The temporary levy on the energy sector

Tax Alert

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28 December 2022 saw the publication in the Official State Gazette of Law 38/2022 of 27 December 2022, 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.

The publication of this Law concludes a legislative process to set 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 institution sectors will contribute to shoring up the income pact".

Indeed, the preamble to the Law refers to a number of the responsibilities of the public authorities, as attributed by the Constitution, which would justify state intervention in the general planning of economic activities.

Based on this premise, the focus is placed on the sectors of the economy that have most to gain from the current escalation of prices, as they record extraordinary profits in stark contrast to other less-advantaged sectors.

Some of the largest economic groups in these sectors (electricity, oil and gas, in addition to credit institutions) 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.

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

The Law proposes a "temporary levy on the energy sector" aimed at the primary operators of each of the energy sectors, namely, the electricity, oil and gas sectors, as classified by the Spanish National Markets and Competition Commission (CNMC) Resolution of 10 December 2020, establishing and publishing the lists of the main energy sector operators (amended by the CNMC Resolution of 9 June 2022), and in accordance with article 34 of Royal Decree-Law 6/2000 of 23 June 2000[1]. Strangely, the lawmaker has failed to take into consideration the CNMC Resolution of 24 November 2022, published in the Official State Gazette on 17 December 2022, in which the CNMC established the list of primary operators in light of 2021 data, and instead opted to continue to refer to earlier resolutions.

Besides the companies listed in the CNMC resolutions, primary energy sector operator status is also deemed to be held by persons or entities engaged in crude petroleum or natural gas production, coal mining or oil refining activities in Spain obtaining, in the year prior to that in which they are required to pay the contribution, at least 75% of their turnover from the extraction, mining, oil refining or coke oven product manufacturing activities referred to in Regulation (EC) no. 1893/2006.

The following are nevertheless exempt from this financial contribution:

a) Entities whose revenues for 2019 fell below Euros 1,000 million.

b) Entities whose 2017, 2018 and 2019 revenues from activities leading to their acquisition of primary energy sector operator status accounted for less than 50 percent of their total revenues for the year concerned, despite exceeding the above revenue threshold for 2019.

The Law specifies that where the entity forms part of a tax group, both conditions must be met by reference to the group.

Likewise, where the entities form part of a group of companies that are required to file individual or consolidated corporate income tax returns in both Spain and the "Foral" territories of the Basque Country and Navarra, revenues must be determined having regard to both the entities filing their returns in Spain and those doing so in the Foral territories.

Based on a literal reading, the Law would appear to allow for individual calculation of the revenues of entities that form part of a business group but not a related tax group. This interpretation may, however, seem to contradict the spirit of the Law which, as set out at the beginning of the preamble, seeks to impose the levy on "large economic groups". The preamble also

[1] Primary operator status is held by companies which classify as operators in the sector concerned and hold one of the top five shares of the relevant market or sector.

makes reference to the notion of “primary operator” defined in Royal Decree-Law 6/2000 of 23 June 2000, on urgent measures to enhance competition in goods and services markets, as operators holding one of the five largest shares of the market or sector in question. Incidentally, in the CNMC Resolutions referred to in the Law, such market shares are calculated by reference to the turnover of business groups, not individual entities.

This reference would appear to be due to a legislative drafting error, since no account was taken of the fact that the notion of primary operator provided for in Royal Decree-Law 6/2000 was designed to curb certain cross holding activity in sectors deemed strategic, with a view to safeguarding competition. This made it necessary for the list to refer precisely to the parent holding companies of the groups with the largest turnover (although such reference to the holding companies without regard to their business group would not seem to make much sense in light of the purported ends pursued by the creation of the extraordinary financial contribution).

That said, we would reiterate that according to the letter of the law, the calculation is performed on an individual basis, which we believe may mean that the levy will not be imposed on entities that, despite forming part of business groups which, taken as a whole, exceed the exemption thresholds, do not file consolidated tax returns.

Developments regarding this matter should be monitored closely, since the draft implementing regulations that have been announced certainly provide no clarity, as they require the details of the entities making up the business group to be included in any case.

Calculation of the “levy”. Main features

The levy takes the form of a contribution for public purposes and is indeed purpose-oriented, as the Law provides that the amount collected in this connection will be earmarked for specific ends.

It will be an annual levy “accruing” on the first day of the calendar year.

The levy is initially envisaged for a temporary period (2023 and 2024), although according to the Law, the Government will assess whether it is to become permanent in the last quarter of 2024.

The levy is to be paid within the first twenty days of the month of September, notwithstanding the establishment of an advance payment of 50 percent of the obligation during the first twenty days of February.

As noted above, the levy is to be calculated on the basis of the revenues -of the tax group, where the entity concerned belongs to one- for the calendar year prior to that in which the payment obligation arises, to which a rate of 1.2% will be applied (any advance payment made will be deducted from the annual charge).

As regards the calculation of revenues, the Law provides certain clarification on the following aspects:

- Any income relating to the tax on hydrocarbons, the special tax levied by the autonomous region of the Canary Islands on oil-based fuels and supplementary levies on oil-based motor and heating fuels in Ceuta and Melilla, paid or borne after being passed on, will be excluded from revenues.

- Revenues will also exclude those arising from regulated activities, such as supply at a regulated price (the voluntary price for small consumers for electricity, the last resort tariff for gas, bottled LPG and pipeline LPG), regulated revenues from electricity and natural gas transmission and distribution networks and, in the case of generation subject to regulated remuneration and additional remuneration in territories not located on the Spanish mainland, all plant revenues, including those received from the market and economic dispatch, respectively.

According to the preamble, the amount of the financial contribution is quantified in this manner to ensure that the levy is split fairly among the various large economic groups on the basis of their market share in each sector, and it is expected to raise some Euros 2,000 million per year.

Lastly, the amount of the levy calculated in this way is not expected to be deductible for corporate income tax purposes, and directly or indirectly passing the financial burden on to customers is expressly forbidden.

Oversight by the CNMC and collection by the State Tax Agency (STA)

Responsibility for ensuring observance of the express prohibition on passing the financial burden of the levy on to customers falls to the CNMC, which will also have powers to impose penalties in the event of a breach.

To this end, provision is made for the imposition of administrative (albeit not tax) penalties, which are expressly classed as penalties for serious infringements and are set at 150 percent of the amounts unduly passed on.

As regards the levying, management, inspection, collection and review of this contribution, the Law provides that such tasks 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. The administrative review of decisions relating to the financial contribution will also be governed by the General Taxation Law.

Lastly, it is provided that the financial contribution system will be implemented by means of a Ministry of Finance and Civil Service order.

Remarks

The new Law undoubtedly poses numerous interpretative issues and raises serious questions as regards conformity with European Union law and the ability-to-pay principle as a measure of taxation (despite the legislator's veiled attempt to evade this debate by presenting the levy as a financial contribution, which we do not believe will stand up to the slightest scrutiny).

We consider the issues relating to the compatibility of the contribution, as it has been defined, with the solidarity mechanism devised at European level to be particularly obvious and do not believe that it can be deemed equivalent to the mechanism introduced by Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices ("Regulation (EU) 2022/1854").

The new Law differs substantially from Regulation (EU) 2022/1854 in various aspects, from the markets identified and the definition of the operators affected to the manner in which the levy is determined.

Let us recall that article 15 of the Regulation permitted the temporary solidarity contribution for companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors to be calculated on the taxable profits, as determined under national tax rules, in fiscal years 2022 and 2023, which are above a 20% increase of the average of the taxable profits in the four fiscal years starting on or after 1 January 2018.

In other words, European legislation does not seek to tax all of the profits of the defined energy groups, but rather a mere portion of the earnings obtained over and above the historical average since, as stated in recitals 53 and 54 of the explanatory memorandum of the Regulation, this ensures that part of the profit margin, which is not due to the unpredictable developments in the markets, could be used by European Union companies for future investment or for ensuring their financial stability, which is considered key in the current energy crisis scenario.

The stance adopted by the Spanish legislator seems to clash with this approach, insofar as the levy is imposed on sales (not profits) and moreover on total sales, not just the increase therein.

This approach also conflicts with the stance taken by the Italian Constitutional Court, for instance, when analysing, back in 2015, the so-called "Robin Hood Tax" created in Italy in the 2010s to counter the effects of the financial crisis and high energy prices (this tax was revoked precisely because it was levied on total profits and not just on a portion thereof considered to be in excess of the historical average).

We also anticipate certain market distortion due to the peculiar manner in which the affected operators have been defined.

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