BARTOLOME & BRIONES

Legal Status

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ENERGY

Development of the system of Energy Saving Certificates

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The *Certificados de Ahorro Energético* [Energy Saving Certificates (CAE)] began to be used years ago in some European countries such as Belgium, Denmark, France, Italy and the United Kingdom. In Spain, since 2014, natural gas and electricity marketing companies and traders of petroleum products and Liquefied Petroleum Gas (LPG) have been required to make an annual financial contribution to the *Fondo Nacional de Eficiencia Energética* [National Energy Efficiency Fund (FNEE)] (hereinafter "obligated parties") proportional to their sales. This contribution allows them to meet the annual energy saving obligation imposed on them, as these contributions from the Fund are invested directly in support programmes for energy saving actions.

On 24 January 2023, the Government approved Royal Decree 36/2023, which establishes a system of Energy Saving Certificates, as a way to encourage compliance with energy saving targets. This system provides more flexibility by offering alternative ways for companies to comply with their savings obligations. In this regard, it is worth noting that the *Plan Nacional Integrado de Energía y Clima* [National Integrated Energy and Climate Plan (PNIEC)] submitted by Spain to the European Commission set an ambitious energy efficiency improvement target of 39.5% in primary energy in the 2020-2030 decade.

On 18 July 2023, two ministerial orders were approved that partially develop Royal Decree 36/2023 with the aim of enabling the correct implementation and operation of the Energy Saving Certificate System (Order TED/815/2023 and Order TED/845/2023).

Nature of Energy Saving Certificates

An Energy Saving Certificate (CAE) is a document that establishes the reliable recognition of the annual savings in final energy consumption derived from an energy efficiency action.

An energy efficiency action is an intervention based on the application of various technologies related to lighting, air conditioning, industrial processes and the intelligent management of energy demand, among others, which results in measurable savings in energy consumption.

However, on 18 July the Ministry for Energy Transition approved Order TED/845/2023, which approves a catalogue of "standardised actions". This catalogue includes an initial list of actions, with 50 technical data sheets, so that companies can calculate the reduction in final consumption that can be obtained with these actions and justify them with the corresponding Energy Saving Certificates (CAE). Furthermore, the procedure for their management and periodic updating is established. The rest of the actions (for example, the redesign of an industrial

process) must be justified in more detail as a "singular action".

Advantages of Energy Saving Certificates

The regulation allows companies obliged to make a contribution to the National Energy Efficiency Fund (FNEE) to make this contribution through the CAE, in addition to the financial contribution they have been making until now to this Fund.

If an obligated entity is able to cover part of its contribution to the Fund with CAE certificates at a lower price than its conventional financial contribution, it will be obtaining a clear economic advantage. This can be done by promoting energy saving actions in its installations that generate CAEs or by purchasing CAEs on the market through Delegated Parties.

Management of CAEs by the MITECO (Ministry of Environment)

Once the savings action has been implemented, the company will present the results to an "Energy Savings Verifier". These savings are certified by the verifier by issuing a CAE for each saving measure generated. In order to issue these certificates, the verifiers must be accredited by the National Accreditation Entity (ENAC) for energy savings.

Once the CAEs have been certified, they will be registered in an electronic platform operated by the MITECO and the Autonomous Community where they have acted will issue the corresponding CAEs with effect throughout the national territory.

Once the CAEs are registered on the e-Platform, they can be liquidated, thus helping to meet companies' savings obligations, or they can be traded, allowing other obligated companies to acquire them and proceed with their liquidation in order to meet their energy efficiency obligations. Obligated entities will be able to operate directly or contract the services of accredited companies called "Delegated Subjects". The Platform will make it possible to inventory all these agents and trace the operations of the CAEs during their three-year term.

Participation of Energy Service Companies

Energy Service Companies (ESCOs) are companies that specialise in carrying out energy efficiency projects for their clients, whereby they achieve demonstrable energy savings.

An Energy Service Company can carry out a savings and efficiency project for a company that is obliged to finance the FNEE, and include the contribution of CAE certificates in the contract for the operation. Another possibility is to sell directly to an obligated entity the certificates generated in other companies that are exempt from making contributions to the FNEE.

The regulation introduces the concept of "Delegated Subject", understood as a public or private company that can assume the total or partial procurement of savings from one or more obligated parties, thus being able to conduct or promote actions that generate final energy savings. The obligated parties, for

their part, may delegate the procurement of energy savings to one or more Delegated Subjects. Energy Service Companies will typically assume this role of Delegated Subjects.

New features of Order TED/815/2023, of 18 July, patially developing the Energy Saving Certificate System

This Order details the figures of the "Delegated Subject", the "Energy Saving Verifier" and the "National Register of CAE", among others.

- **Delegated Subject**

Chapter II of the Order regulates the figure of the Delegated Entity, the legal, technical and economic-financial conditions that must be fulfilled for its accreditation and to be able to assume, by delegation, part of the energy saving objectives of the obligated entities through the development of actions that generate savings in final energy consumption.

Technical capacity of the Delegated Entity: the Delegated Entity must have at least the following on its staff:

a) Six professionals with an official university degree with a minimum level MECES 2-EQF 6 of engineer, technical engineer, architect, technical architect, graduate or bachelor, who meet at least one of the following requirements:

   Meet the requirements for the exercise of the professional activity of energy auditor in accordance with the provisions of Royal Decree 56/2016.

   Hold a valid energy auditor or manager certificate issued by a certification body accredited by ENAC, or by the National Accreditation Body of any Member State of the European Union.

b) Two professionals with an official university degree with a minimum level MECES 2-EQF 6 in one or more of the following stipulated fields of knowledge:

   Economics, business administration and management, marketing, commerce, accounting and tourism.

   Law and legal specialities.

At least one of these two groups of professionals must be able to demonstrate at least three years of experience in energy efficiency.

Activity of the Delegated Entity: it must be covered by a UNE-EN ISO 9001 quality management system.

Financial capacity of the Delegated Entity: it must have the availability of own funds in excess of 500,000 euros.

In the case of entities with previous experience in this field, they must meet certain requirements:

a) Entities with a previous experience of three or more years shall:

   Have a turnover for energy efficiency services or for the purchase and sale of certified savings from another EU Member State of at least one million euros (1,000,000 euros) in the last three years, as a whole.

Have contracted and in force a civil liability insurance policy, or other financial guarantee that covers the risks that may arise from its actions, with a cover of at least one million euros (1,000,000 euros). This insurance must cover at least 10% of the total economic value of the annual energy saving commitments and energy saving needs, as a whole, for which the delegation has assumed.

b) Entities with previous experience of less than three years must have a civil liability insurance policy in force or other financial guarantee covering the risks that may arise from their actions, with a cover of at least two million euros (2,000,000 euros).

   This insurance shall cover at least 20 % of the total financial value of the annual energy savings commitments and energy savings needs for which the delegation has been made.

In both cases, the value of the coverage of the aforementioned civil liability insurance shall be that which determines the maximum capacity of commitments of new energy savings and energy saving needs that said person may assume once accredited as a Delegated Subject.

The regulation establishes in detail the way in which the applicant must justify compliance with all the requirements established for accreditation, as well as for maintaining the status of Delegated Entity.

Delegation contracts that may be concluded between a Delegated Entity and an obliged entity: the Order specifies the information to be sent by the interested parties to the National Coordinator of the CAE System when the contracts are concluded and in the event of changes to the contracts.

- **Energy Saving Verifier**

The Order details the role of the Energy Savings Verifier as an entity accredited by the National Accreditation Entity (ENAC) for the verification of energy savings achieved through the implementation of energy efficiency actions.

ENAC will publish the list of accredited energy saving verifiers with their contact details. For its part, the National Coordinator will be responsible for making the information published by ENAC in this regard accessible from the CAE System platform.

The Order also establishes the application procedure for the verification of the annual final energy savings achieved through the implementation of energy efficiency actions, as well as the procedure to be followed for the verification of the savings by the verifier.

- **Singular actions**

Chapter V regulates the procedure to be followed for singular energy efficiency actions. From the prior consultation with the National Coordinator, before carrying out the singular action, to the documentation that must be provided once the action has been executed and verified, in order to request the issuing of the corresponding CAE.

This Order also establishes the method for calculating final energy savings resulting from singular actions. It also provides that a Resolution of the Directorate General for Energy Policy and Mines may approve a

specific methodology for calculating energy savings resulting from singular actions. In any case, the principles set out in Annex V.2 of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012, Commission Recommendation (EU) 2019/1658 of 25 September 2019 on the transposition of the energy saving obligations under the Energy Efficiency Directive shall apply.

In addition to this, the following basic principles are established for the accounting of final energy savings:

a) For the definition of the baseline of an action, which in any case must be adequately justified, the existence of mandatory regulations for the product, process or installation in question must be taken into account. If there are eco-design or other regulations that establish minimum requirements, the baseline from which energy savings are to be calculated shall correspond to the minimum mandatory requirements established in those regulations.

b) Double counting of energy savings is expressly prohibited. In those cases where two or more energy efficiency actions are carried out on the same energy consuming system or installation, the calculation of the resulting energy savings shall take into account the possible interactions or overlaps of each of the actions, in accordance with the provisions of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012.

However, it is foreseen that these basic principles may be modified or extended by means of the above-mentioned Resolution that may be adopted.

- **Other aspects of the Order**

Once the savings achieved have been verified, the Order defines the requirements for obliged entities, or Delegates, to apply for the issuance of CAE, as well as the minimum amount of savings that the application file must contain.

It also regulates how the Regional Manager must proceed to validate the application file, issue the corresponding CAE and pre-register it in the National Register of CAE.

Chapter III also regulates the minimum content of the CAEs and limits their validity to three years after the end of the implementation of the energy saving action or 1 January 2031, whichever is earlier.

Chapter IV develops the organisation and management of the National Registry of CAE, the procedure for the registration of CAE and the procedure for deregistration in case of irregularities.

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TAX

Tax reporting obligations on cryptocurrencies

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Introduction

In the dynamic environment of taxation, laws and regulations continue to adapt specifically with respect to cryptocurrencies. The legislator considers it imperative to integrate them into our tax system, given their growing importance in the contemporary financial landscape and their evolution in regulatory terms.

In this way, three new tax forms emerge to be submited from 2024, in relation to the year 2023, approved by Order HFP/886/2023, of July 26 and Order HFP/887/2023, of July 26:

- Informative declaration on balances in virtual currencies (Form 172)

- Informative Declaration on operations with virtual currencies (Form 173)

- Informative declaration of virtual currencies located abroad (Form 721)

These tax forms will affect not only the taxpayers holding these cryptocurrencies (Tax form 721) but also the "exchange platforms", that is, the entities through which the operations are carried out or that provide maintenance and storage services, as long as they are residents in Spain, having to file tax forms 172 and 173.

Tax Form 721

Form 721 is an informative statement that aims to improve tax control of taxable events related to the holding or operation of virtual currencies. This obligation is based on a context in which the Tax Authority can only require the declaration of platforms located in Spain. In this sense, it is directly the taxpayers who have the responsibility to report on this ownership.

This obligation must be fulfilled punctually during the first quarter of each year, before March 31st. Failure to comply with this deadline entails sanctions and fines, and in particular, is subject to the same sanctioning regime that applies to Form 720, an informative statement on other assets abroad that shares significant similarities with this obligation. It is essential to respect this deadline to avoid adverse financial consequences and maintain a track record of favorable tax compliance.

This declaration must be submitted by those who, at the end of the previous year (December 31), have held the ownership, authorization or have been beneficiaries of cryptocurrencies abroad with a total balance exceeding 50,000 euros. In addition, in subsequent years, it will only be required to file this form if the balance of virtual currencies has increased by more than 20,000 euros since the last declaration.

Tax forms 172 and 173

These two informative tax forms imply a substantial change in the way exchange platforms and brokerage companies will operate in the future. This is because they are now required to keep a thorough record of all transactions related to virtual currencies and to prepare to file annual reports from January 2024, in accordance with the new regulations established by Order HFP/887/2023, of July 26.

These forms must be presented by entities resident in Spain that store or maintain balances in virtual currencies (in the case of Model 172) or that mediate in operations with virtual currencies (in the case of Model 173). These obligations are critical to ensuring transparency and compliance with cryptocurrency-related regulations in the country.

With regards to Form 172, which refers to the informative declaration on balances in virtual currencies, intermediation platforms must provide the Tax Agency with the following information:

- Identification of persons or entities that have had ownership, authorization or benefit in virtual currencies at some point during the year 2023.

- Details about the amount of virtual currencies in possession as of December 31, along with their market value and the public keys associated with those coins.

For the valuation of these virtual currencies, the quote as of December 31 provided by major trading platforms or price tracking websites will be required to be used. Where this information is not available, a reasonable estimate of the market value shall be permitted.

This change in the evaluation criteria is part of Form 172, which must be submitted annually in January of each year. The first declaration under these new regulations will be carried out in January 2024 and will contain the data corresponding to the 2023 fiscal year.

As for Form 173, referring to information relating to operations with virtual currencies, the declaration of the following types of transactions will be required:

- Operations of acquisition, transmission, exchange and transfer of virtual currencies that have taken place during the year. In this context, detailed information on the persons involved in these transactions should be provided.

- Details of collections and payments made in virtual currencies in the aforementioned operations.

This declaration is also annual and must be submitted during the month of January of each year, in relation to the operations carried out during the previous fiscal year. However, it is essential to highlight that only operations carried out after the entry into force of the new regulation, which took place as of April 25, 2023, should be reported.

Conclusion

These tax forms will allow Tax Authorities to obtain more accurate and detailed information on the holding and operation of

virtual currencies in Spain. This allows the Tax Authorities to exercise more exhaustive control over all transactions involving virtual currencies by each taxpayer.

This control guarantees the correct declaration of these operations within the framework of several taxes, including Personal Income Tax, Wealth Tax, Corporation Income Tax, Transfer Tax and Stamp Duty.

In summary, these new regulations represent a significant step in strengthening fiscal control in the field of virtual currencies. In this context, both intermediaries and taxpayers should be fully aware of their obligations.

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EMPLOYMENT

Hiring false self-employed can lead to criminal liability

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The practice of hiring false self-employed is becoming increasingly common and widespread throughout the country. In this sense, not only high-profile cases like Glovo are under investigation. To date, the Labor Inspectorate has investigated more than 30,000 cases of companies hiring individuals under this guise.

The concept of the false self-employed has been analysed numerous times by the High Court, culminating in its ruling on January 24th, 2018 (resolution no. 45/2018), which outlines the criteria that would reveal the employment nature of the relationship: voluntariness, ownership of the results, and dependency in the execution of the work. However, these terms are considerably abstract, making it complex to determine when a company is hiring false self-employed. Additionally, the situation is further complicated by the introduction of the TRADE figure, or the dependent self-employed.

In this context, Organic Law 14/2022, dated December 22nd, came into effect on January 12th, 2023. This law adds and removes various provisions from the Penal Code, with Title XV, concerning crimes against employees' rights, being one of the most affected and controversial sections. Specifically, Provision 311, which protects the minimum and non-waivable conditions in the field of labour contracting, was modified. A new clause was added, punishing those individuals who avoid hiring new employees by using alternative formulas, including false self-employment, with up to 6 years in prison. The added clause reads as follows:

"2º Those who impose illegal conditions on their employees by hiring them under formulas unrelated to employment contracts or maintain them against administrative requirement or sanction."

According to the explanatory statement, the legislator aims to provide greater protection to all behaviours that intend to infringe "more severely" on employees' rights, thus respecting the principle of minimal intervention characteristic of criminal law. This measure is justified by a lack of appropriate legislation to adequately limit the ways companies can evade responsibility, which have emerged due to the use of new technologies.

This is not the first regulation enacted to combat the hiring of false self-employed, with the notable Law 12/2021, dated September 28th, known as the "Rider Law", providing greater protection to digital platform delivery employees under this scheme. However, it is the first regulation that goes beyond the labour scope and enters the criminal realm, specifically aimed at combating the use of false self-employed and similar figures.

The inclusion of criminal law is not without controversy, as it applies to an area fraught with great uncertainty, potentially leading to legal insecurity for market agents. After all, new technologies are leading to the emergence of various forms of work not specifically contemplated in labour law, making them difficult to categorize under defined figures.

Consequently, the introduction of this legislation must be accompanied by a more exhaustive and specific regulation of labour law that eliminates uncertainty and provides greater legal security for both employees and employers.

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