

Business in Spain

Establishing a business in Spain



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Setting up a business in Spain is simple. The types of business entities available are in keeping with those existing in other OECD countries and there is also a wide range of possibilities capable of meeting the needs of the different types of investor who wish to invest in or from Spain.

It is also worth noting that foreign investment restrictions and exchange controls have been virtually eliminated in line with the EU legislation on deregulation in this area.

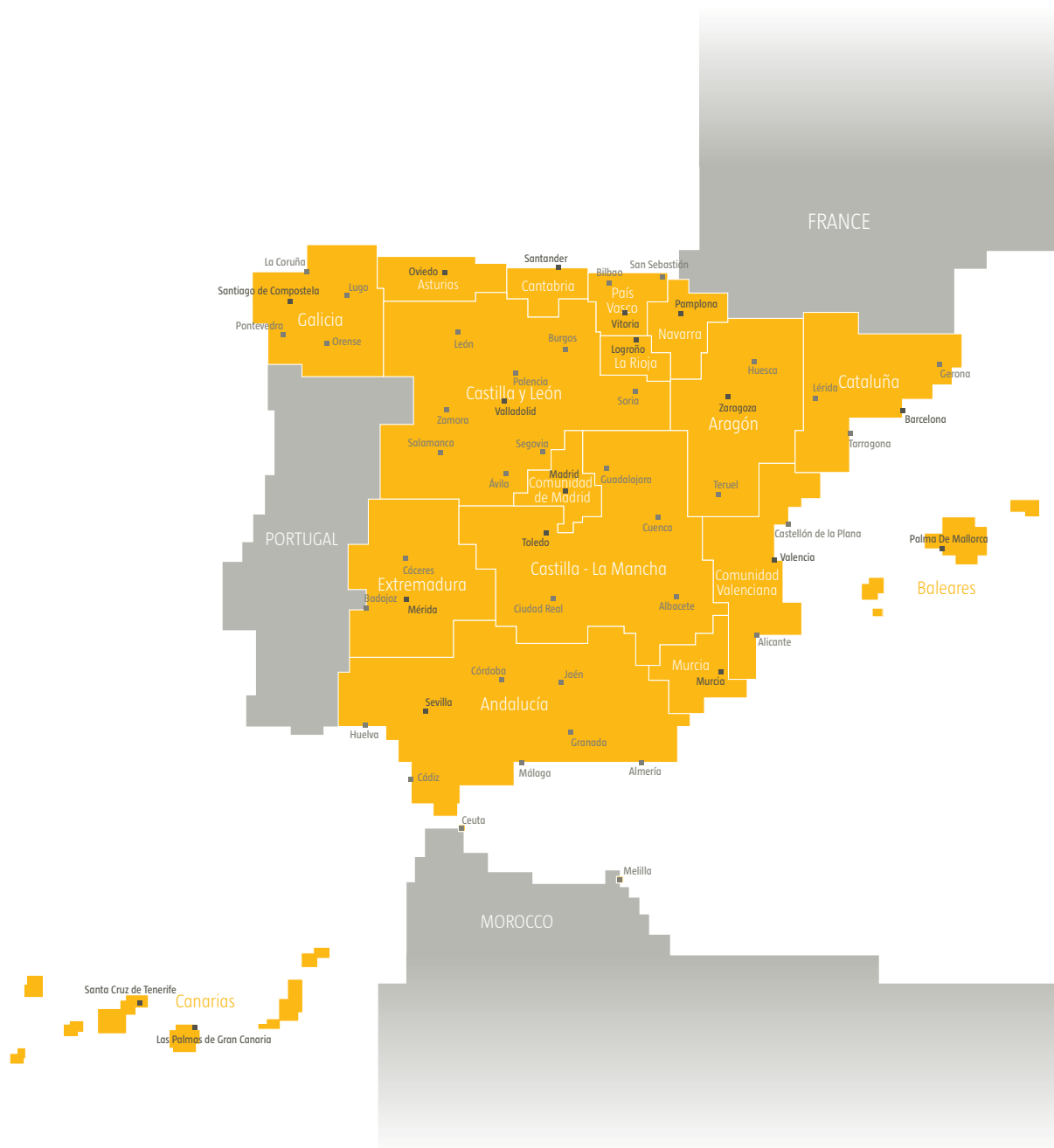
This chapter describes the basic requirements of the different business structures for investing in Spain, as well as the key formalities that a foreign investor must fulfill in order to set up or start up each of them.



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1. Introduction

1. INTRODUCTION

This chapter takes a practical look at the main alternatives open to a foreign investor interested in establishing a business in Spain, as well as the main steps, costs and legal requirements involved.

Several alternatives are analyzed, including sole ownership, incorporation, branches and joint ventures. Other channels for conducting business without a physical presence, such as distribution, agency, commission and franchising agreements are also considered.

The following steps are explained:

- Setting-up of a Spanish corporation and formation of a Spanish branch (sections 3 and 4).
- Acquisition of shares in an existing Spanish corporation (section 6.1).
- Acquisition of real estate (section 6.2).

Last, this Chapter contains a section on disputes resolution in Spain, to be carried out through the national courts or arbitration, this last having proven well-suited to the settlement of such disputes.

2. DIFFERENT WAYS OF DOING BUSINESS IN SPAIN

Various alternatives are open to the foreign investor once the decision to invest in Spain has been taken:

- Incorporation of a Spanish company (an S.A. or any other of the forms of undertakings described in Appendix I of this Guide) or the formation of a branch or permanent establishment. Spanish law provides for a variety of vehicles that can be used by foreign companies or individuals for investing in Spain.

Traditionally, the corporation (S.A.) has been the form most commonly used, although the limited liability company (S.L.) has gained popularity in recent years.

- Association with other businesses already established in Spain. Foreign investors may find a joint venture with a Spanish company to be the most appropriate form of presence in Spain, since it allows the parties to share risks and combine resources and expertise.

A joint venture can be set up under Spanish law in a number of ways:

- An Economic Interest Grouping (“Agrupación de Interés Económico”, EIG) or a European EIG (EEIG).
 - A Temporary Business Association (“Unión Temporal de Empresas” or UTE).
 - A silent partnership (contrato de cuenta en participación) with a Spanish company.
 - Joint ventures through Spanish corporations or limited liability companies.
- However, it is not necessary for every investor wishing to operate and/or distribute his goods or services in Spain to set up a new business or enter into an association with an existing one. Penetration of the Spanish market and a satisfactory response to existing demand may be achieved using the various forms of distribution agreements available in Spain, without establishing a centre of operations. The alternatives include:
 - Signing a distribution agreement.
 - Operating through an agent.
 - Operating through commission agents.
 - Franchising.

Each of these forms of doing business in Spain offers various advantages that should be balanced against the potential problems that each may pose and that need to be considered from the tax and legal points of view.

3. TAX IDENTIFICATION NUMBER (NIF) AND FOREIGNERS’ IDENTITY NUMBER (NIE)

The applicable Spanish legislation currently requires that any individual or legal entity with economic or professional interests in Spain, or involved in a relevant way for tax purposes, must hold a tax identification number (in the case of legal entities) or a foreigners’ identity number (for individuals). These documents, which are issued free of charge, must be obtained not only to set up a company, but also to file and process certain documentation with the Spanish authorities. The steps to be taken are as follows:

- (i) Assignment of a tax identification number to non-resident Directors: (a) if the Director is a legal entity, a specific form must be filed with the competent authorities, along with certain documentation, and a number is automatically

3. Incorporation of a corporation

assigned; (b) if the Director is an individual, a Foreigners' Identity Number (NIE)¹, which will also serve as a NIF, must be applied for by either one of the following methods:

- In Spain: at the Directorate General of Police² A duly notarized and apostilled or legalized general or special powers of attorney is needed for each of the Directors, if he or she does not appear in person.
- Abroad: at Spanish diplomatic missions or consular offices.

(ii) Assignment of a tax identification number to any shareholders of the company: A specific form must be submitted to the competent authorities (in the case of legal entities) or a NIE must be applied for (for individuals).

Throughout the above process, the shareholders and/or Director(s) acting through a representative must grant sufficient powers of attorney to fulfil these formalities.

4. INCORPORATION OF A CORPORATION

The most common form of legal entity under Spanish mercantile law is the corporation ("Sociedad Anónima" - S.A.), and the second most common is the limited liability company ("S.L.").

However, it should be noted that similar steps and expenses are involved for both legal structures, so this chapter describes only those necessary for establishing a corporation.

4.1. Legal steps

Example: incorporation of an S.A. through cash contributions. The formal act of incorporation takes place in the presence of a notary public, who executes the related public deed of incorporation (including the articles of incorporation). The share capital must be fully subscribed and at least 25% paid in at the time of incorporation; the remaining 75% must be paid in within the period stipulated in the by-laws. The minimum share capital required is €60,102 (compared with the much lower figure of €3,005 for an S.L., which must be paid in full at incorporation). The basic requirements to establish a corporation are as follows:

- Issue by the Spanish Central Mercantile Register³ of a certificate of clearance for use of the name of the new

company. This step should precede all others, to ensure that the proposed name can in fact be used.

- Execution of the public deed of incorporation in the presence of a Spanish notary public.
- Evidence of the identity of the founder shareholders.

The notary public will require the persons who appear before him for this purpose to exhibit: evidence of their identity; the power of attorney (if applicable) to represent a third party on whose behalf any of them appears; evidence of payment and whether it is to be made in cash or in kind (if applicable); the name clearance certificate from the Mercantile Register (see above); and the form (to be signed by the notary, if applicable) for subsequent declaration of the foreign investment to the DGCI's⁴ Foreign Investment Register. It is also necessary to provide the notary with the by-laws of the company.

If a shareholder is represented at the act of incorporation, the power of attorney to be used must be sufficient and, if issued abroad, must be duly legalized. There are two main procedures for such legalization:

- Execution of the power of attorney in the presence of the Spanish Consul in the foreign investor's home country. The foreign investor appears before the Spanish Consul, provides evidence of his identity and grants the related power of attorney. If a company, rather than an individual, is the foreign shareholder, apart from his identity, the person appearing before the Spanish Consul must provide evidence of his authorization to act in the name and on behalf of the shareholder and to grant the power of attorney to the designated person.

The Spanish Consul may demand any documentation he considers necessary, and will proceed to execute a public deed of power of attorney, in Spanish, to the person designated. This power of attorney can be used directly in Spain.

- Execution of the power of attorney in the presence of a foreign public authenticating officer. The foreign investor appears before the authenticating officer, gives evidence of his identity and grants the related power of attorney. If the foreign investor is a company, its representative shall execute the power of attorney in the presence of the public authenticating officer, who certifies the document as well as the identity and authorization of the representative of the foreign investor to grant the power of attorney. The

¹ <http://www.mir.es/>

² <http://www.policia.es/>

³ <http://www.rmc.es/>

⁴ General Directorate for Trade and Investment

signature of the foreign authenticating officer would also require subsequent legalization (either by the “apostille” procedure approved by The Hague Convention of October 5, 1961, when applicable, or by a Spanish Consul abroad). Under this second procedure, the power would normally be issued in the language of the authenticating officer who attests to the act so an sworn translation into Spanish would also have to be prepared.

- Bank documents must be delivered to the acting notary public as evidence of payment.
- Assignment of a tax identification number to the new company (NIF or CIF)⁵. This is a necessary step for the payment of transfer tax (see below) and the registration of the company in the Mercantile Register. This step (which involves no cost) consists of filing a special form (also used for VAT purposes) together with certain documents with the competent tax authorities. A provisional number is granted automatically. Once the company has been registered in the Mercantile Register, it must obtain the definitive tax identification number within a maximum period of six months from the issuance of the provisional number.

However, in order to issue a definitive tax identification number to the company, the Spanish authorities require the fulfilment of the formalities for the assignment of a NIF or NIE to the foreign directors and shareholders of the company, as mentioned earlier in section 3.

- It is worthwhile noting in this section that under Spanish labor legislation, non-EU nationals intending to work in Spain must obtain a special work visa and a work and residence permit. The Spanish labor authorities grant different work permits depending on the type of work and its duration (for more information regarding visas and work and residence permits please see Chapter 5).

Workers who have resided legally and continuously in Spain for five years and have renewed their work and residence permits (both for self-employed and for employed work), may obtain a permanent residence permit. After obtaining such a permit, the worker must apply for a resident alien identity card, which will be renewed every five years.

Nationals from other Member States of the European Union, the European Economic Area and Switzerland do not need work permits either as employees or as self-employed workers, since Spain fully applies EU legislation on the free movement of workers. Citizens of the above are therefore

entitled to be employees or self-employed workers, on the same terms as Spanish citizens.

Self-employed workers or employees, students and other beneficiaries of the right to permanent residence, provided that they are citizens of the European Union Member States or of other States included in the European Economic Area, as well as some of their relatives, may live in Spain without a residence card. It will be sufficient for them to hold a valid national identity card or passport. Other foreign citizens included in the European Union system must obtain a residence card.

- Payment of transfer tax (see below). A special form must be filed within a maximum period of 30 days from the act of incorporation. Again, this is a necessary requirement for registration of the company in the Mercantile Register.
- Registration in the Mercantile Register.

Once the above steps have been completed, the company’s public deed of incorporation is filed at the Mercantile Register for its formal registration.

- Subsequent declaration of the investment to the General Directorate for Trade and Investment (“DGCI”) of the Ministry of Economy and Finance. Prior declaration is in certain cases required, especially for foreign investments originating in territories or countries deemed to be tax havens, (see section 8 of Chapter 1 for more detailed information).
- Registration of the company for the purpose for IAE (Business activity tax). Newly incorporated companies must use the same special form used to request a tax identification number, to describe their business activity, and specify the article of the Law by virtue of which they are exempt from this tax (newly incorporated companies or companies starting a new business activity are exempt from this tax for the first two tax periods). This step must be completed before the company starts operation.
- Registration of the company for VAT purposes.
- Opening license.
- Registration of the company for Spanish social security and occupational accident insurance purposes, and registration of the employees for social security purposes⁶.
- Compliance with certain procedural formalities at the local office of the Ministry of Labour and Social Affairs⁷.

⁵ The NIF or CIF is applied for at the Tax Office corresponding to the business address of the company (<http://www.aeat.es>).

⁶ <http://www.seg-social.es/>

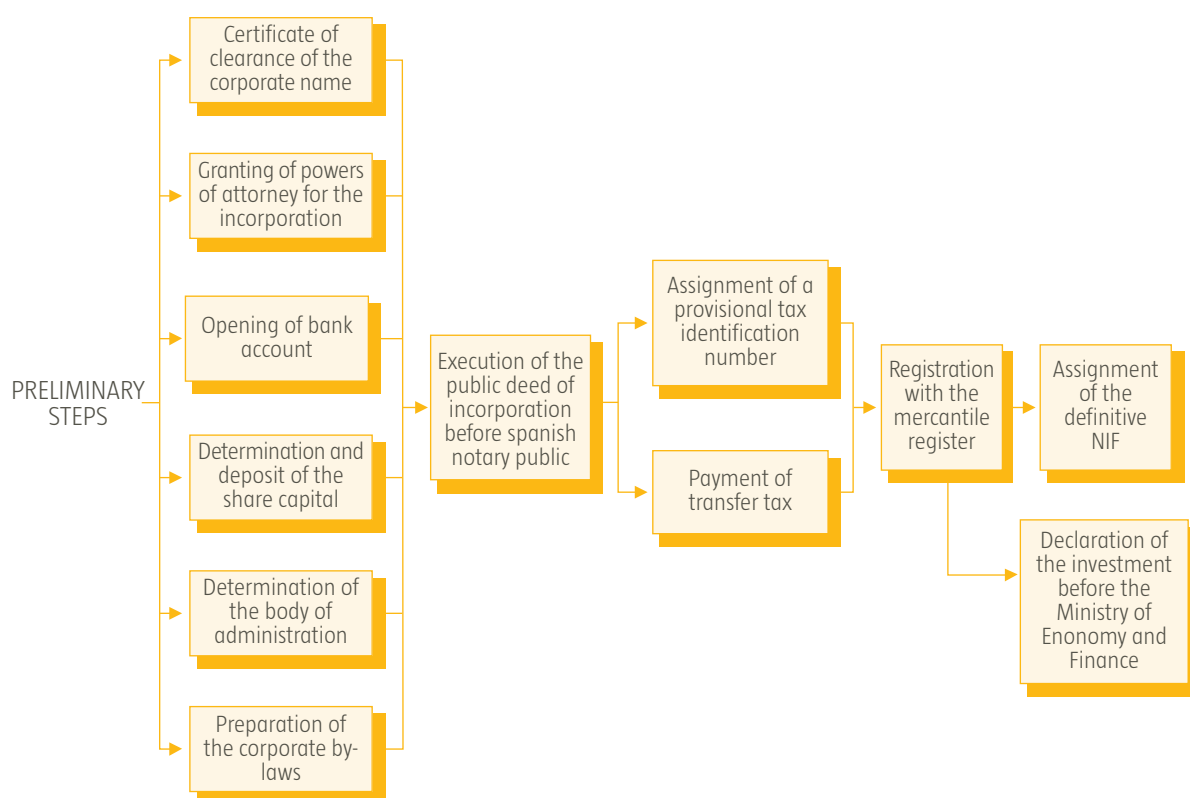
⁷ <http://www.mtas.es/>

3. Incorporation of a corporation

The following chart shows the main steps for incorporation of a company through cash contributions:

guidance purposes, the official rates amount to €90 for the first €6,010, after which the following range is applied:

Table 1
PROCEEDINGS TO CONSTITUTE A SOCIETY



As a general rule, incorporation takes between six and eight weeks although this period may be considerably longer if a NIE must be obtained for any of the foreign directors.

For additional information please visit www.investinspain.org and the web page www.ipyme.org.

Additionally, companies may wish to consult the one-stop business office (www.vue.es), which provides integrated advisory and processing services to entrepreneurs.

4.2. Costs

- Transfer tax at 1% on the share capital.
- Fees of the notary public handling the incorporation, which are charged on a sliding scale based on the share capital. For

0.45% down to 0,03% for share capital in excess of €601,012, and below €6,010,121. For any amount in excess of €6,010,121, the Notary will receive the amount that is agreed upon by the founder shareholders.

- Fees for registering the company in the local Mercantile Register, following its incorporation in the presence of the notary. There are official rates that amount to €6.01 for the first €3,005, after which a sliding scale of officially approved charges is applied. These range from 0.1% down to 0.005% for capital change is applied these range in excess of €6,010,121. The total fee is capped at €2,181 and may not exceed this amount.
- Opening license tax. A one-off municipal levy, ordinarily a relatively small amount.

- Other expenses (e.g. professional fees), which are not readily quantifiable.

5. FORMATION OF A BRANCH

In general terms, the requirements, procedural formalities and costs of establishing a branch are very similar to those for the incorporation of a subsidiary. The main legal steps and costs are summarized below, highlighting the differences with respect to the incorporation of a subsidiary.

5.1. Legal steps and costs

- Execution of the public deed of formation in the presence of a Spanish notary public, in relation to the resolutions previously adopted by the appropriate representatives or committees within the parent company, and the fulfilment of the legal requirements established by Law.

In addition to the documentation required in the case of a subsidiary (evidence of the identity of the person who appears before him; his power of attorney to represent the parent company; evidence of payment and whether it is to be made in cash or in kind (if applicable); and the form, where applicable, for declaring the foreign investment to the DGCI's Foreign Investment Register), the Notary Public will also require evidence of the existence of the parent company, its by-laws, the names and personal details of its directors and the resolution to form the branch previously adopted by the appropriate representatives or committees within the parent company.

- Assignment of a tax identification number (*).
- Appointment of an individual or legal entity residing in Spain to represent the parent company in dealings with the Spanish tax authorities with respect to its non-resident income tax obligations.
- Payment of transfer tax (exempt if certain requisites are met) (*).
- Registration in the Mercantile Register (*)⁸.
- Subsequent declaration to the DGCI in certain cases (see previous section 3.1 for more detailed information). In some cases, prior declaration is required.
- Registration of the branch for IAE (Business Activities Tax) purposes (*).

(*) As in the case of a subsidiary.

⁸ <http://www.rmc.es/>

- Registration of the branch for VAT purposes (*).
- Payment of opening license tax (*).
- Registration for social security purposes (*)⁹.
- Compliance with the labour formalities (*).

5.2. Branch versus subsidiary

The main differences that should be taken into consideration are summarized below.

From a Spanish legal standpoint, the main differences between a branch and a subsidiary are as follows:

- Minimum share capital:
S.A. and partnerships limited by shares: €60,102.
S.L.: €3,006.
General partnerships and branches: no legal minimum.
- A subsidiary is a separate legal entity, whereas a branch is not a legal entity and has the same legal identity as its parent company.
- The liability of the shareholders of a subsidiary incorporated as an S.A. (or S.L.) for the debts of the subsidiary is limited to the amount of the capital contributions they make or undertake to make, with certain exceptions (Appendix I).

In the case of a branch, there is no limit to the parent company's liability.

From a tax standpoint, as stated earlier, both the branch and the subsidiary are, in general terms, liable for Spanish corporate income tax at 32.5% on their net income, although the following considerations should be taken into account:

- Remittance of profits: The remittance of branch profits and the distribution of a subsidiary's dividend to a non-EU parent company resident in a non-treaty country are taxable in Spain at the rate of 18%; if the parent company is EU-resident, the remittance or distribution is usually tax-exempt.
- If the parent company is resident in a non-EU country with which Spain does have a tax treaty, the dividends would be taxable at the reduced treaty rate and the remittance of branch profits would, under most of the treaties, exempt from tax in Spain.

⁹ www.seg-social.es/

5. Formation of a branch

- Share of parent company overheads: In practice, it is usually easier for these expenses (if any are imputed) to qualify as deductible in the case of a branch than in the case of a subsidiary.
- Interest on loans from a foreign parent company to its Spanish branch is not tax-deductible for the branch. By contrast, the interest on loans from the shareholders of a subsidiary is normally tax-deductible for the subsidiary, provided that the transaction is valued on an arm's-length basis and subject to certain requirements.

5.3. Computation of Spanish corporate income tax

Below is a very simple example of the computation of Spanish corporate income tax on the profit obtained by a Spanish subsidiary or by the branch in Spain of a foreign company.

6. OTHER ALTERNATIVES TO OPERATE IN SPAIN

6.1. Forms of business cooperation

6.1.1 One of the most common forms of business cooperation between companies is the joint venture (JV). Spanish law provides for different forms of joint venture Temporary Business Alliances (UTEs)

Under Spanish law, UTEs are temporary business cooperation vehicles set up for a specified or unspecified period of time, for the purpose of carrying out a specific project or service. UTEs allow several companies to operate together in one common project. This form of association is very common for engineering and construction projects but can be used in other sectors as well.

UTEs are not corporations and have no legal personality. In order to qualify for the special regime of flow-through taxation, they

Table 2

EXAMPLE: CALCULATION OF CORPORATE TAX

	Parent company in EU COUNTRY (1)	TREATY COUNTRY	NONTREATY COUNTRY
Subsidiary:			
Profit of Spanish subsidiary	100.0	100.0	100.0
Spanish income tax (32.5%) (2)	32.5	32.5	32.5
Dividends	67.5	67.5	67.5
Withholding tax on dividends	— (4)	6.75 (5)	12.15 (3)
Total tax in Spain	32.5	39.25	44.65
Branch:			
Profit of Spanish branch	100.0	100.0	100.0
Spanish income tax (32.5%) (2)	32.5	32.5	32.5
Profit remitted to the parent company	67.5	67.5	67.5
Withholding tax	— (4)	— (6)	12.15 (3)
Total tax in Spain	32.5	32.5	44.65

(1) Spain has tax treaties in force with all EU countries except with Malta and Cyprus.

(2) See special tax rate for small and medium-sized companies in Chapter 3.

(3) Withholding tax rate = 18%.

(4) Exempt, provided certain conditions are met.

(5) The withholding tax rate on dividends used in this example is 10% (the most common rate in the tax treaties entered into by Spain).

(6) The branch profit tax will apply if provided for in the corresponding tax treaty (e.g. the U.S., Canada and Brazil).

must be formed by notarial deed and registered with the Finance's Special Register of UTEs at the Spanish Ministry of Economy and Finance¹⁰. Furthermore, they may be also registered at the Commercial Register. However, UTEs must comply with bookkeeping and accounting requirements similar to those of corporations. UTEs are governed by Law 18/1982, concerning the Tax Regime of Temporary Business Groupings and Associations and Regional Industrial Development Companies, amended, inter alia, by Law 12/1991, Act 43/1995 and Act 63/2003.

6.1.2. Economic Interest Groupings (EIGs)

One of the key differences between UTEs and EIGs is that the latter are entities of a mercantile nature with a separate legal personality.

Moreover, an EIG must be founded as a not-for-profit entity and may only be created with a view to helping members achieve their objectives. They may not act on behalf of their members nor may they substitute them in their operations. Consequently, the EIG is most commonly used to provide centralized services within the context of a broader association or group of companies, such as centralized purchasing, sales, information management or administrative services.

Spanish law lays down certain requirements for EIGs:

- They may not interfere with their partners' decisions on personnel, finance or investment matters, nor are they allowed to manage or control their activities.
- They may not hold, directly or indirectly, a portfolio of investments in other companies, unless it is necessary to acquire shares or holdings in order to fulfil the EIGs purpose, in which case the shares or holdings must be transferred immediately to its partners.
- They must be formed by notarial deed.

EIG members are considered personally and severally liable for the entity's debts, albeit secondarily to the EIG. Their main obligation is to contribute to the EIGs capital on the agreed terms and to share in its expenses.

There are two main governing bodies in an EIG: the members' meetings and the managers. The managers are jointly liable with the EIG for all tax obligations accrued and for any damage

¹⁰ <http://www.meh.es>

caused, unless they are able to prove that they acted with due diligence.

EIGs are mainly governed by Law 12/1991, of April 29, on Economic Interest Groupings.

The European EIG (EEIG) also has a separate legal identity and EEIGs incorporated in Spain share the main features contemplated in EU Regulation 2137/85, which establishes the basic rules governing EEIGs.

6.1.3. Participation Account Agreement (silent partnership)

This form of business partnership, similar in nature to an unincorporated partnership agreement, consists of a financial collaboration whereby one or more entrepreneurs (nonmanaging investor-participants) provide monetary contributions or contributions in kind

to another entrepreneur (the managing participant) in order to take up an interest in the results of the activities of the managing participant. This interest refers to both the positive and negative results (i.e. income or losses) of the business in question.

The contributions, whether monetary or in kind, do not qualify as capital contributions as such, but rather as an agreement which simply confers a right on the nonmanaging investors to share in the results of the business concerned. Nonmanaging investors do not therefore have shareholder status at the managing company.

As indicated in the Commercial Code, this type of agreement does not require any legal formality (public deed or filing with the Mercantile Register). However, in practice, the contracting parties tend to record the agreement in a public deed that can serve, if necessary, as proof before third parties.

Under current legislation, remuneration obtained by nonmanaging investors must be recorded as an expense in the accounts of the managing participant. This expense qualifies as a tax-deductible item for corporate income tax purposes.

Lastly, the execution of this agreement in a public instrument is regarded as a taxable event under the "corporate transactions" heading of the Transfer Tax Law.

6.1.4. Joint ventures through Spanish corporations or limited liability companies.

A significant number of joint ventures use corporations and limited liability companies as vehicles. Consequently, reference

5. Other alternatives to operate in Spain

should be made to comments made in other sections of this Guide (see this chapter and Annex I) on the formation, basic characteristics and features of the governing bodies of corporations and limited liability companies.

6.2. Distribution, agency, commission agency and franchising agreements

6.2.1. Distribution agreements

In practice, distribution agreements are often confused with agency agreements.

Nevertheless, they are different and have distinct regulations and characteristics.

Distribution agreements offer a highly interesting alternative means of organizing a company or branch or entering into commercial cooperation agreements with previously existing entrepreneurs in order to carry out their operations in Spain, since a considerably lower initial investment is required.

There are several types of distribution agreement. It is worth noting that such agreements are not regulated, allowing the parties broad discretion to decide on the contents of the contract, given the current lack of specific legislation on this area.

Under a distribution agreement, one of the parties undertakes to purchase and resell goods belonging to the other party.

Distributors are legal entities that form an intrinsic, albeit not truly integrated, part of the commercial network of the venture, united by a business relationship and a desire to increase sales.

Agreements in the Spanish distribution networks or system can be divided into the following broad categories:

- *Commercial concession or exclusive distribution agreements:* The supplier not only undertakes not to provide his products to more than one distributor within a specified territory but also not to sell those products himself within the territory of the exclusive distributor.
- *Sole distribution agreements:* The only difference with the above agreement is that, in this case, the supplier reserves the right to supply the agreed products to users in the territory of the concession.
- *Authorized distribution agreements under the selective distribution system:* Owing to their nature, certain products require special treatment by distributors and sellers. The form

of distribution used in both cases is called “selective distribution”, as distributors are carefully selected on the basis of their capacity to handle technically complex products and to maintain a particular image or brand name.

As regards the taxation of distribution agreements, non-resident manufacturers not established in Spain will record business income in Spain on the sale of their goods to distributors, which is generally not taxable in Spain (for further information, see Chapter 3). For information on the taxation of individual or corporate distributors resident in Spain, see Chapter 3.

6.2.2. Agency agreements

Article 1 of Spanish Law 12/1992, on Agency Agreements, which implemented Directive 86/653/EEC, provides the following definition of agency agreements:

“Through an agency agreement, an individual or company, called an agent, undertakes, vis-à-vis another, to negotiate or to negotiate and conclude commercial acts or operations on behalf of another, as an independent intermediary, on a continuous or regular and remunerated basis, without assuming the risk and hazard of such operations, unless otherwise agreed.”

The agent is an independent intermediary who does not act independently, but rather for and on behalf of one or more principals.

The agent must, of his own accord or through his employees, negotiate and, if required by contract, conclude on behalf of the principal, the commercial acts or operations he is instructed to handle. Other specific regulations provide that:

- An agent cannot subcontract his activities unless expressly authorized to do so.
- An agent is authorized to negotiate the acts or operations detailed in the agency agreement but can only conclude them on behalf of the principal when expressly authorized to do so.
- The agent may act on behalf of different principals, unless the related goods or services are identical or similar, in which case the consent of the existing principals is required.

There are three types of remuneration for an agent: A fixed sum, a commission, or any combination of the two.

As a general rule, the restraint of trade clause—restricting or limiting the activities that can be carried out by the agent once

the agency agreement has been terminated– can never be valid for more than two years after the termination of the agency agreement.

The following constitute the obligations of the principal:

- To act loyally and in good faith in its relations with the agent.
- To provide the agent with all the documentation he needs to engage in his activity.
- To provide the agent with all the information required to perform the agreement.
- To pay the agreed compensation.
- To accept or reject transactions proposed by the agent.

One of the essential elements of the agency agreement is that the agent's work must always be compensated with a fixed amount, a commission or a combination of both.

With respect to the tax treatment of agency agreements, the key issue is to determine whether a commercial agent can be considered as a permanent establishment in Spain of the principal, which will in turn depend on whether or not there is a relationship of dependence between them. As regards the taxation of residents and non-residents in Spain, see Chapter 3.

6.2.3. Commission agency agreements

This is the mandate under which the authorized agent (commission agent) undertakes to perform or to participate in a commercial act or agreement on behalf of another (the principal). Commission agents may act:

- In their own name, acquiring rights against the contracting third parties and vice versa; and
- On behalf of their principal, who acquires rights against third parties and vice versa.

The main obligations of commission agents are as follows:

- To represent their principals as if their interests were their own and to perform their engagement personally. Commission agents may delegate their duties if authorized to do so and may use employees under their responsibility.

- To account for amounts that they have received as commission, to reimburse any excess amount and to return any unsold merchandise.
- In general, commission agents are not liable to their principal for the performance of the related agreements by third parties, although this risk can be secured by a commission del credere.
- Commission agents are barred from buying for their own account or for the account of others, without the consent of their principal, the goods that they have been instructed to sell, and from selling the goods that they have been instructed to buy.

The principal undertakes to pay a commission. The payment of this commission is protected by means of lien and preference rights on the commission agent as security for his claims against his principal.

As regards the tax treatment of transactions under this type of agreement, non-resident principals not established in Spain record business income in Spain on the sale of their goods, which is generally not subject to taxation in Spain (for further information, see Chapter 3). For information on the taxation of individual or corporate commission agents residing in Spain, see Chapter 3.

6.2.4. Differences and similarities between agency agreements and commission agency agreements

The main similarity between the two types of agreement is that, in both cases, an individual or legal entity undertakes to pay another compensation for arranging a business opportunity for the former to conclude a legal transaction with a third party, or for acting as the former's intermediary in concluding the transaction.

The main difference between them is that agency agreements involve an engagement on a continuous or regular basis, whereas commission agency agreements involve occasional engagements.

6.2.5. Franchising

Franchising is a system for marketing goods, services and/or technology. It is based on close, ongoing cooperation between undertakings that are legally and financially distinct and independent (the franchisor and its individual franchisees) Under this system, the franchisor grants a right to, and imposes an obligation on, its individual franchisees, for a specific market, to

5. Other alternatives to operate in Spain

pursue the business or commercial activity previously carried out by the former with sufficient experience and success, using the concept and system defined by the franchisor.

In return for a direct and/or indirect consideration, this right entitles, and obliges, individual franchisees to use the brand name and/or trade or service mark for the goods or services, the know-how and the technical and business methods, which must be specific to the business, material and unique, the procedures and other intellectual property rights of the franchisor, backed by the ongoing provision of commercial and technical assistance under, and during the term of, the relevant written franchising agreement between the parties, all of the above regardless of any supervisory powers conferred on the franchisor by contract.

Commercial concession or distribution agreements will not necessarily be considered franchises where an entrepreneur undertakes to acquire, under certain conditions, products (usually brand products) from another entrepreneur who grants him a certain exclusive rights in an area, to resell them, again under certain conditions, as well as to offer purchasers of the products after-sale services.

In addition, the following are not considered to be franchises: (i) the grant of a manufacturing license, (ii) the licensing of a registered trademark to be used in a particular area, (iii) transfers of technology or (iv) a license to use a commercial emblem or logo.

The rules governing these business dealings are (i) the Royal Decree 378/2003, which refers to Regulation (EC) No. 2790/1999, of December 22, 1999, relating to the application of Article 81.2 of the Treaty to certain categories of vertical agreements and concerted practices and Regulation (EC) no. 1400/2002, of July 31, 2002, for the motor vehicles sector; and (ii) the Royal Decree 2485/1998, of April 13, implementing Article 62 of Law 7/1996, of January 15, 1996, regulating retail trade, which was designed to establish the basic conditions for carrying on franchise activity and to create the Register of Franchisors, in accordance with the amendments introduced by Royal Decree 419/2006, of April 7, 2006.

In Spain, prior to the start of their franchising activity in the territory of more than one Autonomous Region, the franchisor shall register with a public administrative Register of Franchisors, which is hierarchically subordinate to the General Directorate for Internal Trade of the Ministry of Industry, Tourism and Trade. Consequently, in accordance with the amendments introduced by Royal Decree 419/2006, the Register will take charge of registering franchisors at the instance of the Autonomous Region in which they are domiciled, or directly at the request of the party concerned, whether or not it is domiciled in Spain. They must also

regularly update the list of franchisors, provide information and issue franchisors with the relevant supporting certificates.

With regard to the various types of agreement, the following are worth mentioning: Industrial franchising agreements (for the manufacture of goods), distribution franchising agreements (for the sale of goods) and service franchising agreements (relating to the provision of services).

The advantages offered by a franchising agreement include the fact that a franchising agreement is a form of product and/or service distribution that enables a uniform distribution network to be swiftly created with limited investment. Franchising also enables independent traders to set up installations more rapidly and with greater chances of success than if they did so themselves without the know-how and assistance of the franchisor.

Antitrust law requirements must be thoroughly considered when defining the content of franchising agreements.

Last, as regards the tax treatment of franchising agreements, the nature of the consideration paid by the franchisee to the franchisor should be analyzed, since it could be considered a royalty and business income, or only a royalty, depending on the different services rendered and the rights granted. For information on the tax treatment of the franchisee, see Chapter 3.

According to the experts, franchising has seen a spectacular growth in Spain in recent years, giving rise to what is now a well-established franchising system. Within the EU, Spain is almost on a par with France and the UK, which have the most franchise establishments.

7. OTHER ALTERNATIVES TO INVEST IN SPAIN

7.1. Acquisition of shares of an existing corporation

7.1.1. Legal steps

- Transfers of shares in a limited liability company must, in all cases, be attested to by an authenticating officer; transfers of shares in Spanish corporations must be attested to by an authenticating officer where so required by Spanish legislation or if so agreed on by the parties. The authenticating officer will require evidence of the following: the identity of the parties involved and, if applicable, the related powers of attorney (if one or both of them act on behalf of another individual or entity); the seller's title to the shares and any forms required to declare the foreign investment to the DGCI's Foreign Investment Register.

- Payment of transfer tax, if applicable: As described in the transfer tax section (see Chapter 3), transfers of shares of companies whose assets consist mainly of Spanish real estate are, in certain cases, subject to a transfer tax of 7% (certain Autonomous Communities have not enforced their own legislation and are still applying a 6% rate, while the applicable rate in the Canary Islands is 6.5%).
- Subsequent declaration of the acquisition to the DGCI is required (in some cases prior reporting might be necessary, see section 8 of Chapter 1 for further information).

7.1.2. Costs

- Fees of the authenticating officer attesting to the transaction: In the case of a notary public, the scale applicable for the incorporation of a subsidiary or the formation of a branch is also applicable here.
- In the case of a Spanish Consul abroad, a similar sliding scale tied to the price fixed is applicable. By way of example, there is a minimum fee for amounts below €1,202, while rates range from 1% down to 0.05% for amounts in excess of €300,506.

No transfer tax is levied on this transaction, except in the cases mentioned above.

7.1.3. Special considerations for the acquisition of shares of companies between non-residents

Acquisitions of shares of Spanish companies between non-residents that have already taken place abroad may be formalized before a Spanish authenticating officer.

The documents to be delivered to the Spanish authenticating officer formalizing the transaction for Spanish purposes may include the special forms on which the investments and corresponding divestment are declared to the DGCI's Foreign Investment Register.

7.2. Acquisition of real Estate

7.2.1. Legal steps

- **General**
 - Execution of the notarized public deed of purchase. The acquisition must be attested to by a Spanish notary public or by a Spanish Consul abroad, to whom it is necessary to show evidence of: The identity of the parties

and, if applicable, the related powers of attorney, as well as their respective tax identification numbers; the seller's title to the property; the special form (to be signed) to declare the investment to the DGCI's Foreign Investment Register; and the effective payment and means by which the purchase was carried out (specifically, whether the payment was received prior to the formalization, the amount, and whether payment was made in cash, by check or any other money transfer instrument or by bank transfer).

- Payment of transfer tax or VAT and stamp tax. If the vendor is a private individual who is not deemed to be a property developer, 7% transfer tax would generally be applicable, regardless of the nature of the real estate to be sold (certain Autonomous Communities have not enforced their own legislation and are still applying a 6% rate, while the applicable rate is 6.5% in the Canary Islands).

If the vendor is a company or an individual developer, the following cases may arise:

- Transfers of buildable land and first delivery of buildings: VAT at 16% (7% if the building is for housing) plus stamp tax, in general, at 1%. The stamp tax rate may be modified by the Autonomous Communities.
- Transfers of rural (unbuildable) land and second or subsequent delivery of buildings: Transfer tax or VAT. VAT is applicable if the acquirer is an entrepreneur or professional who is entitled to deduct 100% of the input VAT and the vendor chooses to pay VAT rather than transfer tax¹¹.

- **If the real estate is located in the Canary Islands** (where VAT is not applicable), the following would be applicable:

- If the vendor is a developer (individual or company) the following cases can arise:
 - Transfer of buildable land and first delivery of buildings: Canary Islands Indirect General Tax (CIIGT) at 5% plus stamp tax at 0.75% (5% if the building is for housing).

¹¹ The stamp tax rate generally applicable to public deeds documenting transfers of real state where the vendor waives the VAT exemption and chooses to pay transfer tax, is the 1.5%. Nevertheless, some Autonomous Communities apply a different rate (i.e. Cataluña: 2%).

6. Other alternatives to invest in Spain

- Transfer of rural (unbuildable) land and second or subsequent delivery of buildings: Transfer tax (6.5%) or CIIGT. CIIGT is applicable if the acquirer is an entrepreneur or professional, and if the vendor chooses to pay CIIGT rather than transfer tax.
- If the vendor (individual) is not a developer: Transfer tax (regardless of the nature of the real estate).
- Registration of the property at the Official Property Register. This step should be completed as soon as the public deed of purchase is notarized and the taxes referred to above have been paid, in order to ensure that the acquirer's property rights are duly protected.
- Subsequent declaration is required when the amount exceeds €3,005,060.52 (see Section 8 of Chapter 1).

7.2.2 Costs

- Notary public fees (as in previous sections).
- Transfer tax or VAT and stamp tax (see above).
- Property Register fees. Here, a sliding scale is again applicable, ranging from 0.4% (for the first €6,010) down to 0.02% (for amounts exceeding €601,012).
- Municipal tax on the increase in urban land value. This tax is optional for municipalities and is based on the deemed increase in the value of urban land from the date of the last sale to the date of the current sale. Although this tax is payable by the seller, the authorities claim it from the purchaser. The amount of this tax depends (among other circumstances) on where the land is located.
- Property tax. An annual tax ("Impuesto sobre Bienes Inmuebles") is levied on the cadastral value of the real estate from the date of acquisition.

8. DISPUTE RESOLUTION

8.1. State court proceedings

Organic Act 6/1985 regulates the constitution, operation and governance of Courts and Tribunals in Spain. For judicial purposes, the State is organized on a territorial basis into municipalities, judicial districts, provinces and Autonomous Communities, in which the Justices of the Peace, the Courts of First Instance, the Administrative Courts, the Labor Courts, the Criminal Courts, the Appellate Courts and the Higher Courts of

Justice have jurisdiction. The Supreme Court and the Audiencia Nacional (the latter only for certain specific matters) have jurisdiction over the entire national territory. The former is the highest court instance with the exception of the guarantee of constitutional rights, which are safeguarded by the Constitutional Court.

Act 1/2000 is the Spanish Civil Procedure Act and came into force on January 8, 2001. Criminal, labor and administrative proceedings are governed, respectively, by the Criminal Procedure Act passed by the Royal Decree dated September 14, 1882, the Consolidated Text of the Labor Procedure Act, passed by Royal Legislative Decree 2/1995 and Act 29/1998 on the Administrative Jurisdiction.

Although the Spanish civil procedural system should be considered as a civil law system, certain features of the Civil Procedure Act have their roots in the common law system. An example of this is the predominance of the oral proceeding. The Civil Procedure Act reduces formalities and promotes more expeditious proceedings and a quicker and more efficient response from the courts.

Spain has signed numerous bilateral and multilateral treaties on the recognition and enforcement of foreign judicial decisions.

8.2. Arbitration

Arbitration is increasingly seen as a genuinely alternative system for the settlement of commercial disputes. Companies, aware of the greater speed, efficiency and flexibility of arbitration in comparison with action before the courts, are seen to be increasingly keen to turn to arbitration. Furthermore, Spanish Courts support arbitration and normally uphold and enforce arbitration clauses and awards without hesitation.

Act 60 of December 23, 2003 on Arbitration (the "Arbitration Act") permits individuals or corporations to make agreements to submit to one or more arbitrators the disputes that have arisen or may arise on matters which they are free to dispose of by law. The Arbitration Act is mostly inspired by the UNCITRAL¹² Model Law on International Commercial Arbitration.

The Arbitration Act reinforces anti-formalist criteria in several ways. It allows for the arbitration agreement to be recorded in any kind of information technology format, provided it can be retrieved for future consultation.

¹² United Nations Commission on International Trade Law

The Arbitration Act allows for the granting of interim measures by the arbitrators. This innovation is in line with the Civil Procedure Act, which allows parties to arbitration proceedings to request Spanish Courts to grant interim measures to secure the outcome of the arbitration proceedings.

Under the Arbitration Act it is possible to enforce an arbitral award even if proceedings to set aside the award are still pending. A State Court may only suspend the enforcement proceedings if the party against whom the award is being enforced posts security for an amount equal to the amount set out in the award, plus the potential damages arising out of the delay in enforcement of the award.

The grounds for refusal to recognise or enforce arbitral awards appearing in the Arbitration Act follow the UNCITRAL Model Law

grounds nearly verbatim, which in turn are based almost in their entirety on the New York Convention of 1958.

Spain has adhered to the New York Convention of 1958 and to the European Convention on International Commercial Arbitration signed in Geneva on April 21, 1961.

Spain's adherence to a Model Law arbitration regime makes international arbitration in Spain more accessible for cross-border practitioners and their clients. The Arbitration Act brings Spain ever closer to becoming an ideal seat for international arbitration, particularly where Latin American interests are involved, given Spain's convenient geographical location in southern Europe, its competitive cost-structure in comparison with other European fora and its linguistic and cultural ties to Latin America.

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