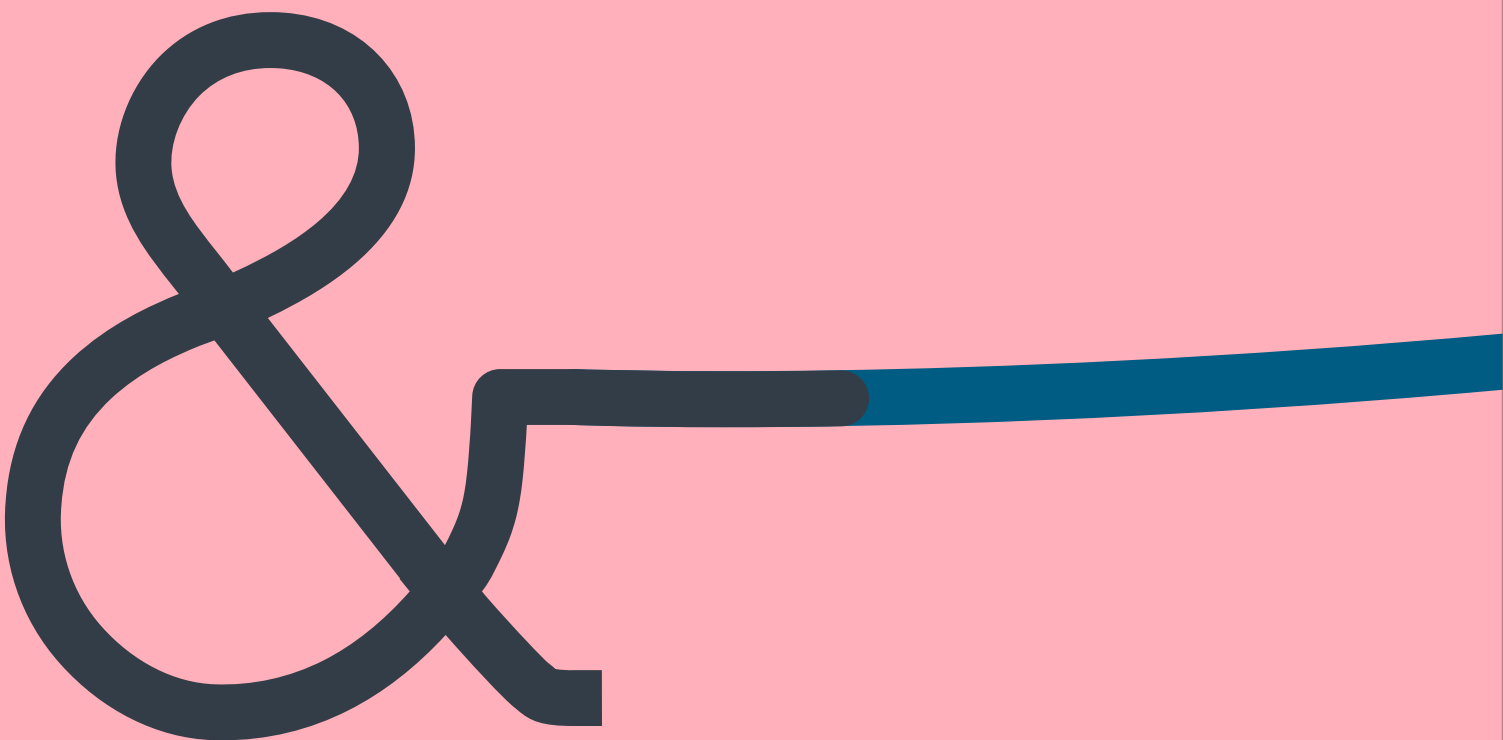


Bird & Bird

Setting up a business in Spain

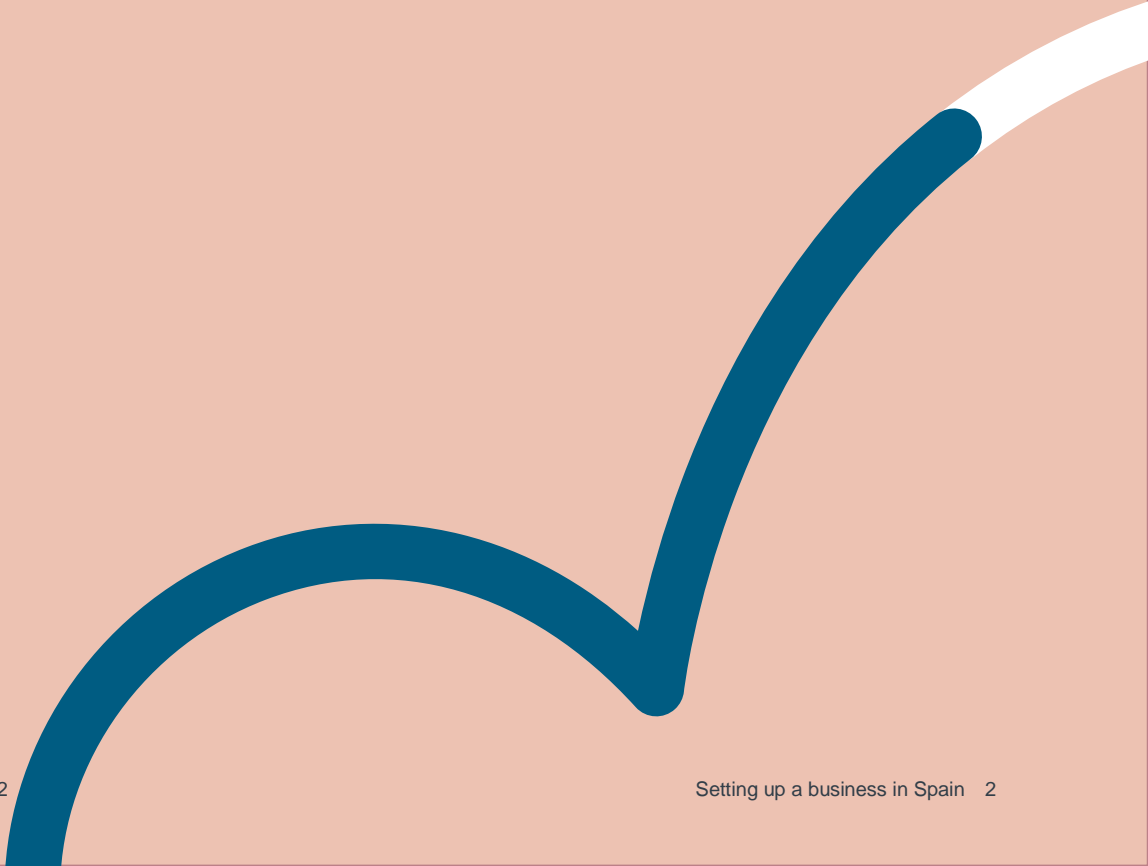
2022





‘The Bird & Bird team is highly specialized, with a very marked commercial focus, excellent quality of service and high proactivity.’

Legal 500 EMEA 2022, Spain



Choice of legal entity

A foreign company can set up a business in Spain either by incorporating a Spanish registered subsidiary company or by registering a Spanish establishment (e.g., a branch), which is considered an extension of the foreign company. In addition, a foreign company can decide, mainly for timing purposes, whether to incorporate a company from scratch or acquire an already incorporated shelf company and ready to operate, incorporated by an external service provider that collaborates with Bird & Bird on a regular basis. The main difference between these two options would be the increased speed with which a business is set up via the acquisition of an incorporated company.

Subsidiary	Branch
Limited liability at subsidiary level ¹ :	Parent company retains direct liability.
<ol style="list-style-type: none"> limited liability companies (“Sociedad de Responsabilidad Limitada” – “S.L.”) or joint stock companies (“Sociedad Anónima” – “S.A.”-). 	
Minimum share capital:	N/A.
<ol style="list-style-type: none"> for a S.L. type company: €3,000.00. for a S.A. type company: €60,000.00. 	
Registration is required with the Commercial Registry	
Similar costs of incorporation (Notarial fees, lawyer’s fees, registration fees, etc. approx. €7,000, depending on the share capital contribution or equity injection to be completed).	
Separate legal entity entitled to contract in its own name and on its own behalf.	The branch has no legal personality different from the legal personality of the parent company.
Subsidiary has its own accounts.	<p>Parent company accounts include Spanish revenue.</p> <p>Parent company accounts need to be filed with the Spanish Commercial Registry.</p>
<p>Directors do not need to be Spanish nationals and could be legal entities (in this latter case an individual must be appointed as representative).</p> <p>For the purposes of their appointment, foreign directors (and any natural persons acting as representatives of the directors) need to apply for the N.I.E. (Spanish Foreign Identification Number, in the case of individuals) or N.I.F. (Spanish Tax Identification Number, in the case of legal entities).</p>	<p>A permanent representative must be appointed.</p> <p>If the permanent representative is a foreign person, they need to apply for the N.I.E. (Spanish Foreign Identification Number).</p> <p>The company must appoint a tax representative (who needs to be a Spanish resident) with the Tax Authorities.</p>

¹ Spanish Corporations Act provides for other less common types of subsidiaries or entities for, among others, SMEs businesses which are not described in detail herein.

Subsidiary	Branch
Corporate income tax will apply to worldwide profits and gains (ordinary rate 25%).	Corporate income tax will apply to profits and gains allocated to the branch (ordinary rate 25%). The branch is considered as a permanent establishment for tax purposes.
As a rule, overhead expenses are deductible.	The taxable base of the permanent establishment will be determined according to the provisions of the general Corporation Tax Law. However, the Spanish Non-Resident Income Tax Act provides as a rule that overhead expenses, royalties, interest, commissions, and consideration for technical assistance services rendered by the parent company are not deductible. However, overhead expenses are deductible under certain circumstances.
Intra-group transactions require arm's length terms.	Parent and other group branches require arm's length terms.
Supplies from a UK subsidiary to an EU parent will be subject to VAT in that Member State. No UK VAT on supplies to non-EU parent.	Supplies between the UK branch and the "parent" should not be subject to UK VAT.

Employment

The Spanish labour market is highly regulated in terms of employer's obligations and duties. Most of the rules affecting the employment relationship have been developed by statutory provisions as well as by the case law of the Spanish Labour Courts. Collective Bargaining Agreements are particularly important in Spain because they generally govern all terms and conditions of a worker's employment within their respective scope of application. From a practical point of view and as a result of the above, in Spain there is little room for individual freedom for negotiation by the parties.

Employment contracts are usually of a permanent nature, since the use of temporary employment contracts is limited to four circumstances: (i) to special production or service needs; to the execution of specific works or services which are not related to the employer's core business; (iii) to substitute for employees entitled to return to their positions following leave; and (iv) for training.

The concept of an "employment at will" relationship, whereby an employer may terminate the employment of an employee at any time for any reason, does not exist under Spanish law. Employees who render services in Spain are protected from dismissal without grounds. Where a dismissal is found to lack grounds, the employer can choose to either: a) reinstate the employee in his/her previous work position; or b) pay him/ her the statutory severance for unfair terminations. Such severance amounts to 33 days of salary per year of service with a maximum of 24 months of salary for employment contracts signed after February 2012. For employment contracts signed prior to such date employees would be entitled to a severance equivalent to 45 days of salary per year of service for the seniority accrued before February 12, 2012, plus 33 days of salary per year of services for the portion of seniority accrued after February 12, 2012. The severance is capped with a 24-month limit, unless the part of severance accrued before February 12, 2012, exceeds that limit, in which case the severance maximum is 42 months of salary.

Discrimination on grounds of gender, race, disability, religion or belief, sexual orientation, age, married/civil partner status, gender reassignment, pregnancy or paternity/maternity leave is prohibited. Moreover, any termination that may be deemed to be based on such discrimination grounds is automatically null and void.

Post contractual non-compete agreements are allowed under Spanish Labour law, provided that: (i) employers have a commercial or industrial interest in executing them; (ii) employees receive adequate

compensation; and (iii) their duration does not exceed the maximum limit of 2 years for qualified technicians and 6 months for the rest of employees.

Non-EEA nationals will require specific immigration authorisations before they can work in Spain: a work authorisation, which must be requested by the employer in the relevant local authority where the employee will render services; and a visa, which must be requested by the individual in the Spanish consulate or diplomatic embassy in their home country. Exceptions apply for individuals who qualify as "highly skilled".

The employer must withhold payroll tax and employee Social Security contributions and must also pay employer Social Security contributions. Different tax rates apply depending on employees' earnings. Since many benefits (e.g., retirement or unemployment subsidy) are paid by public organisations, such Social Security contributions are high in relation with other countries, and they usually amount to a third of the employee's monthly gross salary (with a monthly cap which is annually fixed by the government).

There are no legal requirements to provide non-cash benefits to employees. However, such requirements can be established by: (i) collective bargaining agreements; (ii) agreements with the employees; or (iii) unilateral grant by the employer to their employees which constitutes an acquired right by them. Such benefits may include private medical insurance, lunch vouchers, and contributions to pension plans or stock option.

In order to be able to hire employees in Spain, a company (regardless its nationality, i.e. either if it is a foreign company represented by a permanent establishment, a branch or a Spanish registered company whether the Sociedad Anónima or Sociedad de Responsabilidad Limitada), shall first register as an employer before the Spanish Social Security ("Seguridad Social").

For such purposes, the Spanish Subsidiary shall file a request to the Social Security's General Treasury ("Tesorería General de la Seguridad Social") for an identity number for the Spanish Subsidiary's identification and control of its obligations before the Social Security.

Likewise, together with the request for such an identity number, the Spanish Subsidiary shall file a request for the so-called Payment Number Code ("Código de Cuenta de Cotización") depending in the relevant Spanish Province where it intends to operate.

In sum, the registration as an employer before Spanish Social Security constitutes a prior and indispensable requirement for a Spanish/foreign company to duly start operating in Spain and be able to hire any employees.

The registration of a Spanish company as an employer before the Spanish Social Security requires the following documents:

- i Form TA.6 (request to the Social Security's General Treasury for registration as an employer and an identity number).
- ii A document whereby the so-called owner ("titular") of the Spanish Subsidiary may be identified.
- iii Document issued by the Tax Authorities whereby the Spanish Subsidiary is assigned a Tax Identification Number ("Número de Identificación Fiscal") and the Spanish Subsidiary's economic activity appears.
- iv Public deed of incorporation (having been duly registered or certificate from the relevant Register).
- v Photocopy of the national identity card ("Documento Nacional de Identidad") of the person signing the request; and
- vi Document proving the Powers of Attorney granted to the person requesting the registration (if not specified in the public deed).

Once the Spanish Subsidiary has been registered within the Social Security, the Company shall carry out the registration to the Social Security of all its employees in the 6 days following the beginning of their employment relationship.

Tax

From a Spanish tax standpoint, taxation will vary depending on whether alternative the non-resident company has chosen to carry out business in Spain (i.e., the subsidiary, branch, or representative office).

Regardless of the alternative chosen by the non-resident company, any non-resident company that holds shares of a Spanish company or carries out business in Spain is required to obtain a Spanish Tax Identification Number (NIF).

In order to request this Spanish Tax Identification Number, it would be required to file a 036 Form signed by a representative of the company as well as (i) an official document accrediting the existence of the company (i.e. the incorporation deed/bylaws registered in an official Registry in the U.S); (ii) photocopy of the NIF of the representative of the company who signs Form 036; and (iii) document proving the power of representation of the chosen representative. All these documents must be officially translated into Spanish and include the Hague Apostille, so the company must have them properly prepared before requesting the Spanish Tax Identification Number.

Concerning Value Added Tax and Business Tax Activity, any company (Spanish resident or not) which develops its activity within the Spanish territory is obliged to register in the said taxes.



Bird & Bird have ‘high technical knowledge, business-oriented advice and a good international network.’

Legal 500 EMEA 2022, Spain

Setting up a business in Spain

Commercial Contracts

Spain has a civil law system. The Civil Code and other related regulations provide general rules and obligations for contracts which apply unless otherwise agreed between the parties, as well as other provisions whose application is imperative so that any agreement entered into by the parties infringing these imperative provisions would be unenforceable (e.g., the contractual limitation of liability is permitted under Spanish law unless the liability arises from wilful misconduct or gross negligence). Notwithstanding the above, there is considerable freedom in Spain for all types of collaboration, licensing, franchise, and distribution agreements.

EU legislation applied or implemented in Spain regulates consumer protection, distance selling, government procurement, e-commerce, direct marketing, agency agreements, insurances, etc.

EU and Spanish competition law prohibit anti-competitive behaviour (e.g., price fixing) where there is a significant effect on trade in Spain and/or between EU Member States.

Non-EU companies should be aware of industry specific laws that may apply to their businesses which may require licences or authorisation to access the EU market, e.g., electrical goods, chemical products, medical and pharmaceutical products, and financial products. Often, these laws are based on EU legislation and are relatively consistent across the EU.

Real Estate

Although the applicable law is the Spanish Urban Leases Act, parties may freely agree most of the terms and conditions of commercial leases, subject to certain mandatory provisions. Any matter not contemplated by the parties in the lease agreement will be governed by the Spanish Urban Leases Act and, subsidiary, by the Civil Code. There is no minimum length for such leases.

The Spanish Urban Leases Act sets forth a mandatory cash deposit to be delivered by the lessee to the lessor on the formalisation of the lease agreement for commercial use amounting to two months' rent. The lessor must deposit this quantity with the competent body, which varies depending on the autonomous community in which the lease is signed.

Although the deposit described in the previous paragraph acts as a guarantee for the lessor, it is not unusual that lessors require additional guarantees such as collateral bank security or an on-demand guarantee to ensure the fulfilment of the lessee's contractual obligations.

Foreign Investment

Article 63 of the Treaty on the Functioning of the European Union (TFEU) prohibits restrictions on capital movements between Member States and between Member States and third countries.

This has been reflected in EU Regulation 2019/452 of the European Parliament and of the Council for the control of direct investments in the Union, which establishes greater clarity on the sectors and operations to be controlled in the case of foreign investments from outside the EU. It also establishes a system of cooperation between Member States in monitoring investments from outside the EU.

In the case of Spanish legislation, the basis for the control of foreign investments is contained in Law 19/2003, of 4 July, on the legal regime of capital movements and foreign economic transactions and on certain measures for the prevention of money laundering (recently amended) and in Royal Decree 664/1999, of 23 April, on foreign investments.

The Law establishes a general freedom regime for capital movements in Spain with few exceptions for certain foreign investments that are subject to control or clearance. In brief, these are:

- Investments which, by their nature, form, or conditions of realisation, affect or may affect activities related, even if only occasionally, to the exercise of public power, or activities which affect or may affect public order, public safety, and public health.
- Foreign investment from outside the EU or EFTA if:
 - a there is investment in several sectors: critical infrastructure and technologies, dual-use sectors, supply of critical inputs, sectors with access to sensitive information and media.
 - b the investor is controlled by a foreign government.
- Foreign investments in activities directly related to national defence, such as those involved in

the production or trade of arms, ammunition, explosives, and war material.

- Those investments in activities related to arms and ammunition for civilian use.

Royal Decree-Laws 8/2020 of 17 March and 11/2020 introduced Article 7a of Law 19/2003 of 4 July 2003 on the legal regime governing capital movements and foreign economic transactions. The liberalisation regime is suspended for foreign investments made by non-EU and EFTA residents, which must be subject to an authorisation procedure, provided that they comply with paragraph 1 (definition of foreign investment) and:

- It takes place in one of the sectors defined in paragraph 2 (critical infrastructure, critical technologies and dual-use items, sectors with access to sensitive information, critical inputs or means of communication) and has the potential to affect security, public order or public health; and/or
- The investor complies with a number of characteristics defined in section 3 (if it is of a public nature, among others).

RDL 34/2020 amended Article 7a once again and includes in its Fourth Final Provision some improvements to the previous text, such as a better definition of the sectors established in section 2 and greater specificity in the wording of the characteristics of the investor set out in section 3.

In addition, in its Sole Transitional Provision, it introduces a transitional regime until 30 June 2021 for certain foreign direct investments made by EU and EFTA residents, provided that the following conditions are met:

- The definition of foreign investor in section 1 is met and only if the foreign direct investment is made in companies listed in Spain, or in unlisted companies if the value of the investment exceeds 500 million euros.
- It is carried out in the sectors mentioned in section 2 and may potentially affect public safety, order, or health.

The second final provision of Royal Decree-Law 12/2021, of 24 June, adopting urgent measures in the field of energy taxation and energy generation, and on the management of the regulation levy and the water use tariff, amended the single transitory provision of Royal Decree-Law 34/2020. By virtue, thereof, the regime of suspension of liberalisation of certain foreign direct investments in Spain by residents of other European Union and European Free Trade Association countries established by RDL 34/2020 is extended until 31 December 2021.



“Bird & Bird have a global reach, can navigate the issues and implications of a course of action in overseas jurisdictions, and help us drive towards strategic aims in complex areas.”

Chambers Global, 2022

Setting up a business in Spain

Data Protection/Privacy

Organisations processing personal data (which includes employee data and business contact data) will need to comply with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (“GDPR”). Moreover, the Spanish Data Protection Bill will be approved soon, so organisations that intend to set up a business in Spain will need to take into account this regulation once it is approved.

This means compliance with certain formal and material obligations, including:

- Processing of personal data will only be lawful if the organisation relies on one of the legal basis included in section 6 of the GDPR (i.e., consent, performance of a contract, compliance with a legal obligation, processing is necessary for the purposes of the legitimate interest pursued by the organization, among others).
- Implementing security measures to comply with the requirements of the GDPR. Adhering to any of the mechanisms contained in the GDPR for the transfer of personal data out of the EEA.
- Compliance with the right of information in the collection of data in accordance with the new requirements of the GDPR, obtaining individuals’ consent for the processing of their data (where applicable), and guaranteeing an individual’s exercise of their new data protection rights (access, rectify, erasure, restriction of processing, data portability or object to the processing).
- Furthermore, informed consent must be obtained both for the provision of commercial communications by electronic mail and for the use of cookies, specifically informing the user of the nature and purpose of the use.
- Entering into data processing agreements, whenever third parties’ access personal data in order to provide the data controller with a service.
- Having protocols in place for communicating a data breach to the Spanish Data Protection Agency.
- Carrying out a data protection impact assessment, which will be required in the case

of (i) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the individual; (ii) processing on a large scale of special categories of data person or similarly significantly affect the natural person, or of personal data relating to criminal convictions and offences; or (iii) a systematic monitoring of a publicly accessible area on a large scale.

- Preparing a record of processing activities if the organisation employs more than 250 employees, or if the processing it intends to carry out is likely to result in risk to the rights and freedoms of data subjects, or if the processing includes special categories of data.
- Appointing a data protection officer in any case where the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or (ii) the core activities of the controller or the processor consist of processing on a large scale of special categories of data or personal data relating to criminal convictions and offences.

Breach of data protection regulations may lead to the imposition of economic fines following a sanctioning procedure by the Spanish Data Protection Agency. Fines can be up to €20 million or 4% of the total worldwide annual turnover of the preceding financial year.

Intellectual Property

Trademark registration in Spain can be obtained through national or international proceedings, and both titles should be registered at the Spanish Patents and Trademarks Office (SPTO). In addition, trademarks can be obtained on a European-wide basis through a Community Trademark registration, which has effect in the whole EU territory and is separately enforceable before the Spanish Courts.

Regulation of business names (different from the company name) is similar to trademark regulation, and they should also be registered at the SPTO.

Patents can be applied for on a national, European, or international basis. Regardless of the procedure chosen by the applicant, all of them should be registered at the PTO. The Spanish Patent Act also includes the concept of the so-called “utility model”, basically conceived to protect inventions with a lower inventive idea and related to improvement of goods/ devices (they have a shorter validity period than patents).

Designs can also be protected on a national or Community level. In addition, the concept of the “unregistered Community design” can be very attractive, as it provides protection against copies for every novel design that has not been registered (protection is conferred for a period of three years from the date the design is first made available to the public).

Lastly, protection of art works, databases and software are provided by the Intellectual Property Act, conferring protection to such works on the basis of their mere creation (i.e., no registration needed, although it is advisable).

Business Model Design

Alongside legal challenges, whatever the nature of your international ambitions the planning process requires some key questions to be addressed:

- Is internationalisation a feasible option, and are you ready for it?
- What is your internationalisation strategy, and how will you prioritise which markets to target?
- What business model will be most effective for driving profitable growth?
- Will you require business partners, and how do you plan to find them?
- What will your penetration strategy be for your selected markets?

- How will you build the infrastructure and operating model required to support your move into the new markets?
- How will you execute the plan and implement the business model?

Wherever your starting point, our consultancy arm OXYGY can help you answer these questions and create a fit-for-purpose roadmap to guide your business through its internationalisation journey.

Contact us

If you would like further information on setting up business in Spain, please e-mail our Set up Desk at new.company@twobirds.com and we will contact you within 24 hours.

This summary gives general information only as of June 2022 and is not intended to give a comprehensive analysis. It should not be used as a substitute for legal or other professional advice, which should be obtained in specific circumstances.



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