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Law and Economics

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Once again, the extension of the *corporate moratorium*

What is the corporate moratorium?

One of the measures adopted in response to the Covid-19 pandemic to mitigate the effects of the health crisis on businesses was the temporary modification of the regime established in the Law on Capital Companies (LSC) regarding dissolution due to severe losses (Article 363). Under this regime, if a company experiences losses that reduce its net assets to less than half of its share capital, the administrators must either promote the company's dissolution or implement measures to rectify the financial imbalance.

The corporate or accounting moratorium meant that losses incurred in 2020 and 2021 would not be considered when determining whether the cause for dissolution applied. After several extensions, the moratorium was set to last "until the end of the financial year beginning in 2024" (RDL 20/2022), effectively covering 2022, 2023, and 2024.

What are the consequences of the corporate moratorium?

The corporate moratorium is particularly significant in terms of directors' liability, as they are legally obliged to take appropriate actions when a company faces insolvency.

As mentioned, in cases of financial imbalance as described in Article 363 of the LSC, administrators must call a general meeting within two months to adopt a dissolution agreement. Failure to act as required by law may result in personal liability for the administrators.

The corporate moratorium essentially creates a legal fiction whereby companies that would normally face dissolution do not fall under this situation if their 2020 and 2021 losses are disregarded. Consequently, administrators are not required to promote the company's dissolution nor face liability for failing to do so.

Has the accounting moratorium been extended again?

As the end date for the latest moratorium period approached ("the end of the financial year beginning in 2024"), uncertainty arose about a possible extension, which was ultimately introduced through RDL 9/2024. This decree extended the moratorium for two additional years, until the end of the financial year beginning in 2026. However, political instability prevented the necessary parliamentary approval, meaning the decree never took effect, leaving the potential extension in limbo.

The approval of RDL 1/2025 on January 28 further complicated the matter, removing any reference to a general extension of the moratorium for losses incurred in 2020 and 2021. Instead, it introduced a new moratorium for losses specifically caused by the Isolated High-Level Depression (DANA) that affected large parts of mainland Spain and the Balearic Islands between October 28 and November 4, 2024.

Unlike the previous general moratorium, which applied to all losses in 2020 and 2021, regardless of their cause, the new specific moratorium only applies to losses directly caused by DANA. According to the new law, these losses will not be counted "until the end of the financial year beginning in 2026."

What should company administrators do in these cases?

Given the ongoing political uncertainty, for the 2025 financial year, administrators of companies that did not suffer losses due to DANA must now factor in their 2020 and 2021 losses to determine whether the company falls under the dissolution clause in Article 363 of the LSC.

For administrators of companies affected by DANA, their course of action will depend on calculations: After accounting for 2020 and 2021 losses but excluding those caused by DANA, they must assess whether the company is still subject to dissolution due to losses in other financial years. If so, they must convene a general meeting within two months to either dissolve the company or take action to rectify the financial situation.

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ECJ: Tax Withholdings on *Dividends Paid* to Non-Resident Entities Must Be Refunded in the Fiscal Year When Losses Are Declared

This is the conclusion reached by the European Court of Justice (ECJ) in a December 2024 ruling involving the tax regulations of the Historical Territory of Bizkaia regarding dividend distributions by a company domiciled in Bizkaia to a shareholder based in the United Kingdom.

Dividends, which are profits distributed by an entity to its shareholders, are subject to personal taxation on recipients through the Personal Income Tax (IRPF), Corporate Income Tax (IS), or Non-Resident Income Tax (IRNR) when the beneficiaries of these dividends are non-residents of the Territory of Bizkaia.

It is important to note that dividends are subject to withholding tax as an advance payment toward the applicable tax (IRPF, IS, or IRNR) at the legally established rate. This withholding is applied by the paying entity when the dividends become due, as stated in the distribution agreement, or earlier if payment to the shareholder is made before the due date.

This system means that the dividend recipient prepays part of their tax liability when receiving this income. However, tax regulations to avoid double taxation allow taxpayers to deduct these advance payments from the tax amount due when filing their IRPF or IS returns (depending on whether the shareholder is an individual or a legal entity).

Therefore, focusing on companies specifically, they recover part of the prepayment when filing their IS returns or even the entire amount of withheld taxes if the company declares a loss, meaning the effective tax payable is zero.

When the dividend recipient is a non-resident entity without a permanent establishment, withholding tax is applied under the IRNR rules and within the limits established by the Double Taxation Agreement (DTA) between the countries of the paying and receiving entities, if such an agreement exists.

This implies that non-resident entities are also subject to taxation in the country where the income (dividends) originates, in addition to their country of residence. However, the withholding tax paid in the source country (Bizkaia) can often be deducted from the corporate tax or an equivalent tax in the entity's country of fiscal residence.

Unequal Treatment for Non-Resident Entities

Unlike resident entities in Bizkaia, non-resident entities that declare losses at the end of the fiscal year cannot deduct the withholding tax paid in Bizkaia from their tax obligations in their country of residence. This results in double taxation on the same income (dividends) and places non-resident entities at a disadvantage compared to resident entities. Resident entities can receive a refund of withheld taxes, enjoying not only a different fiscal treatment but also a cash flow advantage, while non-resident entities face immediate and often final taxation.

ECJ Ruling

The ECJ ruled that this unequal treatment of dividends based on the recipient's residency status could deter non-resident entities from investing in Bizkaia, violating the principle of free movement of capital. While European law allows for differential treatment in certain cases—such as when situations are not objectively comparable or when justified by public interest—the court found that these exceptions did not apply in this case.

The ECJ acknowledged that member states have the right to enforce tax regulations to achieve revenue objectives. However, denying tax refunds to non-residents solely to maintain the revenue system is not permissible if it infringes on the free movement of capital. Non-residents must not be treated less favorably than residents in identical circumstances.

The court clarified that the refund system, while an exception to states' taxation authority, must not be applied indiscriminately. Refunds should only apply to entities that declare losses in the fiscal year in which dividends are received. Additionally, non-resident entities must prove that they incurred losses during the fiscal year and that they cannot offset the withholdings paid in the source country (Bizkaia) against taxes owed in their country of residence.

Key Takeaways

The ruling establishes that non-resident entities receiving dividends from companies based in Bizkaia can request a refund of withholding taxes if they declare losses in their country of residence for the corresponding fiscal year.

Although the case involves the tax regulations of the Historical Territory of Bizkaia, the ECJ's reasoning applies to similar regulations in Gipuzkoa, Álava, Navarra, and the Common Territory, as they have comparable tax frameworks.

This judgment promotes fair treatment for non-resident entities, fostering investment and ensuring compliance with the principle of free movement of capital within the European Union.

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Regulatory updates on active retirement and the relief contract (With special reference to the manufacturing industry)

Context and Supreme Court Rulings

The new year has brought several modifications in the labor and Social Security framework, which will have a significant impact on both companies and workers. These changes stem from Royal Decree-Law 11/2024 of December 23, aimed at improving the compatibility between retirement pensions and engaging in work activities. This Royal Decree-Law will come into force on December 25, 2024.

This regulation contains dense and particularly complex provisions, impacting many of the currently effective rules. This article aims to highlight the most relevant changes affecting a larger number of individuals, summarized as follows:

Article 214 of the General Social Security Law (LGSS) – Active Retirement Pension

The most significant modification lies in the second section, which establishes that the amount of the retirement pension that can be combined with work will depend on a percentage of the initially recognized pension, calculated based on the number of years the individual has delayed accessing retirement. The table is as follows:

DELAY BEYOND THE LEGAL RETIREMENT AGE	INITIAL PENSION PERCENTAGE
1 YEAR	45%
2 YEARS	55%
3 YEARS	65%
4 YEARS	80%
5 YEARS	100%

Additionally, the corresponding percentage will increase by 5 percentage points for every 12 consecutive months the retiree remains in active retirement status, with a maximum limit of 100% of the pension.

Another new provision is that, from now on, if the retiree can demonstrate having employed a permanent worker under an indefinite contract, the percentage of the initially recognized pension will rise to 75% (previously, such cases allowed for 100%).

Article 215 of the LGSS – Partial Retirement

The new wording establishes that, to access partial retirement, the age must be at most three years younger than the legal retirement age, as provided in Article 205.1.a) LGSS.

Moreover, while the previous regulation did not contemplate a specific adjustment for work hour reductions in the case of early retirement, the current rule stipulates that if partial retirement is taken more than two years before the ordinary retirement age, the work-hour reduction during the first year must be between 20% and 33%. From the second year onward, the parties may modify the work-hour reduction within the general range of 25%-75%.

Regarding relief contracts, previously, these contracts could be for a fixed term with a minimum duration equal to the remaining time until the ordinary retirement age. However, under the new wording, relief contracts must now be permanent and full-time, with the obligation to maintain them for at least two years after partial retirement ends. If the contract is terminated earlier, the company must formalize a new contract under the same conditions.

Fourth Transitional Provision of the LGSS – Partial Retirement in the Manufacturing Industry

The validity of this provision has now been extended until December 31, 2029. Thus, the regulation for partial retirement combined with relief contracts will continue to apply to pensions initiated before this date, provided the established requirements are met.

Regarding these requirements, the new wording of the regulation maintains, in general terms, the same conditions as before, with two exceptions:

1. Previously, the regulation stipulated that at the time of the partial retirement event, the percentage of workers with indefinite contracts in the company had to exceed 70% of the total workforce. The new regulation raises this threshold to 75%.

2. A new subsection (g) has been introduced, stating that during the partial retirement period, both the company and the employee will be required to contribute to Social Security for 80% of the contribution base that would have applied if the partially retired worker had continued working full-time. However, this contribution obligation will be applied gradually according to the following scale:

    - **Year 2025:** The contribution base will equal 40% of the full-time base.
    - **Year 2026:** The contribution base will equal 50% of the full-time base.
    - **Year 2027:** The contribution base will equal 60% of the full-time base.
    - **Year 2028:** The contribution base will equal 70% of the full-time base.
    - **Year 2029:** The contribution base will equal 80% of the full-time base.

Nevertheless, it should be noted that relief contracts signed before the entry into force of this Royal Decree-Law will continue to be governed by the regulations in effect at the time of their approval.

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The New "Organic Law 1/2025, of January 2, on Measures for the Efficiency of the Public Justice Service": New Requirements for *Civil and Commercial Proceedings* and Changes to the Horizontal Property Law

On January 3, 2025, the Organic Law 1/2025, of January 2, was published in Spain's Official State Gazette (BOE). This law aims to enhance the efficiency of the Public Justice Service (LOSPJ) by modernizing and streamlining the judicial system through significant reforms in court organization, the mandatory use of alternative dispute resolution methods (ADR) in certain matters, and amendments to Law 49/1960, of July 21, on Horizontal Property (LPH).

Below are the most notable updates:

1. Judicial Organizational Reform

The law replaces single-judge courts with courts of instance, collegiate bodies composed of first-instance judges operating in civil, investigative, or specialized sections (e.g., family, commercial, gender violence). These courts will be able to convene to unify criteria without compromising judicial independence.

Courts will also be supported by the newly created Justice Offices, which will replace peace courts, providing common services to citizens.

This reform will take effect on January 23, 2025, aiming to improve coordination and specialization within Spain's judicial system.

2. Mandatory ADR in Civil and Commercial Matters and New Procedural Requirement

ADR mechanisms will become a mandatory prerequisite for initiating civil and commercial proceedings. Methods such as mediation, private conciliation, neutral opinions from independent experts, confidential binding offers, and other legally recognized negotiation methods must be attempted before litigation.

This measure seeks to promote faster resolutions and alleviate court congestion.

Key Aspects:

Requesting an ADR process will suspend the statute of limitations and action deadlines.

If no agreement is reached, the parties will have one year to file a lawsuit.
To initiate a legal claim, proof of having attempted an ADR will be required.

Exceptions:

ADR will not apply to the following proceedings:

- Civil judicial protection of fundamental rights.
- Conflict resolution in litigation and arbitration specific to Spain.
- Adoption of measures under Article 158 of the Civil Code.
- Judicial measures to support persons with disabilities.
- Proceedings involving filiation, paternity, and maternity.
- Summary proceedings for possession or possession-related disputes, demolitions, or works in a state of ruin or causing damage.
- Certain procedures for the protection of minors.
- Bill of exchange lawsuits.
- Filing of executive claims.
- Requests for precautionary measures prior to lawsuits.
- Initiation of voluntary jurisdiction proceedings, with some exceptions (e.g., intervention in cases of spousal disagreement
  over jointly-owned assets or shared parental authority).
  European small claims and payment order proceedings.

These provisions will be effective as of April 3, 2025.

3. Amendments to the Horizontal Property Law (LPH)
The LOSPJ introduces new regulations to the LPH, balancing the rights of property owners with current urban planning laws.

Key Changes:

Property owners wishing to engage in short-term tourist rentals must obtain express approval from the community of property owners, with the favorable vote of three-fifths of all owners and ownership shares.

Owners already engaged in tourist rental activities may continue, but must comply with the conditions and timelines established by the new law.

This amendment will also come into effect on April 3, 2025.

For further details, you can review the official publication in the BOE:

https://www.boe.es/boe/dias/2025/01/03/pdfs/BOE-A-2025-76.pdf

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FEBRUARY

The “Begoña Law” Proposal and the Reform of Popular Prosecution in Spain

The Spanish legal system allows any Spanish citizen to exercise criminal prosecution through the popular prosecution figure, even if they have not been directly harmed by the offense. This mechanism, rooted in the Spanish Constitution and further developed in the Law of Criminal Procedure and the Organic Law of the Judiciary, reflects citizens’ participation in the administration of justice. However, it is subject to certain limitations and conditions.

On January 17, 2025, the PSOE introduced the “Organic Law Proposal for the Guarantee and Protection of Fundamental Rights Against Abusive Judicial Actions”. Popularly referred to as the “Begoña Law,” this proposal seeks to significantly restrict the exercise of popular prosecution to safeguard fundamental rights and prevent the misuse of legal actions for harassment purposes.

Below are the key reforms proposed:

1. Prohibitions on Exercising Popular Prosecution
The proposal establishes that the following entities and individuals will be prohibited from exercising popular prosecution:

Minors.

Persons convicted by a final judgment for a serious or less serious crime.
Judges, prosecutors, and public officials.
Legal entities or public bodies, including political parties and their affiliated associations or foundations.

2. Restriction to Certain Offenses

Popular prosecution will be limited to specific offenses deemed to have a significant social impact or protect diffuse interests, such as:

- Crimes against the market and consumers affecting general interests.
- Illegal financing of political parties.
- Crimes related to urban planning, historic heritage protection, and the environment.
- Bribery (cohecho), influence peddling, embezzlement of public funds, and deliberate judicial misconduct (prevaricación dolosa).
- Hate crimes, rebellion, genocide, and crimes against humanity.
- Terrorism glorification and justification.

3. Judicial Oversight and Financial Bond Requirement

To ensure alignment with the public interest, popular prosecution will now be subject to judicial oversight. The accuser must demonstrate a concrete, relevant, and sufficient link with the public interest at stake.

Additionally, the proposal requires the accuser to post a financial bond in cases where the Public Prosecutor does not join the accusation.

4. Archiving Cases Without State Support

The proposal mandates that criminal cases will be dismissed if only the popular prosecution files charges unless the offense pertains to matters of exclusive public interest.

5. Unified Legal Representation

To streamline procedures, multiple popular prosecutions in the same case will be required to operate under a single legal and procedural representation.

6. Exclusion from the Investigative Phase

The proposal restricts popular prosecution to the oral trial phase, excluding it from the investigative phase to preserve its secrecy. Popular prosecution will only be permitted to file complaints or participate during the oral trial.

7. Inadmissibility of Complaints Based on Journalistic Reports

Complaints relying solely on media reports will be inadmissible under the new provisions.

Criticism and Concerns
The proposal has sparked controversy, with critics arguing it undermines the constitutional right to popular prosecution enshrined in Article 125 of the Spanish Constitution.

Judicial Association Critique: The Professional Association of the Judiciary (APM) has expressed concern, urging the European Commission and Parliament to intervene. The APM claims that the reform effectively hollows out the concept of popular prosecution and violates the right to effective judicial protection for individuals and public/private entities.

Selective Legislative Reform: Critics point out that this reform appears reactionary, addressing a specific high-profile case involving a complaint based on journalistic information.

Conclusion

The reform proposed in the “Begoña Law” introduces significant restrictions on popular prosecution, reshaping its scope and application. Although aimed at curbing misuse, the proposal raises constitutional questions and concerns about its impact on citizens’ ability to participate in the justice system. The definitive approval and potential constitutional challenges to the law will require close scrutiny in the coming months.

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Innovative Startups: *Updates and Regulations* (2025)

Law No. 193/2024, effective as of December 18, following its publication in the Official Gazette on December 17, introduces renewed rules for innovative startups and SMEs.

These changes, in addition to the provisions already outlined for startups under Law No. 162/2024, aim to facilitate access to funding and, in particular, to provide additional tax incentives alongside those already in place.

Specifically, Chapter III of the competition law, from Articles 28 to 33, includes provisions regulating innovative startups and certified incubators.

Key Updates:
Article 28: Updates to Startup Definitions and Requirements

- **New Requirements for Innovative Startups:**
Innovative startups must now qualify as micro, small, or medium-sized enterprises (MSMEs), as defined by Recommendation 2003/361/EC. Additionally, these startups must have the exclusive or primary business purpose of developing innovative products or services with high technological value. Importantly, they must not primarily engage in agency or consultancy activities.

- **Extended Registration Periods:**
Startups can remain in the special business registry for up to five years, with an additional two-year extension (for a maximum of seven years) if specific requirements related to business development are met.

- **Retention of Incentives:**
The new law ensures the continuation of sector-specific incentives for qualifying startups.

Article 29: Conditions for Registry Status

- Innovative startups listed in the special business registry may remain beyond their third year if they meet the new requirements within 6 to 12 months (depending on whether they have been registered for less or more than 18 months).
- If a company no longer qualifies as an innovative startup but meets the criteria for innovative SMEs, it may transfer to the SME registry.

Article 31: Tax Benefits and Deadlines

• The scope of tax benefits is clarified, and the law sets December 31, 2024, as the final deadline for utilizing the 50% deduction on amounts invested by taxpayers in the share capital of one or more innovative SMEs.

Article 32: Tax Credits for Incubators and Accelerators

• Certified incubators and accelerators investing directly or indirectly in innovative startups are eligible for a tax credit starting in the 2025 tax year.

• Credit Details:

- Amount: 8% of the invested sum.
- Maximum Investment: €500,000 per year.
- Conditions: Investments must be retained for at least three years; otherwise, the benefit is revoked, and funds must be returned.
- Budget Cap: €1.8 million per year starting in 2025.

Article 33: Exemptions for Venture Capital Investments

- **Conditions for Non-Taxable Income:**
Income from qualified investments in venture capital funds by mandatory pension entities and supplementary pension funds is tax-exempt, provided such investments represent:
    - At least 5% of the portfolio of qualified investments (rising to 10% from 2026 onward).

- **Safeguard Clause:**
Tax benefits for qualified investments made under previous regulations are preserved, regardless of changes to the portfolio composition in subsequent financial statements.

- **Application:**
This exemption applies to financial income from investments made by private pension funds and pension schemes before these provisions came into effect, even if the qualified investment portfolio does not meet the updated thresholds.

Summary:

These updates aim to streamline the regulatory framework for innovative startups and provide greater financial incentives for incubators, accelerators, and investors, fostering innovation and entrepreneurship in the Italian market.

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