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# NEWSLETTER

## LACAL ACCOMODATION WINDFALL PROFIT TAXES IN PORTUGAL - 2023

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IBFD Tax Correspondent Angola, Mozambique and East-Timor, from 2013

### SUMMARY

After much talk about the introduction of windfall profit taxes in Portugal and in Europe and after Council Regulation (EU) 2022/1854 of 6 October 2022 was approved, Portugal proceeded with the creation of this type of tax(es) through the Proposta de Lei n.º 47/XV/1.<sup>a</sup> that gave rise to Lei n.º 24-B/2022 of 30 December and to the Portaria n.º 312-E/2022 of 30 December, which regulates the temporary solidarity contribution applicable to food distribution.

## **A) INTRODUCTION**

### **1.**

In Portugal, for some time now, and throughout Europe as well, the implementation of new taxes on "extraordinary" or "unexpected" corporate profits, commonly called Windfall Taxes, has been on the agenda.

What does Council Regulation (EU) 2022/1854 of 6 October 2022 set out?

What is the temporary compulsory solidarity contribution?

How are other European countries thinking and acting?

And Portugal?

What does Lei 24-B/2022 of 30 December set out?

What do the new CST Energia and the new CST Distribuição Alimentar represent?

What are they, specifically?

## **B) THE CAUSES**

### **2.**

After the effects caused by COVID19 on the world market, the war in Ukraine,

due to its impact on various market sectors, namely the oil and energy sectors, contributed decisively to world inflation, with a generalised impact on the rise in consumer goods and energy (gas and oil) prices.

In both cases, the global situation has allowed several companies in some sectors to achieve unexpectedly high profits, especially, but not only, where this result more directly from the increase in energy and food prices.

At the same time, rising prices have, of course, caused increased difficulties for families and businesses.

### **3.**

Thus, and with the alleged purpose of financing anti-inflationary policies and mitigating the effects of inflation on families and companies, the imposition of new taxes on the so-called extraordinary or unexpected profits is being considered and introduced, especially targeted at economic sectors where such profits are more evident and accentuated.

Initially, the oil and energy sectors were singled out as being subject to this type of tax, but in the meantime, banking, distribution, and other sectors are also being covered.

## **C) THE POSITION OF THE EUROPEAN COMMISSION**

### **4.**

On 8 March 2022 in Strasbourg, the European Commission expressed the view that state aid measures could be adopted by Member States to enable support for companies and sectors seriously affected by geopolitical developments.

And to finance these emergency measures, the European Commission has anticipated that Member States may consider adopting temporary tax measures on windfall profits.

Specifically, the European Commission states that Member States may, by way of exception, adopt tax measures aimed at capturing some revenue from certain electricity producers, with a view to redistributing it to final consumers of electricity.

### **5.**

Within these indications, the Commission also clarified that these measures should not be retroactive and should only recover part of the (extraordinary) profits actually made.

It also indicated that the duration of the measures should be limited and linked to a specific crisis situation.

Within this context, several European countries have implemented, or are thinking of implementing, Windfall Profit Taxes, adopting different models and covering various sectors of activity, in addition to energy, as will be seen below:

## **D) THE CASE OF ITALY**

### **6.**

Italy introduced the tax on extraordinary or unexpected profits in March 2022, currently taxing such gains at a rate of 25% and due on 30 June and 30 November 2022.

Fundamentally, for this purpose, extraordinary or unexpected profits are those resulting, in the period between 1 October 2021 and 30 April 2022, from an increase in profit margins of more than 10% and more than 5 million euros, compared to the period between 1 October 2020 and 30 April 2022.

This tax falls on the sectors of activity of production, sale and resale of electricity, methane gas, natural gas and petroleum products.

## **E) THE CASE OF SPAIN**

7.

Spain, as early as September 2021, imposed on energy suppliers the payment to the Spanish electricity system of an amount proportional to the increase in earnings obtained as a result of the incorporation of the price of natural gas into electricity prices.

Meanwhile, Spain is proposing to introduce a new tax on extraordinary or unexpected profits corresponding to 1.2% of the profits of energy sector companies with a turnover above €1 billion, with reference to the year 2019.

Similarly, Spain proposes to apply a special rate of 4.8% on financial institutions margins and commissions.

8.

In both cases, there is an express prohibition on passing on the tax to consumers, failing which a penalty of 150% of the amount passed on can be imposed.

The tax falls on the years 2022 and 2023 and is payable in September of the following year, with an advance payment of 50% in February of the same year.

## **F) THE CASE OF THE UNITED KINGDOM**

9.

The UK has chosen, for the time being, to apply the windfall profits tax only to the oil and gas extraction sector, but the extension to the energy sector is anticipated.

This tax corresponds to a 25% rate on the profits of these companies, in addition to the general rate of 40% already applicable. The profits of companies in this sector have, however, a specific profit determination regime and the possibility of deducting up to 91.25% of the tax on extraordinary or unexpected profits depending on the reinvestment of profits in the UK oil and gas sector is foreseen.

Such a tax, special, is to remain in place until the UK Government considers that oil and gas prices have returned to historically normal levels but will expire in December 2025.

10.

The British Government has already extended the validity of this tax until the end of 2028 and is also considering increasing the tax rate from 25% to 35%.

## **G) THE CASE OF HUNGARY**

### **11.**

Hungary applies taxes on extraordinary or unexpected profits to several sectors of activity, including banking and energy, but also to telecommunications, retail and airlines, with different regimes for each sector.

In particular, the banking sector will pay an extraordinary tax on profits of 10% in 2022 and 8% in 2023.

Telecommunications and retail are to pay special progressive rates, up to 7 per cent and 4.1 per cent respectively, on profits above one million guilders.

And airlines will have to pay a tax for each passenger.

## **H) THE CASE OF GREECE**

### **12.**

Greece introduced a tax on extraordinary or unexpected profits in May 2022, for the time being applicable only to companies that produce electricity.

In this case, the profits deemed excessive are calculated by reference to the price of the MWh and the applicable rate is 90%.

## **I) THE CASE OF ROMANIA**

### **13.**

Romania, for the time being, applies the tax on extraordinary or unexpected profits also only to the energy sector.

The tax consists of an 80% rate applicable to profits deemed excessive, also by reference to the price of MWh.

This tax is expected to be temporary and to remain in force until 31 March 2023.

## **J) THE OTHER EUROPEAN COUNTRIES**

### **14.**

Germany, France, Austria, Ireland and Belgium have not yet come forward with such taxes on extraordinary or unexpected profits.

Germany and France seem to be the countries where these taxes are least supported by the governments in office, and there are no concrete proposals for their creation.

On the other hand, Austria, Ireland and Belgium are also studying the implementation of such taxes on extraordinary or unexpected profits for companies in the energy sector, in

terms similar to those in force in other countries.

## **K) THE COUNCIL REGULATION (EU) 2022/1854 OF 6 OCTOBER 2022**

### **(i) scope and nature**

#### **15.**

The European Commission announced, in September 2022, a proposal to create a windfall profit tax of 33% for companies in the energy sector that, in 2022, recorded earnings that were 20% above the average of the previous three years.

Subsequently, in October 2022, Council Regulation (EU) 2022/1854 of 6 October 2022 was approved, precisely concerning emergency intervention to deal with high energy prices.

#### **16.**

The Regulation aims to address the sharp rise in electricity prices and its impact on households and industry, pointing out that uncoordinated national measures could affect the functioning of the internal energy market, endanger security of supply and lead to further price increases in the Member States most affected by the crisis.

The Regulation also assumes that solidarity between Member States, through the adoption of a ceiling on market revenues at Union level, will generate revenue enabling Member States to finance measures to support final customers of electricity, such as households, small and medium-sized enterprises and other energy-intensive sectors, while preserving prices on Union markets and cross-border trade.

The Regulation thus aims (i) to reduce electricity consumption, (ii) to introduce a ceiling on market revenues for certain producers, (iii) to enable Member States to apply public intervention measures to fix prices for the supply of electricity and (iv) to establish rules for a temporary compulsory solidarity contribution.

#### **17.**

Within this framework, Regulation (EU) 2022/1854 introduces a new "solidarity contribution" (windfall profit tax) which applies to companies and permanent establishments in the Union which are active in the following sectors:

- crude petroleum;
- natural gas;
- coal; and
- refinery



**(ii) reduction of gross electricity consumption**

18.

The Regulation thus establishes the reduction of total monthly gross electricity consumption by 10 % compared with the average gross electricity consumption in the period between 1 November and 31 March of the five preceding consecutive years.

And this reduction in gross electricity consumption during peak hours may not be less than 5% per hour on average.

**(iii) capping for market revenues**

19.

Regulation (EU) 2022/1854 also sets a cap on market revenues obtained from the sale of electricity produced from the following sources:

- wind energy;
- solar energy (solar thermal and solar photovoltaic);
- geothermal energy;
- hydropower without reservoir;
- biomass fuel (solid or gaseous biomass fuels), excluding biomethane;
- waste;
- nuclear energy;

- lignite;
- crude petroleum products;
- peat.

The market revenues obtained by these producers should be capped at a maximum of EUR 180 per MWh of electricity produced.

**(iv) other (national) crisis response measures**

20.

Regulation (EU) 2022/1854 also provides for the possibility for Member States to take additional measures, such as maintaining or introducing measures that further limit producer revenues, including the possibility of differentiating between technologies, as well as the market revenues of other market participants, including those trading in electricity, from these or other sources.

It allows, in addition, for these additional measures to be applied to other hydro-power units, including dams, subject to a cap on their market revenues, or to maintain or introduce measures further limiting their market revenues, including the possibility of differentiating between technologies.

21.

These additional measures are, however, subject to the following principles:

- they must be proportionate and non-discriminatory
- they must not undermine investment signals;
- they must ensure that investment and operating costs are covered;
- they must not distort the functioning of wholesale electricity markets and, in particular, they must not affect the merit order or the formation of prices on the wholesale market; and
- must be compatible with Union law.

**(v) measures applicable to the retail market**

22.

Regulation (EU) 2022/1854 also provides for the possibility of temporarily extending public intervention measures for electricity pricing to SMEs and for Member States to exceptionally and temporarily fix a price for the supply of electricity below cost, provided that all the following conditions are met:

- the measure covers a limited amount of consumption and

maintains an incentive to reduce demand

- there is no discrimination between suppliers
- suppliers are compensated for supply below cost; and
- all suppliers are eligible to bid for the price of supplying electricity below cost on the same basis.

**(vi) crude oil, natural gas, coal and refining sectors**

23.

For the crude oil, natural gas, coal and refining sectors, Regulation (EU) 2022/1854 provides for a special measure, centered on a new "temporary compulsory solidarity contribution", to be levied on "excess profits" generated by companies and permanent establishments in the Union active in the sectors concerned.

**(vii) duration.**

24.

The Regulation entered into force on 7 October 2022 and is, by nature, binding and directly applicable in all Member States until 31 December 2023.

However, this Regulation is not enforceable on its own, but needs to be implemented by Member States.



25.

In addition, it provides for specific dates and periods of validity for some measures.

Thus, it has been expressly laid down that:

- the reduction of gross electricity consumption during peak hours is applicable from 1 December 2022 to 31 March 2023;
- the measures to achieve the reduction in demand and distribution of excess revenues will be in force from 1 December 2022; and that
- the cap on market revenues for electricity generators and other national crisis response measures apply from 1 December 2022 to 30 June 2023.

## **L) THE WINDFALL PROFIT TAX PROVIDED FOR BY REGULATION (EU) 2022/1854**

### **(i) compulsoriness**

26.

Regulation (EU) 2022/1854 is clear that the temporary solidarity contribution is compulsory for Member States, except where they have already adopted equivalent national measures.

In this case, Member States must ensure that such approved equivalent national measures have similar objectives to the temporary solidarity contribution and are subject to similar rules to those governing the temporary solidarity contribution under the Regulation, and that they generate revenue of a value comparable to, or higher than, the estimated value of the revenue from the solidarity contribution.

### **(ii) target group**

27.

The compulsory temporary solidarity contribution applies to companies and permanent establishments in the Union, including those forming part of a group consolidated for tax purposes only, with activities in the following sectors:

- crude petroleum;
- natural gas;
- coal; and
- refinery

### **(iii) base for calculation**

28.

The new solidarity contribution shall be calculated on taxable profits, determined according to national tax rules, in and throughout the tax year 2022 and/or the tax year 2023 which are

higher than a 20% increase of the average taxable profits, determined according to national tax rules, in the four tax years starting on or after 1 January 2018.

29.

The Regulation also provides that if the average taxable profits in those four tax years are negative, the average taxable profits should be zero for the purpose of calculating the temporary solidarity contribution.

#### **(iv) rate**

30.

The rate applicable for the calculation of the temporary solidarity contribution shall be at least 33% of the assessment basis and shall be in addition to the normal duties and taxes applicable under the law of each Member State

#### **(v) use of proceeds**

31.

Regulation (EU) 2022/1854 expressly states that the revenue from the temporary solidarity contribution must be used by Member States in a timely manner for any of the following purposes:

- financial support measures for final energy customers, and in particular vulnerable households, to mitigate the effects of high energy prices, in a targeted manner;
- financial support measures to help reducing the energy consumption such as through demand reduction auctions or tender schemes, lowering the energy purchase costs of final energy customers for certain volumes of consumption, promoting investments by final energy customers into renewables, structural energy efficiency investments or other decarbonisation technologies;
- financial support measures to support companies in energy intensive industries provided that they are made conditional upon investments into renewable energies, energy efficiency or other decarbonisation technologies;
- financial support measures to develop the energy autonomy, in particular investments in line with the RE-PowerEU objectives set in the RE-PowerEU Plan and in the RE-PowerEU Joint European Action such as projects with a cross-border dimension.

32.

In a spirit of solidarity between Member States, Member States may assign a share of the proceeds of the temporary solidarity contribution to the common financing of measures to reduce the harmful effects of the energy crisis, including support for protecting employment and the reskilling and upskilling of the workforce, or to promote investments in energy efficiency and renewable energy, including in cross-border projects, and in the Union renewable energy financing mechanism provided for in Article 33 of Regulation (EU) 2018/1999 of the European Parliament and of the Council.

The express reference in the Regulation to the production of "timely" effects is noteworthy, inducing that measures should be of a direct and immediate nature, and without time delays.

33.

Likewise, the Regulation (EU) 2022/1854 also establishes, also exhaustively, that measures must be (i) clearly defined, (ii) transparent, (iii) proportionate, (iv) non-discriminatory and (v) verifiable.

**(vi) entry into force**

34.

Regulation (EU) 2022/1854, as stated above, entered into force on 7 October 2022 and, by its nature, is binding on and directly applicable in the Member States.

Notwithstanding, the Regulation is not enforceable on its own. The measures adopted by the Regulation require implementation by the Member States, which is why it was established that the Member States must adopt and publish measures to implement the compulsory temporary solidarity contribution by 31 December 2022 at the latest.

**(vii) duration**

35.

Regulation (EU) 2022/1854 establishes that the compulsory solidarity contribution is exceptional and strictly temporary.

And, for this very reason, it is expressly defined that the solidarity contribution should only apply to the tax years 2022 and/or 2023.

## **M) LEI 24-B/2022, OF 30 DECEMBER AND THE NEW PORTUGUESE WINDFALL TAXES**

**36.**

The Portuguese Government publicly announced that Portugal would support these measures and actively participated in the work of the European Commission and announced that it would create a solidarity contribution of 33% on the profits of companies in the energy sector which, in 2022, recorded gains that were 20% above the average of the three previous years.

In the presentation of the Draft State Budget Law for 2023 (State Budget 2023), the Minister of Finance even confirmed that he would introduce the new contribution, following the "decision at European level" and stating that it would have its "own regime" and that it would come into force before the State Budget for 2023.

The "decision at European level" referred to by the Government was Regulation (EU) 2022/1854 of the Council, of October 6, 2022, which came to create the windfall profit tax.

As mentioned, the Regulation is mandatory and directly applicable in Portugal

and the windfall profit tax should be implemented by the Government until 31 December 2022.

**37.**

The Government presented, on 17 November 2022, Proposta de Lei n.º 47/XV/1.<sup>a</sup>, which provided for the creation of a temporary solidarity contribution on the energy sector (CST Energia) and another on the food distribution sector (CST Distribuição Alimentar).

**38.**

The Proposta de Lei n.º 47/XV/1.<sup>a</sup> was approved in a plenary meeting on 22 December 2022 and promulgated by the President on 28 December of the same year, giving rise to Lei n.º 24-B/2022 of 30 December, published on that same day and on the eve of the end of 2022.

**39.**

Simultaneously, Portaria n.º 312-E/2022 of 30 December was approved, which regulates CST Distribuição Alimentar (for food distribution).

**40.**

Fundamentally, the Law fully accompanies the Draft Law. Only one amendment proposal, submitted by the

Portuguese Party parliamentary group, in the government was approved, removing from the scope of the exclusion of CST Distribuição Alimentar the micro or small companies subject to the special tax regime for corporate income tax groups and in which the turnover of the group of companies per reference to the tax period in question is greater than € 100,000,000.

## **N) GENERAL RULES**

### **(i) scope**

#### **41.**

Law 24-B/2022 creates and regulates two temporary solidarity contributions:

- CST Energia (Energy) - temporary solidarity contribution on the energy sector; and
- CST Distribuição Alimentar (Food Distribution) - a temporary solidarity contribution on the food distribution sector.

And the expressly states that the CST Energia is "an emergency intervention to deal with high energy prices", while the CST Distribuição Alimentar is intended to "deal with the inflationary phenomenon".

#### **42.**

Therefore, this Law goes beyond the referred Council Regulation (EU) 2022/1854, of 6th October 2022, which only provides for the creation of a mandatory temporary solidarity contribution applicable, as mentioned, to the following energy sectors of:

- crude petroleum;
- natural gas;
- coal; and
- refinery

### **(ii) duration and entry into force**

#### **43.**

The Law came into force on the day following its publication, i.e., on 31 December 2022.

Both contributions are temporary and only applicable to profits considered extraordinary in the tax periods, for IRC purposes, starting in the years 2022 and 2023.

### **(iii) liquidation**

#### **44.**

The contributions provided for shall be settled by the taxable person, even if exempt, through an official model declaration that shall be approved by

the member of the government responsible for the governmental area of finance.

It is also established that taxable persons must proceed to the assessment of the contribution individually and autonomously, even when the special regime of taxation of groups of companies is applicable to them.

The declaration must be sent to the Tax Administration, by electronic transmission of data, until the 20th, regardless of whether that day is useful or non-useful, of the 9th month following the date of the end of the tax period to which it relates.

**45.**

The (self-)liquidation can be corrected by the Tax Administration, within the general deadlines, if there are errors, omissions or changes that determine the requirement of a contribution amount higher than the one paid.

Likewise, it is provided that, in the absence of payment of the contribution under the preceding paragraphs, it may be made (of its own motion) by the Tax Administration on the basis of the elements available to it.

#### **(iv) payment**

**46.**

The contributions provided for shall be settled by the taxable person, even if exempt, through an official model declaration to be approved by ordinance of the member of the government responsible for the governmental area of finance.

#### **(v) (non) deductibility**

**47.**

In accordance with Council Regulation (EU) 2022/1854 of 6 October 2022 and in accordance with Proposal for Law no. 47/XV/1, Law no. 24-B/2022 of 30 December establishes that contributions are not deductible for the purpose of determining taxable income in IRC, even when counted as expenses of the tax period.

#### **(vi) consignment**

**48.**

Law no. 24-B/2022, of 30 December, expressly provides for how the revenues from the contributions now created should be affected.

Thus, the revenue obtained from CST Energia must be allocated, by order of



the Ministers of Finance and Energy, to at least one of the following purposes:

- financial support measures for final energy sectors, in particular vulnerable households, in order to mitigate the effects of high energy prices in a targeted manner;
- financial support measures to help reduce energy consumption, for example through auctions or tendering schemes to reduce demand, reducing the costs of purchasing energy from final energy customers for certain volumes of consumption, promoting investments by final energy customers in renewable energy, structural investments in energy efficiency or other decarbonization technologies;
- financial support measures to support companies in energy-intensive sectors, provided that they are subject to investments in renewable energy, energy efficiency or other decarbonisation technologies;
- financial support measures to develop energy autonomy, in particular investments in line with the goals of the RE-PowerEU plan, set out in the RE-PowerEU Plan and the Joint European Action RE-PowerEU.

49.

In turn, the revenue obtained from CST Food Distribution must be allocated, by order of the Ministers of Finance and Energy, to at least one of the following purposes:

- actions to support the increase of food charges for the most vulnerable population, especially through social sector entities;
- measures to ensure the implementation of consumer protection policy with the aim of ensuring a high level of consumer protection through the Consumer Fund;
- financial support measures for micro and small trade, service and restaurant enterprises that are particularly affected by rising operating costs and inflation and falling demand, through the partial allocation of revenue to the Trade Modernisation Fund for this purpose;
- measures to support the qualification of professionals working in micro and small trade, service and restaurant enterprises, in order to increase the residence of these enterprises, through the partial allocation of revenue to the

Trade Modernisation Fund for this purpose.

## **O) THE NEW CST ENERGY, IN PARTICULAR**

### **(i) target group**

50.

CST Energia accompanies Council Regulation (EU) 2022/1854 of 6 October 2022 and applies to resident IRC taxpayers who principally carry out an activity of a commercial, industrial or agricultural nature, as well as to IRC taxpayers who are not resident with a permanent establishment in Portuguese territory, which develop activities in the following sectors:

- crude oil;
- natural gas;
- coal; and
- refining.

To this end, it is proposed that taxable persons are active in the crude oil, natural gas, coal and refining sectors when they generate at least 37,5 % of their turnover in economic activities in the extraction, mining, oil refining or coke oven products sectors, as referred to Regulation (EC) No 1893/2006 of the European Parliament and of the Council.

In another context, it is expressly provided that a non-resident taxable person of IRC is considered to have a permanent establishment in Portuguese territory when he carries out, in whole or in part, his activity through a fixed institution located in Portuguese territory and the profits attributable to him are subject to IRC.

### **(ii) base for calculation**

51.

CST Energia should apply to profits considered surplus in the tax periods for the purposes of IRC starting in the years 2022 and 2023, in accordance with the provisions of Regulation (EU) 2022/1854.

To this end, it is proposed that the part of taxable profits of the 2022 and 2023 tax periods exceeding the corresponding 20% increase over the average taxable profits in the four tax periods starting in the years 2018 to 2021, also in accordance with the provisions of Regulation (EU) 2022/1854, be considered as excess profits.

But Law no. 24-B/2022 of 30 December also provides that, in cases where the average of the taxable profits of those four tax periods is negative, this average is considered to be equal to zero, with

CST Energia focusing on the totality of the taxable profit.

52.

It is also provided that in the case of taxable persons to whom the special regime for the taxation of groups of companies applies, the relevant taxable profit is that calculated by each taxable person in his income statement.

53.

Law no. 24-B/2022 of 30 December 2022 provides, finally, for special regimes applicable to cases of division and merger of companies.

Thus, where a division has taken place during the relevant tax periods, the taxable profit to be considered, for the periods prior to the division, must be the proportional part, taking into account the market value of the assets detached, corresponding to the taxable person divided.

In the event that a merger has taken place during the relevant tax periods, the payable profit to be taken into account, for the periods prior to the merger, must be the algebraic sum of the taxable profits corresponding to the taxable persons being merged.

### **(iii) the applicable rate**

54.

CST Energia rate is 33% and falls on profits considered to be surplus under the terms already indicated above.

## **P) THE NEW CST FOOD DISTRIBUTION, IN PARTICULAR**

### **(i) target group**

55.

The CST Distribuição Alimentar is applicable to resident IRC taxpayers who principally carry out an activity of a commercial, industrial or agricultural nature, as well as to non-resident IRC taxpayers with a permanent establishment in Portuguese territory, who operate food trading establishments of products of animal and vegetable origin, fresh or frozen, processed or raw, in bulk or prepackaged.

For non-resident IRC taxpayers, it is also provided that, for the purposes of Law No. 24-B/2022 of 30 December, "Food trade establishment" means the place where a commercial activity is carried out within one of the codes of economic activity (CAE), to be defined by order of the Ministers of Finance and Economy, which includes the retail trade of food

or food products, identifying, in the latter case, some degree of avoidable and unwanted subjectivity.

56.

This ordinance has already been published and corresponds to Ordinance no. 312-E/2022, of 30 December, according to which, establishments carrying out a trade activity corresponding to the following PPAs are covered by the notion of "Food trade establishment":

- (a) 47111 Retail trade in supermarkets and hypermarkets;
- (b) 47112 retail trade in other non-specialised establishments, predominantly food, drink or tobacco;
- (c) 47210 retail sale of fruit and vegetables in specialised stores;
- (d) 47220 Retail sale of meat and meat products in specialised establishments;
- (e) 47230 Retail sale of fish, crustaceans and molluscs in specialised establishments;
- (f) 47240 Retail sale of bread, pastries and confectionery in specialised stores;
- (g) 47250 retail sale of beverages in specialised stores;
- (h) 47291 Retail sale of milk and dairy products in specialised shops;

- (i) 47292 Retail sale of natural and dietary food products in specialised establishments;
- (j) 47293 Other retail sale of food products in specialised stores n.e.c.

## **(ii) non-subjections**

57.

It is expected that taxable persons who qualify, in the period of taxation of the contribution (2022 or 2023), as micro or small enterprises, in accordance with Decree-Law no. 372/2007, of 6 November, in its current wording, will be excluded from the CST Food Distribution.

However, as a result of the amendment tabled by the parliamentary group of the Socialist Party in the government, micro or small enterprises subject to the special regime of taxation of groups of companies of the IRC and in which the turnover of the group of companies by reference to the tax period in question is excluded from the CST Food Distribution Superior to € 100,000,000.

## **(iii) subjective exemptions**

58.

Taxable persons whose activity of food retail trade or with a predominance of

food products has, in the tax period to which the contribution relates (2022 or 2023), ancillary nature, which is considered verified when it does not represent more than 25 % of the total annual turnover, are exempt from CST Distribuição Aliment.

#### **(iv) base for calculation**

59.

The CST Food Distribution is applicable to profits considered surplus in tax periods for the purposes of IRC that begin in the years 2022 and 2023.

For this purpose, and like TSE Energia, it is proposed that excess profits be considered the part of taxable profits of the tax periods of 2022 and 2023, which exceed the corresponding to 20% increase in relation to the average of taxable profits in the four tax periods beginning in the years 2018 to 2021.

Here, too, it is provided that in cases where the average of the taxable profits of those four tax periods is considered to be zero, and the CST Food Distribution is considered to be the total taxable profit for the years 2022 and 2023.

Similarly, it is also provided that, in the case of taxable persons to whom the special regime for the taxation of

groups of companies applies, the relevant taxable profit is to be that calculated by each taxable person in his income statement.

60.

Here, too, provision is made for the same special arrangements applicable to cases of division and merger of companies.

Thus, where a division has taken place during the relevant tax periods, the taxable profit to be considered, for the periods prior to the division, must be the proportional part, taking into account the market value of the assets detached, corresponding to the taxable person divided.

In the event that a merger has taken place during the relevant tax periods, the payable profit to be taken into account, for the periods prior to the merger, must be the algebraic sum of the taxable profits corresponding to the taxable persons being merged.

#### **(v) the applicable rate**

61.

The rate of CST Food Distribution is 33% and falls on the profits considered surplus calculated in the terms indicated in the previous point.

## **SOME FINAL CONSIDERATIONS**

62.

Portugal has implemented, through Law no. 24-B/2022, of 30 December, the two mentioned new contributions on the so-called surplus profits, notwithstanding the Prime Minister having previously declared that the Portuguese situation was not comparable to that of other countries due to the high tax burden on companies.

In fact, the main sectors of activity that are, in other European countries, being subject to taxes on unexpected profits are, already, in Portugal subject to some extra-ordinary sectoral financial contributions, with some years, and that burden the normal taxation on profits in IRC, although with different incidence base.

63.

In the case of the energy sector, the extraordinary contribution on the energy sector (CESE) has been implemented in Portugal since 2014.

For its part, the food sector is already subject to the "MAIS" food security contribution since 2012.

But, in addition to these, there are also, in Portugal, the contribution on the

banking sector, since 2011, the additional solidary contribution on the banking sector, since 2020, the extraordinary contribution on the pharmaceutical industry, since 2015, or the extraordinary contribution on the suppliers of the medical device industry of the national health service, since 2021.

And in the process of being created is still, now (again) and for 2023, a special contribution to the conservation of forest resources.

It is not possible, however, to know what the actual revenue generated by each of these contributions is, since they are not properly discriminated in the Portuguese State Budget Law, which violates, in turn, therefore, rules and principles of constitution and budgeting of public revenues, with consequences that the Courts have not yet had the courage to assume (in this sense Maria de Oliveira Martins, *Jornal Expresso*).

64.

However, all these "contributions" add, as mentioned, to the normal taxation on profits, in the IRC, to which Portuguese companies operating in these sectors are also subject, in particular the energy sector and the food sector.



The truth is that it seems to be possible to identify a coincidence of objectives intended by the CESE and CST Energia, bearing in mind the criteria for the allocation of the amount of the fear indicated in Law no. 24-B/2022 and that the CESE aims, in particular, at the financing of social and environmental policies in the energy sector.

And here, as we have seen, the EU Regulation does not seem to allow the coexistence of multiple contributions if they are equivalent in their objectives and generate revenue of comparable or greater value.

For its part, and although CST Food Distribution is not covered by Council Regulation (EU) 2022/1854, potential coincidences in the objectives to be pursued related to the protection of consumers are also identified here.

But, the truth is also that, in Portugal, the ("normal") profit tax, the IRC, at this moment, already focuses (more than proportionally) on "excessive" profits or, as they are now called by Law no. 24-B/2022, of December 30, "surpluses", to the extent that there is to be added a state rate that implies additional taxes (at the normal rate of 21%), of 3%, 7% and 9%, depending on the "tier", to which is added, in some municipalities, the municipal rate, up to 1,5% - which

raises the overall tax rate to (in "rough" terms) 31,5%, the final (making it progressive).

#### 65.

It is possible, however, to identify some other constraints for the implementation of these new profit taxes in Portugal.

First, the principle of equality must be safeguarded, which will require a public and objective justification for taxing, once again, certain companies (and not taxing the others). Moreover, this question is particularly pertinent when there are other economic sectors that have obtained and continue to make extraordinary or unspecified profits, as is currently the case with the arms and defense sector, or as has happened (and may happen again in the winter...) with the health sector, especially the one relating to protective products and disinfection (against COVID), which, as we shall see, will justify questions of a different nature, concerning state aid.

#### 66.

This public and objective justification, which is required, may, however, be facilitated when the tax is temporary, of extraordinary nature and solidarity and when it is introduced by a European

Regulation. But the truth is that, having analyzed Law no. 24-B/2022, of 30 December, and as had already been indicated, in the analysis of Draft Law no. 47/XV/1.<sup>a</sup>, no objective reasons are identified to compress the principle of equal taxation, especially with regard to the food sector, in relation to which, in fact, Law no. 24-B/2022, of 30 December, is involved in "an additional solidarity effort", possibly even referring to the "MAIS" food security contribution.

**67.**

Moreover, the truth is that, in Portugal, tax contributions tend to perpetuate themselves, as is the case precisely with other sectoral financial contributions, such as the CESE itself and this 'MAIS' food security contribution.

There is, therefore, a well-founded fear that this may also be the case with these new taxes – as is already the case in Italy and England, since, as we have seen, the deadlines for the application of windfall taxes have already been extended.

**68.**

It will also be necessary to bear in mind the need to harmonise the new CST Energia with European legislation, namely

the Energy Taxation Directive, which may also not be simple.

**69.**

There will also be issues of state aid, which the European Commission itself has already highlighted and which must be awaited. And not only because there are companies that can be "benefited" by not being subject to the new taxes, while others will be subject to the new contribution, but also because the State aid itself may prove to be somewhat perverse in transferring "beneficiary" companies to the scope of these new taxes on extra-ordinary profits.

**70.**

What is certain is that the Portuguese constitutional revision of 1997 somehow came to provide for this third type of taxes – the sectoral financial contributions – and the doctrine and court ruling have come to understand that these new "taxes" are not, after all, subject to the principles and rules generally applicable to (other) taxes, even if they are coercive and unilateral.

Nevertheless, Professor Sousa Franco already taught, in the 60s and 90s, that this type of contributions – then called "parafiscal" – could have a different regime and nature from those of taxes.

However, when such taxes (so-called parafiscals) assumed the nature of (true) taxes and were thus coercive and unilateral, they would be subject to the same rules – if imposed, to the rules of taxes, if fees, to the rules of rates (or whatever they were) – but without admitting a tertium genus, now excluded from the constitutional guarantees typically inherent in taxes and levies over decades.

The new doctrine and the new court ruling (post 1997) have therefore freed the legislator from these constraints. But there is also no guarantee that they will continue to do so, especially if we are dealing with contributions (taxes) that are applicable to sectors that are already subject to other contributions, financial, sectoral, or other, also called temporary, exceptional and extraordinary.

Moreover, Law no. 24-B/2022 of 30 December itself treats these new contributions as true profit taxes, both in their nature and in their form of settlement.

## 71.

Similarly, the Constitution does not allow the creation of retroactive taxes, as is clearly the case in some other European countries (vg. Italia), where taxes

on such extraordinary, unexpected profits are retroactive in nature.

And what is certain is that, from the analysis of the Regulation, the Draft Law and now, Law no. 24-B/2022, of 30 December, several difficulties are identified, also in this field, since the contribution will also be based on margins calculated by the companies before the prospect of the entry into force of the new contributions in question.

## 72.

On the other hand, the Constitutional Court has held that "the legislature of the 1997 constitutional review ... It only intended to enshrine the prohibition of the authentic retroactivity, or proper, of the tax law, covering only those cases in which the tax event that the new law intends to regulate has already produced all its effects under the old law, excluding from its scope situations of retrospectivity or improper retroactivity, that is, those situations in which the law is applied to past but non-existent facts effects still linger in the present."

In that regard, the Constitutional Court has held that when (complex and) successive taxes are at stake (as is the case with IRC), the tax event does not occur until the end of the year, so that the application since 1 January of 2022 - and

therefore the profit already earned - may not present at the outset, problems of authentic or inauthentic retroactivity, but at most of mere retrospectivity, which has been admitted by the Constitutional Court, unless it flagrantly violates the constitutional principle of security.

It should be noted, however, that in this case, Law No. 24-B/2022, of December 30, entered into force on December 31, 2022, i.e. on the 365th and last day of the year 2022, but falls, as it turned out, on the profits earned over the 365 days - previous - of the year 2022, therefore, it is possible to identify at least a clear compression of the principles of trust and legal certainty, which are presented as being worthy of further protection and different consideration.

### 73.

Finally, it will be necessary to define, very precisely and objectively, in what terms the profit can be considered as "excessive", to justify such "extra-ordinary" taxation, which the regulation and Law no. 24-B/2022, of 30 December, already promote, by reference to the years 2018 to 2021.

However, it is very debatable that in cases where the average of taxable

profits for the four tax periods is negative - i.e., in which taxable persons have presented losses - it is considered that the average, for the calculation of excess profits, is equal to zero, with the contribution on the total of the contingent profit for tax periods beginning in 2022 and 2023.

This means that these taxable persons may be subject to a taxation of profits of more than 60%, in addition to the IRS rate of 28%, in case of distribution to its partners.

Thus, questions will certainly also arise about the limits of the creation by governments of taxes and new contributions, especially on certain sectors of activity, since, theoretically, the State can create so many and so successive taxes that this results in a truly confiscatory taxation.

### 74.

As these new solidarity contributions are structured, provided for in Law no. 24-B/2022, of 30 December, it is confirmed that we are facing (yet another) situation that could increase tax litigation, which may even result in the State being obliged, by the Courts, to return to taxpayers the value of these, new, contributions and a revision of the

jurisprudence of the Constitutional Court on the re-performance of the tax law.

75.

What is certain is that, as Friedman teaches, inflation is the only way for the state to raise taxes without the intervention of the legislator. But, in fact, the State (Portuguese and others) is also obtaining additional "excessive" revenues due to inflation: the same tax rates on higher values, because inflated, result in (much) more taxes.

And as Philippe Bullet teaches in France, governments should be constitutionally obliged to promote the indexation of annual inflation to taxes, particularly with regard to deductions and brackets, and both in terms of IRS and IRC.

76.

On the other hand, and according to the declarations of the Minister of Environment and Climate Action, confirmed in the draft State Budget Law for 2023 (OE 2023), the Government is not expected to change the Extraordinary Contribution on the Energy Sector (CESE), nor has it done so so far. That is, both contributions will be in force, it

seems, in simultaneous and are not deductible, neither between them nor in the IRC. The Minister of the Environment even said that "there is no substitution of rates, we have to see how these two taxes combine" – referring to the Ministry of Finance – but the truth is that retrospectivity makes no reference either to the CESE or to the food security tax "MAIS".

77.

It should be noted that, while Council Regulation (EU) 2022/1854 expressly provides that the new contribution is to be in addition to the standard taxes and rates applicable in accordance with the law of a Member State, it also provides that this may not be the case where, as we have seen, the Member States already apply equivalent contributions.

It remained to be seen what, for this purpose, the Government would mean by "normal taxes and taxes", and whether it would fit here extra-ordinary sectoral financial contributions, such as the CESE, since this is allegedly extraordinary and temporary (and not "normal"). And it even seems that the Government wants taxable persons in the energy sector and the food sector to be subject, simultaneously, to the CESE and to the "MAIS" food security tax and, as well, to the new temporary solidarity contributions.

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On this subject you can also see us on the podcast of Expresso's economics section, Money Money Money at: [Expresso | Portugal needs windfall taxes?](#)

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