

DOING BUSINESS
IN SPAIN



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Introduction

This guide aims to answer the general questions you may have about doing business in Spain from the initial considerations to matters concerning the on-going operations of your business. It is intended as an introductory guide to doing business in Spain and answer preliminary questions frequently asked by those unfamiliar with the Spanish business environment. Our guide presents the law at October 2013.

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We Are Here to Help

If you have any questions, please do not hesitate to contact us. We would be very pleased to advise further on the general matters discussed in this guide as well as on any specific points relating to your particular circumstances or industry sector.

This guide has been prepared with great care and diligence. However, any liability as to the accuracy, correctness and completeness of the guide is explicitly excluded. This guide is not intended to serve as legal or business advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

Spain and its Legal Systems

The Spanish legal system, like the legal systems of the other countries in continental Europe, is a civil law system, in contrast to the Anglo-Saxon model which is based on common law principles. The modern Spanish legal system is based on the principles laid out by the Spanish Constitution of 1978. Spanish law is influenced by regionalism, and the autonomous communities each have their own responsibilities and particular laws. The Spanish legal system is divided into five jurisdictional orders: civil, criminal, administrative, social and military law.

Spain and the European Union

Spain is a member of the European Union (EU), has adopted the euro and is subject to EU legislation, which generally takes the form of directives or regulations. EU Directives have no direct effect, until they have been implemented by Spanish legislation and form part of the domestic law. EU Regulations are immediately enforceable in EU member states without further measures of implementation.

The EU currently comprises the following member states in addition to Spain (shown chronologically in order of accession): Belgium, German, France, Italy, Luxembourg, the Netherlands, Denmark, United Kingdom, Ireland, Greece, Portugal, Austria, Finland, Sweden, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovak Republic, Bulgaria and Romania.

Foreign Investment In Spain

The Spanish Government actively encourages foreign investment in Spain and the legislation provides for a similar treatment of foreign and domestic investors. Under Spanish law, subsidiaries of foreign companies registered as Spanish companies are treated like any other Spanish company. There are no nationality requirements for directors or shareholders, nor do foreign investors need to register with any government entity.

Exchange Control and Currency Regulations

The Spanish peseta was replaced by the euro on 1 January 2002. The euro is a freely traded currency with no restrictions on transfer or conversion. Today the euro is the unit of currency in Spain and 16 other EU member states.

There is no difficulty in obtaining foreign exchange. Further, there are no restrictions on inflows and outflows of funds for remittances of profits or other purposes.

Grants and Incentives

The EU, as well as the Spanish autonomous communities and the state authorities, offers a wide range of incentive programs for foreign investors in Spain. All public administrations have developed and established a comprehensive system of grants and incentives, in order to promote investment, employment, competitiveness and economic growth, giving special emphasis to the indefinite employment promotion and research, development and technological innovation.

Programs in Spain

- Training and employment incentives: set of instruments and actions that are intended to promote and extend between the companies and the workers employed and unemployed training that meets your needs and contributes to the development of a knowledge-based economy.
- Incentives for specific sectors: financial aid and tax benefits for activities developed in certain priority sectors for its potential for growth and its impact on the whole of the national economy (activities in agrifood, energy sector, miner, technological development, research and development, etc.). Financial aid includes grants and bonuses to interest rates of the loans obtained by the beneficiaries.
- Incentives to invest in certain regional areas: incentives consisting of contributions for the financing of investment projects, in areas with lower levels of development or those with special circumstances, encouraging entrepreneurial activity and orienting its location to areas previously determined, in order to alleviate the inter-territorial imbalances and strengthen the potential of endogenous development of the regions.
- Incentives for small and medium-sized companies: grants and incentives aimed at small and medium-sized companies, for their promotion and development, relying on their ability to create employment and contribute decisively to the growth of the economy. These grants can be applied to small and medium-sized companies in the following sectors: industry, construction, tourism, trade and services. Equally, aid applies to intermediate bodies that carry out activities in support of small and medium companies in the sectors mentioned.
- Grants from the European Union: aid that is usually granted to depressed regions, underdeveloped rural areas with low income levels and high rates of unemployment, and to regions suffering from industrial relocation processes. Most European incentives complement development plans that are financed by the State, and are channelled through Spanish official institutions and financial institutions, which act as intermediaries.
- Incentives to internationalization: financial instruments of official support for the internationalization of business.

Project Finance

Spain possesses the financial framework and institutions to support the development of large infrastructure projects.

One area that has attracted project finance is alternative energy production. Clean and renewable energy projects generally have gained prominence in Spain through the country's commitment to meeting sharply reduced CO2 emission targets.

The main Spanish institutions active in facilitating project finance deals are private commercial banks and several of the publicly owned saving banks controlled by the State and regional governments, and institutions such as the Institute of Official Credit (*Instituto de Crédito Oficial*, ICO), the Spanish Company of Credit Insurance to Export (*Compañía Española de Seguros de Crédito a la Exportación*, CESCE) and Research and Development Energy Spanish (*Instituto de Investigación y Desarrollo Energético Español*, IDEA). Other companies involved in international project finance are the Company Created to Encourage Investment and Export (*Compañía creada para Fomentar la Inversión y Exportación Española*, COFIDES) and the Institute of Foreign Trade (*Instituto de Comercio Exterior*, ICEX).

Setting Up Business in Spain: The Business Vehicle

As a foreign investor, you may enter the Spanish market by acquiring an existing business in Spain. If this is the case, Squire Sanders would be pleased to advise you on the acquisition process, in particular with regard to due diligence, the sale and purchase agreement and a tax-efficient structuring.

If you do not acquire an already existing business, there are a number of ways to establish a business presence in Spain. You may:

- set up a Spanish subsidiary in which you hold the shares and/or the capital (*Filial*);
- set up a branch office (*Sucursal*); or
- open a simple office which does not constitute a branch, but is regarded as a dependent permanent establishment (*Establecimiento Permanente*).

The two business vehicles most often used by foreign investors setting up business in Spain are a subsidiary, in the form of a Spanish limited liability company (*Sociedad de Responsabilidad Limitada* or S.L.), or a branch office.

The Main Differences Between a Subsidiary and a Branch Office

A subsidiary is a company registered in Spain owned by another company. It is a separate legal entity distinct from the person who owns it (the foreign investor) and the persons who manage it (the directors). In general, the owner of a subsidiary is not personally liable for the acts and obligations of the subsidiary.

A branch office, by contrast, is not a separate legal entity and it is not distinct from the foreign investor which remains directly liable for any losses or liabilities sustained, or for any wrong-doings committed, by the branch office.

Choosing Between a Branch Office and Subsidiary

The choice between a branch office and a subsidiary is likely to be based on a mixture of commercial and legal considerations, including:

- **The exact nature of the operations to be conducted in Spain.** Is the Spanish presence to be used merely to promote the foreign investor's business or will it be used to carry on some trading activity of its own? In the first case a branch office may be the better choice, while in the second scenario a subsidiary may be preferable.
- **Does the foreign investor want its legal exposure for the Spanish operation to be limited?** If so, a subsidiary should be chosen.
- **Will the Spanish operation incur high levels of capital expenditure or start-up losses?** If so, the use of a Spanish branch office of a foreign investor may make it easier to set off such capital expenditure or losses against the profits of the foreign investor in its domestic market.
- **Will there be more than one Spanish operation?** In this case, it may be preferable to choose a Spanish structure that enables Spanish profits and losses to be aggregated. This will require all the operations to be carried on through the same Spanish subsidiary, or the establishment of a Spanish group of companies involving several subsidiaries.
- The Spanish business community will, in general, assign a higher degree of trust and good will to a subsidiary than to a branch office.

The Key Features of a Subsidiary

A Spanish subsidiary can be established in any of the forms offered by Spanish corporate law. The main forms are:

- Limited Liability Company (*Sociedad de Responsabilidad Limitada* or S.L.)
- Stock Corporation (*Sociedad Anónima* or S.A.)
- European Stock Corporation (*Sociedad Anónima Europea* or S.E.)
- Partnership limited by shares (*Sociedad Comanditaria por Acciones* or S. Com. Por A.).

Unless it is intended that the shares in the subsidiary be publicly traded on an exchange (in which case a stock corporation should be chosen), the most common legal form used by a foreign investor for a Spanish subsidiary is the S.L., as mentioned in Part 7. Here, therefore, we will focus on the S.L. We would, of course, be pleased to advise you with regard to other Spanish legal entities and also with regard to the possibility of using companies registered in other EU member states to carry on business in Spain.

Establishment Procedure

The S.L. is established by way of granting a public deed before a Spanish notary and by the registration of the S.L. with the Commercial Register (*Registro Mercantil*). The social operations will be able to start on the date of granting of the deed of incorporation.

The first step in the establishment procedure is to obtain a name for the subsidiary, requesting from the Central Commercial Register (*Registro Mercantil Central*) the issuance of a certificate of reservation of name for the new company, valid for six months from the date of issue. This step must precede all others to ensure that the proposed name can be used.

Next, prior to any delivery or acquisition of goods or services, it is necessary to obtain a provisional "number of tax identification" or NIF to identify the subsidiary. The NIF is requested before the administration of the tax corresponding to the fiscal domicile of the subsidiary, presenting the Census Declaration of high (model 036).

A bank account must immediately be opened in the name of the company, in any financial institution, where the minimum share capital of incorporation can be deposited, in order to obtain the "certificate of deposit of the share capital" required by the notary.

Upon completion of the previous steps, and before starting the business, a public deed of incorporation should be requested from a notary, presenting the following documentation: negative certification of designation; bank certificate attesting deposit of, at least, the minimum initial capital; the provisional tax; the "Foreigners' Identity Number" or NIE of the inverter; and the articles of association.

Once the first copy of the deed of incorporation has been granted, and within two months, the company must be registered with the register corresponding to its domicile. After such registration, an officer of the company must request the ID that specifically identifies the subsidiary.

Finally, the company's books must be legalized before the Commercial Register.

The registration in Spain usually takes between 20 days and one month. Therefore, in specific cases, it may be advisable to acquire (for a small surcharge) an already established but unused and inactive "shelf-company" from a corporate service provider instead of establishing the S.L.

Liability of Shareholders

In general, the company's shareholders are not personally liable for any obligations of the S.L. The shareholders must pay in their contribution to the registered share capital.

On the other hand, the incorporation of a single-member company (*Sociedad Unipersonal*) must identify the single member in the registered articles of incorporation, though the single member will not be personally liable for the company's debts. Otherwise, after six months from the registration of the single-member company without the single member's identification, he will be responsible for all personal, unlimited and solidarity of liability incurred by the company.

Registered Share Capital

The minimal registered share capital of an S.L. is €3,000 and it must be fully subscribed by the shareholders and fully pay the nominal value of each share. Capital contributions can be made in cash or in kind. For contributions in kind, an expert opinion on value is optional and the shareholders and directors of the company would not be liable for this valuation.

The “New Business Limited Company” (*Sociedad Limitada Nueva Empresa, SLNE*)

The SLNE is a variation of the SL specially designed for small businesses whose incorporation can be implemented through electronic, computer and telematic techniques, so that the necessary procedures for the granting and registration of the articles of association is quicker than in the ordinary procedure. The minimum share capital in a SLNE may not be less than €3,000 or more than €125,000, and may only be paid out by means of cash contributions.

The “Limited Liability Company in Successive Formation” (*Sociedad Limitada de Formación Sucesiva*)

Recently, Spain has approved the Law to Support Entrepreneurs and Internalization, which allows incorporation of an S.L. with a share capital below the legal minimum share capital of €3.000, provided that:

- at least 20% of the benefit of the exercise is used for legal reserve;
- shareholders only receive dividends if the equity value is not less than 60% of the minimum legal capital; and
- the total compensation paid to shareholders and directors does not exceed 20% of the net equity of the corresponding year.

Directors

An S.L. may appoint one or more directors. The directors carry out the day to day business of the S.L. and represent the S.L. with third parties. The scope of representation of a director cannot be validly restricted vis-à-vis third parties. A director can be an individual or a company, but if a company it is necessary to appoint a natural person acting on behalf of the company. Directors cannot be minors or incapacitated persons, or officials in the service of the public administration. A director does not have to be a Spanish national or a Spanish resident.

The Administration of a company can be organized in different ways through the articles of association:

- a sole director, who necessarily represents the company individually;
- joint and several directors who act in solidarity and represent the company individually;
- joint directors who act jointly and represent the company together; or
- a Board of Directors, meaning a collegial body which can delegate its functions to one or several managing directors.

A director is appointed by way of a shareholder resolution. His appointment becomes immediately effective after the acceptance of the resolution. Thereafter, the appointment must be registered with the commercial register. The position of director is supposed to be without pay, but a certain system of remuneration may be fixed in the statutes of the company.

Duties of Directors

The directors must act in accordance with the standard of “due care of a prudent business person”, fulfilling their duties of diligence and loyalty to the company. Specific duties for directors are set out in the Companies Act (*Ley 1/2010, de Sociedades de Capital*). Such duties include compliance with the strict Spanish capital maintenance rules, filing for insolvency when required and preparing and filing the financial statements of the S.L. When a director violates his legal duties, he may be liable not only to the S.L. but also to third parties.

Shareholders

The shareholders are the highest body of an S.L. By virtue of shareholders resolutions, they appoint and recall the directors and can give specific instructions to the directors. Spanish corporate law requires that certain corporate measures (including the amendment of articles and the increase of share capital) are subject to shareholder approval. In addition, the articles of association also generally contain a list of corporate measures and business transactions for which the approval of the shareholders meeting is required.

Name

The name of the S.L. may be freely chosen, but must necessarily include the indication “*Sociedad de Responsabilidad Limitada*”, “*Sociedad Limitada*” or the abbreviations SRL or SL. The name may refer to a person, a thing or may be a pure fiction. It must be clearly distinguishable from the company names of other business in the same activity sector, must not be misleading and must not violate the intellectual property rights of third parties.

Registered Office

The registered office of the S.L. must be within a municipality in Spain. However, neither the production facilities nor the head office of the S.L. need to be situated at the registered office.

Articles of Association

An S.L. has one essential document, the articles of association (*Estatutos*). The articles of association, combined with the provisions of Spanish corporate law, in particular the provisions of the Companies Act, regulate the internal affairs of the S.L. The

shareholders possess wide discretion when agreeing the scope and content of the articles. Many provisions contained in the Corporate Law for Limited Liabilities Companies may be varied by way of individually tailored provisions contained in the articles of association.

Financial Statements

Each S.L. must prepare its financial statements annually. The company's directors are required to formulate, within a maximum period of three months from the close of the fiscal year, the annual accounts, the management report and the proposal for the application of the result, as well as, where appropriate, consolidated accounts and the management report. The annual accounts shall include balance sheet, the profit and loss account, a statement reflecting the changes in the net equity of the exercise, a cash flow statement and the memory.

If, over two consecutive years, the company meets circumstances specified by law it may be permitted to formulate abridged annual accounts. In these cases, it will not be compulsory to present the state of cash flows, nor the management report.

The Key Features of a Branch Office

A branch office comes into legal existence automatically when the steps are taken for its establishment, although it must be registered with the Commercial Register. An establishment qualifies as a branch office if it fulfils the following requirements:

It is a secondary establishment which is not the full address of the business, but is subordinate to the main settlement, both in economic and legal terms, and collaborates in the achievement of the corporate purpose only.

It enjoys some autonomy from management to operate. It has material facilities and its own organization, as well as a governing body, overseen by the main company, to cater to its own customers.

It lacks legal personality because it is an ancillary establishment which may not be distinct and independent from the main company.

It has character of permanence because the branch is intended to operate for an indefinite time.

Full or partial main settlement activities may be developed. The branch does not have to duplicate every one of the operations that make up the purpose of the parent company. The identity with respect to the purpose of both companies can be total or partial, and the secondary activities may be only some of those contained in the unique social purpose.

In Spain, registering a branch of a foreign company requires the preparation and provision of several documents, and introducing them in the Commercial Register corresponding to the company's domicile. These documents must support: the existence of the parent company, its current articles, their managers, the decision to create a branch and the public deed of incorporation granted before a public notary.

An establishment that does not fulfil the requirements mentioned above is considered a dependent permanent establishment (*Establecimiento Permanente*). It is dependent in every respect on the main establishment and invoices are issued on behalf of the main establishment. A dependent permanent establishment does not need to be registered with the Commercial Register.

Both the branch office and the dependent permanent establishment (like the subsidiary) must register their commercial activities with the relevant trade supervision office, if it is applicable. While, as a general rule in Spain, everyone enjoys the freedom to carry out business activities, there are a number of trades for which an authorization from the authorities is required.

Branch offices and dependent permanent establishments are, of course, subject to Spanish tax laws and its employees are subject to general Spanish labour, immigration and residence laws. Please refer to the tax and the labour law section of this guide for more details.

Incorporation and Other Services Offered by Squire Sanders

The corporate lawyers of Squire Sanders have a wealth of experience in establishing and registering subsidiaries and branch offices and in advising you with regard to typical corporate housekeeping tasks, including, the appointment and resignation of managing directors and the relocation of the registered office. We implement these changes by way of bilingual English-Spanish documents to ensure that they are both comprehensible to the foreign investor and acceptable to the Spanish authorities.

Business Premises

The Choice of Location

For a foreign investor, Spain offers interesting business opportunities in strategic sectors with high added value, such as renewable energy, biotechnology, environment, aerospace and automotive, because of its attractive competitive environment. Furthermore, companies that are installed in Spain, not only may have access to the national market, a very attractive market because of its size (more than 47 million consumers) and by their high purchasing power, but it can also access to markets in the EMEA region (Europe, Middle East and North Africa)

and Latin America, given its privileged geostrategic position, its prestige and the strong presence of Spanish companies in these regions. Within the Spanish territory, the choice of location can be influenced by the nature of the business or by cost considerations. Moreover, grants and incentives available in different autonomous communities may be taken into account.

Forms of Holding Real Estate

Real estate in Spain can be held on the basis of:

- Ownership: The holder holds full title in the property.
- Lease: By agreement the holder is entitled to use certain premises for a period of time in exchange for (mostly) periodic payment of rent.
- Entitlement in rem: The holder has a restricted title in the property. Various forms are possible, e. g., a right of use for certain purposes or a right of use for a limited period of time.
- Business premises are commonly held either in ownership or by way of a lease.

Purchase or Lease the Business Premises?

There are no specific restrictions for foreign entities regarding the acquisition or leasing of real estate. Thus, the choice whether to purchase or to lease business premises will usually depend on commercial considerations.

Generally, a lease offers more flexibility and can be more easily adapted to a business' needs. For instance, it is possible to lease only certain rooms of a larger building, agree on options for additional spaces when needed, long or short term agreements are available, while the obligations of the lessee to repair or bear other costs can be limited to make costs more predictable.

Ownership may be appropriate for long term engagements or if the premises themselves are considered investments.

Security in Case of Lease

When entering into a lease agreement, it is common practice for the lessee (whether foreign or domestic) to be asked for some form of security, such as a bank guarantee, parental guarantee, letter of comfort or in some cases a cash deposit. The security will be returned at the end of the lease term if not used to cover any claims of the lessor.

Costs Usually Involved in Acquiring or Leasing Premises

- Legal costs: It is usual for each party to pay for its own legal costs in relation to the lease or purchase of premises.
- Notary's fees: Every purchase of real estate has to be notarized. The Notary's fees depend on the value of the transaction and are usually borne by the seller.
- Land Registry fees: Every change of title in real estate must be registered within the Land Register (*Registro de la Propiedad*) in order to be valid. The applicable fees are usually borne by the purchaser. The same applies for the fees for mortgages or land charges being registered for the funding of a purchase.
- Real Estate Transfer Tax (also see Part 19)

On-going Costs (Non-exhaustive)

In case of purchased premises:

- Real Estate Tax and other public levies like waste water fees or waste disposal fees;
- Building insurance and building liability insurance;
- Costs of consumption of water and electricity.

In case of leased premises:

- Rent;
- On-going costs of the owner are often contractually transferred to the lessee as ancillary costs.

Environmental Law

Spanish Environmental Law (*Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental*), according to European Environmental Law (*Directiva 2004/35/CE, del Parlamento Europeo y del Consejo, de 21 de abril de 2004*) has established an administrative regime of environmental responsibility of objective and unlimited character based on the principles of "damage prevention" and that the "polluter pays". The environmental law establishes a new regime for environmental damages caused or threatened to be caused by operators, noting it is necessary to adopt measures to prevent its causation or, when the damage has occurred, to limit or prevent further environmental damages as well as return damaged natural resources to the state they were in before the damage.

Building Permission

An owner or occupier of land wishing to undertake any development on that land will need to consider a possible requirement for a building permit. Development includes not only the construction of buildings, but also demolition or a change of use (for example, from residential to industrial) of buildings. To obtain a building permit, the development must comply with (i) zoning law and (ii) the laws on building safety and public order. Under zoning law the permissibility of a type of building in a certain area depends on a Zoning Plan or the growth structure of the area (e.g., industrial facilities will not be permitted in a pure residential area and vice versa). Building safety and public order requirements mean, inter alia, that the structural stability of a building must be duly documented to the authorities before the construction work can commence.

Real Estate Services Offered by Squire Sanders

Squire Sanders is able to offer services covering the full scope of real estate related law at any location in Spain. The services comprise advice in relation to the acquisition or leasing of premises, such as due diligence services, negotiation and drafting of bilingual contractual documentation, post-acquisition advice as well as advice and support in relation to construction, project development or financing.

Transferring Staff to Spain

The rules relating to people who are not citizens of an EU member state and who do not have the right to permanently live and work in Spain vary according to the intended length of their stay, the purpose of their stay, their job skills, the labour market and the nationality of the individual.

Temporary Visas

People traveling to Spain need to secure a visa if they plan to stay in the country for up to 90 days. Spain offers different types of visas depending on the nature of your visit. These include student visas, tourist visas, business visas and transit visas. A typical visa for business visitors is the Schengen Visa, which allows the holder to travel freely within the Schengen countries for a maximum stay of up to 90 days in a six month period.

Initial Residence and Work Authorisation

The initial residence and work authorisation entitles the foreign nationals to render services in Spain for a one year period (renewable for two year periods), in a certain geographical area and in a determined sector. For the authorisation to be granted, different conditions must be met. In particular, the national employment situation is consistent with the employment of foreign workers. There are two ways in which this requirement may be met:

- If the employee intends to be employed in an occupation for which is difficult to find employees (it is practically impossible to go down this route).
- If the employer claims difficulty in contracting an employee for a post, the job must be offered before the public employment service, with no positive response.

There are situations under which this condition may not have to be fulfilled:

- The coverage of positions of trust and company managers.
- Highly qualified professionals, including technicians and scientists working for public agencies, universities or research centres, development and innovation dependent companies, notwithstanding the applicable licensing regime.
- Employees of companies or groups of companies in other countries seeking to develop their activity in the same company or group of companies.

Transnational Provision of Services

Foreign employees coming from a company established in a state outside the EU or the European Economic Area may have a temporary residence and work permit in the framework of transnational provision of services in the following cases:

- When the temporary transfer takes place under the direction of the foreign company in pursuance of a contract and the recipient of services is established or carrying on business in Spain.
- In the event of the temporary transfer of employees from workplaces of companies located outside Spain, work centres in the same company or group of companies (in this case the national employment situation could be avoided).
- In the event of temporary transfer of highly qualified employees with the aim of supervising or advising on services provided by companies based in Spain that are to be performed abroad.

For the authorisation to be granted, the following conditions must be met:

- The residence of the foreign employee in the country in which the transferring company is situated must be stable and regular.
- The professional activity of the foreign employee in the country in which the transferring company is based must be regular and the employee must have performed such activity for at least one year and worked for that company for at least nine months.
- The transferring company must guarantee the applicable employment requirements and conditions for employees temporarily transferred to Spain, in accordance with the provisions of Law 45/1999 of 29 November (rights imposed by the Spanish labour legislation).
- The duration of the residence and work permit must coincide with the term of the transfer, with a maximum of one year, renewable for the same period should the same requirements be met. In practice, this statement has resulted in a period of one year plus one year and so on up to five years. However, this has to be analysed case by case, because depending on the country of origin of the employee (and if a Social Security Agreement has been signed between Spain and the other country), the duration and necessity of making Social Security contributions in Spain or in the country of origin may vary.

Self-employed Persons

A person who wishes to set up or invest in a business in Spain may apply for a work authorisation as an entrepreneur. For the authorisation to be granted, the following conditions must be met:

- Individuals must meet current legislation conditions for nationals regarding opening and operating the planned activity (in addition to incorporating the company, individuals may have to follow other procedures, such as obtaining licences).
- Individuals must prove that the estimated investment for the project is sufficient and its effect, where applicable, on the creation of employment. There is no minimum investment amount indicated for this – it depends on issues such as the setup and maintenance costs that must be paid.
- Individuals must provide a forecast of funds relating to the activity to be carried out, so that the activity will have sufficient financial resources as from the first year, which must at least cover the interested party's accommodation and upkeep after the expenses required for the maintenance of the activity have been deducted.

- Individuals must not have criminal records in Spain or in other countries of residence within the past five years prior to application.
- Individuals must avoid putting themselves in illegal situations in Spain.
- Freelance or self-employed workers may be required to prove that one or more companies have hired their services.

In these cases, the professional qualifications required for the professional activity to be carried out or sufficient experience for exercising that professional activity must be provided, together with the qualifications required for professions whose practice requires specific approval and a certificate of membership of the corresponding association in the case of independent professional activities for which association membership is required.

Furthermore, the European Court of Justice case of *Van der Elst* established that, provided certain criteria are met, non-EEA nationals working for an EU employer in the EU should be allowed to provide services in another Member State without the need to obtain a work permit. This means that an established non-EEA employee of an EU company in the EU can come to Spain to provide a service on behalf of the company without a work permit. The requirements to be met by the employee are that they:

- are lawfully resident in the EU Member State in which the employer is established;
- are lawfully and habitually employed by an employer who is temporarily providing a service in Spain;
- will not take any other employment during the transfer.

The duration of the residence and work permit must coincide with the term of transfer to a maximum of one year, renewable for the same period. However, this has to be analysed case by case, depending on the country of origin of the employee and the Criteria of the Spanish Consulate where the application has to be submitted. EU nationals and nationals of Liechtenstein, Iceland, Norway and Switzerland are able to invest in Spain, work as a self-employed or employed individual without restriction.

New Law 14/2013 of 27 September to Support Entrepreneurs and Internationalization: aims to encourage investment and make it easier for foreign investors, entrepreneurs, highly-qualified employees, researchers and intra-company transferees to enter and reside in Spain.

The law introduces new categories for investor and entrepreneur permits processed by the *Unidad de Grandes Empresas* (UGE or “Special Unit of Large Companies”), relaxes qualifying criteria and reduces processing times for existing categories of work and residence permits.

“*UGE*” provides expedited immigration processing for large businesses in Spain, reducing processing times, removing the requirement for a labour market search (avoiding the consideration of the national employment situation) and allowing simultaneous submission of dependent visa applications.

Spanish Employment Law Requirements

Compared to many other countries, Spain has a heavily regulated labour market. Numerous domestic and EU regulation in this area, together with a plethora of case law, means that those setting up operations in Spain should seek specialist assistance to ensure their employee relationship is cordial as well as legally compliant.

Importance of Collective Bargaining Agreements (CBA)

These are agreements entered into between employers’ associations and trade unions for specific sectors (e.g., chemical industry, retail trade, metal industry) and for specific territories (national, regional or provincial). Employers and employees representatives may enter into CBAs in the scope of the company or group of companies. CBAs complying with the legal requirements of parties’ representation authority and formalities have a legally-binding effect and thus bind all employers and employees within their scope, whether employers or employees are members of the negotiating employers’ association or trade unions or not.

Recruitment

Care must be taken when recruiting employees to staff an operation in Spain. For example, employers must take care to comply with Spanish anti-discrimination legislation (which includes protection against discrimination on grounds of, amongst other things, race, sex and disability, religion or belief, sexual orientation and age).

Statutory Rights

Spanish legislation gives employees a number of rights and employers clearly need to be aware of these. Subject to the employee fulfilling relevant statutory criteria, such rights include:

- sick pay for up to 18 months;
- family rights (i.e., paid maternity leave of 16 weeks);
- minimum wages in some industry sectors;

- rights regarding maximum working hours;
- dismissal and redundancy protection;
- paid holidays of at least four weeks per year.

Contracts of Employment

Statutory provisions as well as provisions in collective bargaining agreements, which generally cannot be overridden by contract, play an important role in employment relationships in Spain. The employer and the employee only have a limited degree of freedom when agreeing employment terms. Whilst a written contract of employment is only mandatory in case of contracts limited in time and in case of other exceptions, it is advisable (and customary) to have such contracts in case of unlimited employment. Furthermore, employers need to be aware that all terms agreed with employees will not be enforceable if they violate applicable law. For example, any agreement to restrain an employee from conducting certain activities (such as acting in competition with the company) after the employment relationship has ended, will only be enforceable if the restrictions are reasonably required to protect a legitimate business interest of the employer and an adequate compensation during the restricted period of up to two years has been agreed.

Terminating Employees

There are a number of different ways to terminate employment contracts:

Unfair dismissal: Grounds for termination are deemed not to have been sufficiently evidenced or do not justify termination or, in certain cases, where the employer has not complied with the relevant formalities required by law. In this case, the employee is entitled to statutory severance: 33 days’ salary per year of service, up to 24 months’ salary or at the employers’ election to be reinstated receiving unpaid wages from termination.

Objective termination/business grounds: An employer is entitled to dismiss an employee for individual reasons based on business grounds in the following cases: (i) employee unfit for position acquired after employment; (ii) failure to adapt to changes or technical improvements in the employee’s position, (iii) absences from work, whether justified or not, for a minimum of 20% of working days during two months, or 25% during four months in a 12-month period (a number of absences should not be taken into account) and (iv) business grounds termination based on economic, technical, organisational or productive grounds. In such cases the statutory severance is 20 days’ salary per year of service, capped at 12 months’ salary.

Special dismissal protection: Pregnant employees as well as employees on parental leave enjoy special dismissal protection. Furthermore, members of the works council are also specially protected.

Discrimination/other protection: Spanish legislation provides employees with additional protection during the recruitment process, throughout the employment relationship and upon dismissal including the right not to be discriminated against on grounds of, amongst other things, race, marital status, sex, disability, sexual orientation, religion or belief and age. Failure to comply with these rules can result in the nullification of the dismissal (which implies mandatory reinstatement) plus compensation claims.

Industrial Relations

If the company or work centre has more than 10 workers but less than 50, one or more “Staff Delegates” are elected. In companies or work centres with more than 50 employees, those elected by the workforce make up the “Works Council”. Works Council Representatives have important information and consultation rights,

Transfers of Businesses

The purchase of businesses by way of an asset deal as well as the outsourcing/insourcing/changing of service provision in relation to specific activities may constitute a transfer of business or a transfer of a part of the business pursuant to Article 44 of the Spanish Workers’ Statute. Such legal provision provides for the automatic transfer of employment contracts to the new owner of the business or service provider, with the benefit of previous terms and conditions of employment. There are also information requirements and the affected employees have the right to object to the transfer.

Other Staff

In addition to recruiting employees, it may be appropriate for an operation in Spain to make use of agency staff or even self-employed consultants who provide services for a fee. Depending on certain factors, however, there is a risk that such persons may be deemed to be employees. Careful consideration should be given with regard to the use of such workers, as any person who is deemed to be an employee of the Spanish operation will have the same rights in law as any regular employee. Additionally, with respect to misclassified free-lancers, the employer may be liable for social security contributions.

Taxation: Introduction

In Spain, taxes are levied at state level, regional level and local level.

Companies are subject to corporate income tax (CIT – *Impuesto sobre Sociedades*) and individuals are subject to individual income tax (IIT – *Impuesto sobre la Renta de las Personas Físicas*) levied by the state and the autonomous regions.

Spain offers a special tax regime for holding companies (ETVE – *Entidades de Tenencia de Valores Extranjeros*).

Inheritance and gift tax and wealth tax apply and have different specialties depending on the autonomous community.

Local taxes are mainly levied for real estate except for trade tax, which is also enforced and assessed by the local municipalities.

Spain imposes Value Added Tax (VAT – *Impuesto sobre el Valor Añadido*) in respect of taxable supplies of goods and services in mainland Spain and the Balearic Islands. Canary Islands and the Spanish enclaves of Ceuta and Melilla in Northern Africa have their specific indirect taxation.

Employers must make social security contributions as well as employees and self-employed individuals.

Spain comprises mainland Spain, the Balearic Islands and the Canary Islands as well as the enclaves of Ceuta and Melilla in Northern Africa. The Basque region and Navarre have their own income tax systems.

Taxation: Companies

Companies, such as the Spanish Limited Liability Company or the Spanish Stock Corporation that are tax-resident in Spain are subject to Spanish CIT on their worldwide income, unless relieved by double tax treaties.

A company is resident in Spain if one of the following conditions is met:

- Incorporation under Spanish law;
- Legal seat located in the Spanish territory; or
- Place of effective management located in Spain.

The Spanish tax authorities may deem a company located in a tax haven or a low-tax territory to be resident in Spain if the majority of its assets consist of immovable property located in Spain, or rights on such immovable property, unless the location in such territory is based on valid economic reasons other than the pure management of securities.

Resident companies are liable to corporate income tax on their worldwide income and capital gains. The calculation of the taxable income is based on the annual financial statements drawn up pursuant to Spanish provisions of tax law. These provisions notably include regulations on the treatment of hidden profit distributions and restrictions on the deductibility of business expenses, in particular with respect to debt financing expenditures.

The taxable income includes the current company profits or

losses as well as any capital gains. In general, the entire profit is fully taxable. However, there are some exemptions.

The Spanish Corporate Income Tax Act provides for a tax exemption on dividends received as well as capital gains from the sale of shares in foreign companies unless certain restrictions apply. The tax exemption applies if the following conditions are met:

- Participation directly or indirectly, of at least 5% (a special provision only applicable to ETVE tax regime allows a lower participation if the value is higher than €6 million) in the non-resident company. Such participation must be maintained continuously during a one-year period. The exemption is also granted if the dividends distribution is made before the conclusion of such period, provided the resident parent company keeps holding participation for the remaining period;
- Non-resident company subject to a tax comparable to the Spanish Corporate Income Tax with no possibility of being exempt. This condition is considered to be met if the non-resident company is resident in a country with which Spain has signed a Double Taxation Treaty that contains an exchange of information clause (all treaties). The condition is considered not to be met if the non-resident company is resident in a tax haven, except if the company is resident in another EU Member State and the taxpayer proves that it was incorporated in such territory for valid economic reasons and carries out business activities; and
- At least 85% of the profits of the non-resident company derive from business activities in a foreign country other than a listed tax haven.

The CIT general tax rate is 30%. Companies with an annual turnover lower than €10 million are taxed at a rate of 25% on the first €300,000 of annual profits. Over such amount, 30% tax rate is applicable.

For tax periods beginning in 2009-2012 the tax rate applicable to small and medium-sized companies is reduced to 20% on the first €300,000 annual profits, and to 25% for the excess. The reduced rates apply provided that the following conditions are met:

- Net revenues are lower than €5 million;
- Average number of employees is lower than 25; and
- Employment maintenance or increase.

Participation Exemption

ETVE (*Entidades de Tenencia de Valores Extranjeros*) benefit from a participation exemption regime, under which dividends, other profit distributions and capital gains from the disposal of a qualifying interest in non-resident companies are exempt from CIT, provided that the previous conditions are met. The distribution of profits by a holding company to non-resident corporate or individual shareholders is exempt from withholding tax, unless the recipient is resident in a listed tax haven for Spanish purposes.

The business purposes for ETVE comprise the supervision and management of participations in non-resident entities. The special tax regime would not be available to certain passive entities whose main business is to manage movable or immovable property.

Quarterly pre-payments of CIT are due on an estimation of the current year's tax amount due.

As of 1 January 2012, the thin capitalization rule has been abolished and replaced by a general limitation on the deduction of interest payments that will not apply to financial institutions and insurance companies. The new regime places a deductibility ceiling of 30% of the (adjusted) operating profits for the relevant period, subject to the following rules:

- Interest payments up to €1 million per tax period will be deductible in any case; and
- Any interest payments that were not deducted may be carried forward for 18 years.

If interest payments fall below the 30% ceiling in a tax period, that difference will increase the ceiling of the deductible financial expenses of the next five tax years.

Entities that are taxed as part of a consolidated tax group must apply this ceiling with relation to the whole group, subject to certain conditions.

Transfer Pricing

Under the arm's length principle, the consideration of any inter-company transaction must conform to the level that would have applied if the transaction had taken place between unrelated third parties. In some cases where the arm's lengths principle is not met, the tax office may be entitled to adjust the tax base resulting in an additional taxable income. The tax office may also charge penalties. Furthermore, tax payers are required to maintain proper transfer pricing documentation for intercompany cross-border transactions with regard to the type and content of the business relationships with related parties including details on the calculation of transfer prices. In the event that there is insufficient or no documentation available, the tax authorities are entitled to estimate a higher tax base. Additionally, penalty payments may be assessed.

There are specific rules for groups of companies under the Corporate Income Tax Act, particularly relating to shareholdings. A group consists of a resident parent company or entity holding at least 75% of resident subsidiaries. Where a subsidiary is a listed entity, the 75% threshold is reduced to 70%. The shareholding percentage must have been kept during the whole tax period.

Dividends and Interests

In general, companies have to withhold taxes for all dividends and interests and other profit distributions, irrespective of whether the recipient or shareholder is a Spanish or foreign entity. The withholding tax on the gross amount is 21% in 2012 and 2013, and 19% as of 2014.

An exemption from withholding tax applies under the EU Parent-Subsidiary Directive for dividends distributions to foreign EU companies with a minimum shareholding of 5%. The withholding tax can also be reduced to a lower rate or be avoided/reclaimed under a Double Taxation Treaty. However, the reduction as well as limitation and exemption under the EU Parent-Subsidiary Directive or the double taxation treaties may be subject to Spanish anti-treaty shopping rules whereby the limitation or exemption is not available if the recipient is an interposed entity with insufficient “substance”.

Royalties: The withholding tax rate on Spanish-source is 24% on the gross amount and 24.75% for 2012 and 2013. Royalty payments by Spanish companies are not subject to withholding tax, provided that the recipient is an associated company of the paying company, resident in another EU Member State. Two companies are “associated companies” if one of them holds directly at least 25% of the capital of the other or a third EU company holds directly at least 25% of the capital of the other two companies. In both cases, a minimum holding period of one year is required.

Spanish partnerships are not subject to income tax or CIT. Instead, CIT or income tax is levied at the level of the partners of the partnership (transparency principle). The income is determined uniformly and separately on the level of the partnership and attributed to the partners in proportion to its equity interest in the partnership. The income tax rate for partners is equivalent to the tax rate for individuals.

Binding rulings are issued by the Spanish General Directorate of Taxes. The rulings are binding on the Tax Authorities and also with regard to other taxpayers in similar situations.

Taxation: Individuals

Tax Liability

An individual’s tax status in Spain depends on their residence status. The individual is deemed to be a resident in Spain if they have a domestic domicile or a domestic customary place of abode or if they:

- Stay in Spain more than 183 days (whether or not consecutively) in a calendar year;
- Have their main centre of business or professional activities or economic interests in Spain; or
- Have a spouse and minor dependent children who qualify as residents of Spain under (1) or (2) above (unless the taxpayer can prove – by means of a certificate of residence issued by the tax authorities of another country – that they are resident in another country).

Nationality is not a relevant criterion for determining the residence or tax liability of individuals under Spanish tax law. A resident individual is subject to unlimited tax liability, taxed on their worldwide income. If an individual is not resident in Spain but generates income from a Spanish source, they will be generally taxed on Spanish-source income (limited tax liability).

Worldwide income of Spanish tax resident individuals is subject to individual income tax, classified in six basic categories according to the source or origin:

- Employment income (*rendimientos del trabajo*);
- Income from moveable capital (*rendimientos del capital mobiliario*);
- Income from immoveable capital (*rendimientos del capital inmobiliario*);
- Business income (*rendimientos de actividades económicas*);
- Capital gains (*ganancias y pérdidas patrimoniales*); and
- Imputed income (*imputaciones de renta*).

Employment income includes the value of all benefits provided to the employee, e.g., salary payments, bonuses, benefits in kind (private use of a company car, granting stock options) and other forms of remuneration (for example insurance payments). If the employer grants stock options to the employee at a reduced price or for free, the taxable event generally is only the transfer of the shares to the employee. The difference between the fair market value of the shares at the time of the transfer and the price paid by the employee to acquire the stock option will be taxed.

Taxpayer's income from the different categories is broken down, into two kinds of income:

- The *general income* which is the aggregate of employment income, income from immovable capital, business income and capital gains including the positive or negative capital gains which are not deemed to be savings income.
- The *savings income* that comprises both income from movable capital (dividends, interest and monetary return or payment in kind on life or disability insurance contracts) and positive or negative capital gains that arise on transfer of assets.

Non-resident individuals are only taxed on certain types of income received from a Spanish source at fixed tax rates (general tax rate of 24% generally on a gross basis. However, for tax years 2012 and 2013, the tax rate is increased to 24.75% and 19% on dividends, interests and capital gains, generally, on a gross basis. However, for tax years 2012 and 2013, the tax rate is increased to 21%).

Subject to conditions, an individual who moves to Spain to work may elect to be taxed under the rules of Non Resident Income Tax (i.e. taxation at a flat 24% rate (24.75% in tax years 2012 and 2013) in the tax year in which they move to Spain and for the following five tax years. The election is available to an individual if they:

- Have not been resident in Spain any time in the last 10 years;
- Moved to Spain because of an employment contract;
- Work in Spain for a company or entity resident in Spain or for a Spanish permanent resident of a non-resident entity;
- Their salary income is not exempt from income tax on non-residents; and
- The foreseeable compensation under the employment contract in each of the tax periods in which this special regime applies does not exceed €600,000 per year.

Tax Rates

Taxable income (€)		Tax on lower amount (€)	Rate on excess (%)
up to	17,707.20	0	24
17,707.20	– 33,007.20	4,249.73	28
33,007.20	– 53,407.20	8,533.73	37
53,407.20	– 120,000.20	16,081.73	43
120,000.20	– 175,000.20	44,716.72	44
175,000.20	and over	68,916.72	45

For tax years 2012 and 2013 the following surcharges are applicable:

Taxable income (€)		Tax on lower amount (€)	Rate on excess (%)
up to	17,707.20	0	0.75
17,707.20	– 33,007.20	132.80	2
33,007.20	– 53,407.20	438.80	3
53,407.20	– 120,000.20	1,050.80	4
120,000.20	– 175,000.20	3,714.52	5
175,000.20	– 300,000.20	6,464.52	6
300,000.20	and over	13,964.52	7

The taxpayer's savings income base is subject to as follows:

Taxable income (€)		Rate (%)
up to	6,000	19
6,000.01	and over	21

However, for tax years 2012 and 2013, the following surcharges are applicable:

Taxable income (€)		Rate (%)
up to	6,000	2
6,000.01	– 24,000	4
24,000.01	and over	6

Local Trade Tax (IAE)

IAE is levied annually on registered companies engaged in business, professional or artistic activities in Spain if their annual turnover exceeds €1 million. The tax is deductible for Individual Income Tax purposes. The amount of tax due depends on the activities carried out by the taxpayer and the surface area of the business/professional premises, corrected by certain coefficients and increased by a provincial surcharge.

A 95% reduction in the tax payable is available for taxpayers that perform activities declared to be of special interest.

Social Security Contributions

In Spain, contributions are made according to monthly salary. There is a minimum and a maximum contribution depending on the category of the employee.

* Minimum: €752.70

* Maximum: €3,425.70

Different percentages are applicable for different types of contribution and both the employer and the employee must contribute at different rates. The National Social Security contributions are essentially:

Employer%	Employee%	Total%
Common contingencies		
23.6	4.7	28.3
Unemployment		
5.5	1.55	7.06
Salaries Guarantee Fund		
0.20	0	0.20
Professional Training		
0.6	0.1	0.7
Total		
29.9	6.35	36.25

Taxation: Other Taxes

Value Added Tax (VAT)

VAT is a sales tax which is charged on taxable supplies of goods and services made by a taxable person in the course of any business activity carried on in Spain and on the import of goods from other states. The Spanish VAT Act is harmonized under the EC-wide VAT system.

The standard VAT rate for supplies of goods or services in Spain currently amounts to 21%. A reduced rate of 10% exists for certain services like food, transport, tourism, and hotel accommodation. A 4% super-reduced rate applies to basic necessities. There are further supplies of goods and services that are generally exempted from VAT such as intra-EC supplies of goods, sales of shares and certain financial services. For some of such VAT-exempted supplies, for example sale and letting of real estate, the entrepreneur is entitled to opt for a taxation of these supplies.

Tax charged on supplies made is called output tax. A supplier may in turn have incurred VAT on goods and services received (input tax). Such input tax can be offset against output tax provided that the supplier makes taxable supplies. If and to the extent that the input supply is used to render VAT-exempt output supplies, the respective input tax is generally not deductible. However, if input tax is related to certain VAT-exempt cross-border supplies, the entrepreneur can still claim for a deduction of this input tax.

VAT must be reported to the local tax authorities, typically on a quarterly basis. Where input tax paid can be set off against output tax received; only the balance is required to be paid over. If input tax exceeds output tax, a refund may be obtained. Special rules apply where a taxable person makes both taxable and non-taxable supplies, which have the effect of restricting the input tax relief to the taxable element of supplies received (see above).

Transfer Tax

Levied at a general rate of 7% on the second and any subsequent transfers of immovable property and rights thereon, except guarantees. No transfer tax is levied where the transaction is subject to VAT.

Capital Duty

Levied only on qualifying capital redemptions, liquidations and transfer of the seat of companies to Spain. The duty is levied at a rate of 1% on the value of the net assets contributed/refunded.

Stamp Duty

Levied on officially documented acts which are either formalized in Spain or have any legal or economic effect in Spain and it is generally not significant. Stamp duty may be levied concurrently with VAT. No stamp duty is levied, however, where the transaction is subject to capital duty.

Trading in Spain

Commercial Law

The Spanish Commercial Code (*Código de Comercio, C. Com*) contains rules distinct from the rules of the Spanish Civil Code (*Código Civil, C.C.*), the general statutes of Spanish private law. Commercial law constitutes the specific law of merchants and therefore is only applicable to legal transactions between businesses. If considered a merchant, specific legal rules as well as unwritten trade customs apply. In commercial law, the parties enjoy a greater autonomy than under the Spanish Civil Code, in order not to constrict transactions between businesses more than necessary. Thus commercial law forms a counterpart to consumer protection law, whose protective regulations and restrictions of personal autonomy favour consumers in their transactions with businesses.

Anyone exercising a commercial, for-profit independent activity will be considered a merchant. Commercial activities must be of a certain scale and need to be reflected in the structure of business operations. For small-scale traders this is not the case and they do not fall under the scope of application of the commercial code. However they can voluntarily acquire merchant status through registration with the commercial register.

Partnerships and companies are considered merchants by virtue of their form of organization, irrespective of the field of their business activities, e.g. for companies organized as General Partnerships, Limited Partnerships, Limited Liability Companies, Stock Corporations or as European Corporations (*Sociedad Europea, SE*).

A merchant generally falls under the rules of the Spanish Commercial Code, which implies special rights and obligations for the company's administration. The company's accounting has to follow statutory requirements, such as double-entry bookkeeping. Specific rules for legal transactions apply. For example, under the merchant's obligation to reprove deficiencies, a merchant is obliged to examine goods upon receipt and give notice of deficiencies immediately.

Furthermore, general terms and conditions of a party become part of the legal transaction if they are correctly incorporated into the legal documentation. In the case of shipments of goods

to parties abroad, the United Nations Convention on Contracts for the International Sale of Goods (*Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*) which contains divergent rules that will apply unless they are explicitly excluded.

As mentioned above, certain requirements as to the formality of transactions are less strict between merchants. For example, acknowledgements of debt, promissory notes and bonds do not need to fulfil all requirements set forth in the Spanish Civil Code.

All merchants are required to register with the commercial register, where certain changes to the company or the termination of commercial activities need to be entered. Legal entities are required to register their executives as well as other authorized representatives.

Consumer Protection Law

Spanish consumer protection provisions are divided over several different laws and regulations.

Below there is a non-exhaustive list of consumer protection clauses in the Spanish Law:

- **Standard terms and conditions.** Particularly important rules to be observed when entering into contracts with consumers are the Spanish Law of General Conditions of Contract (*Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación*) and the Spanish law of defence of consumers (*Ley 1/2007 para la defenche de los Consumidores y Usuarios*) which regulate the use of standard terms and conditions with consumers. Contract clauses qualify as standard terms and conditions when they are used by one of the parties for several contracts and are not negotiated individually. Clauses used by a party which in exercise of its trade, business or profession enters into a contract with a consumer also qualify as standard terms and conditions even if they are only used and intended for use in this particular case unless the consumer could influence their content. Standard terms and conditions are validly incorporated into a contract when they have been expressly accepted by the adherent, after being duly informed of its content by the predisposing. In addition, the general clauses must be drafted in accordance with the criteria of transparency, clarity, concreteness and simplicity. General conditions that are contrary to law or unfair to the consumer will be void of full, according to the Spanish law of defence of consumers (*Ley 1/2007 para la defenche de los Consumidores y Usuarios*). Distinguishing between valid and invalid terms and conditions can sometimes difficult and there is an extensive case law in respect of this.

- **Consumer Loans.** The Spanish Law of Consumer Loans (*Ley 16/2011, de 24 de junio, de contratos de crédito al consumo*, LCC) have their origin in EC Directive 87/102 on consumer loans, now replaced by EC Directive 2008/48, which was transposed into national law by the member states middle of 2010 and which led to several modifications of the existing law. The provisions on consumer loans are of considerable economic importance as they apply to loan agreements and credit broker contracts between commercial lenders or credit brokers on the one hand and consumers on the other. The provisions contained in the LCC do not only apply to the purchase and financing of moveable items by loans, but also to all types of non-gratuitous credit. Finance leases and loan contracts secured by real property are partly exempted from the provisions regarding consumer loans.
- **Right of withdrawal.** According to the Spanish law of Defence of the Consumers and Users (*Ley 1/2007, para la defensa de los consumidores y usuarios*), consumers and users have a right of withdrawal for a minimum period of seven days without having to justify a decision and without penalty of any kind.
- **Transactions contrary to public policy.** There is a general provision in the Spanish Civil Code which provides that the parties in a contract have full autonomy to establish clauses, terms and conditions that are suitable, provided that such clauses are not contrary to law, morality or public order (Spanish Civil Code, art.1255).

In addition to the previously mentioned provisions, the Spanish Law of Defence of Consumers and Users establishes the liability of the manufacturer for damages resulting from any defect in the product regardless whether the manufacturer acted carelessly or not, and the right to repeat against other possible perpetrators. All affected consumers are entitled to compensation for material and personal damage caused by the goods or services used.

Intellectual Property Rights

A summary of the main intellectual property rights and how they are protected in Spain is set out below. The statutory framework for each of the different intellectual property areas have developed along similar lines and the range of commercial law claims open to owners of the various intellectual property rights are fairly similar for each type of intellectual property right. Intentional infringement of intellectual property rights has criminal as well as civil law consequences, with the possibility of fines or prison sentence. A criminal prosecution will only take place, however, at the specific request of the infringed party, except in cases of exceptional public interest.

Trademarks

A trademark can be registered or unregistered – however, a registered trademark will provide greater protection. To be registered, a trademark must be a distinctive word, phrase, logo, graphic symbol or other device which is used to identify the source of a product or service and to distinguish it from others. A trademark can be more than a brand name or logo. It can also include shapes, letters, numbers and, sounds.

Registration in Spain is made with the Spanish Patent and Trademark Office (*Oficina Española de Patentes y Marcas, OEPM*). The period of registration is for 10 years with rights to renew for further periods of ten years. There is no limit as to the amount of times the registration can be extended.

Protection of an unregistered trademark in Spain is also possible, through regular use, if the use has established certain brand awareness (*Marca notoria*) for the trademark. However, where legal disputes arise in relation to that trademark, it can be more difficult to prove ownership of the respective trademark without a proper registration.

Registration of a company name or domain name does not necessarily mean that it is registerable as a trademark.

It is also possible to obtain an EU community trademark registration. This is a single trademark registration which can cover all EU member states and is quicker, simpler, and cheaper than carrying out separate applications in each EU member state.

Domain Names

A domain name is an internet website address. Spanish companies often choose a domain name ending in “.es”, as that is the official country code top-level domain for Spain. It is also possible to have a European Union domain name, which ends in “.eu”.

Domain names are normally registered via a registration agent, usually an internet service provider. Red.es is the official registrar for Spanish domain names and a list of Spanish accredited agents can be found on its website: www.red.es/redes/en/quienes-somos.html. A list of accredited registrars for “.eu” domain names can be found on the EURID website www.eurid.eu.

There are specific rules in Spain which protect domain names. The decisive factor in any name dispute is the priority of the domain registration. However, depending on the specific case, it may be possible to claim trademark infringement or unfair competition by use of a domain name. In addition to this, there are entities empowered by Red.es to offer dispute resolution services: www.dominios.es/dominios/es/content/proveedores-acreditados-de-resoluci%C3%B3n-extrajudicial-de-conflictos.

In cases where, for example, a third party registers a domain name which contains elements that are similar or identical to the name or mark of an existing company, it may be possible to challenge the registration using this service (or other dispute resolution services for non “.es” domains) before issuing court proceedings.

Patents

A patent is granted for an invention. Generally, the requirements for patentability are:

- An invention;
- which is new;
- inventive (i.e., not an obvious progression of existing inventions, technology or processes);
- capable of industrial application (i.e. commercial exploitation); and
- does not fall into a category of excluded matters (such as computer programs).

Patent protection has the effect of a monopoly right and allows the patent owner to stop others from creating the same invention independently or making, using or selling the invention without the patent owner's permission. Patents cover products or processes that possess or contain new functional or technical aspects, i.e., how things work, what they do, how they do it, what they are made of or how they are made.

Inventions, made by the employee during the term of his contract work or service with company, and which are the result of research that is explicitly or implicitly the object of his contract, shall belong to the employer. This is regulated by the Spanish Patent Act (*Inventiones Laborales*).

Registration in Spain is with the Spanish Patent and Trademark Office. The period of registration is 20 years provided that the renewal fees are paid. For further information, see www.oepm.es/es/propiedad_industrial/.

It is also possible to file an application for several European countries with the Spanish Patent and Trademark Office or the European Patent Office.

Utility Models (*Modelos de Utilidad*)

A utility model is an intellectual property right to protect inventions. It is very similar to the patent, but has a shorter term (ten years) and less stringent patentability requirements.

A utility model must be “new” and is considered to be so if it does not form part of the existing state of the art. The state of the art comprises any knowledge made available to the public

by means of a written description or by use within Spain before the date relevant for the priority of the application. Description or use within the six months preceding the date relevant for the priority of the application shall not be taken into consideration if it is based on the conception of the applicant or his predecessor in title.

Copyright and Database Rights

Copyright exists in original literary, dramatic, musical and artistic works, published editions of works, sound recordings, films and broadcasts. It does not protect ideas. Copyright can also protect computer software.

Spanish copyright legislation is different in comparison to many other countries as it divides between moral rights and property rights of a copyright. According to Spanish law, the moral rights of an author are not disposable and they cannot be split from the property rights of a copyright. Therefore (in most cases) the author of a copyrighted work can only grant licenses to third parties instead of assigning the copyright in full to them.

Copyrights exist in most cases for the life of the author plus 70 years. If the work is created by an employee in the course of his or her work for the employer then the employee is generally obligated to license in exclusive the copyright to the employer, except they agreed in any other way through a contract. However, an employee creating a copyright protected work is more protected under Spanish copyright law than in other European countries and the conditions if and how the license is granted to the employer can be subject to disputes.

It is a right that comes into existence automatically as soon as the work is created. There is no need to register this right.

Databases may receive copyright protection or be protected in their own right as databases. They have protection for 15 years.

Registered Designs (*Diseños Registrados*)

Registered designs relate to the appearance of all or part of a product resulting from certain features of the product such as lines, contours, colours, shape, texture and materials or its ornamentation. To qualify for registration it must have the described characteristics of a design, an individual character and it must be new.

The Registration of the design shall be granted for five years and may be renewed for a maximum of 25 years. This right is in addition to any other design right and copyright. It is also possible to apply for a Registered EU Community Design Right, which lasts for a maximum of 25 years and is subject to payment of renewal fees.

Registration grants the right to prevent third parties from dealing in products incorporating the design.

Unregistered Community Designs (*Diseños Comunitarios No Registrados*)

Spanish legislation does not provide protection for unregistered designs.

However, EU legislation may give protection to unregistered community designs. To fall under this regime, the design must relate to an aspect of the shape or configuration of a product. The product must be original and must not be commonplace. There are also certain qualification criteria for a person/company to qualify for unregistered community design rights.

The design right exists provided that it is properly documented, e.g. by the production of the product or by detailed drawings.

Protection is available automatically (i.e. without registration) against copying of the design. This lasts for three years from the first public disclosure of the design.

Competition Law

This section covers EU and Spanish competition or antitrust laws, which regulate:

- restrictive agreements;
- abusive conduct by dominant businesses; and
- certain takeovers, mergers, joint ventures.

EU Competition Law

The legislation is contained in the Treaty of Rome and in implementing regulations and is enforced by the European Commission and the European Courts. It is very important to be aware of EU competition law implications since a breach can result in a fine of up to 10% of an undertaking's worldwide turnover (as well as individual penalties such as fines/imprisonment).

Article 101 of the Treaty on the Functioning of the European Union (TFEU)

Article 101(1) prohibits agreements or concerted practices which may affect trade between EU member states and which prevent, restrict or distort competition to a substantial extent in the territory of the EU. This covers, for example, price fixing, market sharing, and bid rigging.

Article 101(1) is concerned with damage to competition, not competitors, and therefore the market position of a given undertaking is taken into account. Notwithstanding this, certain restrictions of competition always infringe Article 101(1) irrespective of market share. Article 101(3) offers the possibility of the Article 101(1) prohibition being inapplicable to an agreement if the restrictions to competition that it causes are counterbalanced by positive effects to competition. As a basic rule, the Article 101(3) exemption almost never applies to the so-called hard core restraints (i.e. price fixing, market sharing, bid rigging).

Article 102 TFEU

Article 102 regulates the behaviour of undertakings that enjoy a "dominant position" in respect of a particular market or markets. Dominance is typically described as the ability to behave, to a substantial extent, without regard to customers or competitors (market share is just one of a range of factors taken into account when assessing dominance). Dominance is not illegal per se; rather, a company in a dominant position has a special responsibility not to behave in an "abusive" way. Abusive behaviour may include charging unfair purchase or selling prices, predatory pricing or excessive discriminatory prices, or refusing to deal with a customer without valid reason.

EU Merger Control Regulation (ECMR)

The regime provides for prior mandatory notification (i.e., these transactions must not close prior to approval) to the European Commission for certain mergers, acquisitions or joint ventures, if the transaction meets financial thresholds, either:

- combined worldwide turnover of all parties to the transaction exceeds €5 billion; and
- the aggregate EU-wide turnover of each of at least two of the parties to the transaction exceeds €250 million; unless
- each of the parties to the transaction achieves more than two-thirds of its EU-wide turnover within one and the same member state.

or

- combined aggregate worldwide turnover of all parties to the transaction exceeds €2.5 billion; and
- in each of at least three member states the combined aggregate turnover of all parties to the transaction exceeds €100 million; and
- in each of at least three member states (included for the purpose of the foregoing bullet point), the aggregate turnover of each of at least two of the parties to the transaction exceeds €25 million; and
- the aggregate EU-wide turnover of each of at least two of the parties to the transaction exceeds €100 million; unless
- each of the parties to the transaction achieves more than two-thirds of its aggregate EU-wide turnover within one and the same member state.

Parties involved in a straightforward acquisition scenario are the buyer's total worldwide group and the target, but not the seller. The assessment of the parties concerned and the allocation of turnover can be complex, in particular if a transaction involves the creation of or an acquisition by a joint venture.

If the thresholds under the ECMR are met, the European Commission has exclusive jurisdiction to review the transaction and therefore no national competition authority (NCA) in a member state may do so – although there are provisions enabling an NCA to request jurisdiction to review transactions that affect competition in their member state. Notification to the European Commission is mandatory and the parties cannot complete a transaction without clearance. If the ECMR thresholds are not met, it is necessary to assess whether any NCA would have jurisdiction to review the transaction. In case a transaction would have to be notified in at least three member states, the parties can request referral to the Commission. If the referral is successful, the parties will have to make only one merger filing to the Commission, rather than three plus filings to the NCAs involved.

Spanish Competition Law

Spanish competition law is set out in the Competence Defence Law (*Ley 15/2007, de 3 de Julio, de Defensa de la Competencia*, LDC). The relevant authorities are the National Competition Commission (*Comisión Nacional de la Competencia*, CNC), in collaboration with the competent bodies of the autonomous communities, and the High Court of Justice (*sala de lo contencioso-administrativo del Tribunal Superior de Justicia*) which reviews the CNC's decisions upon appeal in first instance.

Chapter 1 Article 1 of the LDC covers anti-competitive agreements and concerted practices in Spain. The chapter mirrors Article 101 TFEU as explained above.

Chapter 1 Article 2 of the LDC covers the abuse of a dominant position and mirrors Article 102 TFEU. In addition, Article 2 also includes specific provisions on discrimination, unfair hindrance, boycott and other restrictive practice that apply also to associations of undertakings.

Spanish Merger Control

The Spanish merger control regime is embodied in Chapter 2 of the LDC (articles 7-10). It provides for prior mandatory notification to the CNC for mergers, acquisitions or joint ventures, in either of the following circumstances:

- as consequence of the concentration is purchased or increase a fee equal to or superior to 30% of the relevant product or service market nationally or in a geographic market defined within the same. (They are exempt from the control procedure, provided the participants do not have a single or joint fee equal to or greater than 50% in any of the affected market at the national level or in a geographic market defined within it).

- the global turnover in Spain of the set of participants exceed in the last accounting year the amount of €240 million provided that at least two of the partners individually made in Spain a turnover exceeding €60 million.

A major difference to EU law is that Spanish merger control also applies to acquisitions of a minority interest of 30% or above (although some cases are exempt). The turnover threshold for communication to the CNC is much lower than that required by European law.

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