead to retroactive taxation.[131] In particular, investors may claim that they were not informed nor could they foresee that their activities in the EU Member States would be taxable at the time of their realization in 2022. This means that the EU Solidarity Contribution is a source of tax surprise that goes 'too far'[132] and thus does not meet the requirements under the FET standard.[133] Moreover, it is important to observe that the construction of the EU Solidarity Contribution, notably going back to 1 January 2018 to determine the 'increase of the average of the taxable profits', may lead to the inclusion of routine profits within its scope even though such profits should be excluded.[134] This is a consequence of the backward looking approach in determining the tax base of the EU Solidarity Contribution.

The arbitral tribunals have recognized that retroactive legislation 'suddenly and unpredictably eliminates the essential characteristics of the existing regulatory framework' and thus violates the FET standard.[135] Notably, the tribunal in the *Cairn v. India* case, a retroactive application of tax law without a specific justification (in that case, prevention of abusive tax avoidance practices) deprived investors of 'their ability to plan their activities in consideration of the legal consequences of their conduct, in violation of the principle of legal certainty'. However, this is one of the core elements of the FET standard and the rule of law more generally.[136] This implies that the broad coverage of the former encompasses the principle of legal certainty that arises out of the rule of law that must be respected not only under the

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[126] *9REN Holding S.a.r.l v. Kingdom of Spain* (ICSID Case No. ARB/15/15), Award (3 May 2019), paras 295, 301, 303, 307.

[127] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. *v.* Argentine Republic (ICSID Case No. ARB/01/3), Award (22 May 2007), para. 264.

[128] Biggs, *supra* n. 122.

[129] *Cairn*, *supra* n. 10; *Vodafone International Holdings BV v. Government of India*, PCA Case No. 2016-35, Award (25 Sep. 2020) (apart from the operational part, unpublished).

[130] As stated by Baker, retroactive tax law is law 'which imposes a tax burden, or a higher tax burden, on income that has already been earned' and thus concerns the scenario 'where at the time that income was earned (etc.), there was no tax burden under the law at that time'. P. Baker, *Retroactive Tax Legislation*, 48 Int'l Tax'n 780 (2012). *See also Cairn*, *supra* n. 10, para. 1075.

[131] For example the Dutch Government published the legislative proposal to implement the Temporary Solidarity Contribution Act (Dutch: Wet tijdelijke solidariteitsbijdrage, the WTS) on 1 Nov. 2022. In the explanatory memorandum to the WTS, s. 3 (relationship to higher law), it is explained that the WTS applies over fiscal years beginning in 2022 and therefore has a retroactive effect.

[132] *See* T. W. Wälde & A. Kolo, *Coverage of Taxation Under Modern Investment Treaties*, in *The Oxford Handbook of International Investment Law* 357 (P. T. Muchlinski, F. Ortino & C. Schreuer eds, Oxford University Press 2008).

[133] Compare A. Martín Jiménez, *International Investment Agreements and Anti-tax Avoidance Measures: Incoherencies in the International Law System, 'Systemic Interpretation' and Taxpayers' Rights*, in *Building Global International Tax Law*, Essays in Honour of Guglielmo Maisto (P. Pistone ed., IBFD 2022), s. 3.4.

[134] For these and other design problems, *see* Hebous et al., *supra* n. 33.

[135] *See Charanne B.V. and Construction Investments S.a.r.l. v. Spain*, Stockholm Chamber of Commerce (SCC) Case No. 062/2012, Final Award (21 Jan. 2016), para. 517. *See also Eiser and Energía Solar v. Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017), para. 370; *Cairn*, *supra* n. 10, paras 1757 and 1816; *Vodafone International Holdings BV v. Government of India*, PCA Case No. 2016–35, Award (25 Sep. 2020) (apart from the operational part, unpublished).

[136] *Cairn*, *supra* n. 10, paras 1757 and 1816.

IIAs but also EU law and constitutional law of the EU Member States.[137] Therefore, it is not inconceivable that a violation of the FET standard by an application of the EU Solidarity Contribution would not only lead to violations of IIAs but may also cause issues under EU primary law and the EU Member States' constitutional provisions.

However, the EU Member States may have a specific and compelling public policy objective that warrants not only the regulatory change in general but also the retroactive application of that change. The goal of protecting and enhancing the public treasury to raise revenue has appeared to be insufficient by arbitral tribunals to justify an infringement of legitimate expectations of investors.[138] There must be an identifiable and specific public purpose justifying why it would not suffice to apply the measure prospectively and why the EU Solidarity Contribution has deemed it necessary to apply it to past transactions. The EU Member States' main justification for the retroactive effect may be threefold: (1) the requirement for implementing the EU Regulation; (2) the need for contributing proportionally to improving the energy crisis in the internal market by companies from fossil fuel sector; and (3) taxation on only an unusually high surplus of profits as a result of unexpected circumstances such as distortions in the market in the run-up to and as a result of the war in Ukraine.[139] Although this line of justification may be in accordance with the domestic (constitutional) and EU legal orders, it may not be seen as justified by an arbitral tribunal that will be tasked to undertake a separate analysis of the EU Solidarity Contribution under an IIA and the FET standard.[140] First, as shown in the *Micula v. Romania (I)* case, the requirement for implementing the EU law by EU Member States is not enough to disregard the legal responsibility of Member States for the violation of investment protection standards under IIAs.[141] Second, the EU Solidarity Contribution is not necessarily a proportionate legal measure to achieve its goals as taxing an unusually high surplus of profits of fossil fuel companies in the EU does little to solve the energy crisis in the internal market or protect consumers against high energy prices.[142] Consequently, a tribunal may conclude that the implementation and application of the EU Solidarity Contribution failed to adequately balance foreign investors protected interest of legal certainty, stability, and predictability, on the one hand, and the EU Member States' power to regulate in the public interest on the other, thereby violating the FET standard,[143] e.g., under the Oman-NL BIT (1987).

6 An alternative (proportional) approach

This contribution demonstrates that there is a compelling combination of legal reasons that the EU Solidarity Contribution might be challenged. In addition, even if it might be assumed that legal action against it might fail, there are additional policy considerations below as to why it makes sense that a less legally contestable measure is a better choice for achieving the goals of the regulation. For these reasons, it is contended that the EU Solidarity Contribution should be reconsidered as part of the emergency measures to reduce high energy prices in lieu of an alternative approach.

Such an approach could – much more than the EU Solidarity Contribution does – aim to accelerate investments in fundamentally decarbonizing the economy thereby effectuating one of the overarching purposes of the Paris Agreement.[144] It would also significantly decrease a likelihood for cross border litigation and arbitration initiated by foreign investors against the EU and the EU Member States as it complies with the EU and international investment law. The last quality of the proposed approach is specifically its importance in the energy sector insofar as the biggest investment tax-related risks may arise in the energy sector due to their characteristics. They are large-scale, long-term, and capital-intensive undertakings with an average life span ranging between ten and forty years.[145] A combination of the long-term nature of projects in the energy sector with the significant upfront investments that they might require increases many risks including geological, technical, political, environmental, operational,

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137 Kuźniacki, *supra* n. 93, at 794 and the case law cited therein.

138 *Cairn*, *supra* n. 10, paras 1789–1791.

139 Compare the justification of the Dutch Government, *supra* n. 131.

140 *Cairn*, *supra* n. 10, paras 1063–1064.

141 *Ioan Micula, Viorel Micula and others v. Romania (I)*, (ICSID Case No. ARB/05/20), Final Award (11 Dec. 2013).

142 *See supra* s. 4.

143 *Cairn*, *supra* n. 10, para. 1801.

144 The Paris Agreement is a legally binding international treaty on climate change. It was adopted by 196 Parties at the Conference of the Parties (COP) twenty-one in Paris on 12 Dec. 2015 and entered into force on 4 Nov. 2016. For the full text in English, *see* https://unfccc.int/sites/default/files/english_paris_agreement.pdf (accessed 29 Mar. 2023).

145 In respect of projects in the oil and gas sector, *see* T. Martin, *International Dispute Resolution* (IPAA 2011), https://www.ipaa.org/wp-content/uploads/2016/12/IPAA_DisputeResolution2011.pdf (accessed 29 Mar.2023).

legal, and economic risks.[146] Those may evolve into disputes between foreign investors and states hosting investments whenever the states modify their law to effectuate new policy goals so that it negatively affects other investments.[147] Indeed, some of the largest arbitration disputes to date in terms of the magnitude of claims and awards regarded the energy sector (extraction of crude petroleum and natural gas).[148] These are impossible to overlook, especially in light of the 2021–2023 global energy crisis. Consequently, ensuring an as uncontroversial as possible design of the legal measures dealing with the energy crisis should be of high importance for EU policymakers.

6.1 *Speeding up the Decarbonization of the Economy*

The EU Regulation states that the proceeds from the EU Solidarity Contribution can be used to support investments structurally improving energy efficiency and investments in renewable energy sources or other decarbonization technologies. This financial support can also be provided to energy intensive industries.[149] There is only a very limited number of companies globally that are – through the production and sale of their products – responsible for a significant share of greenhouse gas emissions.[150] Moreover, these are all fossil fuel companies. There is an inherent inefficiency in the concept that these fossil fuel companies would have to pay part of their windfall profit in the form of the EU Solidarity Contribution to subsequently apply for subsidies for investments in decarbonization technologies.

This raises the question of whether it would be more advantageous to allow the fossil fuel companies keep the windfall profit and invest it directly in decarbonization technologies instead of taxing away part of it and then making (part of) those proceeds available for supporting investment in these types of technologies. Arguably, the latter route would have an advantage of the funds to support investments being available to a larger group of companies. Moreover, as the EU Solidarity Contribution does not tax away all of the excess profit; the affected fossil fuel companies would still have part of it to invest in decarbonization technologies.

On the other hand, investments by the larger fossil fuel companies could be more effective in terms of reducing costs of new technologies in combination with the speed at which they could be scaled up. This might be even more the case when it concerns investments in technologies that need further innovation to develop or those that are not yet economically viable enough to scale.[151] Moreover, the fossil fuel companies that are confronted with the EU Solidarity Contribution might not have an incentive to invest more in decarbonization technologies than they already do at present.

It might be argued that discussions similar to these considerations were part of the concerns of Estonia and Latvia as they made the following statement in the written procedure adopting the regulation on the emergency measures to address high energy prices:

> Estonia and Latvia will ensure that all surplus revenues resulting from the application of the cap are employed by investing them in accelerating additional renewable energy production. Inframarginal revenues will be accounted for and reported but not collected. In our specific circumstances, the revenues that could be obtained from the implementation of the cap on market revenues would be insignificant. We conclude that the consumers of Estonia and Latvia will benefit from the accounted inframarginal revenues the most if companies commit to directly investing the surplus profits in additional renewable energy production.[152]

Even though this statement refers to the cap on market revenues instead of the EU Solidarity Contribution, the considerations behind it are persuasive also to the latter solution. Instead of taking the funds away from the inframarginal energy producers, they would rather these energy producers commit to investing these funds in accelerating the energy transition. This article would suggest that a similar approach would be far preferable over the current EU Solidarity Contribution. Instead of taxing away (at least) 33% of the excess profits of 2022, the better alternative would be to have fossil fuel companies commit to investing

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[146] S. Vorburger & A. M. Petti, *Chapter 11: Arbitrating Energy Disputes*, in *Arbitration in Switzerland: The Practitioner's Guide* 1277 (M. Arroyo ed., 2d ed., Alphen aan den Rijn: Kluwer Law International 2018).

[147] E. Aleynikova, T. Timonen & E. G. Pereira eds, *Governing Law and Dispute Resolution in the Oil and Gas Industry* 2 (Cheltenham: Edward Elgar Publishing 2022).

[148] *See* e.g., *Cairn*, *supra* n. 10; *Yukos*, *supra* n. 110; *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. 116/2010, Award (19 Dec. 2013); *Occidental*, *supra* n. 109 and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, (ICSID Case No. ARB/06/11), Award (5 Oct. 2012).

[149] Council Regulation (EU) 2022/1854, *supra* n. 4, consideration 56 and Art. 17.

[150] For example, *see* B. Ekwurzel, J. Boneham, M. W. Dalton et al., *The Rise in Global Atmospheric CO_2, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers*, Climatic Change 144, 579–590 (2017); The Guardian, *Revealed: The 20 Firms Behind a Third of All Carbon Emissions* (9 Oct. 2019), https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions (accessed 29 Mar. 2023).

[151] *See* Bundesministerium der Finanzen, *supra* n. 6, at 14.

[152] Council of the European Union, *supra* n. 12, at 4.

100% of those excess profits in decarbonization technologies within a period of five years. To avoid deadweight loss problems, such a commitment should only include investments that come on top of the 'normal' level of green investments by fossil fuel companies. Much like the way the EU Solidarity Contribution determines the routine profit of such companies, a similar ruleset could be implemented to determine a level of routine investment in decarbonization technologies. To further ensure that there is incentive for fossil fuel companies to comply with their commitment to invest 100% of the excess profits, there should be an expression of intent to tax away the excess profit in its entirety in the case of non-compliance without a reasonable explanation.

It is contended that such a measure would not conflict with the principle of proportionality. The reasons for this are that many of the Commission's arguments with regard to such a measure being temporary would also apply here. Moreover, strengthening the economy and becoming less dependent on energy suppliers from outside the EU would fundamentally protect consumers against high energy prices in the future. Finally, this measure would still force those companies that benefitted from high energy prices to contribute but in a way that would constitute a far less extensive infringement of the economic rights of the fossil fuel sector. In fact, it would support fossil fuel companies in keeping their own promises regarding fighting climate change and decarbonization of their operations. As taxation would only occur at the refusal to keep such promises, this article argues that the solution proposed here would fall within the measure of discretion of the EU to adopt such a solution.

This solution could turn the energy price crisis into a green transition accelerator. It would turn a negative into a positive and lay the groundwork for a fundamentally stronger and more sustainable EU economy. This is in stark contrast to the EU Solidarity Contribution that would allow the excess profit resulting from the high energy prices to essentially leak away as the proceeds of the emergency measures are used primarily to finance private consumption. Not only does this nothing accelerate the green transition, it might even fuel the flames of inflation further and effectuate serious cross border disputes between foreign investors, the EU, and EU Member States.[153]

6.2 *Financing Financial Support to Vulnerable Households via VAT and Excise*

It is important to bear in mind that the proceeds of the emergency measures are – to a large extent – meant to finance financial support measures to, in particular, vulnerable households. In fact, offering them financial support to prevent the accompanying risks of further social and economic harm is one of the main reasons for the emergency measures in the first place.[154] Abandoning the idea of the EU Solidarity Contribution in lieu of an obligation to invest the windfall profit in decarbonizing the economy, therefore, does very little to helping households that are in need of financial support in the short term. In fact, this means that an estimate of EUR 25 billion out of the total estimated proceeds of approximately EUR 140 billion would not be realized. This problem still needs to be addressed. The question is therefore if the EU Solidarity Contribution is necessary to finance this financial support or if there are other means available to do so.

The high rates of inflation in 2022 mean that the tax revenues of particularly the VAT and excise duties also will be much higher than estimated. It could be argued that, if there is consensus with the premise that fossil fuel companies have been realizing a windfall profit as a result of the high energy prices, the same should be true for the tax receipts of governments. Under normal circumstances, prudent fiscal policy would prescribe that the fluctuations of VAT and excise duty receipts as a result of inflation should be considered endemic and therefore should not be used to finance (incidental) government expenditures. However, if the amplitude of these fluctuations becomes so extraordinary that the proceeds would constitute windfall profits, it could be argued that fiscal prudency rules should not prohibit these being used for incidental government expenditures. In fact, if such excess tax revenues were to be employed to compensate exactly those for whom the extra tax burden would be disproportionately high in relation to their income, it might even be considered to be prudent fiscal policy. This contribution therefore contends that the financial support for vulnerable households could and arguably should be financed by the incidental excess tax revenue receipts by EU governments.

If this reasoning is accepted, the question is if the excess tax revenue would be sufficient as a source of finance for the financial support of vulnerable households. In 2019, the total VAT revenue collected in the EU was approximate EUR 1,250 billion.[155] The average inflation rate across the EU in 2022 is almost 8,5%.[156] This means that, compared to 2019, the extra revenue that might be expected in 2022 is about EUR 100 billion. It is important to consider that this entire increase in revenue should not be viewed as

Notes

[153] Hernandez, *supra* n. 92 and *supra* s. 4.

[154] European Commission, *supra* n. 14, at 1.

[155] Statista, *VAT Revenues in the European Union in 2019*, https://www.statista.com/statistics/1175857/vat-tax-revenues-eu/ (accessed 29 Mar. 2023).

[156] Statista, *Harmonized Index of Consumer Prices (HICP) Inflation Rate of the European Union in November 2022*, by country, https://www.statista.com/statistics/225698/monthly-inflation-rate-in-eu-countries/ (accessed 29 Mar. 2023).

excess revenue. Moreover, the inflation rate would not translate one-to-one into extra revenue as there are likely leakage effects. Nonetheless, this article would suggest that the excess tax revenue in the VAT and excise taxes would be sufficient to replace the EU Solidarity Contribution as a source of finance for the financial support measures to vulnerable households.

7 Conclusion

This paper has demonstrated that Article 122(1) TFEU initially appears to provide a sufficient legal basis for the EU Solidarity Contribution. However, a further analysis reveals that particularly the Member States purchasing natural gas in excess of the EU filling trajectory might have significantly contributed to upward pressure on energy price development. The article discusses implications of this observation for the EU Solidarity Contribution with regard to the principle of proportionality and the specific requirements of Article 122(1) as a valid legal basis for the EU Solidarity Contribution.

It is observed that CJEU case law allows significant discretion for EU measures and that the legality of such measures will likely only be affected if they are manifestly inappropriate for achieving the objective and/or if the Commission clearly exceeds the limits of its discretion. However, this lenient approach of the CJEU to the legislative discretion of the Commission may become stricter if the EU Solidarity Contribution interferes with fundamental rights. It cannot be excluded since such economic rights are embedded within the fabric of human rights.

Several separate arguments have been considered on the basis of which it could be stated that the EU Solidarity Contribution is either not the most effective and efficient measure available to achieve its goal or that the Commission might have gone beyond the limits of its competence. Moreover, it is argued that the EU Solidarity Contribution may compromise the protection of investments under the IIAs as the current design, notably the possible retroactivity of the measure and the risk that routine profits might also be targeted, might violate the FET. Perhaps each of these legal arguments taken separately would not directly affect the legality of the EU Solidarity Contribution, but, when combined, they could form a persuasive argument to question the legitimacy of EU Solidarity Contribution. Moreover, given the temporary nature of the EU Solidarity Contribution and its objective to finance financial support measures, it might be assumed that the EU Commission would prefer as little (legal) controversy as possible regarding this emergency measure.

In light of this, it is argued that the EU Solidarity Contribution should be reconsidered. As an alternative, it is proposed that there should be a legal commitment for fossil fuel companies to invest 100% of their realized excess profit in decarbonizing the economy in the long term. This would be accompanied with an expression of an intent to tax these away in their entirety should it become apparent that the investments are not actually realized without there being a reasonable explanation for non-compliance. The article offers a basic design as to how such an obligation could be imagined. Finally, it is argued that the excess (windfall) revenue collected from VAT and excise due to high inflation in the EU in 2022 could replace the EU Solidarity Contribution as a means of financing financial support measures to vulnerable households. All elements of the alternative solution appear to be compatible with EU and international investment law as well as more reasonable as measures to address an ongoing energy crisis. Their additional quality lies specifically with the capacity to accelerate decarbonization of the economy, which is one of the overarching purposes of the Paris Agreement, and reduce a likelihood for cross border disputes between foreign investors and EU Member States and the EU regulatory bodies.