# GARRIGUES

## TRANSPORT AND SHIPPING

MARCH 2016

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**TRANSPORT AND SHIPPING**

# 01 EUROPEAN UNION AND INTERNATIONAL

## 1.1. LEGISLATION AND LEGISLATIVE DEVELOPMENTS

### 1.1.1. Spain ratifies the Protocol on matters specific to aircraft equipment, to the Convention on international interests in mobile equipment

On February 1, 2016, the Official State Gazette (BOE) published the instrument of accession to the Protocol on matters specific to aircraft equipment, to the Convention on international interests in mobile equipment, signed at Cape Town on November 16, 2001 (the "Cape Town Convention").

The Protocol seeks to adapt the Convention to meet the particular requirements of aircraft finance and to extend the sphere of application of the Convention to include contracts of sale of aircraft equipment. Additionally, because the Convention system requires ratification of some of its specific Protocols for their entry into force, Spain's ratification of this Protocol means that it has been definitively included in the Cape Town system in relation only to finance transactions secured with interests in aircraft equipment, within the meaning and with the scope defined in the Protocol.

Spain's declarations in the instrument of accession to the Protocol notably set out that it expressly designates the Movable Property Registry (Registro de Bienes Muebles) as the point of access that will authorize the transfer to the International Register of the information needed for registration in relation to the airframes of aircraft or helicopters registered in Spain or undergoing the registration process, and that it may authorize the transfer of such information to that Register in relation to aircraft engines.

Furthermore, Spain supplemented the system with Royal Decree 384/2015, of May 22, 2015, on the Civil Aircraft Registration Regulations, setting out (in additional provision 6) the rules and procedures laid down for the Convention and its Protocol to be able to be implemented.

The Protocol entered into force generally on March 1, 2006, and for Spain, on March 1, 2016, which it stipulates in paragraph 1 of article XXVIII.

### 1.1.2. Adaptation of a few provisions of the Protocol of 1988 relating to the International Convention on Load Lines, 1966

On November 25, 2015, the BOE published the Amendments of 2013 to the Protocol of 1988 relating to the International Convention on Load Lines, 1966, as amended, adopted in London on June 21, 2013 in a Resolution of the Maritime Safety Committee of the International Maritime Organization.

A number of amendments has thus been included to Annex B to the Protocol of 1988 relating to the Convention, concerning the Regulations for determining the load lines used internationally for merchant fleets. In certain procedures to determine these load lines, the respective maritime authorities have been authorized to delegate technical tasks to certain organizations, including classification societies.

Despite their tardy publication in the BOE, these amendments entered into force generally and for Spain on January 1, 2015, pursuant to paragraph 2 g) of article VI of the Protocol of 1988 relating to the International Convention on Load Lines, 1966.

### 1.1.3. Publication of the Directive containing the future regulations on package travel and linked travel arrangements

On December 11, 2015, the Official Journal published Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

Although members states do not have to adopt this Directive's provisions until January 1, 2018, a notable

feature is the future importance of this new legislation, which will repeal, effective July 1, 2018, the current Council Directive 90/314/EEC. of June 13, 1990, on package travel, package holidays and package tours, and seeks precisely to update the legislation on package travel, and adapt that legislation to the growth in online supply of services and protect consumers' rights, who will see their rights strengthened through coverage of new booking formats and receive detailed information on those rights. It also provides them with protection from price increases and changes to flight times and specifies their rights concerning unforeseen events.

Among other matters, the Directives seek to protect the binding nature of certain obligations to provide pre-contractual information to travelers, by making that information supplied to travelers an integral part of the package travel contract and not allowing it to be altered unless the contracting parties expressly agree otherwise. The organizer and retailer, if one is involved, must communicate all changes to the pre-contractual information to the traveler in a clear, comprehensible and prominent manner.

Additionally, on concluding the package travel contract or without "undue delay" after it has been concluded, the organizer or retailer must provide the traveler with a copy or confirmation of the contract "on a durable medium" and the traveler will be entitled to request a copy on paper if the package travel contract has been concluded with the parties present simultaneously or in the case of contracts concluded electronically.

## 1.2. RECENT CASE LAW

### 1.2.1. Former tax lease. The European General Court annuls the European Commission's decision

The judgment of the General Court of the European Union (EGC), of December 17, 2015, has annulled Decision 2014/200/EU of the European Commission (EC), of July 17, 2013, on the former tax lease.

As you may remember, in that decision the EC held that the former tax lease (also known as STLS, the Spanish Tax Lease System) used in shipbuilding finance was unlawful State aid, and, as such, had to be refunded by the investors.

The recent EGC judgment, which upheld the applications for annulment by Spain (and others), against the EC's decision, directly applies the Autogrill/Santander case law to the effect that, since any company in any sector and of any size may invest in ships, the STLS cannot be considered selective, and therefore (at least with respect to the investors) the system is, without a doubt, a general measure. The judgment therefore concluded that the Commission did not establish in any way that the STLS is selective in relation to the investors, and so, due to the selectiveness element not being present, it cannot be referred to as State aid.

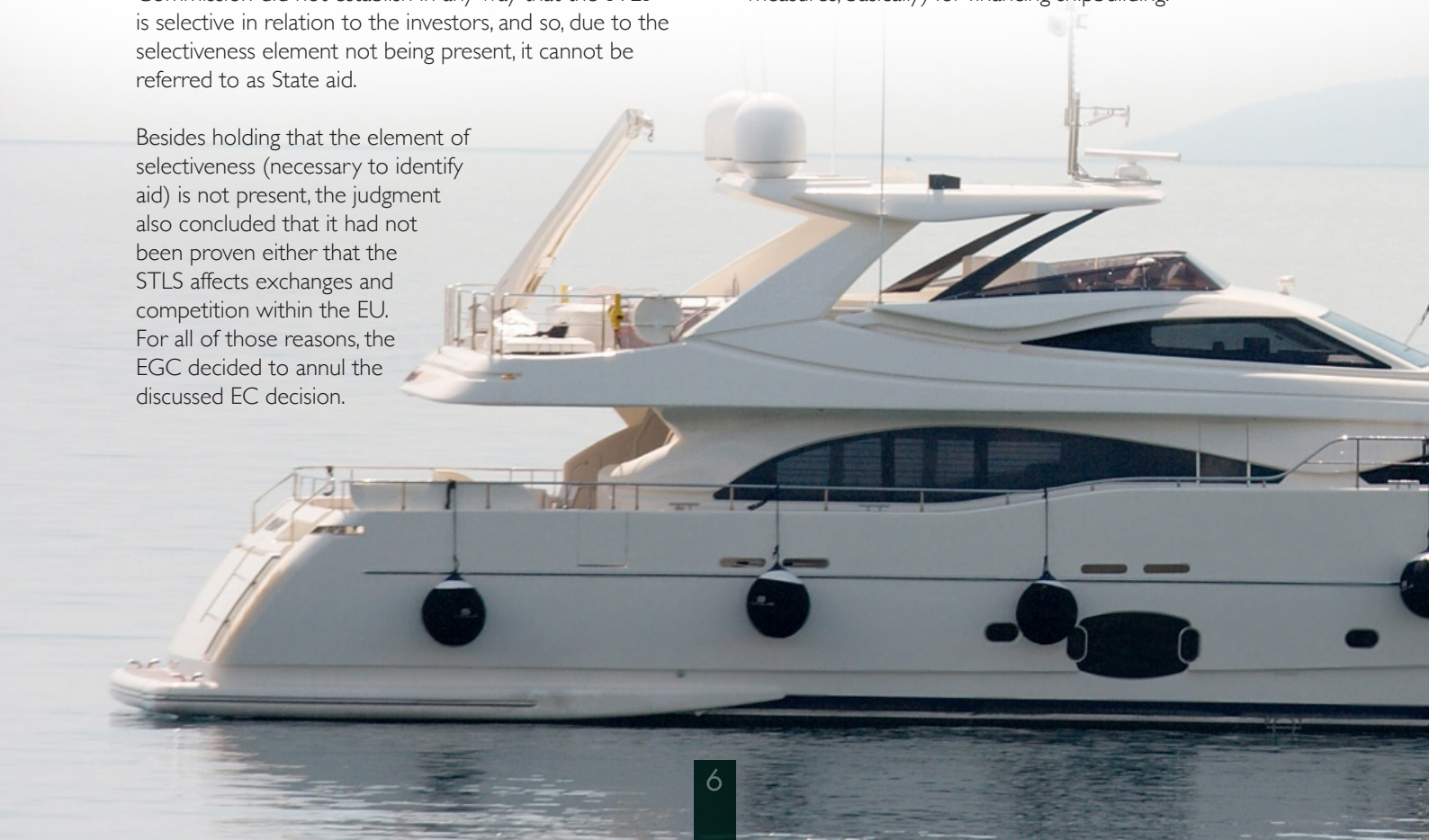
Besides holding that the element of selectiveness (necessary to identify aid) is not present, the judgment also concluded that it had not been proven either that the STLS affects exchanges and competition within the EU. For all of those reasons, the EGC decided to annul the discussed EC decision.

In relation to the national recovery proceedings commenced on the investors in light of the EC decision (now annulled), the EGC's judgment means that neither the CE's decision nor any decisions rendered in its enforcement may be relied on as against third parties, and so the investors do not have to refund any amount whatsoever.

That EGC judgment is not final or definitive, however, since the EC has already lodged an appeal against it to the Court of Justice of the European Union (CJEU). Nevertheless, the EC's decision will remain annulled until the CJEU renders a decision on that appeal.

Even though the EGC has yet to settle the investors' appeals against the EC's decision on the STLS, the EGC's judgment has the same effects as if a decision had been rendered directly on those appeals lodged by the investors. Consequently, the investors cannot under any circumstances be required to refund any amount whatsoever, unless the CJEU annuls the EGC's judgment.

You are reminded that a so-called new tax lease is now in force in Spain (Law 16/2012 adopting various tax measures, basically) for financing shipbuilding.



# 02 SPAIN

## 2.1. LEGISLATION AND LEGISLATIVE DEVELOPMENTS

### 2.1.1. The Spanish shipping register regains ranking on White List in the Paris MOU

According to various industry sources, it is highly likely that this year Spain will return to the list of countries on the White List in the Paris Memorandum of Understanding on Port State Control (MoU), which reflects, by mutual agreement after being mooted among the various member states of the Paris MoU, the Spanish shipping register's involvement with maritime safety.

Thus, according the number of inspections conducted on Spanish ships in the 2013-2015 rolling three-year period and the aggregate number of detentions made in the same period, everything appears to indicate that the requirements have been met for Spain to return to the White List of quality flags, which hold a continued record of low detention rates.

Although the official result will not be known before July 1, 2016, the provisional data in the hands of the Spanish Shippers' Association (ANAVE) indicate that, unlike the data for the previous rolling three-year period, in which, as a result of the 7 Spanish ships detained in the period between 2012 and 2014, Spain was placed on the Grey List, the results obtained in 2015 are more positive, and Spain may be expected to be placed back on the White List.

Once this has been confirmed, it is to be welcomed with great satisfaction that Spain should improve its position in the ranking of flags under the MOU and returns to the highest quality ranking in terms of maritime safety.

### 2.1.2. Updated contribution bases for workers under the special regime for seafarers

On January 30, 2016, the BOE published Order ESS/71/2016, of January 29, 2016, setting out for 2016 the social security bases for workers under the special regime for seafarers included in categories two and three under article 10 of Law 47/2015, of October 21, 2015, on the social security protection of people working in the marine and fishing industry (discussed in previous Newsletters).

This Order sets for 2016, without precluding application of the stipulated correction multipliers, the contribution bases for workers classified in certain trades on shipping vessels and other categories such as *empacadoras* (fish packers), *neskatillas* (workers unloading fish off boats and cleaning it) and *mariscadores a pie* (shellfish pickers).

In a transitional period, the law provides that any contribution differences that might have arisen, due to the application of the established contribution bases with respect to the contributions which should have been made on or after January 1, 2016, may be paid, without a surcharge, within a period ending on the last day of the second month following the month of its publication.

### **2.1.3.** Approval of the rules on use of the Shipbuilding Industry Restructuring Fund for aid to research and development and innovation

On December 15, 2015, the BOE published Order IET/2679/2015, of December 4, 2015, approving the rules on use of the Shipbuilding Industry Restructuring Fund for aid to research and development and innovation.

This Order provides the access tests and procedures applying to aid out of the Shipbuilding Industry Restructuring Fund, in implementation of Royal Decree 1511/2005, of December 19, 2005 and has adapted them to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

A number of types of aid are provided, having shipyards as their beneficiaries, aimed at subsidizing the performance of R&D activities and innovation activities. The sought aim is to strengthen the shipbuilding industry's ability to compete and its technological edge in products and processes. The timeframe for the aid is until December 31, 2020.

A direct grant procedure will be used, as defined in General Subsidies Law 38/2003, of November 17, 2003, in its implementing Regulations approved by Royal Decree 887/2006, of July 21, 2006, in Royal Decree 442/1994, of March 11, 1994, on incentive payments to shipbuilding and in Royal Decree 1511/2005, of December 19, 2006, adapting the legislation on aid to shipbuilding to General Subsidies Law 38/2003, of November 17, 2003, in which the granting body is the Directorate-General for Industry and Small and Medium-Sized Enterprises attached to the Ministry of Industry, Energy and Tourism.

Lastly, it is worth noting that, although the cap on the amount of aid that can be granted to an individual project, in any of the steps related to horizontal aid, amounts to €5 million, the Directorate-General for Industry and Small and Medium-Sized Enterprises (DGIPYME) can set a lower cap for reasons related to the availability of budgetary funds.

**2.1.4. A new regulation lays down the technical, safety and manufacture requirements of recreational craft, jet skis and their components**

On March 15, 2016, the Official State Gazette (BOE) published the Royal Decree 98/2016, of March 11, laying down the technical, safety and manufacture requirements of recreational craft, jetskis and their components.

This thus implements in Spanish law Commission Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013, on recreational craft and personal watercraft and repealing Directive 94/25/EC. The subject matter is to lay down the technical, safety and manufacture requirements of recreational craft, jet skis and their components and to regulate the activity of economic operators commercially involved in the craft and jet ski market.

The aim of the decree is to set up the essential requirements for design, manufacturing and construction of recreational craft and partly completed recreational craft, personal watercraft and their components, and to regulate the requirements regarding exhaust emissions and noise emissions levels allowed for these craft in areas in which Spain has sovereignty, sovereign rights or jurisdiction, in order the protect maritime security, navigation and human life at sea and to protect the marine environment.

The regime updates items regarding the compliance of products regarding CE marking and product conformity, and it also adds a separate regulation for the regime applicable to craft operating with liquefied petroleum gas (LPG) propulsion systems.

## 2.2. RECENT CASE LAW

**2.2.1. Prestige case. The Supreme Court rules that the P&I Club has direct civil liability (by holding that the direct right of action applies) up to the limit of the signed policy not up to the limit under the 1992 CLC**

On January 14, 2016, the Criminal Chamber of the Supreme Court rendered judgment 865/2015 partially upholding the cassation appeal lodged by Spain (among others) against the judgment of Panel 1 of La Coruña Provincial Appellate Court, of November 13, 2013. This Supreme court judgment quashes and partially annuls that provincial appellate court judgment, and, put concisely, ruled as follows:

- The master of MV Prestige was convicted as the perpetrator liable for a reckless offense against the environment in the aggravated form of catastrophic impairment.
- It upheld:
  - Direct civil liability for the master for all the damages and losses caused by the sinking of MV Prestige, with no option to limit the liability (to €22,777,986) subject to the Convention on Civil Liability for Oil Pollution Damage (CLC 1992), due to considering that the master acted recklessly;
  - Direct civil liability for the P&I Club for MV Prestige (due to considering that the so-called direct right to action applied even though, at the time of the events, Maritime Shipping Law 14/2014 was not in force) up to the limit of the signed policy (US$ 1 thousand billion) to which the limit in CLC 92 did not apply, and secondary liability for the shipping company; and Civil liability for the IOPC Fund (International Oil Pollution Compensation Fund) within the limits established by the Fund Convention.
- The quantification of the damages and losses caused by the sinking of MV Prestige and the related indemnity must be determined in enforcing the judgment in accordance with the principles determined in the Supreme court judgment itself

In principle, the Supreme court judgment is final and definitive, although special appeals may be lodged which nevertheless will not prevent its enforcement.

### 2.2.2. The National Appellate Court examines the crime of maritime piracy and the different forms it can take

The Criminal Chamber of the National Appellate Court recently had the chance to examine the crime of maritime piracy provided for in article 616 ter of the Criminal Code.

In its judgment of February 24, 2016 on this subject, the National Appellate Court dismissed the cassation appeal lodged by the Somali citizens tried for crimes of piracy and belonging to criminal organizations, by reason of their belonging in 2012 to an assault cell or pirate action group set up with material and elements to be used for collision and seizure of commercial boats sailing in the Indian Ocean, along the Somali coastline. They were part of an organization based in Harare, engaged in obtaining unlawful gains from the proceeds of assault, collision and seizure of vessels in the area around the horn of Africa.

In reply to doubts over whether there was a case for arguing, under article 616 ter of the Spanish Criminal Code and of article 101 of the United Nations Convention on the Law of the Sea, done in Montego Bay on December 10, 1982, that this was an attempted crime of piracy, because the pirates had not been able to take over control of the ship, the National Appellate Court held that the crime of piracy defined in article 616 ter of the Spanish Criminal Code accepts different forms of committing the crime, because it is structured around alternative definitions.

The first definition requires destruction, damage or the taking over of control of a ship or other type of vessel or platform at sea. The second simply requires an attack against persons, cargo or property on board those ships. In this case, the crime would have been committed regardless of whether the attack against persons or property is simply a means to perform the act of destruction or of taking over control, or whether it was the only aim sought by the pirates.

In other words, neither article 616 ter of the Spanish Criminal Code nor article 101 of the Montego Bay Convention make the crime conditional on the act of depredation taking place, by removing the ship from its owner, or on whether the ship has been rendered unsuitable for the type of sailing for which it is habitually used.

The Chamber concluded accordingly that article 616 ter of the Spanish Criminal Code makes itself very clear when it includes in the definition of the elements of the crime, both acts of violence or intimidation damaging or destroying the ship, and an attack against persons, cargo or property on board the ship, without requiring the occurrence, in the second case, of the actual taking over of control of the ship under attack.

### 2.2.3. The Supreme Court dismisses an application for judicial review filed by the Spanish Institute of Merchant Navy Officers against the royal decree on the sailing qualifications required to operate recreational craft

In a judgment rendered on January 27, 2016, the Judicial Review Chamber of the Supreme Court dismissed the application for judicial review filed by the Spanish Institute of Merchant Navy Officers against Royal Decree 875/2014, of October 10, 2014, on the sailing qualifications required to operate recreational craft.

The professional institute pleaded a violation of the reservation of law principle in the rules on qualified professions, in addition to petitioning for certain articles to be rendered null and void, notably including article 31 of the royal decree on the qualification requirements for the personnel of recreational boating schools who give practical sailing

lessons or training courses in the territories governed by autonomous community governments which do not have devolved powers for recreational boating matters, which article separates the qualifications required to give the regulatory practical lessons on safety and sailing (point 1); to be able to give training courses on radio communications (point 2); to be able to give the regulatory practical lessons on wind sailing (point 3), and to give the regulatory practical lessons on sailing (point 3).

In reply to the professional institute's pleadings, the Chamber held that the article does not establish the activities of a qualified profession or address any other substantive element of the rules on such, which could be affected by the reservation of law principle, since it only determines regulatory elements which have absolutely no impact on the core substantive rules on a qualified profession.

Moreover, regarding the petition to render null and void additional provision one of Royal Decree 875/2014, the Chamber held that there had been no violation of the reservation of law principle, because this additional provision only refers to a very specific issue such as the chance for the holders of the qualifications under Royal Decree 875/2014 to be able to apply for and obtain authorization to operate vessels of a certain type; those entered on the eighth list in article 4 of Royal Decree 1027/1989, of July 28,

1989 [the so-called "eighth list" refers to ships or craft belonging to public organizations attached to Spanish central, autonomous governments or local], and later, in point 2 of the additional provision, the procedure is defined for the application and grant of those authorizations.

In other words, this judgment confirms the validity of the current rule on the sailing qualifications required to operate recreational craft.

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