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ABOUT THE MANDATORY TEMPORARY SOLIDARITY CONTRIBUTIONS IN PORTUGAL (THE PORTUGUESE WINDFALL PROFIT TAXES)

INTRODUCTION

For some time now, in Portugal and throughout Europe, the introduction of new taxes on company profits, known as "extraordinary" or "unexpected" taxes, commonly referred to as *windfall (profit) taxes,* has been on the agenda.

After much talk about the possibility of creating taxes on extraordinary or unexpected profits in Portugal and Europe, and the approval of Council Regulation (EU) 2022/1854 of 6 October 2022, Portugal went ahead with the creation of this type of tax(es) through Draft Law No. 47/XV/1.º, which gave rise to Law No. 24-B/2022 of 30 December.

THE CAUSES

After the effects of COVID-19 on the world market, the war in Ukraine - due to its impact on various market sectors, particularly oil and energy - has also contributed decisively to global inflation, with a generalized effect on the rise in prices of consumer goods and energy, especially gas, oil, and food.

In fact, the global situation has allowed several companies in some sectors to make unexpectedly high profits, especially, but not only, where these are more directly the result of the increase in energy and food prices.

At the same time, this rise in prices is naturally causing increased difficulties for families and businesses.

Thus, and with the alleged purpose of financing anti-inflationary policies and mitigating the effects of inflation on families and companies, the introduction of new taxes on so-called extraordinary or unexpected profits began to be considered, especially aimed at the economic sectors where these profits are most evident and accentuated.

Initially, those involved in the oil and energy sectors were mentioned as being subject to this type of tax, but in the meantime, banking, distribution, and other sectors have also begun to be discussed.

THE POSITION OF THE EUROPEAN COMMISSION

At the beginning of March 2022, the European Commission issued a Communication [COM (2022) 108 final] and stated that state aid measures could be adopted by Member States to enable support for companies and sectors seriously affected by geopolitical developments. To finance these emergency measures, the European Commission anticipated that Member States could consider adopting temporary tax measures on windfall profits.

More specifically, the European Commission has indicated that member states could, on an exceptional basis, approve tax measures aimed at capturing some revenue from certain electricity producers, with a view to redistributing it to their final consumers.

Within these indications, the Commission also clarified that these measures should not be retroactive and would only serve to recover part of the (extraordinary) profits made. It also indicated that the duration of the measures should be limited and linked to a specific crisis.

Within this context, several European countries have implemented, or announced that they will implement, *windfall profit taxes,* adopting different models and covering various sectors of activity, beyond energy.

THE CASE OF ITALY

Italy introduced a tax on extraordinary or unexpected profits as early as March 2022, starting by taxing such gains at a rate of 25 per cent, payable on 30 June and 30 November 2022.

Fundamentally, extraordinary, or unexpected profits are those that result, in the period between 1 October 2021 and 30 April 2022, from an increase in profit margins of more than 10 per cent and more than 5 million euros, compared to the period between 1 October 2020 and 30 April 2022.

This tax was levied on the production, sale and resale of electricity, methane gas, natural gas, and oil products.

In the meantime, the Italian government has approved an increase in the rate of this tax from 25 per cent to 35 per cent and has extended the period of its application until, at least, July 2023.

THE CASE OF SPAIN

In Spain, as early as September 2021, energy suppliers were required to pay the Spanish electricity system an amount proportional to the increase in earnings obtained because of incorporating the price of natural gas into electricity prices.

In the meantime, Spain has proposed introducing a new tax on extraordinary or unexpected profits, corresponding to 1.2 per cent of the profits of companies in the energy sector with a turnover of more than one billion euros and with reference to 2019. It has also proposed a special tax of 4.8 per cent on the margins and commissions of financial institutions.

In both cases, there was an express prohibition on passing on the tax to consumers, failing which a penalty of 150 per cent of the amount passed on could be imposed.

This tax was levied on the years 2022 and 2023 and was due to be paid in September of the following year, with a 50 per cent advance in February of the same year.

THE CASE OF THE UNITED KINGDOM

The UK has opted to apply the windfall tax only to the oil and gas extraction sector, but an extension to the energy sector has been anticipated.

The tax corresponds to a rate of 25 per cent on the profits of these companies, in addition to the general rate of 40 per cent already applicable.

The profits of companies in this sector do, however, have a specific profit assessment regime, with the possibility of deducting up to 91.25 per cent of tax on extraordinary or unexpected profits, depending on the reinvestment of profits in the UK oil and gas sector.

This special tax was to remain in force until the British government deemed oil and gas prices to have returned to historically normal levels and was initially set to expire in December 2025.

Nevertheless, the British government has extended this tax until the end of 2028 and is considering increasing the tax rate from 25 per cent to 35 per cent.

THE CASE OF HUNGARY

Hungary will already apply taxes on extraordinary or unexpected profits to various sectors of activity, including banking and energy, but also telecoms, retail, and airlines, with different regimes for each sector.

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

Telecommunications and retail were, thus, subject to special progressive taxes of up to 7 per cent and 4.1 per cent respectively, depending on profits above one million guilders. Airlines would also have to pay a tax for each passenger.

THE CASE OF GREECE

In May 2022, Greece also introduced a tax on extraordinary or unexpected profits, for now only applied to electricity generating companies. In this case, profits considered excessive would be calculated by reference to the MWh price and the applicable rate is 90 per cent.

THE CASE OF ROMANIA

Romania has applied its new tax on extraordinary or unexpected profits only to the energy sector.

The tax consisted of an 80 per cent rate applicable to profits considered excessive, also by reference to the MWh price. This tax was expected to be temporary and remain in force until 31 March 2023.

OTHER EUROPEAN COUNTRIES

Germany, France, Austria, Ireland, and Belgium did not immediately go ahead with taxes on extraordinary or unexpected profits.

Germany and France seemed to be the countries where these taxes were least supported by the governments in office, and there were no concrete proposals for their creation. However, Austria, Ireland and Belgium have studied the implementation of these taxes on extraordinary or unexpected profits for companies in the energy sector, on terms like those in force in other countries.

However, in the meantime, Council Regulation (EU) 2022/1854 of 6 October 2022 was approved.

COUNCIL REGULATION (EU) 2022/1854

(i) the scope and nature

In September 2022, the European Commission announced a proposal to create a new temporary solidarity contribution of 33 per cent on the profits of companies in the energy sector that in 2022 recorded earnings that were 20 per cent above the average of the previous three years.

Subsequently, in October 2022, Council Regulation (EU) 2022/1854 of 6 October 2022 on emergency intervention to tackle high energy prices was approved.

The Regulation aims to tackle the sharp increase in electricity prices and its repercussions on households and industry, stating that if uncoordinated national measures are adopted, they could affect the functioning of the internal energy market, jeopardizing security of supply and leading to further price increases in the Member States most affected by the crisis.

This Regulation was also based on the assumption that solidarity between Member States, through the adoption of a ceiling for market revenues at Union level, would generate the revenues that would allow Member States to finance support measures for final electricity customers, such as households, small and medium-sized enterprises ("PME") and other energy-intensive sectors, while preserving prices on Union markets and cross-border trade.

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

In this context, Regulation (EU) 2022/1854 introduced a new "solidarity contribution", applicable to companies and permanent establishments in the Union active in the crude oil, natural gas, coal, and refining sectors.

(ii) the reduction of gross electricity consumption

The Regulation in question made it possible to establish a reduction in total monthly gross electricity consumption of 10 per cent, compared to the average gross electricity consumption in the period between 1 November and 31 March of the previous five consecutive years. This reduction in gross electricity consumption during peak hours could not be less than 5 per cent per hour and on average.

(iii) the ceiling for market revenues

Regulation (EU) 2022/1854 also established a ceiling for market revenues obtained from the sale of electricity produced from the following sources: wind energy, solar energy (thermal and photovoltaic), geothermal energy, hydroelectric energy without a reservoir, biomass fuels (solid or gaseous) excluding biomethane, waste, nuclear energy, lignite, crude oil products and peat.

The market revenues obtained by these producers should be limited to a maximum of 180 euros per MWh of electricity produced.

(iv) other (national) crisis response measures

Regulation (EU) 2022/1854 also provided for the possibility for Member States to adopt additional measures, namely, to maintain or introduce measures that further limit the revenues of producers from the indicated sources, including the possibility of differentiating between technologies, as well as the market revenues of other market participants, including those operating in electricity trading.

It also made it possible for these additional measures to fall on other hydropower units, particularly dams, subjecting them to a cap on market revenues, or to maintain or introduce measures that further limit their market revenues, including the possibility of differentiating between technologies.

These additional measures were, however, subject to a number of principles: they had to be proportionate and non-discriminatory, they couldn't jeopardize investment signals, they had to ensure that investment and operating costs were covered, they couldn't distort the functioning of the wholesale electricity markets and, in particular, they couldn't affect the merit order or price formation on the wholesale market, and they had to be compatible with Union law.

(v) the measures applicable to the retail market

On the other hand, Regulation (EU) 2022/1854 provided for the possibility of temporarily extending public intervention measures to fix electricity prices for PMEs, as well as the possibility for Member States to exceptionally and temporarily fix a price for the supply of electricity below cost, provided that all of 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 at the electricity supply price below cost on the same basis.

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

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

(vii) the period of validity

The regulation entered into force on 7 October 2022 and was, by nature, mandatory and directly applicable in all Member States until 31 December 2023. This regulation, however, was not enforceable on its own and needed to be implemented by the Member States.

In addition, it provided for specific dates and periods of validity for some measures, establishing that the reduction of gross electricity consumption during peak hours was applicable from 1 December 2022 to 31 March 2023, that the measures to achieve demand reduction and distribution of surplus revenues would apply from 1 December 2022 and that the ceiling for market revenues to electricity producers and other national crisis response measures were applicable between 1 December 2022 and 30 June 2023.

THE MANDATORY TEMPORARY SOLIDARITY CONTRIBUTION PROVIDED FOR IN REGULATION (EU) 2022/1854

(i) obligation

Regulation (EU) 2022/1854 was exhaustive, stating that the temporary solidarity contribution was mandatory for Member States, unless they had already approved equivalent national measures. In this case, the Member States had to ensure that such equivalent national measures had similar objectives to the temporary solidarity contribution and were subject to rules like those governing the temporary solidarity contribution under the regulation, as well as that they generated revenue of a value comparable to or greater than the estimated value of the revenue from the solidarity contribution.

(ii) subjective incidence

The new solidarity contribution was to be calculated on the taxable profits, determined in accordance with national tax rules, in the 2022 tax year and/or the 2023 tax year and for the whole of them, which were above that corresponding to a 20 per cent increase in the average taxable profits, determined in accordance with national tax rules, in the four tax years beginning on or after 1 January 2018. The Regulation also provided that if the average taxable profits in those four tax years were negative, the average taxable profits had to be zero for the purposes of calculating the temporary solidarity contribution.

(iii) the rate

The rate applicable for calculating the temporary solidarity contribution had to amount to at least 33 per cent of the calculation base and was in addition to the normal taxes and rates applicable, in accordance with the law of each Member State.

(iv) consignment of revenue

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

- financial support for final energy customers, especially vulnerable households, in order to mitigate the effects of high energy prices, in a targeted manner;
- financial support to reduce energy consumption, for example through auctions or tendering schemes for demand reduction, reducing energy end-customers' energy purchase costs for certain consumption volumes, promoting investments by energy end-customers in renewable energies, structural investments in energy efficiency or other decarbonization technologies;

- financial support for companies in energy-intensive sectors, provided they are subject to investments in renewable energies, energy efficiency or other decarbonization technologies; and
- financial support to develop energy autonomy, in particular investments in line with the goals of the REPowerEU plan, set out in the REPowerEU Plan and the REPowerEU Joint European Action, as projects with a cross-border dimension.

In the spirit of "solidarity" between Member States, they could also allocate part of the revenue from the mandatory temporary solidarity contribution to the joint financing of measures aimed at reducing the harmful effects of the energy crisis, including support for job protection and the re-skilling and up-skilling of the labor force, or the promotion of investments in energy efficiency and renewable energies, including in the framework of cross-border projects and the Union Renewable Energy Financing Facility provided for in Regulation (EU) 2018/1999 of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action.

The Regulation's express reference to "timely" effects should be emphasized here, implying that the measures should be direct and immediate, without any time delays.

Likewise, this Regulation (EU) 2022/1854 also established that the measures should be clearly defined, transparent, proportionate, non-discriminatory, and verifiable.

(v) entry into force

Regulation (EU) 2022/1854, as noted above, entered into force on 7 October 2022 and is mandatory and directly applicable, given its nature, to Member States.

Undeterred, it turned out that this Regulation was not feasible on its own, since the measures adopted by the Regulation needed to be implemented by the Member States, which is why it was established that the Member States should adopt and publish the measures implementing the mandatory temporary solidarity contribution by 31 December 2022 at the latest.

(vi) duration

Regulation (EU) 2022/1854 established that the mandatory solidarity contribution was exceptional and strictly temporary. And for this very reason, it was expressly defined that the solidarity contribution should only apply to the 2022 and/or 2023 tax years.

LAW NO. 24-B/2022, OF 30 DECEMBER AND THE NEW PORTUGUESE WINDFALL TAXES

The Portuguese government publicly announced that Portugal would support these measures, actively participating in the work of the European Commission and announcing that it would create a solidarity contribution of 33 per cent on the profits of companies in the energy sector that, in 2022, recorded earnings that were 20 per cent above the average of the previous three years.

When presenting the Draft State Budget Law for 2023 (OE 2023), the Minister of Finance confirmed that he would introduce the new contribution, following the "decision at European level" and stating that it would have a "separate regime" and that it would come into force before the OE 2023.

The "decision at European level" referred to by the government was Council Regulation (EU) 2022/1854 of 6 October 2022, which created this temporary and mandatory solidarity contribution.

As we have also seen, the Regulation was mandatory and directly applicable in Portugal and the temporary and mandatory solidarity contribution was to be implemented by 31 December 2022.

As a result, on 17 November 2022, the government presented the Draft Law No. 47/XV/1.º (draft law) which provided for the creation of a temporary solidarity contribution for the energy sector (CST Energia) and another for the food distribution sector (CST Distribuição Alimentar).

This draft law was approved at a plenary session on 22 December 2022 and promulgated by the President on 28 December of the same year, giving rise to Law No. 24-B/2022 of 30 December, published on the same day and on the eve of the end of 2022.

At the same time, Portaria No. 312-E/2022 of 30 December (an executive regulation) was approved, regulating CST Food Distribution, with the same executive regulation still to be approved for CST Energy.

Fundamentally, Law No. 24-B/2022 of 30 December fully accompanied Draft Law No. 47/XV/1.º, with only one proposed amendment approved, presented by the parliamentary group of the Socialist Party and which removed from the scope of the exclusion of CST Food Distribution micro or small companies subject to the special regime for the taxation of groups of companies under the IRC (Portuguese corporate income tax) and where the

turnover of the group of companies by reference to the tax period in question was greater than 100,000,000 euros.

THE GENERAL RULES

(i) the object

Law No. 24-B/2022 of 30 December, therefore, created and regulated two temporary solidarity contributions: CST Energia - a temporary solidarity contribution for the energy sector - and CST Distribuição Alimentar - a temporary solidarity contribution for the food distribution sector. It expressly stated that the CST Energy was *"an emergency measure to deal with high energy prices"*, while the CST Food Distribution was intended to *"deal with inflation".*

From the outset, as envisaged in Government Draft Law No. 47/XV/1.º, Law No. 24-B/2022 of 30 December went beyond the Council Regulation (EU) 2022/1854 of 6 October 2022, which only provided for the creation of a mandatory temporary solidarity contribution applicable, as we have seen, to the crude oil, natural gas, coal, and refining energy sectors.

(ii) validity and entry into force

Law No. 24-B/2022 of 30 December came into force the day after its publication, i.e., on 31 December 2022.

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

(iii) liquidation

The contributions provided for were to be paid by the taxable person, even if exempt, by means of an official model declaration that was to be approved by order of the member of the government responsible for the area of finance.

It was also established that taxable persons had to pay the contribution individually and autonomously, even when the special taxation regime for groups of companies applied to them.

The declaration should also be sent to the Tax Administration by electronic data transmission by the 20th - regardless of whether that day is a working day or not - of the 9th month following the end of the tax period to which it relates.

The (self-)liquidation could be corrected by the Tax Administration, within the general deadlines, if errors, omissions, or changes were found that led to a higher amount of tax being demanded than the one paid.

Similarly, it was stipulated that in the absence of a settlement of the contribution under the terms of the previous paragraphs, it could be made (ex officio) by the Tax Administration based on the information at its disposal.

(iv) payment

The contributions provided for should be paid by the taxable person, even if exempt, by means of a declaration using an official model to be approved by order of the member of the government responsible for the area of finance.

(v) (non-) deductibility

In line with Council Regulation (EU) 2022/1854 of 6 October 2022 and in accordance with Draft Law No. 47/XV/1.º, Law No. 24-B/2022 of 30 December established that contributions were not deductible for the purposes of determining IRC taxable profit, even when accounted for as expenses in the tax period.

(vi) consignment

Law No. 24-B/2022 of 30 December also expressly provided for how the revenue from the contributions now created should be allocated. Thus, the revenue obtained from CST Energy was to 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 customers, especially 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 for demand reduction, reducing energy end-customers' energy purchase costs for certain consumption volumes, promoting investments by energy end-customers in renewable energies, structural investments in energy efficiency or other decarbonization technologies;
- financial support measures to support companies in energy-intensive sectors, provided that they are conditional on investments in renewable energies, energy efficiency or other decarbonization technologies; and
- financial support measures to develop energy autonomy, in particular investments in line with the targets of the REPowerEU plan, set out in the REPowerEU Plan and the REPowerEU Joint European Action.

For its part, the revenue obtained from CST Food Distribution should be allocated, by order of the Finance and Energy Ministers, to at least one of the following purposes:

- actions to support the increase in the cost of food for the most vulnerable population, particularly through social sector organizations;
- measures to guarantee the implementation of consumer defense policy with the aim of ensuring a high level of consumer protection through the Consumer Fund;
- measures to provide financial support to micro and small trade, service and catering companies that are particularly affected by rising operating costs, inflation and falling demand, by partially allocating revenue to the Trade Modernization Fund for this purpose; and
- measures to support the qualification of professionals working in micro and small commerce, services, and catering companies, to increase the resilience of these companies, by partially allocating revenue to the Trade Modernization Fund for this purpose.

THE NEW CST ENERGY, IN PARTICULAR

(i) subjective incidence

The subjective incidence of CST Energy followed Council Regulation (EU) 2022/1854 of 6 October 2022, and applies to resident IRC taxpayers who carry out, as their main activity, a commercial, industrial, or agricultural activity, as well as non-resident IRC taxpayers with a permanent establishment in Portuguese territory, who carry out activities in the crude oil, natural gas, coal, and refining sectors.

To this end, it was proposed that taxable persons be understood as carrying out activities in the crude oil, natural gas, coal and refining sectors when they generate at least 37.5 per cent of their turnover in economic activities in the sectors of extraction, mining, oil refining or the manufacture of coke oven products, as referred to in Regulation (EC) 1893/2006 of the European Parliament and of the Council.

In another context, it was also expressly provided that a non-resident IRC taxpayer would be considered to have a permanent establishment in Portuguese territory when it carries out, in whole or in part, its activity through a fixed installation located in Portuguese territory and the profits attributable to it are subject to IRC.

(ii) objective incidence

The CST Energy should apply to profits considered surplus in tax periods for corporate income tax purposes beginning in 2022 and 2023, in accordance with the provisions of Regulation (EU) 2022/1854.

To this end, it was proposed that the part of the taxable profits for the 2022 and 2023 tax periods that exceeded the corresponding 20 per cent increase in relation to the average taxable profits for the four tax periods starting in 2018 to 2021 be considered surplus profits, also in accordance with the provisions of Regulation (EU) 2022/1854. However, Law No. 24-B/2022 of 30 December also provided that, in cases where the average taxable profit for those four tax periods is negative, this average would be zero and the CST Energy would be levied on the entire taxable profit.

It was also stipulated that in the case of taxable persons to whom the special taxation regime for groups of companies applies, the relevant taxable profit would be that calculated by each taxable person in their income declaration.

Law No. 24-B/2022 of 30 December finally provided for special regimes applicable to company demergers and mergers. Thus, in the event of a demerger during the relevant tax periods, the taxable profit to be considered for the periods prior to the demerger should be the proportional part, considering the market value of the detached assets, corresponding to the demerged taxpayer.

On the other hand, in the event of a merger during the relevant tax periods, the taxable profit to be considered for the periods prior to the merger should be the algebraic sum of the taxable profits corresponding to the taxable persons being merged.

(iii) the applicable rate

CST Energy's tax rate was 33 per cent and was levied on profits considered to be surplus, as indicated above.

THE NEW CST FOOD DISTRIBUITION, IN PARTICULAR

(i) subjective incidence

The CST Food Distribution would apply to resident IRC taxpayers whose main activity is commercial, industrial, or agricultural, as well as non-resident IRC taxpayers with a permanent establishment in Portuguese territory, who operate food trade establishments for products of animal and vegetable origin, fresh or frozen, processed, or raw, in bulk or pre-packaged.

For non-resident IRC taxpayers, it was also provided that, for the purposes of Law No. 24-B/2022 of 30 December, «Food trade establishment» would be the place where a trade activity is carried out under one of the codes of economic activity ("CAE"), to be defined by decree of the Ministers of Finance and Economy, which includes the food retail trade or with a predominance of food products, identifying, in the latter case, some avoidable and undesirable degree of subjectivity.

This is Portaria No. 312-E/2022 of 30 December, under which establishments carrying out a trade activity corresponding to the following codes of economic activity were covered by the concept of the "Food trade establishment":

- 47111 Retail trade in supermarkets and hypermarkets;
- 47112 Retail trade in other non-specialized establishments, predominantly food, beverages or tobacco;
- 47210 Retail sale of fruit and vegetables in specialized establishments;
- 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, pastry and confectionery in specialized shops;
- 47250 Retail sale of beverages in specialized establishments;
- 47291 Retail sale of milk and milk products in specialized establishments;
- 47292 Retail sale of food, natural and dietetic products in specialized establishments;
- 47293 Other retail sale of food in specialized shops, n.e.

(ii) non-subjections

It was foreseen that taxable persons who qualified as micro or small companies in the tax period of the contribution (2022 or 2023), under the terms of Decree-Law No. 372/2007 of 6 November, in its current wording, would be excluded from the CST Food Distribution.

However, because of the amendment tabled by the Socialist Party's parliamentary group, the exclusion of CST Food Distribution would not apply to micro or small companies subject to the special corporate income tax regime for groups of companies and where the turnover of the group of companies, by reference to the tax period in question, exceeds 100,000,000 euros.

(iii) subjective exemptions

Exempt from the CST Food Distribution would be taxable persons whose food retail trade activity or activity with a predominance of food products was, in the tax period to which the contribution refers (2022 or 2023), ancillary in nature, which is the case when it does not represent more than 25 per cent of total annual turnover.

(iv) objective incidence

The CST Food Distribution was applicable to profits considered surplus in tax periods, for IRC purposes, beginning in 2022 and 2023.

For this purpose, and similarly to TSE Energy, it was proposed that the part of the taxable profits for the 2022 and 2023 tax periods that exceed the corresponding 20 per cent increase in relation to the average taxable profits for the four tax periods beginning in 2018 to 2021 be considered surplus profits.

It was also stipulated that, in cases where the average taxable profit for those four tax periods is zero, this average is zero, and the CST Food Distribution will be levied on the entire taxable profit for the years 2022 and 2023. It was also stipulated that, in the case of taxable persons to whom the special taxation regime for groups of companies applies, the relevant taxable profit would be that calculated by each taxable person in their income declaration.

In this case too, the same special regimes applicable to company demergers and mergers were provided for. Thus, if a demerger has 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, taking into account the market value of the detached assets, corresponding to the demerged taxable person.

On the other hand, if a merger has taken place during the relevant tax periods, the taxable profit to be considered for the periods prior to the merger should be the algebraic sum of the taxable profits corresponding to the taxable persons being merged.

(v) the applicable rate

CST Food Distribution's tax rate was set at 33 per cent and was levied on the profits considered surplus, calculated in accordance with the terms set out in the previous point.

FINAL CONSIDERATIONS

In the meantime, through Law No. 24-B/2022 of 30 December, Portugal implemented the two aforementioned new contributions on so-called surplus profits, despite the then Prime Minister declaring 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 in other European countries have been subject to taxes on extraordinary or unexpected profits are already subject in Portugal to some sectoral and extraordinary financial contributions (which have been in place for a number of years),

and which encumber the normal taxation of profits under IRC, even though based on a different incidence.

In the case of the energy sector, the extraordinary contribution on the energy sector has already been required in Portugal since 2014, while the food sector has been subject to the "MAIS" food safety tax since 2012.

In addition to these, Portugal has also had a contribution on the banking sector since 2011, an additional solidarity on the banking sector since 2020, an extraordinary contribution on the pharmaceutical industry since 2015 and an extraordinary contribution on suppliers of medical devices to the national health service since 2021. A new special contribution for the conservation of forest resources was also in the process of being created (again) for 2023.

However, it is not possible to know the actual revenue generated by each of these contributions, since they are not properly itemized in the State Budget Law, which apparently violates constitutional rules and principles and the budgeting of public revenue, with consequences that the Courts have not yet had the courage to assume.

All these "contributions" were in addition to the normal corporate income tax to which Portuguese companies operating in these sectors are also subject, particularly in the energy and food sectors. And the truth is that it seems possible to identify a coincidence between the objectives sought by the CESE (Extraordinary Contribution on the Energy Sector) and CST Energy, bearing in mind the criteria for allocating the revenue set out in Draft Law No. 47/XV/1.º and that the CESE aims, in particular, to finance social and environmental policies in the energy sector. But here, as we have seen, the 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.

On the other hand, and even though CST Food Distribution is not covered by Council Regulation (EU) 2022/1854, potential coincidences were identified in the objectives to be pursued in relation to consumer protection.

But what is also certain is that, in Portugal, the ("normal") tax on profits, the IRC, is now already (more than proportionally) levied on "excessive" profits or, as Law No. 24-B/2022 of 30 December called them, "surpluses" profits, to the extent that a state surcharge has to be added to it, which implies additional rates (to the normal rate of 21%) of 3%, 7% and 9%, depending on the "tier", plus, in some municipalities, a municipal surcharge of up to 1.5% - which raises the overall tax rate to (in "rough" terms) 31.5% in the end (making it progressive).

However, it is possible to identify some other constraints to the realization of these new taxes on profits in Portugal.

Firstly, the principle of equality must be borne in mind and safeguarded, which requires a public and objective justification for taxing certain companies (again) and not taxing others. In fact, this issue is especially pertinent when there are (other) economic sectors that have made and continue to make (extraordinary or unexpected) profits, as is currently the case with the arms and defense sector, or as has happened (and may happen again this winter...) with the health sector, especially that relating to protection and disinfection products (against COVID-19), which, as we shall see, will justify issues of a different nature, relating to state aid.

However, this public and objective justification could be made easier when the tax is temporary, of an extraordinary and joint nature and when it was introduced by a European regulation. But the truth is that, having analyzed Law No. 24-B/2022 of 30 December, and as already indicated in the analysis of Draft Law No. 47/XV/1.º, no objective reasons can be identified for compressing the principle of equality in taxation, especially with regard to the food sector and for which, moreover, Law No. 24-B/2022 of 30 December implies *"an additional solidarity effort",* possibly even referring to the "MAIS" food safety tax.

Moreover, the truth is that in Portugal, as is well known, extraordinary taxes tend to be perpetuated, as is the case with other sectoral financial contributions, such as the CESE itself or the "MAIS" food security tax.

There was therefore a well-founded fear that this could also be the case with these new taxes - as is the case in Italy and England, where, as we have seen, the deadlines for *windfall* taxes have already been extended to 2023 and 2028, respectively.

It will also be necessary to bear in mind the need to harmonize the new CST Energy with European legislation, namely the Energy Taxation Directive, which may not be easy either.

In the same vein, there will also be questions of state aid, which the European Commission itself has already emphasized and which must be safeguarded. And not only because some companies may "benefit" from 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 by transferring "beneficiary" companies to the scope of application of these new taxes on extraordinary or unexpected profits, and Law No. 24-B/2022 of 30 December remains absolutely silent in this area.

What is certain is that the 1997 Constitutional Revision in some way provided for a third type of tax - sectoral financial contributions - and doctrine and jurisprudence 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 have the nature of coercive installments and are unilateral.

However, Professor Sousa Franco already taught, in the 1960s to 1990s, that these types of contributions - then "parafiscal" - could have a different regime and nature from taxes. However, when such (parafiscal) taxes took on the nature of (true) taxes and were thus coercive and unilateral installments, they would be subject to the same rules - if taxes, to the rules of taxes, if fees, to the rules of fees (or whatever else they were) - but without admitting such a *tertium genus*, now excluded from the constitutional guarantees typically inherent to taxes and won over decades.

The new doctrine and case law (post-1997) have therefore freed the legislator from these constraints. But there is no guarantee that this will continue to be the case, especially if we are dealing with contributions (taxes) that apply to sectors that are already subject to other financial, sectoral, or other so-called temporary, exceptional, and extraordinary contributions. Especially when Law No. 24-B/2022 of 30 December itself treats these new contributions as true taxes on profits, both in their nature and in their method of settlement.

Likewise, the Constitution does not allow the creation of retroactive taxes, as is clearly the case here, and unlike other European countries (e.g. Italy), where taxes on such extraordinary, unexpected profits are retroactive in nature. And what is certain is that the analysis of the Regulation, the Draft Law and now Law No. 24-B/2022 of 30 December also identifies other difficulties in this field, since the contribution was also based on margins calculated by companies before the expected entry into force of the new contributions in question.

On the other hand, the Constitutional Court has held that *"the legislator of the 1997 constitutional revision (...) only intended to enshrine the prohibition of the authentic, or proper, retroactivity of tax law, covering only cases in which the taxable 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, i.e., those situations in which the law is applied to past facts but whose effects still last in the present".*

Here in particular, the Constitutional Court has held that when it comes to (complex and) successive taxes (as is the case with IRC), the taxable event only occurs at the end of the year, so the application since 1 January of this year - and, therefore, to profits already earned - may not, from the outset, present problems of genuine or inauthentic retroactivity, but at most mere retrospectivity, which has been accepted by the Constitutional Court, unless it flagrantly violates the constitutional principle of legal certainty.

It should be noted, however, that in this case Law No. 24-B/2022 of 30 December came into force on 31 December 2022, i.e., on the 365th and last day of the year 2022, but, as we have seen, it applied to profits earned during the 365 - previous - days of the year 2022, and it is therefore possible to identify at least a clear compression of the principles of trust and legal certainty, which may deserve different protection and different weighting.

Finally, it would be necessary to define, more precisely and objectively, in what terms such profit can be considered "excessive" to justify "extraordinary" taxation, which the Regulation and Law No. 24-B/2022 of 30 December already promoted by reference to the years 2018 to 2021.

In this context, however, it is questionable whether, in cases where the average taxable profit for the four tax periods is negative - i.e., where taxable persons have made losses - the average should be zero for the purposes of calculating surplus profits, and the contribution should be levied on the entire taxable profit for the tax periods beginning in 2022 and 2023.

This means, in effect, that these taxpayers could be subject to a tax on profits of more than 60 per cent, plus an IRS rate of 28 per cent in the event of distribution to shareholders.

As these new solidarity contributions, provided for in Law No. 24-B/2022 of 30 December, were structured, it was not confirmed, however, that this was (yet another) situation likely to increase tax litigation, which could lead to the state being forced by the Courts to return the value of these new contributions to taxpayers and to a review of the Constitutional Court's case law on the retrospectivity of tax law.

As Friedman has said, inflation is the only way for the state to raise taxes without any intervention by the legislature, but the state (Portuguese and others) has also been obtaining "excessive" additional revenue as a result of this same inflation, because the same tax rates on higher values, because they are inflated, result in (much) more tax revenue. And as Philippe Bullet has also taught us, 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, and the provisions of the State Budget Law for 2023 (OE 2023) seem insufficient in this respect.

On the other hand, and according to the statements made by the then Minister for the Environment and Climate Action, confirmed in the Draft State Budget Law for 2023 (OE 2023), there were no plans for the government to change the Extraordinary Contribution on the Energy Sector (CESE). In other words, both contributions would apparently be in force at the same time and would not be deductible either from each other or from corporate income tax. The Minister for the Environment even said that "there is no substitution of taxes, we have to see how all these two taxes combine" - referring then to the Ministry of Finance -

but the truth is that the *retrospective* makes no reference to either the CESE or the "MAIS" food safety tax.

In this context, it should be emphasized that while it was true that Council Regulation (EU) 2022/1854 expressly provided for the new contribution to be in addition to the normal taxes and charges applicable under the law of a Member State, it also provided that this might not be the case if, as we have seen, Member States already applied equivalent contributions.

It remained to be seen what the government would mean by "normal taxes" and whether this would include extraordinary sectoral financial contributions, such as the CESE, since the latter is allegedly extraordinary and temporary (and not "normal"), but the government of the time wanted taxpayers in the energy sector and the food sector to be effectively subject to both the CESE and the "MAIS" food safety levy, as well as these new temporary solidarity contributions.

Finally, it should be noted that CST Energy also raised questions about its compliance with the Treaty on the Functioning of the European Union (TFEU), insofar as there were doubts as to whether Article 122(1) of the TFEU and the procedure used constituted the appropriate legal basis for the implementation of a measure such as CST Energy, which could potentially imply a violation of the TFEU, with the necessary impact on CST Energy settlements.

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