BARTOLOME & BRIONES

Legal Status

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TAX

A blow for EDAVs and their partners

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In December 28th, 2021, the General State Budget Law was approved, which entered into force January 1st, 2022.

One of the tax measures introduced is the reduction of the existing tax credit under the Corporate Income Tax (CIT) applicable to entities devoted to the rental of dwellings, commonly known as EDAVs (in Spanish, "*Entidades Dedicadas al Arrendamiento de Viviendas*").

Until January 1, 2022, the EDAVs enjoyed a tax credit of 85% of the amount to be paid of CIT. This special regime implied a clear advantage for those who had eight or more rental homes on the market, being rented for a minimum period of three years. The regime was undoubtedly attractive when, in addition, it was added the possibility of applying a super reduced VAT of 4% for new dwellings acquisitions, provided that they were devoted to the rental market applying the aforementioned special tax regime of Corporation Tax.

Inexplicably, particularly when it is intended to promote the rental market, this tax credit has been reduced from 85% to 40% on the amount to be paid. The direct consequence is that EDAVs that had an effective tax rate of 3.75% will now pay 15%.

It is not difficult to think the debacle that this change of rules, once again in the middle of the match, supposes in financial planning carried out in these investments. Different decisions will have to be taken into consideration for the future, principally in relation to the partners of the EDAVs.

The consequence of this reduction is that, if you want to distribute the dividend obtained by the EDAV to the final investor, the best situation is when the shareholder /investor of the same is an individual and not a company.

In the case of legal entities acting as shareholders/investors, this is, companies sandwiched between the individual investor and the EDAV, the final net obtained by dividends will be significantly lower. This is explained because of the reduction from 85% to 40% of the tax credit but also because the exemption of dividends, which normally occurs at 95%, is reduced in its base to 50% by the mere fact that the EDVA has its CIT's amount to be paid tax credited. This leads to the conclusion that, in some occasions, it will be even better for the EDVA to renounce to the special regime, if the shareholders are companies.

Let's have an example:

EDVA that obtains 250,000 euros of profit completely with origin in the rental activity and distributes it to its shareholder who has 100%, either directly or through an interposed investment company.

	Individual shareholder	Legal entity shareholder	
		With special tax regime	Without special tax regime
Dividend to be distributed after CIT	**212,500** (250,000-15%)	**212,500** (250,000-15%)	**187,500** (250,000-25%)
Tax on dividend received (individual shareholder or legal entity shareholder)	**(48,130)** (6,000 19% 44,000 21% 150,000 23% 12,500 26%)	**(27,890)** (50% 212,500*95%-106,250 applying 95% and the result, 5,313 is added to the other and to the addition we apply CIT rate of 25%)	**(2,343)** (187,500-95% *25%)
Net dividend obtained	**164,370**	**184,610**	**185,157**
Tax on dividend distribution to final shareholder	N/A	**(53,878)** (6,000 19% 44,000 21% 150,000 23% 34,610 26%)	**(54,020)** (6,000 19% 44,000 21% 150,000 23% 35,157 26%)
FINAL NET	**164,370**	**130,731**	**131,137**

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DISPUTES

The division of Common Property

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The law grants the co-owners of a property the power to request the division of common property when it can be divided in such a way that the right of each co-owner subsists unaltered after the division has been conducted.

In this regard, no co-owner is obliged to remain in the community and, if the interest of any of them is to extinguish the condominium, they may request the division of the common property at any time, unless otherwise agreed between them. Without prejudice to the foregoing, it is important to note that it is not a fundamental requirement that the property to be divided be divisible in order to be able to break up the condominium.

There is no doubt that, in legal terms, money is a divisible asset by definition. However, there are many other assets that, although they must be distributed proportionally to the co-owners -according to their percentage of ownership- are perfectly divisible.

Thus, the most obvious example would be property that has been awarded through an inheritance to several persons among whom its condominium is distributed proportionally.

The following can be stated:

a) Divisible assets are all those that can be distributed equally or proportionally among all the owners, without the common goods losing value, being destroyed or rendered unusable.

b) By contrast, indivisible assets are all those that, either materially or physically, are impossible to divide -without being destroyed or rendered unusable- or those that, once divided, have partially or totally lost their economic value.

Our legal system recognises different ways of carrying out the division of common property, but on this occasion, we will focus on the legal action recognised by the *Ley de Enjuiciamiento Civil* [Civil Prosecution Law] , derived from the powers granted to the co-owners of a property by the Civil Code.
Although it is true that legal action to conduct the division of the common property is not the quickest method, it is the only way to do so when there is no agreement among the co-owners to dissolve the condominium - in contrast to notarial proceedings, which would operate in the event of the existence of such an agreement.

The judicial route to the division of the common property is always brought before the Court of First Instance of the domicile in which the property to be divided is located and initiated by means of declaratory proceedings, which are determined by the general rule of the value agreed, so that if the property to be divided has an economic value of less than 6,000 euros, the action will be

processed by means of oral proceedings; while if the value of the property exceeds that sum it will be carried out by means of ordinary proceedings.

The main distinctive aspect of these proceedings is that although the main purpose of the legal action is to divide the common property, such a division may not always be feasible, and the Judge of First Instance may decide that the property should be awarded to only one of the co-owners - who must compensate the other co-owners proportionally - and may even order the property to be auctioned in order to carry out the subsequent equitable distribution of the money obtained in the sale. The most standard thing in most cases is for the rest of the co-owners to dispute -in their statement of defence- the value of the property to be divided, in which case the appraisal conducted by the court expert is especially important.

In fact, it is sufficient for only one of the co-owners to demand the sale of the property by auction for the judge to agree to it, unless one of the following conditions apply:

1. none of them applies to be the sole successful bidder of the property.

2. any other co-owner undertakes to acquire the proportional part of the co-owner who demands the extinction of the condominium.

Although joint ownership is not subject to any of the special proceedings regulated by our Civil Prosecution Law, the truth is that the jurisprudential doctrine on the subject of division of common property is complex, and it is advisable, in most cases, to bring the action through a lawyer who is a specialist in this area.

It is worth noting, as mentioned at the beginning of this article, that most of these actions tend to arise from disputes related to the division of inheritances, which can undoubtedly be a genuine problem for the co-owners.

In short, legal action for division of the common property is the only way to extinguish the co-ownership of a divisible property - or indivisible property, by means of its sale and subsequent distribution of the money - when there is no agreement on how to distribute the property among the co-owners.

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EMPLOYMENT

Fair dismissal of a remote working employee on the grounds of repeated offline status

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In the wake of the Covid-19 pandemic, many companies are opting for a hybrid remote work model, sometimes on a permanent basis. For many employers this has led to difficulties when it comes to imposing penalties for non-compliance as their employees are not physically present in the workplace.

However, the fact that an employee is working from home does not prevent the employer from imposing disciplinary sanctions for non-compliance, including dismissal.

This is what the High Court of Justice of Madrid has considered in a recent judgment dated 24 January 2022, which confirms the validity of a disciplinary dismissal of an employee who was teleworking for unjustified disconnection during repeated periods within her working day. It is worth noting that the employee had not been previously sanctioned or warned.

The Court reasoned that being offline is equivalent to being absent from work without justified cause, and to fraud in the carrying out of her duties from the remote workplace. Thus, the Court states the following in relation to the breach of contractual good faith as cause for dismissal:

"*The transgression of contractual good faith constitutes a breach that can be graded according to its objective seriousness, but when it is serious and blameworthy and is carried out by the worker, it is a cause that justifies dismissal. This occurs when the fidelity and loyalty that the worker must show towards the company is breached or the duty of probity imposed by the service relationship in order not to defraud the trust placed in the worker is violated, justifying the fact that the company can no longer trust the worker who carries out the abusive conduct or conduct contrary to good faith*".

In this regard, the Court points out that Article 54.2 d) of the Workers' Statute must be considered in relation to Article 5 a), the employee's duty to comply with the obligations inherent to their job, and Article 20.2 of the same legal body, which reiterates the reciprocal requirement from company and employee of good faith and diligence in the workplace.

In a similar vein, the High Court of Justice of Madrid, in its ruling of 16 November 2021, also upheld the validity of a dismissal due to a repeated offline status during remote working days, which constitutes absence from work without fair cause.

However, not every disconnection gives rise to the imposition of sanctions by the employer, since when disconnections are involuntary and not attributable to the employee, they count as effective working time. In this regard, the dismissal of an employee has been declared unjustified on the grounds that there were faults in the computer system used by the company as there was no evidence of voluntary disconnection.

Thus, it is clear that in view of the aforementioned court decisions, apart from the considerations of absenteeism, the breach of contractual good faith that presides and governs the field of labour relations plays a very important role and should be strengthened in the arguments and facts of the letter of dismissal.

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DATA PROTECTION

The Supreme Court confirms the obligation of means over the obligation of result

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On 15 February, the Supreme Court passed a judgment that is of particular importance as it concludes that companies must apply technical and organisational means to guarantee the security of personal data and prevent unauthorised access in accordance with the state of the art, this being an obligation of means and not an obligation of results as had been interpreted until now by the AEPD. In this case, the Supreme Court upheld the €40,001 fine imposed by the *Agencia Española de Protección de Datos* [Spanish Data Protection Agency ("AEPD")] on a company for failing to adopt any measures to prevent the leak of personal data.

Obligation of means and not result

According to the doctrine applied until now by the AEPD, the obligation to adopt the necessary measures to prevent unauthorised access to personal data was an obligation of result. In obligations of result, the commitment is to fulfil a specific objective, ensuring, in this case, the security of personal data and the non-existence of leaks or security breaches. Consequently, the AEPD understood that data controllers or processors should be sanctioned in cases of data leaks, given that they had breached their obligation, as they had not achieved the desired result. For the AEPD, it was irrelevant whether the controllers or processors had taken measures to prevent the data breach or had used such measures diligently.

However, the judgment passed by the Supreme Court clarifies that the law means that this is not an obligation of result, but of means, i.e., the commitment is to adopt technical and organisational means and to implement such means with due diligence, in order to achieve the expected result, i.e., to prevent the data breach. Thus, the Supreme Court explains that controllers or processors have the obligation to establish technically adequate measures to prevent the data breach, taking into account the state of technology at any given time, as well as to implement such measures diligently, but this does not necessarily have to lead to the achievement of the result. Accordingly, controllers or processors can only be sanctioned if they have not put such measures in place or have not implemented and used them with reasonable diligence. The level of reasonable diligence, according to the Supreme Court, will depend on the specific case.

In the case under analysis, a leak of personal data took place because the company concerned did not verify that the e-mail addresses provided by the customers were indeed their own. At the time of the leak, there existed an e-mail verification system

that the company could have applied, i.e., checking the veracity of the e-mail address entered, making the continuation of the process conditional upon the user receiving an e-mail at the address provided and giving their consent to the collection and processing of their personal data.

According to the AEPD's doctrine, the company should be sanctioned given that there was a data breach, which it could have avoided if it had implemented an email verification system. The Supreme Court upheld this sanction and concluded that the company could have avoided the sanction by simply demonstrating that it had tried to prevent the data breach by taking measures to that effect.

Conclusion

To conclude, companies can avoid being sanctioned when they can demonstrate that they have taken appropriate security measures to prevent security incidents and that they have been diligent in implementing sufficient technical and organisational measures. Consequently, the fact of suffering data breaches does not mean that companies have breached their obligations and should always be sanctioned, but rather that the AEPD and the courts will now have to take into account the measures taken to try to prevent breaches and the level of diligence in each case.

In the present case, one of the appropriate measures would have been the implementation of a system to verify that the email provided by a user is really their own. However, the level of diligence in implementing such measures considered sufficient to avoid a sanction will depend on the specific circumstances of each case.

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