Tourism & Hotels

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GARRIGUES

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EXCELLENT VIEWS FOR THE SPANISH TOURISM INDUSTRY

JOSÉ MANUEL CARDONA

All the recent forecasts have indicated that 2016, like 2015 before it, is set to be a year in which most of the aggregates for the Spanish tourism industry will top those for the year before along with any in the industry's history. This ability to break records and exceed expectations comes principally from a particularly active sun and beach vacation industry and from resurgence in the demand for the main Spanish urban destinations. Spain has had an added attraction for tourists as a result of current events in competing destinations in the Middle East and North Africa, which are sure to have been affected by geopolitical instability and international terrorism. The international economic climate has also helped: low oil prices, rock-bottom interest rates with euribor close to 0%, the euro exchange rate and forecasted growth (though limited) in the Eurozone. This being so, a record number of foreign visitors was recorded in 2015 (68.1 million) without disdaining the considerable recovery in local demand (overnight stays by residents were 5.02% higher year on year in May 2016) . Also deserves special mention the rapid growth of tourism sub-industries such as the cruise sub-industry. Spain is now the second largest European market as the recipient of cruise passengers, having received 5.9 million passengers in 2015, and a 9.5% increase in the economic contribution to the national economy over 2014 . Therefore it is hardly surprising that the industry has increased its own forecasts for tourist GDP growth in 2016, with estimates reaching +3.8% , far higher than the expected figure for the Spanish economy as a whole.

Similarly to the aggregates for the tourism industry as a whole, they experienced a significant change in trend in 2015. This also applies to the hotel investment market in Spain. The volume of hotel investment in Barcelona was more than twice the 2015 figure year on year, and the increase in Madrid was a little over 3.5 times above the previous year. For the first time in 2015, and by a long way, Spain topped its pre-crisis hotel investment figures (€1,780 million in 2006), by clocking up €2,614 million, obtained from transactions to buy 132 hotel establishments, which totalled just over 29 thousand rooms between them. And 2016 does not seem to be lagging behind in the number of acquisitions of hotels and tourist establishments, with a considerable amount of active participation by international investors and 'socimis' (Spanish REIT).

The biggest cloud on the horizon is the impact Brexit may have on booking levels in the British outbound market, without forgetting the ongoing weaknesses or threats hanging over the industry: mass tourism (especially in coastal areas), illegal tourism service supply, increase in tax and compliance costs, and others.

The remaining element to complete the view of the Spanish tourism industry is a number of important new pieces of legislation. So far in 2016 laws have been approved which have had a direct impact on the tourism industry, particularly forceful in regions and municipalities where new political parties have come into power in their parliaments or governing bodies.

Without presuming to be an exhaustive list of all those amendments, some of the most important new regulations for the Spanish tourism industry are discussed in the following articles.

[1] CEHAT Hotel Monitor, May 2016

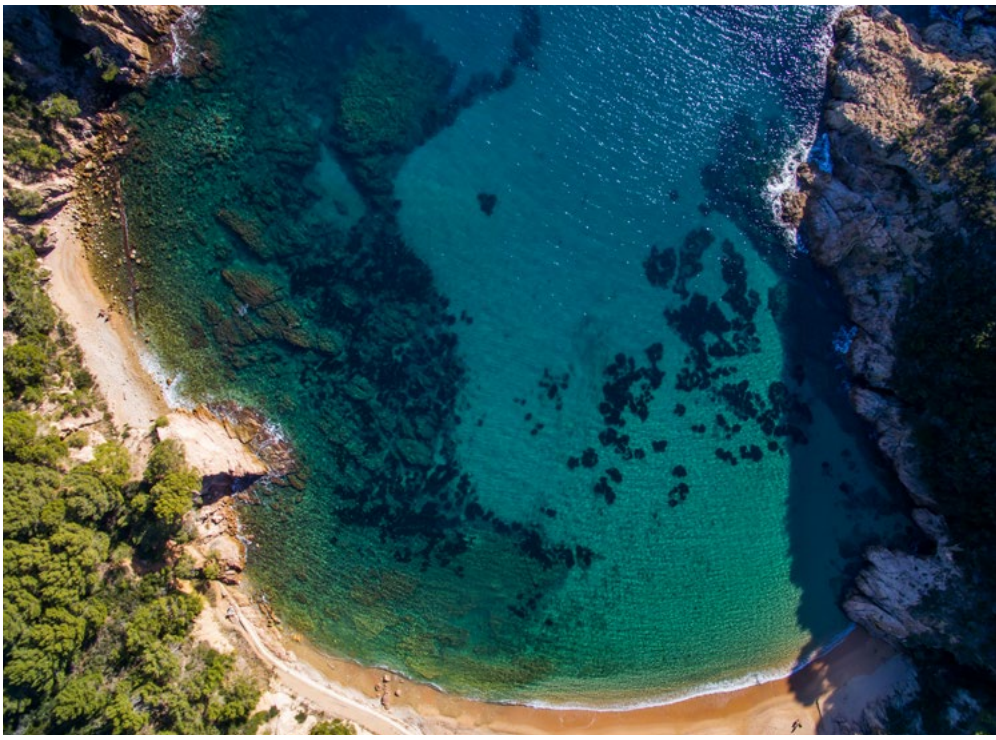
[2] Press release on June 21, 2016 by the Cruise Lines International Association (CLIA)

[3] Exceltur, Synthetic Activity Indicator of Spanish tourist GDP growth

“For the first time in 2015, and by a long way, Spain topped its pre-crisis hotel investment figures

THE NEW TAX ON TOURIST STAYS IN THE BALEARICS

In the ongoing summer season, and after a 13-year absence, the tax on tourist stays (also misnamed the "Eco tax") has come back to one of the biggest Spanish tourist destinations. After ruling out the option of charging a tax on tourists entering the Balearics at ports and airports, the new Balearic government reclaimed the former Law 7/2001 and has published, with Balearic parliamentary approval, a reedited Law 2/2016, on the tax on tourist stays.



SANTIAGO JANER BUSQUETS

From July 1, 2016, all tourist establishments in the Balearic Islands will be liable for the tax on tourist stays under Law 2/2016, of March 30, 2016.

This is not the first tax charged on tourist stays in the Balearics. The new tax is the successor to the tax on stays at tourist accommodation establishments, under Balearic Law 7/2001, which was in force until its repeal in October 2003.

Following autonomous community elections on May 24, 2015, the political parties supporting the current autonomous community government signed a Governability Agreement in which the "actions to do" list included the creation of a new tax on tourism.

After ruling out the option of placing a tax on tourists entering the Balearics at ports and airports, the new Balearic government reclaimed the former Law 7/2001 and decided to reedit the tax on stays. The new government's "action" concluded with the approval of Law 2/2016 by the Balearic parliament.

The new tax is charged on stays by individuals at any tourist establishment in the Balearics on or after July 1, 2016.

The tax charge is between €2 and €0.5 per day or fraction of a day in their stay, depending on the type and category of tourist establishment.

The tax is reduced by 50% for stays in the low season (between November 1 and April 30 of the following year), and there is another 50% reduction for day 9 and the following days in the same stay.

The law also sets out a number of exemptions: (i) for stays by minors aged below 16; (ii) for stays related to events of force majeure; (iii) for stays required for health reasons; (iv) for stays subsidized by social programs in any EU member state (IMSERSO, and the like)

Although the law determines that the individual making the stay is the taxable person and taxpayer for the tax, together with that person, the persons or entities operating the tourist establishments where the stay is made are classed as taxpayer substitute. Accordingly, although the person responsible for the taxable event for the tax is the tourist (the person who makes the stay), the person with the obligation to perform all the procedural and substantive obligations for the new

Unless the substitute expressly chooses against it, the objective assessment method will be used, because of its simplicity.

tax will be the substitute, in other words, the owner of the operating business of the tourist establishment.

Therefore, the owner of the operating business of the tourist establishment will have an obligation to self-assess the tax and pay it over to the Balearic tax authority. The flipside of this obligation is that the substitutes will have to claim payment of the tax from tourists and tourists have an obligation to pay it.

Unlike the law on the tax on tourist stays in Catalonia (the only similar tax currently in force in Spain), the Balearic law provides the substitutes with two methods for determining the tax base: the direct assessment method and the objective assessment method.

Unless the substitute expressly chooses against it, the objective assessment method will be used, because of its simplicity. This method does not use real and actual stays but rather a number of indicators, signs and modules to determine the tax base to be self-assessed by each taxpayer. In particular, this method uses each establishment's type and category, the size of their guest capacity, and the number of days they stay open in the year.

According to the Balearic government's forecasts, annual receipts from the new tax are expected to be between €60 million and €70 million. These receipts have been allocated in full, by legal mandate, to setting up a fund to be put towards promoting sustainable tourism. The contents of the fund must be spent on projects designed to achieve the purposes expressly provided in Law 2/2016.

All the procedural and substantive requirements for this new tax are set out and implemented in Decree 35/2016, of June 23, 2016 (published in the Balearic Islands Official Gazette (BOIB) on June 25, 2016). It was also decided in that law to determine the various self-assessment methods for the tax, and the various business taxpayer status notifications which the taxpayer substitutes must file already in July of this year, all with the aim for the tax to start becoming chargeable on July 1, 2016.

> According to the Balearic government's forecasts, annual receipts from the new tax are expected to be between 60 million and 70 million.

THE COMPULSORY REQUIREMENT TO RECORD WORKING HOURS

A recent national appellate court judgment rendered on December 4, 2015, has underlined the compulsory requirement to comply with article 35.5. of the Workers' Statute in relation to overtime monitoring

BRAULIO MOLINA Y DAMIÁN GALVÁN

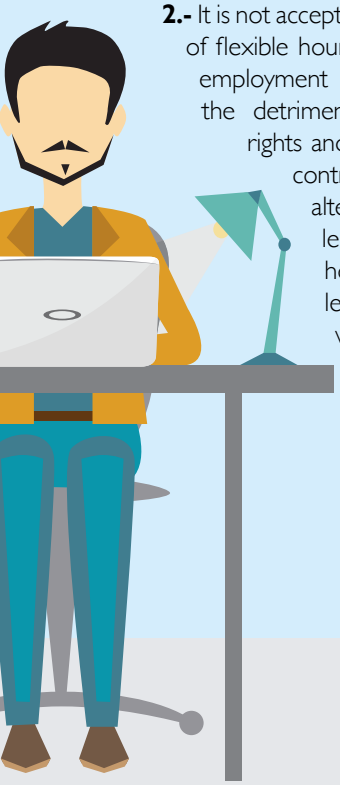
The labour inspection authority is rolling out a nationwide initiative in coordination with the provincial offices, geared towards ensuring that working time and overtime are being monitored.

By now many companies have either received a visit from inspectors or at least have been sent an information notice by the provincial labour inspection authority for their registered office, announcing the initiative in progress and urging employers to set certain guidelines for effective and reliable monitoring of working time and overtime.

A number of reasons have been given for the initiative (some have been taken directly from the standard information notice mentioned above):

1.- The provision in the law contained in article 35.5 of the Workers' Statute, which has "always" required working time to be monitored.

2.- It is not acceptable for the principle of flexible hours under labour and employment laws to be used to the detriment of the workers' rights and for the mentioned contractual balance to be altered by incorrectly lengthening working hours; and much less acceptable for working hours to be lengthened without the worker receiving in exchange the necessary and correct compensation in paid leave or cash.



3.- The need for these monitoring mechanisms to result in policies which assist with achieving a balance between work and personal or family life.

4.- The creation of employment and resulting decline in unemployment, by preventing overtime not being reported or being worked above the permitted limits.

5.- And especially, a recent judgment by the National Appellate Court on December 4, 2015, which has underlined the compulsory requirement to comply with article 35.5. of the Workers' Statute in relation to overtime monitoring. That judgment argued in particular that the provision in that article:

"(…) aims to provide the worker with a form of documentary evidence, enabling him to evidence, which is always difficult otherwise, the overtime he has worked, which is his obligation to prove"

As part of this initiative, labour and social security inspectors will conduct inspection work on working time under full-time contracts, and require working hours to be recorded, which must be the daily figure, including the specific starting and finishing times for every worker. Without entering into the specific method for working time monitoring (which is not set out in the legislation), the recording system chosen by the enterprise, must, in the inspectors' opinion, be at the workplace and ensure that the information is reliable and inalterable.

This initiative will compel the industry to look at what working time monitoring methods they have in place at their workplaces, bearing in mind that they are not restricted to or required for specific professional profiles, but must be used for every worker at the workplace or establishment (administrative personnel, reception, bars, room cleaning staff, gardeners, etc.).

Note also that the putting in place of new methods for the monitoring or distribution of hours to certify correct monitoring and conduct in compliance with the law regarding the daily hours worked by workers may give rise to mechanisms involving a substantial modification to working conditions, and if so, will require observance of the procedure provided in article 41 of the Workers' Statute.

In short, this initiative is poised to be a very important event for the industry, and provide much to talk about over the year. It will require companies to be self-critical and to take a look at their working time monitoring methods, and therefore, the distribution of hours, shifts, rest periods, and the use of overtime.

[4] 5. For the purposes of computing overtime, the every worker's working hours shall be recorded for each day and the total shall be obtained for the period determined for the payment of salaries, with the delivery of a copy of the summary to the work in the relevant pay statement.

Our aim is to provide advice over an issue that has been detected, which will increase in relation to matters such as: the relationship between duties of diligence and proper control, at one end, and the authority bestowed in hotel management agreements, at the other; the consent to or acceptance of compliance programs prepared by third parties or the coordination between the owner and manager's existing programs alike

HOTELIER PROPER CONTROL DUTIES IN REGARDS TO THIRD PARTY HOTEL MANAGEMENT AGREEMENTS

LEOPOLDO CÓLOGAN Y DAVID VICH

Due to the recent path taken by the law, words such as "proper control", "due diligence", "compliance programs" have now become the trend. These terms in themselves require a high degree of consideration and interpretation, but, in relation to the hotel industry, they bring an additional element of practical complexity when interacting with an ongoing contractual instrument such as the hotel management agreement.

Concern over the management of tourism businesses appeared as early as the eighteenth century, when the safety and ease of paths was not matched by those of inns. To remedy this, rules were established and measures prompted to better equip the inns, which would allow them to adequately provide for their travellers' needs. In those days, people travelled for reasons related to military actions, religion, pilgrimages, trade, culture, adventure, investigation, social matters or simply for leisure. The measures included tax exemptions and a restriction on the number of troops to be accommodated in inns by law, as well as, the performance of inspections to force both proprietors and tenants to invest on the improvement of tangible aspects such as the construction of the dwelling and the intangible, such as how the business was run and the service delivered and the obligation of guests to report their status subject to rules of good governance.

There is no doubt that the tourism industry has transitioned to a more professional and demanding business management endeavour in terms of legislation, where the operating model for the operation of tourist hotels is highly dependent on individual business specifications and/or the terms and conditions set out in the agreement, which will determine the company to bear the risk of the said operation. Whether it is the owner, the operator or tenant, or the franchisee, the approach to a more professional management in the industry, has made **management agreements** very

> Concern over the management of tourism businesses appeared as early as the eighteenth century, when the safety and ease of paths was not matched by those of inns.

successful when applied to tourism businesses, where the proprietor continues to be the operator of the hotel, granting an enterprise sufficient powers to run the business, in accordance with the enterprise's abilities, resources and expertise.
However, the above mentioned authorization must be granted, without losing sight of the **general duty to comply with the standard of care of an orderly business-owner which** members of a managing body and the senior executives must abide

by, as monitoring measures must be adopted to enable them to keep track and be aware of what actually goes in the company in order for it to be properly managed. Such measures must therefore be set out in the hotel management but by no means conferring free rein to the authorized enterprise.

Another duty that the representatives of the company owning the hotel must keep in mind, when granting that authorization, is the **duty of loyalty,** which requires them to be faithful representatives, by acting in good faith and in the company's best interests. They therefore have a duty to exercise independent judgment when signing the management agreement, without being conditioned by third parties, or the interests of the business group, and to adopt, if need be, the necessary measures to oversee that a reasonable balance between the interests on both sides is achieved.

The importance of complying with the said duties stems from the fact that the members of a managing body and senior executives of an enterprise could be held liable for the losses caused by culpable breach.

Simply complying with those duties is not enough though, because it must be done with a **genuine ethical commitment by the enterprise**, so as to reduce the risk of any breach, by implementing clearly defined corporate principles and values, as well as to reduce the risk of potential criminal acts in the course of business. Thus, the public prosecution service's circular 1/2016 and recent supreme court judgments (154 and 221/2016) in reference to the subject of the proper control that enterprises must exercise to reduce the risk of being held criminally liable, determined the need for enterprises to implement **effective compliance programs** which seek to deter, as much as possible, criminal offenses by people within the organization (representatives, workers or dependent persons) in the conduct of activities and to the enterprise's benefit.

In fact, a breach of the obligation for proper control carried out by the owning company in the event of a criminal act may entail, fines, closure of the hotel, forfeiture of the right to subsidies or banning entering into government contracts, without forgetting the reputational damage.

In the current legal context, and in view of the general duty to comply with the standard of care of an orderly business owner, which requires representatives to act in good faith, to hold no personal interest, to adopt appropriate decision-making procedures, to comply with the law and with the company's bylaws, it is necessary to determine whether the company to be authorized as hotel manager can supply a **code of conduct** and a c**ompliance program of its own**, if so, ensure that they are compatible with the hotel owner and that they are effectively implemented.

This is a particularly sensitive issue in respect of agreements of this nature because the authorization entails empowering the hotel management company to carry out multiple steps on behalf of the owner in fields such as financial matters, account management, dealings with public authorities, suppliers and customers, from the standpoint of criminal offense control.

As we said, our aim is to provide advice over an issue that has been detected, which will increase in relation to matters such as: the relationship between duties of diligence and proper control, at one end, and the authority bestowed in hotel management agreements, at the other; the consent to or acceptance of compliance programs prepared by third parties or the coordination between the owner and manager's existing programs alike.

Among the new legislation introduced in the preliminary bill, the element that has generated the greatest amount of controversy was the requirement for the local councils themselves to give final approval to all their planning rules, including the master plan.

PRELIMINARY LAND BILL IN THE CANARY ISLANDS

CARLOS VILCHES

In a notice published in Official Canary Islands Gazette no. 50 of March 14, 2016, the Preliminary Land Bill for the Canary Islands was made available for public information and comments. This is a preliminary bill submitted and approved by the Canary Islands autonomous community government on February 22, 2016. That public information and comments period was extended until April 26, 2016 in a notice published in Official Canary Islands Gazette no. 65 of April 6, 2016.

The bill's aim, as described in its preamble, is "to simplify", "rationalize" and "update" the applicable rules for the protection, planning and development and use of the land, considering that for some planning instruments it has taken more than a decade to complete the required procedures, plus the "web of legislation" currently in place on this subject.

The preliminary bill is nevertheless a long document composed of 408 articles and 47 provisions, compared with the 249 articles and 27 provisions in the currently in force revised wording of the Laws on the Development and Planning of Land in the Canary Islands and on Nature Areas in the Canary Islands, approved by Legislative Decree 1/2000, of May 8, 200 ("TRLOTENC ·). According to its only repealing provision, the preliminary bill provides for the replacement of all or part of a number of instruments, including the TRLOTENC planning laws referred to above, Law 19/2003, of April 14, 2003, approving the master planning guidelines and the planning guidelines for tourism in the Canary Islands, Law 6/2009, of May 6, 2009, on urgent measures concerning land planning and development, giving impulse to industry and the planning of tourism, Law 14/2014, of December 26, 2014, on harmonization and simplification concerning the protection of local land and natural resources, and Law 3/2015, of February 9, 2015, on fast-track procedures for strategic investments in the Canary Islands.

Among the new legislation introduced in the preliminary bill, the element that has proved the most controversial was the requirement for the local councils themselves to give final approval to all their planning rules, including the master plan. The important elements of this approval procedure for master plans as set out in article 145, are: (i) the procedure for provisional approval has been removed, and it is now only composed of the advance, initial approval and final approval phases; and (ii) in the procedure for public notification and consultation with the interested public authorities, agencies and public entities, the autonomous community government will issue a mandatory single report which in the case of municipal master plans and island plans, will be binding (article 104 and article 145).

This new arrangement, designed to give more autonomy to the local authorities, has raised quite a number of doubts over its practical application, especially in relation to the local councils that have fewer resources to undertake urban planning for their respective municipalities. In other areas of Spain, local councils are only given the power to give final approval to planning instruments under the autonomous community laws of Galicia, the Balearic Islands, La Rioja and the Basque Country, and this is only for local councils with larger populations .

Moreover, the new document contains provisions aimed at protecting rural land, such as article 34.3 according to which "generally, any land not classified as urban or developable will be rural land", although in article 124 through article 133 it provides for the so-called "plans in the interest of the island or autonomous community", which are defined as "land planning and development instruments aimed at planning and development and design, to be implemented immediately, or at implementing general systems, land reserved for infrastructure and facilities, or industrial, energy, tourism, cultural, sports, health or other types of activities, the impact of which in territorial, economic or social terms goes beyond the interests of the

municipality or municipalities on which they stand, according to their size, special characteristics or important territorial impact".

The key characteristic of these instruments is that: (i) they may be approved when developing or implementing island planning provisions or, where they are not provided for in them, autonomously; (ii) they may be implemented **on any type of land**, regardless of its classification or zoned use (the only exception being that they cannot under any circumstances have any effect on environmentally protected rural land and, only as an exception, they may have an effect on rural land protected as agricultural land); and (iii) they may be set in motion at the initiative of the public authorities or as a private initiative.

The preliminary bill also provides for the future removal of the Land Planning and Development and Environment Commission for the Canary Islands, (COTMAC), which, under article 13.4, will be replaced by a collective body whose members will include representatives of the departments of the affected autonomous communities, with the aim to issue the single report in the procedure for planning instruments, and if applicable, to act as an environmental body in the cases defined in the law.

Although the Preliminary Land Bill has had a favourable reception from businesses, it was considered insufficient, because, according to their comments, it falls short of one of its underlying goals in relation to its drafting; greater simplicity.

In the tourism industry in particular there has been a certain amount of wariness over the determinations in this new law due to a past history of what was known as a "moratorium for tourism". Although, in principle, this new law will not affect land for tourism use classified as such, according to point IV in the preamble, it will entail "a practical ban on classifying new land for tourism use".

Moreover, in final provision five, the preliminary bill amends the currently in force article 4 of Law 2/2013, of May 29, 2013 on the renovation and modernization of Canary Islands touristic sector, and confirms the prior authorization system for investment in new accommodation facilities in the four larger islands, and therefore in Lanzarote, Fuerteventura, Gran Canaria and Tenerife (including the transfer of accommodation capacity), together with the extension of tourist accommodation establishments, has expressly been made subject to prior authorization from the respective island authorities (that prior authorization will also be required for the renovation of these establishments where the local legislation for the island expressly so requires). On the El Hierro, La Gomera and La Palma islands, by contrast, no prior authorization will be required for the renovation processes, although it will be needed for new investments, but only where the local planning rules so require (with the exception of the accommodation establishments on rural land, which will be subject to the specific standards under the island planning rules and, failing that, the general rules set out by the Canary Islands government for establishments of this type).

After the public information and comments period for the preliminary bill had ended on April 26, 2016, and the more than a hundred submitted comments had been studied, the Land Bill for the Canary Islands was approved by the government council on June 27, 2016 and has been submitted to the consultative council for the Canary Islands to issue an opinion before it is laid before parliament.

According to statements by the Canary Islands government minister for land policy, sustainability and safety, the Canary Islands Land Law will be laid before parliament this July and the final wording is expected to be approved in December.

[5] Galicia: Article 61 of Law 2/2016, of February 10, 2016 on land in Galicia (local council for an inhabitant population of over 50,000).

Balearic Islands: Article 53 of Law 2/2014, of March 25, 2014, on land planning and development and land use (local councils for inhabitant populations of over 10,000, will give final approval to: the amendment of nonstructural determinations in master plans, and any for the purpose of adapting master plans to territorial planning instruments).

La Rioja: Article 88 of Law 5/2006, of May 2, 2006 on land planning and development and urban zoning in La Rioja (local councils for inhabitant populations of over 25,000).

Basque Country: Article 91 of Law 2/2006, of June 30, 2006 on urban zoning and planning (local council for more than 7,000 inhabitants).

Although the Preliminary Land Bill has had a favourable reception from businesses, it was considered insufficient, because, according to their comments, it falls short of one of its underlying goals in relation to its drafting; greater simplicity.


20
RECEPTION

END OF THE PERIOD FOR COMMENTS ON THE SPECIAL PLAN FOR TOURIST ACCOMMODATION ESTABLISHMENTS IN BARCELONA

The coming months will be decisive for determining the content of the Special Plan for Tourist Accommodation Establishments in Barcelona that will be given final approval, the lawsuits it will generate and the governmental financial liability that the city council will have to face according to the decision it adopts

PABLO MOLINA

It will soon be a year since the then brand new local government in Barcelona approved the decision to suspend permits to open new tourist accommodation establishments in Barcelona.

According to the local authority team, this suspension would allow the drafters of an imminent Special Plan for Tourist Accommodation Establishments in Barcelona to study the real facts and draft their planning proposals in the certainty that the facts would not have changed and altered the conditions for the study.

Surprisingly, as said practice was not common for the Barcelona local council, the suspension even affected projects with permit applications in progress when the moratorium came into force. This move has generated a lot of debate over the process, and has put a lot of pressure on the municipal technical services.

Within this suspension period, Barcelona city council gave initial approval on March 10, 2016, to the Special Urban Plan for Tourist Accommodation Establishments, Youth Hostels, Collective Residences for Temporary Accommodation and Vacation Rentals in the City of Barcelona (PEUAT). The plan was published on March 14, and the public information and comments period (3 months) ended on June 14.

In the Special Plan which has had initial approval, Barcelona city council divides the city into four specific zones for the purposes of installing tourism accommodation establishments.

In the first zone, the Special Plan proposes a gradual reduction to the number of tourist accommodation establishments by not allowing any new establishments to be opened, not even by closing the currently existing ones.

In specific zones 2, 3 and 4, the Special Plan makes the opening of new tourist accommodation establishments conditional on the closure of some of the previously existing establishments. Another condition for permission to open new establishments will be their distance from existing accommodation establishments. Additionally in zones 3 and 4, a certain amount of growth is allowed, although contained.

The Special Plan also restricts the installation of vacation rentals in specific zone 3 and, additionally, lays down a number of requirements that are hard to fulfil, remarkably the need that the building in which it is installed shall not have been used as a residence before July 1, 2015; that the total allowed use for vacation rentals established in Barcelona shall not have been exceeded; or that the use for vacation rentals in the block where it is sought to be installed as a percentage of the existing residential use shall not be higher than 1.17%.

The Special Plan that has had initial approval appeared with a lot of question marks which must be resolved in its official procedure. There are doubts over the approval procedure, over whether the document's hierarchical position is sufficient for the functions it seeks to carry out or over the compatibility of its determinations with the legislation emanating from the Services Directive.

At present, the plan has received, according to local council sources, more than 130 comments, which may imply that in the version that will be given final approval its contents may have changed considerably. Additionally, the entry on the local council government team of the socialist party may bring a certain amount of change to the contents of the Special Plan which will be submitted for final approval.

The coming months will be decisive for determining the content of the Special Plan that will be given final approval, the lawsuits it will generate and the governmental financial liability that the city council will have to face according to the decision it adopts. At all events, it is important to note that the period for suspension of permits ends on July 2, 2017, and therefore the Special Plan will have to obtain final approval before then, unless the city council wants all of its efforts to end up being a simple planning theory exercise.

ANDALUCIA AUTONOMOUS COMMUNITY GOVERNMENT LAYS DOWN RULES FOR TOURISM VACATION HOMES

According to its preamble, the provisions on the service of providing accommodation in vacation homes for tourism purposes are intended to solve the problems caused by the rise in the use of private accommodation for tourism purposes

CARLOS VILCHES

On February 11, 2016 the Official Gazette of the Junta, Andalucía's autonomous community government, published Decree 28/2016, of February 2, 2016 on vacation homes used for tourism purposes and amending Decree 194/2010, of April 20, 2010, on tourist apartment establishments ("Decree 28/2016"), which came into force on May 11, 2016. This Decree brings vacation rentals out of the legal limbo they were in, after taking these types of rentals out of the reach of Law 29/1994, of November 24, 1994, on urban leaseholds ("LAU"), through the amendment made by Law 4/2013, of June 4, 2013, on measures to bring flexibility and give impulse to the housing rental market.

According to its preamble, the provisions on the service of providing accommodation in vacation homes for tourism purposes are intended to solve the problems caused by increased use of private accommodation for tourism purposes, such as unfair competition this type of accommodation causes for the traditional types of tourist accommodation establishments, the absence of any monitoring by the public authorities, and the lack of protection for users, with the added factor that the image of the tourism industry in Andalucía was suffering due to the presence of unregulated accommodation establishments which were not professionally managed.

Article 3 of the Decree defines "vacation home for tourism purposes" according to three requirements: (i) it must be located on land for residential use, (ii) the accommodation service must be going to be provided in exchange for a price, and (iii) the service must be provided habitually regularly and for tourism purposes. This last requirement will be deemed satisfied when the home is advertised on "channels offering tourism services", in other words, travel agencies, intermediary companies or any channel on which accommodation may be booked.

The Decree does not apply to homes made available at no cost, and homes provided to be used for longer than two months (regulated in the LAU urban leaseholder law), and homes located in rural locations (regulated in Decree 20/2002, of January 29, 2002 on rural tourism and adventure tourism).

It does not apply either to "groups of properties composed of three or more homes belonging to the same owner or operator, which are located in the same building or group of adjacent buildings or otherwise, which are subject to the legislation on tourist apartment establishments, regulated in Decree 194/2010, of April 20, 2010 on tourist apartment establishments".

According to article 9.2 of Decree 194/2010, of April 20, 2010 on tourist apartment establishments ("Decree 194/2010"), "groups of properties" are "any establishments incorporating three or more accommodation units in the same building or group of buildings, adjacent or otherwise not, occupying only part of them, in which the tourist accommodation service is provided in units of operation." And this article adds that: "group of nonadjacent buildings means is referred to that composed of two or more buildings each one located within one thousand meters from the janitor's office or office of the operating enterprise."

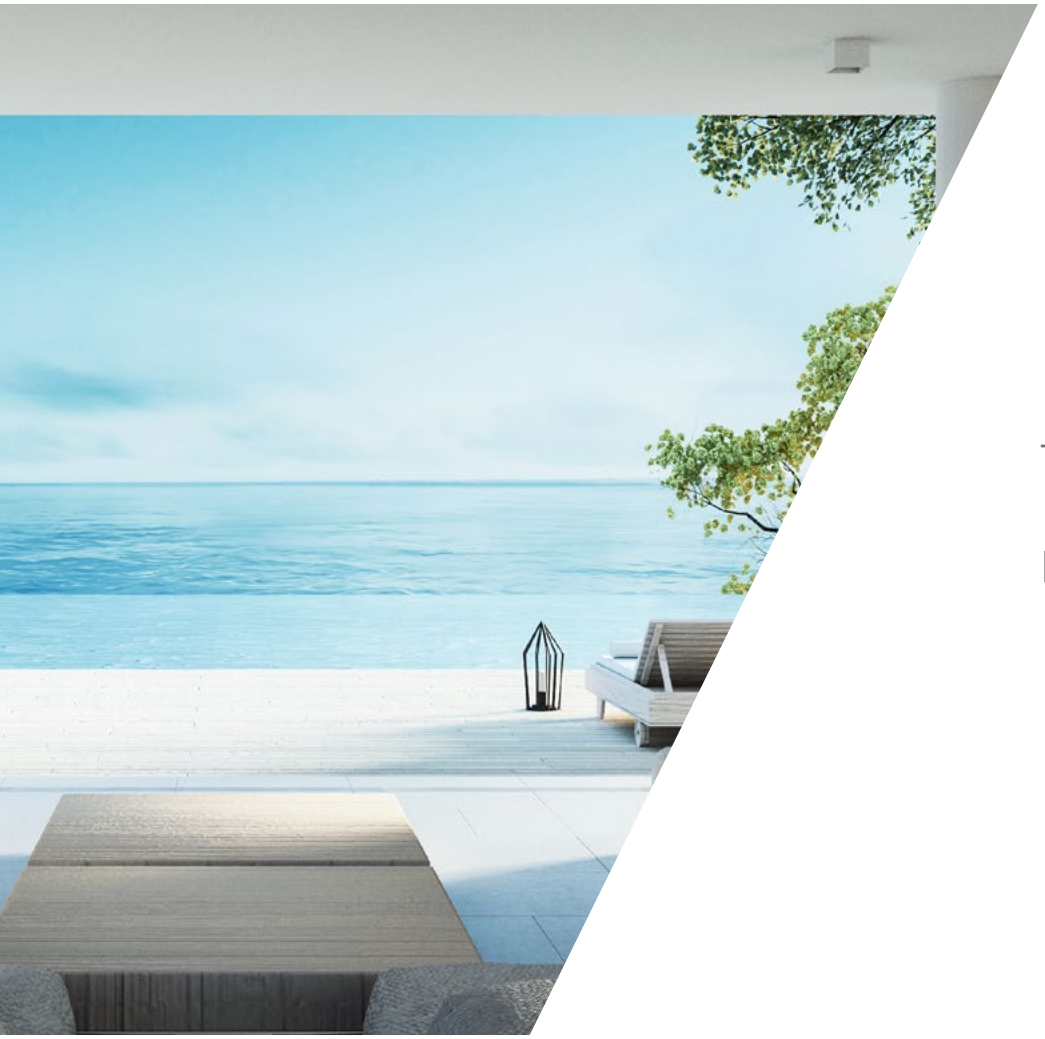
The fact that Decree 28/2016 does not apply to groups of properties formed by three or more homes located in the same building or group of buildings, adjacent or otherwise not, and belonging to the same person as owner or operator, has become the subject of some debate in these first months since the Decree came into force, because given that in Andalucía there are many enterprises which have been operating lately more than three vacation homes used for tourism purposes and may now find themselves subject to Decree 194/2010, which implies having to satisfy all the requirements and provide

all the services associated with tourist apartment establishments, which are more demanding than those laid down for vacation homes for tourism purposes. Decree 28/2016 lays down that it will be presumed the that the owner of the vacation home used for tourism purposes is also the person operating it as a business, and as such will be responsible to the authorities and the users for ensuring that the service is provided correctly. This presumption disappears if in the solemn declaration under article 9.1 of the Decree which must be provided before starting to provide the accommodation service, the name of another individual or enterprise is provided as the business operator for the vacation home.

Article 9 of the Decree makes it obligatory for the individual or enterprise operating the service to register the vacation home on the Tourism Register for Andalucía ("RTA") for the individual or enterprise operating the service, for which a solemn declaration will be required to the Department of Tourism and Sport of the Junta, Andalucía's autonomous community government. The allocated registration number must be made visible on any advertising of the vacation home or promotion conducted by any medium, from when that number has been available.

Moreover, Decree 28/2016 provides that the capacity of vacation homes for tourism purposes will be limited by the occupancy permit, and cannot be higher than fifteen occupying guests when the vacation home is rented as a whole, and six guests when rooms are rented out. The maximum number of guests allowed per room is four in all cases.

Article 6 also sets out a number of



> Decree 28/2016 lays down that it will be presumed the presumption that the owner of the vacation home used for tourism purposes is also the person operating it as a business, and as such will be responsible to the authorities and the users for ensuring that the service is provided correctly.

compulsory requirements for the vacation homes, such as: (i) they must be in possession of a first occupancy permit or equivalent document granted by the local authority concerned; (ii) they must have ventilation systems and blackout facilities on their windows and cooling and heating systems (a one-year adaptation period is allowed for this requirement); (iii) they must be equipped with sufficient furniture, including household items and bed linen, a first aid kit and tourist information on the area; (iv) complaints and claims forms must be made available to users along with a phone number for any incidents, which must be answered immediately; or (v) the facilities must be cleaned on the arrival and departure of every customer.

One of the requirements to be met on the user's arrival at the vacation home is to deliver a document by way of a contract and fill out the guest arrival form under Order INT/1922/2003, of July 3, 2003. In the absence of an express agreement on the times of arrival and departure, article 7 of the Decree provides that the right to occupy the vacation home starts at 16:00 hours on the first day of the rental period and ends on 12:00 hours on the last day of that period.

On the subject of prices, the Decree requires them to be charged per night and stay and they must in all cases be inclusive of utilities charges for water, electricity, heating, air conditioning and cleaning. It also states that the prices will must be set in conformity with article 32 of the Law on Tourism in Andalucía (LTA), which implies that they will be unrestricted, that the rates must be made available to users, that the invoices must be itemized and drawn up in Spanish (at least), and that the prices must be the final and complete amounts, inclusive of taxes, indicating when necessary any increments or discounts applied or expenses charged. In relation to bookings, the decree does not allow the amount paid to make a booking to be higher than 30% of the total price for the stay, and authorize the operator to keep the whole of that amount if the booking is cancelled fewer than ten days before the scheduled arrival date, or to withhold half of that amount in concept of a booking fee if the cancellation takes place earlier than ten days before the arrival date. If the booking is cancelled by the operator, the operator must refund the booking fee to the user, plus 30% indemnification if the cancellation takes place fewer than ten days before the arrival date.

> The regulations do not give a precise definition of the applicable limits, but refer generally to the provisions in the applicable EU legislation according to the investment project.

STATE AID MONITORING IN THE REFORM OF THE CANARY ISLANDS ECONOMIC AND TAX REGIME

The aid monitoring system took shape with the approval of form 282 which must be filed remotely within the period in which the relevant self-assessment returns (for Corporate Income Tax, personal Income Tax or Non-resident Income Tax) must be filed by the taxpayer beneficiaries of State aid, which include all the beneficiaries of the incentives under the economic and tax regime.

CÉSAR ACOSTA

Under the EU law, the tax incentives under the Canary Islands economic and tax regime (REF) are considered State aid, and must be implemented in accordance with that law.

The entry into force of the reform of the Canary Islands REF in Royal Decree-Law 15/2014, of December 20, 2014, on amendment of the Canary Islands REF precisely as a result of the requirement to adapt it to the new EU legislation on regional aid , amended Law 19/1994, on the Canary Island economic and tax regime, a law providing a range of direct and indirect tax incentives, and incorporating new legislation which affected the provisions on the reserve for investments in the Canary Islands, the tax credit for investments in the Canary Islands and in the special Canary Island zone (ZEC), in addition to introducing a tax credit for investments in West African countries and expenditure on advertising and promotional expenses.

This amendment also puts in place new monitoring mechanisms for compliance regarding State aid, bringing a completely new requirement for individual monitoring by the taxpayer, and placing certain limits on the amount of aid granted as a result of claiming those tax incentives along with others also qualifying as State aid. This monitoring will be carried out using the information received from the taxpayers themselves and any breach will trigger the related refund procedures, and if applicable, the implementation of an equally novel penalty system.

The aid monitoring system took shape with the approval of form 282 which must be filed remotely within the period in which the self-assessment returns (for corporate income tax, personal income tax or non-resident income tax) must be filed by taxpayer beneficiaries of State aid, which includes, as we have said, all the beneficiaries of the incentives under the REF.

To provide an overview of that aid monitoring procedure, its key characteristics and some of the important issues associated with it will be described below:

- The state aid will be classified into: (i) regional operating aid; (ii) regional investment aid; (iii) aid to small and medium enterprises; and (iv) aid for audio-visual works.

- Rules are provided on computing the State aid for the purposes of receiving different types of aid, with specification of the limits placed on receiving those different types of aid, and the State Tax Agency is empowered to follow up on and monitor those types of aid. The aid must be computed in the fiscal year in which the right to receive it was generated, except in the case of the reserve for investments in the Canary Islands which must be computed in the fiscal year in which the investments take place. This last exception deserves a special explanation, it means that the computation of the aid regarding the reserve for investments in the Canary Islands will not be done in the fiscal year in which the amount is allocated to the reserve and therefore, the reduction in the corporate income tax base occurs, but in the fiscal year in which the reinvestment takes place. With such a criteria, that tax incentive might be difficult to apply in large investment projects or large reforms in the hotel industry.

- Receiving different types of aid which add up to amounts higher than the limits will be an infringement. The penalty will be a monetary fine in a proportionate amount equal to 20 percent of the excess. The excess aid will be refunded and the penalty will be imposed under the procedures required according to type of aid concerned.

The monitoring of State aid will therefore require a special attention in the following cases:

- Monitoring of operating aid : regime for the producers of tangible goods; tax credit for investments in the Canary Islands and tax credits for technical innovation activities in the Canary Islands and for live scenic arts shows and musicals, where the investments made are not considered an "initial outlay"; the incentives related to the Canary Islands special zone (ZEC); the reserve for investments in the Canary Islands (RIC), in the portion relating to operating aid; exemptions for internal supplies from the tax on imports and supplies of goods in the Canary Islands (AIEM); and the aid for the carriage of goods towards the sea and air carriage costs of goods.

  The tax benefits qualifying as such may be taken within a combined limit of 17.5% of the beneficiary's annual turnover obtained in the Canary Islands, for an enterprise belonging to the manufacturing industry (divisions 1 through 4 of the rates for the tax on economic activities), or 10% of that turnover, in the event the enterprise belongs to any other industry.

- Monitoring of investment aid (initial outlays): investment incentives under article 25 of Law 19/1994; tax credit for investments in the Canary Islands and tax credits for technical innovation activities in the Canary Islands and for live scenic arts shows and musicals, where the investments made are qualified as "initial outlay "; the reserve for investments in the Canary Islands (RIC), in the portion related to aid for initial outlays; other regional incentives granted by the public authorities or using public funds to help with an initial outlay.

The regulations do not give a precise definition of the applicable limits, but refer generally to the provisions in the applicable EU legislation according to the investment project.

Therefore, in the tourism industry, every investment project must be characterized as either operating or investment aid, and the relevant limits on EU aid must be applied in every case, which could hinder the ability to take the full range of tax incentives under the Canary Islands economic and tax regime (REF) in large projects for investment, renovation, improvements, major reforms or fitting out or maintenance work, and so, in every case an appropriate review and tracking of their costs must be done and how they fit in with the state aid monitoring system described.

6 Guidelines on National Regional aid for 2014-2020 and Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation).

7 Implemented by Royal Decree 1022/2015, of November 13, amending the implementing regulations for Law 19/1994, of July 6, 1994, approved by Royal Decree 1758/2007, of December 28, (Canary Island economic and tax regime regulations).

8 Order HAP/296/2016, of March 2, 2016 approving form 282, on "Annual information return regarding aid received under the Canary Island economic and tax regime".

9 Aid to reduce the operating expenses of an enterprise not related to an initial outlay; it includes costs in categories such as personnel expenses, materials, hired services, communications, energy, maintenance, rentals, administrative costs, and so on, but excluding depreciation/amortization expense and finance costs if they were included in the subsidizable costs when the investment aid was granted.

10 Investment in property, plant and equipment and intangible assets related to the creation of a new establishment, increasing the capacity of an existing establishment, diversifying the production of an establishment by adding new products not previously produced at that establishment or a fundamental transformation of the whole production process of an existing establishment; or the acquisition of assets belonging to an establishment that has closed or would have closed if it would not had been acquired and which is acquired by an investor unrelated to the seller. The acquisition of shares in a company would not be considered per se an initial outlay.

11 Guidelines on National Regional aid for 2014-2020; Regulation (EU) No 651/2014; and other applicable EU regulations, if any, on state aid.

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