



Startups and Scaleups Law

On 22nd December, 2022, the Council of Ministers approved the Proposal for Law No. 56/XV, which shall establish a regulatory framework for startups and scaleups as companies with a relevant role in digital transformation and the "new economic paradigm, based on knowledge and innovation", and, as such, as important players in the development of the national economy.

First of all, it should be noted that this is a substantial innovation in the framework of such companies. Although with broad economic application, the truth is that there is no legal definition of startup or scaleup or even any legal framework applicable to this specific type of economic agents.

Notwithstanding this piece of legislation being currently under discussion by the Portuguese Parliament, we understand that the publication of this Newsletter is appropriate taking into account that the legal regime to be created will implement a relevant innovation in the corporate legal framework, as it promotes an adjustment of the corporate, tax and other rules to this type of economic players, which correspond to very specific circumstances.

The proposed law aims to implement several adjustments, from which we would like to highlight the following:

• Definition of legal concept of startup and scaleup:

- *Material requirements, to be observed cumulatively:*

Startups

- a) *Period of activity of less than 10 years;*
- b) *Less than 250 workers;*
- c) *Annual turnover of less than EUR 50,000,000.00 (fifty million euro);*
- d) *Shall not result from the de merger of a large company ("grande empresa") and has no direct or indirect majority shareholding or interest in one of such companies;*
- e) *Have its registered offices or at least 25 workers in Portugal;*
- f) *Meet one of the following conditions:*

(i) To be an innovative company with high development potential, with an innovative business model, products or services, falling under the terms defined by Ordinance ("Portaria") No. 195/2018 of 5 July (which defined the concept of technological sector for the purposes of the Statute of Tax Benefits), or to which suitability has been recognized by the ANI – Agência Nacional de Inovação, S.A. in the practice of research and development activities or certification of the process of recognition of companies in the technology industry – the lack of verification of these requirements may be replaced by a prior declaration issued by Startup Portugal; or

(ii) have completed at least one round of venture capital financing through an entity legally empowered for venture capital investment; or

(iii) have received investment from the Banco Português de Fomento, S.A. or from funds managed by it.

Scaleup

Should a legal person not comply with the requirements referred to in points a), b) and c) above but still comply with the rest indicated in points (d), e) and (f), and the requirements established for the granting of the tech visa (as provided for in Ordinance (“Portaria”) 328/2018), it may still be granted scaleup status.

o Legal persons which no longer meet the requirements for the allocation of startup or scaleup must report it to Startup Portugal within 30 days, under penalty of incurring in a serious misdemeanor, punishable by a fine ranging between EUR 1,700.00 (one thousand and seven hundred euros) and EUR 24,000.00 (twenty-four thousand euros).

o Formal requirements:

The concept of startup and scaleup is reserved for legal persons which comply with the material requirements to which their status is recognized through prior communication procedure addressed to “Startup Portugal” — Associação Portuguesa para a Promoção do Empreendedorismo – SPAPPE”, through the single gate of public services, constituting a valid title of recognition for all legal purposes. This recognition procedure (and the termination of the scaleup status) shall also be defined by government ordinance.

• Tax measures

o The gains resulting from options plans, subscription, attribution or other equivalent effect and on securities, created for the benefit of employees, are only considered at 50% of their value, being subject to personal income tax (“IRS”) at the autonomous rate of 28%, when the plan:

(i) is assigned by an entity recognized as a startup (not applicable to scaleups), and/or

(ii) when it meets at least one of the following requirements: being qualified as a micro, small or medium-sized company or as a small mid-cap or to carry out its activity in the field of innovation, i.e. having incurred in expenses related to R&D, patents, designs, industrial models and software equivalent to at least 10% of the company’s spending or turnover.

These gains are taxed at the disposal of the securities or the loss of the status of resident in Portuguese territory, whichever occurs earlier. Thus, a mechanism for deferring the moment of taxation of those gains is introduced, in order to be the effective disposal and not the moment of exercise of the option (“vesting”), as established in the general framework that this law is intended to create an exception to.

Except in the case of entities that qualify as micro or small companies in the year preceding the granting of the equity incentive plan, the taxable persons who directly or indirectly own a shareholding equal to or greater than 10% of the share capital or voting rights of the entity attributing the equity and the members of the corporate bodies are excluded from this benefit.

This legislative proposal also provides for a strengthening of the system of tax incentives in research and business development (“SIFIDE II”) which will be subject to a separate analysis by pbb.

The proposed law foresees an effectiveness as from 1st January 2023. The provisions relating to the recognition of the statutes of startup and scaleup are excepted from this date of effectiveness, in which case it shall enter into force 180 (one hundred and eighty) days upon its publication.

We will keep you up-to-date on the approval of these points as well as on the developments on this new legal framework.

We naturally remain available for any clarification you may deem necessary.

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