



## **EUROPEAN UNION ENERGY MARKET INTERVENTIONS**

*1 November 2022*

### **Introduction**

Russia's invasion of Ukraine and the ensuing conflict with the European Union have led to a collapse of EU imports of Russian fossil fuels and natural gas during late spring and summer 2022. This has in turn caused the price of natural gas to surge excessively and thus also the price of electricity across Europe, which has given rise to a significant energy crisis.

In response to this energy crisis, the EU recently adopted the temporary Emergency Intervention Regulation with a view to combating the high energy prices<sup>1</sup> (the "Regulation").

Below, the main features of the Regulation will be described, along with reflections on the importance of the Regulation for the purposes of M&A transactions involving in-scope energy

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<sup>1</sup> Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

companies as well as how the Regulation could potentially trigger new investor-state arbitration disputes under the “foreign investor” avenue provided for by the Energy Charter Treaty (“ECT”)<sup>2</sup>.

## The Regulation

The Regulation is directly applicable in the national legal order of the Member States.

The Regulation introduces 3 main mechanisms intended to combat the surging energy prices:

- **Consumption Reduction:** The Regulation imposes different obligations on Member States to reduce overall energy consumption by 10% by 31 March 2023. Further, Member States are obligated to reduce electricity consumption by 5% during peak consumption hours.
- **Windfall Tax:** Market revenues from the generation of electricity will be subject to a mandatory cap of EUR 180 per MWh of electricity produced. The price cap will apply to inframarginal electricity producers – renewables, nuclear, and lignite, etc. – which, due to the nature of the energy market, have benefitted from the increasing prices on electricity driven by the high natural gas prices, without having experienced a corresponding rise in production costs. Any revenue exceeding EUR 180 per MWh is to be collected by Member States and redistributed to, inter alia, the final energy consumers. Member States will, however, also be entitled to introduce measures that further limit the market revenues of the electricity producers and other market participants covered by the Regulation. The windfall taxation measure will apply from 1 December 2022 to 30 June 2023.
- **Solidarity Contribution:** The Regulation imposes a special temporary taxation on surplus profits generated by in-scope fossil fuel suppliers (Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal, and refinery sectors). These economic operators will be subject to a temporary mandatory solidarity contribution unless the Member State in question has enacted equivalent national measures (a similar solidarity taxation). The Solidarity Contribution rate must constitute at least 33% of its calculated base, but Member States are entitled to fix an even higher rate. The base for calculating the Solidarity Contribution will be the taxable profits exceeding a 20% profit increase on the average profits generated in the 4 fiscal years starting on or after 1 January 2018. The Solidarity Contribution obligation will apply for the full fiscal

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<sup>2</sup> The Energy Charter Treaty. As incorporated into EU law by the approval on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997. 24 June 2022, the Commission announced that an agreement had in principle been reached between the contracting states on a wording for the Modernised Energy Charter Treaty, which could be formally adopted at the Energy Charter Conference foreseen in November 2022.

years of 2022 and 2023. The 33% contribution must be added to ordinary taxes and can be set higher by member states. The revenue generated by the Member States from the Solidarity Contribution must be used to support final energy consumers, and advance the green transition and the autonomy of the European energy market.

## **Our Comments**

From an M&A transaction perspective, the Regulation will play an important role when it comes to the acquisition of in-scope energy companies and other market participants, such as intermediaries participating in electricity wholesale markets on behalf of producers.

Potential buyers and financial sponsors of the acquisition of such in-scope energy companies should carefully assess, as part of their due diligence efforts, to which extent the target group would be subject to either the temporary windfall taxation or the solidarity contribution obligation under the Regulation, as well as the effect of such an obligation. The effect of being subject to such obligation is likely to impact the valuation of the target group and, in some cases, possibly also compromise the assumed credit metrics if the effect of the obligation is not duly accounted for by the sellers.

From a dispute resolution perspective, the Regulation could give rise to disputes between the enforcing national authorities and obligated in-scope companies, in particular in case of disagreements with respect to the calculation of the windfall taxation or solidarity contribution arising from the Regulation.

To the extent that the in-scope energy company or other market participant would qualify as a “foreign investor” for the purposes of the ECT, the question beckons whether such company could claim that the introduced windfall taxation or solidarity contribution obligation by the Regulation would breach the protection accorded to “foreign investors” under the ECT. If so, the question arises whether such “foreign investor” could initiate investor-state dispute arbitration proceedings pursuant to Article 26 of the ECT with a view to seek damages from the enforcing Member State for the loss incurred as a result of the imposition of the windfall taxation or solidarity contribution obligation.

Consequently, the obligated companies under the Regulation should in any case carefully assess their legal position when being met by any claim arising from the Regulation and its subsequent implementation.

**If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:**



Pernille Nørkær  
Partner

[pernille.noerkaer@moalemweitemeyer.com](mailto:pernille.noerkaer@moalemweitemeyer.com)



Thomas Mygind  
Senior Associate

[thomas.mygind@moalemweitemeyer.com](mailto:thomas.mygind@moalemweitemeyer.com)



Henrik Ringgaard Diget  
Associate

[henrik.diget@moalemweitemeyer.com](mailto:henrik.diget@moalemweitemeyer.com)

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