GARRIGUES

newsletter

April 2012

TABLE OF CONTENTS

New Legislation in Spain and Portugal

LEGISLATION

1. SPAIN

1.1 Labor & Employment

1.1.1 Urgent measures to reform the labor market

February 11, 2011 saw the publication in the Official State Gazette of Royal Decree 3/2012, of February 10, 2012, on urgent measures to reform the labor market.

The aim behind the royal decree-law is to put in place a clear labor and employment law framework that will contribute to more efficient management of employment relationships and lead to the creation of jobs and stable employment. The following core principles are at its heart:

- Measures to increase the efficiency of the job market and cut down on the two-tier system (between insiders who have indefinite term contracts and outsiders who do not), most notably those described below.

  An array of major amendments have been made to the rules on collective layoff procedures, concerning the enabling grounds (by redefining them) and procedure; particularly noticeable is the disappearance of the need for prior authorization from the authorities.

  In relation to individual dismissals, new rules have been added on unjustified dismissals, under which companies now have 5 days from notification of the judgment in which to choose either to: a) reinstate the worker with back pay, or b) pay severance equal to 33 days' salary per year of service, with a cap of 24 months' salary (the statutory severance has been brought down from the former 45 days' salary per year of service, with a cap of 42 months' salary). There would be no back pay in this second case.

  The law has also amended two of the grounds for termination of an employee's contract on objective grounds. Namely, the grounds relating to workers' failure to adapt to the technical changes affecting their jobs and in cases of absences from work.

- Measures to encourage internal flexibility at companies as an alternative to destroying jobs.

  These measures make the rules on material modifications to working conditions more flexible and give companies the chance to opt out of certain collective labor agreement conditions (working hours, timetable and distribution of working time, rules on shift work, the compensation system and pay level, the performance and work system, duties and voluntary improvements to social security benefits and services), where there are economic, technical, organizational or production-related grounds for doing so, and by agreement between the company and the workers' representatives.

  Greater clout has also been given to company-wide collective labor agreements, which now take precedence over industry-wide agreements on certain matters.

  A new procedure has been put in place for temporary interruptions of work or short-time working. The new procedure applies regardless of the number of workers at the company or the number of persons affected, where there are economic, technical, organization or production-related grounds for doing so.

Elsewhere, as a general rule, companies may now distribute 5 percent of working hours on an uneven basis over the course of a year, as long as they observe the minimum daily and weekly rest periods at all times.

- Encouraging companies to hire employees under indefinite term contracts and other measures to help create jobs.

  A new indefinite-term, full-time contract has been created, usable by companies with less than 50 workers and involving a twelve-month trial period. Companies hiring employees under these contracts can benefit from an array of tax breaks and social security contribution reductions subject to certain requirements.

  There are new provisions on telecommuting and social security contribution reductions have been brought in for companies converting work-experience, handover and substitution contracts into indefinite-term contracts, available for companies with less than 50 workers.

- Measures to increase workers' employability.

Temporary employment agencies can now act as placement agencies, where they meet certain requirements and provide evidence of this fact to the competent authority.

Lastly, workers' entitlement to receive training has been expanded and the definition of training and apprenticeship contracts has been amended. Reductions in social security contributions have also been made available to companies executing training and apprenticeship contracts or converting training and apprenticeship contracts into indefinite-term contracts.

1.2 Tax

1.2.1 Important tax news

As part of its goal to reduce the public deficit, within the framework of the agreements that Spain has reached with the European Union, the Spanish government has approved Royal Decree-Law 12/2012, of March 30, 2012, introducing myriad changes in tax legislation, aimed in particular at the business sector. The key changes are as follows:

- **Goodwill.** Effective for the 2012 and 2013 tax periods, the annual ceiling on the deductible amount for intangible assets relating to goodwill, on both acquisitions of entities and corporate restructurings, has been brought down from 5% to 1%. The annual ceiling is now in line with the ceiling placed in the 2011 Royal Decree on financial goodwill and applies to other types of goodwill with tax effects.

- **Unrestricted depreciation and amortization.** Unrestricted depreciation and amortization has been eliminated for large companies (although it has been kept for SMEs) as it was defined in additional provision 11 of the Corporate Income Tax Law. However, amounts remaining to be amortized or depreciated or investments made before the rules were repealed will still qualify for unrestricted depreciation or amortization but subject to certain ceilings.

- **Borrowing costs.** Until now these costs could be deducted without any restrictions, unlike the situation in Spain's neighboring countries, which have been curtailing this practice in recent years. Following the change, borrowing costs exceeding 30 percent of operating income (determined according to certain rules) will not be deductible.

Borrowing costs up to €1 million will be deductible in all cases, and any borrowing costs not deductible in one period will be deductible in future periods, over eighteen years.

A new restriction has been placed, making borrowing costs not deductible at all if they relate to debts generated within the group (as defined in Article 42 of the Commercial Code) incurred to acquire, from other entities in the same group, holdings in the capital or the equity of any type of entity, or to make contributions to the capital or the equity of other group entities, unless the entity evidences the existence of valid economic reasons.

- **Minimum corporate income tax prepayments for large companies.** Effective for the 2012 and 2013 tax periods, a minimum corporate income tax prepayment is required for companies with net revenues above €20 million, as a new tax obligation.

  This minimum payment has been set at 8% of the positive income figure recorded in the income statement, less any tax loss carryforwards. This rate will be 4% if at least 85% of the company's revenues relate to exempt income or dividends qualifying for the double taxation tax credit.

  Given that this measure has been introduced so close to the next prepayment due date (April 20), the above rates will be reduced by half for this payment only.

- **Celing for tax credits**. The current ceiling on gross tax payable (less domestic and international double taxation tax credits and tax reductions) for taking corporate income tax credits has been brought down from 35% to 25%. This is a temporary reduction, only affecting 2012 and 2013.

- **Partial exemption on sales of holdings.** With a view to encouraging the international expansion of Spanish companies, the exemption on sales of holdings in nonresident entities has been made more flexible and a rule has been added, allowing the exemption to be taken in proportion to the number of years the company actually fulfilled the related requirements.

Lastly, a raft of exceptional measures aimed at attracting income to Spain and contributing to fiscal consolidation has also been brought in. A special 8% tax rate has been created for foreign-source dividends or shares in income derived from the same source which are repatriated by December 31, 2012. With this tax, groups that have not been able to benefit from the exemption established for foreign-source dividends and income because one of their companies was in a low-taxation country will have an incentive to repatriate funds at a reduced cost. The companies in question must form part of the corporate group and be perfectly identified in the company's accounting records.

In addition, another special tax has been put in place with the intention of attracting income to Spain, namely income not reported by payers of personal income tax, corporate income tax and nonresident income tax. After announcing that it will tighten tax enforcement rules in 2013, the government will exceptionally allow voluntary disclosures of unreported capital subject to a supplementary tax equal to 10% of the disclosed assets and rights. Taxpayers can make the voluntary disclosure by filing a confidential tax return. The deadline for filing the return and paying over the related tax is November 30, 2012.

1.3 Corporate

1.3.1 Simplification of the reporting and documentation requirements for mergers and divisions at enterprises

Royal Decree-Law 9/2012, of March 16, 2012, simplifying the reporting and documentation requirements in the case of mergers and divisions at corporate enterprises, which amends the Revised Corporate Enterprises Law and the Revised Law on Structural Modifications to Commercial Companies, was published in the Official State Gazette on March 17, 2012.

This new legislation has a threefold aim: to transpose into Spanish law Directive 2009/109/EC of the European Parliament and of the Council of September 16, 2009 as regards reporting and documentation requirements in the case of mergers and divisions; implement the regulations on how corporate enterprises use their websites and electronic communications; and amend the rules on shareholders' exit rights in the case of cross-border mergers and/or transfers abroad of registered offices.

The key changes that have been brought in are as follows:

- Article 11.bis of the Corporate Enterprises Law has been amended to change its title (from "Online site" which was a little misleading) to "Company website", and a new Article 11.ter has been added, on website publications.

- It has been clarified that an expert's report on non-monetary contributions will not be required in the following three cases:

    - where a new company is set up as a result of a merger or division and an independent expert's report has already been prepared on the merger or division plan;

    - in the case of acquisition mergers, or divisions involving a transfer to another party, where an independent expert's report has already been prepared on the merger or division plan and the required capital increase is carried out to deliver the new shares to the shareholders of the acquired company or the transferred section of the company; and

    - where a capital increase is made to deliver the new shares to the shareholders of the company on which a tender offer has been made.

- The reporting and documentation requirements have been changed in the case of mergers and divisions, notably in the following ways:

    - The rules on filing the common merger (or division) plan at the Commercial Registry have been changed, and replaced, in some cases, by a requirement to be included on the website. The provision in Article 32 of the Law on Structural Modifications to Commercial Companies stating there was no need for a notice for "*juntas universales*" (Shareholders' Meetings held with the presence and unanimous consent of all the capital stock) has also been eliminated.

- A new case requiring an expert's report on the plan has been added involving mergers (or divisions) where one or more of the companies is a corporation (S.A.) or a partnership limited by shares, lengthening the list of cases already in force.

- The merger balance sheet can now be replaced by the half-year financial report in the case of mergers or divisions where one or more of the companies involved is a listed corporation.

- The reporting requirements have been amended and reduced.

- The super-simplified system hitherto available for limited liability companies has been eliminated and a system is now provided for mergers in which "*juntas universales*" are held, irrespective of whether the companies involved are corporations and/or limited companies.

- Clear rules have been added on creditors' objection rights to mergers, and on the procedure in the case of mergers that are approved and registered without observing that right.

- Rules have been added also on the process for special mergers involving the acquisition of 90%-owned subsidiaries, under which shareholders who have expressed a wish to sell their shares, but do not agree with the fair value set for the shares in the merger plan, are authorized to request the appointment of an auditor by the Commercial Registry to determine their fair value.

A new Article 78.bis has been added to the Law on Structural Modifications to Commercial Companies which allows companies to dispense with the report by the directors, the expert's report or the division balance sheet in the case of divisions to set up new companies, if the shares are allocated to the shareholders of the company performing the division in proportion to the rights those shareholders held in that company.

1.3.2 Mortgage reform: protection of low-income debtors

Royal Decree-Law 6/2012, of March 9, 2012 approving urgent measures to protect low-income debtors was published in the Official State Gazette on March 10, 2012 and came into force on March 11, 2012.

The basic components of the mortgage have not been changed, but rather a series of measures have been brought in, applying to people defined by the wording of the new legislation as being within the "exclusion threshold." Debtors that meet certain conditions are entitled to have a ceiling placed on their late-payment interest, and be applied a series of measures laid down in the Code of Best Practices where the credit institution has voluntarily signed up to the Code.

Signing up to the Code of Best Practices is optional for institutions, although after they have signed up, they are under obligation to comply with all of its provisions on residential mortgages where the purchase price is above certain levels. The Code of Best Practices sets out a series of measures to be applied before foreclosure: an offer to reduce the mortgage debt and, as a last resort only in certain specified cases, it allows the debtor to cancel the loan by handing over the property (dation in payment).

A number of tax measures have also been approved to accompany the measures provided in the new legislation, changes have been made to the out of court foreclosure of mortgaged assets to place the rules on out of court auctions on a par with those on court auctions in the Civil Procedure Law, and the support system established in Royal Decree 2066/2008 has been extended to include tenants.

1.3.3 Temporary suspension of premiums for new special-regime facilities

On January 28, 2012 Royal Decree Law 1/2012, of January 27, 2012, suspending the pre-allocation of remuneration procedures and eliminating financial incentives for new electricity generation facilities using cogeneration, renewable energy sources and waste (i.e. under the "special regime"), was published in the Official State Gazette.

The main aims of the new legislation, which came into force on the date of its publication (January 28, 2012) are as follows:

- To reduce the high costs involved in the current remuneration system in order to contain the growing tariff deficit.

- To design a new remuneration system for the future which encourages market competitiveness using mechanisms similar to those found in other EU countries and which ensures the future viability of the system.

- To eliminate financial incentives for special-regime electricity generation facilities which have not been entered on the register for pre-allocating remuneration under the special regime on the date the law came into force.

- To eliminate financial incentives for ordinary-regime facilities included in the special regime which do not have the appropriate administrative authorization on the date the law came into force.

- To suspend the pre-allocation of remuneration procedures for applications for the special financial regime, and the calls for applications for pre-allocation of remuneration relating to 2012 and following years have been cancelled.

The law is not retroactive, meaning it will not affect facilities that are already up and running, premiums that have already been authorized or facilities that have already been entered on the registers for pre-allocating remuneration.

Any facilities with applications in progress which were not registered when the law came into force may withdraw their application for registration on the pre-allocation register in which case the guarantees they provided will be returned. Guarantees will also be returned to facilities already entered on the registers which, within two months from the date of entry into force of the law, choose not to complete their facility.

1.4 <u>Capital Markets</u>

1.4.1 Financial Industry Reform

A new royal decree-law reforming the financial industry was published in the Official State Gazette on February 4, 2012.

Taking forward earlier measures passed to avoid or reduce the consequences of future financial downturns, the aim of this new legislation is to build up the confidence, credibility and strength of the financial system so that it can recommence funding economic growth and the creation of jobs. These goals are to be achieved through a significant tightening of write-down requirements for real estate assets and the provision of incentives for further consolidation in the industry (in the form of extended periods for balance sheet adjustments and assistance from the government's "FROB" Fund for Orderly Restructuring of the Banking Sector). As highlighted in the preamble to the decree, the financial industry will be expected to shoulder the whole of the cost of the reform.

The new legislation has also amended Royal Decree-Law 9/2009, of June 26, 2009 on bank restructuring and reinforcement of the capital of credit institutions, basically regarding the forms that FROB funding can take, and Royal Decree-Law 11/2010, of July 9, 2010 on governing bodies and other aspects of the regulatory framework of savings banks, seeking mainly to simplify the governance structures of savings banks that conduct their business indirectly.

In one of its most controversial provisions, the new royal decree-law places caps on boardroom and executive pay at institutions that receive public funding to help straighten out their finances or for a restructuring.

Another key measure that has been brought in, aside from the reform of the banking system, is the long-awaited extension of the rules for computing losses in mandatory capital reductions at corporations and in the dissolution of corporations and limited liability companies, as provided in Royal Decree-Law 10/2008, of December 12, 2008.

It also sets out other ancillary provisions for achieving these main aims.

1.4.2 Requirements and procedure for application for government guarantees for credit institutions' debt issues, to help credit institutions gain access to the capital markets

In accord with the eurozone's plan to lessen the impact of the international financial crisis on credit institutions, in 2008 the Spanish government put in place a guarantee program for credit institutions' debt issues in order to give these institutions access to the capital markets.

As a result of the recent sovereign debt crisis in the eurozone and the fact that a large number of debt issues will fall due in 2012, in December 2011 the European Council adopted new measures to be implemented by member states. The purpose of these measures is to reinforce the equity of credit institutions and provide member states with an effective and coordinated guarantee system that will give credit institutions easier access to medium and long-term financing.

Against this background, the Spanish government passed Royal Decree-Law 20/2011 of December 30, 2011 on urgent tax and financial budgetary measures to redress the public deficit, and amended the 2011 General State Budget Law (Article 49.2b) with the aim, among others, to place a €100 billion ceiling on government guarantees for credit institutions' debt issues.

Ministerial Order ECC/149/2012 of the Ministry of Economy and Competitiveness, dated January 30, 2012, published in the Official State Gazette on February 1, 2012, stipulates the requirements and procedure that credit institutions must follow to apply for these guarantees.

The ministerial order lays down the following requirements for credit institutions wishing to apply for guarantees:

- be domiciled in Spain;
- have a share of at least one per 1,000 of the Spanish loan market; and

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- have issued securities that could have been secured by guarantee between 2007 and 2011, regardless of whether a guarantee was in fact obtained during this time.

In the case of consolidated groups of credit institutions, the first and third requirements must be fulfilled by at least one institution in the group. The second requirement (market share) must be met by the group as a whole, but only by reference to the amounts related to group institutions domiciled in Spain. Only one application may be made per group, meaning that no other group institutions will be able to issue debt with guarantees, except in cases where any other credit institutions in the group have a market share of least five per 1,000 (in contrast to the 2008 guarantee program, it is no longer necessary for the credit institution applying for the guarantee to be the one with the highest credit rating among the group institutions) and fulfill the other requirements, in which case they will be able to file separate applications in addition to those of the consolidated group.

The ministerial order also lays down that, to qualify for the guarantee program, debt issues must meet the following conditions:

- be issued before June 30 2012;
- mature within one to five years, with either a fixed or variable interest rate; and
- adhere to a bullet repayment structure.

The fees the government will charge for issuing the guarantees (which have been changed from those set in 2008) are as follows:

- a granting fee of 0.5% of the amount of the guarantee, to be paid when the guarantee is granted and before any debt issue; and
- an issue fee to be determined by the Office of the General Treasury and to be paid under each guaranteed securities issue, before the securities are issued.

Lastly, the guarantee applications must be submitted to the Office of the General Secretary for Treasury and Financial Policy, drawn up on the form attached in Annex II to the Order. Only one application per credit institution, consolidated group or grouping is allowed, and must be submitted between February 2 and February 6, 2012.

1.4.3 Changes to certain financial regulations on the powers of the European Supervisory Authorities

Royal Decree-Law 10/2012, of March 23, 2012, amending certain financial regulations on the supervisory powers of the European Supervisory Authorities has ushered in certain legislative amendments that became necessary following the transposition into Spanish law of Directive 2010/78/EU of the European Parliament and of the Council of November 24, 2010 in relation to the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

Aimed at adapting the Spanish supervision rules to the obligations brought by the directive and to the European supervisory framework, so as to avoid bad financial practice, the following changes have been made:

- Law 13/1985 on the Investment Ratios, Equity and Disclosure Requirements of Financial Intermediaries

  A change has been made affecting the six-month period granted to authorize the use of internal credit ratings or operational risk measurement methods to be applied in Spanish groups of credit institutions, to the effect that if, within that period any of the European authorities involved refer the matter to the European Banking Authority, the Bank of Spain will defer its decision until it has the European Banking Authority's decision, which it must take into account.

New consultation obligations, which are binding in some cases, have been introduced, requiring the Bank of Spain to consult the European Banking Authority where it is to take decisions that are at odds with the other European authorities involved.

- Legislative Royal Decree 1298/1986 on Adaptation of the Existing Legislation on European Community Credit Institutions

  The Bank of Spain's duty to cooperate with the European Banking Authority has been included, and additions have been made to the information that is exempt from the duty of secrecy and must be provided by the Bank of Spain to the European Banking Authority and to the European Systemic Risk Board.

- Securities Market Law 24/1988, of July 28, 1988

  The key changes made to the Securities Market Law are listed briefly below:

  - Prospectuses and preventive measures will be valid in cross-border transactions.
  - Spanish investment services firms intending to open a branch or provide services without a branch in a non-EU country will no longer need prior authorization from the CNMV (the Spanish National Securities Market Commission).
  - The information that the CNMV has to provide to the European Securities and Markets Authority, the European Banking Authority and the European Systemic Risk Board is no longer subject to the duty of secrecy under Article 90 of the Securities Market Law.
  - New disclosure requirements have been added concerning the information to be sent by the CNMV to the European Securities and Markets Authority.

- Credit Institutions (Discipline and Control) Law 26/1988

  The Bank of Spain will have to notify the European Banking Authority of any penalties for serious or very serious infringements resulting from proceedings carried out on branches of European institutions in Spain, and of any refusals to allow Spanish groups to open branches in other EU countries.

  The Bank of Spain must notify the European Commission and the European Banking Authority of any refusal to allow a Spanish credit institution to open a branch in another EU member state.

- Law 41/1999 on Payment and Securities Settlement Systems

  A requirement has been added for the Bank of Spain and the CNMV to provide the European Securities and Markets Authority with the information it requests on payment and securities settlement systems. Furthermore, both the European Securities and Markets Authority and the European Systemic Risk Board will now have to be informed of any insolvency proceedings on credit institutions or investment services firms that take part in a payment and securities settlement system.

- Revised Pension Plans and Pension Funds Law

  The Spanish insurance and pension fund authority must inform the European Insurance and Occupational Pensions Authority, among others, of any potential cross-border activities of pension funds, of revocation of the administrative authorization for any pension funds, of any special administrative control measures consisting of not allowing new plans to be admitted in existing funds or not allowing new fundholders or contributions, etc.

- Law 5/2005, of April 22, 2005 on the Supervision of Financial Conglomerates

  An obligation has been added for the Spanish authorities to cooperate with the Joint Committee of the European Supervisory Authorities for the supervision of regulated entities that are part of financial conglomerates.

- Royal Decree-Law 7/2012, of March 9, 2012 creating the Fund for Financing Payments to Suppliers

  More information has been added on the specific sections of the budget in force that are affected by the provision of an extraordinary loan amounting to €1,500,000,000.

  Without affecting the powers of the Court of Auditors, management of the Fund will be monitored by the Government Audit Department in public audits.

It has also been clarified that the Fund's debt issues will have the same tax treatment as public debt issues.

1.5 Shipping

1.5.1 Changes to the vessel traffic monitoring and information system

Spain has adapted its legislation on vessel traffic monitoring and information to the provisions of Commission Directive 2011/15/EU amending Directive 2002/59/EC of the European Parliament and of the Council establishing a Community System.

The Directive amends the references to Resolution MSC.150(77) of the International Maritime Organization, which was revoked by Resolution MSC.286(86) and replaces Annexes II and IV to the Directive.

One of its chief new provisions is for the requirements concerning the fitting of vessels with automatic identification systems (AISs) and voyage data recorders (VDRs), better known as a vessel's "black box" to be updated in keeping with the modifications to the SOLAS Convention and the fitting of simplified VDRs in certain types of vessels.

The directive also outlines the measures that the shipping authorities of a member state can adopt if, following an incident involving a vessel, they are of the view that, within the framework of international law, it is necessary to avert, lessen or remove a serious and imminent threat to its coastline or related interests, the safety of other ships and their crews and passengers or of persons on shore or to protect the marine environment.

This list of measures, which may be considered necessary to safeguard human life at sea and the protection and fight against pollution, includes restricting the movement of the ship or directing it to follow a specific course, giving official notice to the master to put an end to the threat to the environment or maritime safety, sending an evaluation team aboard the ship to assess the degree of risk, helping the master remedy the situation and keeping the authorities informed, and directing that the ship be put in at a place of refuge in the event of peril, or even causing the ship to be piloted or towed at the expense of the shipping company.

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COURT CASES AND RULINGS

1. SPAIN

1.1 Tax

1.1.1 New slant in supreme court judgment on permanent establishments

In a judgment handed down on January 12, 2012, the Supreme Court analyzed the definition of permanent establishment in the specific case of a nonresident entity that sells in Spain the products manufactured for it by a Spanish-resident limited-risk manufacturer that is a related party. In this case, the manufacturer also markets the products.

The court concluded that the nonresident entity does not have a fixed place of business in Spain simply due to the existence in Spain of a manufacturer that only produces for that entity, and that the Spanish entity does not have the authority to conclude contracts in the name of the nonresident entity. In other words, it would appear from the outset that there is no permanent establishment from either of the two traditional angles: the fixed place of business and the dependent agent that binds the nonresident entity.

The court held, however, that the nonresident entity did have a permanent establishment in the manufacturer/marketer because both functions were combined in the same person. It arrived at this conclusion on the basis of an arguable interpretation of the current wording of the OECD Model Convention which it applied, even though the wording did not match the terms of the particular tax treaty signed by the countries concerned, by invoking the recently much-used principle of "dynamic interpretation" of tax treaties.

1.1.2 View of Directorate-General of Taxes on services provided between Spanish and Danish companies

In the wake of the recent demise of the tax treaty signed by Spain and Denmark following the notice of termination served by Denmark, reasonable doubts have arisen as to where the services provided between companies from the two countries should be taxed.

The Directorate-General of Taxes has recently expressed its opinion on this conundrum in two binding rulings examining the withholding obligations in Spain concerning services received by Spanish subsidiaries from their Danish parent companies.

The Directorate-General of Taxes explained that, because the tax treaty is no longer in force, it is necessary to look to the domestic legislation, in this case to the revised Nonresident Income Tax Law, and more exactly, to Article 13, which says that the income derived from services that are used for economic activities carried on in Spain or that relate to assets located in Spain will be deemed to be obtained in Spain and therefore subject to withholding tax.

Therefore, a Spanish company that pays income of this kind to its Danish parent company must withhold tax on that income if the services received by it are used for economic activities carried on in Spain or have do to with assets located in Spain.

1.2 Corporate

1.2.1 Data protection: supreme court judgment of February 8, 2012

Last February 8, 2012, the Supreme Court issued a judgment (Appeal No. 25/2008) invalidating Article 10.2.b) of Royal Decree 1720/2007, which approves the implementing regulations for the

LOPD, the Spanish data protection law (Law 15/1999, of December 13), after finding it was contrary to EU legislation.

That article allowed data to be disclosed or processed without the data subject's consent, where the data appeared in sources accessible to the public and the third-party recipient of the data had a *"legitimate interest in processing the data"*, whereas Directive 95/46/EC only refers to legitimate interest and does not say anything about the data being contained in sources accessible to the public.

This invalidation creates the need to assess the direct effect of Article 7.f) of Directive 95/46/EC (as set out in the ECJ judgment of November 24, 2011, in cases C-468/10 and C-469/10). The direct effect should be analyzed case by case, since a company's (i.e. data controller's) *"legitimate interest"* in processing a data subject's data must observe the data subject's fundamental rights and freedoms.

Furthermore, there are other obligations set out in the data protection and information society services and e-commerce legislation that need to be met to process data, such as the duty of information in cases where the data have not been obtained directly from the data subject, or obtaining consent before sending commercial communications by email.

In addition, Article 6.2 of the Spanish Personal Data Protection Law from which the invalidated article arises remains in force. Therefore, although nothing has been mentioned for the time being, it would be advisable for the legislature to introduce the necessary changes to data protection legislation as soon as possible in order to clarify how the definition of "legitimate interest" must be interpreted, and determine the specific cases in which that definition can be applied in order to facilitate the free movement of data among companies in the European Union.

It is also likely that, as on previous occasions, the Spanish Data Protection Agency will publish a note or legal report giving its formal opinion on interpreting the possible application of the legitimate interest exception.

1.3 Labor & Employment

1.3.1 Being excluded from application or interpretation committees is not a breach of labor union freedom

In a judgment rendered on December 22, 2011, the National Appellate Court ruled that labor unions that have taken part in the negotiation of a collective labor agreement but have not signed it are entitled to sit on negotiating and regulatory committees, but not on the application or management committees, without this constituting a breach of labor union freedom.

The parties signing the collective labor agreement concerned placed restrictions in its clauses determining that only the signing parties could sit on some of the employer/employee committees, thereby excluding those that were involved in the negotiation but did not ultimately sign the agreement, which was the case of a particular union that challenged certain provisions of the agreement.

In its decision on this case, the National Appellate Court drew a distinction between regulatory committees (those entitled to amend or add new provisions to an agreement) and application committees (tasked with applying or interpreting the clauses of a collective labor agreement or adapting its clauses to a particular case) and those entitled to take part in each type.

The court concluded that labor unions representing any of the workers cannot be excluded from regulatory committees, given that they are governed by the rules on the lawfulness of the right to collective bargaining under the Workers' Statute. On the other hand, participation on application committees can be restricted exclusively to the unions that signed the agreement, and this cannot be held to constitute a breach of the labor union freedom of any unions that did not sign.

1.4 Restructuring & Insolvency

1.4.1 Opening of the assessment section in insolvency proceedings following the insolvency law reform

On January 10, 2012, Madrid Commercial Court No. 5 handed down a judgment in which it approved an advanced proposal for an arrangement filed by an airline. The importance of this judgment lies in it being one of the first decisions approving an advanced proposal for an arrangement since the insolvency law reform, which came into force in its entirety in January 2012.

Besides approving the advanced proposal for an arrangement, the judgment contains other noticeable rulings (it states, for instance, that a change of corporate name and corporate purpose and a capital increase cannot be regarded as "conditions" making it impossible for the advanced proposal for an arrangement to go ahead and also discusses the scope of the procedure to determine how to interpret the contents of the arrangement), and is innovative in its analysis of the new wording of Article 167.1 of the Insolvency Law on the opening of the assessment section. This section is opened for the court to determine liability for the occurrence or aggravation of the company's insolvency.

As can be seen from the wording of Article 167.1 LC (the Spanish Insolvency Law), the court will order the opening of the assessment section in two defined cases: (i) where it is appropriate to open the liquidation phase; or (ii) where "onerous" arrangements have been approved i.e. arrangements that include releases or deferrals over and above specific limits. The article sets out exceptions to the general rule which describe which kinds of arrangements will not require the assessment section to be opened unless the arrangements in question are breached.

The advanced proposal for an arrangement submitted by the airline provided for a 50% release of claims and a 5-year deferral, bringing the proposal within the definition of "onerous" which, in principle, would have resulted in the assessment section being opened automatically before the insolvency law reform. The proposal also gave special treatment to one particular category of creditors (holders of ordinary claims arising from tickets bought for scheduled flights that did not take place), who would have their claims paid in full (without any release, therefore) within one year of the judgment approving the advanced proposal for an arrangement (therefore, with a 1-year deferral).

In its judgment approving the advanced proposal for an arrangement, the court applied the insolvency law reform and concluded that the assessment section did not need to be opened specifically because of the special treatment involving no release and a deferral that would fall below the threshold determining "onerous" arrangements.

In essence, what it is saying is that under the reform, the assessment section will not be opened where there has been court approval of an arrangement which establishes, for all creditors or *for one or more categories of creditors*, a release of less than one third of the amount of their claims or a deferral for less than three years, unless the arrangement is breached. Before the reform, the assessment section used to be opened upon approval of an arrangement which provided, for all creditors or for one or more categories of creditors, a release of more than one third or a deferral of more than three years – in other words, in order for the assessment section to be opened, it was sufficient for the arrangement to establish, for instance, a release of more than one third for a single category of creditors.

This is a significant change with respect to the pre-reform days which, in this case, allowed the judge (even though the general payment proposal under the advanced proposal for an arrangement entailed a 50% release and a 5-year deferral) to order that the assessment section not be opened due to the fact that the advanced proposal for an arrangement also provided for payment without release and with a 1-year deferral for a specific category of ordinary creditors.

In short, the new wording added by the reform reduces the cases in which the assessment section may be opened, which may bring about an increase in advanced proposals for arrangements that include, for one or more categories of creditors, less onerous payment conditions even though this may entail (under Article 125 LC) the obligation to obtain a majority of votes not only from half of the ordinary liabilities as a whole, but also from the creditors or categories of creditors who do not receive the special treatment in question.

1.5 Antitrust

1.5.1 The CNC fines two companies for breach of their notification duty regarding a merger in the automotive component stamping industry

In its decision of January 30, 2012, the Council of the National Antitrust Commission (*Comisión Nacional de Competencia* or “CNC”) ordered a joint fine of €124,400 for two companies in the automotive component stamping industry and their parent companies for carrying out a merger transaction without prior authorization, involving the acquisition of joint control over another company, which infringed Article 9.2 of the Antitrust Law (Law 15/2007, of July 3, 2007).

This proceeding related to merger C/0382/11, which was authorized in phase one without commitments in a decision dated September 7, 2011. In the CNC’s view, however, phase one of the sale and purchase transaction had taken place on July 22, 2011, before notification of the merger. Accordingly, the antitrust authority decided to initiate an enforcement proceeding for a possible breach of Article 9 of the Antitrust Law, which lays down the obligation to notify the CNC of any merger before it takes place.

According to the decision, the merger was implemented through the signature of two agreements on July 22, 2011, which divided the transaction into two parts: (i) a first part, in which the incoming company acquired 10% of the company and introduced qualified majorities that gave shareholders veto rights for given matters; and (ii) a second part in which the incoming company acquired an additional 30%, which was subject to authorization being received from the antitrust authorities.

The CNC said it had determined in its analysis of the transaction that the notification obligation arose when the agreements were signed in that there was a single transaction which exceeded the turnover threshold set forth in Article 8.1 a) of the Antitrust Law and one of the companies acquired veto rights for a range of matters that gave it control over the acquired company jointly with another company.

The veto rights they acquired concerned the following matters: (i) approval of transactions that involve incurring financial debt which, in the CNC's view, jeopardized the company's ability to compete because these transactions are used for daily operations; and (ii) approval of the financial statements and the distribution of income or loss which, together with (i), would create suspicion and uncertainty among customers, thereby causing detriment to the company's commercial relationships with them and, as a result, to its normal activities. The CNC also said that the approval of the financial statements gave shape to the company's strategic decisions.

The antitrust authorities concluded from the above that the parties entered into and carried out, from July 22, 2011, a merger for the purposes of the Antitrust Law, without giving notification of it or waiting for the required authorization, since from that date onwards veto rights were conferred which were capable of influencing the sales strategy of the acquired company.

1.5.2 Penalty for abuse of a dominant position

On February 8, 2012, the CNC Council delivered a decision finding from evidence that a company from the telecommunications infrastructure industry had infringed Article 2 of the Antitrust Law and Article 102 of the Treaty on the Functioning of the European Union. The infringement involved an abuse of its dominant position on the wholesale services markets for access to broadcasting centers and sites for the emission of TDT signals in Spain and the retail services markets for the transmission and distribution of TDT signals, by engaging in a margin squeeze between April 2009 and the present.

Following a complaint filed by a competitor in Spain, the CNC's Investigation Directorate initiated an enforcement proceeding against the reported company in April 2010 for an alleged abuse of its dominant position. That company had been required (in a decision by the Telecommunications Market Commission dated May 21, 2009) to provide access to its network of broadcasting centers and sites for the emission of TDT signals to other operators as that network was essential equipment for the provision of TDT signal transmission and distribution services.

The Investigation Directorate determined that the price and conditions applied by this company for the provision of access to its centers did not leave equally efficient competitors with any margin to operate on the services markets for the transmission and distribution of TDT signals, giving rise to the restrictive practice known as margin squeezing. Consequently, the CNC Council found the breach of the above legal provisions to be proven and fined the company €13,775,000.

This company had already been fined for abuse of a dominant position in the CNC's decision of May 19, 2009, on the grounds that it had engaged in exclusionary practices involving the imposition of unfair conditions, its contracts with other companies from the same industry had excessively long terms, and it had offered discounts for joint contracts for broadcasting across all areas of Spain, which had closed off the market for the provision of television signal carrier services.

1.5.3 The CNC fines several cement companies over €11 million in total for taking part in a cartel

In its decision of January 12, 2012, the CNC Council fined five cement companies between €500,000 and €5,700,000 for taking part in a cartel in the concrete, aggregates and mortar markets in northern Spain.

This proceeding came about following a complaint lodged against companies in the construction industry which included transcriptions of recorded telephone conversations and of meetings between different companies, which were later accused, plus other additional documents. After commencing a secret information procedure and making the appropriate house and office searches, on December 15, 2009, the CNC's Investigation Directorate ordered the commencement of an enforcement proceeding for infringement of Article 1 of the Antitrust Law.

In its decision of January 12, 2012, the CNC Council held it had been proven that the accused companies (with varying degrees of involvement) adopted agreements to fix and gradually increase the prices of concrete, aggregates and mortar, and to share out the markets for those products. The agreements were implemented by allocating the construction projects to which the participating companies could supply these products within each of the areas defined according to the quotas they had set. The agreements affected the province of Navarra and bordering provinces from June 2008 until at least September 22, 2009, when the searches took place.

The CNC Council found that these anticompetitive agreements constituted a single cartel infringement defined in the Antitrust Law as "*any secret agreement between two or more competitors, the purpose of which is to fix prices, production or sales quotas, market distribution, including fraudulent bids, or the restriction of imports or exports*".

1.6 Environment

1.6.1 Restrictions on setting maximum emissions values in a comprehensive environmental permit

We recently learned of a judgment handed down by the Supreme Court on December 2, 2011 on a cassation appeal lodged by Castilla-La Mancha autonomous community government against a judgment by the Judicial Review Chamber of Castilla-La Mancha High Court, rendering invalid an Environmental Integrated Permit ("EIP") for a combined cycle plant.

The main issue in this case was whether an EIP can determine a higher and more restrictive protection limit, in relation to the emissions values of certain pollutants, than the limit set out in the environmental impact statement. It must be noted that the EIP was granted by the autonomous community government, whereas the environmental impact statement was issued by the central government.

The Supreme Court dismissed the cassation appeal and confirmed the decision rendering the EIP invalid. It thus ruled that the autonomous community government cannot determine more restrictive emissions values in the EIP than those provided in the environmental impact statement, based on the following arguments:

- Firstly, the Supreme Court looked into whether the EIP had exceeded its scope, since Article 7.1 of Law 16/2002, of

July 1, 2002 on integrated pollution prevention and control allows different parameters to be used when determining the maximum emissions values in the EIP. The Supreme Court underlined the legal nature of the EIP as an administrative act through which the government exercises prior control to allow a specific activity to be carried on. The court thus confirmed that it is regulated and not discretionary, since if the statutory requirements are met the authorization must be granted. Whether there is legislation in support of the conditions imposed is a different matter.

- Secondly, the court took into account that the EIP must be applied the rules governing this industry and that environmental limits not envisaged by central government or autonomous community law may not be included in a permit. In this regard, the Supreme Court concluded that the autonomous communities can draw up "*additional protection rules*" to those established by the central government, but may not substitute the legislative power that had been exercised by establishing "*additional protection conditions*" in an administrative act, since this would be contrary to the principle of legal certainty.

- Finally, the Supreme Court explained that there has to be coordination between the EIP and the environmental impact statement and set out the obligation of the environmental agency of the autonomous community to include the conditions of the environmental impact statement in the terms of the EIP.

1.7 Shipping

1.7.1 The Supreme Court confirms that the pirates who participated in the hijacking of the Alakrana fishing vessel are not terrorists

The two accused were sentenced to 439 years in jail each on one count of unlawful association, 36 counts of unlawful detention, one count of robbery with violence and 36 counts of crimes against moral integrity following their arrest by a Spanish navy frigate as they were returning on a skiff from the hijacked fishing vessel, where they had seized personal belongings of the Spanish sailors aboard. Both of the accused admitted their involvement in the events at trial, but contended that they acted under threats and coercion from the members of the pirate group.

The Supreme Court's judgment of December 12, 2011 partly upheld the cassation appeals filed by the defense counsel for the two accused as well as by several sailors from the fishing vessel who appeared as private prosecution parties in the proceeding.

As regards the appeals filed by the accused, Chamber No. 2 of the Supreme Court rejected that there had been a denial of due process rights because the accused had not been allowed to submit documents from the CNI (National Intelligence Center) concerning their involvement in the negotiations which led to the liberation of the kidnapped sailors and the payment of a ransom.

The chamber took the view that the defense had to demonstrate the link between the facts they intended, but were unable, to prove and the inadmissible evidence. In this case, it had not been established that those documents needed to be submitted because they were proof that the accused participated in the events under threat or duress (the version of events put forward by the accused) rather than nothing more than speculative theory, which was not sufficient reason to declassify documents that the government had classified as secret, with the result that a balance had to be struck between the obligation to safeguard national security and the right to effective judicial protection.

The chamber also observed that the witness statements that were not admitted by the court (from the Minister of Defense, the ex-Minister for Foreign Affairs and the Spanish ambassador in Kenya) were going to focus on payment of the ransom and since fulfillment of this condition is not a requirement to consider that the accused committed a hijacking offence, for which there only needs to be a condition placed on liberation not actual fulfillment of that condition, the refusal to admit that proof did not go against the right to a defense.

Furthermore, the chamber rejected the argument that the new Article 616 ter of the Criminal Code, which criminalizes piracy, could be applied to the accused (as a more lenient provision) since it expressly establishes that the envisaged penalty (imprisonment of between 10 and 15 years) is imposed regardless of the penalty imposed for other crimes committed, given the nature of piracy as a crime against the international community. Applying that article would therefore increase the penalty as it would be added to the penalties already imposed for crimes committed at the same time.

Lastly, the court partly upheld the appeal filed by the defense counsel for the accused and acquitted them of the 36 counts of crimes against moral integrity on the ground that the events during the hijacking which resulted in the charges occurred after the BBC had reported that a Spanish navy frigate deployed as part of the ATALANTA operation had captured the two accused as they were returning with the mother skiff. Therefore, even though the accused were undoubtedly necessary accomplices in the hijacking of the tuna vessel and the kidnapping of its sailors, they were not on board when the ill-treatment took place and could not be held liable for it under the joint participant principle since the ill-treatment was not part of the original plan when the decision was taken to hijack the ship and they could not have foreseen what was going to happen when they decided to take part in the plan. By contrast, the ill-treatment took place as a result of an unforeseen event which was the actual detention of the accused.

The appeals lodged by the defense counsels for several crew members were partly upheld in relation to ordering the accused to pay compensation for the psychological damage sustained by several of them and their families, but the Supreme Court categorically rejected the argument that the two accused should be regarded as members of a terrorist group.

Firstly, the chamber held that that the defense counsels' contention that the two accused were members of the BURCA BADEED group which itself was part of the self-styled SOMALI MARINES who collaborated with terrorist organization SHABAAB was based on documents (essentially UN Security Council reports, a police report from the General Information Commissariat and the interception of communications to the accused while on remand) which, although undeniably illustrative and containing highly important information on the actual state of affairs and the risks to vessel traffic in the area, were not inculpatory evidence as they only set out beliefs or theories. All of this must also be viewed against an issue of a legal, rather than factual, nature that was incontrovertible for the chamber, which was that the acts of piracy and terrorism belonged to two independent and different criminal offences, regulated in separate titles of the Criminal Code.

Secondly, the chamber rejected the argument that the accused could be convicted of the crime of membership of an armed gang (linked to the crime of terrorism) and that the Council Framework Decision of 13 June 2002 on terrorism, which includes the seizure of aircraft or ships and kidnapping or hostage taking as terrorist offences, could be applied directly, counter to national law, which it supported by referring extensively to the case law of the ECJ. The court also rejected the argument that the international conventions relied on by the defense (New York International Convention against the Taking of Hostages of December 17, 1979 and the International Convention for the Suppression of the Financing of Terrorism) could be applied directly in order for a terrorist offence to be made out, in contrast with the requirements of national law.

The court recalled that it is firmly established case law in Spain that for terrorism-related crimes to be made out, there must be collective activities by members of an armed gang intent on seriously disturbing public peace or subverting the constitutional order who commit specific criminal acts which, by having these as their aim, are classed as crimes of terrorism. By contrast, in the case at hand the court did not consider it had been proven that the accused had engaged in repeated and systematic acts aimed at causing terror or had been members of an organization of that type, or had subverted the constitutional order or public peace to the extent that it could be classed as a terrorist activity since their acts were only motivated by gain.

OTHER NEWS

1. SPAIN

1.1 Capital Markets

1.1.1 Decision of the Spanish National Securities Market Commission to lift the precautionary ban on creating or increasing net short positions on Spanish shares in the financial industry

In a decision dated February 15, 2012, the Spanish National Securities Market Commission ("CNMV") lifted, with effect on February 16, 2012, the precautionary ban on creating or increasing net short positions on Spanish shares or equity units in the financial industry, approved on August 11, 2011 and renewed on August 25 and September 28, under Article 85.2 j) of Securities Market Law 24/1988, of July 28, 1988.

It must be remembered that the decision of the CNMV's Executive Committee, dated May 27, 2010, regarding the disclosure of short positions remains in force. That decision refers to the obligation to disclose all short positions that reach or exceed 0.2% of the capital stock (balance or shares) admitted to trading, and also all previously disclosed positions which fall below that percentage. Once a position has been disclosed, it must be updated through a new disclosure every time it falls below or decreases by one percentage point of the issued capital.

Lastly, the ban and penalty on naked short selling must also be kept in mind.

1.1.2 New changes to the rules on notification of cross-border economic transactions

Bank of Spain Circular 1/2012, of February 29, 2012, which will come into force on June 1, 2012, will set out the rules on notification to the Bank of Spain of certain transactions carried out by suppliers of payment services.

The Circular sets out the content, periods and notification system for the reporting requirements of suppliers of payment services on:

- cross-border collections and payments, and transfers to or from other countries, in euros or in foreign currency, made on behalf of their clients, where the collections and payments are made from or to accounts opened at a supplier of payment services in another EU member state or in any other country;

- payments and debits in accounts of their nonresident clients;

- remittances, defined as transfers of banknotes and cash in euros sent to or received from their foreign correspondent suppliers.

Suppliers of payment services must notify the Bank of Spain each month of the transactions on that list they have performed involving sums higher than €50,000 or the amount determined in the legislation in force at the time.

Depository institutions have also been placed under obligation to identify the holders of accounts in euros or foreign currency, and state whether or not they are resident in Spain when the account is opened.

1.1.3 Changes to public and confidential financial reporting rules and financial statement formats

Bank of Spain Circular 2/2012, of February 29, 2012, has effectively rounded out Bank of Spain Circular 4/2004 by adding to Annex IX, a section that is an almost word-for-word copy of Subarticles 1.1 and 1.2 and Annex 1 of Royal Decree-Law 2/2012, of February 3, 2012.

The most notable exception added by the Circular is that foreclosed real estate assets or real estate assets received in payment of debts by credit institutions that have been on the balance sheet for longer than 36 months will need to have at least 40% of their value covered by provisions.

A further key new measure is that institutions must record a one-off provision equal to 7% of the outstanding balance as of December 31, 2011 for all lending related to land for property development and to construction or property development projects.

A change has also been made in the composition of risk categories for lending included in the "normal risk" category, designed to reflect the higher risk considered to exist in lending provided for land for property development or for construction or property development projects.

Lastly, the Circular has amended the confidential financial reporting formats currently in force and added new ones. It has also made the necessary changes to the Special Accounting Record of Mortgage Transactions to back up the new information requested for supervisory purposes following the changes made to the Circular.

1.2 Corporate

1.2.1 Conditions for the new debt transactions of autonomous communities that apply for the ICO-CCAA 2012 direct facility

On February 2, 2012, the Government Commission for Economic Affairs instructed the Official Credit Institute ("ICO") to implement a direct credit facility for autonomous communities Ceuta and Melilla, amounting to €10,000 million, which can be increased to €15,000 million (the "ICO-CCAA 2012" facility). This credit facility is a mechanism for funding payments to suppliers in those autonomous communities and to pay for supplies, construction work and services recognized before January 1, 2012, to lower the number of late and deferred payments of these debts.

The conditions placed on the new debt transactions carried out by the autonomous regions or cities that apply for the ICO-CCAA 2012 facility were determined in a decision approved by the General Secretary for the Treasury dated February 23, 2012 (Official State Gazette of February 25, 2012)).

The decision contains a finite list of the financial instruments that can be used to carry out the new debt transactions, including, negotiable securities, bank loans, and credit facilities.

The financial conditions set out for the new debt transactions depend on the financial instruments used: (i) negotiable securities and *Schuldschein* (debt certificates issued under German law), and other instruments with maturities over twelve months; (ii) other instruments with maturities of twelve months or less; or (iii) financial derivatives. The conditions place restrictions on the cost of the new debt transactions carried out, the currencies, the valuation methods, and other terms.

Any change in the existing conditions of debt transactions performed before obtaining the ICO-CCAA 2012 facility, other than an extension of the repayment period, will be deemed a new debt transaction. Therefore, the repayment period for these transactions can be extended but not shortened, provided the extension is made under the same conditions as the original transaction or saves costs compared to the original transaction.

Exceptionally, the General Secretary for the Treasury and Financial Policy can authorize debt transactions that do not meet the requirements in the decision determining the conditions for them, in which case the autonomous community must prepare a report describing the special market circumstances and the reasons justifying the conditions of the transaction.

If any autonomous community performs a transaction that does not meet the financial prudence principle on the terms in the decision determining the conditions, the penalties set out in the Resolution of the Commission of Economic Affairs will apply.

1.3 Tax

1.3.1 Modifications to the mutual assistance framework

On December 31, 2011, Royal Decree-Law 20/2011, of December 30, 2011, on urgent tax and financial budgetary measures to redress the public deficit, was published in the Official State Gazette.

Final provision one of this decree-law makes various changes on the subject of mutual assistance to the General Taxation Law as a result of the transposition into Spanish law of Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

EU News

1. FAVORABLE OPINION FROM EUROPEAN ECONOMIC AND SOCIAL COMMITTEE ON PROPOSED DIRECTIVE ON COMMON CONSOLIDATED CORPORATE TAX BASE

On October 26, 2011, the European Economic and Social Committee ("EESC") adopted a favorable opinion on the "Proposal for a Council Directive on a common consolidated corporate tax base ("CCCTB")". This opinion by the EESC is a compulsory step in the process for the adoption of the proposed directive (consultation procedure). And on February 23, 2012, another opinion, the Opinion of the Committee of the Regions, appeared in the Official Journal of the European Union, and is also discussed briefly below.

The chief comment in the EESC's Opinion to be reported is that it "decisively" supports the draft directive on a CCCTB.

To back up its view, the EESC specifically makes the point that the draft directive will increase the neutrality of the tax and reduce tax competition among the member states. As a result, the CCCTB should be made revenue-neutral (the effect of a larger tax base would be neutralized, as a general rule, by the ability to offset cross-border losses). In addition, and although this point has been queried by major multinational audit and consultancy firms, the EESC believes that the CCCTB would achieve one of its key objectives in the mid-term, namely, a reduction in tax compliance costs.

The EESC also specifically mentions that one of the main advantages and the key component of the CCCTB is consolidation. Consolidation, meaning the offsetting of losses against profits, will make it possible, in the words of the EESC, to "eliminate current transfer pricing problems, make EU-wide tax-neutral restructuring possible and avoid double taxation." That is why the EESC believes that the CCCTB should take into account the need for "consolidation" from the outset, and does not share the view of certain member states which originally proposed that the CCCTB should initially just be a "common base" (without consolidation).

Another aspect that the EESC supports is that the CCCTB is not linked to a particular set of accounting standards. As a result of this, however, and to reduce the risk of the CCCTB not being calculated uniformly, the EESC expressly points to the need for greater efforts to be made to define certain concepts and to introduce more detailed provisions for certain sectors, such as the financial services industry.

The EESC welcomes the use of the blanket exemption for the avoidance of double taxation of income earned outside the EU. It sees no reason, however, for the draft directive containing an exception allowing a switch to the credit method where the tax paid in the source state is too low. The EESC goes on to say that this exception to the general rule is questionable, since it would not just affect abusive arrangements, but "normal business activities" also.

In relation to more specific components of the draft directive, the EESC believes the pool depreciation of assets make sense although it also recommends increasing the depreciation rate which the draft directive sets as 25%. With regard to provisions, however, the EESC makes a criticism that the rules on the deduction of some provisions are too strict and should be more clearly defined, as they only take into account provisions for covering legal obligations and not provisions for covering business and commercial obligations.

The EESC's main criticisms of specific components of the proposed directive relate to the apportionment formula. Although the EESC considers it to be generally adequate, it suggests giving thought to including intangible assets as an apportionment factor and to taking weight off the “sales” factor, as it unduly favors large member states with consumer economies simply because of their size. The EESC also points out that, given the differing social security and pension systems existing in the EU, the inclusion of social benefits and pensions in the “labor” factor could lead to conflict among the member states.

Lastly, the EESC points to slower decision-making on tax policy and the consequent lack of flexibility when it comes to establishing tax incentives, as a drawback to be kept very much in mind.

Turning to the Opinion of the Committee of Regions, its key contents are a favorable view of the proposed review of the apportionment formula, to take better account of the economic situation of the various member states in keeping with what is proposed by the EESC, as well as the doubt it expresses as to whether or not it would be more beneficial for the objective of tax harmonization if the CCCTB were mandatory rather than optional.

In relation to deductible expenses, the committee proposes that recurring costs relating to environmental protection and reducing greenhouse gases also be treated as deductible expenses.

In addition, the committee stresses that, to fully achieve the goal of streamlining red tape, besides setting out rules for calculating the tax base, the CCCTB should also include common accounting rules.

And lastly, the Committee of Regions believes that the draft directive is incomplete, as it does not include local and regional taxes. This is important given that a significant proportion of the income of local and regional authorities comes either from local or regional taxes levied on the national tax base or from a share of national corporate taxes. The committee notes that, even if these taxes are not included, they will be affected in most member states by the establishment of the CCCTB system. This is why the Committee favors the establishment of an enabling clause in favor of local and regional taxes so that member states can adopt the necessary measures.

2. CODIFICATION OF THE LEGISLATIVE FRAMEWORK ON THE ASSESSMENT OF THE ENVIRONMENTAL EFFECTS OF CERTAIN PUBLIC AND PRIVATE PROJECTS

Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment was published in the OJEU on January 28, 2012.

This Directive repeals, with effect from February 17, 2012, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Directive 85/337/EEC had been substantially amended several times and therefore, in the words of the first recital of the new Directive “in the interests of clarity and rationality the said Directive should be codified.”

Thus, under the new Directive, the projects listed in Annex I will be made subject to an environmental impact assessment whereas for projects listed in Annex II, member states must determine whether the project must be made subject to an environmental impact assessment on a case-by-case basis or through thresholds or criteria set by the member state.

In both cases, the environmental impact assessment must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora;
- soil, water, air, climate and the landscape;
- material assets and the cultural heritage;
- the interaction between the above factors.

Garrigues in the News

1. GARRIGUES, BEST SPANISH LAW FIRM TO WORK FOR IN SPAIN

Garrigues was placed number 34 on a league table of the 100 best companies to work for in Spain in 2011 appearing in a report published recently by corporate reputation tracker Merco. According to this annual league table, now in its sixth year, Garrigues is the best law firm to work for.

To prepare this report Merco Personas surveyed six target groups: employees at the companies, final-year university students, business school alumni, directors and experts in talent management and members of the general public. The people in the sample scored 15 different subjects, including salary, professional development, motivation and recognition.

What is more, in the reputation league table prepared by Merco Líderes Antonio Garrigues Walker moved up to number 30 in a list headed by Emilio Botín, Amancio Ortega and César Alierta.

2. GARRIGUES PICKS UP AWARDS FOR BEST PROJECT FINANCE DEALS

Garrigues received recognition in London for the role it played, together with companies and financial institutions, in the most prominent Project Finance Deals of the Year 2011 in renewables and healthcare. In this way, Euromoney, which publishes Project Finance Magazine, highlights the best deals of 2011 in Europe in 24 different categories.

The recognition in renewables was for the advisory services provided in the refinancing of the renewables portfolio acquired by Acciona from Endesa in 2009. The deal relates specifically to the financing of a 1,310MW set of hydroelectric and wind power assets located in Spain (41 wind farms and 24 small hydroelectric power plants) for a sum of €1,421 million. The deal involved 12 banks and was one of the largest completed in Europe.

In turn, financing of the construction of the Hospital de Móstoles in Madrid was recognized as the top healthcare deal in the year, for its technical complexity and the fact that it took place at a time of great uncertainty in the construction industry.

During the course of the project, devices were used to lighten the burden of guarantees for the developer; this involved having the construction work as such and the operations and maintenance (O&M) of the hospital infrastructure carried out by separate companies.

This recognition from the Euromoney group confirms Garrigues as the leading law firm in project finance, thanks to the top-quality legal advisory services provided by an outstanding team of lawyers with in-depth knowledge of the Spanish and international markets and the ability to grasp and adapt to client concerns.

The Project Finance area at Garrigues has also received recognition in other prestigious publications. According to Chambers Global, clients describe Garrigues as “the No. 1 Law Firm in the Project Finance area in Spain; the Firm that provides the best service, in Spanish and international deals, with an outstanding close-knit team.”

3. GARRIGUES PUBLISHES A GUIDE TO THE LABOR MARKET REFORM

The recently approved labor market reform has jolted the status quo concerning the rights and obligations within the employee-employer relationship in Spain. It has touched key components, such as severance costs, measures encouraging internal flexibility at companies and collective bargaining, to name a few. The debate is served up both for companies and workers.

The firm analyzes all these changes in a book entitled *Reforma Laboral 2012. La Ley y manual práctico* (The 2012 Labor Market Reform. The Law and a practical guide) delivered last Saturday, March 24, 2012, with Expansión, a business newspaper. The book contains the complete wording of the law and the errata sheet, accompanied by a legal interpretation of the law and several practical case studies.

Federico Durán, professor of employment law and managing partner of the Garrigues Labor and Employment Law Department signs the book's prologue and Garrigues lawyers bring their expert insight to the practical case studies and the possible interpretations of the wording of the reform.

The labor market reform addresses, as we have mentioned, problems associated with the labor market such as a cut in severance costs; measures to encourage internal flexibility at companies in addition to a sweeping reform of collective bargaining. The new reform legislation has brought in for the first time provisions on the dismissal by reason of budgetary shortfalls of people hired under employment contracts in the public sector and puts an end to golden handshake clauses for executives at public companies, to name just a few examples.

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