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b-solutions

FINAL REPORT BY THE EXPERT

Advice Case: Double personality is a single reality: working in Portugal and paying taxes in Spain due to legal and/or administrative impediments

Advised Entity: European Grouping of Territorial Organisation Duero-Douro EGTC, ES - PT

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I. Description of the Obstacle

The subject under review presents a series of situations faced by the EUROPEAN GROUPING OF TERRITORIAL COOPERATION DUERO – DOURO [AECT Duero-Douro] in the actions developed for the execution of the Spain-Portugal territorial cooperation programmes or projects, with or without Community funding.

We refer, in particular, to the obstacles encountered by AECT Duero-Douro when addressing the series of procedures that any legal person is required to formalise in the **hiring of the professionals who collaborate in the development of the projects** and actions undertaken with a view to achieving the objective of strengthening the economic and social cohesion for which the Grouping was constituted.

- *CONTEXT*

The European Grouping of Territorial Cooperation Duero-Douro was created and constituted under Regulation (EC) No 1082/2006 of the European Parliament and Council of the European Union of 5 July 2006.

The arduous process of its constitution culminated on 16 June 2009 with the publication of its Articles of Association and Regulatory Agreement in the Official Journal of the European Union, following the publication of these documents in the [Portuguese] *Diário da República* (7 March 2009) and [Spanish] *Boletín Oficial del Estado* (21 April 2009).

AECT Duero-Douro consists of 188 public entities located in the NUTS III subregions of Portugal named *Alto Trás-os-Montes*, *Douro*, *Beira Interior Norte* and the Spanish provinces of *Salamanca* and *Zamora*, of which 107 are crossborder municipalities of the provinces of Zamora and Salamanca, 7 municipal councils, 69 Portuguese crossborder parishes, 2 municipal associations, 1 autonomous body and 2 academic entities: the University of Salamanca and Bragança Polytechnic Institute.

AECT Duero-Douro has its own legal personality and, in Spain and Portugal, has the most extensive **legal capacity to act** that the respective States grant; it is non-profit making with its **object being to foster and develop crossborder, transnational and interregional cooperation** among its members, for the purpose of strengthening economic and social cohesion.

The main duties to be carried out by the AECT are the management and implementation of programmes, subprogrammes or initiatives supported by Community funds, for which it may acquire or dispose of movable or immovable assets, **employ personnel** and appear in court as a party.



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As established in the Pursuant to the European Territorial Cooperation Agreement by which AECT Duero-Douro was created, the **applicable legislation** for its correct interpretation and application shall be the **Spanish legislation by virtue of *ius soli* of the registered office of** AECT Duero-Douro located in Trabanca, province of Salamanca (ES). Notwithstanding the above, hermeneutic integration with Community law shall also be drawn on, in conformity with the principle of primacy of European Union, and likewise with Portuguese law which proves to be materially concurrent, and in particular concerning the exercise of national constitutional rights, pursuant to article 15.3, in line with article 2, of the AECT Regulation.

- BACKGROUND

It is evident that for the pursuit of its objectives and the implementation of its activities, AECT Duero-Douro required its own personnel to prepare, start up and develop the necessary territorial cooperation projects.

As established in its articles of association (article 30), the coverage of the staff that are part of AECT Duero-Douro shall seek to foster a balance between the Spanish and Portuguese nationalities, without prejudice to the most scrupulous respect for article 12 of the Treaty establishing the European Community, which prohibits all and any discrimination based on nationality.

The staff of AECT Duero-Douro shall be considered its workforce. The employment contracts shall be formalised in writing, in any of the modes for hiring personnel established in the labour legislation.

The selection of the workforce shall be carried out via procedures that assure the guiding principles for public employment established in article 55 of Law 7/2007, of 12 April, which approves the Basic Statute of Public Employees.

Accordingly, the hiring of staff has presented the AECT, up to date, with the following problems that are perceived as an **obstacle to crossborder mobility** between Spain and Portugal:

1.1. Obtaining of Foreigner Identification Number (NIE)

Citizens of the EU who are related to Spain for reasons of their economic, professional or social interests shall be given, for purposes of identification, a personal, unique and exclusive number, which can be requested in person or through a representative at an Office for Foreigners, Police Station or Consular Office.

The Director of the AECT states that, in the province of Zamora, citizens resident in Portugal who applied for a Foreigner Identification Number (NIE) experience problems in achieving the assignment of this identification number which is required to formalise, among other matters, an employment



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contract and consequent registration in Spanish Social Security. They must do so at the head office of the Government Subdelegation.

We contacted (by telephone and email) the Provincial Brigade of Foreigners and Borders of the Provincial Police Station of Zamora (Av. Requejo no. 12. 49020 – Zamora / Tel: +34 980 50 92 50), the entity indicated by the Ministry of the Interior of the Government of Spain, as the correct entity for the assignment of the Foreigner Identification Number [NIE]. Here, we were sent to the Government Subdelegation in Zamora (Tel: +34 980 75 91 09 / Plaza Constitución 1, 49003 - Zamora).

At the Government Subdelegation of Zamora we were informed that the **application for assignment** of NIE is effectively carried out here and requires the submission of the following documents:

- Standard application form (EX-15), properly completed and signed by the foreigner.
- Original and copy of the complete passport, identity document, travel document or valid registration card.
- Statement of the economic, professional or social reasons justifying the application. This statement should be accompanied by a documental evidence (certificate issued by the employer entity providing details on the formalisation of a future employment contract, certification issued by a bank entity if the NIE is requested for the purpose of opening an account...).

The application dossier is sent to the Provincial Police Station of Zamora where the documentation is analysed and, if it is correct, the NIE is assigned to the applicant.

The attributed NIE is of a temporary nature, being valid for 3 months.

Moreover, they told us that in reality they do not usually assign NIE to non-resident persons but what happens is that people indicate that they are going reside in Spain and should, therefore, request a **European Union Citizen Registration Certificate**.

We made the same query at other Procedural Offices for Foreign Citizens of the General Department for Foreigners and Borders of the province of Salamanca (ES), indicated for the effect on the portal of the National Police, having received different answers to the same question of “procedure and documents required for assignment of Foreigner Identification Number by a Community citizen with residence in Portugal who requests the NIE for reasons of work in Spain”.

We made the same query at various Police Stations of different border municipalities located along the entire Spain-Portugal frontier area (from Galicia to Andalusia), also having received different answers to the same question of “procedure and documents required for assignment of Foreigner



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Identification Number by a Community citizen with residence in Portugal who requests the NIE for reasons of work in Spain”.

1.2. Enrolment and Registration in Social Security

As a consequence of the situation described in the previous section, i.e. that workers who shall be hired by AECT Duero-Douro should request a European Union Citizen Registration Certificate due to having changed their residence from Portugal to Spain, or should only request the assignment of a Foreigner Identification Number (NIE) because they did not change their residence from Portugal to Spain, **we detected a series of implications for the enjoyment of rights and the exercise of obligations with respect to Spanish Social Security, which also entail an obstacle to crossborder labour mobility.**

Both in Spain and in Portugal, the employer entities are duty-bound to inform the corresponding Social Security services of the admission of employees, before the start of the working day (*ES - article 32.3.1 of Royal Decree 84/1996, of 26 January, which approves the General Regulation on registration of companies and affiliation, employee registration and cancellation, and changes to employee data in Social Security*) (*PT - Law 110/2009, of 16 September which regulates the Code of Contribution Regimes of the Social Security Welfare System*).

a) When persons hired by the AECT will carry out their work activity in Spain, they should be registered in the Spanish Social Security system.

If the habitual residence of the hired worker, prior to being hired, was in Portugal and this worker establishes a new residence in Spain driven by the assignment of the NIE and issuance of the **European Union Citizen Registration Certificate**, by formalising her/his registration in the Spanish Social Security this produces undesirable implications for the exercise of rights and obligations inherent to Social Security benefits in Portugal.

b) When persons hired by the AECT will carry out their work activity in Portugal, they should be registered in the Portuguese Social Security system.

As in the previous situation, if the habitual residence of the hired worker, prior to being hired, was in Spain and this worker establishes a new residence in Portugal solely to formalise her/his registration in the Portuguese Social Security system, also in this case, this change of residence (from Spain to Portugal) has undesirable implications for the exercise of rights and obligations inherent to Social Security benefits in Spain.

c) When AECT Duero-Douro, with registered office in Salamanca (ES), hires personnel to carry out any activity in Portugal it must inform the Social Security of this country of the start of the employment relations.



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In order to undertake this procedure, the AECT should be constituted in this country as a foreign entity without permanent establishment and register at the “*National Register of Legal Persons*” where a *Legal Person Taxpayer Number* shall be assigned to it.

Based on this Taxpayer Number that identifies the AECT in Portugal, the AECT can hire personnel in Portugal and register them in the Portuguese Social Security system.

Obviously, this Taxpayer Number that identifies the AECT in Portugal is different from the Taxpayer Number that identifies the AECT in Spain. Therefore, we are faced with the same legal person with two different identification numbers (in Spain and in Portugal).

This implies, among other effects, that when AECT Duero-Douro is the beneficiary of an economic subsidy due to having some project under the name and identification of a particular Taxpayer Number, it cannot impute expenditure made under another Taxpayer Number.

1.3. Taxation of the Worker

Once again, as a consequence of the situation described in the section 1.2., i.e. that workers who will be hired by AECT Duero-Douro should request a European Union Citizen Registration Certificate because they changed their residence from Portugal to Spain, or should only request the assignment of a Foreigner Identification Number (NIE) because they did not change their residence from Portugal to Spain, **we detected a series of tax implications in Spain and/or Portugal, which also entail an obstacle to crossborder labour mobility.**

The income from work received by a person resident in Spain is subject to Income Tax which is personal and direct, being applicable to the income of natural persons pursuant to the nature of the income and the personal and family circumstances. (Law 35/2006, of 28 November 2006).

When income from work is received by a person not resident in Spain, Income Tax of Non-Residents is applicable instead (Legislative Royal Decree 5/2004, of 5 March, which approves the consolidated text of the Law on Income Tax of Non-Residents and Royal Decree 1776/2004, of 30 July, which approves the Regulation on Income Tax of Non-Residents).

In being considered resident entails acquiring the condition of taxpayer for purposes of Personal Income Tax (IRPF) and the exclusion of the application of the rules of Income Tax of Non-Residents (IRNR), which are precisely applicable to non-resident natural persons.

Likewise, the income received by a person resident in Portugal is subject to Personal Income Tax (IRS) (Decree-Law 442-A/88, of 30 November).



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Well, regarding the possibility of being taxed in Spain and in Portugal, both countries have endorsed an Agreement **to avoid double taxation and prevent tax evasion concerning Income Tax**. The Portuguese text is recognised in the Resolution of the Assembly of the Republic 6/95, of 28 January - Diário da República – I Series A, number 24 of 28/01/95 and the Spanish is published **in the Boletín Oficial del Estado** of 7 November 1995.)

When the AECT hires personnel with habitual residence in Portugal and there is a change of residence to Spain (as indicated above) this produces undesirable situations in the taxation of the worker.

II. Indication of the Legal/Administrative Provisions causing the Obstacle

Article 21.1 of the Treaty on the Functioning of the European Union establishes that *“Every citizen of the Union shall have the right to move and reside freely within the territory of*

the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”.

II. 1. Obtaining of Foreigner Identification Number (NIE)

The citizens of any country of the European Union who wish to work in Spain can choose to establish their residence in Spain or continue living in their country of origin (or another).

In what follows we shall explain how they should proceed in each of these situations.

Pursuant to article 1.1 of Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration (hereinafter Law on Foreigners), foreigners are considered all persons who *“do not have Spanish nationality”*.

In Spain, foreigners can be classified into 2 major groups:

- 1) Non-EU foreigners**, subject to the general regime for foreigners.
- 2) EU foreigners**, subject to the Community regime.

The **Community regime** is established by Royal Decree 240/2007, of 16 February, on the entrance, free movement and residence in Spain of citizens of Member States of the European Union and other States which are parties to the Agreement on the European Economic Area (in the successive Royal Decree 240/2007), which transposes Directive 2004/38/EC of the European



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Parliament and Council of 29 April 2004 relative to the right of EU citizens and the members of their families to free movement and residence within the territory of the Member States.. In turn, Directive 2004/38/EC and Royal Decree 240/2007 establish the right to freedom of movement and residence foreseen in article 21.1 of the Treaty on the Functioning of the European Union (hereinafter TFUE), which was enshrined as follows:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”.

The main **rights** of those who are subject to the Community regime are freedom to “**enter, leave, move and reside in Spanish territory**” (article 3.1 of Royal Decree 240/2007).

Likewise, these persons “*have the right to **access any activity, both as employees and self-employed, provision of services or pursuit of education, under the same conditions as the Spanish***” (article 3.2 of Royal Decree 240/2007), i.e. that in principle they have the full right to work.

- **Residence in Spain and application for the European Union Citizen Registration Certificate.**

In the light of article 3.3 of Royal Decree 240/2007, citizens of the EU and family members subject to the Community regime “*who wish to **remain or establish their residence in Spain for more than 3 months must apply for a registration certificate or a residence card of a family member of an EU citizen***”, respectively.

EU citizens are “*obliged to apply in person at the office for foreigners of the province in which they wish to remain or establish their residence or, in its absence, at the corresponding Police Station, for their registration in the Central Register of Foreigners*” (article 7.5 Royal Decree 240/2007).

The time limit for application is 3 months counted from their entry into Spain. Once the application has been submitted, “*a registration certificate shall be issued immediately containing the name, nationality and domicile of the registered person, **this person's foreigner identification number (NIE)**, and the registration date*” (article 7.5 Royal Decree 240/2007).

The right to free movement and residence of EU citizens and their family members is not absolute. Hence, for EU citizens and their family members to be able to reside for more than 3 months in Spain, they are required to be in any of these situations:

- a) Be **employee or self-employed** in Spain; or
- b) **Possess**, for their person and their family members, **sufficient resources** to not be transformed into a burden for social welfare in Spain during their period of residence, as well as **health insurance covering all risks in Spain**; or
- c) Be **registered in a public or private centre, for the main purpose of pursuing education, and have health insurance covering all risks in Spain** and assure the competent national authority that the person possesses **sufficient resources for her/himself and the members of her/his**



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family to not be transformed into a burden for social welfare in the Spanish State during their period of residence (article 7.1.a), b) and c) of Royal Decree 240/2007).

Pursuant to article 7.6 of Royal Decree 240/2007, EU citizens should submit together with the **registration certificate application**, *“the applicant's passport or national identity document which must be valid and in force, as well as the **documentation confirming** compliance with the established application requirements”* in the aforesaid royal decree.

The documentation confirming compliance with the established requirements is regulated in article 3.2 of Order PRE/1490/2012, which stipulates the following:

*a) **Employees must provide a statement of employment by the employer or an employment certificate.** These documents must include at least the data relative to the name and address of the company, tax identification and social security account number. In any case, the following shall be accepted: submission of the employment contract registered at the corresponding Public Employment Service or registration document, or situation equivalent to registration, under the corresponding Social Security system, although this documentation does not need to be provided if the interested party consents to the verification of these data in the Files of the General Treasury of the Social Security system.*

*b) **Self-employed workers** must provide proof that they are effectively self-employed.*

- **Non-Residence in Spain and application for Foreigner Identification Number (NIE)**

Foreigners who, due to their economic, professional or social interests, are related to Spain shall be given, for purposes of identification, a **personal, unique and exclusive number**, of sequential nature.

The personal number shall be the **identifier of the foreigner** which should feature in all the documents issued or processed, as well as on stamps in this person's identity card or passport.

The following applications shall be accepted for the assignment of NIE for reasons of economic, professional or social interests:

- a. Those submitted in Spain in person by the interested party,
- b. Those submitted in Spain through a representative,
- c. Those submitted at Spanish Diplomatic Representations or Consular Offices based in the country of residence of the applicant, corresponding to their place of residence.

For the assignment of the aforesaid number, the following documents must be provided:

- Standard application form (EX-15), properly completed and signed by the foreigner.
- Original and copy of the complete passport, identity document, travel document or valid registration card.
- **Statement** of the economic, professional or social reasons justifying the application.

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EX-15

Solicitud de Número de Identidad de Extranjero (NIE) y Certificados (R.D. 400/04 y R.D. 557/2011)

España por medio de registro

Nombre y apellidos del titular:

1) DATOS DEL EXTRANJERO/A

PASAPORTE: _____ N.I.E.: _____

1er Apellido: _____ 2º Apellido: _____ Sexo: M F

Fecha de nacimiento: ____/____/____ Lugar: _____ País: _____

Nacionalidad: _____ Estado civil: S C V D S

Nombre de padre: _____ Nombre de la madre: _____

Domicilio de residencia: _____ Nº: _____ Piso: _____

Localidad: _____ C.P.: _____ Provincia: _____

Teléfono móvil: _____ E-mail: _____

Representante legal, en su caso: _____ DNI/NIE/PAS: _____ Título: _____

2) DATOS DEL REPRESENTANTE A EFECTOS DE PRESENTACIÓN DE LA SOLICITUD⁽¹⁾

Nombre/Razón Social: _____ DNI/NIE/PAS: _____

Domicilio de residencia: _____ Nº: _____ Piso: _____

Localidad: _____ C.P.: _____ Provincia: _____

Teléfono móvil: _____ E-mail: _____

Representante legal, en su caso: _____ DNI/NIE/PAS: _____ Título: _____

3) DOMICILIO A EFECTOS DE NOTIFICACIONES

Nombre/Razón Social: _____ DNI/NIE/PAS: _____

Domicilio de residencia: _____ Nº: _____ Piso: _____

Localidad: _____ C.P.: _____ Provincia: _____

Teléfono móvil: _____ E-mail: _____

4) DATOS RELATIVOS A LA SOLICITUD⁽²⁾

4.1. TIPO DE DOCUMENTO (art. 206)

NÚMERO DE IDENTIDAD DE EXTRANJERO (NIE) CERTIFICADO

De residente
 De no residente

4.2. MOTIVOS

Por intereses económicos Por intereses profesionales Por intereses sociales

(Especificar) _____

4.3. LUGAR DE PRESENTACIÓN

Oficina de Extranjería Comisaría de Policía Oficina Com.

4.4. SITUACIÓN EN ESPAÑA⁽³⁾

Estancia Residencia

NO CONSENTO la consulta sobre mis datos y documentos que se hallen en poder de la Administración (en este caso, deberán aportarse los datos correspondientes) ⁽⁴⁾

..... de de

FIRMA DEL SOLICITANTE (o representante legal, en su caso)

CONSENTO que las comunicaciones y notificaciones se realicen por medios electrónicos ⁽⁵⁾

EU citizens may apply for their NIE in person at the Directorate General of Police or, if they are in Spain at the time of their application, at the Embassy or Honorary Consulates. (**Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration, and Royal Decree 557/2011, of 20 April, which approves the Regulation of Organic Law 4/2000 - Title 13. Chapter I. Article 206**)

Consequently, citizens resident in Portugal who move to Spain in order to work as an employee at a company or entity located in Spain **are not obliged to establish their residence in Spain**. Therefore, if they travel daily or weekly from their residence in Portugal to their work in Spain (crossborder worker), they must apply for the assignment of a **Foreigner Identification Number** and not the issuance of a **European Union Citizen Registration Certificate**.

We highlight the fact that article 7.6 of Royal Decree 240/2007 establishes that EU citizens should submit together with the application for a **Registration Certificate**, “the applicant’s passport or national identity document which must be valid and in force, as well as the **documentation confirming compliance with the established application requirements**”; while article 206.3 of Royal Decree 557/2011 stipulates that the assignment of the **Foreigner Identification Number** requires the “**statement of the motives for which the assignment of this number is requested**”.

We understand that “**confirming**” is different from “**stating**”. The actual NIE assignment application form (included in this report) includes a section (4.2.) that enables stating the motive of the application for the assignment.



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By analogy, if we analyse the procedures that should be carried out by citizens of Spanish nationality who move to Portugal solely for work purposes, without establishing their residence in this country, we observe that the procedure is much simpler, in order to obtain a *Tax Identification Number (NIF)* also referred to as *Taxpayer Number*, attributed by the *Directorate General of Contributions and Taxes*. This identification number of the worker should only be applied for at a *Finance Division*, requiring submission only of the application form and applicant's identity card featuring her/his residence in Spain.

II.2. Enrolment and Registration in Social Security

• II.2.a) Employee in Spain

Article 11.3.a of Regulation (EC) No 883/04 of the European Parliament and Council of 29 April 2004 on the coordination of Social Security systems establishes as a general rule that an employee is subject to the Social Security legislation of the country where this person works.

In the case of a crossborder worker, i.e. a worker who is an employee or self-employed in the territory of a Member State different from that in which the worker resides, who returns to the country of residence every day or at least once a week, the legislation of the Member State in which this person works is applicable (article 1.f and article 11.3.a of Regulation (EC) No 883/04).

Thus, a worker who is resident in Portugal and an employee in Spain shall be subject to the Spanish legislation and should make contributions to the Spanish Social Security system.

Before the worker's start of activity, the employer entity should communicate this worker's registration in the social security account number of the employer entity in the Spanish Social Security system.

Regulation (EC) No 883/2004 of the European Parliament and Council of 29 April 2004 about the coordination of Social Security systems and Regulation (EC) No 987/2009 of the European Parliament and Council of 16 September 2009 are applicable to all legislation relative to Social Security branches related to:

- a) sickness benefits;
- b) maternity and equivalent paternity benefits;
- c) incapacity benefits;
- d) old-age benefits;
- e) survivor benefits;
- f) benefits in respect of work accidents and occupational disease;
- g) death grants;



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- h) unemployment benefits;
- i) early retirement benefits;
- j) benefits for families.

Some of these benefits have **particular provisions subject to the place of residence** of the insured person or of the family members.

Thus, in what concerns benefits in respect of sickness, maternity, paternity, work accidents and occupational diseases, article 17 and following of Regulation (EC) No 883/2004 permits that the **insured person or the members of her/his family who reside in a Member State (Portugal) different from that of the competent Member State (Spain) enjoy in the Member State of residence the benefits in kind** provided, on account of the competent institution (Spanish Social Security), by the institution of the place of residence (Portuguese Social Security), as though they were insured by virtue of this legislation.

Article 42 of Regulation (EC) No 883/2004 establishes that when an insured person or a member of her/his family dies in a Member State different from that of the competent Member State, the death shall be considered to have occurred in the competent Member State. The competent institution shall be obliged to provide death grants payable by virtue of the applicable legislation, although the beneficiary resides in a Member State that is different from that of the competent Member State.

Article 65 of Regulation (EC) No 883/2004 establishes that persons in a situation of total unemployment who, during their last period as an active employee or actively self-employed, resided in a Member State (Portugal) different from that of the competent Member State (Spain) and continue to reside in that Member State or return to that Member State shall make themselves available to the employment services of the Member State of residence (Portugal).

The determination of the place of residence of an employee, therefore, has significant implications with respect to the enjoyment of benefits relative to the Social Security system in this place of residence.

- **II.2.b) Employee in Portugal**

Pursuant to article 11.3.a of Regulation (EC) No 883/04 of the European Parliament and Council of 29 April 2004 on the coordination of Social Security systems, as a general rule, an employee is subject to the Social Security legislation of the country where this person works.

Accordingly, when AECT Duero-Douro, with registered office in Salamanca (ES), hires personnel to carry out any activity in Portugal it must inform the Social Security of this country of the start of the employment relations.



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In order to undertake this procedure, the AECT should be constituted in this country as a foreign entity without permanent establishment and register at the “*National Register of Legal Persons*” where a *Legal Person Taxpayer Number* (NIPC) shall be assigned to it.

Furthermore, the AECT should register in the Portuguese Social Security system (article 21 of Regulation (EC) No 987/2009)

Based on this Taxpayer Number that identifies the AECT in Portugal, the AECT can hire personnel in Portugal and register them in the Portuguese Social Security system, for which it should submit the following documents:

- Registration form
- Individual employment contract concluded between the company and the worker
- Copy of the worker's identity document
- Copy of the agreement concluded between the company and the representative (natural or legal person with residence for tax purposes in Portugal) by virtue of which the latter undertakes to comply with the corresponding Social Security obligations to the company.

Obviously, this Taxpayer Number that identifies AECT Duero-Douro in Portugal is different from the Taxpayer Number that identifies the AECT in Spain. Therefore, we are faced with a single entity represented by two different identification numbers (in Spain and in Portugal).

This implies, among other effects, that when AECT Duero-Douro is the beneficiary of an economic subsidy due to having some project under the name and identification of a particular Taxpayer Number, it cannot impute expenditure made under another Taxpayer Number.

Moreover, the procedures that must be carried out are complicated and could have undesirable tax implications for the entity.

II.3. Taxation of the Personnel

The income from work received by a person **resident** in Spain is subject to Income Tax which is personal and direct, being applicable to the income of natural persons pursuant to the nature of the income and the personal and family circumstances. (Law 35/2006, of 28 November 2006).

When income from work is received by a person not resident in Spain, Income Tax of Non-Residents is applicable instead (Legislative Royal Decree 5/2004, of 5 March, which approves the consolidated



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text of the Law on Income Tax of Non-Residents and Royal Decree 1776/2004, of 30 July, which approves the Regulation on Income Tax of Non-Residents).

In being considered resident entails acquiring the condition of taxpayer for purposes of Personal Income Tax (IRPF) and the exclusion of the application of the rules of Income Tax of Non-Residents (IRNR), which are precisely applicable to non-resident natural persons.

Likewise, the income received by a person resident in Portugal is subject to Personal *Income Tax* (Decree-Law 442-A/88 of 30 November).

Well, regarding the possibility of being taxed in Spain and in Portugal, both countries have endorsed an Agreement **to avoid double taxation and prevent tax evasion concerning Income Tax**. (The Portuguese text is recognised in the Resolution of the Assembly of the Republic 6/95, of 28 January - Diário da República – I Series A, number 24 of 28/01/95 and the Spanish is published in the Boletín Oficial del Estado of 7 November 1995.)

Once again, the determination of the worker's place of residence has a significant influence on the taxation to which her/his income from which is submitted.

II.4. Applicable Labour Legislation

Regulation (EC) No 593/2008 of the European Parliament and Council of 17 June 2008 is applicable to the law on contractual obligations (Rome I)

General rule. Article 3: Law chosen by the parties.

Rule applicable to individual employment contract. Article 8:

8.1. An individual employment contract shall be governed by the law chosen by the parties in accordance with article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this article.

8.2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work (*lex loci laboris*).

III. Description of a Possible Solution

III.1. Roadmap to overcome the obstacle to mobility: **Obtaining of Foreigner Identification Number (NIE)**



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Establish **formal contact** with the **Directorate General of Police**, a body dependent on the Ministry of the Interior of the Government of Spain in order to:

- **Request clarification of the procedures to be carried out and the documentation required** for assignment of Foreigner Identification Number (NIE) when requested for professional motives, without the applicant residing in the future for this motive in Spain;
- **Request the adoption of the procedure for processing and documentation required** by the personnel of the **Procedural Offices** for foreign citizens of the **border municipalities of Spain with Portugal**, in particular those handling a larger volume of applications due to being located in the geographic areas in which the highest number of crossborder workers between Spain and Portugal are situated; i.e. for cases in which the application for assignment of NIE comes from a citizen with nationality of any EU country who only wishes to engage in a professional activity in Spain, without establishing residence in Spain for this purpose, the following documentation should be submitted:
 - Standard application form (EX-15), properly completed and signed by the foreigner.
 - Original and copy of the complete passport, identity document;
 - Statement in the specific application form of the economic, profession or social reasons underlying the application, without the need to justify or provide evidence.
- Request the **standardisation of procedures for processing and documentation required and official communication** to all the Procedural Offices for Foreign Citizens.

Once this situation is clarified, the worker can freely take the decision as to where she/he wish to reside, whether in Spain or in Portugal, without endeavouring to select one of the two countries just because the registered office of the entity in which she/he works happens to be based in one of them.

Consequently, the negative implications that could arise from the selection of place of residence in accordance with the workplace and which affect the Social Security benefits and Taxation of the worker would be eliminated.

III.2. Roadmap to overcome the obstacle to mobility: **Obtaining of Legal Person Identification Number (NIPC)**

- Request the EC for Community Funds to consider, in their Call for Proposals, the particularity that the AECTs can operate on both sides of a border and can, as a result, be represented by two different taxpayer numbers, requesting their



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recognition so that expenses incurred can be imputed to either of the identifications representing them;

- Change the Portuguese Social Security legislation for AECTs, since their governing Regulation recognises their legal capacity (article 1.3) and most extensive legal capacity of action that the national legislation of the Member State recognises to legal persons (article 1.4), in both countries the registration of a worker could be done merely by requesting a **social security account number**, without the necessary constitution of the AECT as an entity represented by a taxpayer number that is different from the one already possessed in Spain.

IV. Pre-Assessment of whether the Case could be solved with the European Cross-Border Mechanism

- The Spanish State Public Employment Service (SEPE), through the National Coordination Office of the **EURES Network** (*EUROpean Employment Services*) in coordination with the Public Employment Services of the Autonomous Communities of Castilla y León, Galicia, Extremadura and Andalucía, and the Coordination Offices of their respective Crossborder EURES Services, could ask the Directorate General of Police to adopt a simple procedure common to the entire territory for assignment of the Foreigner Identification Number.
- AECT Duero-Douro could request the technical advisory service on labour matters provided by the EURES Network in Spain which has a EURES adviser in each province, under the Public Employment Service of Castilla y León - ECVL and with the EURES Network in Portugal, with EURES advisers of the *Instituto do Emprego e Formação Profissional-IEFP*, in the North and Centre Regions.
- AECT Duero-Douro could also request the more specific technical advisory service provided by the **EURES Crossborder Services** of Galicia-North Portugal, Andalusia-Algarve and/or Extremadura-Alentejo, all managed jointly by the Public Employment Services of the respective Autonomous Communities and by the *Instituto do Emprego e Formação Profissional*.
- Request the intervention of SOLVIT, the service free of charge of the national managers of EU countries whose goal is to find solutions within a maximum time limit of 10 weeks from the moment that the centre of the country where the problem arises accepts taking charge of it.

V. Other Relevant Aspects to this Case

In reviewing this case, we found and wish to highlight that the determination of the place of residence of an employee has significant implications with respect to the enjoyment of benefits relative to the Social Security system in the country of employment and/or in the country of



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residence, and also on the Taxation of the income received for the work carried out; and hence the importance of the determination of this place of residence.

VI. References and Appendix/Appendices if any

- *Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*
- *Directiva 2004/38/CE del Parlamento Europeo y del Consejo de 29 de abril de 2004 relativa al derecho de los ciudadanos de la Unión y de los miembros de sus familias a circular y residir libremente en el territorio de los Estados miembros*
- *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*
- *Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000*
- *Reglamento CE nº 883/04 del Parlamento Europeo y del Consejo de 29 de abril de 2004 sobre la coordinación de los sistemas de Seguridad Social*
- *Reglamento (CE) de aplicación nº 987/2009 del Parlamento Europeo y del Consejo de 16 de septiembre de 2009*
- *Convenio entre el Reino de España y la República Portuguesa para evitar la doble imposición y prevenir la evasión fiscal en materia de impuestos sobre la renta*
- *Ley 35/2006, de 28 de noviembre de 2006 del Impuesto sobre la Renta de las Personas Físicas*
- *Real Decreto Legislativo 5/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre la Renta de no Residentes*
- *Real Decreto 1776/2004, de 30 de julio, por el que se aprueba el Reglamento del Impuesto sobre la Renta de no Residentes*
- *Decreto-Lei 442-A/88 de 30 de Novembro por el que se aprueba el Código do Imposto sobre o Rendimento das Pessoas Singulares (IRS)*

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