NEW ENTREPRENEURSHIP LAW: LIVING UP TO EXPECTATIONS? - OLLEROS ABOGADOS

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On May 24th, 2013, the Spanish Council of Ministers analysed a report on the eagerly awaited Draft Bill to support entrepreneurs and their internationalisation (Anteproyecto de Ley de Apoyo a los Emprendedores y su Internacionalización). The main purpose of the Law will be to create

the appropriate leverages for recovery of the Spanish economy and reduction of unemployment by fostering entrepreneurial spirit and facilitating the creation of new businesses in Spain.

This article analyses some of the key measures contained in the draft bill and evaluates the likelihood that such measures will fulfil the desired objectives.

I am one of those who strongly believe that entrepreneurship is one of the quintessential elements of the formula to having a healthy, sound and dynamic economy. Having founded my own law firm over 25 years ago after working at an international audit firm and as General Counsel of a multinational group, I like to consider myself an entrepreneur.

As such, I was pleased to hear that on 24 May 2013 the Spanish Government announced that the eagerly-awaited Draft Bill would soon be seeing the light of day.

The Draft Bill represents a follow up of the previous set of measures, which were approved by means of Royal Decree-Law 4/2013, on measures to support entrepreneurs, stimulate growth and create employment, some of which are worth mentioning here.

These include: the € 50 flat rate social security contribution for young self-employed entrepreneurs; the compatibility of unemployment benefits with the start of entrepreneurial activities; the reduced rate of 15 percent in Corporate Income Tax and 20 percent reduction of net profit in Personal Income Tax for two fiscal years as from the first positive tax year; a new Supplier Payment Plan or 'Entrepreneur Support Contract' incentivised by tax deductions and benefits for new hirings; and, a 100 percent reduction in corporate social security contributions for new hirings.

Quoting the Council of Ministry's own words, the strategic lines of action of the Draft Bill will be the following: To facilitate entrepreneurial culture and initiative; to provide tax and social security support for entrepreneurs; to help finance entrepreneurs; to foster business growth and new hirings; and to foster the internationalization of Spanish companies and economy.

In order to achieve such objectives, the Draft Bill contains a number of measures, among which I would like to emphasise the following.

Key measures

The Draft Bill includes a set of measures that are intended to give entrepreneurs and emerging businesses a second chance, or in other words to make sure that those facing a business failure are deterred from re-starting a new venture and are allowed a fresh start.

Some measures include rules where by liability from business debts will not affect the primary residence of self-employed entrepreneurs up to a certain threshold. Also, an out-of-court mechanism for debt restructuring designed for self-employed entrepreneurs and small and medium-sized enterprises (SMEs) that are close to bankruptcy, as a mechanism to avoid costly and time consuming bankruptcy proceedings that usually end with the business being liquidated.

There are tax measures and incentives included in the Draft Bill that tackle the following areas. First, the implementation of a special VAT regime, which allows self-employed entrepreneurs and SMEs that voluntarily choose to benefit from it to pay VAT when the invoices are collected and not when VAT is charged.

Second, a new tax incentive whereby 10 percent of the yearly profits made by self-employed entrepreneurs and SMEs will be tax deductible if they are reinvested in the business activity. Third, the refinement and reduction of the requirements to benefit from tax incentives attached to R&D+i deductions and the 'Patent Box' regime, which applies to the revenues made from the assignment of certain intangible assets.

Finally, tax benefits for individual investors (seed capital and business angels) such as a 20 percent tax deduction of the investment in new or recently incorporated companies (up to a tax base of €20,000) and a tax exemption applicable to any capital gains made by the investors upon exit to the extent of what is reinvested.

The Draft Bill also includes a set of measures aimed at reducing administrative hurdles and barriers and the start-up costs, such as: the removal of the minimum €3,000 share capital threshold for limited liability companies; the use of telematic processes and simplified work processes; and, the increase of the thresholds in order to be exempt from external financial audit requirements.

Finally, new regulations devised to attract talent and investment to Spain through facilitating the issue of residence permits.

The market response

Unfortunately, the full text of the Draft Bill has not been made available to the public and thus, any thorough analysis will have to wait. Without prejudice to the foregoing, the announced measures have provoked mixed reactions.

On the one hand, peers say that both the Royal Decree-Law 4/2013 and the Draft Bill clearly show that the Government is steering in the right direction and is listening to some of the entrepreneurs' and investors' demands.

On the other, criticism comes from the fact that the Draft Bill lacks a systematic approach to the problems and also that it is rather superficial, in the sense that in many cases it only provides an outline of the measures, the substance of which will need to be developed by subsequent regulations.

In my view, in some cases a bolder approach was to be expected and in others the measures are simply missing. As a general rule, fresh start and second chance rules will not apply to debts towards public administrations. Besides, the protection will only apply to the permanent residence but not to other significant assets or sources of income. These limitations will likely reduce the effectiveness of these set of measures dramatically.

This Draft Bill embraces the 'one in, one out' principle, which means that each administrative burden must be offset by the removal of at least one burden with an equivalent cost.

However, far from reducing the existing corporate vehicles and making them more flexible (for example the *Sociedad Limitada Nueva Empresa* that was created years ago with relatively low success), the Draft Bill will add two brand new legal vehicles in order to implement two relevant, but overall very specific corporate governance rules for self-employed and SM. These are the so-called 'Limited Liability Entrepreneur' (*Emprendedor de Responsabilidad Limitada*) and the 'Limited Liability Capital Growth Company' (*Sociedad de Responsabilidad Limitada de Formación Sucesiva* Es.

The Draft Bill also includes new regulations in an attempt to boost the electronic incorporation of companies through the single electronic document (*Documento Único Electrónico*) and the one-stop-window (*Ventanilla Única Empresarial*), which were items that were introduced in our legal system by means of past legal reforms and which to-date have not fully succeeded in achieving the intended objectives.

On top of that, a significant portion of the measures will be aimed at creating new administrative bodies and public plans and at restructuring the existing ones (ICEX, ICO, CESCE, Chambers of Commerce, etc) in order to support the internationalisation of businesses, while the common feeling is that the current system is overly complex and needs to be downsized.

In the meantime, important legal mechanisms to support internationalisation, such as the Double Taxation Treaty between the US and Spain, are still pending, in this case due to political disputes at the US Senate.

There is still significant uncertainty as to the costs that the new measures will involve, and how they will be financed in an environment of great public budget constraints and increasing taxation pressure.

Overall, I believe that the Draft Bill brings more light than it casts shadows. It conveys relevant measures that are devised to offer self-employed entrepreneurs, SMEs and investors a whole set of measures, tools and incentives, to start up a new business, to scale it, to internationalise it and, if needed, to close it and try again.

However, some of the measures announced need further improvement, while others have to be explored as well. The removal of regulatory hurdles has to become one of the greatest concerns.

I can only hope that the Draft Bill is refined and improved by the Government and the Parliament and that the Law is approved sooner rather than later if we do not wish to delay the creation of jobs and setting up of new businesses as a condition of the essence for economic recovery.

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