

Business in Spain

Establishing a business in Spain



Setting up a business in Spain is simple. The business models to choose from are the same as in other OECD countries and a wide range of possibilities are available to companies interested in investing in Spain.

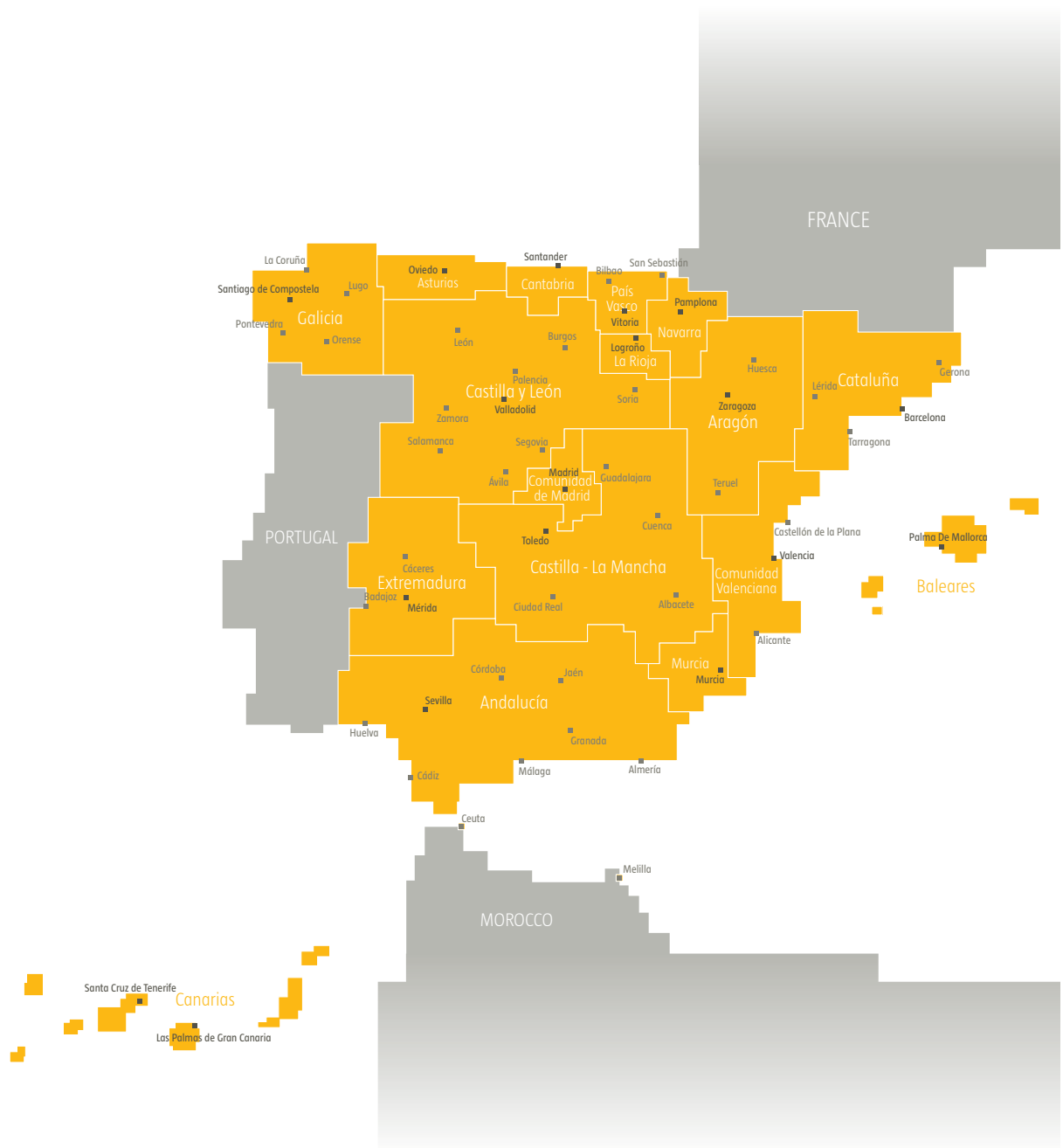
It is also worth noting that foreign investment restrictions and exchange controls have been virtually eliminated in line with the EU legislation on deregulation in this area.

This chapter describes the basic requirements for establishing a company in Spain and lists the key steps in the process, for the different types of business.



Establishing a business in Spain

1. Introduction	3
2. Different ways for conducting business in Spain	3
3. How to incorporate a corporation	3
3.1. Legal steps	4
3.2. Costs	5
4. Formation of a branch	6
4.1. Legal steps and costs	6
4.2. Branch versus subsidiary	7
4.3. Computation of spanish corporate income tax	8
5. Forms of business cooperation	8
5.1. Temporary Business Association (UTEs)	8
5.2. Economic Interest Groupings (EIGs)	8
5.3. Participation Account Agreement	9
5.4. Joint ventures through Spanish corporations or limited liability companies	9
6. Distribution, agency, commission agency and franchising agreements	9
6.1. Distribution agreements	9
6.2. Agency agreements	10
6.3. Commission agency agreements	10
6.4. Differences and similarities between agency agreements and commission agency agreements	11
6.5. Franchising	11
7. Other alternatives to investing in Spain	11
7.1. Acquisition of shares of an existing corporation	11
7.2. Acquisition of real estate	12
8. Dispute resolution	13
8.1. State court proceedings	13
8.2. Arbitration	13



1. Introduction

1. INTRODUCTION

This chapter deals with, from a very practical viewpoint, the main alternatives for a foreign investor to establish a business presence in Spain, as well as the main steps, costs and legal requirements in connection with them.

As regards the ways of establishing a business presence, several alternatives are analyzed, whether in the form of sole ownership of a business through the incorporation of a Spanish entity or the formation of a Spanish branch, whether through joint ventures for carrying on a business jointly with one or more entrepreneurs already established in Spain. Other channels for conducting a business without requiring a physical presence, through the arrangement of distribution, agency, commission agency and franchising agreements are also considered.

The steps to be taken for the following types of investment are analyzed:

- Setting-up of a Spanish corporation and formation of a Spanish branch (sections 3 and 4).
- Acquisition of shares of an existing Spanish corporation (section 6.1).
- Acquisition of real estate (section 6.2).
- Lastly, this Chapter contains a last section on the disputes resolution in Spain, whether through State court proceedings or through arbitration, which is seen to be a very real alternative system suitable for the settlement of commercial disputes.

2. DIFFERENT WAYS FOR CONDUCTING A BUSINESS IN SPAIN

A distinction may be drawn between various alternatives once the foreign investor has decided to invest in Spain:

- Incorporation of a Spanish company (an S.A. or any other of the forms of business enterprise described in Annex I of this Guide) or the formation of a branch or permanent establishment. In this regard, various kinds of mercantile entities envisaged by Spanish law can be used by foreign investors to invest in Spain.

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

- Association with other entrepreneurs 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.

There are different vehicles which can be used to set up a joint venture under Spanish law as explained below:

- An Economic Interest Grouping (“Agrupación de Interés Económico”, EIG) or a European EIG (EEIG).
- A Temporary Business Association (“Unión Temporal de Empresas” or UTE).
- Another possibility is to execute a form of Spanish partnership agreement known as a Participation Account Agreement (silent partnership), “contrato de cuenta en participación”, with a Spanish company.
- Joint ventures through Spanish corporations or limited liability companies.
- However, not every investor wishing to operate and/or distribute his goods or services in Spain needs necessarily to set up a new entity or enter into an association with other existing entities. Penetration in the Spanish market and a satisfactory response to existing demand can be achieved through the various forms of distribution agreements available in Spain, without having to physically establish a centre of operations in Spain. The various 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 possible problems that each one may raise and that need to be considered from the tax and legal points of view.

3. HOW TO INCORPORATE 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 the steps only for a corporation.

3. Incorporation of a corporation

3.1. Legal steps

The example given here is of the incorporation of an S.A. by means of cash contributions. The formal act of incorporation takes place in the presence of a notary public, who executes the related public deed of incorporation (articles of incorporation). The capital stock 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 bylaws. The minimum capital stock required is €60,102 (compared with the much lower figure of €3,005 for an S.L., which must be fully paid in on formation).

The basic requirements for forming a corporation are as follows:

- Issuance by the Spanish Central Mercantile Register¹ of a certificate of clearance for use of the name of the new company. This step should precede all others, so as to have assurance that the proposed name can in fact be used.
- Execution of the notarized public deed of incorporation.
- Evidence of the identity of the founder shareholders.

The notary public will require the people 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 method of contribution (if applicable); the name clearance certificate from the Mercantile Register (see above); and the form (for signature by the notary, if applicable) to declare subsequently the foreign investment to the DGCJ's Foreign Investment Register. It is also necessary to provide the notary with the bylaws 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 country. The foreign investor would have to appear before the Spanish consul, giving evidence of his identity and granting 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 consul must evidence his power to execute, in the name and on behalf of the shareholder, the power of attorney to the person designated.

The Spanish consul will demand presentation of whatever 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. Thus, the foreign investor would appear before the authenticating officer, giving evidence of his identity and granting 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 shall certify the document and the identity and capacity of the representative of the foreign investor to grant the power of attorney. The signature of the foreign authenticating officer would also have to be subsequently legalized (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 executed in the language of the authenticating officer who attests to the act. For this reason, it would be necessary to subsequently prepare an official translation into Spanish.
- Evidence of payment can be provided in the form of appropriate bank documentation for delivery to the notary attesting to the act of incorporation of the company.
- Assignment of a tax identification number to the new company (NIF or CIF)². 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.

Spanish authorities currently demand the fulfilment of the following requirements in order to grant the definitive tax identification number:

- Prior assignment of a tax identification number to non-resident Directors of the company, which can be obtained: (i) If the Director is a legal entity, following the abovementioned steps; or (ii) if the Director is an individual, obtaining the foreigners identification number ("número de identificación de extranjeros" or "NIE")³,

¹ <http://www.rmc.es/>

² The NIF or CIF shall be requested before the Tax Office corresponding to the business domicile of the company (<http://www.aeat.es>).

³ <http://www.mir.es/>

which will be the same as the NIF, and can be obtained as follows:

- In Spain: Before the Police General Directorate⁴, with duly notarized and apostilled or legalized powers of attorney from each of the Directors that do not appear in person.
- Abroad: Before the Spanish diplomatic or consular offices.
- Prior assignment of a tax identification number to non-resident partner or partners of the company, which can be obtained: (i) If the Director is a legal entity, following the abovementioned steps; or (ii) if the Director is an individual, obtaining the foreigners identification number (“número de identificación de extranjeros” or “NIE”).

In all the abovementioned process the partner or partners and/or the Director or Directors that are represented shall grant sufficient powers of attorney for said purpose.

- 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-mentioned steps have been completed, the public deed of incorporation of the company is delivered to the Mercantile Register for formal registration of the company.

- Subsequent declaration of the investment to the General Directorate for Trade and Investment (“DGCI”) of the Ministry of Economy and Finance, in certain cases, mainly limited to cases of foreign investment originating from territories or countries deemed to be tax havens, prior declaration is required (see section 8 of Chapter 1 for more detailed information).
- Registration of the company for the purposes of the business activities 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 during the two first tax periods in which they carry out said activity). This step must be completed before the company starts its activities.
- Registration of the company for VAT purposes.
- Opening license.

⁴ <http://www.policia.es/>

- Registration of the company for Spanish social security and occupational accident insurance purposes, and registration of the employees for social security purposes⁵.
- Compliance with certain procedural formalities at the local office of the Ministry of Labour and Social Affairs⁶.

A chart with the main steps to incorporate a corporation by means of contributions in cash is included next:

As a general rule, the incorporation of a corporation will take between six and eight weeks.

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

Additionally, please consult the sole business office (“ventanilla única empresarial”), which has the objective of supporting entrepreneurs and offers integrated consulting and processing services at www.vue.es/.

3.2. Costs

- Transfer tax at 1% on the capital amount.
- Fees of the notary public handling the incorporation, which are charged on a sliding scale based on the capital amount. For guidance purposes, the official rates amount to ?90 for the first €6,010, applying afterwards a range from 0.45% down to 0.03% for capital in excess of €601,012, and up to €6,010,121. For the amount exceeding €6,010,121, the Notary will receive the amount that is freely agreed upon by the granting parties.
- 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, applying afterwards a sliding scale of officially approved charges ranging from 0.1% down to 0.005% for capital amounts in excess of €6,010,121. In any case the total amount of the fee cannot exceed €2,181.
- Opening license tax. A one-time municipal levy, ordinarily of a relatively small amount.
- Other expenses (e.g. professional fees), which are not readily quantifiable.

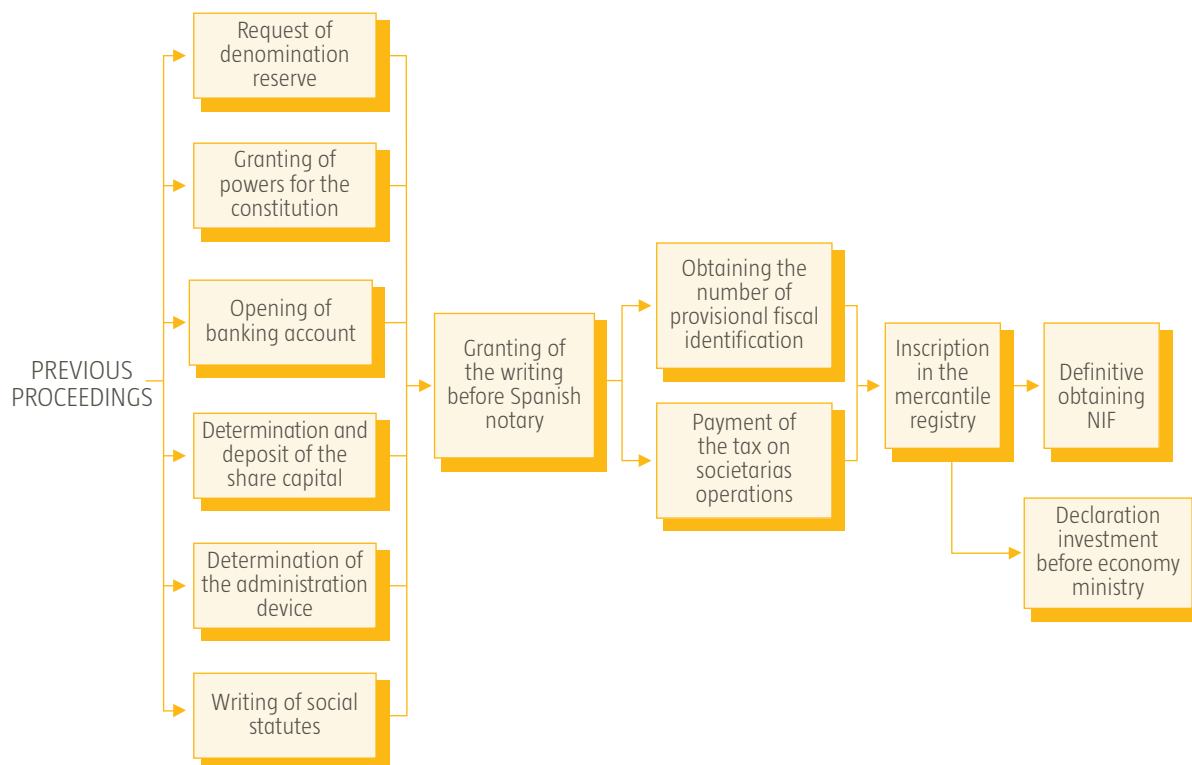
⁵ <http://www.seg-social.es/>

⁶ <http://www.mtas.es/>

3. Incorporation of a corporation

Table 1

PROCEEDINGS TO CONSTITUTE A SOCIETY



4. FORMATION OF A BRANCH

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

4.1. Legal steps and costs

- Execution of the notarized public deed of formation in the presence of a Spanish notary public. This formality consists of notarizing the resolution to form the branch adopted previously by the parent company's competent body.

In addition, the notary public will require not only documentation similar to that required in the case of a subsidiary (i.e. evidence of the identity of the person who appears before him; his power of attorney to represent the parent company; evidence of the payment and method of

contribution (if applicable); and the form, where applicable, to declare of the foreign investment to the DGCI's Foreign Investment Register), but also evidence of the existence of the parent company, its bylaws, the names and personal data of its directors, as well as the resolution adopted by the competent body of the parent company to form a branch.

- Assignment of a tax identification number (*).
- Payment of transfer tax (exempt if certain requisites are met) (*).
- Registration in the Mercantile Register (*).⁷
- 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 business activities tax purposes (*).

⁷ <http://www.rmc.es/>

- Registration of the branch for VAT purposes (*).
- Payment of opening license tax (*).
- Registration for social security purposes (*)⁸.
- Compliance with the labour formalities (*).

(*) As in the case of a subsidiary.

4.2. Branch versus subsidiary

Summarized below are the main differences between the two types of entity that should be taken into consideration.

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

- Minimum capital: an S.A. must have a minimum capital of €60,102, €3,006 a S.L.'s, €60,102 for mixed partnerships,

⁸ www.seg-social.es/

and no legal minimum for general partnerships). A branch does not require any minimum assigned capital.

- 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 the exceptions analyzed in Annex 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, taxed under Spanish corporate income tax at 35% on their net income, but there are some other aspects that should be mentioned, among others:

- Remittance of profits: The remittance of branch profits and the distribution of a subsidiary's dividend to a non-EU parent

Table 1

EXAMPLE: CALCULATION OF CORPORATE TAX

	Parent company in EU Country (1)	Parent company in treaty Country	Parent company in nontreaty Country
Subsidiary:			
Profit of Spanish subsidiary	100	100	100
Spanish income tax (35%) (2)	35	35	35
Dividends	65	65	65
Withholding tax on dividends	— (4)	6.5 (5)	9.75 (3)
Total tax in Spain	35	41.5	44.75
Branch:			
Profit of Spanish branch	100	100	100
Spanish income tax (35%) (2)	35	35	35
Profit remitted to the parent company	65	65	65
Withholding tax	- (4)	- (6)	9.75 (3)
Total tax in Spain	35	35	44.75

(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 = 15%.

(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).

4. Formation of a branch

company resident in a non-treaty country are taxable in Spain at the rate of 15%; if the parent company is EU-resident, the remittance or distribution is normally 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, not be taxable in Spain.
- Share in parent company overheads: In practice, it is normally easier for these expenses (if any are imputed) to qualify as deductible in the case of a branch as 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.

4.3. 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.

5. FORMS OF BUSINESS COOPERATION

One of the most common forms of business cooperation between companies is the joint venture (JV). Different forms of joint venture are provided by Spanish legislation for carrying on a business between one or more partners.

5.1. Temporary Business Associations (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 any case, in order to opt for the special tax regime, of flow-through taxation, they have to be formed by notarial deed and registered with the Finance's Special Register of UTEs of the Spanish Ministry of Economy and Finance⁹. Furthermore, they may be also

registered at the Commercial Registry¹⁰. However, UTEs must comply with bookkeeping and accounting requirements similar to those of corporations. UTEs are governed by Law 18/1982, on the Tax Regime of Groupings and Temporary Business Associations and Regional Industrial Development Companies, amended, *inter alia*, by Law 12/1991, Act 43/1995 and Act 63/2003.

5.2. Economic Interest Groupings (EIGs)

One of the main differences between UTEs and EIGs is that the latter are entities of a mercantile nature which have their own legal personality as separate legal entities.

Additionally, the EIG must be founded as a not-for-profit entity and may only be created in order to help its members achieve their objectives. They may not act on behalf of their members nor may they substitute for them in their operations. Consequently, the EIG is most commonly used to provide centralized services within the context of a wider 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, and may not manage or control their activities.
- They may not hold, directly or indirectly, a portfolio of investments in other companies unless shares or holdings need to be acquired in order to achieve the EIGs purpose. If this is the case, the shares or holdings must be immediately transferred to its partners.
- They must be formed by notarial deed.

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

There are two main governing bodies in an EIG: its members' meetings and its managers. The managers are jointly liable with the EIG for all tax obligations accrued and for any damage caused unless they can prove that they acted with due diligence.

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

⁹ <http://www.meh.es>

¹⁰ <http://www.registradores.org/>

The European EIG (EEIG) also has its own legal personality and EEIGs incorporated in Spain share the main features contemplated under EU Regulation 2137/85, which provides the basic governing rules for EEIGs.

5.3. Participation Account Agreement (silent partnership)

The nature of this form of business cooperation, which is close to an unincorporated partnership agreement, consists of the financial collaboration by virtue of which one or more entrepreneurs (nonmanaging investor-participant) provide with monetary or in kind

contributions another entrepreneur (managing participant) in order to share an interest in the performance of certain activities carried out by the managing participant. Such an interest refers to both the positive and negative results of that particular business (i.e. income or losses arising from the activity in question).

The contributions, whether monetary or in kind, do not qualify as capital contributions as such, but rather this agreement only creates a right in favour of the nonmanaging investors to share in the results of the activity concerned. Therefore, nonmanaging investors are not shareholders in 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), although, in practice, both parties usually reflect it in a public deed, to be used, if necessary, as a proof before third parties.

Under current legislation, the remuneration obtained by the 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.

5.4. Joint ventures through Spanish corporations or limited liability companies

A significant number of joint ventures use corporations and limited liability companies as vehicles. Consequently, the comments made in other sections of this Guide (please see this chapter and Annex I) on the formation, basic characteristics and features of the governing bodies of corporations and limited liability companies should be reviewed.

6. DISTRIBUTION, AGENCY, COMMISSION AGENCY AND FRANCHISING AGREEMENTS

6.1. Distribution agreements

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

They are, however, different and have distinct regulations and characteristics.

Distribution agreements are a very interesting alternative to the organization of a company or branch or the entering into commercial cooperation agreements with previously existing entrepreneurs, for carrying out their operations in Spain, since the initial investment required is considerably low.

Several types of distribution agreement have emerged in practice. Please note that they are unregulated agreements that allow the parties broad discretion to decide on the contents of the contract, since there is no current specific legislation on this area.

Under a distribution agreement, one of the parties undertakes to purchase and resale 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 and are united by a business relationship and by the desire to boost 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 from the aforementioned agreement is that, in the case of sole distribution agreements, 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:* There are certain products which, because of their nature, require special treatment by distributors and sellers. The form of distribution used in both cases is called “selective distribution” because the distributors are carefully selected according to their capacity for handling technically complex products and for preserving a certain image or brand name.

5. Other alternatives to operate in Spain

As for the tax treatment of distribution agreements, non-resident manufacturers not established in Spain will record business income in Spain on the sale of their goods to distributors, and this income is typically not taxable in Spain (for more information, see the comments on taxation in Chapter 3). As for the taxation of individual or corporate distributors resident in Spain, see the comments on taxation in Chapter 3.

6.2. Agency agreements

Spanish Law 12/1992, on Agency Agreements, implemented Directive 86/653/EEC, and defines the agency agreement in its article 1:

“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 said aforementioned operations, unless otherwise agreed.”

The agent is an independent intermediary that does not act in his own name and on his own behalf, but rather in the name 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 in the name of the principal, the commercial acts or operations he is instructed to handle. Among other specific regulations it is provided 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 he is 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, and any combination of the two.

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 termination of the agency agreement, as a general rule.

The following constitute obligations of the company:

- 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 give the agent all the information necessary to perform the agreement.
- To pay the agreed compensation.
- To accept or reject the transaction proposed by the agent.

One of the essential elements of the agency agreement is that the agent’s work must always be compensated through either a fixed amount, a commission or a combination of the two.

Regarding its tax treatment, the key issue is determining whether a commercial agent can be considered as a permanent establishment in Spain of the principal, and this will depend on whether or not there is a relationship of dependence between them. In connection with the taxation of residents and non-residents in Spain, see our comments in Chapter 3.

6.3. Commission agency agreements

This is the mandate under which the authorized agent (commission agent) undertakes to perform or participate in a commercial act or agreement for the account 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 defend the interests of their principals as if such interests were their own and to perform their engagement personally. Commission agents may delegate their duties if they have authority to do so and may use employees under their responsibility.
- To account for amounts that they have received as commission and to reimburse any excess amount. They are required to return any unsold merchandise.
- In general, commission agents are not liable to their principal for the performance by third parties of the related agreements, although this risk can be secured by a commission del credere.
- Unless their principal consents, commission agents are barred from buying for their own account or for the account of another the goods that they have been instructed to sell, and from selling the goods that they have been instructed to buy.

The types of consideration which the principal undertakes to provide are, firstly, a commission and, secondly, lien and preference rights in favour of the commission agent as security for his claims against his principal.

As for the tax treatment of transactions under this type of agreement, a non-resident principal not established in Spain will record business income in Spain on the sale of his goods and this income is typically not taxable in Spain (for more information, see the comments on taxation in Chapter 3). As for the tax treatment of individual or corporate commission agents resident in Spain, see the comments on taxation in Chapter 3.

6.4. 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 an opportunity for the former to conclude a legal transaction with a third party or for acting as the former intermediary in concluding that 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.

6.5. Franchising

Franchising is a system for marketing goods, services and/or technology. It is based on close, ongoing cooperation between enterprises that are legally and financially distinct and independent (the franchisor and its individual franchisees) and, under this system, the franchisor grants a right to, and imposes an obligation on, its individual franchisees to do business using the franchisor's concept.

In return for a direct or indirect financial 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, the technical and business methods, 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.

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 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, which was designed to establish the basic conditions for carrying on franchise activity.

In Spain, prior to commencing their franchising activity in the territory of more than one Autonomous Region, 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. With regard to the various types of agreement, the following can be mentioned: 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.

Lastly, 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 as a royalty and as business income, or only as a royalty, depending on the different services rendered and rights granted. For the tax treatment of the franchisee, see our comments in Chapter 3.

According to the experts, franchising has seen 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 INVESTING 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

6. Other alternatives to invest in Spain

authenticating officer will require evidence of the following: 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 the appropriate forms, if applicable, 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 transfer tax at 7% (certain Autonomous Communities have not enforced their own legislation and are still applying a 6% rate. In the Canary Islands the applicable rate is a 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. For guidance purposes, there is a minimum fee for amounts below €1,202 and then rates that range from 1% down to 0.05% for amounts in excess of €300,506.

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

7.1.3. Special considerations for an 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 in certain cases 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; the seller's title to the property; the special form (for his signature) to declare the investment to the DGCI's Foreign Investment Register; and the effective payment of the investment.
- 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, generally transfer tax at 7% would 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. In the Canary Islands the applicable rate is a 6.5%).

If the vendor is a company or an individual developer, the following cases can 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 can 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).
 - 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 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).

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%).

- Registration of the property in the Official Property Register. This step should be completed as soon as the public deed of purchase is notarized, 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, again, a sliding scale is applicable, ranging from 0.4% (only 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 some 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, the safeguarding of which rests with 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, some of the features of the Civil Procedure Act derive from the common law system. Such is the case with 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 seen to be more and more a real alternative system suitable 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 prepared to have recourse to arbitration. Furthermore, Spanish Courts are supportive of 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 making agreement to submit to one or more arbitrators 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 UNCITRAL 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.

The Arbitration Act allows for the granting of interim measures by the arbitrators. This innovation is in line with the Civil Procedure Act, which allow the 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 stay 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 to enforce the award.

7. Dispute resolution

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 even 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.

interes@interes.org
www.investinspain.org

Prepared by:

 **GARRIGUES**
ABOGADOS Y ASESORES TRIBUTARIOS



MINISTERIO
DE INDUSTRIA, TURISMO
Y COMERCIO

SECRETARÍA DE ESTADO
DE TURISMO Y COMERCIO