

INFORMATIVE NOTE

Novelties in relation to the sanctioning regime applicable to non-compliance with the obligation to file annual accounts

▪ Background

Under the Capital Companies Act ("*Ley de Sociedades de Capital*" - LSC), failure to comply with the obligation to file the accounts with the Commercial Registry entails a twofold consequence:

- The impossibility, with certain exceptions, of registering documents relating to the Company concerned, as long as the situation of non-compliance persists ("Registry Closure" - art. 282 LSC); and
- The imposition, through the corresponding sanctioning procedure, of a fine on the affected Company ("Sanctioning Regime" - art. 283 LSC).

▪ News

Royal Decree 2/2021, of January 12, which approves the Regulations for the development of Law 22/2015, of July 20, 2015, on Accounts Auditing, introduces novelties of potential transcendence in relation to the aforementioned sanctioning regime.

Firstly, in its Tenth Additional Provision, last paragraph:

- (i) It enables the possibility of entrusting the processing and proposal of decision of sanctioning proceedings relating to this matter to the Companies Register registrars.
- (ii) It also establishes that the fees to be charged as a settlement prize (sic) for the above will be established in the corresponding engagement to be agreed between the Accounting and Auditing Institute ("*Instituto de Contabilidad y Auditoría de Cuentas*" - ICAC) and the General Directorate of Legal Security and Public Faith ("*Dirección General de Seguridad Jurídica y Fe Pública*").

This novelty, from our point of view, is the most important of those introduced by Royal Decree 2/2021.

It should be taken into account that, traditionally, according to our experience, the management of proceedings for the prosecution of this type of non-compliance was perhaps not prioritized by the bodies involved. In this sense, according to the economic report of the Institute of Accounting and Auditing of Accounts for 2019 (last available at the time of writing these lines), the number of files resolved in relation to lack of deposit of accounts was 162 in 2019, and 147 in 2018. In the foreseeable assumption that the collaboration with the Companies Register

registrars is put into effect, it can be predicted that the sanctioning activity will increase notoriously (it remains to be seen to what extent).

Secondly, in its Eleventh Additional Provision, it establishes the following novelties that directly affect said sanctioning regime:

- (i) Regarding time limits: the total term to resolve and notify the resolution in the sanctioning procedure will be six months as from the adoption of the corresponding resolution of initiation, without prejudice to the suspension of the procedure and the possible extension of said total term and of the partial terms provided for the different steps of the procedure.
- (ii) Regarding the quantification of the penalty: it establishes the following criteria for determining the amount of the penalty:
 - a) The penalty shall be 0.5 per thousand of the total amount of the concerned Company's assets, plus 0.5 per thousand of the sales figure included in the last Corporate Income Tax return filed with the Tax Authorities (the original of which must be provided by the Company when the procedure is conducted).
 - b) In the event that said tax return is not provided, the penalty shall be equivalent to 2 percent of the share capital according to the data recorded in the Companies Registry.
 - c) In the event that the tax return is provided and the result of applying the rules of letter a) above is greater than 2% of the share capital, the penalty shall be equivalent to the latter reduced by 10%.

With respect to the above, at least two considerations must be made:

- Despite the introduction of these novelties, the provisions on the sanctioning regime of the Capital Companies Act (art. 283) do remain in force, and -by operation of the principle of hierarchy of norms- must prevail, particularly in relation to the maximum limits of the amount of the penalty, reduction of the penalty for deposit of accounts prior to the initiation of the proceedings and the statute of limitations.
- Even admitting that they were conditioned by the wording of art. 283 LSC, it should be noted that the quantification criteria introduced could enable the affected companies to modulate the amount of the penalty, as it is determined according to different parameters (assets and sales; or capital) depending on whether or not the tax return is filed.

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