



Company/Commercial - Spain

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Overview (March 2003)

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Legislative Framework

Company law

The main sources of company law in Spain include:

- the Code of Commerce, established by royal decree and last modified by the Information Society and Electronic Commerce Services Act (34/2002);
- the Corporations Act, established by Royal Legislative Decree 1564/1989;
- the Limited Liability Companies Act (2/1995); and
- the Mercantile Register Regulation, established by Royal Decree 1784/1996.

Contract law

The main sources of contract law include:

- the Stock Market Regulation Act (24/1988), as modified by Act 37/1998;
- the Agency Contracts Framework Act (12/1992);
- the Act Relating to Bills of Exchange, Promissory Notes and Cheques (19/1985); and
- the General Contractual Terms and Conditions Act (7/1998), as modified by Act 39/2002, which implements various EU consumer protection directives.

Forms of Business

The Code of Commerce and the Civil Code both provide for the formation of companies, although specific legislation has been introduced to govern certain types of entity. Whenever two or more people undertake to pool money, assets or labour in order to make a profit they have entered a commercial contract to form a company, as long as (i) the contract meets

the essential requirements of validity and enforceability (see Article 1261 of the Civil Code regarding consent and the clarity of the subject matter and the obligation undertaken), and (ii) the company has been constituted according to the provisions of the Code of Commerce.

Mercantile companies may be incorporated as:

- a corporation;
- a limited liability company;
- a general partnership;
- a limited partnership; or
- a limited partnership by shares.

The corporation, limited liability company and limited partnership by shares are capitalized companies, while the general partnership and limited partnership are companies formed by individuals. The most common form used today is the limited liability company: according to the National Institute of Statistics, in 2002 96% of new companies were incorporated as a limited liability company, compared to 3% as corporations and 1% as other forms of company. This Overview concentrates on the two major forms of company.

Other types of company (eg, manufacturing cooperatives and mutual insurance companies) may be commercial if they carry on commercial activities.

The partnership or incorporation agreement must contain certain elements, including:

- the association of civil or legal persons who are to be bound by the agreement;
- the creation of a common fund for carrying out the company's intended activities;
- the intention of making a profit; and
- the distribution of the profit among the persons associated by the agreement.

Before commencing operations a commercial company must include the articles of association in a public deed, including the company by laws, which must be presented for registration in the Mercantile Register.

Corporations and Limited Liability Companies

Management

The corporation and the limited liability company limit the total liability of the shareholders to the amount of capital invested. Their management bodies may be structured in one of the following ways:

- sole administrator;
- several administrators acting individually;
- two administrators acting jointly; or

- board of directors made up of at least three members with specific powers or an executive committee (it is possible to delegate powers to a managing director).

Directors of a corporation serve for a maximum term of five years, but they may be re-elected by the shareholders (in a limited liability company the term is indefinite unless specified in the by laws). Directors do not need to be Spanish residents. However, if there is a sole director or managing director it is advisable for practical purposes to have someone easily available for signature, preferably in Spain.

Sole shareholder

If there is a sole shareholder, this fact must be notified to the Mercantile Registry at the time of registration. If notification has not been made within six months, the sole shareholder bears unlimited personal liability for company debts incurred during the period of sole ownership. Once registered, the sole shareholder is not liable for debts incurred thereafter.

Ownership by a sole shareholder must be reflected in all documents. The company must keep a record of all contracts made between the sole shareholder and the company (self-dealing) and these must be mentioned in the annual report (non-registered contracts may not be withheld from the bankruptcy estate in case of insolvency of either the sole shareholder or the company).

Main differences

Share capital

The minimum share capital required to create a corporation is about €60,101, 25% of which must be paid up and documented in certificates or accounts. Limited liability companies require about €3,005 to be paid up in full. This must be divided into identical shares or 'participations' which may not be called 'shares of stock' and may not be incorporated into negotiable instruments. Hence, participations are not governed by securities law.

Transfer of shares

Shares in corporations are fully transferable unless restricted in the by laws, while shares in limited liability companies are not freely transferable except between existing shareholders. Additional restrictions can be agreed in the by laws.

Financing

Corporations may issue bonds or debentures and be listed on the stock exchange. Limited liability companies may not issue bonds or debentures or be listed on the stock exchange.

Non-monetary contributions

Corporations must present an independent expert report on the contribution's value and type. There is no obligation on a limited liability company to provide such a report.

Publication

On amending certain provisions of by laws (ie, corporate name, registered office, or substitution or change of corporate purpose) corporations must publicly notify the amendment in two major daily newspapers in circulation in the relevant province(s). Publication is required before the amendment will be recorded in the Mercantile Register. Limited liability companies are not obliged to publish amendments.

Formalities

The incorporation of a limited liability company or corporation requires

certain formalities, including:

- the grant of legal power of attorney by the founding partners for the purpose of incorporating the company and appointing the directors;
- the grant of legal power of attorney by an absent director for the purpose of accepting his office (if a director is not due to attend the incorporation);
- the establishment of by laws;
- the receipt of a bank certificate showing that the amount transferred for the disbursement of share capital has been deposited in an account for the formation of a new company (and specifying whether it comes from foreign investment sources);
- the receipt of a Central Mercantile Registry certificate of availability of the commercial name. This reservation must be made in the name of a founding shareholder and list three possible names in order of preference (subsequent assignments of that name are restricted);
- any relevant authorization by, or notification to, the appropriate administrative body if foreign capital is involved;
- the execution of an incorporation deed by a notary public;
- the designation of a provisional fiscal identity code by the local tax agency. A copy of the incorporation deed and a photocopy of the applicant's national identity card must be filed with the application form;
- the payment of the stamp duties for the incorporation of the company (1% of the share capital) and, where applicable, registration to pay the economic activities tax;
- the registration of the company in the local mercantile register; and
- the filing of an application for a permanent fiscal identity code following registration.

Alternative Forms of Establishment

Foreign companies may operate in Spain through a branch office, incorporation of which requires a public deed executed by a notary public and the deed's registration in the relevant commercial register corresponding to the branch office's registered office. The branch office does not have independent legal status.

The branch office must have at least one legal representative who is empowered by the parent corporation to administer its affairs. This representative may have limited powers. Other than this, there are no formal administrative or management bodies.

Another feature that distinguishes a branch office from a corporation or limited liability company is that there is no minimum share capital requirement. The accounting and fiscal obligations of a branch office are similar to those for a corporation or limited liability company.

In addition to these formalities, the establishment of a branch office requires:

- documents proving that the parent corporation is incorporated and validifying its existence;
- documents proving the parent corporation's current by laws, as well as the names and personal details of its directors (ie, name and surname, legal age, nationality, marital status, domicile and valid passport number) and their positions;
- documents proving the parent corporation's resolution to set up a branch office in Spain. This resolution must include the following details:
 - the corporate name of the branch office, which is usually the name of the parent company followed by the words 'branch office';
 - the branch office's registered office in Spain;
 - the activities to be carried out by the branch office in Spain, which must be consistent with the parent corporation's corporate purpose; and
 - identification and personal details of the representatives appointed by the parent corporation to manage the branch office as well as their powers;
- legal power of attorney granted by the parent corporation's management body to the person who is to sign the branch office's public deed of incorporation on behalf of the company; and
- proof of payment of any share capital allocated to the branch office (ie, through a bank certificate certifying the payment).

However, it is not always necessary to set up a branch office when first doing business in Spain. A company may establish a representative office to carry out promotional services on behalf of the company if it does not sell goods or services in its own name.

Other Internal Regulatory Matters

An ordinary general shareholders meeting of a corporation or limited liability company must be held within the first six months of each business year, to review the company's management and approve the accounts for the preceding fiscal year (the administrators must prepare the annual accounts within the first three months). If the entirety of the share capital is present the meeting is universal.

Corporations must publish the invitation to a shareholders meeting in the Official Mercantile Register Bulletin and in a newspaper. On the other hand, limited liability companies may also extend the invitation to a general partners meeting through individual written communication - depending on the provisions of the articles of association.

Shareholders in a corporation and partners in a limited liability company may challenge resolutions of the decision-making bodies. The Corporations Act governs these challenges to resolutions, whether adopted by a corporation or a limited liability company. Resolutions may be either void (ie, contrary to the law or public policy) or voidable (ie, contrary to the by laws or prejudicial to corporate interests to the benefit of one or more shareholders or third parties). If a resolution is declared void or voidable, the final judgment must be recorded in the Mercantile Register. Previously, the courts had exclusive jurisdiction over corporate challenges but now such challenges may be made through arbitral

tribunals.

Corporate Governance

Directors and administrators of corporations and limited liability companies may incur liability for company debts. They may also be liable for acts or omissions which are unlawful, contrary to the by laws or performed without due diligence. The liability is personal and unlimited. Directors may be sued by:

- the company;
- the shareholders/partners or the company's creditors; and
- third parties, in circumstances where the third party has suffered direct harm due to the director's act or omission.

In certain situations a director may be exempt from liability. The directors' liability regime was introduced by the Corporations Act in the early 1990s, but only now is a definitive interpretation of its provisions being issued by the Supreme Court.

Generally corporate governance is defined by the Code on Good Governance, prepared by the special commission of experts appointed by Cabinet in 1997 and chaired by Manuel Olivencia Ruíz. The recommendations in the code concern various aspects, including structure, functioning and responsibility of boards of directors in publicly listed companies. Compliance with the code is not mandatory.

The code has come under review by another government-appointed commission presided over by Enrique de Aldama, which recently presented its report. The Aldama Commission recommendations emphasize the need for transparency and access to information, and the loyalty and diligence of administrators. The commission proposes that an annual report (including information on inter-corporate agreements, shareholders' participations and shareholder-administration relationships) be made available to shareholders and investors and published on the company website. It also recommends prohibiting the performance of duties on behalf of competitor companies by administrators, and that administrators be forced to abstain from voting on matters in which they hold a direct interest.

The government may introduce a bill which incorporates the commission's recommendations. However, the government has already presented a Code on Mercantile Companies which contrasts with the Aldama Report, in that it supports more intervention by administration in the governance of companies. There should be important developments in this area in the coming months.

Contracting

The concept of when a contract becomes effective has undergone an important change due to the enactment of the Information Society Services and Electronic Commerce Act. Consent in Spanish contract law is the coinciding of an offer and the acceptance of that offer. Previously, written acceptance bound the offeror when it became aware of the acceptance. However, a contract between absent parties now becomes affective when the offeror gains knowledge about the acceptance or once the acceptance has been sent by the accepting party. The offeror cannot be ignorant of acceptance without a presumption of bad faith.

Where contracts are made by means of automatic devices, consent is given once the acceptance has been produced. As before, the contract is considered to have been completed in the place where the offer was made.

Recent Developments

The limited liability company framework is due to be modified in the near future. A bill was approved by Congress in December 2002 and will shortly be discussed by the Senate before being returned to the lower chamber of Parliament for final ratification.

Known as the New Business Bill, it is based on the limited liability company form, but is adapted to fit the specific characteristics of the smallest companies and should be a welcome addition for small and medium-sized Spanish companies. If approved by Parliament, the bill will add a new chapter and other additional provisions to the current Limited Liability Companies Act.

The unique characteristics of the new company form will be that at the time of incorporation, there must be a maximum of five partners who are all natural persons. In addition, the name of the company must be formed by the name and surnames of one of the partners plus an alphanumeric code followed by the words 'limited liability company new business'. The capital of the company must be between €3,000 and €60,000.

To assist the incorporation of this type of company, the bill provides for a reduction in times for dealings with administrative bodies as well as with notaries and company registrars. New technologies will be employed to allow documents to be filed electronically so the entrepreneur will have to make fewer visits. The incorporation of a company currently takes anywhere between 30 and 60 days: the aim is that a new business may be set up within 48 hours.

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