SHIFTING ROLE OF NATIONAL REGULATORY AUTHORITIES? LEVY ON SURPLUS MARKET REVENUES OF ELECTRICITY PRODUCERS – IMPLEMENTATION STUDY & LESSONS LEARNED

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Abstract: *This paper examines an emerging trend where the responsibilities of certain national regulatory bodies are being shifted and expanded beyond the traditional agenda. Using the energy sector as a case study, the author analyzes the levy on surplus market revenues of inframarginal electricity producers, as outlined in EU Regulation 2022/1854, and explores the evolving role of national energy regulatory authorities in relation to the new instruments for administration and collection of this levy. The levy can be classified as a tax instrument; therefore, it falls outside the core energy regulatory agenda. The paper begins with a brief overview of the characteristics of the windfall taxes and the legislative framework of the levy under EU Regulation 2022/1854. Subsequently, it identifies two categories of implementation approaches in EU Member States. It contrasts these with the approach taken by the Czech Republic, specifically regarding the choice of the responsible authority and its assigned tasks. The analysis suggests that the Czech approach exemplifies a trend where regulatory bodies are assigned responsibilities on top of and beyond their traditional core agenda, often without adequate personnel, knowledge, or financial support. The paper also discusses what pitfalls and challenges are associated with such a shift in the traditional regulatory agenda.*

Keywords: *surplus market revenues, national regulatory bodies, energy, windfall tax*

INTRODUCTION

Recently, an emerging trend of interconnection and overlap across different sectors can be noticed. This has led sector regulatory authorities to address issues that extend beyond their primary legal competencies and focus. In other words, the regular agenda and the standard role they have had in the public sector for many years have been changing and shifting, more specifically, broadening. One of the examples can be observed in the energy sector. It is the national regulatory agencies for energy that ever more often must exercise powers outside the scope of their current agenda related to price and energy market regulation and supervision – all that because of rapid technological development and, in the last couple of years, the energy crisis. Energy regulators ("NRA" or "NRAs") nowadays therefore tackle the issues regarding cybersecurity,[1] also national (energy) security[2] or, as is the focus of this article, they can be assigned with competencies related to tax administration. As this article examines, that happened in the case of the Czech Energy Regulatory Office ("ERO") being assigned a crucial role in the caps on excess revenues from electricity generated by inframarginal electricity producers.

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[1] See Commission Delegated Regulation (EU) 2024/1366 of 11 March 2024 supplementing Regulation (EU) 2019/943 of the European Parliament and of the Council by establishing a network code on sector-specific rules for cybersecurity aspects of cross-border electricity flows

[2] See Article 3a of the revised Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to natural gas transmission networks and Repealing Regulation (EC) No. 1775/2005 or Article 15 of the Regulation (EU) 2024/1789, which requires certification of gas storage operators.

On 7 October 2022, Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices ("Regulation 2022/1854") was published in the Official Journal of the European Union to combat the energy crisis and high energy prices. Regulation 2022/1854, or rather the measures and instruments contained therein, went far beyond the usual framework of market measures.[3] Together with Regulation 2022/2578,[4] Regulation 2022/1369,[5] and Regulation 2022/2576[6] Regulation 2022/1854 is part of the EU's legislative efforts to provide Member States with tools to deal with high energy prices and to support and protect end customers. These tools would likely violate the principles of the liberalized European energy market if introduced in standard free and open market conditions.

ACER's analysis[7] of the energy crisis identified several of its causes and proposed certain measures, out of which many were later adopted. One of them was a tax institute – a so-called levy on surplus market revenues paired with a price cap on the electricity retail price. This levy revenues is an exceptional non-market measure of tax nature which has (and, as it turned out, actually had)[8] the potential to negatively affect the EU market environment in the energy sector.

Although the measure was introduced by a directly applicable Council Regulation in accordance with the procedure laid down in Article 122(1) of the Treaty on the Functioning of the European Union ("TFEU"), the Regulation left a considerable degree of flexibility for Member States to modify the measure. The designation of a national authority responsible for collecting the levy and supervising its correct calculation was one of the possible modifications. As it was left at the discretion of Member States, it was likely that the national approach would differ.

This text is based on the premise that the role of national regulatory bodies is evolving and shifting. The article aims to be an implementation study on how the above-described instrument of levy on surplus market revenues was implemented in selected Member States, particularly which body was chosen as a responsible authority and which powers were granted to them. A situation of new tax-related powers entrusted to ERO is chosen as one of the examples of such shift because, as it is argued, the levy on surplus revenues under Regulation 2022/1854 is by its nature a tax institute and therefore does not represent standard regulatory agenda in the energy sector.

[3] Measures used during energy crisis would have not been an option in liberalized energy market environment until the energy crisis began in autumn 2021 and escalated by Russia's attack on Ukraine in February 2022. Such measures also potentially undermine the EU's continuous energy market liberalization efforts.

[4] Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices, which implements market correction mechanism for gas supply security.

[5] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, which provides for voluntary gas demand reductions to help address the gas crisis in a coordinated manner.

[6] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders.

[7] Agency for Cooperation of European Energy Regulators. ACER's Final Assessment of the EU Wholesale Electricity Market Design. In: *ACER* [online]. 2022 [2024-03-01]. Available at: <https://www.acer.europa.eu/sites/default/files/documents/Publications/Final_Assessment_EU_Wholesale_Electricity_Market_Design.pdf>.

[8] Report from the Commission to the European Parliament and the Council on the review of emergency interventions to address high energy prices in accordance with Council Regulation (EU) 2022/1854 (COM/2023/302 final). In: *EUR-Lex European Commission* [online]. [2024-09-26]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0302>.

Two main approaches across different Member States are identified based on analysis of respective national legislative acts or other available sources. The Czech implementation approach is then analyzed and put into contrast since it does not fall within those two categories. The last chapter contains recommendations and lessons learned that can be drawn from how the collection and supervision of levy on surplus market revenues has been set up in Czech legislation. The text then concludes that such an abrupt and unprecedented role shift is difficult for the responsible body to handle without enough personal and knowledge support and, combined with time constraints, negatively impacts the exercise of standard tasks and powers of the respective regulatory bodies.

I. WINDFALL TAX

A windfall tax refers to a levy on excessive, abnormal, and simultaneously unexpected or unpredictable revenues of certain entities, which would not normally be earned under typical market conditions.

These revenues, known as "windfall profits," accrue to entities essentially by chance, "by luck", without any corresponding improvement in the quality of their products or services. The revenues generated from windfall profits are typically redistributed through the windfall tax to benefit broader segments of society.[9]

In the energy sector, certain groups of actors began to generate windfall profits as a result of the post-COVID19 economic recovery and Russia's attack on Ukraine, when wholesale electricity and gas prices have increased extremely over a short period, burdening primarily final energy consumers, such as households and businesses. These price increases were justified neither by the decisions or business strategies of these energy actors nor by improving the quality of the commodities they supply or of the services they provide. The introduction of a (temporary) windfall tax in such circumstances was primarily justified by the fact that windfall profits generated under such conditions are essentially immoral from a societal point of view, as energy enterprises benefit from a certain geopolitical situation that negatively impacts other population groups.[10]

The collection of windfall tax inherently interferes with the freedom of entrepreneurship by limiting the amount of income that entrepreneurs are entitled to retain from their activities, and thus, it carries certain risks, *"These 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. Investors prefer a stable, predictable tax regime over the risk of future temporary taxes when prices rise."*[11] The introduction of a temporary windfall tax also decreases certainty for investors in renewable energy

[9] NICOLAY, K., SPIX, J., STEINBRENNER D., WOELFING, N. The effectiveness and distributional consequences of excess profit taxes or windfall taxes in light of the Commission's recommendation to Member States. In: *europarl.europa.eu* [online]. March 2023 [2024-03-01]. Available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740076/IPOL_STU(2023)740076_EN.pdf>.

[10] BAUNSGAARD, T., VERNON, N. Taxing Windfall Profits in the Energy Sector. In: *International Monetary Fund* [online]. 30. 8. 2022 [2024-03-01]. Available at: <https://www.imf.org/en/Publications/IMF-Notes/Issues/2022/08/30/Taxing-Windfall-Profits-in-the-Energy-Sector-522617>.

[11] Ibid., p. 3.

sources ("RES"), as these producers are one of the groups likely to generate substantial windfall profits. This uncertainty, however, goes against EU efforts to introduce as much RES-generated electricity as possible. Furthermore, the reason why some electricity producers generate windfall profits may be attributed to the very set-up of the market mechanisms and market design.[12]

II. REGULATION 2022/1854

Regulation 2022/1854 as a response to the energy crisis to tackle high energy prices and provide greater protection to end consumers introduces several exceptional, targeted and time-limited measures to mitigate the impact of high energy prices.[13] The measure of cap on market revenues of certain types of generating power plants was based on the principles of the windfall tax. The collected levy in the amount of windfall profit of electricity producers was then to be redistributed to combat high retail prices and to help end consumers. Due to the interconnected nature of the EU energy markets, coordinated action by all Member States was essential to avoid competition distortions among electricity producers, even though these measures also affect the market's independence.

Article 6 of Regulation 2022/1854 introduces a mandatory price cap on the market revenues of certain groups of electricity producers – this applies to those producers with lower marginal costs, i.e. RES, nuclear or lignite power plants.[14] The cost of generating electricity from these sources was significantly lower than the price of electricity traded on the wholesale market, which, at that time, made these producers less sensitive to market changes.[15]

"A market revenue cap that is uniform across the Union is best suited to maintaining the functioning of the internal electricity market, as it maintains price competition between electricity generators based on different technologies, in particular as regards renewable energy sources."[16] The level of the cap was the subject of considerable political debate, but the cap was ultimately set to reflect the reasonable expectations of market participants.[17] In other words, the level of the cap should reflect what investors reasonably expected to earn based on the assumed long-term average price of electricity on wholesale markets. However, the actual profits of inframarginal electricity generators, which were not and could not have been foreseen due to unprecedented political events, were notably higher

[12] Ibid., pp. 4, 6.
[13] These are coordinated reductions in demand, series of measures on fossil fuels, including a temporary solidarity contribution by respective companies, and last but not least, measures to cap market revenues from certain types of generating power plants and to distribute surplus revenues exceeding this price cap to final electricity consumers.
[14] Regulation 2022/1854, recital point 32.
[15] For further reference on the functioning of electricity wholesale pricing, energy crisis, its drivers and electricity market design reform proposal see: Agency for Cooperation of European Energy Regulators. ACER's Final Assessment of the EU Wholesale Electricity Market Design. 2022. In: *ACER* [online]. April 2022 [2024-09-26]. Available at: <https://www.acer.europa.eu/sites/default/files/documents/Publications/Final_Assessment_EU_Wholesale_Electricity_Market_Design.pdf>.
[16] Regulation 2022/1854, recital point 27.
[17] The expectations of profits that investors had had at the time they had invested in generation facilities.

than what investors could have anticipated when making the initial investment. Therefore, these surplus revenues became the subject of capping and redistribution. This is the basic principle of the windfall tax described above, although the Regulation does not name the measure as such.[18] Because the levy is regarded as a tax instrument, it should not, either primarily or entirely, be administered by energy regulatory authority. Moreover, as the Commission[19] highlights, there have been significant negative effects associated with the introduction of this type of windfall tax. Therefore, even in the proposal for a new market design,[20] the Commission proposed to use different measures that are better designed to achieve the desired objectives (i.e. to collect and redistribute the surplus revenues of certain generators, e.g. the two-way contracts-for-difference).

Regulation 2022/1854 allows for a significant degree of flexibility,[21] but does not address the actual calculation of the levy and the process of its collecting, supervising and managing. This includes the designation of the authority responsible for these tasks. It can be assumed that it is so because the levy on surplus revenues is a *de facto* windfall tax – a type of tax or tax revenue that the EU is not in default authorized to impose without further consideration of its competencies under the TFEU, which primarily covers only the harmonization of indirect taxes. Since the surplus revenue levy does not align well with the characteristics of indirect taxes, it can be assumed that for this reason Regulation 2022/1854 delegates the responsibility for procedural arrangements and the designation of the responsible authority to the Member States. This also suggests that NRAs for energy should not be a "first-choice" responsible body.

III. IMPLEMENTATION OF SURPLUS MARKET REVENUES LEVY IN SELECTED EU COUNTRIES

Given the considerable degree of flexibility or the (deliberate) lack of regulation of certain aspects, the implementation of Regulation 2022/1854 (not exclusively) concerning the introduction of the cap on surplus revenues and collection of respective levy varies consid-

[18] And for obvious reasons – EU has limited powers in the tax policy area, mainly only focuses on harmonization of indirect taxes.

[19] Despite these efforts, the Commission's report ultimately concludes that the (heterogeneous) implementation of this measure had a negative impact on the frequency of PPA closures, and thus on efforts to create the most liquid market possible, as well as on regulatory uncertainty for market participants and investors, which further adversely affected new investments, especially in RES. The Commission therefore does not recommend extending the duration of this measure and urges Member States to also end the levy on excess revenues on the expiry date of Regulation 2022/1854, which was 30 June 2023. (See Report from the Commission to the European Parliament and the Council on the review of emergency interventions to address high energy prices in accordance with Council Regulation (EU) 2022/1854 (COM/2023/302 final), pp. 11–13. In: *EUR-Lex* [online]. [2024-09-26]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0302>.

[20] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design (COM/2023/148 final).

[21] In relation to the level of the cap, Regulation 2022/1854 gives Member States a certain degree of flexibility, in particular by listing the national crisis measures that Member States may apply according to Article 8 of Regulation 2022/1854, provided that they are proportionate and non-discriminatory, always cover at least costs and do not jeopardize the market or investment signals. Significant degree of flexibility is signature for the entire Regulation, making it almost directive-like.

erably across EU Member States, as also noted by the Commission in its evaluation report.[22]

For the purposes of this article, the key issue is how the selected EU Member States have approached the question of which national authority will be responsible for the collection, administration and supervision of the surplus revenue levy. Member States were selected on the basis of a meta-analysis of implementation across all Member States in order to include representative implementation patterns for the range of approaches chosen. Two main categories were identified. It includes Member States that have approached the collection of the surplus revenue levy as a tax (Slovakia, Hungary, Netherlands), as they have chosen the tax administration authorities as the competent authority for its collection, administration and control, as well as those that have delegated selected or only control (in the sense of verifying the correctness of the calculation of the amount of the levy) powers to the energy regulatory authority (Poland, Austria, Germany, Denmark). The core of the following discussion then is putting the approach of the Czech Republic in contrast with other Member States' models because it differs significantly from the two identified approaches to implementation. The comparison with the Czech implementation approach throughout the following text is limited to determining which authority was designated as responsible, as the primary purpose is to highlight the unnecessarily broad scope of implementation in the Czech Republic, particularly concerning the tasks and competencies assigned to ERO, as described in the following passage of the text.

III.1 Implementation through full empowerment of the tax administration authority

As examples of the approach, which is characterized by full involvement of the tax administration authority, Slovakia, Hungary and the Netherlands were chosen.

Slovakia

Slovakia introduced the market revenue caps by amendment of Act No. 251/2012, on Energy.[23] This legislation was to be applied even after the expiry of Regulation 2022/1854 in June 2023.[24] The levy on the surplus income was paid by obliged producers to the account of the Slovak Financial Directorate[25] and, according to § 25j of the Energy Act, the administration of the levy is carried out by the tax office which is competent for the ad-

[22] Report from the Commission to the European Parliament and the Council on the review of emergency interventions to address high energy prices in accordance with Council Regulation (EU) 2022/1854 (COM/2023/302 final). In: *EUR-Lex* [online]. [2024-09-26]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0302>; ENACHE, C. What European Countries Are Doing about Windfall Profit Taxes. In: *Tax Foundation* [online]. 20. 6. 2023 [2024-03-01]. Available at: <https://taxfoundation.org/data/all/eu/windfall-tax-europe-2023/>.

[23] Law Nr. 251/2012 Z. z., o energetike a o zmene a doplnení niektorych zákonov [On Energy and on Amendments to Certain Laws]. In: *Slov-Lex* [online]. [2024-03-01]. Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2012/251/20230205>.

[24] Law Nr. 251/2012, § 25g.

[25] Finančné riaditeľstvo SR [Financial Directorate of the Slovak Republic]. In: *FINANČNÁ SPRÁVA SLOVENSKÁ REPUBLIKA* [online]. [2024-03-01]. Available at: <https://www.financnasprava.sk/sk/financna-sprava/organy-financnej-spravy/financne-riaditelstvo>.

ministration of the income tax of the obliged entity according to the Slovak Tax Code. The Slovak NRA URSO is obliged to provide all assistance in the collection and administration of the levy, if requested. The Tax Code shall then apply mutatis mutandis to the administration of the surplus revenue levy. The Ministry of Economy is the second-instance authority concerning the levy on excess income, in matters where the Financial Directorate decides under the Tax Code (i.e. in matters where an administrative procedure ending with an administrative decision is in progress). The notification of the levy on surplus income submitted by the obliged entity is considered under Slovak law to be a tax return under the Tax Code.

Hungary

Surplus revenue levies are part of the Hungarian tax legislation, there is no direct adaptation of Hungarian law to Regulation 2022/1854. Hungary addresses this issue directly through the windfall tax, which had been introduced before this measure was discussed at the EU level. The reporting obligations arising from Regulation 2022/1854 are the responsibility of the relevant ministries, the Hungarian NRA MEKH has no powers, tasks or obligations in this respect.[26]

The Netherlands

Dutch NRA (Authority for Consumers and Markets) is not involved in the process of surplus revenue levies at all. The levy is considered as a tax and requires tax returns to be filed. The obliged subjects must determine the right amount of the tax by themselves and then pay it on the account of the Dutch Tax and Customs Administration, which is responsible for the tax collection, together with the market revenues report. The General Tax Act is applied as far as administrative penalties are considered when the obliged subjects do not comply with the filing deadline or fail to pay the whole or part of the levy. The substantive disputes about the taxable market revenues are settled by the Dutch Emissions Authority (Nederlandse Emisseautoriteit NEa).[27]

III.2 Implementation involving control powers of the energy regulatory authority

The other identified approach involved some degree of control powers of energy NRAs. Poland, Austria, Germany or Denmark are shown as examples. This group represents a possibly sustainable, limited involvement of energy NRAs in the levy collection process, unlike the Czech case, which is analyzed in the following chapter. However, because of the nature of the discussed levy, it is questionable, whether the NRA could be engaged even less or not at all, like the previously discussed approach suggests, as especially nowadays NRAs are very busy with performing other new tasks directly related to their standard agenda and position as an independent energy market regulator.

[26] <THAN, K., SZAKACS, G. Hungary sees reforms boosting bond demand by up to $ 5.3 bln. In: *reuters.com* [online]. 1. 6. 2023 [2024-03-01]. Available at: <https://www.reuters.com/article/hungary-taxes-idUSL1N37T0BV>.

[27] Draft bill on inframarginal electricity levy. In: *KMPG – Meijburg&co.* [online]. [2024-03-01]. Available at: <https://meijburg.com/news/draft-bill-inframarginal-electricity-levy>.

Poland

Polish legislation[28] considers the levy on surplus revenues as a levy paid to the Price Difference Reimbursement Fund (Fundusz energetyczny), which is administered by the market operator (Zarzadca Rozliceń S.A.). The market operator also collects the levy and controls the correctness of its calculation. A revenue cap is determined for each generating resource type, and the levy is calculated on the basis of a uniform formula. The levy is payable for each month from December 2022 until the end of 2023 – i.e. six months longer than required by the Regulation 2022/1854.[29] In the event of formal deficiencies or errors in the calculations, or any uncertainties regarding their accuracy, the market operator is responsible for requesting the obliged entity to perform corrections. If the obliged entity does not respond or if the market operator issues a negative verification, the matter is referred to the Polish NRA URE with a request for an audit. URE checks the calculation of the levy. If the calculation is incorrect, the obliged entity must pay the rest of the levy plus interest for late payment. If the entity fails to pay, the obligation is enforced and further penalized by URE as an administrative penalty under the Polish Energy Act[30] and the newly adopted Levy Act.[31] If URE concludes during the audit[32] that the levy should have been lower, the corresponding amount is carried over to the next month or returned to the obliged entity.[33]

Austria

The Austrian implementation of Regulation 2022/1854 can be found in the Austrian Federal Energy Crisis Grant Act ("EKSBG Act").[34] *"90% of the excess revenue, i.e. the positive difference*

[28] This legislation has been challenged by generators - they claim that the way Regulation 2022/1854 has been adapted to the Polish legal system is incompatible with EU law, discriminating against generators with higher costs or with long-term PPAs, as profits are not included in the calculation, but the calculation is based on revenues. See LEE, A. Green power giant EDPR sues Poland and Romania over 'unfair' windfall raids. In: *rechargenews.com*. [online]. 9. 1. 2023 [2024-03-01]. Available at: <https://www.rechargenews.com/energy-transition/green-power-giant-edpr-sues-poland-and-romania-over-unfair-windfall-raids/2-1-1384934>.

[29] BAUNSGAARD, T., VERNON, N. *Taxing Windfall Profits in the Energy Sector.* p. 64.

[30] Przypomnienie o obowiązku odpisu na Fundusz Wypłaty Różnicy Ceny dla wytwórców i spółek obrotu oraz złożenia sprawozdania [Reminder on the Obligation to Write off the Fund for Payment of Differences in Prices for Producers and Trading Companies and Submit a Report.]. In: *gov.pl* [online]. 19. 1. 2023 [2024-03-01]. Available at: <https://www.gov.pl/web/klimat/przypomnienie-o-obowiazku-odpisu-na-fundusz-wyplaty-roznicy-ceny-dla-wytworcow-i-spolek-obrotu-oraz-zlozenia-sprawozdania>.

[31] Article 31 and 56. Ustawa z dnia 27 października 2022 r. o środkach nadzwyczajnych mających na celu ograniczenie wysokości cen energii elektrycznej oraz wsparciu niektórych odbiorców w 2023 roku oraz w 2024 roku [Act of 27 October 2022 on Emergency Measures aimed at Reducing Electricity Prices and Supporting Certain Customers in 2023 and 2024]. In: *Kancelaria Sejmu* [online]. [2024-03-01]. Available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220002243/U/D20222243Lj.pdf>

[32] JANKIELEWICZ, K., ROYSKOWSKI A., CHYB, N. Energy price caps and other emergency interventions in the electricity market in Poland in 2023. In: *JD Supra* [online]. 28. 11. 2022 [2024-03-01]. Available at: <https://www.jdsupra.com/legalnews/energy-price-caps-and-other-emergency-9171110/>.

[33] Obowiązek przekazywania przez przedsiębiorstwa energetyczne tzw. „odpisów na Fundusz" w celu sfinansowania tzw. „zamrożenia cen" dla gospodarstw domowych, MŚP oraz wybranych odbiorców sektora publiczno-socjalnego w 2023 r. [Obligation for energy companies to transfer the so-called „subscriptions to Fund" in order to finance the so-called „freezing prices" for households, SMEs and selected recipients of the public-social sector in 2023]. In: *skslegal.pl* [online]. 29. 11. 2022 [2024-03-01]. Available at: <https://skslegal.pl/wp-content/uploads/2022/12/Raport-SKS-Odpisy-na-fundusz-.pdf>.

[34] Bundesgesetz über den Energiekrisenbeitrag-Strom (EKBSG). In: *BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH* [online]. 29. 12. 2022 [2024-03-01]. Available at: <https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2022_I_220/BGBLA_2022_I_220.pdfsig>.

between the debtor's market income and the limit, is paid as Energy Crisis Grant – Electricity (EKB-S) to the competent tax authority. This amount of the contribution is deductible as an operating expense under Section 4(4) of the Austrian Income Tax Act (EStG)."[35] This crisis contribution is therefore considered being a tax.[36] According to Section 6 of the EKSBG Act, the tax administration office is the responsible body, the levy is calculated by the obliged entity itself and paid to the competent tax administration office in due time. Austrian NRA Energie-Control Austria for the Regulation of the Electricity and Natural Gas Industries ("E-Control") carries out, at the request of the competent tax authority, a plausibility check regarding the obligation to pay contributions and the correct calculation of the contribution. E-Control is entitled to inspect and request information on all data and documents of the debtor. The additional monetary costs needed by E-Control to perform tasks under the EKSBG Act shall be reimbursed by the Federal Minister of Finance from the revenues of the EKSBG Act.[37]

Germany

The German legislation (so called "StromPBG Act") required to pay 90 % of the surplus revenues generated by an electricity producer to a system operator to whose network the electricity producer (except RES below 1 MW of installed capacity) is connected.[38] The transmission system operator set up an online portal where the obliged entities had to register and fill in forms and reports. Based on this data, the portal then made automatic calculations for the obliged electricity producers. The system operator then paid the total amount for all electricity producers connected to its system to the upstream transmission system operator ("TSO"). TSO verified the amount using the data from the portal.[39] The transmission system operator then had obligations under the Strom-PBG Act (§ 3 - 12a) to reduce end-user prices using the collected levy. In Germany, the levy is not considered a tax measure, and financial or tax authorities are not involved in the process; however, the role of German NRA BNetzA is also quite limited, and the majority of the procedures are up to the system operators.[40]

The obligation to pay the surplus revenues was in effect till 30 June 2023 like the Regulation 2022/1854 and Germany did not prolong its validity.[41] The role of the German NRA

[35] LAWSON, Y., WENZL, M. Austrian Federal Law on Energy Crisis Contribution / Electricitz (EKBSG) and Austrian Federal Law on Energy Crisis Contribution – Fossil Fuels (EKBFG). In: *steuernachrichten.pwc.at* [online]. [2024-03-01]. Available at: <https://steuernachrichten.pwc.at/en/blog/2022/12/23/austrian-federal-law-on-energy-crisis-contribution-electricity-ekbsg-and-austrian-federal-law-on-energy-crisis-contribution-fossil-fuels-ekbfg/>.

[36] Article 3 of Bundesgesetz über den Energiekrisenbeitrag-Strom (EKBSG). In: *BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH* [online]. 29. 12. 2022 [2024-03-01]. Available at: <https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2022_I_220/BGBLA_2022_I_220.pdfsig>.

[37] Article 1, § 10 of Bundesgesetz über den Energiekrisenbeitrag-Strom (EKBSG). In: *RIS* [online]. 29. 12. 2022 [2024-03-01]. Available at: <https://www.ris.bka.gv.at/eli/bgbl/I/2022/220/20221229>.

[38] Gesetz zur Einführung einer Strompreisbremse (Strompreisbremsegesetz - StromPBG). In: *Bundesministerium der Justiz, Bundesamt für Justiz* [online]. 20. 12. 2022 [2024-03-01]. Available at: <https://www.gesetze-im-internet.de/strompbg/BJNR251210022.html>.

[39] Regelungen für Anlagenbetreiber. In: *netztransparenz.de* [online]. [2024-03-01]. Available at: <https://www.netztransparenz.de/StromPBG/Anlagenbetreiber>.

[40] § 13 to 19 of Strom-PBG Act.

[41] Abschöpfung von Überschusserlösen im Rahmen der Strompreisbremse läuft aus. In: *bmwk.de* [online]. 9. 6. 2023 [2024-03-01]. Available at: <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2023/06/20230609-abschoepfung-von-ueberschusserloesen-im-rahmen-der-strompreisbremse-laeuft-aus.html>.

BNetzA is mainly supervision and monitoring.[42] The provisions of the German Energy Act on the exercise of the BNetzA's powers under the StromPBG Act then apply to BNetzA's powers and tasks connected with the levy.[43] BNetzA has the power to extend the deadline for the electricity producers to pay the levy. In the event of non-compliance with the payment obligation, the volume of the levy is increased from 90 % to 100 %. For a particular segment of the levy (related to hedging instruments), the relevant TSO is entitled and obliged to take legal action to enforce the payment obligation of the electricity producer if the levy is not paid even within the additional time limits.[44]

Denmark

According to Danish legislation, the responsibility for levy administration is shared between the Danish Energy Agency and the tax authorities. The Danish Energy Agency is tasked with verifying whether a specific electricity producer falls under the legal obligation to pay the levy on excess market revenues or if the producer is exempt (for instance, if it is classified as a demonstration project or a hybrid plant). However, it is essential to note that the Danish Energy Agency does not issue binding administrative decisions in this matter. The tax authorities are responsible for overseeing the submission of required reports by producers in due time and ensuring the correct calculation of the levy. Additionally, the tax authorities handle certain aspects of the administrative procedure. Binding administrative decisions are issued by the Ministry for Climate, Energy and Utilities. The National Tax Tribunal serves as the appellate body for decisions made by both the tax authorities and the Ministry.[45]

IV. IMPLEMENTATION IN THE CZECH REPUBLIC

The Czech Republic responded to Regulation 2022/1854 by amending[46] Act No. 458/2000 Coll., on the conditions of business and the exercise of state administration in the energy sector ("Energy Act"). This amendment was enacted swiftly, utilizing an extraordinary legislative procedure with very short *vacatio legis*. Under the amendment, the obligation to pay the levy on surplus revenues of inframarginal producers remained in effect until the end of 2023. Consequently, the Czech Republic is among several other Member States that have not responded to the recommendation of the Commission or several associations of electricity producers[47] to terminate the caps and levies on surplus revenues as soon as possible. Despite the respective provisions no longer being in force, collecting these revenues has still been ongoing as they are collected retrospectively.

[42] § 24 and 40 of Strom-PBG Act.
[43] § 40/3 of Strom-PBG Act.
[44] § 41 of Strom-PBG Act.
[45] New Act to introduce a cap on electricity production revenues. In: *bechbrunn.com* [online]. 3. 5. 2023 [2024-03-01]. Available at: <https://www.bechbruun.com/en/news/news/new-act-to-introduce-a-cap-on-electricity-production-revenues>.
[46] By the Act no. 365/2022 Coll.
[47] Electricity industry priorities on inframarginal revenue caps. In: *api.solarpowereurope.org* [online]. 5. 4. 2023 [2024-03-01]. Available at: <https://api.solarpowereurope.org/uploads/Joint_industry_statement_on_inframarginal_revenue_cap_bce448962d.pdf?updated_at=2023-04-05T13:47:35.205Z>.

The levy is constructed using tax terminology and procedural provisions outlined in the Tax Code. Under Czech legislation, a levy can be considered a tax *sensu largo*, meaning it is a compulsory monetary payment of tax character. The subject of the levy is the surplus income, defined as the positive difference between the market income and the market income ceiling for the levy period.[48]

Obliged entities must simultaneously report and pay the calculated levy amount and submit a settlement report for the entire levy period. The regulation in the Energy Act is fragmentary and is complemented by the provisions of the Tax Code – that is likely to cause interpretative ambiguities.

Another issue is the designation of the responsible body for administering the levy on surplus revenues. In the Czech Republic, this responsibility falls primarily on ERO, which is somewhat unexpected given the fact that levy can be classified and has the pretty much the same procedural rules as a tax.

ERO administers the surplus revenue levy using the procedural rules of the Tax Code, performing tasks typically carried out by a "standard" tax administrator, e.g., when collecting income tax. It receives (electronic) submissions, verifies their formal and material correctness, including the proper and lawful calculation of the levy, communicates formally and informally with the obliged entities. Additionally, ERO issues administrative decisions (payment order) for each advance payment and settlement report, monitors compliance and takes the necessary steps to penalize non-compliance.

ERO has not previously handled such an extensive experience procedure under the Tax Code, nor does it have experience with the administration and collection of monetary benefits. The most similar activity it has engaged in is the imposition of administrative fines for offenses under the Energy Act, but in that case, only partial and limited (as to the penalty amount). In contrast, administering the levy on surplus revenues requires a more complex knowledge and experience that goes beyond that of the general procedure under the Administrative Code and Tax Code.

A significant problem was time sensitivity and pressure, as ERO had only a few weeks to prepare before the law entered into effect. It required organizational change, redeployment of some staff and recruitment and training of new personnel, or the development of new IT solution. It can be assumed that tax authorities, given their regular involvement in tax-related matters, would have been much better prepared (in terms of know-how, staff, hardware and software) to meet most of these requirements. Nonetheless all tasks were assigned to the energy regulator ERO, which had to respond quickly under considerable time pressure.

In the context of national implementation by Member States, as discussed in Chapter 4, it can be questioned whether the Czech implementation was efficient or whether it could have been handled differently. However, since this implementation is an act of the legislator, it cannot be considered a violation of, for example, Act No. 320/2001 Coll., on Financial Control.[49]

[48] As a side note, the Czech Republic has applied the levy to all market income from the sale of electricity supplied in the levy period, regardless of when the payment for this supply is due, which is contrary to the requirement of Regulation 2022/1854 that the levy should only apply to realised market income.

[49] This act mandates the economic, efficient and effective performance, but is directed to the activities of public administration rather than the legislature.

Regarding the division of the statutory competences among individual state bodies, a potential contradiction with the Act No. 2/1969 Coll. on the establishment of ministries and other central state administration bodies ("Competence Act") can be identified. This Act establishes central administrative authorities, (ministries and also ERO), and defines the scope of their competence (the scope of competence of the ERO is, however, defined solely by the Energy Act).

Under the Competence Act, the Ministry of Finance is responsible for taxes. The levy on surplus income has been assessed above as tax revenue, a tax *sensu largo*. Its administration is governed by the Tax Code, and the levy is regarded as tax revenue. Further, it is argued that the administration of the levy on surplus revenues does not fulfil the characteristics of either the price regulation under Act No. 526/1990 Coll., on prices.[50] Furthermore, the Energy Act does not justify the assignment of the administration of the levy to ERO, as this task does not pertain to energy regulation. The primary justification, that the legislature made for assigning this role to ERO, was the fact that the obliged entities are electricity generators and ERO serves as their supervisory authority. This argument is false, however, as the tax office also serves as their supervisory authority, but in a different area.

The Czech legislator then explicitly states in the explanatory memorandum that the fact that the administration of the levy has been granted to ERO *"corresponds to the pan-European concept of the regulation in question, which is strictly non-tax. It is therefore the regulation of the electricity market, which, according to Article 17 of the Energy Act, corresponds to the remit of the Energy Regulatory Office. Expert knowledge of the issues of the segment in question is also key here."*[51] The non-tax character is also inferred by the legislator from Regulation 2022/1854 itself, where the levy is described as an instrument for regulating the electricity market. Arguments countering these claims are outlined in the following chapter.

Recognizing that the ERO lacked practical experience and necessary organizational and technical tools for handling this new agenda, the legislature included the option of using the so-called institute of request under the Tax Code in the Energy Act.[52] Therefore, in practice, ERO carries out part of the agenda entrusted by law – mainly receives levy reports, checks the correctness of calculations, and issues payment assessments, or, in the context of administrative proceedings, resolves situations where an obliged entity submits an incorrectly calculated levy. For other procedural steps, the institute of request is used. Thus, the tax administration helps with the levy administration regardless. Nonetheless, ERO therefore serves as a responsible body, guaranteeing the correctness of the calculation and its other aspects. This arrangement reveals that the discussed Czech legal implementation has practical shortcomings. It can be argued that this rather unusual model has likely imposed unnecessary financial, time and personnel burden on the regulator by placing it in the position of a tax administration body.

[50] This act is a general law for prices regulation, which is carried out by ERO.
[51] Explanatory memorandum, p. 9.
[52] This institute is typically employed by tax administrations with the same substantive competence (e.g. income tax). However, since the ERO is the only "tax authority" with substantive competence regarding the levy, the application of the institute of request in the Energy Act is significantly distorted, leading again to interpretative ambiguities.

V. CZECH APPROACH – LESSONS LEARNED

As described in the previous chapter, the Czech legislative approach was rather cumbersome. Despite some minor similarities with other member states, Czech lawmakers have taken a step further, when conveying almost all tasks to energy regulator. It has proven to be quite challenging and burdensome for the NRA and it remains questionable, whether the implementation could have been carried out more effectively and efficiently by following the example of other member states mentioned in Chapter 4.

First, the tax nature of the levy was overlooked, which can be seen as the root cause of the problem. Lawmakers not only adopted the questionable characterization of levy as a non-tax instrument from the Regulation, but they also even emphasized it by the national law, as it was used as the primary justification for assigning responsibility in this matter to the NRA. However, such justification can be seen as somewhat superficial, a more thorough analysis of the levy instrument should have been conducted beforehand and the fundamental tax characteristics of the levy should have been given proper consideration.

Another questionable argument for assigning the respective powers to ERO, was the argument, that since entities that are subject to the levy are electricity generators, ERO as energy regulator is their supervisory authority regardless. This argumentation is, however, misplaced, as electricity producers per se are not regulated entities in the same way as system operators. The electricity production sector is liberalized, competitive, and market-driven. Producers have the autonomy to decide the price at which they sell their electricity, whether below or above the cap. Moreover, this argument raises the question of why other regulatory authority, such as the Czech National Bank or the Czech Telecommunications Authority, does not administer comparable monetary or tax payments of the entities they regulate as part of their core agenda (banks, telecommunications operators). The administration of the levy does not even fall within the scope of price regulation as well. It is apparent that it is the proper calculation of the levy, its supervision and collection, regardless of the obliged entity's nature, that is of importance. Thus, it can be argued, that energy regulator should only provide necessary support stemming from its sector knowledge, as for example in Slovakian case.

Furthermore, the use of the institute of request by ERO, along with the frequent informal communication, again raises questions about why the administration of the levy was not entrusted directly to the experienced tax authorities from the beginning. Assigning the task to tax authorities could have avoided the time-consuming formal requests and communication between ERO and tax offices, reducing delays and mitigating the risk of information leakage during file exchanges.

Additionally, since caps on electricity production were only a temporary instrument, the hasty enforcement, redeployment and extensive training of ERO staff seems to be a misallocation of resources. This investment in finance and time have prevented ERO from focusing on its core agenda and tasks, which is nowadays more and more critical.

In conclusion, the Czech implementation approach was unnecessarily complicated and ineffective, and it was certainly not the only viable option. Comparing the Czech legislation to those discussed in Chapter 4 reveals some similarities and potential inspiration.

In case of Poland, both Czech and Polish NRA has the role in authoritatively determining the final amount of the levy and imposes fines. However, unlike ERO, URE intervenes

only in the cases of disputes between the obliged entity and the entity collecting the levy, which is not URE. In contrast, ERO reviews each levy report received from each obliged entity, makes an authoritative decision on each, handles disputes in cases of non-compliance, imposes penalties, and decides on interests (and would have also handled the collection and enforcement of the levy if not for the institute of request).

Similarities can be found in the Austrian and, to some extent, German legislation, where in both NRA is the supervisory body. That is also the case in Denmark; there, however, responsibilities are divided between the tax authorities and the NRA. The Danish NRA's role is limited only to determining and verifying which entities are indeed obliged to pay the levy and which are not. The rest is done by the tax authorities. This could represent a good example that would be sustainable also in the case of ERO. Verifying the fulfilment of legal conditions by obliged electricity producers would fall within its current agenda as ERO already collects necessary information via its tasks in licensing and monitoring.

The Slovak legislation on levies on surplus income is procedurally similar to the Czech law but differs significantly in terms of the designated authority administrating the levy. In Slovakia, the levy is managed by the financial (tax) administration authorities. The Slovak NRA provides assistance only when requested, marking a substantial difference from the Czech approach. This model appears to be better suited for enabling smooth law amendments within the framework of existing Czech legislation.

In the Netherlands and Hungary, the approach differs from the Czech one the most, as the Regulation was implemented in a way, that NRA is not involved at all. It serves as an example that energy regulators do not need to be the responsible stakeholders for the purpose of proper levy collection.

Thus, it can be concluded the Czech case especially (and to a lesser extent Denmark, Austria, Poland and Germany) illustrates examples where established public administration bodies are assigned tasks outside their typical regulatory agendas. However, the Czech implementation outcome reveals several serious deficiencies, suggesting that these issues could have been addressed more effectively and efficiently. Moreover, the rushed implementation process, driven by the urgency to address and mitigate the energy crisis, left little room for deeper and more thorough discussion. On the other hand, the energy crisis affected all EU Member States and as shown, there were many less complicated legislative solutions available, that would not place additional burden on the NRA. ERO, like many other EU NRAs, already manages a wide range of tasks and responsibilities, which is likely to expand further with new EU energy legislation introduced in 2023 and 2024. It is advisable that, particularly within the energy sector, a more comprehensive dialogue be conducted regarding new competencies, with the aim of finding a solution that facilitates close yet procedurally streamlined cooperation among various authorities.

CONCLUSION

Recent developments in the energy sector, including the energy crisis and the response of EU Member States, have highlighted a trend in which established regulatory bodies are being assigned tasks and competencies outside their core agenda. In this context, this text examined the case of temporary caps on market revenues of inframarginal electricity producers, connected to a collection of surplus market revenues levy imposed on certain electricity producers by Regulation 2022/1854. Although the Regulation had a direct effect, it

allowed for significant national flexibility, particularly concerning administrative and procedural aspects of the levy, including the designation of competent authority.

This text argues that the levy on surplus market revenues of electricity producers is, by its nature, a tax instrument, as it meets the criteria of a windfall tax. Despite this, both EU and Czech lawmakers claimed that the levy is not a tax, as acknowledging it as such would prevent the EU from harmonizing it legally. Czech lawmakers opted to empower national regulatory authority for energy with these competencies, thus creating a case where a tax-related agenda was assigned to the energy regulatory body.

When examining implementation approaches in other EU member states, two main categories emerged: those that fully empowered the tax administration authority, as seen in Slovakia, Hungary and the Netherlands, and those that entrusted some tasks to the energy regulatory authority represented, such as Austria, Denmark, Poland or Germany. The Czech implementation of Regulation 2022/1854 stands out, as the levy is *de facto* implemented as a tax institute using a tax procedure, with the Czech energy regulatory authority ERO designated as the *de facto* tax administrator. This exemplifies the trend of assigning non-traditional tasks to regulatory bodies, albeit with significant challenges. The Czech example illustrates that expanding the core energy sector-related agenda to include tax administration is challenging and that practical, high-quality implementation would require far more time and resources than were available.

The manner and scope, in which the tax authority was legally invested, suggests, that the roles could have been reversed, with the tax authority as the primary responsible body with ERO serving as an advisor on electricity sector-specific issues, like for example in Slovakia or Denmark. Furthermore, legal approaches in other EU Member States indicate that a more straightforward solution could have been employed without detrimental consequences or without compromising effectiveness.

Regardless, introducing a windfall tax (termed as a levy on surplus market revenues) to inframarginal electricity producers was a valuable first-time experience for many EU Member States. With the tool now implemented to some degree, it is prepared for future use, if necessary, although it might require further reconsideration, clarification or amendments. This experience also demonstrated that rapid changes in the energy sector might result in shifting the traditional role of energy regulatory bodies towards a more cross-sectoral approach. This shift, however, calls for further discussion on first, how to implement such changes more efficiently to avoid the issues identified in the Czech case, and second, whether this trend of assigning non-core tasks is actually effective, especially in one-time or temporary situations.