Bird & Bird &
Setting up a business in Spain
Bird & Bird LLP are praised for being “extremely well prepared, with the capability to discuss complete agreements in different languages, providing always the best cost-efficient advice.”

Chambers, Global 2018
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Bird & Bird LLP’s approach to instructions is appreciated by clients, with one stating: “My impression of the team is impeccable in all aspects: resources, billing and cross-border capabilities.”  
Spain, Chambers Europe, 2018
Setting up a business in Spain

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.

### Subsidiary

<table>
<thead>
<tr>
<th>Limited liability at subsidiary level:</th>
<th>Branch</th>
</tr>
</thead>
<tbody>
<tr>
<td>i. limited liability companies (“Sociedad de Responsabilidad Limitada” - “S.L.”) or ii. joint stock companies (“Sociedad Anónima” - “S.A.”).</td>
<td>Parent company retains direct liability.</td>
</tr>
</tbody>
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<th>Minimum share capital:</th>
<th></th>
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<tbody>
<tr>
<td>i. for a S.L. type company: €3,000.00; ii. for a S.A. type company: €60,000.00.</td>
<td>N/A.</td>
</tr>
</tbody>
</table>

Registration is required with the Commercial Registry.

Similar costs of incorporation (Notarial fees, lawyer's fees, registration fees, etc. approx. €7,000).

### Employment

The Spanish labour market is highly regulated in terms of employee’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; (ii) 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 in the case the severance maximum is 42 months of salary.

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 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 programmes.

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).

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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, subsidiarily, 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.

Bird & Bird’s team provides ‘a highly responsive’ service and ‘understands complex business and industry issues’.

Spain, Legal 500 EMEA, 2018
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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, erase, 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 (i) 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 EUR 20 million or 4% of the total worldwide annual turnover of the preceding financial year.

Intellectual Property

Trade mark 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 trade mark 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:

• How will you execute the plan and implement the business model?

Wherever your starting point, our consultancy arm Baseline can help you answer these question 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 at August 2018 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.