BARTOLOME & BRIONES

Legal Status

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1. Insolvency
2. Tax
3. Corporate

INSOLVENCY

New amendments to the insolvency law

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Law 16/2022, in force since 26th September, and which partially amends the current Insolvency Act, has recently been published.

It is worth noting that the Insolvency Act had been already substantially amended exactly two years ago. Although this new amendment is not as important as the previous one, it does modify important aspects of insolvency.

One of the important changes introduced by the law is that in the so-called "express" or "open and close" insolvency proceedings, i.e. proceedings in which a debtor states that they have no assets to liquidate and requests the judicial declaration of insolvency and immediate dissolution of the company, the judge is obliged to publish the proceedings in the Official State Gazette and in the Insolvency Register, with creditors having 15 days to request the appointment of an insolvency administrator and to discuss the personal liability of the administrators. If they fail to do that, it is understood that the insolvency proceeding is archived without further steps, as was the case with express insolvency proceedings. Until now, this period did not exist, and if a judge considered that the application for insolvency was correct, they simply declared insolvency and liquidation and dissolution without further formalities.

We understand that, in practice, this will not alter to any great extent what happened with express insolvency proceedings given that creditors will not be notified personally of this deadline, so that in order for them to avoid the dissolution of the debtor company, they would have to permanently check the BOE or the Insolvency Register, which is not standard practice.

Another important aspect is that a new type of prior insolvency is introduced: the probability of insolvency, which is the situation in which a debtor foresees that they will not be able to meet their payment obligations in the next two years if they do not apply a restructuring plan. This is a complex figure given that such long-term financial forecasts are highly debatable.

Another noteworthy new aspect is the fact that in principle payment agreements can only be for up to 3 years, whereas up to now they were for 5 years. However, it is expected that they can be extended up to 5 years in certain burdensome circumstances.

Furthermore, one of the changes that has attracted the most attention in the press is the specialization of insolvency proceedings for micro-companies, i.e. companies with less than 10 employees and a turnover of less than €700,000 or liabilities of less than €350,000. An online liquidation platform will be created for these cases, which it is apparently in the process of being developed and should be in place by January 2023, and

their right to free legal aid, which is a very notable exception to the general rule that legal persons do not have this right.

In general, this amendment has introduced more changes in the pre-judicial phase, regulating in more detail the instruments for debt restructuring and the sale of productive units in this phase.

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TAX

Are financial expenses derived from a loan obtained to return funds to partners deductible?

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On July 26, 2022, the Supreme Court issued a judgement to determine if any qualified and accounted expense that is not directly linked to a business income must constitute a deductible expense.

Background

To better understand the context in which the previous judgment was issued, it should be noted that two companies belonging to the same group requested a syndicated loan to be used in the financing of general corporate needs and to be able to refinance the existing current debt.

The loan in question was divided into two tranches: (i) the first granted to the parent company - bridge loan - for an amount of EUR 12 million intended for the acquisition of that company's own shares and to obtain financing to curb the costs resulting from the contract and the guarantees granted (ii) the second granted to the dominated company - long-term loan - in the amount of EUR 12 million euros intended to make payment of dividends of this company. It is important to mention that the financial expenses accrued from the loan were made deductible.

Initially, the interest and related costs borne by companies when applying for a loan are deductible. However, the Tax Agency rejected these deductions considering that they are not linked to their income, that is, at the discretion of the tax authorities such expenses do not directly serve to generate benefits and, therefore, considers them as donations or gifts established in art. 14.1.e) of TRLIS.

Subsequently, both the Economic Administrative Court and the National High Court endorsed the criterion held by the tax authorities, which is why the taxpayer company filed an appeal in cassation before the Supreme Court.

Analysis of the judgment of 26 July 2022

The case before the Supreme Court raised two conflicting positions.

On the one hand, the tax authorities considered that the interest on the loan can in no way be considered as deductible since it is not related to income. Likewise, the Tax Agency maintained that there was no need to apply for the syndicated loan since the company had at its disposal own funds (voluntary reserves) that could have been used for the payment of dividends.

On the other hand, the appellant society that argued that not all spending without direct correlation with business income should be considered a donation or liberality.

In that sense, the question with cassational interest focused on elucidating whether any expense accredited and duly accounted for -

which is not in a strict sense directly correlated with a business income - should be considered as a non-deductible liberality for the purposes of the tax, even if such expenditure is not strictly considered a liberality.

However, with regard to the principle of correlation between expenses and the income of the company, the Supreme Court - within the judgment in question - established that it was not possible to conceive of this correlation as that existing between a certain operation or project that also tends to report a singularized income but with the whole of the economic management of the company.

In other words, the Court considers that both income and expenditure are part of a financial management of the activity carried out by the company, in which a set of actions are carried out that are aimed at obtaining the best possible results and, therefore, the relationship between expenses and income is justifiable directly or indirectly.

In this regard, the Supreme Court confirms that the financial expenses of companies - such as interest on loans - are deductible in Corporation Tax as long as they are related to business activity.

On the other hand, the Supreme Court's ruling rejects that this type of expenses are contemplated within the concept of liberalities, which are not deductible for Corporate Income Tax purposes.

The Court reaches this conclusion on the basis that the interpretation of the concept of donations and gifts does not allow the inclusion in it of financial expenses that, as in the case before it, are documented, incorporated into the accounts and clearly have an onerous and not gratuitous cause, that is, they are accounting expenses incurred in the exercise of the business activity.

Finally, with regard to the Tax Agency's consideration that these expenses constitute a liberality because the company could cover its needs with its own funds, the Supreme Court maintains that this argument is of no relevance from the point of view of the tax classification since the tax authorities question decisions to manage the economic resources of a company.

Taking into consideration the above, the Supreme Court points out that the operation subject to financing allows the company to conserve its own resources instead of having them to pay the dividends to be distributed, but it is still correlated with the exercise of the business activity.

Conclusions

1. The financial expenses that accrue from a loan that is directly related to the business activity of the company - even if it is not related to an income - do not constitute a donation or liberality since they clearly have an onerous cause just like the loan.
2. The financial expenses accrued by a loan will be tax-deductible for the purposes of determining the taxable base of Corporation Tax as long as they are registered in the accounts, are imputed according to accrual and find documentary justification.

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CORPORATE

Approval of Law 18/2022, on the establishment and growth of companies

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Following on from the Newsletter published in March, when we reported on the Project for the Creation and Growth of Companies, we can now confirm its final approval by the Congress of Deputies and its publication as *Ley 18/2022, de creación y crecimiento de empresas* [Law 18/2022, on the establishment and growth of companies] in the Spanish Official State Gazette, on 29 September 2022.

The aim of this new law is to improve the business environment by boosting the creation of companies by encouraging their growth both through regulatory improvements and the elimination of obstacles to economic activities, and through financial support for business growth.

Main measures adopted in the law

Measures to speed up the creation of companies. A minimum founding capital of 1 euro is established for the minimum legal share capital of a Limited Liability Company (previously 3,000 euros). In this regard, the possibility of a limited liability company being set up under a successive formation regime is eliminated.

The *Centro de Información y Red de Creación de Empresas* [Information Centre and Business Creation Network (CIRCE)] has been reformed by improving its regulation in order to reduce the time it takes to set up an LLC. Furthermore, an obligation is introduced for notaries and other intermediaries involved in the creation of LLCs through CIRCE to provide information on the advantages of using it.

Improved regulation and elimination of obstacles to economic activities. The catalogue of activities exempt from prior activity licensing is extended to include market research companies and comprehensive postal and telecommunications services.

The Ley 20/2013, de garantía de la unidad de mercado [Law 20/2013, on guaranteeing market unity, issued on December 9, 2013, is amended]. It now extends legal standing to file a complaint with the *Secretaría para la Unidad de Mercado* [Secretariat for Market Unity] for infringement of the freedom of establishment or movement to any natural or legal person. The need to assess the necessity of limits or requirements related to access to and exercise of regulated professions according to a proportionality test is established. The *Consejo para la Unidad de Mercado* [Market Unity Council] has been amended and is now replaced by the *Conferencia Sectorial para la Mejora Regulatoria y el Clima de Negocios* [Sector Conference for Regulatory Improvement and the Business Environment].

The *Ley 29/1998, de 13 de julio, Reguladora de la Jurisdicción Contencioso- Administrativa* [Law

29/1998, of 13 July 1998, regulating the Contentious-Administrative Jurisdiction], has been amended. The automatic precautionary suspension of the provisions or acts appealed in the special contentious-administrative proceedings for the guarantee of market unity that may be brought by the National Markets and Competition Commission is abolished, so that the ordinary channel applicable to any precautionary measure will have to be followed.

Measures to combat commercial late payment. The monitoring of the evolution of late payment in Spain is reinforced by attributing to the newly created *Observatorio Estatal de la Morosidad Privada* [State Observatory on Private Late Payment] the task of drafting an annual report on the situation of payment periods and late payment in commercial transactions.

It establishes the widespread adoption of electronic invoicing, obliging businesspeople and professionals to issue, send and receive electronic invoices in their commercial relations with their peers. Likewise, companies providing electronic invoicing services must ensure that their technological solutions and platforms comply with minimum technical and information requirements that allow them to control the date of payment and determine companies' average payment periods. These minimum interoperability requirements will be developed by regulation.

The reporting obligations of listed companies and unlisted companies that do not file abridged annual accounts are strengthened.

Repeated failure to comply with the rules on combating late payment in commercial transactions is considered an unfair act.

In public sector contracts, the guarantee mechanisms for the collection of invoices from subcontractors are reinforced.

An additional condition for eligibility as a beneficiary of subsidies or as a collaborating entity is to not be in a situation of non-compliance with Law 3/2004, of 29 December, which establishes measures to combat late payment in commercial transactions.

Measures to financially support business growth. Participatory financing or crowdfunding platforms. The aim is to adapt national legislation to Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European providers of crowdfunding services for businesses. The adaptation involves adjusting the legal framework of this activity from a relatively simple conception of crowdfunding platforms' role as mere intermediaries, to giving recognition to the provision of crowdfunding services in a more active way.

The main new features of the European regulation compared to the pre-existing Spanish regulation include, first, the inclusion of a new category, "portfolio management," to allow the provider of crowdfunding services to invest funds on behalf of the investor.

Furthermore, a single individual investment limit per project for retail investors is set as

the higher of an amount of EUR 1,000 or 5% of wealth (excluding real estate and pension funds). Retail investors are not prevented from investing above the limit, but if they wish to do so, they will receive a risk warning and will have to give their express consent to the crowdfunding service provider.

The investment limit per project is now EUR 5 million, which can be exceeded up to the limit provided for in the legislation of each Member State above which a prospectus must be issued (but in this case without being able to hold a European passport, but only within that Member State).

In addition to the adaptation to European regulation, it is worth noting that it will be possible for equity financing platforms to create and group investors in a limited liability company, whose corporate purpose and sole activity consists of holding the shares of the company in which they invest, in an entity subject to the supervision of the CNMV, or in other figures that are habitually used for these purposes in other EU countries.

Promoting and improving collective investment and venture capital. In relation to collective investment institutions, European long-term investment funds are explicitly included in the legislation on collective investment institutions.

In relation to venture capital institutions, a new category, "Closed-Ended Lending Collective Investment Undertakings," is created to expand the possibilities for creating collective investment vehicles dedicated to this type of assets. The aim is to allow closed-end vehicles, without mandatory periodic liquidity windows, which enables more appropriate management of the vehicle (unlike the open-ended loan funds already recognized in Law 35/2003, of 4 November, on collective investment undertakings). It also explicitly includes the investment in financial institutions whose activity is mainly based on the application of technology to new business models, applications, processes or products as the main purpose of venture capital; and the regime for non-professional investors in venture capital institutions is now more flexible.

During the parliamentary proceedings, and as a result of amendments, the following measures have been included in the text of the Law.

Registration of civil companies in the Mercantile Register (eighth additional provision): The aim is to enable civil companies to operate in legal transactions under conditions of full legal certainty and, consequently, to benefit from clear, precise and accessible registry publicity for all citizens.

This obligation to register was first established in Royal Decree 1867/1998, of 4 September, amending certain precepts of the Mortgage Regulation, which facilitated legal visibility, the means to accredit positions and powers of representation, as well as transparency to agreements and public life, as required by Article 1669 of the Civil Code. The Supreme Court ruling of 24 February 2000 declared such provisions null and void

on the grounds of infringement of the principle of legal reserve, i.e. the enabling regulation lacked sufficient substance (legal rank). With this legal reform, it is now a question of restoring the previous situation.

Recognition of Benefit and Common Interest Companies (10th Additional Provision): Benefit and Common Interest Companies are identified with those capital companies that voluntarily decide to include in their articles of association:

- Their commitment to explicitly generate a positive impact on people and the environment through their activity;
- Submit to higher levels of transparency, being subject to external verification that guarantees their performance in the aforementioned social, economic and environmental objectives;
- Incorporate fiduciary and accountability duties, in order to be legally responsible for considering all stakeholders in their decisions.

The objective of this new legal figure is to guide the business sector to be genuinely aligned with the creation of value for society as a whole and to embrace the so-called triple impact economy - environmental, social and economic. To this end, it is planned to propose, through a regulatory development, the methodology for the validation of this new business figure with the highest standards of transparency.

Access to Business Register information: It is proposed to create an inter-ministerial working group whose task will be to analyze the measures necessary to ensure that Business Register information is provided in an open format that allows it to be downloaded and facilitates its processing. It is also established that the Business Register will provide the Ministries of Justice and of Economic Affairs and Digital Transformation with sufficient information on an annual basis, broken down by type and volume of information requests handled from its platform, as well as the operating costs of said platform, including the cost of maintenance and duly justified improvements introduced.

Late Payment Observatory: A new function is added to the Late Payment Observatory, specifically, the annual publication of a list of companies that have failed to meet payment deadlines in accordance with Law 3/2004, of 29 December, which establishes measures to combat late payments in commercial transactions or other applicable sector regulations, and in which at least the following circumstances are present:

- That on 31 December of the previous year, the total amount of unpaid invoices within the period established by Law 3/2004, which establishes measures to combat late payment in commercial transactions or other applicable sectoral regulations, exceeds 600,000 euros;

- The percentage of invoices paid by the company during the previous financial year in a period of less than the maximum established in the regulations on late payment as a percentage of total payments to suppliers is less than ninety percent; and

- Companies with legal personality that, in accordance with accounting regulations, cannot present an abridged profit and loss account.

The list will include the company's corporate name, its tax identification number and the amounts unpaid within the deadlines established by the regulations on late payment. Regulations will determine the additional information to be included, if applicable, the procedure for information and allegations for those affected, as well as the means and duration of publication of the list.

The objective is to reinforce the function of the Observatory in terms of the evolution of payment periods, means of payment and late payment in commercial transactions.

Composition of the Consejo Estatal de la Pequeña y Mediana Empresa[State Council for Small and Medium-sized Enterprises]: Royal Decree 962/2013, of 5 December, which creates and regulates the State Council for Small and Medium-sized Enterprises, is amended so that this Council is made up of six members representing the most relevant state and intersector business organizations of small and medium-sized enterprises, including those organizations specializing in the area of late payment. The aim is to ensure the participation, within the governing bodies of the State Council for SMEs, now also in charge of the State Observatory on Late Payment, of independent organizations and specialists in the field of late payment.

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