

AN INTERNATIONAL PERSPECTIVE ON LAEI: *FOLLOWING TRENDS*

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Abstract: This paper is an analysis of LAEI (Spanish entrepreneurship's law), understood here as an effort to enhance entrepreneurship and make other changes boosting the Spanish economy's competitiveness. The law is canvassed in order to determine whether, and to what extent, the law achieves its aim, especially in taking hold of the new trends and challenges of the global economy and responding adequately to those challenges consistently with those trends. For this purpose a legal analysis of the main provisions is undertaken, measuring their effect, with an emphasis on the issues deemed more essential, and comments and arguments on innovation and economic issues reinforcing the analysis, which is not solely a legal one. An international perspective is introduced by incidentally comparing rules and policies with those in other countries.

Keywords: Entrepreneurship, Law, Spain, Reforms, Law 14/2013, Supporting Entrepreneurs and their Internationalisation.

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1. Introduction

Law 14/2013, Supporting Entrepreneurs and their Internationalisation (from now on, LAEI) is a law passed in the midst of a series of reforms to address the current economic situation in Spain. It is not, therefore, a purely legal text: it has effects on many different areas of the law (corporate, insolvency, administrative, to name but a few) and creates instruments and devices the analysis of which escapes from traditional legal analysis, because of economic policy and operative reasons. This is why the analysis of the law cannot be made solely from a legal point of view. The context of this law is an aim to effect fundamental changes in accordance with global realities and trends in order to ensure future competitiveness for the Spanish economy.

From this point of view, LAEI's judgment must be that it fails to grasp global trends and the changes they imply and, where it does so, is usually late. This does not except the fact that most of its specific ordinations go in the right direction. But the impression on the law as a whole is it is insufficient in its practical achievements, even though it sets to make important and profound changes.

The analysis of the law has mostly been organised basically by following the structure of the law itself (with a few minor changes now and then.) It is intended to be comprehensive, although some things have had to be left out, but it also strongly stresses its analysis and strength in points which are deemed essential. Specially, those concerned with innovation and global trends in international economy. There is also, of course, a thorough legal analysis of some issues, but focused in results, rather than carrying too much weight into an exegesis of the specific disposition. We believe this is a sensible approach for a paper which must stick to a space limit that is quite stringent in this case. Effectively, this paper is an overview of LAEI. It discusses some of the questions raised rather than pretending to give outright answers.

The elephant in the room

There is an elephant in the room, or rather, in the law. One of the main challenges the Spanish economy faces, and indeed a reason why it is struggling in macroeconomic terms, is its public finances. The challenge is not one of adding and deducting amounts.

A structural reform is needed in order to deliver an effective and sustainable Government and public services. This reform is fundamental to growth the prospect of a future innovative and dynamic economy, LAEI's underlying and final aim.

2. Support to entrepreneurship

2.1 Entrepreneurship in Education

LAEI attempts to elevate entrepreneurship culture to yet another input in the Spanish education system¹, from primary school up to university. The aim of this new programme (which is still to be unfolded) is to help develop the core competencies necessary for the creation and development of businesses from the beginning of the education cycle. It is indeed true that Spain is in no way ahead of other European countries in this regard. 50% of Finland's population had received some kind of training, either formal or informal², in entrepreneurship matters. There is an obvious influence of cultural mindset in entrepreneurial attitudes and results. The different views on failure either push or restrain the creation of new businesses. According to the analysis by Prince of Girona Foundation³, approximately 50% of the Spanish population perceives fear of failure as an obstacle for undertaking enterprises, in sharp contrast with Nordic countries (Norway) or the US, where the percentage is about 25% (2009).

The current economic situation in the developed countries encourages a stronger entrepreneurial endeavour, which has seen a 118% increase between 2009 and 2013 in the rate of entrepreneurial intention in Spain⁴. In this context, and in the larger picture of global economic trends, entrepreneurship is one of the main drivers of innovation, competitiveness, growth and development⁵. This is, then, a fundamental area.

Entrepreneurial inputs in education are very welcome, but a cultural change is slow to achieve. Therefore, it is perhaps more effective to focus on formal institutional restraints on entrepreneurship⁶ (in the law, in bureaucracy, in the quality of public institutions) and expect cultural change to be partially and slowly achieved in that way, rather than hoping a State-designed education programme will do the trick.

¹ Regulated by Law 14/2013 articles 4-6 Chapter I

² The GEM report on education (Coduras et al, 2010) divides entrepreneurial training into "formal" or "informal". Formal training is the one received according to education programmes in place (primary, secondary and university.) Informal training refers to the rest of training (seminars, in-company training, etc.)

³ Alemany, L. et al. "White Book on entrepreneurship initiative in Spain", Report by Prince of Girona Foundation and ESADE, 2011

⁴ GEM Spain – 2012 Report.

⁵ Carre y Thurik, 2003; Van Stel et al., 2005; Wennekers y Thurik, 1999; y Wennekers et al. 2005, among others.

⁶ A relatively minor but still significant example is the design of PAE (Punto de Atención a Emprendedores.) Its design around Notaries is not a good idea and may even seem to have been thought of as some kind of compensation for bureaucratic easings. The bulk of the services the law intends them to provide are largely already being offered by locally promoted institutions (such as Madrid Emprnde or Barcelona Activa.)

2.2 The Limited Responsibility Entrepreneur

LAEI creates a new figure, the Limited Responsibility Entrepreneur⁷. This new condition allows the entrepreneur to limit his or her responsibility for all debts incurred into for the purpose of commercial activity. Specifically, the condition protects the entrepreneur's main residence from creditors, up to the amount in rateable value of 300.000€ for a city population of under a million, and 450.000€ otherwise. This asset must be registered in the Land Registry so that creditors are aware of it. The amount limitation is somewhat arbitrary or inconsistent with any recognisable legal argument (it seems to imply that richer entrepreneurs do not deserve this protection, as if this benefit was put in place for social reasons.)

This issue is a tricky one. By trying to protect entrepreneurs the law may be damaging them. This new settlement has two different effects: firstly, it encourages (and such is admittedly the aim of the law) entrepreneurship by providing entrepreneurs with protection from creditors. At the same time, it discourages lending and to some extent trade with entrepreneurs, because creditors now have one asset less to guarantee their credits. It is unclear which of these effects will be stronger. The fact that no prediction on this matter is found in LAEI's Explanatory Memorandum is puzzling. The offsetting effect of these two effects will determine whether the law succeeds with this rule in encouraging more entrepreneurship or actually harms entrepreneurs by further restricting their access to credit (down by 417.900 million € from 2008⁸).

This responsibility limitation cannot be argued to be a proxy of limited liability as such.

If it were so, then this limitation would have all the benefits of limited liability (efficient allocation of risks and monitoring costs between personal and commercial creditors⁹).

But incorporation is already made available to every entrepreneur with no minimal capital requirements in this law (although with serious restraints, so the aim of the law with the creation of this figure seems to be to crudely encourage entrepreneurship by granting certain protection from creditors.

Moreover, it is clear that in some stages house guarantee is the only possible way to start many small businesses. In many undue influence cases it is admitted in passing that for a wife to provide his half of the home as a guarantee for his husband's business is acceptable in

⁷ See Articles 7 to 11 LAEI

⁸ See "Loans and credit lines given by OIFM and bank accounts of the preceding in other industries in Spain, by institutions", Bank of Spain Statistics Bulletin, 2013

⁹ Kraakman, R. et al., "The Anatomy of Corporate Law. A Comparative and Functional Approach", Oxford University Press, 2009, Chapter I.

general terms¹⁰. The judges argue this is in many cases the only way to obtain the necessary loans. So, in conclusion, it is very difficult for the legislator to set a limit on universal responsibility (article 1911 CC) without altering some of the basic presumptions that keep the law working.

From a trade perspective, the change is probably not too relevant, although it is potentially less damaging.

As is apparent this is a voluntary regime (and one that must be opted into) so the effects of its implementation can be mitigated by individual's choices. This means its effects will probably be limited. If lenders require a stronger guarantee they will not lend to limited responsibility creditors. The only conceivable beneficiary of this new settlement, then, is the entrepreneur who is able to obtain lending and trust by creditors without a house guarantee but is reluctant to undertake business activities for fear of eventually having his or her house seized by creditors. Indeed a far-fetched scenario.

One additional comment: the fact that an auditing is required, requiring the same bureaucratic burden asked of Limited Responsibility Unipersonal Companies, makes the whole device unfit for purpose. Surely this, together with Registration costs (not only monetary) makes it seldom worthwhile to pursue this new condition for many entrepreneurs.

2.3 **The Limited Responsibility Successive Corporation (SLFS)**

LAEI also creates a new kind of corporation, stemming from Limited Responsibility Companies, called Limited Responsibility Successive Company¹¹. The main novelty of this company type is the fact it can be created with no minimum capital requirements. However, this sort of privilege is subject to a series of obligations protecting creditors: the company has to keep 20% of its earnings before taxes as legal reserves, instead of the general rate of 10%. Equally, dividends are regulated, distribution only being allowed when equity is not lower than 60% of required minimum capital. The company loses its condition of "successive" when minimal capital is achieved. Importantly enough, the law establishes a joint and several liability on the part of the partners for the amount up to minimal capital. This means that, in effect, this new company is only a Limited Responsibility Company which is allowed not to pay-up the whole of its capital from the very beginning.

¹⁰ See Royal Bank of Scotland v. Etridge.

¹¹ Regulated by LAEI in article 12, Chapter III

Minimum capital requirements are usually inadequate instruments to regulate risk and seldom confer any significant protection to creditors at a reasonable cost. Very much like an elephant into a china shop, as the saying goes. The reason for this is they should depend on the riskiness of every business endeavour. In the industries where capital requirements are taken seriously (such as insurance and banking) there are enormous regulations relating capital requirements to the company's activities. Where this is not the case, capital requirements are either too low or, when too high, simply work to restrict competition by making it costly for competitors to join a market¹².

Admittedly there are tax reasons to dislike the proliferation of companies without minimum capital, but this is a separate issue.

The regime introduced is not as significant as it may seem. It only allows for a indefinite period of time where the company will not have to pay-up its capital with very stringent distribution rules to prevent draining of assets. As aforementioned, the approach of not requiring minimum capital as a rule (and having other, more customised rules of control, including good ex-post control¹³) is a sound one. Common law jurisdictions have been building on this tradition for many years, and their company structure is difficult to brand as insecure or weak.

This lack of flexibility in Company law regulations is an element that adds to the Spanish economy's lack of competitiveness. In a global economy investment goes forum shopping looking for the best conditions, also in the legal aspect. In this respect, the elimination of the rule on capital requirements would not be a race to the bottom action (if replaced with appropriate regulation where necessary, such as ex-post controls) because it would mean no weakening of appropriate an efficient rules to favour a particular set of investors, but rather the setting of more efficient rules for a stronger and more flexible Corporate law that would benefit all parties: entrepreneurs, creditors, shareholders, etc.

2.4 **Insolvency Law**

LAEI makes some important changes in Insolvency law. The intention of this changes is to further move Spanish insolvency law from a rigid asset-liquidation perspective to a more flexible conventional approach. This matter is serious enough to devote many pages to it, but

¹² Davies, P.L.; "Principles of Modern Company Law", Thomson, Sweet&Maxwell, 2008, P. 257-265

¹³ See, further on this topic, Gomez, F.; Ganuza, J-J; "Undercapitalized Firms and Liability: The Advantage of Softer Standards over Strict Liability" Universitat Pompeu Fabra, Working Paper, 2008

for the sake of synthesis and comprehensiveness in the analysis of LAEI we must only briefly canvass some of its fundamental traits. This issue is discussed in this chapter, together with corporate law issues, because of its relation to creditor protection and the functioning of corporations.

The law basically changes two regulations, Formal Refinancing Agreements¹⁴ (percentage required going down to 55%) and the procedure to appoint an independent expert¹⁵. The other change, perhaps the most important one, is the creation of a new out-of-Court payments agreement procedure (acuerdo extrajudicial de pagos). The fundamental idea is to set a device by which a sufficiently supported agreement can arrange partial defaults or changes in payment conditions to the benefit of creditors as a whole and debtors. The percentage required is 60% of credit amount. Spanish law faces a problem regarding Company restructurings and liquidations. Its very efficient mortgage market (having the credits supported by mortgages priority over other creditors) together with the relative traditional lack of flexibility of insolvency law creates an incentive for companies and generally for creditors to demand mortgage or similar guarantees for debts, causing huge inefficient costs¹⁶ (this is what economists call a public-good situation: everyone would be better-off by acting coordinately in a different way, i.e. having unguaranteed debts but a better insolvency regulation, but incentives make agents act in a way that leaves everyone worse-off, in this case by having to secure payment through inefficient mortgage-like guarantees.) One of the consequences of this is many corporations do not file for liquidation (the trouble is not worth the earnings for creditors.) Of course the economic crisis has meant too many corporations are broke-down, instead of being able to rearrange debt payments. From this point of view more flexibility in insolvency law is very necessary and very welcome. Other countries have much speedier and workable insolvency systems¹⁷ (Common Law jurisdictions traditionally share this feature) from which much can be learned and applied. Out-of-court are a firm step in this direction, although there is still way to go.

¹⁴ See Article 31 Two LAEI

¹⁵ See Article 31 One LAEI

¹⁶ Gomez-Pomar, F.; Calentani, M.; García-Posada, M. "The Spanish Corporate Insolvency Puzzle and the Crisis", Mimeo, European Business Organization Law Review, 2009, p. 1- 44

¹⁷ See in this regard: the World's Bank Global Insolvency Law Database, available at:

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,pagePK:181022~theSitePK:215006,00.html> (Last Access: 8 may 2014, 2:31 pm)

3. Changing Tax Environment

3.1 VAT Cash method

The idea of the application of a cash approach to VAT must be welcomed as a conceptual improvement. Under the accrual method, businesses effectively act as involuntary lenders of the Treasury, because they are compelled to file for the VAT of products and services which have not been paid for yet, thus draining their liquid assets.

This causes economic distortions which plays against the neutrality of the tax.

Furthermore, this scheme is especially harsh on SMEs, who have less bargaining power when negotiating payment deadlines. This last idea is the main motive behind the establishment of this new special regime.

The explanatory Memorandum thus frames this creation as a means of easing liquidity problems and credit access for businesses. A question that is immediately raised in this context is whether VAT should be based on the accrual method or on the cash method. There is no definite answer to this question. The problems in both cases have more to do with practical matters than with theoretical consistence.

The cash method has two main difficulties. Firstly, it arguably makes VAT payments more difficult to control. If payment of the tax is separated from the related economic transaction there appears to be a wider ground for fraud (one can imagine innumerable purportedly insolvent corporations being created for this purpose) and higher control costs as a result, since the tax collector now needs to follow two different chains.

Moreover, this separation implies that corporations will have to keep two different accounting records (since virtually all of them use the accrual method in their accounting, because it provides more information.) This is likely to increase administrative costs by some margin, something which may go almost unnoticed by large corporations but can have an important effect on small corporations, especially on very small ones.

But the accrual method also has its weaknesses. Most importantly, it has the effect already described of distorting economic activity and draining corporations' liquid assets, with a heavier burden falling on SMEs. This is a distortion that falls not only in favour of the tax collector and as a detriment to corporations in general, but, more importantly, it falls with differential thrust on corporations who do not manage to obtain favourable payment deadlines, to the point where large corporations can even enjoy a neat benefit as a result of this system, by having their VAT payments financed by smaller suppliers. This will happen broadly when they manage to be slow to pay and at the same time have clients who are diligent in their payments.

The law attempts to circumvent this status quo, in line with the Council Directive 2006/112/EC which frames its scope in this matter, by organising the cash method as a special regime available only in a given set of circumstances, primarily where the taxable person's annual volume of operations is below two million €¹⁸. A further provision is made that a ministerial regulation may set a limit on the amount of the payments from the same client, its reaching having the effect of preventing the application of the special regime¹⁹. The reason why this limit ought to be set by a ministerial regulation instead of being set by the law itself is unclear. The regime can be opted out from for a minimum of three years.

The law further draws the line by excluding some operations from this regime.

Operations under the other main special regimes (simplified, farming...) are excluded, and so are intra-Community acquisitions and imports²⁰. The latter exclusion relates to the fact that taxpayers outside the Spanish VAT territory cannot be expected to keep a record of transactions using the cash method, something which would be essential for the administration of the tax.

There is an obvious need to lay a limit on the time for which a transaction will go untaxed where such transaction has not been paid for. The law establishes this deadline as the 31st of December of the year coming next to the one where the transaction took place²¹. Although this is possibly a sufficient period of time, perhaps it would have been better to relate the deadline to the date of the operation (say, 18 months after the operation) so as to avoid liquidity problems and secure both the income for the tax collector and the taxpayer's better management of liquidity.

The law provides that the taxable person's formal obligations will be established by ministerial regulation²². Again, it is striking that in a tax such as VAT, where formal obligations are considerable and burdensome, not even the slightest outline of these obligations is set out in law.

To conclude with this analysis of some of the details of the law regarding cash-based VAT, Article 163 sexiesdecies sets the closure clause that VAT shall accrue (both as payable and deductible) upon declaration of bankruptcy.

The solution of the law is an intermediate one between the accrual method and the cash method. The coexistence of both methods has a series of implications that may render the special regime insufficient when contrasted against what it sets out to accomplish.

¹⁸ See Article 163 decies. Uno

¹⁹ See Article 163 decies. Cinco

²⁰ See Article 163 duodecies. Dos

²¹ See Article 163 terdecies. Tres a)

²² See Article 163 terdecies. Cuatro. The point and scale to which these behaviours are taking place is difficult to assess as of today.

There is a fundamental problem of double recording. Corporations which are not working under the cash regime will still suffer its consequences when dealing with suppliers who do operate under this cash scheme. This is necessarily so because VAT relies on a bilateral recording of transactions, so either regime must be necessarily bilateral: Corporations who stay in the accrual method, but who have suppliers working under the cash method, will not be able to deduct a purchase from them until they have actually paid for it. It is possible, then, that many large corporations will prefer to work with suppliers who use the accrual method, making the whole device of this special regime at least partly ineffective. On the other hand, corporations who sell to the Government and local authorities will probably fully benefit from this new scheme. The point and scale to which these behaviours are taking place is difficult to assess as of today.

As a conclusion, the new regime does set out to solve a real dysfunction in the working of VAT and will probably partly achieve its objective of easing liquidity for SMEs. The better solution in the medium term might be to unify VAT under the cash method for all taxpayers and to engage in further developments for the easing of the burdens of the tax (especially its formal obligations), so as to ensure it ceases to be comparatively more harmful to SMEs. But of course the extension of the cash method to all taxpayers would greatly diminish the amount of tax collected, and thus becomes politically troublesome.

Furthermore, such a change is impossible under the present Directive, and the new difficulties that would arise from it in terms of tax-fraud are, to some degree, unknown.

It is difficult to regard this innovation in the law as a major factor pushing for a more internationally competitive Spanish economy, since its effects will be limited. Similar regimes exist in other European countries, among them the United Kingdom, Sweden Estonia, Slovenia and Latvia²³. Recent years have seen a true soaring in the number of countries introducing this scheme (Spain, Portugal, Romania, Bulgaria...) In the midst of current structural reforms in uncompetitive European countries the Commission seems to look favourably upon this cash scheme as a means of helping out SMEs in stagnating economies²⁴. The effect on competitiveness of these changes is, as with many other provisions contained in LAEI, of an incremental sort, both because of its limitations in scope (the 2 million limit) and because of its partial ineffectiveness due to the creation of the aforementioned dual system.

²³ Bunea-Bontas, C.M., "VAT Cash Accounting Scheme in Romania", Pitesti University, 2013, p. 77-83

Available at:

http://www.fse.tibiscus.ro/anale/Lucrari2013/Lucrari_vol_XIX_2013_012.pdf (Last access: 7 may 2014, 9:31 am)

²⁴ See "VAT. A Study of Methods of Taxing Financial and Insurance Services", Ernst and Young for the European Commission, 1996. On the specific issue of VAT on financial services and insurance the cash scheme is viewed as an effective one as early as in 1996: [study of Methods of Taxing Financial and Insurance Services](#).

3.2 Deduction to innovation reinvestment

One of the features of LAEI is its aim to reinforce research, development and innovation and economic activity related to IT and communications, which are deemed essential to the country's growth and competitiveness²⁵. In a global economy characterised by increasingly integrated markets it is fundamental that the appropriate tax incentives are put in place in order to secure the development of the industries which are projected to have the strongest growth worldwide in the following years. Not being competitive in these areas implies missing out on substantial opportunities of growth and prosperity, and the national economy as a whole being comparatively left behind by other economies.

Hence, the Law should give rise to high levels of investment in innovation and technological development through an attractive tax legislation as this area of the market represents one of the most important sources of corporate wealth²⁶. In this sense, Article 26 Uno LAEI has amended art. 44. 2 and 3 of the Corporation Tax Act²⁷ on tax treatment of certain innovation activities. Whilst this article may seem a somewhat incidental provision inside LAEI, its causing effects are considerably relevant to Spanish economy due to the impact it has on R+D and other innovative activities.

The provision to which we refer states that "deductions for activities and development and technological innovation [ex art. 35 Corporation Tax Act], [...] generated in tax periods subsequent to January 1, 2013 shall qualify for a discount of 20% thereof"²⁸.

However, the Act provides certain additional limitations such as the requirement that the amount of technological innovation activity does not exceed one million Euros per year and that the amount of the deduction may not exceed three million Euros per year. These limitations shall apply to the entire group of companies²⁹.

²⁵ Explanatory Memorandum LAEI.

²⁶ Explanatory Memorandum LAEI, COTEC Report, CES Report and other relevant documents insist to increase investment in this area.

²⁷ Another important introduction into the law on Corporate tax is the reduced rate (15% up to 300.000€ and 20% for the rest) for newly created entities. Because this is a temporary settlement a detailed analysis of its effects is not deemed essential given the scope of this paper. The proper detailed analysis should come when the expected tax reform is enacted. For now, the Government's attitude towards the conclusions of the Lagares Report should not spur too much optimism.

²⁸ Together may not exceed 35 percent of the total tax liability net of deductions to avoid domestic and international double taxation and subsidies. However, the limit increases to 60 percent when the amount of the deduction provided for in Articles 35 and 36 (corresponding to expenses and investments made in the tax period itself) exceed 10 percent of the total tax liability, net of deductions to avoid domestic and international double taxation and subsidies.

²⁹ Nevertheless, this provision is subject to the specifications that article 42 and 43 of the Spanish Commercial Code establishes for the group of companies. In this sense, the ruler avoids regulate more precisely concerning the regime that would be applied to the group of companies in an international and European level.

The law-giver has intended to constrain companies that spend part of their budget in innovation to reinvest in the course of a year "from the end of the tax period in which the deduction was generated without [...] has been application object" as a counterpart to the incentive. Moreover, the law requires that no changes to the workforce occur from the end of the tax period in which any deduction generated until 24 months later.

The criterium used by the legislator is keeping the average number workers of the entity during two years after the investment, without possibility of reducing the workforce³⁰.

Regardless of how the legislator has introduced incentives for investors in R+D, technological and innovative activities are key aspects of the new business culture that the Law intends to introduce. Hence, a tax benefit recorded in the conduct of such activities is appropriate for its purposes.

When talking about innovation we should firstly consider the main technologies that are taking the most of international investment in the field: robotics and artificial intelligence have been a growing investment trend during the last decade, both private and public sourced³¹. The tendency seems to be growing according to the latest movements in the technology market³². Hence, Spanish legislator is moving a step forward by protecting the potential collateral social harms that the disruption of robotics can create in terms of job automation when prohibiting changes in the workforce for 24 months after the investment.

Nevertheless, the concern of the Spanish legislator shown in the aforementioned article should be relativized. Despite the possibility that robotics could open new markets in Spain³³ it should be taken into account that "small and medium-sized companies are between 20 and 200 times less likely to use robots than large ones in similar sectors"³⁴.

With this said, it should be noted that the typical enterprise in Spain is the referred small or medium-sized (99,88% of the Spanish business network is based on so-called PYME's)³⁵.

³⁰ Additionally, the Law requires that the company has benefited from the provisions of this rule "to allocate an equivalent deduction amount paid or applied" in related technological research and innovation activities. Moreover, letter d) of the amended article 44.2 requires a reasoned report.

³¹ Studies have shown that robotics and similar disruptive technologies are the key for market in the 21st century. For a more detailed insight read Ross, L. "Global investment activities in robotics, nanotechnology and energy", Robotics and Biomimetics (ROBIO). 2005 IEEE

³² Big internet players are taking positions in the robotics market by investing in major robotics manufacturers. It is to say that Google has recently acquired London-based artificial intelligence Deepmind. On the other hand, Facebook has acquired -among others- the british drone firm Ascenta.

³³ There are already different institutions and companies that join forces around HispaRob, an initiative from the Spanish Ministry of Science and Innovation. Some of them are: Adele, Indra, DumiRobótica or Robotnik. Find the members in the next link: <http://www.hisparob.es/?q=entidades> (Last access: 25 April 2014, 8:41)

³⁴ See "A mighty contest, Job destruction by robots could outweigh creation" The Economist, special edition on robotics

³⁵ See "Retrato de las PYME 2014" Subdirección General de Apoyo a la PYME, Ministerio de Industria, Energía y Turismo, 2014

Consequently, the disruption of these technologies in southern Europe may have to wait for a while despite the fact that internationally-reputed companies and robotics projects have been founded there³⁶.

However, the labour threats and challenges coming from different AI agents will not necessarily mean massive job destruction. In fact, education³⁷ will play an important role in the recycling of a generation of unskilled young professionals that could be set apart during disruptive technologies' mainstreaming phase³⁸. Hence, a two-year period of training while employed is an adequate social measure that may avoid social crisis.

Nevertheless, it is widely recognized that robotics and automation will not substitute workers but they will be better at supporting tasks³⁹.

Hence, the two years compulsory job maintenance is not just a good provision for prospective generalized job crisis but it might be that the industry is at too early a stage to receive such advanced regulation. Moreover, expert reports show a decreasing tendency in Spanish innovation industry: as an example, Madrid and Cataluña, the two most innovative Autonomous Communities in Spain have reduced its market volume during past years⁴⁰. This fact implies the need to resort to international investors having high budget profile for innovative investments.

Complementarily, several legal issues remain unregulated by Spanish laws. For instance, those concerning the disruption of mass-automation that will arise from investments under the

³⁶ Arduino is an Italian open source prototyping platform which is changing the way society understands electronics. For a major understanding see its founder talk at TED: https://www.ted.com/talks/massimo_banzi_how_arduino_is_open_sourcing_imagination (Last access: 25 April 2014, 9:20am)

³⁷ Title I, Chapter I of the Law could be an important complement for the scenario that provision 26 wants to avoid by regulating several conducts that companies should adopt towards their employees.

³⁸ Scholars suggest that when facing the so-called "second machine revolution" some problems could arise in terms of technological gap between society. Being this said, young unskilled professionals will be threaten by this technology as they will not be able to provide a qualified service to the market what can create a long term misery all over the world. For a deep understanding on the topic read Sachs, J; Kotlikoff, L "Smart Machines and Long-Term misery" NBER Working Paper No. 18629, Issued in December 2012

³⁹ See Informe COTEC, 2013, on "Special Report: Manufacturing and innovation" The Economist, april 21st, 2012. Additionally, see Takayama, L; Ju W; Nass, C. "Beyond Dirty, Dangerous and Dull: What Everyday People Think Robots Should Do", IEEE, Conference on Human-robot interaction, p. 25-32

⁴⁰ There were 77.366 businesses in the IT sector in 2010. It should be stated that most of IT companies are located in Catalonia and Madrid. Nevertheless, the exact number of companies in each Autonomous Community may vary as the numbers in the different official reports differ considerably. While Spanish Government reports around 3000 IT companies in Catalonia, and around 9000 for Madrid, respective regional reports identify more than 6000 for both regions. For a comparative read: "Informe del Sector de las Telecomunicaciones, las Tecnologías de la Información y de los Contenidos en España" (2013 Edition) Ministerio de Industria, Tecnología y Diseño-Ontsi; "Sector TIC y afines en la Comunidad de Madrid, Análisis, perspectivas y propuestas de acción para potenciar el Sector TIC", Comunidad de Madrid, 2013; "Baròmetre CTecno", Generalitat de Catalunya-Pentec, 2013 .

tax benefit introduced by the aforementioned article. In this sense, a change in company processes (by substituting people by machines) can lead moving expenditures from payroll to capital. This, given the business structures, could lead to a change in tax paradigms⁴¹.

Furthermore, when talking about innovation we have to take into account the costs of high tech R+D (especially when facing automation technologies). The costs of these technologies are considered as high valuable and normally require specific financing structure⁴². Nonetheless, this type of investment is not being remarkably developed in Spain. R+D investments in Spain for 2010 represented 0.72% of the GDP while OCDE members committed 1.58% and UE-27 1.17%⁴³. So, the provision contained in article 26 may be partially useful but not adequate to the market interests. However, the limitation of the tax benefits on the investment on technology and innovation is not a good solution to the problem Spain is facing: the most innovative companies are the ones providing R+D Services (i.e. TIC companies or telecom). The medium company in both industry invests more than 1.000.000€ in innovation⁴⁴ which is clearly above the limit imposed by art. 44 TRLIS.

As it has been said, Spain's innovative companies suffered a devolution⁴⁴ that has been offset by internationalization⁴⁵. Nevertheless, R+D has been a key aspect for the companies that have internationalized their activities: there is a positive tendency in companies that are introducing international factors in their processes. Data shows that from 2006 to 2008 R+D investment grew from 39.2 EUM points to 57.4 starting to decrease in 2009⁴⁶. Hence, the measures boosting R+D investment are needed, due to the negative tendency of last years and also to compensate the United Kingdom, France and Germany's advantageous position by concentrating 104.476 million Euros in R+D investments representing 68, 2% of EU companies' investments in innovation⁴⁷.

The solution rests in international investment, and the law does little to incentivize it by creating a narrow tax benefit for R+D activities.

⁴¹ It can be considered an uncertain problem that cannot be required to be regulated by the Ley 14/2013 despite scholars have suggested it for other jurisdictions. Calo, R "Robotics and the new cyberlaw" *California Law Review*, Vol. 103, 2015. 2014, p. 125

⁴² See Aghion, P.; Bond, S.; Klemm, A.; Marinescu, I. "Technology and Financial Structure: are innovative firms different?", *Journal of the European Economic Association* 2(2-3): 277-288. ("...Firms that report R&D are more likely to raise funds by issuing shares than firms that report no R&D, and this probability increases with R&D intensity. The shares of bank debt and secured debt in total debt are both lower for firms that report R&D compared to those that do not"). Available at: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:3200323> (Last access: April 27th, 21h13)

⁴³ See Informe COTEC 2013, p.93

⁴⁴ Id. at 38

⁴⁵ See "Informe: La internacionalización de la empresa española como factor de competitividad" Consejo Económico y Social, 2012, p. 65-82

⁴⁶ Op. cit., p. 69

⁴⁷ European Commission, "2012 EU Industrial R&D Investment Scoreboard", 2012

Consequently, the legislator has made several mistakes discouraging international investment by (i) establishing a limit for tax benefits that is under the average investment of innovative companies, (ii) establishing unnecessary labour regulation for current situation, as Spanish is an early stage in innovation compared to other neighbour states, (iii) ignoring the development of alternative tax incentives, (iv) creating an excessive counterpart for investors.

3.3 Patent Box

In the same sense, Article 26 Dos LAEI confronts this issue by widening the tax incentive known as patent box, which consists in a substantial reduction of the tax payable on revenues accruing from certain intangible assets. This incentive, which was first put in place in Spain in 2008, is commonplace in many European jurisdictions. In groups of corporations the incentive usually operates by way of creating a corporation which holds the group's intangible assets and collects licensing fees and similar revenues from the rest of the corporations in the group (subject to the duty to document such transactions as regulated in article 16 of the Law on Corporation tax). This allows for an only corporation to concentrate and be taxed at a lower rate for the worldwide produced income on said intangible assets.

The change introduced by law 4/2013 provides for the widening of the reduction of taxable of income deriving from these assets from 50% to 40% (which is equivalent to an effective tax rate of 15% and 12,5%, respectively). This is still somewhat lower to the effective tax rate in other jurisdictions. The UK introduced this benefit altogether in 2013 at an effective tax rate of 10% and the Netherlands apply a 5% tax rate from as early as 2007⁴⁸. Still, it represents a considerable effort.

The deduction is regulated both in terms of the assignor and the assignee, which have to meet certain conditions for the tax benefit to apply. Firstly, the assignor must have born at least 25% of the cost of creation of the intangible asset and the assignee must use it in the development of an economic activity. Secondly, the assignee cannot be a resident in

a tax haven or equivalent outside the EU (within the EU, only where it demonstrates valid economic reasons for it). Moreover, intangible assets which are not included in the corporation's balance sheet will pay tax on 80% of the revenue accrued by its assignment⁴⁹.

Finally, the law draws a distinction between intangible assets related to IT and scientific research and other intangible assets, the latter being excluded from the tax incentive.

⁴⁸ See "European patent box regimes", JATRO-Japan External Trade Organisation, PricewaterhouseCoopers, 2013

⁴⁹ Article 23, Law on Corporations Tax

There is a provision that these operations may be concluded through agreements with the tax authorities. This arrangement, if it is to work effectively in terms of its operation, ought to be very welcome. It is increasingly necessary that, in order to grant sufficient certainty to economic agents with respect to their tax obligations, there should be an agreement between corporations and tax collectors when engaging in complicated transactions. This change in attitude by all agents (mainly tax collectors and corporations) towards a more cooperative and transparent tax system is surely one of the developments that are beginning to unfold and will grow in scope and applications in the future. It is thus an absolutely key factor of international competitiveness in terms of the tax system that these arrangements do provide certainty at a reasonable cost⁵⁰.

3.4 Incentivizing financing businesses: business angels

Article 27 of law 4/2013 finally introduces tax incentives for business angels in Spain.

In the past few years alternative ways of financing entrepreneurial projects that depart from the banking industry altogether have sprouted out and significantly grown in importance⁵¹. Business angels (together with Family, Friends and Fools) are perhaps the most widespread form of financing that are targeted to kinds of projects which, because of some of their features, are not suited for banking financing in the traditional sense.

These are businesses which are at the very beginning of their journey (or are about to embark into an expansion) and normally have a considerable technological component.

Informal venture capital, as it is generally named, is thus a very risky endeavour, but the returns of one single successful project can compensate for many failures. It is easy then to see why the banking industry has failed to grasp and address these funding needs until very recently.

By their very nature business angels (especially when they are organised in networks, as they increasingly are) are particularly well placed to meet the demands of new entrepreneurs. This is true not only because of the risk involved in new projects but also for monitoring and management reasons. The extreme diversity and inherent risk of new projects makes it essential for the investor to carefully look into each specific project and make a prediction of success, as opposed to a bank, which focuses primarily on guarantees and future cash flow. This soft involvement of investors in the management of projects, which sometimes includes the sharing of knowledge and experience, has had business angels been dubbed as ‘smart

⁵⁰ See, further on this topic, “Action plan on Base Erosion and Profit Shifting”, OCDE, 2013

⁵¹ Famously, the first purportedly Business Angel was Frederick Terman, Dean of Engineering at Stanford University, who in 1938 lent 500\$ to two of his students: Bill Hewlett and Fred Packard.

capital'. Another fundamental trait of these investments is that they seek to obtain a return on the medium term, the average time being between 4 and 5 years⁵².

The specific effects of policies in support of this kind of investors remain largely unknown to governments and the public at large. Due to the informal and private nature of the investment it is very difficult to record accurate data on the size of the market, the number of investors involved, and other key factors. Encouragement of these investments has thus been to some extent an act of faith by governments⁵³, although the trend towards the creation of networks is increasingly enabling monitoring of the facts aforementioned. Nonetheless, a strong point has been made in favour of these policies in terms of their returns on public investment⁵⁴. According to a syndicate in Scotland, the gains in personal tax and social security contributions (plus the reduced costs of social services) result in a payback period for the Government of less than one year⁵⁵. In Ireland, investment of 12m€ in 2011 created 344 jobs, with a resulting annual investment of 35.000€ per job. Tax relief related to these jobs will be recovered in a short period⁵⁶.

But the effects aforementioned ought not to be evaluated solely on their quantitative dimension. The fact that these investments highly concentrate in technological and innovative new enterprises (which pay higher salaries) is an additional reason to support them, as a strategic decision aiming to achieve a more competitive economy.

From an international standpoint, the scheme which works best in Europe is the UK Enterprise Investment Scheme (now Seed Enterprise Investment Scheme⁵⁷, SEIS), first introduced as early as 1994⁵⁸. As of today, it grants a 50% deduction on a maximum base of 100.000£ (deduction can be as high as 50.000£). Additionally, no capital gains tax is paid on profits earned on shares held for more than three years. Enacted law 14/2013 compares poorly with this scheme: it confers a 20% deduction on a maximum base of 50.000 (maximum deduction of 10.000€). True, deductions put in place by Autonomous Communities may increase that threshold up to about 20.000€ Still, the result is that such tax break is unlikely to motivate investments which would not have been made otherwise.

⁵² ESBAN, Garrigues, "Propuesta de medidas fiscales de Business Angels en España", Ministerio de Industria, Turismo y Comercio, 2009, p. 15.

⁵³ Mason, C.M. "Public Policy Support for the informal venture capital market in Europe: A critical review", *International Small Business Journal*, vol. 27, 2009, pp. 26-27.

⁵⁴ Evaluation of EU Member States' Business Angel Markets and Policies Final Report, October 2012.

⁵⁵ Based on a discussion with the largest Scottish syndicate, Archangel, as cited in 53 Evaluation of EU Member States' Business Angel Markets and Policies Final report, October 2012. Center for Strategy and Evaluation Services.

⁵⁶ Halo Guide for Business Angel Network (HBAN), April 2012.

⁵⁷ See "EIS & The investor" at HM Revenue & Customs' website:

<http://www.hmrc.gov.uk/eis/part1/1-2.html> (Last Access: 7 may 2014, 9:40 am)

⁵⁸ There is a 20 year difference with the coming into effect of LAEI.

Moreover, the limiting provision that the business angel's participation cannot be higher than 40% incentivises cofounding, perhaps unnecessarily. This provision is confusing in terms of its objectives.

To end with the practical effects of this regime, statistics made available by the Agencia Tributaria⁵⁹ show only 290 companies have filed the necessary declaration last January (modelo 165) in order to benefit from the tax benefit. This figure certainly suggests that the effects of the incentive have not been as important as one might hope or as it was projected.

The conclusions that can be derived from the analysis of this tax relief (and its comparison with similar schemes in other countries) are two-fold. Firstly, (i) the intention and spirit of the provision are in line with the objective of increasing the Spanish economy's competitiveness at a micro level. On the other hand, however, (ii) the limited quantitative scope of the scheme (and the fact that it does not include other tax reliefs, such as a capital gains tax relief) makes it unlikely that it will unlock a great flow of investment.

⁵⁹ See, for further detail, "Declaraciones Presentadas por Internet", Agencia Tributaria, 2014, Available at: http://www.agenciatributaria.es/static_files/AEAT/Contenidos_Comunes/La_Agencia_Tributaria/Tramites_on_Line/Otros_Servicios/ESTADISTICAS/Declaraciones_presentadas_por_Internet/2014/estadinet03032014.pdf (Last Access: 7 may 2014, 9: 35 am)

4. Involving Society

4.1 Incentives for the employment of disabled workers

Law 3/2014 increases the threshold of the deduction on corporate tax for employing people with a disability from a general 6.000€ to 9.000€ for people with a disability of over 33% and 12.000€ for people with a disability of over 65%.

This change must be praised as a step further towards the integration of people with disabilities in our job market (this is a group which has also been hit by the severity of the recession.) Our society needs to shift from a system based on subsidy to a system based on integration, where people with disabilities can develop their potential to the highest possible standard. Institutions like the ONCE have played a role that serves as a model for future developments.

4.2 Changes to Social Security contributions

Law 14/2013 enacts a series of reductions and tax credits on Social Security Contributions. This is a good way of easing liquidity problems for individual entrepreneurs. Moreover, any action reducing payroll taxes' share in the total tax income is in line with the internal devaluation plan that is set to recover the international competitiveness of the Spanish economy. Let us not forget, however, that there is an obvious and ineluctable conflict between the need for flexibility by entrepreneurs in terms of the taxes they pay on the one hand, and the need for fixed incomes (incomes which are safe to a large extent from the effect of economic crises) by the Government⁶⁰ on the other.

Firstly, workers who take on multijobbing will be able to choose the base of their contribution to Social Security among a range, scaling from 50% of established minimum contribution for the first 18 months and 75% of established minimum contribution for the next 18 months up to maximum established contribution in both cases. Similar provisions (less generous) are made for the case where the second job is taken on along with part-time 50% time job⁶¹.

Secondly and more importantly, workers who start being self-employed will enjoy a reduction of 80% over the first 6 months, 50% over the next 6 months and 30% over the following 6

⁶⁰ See "Informe Anual de Recaudación Tributaria", Agencia Tributaria, 2012, P. 9. Contrast with plummeting in Corporate tax collections during the current economic crisis. Available at: http://www.agenciatributaria.es/static_files/AEAT/Estudios/Estadisticas/Informes_Estadisticos/Informes_Anuales_de_Recaudacion_Tributaria/Ejercicio_2012/IART_12.pdf (Last Access: 7 may 2014, 10: 48 am)

⁶¹ See Article 28 law 14/2013.

months. These reductions are calculated multiplying the percentage by the minimum base contribution⁶².

Finally, similar benefits are introduced for workers with a disability over 33% who become self-employed (members of a worker cooperative are included.) This benefit lasts for 5 years.

Again, these changes are welcome as temporary changes but there is still to be a comprehensive review of Social Security contributions in order to lower its share of the tax income. This lowering should be compensated for by the rising of indirect taxes.

5. Keeping it Simple for Entrepreneurs: Administrative Easing

Title IV of LAEI includes a series of changes that try to alleviate the administrative burden on businesses and better the access of SMEs to government contracts. The changes are not of extraordinary importance separately so we shall go over them with relative speediness, so as to evaluate the whole combination.

There is a general statement, hardly retaining any normative nature, whereby the Ministry shall see to it that a series of reviews on the business climate and possible regulatory improvements are carried out. The general principle is established that any government departments or agencies imposing a new administrative burden on corporations will be forced to eliminate at least one other existing burden. It is difficult to foresee how this declaration will become anything more than a declaration of intent.

The compulsory statistics for companies with less than 50 workers employed will roll down to one, and remote surveys will be encouraged.

Article 39 of the law increases the number of corporations which will be allowed to draft and approve the Plan for Safety in the Workplace. Previously only corporations employing less than 10 workers were allowed to do this. Now corporations with up to 25 workers (95,5% of Spanish corporations⁶³) are included into this scheme. This confection of this plan is usually externalised, which means that the many companies will now be able to save that expenditure. It seems reasonable that safety in the workplace be regulated mostly on the basis of individual industries. The obligation of externalising the Safety Plan can be costly and unnecessary for many SMEs.

The law also introduces Electronic Visit books for Inspections by Social Security and the Labour Department. It also introduces into law electronic Powers of Attorney. These are probably too specific matters to be made into law.

⁶² See Article 29 law 14/2013.

⁶³ Data available at: <http://www.ugt.es/actualidad/2013/octubre/d08102013.html> (Last Access: 7 May 2014, 9:41)

Moving on to Government contracts, the law increases the price limitation for concurring without having to go through the classification procedure (a test of creditworthiness) from 350.000 to 500.000€ in the case of building works and from 120.000 to 200.000 in the case of services. Businesses will be allowed to jointly compete for Government contracts. Furthermore, in terms of guarantees, a new possible guarantee for Government contracts is introduced: the partial withholding of payments; and, where deemed appropriate (or being the contract worth less than: 1 million € for building works, and 90.000 for services and supplying contracts), tenderers will be allowed to submit a declaration of responsibility without handing in all documentation from start. Successful tenderers will be asked to submit said documentation. A general rule is introduced that all provisions giving advantage to a previous contractor shall be null and void. Finally, regarding SMEs, terms for surety release and legal termination by the contractor for non-performance are cut down from 12 and 8 months respectively, to 6 months in both cases.

These changes on Government contracts regulations aim at SMEs are sound but not immensely helpful. Much can still be learned from the practices in other countries. On another note, the provision⁶⁴ that any regulation or law giving advantage to previous contractors shall be null and void is striking in its wording. The rule is necessary and very appropriate. But in our constitutional systems invalid laws are unconstitutional rather than null. Even more, it is against the hierarchy of norms in continental law systems to have a law limiting the scope of a subsequent law (unless so provided for specifically in the Constitution).

Finally, to end with actions of administrative easing, more corporations are introduced into the abridged annual accounts scheme (with magnitudes more in line with the EU Accounting Directive 2013/34/EU⁶⁵) and some smaller corporations are excluded from the obligation of auditing their accounts.

6. Financial Measures

6.1 Financing internationalization

As it has been discussed, innovation in Spain has a long way to walk before it can generate an economic engine for the country, both by attracting investors from abroad or by self-financing of investments. Economic growth in the short term is thus not achieved by R+D but by other ways of internationalising the economy: boosting exports, which is also a structural and

⁶⁴ See Article 45 LAEI

⁶⁵ Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF>
(Last Access: 7 May 2014, 10:14 am)

necessary step. But in a shrinking economy, where credit is not available for entrepreneurs and so-called PYMEs (i.e. SMEs), commercial internationalisation rests a difficult milestone for Spanish businesses. So how does the LAEI deal with this matter?

There are various elements that the law modifies and others that are newly created in order to facilitate the goals to which the regulation is committed. The most important aspects to be highlighted are: (i) the modification of “Internationalization Covered Bonds” (ICB, or Cédulas de Internacionalización) -first created by Law 22/2010- and the creation of the so-called “Internationalization Bonds” (IB, or Bonos de Internacionalización)⁶⁶ and the (ii) system of government financial support for the internationalization of companies: Fund for Investment Abroad (FIEX), Fund for Company Internationalization (FIEM) and the Agreement of Mutual Adjustment of Interests (CARI).

6.2 ICBs and IBs⁶⁷

ICB and IB’s are debt securities issued by listed institutions such as banks, the Official Credit Institute (ICO), saving institutions, credit unions and other credit institutions. As we will see, the aim of this type of securities is to incentivize credit lending by financial institutions and to incentivize Spanish companies to internationalize their activities through exports. The main features of ICBs are therefore imbued with the purpose of this financial tool⁶⁸.

In other words, the LAEI is developing ways to boost financing of Spanish companies by securing the refinancing by credit institutions of specific loans and credits (e.g. these must be linked to exporting contracts) or other substitute or replacement assets (up to 5% and 10% of the issued principal) as well as by the existing economic flows generated by any derivative financial instruments linked to the issuance of the debt security⁶⁹.

Deeper into detail, the loans and credits securing these financial instruments must (i) be associated with financing of either export agreements or contracts of Spanish goods and services or to the internationalization of companies residing in Spain or other countries, (ii) have high credit quality⁷⁰ and (iii) be:

⁶⁶ See Title III Ley 14/2013

⁶⁷ See Article 34 and following LAEI

⁶⁸ Both instruments are successors of the mortgage covered bonds that were firstly introduced by the Law 2/1981 and modified by Royal Decree-Law 20/2012. Nevertheless, the first regulation of ICB was introduced by the Law 44/2002, whose article 13 *bis* was repealed by Article 34 of the LAEI.

⁶⁹ For this last collateral pool the Law states that it should be complemented by the conditions of secondary legislation

⁷⁰ The law is inefficient when regulating this subject, particularly when structuring its provisions. Article 34.7 LAEI clarifies that “high credit quality” corresponds to loans and credits that fulfil requirements of article

- a) Granted to central authorities, central banks, regional authorities, local authorities or public European entities, when the borrower is a Spanish public entity.
- b) Granted to central government bodies, central banks, regional governments, local authorities, non-European public entities, MDBs or international organizations.
- c) Secured by personal guarantees⁷¹ provided by central authorities, central banks, regional governments, local authorities, public entity export credit agencies and other of similar agencies acting on behalf a public sector entity, when the guarantor is established inside the European Union.
- d) Secured by personal guarantees provided by central authorities, central banks, regional governments, local authorities, public entity export credit agencies and other similar agencies acting on behalf of a public sector entity, not belonging to the European Union, of MDBs or international organizations.

Particularly, for IBs principal and interests, and additionally to general requirements, it is established that they can be secured by loans and credits granted to businesses associated to exportation agreements of Spanish or third parties goods and services, provided that they receive a maximum 50 per cent on risk weighting, for calculating the minimum equity requirements applicable to credit entities (including loans and credits granted by the ICO to financial institutions, when aforementioned 50 percent risk weighting is met).

ICBs and IBs are then important tools for the Spanish economy's internationalization as they can provide more incentives for credit entities in boosting exportation of goods and services. Refinancing credit entities are therefore good both for businesses and for credit entities. But the speciality of this new tool lies in the created device of securing principal and interests with loans and credits linked to the international activity of Spanish markets.

In this line, the Law seeks to boost investment in these financial instruments by generating a wide list of attractive requisites that move from credit-worthiness of the granted entities to the content of these instruments as well as the features of the new IB.

34.6.c).1 and 3 (described next page as "a" and "c"), or article 34.6.c).2 and 4 (described next page as "b" and "d") provided that borrowers, guarantors or insurers are credit-worthy.

⁷¹ These include credit insurance

Regarding their content, for instance, ICBs cannot be given for more than 70% threshold of the loan or credit granted⁷² and they can be now negotiated in the stock and secondary market. This is an important prudence criterion from a financial standpoint.

On the other hand, IBs discounted value of IB will be at least 2% lower than the discounted value of the affected loans and credits⁷³.

It is therefore a good measure by which the Law pretends to give confidence to the investor by making available the knowledge of the risk taken with the new securities.

Hence, it can be concluded that it opens new financing possibilities to banks - which should have repercussions in businesses - because they offer their funders additional guarantees like the obligation to acquire the own ICB or IB by the issuer in case the quantity exceeds legal limits. Another important feature is the special preference the holder of these securities enjoys, with priority over other credits owed by the issuer⁷⁴ and this preference will be applicable to the situation of bankruptcy.

Nevertheless, it is not clear whether the new IBs are necessary and especially useful to the market due to its weaknesses when comparing it to ICBs as the Law establishes that the IB's present value should be lower, by at least 2 percent, to the updated value of the loans and credits affected, while the legal minimum overcollateralization for ICBs is 43%⁷⁵. Hence, coverage is lower for ICB-holders than for IB-holders, which questions the attractiveness of IBs for bond investors.

In conclusion, it can be said that the goal of provisions concerning ICB and IB is to benefit the financing of Spanish businesses in their process of internationalization.

Hence, risk of this measure's effectiveness lies in the policies of entities and other institutions issuing ICBs and IBs (e.g. ICO) that should implement ways of connecting with all kind of businesses and offering financing equitably and without procedures of dubious quality. Besides the high impact that ICO has on Spanish economy and internationalization, the so-called "ICO-lines" are based on a fully supervised lending by credit institutions.

Hence, there should be questions about the existence of empirical objective criteria on the procedures of supervision and analysis of businesses applying for a credit to avoid

⁷² See Article 34.11 LAEI

⁷³ See Article 34.12 LAEI

⁷⁴ Thus, equates to the provisions of article 1922 of the Civil Code and article 90.1.1 of the Spanish Insolvency Law.

⁷⁵ See "Special Comment: Spanish Covered Bonds, New Export-Finance Bonds Have Weaker Credit Profile Than Existing Export-Finance Covered Bonds, but Introduce Flexibility to Reduce Refinancing Risk", Moody's Spain, October 2013, Spain. Available at: http://www.moodys.com/viewresearchdoc.aspx?docid=PBS_SF344345 (La password access 4 may 2014, 7:23 pm)

partisanship and lack of independence by these credit entities. For these reasons, the provisions around the matter are highly valuable for the Spanish financial market but lack a clear regulation on the role that these institutions should have in minute detail responsibilities, procedures, supervision and other measures granting the real impact of these financial tools.

International expansion through exports is a fundamental challenge and one of a structural nature, notwithstanding the fact it is also crucial (it is being crucial, as a matter of fact) for short-term alleviations and recovery from economic distress. The strategies put in place raise some doubts on matters of detail, especially concerning management of this new set of financial tools. Moreover, additional tax reforms (the ever called for fiscal devaluation) would probably be more effective than some of the quasi quinquenal-plan approach of some of the provisions. The internationalisation of the economy at the SMEs level is an indispensable step in order to have a competitive economy in the future. It is a rich source of innovation for corporations and must be hardly pushed for, to compensate for a flawed historical growth design based on unsustainable internal consumption and demand.

a. Instruments and financial support agencies

The Spanish international economy relies on different support bodies such as the FIEM, FIEX or CARI as well as COFIDES, the above discussed ICO or ICEX. In spite of its importance, the latter have not suffered any major modification under the LAEI. Even though (i) FIEX: LAEI introduces the FIEX aiming for investment in Spanish companies by participating in equity through a public investment fund. Even though the Law talks about temporary and minority participation, this regulation questions the paper of the State in the free market economy⁷⁶ threatening the independence of the Public institutions as it opens the door to “take over the management of the investee company”⁷⁷.

- (i) FIEM: The FIEM is modified under the LAEI⁷⁸ allowing the fund to finance projects of special interest for the Spanish economy through loans and credits or repayable contributions to investment funds boosting internationalisation. On the other hand, the FIEM conducts consulting activities (EVATIC). Nevertheless, activities such as defence, paramilitary or police as well as education, health and nutrition rest excluded from the

⁷⁶ In order to boost investment, the economic resources committed to FIEX could have been alternatively intended for private investment funds or other private initiatives such as Grupo Intercom, Wayra, Mola, SeedRocket, Yuzz, TetuanValley, BBoster, ClickEmprende, SonarVentures, Spain Startup, DAD, Grupo ITnet, Conector Startup Accelerator, among many others.

⁷⁷ See Article 56 LAEI which modifies Article 114 Law 66/1997.

⁷⁸ See Article 57 LAEI which modifies Articles 4, 5.1, 7 and 11 of the Law 11/2010.

scope of FIEM activities. Exceptionally, education, health and nutrition may be included if the activity is strongly linked to high technological content. In this regard the legislator makes little effort in helping Spanish businesses in these areas (which represent a high percentage of the economy⁷⁹) by restricting to technological projects without specifying whether the technology required should be the basis of the business applied to one of the areas or just the means by which the business is conducted⁸⁰. Hence, the regulation risks opening the door to arbitrary credit allocation conflicting with equal treatment enshrined in the Spanish Constitution⁸¹. Besides FIEM's consulting activities, financing management is responsible to the Ministry of Economy and Competitiveness⁸², whose supervision is entrusted to in general terms and the criterion committed to a subsequent statutory regulation.

- (ii) CARI: the Agreement of Mutual Adjustment of Interests is based on a readjustment of the interest of certain credit given by a registered credit entity, by which the ICO assumes the difference between the market costs of a given international operation and the terms established by regulation. If from the credit solvency risks may arise for CARI system, the Commerce Secretary of State may request certain additional guarantees to credit entities participating in the agreement. Moreover, for credits covered by State insurance (CESCE) in more than 95%, interest adjustments on behalf of ICO derived from amounts not paid by the debtor of a loan that are not covered by insurance CESCE, may be cancelled in the event that more than 110 days have elapsed from the date on which it occurred maturity and it remains unpaid. Hence, the CARI system is attractive to

⁷⁹ Food expenditure for 2013 amounted to 101.250m€ For further detail, see "Datos de Consumo en España en 2013", Ministerio de Agricultura, Alimentación y Medio ambiente, 2014

⁸⁰ Strong differences can be identified between companies providing services to, for instance, health sector through Software (SaaS) like the Artificial Intelligence lab IActive and other less emergent technological companies such as the Spanish educational tablets provider Zipy.

⁸¹ See Article 14 Spanish Constitution, 1978

⁸² Through the Commerce Secretary of State and support of agencies such as COFIDES for operations analysis, CESCE for risk valuation and ICO as financial agent.

companies willing to export as it offers financing the export contract through a long-term credit. The credit, as it is being said, has a fix interest rate which makes the measure competitive in the market.

These measures open new doors to financial support to internationalization activities of Spanish businesses. As we can see, the range of actions undertaken open new doors to economic expansion and, in effect, a significant increase in Spanish market structures – something which is required in an internationalized economy-. However, the success of these initiatives depends excessively on the proper functioning of certain public institutions. This may be negative for the Spanish economy in absolute terms, since it does not facilitate the emergence of synergies within the market (by which the Spanish economy is integrated into other international synergies) without intervention but gives a prominent role to institutions. Thus, it appears that the legislator does not seem to understand that economic expansion without direct intervention is possible and that the State can boost economic growth as a facilitator and not as an arbitrator.

7. Other measures

7.1 International Mobility

In a global economy competitiveness is about openness. In the case of Spain, inflows of capital have historically made an essential contribution to economic growth and development in recent decades, as they have compensated for an ever unbalanced trade balance. But the more recent and key race is the race for talent. It is a race that has seen big changes as new actors come into play⁸³ (emerging economies).

LAEI introduces variations by creating a new range of residence permits. The approach is unsystematic in terms of general immigration policy and legislation and the specific provisions will probably have only a limited effect. The regulation does not seem to have been designed in line with a consistent and ambitious strategy on immigration and talent attraction. It seems to have more to do with attracting investment (with no considerations of quality or the nature of such investment) on the short term. Like many other rules in LAEI, this section

⁸³ Strokes, B. “US Falls Behind in Global Race for Talent”, YaleGlobal, October 2011, Available online at: <http://yaleglobal.yale.edu/content/us-falls-behind-global-race-talent> (Last Access: 6 may 2014, 10:00 am)

ends up achieving much less than it proclaims, though the actions taken are generally headed in the right direction.

Some general requirements are established to obtain these permits and subsequent requirements are put in place for each category (investors, entrepreneurs, highly qualified professionals, researchers and intra-corporation movement of workers.) The general requirements are among others: being off age, not having been convicted of any crime recognised in Spanish law, not to appear as undesirable in territories which have an agreement with Spain, an having a health insurance and sufficient financial resources for themselves and their family.

The first category is investors⁸⁵, who in addition to the general requirements must make a significant investment. This investment can consist in: either 2 million € or above in Spanish Government debt or 1 million € or above in Spanish corporations or bank accounts, acquisition of an immovable property in Spain for 500.000€ or above, an entrepreneurial project considered of general interest. A project will be considered of great interest with regards to its creation of jobs, its impact upon a geographic area or the fact that it makes a significant contribution to scientific and technological innovation. Further provisions are made as to how to certify each of these investments.

This visa allows for stays lasting up to a year. In order to acquire an authorization of residence the investor must show the visa (even if it has expired up to 90 days before the application) and prove that he or she has travelled to Spain at least once during the one-year period. The investor must also prove that the initial investment is held on to.

This authorization will last for two years and is renewable.

The second category of visas is the one awarded to entrepreneurs. In order to certify its entrepreneurial activity the entrepreneur must obtain a favourable report from the corresponding administrative body of the national Government. The law defines entrepreneurial activity as that which is innovative and has a special economic interest for Spain (which seems very much like a clause granting an important degree of discretion to officials). Officials will also consider job creation in Spain and, more Article 63.1 law 14/2013 clarifies that the investment can be made through a corporation controlled by the physical person who wishes to obtain the permit.

specifically: the entrepreneur's professional profile, his or her business plan and the innovation, value addition and investment opportunities for the Spanish economy. The investor visa is the most significant one in terms of its effectiveness. It is mainly directed to Chinese and Russian investors. Its effect in the opening up of investment from China (even if only of a personal nature, mainly immovable property) is reportedly being considerable.

Finally, the next articles concern highly qualified individuals and intra-corporation transfer. Highly qualified professionals are defined as managers or highly qualified staff in companies having 250 employees, a volume of operations of over 50 million € or meeting other size conditions or being in a strategic industry. Graduates from prestigious universities and business schools, and managers of entrepreneurial projects having an impact in jobs, a geographical area, or innovation can also benefit from this provision. Other highly qualified individuals are researchers, who are granted the visa both for working at universities and in enterprises and corporations. Concerning incorporation transfers, the law only requires three years of experience and having been in the corporation for more than 3 months.

This set of measures will probably be effective in enabling some additional investment in Spain (especially in the housing market.) However, it is not consistent with a talent and capital attraction overall strategy. In any event, it is sure to have its effect on some investors. It must be recalled that many other European countries have similar provisions (Portugal, Greece, UK, Hungary, Cyprus) so this will not be a hugely differentiating factor.

8. Conclusion

The general conclusion of this review must be that while LAEI enacts some important changes that are steps in the right direction, it conquers much less than it sets out to achieve. More specifically, it fails to grasp the scope and direction of global trends in the international economy. Often, when measures are appropriate, they are late, and thus do not create competitive advantages over other countries, who already have more adapted and effective rules in place. In some provisions, the law lacks a truly ambitious and general mentality, trying to solve short-term problems (a sensible yet insufficient attitude) or channelling immediate flows of investment without a clear consistent strategy.

The global economy is at a tipping point. The impact of new technologies is changing the very names and ideas we use to describe the economy. Consumers are now called users and business increasingly do not concentrate their efforts in selling products, but in solving functions to users. At an ever faster rate, specific applications of the enormous opportunities provided by hard technologies (i.e. the internet and connectivity in general) are seeing the unfolding of a kind of soft technology that is driven by innovation and is the force spurring economic growth in the more advanced societies. In this context, having a set of rules which are as dynamic an updated in their regulation as possible is essential to guarantee the success of an economy. Get emerging economies into the picture and the challenge is obvious. LAEI only partially addresses this challenge and it frequently does so with a somewhat outdated approach.

And, as ever, remember: there's an elephant in the room.

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