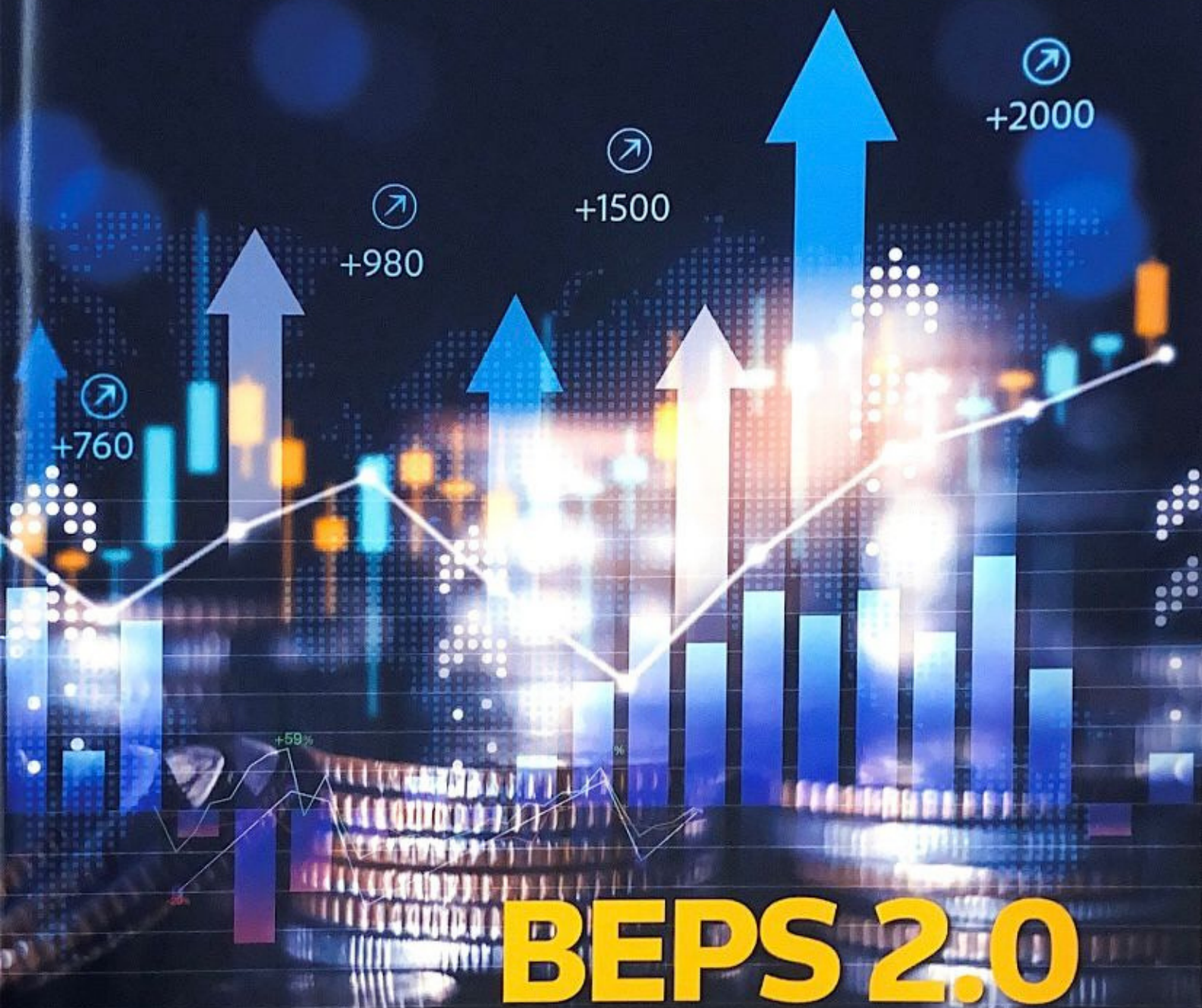


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Windfall Profit Taxes

Throughout Europe, the implementation of new taxes on “extraordinary” or “unexpected” corporate profits, commonly called Windfall Taxes, was on the agenda for some time and, following the Council Regulation (EU) 2022/1854 of 6 October 2022, it ended up being implemented in late 2022.

Where did windfall profit taxes come from? How did European countries react? What does Council Regulation (EU) 2022/1854 of 6 October 2022 set out? What has Portugal done? What do the new CST Energia and the new CST Distribuição Alimentar represent in Portugal?

The effects caused by COVID-19 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, which led to the rise in consumer goods and energy (gas and oil) prices. In both cases, the global situation allowed several companies in certain sectors to achieve unexpectedly high profits. At the same time, rising prices and interest rates have caused increased difficulties for families and businesses.

As a result, new taxes on the so-called extraordinary or unexpected profits were introduced by the European Union (EU) and, independently, by European countries, with the purpose of financing anti-inflationary policies and mitigating the effects of inflation on families and companies, and 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 banking, distribution, and other sectors are also covered.

European commission's stance. On 8 March 2022, in Strasbourg, the European Commission (EC) expressed the view that state aid measures could be adopted by Member States to enable support for companies and sectors significantly affected by geopolitical developments. To finance these emergency measures, the EC has anticipated that Member States could consider adopting temporary tax measures on windfall profits. Specifically, the EC stated that Member States could, 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. The EC also clarified that these measures should not be retroactive and should only aim to 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.

As so, and even before any official European regulation, several European countries started implementing *Windfall Profit Taxes*, adopting different models and covering various sectors of activity.

Italy. Italy introduced the tax on extraordinary or unexpected profits in March 2022, taxing such gains at a rate of 25% and due on 30 June and 30 November 2022. Extraordinary or unexpected profits were 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 2021. This tax falls on the sectors of production activity, sale and resale of electricity, methane gas, natural gas, and petroleum products.

Spain. 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 from the incorporation of the price of natural gas into electricity prices. There was an express prohibition



on passing on the tax to consumers, failing which, a penalty of 150% of the amount passed on can be imposed. This 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.

United Kingdom. The UK choose to start introducing windfall profit taxes only to the oil and gas extraction sector, but the extension to the energy sector was anticipated. This tax corresponded 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 was created to remain in place until the UK Government considers that oil and gas prices have returned to historically normal levels and to expire in December 2025. Afterwards, the British Government plans to extend this tax until the end of 2028.

Hungary. Hungary started applying 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 was to pay an extraordinary tax on profits of 10% in 2022 and 8% in 2023. Telecommunications and retail were to pay special progressive rates, up to 7% and 4.1% respectively, on profits above one million guilders. In addition, airlines should pay a tax for each passenger.

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Greece. Greece introduced a tax on extraordinary or unexpected profits in May 2022, only applicable to companies that produce electricity. In this case, the profits deemed excessive were calculated by reference to the price of the MWh and the applicable rate was 90%.

Romania. Romania applied the tax on extraordinary or unexpected profits only to the energy sector. The tax consisted of an 80% rate applicable to profits deemed excessive, also by reference to the price of MWh.

Council Regulation (EU) 2022/1854 of 6 October 2022. Following this sequence of events, in September 2022, the EC announced 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, concerning emergency intervention to deal with high energy prices. 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.

Within this framework, Regulation (EU) 2022/1854 has introduced a new "solidarity contribution" (windfall profit tax) applicable to companies and permanent establishments in the EU active in the following sectors: crude petroleum; natural gas; coal; and refinery.

The Regulation thus established the reduction of the 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. This reduction in gross electricity consumption during peak hours should not be less than 5% per hour on average.

Regulation (EU) 2022/1854 also has set 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.

Regulation (EU) 2022/1854 also envisaged the possibility for Member States to take additional measures, such as maintaining or introducing measures that could 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 other sources. It also allows for these additional measures to be applied to other hydropower units, including dams, subject to a cap on their market revenues.

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
- they must be compatible with Union law

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 fix a price exceptionally and temporarily 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
- all suppliers are eligible to bid for the price of supplying electricity below cost on the same basis

Regarding 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 specific sectors.

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. This Regulation is not enforceable on its own, but needs to be implemented by Member States. In addition, it provides for specific dates and periods of validity for certain measures, including the following:

- 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
- The cap on market revenues for electricity generators and other national crisis response measures apply from 1 December 2022 to 30 June 2023.

Windfall Profit Tax in Regulation (EU) 2022/1854. 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. 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.

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.

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. 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.

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.

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 reduce 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 decarbonization 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 decarbonization technologies
- financial support measures to develop energy autonomy, in particular investments in line with the REPowerEU objectives set in the REPowerEU Plan and in the REPowerEU Joint European





Action such as projects with a cross-border dimension

In a spirit of solidarity, 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, inferring that measures should be of a direct and immediate nature, and

without delays. The Regulation (EU) 2022/1854 also establishes, exhaustively, that measures must be (i) clearly defined, (ii) transparent, (iii) proportionate, (iv) non-discriminatory and (v) verifiable.

Lei 24-B/2022, of 30 December and New Portuguese Windfall Taxes. The Portuguese Government publicly announced that Portugal would support these measures and actively participated in the work of the EC 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 late 2022, at 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”¹ and stating that it would have its “own regime,” which would come into force before the State Budget for 2023. As mentioned, the Regulation is mandatory and applicable in Portugal and the windfall profit tax should be implemented by the Portuguese Government until 31 December 2022.

On 17 November 2022, the Government presented the Proposta de Lei n.º 47/XV/1.⁸ (draft law), 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). The draft law 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 (the Law), published on that same day. Simultaneously, Portaria n.º 312-E/2022 of 30 December (an executive regulation) was approved, which regulates CST Distribuição Alimentar (for food distribution).

Fundamentally, the Law fully accompanies the draft law. Only one amendment proposal, submitted by the parliamentary group of the governing party 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.

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

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

The Law expressly states that 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.” 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.

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. The contributions shall be settled by the taxpayer, even if exempt, through an official model declaration approved by the member of the government responsible for the governmental area of finance. Taxpayers 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 of the 9th month following the date of the end of the tax period to which it relates. 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. The tax assessment must be completed and submitted by the taxpayer, which also determines the tax amount. If the taxpayer does not assess the tax, the tax administration will do so independently.

¹ 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.

Contributions must be paid by the last day of the month in which the declaration is due, regardless of whether that day is a working day or not. In accordance with Council Regulation (EU) 2022/1854 of 6 October 2022 and in accordance with Draft Law no.° 47/XV/1, Law n.° 24-B/2022 of 30 December, contributions are not deductible for the purpose of determining taxable income in IRC, even when counted as expenses of the tax period.

Law n.° 24-B/2022, of 30 December, expressly provides for how the revenues from the contributions should be affected. 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 by 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 REPowerEU.

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 costs for the most vulnerable population, especially through social sector entities

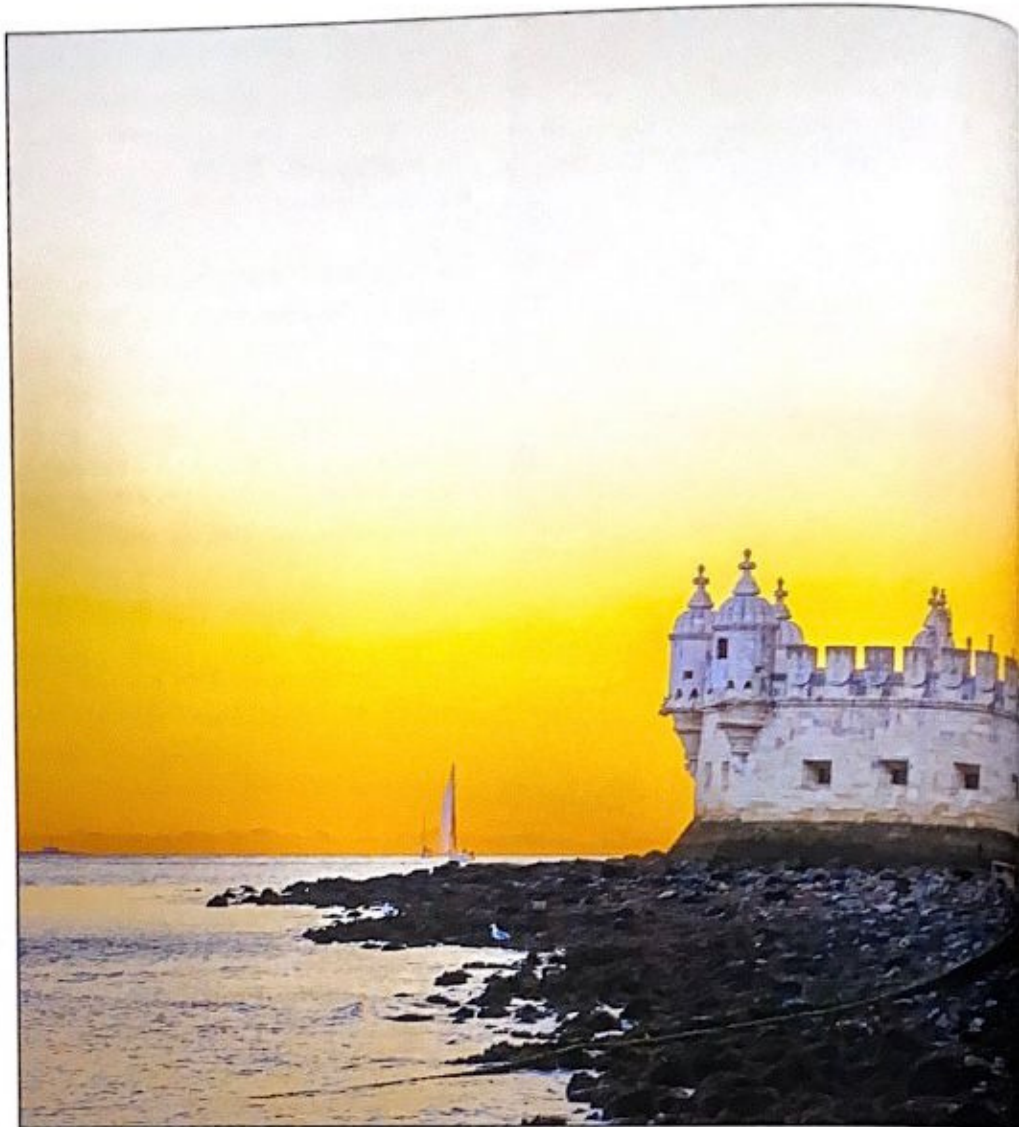
- measures to ensure the implementation of consumer protection policy with the aim of ensuring a high level of consumer protection through the Consumer Fund
- financial support measures for micro and small trade, service and restaurant enterprises that are particularly affected by rising operating costs 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.

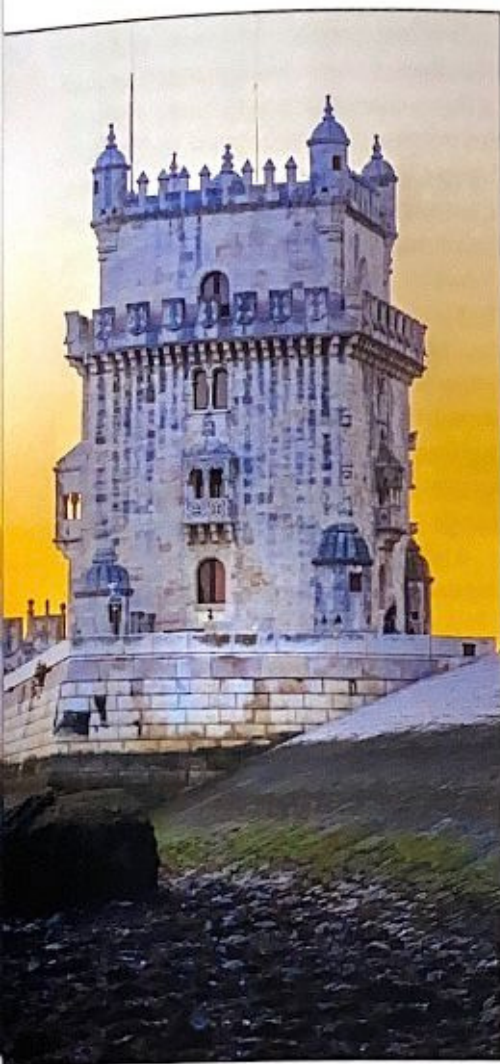
CST Energia. CST Energia accompanies Council Regulation (EU) n.° 2022/1854 of 6 October 2022 and applies to resident IRC taxpayers who principally carry out an ac-

tivity of a commercial, industrial or agricultural nature, as well as to IRC taxpayers who are not resident, but have a permanent establishment in Portuguese territory, active in the following sectors: crude oil; natural gas; coal; and refining. CST Energia is applicable to taxpayers 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) N.° 1893/2006 of the European Parliament and of the Council.

It is expressly provided that a non-resident taxpayer is considered to have a permanent establishment in Portuguese territory when it carries out, in whole or in part, activity through a fixed institution located in Portuguese territory and the profits are subject to IRC.

CST Energia applies to profits considered surplus in the IRC tax periods starting in the years 2022 and 2023, in accordance





taken place during the relevant tax periods, the taxable profit to be considered, for the periods prior to the demerger, must be the proportional part, considering the market value of the assets detached. If a merger has taken place during the relevant tax periods, the payable profit to be considered, for the periods prior to the merger, must be the algebraic sum of the taxable profits corresponding to the taxpayers being merged.

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

CST Food Distribution. The CST Distribuição Alimentar is applicable to resident IRC taxpayers who carry out activities of a commercial, industrial, or agricultural nature, as well as to non-resident IRC taxpayers with a permanent establishment in Portugal, 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 N.º 24-B/2022 of 30 December, “food trade establishment” means the place where an 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.

This order has already been published and corresponds to Portaria n.º 312-E/2022, of 30 December, according to which, establishments carrying out a trade activity corresponding to the following codes of economic activity are covered by the “food trade establishment”:

- 47111 Retail trade in supermarkets and hypermarkets
- 47112 retail trade in other non-specialized establishments, predominantly food, drink or tobacco
- 47210 retail sale of fruit and vegetables in specialized stores
- 47220 Retail sale of meat and meat products in specialized establishments
- 47230 Retail sale of fish, crustaceans and mollusks in specialized establishments
- 47240 Retail sale of bread, pastries and confectionery in specialized stores

- 47250 retail sale of beverages in specialized stores
- 47291 Retail sale of milk and dairy products in specialized shops
- 47292 Retail sale of natural and dietary food products in specialized establishments
- 47293 Other retail sale of food products in specialized stores

Micro or small enterprises subject to the special regime of taxation of groups of companies of the IRC are excluded from the CST Food Distribution, unless the turnover of the group of companies by reference to the tax period in question exceeds €100,000,000.

Taxpayers whose activity of food retail trade or with a predominance of food products has, in 2022 or 2023, an ancillary nature, when it does not represent more than 25% of the total annual turnover, and are exempt from CST Distribuição Alimentar.

The CST Food Distribution is applicable to profits considered surplus in tax periods that begin in the years 2022 and 2023. For this purpose, and like CST Energia, the part of the 2022 and 2023 taxable profits, which exceed a 20% increase in relation to the average taxable profits in the four tax periods beginning in the years 2018 to 2021, are considered excess profits. Here, too, in cases where the average taxable profits of those four tax periods is zero, the CST Food Distribution is set upon the total taxable profit for the years 2022 and 2023. Similarly, in the case of taxpayers 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.

Here, too, provision is made for the same special arrangements applicable to cases of demerger and merger of companies. Thus, where a demerger has taken place, 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. If 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.

with the provisions of Regulation (EU) 2022/1854. 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, are considered as excess profits. However, Law n.º 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.

In the case of taxpayers to whom the special regime for the taxation of groups of companies applies, the relevant taxable profit is that calculated by each taxpayer in his income statement.

Law n.º 24-B/2022 of 30 December 2022 provides for special regimes applicable to cases of division and merger of companies. Thus, where a demerger has



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

Final Considerations. Since late 2021, some European countries started implementing the so-called windfall profits taxes, specially aiming the energy sector. The EU followed this trend and made the windfall profit taxes mandatory in every Member State through Council Regulation (EU) 2022/1854 of 6 October 2022.

For its part, Portugal has implemented, through Law n.º 24-B/2022, of 30 December, two new contributions on the so-called windfall 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 already in place. In fact, the main sectors

of activity that are, in other European countries, being subject to taxes on unexpected profits were already subject to some extra-ordinary sectoral financial contributions in Portugal, although with different incidence base.

In the case of the energy sector, an extraordinary contribution on the energy sector (CESE) has been implemented in Portugal since 2014. The food sector is also subject to the "MAIS" food security contribution since 2012. In addition to these, there are also, in Portugal, the contribution on the banking sector, since 2011, the additional solidarity contribution on the banking sector, since 2020, the extraordinary contribution on the pharmaceutical industry, since 2015, and the extraordinary contribution on the suppliers of the medical device industry of the national health service, since 2021.

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 the Portuguese constitution on budgeting of public revenues, with consequences that the Courts have not yet had the courage to assume. However, all these "contributions" weigh on the normal taxation of company profits to which Portuguese companies operating in these sectors are also subject, in particular the energy sector and the food sector.

And it seems possible to identify a coincidence of objectives intended by the CESE and CST Energia, bearing in mind the criteria for the allocation of revenue indicated in Law n.º 24-B/2022 and that 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.

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 n.º 24-B/2022, of December 30, "surpluses," to the extent that there is a state rate that implies additional taxes (at the normal rate of 21%), of 3%, 7% and 9%, depending on the "tier," in addition to the municipal rate, up to 1.5% - which raises the overall tax rate to (in "rough" terms) 31.5% (making it progressive).

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

First, the principle of equality must be safeguarded, which requires a public and objective justification for taxing, once again, certain companies (and not taxing the others). Moreover, this ques-

tion is particularly pertinent when there are other economic sectors that have obtained and continue to obtain extraordinary or unexpected 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 also justify questions of a different nature, concerning state aid.

This public and objective justification may 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 no objective reasons are identified to compress the principle of equal taxation. Moreover, in Portugal, tax contributions tend to perpetuate themselves, as is the case with the indicated sectoral financial contributions, such as CESE and "MAIS" food security contribution. There is, therefore, a well-founded fear that this may also be the case with these new taxes.

It is certain that the Portuguese Constitutional revision of 1997 somehow came to provide for a 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 taught, in the 60s and the 90s, that this type of contribution – then called "parafiscal" – could have a different regime and nature from those of taxes. However, when such taxes 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 fees (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 court ruling (post-1997) has 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, the Portuguese Law n.º 24-B/2022 of 30 December treats these new contributions as true profit taxes, both in their nature and in their assessment.

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

taxes on such extraordinary, unexpected profits are retroactive in nature.

But what is certain is that the special contributions created are based on margins calculated by the companies before the prospect of the entry into force of the new contributions in question.

The Constitutional Court has held that when (complex and) successive taxes are at stake (as is the case with corporate tax), 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 problems of authentic or inauthentic retroactivity, but at most of mere retrospectivity, which has been admitted by the Portuguese Constitutional Court, unless it flagrantly violates the constitutional principle of security.

It should be noted, however, that in this case, Law N.º 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 – previous – 365 days 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.

Finally, it is necessary to define, very precisely and objectively, in what terms

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the profits can be considered “excessive,” to justify such “extra-ordinary” taxation, which the Regulation and Law n.º 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 taxpayers 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 shareholders.

Thus, questions will certainly also arise about the limits for the creation of taxes and new contributions, especially on certain sectors of activity.

The way these new solidarity contributions are structured, we are facing (yet another) situation that could increase tax litigation, which may result in the State being obliged, by the Courts, to return to taxpayers the value of these new contributions and a revision of the ruling of the Constitutional Court.

In 2022, Portugal had a surplus of more than two billion euros and in 2023, this surplus will be even higher.

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 (Portugal and others) is also obtaining additional “excessive” revenues due to inflation: the same tax rates on higher values, because inflated, result in (much) more tax revenue.

And as Philippe Bullet teaches in France, governments should be constitutionally obliged to promote the indexation

of annual inflation to taxes, particularly regarding deductions and brackets, and both in terms of personal income tax and corporate income tax. On the other hand, according to the declarations of the Portuguese 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. That is, both contributions are in force, simultaneously and are not deductible, neither between them nor to the corporate income tax. The Portuguese 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 Portuguese Ministry of Finance – but the truth is that no changes in the regime were implemented.

It is worth noting that while Council Regulation (EU) 2022/1854 expressly provides that the new contribution should add 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 the Member States already apply equivalent contributions.

It remains to be seen what the Portuguese Government would mean by “normal taxes,” and whether it would fit extra-ordinary sectoral financial contributions, such as the CESE, since this is allegedly extraordinary and temporary (and not “normal”). But the truth is that, for now, the Portuguese Government still subjects taxpayers in the energy sector and in the food sector, simultaneously, to the CESE and to the “MAIS” food security tax and, as well, to the new temporary solidarity contributions.

Furthermore, the reasons underlying the conception of these windfall profit taxes, including at the European level, generally remain the same: i.e., energy prices, the war in Ukraine, inflation and interest rates. It also remains to be seen if the EU, as a whole, or other countries, individually, will extend these special contributions beyond the initially established deadline of December 31, 2023, and how it may affect the intrinsic legitimacy of these manifestly discriminatory taxes. ●