

## administrative/corporate

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**ROYAL DECREE-LAW 20/2012, OF JULY 13, 2012, ON MEASURES TO ENSURE BUDGETARY STABILITY AND ON ENCOURAGING COMPETITIVENESS**

Royal Decree-Law 20/2012, of July 13, 2012, on Measures to Ensure Budgetary Stability and on Encouraging Competitiveness was published in the Official State Gazette on July 14, 2012 and affects a considerable number of legislative provisions regulating different areas of economic activity and spanning virtually all fields of law (tax, commercial, administrative, and labor and employment law).

In this newsletter, we highlight succinctly the most relevant legislative developments introduced by said Royal Decree-Law in the area of commercial law, with particular reference to the measures adopted in relation to commerce, the internationalization of enterprises, infrastructure, and the energy industry.

**1. MEASURES FOR DEREGULATION IN THE RETAIL TRADE**

Royal Decree-Law 20/2012 introduces modifications that deregulate commercial opening hours and the opening of establishments, the most relevant being, in our view, the opening of stores on Sundays and public holidays.

According to the Preamble of the Royal Decree-Law, the relaxation in restrictions has been a recommendation made repeatedly by international institutions such as the IMF and the OECD. The government argues in the Preamble that the increased freedom in opening hours will have positive effects on productivity and efficiency in the retail sector and on prices, thereby giving businesses a new variable that will permit an increase in the effective competition between stores. It is also envisaged that since consumers will have more opportunities to shop, the prospects for their achieving a better work-life balance will consequently increase.

Moreover, the rules on commercial sales promotion measures are made substantially more flexible.

The provisions in relation to the above are as follows:

### 1.1 Amendment of Commercial Opening Hours Law 1/2004, of December 21, 2004

The following aspects of Commercial Opening Hours Law 1/2004, of December 21, 2004 (the “Commercial Opening Hours Law”) are amended:

#### 1.1.1 Weekly opening hours

The overall number of hours during which stores can trade during the working days of the week, taken as a whole, cannot be restricted by autonomous community governments to less than 90 hours, instead of the 72 hours stipulated by the Commercial Opening Hours Law before it was amended.

#### 1.1.2 Opening on Sundays and public holidays

The minimum number of Sundays and public holidays on which stores can open is set at 16 per year (instead of 12, as was the case until now). Autonomous community governments can reduce that number (to a minimum of 10 opening days, rather than 8, as was provided for until now) or increase it (without limit). They will also designate Sunday and public holiday opening days, primarily considering the commercial attractiveness of the days to consumers and in accordance with the criteria set (in a novel way) in the new wording of the Commercial Opening Hours Law (Christmas campaign, public holidays on consecutive days, sales, and days with the greatest influx of tourists into the autonomous community).

The possibility is also introduced for each trader to freely decide on its Sunday or public holiday opening hours without any limitation, unlike the position under the former wording of the Commercial Opening Hours Law, which permitted such opening hours to be limited by autonomous community governments to a minimum of 12 hours.

#### 1.1.3 Regulation of establishments subject to special rules on opening hours

The previous rules basically remain unchanged. Accordingly, establishments that mainly sell cakes, pastries and confectionery, bread, ready-to-eat food products, printed press, fuel, flowers and plants, and so-called convenience stores are free to decide on what days and for how long they can open to the public, anywhere in Spain, as are outlets located at borders, in stations and on means of land, maritime and air transportation, and in areas with a large influx of tourists. Retail outlets of a reduced size other than those listed previously and having a useful floor space of less than 300 square meters for displaying and selling products to the public can also decide freely, unless they belong to retail enterprises or groups that do not have SME status (small and medium enterprises), as defined by the legislation currently in force. Note that one of the principal changes in this area brought about by Royal Decree-Law 20/2012 is that autonomous community governments are no longer able to modify the rules on establishments subject to the above-mentioned special rules on opening hours, for reasons of commercial policy, by increasing or reducing the sales

space of such establishments (subject to a 150 m<sup>2</sup> limit) and by restricting them to the sale of a certain type of product or products.

Royal Decree-Law 20/2012 has also inserted a new subarticle 4 into article 5 of the Commercial Opening Hours Law dealing with the criteria that must be used by autonomous community governments to determine, at the proposal of municipal councils, areas with a large influx of tourists for their respective territories. These criteria include the existence of a sufficient concentration of beds for tourists, designation as a World Heritage Site, the creation of an area whose main attraction is retail tourism, etc.

In all cases, there is an obligation to designate at least one area as an ‘area with a large influx of tourists’ in cities with over 200,000 inhabitants that have logged more than 1 million overnight stays in the immediately preceding year, or have ports from which tourist cruises operate and which have received over 400,000 passengers in the immediately preceding year, using the above-mentioned criteria.

#### 1.1.4 Freedom of opening hours and choice of Sundays and public holidays as a regime that is secondarily applicable in the absence of autonomous community government regulations

Royal Decree-Law 20/2012 amends additional provision 1 of the Commercial Opening Hours Law, relating to the freedom of traders to decide the opening hours for their establishments in the event that autonomous community governments do not set any maximum limit on opening hours, with a view to bringing its wording into line with the above-mentioned elimination of the ability of autonomous community governments to limit opening hours on Sundays and public holidays (subject to a minimum of 12 hours).

On the other hand, additional provision 2 of the Commercial Opening Hours Law is amended in such a way as to merely leave the heading of the provision, without the wording of the new provision appearing in the text published in the Official State Gazette. However, in our view, since the former heading of additional provision 2, which refers to the freedom to designate which Sundays and public holidays are store opening days, remains unchanged, one might expect that the modification merely involves substituting the former reference to 12 Sundays/public holidays with the reference to 16 Sundays/public holidays now provided for by the amended Commercial Opening Hours Law, while preserving the freedom of traders to decide (subject to the limit of 16) on which Sundays and public holidays to open should the autonomous community government not exercise its power to designate them, for the sake of consistency with additional provision 1.

In any case, we consider that there should be a corrigendum published in the Official State Gazette on July 14 to remedy the omission of the new wording of additional provision 2.

## 1.2 Amendment of Retail Trade Law 7/1996, of January 15, 1996

The following aspects of Retail Trade Law 7/1996, of January 15, 1996 (the “LOCM”) are amended:

### 1.2.1 Relaxation of the rules on sales promotion activities

The following amendments are made to the LOCM in order to make the rules on sales promotion activities more flexible:

- A new subarticle is inserted into article 18 LOCM in order to expressly allow the same retail outlet to hold different types of sales promotions at the same time (sale, sales on offer or promotion, remnant sales, sales with free gifts, and direct sale offers), except for clearance sales, provided that they are duly separated and the duties of information are respected.
- A new subarticle 3 is added to article 20 LOCM to specify that sales promotion activities cannot be made conditional on the existence of a minimum or maximum percentage reduction in prices.
- Article 27.2 LOCM is amended in order to expressly allow articles that are to be marketed as products on promotion to be acquired for this sole purpose, although the condition remains that such articles cannot be soiled or of worse quality than identical products to be ordinarily sold in the future at the full price.

### 1.2.2 Deregulation of sales

Article 25 LOCM is amended to give traders complete freedom to individually decide on seasonal sale periods and their duration, in contrast to the restrictions in place until now, which limited the frequency of sale seasons to twice a year (early in the New Year and summer) and their duration (between at least one week and at most two months, depending on what the autonomous community governments decided in this connection).

Although traders remain under an obligation to ensure that sale items were previously offered for sale on a regular basis, they are no longer subject to the requirement that the items must have been on sale to the public for at least one month and must not been the subject of any promotional practice.

### 1.2.3 Relaxation of the rules on remnant sales

Article 28 LOCM is amended so as to eliminate the requirement that products offered as remnants must have belonged to the trader six months before the start of the sale, unless the outlet specialized in this kind of sales.

#### 1.2.4 Relaxation of the rules on clearance sales

The requirements for clearance sales have been relaxed: (i) such sales can now last for up to one year in all cases (previously, they could be held for up to three months, unless the store was closing down); and (ii) the ban on the trader selling in the same place similar products for 3 years after the end of the clearance sale is eliminated, although a 3-year prohibition remains against holding a further clearance sale on the same premises of products similar to those initially sold on clearance, except where the clearance is due to a court or administrative decision, the closing down of the business, or an event of force majeure.

## 2. MEASURES TO ENCOURAGE EXPORTS AND THE INTERNATIONALIZATION OF ENTERPRISES

The avowed aim of Royal Decree-Law 20/2012 is to reorient the instruments for supporting the financing of export transactions and to bolster the central government's tools for stimulating internationalization activities, with the focus being on efficiency and effectiveness against a backdrop of austerity and fiscal consolidation.

On the one hand, the State's involvement in the export credit insurance scheme is reduced, although the central government will continue to control the activity in relation to the State's Account.

On the other, the role of export credit agencies is expanded and instruments are enhanced for official support in the areas of foreign trade, foreign investment, and economic transactions abroad. Accordingly, Compañía Española de Seguros de Crédito a la Exportación, S.A. ("CESCE") is given the power to issue unconditional guarantees for risks deriving from or linked to foreign trade, including those of an exclusively financial nature. The potential scope of coverage in transactions performed by CESCE for the account of the State is also widened.

Lastly, Instituto Español de Comercio Exterior (ICEX) becomes a publicly-owned business entity attached to the Ministry of the Economy and Competitiveness, through the Office of the Secretary of State for Trade.

### 2.1 Modification of Law 10/1970, of July 4, 1970 Amending the Regime Governing Export Credit Insurance

Law 10/1970, of July 4, 1970, amending the Regime Governing Export Credit Insurance is modified as follows:

- The scope of operations by CESCE, in its own name and for its own account, is widened to cover any class of direct insurance other than life insurance, albeit complying with the legislation applicable to private insurance in all cases.
- Transactions disposing of CESCE's capital owned by the central government, become subject to Law 33/2003 on the Property of the Public Authorities.
- The requirement that the State holds a majority stake in CESCE is eliminated.

- The activity of the State's Account managed by CESCE is subjected to central government control.
- CESCE is authorized to grant guarantees for the State's account up to the maximum limit set by each year's General State Budget Law in connection with economic obligations aimed at facilitating financing for foreign trade transactions and the internationalization of Spanish enterprises (obligations derived from guarantees provided by third parties, loans, export credits, and issues of financial instruments), including securitizations, the issuing of which is backed by export credits or loans secured by CESCE. To do so, CESCE may grant guarantees, whether first-demand or otherwise, and any other payment or indemnification commitment which must be approved by CESCE's Political Risks Committee for the account of the State. The State guarantees the obligations entered into by CESCE for its account, for which purpose the relevant credits will be included in the General State Budget Law.

## **2.2 Amendment of Royal Decree-Law 4/2011, of April 8, 2011, on Urgent Measures to Stimulate Internationalization through the Creation of the Publicly-Owned Business Entity Instituto Español de Comercio Exterior (ICEX)**

The amendments to Royal Decree-Law 4/2011 involve a change in the name of the publicly-owned business entity (from "Instituto Español de Comercio Exterior (ICEX)" to "ICEX España Exportación e Inversiones") and the widening of the scope of its purpose to include the promotion of Spanish exports and the attraction and promotion of foreign investment in Spain, which both become general-interest activities.

## **2.3 New internationalization covered bonds**

Royal Decree-Law 20/2012 introduces into Spanish law a new negotiable security, the "internationalization covered bond" (*cédula de internacionalización*) which will have as an "underlying asset" credits supporting the internationalization of Spanish enterprises, with the aim of making the financing of export and investment activities by Spanish enterprises more attractive to financial institutions.

For these purposes, a new article, art. 13 bis, is added to Law 44/2002, of November 22, 2002, on Measures for the Reform of the Financial System, defining the characteristics of internationalization covered bonds, which are very similar to public-sector covered bonds.

The principal of and interest on internationalization covered bonds will be particularly secured by, basically, loans and credits related to the financing of contracts for exports of Spanish goods and services or for the internationalization of enterprises resident in Spain.

Such loans and credits may include those granted or secured by certain public authorities and which may also currently serve to secure issues of public-sector covered bonds (in accordance with the regime established in article 13 of Law 44/2002), although it is not permitted for such loans and credits to secure both types of covered bonds at the same time. Accordingly, when either internationalization covered bonds or public-sector covered bonds are issued, the issuer must choose from among the loans that can secure both types of covered bonds which ones are to secure the specific covered bonds issued; once earmarked as collateral for the issue of either type of covered bond, they cannot

cease to secure that type of covered bond in order to be used to secure the other type. The rules are not overly clear on existing issues of public-sector covered bonds or on the possible exclusion from the scope of collateral of certain loans that are then used to secure internationalization covered bonds.

In contrast to public-sector covered bonds, internationalization covered bonds may, as in the case of mortgage covered bonds, be backed up to a limit of 5 percent of the issued principal by certain substitute assets and the economic flows generated by the financial derivatives linked to each issue and, in particular, those used to cover the exchange rate risk, on such conditions as may be determined by regulations.

The total amount of the covered bonds may not exceed 70% of the outstanding loans and credits serving as collateral. If the limit is exceeded, this must be redressed by the issuer within no more than three (3) months by increasing the loan portfolio, acquiring its own covered bonds on the market, or by redeeming the necessary amount of internationalization covered bonds to restore the balance. While such imbalance subsists, the issuer must cover the difference by making a deposit in cash or public funds at the Bank of Spain or by earmarking new substitute assets for the payment of the covered bonds (provided that the stipulated 5% limit is not exceeded).

### **3. REPEAL OF COMPENSATION FOR LOSS IN REVENUES OF TOLL ROAD CONCESSION-HOLDERS**

Royal Decree-Law 20/2012 repeals article 8 of Royal Decree-Law 6/1999, of April 16, 1999, on Urgent Measures for Deregulation and on Increasing Competition, which established the compensation which central government would pay toll road concession-holders for the loss in revenues entailed by the 7% reduction in the amount of toll road charges. According to the Preamble, such compensation, envisaged more than a decade ago, was based on circumstances of a tax nature that have changed today, which is why its continued payment is no longer justified.

### **4. MEASURES IN THE ENERGY INDUSTRY**

In relation to the energy industry, Royal Decree-Law 20/2012 establishes new measures mainly aimed at reducing the tariff deficit. The measures taken are as follows:

- Island and nonmainland electricity systems: the legislative reviews of the system of remuneration for power plants under the ordinary regime in the island and nonmainland electricity systems that implement the provisions of Royal Decree-Law 13/2012, amending the calculation of the fixed and variable costs of these plants, will be applicable as from January 1, 2012. In addition, the start date for the applicability of certain measures has been brought forward to January 1, 2012: these measures relate to the elimination of recurring expenses from the remuneration, to the review of the financial rate of remuneration for calculating the financial remuneration for the investment in each facility, and to the 10% reduction in the unit values of the annual payment established in respect of fixed operation and maintenance of generation units.

- Impact on access fees and on the “last resort” tariff of autonomous community government taxes levied on electricity-related activities: the imposition of a territorial supplement to be included in access fees and last resort tariffs in the case of autonomous community governments that levy their own taxes or surcharges on central government taxes on activities or facilities used for the supply of electricity. The supplement will be payable by consumers located in the relevant autonomous community. As for local taxes that are not determined by a piece of central government legislation, the supplement to be included in the access fee or last resort tariff covering the entire excess cost incurred will be optional.

The Minister for Industry, Energy and Tourism is given the power to determine the specific taxes and surcharges that will be taken into consideration for the purpose of applying this supplement, as well as the necessary mechanisms for its management and calculation.

- Reduction in remuneration for the activity of transmission as from January 1, 2012. Remuneration in respect of investment will be recognized for nondepreciated assets in service, taking their net value as the basis for their financial remuneration. In fact, pursuant to the above, the 2012 remuneration for transmission companies is modified.
- Interest rate applicable to outstanding amounts of the revenue deficit incurred in 2006 in the calculations for regulated activities in the electricity industry: the following is established in relation to various judgments handed down by the Spanish Supreme Court in 2011 setting aside the third paragraph of additional provision 8.1 of Royal Decree 485/2009 on the ground that 3-month EURIBOR was insufficient to determine the interest payable to electric utilities holding the right to compensation for the 2006 tariff deficit:
  - The provision set aside by the courts is substituted. A spread of 65 basis points on 3-month EURIBOR for November of the previous year is established and will accrue on the amount recoverable at December 31 of each year.
  - In order not to affect assignments of 2006 deficit collection rights already made, or the electricity industry deficit securitization process, 3-month EURIBOR for November of the previous year is set as a definitive interest rate for calculating the price of assignment to the Electricity System Deficit Securitization Fund (FADE), and it is envisaged that the difference between this price and the price that would have resulted had the interest rate established in additional provision 8 of Royal Decree 485/2009 been used will be treated as a calculable cost of the system.



- The Institute for Energy Diversification and Saving (IDAE) becomes a technical service of, and vehicle wholly controlled by, the government for the performance of all work entrusted to it. Its functions are also clarified for the above purposes and it is stipulated that the procurement rules applicable to it will be governed by Legislative Royal Decree 3/2011, of November 14, 2011, approving the revised Public-Sector Contracts Law.
- Application of progressivity criteria to access fees: the Minister for Industry, Energy and Tourism is given the power to apply progressivity criteria in approving access fees, taking into account the average consumption of points of supply, without affecting vulnerable consumers.
- Repeal of the quarterly review of electricity transmission and distribution grid access fees.

## 5. MEASURES RELATING TO INFRASTRUCTURE, TRANSPORTATION AND HOUSING

Royal Decree-Law 20/2012 also amends essentially the following aspects of Royal Decree-Law 13/2010, of December 3, 2010, on initiatives in the tax and labor areas and for deregulation to encourage investment and job creation:

- The participation of autonomous community or city governments, local corporations, and representative social and business organizations in airports managed and operated by Aena Aeropuertos, S.A. must be guaranteed.

To such end, an airport coordination committee will be set up not only for the territory of each autonomous community (as was previously the case), but also for each autonomous city. A coordination commission for each airport may be set up by specific regulations, depending on the annual volume of passenger traffic.

- The government will have the power to determine the composition of, and operating rules for, airport coordination committees, which must in all cases envisage the involvement of one representative from the Ministry of Development, two from the respective autonomous community or city government, three from Aena Aeropuertos, S.A., three from local corporations, one from the council of the chambers of commerce of the autonomous community or city in question, and one from the representative social and business organizations of the respective autonomous community or city government.

In the case of airport coordination committees, the manager of the airport in question will be a committee member as a matter of law.

- Airport coordination committees must meet at least twice a year and whenever an absolute majority of their members so request.

- The functions ascribed to the airport coordination committee of the respective autonomous community or city are modified and expanded. In particular, they are appointed with the following functions:
  - To ensure the appropriate quality of airport services and the operations of airports, proposing such actions as are considered necessary to stimulate the development of the airport business.
  - To collaborate with Aena Aeropuertos, S.A. and, if appropriate, with the competent public authorities on the definition of the strategy to be followed in relation to the airports of the respective autonomous community or city, particularly in the commercial sphere. In particular, the committee must report on the master plans for the respective airports before they are submitted for approval by the Ministry of Development.
  - To ascertain proposals by Aena Aeropuertos, S.A. on aeronautical and acoustic easements, as well as on the consultation procedure developed by Aena as regards airport charges relating to the airports of the respective autonomous community or city.
  - To channel initiatives relating to the promotion of air transportation, within the scope of its powers, and to promote the strengthening of flight connectivity by establishing and promoting new domestic and international air routes.
  - To gather data and information on aspects of airport management that are necessary to perform the above functions.
  - To perform as many functions as are deemed appropriate to increase passenger and cargo transportation, as well as any other functions ascribed to it by provisions made on airports of general interest.

In relation to housing measures, effective upon the entry into force of Royal Decree-Law 21/2012, the loan subsidization aid contained in Royal Decree 2006/2008, of December 12, 2008, regulating the 2009-2012 State Housing and Refurbishment Plan has been abolished. In addition, the monthly aid for facilitating the payment of expenses relating to the rental of the aid beneficiary's principal residence (provided for in Royal Decree 1472/2007, of November 2, 2007, regulating the Basic Income for the Emancipation of Young People), is reduced to 147 euros, also effective upon the entry into force of the Royal Decree-Law.

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