

Partial privatization of the spanish airport sector by royal decree-law 13/2010

1. The bases of the new model on airport sector management. The creation of "AENA Aeropuertos, S.A."

In the past, the public entity "Spanish Airports and Air Navigation" (known by its Spanish official name as "Aeropuertos Españoles y Navegación Aérea" or AENA) has entirely assumed the management functions of the air navigation and airport infrastructures used by Spanish civil airports. The liberalization of the ground services was imposed in Spain by means of EU Law: Council Directive 96/67/EC, of October 15th, 1996, on access to the groundhandling market at Community airports; which has obliged airport authorities to admit groundhandling agents and to organize public tenders so as to assure the liberty of the users to choose between two or more of those agents.

The reform introduced by the recent Royal Decree-law 13/2010 establishes a new regulation of the airport managers' activities based on the corporative model, using business formulas and ruled by commercial law provisions. This model is inspired in the changes carried out by other European countries (i.e. French Law 2005-357, of April 20th). The ultimate objectives of the reform are to improve the agility and efficiency of the Spanish airport management activity and to raise revenues in order to wipe out the debt accumulated by AENA as a result of substantial investments in airport infrastructure in recent years.

The new management structure of Spanish airports may be described as follows:

(i) Distinguishes between air navigation management and airport services management.

(ii) The public company AENA remains functioning under the same legal framework, keeping its legal prerogatives, and maintains its air navigation functions.

(iii) For the management and exploitation of airport services, the creation by the Cabinet of Ministers of a public company named "AENA Aeropuertos, S.A." (hereinafter, "New AENA") is foreseen. Initially, the share capital of this company will correspond entirely to AENA, which shall always hold the majority, but also being able to hand over the remainder according to the legal provisions.

New AENA will be a company which will be ruled by the provisions established in the Spanish commer-

cial legislation, but keeping in mind the following particularities:

a. Will employ the public contractual regime established upon the Law 31/2007, on contractual procedure in water, energy, transport and post services, as New AENA is considered a company associated to AENA.

b. Will have the legal status of a recipient body of all the expropriation procedures carried out regarding the airport infrastructure, linked to its management.

c. All the works that New AENA may want to perform in airports and their service areas will not need to obtain a special building licence or other kind of municipal preventive control actions.

d. Will have to surrogate to all the employment contracts subscribed by AENA until now, regarding those employees who are carrying out airport activities.

2. The airport heritage: loss of the state-owned legal nature of those assets that are not linked to the air navigation services

The Royal Decree-law here analyzed, which enables the new regulatory framework to be imposed, declares that "all state-owned assets linked to the public company AENA but not employed in the air navigation services will no longer have the legal nature of state-owned assets, without altering the expropriation purpose and, thus, not proceeding to their reversion".

Even though there isn't a legal formal definition, the Spanish doctrine and jurisprudence have recognized the state-owned legal nature of those airports which are considered of general interest (all the airports managed by AENA). This is why, the legal reform explained above was undeniably necessary in order to enable the management of those types of assets by New AENA, because public companies, upon the legal Spanish provisions, can not manage state-owned assets, as it implies the possibility to perform public authorities' powers.

As for those concessional forms already existing on airport public state-owned assets, Royal Decree-law 13/2010 establishes that they "will be transformed in lease contracts, maintaining the same conditions, terms and time limits, and only if the conformity of the concessionaire is obtained (...). In case that the concessionaire is not willing to change or does not





respond on time, the concession itself will be declared extinguished and deemed to be liquidated" (Third Transitory Provision of the Royal Decree-law).

3. The possibility to decentralize the airports' management by means of a concessional contract or incorporating subsidiaries of New AENA

It is New AENA's function to exploit all the airports and heliports subsumed under its management field, without prejudice to carry out an "individual exploitation" (i.e. decentralized) by means of:

(i) An airport services concessional contract, where the private investor assumes the risk and venture of the business. The awarding of this type of contract will be carried out upon the rules described in Law 31/2007, on public bidding procedures. The airport services concessionaire will be ruled by private law regulations, but taking into account the same particularities established regarding New AENA (legal status of a recipient body for all the airport infrastructures linked to its management; exemption of municipal preventive control actions for works to be carried out in the airport or its service areas; and, finally, the subrogation to all the existing employment contracts when the employees are in agreement).

(ii) Creating subsidiaries, ruled by the same regulatory framework as that described for New AENA.

The "airport services concession" is a new legal figure created by Royal Decree-law 13/2010. It does not have the consideration of a public works concessional contract, or of a public service management contract (which may only be subscribed by a Public Administration). It is a private contract submitted by the Royal Decree-law to the legal provisions established for public contracts, contained in Law 31/2007, but only regarding their awarding process.

Remaining inalterable, on the other hand, is the possibility described in article 43 of the Law on Air Navigation consisting of the possibility that any Territorial Public Administration or private persons/entities of a UE Member State may hold the ownership of a Spanish airport of public interest, and also may participate in its management (concerning services that are not strictly aeronautical and other activities), but only if they have entirely or partially built the airport, previously authorized by an Order of the Ministry of Public Works and complying with the

conditions established in that Order. Please bear in mind that the airports already built (i.e. Castellon, Region of Murcia and Ciudad Real) or eventually to be built according to this scheme, as not being state-owned assets, will not be included in the management area of New AENA.

Moreover, please take into consideration that the Royal Decree-law is not regulating the incomes obtained by airport managers, directing this issue to a future regulation to transpose the Directive 2009/12/CE, of March 11th, on Airports Charges (General Provisions of the Royal Decree-law). However, it does clarify that "the airport charges obtained by the concessionaires from the users will be submitted to private law provisions and to the Directive 2009/12/CE".

4. State reserve on airport management and inter-administrative participation and coordination bodies

The new model implies the maintenance by the State of the management of all the airports of general interest, replacing the public entity AENA by a public company. This backup scheme is employed due to an economic reason, in order to compensate the losses eventually suffered by deficient airports with the incomes produced by the profitable ones, and also finds its justification in the Constitutional Court Decision 68/1984, of June 11th.

Nevertheless, the possibility to create "as a supporting instrument of the airport manager, a monitoring body of the airport activity, composed by the airport manager itself, the Central Public Administration, the Autonomous Community and, if necessary, the nearest municipalities" is foreseen. This scenario will be also created by a regulation norm "Airport Coordination Committees, between the State and the Autonomous Community", informing and advising vis-à-vis different politics (on airports, urban, environmental issues) that coexist in airports, and also regarding the connectivity of the airport itself with other ways and means of transport and the development of air routes.



If you need more information , please call your usual contact person,
any of the partners of the **Private Equity Team** or:
privateequity@gomezacebo-pombo.com



We give specialised advice to private equity funds and other alternative investment funds on both fund structuring and managing entities as well as in relation to the transactions (investments/disinvestments) they carry out.

The private equity team, with its breadth of experience, advises on the entire transactional process – from the early negotiation phase, with the drafting of letters of intent and other relevant documents, right through to the closing of the transaction, including a legal due diligence and negotiating and drafting of contracts.

The department is led by Iñigo Erláiz and is a multidisciplinary team made up of lawyers from various areas specialised in acquisitions, financing, regulatory aspects, taxation and restructuring.



The solid domestic network of this long-established national firm -which also has a branch in London- gives the group a strong profile in the private equity field. The department is a favourite choice for regulatory work spanning several jurisdictions and for private equity linked to real estate. The team is respected for its "fine legal opinions and quick speed of response".

The Chambers Global Guide 2009
Private Equity



An excellent option for national, mid-sized deals (...); a great alternative to some of the larger outfits (...); full of strong technicians who deliver quality work (...); an excellent team (...).

The Chambers Global Guide 2008
Private Equity



GOMEZ-ACEBO & POMBO



Iñigo Erláiz

Partner, Head of Private Equity
Corporate
ierlaiz@gomezacebo-pombo.com



Ángel Varela

Partner, Head of Banking and Finance
avarela@gomezacebo-pombo.com



Fernando De las Cuevas

Partner, Head of Corporate
fcuevas@gomezacebo-pombo.com



Carlos Rueda

Partner, Project Finance
Banking and Finance
crueda@gomezacebo-pombo.com



Miguel Lamo de Espinosa

London Resident Partner
Banking and Finance
mlamo@gomezacebo-pombo.com



Eduardo Martínez-Matosas

Tax
ematosa@gomezacebo-pombo.com

Castellana, 216 - 28046 Madrid. Tel.: (34) 91 582 91 00

www.gomezacebo-pombo.com