New temporary levy on the finance sector

Tax Alert

December 2022

kpmgabogados.es
kpmg.es

New temporary levy on the finance sector

28 December 2022 saw the publication in the Official State Gazette of Law 38/2022, of 27 December, for the Establishment of Temporary Levies on Energy and on Credit and Financial Credit Institutions, which creates a temporary solidarity tax on large fortunes and amends certain tax regulations.

This Law sets in place certain temporary "non-tax contributions for public purposes" by means of which, in the words of the Law's Preamble, "the large economic groups in the energy and credit institutions sectors will contribute to shoring up the income pact" against a backdrop of ever increasing prices, caused, among other things, by the Russian invasion of Ukraine.

The Income Pact is defined in the Preamble as an instrument of consensus between economic players across the board, designed to mitigate the detrimental effects of rising prices for vulnerable families and certain business sectors, while more equitably distributing the effects of inflation.

The preamble refers in this connection to a number of the responsibilities of the public administrations, as attributed to them by the Constitution, to justify the government's intervention in the general planning of economic activities to meet collective needs, while stimulating the growth and fairer distribution of income and enabling the accomplishment of constitutional principles and values.

Based on this premise, the focus is placed on the sectors of the economy that have most to gain from escalating prices, as they record extraordinary profits in stark contrast to other less-advantaged sectors. Credit institutions and some of the largest economic groups in the energy (electricity, oil and gas) sector are thus called upon to bear a temporary mandatory contribution that is envisaged as a levy on (and will thus reduce) their business profits, as a means of securing additional resources for the government's actions. This levy, which is calculated on the basis of revenue, "constitutes a contribution by the largest economic groups in terms of market share to a "virtual" solidarity fund needed to shore up the income pact, hence its classification as a levy".

In justifying the use of this exceptional measure, the Preamble cites the insufficiency of the tax system as it stands, referring to corporate income tax and, in the case of the finance sector, value added tax. Moreover, it presents it as a form of trade-off for the mobilisation of public funds to bail out financial institutions during the financial crisis of the 2010s, going on to equate temporary levies with the principles of transparency, responsibility and sustainability.

We set out below a summary and brief analysis of some of the most salient aspects of the new temporary levy on the banking sector.

Temporary levy on the finance sector. Who is it aimed at?

The planned levy for the finance sector will be payable by **credit institutions and financial credit establishments operating in Spain whose income from interest and commissions in 2019, calculated according to the sector-specific accounting regulations, was equal to or exceeded Euros 800 million**.

Where the affected taxpayers form part of a **tax group** that is taxed under the consolidated corporate income tax regime, the above amount will be calculated at group level, and must be paid by the tax group's representative entity for corporate income tax purposes.

Where credit institutions and financial credit establishments form part of a **group of companies** and are required to file individual or consolidated corporate income tax returns in both Spain and the "Foral" territories of the Basque Country and Navarra, total interest and commissions must be determined having regard to both the entities and groups filing their returns in Spain and those doing so in the Foral territories. The entity required to pay the full amount of the levy will be the entity that filed the tax return or the group representative per Corporate Income Tax Law 27/2014 of 27 November 2014.

Calculation of the "levy". Main features

This temporary levy takes the form of an **annual non-tax contribution for public purposes** accruing on the first day of the calendar year. It is to be paid within the first twenty days of the month of September 2023 and 2024, notwithstanding the establishment of an advance payment of 50 percent of the obligation during the first twenty days of February.

The initially envisaged term is two years (2023 and 2024), although the Government will assess in due course whether it is to remain permanent.

The levy will be calculated as 4.8% of the sum of the interest margin (interest collected less interest paid) plus net fees and commission income (income less expenses) deriving from the **activity pursued in Spain** in the year preceding that to which the levy refers, determined according to the provisions of accounting legislation. In other words:

- the levy for 2023 will be calculated having regard to the interest margin and commissions for 2022.

- the 2024 levy will be calculated based on the interest margin and commissions for 2023.

According to the Preamble, this method is used because it "offers a means of ensuring the appropriate proportionality of the contributions of each business group, based on market share", and is expected to raise some Euros 1,500 million per year.

In the case of tax groups, the sum of the interest margin and net fees and commission income is to be determined using the group as a benchmark, and excluding, as stated in the Preamble, any interest and commissions obtained by foreign subsidiaries.

Where the taxpayer is part of a group of companies, the sum of the interest margin and net fees and commission income will be that obtained from the income statements of the tax groups, entities and establishments that comprise it.

The amount of the levy calculated in this way will not be deductible for Corporate Income Tax (CIT) purposes, and taxpayers are expressly prohibited from passing the financial burden on to their customers.

Oversight by the National Markets and Competition Commission (CNMC) and collection by the State Tax Agency (STA)

Responsibility for ensuring observance of the prohibition on passing the financial burden of the levy on to customers falls to the National Markets and Competition Commission (notwithstanding the competence of Banco de España and its obligation to cooperate with the CNMC), which will also have powers to impose penalties in the event of failure to comply.

To this end, provision is made for the imposition of an administrative (albeit not tax) penalty, which is expressly classed as a penalty for a serious infringement and will amount to 150 percent of any amounts unduly passed on.

Elsewhere, the levying, management, inspection, collection and review of this contribution will fall to the STA's Central Office for the Management of Large Companies, in accordance with General Taxation Law 58/2003 of 17 December 2003.

Preliminary issues arising

The legislation governing this levy may prove controversial for a number of reasons.

Doubtful constitutionality of the Levy

The first issue concerns the numerous questions as to its lawfulness or constitutionality.

From a constitutional viewpoint, the fact that the Law classes the levy as a "non-tax contribution for public purposes" (rather than a tax), is problematic, as it is clear from the literal wording of, and rationale set out in, the Preamble that the measure is born, above all, with revenue-collection and extra-fiscal (as an economic policy instrument) aims in mind. Both such aims are ordinarily characteristic of taxes.

The newly introduced contribution presents a tax-like structure, from the way in which it is triggered (by a "taxable" event), to the way in which it is enforced, and it ought therefore to be subject to the constitutional test of the "ability-to-pay" principle enshrined in article 31 of the Constitution. Nevertheless, given some of the features of the levy (e.g. non-deductibility of the levy for CIT purposes, determination of the tax base on the basis of net revenue, with no possibility of deducting the expenses incurred to obtain such revenue) it would be hard-pushed to pass the above test.

Meanwhile, as the Institute of Economic Studies has noted, if it in fact constitutes a tax, the use of a "Proposed Law" to approve the levy could be deemed fraudulent use of the parliamentary procedure envisaged for "Draft Laws", which ought to have included a public consultation, a regulatory impact report and an opinion of the Council of State.

This defect has already been noted, to little effect, by the European Central Bank in its Opinion of 2 November 2022, on the imposition of temporary levies on Spanish credit institutions (CON/2022/36), in which it warned of the negative impact that the future levy could have on monetary policy and financial stability, urging the Spanish lawmaker, to no avail, to accompany the legislative proposal with a suitable analysis of the potentially detrimental impact of the levy on the banking sector.

Meanwhile, the fundamentally tax-like nature of the contribution, in light of the recent case law on the ability-to-pay principle as a measure of taxation, established by the Constitutional Court in Judgment 182/2021, coupled with the Preamble's justification of the temporary levy on the basis of increased "profit margins" in the financial and energy sectors, raise questions as to its consistency. Indeed, this contribution is not levied on the increase in interest and commission margins alone, but on all of the margins, which, in our opinion, could be deemed a defect akin to that reported in respect of the so-called "Robin Hood Tax" imposed on Italy's energy sector in 2008, and which ultimately led to it being declared null and void by the Italian Constitutional Court.

Also worth noting is the contribution's overlap with the tax on deposits in credit institutions, and indeed, the fact that the taxable event triggering the latter is the theoretical receipt of the interest income associated with such deposits cannot be overlooked.

Lastly, the retroactive nature of the measure raises further constitutional issues. On the one hand, and seemingly arbitrarily, the state contribution is given retroactive effect by identifying taxable persons on the basis of financial events dating back to 2019, while on the other, the first contribution of 2023 (when the obligation to pay it will apply for the first time) is to be levied on events (revenue) from 2022

Quite apart, therefore, from the structural aspects of the measure, the poor drafting of the Law raises a number of interpretative and practical questions.

Relevance of activities pursued abroad

The Law does not restrict application of the levy to Spanish credit institutions alone. Rather, following the amendments made during its passage through parliament, it specifically provides that the contribution is also to be paid by foreign credit institutions operating in Spain.

Particularly noteworthy in this regard is the case of branches of foreign banks in Spain, as none of the permanent establishments of foreign banks in this country meet the relevant threshold of Euros 800 million without also factoring in the interest and commission of their foreign parents.

The spirit of the initiative and the wording of the Law appear to suggest that branches of foreign banks in Spain may only be subject to the levy where the interest and fee income attributable to such establishments exceeded the threshold of Euros 800 million in 2019. However, the Law is insufficiently clear in this regard.

Similar uncertainty arises as regards calculation of the above threshold and the inclusion in the tax base of financial margins and commissions obtained by non-resident entities operating in Spain without a fixed place of business (i.e. an activity pursued as a "free provision of services").

Yet another question concerns the inclusion for the purposes of the taxability threshold, of income and commissions from activities pursued by Spanish credit institutions abroad, e.g., those corresponding to transactions performed by the branches of such institutions located abroad.

Non-financial entities included within a tax group

Elsewhere, the Law raises serious questions as regards the application of the levy to the entities that form part of a tax consolidation group for corporate income tax purposes.

It is not clear whether the above threshold and the tax base (financial margin and commissions) are calculated including the relevant figures of subsidiaries which, on the basis of their activity alone ought not be required to pay the contribution (e.g. investment fund managers, insurance institutions, real estate entities of banking groups, etc.).

In this regard, the Preamble states that the levy is aimed at the credit institutions sector, as one of the sectors likely to see the greatest increase in profits as a result of rising prices. However, it makes no reference at all to others such as the insurance or real estate industries.

Impact on the pursuit of activities in Spain and in the "foral" territories

Also somewhat confusing is the reference to the gross revenue of the "group" or entities when determining the entities subject to the levy in the case of entities of a group of companies that file their corporate income tax in both Spain and the foral territories.

In our view, this point of the Law should be deemed to refer to the "tax groups" in Spain and the foral territories of entities forming the same "group of companies". However, as noted above, the wording of the Law is far from clear.

Also worth noting is the attribution of taxable person status to the entity filing the CIT return in Spain (or, as the case may be, the entity representing the tax consolidation group in Spain), where the parent of the group of companies may be subject to CIT in foral territory.

Given that the new contribution is not, in principle, a tax, it cannot be subject to the regulations set out in the Economic Agreement with the Basque Country. Consequently, and as announced recently, a specific agreement will be called for in this regard.

Prohibition on the passing on of the levy

Lastly, by prohibiting affected entities from "directly or indirectly passing on the financial impact of the levy" the Law raises yet more legal issues.

This provision clashes directly with the view expressed by the European Central Bank, which, as stated in its Opinion, and in line with international best practices, generally expects credit institutions to consider and reflect all costs (including tax costs, where appropriate) in the price of their services. While it falls to the CNMC to check compliance with this requirement, the Law fails to clarify the mechanisms available to it to do so in today's complex climate, where a range of factors may simultaneously affect a potential price increase (increased interest rates, inflation, deterioration of risk premium, etc.). For the same reasons, and as also noted by the European Central Bank, the obligation on Banco de España to cooperate with the CNMC is even less clear, given that the functions of Banco de España are established in the relevant legislation.

Faced with these contradictions and the lack of clarity, this prohibition may not be easy to enforce (or to penalise) in practice.

It is also unclear whether the above prohibition on passing on the contribution may in itself be deemed an infringement of legislation and, in turn, give rise to penalties. As a result, serious questions may arise as to the feasibility from a legal standpoint of any penalty imposed under the new penalty regime.

A permanent levy?

Finally, and particularly worth mentioning, is another move that would run directly contrary to the view expressed by the European Central Bank. Namely, the plan for the Government to assess, in the last quarter of 2024 and on the basis of its results, the possibility of making this levy permanent.

For the reasons set out above, the practical application of this levy is the subject of many questions and a good deal of uncertainty for affected institutions and no small number of taxpayers are likely to consider appealing a levy so at odds with the Constitution. It is also likely to trigger numerous ruling requests with the Directorate-General of Taxes, as affected institutions seek clarification of some of the doubts and issues referred to in this alert.

The KPMG Abogados Financial Services Taxation team is at your disposal to clarify any doubts you may have in relation to the new levy, its practical application, and the possibilities of challenging it.

.

Contacts

Arturo Morando
Partner
KPMG Abogados
Tel. 91 456 34 67
amorando@kpmg.es

Irene Cao Ruiz
Partner
KPMG Abogados
Tel. 91 456 34 69
irenecao@kpmg.es

Pedro Ruiz Correas
Partner
KPMG Abogados
Tel. 91 456 34 91
pedroruiz@kpmg.es

Guillermo Rodriguez
Director
KPMG Abogados
Tel. 91 456 34 00
guillermorodriguez@kpmg.es

Juan Daniel Londoño
Director
KPMG Abogados
Tel. 91 456 34 00
juandaniellondono@kpmg.es

Nadia Batiukova
Director
KPMG Abogados
Tel. 91 456 34 00
nbatiukova@kpmg.es

KPMG Offices in Spain

A Coruña
Calle de la Fama, 1
15001 A Coruña
Tel: 981 21 82 41
Fax: 981 20 02 03

Oviedo
Ventura Rodríguez, 2
33004 Oviedo
Tel: 985 27 69 28
Fax: 985 27 49 54

Alicante
Edificio Oficentro
Avda. Maisonnave, 19
03003 Alicante
Tel: 965 92 07 22
Fax: 965 22 75 00

Palma de Mallorca
Edificio Reina Constanza
Calle de Porto Pi, 8
07015 Palma de Mallorca
Tel: 971 72 16 01
Fax: 971 72 58 09

Barcelona
Torre Realia
Plaça de Europa, 41
08908 L'Hospitalet de Llobregat
Barcelona
Tel: 932 53 29 00
Fax: 932 80 49 16

Pamplona
Edificio Iruña Park
Arcadio M. Larraona, 1
31008 Pamplona
Tel: 948 17 14 08
Fax: 948 17 35 31

Bilbao
Torre Iberdrola
Plaza Euskadi, 5
48009 Bilbao
Tel: 944 79 73 00
Fax: 944 15 29 67

San Sebastián
Avenida de la Libertad, 17-19
20004 San Sebastián
Tel: 943 42 22 50
Fax: 943 42 42 62

Girona
Edifici Sèquia
Sèquia, 11
17001 Girona
Tel: 972 22 01 20
Fax: 972 22 22 45

Seville
Avda. de la Palmera, 28
41012 Sevilla
Tel: 954 93 46 46
Fax: 954 64 70 78

Las Palmas de Gran Canaria
Edificio Saphir
C/Triana, 116 – 2º
35002 Las Palmas de Gran Canaria
Tel: 928 33 23 04
Fax: 928 31 91 92

Valencia
Edificio Mapfre
Paseo de la Almeda, 35, planta 2
46023 Valencia
Tel: 963 53 40 92
Fax: 963 51 27 29

Madrid
Torre Cristal
Paseo de la Castellana, 259 C
28046 Madrid
Tel: 91 456 34 00
Fax: 91 456 59 39

Vigo
Arenal, 18
36201 Vigo
Tel: 986 22 85 05
Fax: 986 43 85 65

Malaga
Marqués de Larios, 3
29005 Málaga
Tel: 952 61 14 60
Fax: 952 30 53 42

Zaragoza
Centro Empresarial de Aragón
Avda. Gómez Laguna, 25
50009 Zaragoza
Tel: 976 45 81 33
Fax: 976 75 48 96