

The 2002 Economic Agreement

Indefinite agreement

The signature of a new Economic Agreement, by virtue of the 2002/12 Law, 23rd May, implemented remarkable changes in the agreed system. Perhaps the most striking one from all of them is the abolishment of the traditional temporal validity clause, being, as a result, the approved legal text of permanent validity or duration. However, this is not the only and most outstanding feature of the 2002 Agreement but the fact that the exclusive competences of the Spanish State, which are vested in the import duties and import levies included under Excise Duties and Value Added Tax and in the High inspection of the Economic Agreement, have been remarkably diminished.

At the same time, it can be pointed out as really relevant the new competences conferred to the Historical Territories, deriving from new agreed tax figures, as the taxation of non-residents or the Excise Duty on Retail Sales of Certain Mineral Oils, the expansion of the regulation capacity in the less delocalized indirect taxation figures, i.e., the Excise Duty on Electricity or on Certain Means of Transport, or the increase of the business turnover up to six million euro in order to confer exclusive competence to the Basque Country in the Corporate Incorporate Tax, provided that the fiscal domicile is in its territory. In the Value Added Tax, there is also an expansion of the administration and inspection exclusive competences with the increase of the business turnover up to six million euros, also provided that the fiscal domicile is in the Basque Country.

Moreover, the Agreement reached in 2002 stated a new composition for the Board of Arbitration which has turned out to be of major importance as has made finally feasible its constitution and operation. One of the landmarks of the current era of the Agreement is the constitution, for the first time since 1981, of the Board of Arbitration in charge of resolving all disputes arising between the central State or an Autonomous Community administration and the Foral Deputations, or vice versa, in relation to any issue concerning the Economic Agreement. Its establishment makes the extrajudicial procedure to solve conflicts be in force in response to the long term demands not only of taxpayers but of the Spanish and Basque tax administrations as well. Its setting up took place on the 30th of June 2007, being Carlos Palao Taboada, Fernando de la Hucha Celador and Isaac Merino Jara, the first arbitrators to make it up.

Since then, the Board of Arbitration has not been without problems due to the difficulties in appointing its members when some of the positions have become vacant, which the Agreement itself says should be done by the Mixed Commission of the Economic Agreement. This has led to periods of inactivity at times when the renewal of its components has been necessary. Through Royal Decree 1760/2007, of December 28, the regulations of the Board of Arbitration were also approved —

doing so in compliance with the provisions of section two of article 66 of the Economic Agreement, which states that “disputes will be resolved by any procedures that are officially established; procedures in which the parties will have the right to be heard”.

Problems for the application of foral tax regulations

Although it hasn't been necessary for the Agreement to face a new negotiation due to its loss of temporal validity, unlike previous times, during all these ten years of implementation, the new Agreement hasn't been operating fully in peace. Tensions, which have been really intense, haven't been provoked by negotiation processes or by the Spanish State appealing to Court about the competences the Historical Territories are executing, but by the actions to Court of Institutions and stakeholders, as union trades or business associations, of neighbouring Autonomous Communities. These tensions have been finally solved with excellent results for the Economic Agreement and it can be affirmed that, after really hard times i.e, the judgement of the Spanish Supreme Court in 2004 or the previous procedures to the resolution of the Economic Agreement ruling by the European Court of Luxemburg in 2008, the Economic Agreement is nowadays at its peak of legal certainty, fitting unquestionably well not only within the legal Spanish framework but within the European Community one as well.

The most outstanding watershed in the development of the Economic Agreement was marked by the Spanish Supreme Court's judgement of 9th of December of 2004, which regarded, by virtue of some apparent Community case-law, some elements of the Basque regulation of the Corporate Income Tax, among which the tax rate was clearly outstanding, as state aids, rejecting its nature of tax general regulations due to the mere fact that they were different from the regulation in force in the rest of the State and were applicable only in Basque territory.

Compliance with Europe and the Protecting of the Economic Agreement.

Two years later, the 6th of September of 2006, the Decision of the European Court of Justice in the so-called Azores case, following the Opinion of the Advocate General Mr. Geelhoed, shed some light for the first time on the issue of the tax regional regimes and the Community legal system. This Decision sets the three parameters to measure the autonomy of infra state bodies as to be capable of laying down tax general measures: institutional autonomy, procedural autonomy and financial autonomy, rejecting the presumption that regional tax measures, just

because of the fact that they are applicable only in a particular region, are automatically selective and regarded as state aids.

Based on the Azores Decision, the 11th of September of 2008, the European Court of Justice backed up the right adjustment of the Economic Agreement and of the foral autonomy to the legal framework of the European Union, regarding the Basque system to be in line with the Community regulations of state aids, which was the legal base to put the legislative capacity of the Historical Territories in respect to the Corporate Income Tax into question during the last years. This Decision gives response to the preliminary ruling referred by the High Court of Justice of the Basque Autonomous Community, when doubts in the interpretation of the Community Law the Supreme Court's Sentence in 2004 rose.

This Court Decision is a turning point in the regulatory capacity of the Agreement, and a few months later, on the 22nd of December of 2008, the High Court of Justice of the Basque Autonomous Community dismissed all the pending actions against the foral regulations of the Corporate Income Tax, establishing a well grounded case law in support of the foral autonomy, which places the Agreement in a scenario, internally and within Europe, of high legal certainty.

The most recent landmark for the Agreement is the final answer to a historical demand, the one known as the internal "armour" or blindaje interno of the Agreement. What this term means is the demand for tax legal regulations, Normas Forales, of the Basque Historical Territories to be taken to Court, by virtue of the same parameters, conditions and requirements as the tax Laws approved by the central State, this is to say, to the Constitutional Court and not to the Contentious-administrative Court, as was the case taking into account the formal consideration of the foral regulations as provisions of a regulatory nature, despite the fact that their material content aligns with the principle of non-delegable legislation applicable to tax regulations in accordance with the Spanish legal system.

To this purpose, the Foral Government of Bizkaia led a proposal which made the General Assemblies of Bizkaia and the Basque Parliament to demand from the Spanish Parliament the amendment of the Organic Law of the Constitutional Court and of the Organic Law of the Judiciary Power, in order to correct the shortage of jurisdictional protection of the Basque Tax Normas Forales suffered. This demand was fulfilled by the 2010/1 Law, de 19 de febrero, de modificación de las Leyes Orgánicas del Tribunal Constitucional y del Poder Judicial, que entró en vigor el 8 de marzo de 2010.

Modifications to the Economic Agreement

In 2007, Law 28/2007, of October 25, produced a partial modification of the Agreement in order to introduce the establishment of VAT groups and a Coal Tax, as well as to increase the connecting factor transaction figure in Corporation Tax and in VAT to seven million euros; likewise, to increase the regulatory powers in terms of the Special Tax on Certain Means of Transport and the Tax on the Retail Sale of Certain Hydrocarbons.

Likewise, measures were introduced to improve cooperation between the State and the Institutions of the Basque Country in matters of information exchange for compliance with International Treaties, doing so by adding a new section to Article 4 of the Agreement, designed to govern the principle of collaboration.

Act 7/2014, of 21 April, approving the amendment of the Economic Agreement in order to incorporate therein the harmonising of the new taxes established in the Common Territory. On the one hand, they are three taxes on certain activities of the electricity sector: the Tax on Electricity Production, the Tax on the Production of Spent Nuclear Fuel and Radioactive Waste from Nuclear Power Generation, and the Tax on the Storage of Spent Nuclear Fuel and Radioactive Waste at Centralised Facilities. The other three taxes are the Tax on Fluorinated Greenhouse Gases, the Tax on Deposits in Credit Institutions and the Tax on Gaming Activities. Some amendments have also been introduced affecting different formal and material questions and the competences of certain legislative bodies: The Legislative Assessment and Coordination Committee and the Economic Agreement Arbitration Board.

Finally, Act 10/2017 of 28 December amended more than 20 articles of the Economic Agreement, entailing improvements in the ability of the provincial councils to manage taxation and in coordination between administrations, incorporated into the Economic Agreement. Thus, a connection point has been established for the new Tax on the value at extraction of gas, oil and derivatives, and changes have been made in the connection points for certain withholdings and payments on account.

In corporation tax and VAT the threshold value for operations beyond which the tax is payable has been updated from €7 million to €10 million, thus making it simpler for small firms to pay taxes to only one administration. In both taxes, Euskadi also takes over authority over taxpayers whose residence for tax purposes is in the common administrative territory but who have carried out 75% of their operations or more in Euskadi. This eliminates the asymmetry that had hitherto led to these taxpayers only paying taxes in Euskadi if all their operations took place there.

From now on tax on inheritances and donations payable by the Basque heirs of deceased persons not resident in Spain will be paid in Euskadi. Tax on donations of real-estate properties located abroad will also be payable there.

Measures have also been taken to improve coordination and collaboration between the Basque and Spanish administrations and three new procedures have been drawn up in the area of the Board of Arbitration.

In 2021, through an agreement reached in the Mixed Commission of the Economic Agreement, held on July 29, a new modification of the Economic Agreement was agreed with the aim of setting the three tax figures that were pending: taxes on Financial Transactions, on certain Digital Services, and the new VAT one-stop-shop regimes (OSS).

In addition, the deficit and debt reference rates for 2022 of the Basque Government and the Regional Deputations were agreed, and the Board of Arbitration for the Economic Agreement was renewed, proceeding to appoint the two members whose places were vacant, appointing Professor of Financial and Tax Law at the Carlos III University of Madrid, Ms. Violeta Ruiz Almendral, as president and, as a member, Ms. Sofía Arana Landín, who holds a PhD from the University of the Basque Country; likewise ratifying the position of Javier Muguruza Arrese.

The modification of the Agreement must be approved in the Congress of Deputies and converted into law for its entry into force.