Startups Law: new tax regime for startups defined

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The new law has also added flexibility to the special regime for workers assigned abroad, enhanced the tax treatment of carried interest from the management of private equity entities and set out new rules on the obligation to disclose corporate income tax information.

Law 28/2022 of December 21, 2022 promoting the ecosystem for startups (**Startups Law**) was published in the Official State Gazette on December 22, 2022. It contains various tax incentives for startups and their investments and workers, as well as various other measures unrelated to startups. The main tax measures introduced in the law are summarized below:

1. Tax regime for startups and their investors and workers

The incentives summarized below apply generally to startups and to their investors or workers, although in a few cases the incentives have been given a broader definition that takes in other types of entities, as will be explained.

1.1 Definition of startup

Startup companies are defined as legal entities, including tech companies, that simultaneously fulfill the following requirements:

a. It must be a **newly created** company or a company whose creation was registered at the commercial registry or at the competent cooperatives registry not longer than **five years** earlier (**seven years** for biotech, energy, industrial companies or companies in other strategic industries or which have developed their own technology, designed entirely in Spain).

b. The company **must not be the result of a merger, spin-off, change of corporate form or carve-out involving companies** which are not considered to be startups.

c. No **dividends** must be distributed or have been **distributed** (returns, in the case of cooperatives).

d. They must **not** be **listed** on a regulated market.

e. They must have their **principal place of business**, **registered office** or **a permanent establishment** in **Spain**.

f. A number of employees equal to 60% of their **headcount** must have an **employment contract in Spain**. When calculating that percentage at cooperatives their headcount must include worker members and managers who have a contract for services.

g. They must carry out an **innovative entrepreneurship project** which has a scalable business model as defined in the law.

h. If they belong to a **group of companies** within the meaning of article 42 of the Commercial Code, the group or each one of the companies within it must meet the foregoing requirements.

In all cases, the incentives that are provided for startups and their investors will not apply or will cease to apply in the following events:

a. Where the company no longer fulfills any of the foregoing requirements and, in particular, at the end of 5 or 7 years from the creation of the company.

b. Where the existence of the company is terminated before the end of that period.

c. Where the entity is acquired by another entity that is not a startup.

d. Where the company's annual revenues are higher than €10 million.

e. Where an activity is carried on that causes significant environmental damage under Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020.

f. Where the members own (directly or indirectly) at least 5% of its capital or the directors have been convicted by a final judgment for any of the offenses mentioned below as grounds for exclusion from the regime.

Additionally, the benefits under the law cannot be elected by self-created or self-managed startups or startups created or managed by an interposed person (i) which are not current with their tax or social security obligations, (ii) have been convicted by a final judgment for “disloyal” (or improper) administration, criminal insolvency, corporate offenses, money-laundering or terrorist financing offenses, offenses against public finance and the social security system, offenses of misfeasance in public office, bribery in public office, trading in influence, misappropriation of public funds, fraud and extortion or zoning and planning offenses, which have given rise to a ban from obtaining subsidies; or (iii) have been banned from entering into contracts with public authorities.

Elsewhere, the law states that if the notary authorizing the deed, the commercial registrar, or person in charge of the cooperatives registry consider that the company was formed with fraud upon the law, they must pass on this information to the Directorate-General for Legal Certainty and Attestation and the State Tax Agency (and notify the interested party of the reporting of that information). It may therefore be inferred that companies formed with fraud upon the law are not eligible for any of the benefits under the law either.

The law defines in detail the procedure for Empresa Nacional de Innovación SME, S.A. to validate the requirements to be considered a startup and for its mandatory registration at the commercial registry or at the cooperatives registry as applicable.

1.2 Corporate income tax and nonresident income tax for startups

a. **Tax rate**

   Any corporate income taxpayers and nonresident income taxpayers that obtain income through a permanent establishment in Spain and are considered startups are taxable at 15% in the first taxable period in which they obtain taxable income and the following three periods (provided they continue to be considered startups).

b. **Debt deferment**

   They may apply for deferment without providing security for the tax debt, in the first two periods in which they obtain taxable income, provided they are current with the performance of their tax obligations (on the application date) and their self-assessment is filed in the voluntary period.

The tax authorities will grant the deferment for twelve months (in the first taxable period) and six months (in the second taxable period), from the end of the period for payment of the tax debt in the voluntary period.

c. **Exception to the obligation to make prepayments**

Startups will not have to make prepayments in the first two periods in which they obtain taxable income, provided they continue to be considered startups in those periods.

1.3. Personal income tax for employees and investors

1.3.1 Stock options

Starting on January 1, 2023, the tax regime for share-based compensation mechanisms or stock options awarded to startups' employees will have the following benefits:

a. **Valuation.** Startups' shares awarded to workers must be recognized at the value given to the shares in the latest capital increase (subscribed by an independent third party) performed in the year before that in which they are awarded.

   If no capital increase fulfilling these requirements has taken place, they must be recognized at their market value when they are awarded to the worker.

b. **Exemption.** Salary income obtained from the award to active workers, for no consideration or at below the normal market price, of the company's own shares or shares in other companies in the same group, will give entitlement to an annual exemption amounting to €50,000 (compared with the general exemption amounting to €12,000).

   To be eligible for this exemption, it will not be necessary for the offer to be made with the same terms and conditions to all the workers at the company, group or subgroups of companies, instead it simply has to be part of the company's general compensation policy and contribute to employee involvement at the company.

   The requirements to be considered a startup must be fulfilled at the point when the option is granted.

c. **Recognition of non-exempt income.** Any income over and above that exempt amount may be deferred to a period in which either of the following events occur:

   i. the company's capital is admitted for trading at a stock exchange or at any multilateral trading facility, in Spain or elsewhere; or

   ii. the taxpayer ceases to own the share concerned.

   If neither of those events have occurred within 10 years, the income will have to be recognized in the taxable period in which that 10-year period ends.

1.3.2 Tax credit for investment in newly or recently created companies

Starting on January 1, 2023, the personal income tax credit for investors in newly or recently created companies has been enhanced. Its new characteristics are:

a. The tax credit will be equal to 50% (formerly 30%) of amounts paid in the period to subscribe to shares in newly or recently created companies, subject to a maximum tax credit base limit of €100,000 in a year (formerly €60,000).

b. The period for subscribing to shares is increased, generally, from three to five years, running from when the entity is created, and may go up to 7 years for certain categories of startups.

Additionally, if the newly or recently created companies fulfill the requirements to be considered startups, their founding shareholders are eligible for this tax credit regardless of their percentage ownership of the entity.

1.3.3 More flexible rules for workers assigned to Spain

Starting on January 1, 2023, amendments have been made to the tax regime applicable to workers assigned to Spain ("inbound expatriates regime"), designed to attract foreign talent to Spain (with certain specific provisions in relation to work for startups).

This regime is characterized by allowing individuals who acquire their tax residence in Spain to elect to be taxed in the period in which they change residence and the following five taxable periods as nonresident income taxpayers (instead of as personal income taxpayers) with certain specific provisions.

The main new features are as follows:

a. The number of taxable periods **before assignment** to Spain in which the worker must not have been tax resident in Spain has been lowered from ten to five years.

b. The eligibility criteria for the regime have been broadened to include the following cases:

   - **Assignments not ordered by the employer, where the work is performed remotely, through the exclusive use of computer, remote and telecommunications technology and systems.**

     In particular, this requirement will be considered fulfilled where employees have the international remote work visa under Law 14/2013 of September 27, 2013, to support entrepreneurs and their internationalization.

   - **People carrying on an entrepreneurial economic activity in Spain**, under the procedure set out in Law 14/2013 of September 27, 2013.

   - **Highly skilled professionals** providing services to startups or carrying out training, research, development and innovation activities, for which they receive compensation representing in aggregate more than 40% of their total (business, professional or salary) income.

   In these last two cases, the obtaining of income that could be classified as income obtained through a permanent establishment in Spain will not (unlike in the other cases) prevent the ability to apply the regime.

c. The regime continues to be applicable for anyone assigned to Spain as a result of **becoming director of an entity**.

   However, to date it was required for the director not to own the entity; or if the director did have an ownership interest, for it not to be a controlled entity. This restriction has disappeared unless the **entity** is a **holding** company, in which case the director **cannot** have an ownership interest in the entity determining that it is considered a **controlled entity**.

d. The income that will be considered to be obtained in Spain includes not only (as had been the case to date) the taxpayer's salary income (no matter where the work was performed),

but also all of the earnings from the economic activity that is classified as entrepreneurial activity.

e. It is stated that **the salary income in kind** set out in article 14.1.a) of the Revised Nonresident Income Tax Law will be **exempt**; which, as a result of the amendment introduced in the Startups Law itself, means the exempt income under article 42.3 of the Personal Income Tax Law.

f. It allows the special regime to be elected by the **taxpayer's offspring aged under 25** (or at any age if they have a disability) **and their spouse** or, if they are not in a marriage union, the parent of the taxpayer's offspring, if they fulfill the following conditions:

- They must go to Spain with the taxpayer eligible for the special regime or at a later date, provided that the first taxable period in which they are eligible for the regime has not ended.

- They must acquire their tax residence in Spain.

- They must not have been resident in Spain for the five taxable periods before they travel for the assignment and they must not obtain any income that would be classified as obtained through a permanent establishment in Spain (except were an entrepreneurial or highly skilled economic activity is performed in Spain or training, research, development or innovation activities as described in article 93.1 letter b), paragraphs 3 and 4, of the Personal Income Tax Law are carried out).

- The sum of taxpayers' net taxable income figures in each of the taxable periods in which this special regime is applicable must be below the taxpayer's net taxable income that gives rise to eligibility for this special regime.

In these cases, the special regime will be applicable in the successive periods in which these conditions are fulfilled and the regime must also be applicable to the taxpayer.

2. Personal income tax treatment of carried interest

Starting to apply on January 1, 2023, express personal income tax rules have been provided on carried interest, meaning the income obtained from successful management of private equity entities:

a. Closed-ended alternative investment funds, as defined in Directive 2011/61/EU, falling into any of the following categories: (i) private equity entities as defined in article 3 of Law 22/2014 of November 12, 2014, (ii) European venture capital funds, (iii) European social entrepreneurship funds and (iv) European long-term investment funds.

b. Other similar investment schemes to those mentioned.

The specific provisions are as follows:

a. Carried interest is defined expressly in the law as salary income.

b. A 50% portion of this income will be included without applying any exemption or reduction whatsoever, provided the following requirements are fulfilled:

- The economic rights will have to be conditional on the other investors at the entity obtaining a minimum level of profitability defined in the entity's regulations or bylaws.

- The shares or rights must be held for at least five years, unless a transfer following death occurs, or they are liquidated earlier or become null and void due to a change of management entity.

  This requirement will be laid down, as applicable, for the entities owning the shares or rights.

This tax treatment will not be applicable where the special economic rights come directly or indirectly from an entity resident in a country or territory classed as a noncooperative jurisdiction or with which there is legislation on mutual assistance regarding the exchange of tax information.

3. Nonresident income tax treatment of compensation in kind

As mentioned above, it has been stated that salary income that is exempt from personal income tax will be exempt from nonresident income tax (in line with the principle that has already been supported by the Directorate General for Taxes).

4. New corporate income tax disclosure obligation

On December 1, 2021, Directive 2021/2101/EU of 24 November 2021 was published, amending Directive 2013/34/EU as regards the disclosure of corporate income tax information by certain undertakings and branches (see our Alert dated December 3, 2021).

As we reported in our Alert dated October 13, 2022, this obligation has been introduced into the Startups Law by amending Audit Law 22/2015 of July 20, 2015. Specifically, a new additional provision number eleven has been added to this law, which establishes two types of obligation for entities and branches that meet various requirements.

The following table summarizes the obligation and its holders, as well as the exceptions to the obligation and the cases in which, together with the report, it is required to issue a statement on certain elements.

	Obligated parties	Main obligation	Substitute statement	Exclusion from the obligation	Obligation ceases	Non-obligated parties
1.	**Ultimate controlling company of group** a) Subject to Spanish law b) which draws up consolidated financial statements; and c) with a consolidated net revenues figure at the year end, for each of the latest two consecutive fiscal years, higher than **€750,000,000.**	Prepare, publish, file and make accessible: Report on corporate income tax (or similar tax) for the latest of the two consecutive fiscal years.			Where consolidated net revenues at the year end, for each of the latest two consecutive fiscal years, according to the consolidated financial statements, are lower than **€750,000,000.**	a) Companies that do not belong to a group and ultimate controlling companies and their subsidiaries (including their branches) where those companies are established or have their registered office or permanent business activity in the territory of a single member state. b) Businesses not forming part of a group and ultimate controlling companies which publish the report under article 87 of Law 10/2014 (credit institutions), **if they include** information on all their activities and, in the case of ultimate controlling companies, on all the activities of their subsidiaries included in their consolidated financial statements.
2.	**Company not forming part of a group,** whose net revenues at the year end, for each of the latest two consecutive fiscal years, according to its annual financial statements, are higher than **€750,000,000**.				Where its individual net revenues at the year end, for each of the latest two consecutive fiscal years, according to its consolidated financial statements, are lower than €750,000,000.	

	Obligated parties	Main obligation	Substitute statement	Exclusion from the obligation	Obligation ceases	Non-obligated parties
3.	**Subsidiaries** a) Subject to Spanish law, b) controlled by ultimate controlling companies **not subject to the law of an EU member state**, c) with net revenues for each of the latest two consecutive fiscal years, according to their consolidated financial statements, higher than **€750,000,000**. d) not classed as a small entity pursuant to article 3 of the Audit Law.	Publish and make accessible: Report on the consolidated corporate income tax (or similar tax) of the ultimate controlling company, relating to the more recent of the latest two consecutive fiscal years.	If the information is not accessible, the relevant party must be asked to provide it. If the controlling company or company not part of a group does not provide it, the subsidiary **is required to prepare, publish, deposit and make accessible** a report containing all the information in its possession, along with a **STATEMENT** specifying that the parent company has not provided all the information.	Where the **report has already been prepared by an ultimate controlling company** or a company that is not part of a group which is not subject to the law of an EU member state, if that report has **compatible contents** and, in addition: a) It is made publicly accessible, free of charge and in a machine-readable electronic format, on the website of the ultimate controlling company or company that is not part of a group, in one of the official languages of the EU, within a maximum period of 6 months from the end of the fiscal year in which the report is prepared. b) It gives the name and registered office of a single subsidiary, or the name and address of a single branch subject to EU law, which publish the report in accordance with this law.	Where the consolidated net revenues of the ultimate controlling company at the year end, for each of the latest two consecutive fiscal years, according to its consolidated financial statements, are lower than €750,000,000.	
4.	**Branches** a) Set up in Spain b) by companies **not subject to the law of an EU member state**, c) if the company that created it is (i) a subsidiary of a group whose ultimate controlling company is not subject to the law of an EU member state and its consolidated net revenues at the year-end have exceeded, in each of the latest two consecutive fiscal years, €750,000,000, according to the consolidated financial statements; or, (ii) a company not belonging to a group which recorded this level of net revenues in the same fiscal years; d) provided that the ultimate controlling company does not have a subsidiary meeting the requirements referred to in point 3 above; and e) they are not classed as small entities (article 3 of the Audit Law).					
5.	**Subsidiaries and branches not subject to the above obligations** where their sole purpose is to evade these reporting obligations					

Content of the report

The report to be prepared and/or published and made accessible must include information on all the activities of the ultimate controlling company or of the company not belonging to a group, including the activities of all subsidiaries included in the consolidated financial statements for the fiscal year in question.

The following information must be provided:

i. The name of the ultimate controlling company or of the company not belonging to a group, the reporting period, the reporting currency and, if applicable, a list of all subsidiaries included in the consolidated financial statements of the ultimate controlling company for the reporting period that are established in the European Union (EU) or in territories classed as non-cooperative for tax purposes.

ii. A brief description of the nature of its activities.

iii. The number of full-time employees it has.

iv. Its revenues (calculated in the manner stipulated in the law). These revenues must include those deriving from related-party transactions.

v. Income or loss before corporate income tax

vi. Corporate income tax that fell due in the fiscal year on activities relating to that year (not including deferred taxes or provisions for uncertain tax liabilities); and the amount paid in cash (including withholdings paid by other companies relating to payments made to companies and branches within a group).

vii. The amount of reserves at the end of the fiscal year in question.

The information may be reported in accordance with the instructions for disclosure of the information referred to in article 14 of the Corporate Income Tax Regulations and regulated by Order HFP/1978/2016, of December 28, 2016, approving the country-by-country reporting form 231.

The information must be presented separately (i) for each member state (its internal tax territories must be included in aggregate form), and (ii) by presenting separately the information for territories classed as non-cooperative for tax purposes. Information from other tax territories must be presented in aggregate form.

For these purposes, the information must be attributed to the tax territory concerned on the basis of the establishment, the existence of a registered office, or a permanent business activity which, in view of the activities of the group or of the independent entity, may be subject to corporate income tax in that territory.

The information must be submitted using a common template and in machine-readable electronic formats (to be prepared by the European Commission).

The currency used must be the currency in which the consolidated financial statements of the ultimate controlling company or the annual financial statements of the company that is not part of a group are presented. Where the information is not accessible in the case of obliged subsidiaries, the currency used must be that in which the subsidiary publishes its annual financial statements.

Lastly, it must be indicated in the report whether it has been prepared in accordance with the law.

Temporary omissions allowed

Certain items of information may be temporarily omitted where their disclosure may be seriously detrimental to the commercial position of the companies to which the report relates.

However, any omissions must be clearly stated in the report, and an explanation provided of the reasons for them. Any omitted information must also be disclosed in a subsequent report, within not more than five years of its initial omission.

None of the information relating to territories considered non-cooperative for tax purposes may be omitted.

Time periods for publication and access

The report and the statement, if applicable, must be approved and published within six months following the end of the fiscal year to which they relate and must be filed with the commercial registry together with the annual financial statements.

In addition, they must be made accessible to the public free of charge in at least one of the official languages of the EU, within six months from the date of the balance sheet for the fiscal year on which the report is prepared, on the website of the company or the subsidiary/branch (or the company that set it up), as applicable.
The report and the statement (as appropriate) must remain accessible on the relevant website for at least five consecutive years.

Responsibility

The members of the managing bodies of the ultimate controlling companies or of the company that is not part of a group, or those of the subsidiaries or designated persons in branches, as the case may be, will be collectively responsible for ensuring that the report is prepared, published, filed and made accessible in accordance with the provisions of the law.

Entry into force

These obligations will be applicable for fiscal years starting on or after June 22, 2024.

5. Events of exceptional public interest

The term of the following events of exceptional public interest has been extended:

a. “Programa VIII Centenario de la Catedral de Burgos 2022” (Eighth Centenary of Burgos Cathedral Program) which will run from December 1, 2018 through to December 31, 2022.

b. “Alicante 2021. Salida Vuelta al Mundo de Vela” (Leg 1 Start Alicante. Ocean Race), for which the term will run from January 1, 2021 through to December 31, 2024”.