GARRIGUES Newsletter

Transport & Shipping

April 2014

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I. European Union

1. Legislation and legislative developments

1.1 New Regulation on tachographs in road transport

Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport was published in the Official Journal of the European Union (OJ) on February 28, 2014.

The Regulation is intended to regulate the future introduction of "smart tachgraphs" and the establishment of new control measures to improve compliance with the European legislation on driving time and rest periods in land transportation by road.

Notably among its new provisions, transportation companies (except for vehicles with a maximum permissible mass not exceeding 7,5 tonnes, which will be exempt from this legislation, if they are used for carrying materials, equipment or machinery for the driver's use in the course of his work, and are only used within a 100 km radius from the base of the company) will be required to install the "smart tachographs" in all new vehicles, at the latest by the end of three years from when the European Union specifies their technical characteristics. This provision will apply to newly registered vehicles (registered in a member state) that are used for transportation by road of passengers and goods and fall within the scope of application of Regulation (EC) No 561/2006.

The Regulation also provides a 15-year time limit, which will start to run the same day the EC specifies the technical characteristics of those tachographs, so that the companies can install the new devices in the whole of their fleets of vehicles used for professional transportation which are driven in a member state other than the state where they are registered.

For national transportation, the member states can require the installation and use of tachographs in accordance with the Regulation in any of the vehicles in which their installation and use are not required for another reason.

These devices will automatically record the distance and speed of the vehicle, as well as the point of departure and end destination, any potential incidents or failures and other data, while also allowing remote monitoring of the data obtained.

1.2 Amendment to passenger rights following delayed flights

On February 5, 2014, the European Parliament made amendments to a draft law on the rights of air passengers to receive compensation for flight delays or cancellations, which include requiring air carriers to have specific contact persons at airports to inform passengers about their rights, complaint procedures, assistance, reimbursement and re-routing of flights. Passengers could also lodge complaints with them about lost or damaged luggage.

The approved amendments determine the following amounts of compensation for delayed flights by journey distance:

- Delays longer than three hours for journeys of 2,500 km or less: 300 euros
- Delays longer than five hours for journeys of 6,000 km or less: 400 euros
- Delays longer than seven hours for journeys of 6,000 km or more: 600 euros

Moreover, where flights are delayed, the air carriers would be required to provide information to passengers on rescheduled flights within 30 minutes from the initially scheduled departure time.

Air carriers will not be able to prevent passengers with a return ticket from boarding if they do not use the outbound ticket.

Also, the amendments concerning luggage specify that luggage will include hand luggage, coats, handbags and another bag of airport shopping, in addition to the prescribed cabin luggage allowance.

The draft now provides in relation to complaints that a carrier must accept a passenger's complaint if it fails to provide a full answer to the complaint in two months. Additionally, where the air carrier invokes "extraordinary circumstances" as a reason not to pay out compensation, it must provide the passenger with a detailed written explanation. An exhaustive list of circumstances of this type is provided, including delays caused by birds, strikes, political unrest and operational problems which are outside the airline´s control.

The draft is currently at the stage of amendment and a first reading before the European Parliament, and so there are still a few more steps to complete before these provisions could eventually come into force, if they are not struck out.

2. Recent case law

2.1 "Spanish healthcare cent" (céntimo sanitario") held unlawful by the CJEU

In a judgment rendered on February 27, 2014, the Court of Justice of the European Union (CJEU) replied to a request for a preliminary ruling from the Cataluña High Court of Justice concerning proceedings involving a transport company, in case C-82/12, by holding that the tax on retails sales of certain hydrocarbons (IVMDH - *Impuesto sobre las Ventas Minoristas de Determinados Hidrocarburos* -, also known as the "Spanish healthcare cent" applicable to those types of fuel) is contrary to EU law.

The "Spanish healthcare cent" was created by article 9 of Law 24/2001, of December 27, 2001, on tax, administrative and social security measures to contribute to the funding of the autonomous community governments' new powers over healthcare. All powers in relation to the tax had been transferred to the autonomous community governments, a tax that had a central government rate and another autonomous community rate, whereby all revenues obtained from the tax must be used in full to fund healthcare expenses guided by objective criteria set centrally for Spain as a whole, except for the portion of the funds obtained from the autonomous community rates which could be used to finance environmental actions.

The Cataluña High Court had doubts over the compatibility of the tax with article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, which set the rules on the receipt of excise duty in the European Union. That court was uncertain as to whether this tax could be considered to be for a specific purpose, within the meaning of that provision, because it is used to fund (in addition to environmental actions, if so decided) the new powers transferred to the autonomous communities over healthcare matters, whereas the purpose of the excise duty established in this Directive is to protect health and the environment. The requesting court further considered that the provisions on the chargeability of the tax do not fulfill either the rules applicable to excise duties, because this tax is received upon the sale to the end consumer, or the applicable Spanish VAT rules, because it is not received at each stage of the production and distribution process.

In its judgment, the CJEU held that article 3(2) of Directive 92/12 must be interpreted as precluding national legislation that establishes a tax on the retail sail of hydrocarbon fuels, such as the Spanish IVMDH at issue in the main proceedings, because such a tax cannot be regarded as pursuing a specific purpose within the meaning of that provision where that tax, intended to finance the exercise by the regional or local authorities concerned of their powers in the fields of health and the environment, is not itself directed at protecting health and the environment.

Further, the CJEU held that it is not appropriate to limit the temporal effects of this judgment, because it cannot be accepted that the Generalitat de Catalunya (Catalan autonomous community government) and the Spanish government acted in good faith in maintaining the IVMDH in force for a period of more than ten years, and also it is irrelevant that the Commission by permitting another member state, in 2004 to authorize the regional authorities of that state to increase the excise duties on hydrocarbons, may have accepted a fiscal measure analogous to that which the Spanish authorities had presented to the staff of the Commission before the adoption of the IVMDH.

In the wake of that judgment, the Spanish government has announced that it will set up a system to refund IVMDH to affected parties. Affected parties also have various remedies available to claim a refund, such as economic-administrative claims for a refund of incorrect payments and administrative claims for the financial liability of the government, plus in this case there is the added complication of it being a tax transferred to the autonomous community governments but with a central government rate and another autonomous community rate.

2.2 The CJEU rules against residence-based restrictions for obtaining a boating license

In its judgment of February 27, 2014, the CJEU replied to a request for a preliminary ruling filed by the Tribunal Central Administrativo Norte de Portugal concerning proceedings involving a number of Portuguese sailing schools, in case C-509/12 (Navileme). It discussed the validity of the refusal by Instituto Portuário e dos Transportes Marítimos (IPTM) to admit European Union citizens not resident in Portugal to the examination for the award of a recreational boating license.

The sailing schools claimed that the IPTM has been refusing to admit their pupils not resident in Portugal to the examination because they failed to satisfy the conditions set out in article 29 (1) of the Recreational Boating Regulation approved by Decree-Law No 124/2004 in Portugal. They submitted that this residence condition set out in article 29 (1) is contrary to European Union Law and to the case law of the CJEU, which prohibits restrictions on the freedom to provide services on grounds of nationality and residence.

The CJEU pointed out that in a case such as the one at issue in the main proceedings the provisions on the freedom to provide services set out in article 56 through article 62 TFEU apply, on the one hand, to the *provision of training* services for the purpose of obtaining a boating license offered by sailing schools to students from other member states not resident in Portugal seeking to obtain their boating license in Portugal, and, on the other, to the *receipt of such services* by those students.

Therefore, a provision of law which limits the issuing of boating licenses solely to the residents of the member state in question, fails to have regard to the prohibition of restrictions on the freedom to provide services laid down in article 56 (1) TFEU.

In short, in its reply to the request for a preliminary ruling submitted to it, the CJEU held that article 52 TFEU and article 56 TFEU preclude legislation of a member state such as that at issue in the main proceedings, which imposes a condition of residence for European Union citizens seeking to obtain a boating license in that member state, legislation which is contrary, therefore, to EU law.

II. Spain

1. Legislation and legislative developments

1.1 Transportation reform (Royal Decree 1/2014, of March 24, 2014)

On January 25, 2014, the Official State Gazette published Royal Decree-Law 1/2014, of January 24, 2014 on infrastructure and transportation reform and other economic measures, which makes a number of amendments of varying extent in the field of transportation.

On railway safety, it amends Law 39/2003, of November 17, 2003, on the railway industry, to implement as primary legislation the most important railway safety elements set out in Directive 2004/49/EC on safety on the Community's railways. It also amends Law 28/2006, of July 18, 2006, on state agencies for the improvement of public services, to change the name and powers of the State Agency for Land Transportation Safety, which will now be called the State Railway Safety Agency.

On carriage by air, it amends Law 21/2003, of July 7, 2003, on air safety, to regulate the public levy on the assignment of slots which remunerates the slot coordinator and schedules facilitator, appointed by the ministry of development, for the services provided to airport managers and airline operators. It also partially amends the rules on the subsidies for the carriage on scheduled flights of passengers resident in the Canary Islands, the Balearic Islands, Ceuta and Melilla, for example concerning the use of remote systems for the relief for the carriage on scheduled flights of passengers. And lastly it determines the airports that are in the same destination catchment area, for them to apply the incentive to strengthen traffic growth at airports managed by AENA established in additional provision 66 of the 2014 General Budget Law.

On shipping, it makes material amendments to article 137 of the Revised State Ports Merchant Shipping Act, which have brought marine aids to navigation services or signaling services under the services provided by the Spanish marine safety and rescue company (SASEMAR - Sociedad de Salvamento y Seguridad Marítima), which hitherto did not include those types of

services. This means in practice that the costs of the aids to navigation service provided by SASEMAR will be funded out of the fees paid by users rather than out of the General Budget Law as was previously the case.

1.2 Publication of the fourth master agreement for dock workers and stevedores

On January 30, 2014, the Official State Gazette published the Decision of January 17, 2014, by the Directorate General of Employment, in which the fourth agreement regulating the employment contracts of dock workers and stevedores was registered and published.

This agreement, which is a collective labor agreement, applies to the employment relationships between enterprises and employees performing their work throughout Spain, for loading, discharging and transferring goods between ships or between ships and land or other modes of transportation and other employees performing qualifying activities falling under the agreement.

The agreement will apply at both the port freight handling companies known as SAGEP (Sociedades Anónimas de Gestión de Estibadores Portuarios), which are also known collectively as members of the port freight handling companies organization OEE (Organización de Empresas de Estiba) and companies engaged in port services involving freight handling services. It can be applied to employees under a special or ordinary employment contract, hired by companies in the OEE or by the other port freight handling companies falling within its scope.

The agreement sets out detailed provisions on practically all the employment matters covered by any collective labor agreement for this specific industry of port freight handling services, it is for a four-year term, from when it is signed in July 2013 until January 31, 2017, and will be renewed annually if none of the parties files any objection.

1.3 Regulations on transportation of dangerous goods by road

On February 27, 2014, the Official State Gazette published Royal Decree 97/2014, of February 14, 2014, on transportation of dangerous goods by road in Spain, which repeals and replaces the previous Royal Decree 551/2006, of May 5, 2006, on transportation of dangerous goods by road in Spain, which implemented in Spanish law Council Directive 94/55/EC of 21 November on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road.

This new royal decree adapts the legislation applicable to the transportation of dangerous goods by road to include Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods and, also, to mirror the successive amendments made to the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), which is directly applicable to the carriage of goods inland under the provisions in the Directive mentioned above.

The various elements this royal decree contains notably include provisions governing transportation, the technical rules on vehicles, packages and containers, the rules of conduct in the event of an accident or breakdown, the regulations on loading and unloading operations, and the penalty system.

The royal decree does not apply to the transportation of dangerous goods by road done with vehicles belonging to the armed forces or done under their responsibility. Those transportation operations will be governed by their own special legislation.

1.4 Approval of new rates for the use of air navigation aids

On February 6, 2014, the Official State Gazette published Order FOM/136/2014, of January 31, 2014, amending the rates to be charged for the use of the air navigation aid infrastructure (Eurocontrol), also known as route charges, and amending the interest rate for delay in payment of those rates.

The enlarged committee within the European Organisation for the Safety of Air Navigation (Eurocontrol), in charge of determining those charges, their payment terms and period of application, has thus established the new unit rates for 2014, which draw a distinction between the rates charged for use of the Spanish air space of Madrid, Barcelona and the Canary Islands, and that of the other states participating in the common system for establishing and collecting route charges for air navigation aid.

1.5 New legislation on tax leases of ships in Spanish Corporate Income Tax Law (TRLIS)

On March 1, 2014, the Official State Gazette published Law 1/2014, of February 28, 2014 adopting measures for the protection of part time workers and other urgent economic and employment-related measures.

The many adopted measures in the field of transport notably include the creation of a transitional regime for the shipbuilding industry as a result of the Decision on the disappeared tax lease rules, discussed in earlier Newsletters. A final provision has been added to the Spanish Corporate Income Tax Law (TRLIS), establishing transitional rules for companies in the shipbuilding industry which must apply to any administrative authorizations currently in force in the shipbuilding industry and are affected by the European Commission Decision of July 17 2013, on the disappeared tax lease regime in the shipbuilding industry.

2. Recent case law

2.1 The Constitutional Court gives protection to parties affected by the closure of airspace in 2010

In a judgment rendered on January 27, 2014, the Spanish Constitutional Court granted, for procedural reasons, the protection requested by a number of parties affected by the closure of Spanish civil airspace on December 3 and December 4, 2010 and acknowledged the claimants' right to an effective remedy before the court.

The appeal was lodged following a decision rendered by the Central Judicial Review Court dismissing an appeal, without entering into the facts of the case, submitted against an interlocutory order rendered in an "abbreviated" proceeding (for a criminal offense punishable by less than nine years' imprisonment) on one of the affected parties, which provided that the appeals submitted to be joined in the same proceeding by more than fifteen thousand affected parties against the decisions setting aside the government's financial liability rendered on various individual claims concerning the same facts must be conducted separately.

The administrative decisions setting aside the administrative claims for the government's financial liability looked at the same facts giving rise to the administrative claims (closure of civil airspace on December 3 and December 4 2010 as a result of the acts of air traffic control staff) and provided the same legal grounds for setting aside the petitions made. They argued that an event of force majeure had occurred falling outside the scope of AENA's decision-making powers and that, therefore, the reported damage resulted from causes falling outside the powers and decision-making authority of AENA or of the Ministry of Development.

After the case had been brought before the courts, the affected parties petitioned for the proceedings to be joined, which was denied by the court authority.

The Constitutional Court held, however, that the refusal to join the proceedings has no legal basis because the reasons for the decision were not explained and a breach had occurred of the provisions in Law 29/1998, of July 13, 1998, on the judicial review jurisdiction. It also found that the decision was arbitrary and disproportionate, having no regard for the pro actione principle, by contradicting the concept of expediting proceedings and the need to avoid contradictory decisions, hindering access to the process and the appellant's activity in the process and creating unnecessary obstacles to the right to effective judicial protection (article 24.1 of the Spanish Constitution).

All of the above reasons were behind the decision in the judgment to restore the claimants' rights, hold the interlocutory order mentioned above null and void, and order the proceedings to be taken back to the point immediately before the rendering of the interlocutory order mentioned.

2.2 The Constitutional Court confirms central government's powers to authorize offshore wind farms

In a judgment rendered on February 13, 2014, the Plenary Session of the Constitutional Court ruled on a positive jurisdiction dispute brought by the Canary Island government against Royal Decree 1028/2007, of July 20, 2007, establishing the administrative procedure to handle authorization applications for electricity generation in Spanish waters.

The Canary Island government asked for the jurisdiction at issue to be held to belong to the Canary Island autonomous community and, as a result, for the decree to be rendered null and void or, secondarily, for the decree to be held not to apply in this autonomous community. Among other grounds, it pleaded that the central government's ownership of coastal public land is not, in itself, a criterion for determining powers, and that the sea area adjacent to the Canary Islands does form part of its territory.
The Constitutional Court threw out these arguments, because they failed to take into account that the legal definition of archipelagic waters that was sought to be taken from international public law, and from the United Nations Convention on the Law of the Sea, in particular, is only for the purposes of the Convention itself and serves the definition of "Archipelagic State" in the Convention. The Canary Island autonomous community is obviously not an archipelagic state nor, therefore, do the provisions of article 46 et seq. of the Convention apply to it.

Additionally, referring to its own case law, the court reiterated conclusively that the autonomous community territory does not take in territorial waters, and that the autonomous community territory is defined only in terms of the islands ("the Canary Island archipelago consisting of the seven islands"), and no explicit mention is made of the sea surrounding them, nor can this be inferred from the ordinary meaning of the term "archipelago," according to which the islands must be grouped in the sea, in more or less close proximity to each other.

Moreover, after analyzing Royal Decree 1028/2007, the court did not observe either that this was an exceptional case of autonomous community powers being exercised outside their territory over territorial waters.

In short, the Constitutional Court set aside the positive jurisdiction dispute and confirmed that the articles in the central government regulations on the authorization of offshore electricity generating stations in territorial waters were constitutional.

2.3 The government's financial liability for detaining a foreign vessel held void

In a judgment rendered on November 13, 2013, the Supreme Court upheld a cassation appeal lodged by the Italian owner of a tuna fishing boat, against a National Appellate Court judgment that did not allow the boat owner to receive damages from the government for losses caused by the detainment of a vessel and the expenses associated with a guarantee provided as an injunctive remedy, following the commencement of a penalty proceeding on fishing, after the time limit for that penalty proceeding had expired.

After examining various court precedents, the chamber concluded that, although the request for injunctive remedies consisting of the requirement to provide a guarantee and detain a foreign boat cannot be accused of any unlawfulness that might give rise to damages in connection with that detainment, this absence of unlawfulness disappears completely from when, after the period for this penalty proceeding has run, its time limit expires.

That is the date when the strict legal fact of the effluxion of time prevented the authorities from ruling on the facts in the penalty proceeding, when their unlawful activity commenced and when their financial liability arose for the period between expiry of the time limit for the proceeding and the boat's release.

To determine the government's financial liability for damages to the boat owner, the Supreme Court added up the mooring costs of the detained boat, and the costs incurred in relation to the security provided for the payment of the original penalty, bearing in mind that it was provided after the date on which the time limit for the proceeding had expired.

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