

# *Legal Status*

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# Draft Law on the Creation and Growth of Companies



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The Council of Ministers has approved and sent to the Spanish Parliament the Draft Law on the Creation and Growth of Companies ("*Proyecto de Ley Crea y Crece*"), the text of which was published on 17 December 2021 in the Official Gazette of the Spanish Congress of Deputies. It is expected that the final approval and subsequent entry into force of the aforementioned law will take place this year.

With the aim of improving the business environment, boosting entrepreneurship, promoting an increase in business size and building collaboration and interaction networks, this Draft Law introduces important measures affecting both the regime of incorporation of companies, in particular limited liability companies, and their operational functioning. These measures focus on improving existing regulation, removing obstacles to economic activities, reducing commercial arrears, and financial support for business growth. It is also expected to indirectly promote foreign investment and job creation.

## Reducing the minimum share capital of a limited liability company to one EUR

The main change introduced by the Draft Law is the possibility of creating a limited liability company with only one euro of share capital, as opposed to the three thousand euros required currently.

It is worth noting that this measure does not affect *sociedades anónimas* [public limited companies]. Therefore, the minimum share capital for these companies will continue to be sixty thousand euros.

In order not to leave creditors unprotected in the face of this "under-capitalisation", the Draft Law establishes two measures to safeguard their interests. First, at least 20% of the profit must be allocated to the legal reserve until the sum of the legal reserve and the share capital reaches the amount of three thousand euros. Second, in the event of company liquidation, if the company's assets are insufficient to meet the company's obligations, the shareholders are jointly and severally liable for the difference between the amount of three thousand euros and the amount of the subscribed capital. Finally, it is important to point out that as a result of this measure the regime of *sociedades en formación sucesiva* (a trading company subject to the same rules as a limited liability company, but which does not require the payment of a minimum share capital) is eliminated, since this exceptional regime was designed for companies with a share capital below three thousand euros.

## **Incorporation of companies online**

The Draft Law also introduces reforms to enable the creation of a company in a fast, flexible, and online manner, while at the same time trying to reduce the costs associated with the incorporation of companies.

To this end, it makes use of the telematic processing system of the *Centro de Información y Red de Creación de Empresas* [Centre and Business Creation Network (CIRCE)] and the *Documento Único Electrónico* [Electronic Document (DUE)]. Those interested in setting up a company by these means have to go to one of the *Puntos de Atención al Emprendedor* [Entrepreneur Help Desk]. The CIRCE system reduces the time taken to set up a limited liability company to 24 hours if standardised instruments are used.

The Draft Law also establishes a series of obligations for notaries to encourage the use of this new method of company creation, such as the duty to inform all those who go to their offices to create a limited liability company of the possibility of doing so through the CIRCE system and all the advantages that this entails.

At the European level, there is Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 regarding the use of digital tools and processes in the area of company law. This directive states that it must be possible to create a limited liability company entirely online. With the Draft Law,

the government is attempting to adapt to the requirements of the European Union, without prejudice to the transposition of the directive, which is still pending.

In the absence of the transposition of the above-mentioned directive, the CIRCE system would allow the electronic incorporation of a limited liability company, with the exception of the notarial proceedings, which for the time being will still have to be carried out in person.

## **Other measures in the Draft Law**

Apart from the incorporation of limited liability companies with one euro of share capital, and the possibility to do so online, the Draft Law seeks to introduce other measures to pursue its objectives.

It promotes the use of electronic invoicing with the aim of reducing transaction costs and favouring commercial transparency, and at the same time attempts to reduce arrears in commercial operations. Arrears are indeed a problem that the Draft Law seeks to mitigate. To this end, apart from promoting electronic invoices, it includes compliance with payment deadlines as a requirement for accessing public subsidies. Failure to meet these deadlines will also entail a penalty under the Public Sector Contracts Act. The creation of an *Observatorio Estatal de la Morosidad Privada* [State Observatory on Private Sector Late Payments] is also expected to monitor payment data and promoting good practices in this area.

The Draft Law further aims is to improve cooperation and coordination between

public administrations and reinforce the channels through which companies can complain to the administration when it does not comply with the principles of good economic regulation. Furthermore, the catalogue of activities exempt from licensing is extended, such as those related to cleaning services and market research companies.

Finally, with regard to company financing, alternative financing methods such as crowdfunding and venture capital are promoted. With regard to crowdfunding platforms, the Draft Law also provides that those authorised in Spain may provide their services throughout the European Union without restrictions.

## Conclusions

In the light of the above, the following conclusions can be drawn.

1. First, it should be pointed out that, as mentioned above, the Draft Law is pending ratification by the Spanish Parliament, so it is possible that it may not enter into force if it is not approved, and that substantial modifications may be made to the text.
2. As regards the reduction of the minimum share capital for limited liability companies from three thousand euros to one euro, this may seem like a major change that will encourage the creation of many companies. However, it is advisable to be cautious and see what real effect it will have once the Draft Law enters into force. Doubts also arise as to how this measure will help the growth of Spanish companies, since even if creating a limited liability company for just one euro is allowed, in order to operate successfully such a company will need financing which, in this case, will have to be external. Perhaps what is lacking is that this Draft Law, if ratified by Parliament, be accompanied by an expansion of loans, aid and subsidies dedicated to the growth of small businesses.
3. The agility and flexibility that the option of incorporating a limited liability company online will allow seems to be a key feature of this Draft Law. With this possibility, Spain is also aligning itself with the interests of the European Union in digitising the business environment. The reliable operation of the CIRCE system will be fundamental to achieving these objectives so that users are not forced to give up and continue to opt for the traditional system. In the same vein, it will also be of great importance that the proceedings and steps to incorporate the company electronically are intuitive and easy, since when it comes to carrying out official proceedings online, there are many cases in which they are so complex that users abandon their efforts.
4. Finally, it should be taken into account that the proposed measures in the Draft Law will be supplemented by the provisions of the *Ley de Fomento del Ecosistema de las Empresas Emergentes* [Draft Law for the Promotion of the Start-up Ecosystem], and by the proposed measures for the reform of the Bankruptcy Law.

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# Analysis of the Start-up bill



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The government has formulated a bill for startups. Through this project, important tax measures are incorporated that foresee a very favorable tax regime to attract national and international talent and attract investment through the creation of technology-based start-ups. It will allow Spain to align with the European standards of excellence of the "EU Startups Nations Standard". It is expected to be approved in the following months.

Among the most relevant measures are:

- The reduction of the corporate tax rate from 25% to 15%
- The deferral of the tax debt without guarantees or interest
- Major improvements in the special tax regime for displaced employees to Spanish territory (also known as Beckham Law)
- Improvement of the tax treatment of remuneration based on the grant of stock options

## 1. Improvements to the Corporate Tax Regime

### a) Reduced tax rate of 15%

The bill on Startups establishes a reduced corporate tax rate of 15% applicable to the first year a company obtains profits and the following 3, as long it maintains the status of emerging.

A start-up is any legal person, which meets the following conditions:

- i. Being newly created, if that is not the case, when no more than five years have passed since the date of registration in the Mercantile Registry or seven years in the case of biotechnology, industrial energy and other strategic sectors companies or that have developed their own technology, designed entirely in Spain.
- ii. Not being born/formed from a merger, spin-off or transformation operation. The terms concentration or segregation are included in the above operations.
- iii. Have its registered office or permanent establishment in Spain.
- iv. 60% of the workforce must have an employment contract in Spain
- v. Be an innovative company (provided for in Article 4 of this proposed law)
- vi. Not distributing or having distributed dividends
- vii. Not listed on a regulated market
- viii. If the firm belongs to a group of companies defined in Article 42 of the Commercial Code, the group or each of

the companies that compose it must comply with the requirements above.

### **b) Exemption from making installment payments**

The obligation to make advanced payments for the corporate tax is eliminated in the 2 years after the one in which the taxable base is positive for the first time.

### **c) Deferral of tax debts**

To reduce the tax burden in the first years of a project, tax debts may be postponed. This eliminates the obligation to make advance payments while allowing the deferral of the corporate income tax debt in the first two years since the tax base is positive (for 12 and 6 months, respectively), without the need for guarantees or paying interests for delay.

## **2. Improvement of the personal income tax regime**

### **a) Improvement of the taxation of the delivery of shares or participations**

In the first place, the conditions for the generation of treasury stock in limited liability companies are made more flexible.

And secondly, the amount exempt from taxation of stock options is increased from the current 12,000 euros to 50,000 euros in relation to stock options plans.

### **b) Improvement of the deduction for investment in a new or newly created company**

The maximum deduction base for investment in newly or recently created companies increases to 100,000 euros per year as well as the deduction rate which raises to 50%. Likewise, the period in which the entity is considered newly created is extended, which raises from 3 to 5 years, in general, or to 7 for companies in certain sectors.

### **c) Improvement of the special regime applicable to employees displaced to Spanish territory**

Another of the advances included is in relation to entrepreneurs and remote employees who move to Spanish territory, also known as "digital nomads". These people will have the possibility to take advantage of what we know today as the Beckham Law. In relation to the Beckham Law, keep in mind it is a special tax regime that allows foreigners to pay taxes in the first 6 years as if they were non-tax residents (the arrival year if they exceed 183 days in Spanish territory that same year, plus the following 5). They will be paying a fixed tax rate of 24% on the income obtained in Spain (on the first 600,000 EUR), instead of a progressive tax (19-45%) on income earned worldwide. With the aim of attracting talent, the general requirement of not having been a tax resident in the last 10 years in Spain is reduced to 5 years, which is an improvement on the current situation.

Similarly, in order to make their presence in Spanish territory more attractive, the same possibility is extended to other family members. Specifically, to their spouse or

parent of the children, children under 25 years of age and disabled children.

### **3. Other Improvements**

#### **a) Social Security incentives**

As a social security incentive, what might be worth mentioning is the elimination of the double contribution to Social Security for 3 years in case of holding more than two activities at the same time (working simultaneously for an employer as well as being a freelancer).

#### **b) Bureaucratic incentives**

The procedures are streamlined, so that the creation of a company can be registered by telematic means. It will no longer be mandatory to obtain the foreigners identification number (NIE) for non-resident investors. In this sense, only tax identification numbers (NIF) will be required. Furthermore, there will be no notarial or registration costs.

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## EMPLOYMENT

# Null and Void Dismissal. Scenarios where a company's precautions must be increased.



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This article addresses the situations of those employees who are under special protection in the event of dismissal, as established in Article 108.2 of Law 36/2011, of October 10, 2011, regulating social jurisdiction. In general, we refer to employees with suspended contracts due to maternity, risk during pregnancy, paternity, pregnant women, victims of gender violence, among others, as well as those dismissals that occur in violation of fundamental rights.

The law is clear in terms of the consequences that occur in the event that you communicate a disciplinary or objective dismissal to an employee who is in a protected situation, or the dismissal occurs in violation of fundamental rights. In these cases, if the cause of the dismissal is not justified and accredited, that is to say, if the legal sufficiency to declare the dismissal as fair is not complied with, it will automatically be classified as null and void. It is worth repeating at this point that in these cases there are only two possible judicial pronouncements: fair or null and void.

As regards protected situations, there have been some controversial points, which we consider interesting to highlight in this article. In relation to pregnant women, as a result of the Supreme Court decision of October 17, 2008, it is considered that if the dismissal takes place while the employee is pregnant, it will be null and void directly and automatically if it is not declared fair for other reasons, regardless of whether or not the employer is aware of the pregnancy, given that it is part of the intimate sphere of the person. This aspect is particularly important since the mere proof that the employee is pregnant, even if the company is not aware of it, will determine the nullity of the dismissal in case it is not justified.

A similar case occurs with the dismissal of employees on paternity or maternity leave. The Supreme Court has ruled in numerous judgments (judgment of October 17, 2008, in the judgment of May 11, 2016, rec. 3245/2014 and judgment of November 28, 2017, rec. 3657/2015): *"An employee who is in any of the circumstances contemplated in art. 55. 5,b) of the Workers' Statute , which are subject to special protection, may see her employment contract terminated for just cause duly accredited and communicated, but if such cause does not exist or is not accredited - which, legally, is the same thing, the dismissal cannot be declared fair; but neither can it be declared unfair; necessarily, it must be declared null and void, which, has a protective effect superior to that of unfair dismissal"*.

In this same line, the Supreme Court has recently pronounced in its Ruling 1246/2021 of December 9, 2021, confirming the null



dismissal of a pregnant employee even during the probationary period. The Court reasoned as follows: *"it constitutes a dismissal in which no justifying cause has been alleged or, therefore, proven, which leads, in view of the fact that the employee was pregnant - a fact which, moreover and although not relevant for the resolution of the matter, was known to the employer - to confirm the nullity of the dismissal"*. This recent judgment leads to reflect on the way in which terminations of contracts during the probationary period should be carried out.

A more recent and controversial issue, which deserves a detailed analysis of each specific case, is the potential consideration of dismissal as null and void of those employees who are on sick leave due to temporary disability. All this is relevant as a result of the recent Judgment of the High Court of Justice of Catalonia of September 14, 2021.

Apart from the above situations, which are legally established, actions for null dismissal due to discrimination and/or violation of fundamental rights are becoming more and more frequent.

The consequences of null and void dismissal are the mandatory reinstatement in the job position and the payment of the processing wages accrued from the date of dismissal

until the effective reinstatement. However, it is standard practice to claim compensation for damages associated with dismissals with discrimination and/or violation of fundamental rights. To this effect, there are numerous claims in which the penalty provided for in Article 8.12 of the LISOS is used as a reference standard for the calculation of such compensation, which refers to situations of discrimination with a penalty in its minimum degree between Euro 7,501 and 30,000. However, the amount will depend on the particular circumstances of the case.

Therefore, it is clear that, apart from the serious economic consequences that the declaration of null and void dismissal may entail, it causes a clear damage to the company's reputation and image. Consequently, this type of situation requires a prior analysis and in-depth legal work in order to analyze its viability and estimate risks.

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