

TEXT OF THE DRAFT LAW ON START-UPS PUBLISHED

The Official Bulletin of the Spanish Parliament has published the text of the Draft Law to promote the start-up ecosystem in Spain (the “**Draft Law on Start-ups**”), which was approved by the Council of Ministers on 10 December. The publication marks the beginning of the passage through parliament of this law, which is expected to be approved by next summer or, at the latest, during the third quarter of 2022.

In this legal briefing we analyse the most important aspects of the Draft Law on Start-ups, although its wording will likely be modified by the Congress and the Senate during its passage through parliament.

1. General aspects:

- *Start-ups* are defined as legal entities, including technology-based companies, that meet the following conditions: (i) they must be a newly-created company or one established no more than five years ago (or seven years ago in the case of the biotechnology, energy, industrial or other sectors to be determined by means of a ministerial order, depending on the state of art of the technology); (ii) they must be headquartered, have their registered office or permanent place of business in Spain and at least 60% of their workforce must have an employment contract in Spain; (iii) they must not have arisen from a merger, spin-off or transformation transaction; (iv) their securities must not be listed on a stock market; (v) they must not distribute or have distributed dividends; (vi) they must be innovative; and (vii) they must not have an annual turnover of more than five million euros.
- In order to be eligible for the benefits and specialities introduced in the Draft Law of Start-ups, a company must be registered as a start-up company in the Commercial Register. Therefore, the *Empresa Nacional de Innovación SME* (ENISA) will be established to accredit the innovative character of companies. As such, a start-up will be considered to be innovative when its purpose is to solve a problem or improve an existing situation by developing products, services or processes that are new or substantially improved compared to the then current state of technology and which therefore carry an implicit risk of technological or industrial failure.

- A start-up will lose its status as a “start-up company” if any of its shareholders has previously been a shareholder in three start-up companies that have benefited from the measures of this law.

2. Corporate and insolvency measures

- The draft law provides for the creation of start-ups in a single step, by issuing a tax identification number, so that the company can complete the other formalities for its incorporation at a later stage. Additionally, the dual registration and notarial procedure currently required to incorporate a limited liability company would be eliminated, since a fully electronic incorporation procedure has been envisaged instead.
- The deadline for the registration of start-up companies and all their corporate registerable acts would be five working days, and if standard articles of association are used, this deadline would be reduced to six working hours following the electronic receipt of the incorporation deed by the Commercial Register.
- Entrepreneurs making use of the standard articles of association adapted to the needs of start-ups and the *Centro de Información y Red de Creación de Empresas* (Business Creation Network and Information Centre)’s online processing system will be exempt from paying notary or registry fees. In addition, the publication of these acts in the Official Bulletin of the Commercial Register will be exempt from the payment of fees.
- Shareholders’ agreements in start-ups in the form of a limited liability company (*sociedad de responsabilidad limitada*) will be registrable and will be published in the register if they do not contain clauses contrary to the applicable law. Similarly, clauses in the articles of association which include an ancillary obligation (*prestación accesoría*) to subscribe to the provisions of shareholders’ agreements in start-ups will be registrable, provided that the content of the agreement is identified in such a way that it is known or identifiable for both current and future shareholders.
- Treasury stock to implement a remuneration plan in start-ups that are limited liability companies (*sociedades de responsabilidad limitada*): the general meeting may authorise the acquisition of treasury stock, up to a maximum of 20% of the capital, for delivery to directors, employees or other collaborators of the company, for the sole purpose of implementing a remuneration plan.
- Until three years have elapsed since their incorporation, start-up companies will not be required to comply with the net equity balances set forth in Spanish law and therefore will not be required to be dissolved and wound-up in the event that, during

such first three years, operative losses cause their net equity to be valued in less than 50% of their registered share capital (provided always that such start-up is not insolvent).

3. Tax measures

- The Draft Law on Start-ups introduces several tax benefits that would be exclusively applicable to those companies that qualify as start-ups according to the requirements set forth therein and provided that such entities are validated as such by the Spanish public body *Empresa Nacional de Innovación, S.A.* (ENISA). Assuming that the current wording of the Draft Law on Start-ups is not amended during its parliamentary passage, these tax benefits would be as follows:
 - (i) The tax rate applicable on Corporate Income Tax (“CIT”) and Non-Resident Income Tax applicable to permanent establishments (“NRIT”) would be of 15% (instead of the general tax rate of 25%) in the first year in which the start-up obtains a positive taxable income, and in the following three tax periods.
 - (ii) No obligation to make instalment payments on CIT or NRIT.
 - (iii) Possibility of deferring the tax debt arising from CIT or NRIT during the first two tax periods in which a positive taxable income is obtained. The deferral would be for a period of 6-12 months, and no delay interest would be accrued.
 - (iv) Special conditions for the application of the Personal Income Tax (“PIT”) exemption regime for income attributable to the delivery of shares to employees or the exercise of stock options:
 - The exemption would be applicable to a maximum amount of EUR 50,000, instead of the generally applicable threshold of EUR 12,000.
 - Additionally, any income exceeding such EUR 50,000 threshold would only be taxed after an exit event occurs, or if a 10-year period elapses (whichever occurs first).

For the application of this exemption regime, it would not be required that all employees of the Start-up receive or are entitled to receive shares as part of their compensation package.

- (v) Amendments to the PIT deduction based on investment in newly established companies (also known as the ‘business angel deduction’):
 - The deduction tax rate would be 50% (instead of the current rate of 30%).
 - The deduction would be applied to a maximum base of EUR 100,000 (instead of the current threshold of EUR 60,000).
 - Shareholders may hold up to 100% of the stake in the start-up together with their close relatives (instead of a maximum 40% stake established for non-start-up companies).
- (vi) Directors of start-ups holding a stake of over 25% of its share capital would be eligible for the inbound expatriate PIT regime.
- The Draft Law on Start-ups also sets out other tax measures applicable to any company or individual, regardless of whether or not they are start-ups:
 - (i) Perhaps the most relevant measure is the regulation of “carried interest”, which is widely used in the venture capital sector, in terms similar to those that the Territory of Vizcaya recently incorporated into its regulations.

Pursuant to the current wording set forth on Draft Law on Start-ups, the amounts received by the directors, managers or employees of venture capital companies, their managers or other group companies will be expressly considered as earned income, although with the right to apply a 50% reduction in PIT. This will effectively bring the level of taxation to the same level as for savings income.

It is important to note that in order for this reduction to be applicable, the venture capital entity must take one of the forms listed in the Draft Law on Start-ups¹.

- (i) Inbound expatriates PIT regime:
 - The number of tax periods prior to the relocation to Spain in which the taxpayer needs to have been a Spanish non-resident is reduced to 5 years (instead of the currently applicable period of 10 years).
 - The regime could also be applied by (i) directors of start-ups (even if they hold a stake higher than 25%), (ii) the children under 25 years of age and the spouse of the taxpayer (provided that certain requirements are met), and (iii) workers who move to Spain to work remotely, even if their employers do not order such relocation (“digital nomads”).
- (ii) The PIT deduction on investment in newly established companies would increase both its deduction percentage (up to 50%) and maximum tax base (up to EUR 100,000), but the stake held in the company by the taxpayer and his/her close relatives shall not exceed 40% (except in the case of start-ups).

¹ Specifically:

- Closed-ended Alternative Investment Funds as defined in Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 falling into one of the following categories:
 - ¹ Entities regulated in Law 22/2014, of 12 November, which regulates venture capital entities, other closed-ended collective investment entities and management companies of closed-ended collective investment entities, and which amends Law 35/2003, of 4 November, on Collective Investment Institutions.
 - ² European venture capital funds regulated in Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.
 - ³ European social entrepreneurship funds regulated in Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, and
 - ⁴ European long-term investment funds regulated in Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.
- Other investment undertakings similar to the above.

- (iv) Several exemptions are included for non-resident individuals related to certain in-kind remunerations.

4. Measures applicable to digital nomads

The Draft Law on Start-ups also includes other measures applicable to those known as “digital nomads”, entrepreneurs or those whose activity allows them to work remotely and change residence frequently, aimed at regulating the residence and activity in Spain of these itinerant professionals, such as:

- Shareholders not resident in Spain will not be required to obtain a foreigner identity number (NIE), and will only be required to obtain a taxpayer identification number (NIF) in order to carry out acts with tax implications, for which an electronic application form will be provided.
- Public authorities would take measures to ensure the equivalence of official documents issued in other countries, such as powers of attorney for tax representatives of non-resident shareholders.
- A set of migration measures will be introduced to facilitate entry and residence including the creation of an (i) international remote working visa; and (ii) international remote working residence permit.

5. Administrative measures

- Measures will be implemented to facilitate public-private collaboration for the creation of innovative start-ups in the university environment (known as spin-offs), as well as initiatives to promote student entrepreneurship.
- There are plans to set up regulated test environments (sandboxes) to test the start-ups’ innovations for a year, in a controlled environment, which will make it possible to assess the usefulness, viability and impact of technological innovations in the different sectors of productive activity.
- There are calls for proposals for the design of innovative solutions that solve the Administration’s problems or requirements in the performance of its functions (innovative public procurement), with special attention to start-ups in rural environments or outside the already consolidated urban innovation clusters.
- Barriers for accessing public aid will be reduced and public authorities will strive to increase the transparency and coherence of the state system of subsidies for innovation-based entrepreneurship, by designating *Puntos de Atención al*

Emprendimiento (Entrepreneurship Assistance Points) and the *Oficina Nacional de Emprendimiento* (National Entrepreneurship Office) as information points for support measures and aid.

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The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 30 December 2021 and Pérez-Llorca does not assume any commitment to update or revise its contents.

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