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The Startups Law

On 22 December, Law 28/2022, of 21 December, on the promotion of the startup ecosystem (the “**Startups Law**”) was published in the Official State Gazette (BOE).

This law, which has been through a long period of development and parliamentary processing, aims to improve entrepreneurship and the attractiveness of Spain for entrepreneurs, and to improve taxation for investors. In this Legal Briefing we will analyse the most important aspects of the Startups Law.

1. General aspects

- Startups are defined as legal entities, including technology-based companies, that cumulatively meet the following conditions:
 - (i) they must be a newly-created company or one registered no more than five years ago (or seven years ago in the case of the biotechnology, energy, industrial or other strategic sectors, or that have designed their own technology entirely in Spain);
 - (ii) they must not have arisen from a merger, spin-off or transformation transaction;
 - (iii) they must not distribute or have distributed dividends (or returns in the case of cooperatives);
 - (iv) they must not be listed on a regulated market;
 - (v) they must be headquartered, have their registered office or permanent place of business in Spain;
 - (vi) at least 60% of their workforce must have an employment contract in Spain (in cooperatives, partners will also be counted for the purposes of this percentage);
 - (vii) they must develop an innovative entrepreneurship project with a scalable business model; and
 - (viii) they must not have an annual turnover of more than €10 million.
- When the company belongs to a group of companies within the meaning of Article 42 of the Commercial Code, the group or each of its constituent companies must meet the requirements
- Companies wishing to take advantage of the benefits and new features introduced by the Startups Law must apply to the Empresa Nacional de Innovación SME, S.A. (ENISA) which will assess both the formal requirements and the innovative and scalable nature of their business model. This innovation can be both product and business innovation. By joint ministerial order, the Ministry of Economic Affairs and Digital Transformation, the Ministry of Industry, Trade and Tourism and the Ministry of Science and Innovation will jointly determine the criteria for assessing these characteristics.

Notwithstanding the above, the analysis of the degree of innovation of the business project and the scalability of the business model will be based on at least the following criteria: the degree

of innovation, the degree of market attractiveness, the phase of the company's life, the business model, competition, the team, the dependence on providers or clients, and clients, among others.

- The company's status as a startup must be registered in the Commercial Register (or Register of Cooperatives) in order for it to be eligible for the benefits and new features of this Law, without prejudice to any checks that the tax authorities may carry out in relation to the company's tax matters.
- In addition, it should be noted that companies founded or managed by themselves or intermediaries, who are not up to date with their tax and Social Security obligations, who have been convicted by final judgement for an offence of mismanagement, criminal insolvency, corporate crime, money laundering, financing terrorism, offences against the Treasury and the Social Security authorities, corruption, bribery, influence peddling, embezzlement of public funds, fraud and extortion or urban planning offences, as well as those declared ineligible for public subsidies or aid, will not be eligible to access the benefits of this law. Nor will those who are no longer eligible to contract with the Administration.

2. Corporate and insolvency measures

- The law provides for the creation of startups 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 has been eliminated and a fully electronic procedure has been envisaged.
- Investors 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.
- Equivalence of documents issued in other countries, such as powers of attorney for representatives of non-resident foreign investors, is encouraged. These may be formalised by a notarial deed or a mandate contract with representation expressly stating the acceptance of tax representation. If the notarial deed has been issued abroad by a foreign notary, its content is not required to be brought into line with Spanish law, with the term 'notary' being understood to mean only career notaries, not consuls or consular officials exercising public trust abroad.
- The deadline for the registration of startup companies and all their corporate acts will be five working days, and if standard articles of association are used, this deadline would be reduced to six business hours following the electronic receipt of the deed by the Commercial Register.
- Shareholders' agreements in startups in the form of a limited liability company will be registrable and will be published in the register if they do not contain clauses contrary to the law. Similarly, clauses in the articles of association which include an ancillary obligation ("*prestación accesoria*") to subscribe to the provisions of shareholders' agreements in startups will be registrable, provided that the content of the agreement is identified in such a way that it is known not only to the shareholders who have signed it but also to future shareholders.
- Treasury stock ("*autocartera*") to implement a remuneration plan in startups that are limited liability companies: the general shareholders' meeting may authorise the acquisition of treasury stock, up to a maximum of 20% of the share capital, to be delivered 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, startup companies will not be liable to be compulsorily wound up for losses that reduce the net equity to less than half of the share capital (provided that it is not appropriate to file for insolvency proceedings).

3. Tax measures

The Startups Law includes various tax benefits, some of which will be applicable exclusively in relation to companies that qualify as startups according to the requirements set out in the Law, and some of which will be applicable generally.

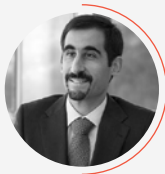
- Tax benefits linked to startups according to the requirements established in the Startups Law and that are accredited by ENISA:
 - » The tax rate applicable on Corporate Income Tax (“**CIT**”) and Non-Resident Income Tax applicable to permanent establishments (“**NRIT**”) would be of 15% (instead of the general tax rate of 25%) in the first year in which the startup obtains a positive taxable income, and in the following three tax periods.
 - » There will be no obligation to make instalment payments on account of CIT or NRIT for the first two periods in which a positive taxable income is obtained.
 - » Companies may defer the tax liability derived from CIT or NRIT during the first two tax periods in which a positive taxable income is obtained without the need to provide guarantees and without accrual of delay interest. The duration of the deferral will be 12 months and six months respectively.
 - » The Startups Law establishes 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 will apply up to a maximum amount of €50,000 per year, instead of the general threshold of €12,000 per year, when the beneficiary is an employee of a startup and is given shares in the company itself. This measure is therefore not applicable to the company’s suppliers.
 - Additionally, when the income obtained exceeds the €50,000 threshold, the excess over that amount will not be taxed at that time, but at a later date. Specifically, the income will be deemed to accrue when the first of the following events occurs: the sale of the shares, the company’s IPO, and the expiry of a period of 10 years from delivery or exercise of shares.
 - Shares delivered to employees of the startup shall be valued for tax purposes at the value of the shares subscribed by an independent third party in the last capital increase (“round”) carried out in the year preceding the year in which the shares are delivered. If there have been no increases in the previous year, they shall be valued at their market value at the time of delivery to the employee.
 - For the application of this exemption regime, it will not be necessary for the shares delivery policy to be applied to all of the company’s employees, but it must only be carried out as part of the company’s general remuneration policy.
 - When the delivery of such shares results from the exercise of share options previously granted to employees, the requirement to qualify as a startup must be met at the time of the option being granted and not at the time of the delivery of the shares.
- The Startups Law also sets out other tax measures applicable to any company or natural person, regardless of whether or not they are startups:
 - » One of the most significant measures introduced by the Startups Law is the regulation of the treatment of carried interest, which is widely used in the venture capital sector:

- Carried interest is confirmed to be taxed as employment income for PIT purposes. However, it is foreseen that only 50% of the income will be integrated, without quantitative limits, provided that certain requirements are met. In this way, the level of taxation will in practice be close to that of savings income¹ and the treatment in common territory will be similar to that established in the chartered territories of Vizcaya and Álava.
 - Income derived both directly and indirectly from stakes, stocks or other rights, including success fees, which grant special economic rights to their beneficiaries, will be considered as such.
 - Venture capital entities must adopt one of the following forms:
 - a) Closed-ended Alternative Investment Funds falling into one of the following categories: (i) entities defined in Law 22/2014, (ii) European venture capital funds (iii) European social entrepreneurship funds and (iv) European long-term investment funds.
 - b) Other investment undertakings similar to the above.
 - The direct or indirect beneficiary of these special rights must be a director, manager or employee of the entities listed above or of their management entities or group entities - this includes operating companies that form part of the group according to the accounting rules.
 - The rights derived from the carried interest should be conditional on the investors obtaining a minimum return defined in the rules or articles of association of the institution.
 - The stakes or rights must be held for a period of at least five years. However, exceptions to this requirement are provided for, such as in the case of early liquidation of the fund manager or transfer on death.
 - In no case may the carried interest originate directly or indirectly from an entity or territory that qualifies as a non-cooperative jurisdiction or with which there are no rules on mutual assistance in the exchange of information.
- » Amendments to the PIT deduction based on investment in newly established companies (also known as the ‘business angel deduction’):
- The deduction will be applied to a maximum base of €100,000 (instead of the current limit of €60,000).
 - The deduction tax rate goes up to 50% (instead of the current rate of 30%).
 - When the investment relates to a company that qualifies as a startup under the Startups Law and has been recognised as such by ENISA, investors may hold up to 100% of the stake in the startup together with close relatives (as opposed to the maximum 40% established for companies that do not qualify as startups).
 - The stakes invested in must be acquired at the company’s incorporation or within five years of its incorporation, or within seven years thereafter (in the case of startups in the biotechnology, energy, industrial or other sectors, depending on the state of the technology).

¹ The 50% exemption would mean that the maximum rate at which carried interest could be taxed would be between 22.5% and 25.5% depending on the recipient’s region of residence, compared to the maximum rate for general income of between 45% and 51% and 28% for savings income.

- » The Startups Law proposes extending the subjective scope of the Inbound expatriates PIT regime (the Beckham 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 five years (instead of the currently established period of 10 years).
 - The regime may also be applied in addition to posting as a consequence of an employment contract, by
 - (i) directors of entities irrespective of their level of shareholding. If the entity is considered a holding company (“*entidad patrimonial*”, article 5.2 of the CIT Law), the director may not hold a shareholding of 25% or more in it;
 - (ii) persons carrying out economic activity in Spain classified as entrepreneurial by ENISA;
 - (iii) highly qualified professionals who provide services to startups or who carry out training, research, development and innovation activities, provided that the income received from these activities exceeds 40% of their total income from employment, business or professional; and
 - (iv) workers who move to Spain to work remotely, even if their employers do not order such a move (“digital nomads”).
 - The taxpayer’s spouse and children under the age of 25 may also apply to this scheme provided that the following conditions are met:
 - a) They move to Spanish territory with the taxpayer or before the end of the first year of application of the regime.
 - b) They acquire tax residence in Spain.
 - c) They do not obtain income classified as being obtained through a permanent establishment and have not been tax residents in Spain in the last five tax periods.
 - d) The sum of the taxable income of the children under 25 years of age and the spouse must be less than that of the taxpayer in each of the tax years.
 - With regard to the content of the scheme itself, it should be noted that it has not undergone any particularly significant changes. In addition to employment income, only income from economic activities classified as an entrepreneurial activity is taxed in Spain. It is also stated that certain income, such as income from the delivery of company shares to employees, will be exempt.
- » The exemptions applicable to non-resident individuals are extended to bring them into line with those applicable to PIT taxpayers in relation to exempt income in kind (i.e. delivery of shares, meal vouchers, childcare vouchers, etc.).

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