Tithe an Oireachtais
Houses of the Oireachtas

An Comhchoiste um Chomhshaol agus Ghníomhú ar son na hAeráide

Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta an Bhille Fuinnimh (Gnóchain Amhantair san Earnáil Fuinnimh), 2023

Bealtaine 2023

Joint Committee on Environment and Climate Action

Report on the Pre-Legislative Scrutiny of the General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill 2023

May 2023

JC/JCECA/13

Membership of the Joint Committee on Environment and Climate Action

Richard Bruton TD

Fine Gael

Claire Kerrane

Sinn Féin

Cormac Devlin TD

Fianna Fáil

Alan Farrell TD

Fine Gael

Brian Leddin TD (Cathaoirleach)

Green Party

Darren O'Rourke TD

Sinn Féin

Christopher O'Sullivan TD

Fianna Fáil

Bríd Smith TD

Solidarity-People Before Profit

Jennifer Whitmore TD

Social Democrats

Senator Lynn Boylan
Sinn Féin

Senator Timmy Dooley
Fianna Fáil

Senator Alice-Mary Higgins
Independent

Senator John McGahon
Fine Gael

Senator Pauline O'Reilly
Green Party

Cathaoirleach's Foreword

The Committee agreed to conduct Pre-Legislative Scrutiny of the General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill 2023.

This report sets out the details of that scrutiny and also contains a number of recommendations that the Committee feel would enhance and strengthen the Bill.

I would like to express my appreciation to all the witnesses for their valuable contributions and to the members of the Committee for their dedicated work in this collaborative process.

Brian Leddin T.D.
Chairman
Joint Committee on Environment and Climate Action
18 May 2023

Table of Contents

Introduction

In accordance with Standing Order 146A the General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill 2023 was referred to the Joint Committee on Environment and Climate Action on 23 March 2023. The Committee agreed at its meeting on 30 March 2023 to undertake pre-legislative scrutiny of the General Scheme.

Stakeholder Engagements

The Committee conducted pre-legislative scrutiny of the General Scheme by way of one engagement with stakeholders on 18 April 2023, as detailed below.

18 April 2023

Session 1: Office of the Director General for Energy, EU Commission

- Catharina Sikow-Magny, Director of Green Transition and Energy System Integration, European Commission

Session 2: Department of the Environment, Climate Action and Communications

- John Burke, Principal Officer, Energy Security
- Evan Walker, Economist Assistant Principal (Cap on market revenues)
- Laurena Leacy, Senior Geologist (Temporary Solidary Contribution)
- Kevin Hagan, Manager, Wholesale Electricity Market, CRU
- Michael Kelly, Director, Eirgrid

Background

The war in Ukraine led to significant increases in wholesale natural gas prices which in turn impacted consumer prices for gas and electricity.

The EU Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices came into force in October 2022, and seeks to address the issue of windfall gains by collecting and redistributing proceeds from these gains by introducing:

- a temporary solidarity contribution based on taxable profits in the fossil fuel production and refining sectors;
- a cap on the market revenues of certain generators (such as wind, solar and oil) in the electricity sector.

On 22 November 2022, the Government approved the implementation of these measures along with key high-level decisions in relation to their implementation.[1]

On the 21 March 2023, the Government approved and published the General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill which was referred to the Joint Committee on Environment and Climate Action for pre-legislative scrutiny on the 23 March.

[1] https://www.gov.ie/en/publication/c923c-draft-general-scheme-energy-windfall-gains-in-the-energy-sector-bill-2023/

Summary of the General Scheme

The overall aim of the General Scheme is to provide for the implementation of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices. The General Scheme provides for the administration and collection of a temporary solidarity contribution based on taxable profits in the fossil fuel production and refining sectors; and for the administration, collection and distribution of proceeds from a market cap on revenues of certain generators (such as wind solar and oil) in the electricity sector.

Part 1: Preliminary and General

Head 1: Short title and Commencement **Head 2: Interpretation**	These are standard provisions providing for the title of the Bill, its commencement and definitions used in the Bill.

Part 2: Temporary Solidarity Contribution

Chapter 1: Calculation of temporary solidarity contribution

Head 3: Temporary Solidarity Contribution **Head 4: Definition of Taxable Profits for the purposes of calculating the temporary solidarity contribution, Amendment to the Taxes Consolidation Act 1997**	These heads provide for the method by which the Temporary Solidarity Contribution is calculated. The obligation and rate of 75% are set out in Head 3. The definition of taxable profits, which is used for both the baseline (a 20% increase on the average taxable profits for the period 2018 to 2021) and the taxable profits on which the Temporary Solidarity contribution are based (for 2022 and 2023), is set out.

Chapter 2 – Administration of temporary solidarity contribution

Head 5: Administration of temporary solidarity contribution	This Head provides for the Revenue Commissioners to administer the Temporary Solidarity Contribution and remit the proceeds collected to the exchequer.

Chapter 3 - Company Obligations, Revenue Powers, Assessments, Anti-Avoidance, Penalties

Head 6: Company Obligations **Head 7: Revenue Powers** **Head 8: Assessment** **Head 9: Anti-avoidance** **Head 10: Penalties, offences, Interest on Overdue Payment and Other Sanctions**	These Heads place obligations on the relevant companies to register and pay the Temporary Solidarity Contribution and provide required information. These Heads also provide powers to the Revenue Commissioners to administer the Temporary Solidarity Contribution including conducting assessments, ensuring anti-avoidance and applying penalties where appropriate.

Chapter 4 – Use of proceeds from temporary solidarity contribution

Head 11: Use of proceeds	This Head sets out that the proceeds collected from the Temporary Solidarity Contribution must be used in line with the requirements set out in the Council Regulation. The proceeds from the Temporary Solidarity Contribution may be used to provide financial supports to energy consumers. The proceeds may also be used to support investments in renewable energy, energy efficiency and measures to increase

	energy autonomy. Government has not yet decided how the proceeds should be used.

Part 3: Cap on Market Revenues

Chapter 1 – Calculation of Cap on Market Revenues

Head 12: Mandatory Cap on Market Revenues and entities to which the cap applies **Head 13: Fuel sources to which the cap applies** **Head 14: Level of the cap** **Head 15: Market Revenue** **Head 16: Capped Revenue** **Head 17: Preliminary surplus revenue** **Head 18: Adjusted surplus revenue** **Head 19: Payment Obligation**	These Heads set out which entities (Head 12) and technologies (Head 13) are subject to the cap. Entities include generators, suppliers and other entities in the market. This is to ensure that windfall gains which may be passed on from one entity to another are included. The list of technologies includes wind, solar, hydro, oil, coal, peat, biomass and waste. The level of the cap is set in Head 14. This is €120 per MWh for wind and solar, a floating cap of at least €180 per MWh (based on costs of production) for coal, oil, peat and biomass and €180 per MWh for other technologies (e.g. hydro and waste). The method by which the cap is applied includes the calculation of market revenue based on an index of market prices multiplied by the output of each generator (Head 15). The capped revenue is calculated as the level of the cap multiplied by the output of each generator (Head 16). The preliminary surplus revenue is then calculated as the market revenue less the capped revenue for each month in the period December 2022 to June 2023. The adjusted surplus revenue is then calculated (Head 18) with the payment obligation set out (Head 19). The adjusted surplus revenue takes into account hedging

Head 20: Hedging Operations **Head 21: Declaration and Payment**	operations (set out in Head 20). Examples of hedging operations includes where a genitor may have forward sold the electricity output. If this was done, then the windfall gain was not realised by a generator but effectively passed on to another market entity (e.g. a supplier). In these cases, the other market entity may be fully or partly liable to pay the adjusted surplus revenue. Provision is also made for suppliers to demonstrate that the windfall gains (i.e. adjusted surplus revenues) have been passed on to final consumers and so not be liable to pay these revenues. Head 21 places the obligation on the market entities to declare and pay relevant sums to the Commission for Regulation of Utilities. As the Council Regulation requires that the proceeds of the Cap on Market Revenues are used to finance measures to support final electricity consumers, the proceeds are held by the Commission for Regulation of Utilities (or EirGrid on their behalf) prior to being directed by to redistribute back to consumers.

Chapter 2 - Administration and Collection of Cap on Revenues

Head 22: Confirmation **Head 23: Collection of payment obligation** **Head 24: Provision of information** **Head 25: Distribution system operator** **Head 26: Transmission system operator** **Head 27: Determinations, late payment and interest, reimbursement for full compliance, and revocation of licences** **Head 28: Collection Agent**	These Heads provide for the administration of the Cap on Market Revenues by the Commission for Regulation of Utilities. This includes the confirming which entities are subject to the cap, placing obligations on those entities to provide information and pay, ensuring ESB Networks and EirGrid provide necessary information to the Commission for Regulation of Utilities, and provide for penalties in the event of late/underpayment. The Heads also provide for EirGrid to collect and hold the proceeds on behalf of the Commission for Regulation of Utilities.

Chapter 3 – Distribution of Proceeds

Head 29: Distribution of Revenues	This Head sets out that the proceeds collected from the Cap on Market Revenues must be used in line with the requirements set out in the Council Regulation. The proceeds from the Cap on Market Revenues must be used to finance measures to support final electricity consumers that mitigate the impact on high electricity

	prices in a targeted manner. Government has not yet decided how the proceeds should be used.

Committee scrutiny of the General Scheme

1. The Committee held one engagement in relation to the General Scheme. In examining the General Scheme, the Committee identified a number of key issues where further consideration is necessary.

   The key issues raised are as follows:

   - Wholesale prices vs final consumer prices and hedging contracts
   - Cap on revenues
   - Temporary solidarity contribution (TSC)

Introduction - Response to the EU energy crisis

2. The EU's energy market has been heavily impacted by Russia's invasion of Ukraine leading to a crisis in the gas and electricity markets. This has resulted in significantly increased wholesale prices and prices on consumer bills with some of these wholesale price increases leading to windfall gains for some entities in the energy sector. The European Commission proposed a number of measures in response to this crisis including the proposal on an emergency intervention to address high energy prices which seeks to address the issue of windfall gains by collecting and redistributing proceeds from these gains.

3. Ms Catharina Sikow-Magny, Director of Green Transition and Energy System Integration, European Commission highlighted that in addressing this issue a rapid and coordinated EU response was necessary. The Committee noted that the Commission's main concern is to ensure that there will not be different and uncoordinated national measures in Member States that could negatively affect the supply in neighbouring countries or impact the effective functioning of the internal market.

4. Ms Sikow-Magny outlined a number of emergency measures proposed by the Commission to address the energy crisis in the short-term including the revised Gas Storage Regulation and the Gas Demand Reduction Regulation

which led to the successful reduction in gas consumption by 15% in winter 2022.

5. The Council proposal for an emergency intervention to address high energy prices (Regulation 2022/1854) came into force in October, providing for a reduction in electricity demand, the collection and distribution of the energy sector's surplus revenues to final consumers and the introduction of a solidarity contribution from the fossil fuel industry.

6. The General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill 2023 provides for the implementation of the temporary solidarity contribution and cap on market revenues. The Department of Environment, Climate and Communications stated that the revenues from this initiative will be available to Government to offer additional supports going forward but that no details were yet available. The Committee agreed that it is important to ensure a balance whereby a strong revenue stream is gained for the State without introducing risk to our security of energy supply or a reduced appetite for future investments. Committee Members noted that a number of other EU states have adopted windfall tax measures that extend beyond the provisions that are provided for by the Regulation.

Wholesale prices vs final consumer prices and hedging contracts

7. The Committee expressed concern that while wholesale prices for energy are now close to the level they were at before the Russian invasion of Ukraine, consumers in Ireland continue to pay extremely high prices. Ms Sikow-Magny stated that the situation regarding the gas market is currently much improved on last year and as such this should be reflected in the electricity market where electricity is produced by gas.

8. However, the Committee noted that it was important to ascertain there is continued scarcity in the market or if the gas in the market had been purchased when wholesale prices were still at a much higher level. In addition, Ms Sikow-Magny also stated that the hedging market would also need to be examined.

9. The Committee noted that there should be further examination of this with some Members concerned that if electricity companies are not passing on reductions in wholesale prices or the benefits of their hedging contracts, they will not be susceptible to the new TSC. While the Department acknowledged the increase in prices, Mr Evan Walker, DECC, highlighted that at the peak of the energy crisis, between January 2021 and August 2022, wholesale prices for gas and electricity increased by 417% and 493% respectively while consumer bills increased by 138% and 98% respectively and emphasised the need to manage expectations with regard to the outcome of the provisions of the General Scheme of the Bill.

10. Mr Walker stated that during the peak of the energy crisis, hedging ensured that final consumers were not affected by the same level of price increases as seen with wholesale prices. Due to the clear importance of hedging in the market, the Committee noted that it is essential that hedging operations are fully comprehensible and verifiable through clear visibility as provided by the General Scheme.

Temporary Solidarity Contribution (TSC)

11. The Committee noted that the TSC will apply for the years 2022 and 2023 as per the Council Regulation at a rate of 75% and will be administered by the Revenue Commissioners. Some Committee Members expressed concern that it was not clear if the Regulation established whether or not losses may be offset against the solidarity contribution and the Commission confirmed that the Regulation does not. Although Member States cannot change the Regulation itself, Recital (55) states that they may adjust their national legislation to ensure that it caters for the treatment of losses made by a company in scope of the Regulation in previous fiscal years.

12. Mr Walker stated that the TSC will apply for the years 2022 and 2023 as per the Council Regulation at a rate of 75% on any profits more than 20% higher than the profits which might normally have been anticipated for that period. This will be administered by the Revenue Commissioners.

13. Committee members raised a number of concerns in relation to what mechanisms companies might use to reduce the amount of contribution they make under the TSC. Some Committee members enquired as to whether or not losses and capital expenditure from previous years would be taken into account when calculating the TSC for corporation tax. Ms Laurena Leacy stated that the Government decision was not to include losses pre 2018 and to preclude losses being carried back from 2023. However, losses from the period 2018 to 2023 can be brought forward.

14. Ms Leacy emphasised that by taking the decision not to include losses before 2018, companies cannot offset losses from these years against the contribution which would result in lower collection by the State. Ms Leacy further outlined that as the TSC applies to taxable profits under national tax rules, "a negligible contribution" would be collected if applied under current corporation tax rules due to the nature and history of the sector whereby companies can offset tax bills against losses made in previous years. Committee members expressed concern regarding the lack of contribution under current tax policies.

15. The Committee noted that under the General Scheme, losses can only be carried within the period of 2018 to 2023. Ms Leacy stated that losses predating that period are not included so as to maximise the return and windfall gain to the State.

16. The Committee questioned whether significant revenue might be lost through group relief and capital expenditure relief. Ms Leacy highlighted that the approach to group relief in respect of TSC is provided for under Head 4 of the General Scheme and is designed to maximise the return of contribution to the State in keeping with tax principles.

17. Ms Leacy stated that the General Scheme provides for two conditions on capital expenditure; that it must be allowable for capital allowances and claimed with normal corporation tax and tangible assets for the purpose of activities for which the contribution relates in Ireland or within the maritime

jurisdiction area and within use for a period of at least five years. The Committee noted that the inclusion of these conditions will ensure situations where companies might buy assets or form other ways to artificially lower their contribution are avoided.

18. Committee members asked about the difference between the expected revenue from the TSC before and after the decision to allow for the writing-off of capital expenditure. Ms Leacy stated the Department estimates the write off of capital expenditure would reduce the total proceeds of the TSC by about 10% to 15%. Committee Members asked whether it would be worth considering a ceiling to ensure there are limits on the amount of TSC that could be discounted. Ms Leacy stated that such measures or ceilings could be possible but that further consideration would be needed as to how this would be implemented.

19. Some Members expressed concern that Head 29 is not prescriptive enough in stating how the revenues raised by the TSC will be targeted with the Committee noting that it is essential for funds to go to those who are most vulnerable i.e. households and small businesses. Ms Leacy outlined that the distribution of revenue will be a Government decision and that an inter-Departmental engagement process is the next body of work that will be undertaken to inform that decision.

20. Committee members asked Ms Sikow-Magny about the approach being taken by other EU countries in terms of the targeting of the revenue that is raised, in particular with respect to households. Ms Sikow-Magny stated that the revenues collected by means of either of the measures should go back to help those who are suffering as a result of the high prices, be it households or certain companies, in particular SMEs and vulnerable households.

21. Committee Members referenced the earlier contribution from Ms Sikow-Magny and noted that, as the policy justification and stated purpose of the TSC is solidarity with those most affected by the energy crisis, it would be appropriate to have more clarity on this aspect of the transposition in the

legislation. Ms Sikow-Magny stated that “that is why we have put a lot of emphasis that the benefit of the two measures - the revenue cap measure and the revenues therefrom and the solidarity measure and the revenues therefrom - should go to households and especially to small and medium-size companies”.

22. However, some Members of the Committee agreed that in order to avoid a scenario whereby large energy users benefit from the TSC, it is essential that more detail is provided within Head 29 of the General Scheme of the Bill. Mr Walker highlighted that under Head 29 the TSC provisions are somewhat broader than the cap on market revenues to allow for supports to be used for energy customers but also for encouraging potential renewable investments.

23. Mr Walker further stated that Head 29 outlines that the funds will be used in a manner is entirely aligned with the EU Regulation. The Committee noted that the specifics of how the funds are distributed beyond the General Scheme is a matter for the budgetary process and that the General Scheme can only provide that revenues are ring-fenced for electricity consumers and that they will be “targeted, transparent and verifiable”.

Cap on Market Revenues

24. In drafting the EU Regulation, Ms Sikow-Magny stated that the Commission felt Member States were best placed to assess the market caps that would work for their national markets and for their production mix and future investments. Mr Walker outlined that a multi-criteria analysis facilitated the calculation of the caps as set out in Head 14 of the General Scheme.

25. The Department indicated that a cap of €120 per MWh will apply for wind and solar which reflects their lower operating costs while other sectors have a cap of €180 as per the EU Regulation. Mr Walker stated that the Department engaged in a stakeholder consultation with approximately 30 representative bodies in relation to the drafting of the General Scheme with the key concern emerging that a €120 cap was too low and would create a country-specific risk that would negatively impact future investment in Ireland.

26. However, Members expressed concern that the stakeholders for whom the TSC and market cap are designed to benefit were not adequately consulted in relation to energy poverty and the effective operation of social solidarity measures. The Committee noted that, given that decisions and choices that affected the amount of contribution payable by one set of stakeholders, directly impacted the amount of funds available or the level of bills payable for the likely beneficiaries, both sides of the equation should be consulted.

27. As such, the Committee noted that the caps were set in order to capture windfall gains while also maintaining positive investment signals thereby minimising country-specific market risks. Mr Walker stated that while a €90 cap would capture the windfall gains to the greatest extent, it was felt that this would deliver negative investment signals.

28. The Committee noted that the EU regulation as implemented by the General Scheme does account for hedging operations to ensure entities are not exposed to daily market volatility in relation to the cap. Members also noted that the Commission for the Regulation of Utilities (CRU) will have full visibility of and responsibility for the verification of hedging operations with regard to the cap. If a company cannot verify its hedging operations to the regulator, then the full payment obligation will remain.

29. The Committee expressed concern that the CRU would not be adequately resourced to take responsibility for the verification of hedging operations as per the General Scheme as per previous evidence heard in public session. While Mr Kevin Hagan stated that the CRU will have expert consultancy support as well as collaboration with Eirgrid to ensure hedging operations meet the conditions of the legislation, Members expressed concern around the lack of in-house expertise regarding this particular area. The Committee noted that CRU already spends approximately 25% of its annual budget on external consultancy.

30. Several Members expressed concern that the cap on market revenue is applicable for too limited a period and that exorbitant revenues were made by

renewables companies in the period before December 2022. The Committee agreed that vast profits were made by nuclear, solar and wind energy companies while incurring no additional production costs.

31. As a result, Members queried whether there would be an opportunity for retrospective or indeed prospective application of the cap on market revenues and the Committee noted that countries such as Belgium and France apply a tax running back to June or July respectively.

32. However, Ms Sikow-Magny highlighted that the application of the regulation can only be from the date it entered into force (October 2022) and that Member States applying measures before that time are simply applying taxation measures, not the regulation. The Committee noted that should the Commission propose taxation measures alongside the regulation, it would be important to assess how they work together.

33. Mr Walker stated that over the course of discussion on windfall tax, all options were examined including windfall taxes as implemented by other Member States running back to June 2022. However, the Committee noted that final consideration resulted in the optimal solution being the EU regulation. While Mr Walker acknowledged that the highest prices and greatest volatility in the market were seen between April and August 2022, he stated the policy is a matter for both the EU Commission and the Government.

34. Some Members questioned whether the price cap could be set higher for smaller community-owned renewable energy providers as is done in the UK in order to differentiate between smaller business and larger entities. Ms Sikow-Magny stated that the regulation is purposely not prescriptive in this regard in order to cover all potential situations across the EU. The Committee noted that the Commission would not take issue with a different approach if adequate justification is made.

35. The Committee noted that greater flexibility around the exclusion of wind farms of up to 1MWh was requested during stakeholder consultation with the Department by community wind farms. However, Mr Walker highlighted that

while every effort was made to engage with stakeholders and their requests, the mandate was to deliver the Government objective to capture windfall gains while minimising any risk to the market and energy security of supply.

36. The Committee noted that the Commission is due to report in mid-May on whether the regulation has worked and should there be a proposal to extend it.

Recommendations

1. The Committee supports the EU principles and policies reflected in the General Scheme of the Bill and the introduction of a revenue stream while protecting the security of our energy supply and future industry investment.

2. The Committee acknowledges that final consumers are continuing to pay extremely high prices on energy bills. The Committee agrees that wholesale prices for energy should be reflected in the electricity market and recommends an examination be undertaken to ascertain why pricing for final consumers has not decreased in line with wholesale prices.

3. The Committee supports and recommends full and transparent visibility of hedging operations as provided by the General Scheme.

4. The Committee notes that approximately 25% of the Commission for the Regulation of Utilities budget is allocated to external consultancy and recommends that, where practicable, in-house expertise facilitate the verification and reviewing of hedging operations and to ensure it is suitably structured and resourced to do so and the Committee asks the Minister to inform it of the above. Where necessary, the Committee recommends that further resourcing be provided to ensure that expertise is maintained on an internal basis. The Committee recommends ongoing analysis of the temporary solidarity contribution and the cap on market revenues and to explore avenues such that the return of windfall proceeds to the State is maximised.

5. The Committee recommends that Head 29 and 11 be more prescriptive as to the targets of the revenues raised by the Temporary Solidarity Contribution and that it is essential that these are directed to those who are most vulnerable.

6. The Committee recommends that consideration should be given to extending the cap on market revenues retrospectively to include those months where the energy crisis was at its peak. The Committee is cognisant that this may

involve an examination of applying a new tax measure akin to the windfall gains as set out in the General Scheme.

7. The Committee notes the Commission's response that it is to review the Regulation by mid-May including the potential of a possible extension. The Committee recommends that the Government actively engages in the review process and advocates for an extension of the Regulation should the circumstances allow.

8. The Committee recommends an analysis of the implications of allowing losses from 2018-2022 to be carried forward and offset against companies' profits in 2022 and 2023 for the purposes of calculating the TSC, and that estimates of TSC foregone in each year as result of this measure inform the final drafting of the Bill.

9. The Committee recommends an analysis detailing the impact on the TSC arising from the decision to allow capital expenditure to be deducted for the purposes of calculating the TSC and that this analysis and estimates be considered in the final drafting of the Bill.

10. The Committee recommends that expert stakeholders from civil society and the energy poverty steering group be consulted in respect of the intended beneficiaries of the TSC are consulted on the development of Head 11 and 29.

Appendix 1 – Terms of Reference

Functions of the Committee – derived from Standing Orders [DSO 95; SSO 71]

(1) The Select Committee shall consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to —

(a) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(b) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) The Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(a) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(a) for the accountability of the relevant Minister or Minister of State, and

(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) The Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

(a) consents to such consideration, or

(b) has reported on such accounts or reports.

(5) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

(a) the Committee Stage of a Bill,

(b) Estimates for Public Services, or

(c) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where the Select Committee proposes to consider—

(*a*) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,

(*b*) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(*c*) non-legislative documents published by any EU institution in relation to EU policy matters, or

(*d*) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings,

the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the European Parliament.

(9) The Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

(a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions

of Standing Order 130 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 94; SSO 70]

(1) It shall be an instruction to each Select Committee that—

(a) it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

(b) such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

(c) it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1)1; and

(d) it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(2) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

Appendix 2 – Correspondence received

Deputy Brian Leddin TD,
Chairperson Committee on Environment and Climate Action,
Dáil Éireann,
Kildare Street,
Dublin 2

17th April 2023

Proposed Bill addressing Windfall Gains in the Energy Sector implementing EU Council Regulation 2022/1854

Deputy Leddin,

We understand that the Joint Oireachtas Committee on Environment and Climate Action is meeting tomorrow to start pre-legislative scrutiny of the General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill 2023 which will give effect to the revenue cap on wind generators.

First, we would like to thank you for agreeing to consider our concerns with the proposed Bill.

Here is some topline information that should help inform the Joint Oireachtas Committee in its deliberations and to identify issues and shortcomings that are causing the current high electricity prices for the Irish consumer.

We are a group of small, indigenous, independent wind farm developers and owners. We are among the pioneers of the Irish wind energy industry and can be differentiated from the composition of the current industry which is dominated by large national and international corporations and based locally within our communities.

We have genuine concerns with the Government proposed Bill which we believe unfairly discriminates against small independent generators such as us and in that regard is not consistent with the spirit or the letter of the EU Regulation. We have made written representations to the Department of Environment, Climate and Communications (DECC) and directly to the Minister setting out our concerns. We enclose a copy of our letter of to the Minister for your information (3rd March 2023).

We don't propose to repeat our issues here which are addressed in detail in our letter to the Minister. We would reiterate our main grievance and that is the singling out of wind and solar generators for the imposition of a significantly lower cap of €120/MWh than the EU recommended price cap while others generators have caused the high electricity prices for industry and consumers in particular the price makers in the market. This is clearly discriminatory and places other generators, such as hydro electricity generators, at a distinct advantage.

Regrettably, the Department and the Minister have refused to engage with us at any level – we find this particularly disappointing and leaves us with no alternative but to explore other avenues to protect our legitimate interests including ultimately challenging the validity of any Act which may be enacted, and which reflects the intent set out in the proposed Bill. Indeed, in this vein, we have just recently applied to the CJEU to intervene in and support an action brought by a Bulgarian generator, Electrawinds Shabla South EAD, seeking an annulment of the EU Council Regulation.

We would also like to make you aware that the divergence in the UK approach and our approach will disadvantage small generators such as us when competing with generators north of the border in the allisland electricity market - the UK are exempting generators with an annual generation less than 50GWH from the application of their proposed price cap.

We would like to highlight some of the more salient issues that should be brought to the attention of the Committee on Environment and Climate Action in the interest of the consumer and business.

To be clear we are not objecting to the principle of the price cap. We are objecting to the discriminatory treatment of wind and solar on the basis that the proposed legislation is not technology neutral. The proposed Irish price cap for wind and solar at €120/MWh is not scientifically evidenced based or justified or consistent with State Aid approvals already in place and is misguided.

The 2022/23 T-4 Capacity Auction has provided capacity payments to conventional gas, oil and coal generators, as well as the mainly ESB owned hydro and pumped storage facilities for the year Oct 2022 to Sep 2023. Wind /solar generators do not receive these payments.

The capacity payments already awarded to capacity providers is €46,178 /MW.   For example, ESB 190 MW Hydro receives €8.79m and the 209 MW Pumped Storage receives €9.64m.[1]

The capacity payments announced recently for 2026/2027 T-4 Capacity Auction are in excess of €80,000 /MW.[2]

Therefore, any additional price cap allowances for security of supply for other technologies is doubly rewarding these generators.

Our concerns would be easily addressed by setting the price cap at the EU recommended cap of €180/MW for all generators.

We are small independent generators selling electricity into the wholesale market without customer bases. Many of the national and multinational corporations active in the electricity market participate as both generators and suppliers with large retail customer bases.

It is important to note that wind and solar are price takers and not price makers. The market price is set by thermal plants on an hourly basis. We are at a loss to understand how the wholesale gas prices have fallen to close to pre-war levels but consumer electricity prices remain high. It should be noted that the current Day Ahead Market (DAM) wholesale average price is €145/MWh[3] while the consumer price on a recent bill from Electric Ireland dated 14th April 2023 is a unit price of €0.397/kWh which equates to €397/MWh which is almost 275% higher.

It should also be noted fuel cost accounts for just 45-50% of the final consumer electricity price. The remaining 50-55% include network costs such as transmission, distribution, PSO levy, VAT and suppliers margin making up the balance.[4,5]

Of these:

a. PSO has become negative (or is now a credit on consumer bills) – being paid back from wind generation REFIT contracts.

b. VAT was reduced from 13.5% to 9%.

c. Transmission and distribution are capacity (or kVa) based – so should not increase with higher fuel cost.

So that that leaves supplier margin as the unknown. It is obvious even with the Solidarity Tax of 33% in the EU Price Cap Regulation 2022/1854 that there is a commercial business incentive for the utilities to maintain high electricity prices and benefit from the upside despite paying the Solidarity Tax.

We would question the focus of the Minister and DECC seeking to impose a price cap on select renewables generators when the wholesale market price of electricity has fallen in recent months but yet the price to the consumer has not – the answer to this anomaly is, in our view more pressing, and has a more immediate impact on consumers.

Therefore, this proposed legislation is not fit for purpose and does not achieve what it was intended to do which is to rebalance the electricity consumer prices to pre-war levels and is therefore deficient.

By not directly and comprehensively addressing these deficiencies and shortcomings in the market, high electricity prices will be baked into the system and will prevail and make Ireland Inc uncompetitive resulting in the loss of jobs.

The focus of the Joint Oireachtas Committee on Environment and Climate Action should be to implement measures to ensure that the consumer and industry benefits from lower wholesale electricity prices immediately. Our recommendations are as follows:

1. Apply principle of technology neutral and EU Commission recommended price cap: In the interest of consistency and transparency with State Aid approval of RESS which fundamentally underpins these contracts, treat all technologies equally at the same price cap proposed by the EU Commission of €180/MWh.
2. Audit: Full audit/review of the whole electricity supply chain with a particular focus on the utilities including a competition investigation in the interest of the consumer to establish why consumer prices are not falling.
3. Implement audit recommendations: Direct CRU and SEMO to implement a set of recommendations out of this audit.

We would respectfully request that we be afforded an opportunity to address the Committee to put our concerns directly to the Committee.

Thanking you again for taking the time to consider our concerns.

Yours sincerely,

Thomas Cooke

For and on behalf of
Ballincurry Wind Farm Limited, Bearna Gaoithe Teoranta, Carrons Windfarm Limited, Collon Wind Power
Limited, Cronelea Wind Farm Limited, Dunmore Wind Power Limited, Foyle Windfarm Limited, Gurteen Windfarm Limited, Killybegs Wind Power Limited, Metro Energy DAC, Rathnameneenagh Energy Limited, Slievereagh Power Limited.

1. https://www.sem-o.com/documents/general-publications/T-4-2022-2023-Final-Capacity-Auction-Results-Report.pdf
2. https://www.sem-o.com/documents/general-publications/PCAR2627T-4-report.pdf
3. https://www.semopx.com/documents/general-publications/Monthly%20Market%20Report%20March%202023
4. https://www.electricireland.ie/residential/help/my-bill;
5. https://www.bonkers.ie/blog/gas-electricity/why-are-energy-prices-increasing/

CCA-R23-582(b)

BEAUCHAMPS

BEAUCHAMPS LLP
RIVERSIDE TWO
SIR JOHN ROGERSON'S QUAY
DUBLIN 2, D02 KV60
IRELAND

Minister for the Environment Climate and Communications
Department of Environment Climate and Communications
29-31 Adelaide Rd
Saint Kevin's
Dublin 2
D02 X285

By Registered Post

3 March 2023 Our Ref: STC/KT/ENE9/1 Your Ref:

Our Clients: Ballincurry Wind Farm Limited, Bearna Gaoithe Teoranta, Carrons Windfarm Limited, Collon Wind Power Limited, Cronelea Wind Farm Limited, Dunmore Wind Power Limited, Foyle Windfarm Limited, Gurteen Windfarm Limited, Killybegs Wind Power Limited, Metro Energy DAC, Rathnameneenagh Energy Limited, Slievereagh Power Limited.

Re: Implementation of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

Dear Minister,

We are instructed by the above listed group of small, community-based, independent, green electricity producers. Our clients have significant concerns with the way the Irish Government is proposing to implement Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (the "**Regulation**"), as outlined in your announcement of the 22 of November 2022 and subsequently communicated by your department in the course of engagements with stakeholder groups.

Our clients wrote to your department on the 17 January 2023 setting out their concerns in some detail and requesting your department to engage with them with a view to addressing these concerns. Unfortunately, your department has failed to make any attempt to engage with our clients. Furthermore, we are instructed that the Irish Wind Farmers Association (of which our clients are members) was excluded from bilateral meetings offered by your department to other stakeholders. In the circumstances, our clients have instructed us to write to you on their behalf setting out the legal basis they say the Government's proposed implementation of the Regulation is in breach of the Regulation itself and wider EU law.

Their primary concern relates to the proposal to impose a revenue cap of €120 per MWh for wind and solar while all other inframarginal technologies will be subject to a cap of €180 per MWh. This is a differential of 50% for which there is no objective justification. Singling out wind and solar for this significantly lower cap will have a disproportionate impact on small independent electricity producers, is discriminatory, is inconsistent with the Regulation and consequently *ultra vires*.

Article 6 of the Regulation imposes a mandatory price cap of €180MWh on the market revenues of producers obtained from the generation of electricity from the sources listed in Article 7(1). The technologies listed in Article 7(1) include a range of inframarginal technologies including wind, solar, hydropower, waste, biomass and peat. Article 8(1) of the Regulation empowers member states to (i) further limit revenues below the cap of €180 set in Article 6 and (ii) to set different caps for different

9254939.1

Partners: John White (Managing), Imelda Reynolds (Chair), Caoimhe Banks, Barry Cahir, Daniel I. Cashman, Stuart Conaty, Máire Cunningham, Maureen Daly, Anne Doyle, Sharon Delaney, Edward Evans, Gerry Gallen, Paul Gough, Ainsley Heffernan, Emma Keegan, Pauline Louth, Edward Lyons, Damian Maloney, Aidan C. Marsh, Sandra Masterson Power, Conor McEvoy, Fidelma McManus, Emer Moriarty Crowley, Jeanne-Marie Moriarty, Ciara Murphy, Grace Murphy, Simon Murphy, Jacinta Niland, Pat Nyhan, Niall P. O'Brien, Fiona O'Connell, Maitiú Ó Dónaill, Thomas O'Dwyer, Colm E. O'Keeffe, Shaun G. O'Shea, Tony O'Sullivan, Caroline Shanahan, Domhnall Small, Richard Stowe, Cliodhna Walsh.
Consultants: Mark Pery-Knox Gore, Terence O'Keeffe.

Tel: +353(0)1 418 0600
Fax: +353 (0)1 418 0699
DX No. 63
Email: info@beauchamps.ie
www.beauchamps.ie

BEAUCHAMPS

technologies. However, the discretion afforded member states under Article 8(1) is subject to the limitations set out in Article 8(2) namely:

> *"The measures referred to in paragraph [8(1)] shall, in line with this Regulation:*
> 1. *Be proportionate and non-discriminatory;*
> 2. *Not jeopardise investment signals*
> 3. *Ensure that the investments and operating costs are covered;*
> 4. *Not distort the functioning of electricity wholesale markets, and in particular, not affect the merit order and the price formation on the wholesale market;*
> 5. *Be compatible with Union law. "*

It is our client's case that a price cap of €120/MWh for wind and solar power generators is:

- Disproportionate;
- Discriminates wind and solar power generators;
- Jeopardises investment signals;
- Distorts the ISEM market; and
- Is otherwise in breach of Union law

1. Disproportionate

It is clear from the Regulation that in embarking on this exceptional market intervention the Council of the European Union (the "**Council**") were concerned to only address the *"extreme and lasting price increase observed [in the wholesale electricity market] since February 2022"* (Recital 28, emphasis added) – *i.e.* the measure should only rebalance the exceptional impact on consumers of the onset of war in Ukraine - in other words the intervention should be proportionate.

In arriving at the cap of €180 per MWh the Council were satisfied that "*Before February 2022, the average peak prices in the electricity wholesale market were significantly and consistently expected below €180 per MWh across the Union in the last decades, despite the differences in electricity prices between regions in the Union"* (Recital 28, emphasis added). And by "*average peak prices*" they mean the "*average level of electricity prices in the hours during which the demand for electricity was at its highest*" (Recital 28, emphasis added). In Recitals 28 & 29 the Council Regulation set out the relevant considerations in identifying what is considered a proportionate cap to achieve the objective of the Regulation. In considering introducing a lower cap a member state must respect these principles.

Our clients have analysed the market data from when ISEM went live to the onset of the war in Ukraine. This analysis confirms that for the 12 months to February 2022 the average DAM price at peak demand (between 5 and 7pm) was consistently higher than €180/MWh, in fact exceeding €200/MWh over this period.

When the data is analysed for the period from the inception of ISEM to Feb 2022 the annual average DAM at peak demand was frequently higher than €180 and indeed was consistently higher than €120 and therefore most certainly cannot be said to have been "*significantly and consistently*" below €120 - the annual average DAM at peak demand was €193 in 2021 and €264 for the period 1 Jan to 24 Feb 2022..

2. Discriminates wind and solar power generators

The government has failed to justify with empirical evidence the case for a significantly lower cap of €120 per MWh for wind and solar over other inframarginal technologies to which a cap of €180 per MWh is to apply – a differential of 50%. In fact, reports over recent years (e.g. from CRU), have tended to show a

9254939.1

BEAUCHAMPS LLP, RIVERSIDE TWO, SIR JOHN ROGERSON'S QUAY, DUBLIN 2, D02 KV60, IRELAND. www.beauchamps.ie

Beauchamps LLP is an Irish law firm authorised by the Legal Services Regulatory Authority in Ireland to operate as a limited liability partnership under the Legal Services Regulation Act 2015.

BEAUCHAMPS

strong similarity in LCOE between wind, solar, landfill, anaerobic digestion, hydro, biomass and even coal, not the least of which was, the somewhat out of date, Trinomics report used by the European Commission as the basis for its proposal to Council (COM/2022/473 final), which forms the basis of the Regulation.

It is our clients' case that the market evidence does not support a differential of 50% between the cap applicable to wind and solar and the other inframarginal technologies and your department have failed to provide any justification for this differential. Any purported justification for applying the lower revenue cap based on the fact wind and solar incur no fuel cost, and therefore have not been impacted by the significant inflation in fuel costs following the onset of war in Ukraine, is not sustainable as it is an argument that would equally apply to several of the other sources listed in Article 7. While it may be fair to say that all generators have suffered increased costs due to the general rise in inflation to somewhat varying degrees, a differential of 50% is completely unjustifiable, and is clearly a discriminatory measure contrary to the Regulation and wider Union law principles.

3. Jeopardises investment signals

The Regulation consistently highlights the need to ensure that the price cap does not impair future investment in renewable technologies:

> "*...the cap on market revenues of 180 EUR per MWh is consistently higher, including a reasonable margin than the current levelised cost of energy (LCOE) for the relevant technologies... it can therefore not be expected to impair investment in new inframarginal capacities*" (Recital 29, emphasis added)

This is echoed in Article 8(2) and it is therefore incumbent on member states when electing to set a cap below €180 per MWh, as the Irish government proposes, to ensure that there is sufficient headroom between the cost of delivering new renewable energy projects and the proposed cap, such that future investment will not be negatively impacted. The report, *Policy options to support the uptake of small-scale renewable electricity generation in Ireland* (July 2022, Ricardo), prepared by Ricardo and BioXL for the SEAI to accompany the public consultation process run by your department in August 2022, estimated the LCOE for small scale (4MW) solar and wind to be €127.20 and €128.2 respectively (see table 39). Since the publication of this report general inflation, construction inflation (up to 40%), operating costs increases (approx. 50%) and cost of funds has increased significantly. Our clients have evidence to demonstrate that the LCOE for small scale solar projects in Ireland currently lies between €146 and €178 per MWh depending on the discount factor applied and are satisfied that the cost of small scale wind has risen to a similar extent. Setting the price cap at €120, which our clients estimate would only yield average project revenue below €110, is clearly inconsistent with the Regulation, will negatively impact future investment and consequently jeopardise Ireland achieving its renewable energy targets.

Your department has failed to apply an evidence-based approach to justify the proposed cap of €120 per MWh. In fact, the only justification put forward by your department, as confirmed at a recent Stakeholder briefing, is by reference to the €120 per MWh auction cap which was adopted for the RESS 1 auction in 2019. Reliance on the RESS 1 auction cap is fundamentally flawed for a number of reasons, not least the fact that this figure is outdated, but more particularly the auction cap is a cap under a two-way contract for difference – *i.e.* the RESS auction cap is both a cap on maximum revenue and a floor on the minimum revenue and in that respect is more comparable to the average revenue. To achieve an average revenue of €120/MWh, a maximum revenue cap (i.e. one-way with no floor on the open market – *e.g.* with cPPAs)) would need to be considerably higher. Even in RESS itself, given the elevated cost base, our clients believe an auction cap of €120/MWh would now seriously hinder investment.

4. Distorts ISEM Market

The Regulation highlights the need for a coordinated approach to price cap interventions in the wholesale electricity market to avoid distortion between generators competing in the same market. In establishing a price cap the Irish Government must have regard to the all-island nature of ISEM. The authorities in the UK have acknowledged the disproportionate burden that is being placed on small scale wind and solar

9254939.1

BEAUCHAMPS

generators and have proposed an exemption on the application of their equivalent price cap on the first 50 GWh of electricity generation per producer to mitigate this. It is incumbent on the Irish authorities to address this when establishing the revenue cap regime in this jurisdiction so as to ensure, as far as possible, that there is no discrimination between market operators north and south of the border or distortion of the ISEM. This may be achieved either through the introduction of an equivalent *de-minimis* exemption or otherwise setting a revenue cap for small scale wind and solar generators that will have a commensurate effect.

In summary, your department's proposal to introduce a reduced revenue cap of €120 per MWh on wind and solar generators is patently not consistent with the principles set out in the Regulation, will have a disproportionately negative impact on our clients in breach of Article 17 of the Charter of Fundamental Rights of the European Union, and unjustifiably discriminates wind and solar generators, thereby conveying a benefit on other inframarginal energy producers in breach of State Aid rules.
We therefore ask you, Minister, to reconsider you and your department's position on the imposition of the proposed €120 per MWh revenue cap on wind and solar generators. On behalf of our clients, we reiterate their request for you and your department to engage with them to address their genuine concerns in advance of finalising any legislative measures.
Finally, we put you on notice that should you introduce legislative measures to give effect to your current proposals we have instructions to commence legal proceedings seeking *inter alia* declarations that such legislative measures are contrary to the Regulation and in breach of Union Law, including, the principles of proportionality and non-discrimination, the Charter of Fundamental Rights of the European Union, and State Aid rules.

Yours faithfully,

Beauchamps LLP

BEAUCHAMPS LLP

9254939.1

BEAUCHAMPS LLP, RIVERSIDE TWO, SIR JOHN ROGERSON'S QUAY, DUBLIN 2, D02 KV60, IRELAND. www.beauchamps.ie
Beauchamps LLP is an Irish law firm authorised by the Legal Services Regulatory Authority in Ireland to operate as a limited liability partnership under the Legal Services Regulation Act 2015.

From: LIUTVINSKAITE Dovile <Dovile.LIUTVINSKAITE@ec.europa.eu>
Sent: Friday 21 April 2023 15:19

To:	Climate Action
Cc:	OCONNELL Elaine
Subject:	RE: REMINDER RE: Invitation from the Joint Committee on Environment and Climate Action

Dear Ciara,

As mentioned by Ms Sikow-Magny in the Committee hearing on Tuesday, we wanted to follow up in writing to add some details regarding questions received from Committee Members. Deputy Brid Smith and Senator Alice Mary Higgins asked about the solidarity contribution, and in particular how companies can write off losses in previous years against their obligation to pay the contribution.

Council Regulation 2022/1854 does not establish whether or not losses may be offset against the solidarity contribution. Although Member States cannot change the Regulation itself, Recital (55) states that they may adjust their national legislation to ensure that it caters for the treatment of losses made by a company in scope of the Regulation in previous fiscal years.

Member States should take the necessary measures to ensure the full application of the solidarity contribution provided for in this Regulation and should arrange for the necessary adjustments in national law, in particular in order to ensure the timely collection of the solidarity contribution, including on the basis of net revenues against which the solidarity contribution can be offset, to cater for the deductibility or non-deductibility of the solidarity contribution, or to cater for the treatment of losses in previous fiscal years, for the consistent treatment of shortened fiscal years for companies created in 2022 and/or 2023, or for business restructuring or mergers, for the purpose of calculating the solidarity contribution.

I hope that this reply will be helpful in the Committee's deliberations. In addition, Senator Alice Mary Higgins asked
a question about nuclear but it wasn't very clear for us what information she needed in the context of this Regulation. If you would like to send her question in writing to us, we would be happy to follow up on that.

Best Regards,

Dovile

Dovilė Liutvinskaitė
Assistant to the Director

European Commission
Directorate General for Energy
C: Green Transition and Energy System Integration

dovile.liutvinskaite@ec.europa.eu

Response to Beauchamps LLP Correspondence 21 April 2023

Dear Brian Leddin TD,

In relation to your request for a reply to the committee outlining our response to the Beauchamps LLP letter sent to the Minister on 03 March 2023:

The letter expresses their clients' concerns with the way the Department is proposing to implement Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

In summary, the letter states that:

1. the clients have written to the department setting out their concerns in some detail and requesting the department to engage with them with a view to addressing these concerns. However, the department has failed to make any attempt to engage with the clients.

2. The clients' primary concern relates to the proposal to impose a revenue cap of €120 per MWh for wind and solar, while all other inframarginal technologies will be subject to a cap of €180 per MWh. “This is a differential of 50% for which there is no objective justification.”

3. The letter goes on to argue that a price cap of €120/MWh for wind and solar power generators is disproportionate, discriminates wind and solar power generators, jeopardizes investment signals, distorts the ISEM market, and is otherwise in breach of Union law.

In response:

1. Department Engagement with Stakeholders:

a. The letter from Beauchamps to the Minister on 03 March 2023 states:

“Our clients wrote to your department on the 17 January 2023 setting out their concerns in some detail and requesting your department to engage with them with a view to addressing these concerns. Unfortunately, your department has failed to make any attempt to engage with our clients.”

b. These claims are categorically untrue:

i. Upon receipt of the letter of dated 17 January 2023, from the Irish Wind Farmers Association, the Department met with members the Irish Wind Farmers Association on 27 January 2023 12:00pm to discuss their concerns. A list of names of representatives of the Irish Wind Farmers Association and their consultants who were in attendance is available upon request.

2. The €120/MWh cap is too low and “there is no objective justification”.

a. The International Monetary Fund published a paper in August 2022 “Taxing Windfall Profits in the Energy Sector”, defining economic rents (windfall gains) as:

i. “the return on an investment above the minimum threshold needed for the investment to be undertaken”.

b. This is the definition the Departments IGEES staff used to inform their analysis of windfall gains being made in the sector and in quantitatively examining an appropriate level of the cap to apply to wind and solar generation.

c. 2023 Reference Prices for REFIT for windfarms was set at a maximum of €81/MWh plus a balancing payment of €11/MWh.

d. Therefore, any return above €92/MWh could be considered “as the minimum threshold needed for the investment to be undertaken” as per the IMF definition. As such any price received by wind farms beyond €92/MWh could be defined as economic rent, or a windfall gain.

e. In appraising the policy options via a structured multi-criteria-analysis, against the criteria set out in the RIA a €120/MWh cap was deemed appropriate to capture the windfall gains whilst maintaining positive investment signals and reducing country specific risk.

f. The Department is satisfied that best available data and evidence from reputable sources was used to define windfall gains and set an appropriate cap level.

3. Further arguments against the €120/MWh level:

a. In addition to the claim that there is “no objective justification” for the level of the cap, as dealt with in response 2a-f above, Beauchamps on behalf of their clients also argue that:

i. “department's proposal to introduce a reduced revenue cap of €120 per MWh on wind and solar generators is patently not consistent with the principles set out in the Regulation”.

ii. “Disproportionate, discriminates wind and solar power generators, jeopardizes investment signals, distorts the ISEM market, and is otherwise in breach of Union law.”

b. The Department respectfully refutes these assertions as per sections 4 and 5 below.

4. The assertion that the cap is not consistent wit the principles set out in the Regulation:

a. Article 8.1 of the Regulation:

i. Member States may:

ii. maintain or introduce measures that further limit the market revenues of producers generating electricity from the sources listed in Article 7(1), including the possibility to differentiate between technologies, as well as the market revenues of other market participants, including those active in electricity trading.

b. Entirely consistent with this regulation, the Department has proposed to Government, that Ireland should introduce measures that further measures that further limit the market revenues of producers generating electricity from the sources listed in Article 7(1).

c. The Government decision of 22 November 2022 gives effect to Article 8.1 by implementing €120/MWh cap on revenues for Wind and Solar (listed in Article 7.1 of the Regulation).

5. The assertion that the measures are in breach of Article 8.2 of the Regulation:

a. be proportionate and non-discriminatory:

i. Proportionate:

1. As per section 2.d above, in mathematical terms, the €120/MWh cap will allow for a 24% increase in unexpected revenue (windfall gains) beyond the 2023 REFIT reference prices to be earned by windfarms of €91/MWh.

2. Coal, Oil, Peat/Biomass, by comparison will experience no increase in unexpected revenue, due to the variable cap proposed by the Department. The variable cap will allow for cost recovery to operate the generation units, and there will be a maximum margin limit – based on the historical average margin received from 2018-2021.

3. Therefore, Wind and Solar generators are receiving a 24% advantage over fossil fuel generation, rather than their assertion that the proposal disadvantages them.

4. The rationale for the €120/MWh cap is to maintain positive investment signals (as per Article 8.2.c discussed below) to ensure Ireland remains an attractive location for climate investment, in order for Ireland to secure the investment required in renewable projects to meet our climate targets.

5. The price level of €120/MWh is in line with the contracted strike prices under RESS. This demonstrates that a double-sided Contract for Difference (CFD), which involves payback when market prices exceed €120/MWh, does not hinder investment in wind generation.

ii. Non-discriminatory:

1. Regulation acknowledges the economic and technical justification differential rates, based on a marginal cost analysis.

2. Recital 24:

"Given the role of the price in the day-ahead market as a reference for the price in other wholesale electricity markets, and the fact that all market participants receive the clearing price, the technologies with significantly lower marginal costs have consistently recorded high revenues since the Russian military aggression against Ukraine in February 2022, well above their expectations when deciding to invest.

3. Recital 25

“In a situation where consumers are exposed to extremely high prices which also harm the Union’s economy**, it is necessary to limit, on a temporary basis, the extraordinary market revenues of producers with lower marginal costs by way of application of the cap on market revenues** achieved through the sale of electricity within the Union”.

iii. Therefore, the lower cap for wind and solar is non-discriminatory, it simply reflects the fact that wind and solar have lower marginal costs, and as such would experience disproportionate non equitable windfall gains in the absence of the Government exercising their right under Article 8.1 of this regulation.

b. not jeopardise investment signals;

i. The Departments IGEES staff carried out a case study and literature review of windfall tax policies across multiple jurisdictions and sectors from 1980s onwards.

ii. The analysis found that the link between investment risk and windfall tax is mixed.

iii. It found that in cases where a windfall tax targeted revenues above what was beyond the expected return on investment, the impact on investment was minimal.

iv. This is a finding that was later confirmed by analysis by the IMF produced in August 2022 which states:

“Excess profits can be taxed by tax instruments targeted at economic rents that avoid discouraging investment and limit any impact on further price increases… A well-designed tax on economic rents can therefore provide government with additional revenue from more profitable projects without distorting investment and production decisions”.

v. Given this cap level of €120/MWh is 24% above what was expected and sufficient to maintain the original investment, this cap does not jeopardise investment signals.

vi. Furthermore, the application of the cap will primarily effect already operational wind farms which are supported under the Renewable Energy Feed in Tariff, and which are insulated from recent increases in commodity and transportation costs (e.g. steel, shipping etc.) related to the construction of the projects. While the sector has relayed to us their concerns over operational and maintenance cost increases for renewables, the support price under the REFIT schemes are indexed to inflation (the Consumer Price Index) to remove any exposure for the projects to inflation. In addition, the aforementioned 24% allowable increase in revenues beyond the 2023 REFIT reference price, provides a significant buffer to protect investment against increased inflation.

vii. In addition, while there is no doubt that the €120/MWh cap is below the €180/MWh cap, countries such as France, Romania, Greece, Poland, and the UK have similar but slightly lower caps, thus maintain a positive investment signal relative to some of our competitors for renewable investment.

c. ensure that the investments and operating costs are covered.

i. As detailed above, the €120/MWh cap is in excess of the price that covered the investment and operating costs.

d. not distort the functioning of electricity wholesale markets, and in particular, not affect the merit order and the price formation on the wholesale market.

i. The electricity market revenue cap will not have any distorting effect on the Single Electricity Market between Ireland and Northern Ireland as it is an ex-post cap and will have no direct impact on price formation in the wholesale market. The high level of correlation between gas and electricity prices indicates that gas fired generation is largely responsible for setting the marginal price, which is turn paid to all generators. As gas fired generators are not subject to the revenue cap, their bid prices should be unaffected by the introduction of such a measure and continue to reflect their operating costs.

ii. For zero marginal cost technologies such as wind and solar, by definition, there can be no effect on the merit order through a revenue cap set at €120/MWh. There are significant differences in design and tariffs between support schemes for renewables in Ireland and Northern Ireland which have no caused market distortions since the introduction of the SEM in 2007.

iii. Furthermore, the revenue cap for other relevant technologies is set at a level that will avoid any distorting effect.

In Summary:

The Department refutes the claim that we have not engaged with these stakeholders, as we met with members of the Irish Wind Farmers Association and their consultants to discuss their concerns on 27 January 2023. The Department used the International Monetary Fund's August 2022 guidance "Taxing Windfall Profits in the Energy Sector definition of economic rents to inform the analysis of windfall gains and set the €120/MWh cap level to capture windfall gains while maintaining positive investment signals and reducing country-specific risk. The Department's legal advisors and in consultation with the Attorney General's Office are satisfied that the proposal is uniformly aligned with Article 8.1 of the Regulation, and the measures are consistent with Article 8.2.

While the Department has outlined its policy proposal in relation to the €120/MWh cap level, it is understood that the Committee may wish to take a different view, more aligned with what is proposed in the Beauchamps LLP letter. If this is the case, it is important to note there will be budgetary implications in relation to changing the cap level to €180/MWh for Wind and Solar.

Based on February futures data, the Departments IGEES staff estimate that implementing a €180 cap level for all technologies would yield a baseline estimate of €47m (within a range of

€31m - €67m), from a baseline estimate of €105m (within a range of €81m - €143m) for the preferred option of a €120/MWh cap for Wind and Solar.

Therefore, the direct trade-off between capturing economic rents (windfall gains) and concessions made to lobbyists of €58m, should be considered in the context of achieving the stated objectives of this policy, to mitigate the effects of higher prices and distribute those revenues back to final electricity consumers.

Full details of the estimated yields of different options are detailed in the supplementary note on the “Analysis of Costs, Benefits and Impacts of Options” also provided to the Committee.

Evan Walker,

Economist,

Irish Government Economic and Evaluation Service Department of Environment, Climate and Communications

Note for Committee on Economic Appraisal of Market Cap Options 21 April 2023

1. Policy Objectives:

a. As outlined in section 4.10 of the RIA guidelines simply transposing an EU directive is not sufficient to clearly articulate the objectives for government intervention. "The objectives behind the particular EU directive / regulation or international action should be framed as the (policy) objectives".

b. As per council regulation (EU) 2022/1854, and in line with section 4.9 RIA guidelines to ensure policy objectives are Specific, Measurable, Accepted, Realistic and Time-bound, the stated policy objectives are to:

i. Mitigate the effects of higher energy prices, namely "supernormal" returns of firms and reduced consumer surplus,

ii. By capping the market revenues that certain producers receive from the generation of electricity between December 2022 – June 2023

iii. And to redistribute the proceeds final electricity customers in a targeted manner.

2. Identification of Policy Options

a. As per section 4.11 of the RIA guidelines, "there is often a variety of options available to fulfil the requirements of EU Directives / Regulations. In such cases, the full range of options should be considered. In most cases at least 3 options".

b. The OECD (2015) states: "Efficient and effective policy action is only possible if all available instruments are considered".[1] As such, wide consideration was given to all the available options from considering a no-policy change / do nothing (in line with section 4.11 of the RIA guidelines) to a maximum option.

c. In line with section 3 of the Public Spending Code, the process of developing the short-list of options involved workshops with stakeholders and experts.[2]

Table 1: Short-List of Options:

Option	Options Description
Do Nothing	No intervention
An Irish solution outside of the Regulation	Intervene in a way that is different to Council Regulation (EU) 2022/1854 and unique to Ireland. Noting advice that not feasible to impose retrospective taxation in IE, outside of the Regulation.
Do Minimum – EU Regulation with all €180	Implement Council Regulation (EU) 2022/1854 as it is, giving no consideration to the flexibilities afforded to Member States (i.e. a default cap of €180 per MWh for all specified non-gas electricity generators)
Do Alternative (A) EU Regulation with Flexibilities (€180 plus Floating Cap for High Marginal Cost Units)	Implement Council Regulation (EU) 2022/1854 as it is, giving partial consideration to the flexibilities afforded to Member States (i.e. a default cap of at least €180 per MWh for all non-gas electricity generators, and a floating cap for technologies where security of supply is a risk due to cost recovery)

Policy Alternative (B) EU Regulation, partially capture upside (€120 Cap for wind and Solar, €180 of other, Floating Cap for High Marginal Cost Units	Implement Council Regulation (EU) 2022/1854, exercising flexibilities afforded to Member States in a way that meets key criteria (i.e. captures windfall gains and doesn't impose risk to security of supply or investment)
Do Maximum - EU Regulation, fully capture upside (€90 Cap for wind and Solar), Floating Cap for High Marginal Cost Units	Implement Council Regulation 2022/1854 and exercise flexibilities afforded to Member States to capture the greatest windfall gains.

3. Analysis of Costs, Benefits and Impacts of Options:

1. Estimating the Cost and Benefits

a. As per section 4.13 of the RIA guidelines, once the options have been outlined, the costs, benefits and impacts of these options should be identified and analysed.
b. As outlined in section 4.15 of the RIA guidelines, all the cost, benefits and impacts that pertain to all options are assessed.
c. As such, we have conducted a detailed economic analysis and developed a policy options model, using the best available data – to quantify the costs and benefits and impacts of various options.

2. Brief Description of the Model, Data and Parameters:

a. In line with section 4.33 under "General Analytical Issues" in the RIA guidelines, the assumptions used in the estimates are clearly highlighted below.
b. A detailed description of the scenario and sensitivity analysis is presented in section G of this document.

Prices:

- Wholesale gas prices - markets ○ Wholesale electricity prices – SEM ○ Future Prices (Day-Ahead and Month-Ahead) **Capacity**:
- TSO connections – Eirgrid (Renewables & Non-Renewables) ○ DSO connections – ESB (Wind & Non-Wind)
- Project level, technology type, connection date (REFIT vs RESS), maximum export capacity
- Capacity factors – SEAI, Eirgrid, DECC estimates.

Assumptions:

- Sensitivities
  - Optimism bias
  - Hedging
  - Future Prices (+/- 10- 25%)
  - Behavioural change (production & consumption).

3. Cost Benefit Analysis:

a. As outlined in section 4.36 when valuing the costs and benefits of policy options "consideration should be given to the issue of deadweight and displacement":

I. The impact of this proposal is to raise cap the revenue of firms to normal levels, and to raise proceeds from capturing revenues above that level. Therefore, the benefit of higher proceeds for government, is a cost to the firms i.e., a redistribution. In economic evaluation terms this represents an economic transfer, as opposed to an economic benefit.

II. As per the Public Spending Code Guidance "A Guide to Economic Appraisal: Carrying Out a Cost Benefit Analysis:

i. "In general, transfer payments should be excluded because from society's perspective such payments have no effect on real resources and benefits are merely transferred from one part of society to another".

b. Therefore, in line with section 4.36 of the RIA guidelines, the net benefits arising, in monetizable terms, should be reduced to €0.

Table 2: Options with corresponding Cost (to firms) / Benefits (to consumers)

Option	Estimated Option Revenue (in millions)
Do Nothing	€0 – this option was discounted by the MCA
Intervene in a way that is different to Council Regulation (EU) 2022/1854 and unique to Ireland. Noting advice that not feasible to impose retrospective taxation in IE, outside of the Regulation.	€0 – this option was discounted by the MCA
Do Minimum – EU Regulation with all €180	€47 (within a range of €31 to €67)
Do Alternative (A) EU Regulation with Flexibilities (€180 plus Floating Cap for High Marginal Cost Units)	€48 (within a range of €32 to €68)
Policy Alternative (B) EU Regulation, partially capture upside (€120 Cap for wind and Solar, €180 of other, Floating Cap for High Marginal Cost Units	€105 (within a range of €81 to €143)
Do Maximum - EU Regulation, fully capture upside (€90 Cap for wind and Solar), Floating Cap for High Marginal Cost Units. Calculated on half hourly basis.	€190 (within a range of €129 to €294)

4. Multi-Criterial Analysis:

a. In line with section 4.25 of the RIA guidelines, in cases where a cost-benefit analysis may not be suitable, a multi-criteria analysis should be conducted.

b. As per the Public Spending Code Guidelines "Overview of Appraisal Methods and Techniques", an MCA is an analytical framework where the options are assessed relative to the stated objectives using a set of clearly defined and mutually exclusive criteria.

c. The stated objective in line with the council regulation, is to:

I. Mitigate the effects of higher energy prices, namely "supernormal" returns of firms and reduced consumer surplus via:

i. capping the market revenues that certain producers receive from the generation and sale of electricity between December 2022 – June 2023 ii. redistributing the proceeds final electricity customers in a targeted manner.

1. Description of Criteria and Weights:

a. With due regard to prescribed RIA impacts to be considered, and the additional risk of Security of Supply the appropriate criteria and weights to assess the options relative the stated objectives are described below.

b. As per the Public Spending Code guidance "Overview of Appraisal Methods and Techniques" the choice of criteria and the weight placed upon each must closely align to the policy objectives:

I. As the stated objective is to "mitigate the effects of higher energy prices, namely "supernormal" returns of firms and reduced consumer surplus", the first and highest weighted criteria is to the extent that the policy option limits supernormal returns.

II. As detailed in the economic literature, a windfall measure has the potential to impact investment and, consequently, Ireland's ability to compete for international investment needed to meet our Climate Action targets. Therefore, in assessing the available options, it is appropriate to consider the criterion of minimizing the impact on national competitiveness and investment risk. While this criterion is important, it is considered a secondary impact that needs to be minimized, rather than a primary objective. As a result, it is weighted less than the first criterion.

III. In line with the flexibilities afforded to member states by regulation, the interventions should not negatively impact on security of supply. On that basis, security of supply has been included as a criterion. As this is a secondary impact that needs to be minimised, rather than a primary objective, this is weighted less than the first criteria but equal to minimising the impact on national competitiveness & investment risk.

IV. In line with section 4.16 of the RIA guidelines; "an RIA is designed, inter alia, to help reduce the burden of red tape on business and to ensure that future regulations do not impose disproportionate compliance costs on business or the citizen". As such every effort has been taken to reduce compliance costs, and minimising compliance burden is also a criteria by which the options were assessed, and weighted equally with criteria 2 and 3.

Table 3: Criteria and Weights:

Criteria	**Weight**
Limits "supernormal" returns	100
Minimising impact on national competitiveness & Investment Risk (in line with section 4.39 of the RIA guidelines)	80
Minimising impact Security of Supply	80
Minimising Compliance Burden (in line with section 4.16 of the RUA guidelines.	80

2. Description of the Scoring System:

a. In line with the Public Spending Code guidelines on best practice in conducting a multicriteria analysis, the scoring of the options was conducting by a panel of different government stakeholders, the Department, CRU and Eirgrid. .

b. To mitigate conformity bias and group-think, the panel scored the options separately, and the final results represent the average of the scores from the panellists. The scoring system employed limited complexity by using a simple 0-3 scoring range

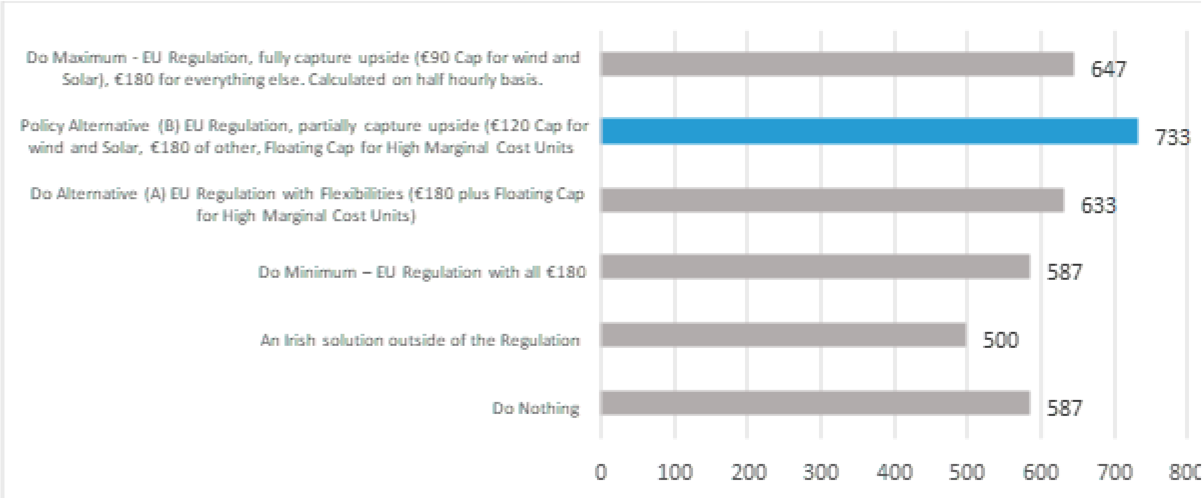
3. Results of the MCA:

a. As per the Public Spending Code Guidelines "Overview of Appraisal Methods and Techniques" (page 12), the justification of the scoring must be detailed. As such, the compositional scores of the options (by each criteria) as well as the aggregate results are presented below.

Table 4: Compositional Results of the MCA

Option Description	Limits "supernormal" returns: Weight = 100.	Minimising impact on national competitiveness (Investment Risk) (in line with section 4.39 of the RIA guidelines): Weight = 80.	Minimising Compliance Burden (in line with section 4.16 of the RIA guidelines.: Weight = 80.	Minimize impact Security of Supply: Weight = 80.
Do Nothing	0	2	3	3
An Irish solution outside of the Regulation	1	2	1	2
Do Minimum – EU Regulation with all €180	1	2	3	1
Do Alternative (A) EU Regulation with Flexibilities (€180 plus Floating Cap for High Marginal Cost Units)	1	3	1	3
Policy Alternative (B) EU Regulation, partially capture upside (€120 Cap for wind and Solar, €180 of other, Floating Cap for High Marginal Cost Units	2	2	2	3
Do Maximum - EU Regulation, fully capture upside (€90 Cap for wind and Solar), €180 for everything else. Calculated on half hourly basis.	3	1	3	1

Figure 3: Aggregate Results of the MCA:



Source: DECC IGEES

5. Risk and Uncertainty:

a. As per section 4.33 of the Government's RIA Guidelines:

a. *"In the real-world, it is impossible to predict with certainty the impacts associated with a policy option. These impacts will depend on future events, some of which are out of the control of policy-makers. RIAs (and the MCAs and CBAs performed in this context) should reflect these uncertainties by taking account of risk and the various future scenarios which might occur."*

b. As per section 4.35 of the Government's RIA Guidelines:

a. "(another) possible approach to uncertainty is to use ranges when presenting estimated benefits and costs. In other words, an RIA might state that costs are likely to be in the range of €1 million and €1.5 million. Ranges may be broader or narrower depending on the level of uncertainty. When using ranges, it is useful to explain the variables or factors which might influence whether a value ends up being at the higher or lower end of the range."

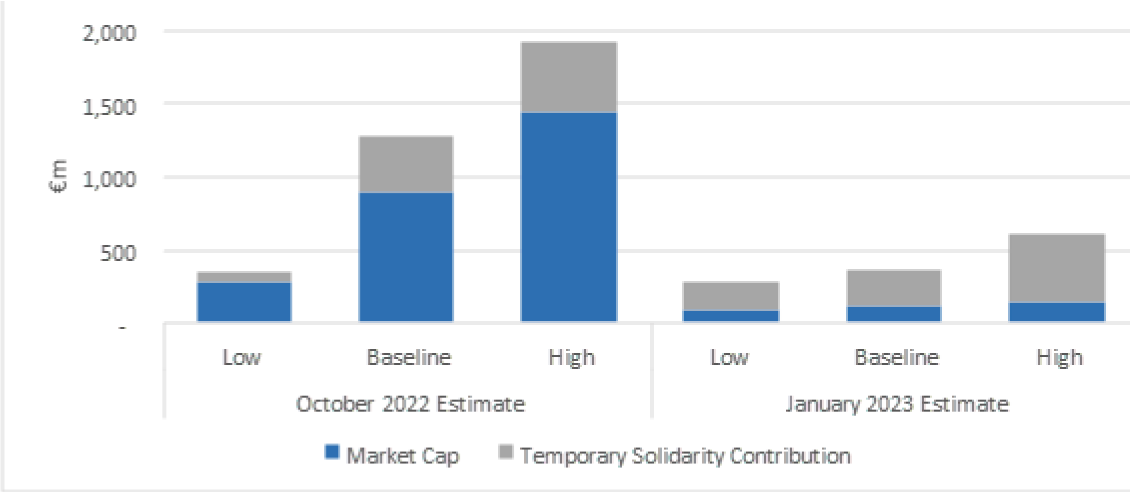
c. As such, and provided in detail previously, a scenario and sensitivity analysis was used to inform the estimates.

d. Details of the scenario parameters are provided below, **while figures 2 and 3 also show the reduction in the estimates is driven by external market prices completely independently of policy.**

Table 5: Model Parameters:

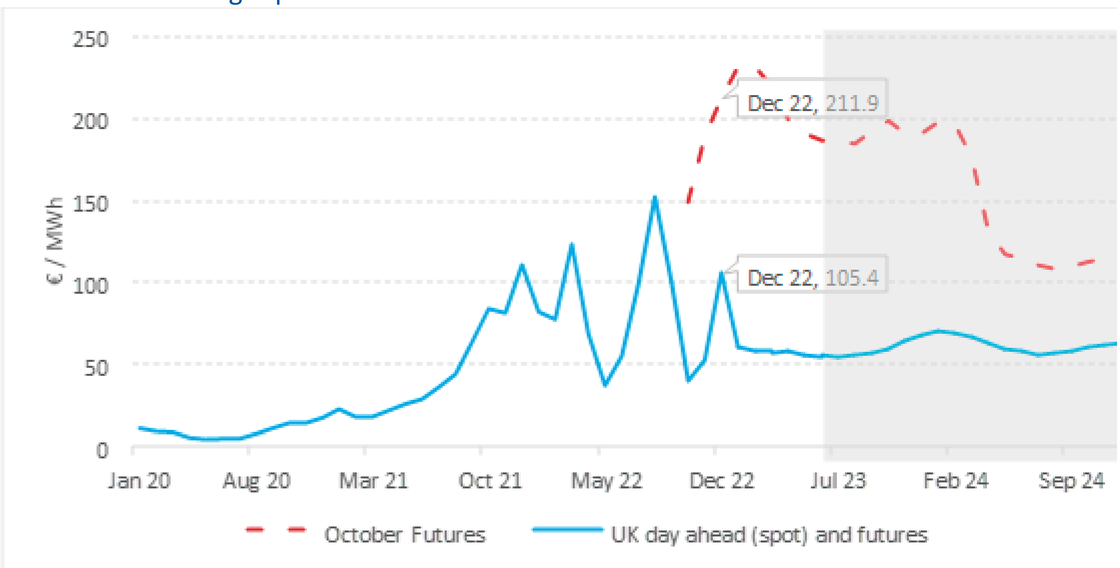
	November 2022 Model			**February 2023 Model**		
	Low	Baseline	High	Low	Baseline	High
Price sensitivities	-25%	0	+25%	-10%	0%	+10%
Price Cap Modelled	€120 €180	€120 €180	€120 €180	€120 -€180 & variable	€120 -€180 & variable	€120 -€180 & variable
Hedging	40%	20%	10%	50%	40%	30%
Production Change	-10%	0%	0%	0%	0%	0%
Optimism Bias	-20%	-20%	-20%	-10%	10%	10%

Figure 2: Revised Estimates:



Source: DECC IGEES

Figure 3: Actual Wholesale gas prices versus Futures as of October 2022:



Source: DECC IGEES

Appendix 3 – Link to Transcript

main.pdf (oireachtas.ie)

Houses of the Oireachtas
Leinster House
Kildare Street
Dublin 2
D02 XR20

www.oireachtas.ie
Tel: +353 (0)1 6183000
Twitter: @OireachtasNews

Connect with us

Download our App