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Legal framework and tax implications of e-commerce in Spain

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The main legal and tax issues to take into consideration regarding e-commerce, digital economy and privacy are discussed in this Chapter.

In Spain, as in neighboring countries, e-commerce-related activities are currently the object of specific regulation. In transactions involving e-commerce, regard should be had to the legislation on distance sales, advertising, standard contract terms, data protection, intellectual and industrial property, and e-commerce and information society services, among others. Apart from these specific laws, it is also necessary to examine the general legislation on civil and commercial contracts and, when in case of e-commerce addressed to consumers (B2C), the specific regulation on consumers' protection should also be considered. Additionally, matters such as cybersecurity or electronic identification (electronic signature) have an increasing importance.

From the tax perspective, e-commerce raises issues, which would require a consensus to be reached on measures to be adopted at regional and even global level. Fair progress has been made in reaching a consensus on the VAT treatment of "on-line e-commerce". As regards the Tax on Certain Digital Services, although Spain has created this tax, we will have to wait for a coordinated, uniform interpretation of the various criteria determining the tax treatment of e-commerce at international level.

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E-commerce-related activities are regulated by diverse rules contained in Spanish legislation. Moreover, a fundamental point to bear in mind when undertaking any initiative in the area of electronic transactions is that the applicable legislation varies depending on the potential recipient of the related offer. Consequently, there is greater leeway for the parties to agree if the transaction takes place between companies (business to business, B2B) than if the commercial dealings are between a company and a private consumer as the final recipient (business to consumer, B2C), since, among others, consumer protection legislation or data protection legislation will apply in the latter case.

In the tax sphere, e-commerce raises issues that are difficult to address from a purely Spanish perspective. Perhaps for that reason, the Spanish tax authorities have not seen fit to adopt unilateral measures, preferring to wait until a consensus is reached on the measures to be adopted regionally and even worldwide.

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2.1 CIVIL AND COMMERCIAL LEGISLATION

2.1.1 Civil and Commercial Codes

Electronic contracts are fully subject to the rules established by the Spanish Civil Code on obligations and contracts and by the Commercial Code.

Electronic contracts are also subject to EC Regulation 593/2008, of June 17, 2008, on the law applicable to contractual obligations (Rome I) which will apply to contractual obligations in the civil and commercial area in situations involving a conflict of laws.

2.1.2 Distance sales

1. Equally applicable to electronic sales are the rules related to distance sales and other related relevant rules: Regarding commercial operations in which the buyer is an undertaking or a business man, the Act 7/1996 ordering the Retail Trade should be taken into consideration, in particular the Chapter regarding Distance Sales, which makes a specific referral to Title III of Book II of the Legislative Royal Decree 1/2007, of 16th of November, approved the Revised General Consumer and User Protection Law and other supplementary laws.
2. Whenever e-commerce activities are targeted at consumers, it is necessary to comply with consumer protection

legislation, regulated in the mentioned Legislative Royal Decree 1/2007, of November 16, 2007.

This Law defines “distance sales” as sales concluded without the simultaneous physical presence of the buyer and the seller, where the seller’s offer and the buyer’s acceptance are conveyed exclusively by a means of distance communication of any nature and within a distance contract system organized by the seller.

This Law establishes that distance sale offers (either to consumers or to undertakings) must contain at least the following:

- The seller’s identity.
- The special features of the product, the price, and the shipping expenses and, if applicable, the cost of using the distance communication technique if it is calculated on a basis other than the basic rate basis.
- The payment method, and form of delivery or types of fulfillment of orders.
- The period for which the offer remains valid and, if applicable, the minimum term of the contract.
- The existence of a right to withdraw or terminate the contract and, if applicable, the circumstances and conditions in which the seller could supply a product of equivalent price and quality.
- The out-of-court dispute resolution procedure, if applicable, in which the seller participates.
- Remainder of the existence of a legal guarantee depending on the type of goods or services.
- Information of the cases in which the Seller shall take the costs of returning the goods.

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This Royal Decree sets out, among other matters affecting the consumers, the rules governing unfair conditions of contracts concluded with consumers, and the right to withdraw that consumers have in distance sales (fourteen calendar days).

3. It should also be noted that Law 22/2007, of July 11, 2007, on the distance marketing of consumer financial services, shall also be taken into consideration when dealing with consumers in the financial sector. The Law specifically regulates the protection granted by the general law to the users of remote financial services by establishing, among others, the generic requirement to provide the consumer with precise and exhaustive information on the financial contract prior to its signature and by granting the consumer a specific right to withdraw from the distance contract previously concluded.
4. In making the contract, there is an intention to incorporate predisposed clauses into a plurality of contracts, regard must be had to Standard Contract Terms Law 7/1998.
5. If the activity carried out is related to the sale of consumer goods, the aforementioned Legislative Royal Decree must be taken into consideration regarding the warranties on consumer, because it establishes the measures aimed at ensuring a minimum uniform standard of consumer protection. The Royal Decree establishes a free 2-year warranty for consumers on all consumer goods and offers consumers a range of possible remedies when the goods acquired are not in keeping with the terms of the contract, enabling consumers to demand their repair or substitution.

2.1.3 Other applicable regulations

1. In accordance with Law 56/2007, enterprises that provide services of special economic significance to the general public and that are of a certain size are required to provide their users with an electronic means of communication which, through the use of qualified electronic signature certificates, enables them to perform at least

the following steps: (a) conclude contracts electronically and amend and terminate them; (b) consult their customer data (including a record of billing covering at least the past 3 years) and the concluded contract, with its general conditions; (c) submit complaints, incidents, suggestions and claims (while guaranteeing a record of their submission and direct personal assistance); and (d) exercise the rights of access, rectification, cancellation and objection (known as *ARCO* rights) provided for in the data protection legislation.

This requirement applies to enterprises providing services of special economic significance to the general public provided that they employ more than 100 workers or have an annual turnover (according to the VAT legislation) of more than €6,010,121.04. The enterprises that Law 56/2007 includes in this category are those operating in the following industries: (i) electronic communications services to consumers; (ii) financial services aimed at consumers (banking, credit or payment, investment services, private insurance, pension plans and insurance brokerage); (iii) supplying water to consumers; (iv) supplying retail gas; (v) supplying electricity to final consumers; (vi) travel agencies; (vii) carriage of travelers by road, railway, by sea, or by air; and (viii) retail trade (although for these last-mentioned ones, the electronic means of communication need only enable what is set out in letters (c) and (d) above).

2. Due to their particular importance in electronic commerce, it is worth noting some legal provisions concerning payment services:
 - a. Royal Decree-Law 19/2018, of November 23, on payment services and other urgent measures on financial matters is the law transposing in Spain the Directive (UE) 2015/2366, of November 25, on payment services in the internal market (known as PSD2 Directive). This Royal Decree-Law has repealed the Payment Services Law 16/2009, of November 13, 2009. The new payment services legislation mainly affects the payment transactions that are most commonly used

in an electronic commerce environment: transfers, direct debiting and cards, establishing, as a general rule, that the payer and the payee of the transaction must each bear the charges levied by their respective payment services providers. In any event, in the case of transactions with consumers, the specific legislation (Legislative Royal Decree 1/2007) prohibits the trader from charging the consumer fees for the use of payment methods that exceed the cost borne by the trader for the use of such payment methods.

Lastly, both the Royal Decree-Law 29/2018 and the consumer protection legislation envisage for distance contracts that, where the amount of the purchase or of a service has been charged fraudulently or incorrectly using the number of a payment card, the consumer may request the immediate cancellation of the charge.

As one of the main news of the Royal Decree-Law 19/2018, it regulates the payment initiation services and the account information services.

- b. The legislation on interchange fees has been introduced by Royal Decree-Law 8/2014, of July 4 and Law 18/2014, of October, 15. This legislation establishes a system of caps on interchange fees in transactions with credit or debit cards in Spain (applying them to POS terminals located in Spain), regardless of the trade channel used (that is, including physical and virtual POS terminals), provided that they require the involvement of payment services providers established in Spain.

The caps applicable on or after September 1, 2014 are as follows:

- i. Debit cards: The interchange fee per transaction may not exceed 0.2% of the value of the transaction, subject to a cap of 7 euro cents. But if the amount does not exceed €20, the interchange fee may not exceed 0.1% of the value of the transaction.

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- ii. Credit cards: The interchange fee per transaction may not exceed 0.3% of the value of the transaction. But if the amount does not exceed €20, the interchange fee may not exceed 0.2% of the value of the transaction.

These caps do not affect transactions performed with company cards or withdrawals of cash from automatic teller machines. In addition, three-party payment card systems are excluded from the application of these caps, except for certain cases identified by the legislation.

- 3. Also worthy of note is Law 29/2009, of December 30, 2009, modifying the legal regime governing unfair competition and advertising in order to enhance consumer and user protection. Special mention should be made of the unfair practice status to be granted to the making of unwanted and reiterated proposals by telephone, fax, e-mail and other means of long-distance communication, unless such proposals are legally justified for the purpose of complying with a contractual obligation. Moreover, when issuing such communications, traders and professionals must use systems that enable consumers to place on record their opposition to continuing to receive commercial proposals from such traders or professionals. Thus, when making such proposals by telephone, calls must be made from an identifiable number.
- 4. Finally, it is convenient to take into account the legislation deriving from the Directive (EU) 2016/1148, concerning measures for a high common level of security of network and information systems across the Union. In Spain, this Directive has been transposed by means of the Royal Decree-law 12/2018, of 7 September, concerning security of the networks and information systems, which has itself been developed by Royal Decree 43/2021, of 26th January. This legislation applies to essential services operators and digital services providers, as they are defined in the regulations (digital services being the cloud computing services, online search engines and online marketplaces).

In particular, these marketplaces are a more and more common way of developing e-commerce activities. We just mention this legislation because it only applies to a limited number of services, but it will be important to bear in mind that, when applicable, this regulations oblige to a previous notification and to other mandatory duties regarding security of the information.

2.2 ELECTRONIC INVOICING

Article 88.2 of Value Added Tax Law 37/1992 states that VAT shall be charged through the invoice, on the conditions and with the requirements determined by regulations. A clear indication that the new invoicing regulations approved by Royal Decree 1619/2012, of November 30, 2012, aim to promote electronic invoicing is that they establish the same treatment for electronic invoices as for paper invoices. A new definition is provided for electronic invoice, i.e., an invoice that meets the requirements established in the Royal Decree but which has been issued and received on electronic format.

Therefore, this equal treatment for paper and electronic invoices broadens the possibilities for the supplier to be able to issue invoices electronically without needing to use specific technology to do so.

Moreover, Order EHA/962/2007¹ issued by the former Ministry of Finance establishes and further develops particular obligations regarding telematic invoicing. That Order clarifies that any Advanced Electronic Signature based on a certain certificate and generated through safe signing procedures will be valid in order to guarantee the authenticity and origin of the bill. The Order also clarifies the legal requirements that electronic invoices issued abroad must meet in order to be validly accepted in Spain.

Since January 15, 2015, there has been an obligation in Spain (by application of Law 25/2013, of December 27, 2013, on the promotion of electronic billing and the creation of a public sector accounting register of invoices) to issue

invoices in electronic format that affects enterprises operating in certain industries (according to a list included in the law) and providing services “of special economic significance” to the general public.

This obligation to issue electronic invoices applies regardless of the contracting channel used (face-to-face or distance, electronic or non-electronic), provided that the customer agrees to receive them or has expressly requested them. However, travel agencies, carriage services and retail trade businesses are only required to issue electronic invoices where the contracting has taken place by electronic means.

In any event, it is the recipient of the invoices who has the power to give his or consent to the issuance and sending of invoices in electronic format and to revoke such consent in order to receive them on paper again. In the absence of consent, the trader should issue and send the invoices on paper.

2.3 ELECTRONIC SIGNATURE

On the 28th of August 2014, the Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC was published in the Official Journal of the European Union. This Regulation came into force on the 17th of September of the same year and it is obligatory since the 1st of July 2016 (known as e-IDAS Regulation). At a national level, Law 6/2020, of 11th of November, on several aspects of the electronic trust services, introduces specific regulations complementing the contents of e-IDAS Regulation in Spain.

¹ Order EHA/92/2007, of April 10, 2007, implementing certain provisions concerning telematic billing and electronic invoice storage, contained in Royal Decree 1496/2003, of November 28, 2003, approving the regulations governing billing obligations.

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Regulation 910/2014 defines the following concepts:

- Electronic signature, data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.
- Advanced electronic signature means an electronic signature which meets the requirements set out in article 26.
- Qualified electronic signature means an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.
- Certificate for electronic signature means an electronic attestation which links electronic signature validation data to a natural person and confirms at least the name or the pseudonym of that person.
- Qualified certificate for electronic signature means a certificate for electronic signatures, that is issued by a qualified trust service provider and meets the requirements laid down in Annex I of the e-IDAS Regulation.
- Electronic seal means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity.
- Advanced electronic seal means an electronic seal, which meets the requirements set out in article 36 of the e-IDAS Regulation.
- Certificate for electronic seal means an electronic attestation that links electronic seal validation data to a legal person and confirms the name of that person.
- Qualified certificate for electronic seal means a certificate for an electronic seal, that is issued by a qualified trust service provider and meets the requirements laid down in Annex III .of the e-IDAS Regulation.

In the structure of the e-IDAS Regulation, *“an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures”*, and therefore any electronic signature, whatever the type, has legal effect and must be admitted as evidence, although, as the e-IDAS Regulation states, only *“a qualified electronic signature shall have the equivalent legal effect of a handwritten signature”*.

2.4 PERSONAL DATA PROTECTION

Another aspect that may have e-commerce implications is the possible processing of any personal data in transactions of this nature.

At present, the applicable legislation on these matters in Spain, as in the rest of the European Union, is the 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 (General Data Protection Regulation), known as GDPR.

In the framework of the GDPR, which is directly applicable in Spain since 25th May 2018, the Constitutional Law on the Protection of Personal Data and guarantee of digital rights (*LOPD-gdd*) has been passed, repealing the previous Constitutional Law 15/1999, of 13 December, on Personal Data Protection. The *LOPD-gdd* regulates some aspects of the processing of an individual's personal data within the margins that the GDPR allows to the EU Member States.

The GDPR applies to “personal data,” meaning any information concerning identified or unidentified individuals. Accordingly, it does not apply to data concerning legal entities; however, as opposed to the previous legislation in Spain, it applies to data concerning individual entrepreneurs or individuals being the contact person of a legal entity where the personal data is used.

Personal data protection legislation revolves around the following principles:

- The data controller has to rely on one of the legal basis established in the GDPR in order to be able to process personal data.
- The processing of specially protected data (i.e., data referring to ideology, labor union membership, religion, beliefs, ethnicity, health, and sex life) is subject to very strict limitations or, in some cases, prohibitions.
- The data subject must be informed of a number of matters in relation to the envisaged processing of his or her personal data.
- Personal data may only be processed where they are adequate, relevant and not excessive in relation to the purpose for which they have been obtained.
- Personal data may only be disclosed if a legal basis applies.
- When the communication is addressed to a third party classified by the Law as a data processor, which provides a service entailing access to such data, prior consent by the data subject is not required, but the relationship must be regulated in a contract for services that includes a number of provisions established by the GDPR.
- Data subjects are granted the rights of access, rectification, cancellation, and opposition to the processing of their personal data, as well as other new rights such as portability or limitation of the processing.
- Sanctions for infringement of GDPR may consist of fines of up to €20,000,000 or 4% of the global annual turnover of the group during the previous fiscal year.

It should also be noted that international transfers of personal data are subject to limitations and the obligation to ensure an

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equivalent level of security as that inside the EU, and therefore it is necessary to use one of the methods listed in the GDPR including, in some cases, the prior authorization of the Director of the Spanish Data Protection Agency.

In relation to penalties, worthy of note is the power of the Spanish Data Protection Agency not to commence, in certain exceptional cases, disciplinary proceedings and, instead, require the party responsible for the offense to evidence that it has taken the corrective measures applicable in each case.

The GDPR bases its regulatory structure on the “accountability”, which implies the obligation for the data controller to assess the processing that it carries out and the risks attached thereto, adopting the security measures that are more accurate for each case.

2.5 INTELLECTUAL AND INDUSTRIAL PROPERTY AND DOMAIN NAMES

2.5.1 Copyright

The legal protection of copyright is crucial when engaging in e-commerce in the “information society”, since digital content protected by intellectual property (authorship, trademarks, image rights, etc.) constitute the real value added of the internet.

The Copyright Law² establishes in article 10 that all original literary, artistic or scientific creations expressed by any means or on any medium, whether tangible or intangible, currently known or invented in the future, are copyrightable. Accordingly, all original creations are subject to protection, including graphic designs and source codes of, and information contained on, websites.

Website content will be afforded such protection as pertains to the specific category of the content (graphics, music, literary works, audiovisual, databases, etc.) and, therefore, the person in charge of the website must hold the related rights,

either as the original owner (of the collective work under his management or developed by employees) or as a licensee.

In protecting intellectual property, the owner may seek both civil and criminal remedies. The Copyright Law affords the holder of the rights of exploitation the possibility of applying for the cessation of unlawful activities (e.g., a website unlawfully disseminating a protected work could be closed down) and of seeking damages. From a criminal law standpoint, the protection of intellectual property on the Internet is based on article 270 of the Criminal Code, which imposes prison sentences or fines for crimes against intellectual property.

Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, was implemented in Spain through Law 23/2006, which amends the Copyright Law in order to harmonize the economic rights of reproduction, distribution and public communication (including new forms of interactive on-demand making available of works), with the rest of EU Member States and to adapt the rules governing these rights to the new operating procedures existing in the Information Society. Recently, Spain has placed itself at the forefront of the fight to strengthen copyright protection on the Internet in Europe. The Law 21/2014, of November 4, broadens the powers of the administrative body within the Ministry of Culture and Sport (the “Second Section of the Copyright Commission”), strengthening an expedited hybrid procedure of administrative and judicial nature to fast-track action for copyright infringement on the Internet. The purpose of this amendment is to force Internet Service Providers (ISPs) to take down unlawful content and, in some cases, to shut down websites which openly violate copyright legislation (including websites which actively provide lists of links to unlawful content). However, the amendment is not focused on individuals who share unlawful content through “peer to peer” networks.

Lastly, we must underline the elimination of the private copying levy, applied in Spain until January 1, which required collaboration from manufacturers, distributors and retailers

of products “suitable for reproducing copyrighted works”. The former system was replaced in 2012 with a new form of compensation which shall be satisfied directly by the State to the copyright owners. The law 21/2014 consolidates the State-funded system.

2.5.2 Intellectual property

When engaging in e-commerce, regard should also be had to intellectual property matters. Article 4.4.c of the Patents Law 24/2015, in force since 1st of April 2017, provides that plans, rules, and methods for conducting a business, as well as software, cannot be patented.

2.5.3 Domain names

Another essential issue to take into account is the registration and use of domain names. In this respect, Order ITC/1542/2005 approved the National Plan for Internet Domain Names under the country code for Spain (“.es”). The function of assigning domain names under the “.es” code is performed by the public for-profit entity Red.es.

Order ITC/1542/2005, following international trends, simplified the system for assigning “.es” domain names, which can be requested directly from the granting authority or through an agent.

Thus, second-level domain names under the code “.es” are assigned on a “first come, first serve” basis. This assignment can be requested by individuals or legal entities and entities without legal personality that have interests in or ties with Spain. However, those which coincide with a first-level domain name or with generally known names of Internet terms will not be assigned.

² Legislative Royal Decree 1/1996, of April 12, 1996, approving the Revised Intellectual Property Law, regulating, clarifying and harmonizing the legal provisions in force in this area.

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It is also established that domain names under the codes “.com.es,” “.nom.es,” “.org.es,” “.gob.es” and “.edu.es” may be assigned in the third level. The persons or entities that can apply for the domain names will vary according to the codes. Thus, for example, the Spanish Public Authorities and the public law entities can request domain names under the “.gov.es” code.

Furthermore, the National Plan establishes that the right to use a domain name under the “.es” code is transferable provided that the acquiror meets the requirements necessary to own the domain name and that the transfer is notified to the assigning authority.

Also, one of the main features of Order ITC/1542/2005 is the establishment of an extrajudicial body of mediation and arbitration for the resolution of disputes concerning the assignment of “.es” domain names.

2.6 LAW 34/2002 ON E-COMMERCE AND INFORMATION SOCIETY SERVICES

Law 34/2002 on E-Commerce and Information Society Services (ECISSA) defines as “information society services” any service provided for a valuable consideration, long-distance, through electronic channels and upon individual request by the recipient, also including those not paid for by the recipient, to the extent that they constitute an economic activity for the provider. Specifically, the following are deemed to be information society services:

- Contracting for goods and services through electronic means.
- Organization and management of auctions using electronic means or of virtual shopping centers or markets.
- Management of purchases on the network by groups of persons.

- Sending of commercial communications.
- Supply of information through telematic channels.
- Video upon demand, as a service that the user may select through the network and, in general, the distribution of contents upon individual request.

The ECISSA applies to information society service providers established in Spain. In this respect, the provider is considered to be established in Spain when its place of residence or registered office is located in Spanish territory, provided that it coincides with the place where its administrative management and business administration are actually centralized. Otherwise, the place where such management or direction is performed will be considered.

Likewise, the ECISSA will apply to services rendered by providers who are resident or have a registered office in any other State when the services are offered through a permanent establishment located in Spain. Therefore, the mere use of technological means located in Spain to provide or access the service will not of itself determine that the provider has an establishment in Spain.

The above notwithstanding, the requirements of the ECISSA will apply to service providers established in another State of the European Union or the European Economic Area when the recipient of the services is located in Spain and the services affect:

- Intellectual or industrial property rights.
- Advertising issued by collective investment institutions.
- Direct insurance activities.
- Obligations arising from contracts with consumers.
- The lawfulness of unsolicited commercial communications by e-mail.

The ECISSA establishes the basic legal regime for information society service providers and e-mail activities, including:

- The principle of freedom to provide services not subject to prior authorization applies to information society services, except in certain cases. In the case of service providers established in States that do not belong to the European Economic Area, this principle will apply in accordance with the applicable international agreement.
- The following obligations are imposed on information society service providers:
 - To put in place the means to permit the recipients of the services and the responsible bodies to access easily, directly and free of charge, the information on the provider (corporate name, registered office, registration particulars, tax identification number, etc.), on the price of the product (stating if it includes applicable expenses and shipping costs) and on the codes of conduct to which it has adhered.
 - For providers of intermediation services, to cooperate with the responsible authorities in interrupting the provision of information society services or in withdrawing contents.

Please note that depending on the specific services that these intermediation service providers carry out (access to the internet, e-mail services), they are obliged to furnish certain information such as, for example, the security measures in place, the filters for certain persons to access the site or the responsibility of the users.

- A specific system of liabilities is established for information society service providers, without prejudice to the provisions of civil, criminal and administrative legislation.
- A specific system is established for commercial communications through electronic channels, without prejudice to the legislation in force on commercial, publicity and personal data protection matters. In this regard, commer-

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cial communications through electronic channels must be clearly identifiable, stating the individual or corporation for whom they are made, and spelling out the conditions for access and participation, in the case of discounts, prizes, gifts, competitions or promotional games.

Additionally, advertising or promotional communications sent by e-mail or similar form of communication that have not been previously requested or expressly authorized by the recipients are prohibited. Express consent will not be necessary when there is a pre-existing contractual relationship, provided that the supplier had lawfully obtained the recipient's contact data and that the commercial communications refer to goods or services of the provider's own company which are similar to those for which the recipient initially made a contract. In any case, the provider must offer the recipient the possibility to object to the processing of his data for promotional purposes, through a procedure that is simple and free of charge, both at the time the data is collected and in each of the commercial communications sent to him. Where the communications have been sent by e-mail, that medium shall necessarily include a valid e-mail address where the recipient can exercise this right, it being prohibited to send communications that do not include such address.

- Service providers may use devices for storage and recovery of data on computer terminals of the recipients (commonly known as "cookies"), on the condition that the recipients have given their consent after having received clear and complete information on their use.

Where technically possible and efficient, the recipient may give his consent to the processing of his data through the use of the appropriate parameters of the browser or of other applications, provided that the recipient must configure it during installation or updating through express action for that purpose.

The foregoing will not prevent the possible technical storage or access for the sole purpose of transmitting a

communication through an electronic communications network or, to the extent that it is strictly necessary, providing an information society service expressly requested by the recipient.

The Spanish Data Protection Agency is the body with the authority to impose monetary penalties to the information society providers for the use of cookies without the proper informed consent from users of an information society service. The fines can reach the amount of €30.000.

- Contracts through electronic channels are regulated, recognizing the effectiveness of the agreements made through electronic channels when consent has been granted and other requirements necessary for their validity are met. Additionally, the following provisions are established for contracts made through electronic channels:
 - The requirement that a document should be placed on record in writing is considered to be met when it is contained on electronic medium.
 - The admission of documents on electronic medium as documentary evidence in lawsuits.
 - Determination of the legislation applicable to the contract made through electronic channels will be governed by the provisions of international private law.
 - Establishment of a series of obligations to be met prior to commencement of the contracting procedures, relating to the information that must be furnished on the formalities for the making of the contract, the validity of offers or proposals of contracts and the availability, if any, of general contracting conditions.
 - Obligation on the offeror to confirm receipt of the acceptance within 24 hours after its receipt, by an acknowledgement sent by e-mail or equivalent means to that used in the contracting procedure which enables the recipient to give such confirmation.

- Assumption that agreements made through electronic channels in which the consumer participates have been made in the place where the consumer has his customary place of residence. When these contracts are made between entrepreneurs or professionals, they will be assumed to have been made, in the absence of a provision on the matter, in the place where the service provider is established.

When dealing with agreements entered into with customers, the Revised General Consumer and User Protection Law should be taken into account, in particular in connection with distance sales.

- Recognition of a ground to claim cessation against conduct that contravenes the ECISSA which is detrimental to collective or general consumers' interests, and promotion of out-of-court settlement of disputes.
- Establishment of minor, serious and gross infringements due to failure to comply with the obligations imposed by the ECISSA, with penalties of up to €600,000.

2.7 PLATFORMS REGULATION

As an important European law it is also worth mentioning the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 "on promoting fairness and transparency for business users of online intermediation services", known as P2B. This regulation applies to online intermediation services (commonly known as "Marketplace") and the search engine services.

The Regulation imposes certain obligations to the online intermediation services providers, such as the inclusion in the terms and conditions of information on the ranking parameters, clear and transparent description of the terms and conditions and of the ancillary goods and services, limitations regarding termination of the contracts or inclusion of internal complaint-handling systems.

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3.1. INITIATIVES TAKEN IN RELATION TO TAXATION, PROBLEMS AND GENERAL PRINCIPLES

In relation to e-commerce, Law 4/2020 of October 15, 2020 on the Tax on Certain Digital Services ("TCDS") came into force on January 16, 2021, such tax being levied on the provision of certain digital services involving users located in Spanish territory. As shall be explained in greater detail in the section on direct taxation, this is a measure adopted by Spain unilaterally, on a transitional basis, through provisional legislation which shall remain in force until a solution adopted internationally can be implemented.

On the other hand, in relation to VAT, Spain has assumed commitments at European Union ("EU") level.

Below is a list of the basic pieces of VAT legislation emanating from the EU:

- Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. Council Directive 2008/8/EC of 12 February 2008 has amended Directive 2006/112/EC as regards the place of supply of services, introducing, in particular, rules applicable to telecommunications, broadcasting and electronically supplied services, with effect from January 1, 2015. On the other hand, Directive 2017/2455 of 5 December 2017 also introduced certain amendments in relation to on-line trading in goods and services. Part of these amendments came into force on January 1, 2019 (those affecting trade in services)

and the pertinent changes have therefore already been made to internal legislation. Other measures, however, will not come into force until January 1, 2021 (those relating primarily to distance sales of goods) and are pending transposition into Spanish legislation.

Finally, other measures came into force on July 1, 2021 (those relating primarily to distance sales of goods) and have been transposed into Spanish legislation by means of Royal Decree-law 7/2021 of April 27, 2021.

Additionally, Council Directive 2019/1995 of 21 November 2019 introduced amendments which came into force on July 1, 2021, related to distance sales of goods and certain domestic supplies of goods.

- Council Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax. This Regulation has been amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 as regards the place of supply of services. Similarly, Implementing Regulation 282/2011 was amended by means of Implementing Regulation 2017/2459 of 5 December 2017 for the purpose of introducing certain simplification rules in respect of on-line trading in services for small and medium-sized companies. These changes came into force on January 1, 2019.

Additionally, Council Implementing Regulation 2019/2026 of 21 November 2019 has also introduced amendments to Implementing Regulation 282/2011 that came into force on July 1, 2021. Those amendments are related to supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods.

- Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, which recast Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative

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cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT), in respect of additional measures regarding electronic commerce. On the other hand, this Regulation has been amended by Regulation (EU) 2017/2454, in order to introduce certain changes concerning the transmission of information and transfer of money between Member States, as a result of the new provisions introduced in relation to on-line trading, with effect as from January 1, 2021.

- Council Regulation (EU) No 967/2012 of 9 October 2012 amending Council Implementing Regulation (EU) No 282/2011, as regards the special schemes for non-established taxable persons supplying telecommunications services, broadcasting services or electronic services to non-taxable persons. Among other matters, this Regulation regulates the existence, starting January 1, 2015, of a single point of electronic contact for suppliers of EU electronic, telecommunications, and broadcasting services which will enable enterprises to declare and pay over the VAT in the Member State where they are established rather than doing so in the customer's country.

The content of these EU provisions and their transposition into Spanish law are examined in the [section](#) on the indirect taxation of e-commerce.

Work is currently being undertaken by the OECD and the European Union to adapt the international tax system to the digitalization of the economy through the re-allocation of taxing rights to market countries or territories when participating in the economic activity, without the need for a physical presence, and the establishment of certain minimum taxation thresholds, among other questions.

The EU has also been concerned about the growing digital economy of our day. In this sense, it has long promoted the European Strategy eEurope002 (now eEurope2020) which encourages e-commerce. The consultation period in respect of an initiative to implement a harmonized digital levy was recently initiated.

3.2. DIRECT TAXATION

The following chart shows the main potential issues of this nature.

MAIN CONTENTIOUS ISSUES IN RELATION TO DIRECT TAXATION

a) The permanent establishment problem.

b) Legal characterization of the income generated from the sale of goods and services on the Internet.

c) Determination of taxable income and transfer pricing problems.

d) Application of the place-of-effective-management rule to determine the tax residence of taxable persons engaging in e-commerce activities.

The most relevant considerations and the progress made in analyzing those issues are summarized below:

3.2.1 The permanent establishment problem

The issue concerns whether the paradigmatic elements of e-commerce, such as a server, a website, etc., can be deemed a permanent establishment ("PE") in the country where a company supplying a good or service on the Internet is located:

In the Commentary published in December 2017 on the OECD Model Tax Convention, the comments regarding article 5 (concerning the definition of permanent establishment) remain unchanged from those published in 2003, in which the elements defining the new forms of commerce were already foreshadowed. Based on the observations made in the Commentary, the following chart shows the scenarios in which, as a general rule, a PE can be deemed to exist and those in which it cannot:

CAN CONSTITUTE A PE	CANNOT CONSTITUTE A PE
Server	Software.
	Website.
	ISP (Internet Service Provider).
	Hosting.

The reasons justifying the characterization of a PE in each case are as follows:

- A computer or server can constitute a PE whereas the software used by that computer cannot. This distinction is important because the entity that operates the server hosting the website is normally different from the entity that engages in the online business (hosting agreements).

In order to characterize a server as a PE, regard must be had to the following considerations:

- A server will constitute a fixed place of business only if it is permanent and located in a certain place for a sufficient length of time. What is relevant here is whether it is actually moved from one place to another, rather than whether it can be moved. A server used for e-commerce can be a PE regardless of whether or not there is personnel operating that server, since no personnel is required to perform the operations assigned to the server.
- In determining whether or not the server installed by a given enterprise in a country constitutes a PE, it is particularly important to analyze whether the enterprise engages in business activities specific to its corporate purpose through that server, or whether, on the contrary, it only engages in activities of a preparatory or auxiliary character (such as advertising, market research, data gathering, providing a communications link between suppliers and customers, or making backup copies).

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- A website does not, in itself, constitute tangible property and, therefore, cannot be deemed a “place of business,” defined as facilities, equipment, or machinery capable of constituting a PE. ISPs do not generally constitute a PE of enterprises that engage in e-commerce through websites since ISPs are not generally dependent agents of those nonresident enterprises.

3.2.2 Legal characterization of income

The second relevant issue is the characterization of income and, in particular, the possibility that certain goods supplied online may, merely by virtue of the fact that they are protected by intellectual or industrial property laws (such as music, books and, particularly, software), be characterized as generators of royalties and, therefore, be taxable in the country of source.

The Commentaries on the OECD Model Tax Convention characterize as business profits (instead of royalties) almost all payments made for all intangible goods delivered electronically, on the ground that the subject-matter of those transactions are copies of images, sounds or text, rather than the right to exploit them commercially.

Initially, Spain included an observation on the relevant Commentary on the 2003 Model Tax Convention qualifying the treatment of the acquisition of rights to software by arguing that payment for those rights could constitute a royalty. Specifically, Spain considered that payments relating to software were royalties where less than the full rights to it were transferred, either if the payments were in consideration for the use of a copyright on software for commercial exploitation or if they related to software acquired for business or professional use when, in this latter case, the software was not absolutely standardized but somehow adapted to the purchaser.

However, the relevant Commentary on the OECD Model Tax Convention published in July 2008 took the novel line that payments made under arrangements between a software copyright holder and a distribution intermediary do not

constitute a royalty if the rights acquired by the distributor are limited to those necessary for the commercial intermediary to distribute copies of the software. Thus, if it is considered that distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights (without the right to reproduce the software), payments in these types of arrangements would be characterized as business profits. The Commentary published in December 2017 maintains this position.

In light of this change in the Commentary on royalties in the Model Tax Convention, Spain introduced a qualification in the observations published in July 2008 (which was kept in the Commentary on the OECD Model Tax Convention published in December 2017), indicating that payments in consideration for the right to use a copyright on software for commercial exploitation constitute a royalty, except payments for the right to distribute standardized software copies, not comprising the right to customize or to reproduce them.

Therefore, as acknowledged by the Directorate-General of Taxes in its binding ruling of November 10, 2008 and other subsequent rulings, Spain considers that payments made for the right to distribute standardized software copies are business profits, although it continues to treat as royalties any payments made for the right to distribute software where the software has been adapted. This issue is also addressed, in relation to a “cloud base software distribution agreement”, in ruling V2039-15 of July 1 2015, in which the DGT resolves, on the basis of agreements of this type, on the distinction between business profits and royalties. In any case, as was clarified in a binding ruling of November 23, 2010, the transfer, together with the distribution right, of other rights, such as a license to adapt the software being distributed, will mean that the payments are treated as royalties.

It should also be noted that article 13 of the Revised Nonresident Income Tax Law, approved by Legislative Royal Decree 5/2004, of March 5, 2004, treats as royalties amounts such as those paid for the use of, or the right to use, rights in software.

Also, in some tax treaties signed by Spain, income derived from the licensing of software is expressly characterized as a royalty. In this regard, one should note the Supreme Court judgment of March 25, 2010, which defined the licensing of software as a license of the rights to exploit a literary work, although the Court’s definition addressed a situation pre-dating the entry into force of the Spanish legislation specifically listing the items deemed to be royalties. However, in a judgment dated March 22, 2012, the National Appellate Court held that such a definition was no longer possible after the entry into force of the above-mentioned legislation. The Supreme Court confirmed this view in a judgment handed down on March 19, 2013, in which it held that characterization as a literary work is no longer correct after the change in the legislation, reflecting a criterion which has continued to gain strength in judgements delivered by this High Court (the most recent of which include judgement STS 2189/2016 of October 11, 2016).

3.2.3 Determination of taxable income and transfer pricing problems

The widespread use of intranets among different companies belonging to multinational groups, and the enormous mobility of transactions over computer networks, create highly complex problems when applying the traditional arm’s-length principle to pricing transactions within groups. This has been accentuated by the increase in transactions between group companies and the downloading of digital content or of free services.

Accordingly, the tax authorities of OECD countries (including Spain) are advocating the development of bilateral or multilateral systems for advance pricing agreements, applying the OECD transfer pricing guidelines to e-commerce. Noteworthy in this regard is the creation of an EU Joint Transfer Pricing Forum in which, among other matters, non-legislative measures are being proposed to enable a uniform application of the OECD guidelines across the EU.

Following the initial proposal in relation to Actions 8 to 10 of the BEPS Action Plan, which are ultimately aimed at ensuring that the results of transfer pricing are in line with the creation

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of value, the implementation of these measures was initially addressed in July 2017 by the OECD Guidelines on transfer pricing for multinational enterprises and tax administrations, which have recently (in January 2022) been updated.

The update reflected in this new version focuses on three main areas:

- Revised guidance in relation to the method for allocating results.
- Guidance for tax administrations regarding the application of the approach towards hard-to-value intangibles.
- Transfer pricing guidance on financial transactions.

In what concerns the second point, which reflects the work carried out by the OECD since the report published in June 2018 on this matter, it is now included in Appendix II of Chapter VI of the 2022 Guidelines. A particular aspect of this new publication regards the guidance reflected on the ex ante criterion, related to pricing, and the ex post criterion, which attends the reliability of evidence on financial results, related to transactions based on the arm's length principle. Some examples are provided to illustrate the adjustments that can be made, in practice, in respect of intangible property of this type.

3.2.4 Application of the place-of-effective-management rule

Due to the special characteristics of e-commerce (which include easy detachability from location, relative anonymity, and the mobility of the parties involved), the traditional rules on taxation of worldwide income, based on the principles of residence, registered office or place of effective management, are more difficult to apply to taxpayers engaging in e-commerce.

Indeed, the parameters established in the tax treaties for apportioning the revenue powers among States in the event of a conflict (most of them based on the "place-of-effective-management" principle) are exceeded in the context of e-commerce, since the various managing bodies of the

same enterprise can be located in different jurisdictions and be totally mobile during the same year. It can therefore be extremely difficult to determine where the enterprise's place of effective management is situated, and this can lead to double taxation or to no taxation at all³.

3.3. INDIRECT TAXATION

It is in the area of VAT where the most relevant coordinated legislative measures have been adopted.

The indirect taxation implications for e-commerce have so far mainly concerned "online e-commerce," a term that refers to products supplied on the Internet in digitized format (books, software, photographs, movies, music, and so on) and downloaded by a user in real time onto his or her computer, having clicked on to the supplier's website and paid for the products in question (in contrast to offline supplies where products sold on the Internet are subsequently delivered by using conventional means of transportation).

However, the EU provisions regarding offline intra-Community trade in goods (distance sales), which are also referred to in this chapter, are to come into force with effect as from July 1, 2021.

There are other relevant VAT issues also to be considered in relation to e-commerce (especially in the area of online e-commerce). These are basically the following:

- The determination of the VAT rates applicable to the different types of e-commerce.
- The adaptation of the formal obligations and management of VAT to the realities of e-commerce and, particularly, the invoicing obligations.
- The problems already raised in relation to direct taxation, regarding the determination of the existence of a fixed establishment and of the effective place of business, are also applicable in the area of indirect taxation. Council

Implementing Regulation (EU) No 282/2011 has clarified these concepts, defining them as follows:

- Place of establishment of a business: The place where the functions of the business's central administration are carried out, i.e., the place where essential decisions concerning the general management of the business are made, the place where the registered office is located or the place where management meets. The Regulation clarifies that if, having regard to the above criteria, the place of establishment of a business cannot be determined with certainty, the place where essential management decisions are made will take precedence. It also clarifies that a postal address cannot be taken to be the place of establishment of a business.
- Fixed establishment: Any establishment, other than the place of establishment of a business, with a degree of permanence and a suitable structure in terms of human and technical resources to enable the services supplied to be received and used for its own needs.

Each of these issues is briefly examined below.

3.3.1 Services provided electronically

3.3.1.1 Definition of "taxable event" as a supply of goods or services for the purpose of determining the place of supply

Directive 2002/38/EC was based on the premise that transactions performed electronically are deemed supplies of services:

³ From a general perspective, mention should be made of the State Tax Agency Directorate General's Ruling of January 26, 2022 approving the general guidelines of the 2022 Annual Tax and Customs Control Plan. Point A4 of this Ruling, on the "control of economic activities", in section two entitled "control of internal taxes", under heading III on "investigation and verification proceedings in respect of tax and customs fraud", expands upon the various provisions planned to be carried out in 2022. These relate to (i) e-commerce, (ii) the ban on dual-use software, (iii) virtual currencies, and (iv) other virtual work, on which further information will be further provided in the section on indirect taxation.

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- Services will be deemed to be electronically supplied services where their transmission is sent initially and received at destination by electronic data processing equipment. The fact that the supplier of a service and his customer communicate by e-mail does not of itself mean that the service performed is an electronically supplied service.

In relation to the concept of “electronically supplied service”, article 7 of Council Implementing Regulation (EU) No 282/2011 further defined it by including a list of services that must be regarded as electronically supplied services and others that are not. In this regard, article 7 established that electronically supplied services are those “delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology”.

Implementing Regulation 1042/2013, to which we shall refer subsequently because it regulated the changes which came into force on January 1, 2015, revised the list of electronically supplied services as set out in the following table:

ELECTRONICALLY SUPPLIED SERVICES	SERVICES NOT SUPPLIED ELECTRONICALLY
<ul style="list-style-type: none"> a. The supply of digitized products generally, including software and changes to or upgrades of software. b. Services providing or supporting a business or personal presence on an electronic network such as a website or a webpage. c. Services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient. d. The transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by e-mail automatically generated from a computer. e. Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e., packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.). f. The services listed in Annex I. 	<ul style="list-style-type: none"> a. Radio and television broadcasting services. b. Telecommunications services. c. Goods, where the order and processing are done electronically. d. CD-ROMs, floppy disks and similar tangible media. e. Printed matter, such as books, newsletters, newspapers or journals. f. CDs and audio cassettes. g. Video cassettes and DVDs. h. Games on a CD-ROM. i. Services of professionals such as lawyers and financial consultants, who advise clients by e-mail. j. Teaching services, where the course content is delivered by a teacher over the Internet or an electronic network (namely via a remote link). k. Offline physical repair services of computer equipment. l. Offline data warehousing services. m. Advertising services, in particular as in newspapers, on posters and on television. n. Telephone helpdesk services. o. Teaching services purely involving correspondence courses, such as postal courses. p. Conventional auctioneers' services reliant on direct human intervention, irrespective of how bids are made. q. Tickets to cultural, artistic, sporting, scientific, educational, entertainment or similar events, booked online. r. Accommodation, car-hire, restaurant services, passenger transport or similar services booked online.

3.3.1.2 Place of supply of services provided electronically

Directive 2006/112/EC provides that starting on January 1, 2015, the electronically supplied services will be taxed in the Member State where the recipient is established, regardless of where the taxable person supplying them is established. Thus, effective that date, where the recipient is established in Spain, the services will be deemed supplied in Spanish VAT territory. This general rule is applicable for both recipients classed as traders or professionals and those not classed as such.

The above notwithstanding, Directive 2017/2455, effective as from January 1, 2019, established a threshold for the determining the place of provision of these services, the rule being that when the total amount of services of this kind rendered by the services provider does not exceed, in the current year or the preceding year, €10,000, services provided to final consumers shall be considered subject to VAT in the place where the supplier is established. It should be borne in mind that, effective since July 1, 2021, intra-Community distance sales have also been taken into account for the purposes of calculating this €10,000 threshold.

Spanish legislation stipulates that businesses and professionals may opt voluntarily for taxation at destination even when the €10,000 threshold is not exceeded, this option being valid for a minimum of two calendar years. The option must be exercised through the pertinent census communication, using form 036. In addition, since the approval of Royal Decree 1512/2018 of December 28, 2018, which amends – inter alia – the VAT Regulations, the rule has been that taxable persons who take up this option must demonstrate to the tax administration that the services rendered have been declared in another Member State. Similarly, taxable persons wishing to extend the option exercised must reaffirm it once two calendar years have elapsed, with failure to do so resulting in automatic revocation.

In order to implement the above provisions, Implementing Regulation 1042/2013 introduced the relevant amendments. Accordingly, the Regulation contains provisions:

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- To define and update the list of services that are affected by the rules discussed here and to clarify who the supplier is where several traders are involved (e.g. sale of applications).
- To define the place of establishment of the customer (legal person not acting as a trader).
- To clarify – since certain rules already exist in this respect in the Regulation – how to evidence the trader's status as a recipient.
- To specify the place of actual consumption of the services through presumptions on the customer's permanent address or residence and the evidence that can be required, if applicable, to rebut them.
- To establish transitional provisions.

The Regulation also address the supply of services through a portal or telecommunications network such as a marketplace for applications, in order to clarify who will be deemed the supplier in these cases.

The Regulation contains a number of provisions aimed at defining the place of business, establishment, permanent address or habitual residence according to the type of customer in order to clarify the application of the place-of-supply rules for supplies of services that depend on these circumstances.

These definitions are kept intact, although a specific rule is added for legal persons who do not act as traders whose place of establishment will be where the functions of their central administration are carried out (place of business) or where they have a permanent establishment that is suitable for receiving or using the services.

As regards determining the location of the recipient, the place-of-supply rules that apply from 2015 are those for supplies to parties acting as final consumers, that is, natural or legal persons not acting as traders.

For these purposes, the supplier may regard the recipient as the final consumer as long as the recipient has not communicated his individual VAT identification number to the supplier but, unlike other supplies of services, the supplier may consider the recipient as the final consumer regardless of whether he has information to the contrary.

In the case of legal persons that have several establishments or of natural persons who have a permanent address other than their habitual residence, the Regulation establishes that:

- For non-trader legal persons the “place of business” prevails on the terms defined in the preceding section.
- For natural persons, priority will be given to their habitual residence (a concept which is already defined in the Regulation in its current wording) unless there is evidence that the service is used at the person's permanent address.

However, these rules are not sufficient to determine the place of supply of services where the same recipient can access them from several places or by various means. To try to cover the most frequent cases, the Regulation includes specific rules such as the following:

- If the services are supplied requiring the physical presence of the customer (e.g. an internet café, a wi-fi hot spot or a telephone booth), the services will be taxed at that location. This rule also applies to services supplied by hospitality establishments where they are supplied in connection with accommodation services.
- If the service is supplied on board a ship, aircraft or train, at the place of departure of the transport operation.
- A service supplied through a fixed land line, at the permanent address of the customer where it is installed.
- If it is supplied through mobile networks, at the country identified by the mobile country code of the SIM card.

- If the service requires a viewing card or decoder or similar device (without being supplied through a fixed land line), where the decoder or similar device is located, or if that place is not known, at the place to which the viewing card is sent.

In any other case, at the place identified as such by the supplier on the basis of two items of evidence: billing address, IP address, bank details (e.g. place of demand deposit account), the mobile country code stored on the SIM card, location of the land line, other commercially relevant information.

Since January 1, 2019, the rule has been that only one item of evidence is required when the amount of these services rendered by the services provider does not exceed €100,000, either for the current year or the preceding year.

The presumptions on the place of supply of the service described can be rebutted by the supplier if three of the items of evidence listed in the preceding point determine a different place of supply.

The tax authorities may, in turn, rebut any of the presumptions described where there are indications of misuse or abuse by the supplier.

Finally, it should be noted that the use and enjoyment rule set out in article 70.2 of the VAT Law is applicable to electronic services provided both to private individuals and traders or professionals. This closing rule means that electronic services shall be subject to Spanish VAT when, under the general place-of-supply rules, they are not deemed made in the EU, the Canary Island, Ceuta or Melilla, but they are effectively used or utilized in such territory.

3.3.1.3 Special schemes applicable to electronic services

Directive 2002/38 created a special regime applicable to electronic services provided by traders or professionals not established in the EU to final consumers in the EU (the Non-Union

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Scheme). The scope of this special scheme was extended, as from January 1, 2015, to cover services provided to private individuals by operators established in the EU but not in the Member State of consumption (the Union Scheme).

The schemes in question, which are optional for the traders by whom such services are provided, are aimed at simplifying their obligations, so that traders only have to register (electronically) in one Member State, although they will have to charge the VAT relating to each of the jurisdictions where their customers are located and pay it over (also by telematic means) to the tax authorities of the Member State in which they are registered. Subsequently, that Member State will reapportion the VAT collected among the other Member States.

The “mini one stop shop” system was created for this purpose, to allow the taxable person to file in the Member State of identification a single return which includes transactions addressed to final consumers of different Member States.

Similarly, Regulation 282/2011 establishes certain special VAT management rules in the case of exclusion from the scheme, rectification of VAT returns, impossibility of rounding off the VAT payable, etc.

Summarized below are the main characteristics of each of these schemes:

- The Non-Union scheme:

This scheme may be applied by traders or professionals who are not established in the EU and provide electronic services to final consumers in the EU.

The trader is required for these purposes to register in a Member State (the “MS of identification”), in which it must comply with the obligations deriving from the scheme. If the Member State of identification is Spain, the corresponding returns declaring the commencement, change or cessation of operations covered by the scheme — form

035 — must be presented, VAT returns must be filed electronically, the corresponding amount of VAT must be paid in, a register of operations included under the scheme must be kept, etc.

Non-established traders or professionals that apply this special regime in Spain will be entitled to a refund of input VAT in accordance with the refund procedure for non-established traders, without being subject to the reciprocal treatment requirement generally established in the legislation.

- Union Scheme:

This scheme is available to traders who provide electronic services and are established in the EU but not in the Member State of consumption.

In this case, the Member State of identification is the place where the trader's main place of business is located or, if this is outside the EU, the place where it has a fixed establishment. If the trader has more than one fixed establishment, it can choose the Member State of identification.

If the Member State of identification is Spain, the corresponding returns declaring the commencement, change or cessation of operations covered by the special scheme — form 035 — must be presented, VAT returns must be filed in respect of these services, the VAT must be paid in, a register of operations included under the scheme must be kept, etc.

It should be noted that traders established in a Member State cannot apply these special schemes in respect of technological services provided in the Member State in which they themselves are established.

VAT charges borne for the provision of technological services can be deducted either through the general procedure or via the procedure envisaged for traders established in another EU Member State.

For these purposes, where Spain is the Member State of identification, VAT borne in Spanish territory must be deducted in the returns filed under the general VAT regime.

If Spain is the Member State of consumption, the deduction procedure is that envisaged for non-established persons in article 119 of the VAT Law.

3.3.2 The new treatment applicable to distance sales of goods and certain domestic supplies of goods and new one stop shop schemes

As mentioned above, a package of EU measures — established in Directives 2017/2455 and 2019/1995 — is set to come into force with effect as from July 1, 2021. These will be applicable primarily to distance sales of goods and certain imports and will make it possible to pay VAT in the Member State of identification through the “one stop shop”.

These EU measures have been transposed into Spanish legislation⁴ during 2021. We describe below the main changes introduced within the offline e-commerce framework:

- As a general rule, distance sales made from one Member State to another, to recipients who are not acting as traders or professionals are deemed subject to VAT in the Member State of destination.

Taxation will nevertheless take place in the Member State of origin where the following requirements are met:

- The seller is established in a single Member State.

⁴ We refer, specifically, to Royal Decree-law 7/2021, of April 27, 2021 on the transposition of European Union directives on competition, anti-money laundering, credit institutions, telecommunications, tax measures, environmental damage prevention and remediation, posting of workers in the framework of the transnational provision of services and consumer protection; to Royal Decree 424/2021 of June 15, 2021 amending, inter alia, the VAT Regulations (Royal Decree 1624/1992), and the Billing Regulations (Royal Decree 1619/2012).

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- Total distance sales for the year do not exceed €10,000, with provisions of telecommunications services, broadcasting and television services and services provided electronically also being taken into account for these purposes.

In any event, the rule will envisage the possibility of opting voluntarily for taxation in the Member State of destination.

- A special one stop shop scheme – “Union Scheme” — has been introduced to simplify the self-assessment and paying-in of VAT, and this is similar to that already in place for digital services, as referred to above. The filing of a single quarterly return in the Member State of identification has been envisaged for these purposes, including all intra-EU distance sales of goods.
- A new special scheme has been introduced for distance sales of goods imported from third countries – the “Import scheme” — which are not subject to special taxes and whose intrinsic value does not exceed €150. Over and above this value, a full customs declaration is required at the time of importing the goods.

The general rule under this scheme is that the place of supply will be the Member State of destination of the goods and that the import of the goods will be exempt in order to avoid double taxation. A one stop shop system with a monthly return in the Member State of Identification is also envisaged.

Finally, VAT relief (exemptions) on imports of goods of negligible value — which had been set at €22 — has been eliminated. As a result, since July 1, 2021, imports have been subject to and not exempt from VAT whatever their value.

- In certain cases, the operators of the electronic interface are responsible for payment of the VAT (on the understanding that they act as intermediaries in the sale in their own name).

In particular, it is established that a trader who facilitates certain sales through the use of electronic interfaces (online marketplace, platform, portal or similar) has itself received and supplied the goods in the following situations:

- a. Distance sales of imported goods in consignments with an intrinsic value not exceeding €150.
- b. Supply of goods made within the EU by traders not established in the EU to private individuals.

In this way, when the interface is understood to have facilitated the sale, two supplies of goods take place: (i) that made by the supplier of the goods to the trader who facilitates the sale via the electronic interface and (ii) the supply made by such trader to the private individual.

3.3.3 New regimes applicable to services provided by taxable persons not established in the Member State of consumption

In addition to the one stop shop schemes referred to in previous sections, Directive 2017/2455, since July 1, 2021, has envisaged the possibility of including in the Union Scheme services provided by traders or professionals established in the EU but not in the Member State of consumption, to recipients who are not classed as traders or professionals acting in their capacity as such, following identification for this purpose in the Member State of their choice.

Similarly, services provided by taxable persons not established in the EU who provide services to recipients who are not classed as EU traders or professionals would come under the Non-Union Scheme.

3.3.4 Determination of the VAT rates applicable to the various types of e-commerce

In keeping with the view held by the Spanish tax authorities, the standard VAT rate of 21% will apply in all cases, since it

is a kind of service for which the VAT Law makes no special provision.

In the case of electronic books, newspapers and magazines, however, the legislation envisages, as from April 23, 2020, the application of the super reduced VAT rate (of 4%) when such publications are not made up solely or primarily of advertising and do not consist entirely or mainly of audible video or music contents, and supplementary items supplied along with them for a single price.

3.3.5 Formal obligations and management of taxes

Both the EU and the Spanish tax authorities ascribe to the principle that this form of commerce should not be hindered by the imposition of formal obligations that reduce the speed with which transactions should be performed.

Of particular relevance in this regard are the rules already contained in Council Regulation (EEC) No 1798/2003 on administrative cooperation in the field of Value Added Tax, which, among other matters, provides that individuals and legal entities involved in intra-Community transactions can access the databases kept by the tax authorities of each Member State. This possibility of identifying reliably the status under which the recipient is acting (trader, professional or final consumer) is absolutely decisive for the proper tax treatment of each transaction.

Royal Decree 1619/2012, approving the Regulations on Invoicing Obligations, establishes the legal regime applicable to electronic invoices, which are defined as invoices that have been issued and received in electronic format without the use of a certain technology being required. This Royal Decree supersedes its predecessor, Royal Decree 1496/2003, and stipulates that paper and electronic invoices are treated similarly. In addition, it permits invoices to be kept in an electronic format provided that the conservation method ensures the legibility of the invoices in the original format in which they were received, and the data and mechanisms that guarantee the authenticity of their origin and the integrity of their contents.

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The requirements that must be met by electronic invoices are as follows:

- The recipient must have given his consent.
- The invoice must reflect the reality of the transactions documented in it and guarantee this certainty throughout its period of validity.
- The authenticity, integrity and legibility of the invoice must be ensured.

These aspects must be guaranteed by any legally admissible proof and, in particular, through the “usual management controls over the business or professional activity of the taxable person” which must enable the creation of a reliable audit trail establishing the necessary connection between the invoice and the supply of goods or services documented in it.

The authenticity of the origin and integrity of the contents will, in all cases, be guaranteed by:

- The use of an advanced electronic signature based either on a qualified certificate and created using a secure-signature-creation device, or on a qualified certificate.
- An EDI that envisages the use of procedures that guarantee the authenticity of the origin and integrity of the data.
- Other means that have been communicated prior to their use and validated by the authorities.

In relation to the issue of invoices, Royal Decree 1512/2018 of December 28, 2018 which amends – inter alia - the VAT Regulations, stipulates that the legislation applicable to invoices issued by taxable persons who have elected to apply the special single one-stop shop regimes for telecommunications, radio and television broadcasting services and services provided electronically - which had previously been the legislation of the Member State of consumption - shall now be that of the Member State of identification. This avoids the

taxable person being subject to different legislative regimes in relation to billing.

Accordingly, the aforementioned Royal Decree 1512/2018 of December 28, 2018 amends the Billing Regulations and clarifies that Spanish billing rules shall be applicable when Spain is the Member State of Identification of the provider of electronic services.

Moreover, the entry into force on July 1, 2021 of the provisions of Directive 2017/2455 will result in the elimination of the obligation to issue an invoice in distance sales for which this was previously required in accordance with the billing obligations applicable in the Member State of destination of the goods.

On the other hand, regarding to formal obligations, it must be noted that since 1 July 2017, taxable persons who have to file monthly VAT returns (generally, those whose turnover in the previous year exceeded €6,010,121.04; any taxable person registered in the monthly refund scheme, and any taxable person applying the VAT grouping regime) have also been required to keep their business records on the website of the Spanish tax agency (AEAT) by electronically providing the information requested therein, together with some additional data of the invoices (but not the invoices themselves).

Under this system (generally known as “SII”), taxable persons will have to submit the information related to invoices issued within 4 calendar days from the date of issuance. If they are invoices issued by the recipient or by a third party, a longer time period of 8 calendar days is allowed. In both cases, subject to a limit ending on the 16th day of the month following that in which VAT on the transaction became chargeable.

Invoices received must also be reported within 4 calendar days, in this case from the date when they are recorded in the accounts. A limit is laid down, also ending on the 16th day of the month following the assessment period in which the transactions are included. A similar rule applies to import transactions.

Saturdays, Sundays and public holidays are excluded from the calculation of the time periods.

The above notwithstanding, in the case of taxable persons who apply the special regime for telecommunications, radio and television broadcasting services and services provided electronically, it is not necessary to record the operations performed under this special regime in VAT registers. Instead, a specific register must be kept, containing a series of special fields:

- The Member State of consumption in which the service is provided;*
- the type of service provided;*
- the date of provision of the service;*
- the taxable amount, indicating the currency used;*
- any subsequent increase or reduction of the taxable amount;*
- the tax rate applied;*
- the amount of tax owed, indicating the currency used;*
- the date and amount of payments received;*
- any advance received prior to the provision of the service;*
- the information contained in the invoice, if this has been issued;*
- the name of the customer, where available;*
- the information used to determine the place where the customer is established, or its domicile or habitual place of residence.”*

3.3.6 Tax on Certain Digital Services

The preamble to the Law approving the TCDS reminds us that the creation of this tax is temporary until the OECD completes its works to adapt the international tax system to the digitalization of the economic, through the “re-allocation of taxing rights to market countries or territories when

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participating in the economic activity, without the need for a physical presence, creating a new nexus for that purpose”, in clear reference to pillars 1 and 2 of the OECD.

The TCDS charges taxes to companies whose global net revenues in the preceding calendar year are above 750 million euros and that obtain revenues in Spain (also in the preceding calendar year) of at least 3 million euros derived from the provision of online advertising services, online intermediation services or the sale of data generated on the basis of information provided by the user of digital interfaces.

The tax rate at 3%, and the scope of the tax excludes sales of goods or services between users in the context of an online intermediation service, and sales of goods or services contracted online on the website of the supplier of those goods or services in which the supplier does not act as intermediary. The tax will be assessed every three months.

It is stipulated in the sole transitional provision that for 2021, the revenue taken into account shall be the total amount deriving from digital services subject to the tax from January 16, 2021 through to the end of the settlement period, on an annualized basis.

The Directorate-General of Taxes (DGT), in its Ruling of June 25, 2021, has sought to provide clarification and greater legal certainty in the interpretation of the elements and criteria relating to this tax, focusing on the following concepts:

- Online advertising services.
- Online intermediation services.
- General instances of non-subjection.
- Accrual and taxable amount.

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This Annex explains the basic legislative aspects that govern the various vehicles, corporate or otherwise, that can be used by foreign investors in order to operate in Spain. Specifically, it covers the legal requirements that must be observed for both formation (minimum capital and the time at which it must be paid, minimum number of members, requirement to be met by the bylaws, etc.), and the subsequent pursuit of its business (rules governing the adoption of business resolutions, powers of the managing body, the rules on liability of partners and shareholders, etc.).

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/ 1 Applicable Legislation

Legislative Royal Decree 1/2010, of July 2, 2010, approving the Revised Capital Companies Law (hereinafter, the **“Capital Companies Law”**), constitutes the basic legal text that regulates the various legal forms of capital companies envisaged in Spanish law, *i.e.*, the corporation (S.A.), the limited liability company (S.L.), the partnership limited by shares, the new limited liability company (S.L.N.E.) and the European company (S.E.), as well as the main special features of listed corporations.

The Capital Companies Law is supplemented by (i) Royal Decree 1784/1996, of July 19, 1996, approving the Commercial Registry Regulations; (ii) Law 3/2009, of April 3, on Structural Modifications to Commercial Companies, which regulates business restructuring processes under current commercial law practices, including changes in corporate form, mergers, spinoffs, global transfers of assets and liabilities and international transfers of registered offices; (iii) the Royal Decree of August 22, 1885, approving the Commercial Code; and (iv) Law 2/2007 on Professional Services Firms, which regulates the formation of commercial undertakings by members of professional associations ([see section 9 of this Annex](#)). These texts constitute the core legislation in the area of Spanish company and commercial law.

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/ 2 Forms of Business Enterprise

Spanish law envisages various different kinds of business enterprises, all of which can be used by foreign investors.

The most significant are:

- Corporation (*Sociedad Anónima*, abbreviated as “S.A.”).
- European Public Limited-Liability Company (*Sociedad Anónima Europea*, abbreviated as “S.E.”). Possibility offered by EU legislation to companies that operate in various Member States to create a single company capable of operating in the EU in accordance with a single set of rules and a unified management system.
- Limited Liability Company (*Sociedad de Responsabilidad Limitada*, abbreviated as “S.L.” or “S.R.L.”).
- New Limited Liability Company (“*Sociedad Limitada Nueva Empresa*” abbreviated as “S.L.N.E.”), a variation on the S.L. specially intended for small and medium-sized companies that simplifies the requirements for its formation.
- General Partnership (*Sociedad Regular Colectiva*, abbreviated as “S.R.C.” or “S.C.”).
- Limited Partnership (*Sociedad en Comandita*, abbreviated as “S. en Com.” Or “S. Com.”) or Limited Partnership by Shares (*Sociedad en Comandita por Acciones*, abbreviated as “S. Com. p. A.”).

- Professional Services Firm (“*Sociedad Profesional*”, abbreviated as “S.P.”)¹, the purpose of which is the common pursuit of an activity regulated by professional association, and which may be formed in accordance with any of the corporate forms legally established under their specific legislative provisions.

The corporation (S.A.), which is the archetypal trading company and has traditionally been the most commonly used form, has become less popular and today the most common form of trading company is the limited liability company (S.L.). The reasons for this include the fact that a limited liability company requires less capital than an S.A. However, the limited partnership and the general partnership forms are hardly used at all.

Some of the salient features of each of the above corporate forms are summarized below. It should be noted that in many instances the Law provides only minimum applicable standards or general rules. The founders of a company have a great deal of flexibility when it comes to tailoring the structure of the company to their specific needs through the inclusion of certain clauses in the bylaws, for which they should seek the appropriate legal advice.

¹ The corporate name of this kind of firm should include, together with the corporate form in question, the expression “Professional” or the abbreviation “P”, (for example, *Sociedad anónima profesional* [Professional corporation] or “S.A.P.”).

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/ 3 The Treatment of Liability at the types of Business Enterprises

The following table summarizes the liability regime governing shareholders and partners at the various business enterprises:

CORPORATE FORM	LIABILITY
Corporation (S.A.) / Limited Liability Company (S.L.)	<p>The liability of the shareholders is generally limited to the amount of the capital stock contributed by each of them.</p> <p>However, in exceptional circumstances, liability may be sought from shareholders in order to protect the interests of third parties.</p> <p>In these exceptional cases, the courts have followed the doctrine of "piercing the corporate veil" (<i>levantamiento del velo</i>) as a reaction to misconduct by the shareholders while fraudulently sheltering behind the company's legal personality; in such event, the courts may look behind it and not differentiate between the company's assets and those of each of the shareholders when establishing liability.</p>
General partnership (S.R.C.)	Liability is not limited. General partners are personally and jointly and severally liable with the whole of their net worth for the debts of the partnership.
Limited partnership (S. Com)	There is at least one general partner and one or more limited partners. General partners are personally and jointly and severally liable with the whole of their net worth for the debts of the partnership. Limited partners are only liable for the amount of capital they contribute or promise to contribute to the partnership. The capital of limited partnerships may be divided into shares.
Professional services firm (S.P.)	The professional members will be jointly and severally liable with the firm for its professional acts, and they will be subject to such general rules on contractual and noncontractual liability as may apply.

Notwithstanding the above, Organic Law 5/2010, of June 22, 2010, amending Organic Law 10/1995, of November 23, 1995, on the Criminal Code, introduced into Spanish law the criminal liability of legal entities in certain activities and cases (among others, for example, trafficking in human beings, discovery and disclosure of secrets, fraud, criminal insolvency, damage to others' property, offenses against intellectual and industrial property, the market and consumers, concealment of criminal property and money laundering, money laundering offenses against the tax and social security authorities, foreign citizens' rights, offenses against zoning and urban planning, offenses against natural resources and the environment, bribery, influence peddling or corruption in international commercial transactions).

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/ 4 Main Characteristics of Corporations and Limited Liability Companies

This section summarizes some of the major substantive aspects that commonly interest foreign investors with respect to the most widely used forms of business entity in Spain, the S.A. and the S.L.

4.1 MAIN DIFFERENCES BETWEEN CORPORATIONS AND LIMITED LIABILITY COMPANIES

The main differences between S.A.s and S.L.s are as follows:

	S.A.	S.L.
Minimum capital stock	€60,000.	€3,000 ^{2 3} .
Payment upon formation	At least 25% and any share premium.	Payment in full.
Contributions	<p>A report from an independent expert on any non-monetary contributions is required⁴. The value stated in the deed recording the contribution may in no case be higher than the valuation performed by the expert.</p> <p>In the case of monetary contributions, their actual existence must be evidenced to the authorizing notary by means of a certificate of deposit at the credit institution of the corresponding amounts in the name of the company or entity.</p>	No report from an independent expert on non-monetary contributions is required, although the founders and shareholders are jointly and severally liable for the authenticity of any non-monetary contributions made.
Shares	They are marketable securities. Debentures and other securities can be issued.	They are not marketable securities. Debentures and other securities can be issued.

² In December 2021, the Council of Ministers approved the Enterprise Creation and Growth Bill, which is currently passing through parliament. This bill forms part of the reforms introduced by the Recovery, Transformation and Resilience Plan and will make it possible to form an S.L. (limited liability company) with share capital of 1 euro, eliminating the current requirement of 3,000 euros. This measure, according to the Spanish government, will enable Spain to come into line with its neighboring countries in terms of business creation.

³ Except in the case of the entrepreneurial limited liability company, the rules for which are described in [section 4.2 below](#).

⁴ The expert report is not required, but the substitute report from the directors is required in the following cases:

- a) Contribution of transferable securities that are listed on an official secondary market or on another regulated market or in money market instruments, in which case they will be valued at the weighted average price on one or more regulated markets in the last quarter preceding the date on which the contribution was actually made, with the certificate issued by the relevant governing company.
- b) Contribution of assets other than those indicated in letter a) above the fair value of which has been determined, within the 6 months preceding the date on which the contribution was actually made, by an independent expert not appointed by the parties.
- c) Where in the formation of a new company by merger or spin-off a report has been prepared by an independent expert on the merger or spin-off plan.
- d) Where the increase in share capital is carried out to deliver the new S.A. or S.L. shares to the shareholders of the absorbed or spun-off company and a report has been prepared by an independent expert on the merger or spin-off plan.
- e) Where the increase in share capital is carried out to deliver the new S.A. shares to the shareholders of the company that is the target of a tender offer

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	S.A.	S.L.
Transfer of shares	<p>Depends on how they are represented (share certificates, book entries, etc.) and on their nature (registered or bearer shares).</p> <p>In principle, they may be freely transferred, unless the bylaws provide otherwise, and provisions that render the shares practically untransferable are null and void.</p>	<p>Must be recorded in a public document.</p> <p>S.L. shares are generally not freely transferable (unless acquired by other shareholders, spouse, ascendants, descendants or companies within the same group). In fact, unless otherwise provided in the bylaws, the law establishes a pre-emptive acquisition right in favor of the other shareholders or the company itself in the event of a transfer of the shares to persons other than those referred to above.</p>
Amendments to the bylaws	The directors or shareholders, as the case may be, making the proposal must make a report.	No report is required.
Venue for shareholders' meetings	As indicated in the bylaws (in any event, it must be in Spain). Otherwise, in the municipality where the company has its registered office.	
Attendance and majorities at shareholders' meetings	Different <i>quorums</i> and majorities are established for meetings on first and second call and depending on the content of the resolutions. These can be increased by the by laws.	Different majorities are established depending on the content of the resolutions. These can be increased by the by laws.
Right to attend shareholders' meetings	A minimum number of shares may be required to attend the shareholders' meeting, which may not be greater than one thousandth of the share capital.	This right cannot be restricted.
Number of members of the board of directors	<p>Minimum: 3.</p> <p>No maximum limit.</p>	<p>Minimum: 3.</p> <p>A maximum of 12 members.</p>
Term of the office of director	Maximum 6 years (4 years at listed companies). They may be reelected for periods of the same maximum duration.	May be indefinite.
Issue of bonds	<p>Bonds and other securities may be issued.</p> <p>Bond issues may be used as a means to raise funds. Bonds convertible into shares can be issued and guaranteed.</p>	<p>Bonds and other securities may be issued.</p> <p>Bond issues can be used as a way of raising funds, although such issues cannot, in total, amount to more than twice the company's equity, unless the issue is secured by a mortgage, a pledge of securities, a government guarantee or a joint and several guarantees provided by a credit institution.</p> <p>If the issue is secured by a joint and several guarantees provided by a mutual guarantee society, the limit and other terms of the guarantee will depend on the guarantee capacity of such society at the time of providing it, in accordance with the specific rules applicable to it.</p> <p>Bonds convertible into S.L. shares can be neither issued nor guaranteed.</p>

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4.2 FORMATION AND CAPITAL STOCK

	S.A.	S.L.
Minimum capital stock	€60,000, fully subscribed and at least 25% of the par value of the shares paid in ⁵ .	€3,000, fully subscribed and paid in (except in the case of the entrepreneurial limited liability company for which the law permits lower capital stock).
Debt ratios	There are currently no mandatory minimum debt-equity ratios under Spanish law for any type of business enterprise. However, there is a limitation on the deductibility of finance costs for tax purposes (see Chapter 3, section 2). Moreover, certain legal requirements may be applicable to companies operating in regulated sectors.	
Special rules on mandatory winding up or capital reduction	There must be a certain balance between the capital stock and the net worth of a company, meaning that if losses incurred reduce the net worth to less than one-half of the capital stock figure, the company will be subject to mandatory grounds for dissolution (article 363.1 of the Capital Companies Law), unless the capital stock is sufficiently increased (or reduced) and, as from September 1, 2004, provided that it is not necessary to petition for insolvency pursuant to Insolvency Law 22/2003, of July 9, 2003. Capital must be reduced at a corporation where losses have reduced the net worth of the corporation to less than two-thirds of its capital stock figure and one fiscal year has elapsed without its net worth having been restored (article 327 of the Capital Companies Law).	
Number of shareholders	<ul style="list-style-type: none"> No minimum number of shareholders is required by Spanish law to incorporate a company, although sole shareholder companies are subject to a special system of disclosure. Shareholders can be individuals or companies of any nationality and residence. 	

As an exception to the general rule of minimum capital of €3,000 that applies to limited liability companies, Law 14/2013, of September 27, 2013, on support to entrepreneurs and their internationalization (the “**Entrepreneurs Law**”) amended the Capital Companies Law to regulate the concept of the “Entrepreneurial Limited Liability Company”, which can have capital lower than €3,000 subject to the following requirements:

NUMBER	REQUIREMENTS
1	Continued submission to the entrepreneurial limited liability company regime: <ul style="list-style-type: none"> In the bylaws. The Commercial Registrar will automatically state this circumstance in the clearance notes for any registrable documents and any certificates that are issued.
2	Legal reserve: At least 20% of the income for the fiscal year must be allocated to the reserve without any limit on the amount.
3	Distribution of dividends: Once the legal and bylaw reserves have been covered, dividends may be distributed to the shareholders only if the net worth is not or, as a result of the distribution, does not become, lower than 60% of the minimum legal capital.
4	Compensation to shareholders and directors: The sum of the compensation paid to the shareholders and directors for discharging such offices may not exceed 20% of the net worth for the year in question, notwithstanding the compensation to which they may be entitled as self-employed workers or for the provision of professional services.
5	Liquidation: In the case of voluntary or mandatory liquidation, if the net worth of the company is insufficient to pay its obligations, the shareholders and directors of the company will be jointly and severally liable for the payment of the minimum capital figure stipulated in the Capital Companies Law.
6	Substantiation of monetary contributions: It will not be necessary to substantiate the existence of the monetary contributions from the shareholders when forming entrepreneurial limited liability companies, as the founders and those who acquire the shares subscribed in the formation will be jointly and severally liable to the company and its creditors for the existence of such contributions.

5 Nonetheless, bear in mind that:

- When the capital stock is not fully paid in, the bylaws must state the manner and time period for the payment of the remaining portion of subscribed capital. No maximum time period for payment of outstanding capital by contributions in cash is stated in the Law but five years is the maximum term for full payment of contributions in kind.
- The specific regulations governing certain activities (banking, insurance, etc.) may require that the minimum amount under the Capital Companies Law be exceeded.

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4.2.1 Formalities for formation

The shareholders (or their representatives) must appear before a notary in order to execute the public deed of formation of a corporation or limited liability company. Subsequently, the deed of formation must be registered at the Commercial Registry. Upon registration, the company acquires legal personality and legal capacity⁶.

4.2.2 Contracts made in the corporation's name prior to registration

The formation of an S.A. or an S.L. two-step process involving, as noted, execution of a public deed before a notary and registration at the Commercial Registry. It is only after registration of the public deed of formation that the corporation acquires legal personality and legal capacity. Persons who enter into contracts for and on behalf of the corporation prior to its registration are jointly and severally liable for their performance, unless such performance was made conditional on the corporation's registration and, if applicable, on later assumption by the corporation of compliance with their terms. Contracts made in the corporation's name and on its behalf may generally be ratified by the corporation prior to its registration at the Commercial Registry or within three months of registration.

However, a corporation in the process of formation and its shareholders (but not its directors or representatives) are liable, up to the limit of the amount they have undertaken to contribute, for the following types of contract prior to registration:

- Contracts that are essential for registration of the company.
- Contracts entered into by the directors within the scope of the powers granted to them in the pre-registration stage.
- Contracts entered into by virtue of a specific mandate granted by all the shareholders.

Upon registration, the corporation becomes bound by the foregoing acts and contracts.

In these cases, and if the corporation ratifies acts performed prior to its registration within three months of the date of registration, the joint and several liability of the shareholders, directors or representatives lapses.

Moreover, it should be noted that directors will be deemed to have authority to fully pursue the corporate purpose and to perform and make all kinds of acts and contracts if the date of commencement of the company's operations coincides with the date of execution of the deed of formation.

4.2.3 Acquisitions following the registration of a corporation at the Commercial Registry

In the case of corporations, in the two years following its formation, the shareholders' meeting must grant its prior approval for acquisitions of assets for consideration involving amounts in excess of 10% of the capital stock, unless such acquisitions are within the ordinary scope of business of the corporation or the purchase is made on a stock exchange or by public auction. Where prior approval of the shareholders' meeting is required, the following are basically necessary:

- Issuance of a report prepared by the directors that justifies the acquisition.
- An independent valuation by the expert appointed by the Commercial Registry.

4.3 COMPANY BYLAWS

An S.L. and an S.A. are governed by the Capital Companies Law and by their bylaws. The bylaws should therefore be drafted in accordance with the requirements of the above law and must at least include reference to:

MANDATORY REFERENCES

Corporate name	The corporate name must be included.
Corporate purpose	<p>This should be stated in a concrete and precise manner, since:</p> <ul style="list-style-type: none"> • It serves to establish the general framework for the activities of the company. • The completion of the stated purpose automatically leads to the dissolution of the company. <p>If the corporate purpose is modified in such a way as to be entirely different, any dissenting shareholders and non-voting shareholders can withdraw from the company and are entitled to be reimbursed for their shares.</p>
Registered office	Must be located in Spain.

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⁶ Moreover, there is an alternative little-used procedure for formation called "successive formation", consisting of a public offering to subscribe shares prior to execution of the deed of formation. To this end, means such as advertising or financial intermediaries may be used.

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MANDATORY REFERENCES

Capital stock	<p>Must indicate the capital stock, the shares into which it is divided, their par value and their sequential numbering.</p> <p>In the case of a limited liability company, the bylaws must state, if they are unequal, the rights that each share confers on the shareholders, and the amount or scope of such rights.</p> <p>In the case of a corporation, the bylaws must state the classes of shares and the series, if any; the portion of the par value not yet paid in and the method and deadline for paying it in; and if the shares are represented by certificates or book entries. If they are represented by certificates, it will be necessary to state if they are registered or bearer shares and if the issuance of certificates representing more than one share is envisaged.</p> <p>In the case of the entrepreneurial limited liability company, the bylaws must state this circumstance (see section 4.2 above).</p>
Managing body	<p>The management of the company can be entrusted to a sole director, a number of directors acting severally or jointly or a board of directors. Listed companies must be managed by a board of directors.</p> <p>The bylaws may establish different means of organizing the management, giving the shareholders' meeting authority to choose between any of them without the need to amend the bylaws. The bylaws must also indicate the number of directors or, at least, the maximum and minimum number, the term of office and the compensation system, if any.</p> <p>In the case of collective management bodies, the procedures for debating matters and adopting resolution must be specified.</p>

Additionally, the public deed of formation, which includes the bylaws, may contain such agreements and covenants as the founders may deem fit, provided that they do not contravene any law or the fundamental principles that govern companies. Thus, the bylaws may include, inter alia, the following aspects:

- Duration of the company. The bylaws will ordinarily stipulate that the duration is indefinite in order to avoid triggering automatic dissolution.
- The date on which activities commence, which cannot be earlier than the date of execution of the public deed of formation (except in cases of re-registration).
- Restrictions, if any, on share transfers and the grounds for removal of any of the shareholders.
- Ancillary obligations, if any. If ancillary obligations are created, the bylaws must state the content of such obligations, whether or not they are remunerated, and the penalties, if any, for a breach thereof.

- The fiscal year-end. Where not expressly indicated, the company's fiscal year will be understood to end on December 31. The fiscal year may not exceed twelve months.
- Special rights reserved to founders or promoters, if any.

The power to amend the bylaws lies with the shareholders' meeting. As an exception, Royal Decree-Law 15/2017, of October, 2017, on urgent measures for the mobility of economic operators within the national territory, introduced the option of the managing body having the power to relocate the registered office within the national territory, unless stated otherwise in the bylaws (art. 285 LSC).

4.4 TYPES OF SHARES

4.4.1 Types of shares at a corporation

A distinction can be made between the following share categories:

Registered vs. bearer shares

The shares of an S.A. can be registered shares (the holder is the person designated in the certificate) or bearer shares (the holder is the bearer of the certificate). However, the shares must be registered in the following cases:

- If they are not fully paid in.
- If their transferability is subject to restrictions.
- If they are subject to ancillary obligations (see below).
- When so required by special regulations (e.g. shares of banks and insurance companies).

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Common vs. preferred stock

Preferred stock may be created as a separate class or classes pursuant to the same procedural formalities applicable to bylaw amendments (*i.e. quorum* and voting requirements and method of calling the shareholders' meeting), and may include shares entitled to a preferential dividend.

In any event, issues of shares will not be valid in the following cases:

- Shares remunerated in the form of interest.
- Shares which directly or indirectly alter the proportionality between their par value and voting rights or the existing shareholders' preferential right to subscribe new shares in capital increases.

Specific regulations on the issuance of preferred stock differ according to whether or not a company is listed on a stock exchange.

In the case of *listed companies*, the following obligations are established:

- Where the privilege consists of the right to obtain a preferential dividend, when distributable profits exist, the company is obliged to distribute such preferential dividend.
- The company bylaws must establish the consequences of any failure to pay some or all of the preferential dividend, whether or not it is cumulative as regards unpaid dividends, and the possible rights of holders of privileged shares in connection with any dividends to which the ordinary shares may be entitled.
- Higher ranking is provided for shareholders owning privileged shares, since collection of dividends by ordinary shares against the profits of one fiscal year is strictly prohibited until the preferential dividend for the same fiscal year has been paid.

In the case of *non-listed companies*, a more flexible system is in place, since there are no mandatory statutory rules making specific regulations in the bylaws obligatory. Nevertheless, the company is obliged to declare a dividend whenever distributable profits exist, unless otherwise provided for in its bylaws.

Shares issued with a premium

Shares may be issued with a premium payable to the company above their par value. In such cases the premium must be fully paid in upon subscription of the shares.

Non-voting stock

Non-voting stock may be issued for a total par value that does not exceed one-half of the total paid-in capital.

The special rights attached to non-voting stock are as follows:

• Minimum annual dividend.

The minimum annual dividend shall be set by the bylaws as a percentage of the paid-in capital corresponding to each non-voting share. The minimum annual dividend and ordinary dividends are cumulative for a period of five years in the case of non-listed companies. In the case of listed companies this period will be indefinite. Accordingly, non-voting shares also participate in company profits proportionately with the other shares if an ordinary dividend is distributed.

• Preferential rights in liquidation.

In the event of liquidation of the company, non-voting shareholders rank above common shareholders with respect to their right to obtain reimbursement of the paid-in portion of their shares.

• Capital reduction.

If capital is reduced to offset losses, the reduction must first be applied against all other classes of stock before it can affect non-voting stock.

• Shareholder rights.

Non-voting stock has the same basic rights as common stock except for the right to vote at shareholders' meetings ([see description of basic shareholder rights below](#)).

However, under certain exceptional circumstances, holders of non-voting shares may acquire a transitional right to vote at shareholders' meetings. Two examples follow:

- Non-voting shareholders acquire the right to vote if the minimum annual dividend is not distributed.
- If, due to a capital reduction, all common shares are redeemed, then non-voting stock becomes voting stock until such time as equilibrium is restored between voting and non-voting stock (*i.e.* new common shares are issued in sufficient number so that the total par value of non-voting stock does not exceed one-half of the total paid-in capital). If equilibrium is not restored within two years, the company is subject to mandatory dissolution.

Redeemable shares

Redeemable shares are a type of preferred shares at listed companies, subject at all times to various terms and conditions.

Redeemable shares are those whose redemption or full or partial purchase by the issuer or by third parties is fixed in time or released at the discretion of the shareholder, according to the conditions of the issue; or those whose redemption or full or partial purchase by the issuer or by third parties is undertaken in any other manner, excluding that detailed above.

Shares with ancillary obligations

An ancillary obligation is an obligation to perform or refrain from performing certain acts. Ancillary obligations do not form part of the capital stock of the company.

The shares of an S.A. can only be paid for with money or assets and not with work or services. The ancillary obligation is a device whereby the work, services or other obligations of individual shareholders can be tied to the corporation.

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4.4.2 Share certificates

In general, shares of an S.A. may either be issued physically as certificates or recorded by a book-entry system. The conditions for recording shares under a book-entry system and the regulations governing this system are set out in the Revised Securities Market Law (Legislative Royal Decree 4/2015, of October 23, approving the Revised Securities Market Law), and its various legislative amendments.

4.5 BASIC RIGHTS OF CORPORATION AND LIMITED LIABILITY COMPANY SHAREHOLDERS

The basic rights of shareholders are as follows:

- Right to share in corporate earnings and assets upon liquidation.
- Preferential right to subscribe new shares or convertible bond issues.
- Right to attend shareholders' meetings. At limited liability companies, the bylaws cannot require a minimum number of shares in order to attend meetings. Nonetheless, in the case of corporations, the bylaws may require that a minimum number of shares (regardless of their class or series) be held with respect to all of the shares in order to attend shareholders' meetings, however the number required may not exceed one thousandth of the capital stock under any circumstances.
- Right to attend and vote at shareholders' meetings (except non-voting stock) and to challenge corporate resolutions.
- Right to obtain information about the company's affairs.
- Right of withdrawal: Apart from in the cases established by the bylaws and in the cases of change of corporate form of the company or of relocation of the registered

office, shareholders who have not voted for the relevant resolution, including shareholders without a vote, will be entitled to withdraw from the company in the following cases:

- Replacement or material modification of the corporate purpose.
- Extension or reactivation of the company.
- Creation, modification or early termination of the requirement to perform ancillary obligations, unless provided otherwise in the bylaws.
- Amendment of the rules on transferring shares in the case of limited liability companies.
- In the event of a failure to distribute dividends, unless provided otherwise in the bylaws. Following the amendment introduced on December 30, 2018, article 348 bis of the Capital Companies Law establishes a right of withdrawal for shareholders of limited liability companies or corporations (except for (i) listed companies or companies whose shares are admitted to trading on a multilateral trading facility; (ii) companies in situations of insolvency or pre-insolvency, and (iii) sports corporations) in the event of a failure to distribute dividends once the fifth fiscal year since the company was registered at the Commercial Registry has elapsed⁷.

The requirements for shareholders to be able to exercise this right of withdrawal (within one month after the shareholders' meeting was held) are as follows:

- a. The shareholder's protest due to the insufficiency of dividends recognized must be recorded in the certificate of distribution of income.
- b. The shareholders' meeting must not approve the distribution as a dividend of at least twenty-five percent of the income obtained in the preceding year where

such income is legally distributable, provided that the company has not obtained income in the past three fiscal years.

- c. The total amount of dividends distributed in the past five years must be less than twenty-five percent of the legally distributable income recorded in that period.

Also, even if the above requirements are not met, this right of withdrawal is granted to the shareholder of the parent company of the group where the company in question is required to prepare consolidated financial statements, where: (i) the shareholders of the company do not approve the distribution as a dividend of at least twenty-five percent of the consolidated income attributed to the parent company in the prior year, provided that it is legally distributable; and (ii) consolidated income attributed to the parent company has been obtained in the past three fiscal years.

4.6 GOVERNING BODIES

The governing bodies of a company (a limited liability company or a corporation) are the shareholders' meeting and the directors (who may or may not be organized as a board of directors, as explained below).

4.6.1 Shareholders' meetings

The shareholders' meeting is the supreme governing body of an S.A. or S.L.

⁷ Following the entry into force of Royal Decree 7/2021, the shareholder's right to withdraw in the event of a failure to distribute dividends has been eliminated for credit institutions, credit financial establishments, investment services firms, payment institutions, electronic money institutions, financial holding companies and mixed financial holding companies.

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The following table sets out the main aspects and characteristics of shareholders' meetings:

SHAREHOLDERS' MEETING	
Types	<p>Ordinary: An ordinary shareholders' meeting may be held as and when stipulated by the bylaws, provided it takes place within the first six months of the financial year, in order to review the management's conduct of the business and to approve, if appropriate, the financial statements of the prior year and the proposed distribution of profit. If the ordinary shareholders' meeting is not held within the legal term, it may be called, at the request of any shareholder and subject to a prior meeting with the directors, by the Court Clerk or the Commercial Registrar pertaining to the registered office.</p> <p>Special: Any meeting of the shareholders other than an ordinary meeting is a special shareholders' meeting. A special shareholders' meeting may be called:</p> <p>By the company's directors if and when they consider it in the company's interests to do so.</p> <p>By the company's directors when requested to do so by shareholders representing at least 5% of capital stock. In this case, the directors must call the meeting so requested to be held within two months of the date of the notarial notification in such connection.</p> <p>By a court if the directors disregard the notification referred to above.</p>
Venue	Unless established otherwise in the bylaws, both ordinary and special shareholders' meetings must be held in the municipality in which the company has its registered office (Spanish companies must be domiciled in Spain).
Meeting call	<p>The formal requirements for calling a meeting, which relate to publicity and advance notice, are the same for ordinary and special meetings.</p> <p>Shareholders' meetings must be called by way of an announcement published on the website of the company where it has been created, registered and published on the terms provided for in the Capital Companies Law. Where the company has not resolved on the creation of its website or the website is not yet duly registered and live, the call must be published in the Official Commercial Registry Gazette and one of the large circulation newspapers of the province in which its registered office is located.</p> <p>As an alternative to the call methods detailed in the preceding paragraph, the bylaws of corporations and limited liability companies with registered shares may provide for calls to be made by any form of individual, written notice ensuring the receipt of the notice by all of the shareholders at the address designated for such purpose or that recorded in the company documentation. In the case of shareholders residing abroad, the bylaws may provide that they will only be individually called if they have designated an address for notifications in Spain.</p>
Universal shareholders' meetings	Regardless of the type of shareholders' meeting (ordinary or special), the formal call requirements need not be followed if shareholders representing one hundred percent of the capital stock are present and unanimously agree to hold a shareholders' meeting. Such meetings are called universal shareholders' meetings.

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SHAREHOLDERS' MEETING

Quorum for meetings to be deemed to have been validly convened

S.L.: One third of the votes corresponding to the shares into which the capital stock is divided.

S.A.

On 1st call:

General rule: Where the attendees represent at least 25% of the voting capital stock (the bylaws may provide for a higher percentage).

Special resolutions: In order to validly resolve on a capital increase or reduction or any other amendment to the company bylaws, the issue of debentures, the elimination or limitation of preemptive acquisition rights over new shares, as well as re-registrations, mergers, spin-offs and the global transfer of assets and liabilities or the relocation of the registered office abroad, the shareholders present in person or by proxy must represent at least 50% of the subscribed voting capital stock.

On 2nd call (due to the absence of sufficient quorum on 1st call):

General rule: The meeting will be deemed to have been validly convened regardless of the percentage of the capital stock present or represented.

Special resolutions: In order to validly resolve on a capital increase or reduction or any other amendment to the company bylaws, the issue of debentures, the elimination or limitation of preemptive acquisition rights over new shares, as well as re-registrations, mergers, spin-offs and the global transfer of assets and liabilities or the relocation of the registered office abroad, the shareholders present in person or by proxy must represent at least 25% of the subscribed voting capital stock.

The company bylaws may provide for special requirements for meeting calls and *quorums* that may not be less than those required by the Capital Companies Law (those described above) under any circumstances.

Majorities for the adoption of resolutions

S.L.

General rule: A majority of the votes validly cast where they represent at least one-third of the votes under the shares into which the capital stock is divided (blank votes do not count).

Qualified majorities:

A capital increase or reduction and any other amendment to the company bylaws will require the affirmative vote of at least one half of the votes corresponding to the shares into which the capital stock is divided.

Authorization so that directors may pursue, for their own account or the account of others, the same, similar or supplementary types of activities as those under the corporate purpose; the elimination or limitation of preemptive rights under capital increases; re-registrations, mergers, spin-offs, global transfers of assets and liabilities and relocations of the registered office abroad and the removal of shareholders will require the affirmative vote of at least two-thirds of the votes corresponding to the shares into which the capital stock is divided.

In addition to the proportion of votes established by the law and the bylaws, the bylaws may require the affirmative vote of a certain number of shareholders, higher than the number established by the law, without reaching unanimity.

S.A.

General rule: A simple majority (more votes in favor than against) of the votes of the shareholders present in person or by proxy.

Qualified majorities: A capital increase or reduction and any other amendment to the company bylaws, the issue of debentures; the elimination or limitation of the right to acquire new shares; re-registrations, mergers, spin-offs, global transfers of assets and liabilities and relocations of the registered office abroad, and the removal of shareholders: where the capital stock present in person or by proxy exceeds 5%, it will be sufficient for the resolution to be adopted by an absolute majority. However, the affirmative vote of at least two-thirds of the capital stock present in person or by proxy at the shareholders' meeting will be required where, on second call, shareholders are present that represent twenty-five percent or more of the subscribed voting capital stock but less than fifty percent.

The company bylaws may increase the above majorities.

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SHAREHOLDERS' MEETING

Proxies	S.L.	Shareholders may only be represented at shareholders' meetings by their spouse, ascendants or descendants, by another shareholder or by a person with general powers conferred in a public document with authority to manage all of the assets owned by the principal in the country. The bylaws may authorize representation by other persons. Representative authority must be conferred in writing. Where not recorded in a public document, it must be specially conferred for each shareholders' meeting. The representative authority will relate to all of the shares held by the represented shareholder.
	S.A.	All shareholders entitled to attend may be represented at the shareholders' meeting by another person, even where such person is not a shareholder, unless otherwise provided for in the bylaws. Representative authority must be conferred in writing or by a means of distance communication that meets the requirements established by the law for the exercise of distance voting rights and on a special basis for each shareholders' meeting.

4.6.2 Managing body

An S.A.'s executive managing body is its director or directors, who need not be Spanish citizens. However, the directors (individuals or legal entities) will need to obtain a taxpayer identification number (*N.I.F.*) or foreigner identity number (*N.I.E.*) (for more information, [see section 3 of Chapter 2](#)).

The board of directors represents the company in dealings with third parties in all acts within the scope of its corporate purpose. The company is bound to any third parties who have acted in good faith and without serious negligence, even with respect to acts outside the scope of its corporate purpose as registered at the Commercial Registry. Any limitation on the representative powers of the managing body, even if registered at the Commercial Registry, is not binding on third parties.

The management may be entrusted to:

- A sole director.
- Several directors acting on a several or joint basis.
- A board of directors. Resolutions may be validly adopted in writing and without holding a meeting, provided certain requirements are met.

The bylaws may establish different means of organizing the management, granting the shareholders' meeting authority to choose between any of them without the need to amend the bylaws. Listed companies must necessarily be managed by a board of directors.

Where there is a board of directors, it must comprise (i) in the case of limited liability companies, a minimum of three and a maximum of twelve members; and (ii) in the case of corporations, a minimum of three members, with no maximum statutory limit whatsoever.

A director is normally not required to be a shareholder unless the bylaws expressly provide otherwise.

Directors are appointed by the shareholders' meeting.

Appointment as a director becomes legally effective when accepted by the appointee and must be registered at the Commercial Registry within a stipulated period of time.

The term of office of directors is expressed in the bylaws. In the case of limited liability companies, the term may be indefinite, while in the case of corporations it may not exceed six years (four years in the case of listed companies), and directors may be reelected for one or more additional periods of not more than six years (or four years, in the case of listed companies). The term of office must be the same for the board members.

The shareholders' meeting can freely dismiss the directors at any time.

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The following paragraphs refer to some special features of a board of directors:

BOARD OF DIRECTORS		BOARD OF DIRECTORS	
Powers	<p>The board may delegate its functions to one or more managing directors or to an executive committee of board members, except for the following powers which may not be delegated in any circumstances:</p> <ol style="list-style-type: none"> The power to supervise the effective functioning of any committees which it may have formed and the actions of delegated bodies and of any senior management personnel it has appointed. To determine the company's general policies and strategies. To authorize or discharge obligations deriving from the duty of loyalty incumbent upon directors. Its own organization and functioning. To prepare the financial statements and present them to the general meeting. To prepare any kind of report which the managing body is required to issued by law, whenever the transaction to which the report refers is one which cannot be delegated. To appoint and remove the company's managing directors and establish the terms and conditions of their contracts. To appoint and remove senior management personnel who report directly to the board or to any of its members, and establish the basic terms and conditions of their contracts, including compensation. To reach decisions with respect to directors' compensation, within the framework of the bylaws and, where appropriate, of the compensation policy approved by the general meeting. To call the general meeting and draw up the agenda and resolution proposals. To determine the policy with respect to treasury stock shares. Any powers delegated to the board of directors by the general meeting, unless the board has been expressly authorized to sub-delegate them. 	Liability of directors	<p>Directors must comply with the duty of diligent administration, faithful defense of the corporate interests, loyalty and secrecy.</p> <p>Directors are liable to the company, its shareholders and its creditors for damage caused by acts that are illegal, contrary to the bylaws or carried out in breach of the duties specific to the office.</p> <p>In such cases, all directors are jointly and severally liable. A director can only be released from liability if he/she proves that he/she did not participate in the adoption or execution of the resolution and that he/she was unaware of the existence of the harmful act or, if he/she was aware of it, did everything reasonably possible to mitigate it or at least expressly opposed the resolution giving rise to the harm.</p>
Adoption of resolutions by the board	<p>The <i>quorum</i> for a board meeting is the presence, either in person or by proxy, of one-half plus one of the board members.</p>	Powers of attorney	<p>In addition to the powers vested in the board of directors, general powers of attorney may be conferred upon any person, whether or not a director, in which case they must be documented in a public deed of power of attorney registered at the Commercial Registry.</p>
Majorities for the adoption for resolutions	<ul style="list-style-type: none"> Generally, by an absolute majority of the directors attending (in person or by proxy). Exceptionally, for permanent delegation of board powers, by the affirmative vote of two-thirds of the board's members; such delegation is not legally valid until it has been registered at the Commercial Registry. 	Meetings	<p>The board must meet at least once a quarter; that is, four times a year.</p>
		Contract with managing director or director assigned executive functions	<p>Where a member of the board of directors is appointed as managing director or assigned executive functions by virtue of any other title, a contract must be entered into between the board member concerned and the company, with such contract having been approved beforehand by the board of directors with the affirmative vote of two thirds of its members. The board member in question must refrain from attending the deliberations and participating in the voting. The contract approved must be attached as an exhibit to the minutes of the meeting.</p> <p>The contract must indicate all items for which compensation may be received for the performance of executive functions, including, where appropriate, potential severance for early removal from such functions and amounts payable by the company in the form of insurance premiums or contributions to savings plans. The board member may not receive any other compensation for the performance of executive functions which is not envisaged in his/her contract.</p>

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BOARD OF DIRECTORS

Compensation

As a general rule, the office of director is not compensated, unless the bylaws establish otherwise, in which case the bylaws must stipulate the compensation system to be applied, determining the compensation item or items payable. These may consist, among others, of the following: a fixed allocation; per diems; a share in profits; variable compensation based on reference parameters or indicators of a general nature; compensation in shares or linked to share performance; severance for removal, provided that the removal is not due to a breach of directorial duties; or contributions to such saving or welfare plans as may be deemed appropriate.

Under the Decision of the Directorate-General of Registries and the Notarial Profession ("DGRN") of June 4, 2020, the bylaws can contain a list of compensation systems so that the board of directors can choose a system in the contract, and the office of director can even be compensated for executive directors and not compensated for deliberative directors.

The maximum annual compensation payable to the directors overall must be approved by the general meeting, with such limit remaining in force until its amendment is approved. Unless otherwise determined by the general meeting, the distribution of such compensation among the directors is to be established by agreement among them. The compensation paid is nevertheless required to be reasonable and proportionate taking into consideration the company's importance, its economic situation at any given time, and market standards among comparable companies. It should be geared towards promoting the company's longterm profitability and sustainability, while incorporating such safeguards as may be necessary to avoid excessive risk-taking and poor results.

4.6.3 Requirements for the adoption of resolutions at shareholders' and board meetings

The legal or bylaw requirements for the exercise of certain rights and the adoption of resolutions at both shareholders' and board meetings of S.A.s and S.L.s are as follows:

CORPORATIONS		CAPITAL COMPANIES LAW		LIMITED LIABILITY COMPANIES
Article of the Capital Companies Law	Minimum stake required	Minority shareholders' rights at an S.A. or S.L.	Minimum stake required	Article of the Capital Companies Law
a) Common general aspects:				
Art. 203	1%	Right to request the presence of a notary to record the minutes of the shareholders' meeting.	5%	Art. 203
Art. 168	5%	Right to request the calling of a shareholders' meeting.	5%	Art. 168
Art. 238.2	5%	Right to oppose a waiver of an action for liability against directors.	5%	Art. 238.2
Art. 239	5%	Right to file an action for liability of directors if such claim has not been filed by the company itself.	5%	Art. 239
Art. 251	1%	Right to contest any resolution adopted by the board of directors.	1%	Art. 251
Art. 265.2	5%	Right to request that the Commercial Registry appoint an auditor.	5%	Art. 265.2
Art. 381	5%	Right to request that the Commercial Court appoint a receiver to monitor the liquidation process.	Not Regulated	
Art. 266	5%	Right to request that the Commercial Court revoke the appointment of an auditor.	5%	Art. 266

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CORPORATIONS		CAPITAL COMPANIES LAW		LIMITED LIABILITY COMPANIES
Art. 197	25%	Right to request the information deemed appropriate for the holding of shareholders' meetings (which cannot be refused by the directors).	25%	Art. 197
Art. 172	5%	Right to request an addition to the notice calling a shareholders' meeting in order to include one or more items on the agenda.		Not Regulated
b) The quorums of attendance and majorities required to adopt resolutions at shareholders' and board meetings of corporations are as follows:				
Art. 193.1	25%	Quorum on first call for shareholders' meetings. No quorum is required on second call. In any event, a simple majority is required for the adoption of resolutions.		
Art. 194.1	50%	Quorum on first call for meetings in special circumstances, such as issuance of debentures, increase or reduction of capital, re-registration, merger, spin-off or any other amendment of the bylaws.		
Art. 194.2	25%	Quorum on second call for meetings in special circumstances, such as issuance of debentures, increase or reduction of capital, re-registration, merger, spin-off or any other amendment of the bylaws. If shareholders representing less than 50% of the subscribed voting capital are present at such meetings, a 2/3 majority of the capital present or represented is required for the adoption of resolutions.		
Art. 248	≥ 50%	Required majority of votes cast by members present or represented for the adoption of resolutions by the board of directors.		
Art. 249.3	66%	Required majority of votes cast by members of the board of directors present or represented for the permanent delegation of authority to the Executive Committee or in the managing director.		
c) The quorums and voting majorities required for the adoption of resolutions at shareholders' and board meetings of limited liability companies are as follows:				
Art. 198	33%	Quorum for meetings the agenda of which includes resolutions not listed in Article 199.a) or 199.b). In any event, a simple majority of the votes cast is required, provided that it represents least one-third of the votes under the shares into which the capital is divided.		
Art. 199.a)	≥ 50%	Required majority of votes for resolutions to increase or reduce capital or to amend the bylaws in any way.		

CORPORATIONS		CAPITAL COMPANIES LAW		LIMITED LIABILITY COMPANIES
Art. 199.b)	≥ 66%	Required majority of votes for resolutions such as re-registration, merger, spin-off, removal of members, etc.		
Art. 245.1		Majority of votes required in the bylaws.		
Art. 249.3	≥ 66%	Required majority of votes cast by members of the board of directors present or represented for the delegation of authority to the Executive Committee or the managing director.		

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/ 5 European Public Limited-Liability Company (S.E.)

Regulation (EC) no. 2157/2001, of October 8, 2001, approving the bylaws for a European Company (S.E.), regulates the legal framework currently in force within the EU for this type of European corporate entity. Law 19/2005, of November 14, 2005⁸, which regulates S.E.s domiciled in Spain, adopted the necessary measures to guarantee the effectiveness of the directly applicable rules included in the Regulation, amending the repealed Corporations Law and including a new chapter. Moreover, this Regulation has been supplemented in Spain by Law 31/2006, of October 18, 2006 regulating the involvement of employees of European corporations and cooperatives, transposing Council Directive 2001/86/EC, of October 8, 2001.

- **Concept:** An S.E. offers companies carrying on business in various Member States the possibility of setting up as a single company under EU regulations and operating in the EU under a single legislation and a unified administrative and declaration system. For companies acting in different Member States, an S.E. offers the possibility of reducing administrative costs with a legal framework adapted to EU regulations.
- **Main characteristics:**
 - An S.E. will always be considered a derivative company since it can only be founded by other pre-existing companies. In other words, individuals are not allowed to create this type of company.

- Need for the existence of a European multinational nature in the process of association giving rise to the formation of an S.E. In this regard, although there are different procedures for forming an S.E., there are two unavoidable requirements common to all with a view to preserving this European multinational nature:
 - That only entities formed pursuant to the legislation of a specific member state be involved in the formation of an S.E., and their registered office and central management must also be located in the EU.
 - At least two of the entities involved must be subject to the legislation of *different* member states.
- The subscribed capital may not be less than €120,000, although the minimum required capital can be higher in specific cases contemplated under Spanish legislation for companies pursuing certain activities (*i.e.* lending institutions). The Spanish legislation governing corporations will also apply to share subscription, payment, ownership and transfers.
- S.E.s can only be formed as follows:
 - Merger: The merged companies must be subject to the legislation of different member states.
 - Formation of a holding S.E.: Provided that at least two of the companies are governed by the law of a different Member State, or for at least two years have had a subsidiary company governed by the law of another Member State or a branch located in another Member State.

⁸ This Law 19/2005 was implicitly repealed by Legislative Royal Decree 1/2012, of July 2, 2012, which regulates this type of company under its Chapter XIII.

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- Formation of a subsidiary S.E.: Provided that at least two of the companies are governed by the law of a different Member State, or for at least two years have had a subsidiary company governed by the law of another Member State or a branch located in another Member State.
- Re-registration of an existing S.A.: Provided that for at least two years it has had a subsidiary company governed by the law of another Member State.
- S.E.s must be registered at the Commercial Registry of their registered office. Their registered office is situated in the place where their central management is established.
- The governing bodies are:
 - A shareholders' meeting.
 - A managing body (one-tier system) or a managing body and an over-sight body (dual system), per the option adopted in the bylaws.
- Shareholder's liability is, in principle, limited to the subscribed capital.
- The name of an S.E. must be preceded or followed by the abbreviation S.E.
- From a labor standpoint, Law 31/2006 regulates the application of certain rights of information, consultation and participation of the workers in the corporate bodies of an S.E. where such participation already existed within the founding companies at the time of the formation of the S.E. This is to ensure the participation of the workers in the S.E. for the purposes of allowing them to have an influence on any decisions adopted at the company which directly affect them.

Furthermore, Law 10/2011 attempts to reinforce the influence employees have on a company's intentions, emphasizing the need for employees to exercise their rights of information and consultation before decisions are effectively made.

In general terms, an S.E. is an effective investment vehicle for companies that already have a business presence in the EU and wish to invest in Spain.

While an S.E. has the disadvantage of being a new legal vehicle which, in certain cases, may allow greater employee participation in the management decisions of the company, it has the advantage that its legal framework is known in all EU countries.

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/ 6 New Limited Liability Company

The intention of the lawmakers is to encourage the creation of small and medium-sized companies, simplifying the requirements for their formation and the pursuit of their activity, as can be inferred from the main features that distinguish an *S.L.N.E.* from a limited liability company, as detailed below:

Registration	An <i>S.L.N.E.</i> can be registered, using a single electronic document together with the public deed of formation, within 48 hours of the execution of the deed.
Name	When forming the company, the corporate name must include the name and two surnames of one of the shareholders followed by an alphanumeric code, and the reference <i>Sociedad Limitada Nueva Empresa</i> or the abbreviation " <i>S.L.N.E.</i> ". This must be modified where the shareholder ceases to hold such status. The corporate name must include the name of one of the shareholders only on formation of the company. Subsequently, under an amendment to the company's bylaws and subject to prior clearance from the Central Commercial Registry, any name may be adopted.
Capital stock	The capital stock may not be less than €3,000 or more than €120,000, and may only be paid in with monetary contributions. If the capital stock exceeds €120,000, the company must be reregistered.
Shareholders	Only individuals can be shareholders of a New Limited Liability Company. On the date of formation, an <i>S.L.N.E.</i> may not have more than 5 shareholders, although this number can be increased later. A shareholder may only be a sole shareholder of one <i>S.L.N.E.</i>
Members of the managing body	Must have shareholder status. This body may never take the form of a board of directors.
Corporate purpose	It will be any or all of the following activities: agriculture, livestock, forestry, fishing, industrial, construction, commercial, tourism, transportation, communications, brokerage, professional services or services in general. In addition, other different individual activities may be included.
Tax and legal obligations	An <i>S.L.N.E.</i> may fulfill its accounting and tax duties by means of a single record.
Deferral of tax payments	Additional Provision Six of the Capital Companies Law indicates that an <i>S.L.N.E.</i> may defer the payment of certain taxes and/or withholdings and prepayments by between one and two years, without having to grant any security albeit paying late-payment interest.

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/ 7 Professional Services Firm (S.P.)

Pursuant to Professional Services Firms Law 2/2007, of March 15, 2007 (partially amended by Law 25/2009, of December 22, 2009, amending various laws to bring them into line with the Law on Free Access to, and Pursuit of, Service Activities), the regulations governing a type of company known as a Professional Services Firm (S.P.) entered into force. The purpose of the above Law is to set in place a regulatory framework governing the common pursuit by several members of a professional activity under a specific corporate form.

Thus, professional services firms are characterized by three specific general features:

Corporate purpose	Their corporate purpose can only be the common pursuit by various members of a professional activity (meaning an activity the pursuit of which requires an official university or professional qualification and registration with a professional association). This feature also implies that all firms that have such purpose must necessarily be formed as professional services firms.
Professional members	The professional members must have a stake in the company's capital ("professional members" meaning individuals or other professional services firms that meet the requirements necessary to engage in the professional activity).
Corporate forms	Professional services firms may be formed in accordance with any of the forms provided for in the law, provided that they meet the specific requirements included in the Professional Services Firms Law.
Specific requirements	<p>Three quarters of the capital and of the voting rights, or three quarters of the firm's assets and of the number of members at non-corporate enterprises, must belong to professional members.</p> <p>Three quarters of the members of the managing body must be professional members. Where the managing body has a single member or there are managing directors, such duties must necessarily be performed by a professional member. In any event, the resolutions of collective managing bodies will require the affirmative vote of the majority of the professional members, regardless of the number of the members present.</p> <p>The professional activity will be pursued in accordance with the code of ethics and disciplinary rules specific to the professional activity in question, with the grounds for incompatibility or disqualification of the members affecting the company itself. A professional services firm may also be fined on the terms established in the disciplinary rules that apply under its professional code.</p> <p>Broadly speaking, to transfer the status of professional member, it is necessary to have the consent of all of the professional members, unless the firm's bylaws permit transfers by an agreement of the majority of the members.</p> <p>Must be registered at the Commercial Registry and the Registry of Professional Services Firms of the relevant professional association.</p> <p>The distribution of income or allocation of loss may be based on or modified according to the contribution made by each member to the sound running of the firm.</p> <p>Professional services firms must arrange for an insurance policy that covers the liability they may incur in the course of the activity or activities that make up their corporate purpose.</p>

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Under the Law, which applies in this respect to both S.A.s and S.L.s, either of these corporate forms can be set up as, or can subsequently become, a sole-shareholder company.

Such companies are subject to a specific regime entailing special reporting and registration requirements. For example, the fact that a company has a single owner has to be registered at the relevant Commercial Registry and acknowledged on all company correspondence and commercial documentation. Likewise, contracts between the company and its sole owner need to be recorded in a special company register (the book of contracts with the sole shareholder).

In general, such requirements may be deemed for the purpose of providing information, although compliance is of the utmost importance since, if six months elapse from the date on which the company acquires sole shareholder status without such circumstance having been registered at the Commercial Registry, the sole shareholder will bear personal, unlimited and joint and several liability for any company debts assumed during the period of sole-shareholder status.

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/ 9 Branches

9.1 CREATION OF A BRANCH

In addition to the forms of business enterprise created under Spanish law with separate legal personality, a foreign investor may operate in Spain through a branch.

The opening of a branch requires the execution of a public deed, which must be registered at the Commercial Registry, together with the formalities indicated in [section 6.1 of Chapter 2](#).

From a foreign investment legislation viewpoint, it is not necessary to provide the branch with capital, although certain branches of entities with financial activities, due to the special nature of their activity, must be allocated capital.

The decision of the DGRN of May 24, 2007, establishes that foreign companies do not have to obtain a clear name search certificate from the Central Commercial Registry in order to set up a branch in Spain. Given they are not forming a new legal entity, they do not have to meet the requirements for

setting up a company (i.e. a certificate from the Central Commercial Registry evidencing that the name of the company to be formed is not registered).

The branch must have a legal representative who is empowered by the head office to administer the affairs of the branch. Apart from this requirement, there are no formal governing or management bodies.

Aside from the obvious differences in terms of internal structure and organization, a branch operates much like a company in its dealings with third parties.

The choice between forming a branch or a legal entity in Spain may be affected by commercial reasons; for example, a company may be deemed to provide a more “solid” presence than a branch.

There are also other differences which are addressed in different chapters of this publication.

9.2 BRANCH VS. SUBSIDIARY (WHETHER S.A. O S.L.)

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

	S.A.	S.L.	BRANCH
Concept	Company of a commercial nature engaging in the pursuit of an economic activity, with a capital stock divided into shares and consisting of contributions by the shareholders, who, as a general rule, will be personally liable for company debts only up to the limit of the contribution made or promised.		Secondary establishment with a permanent representation and certain management independence, through which the activities of the head office are totally or partially pursued, and with no legal personality independent of that of the head office.
Capital stock	€60,000.	€3,000 ⁹ .	No capital is required for the establishment of a branch, although for practical reasons it is advisable.

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⁹ Except in the case of the entrepreneurial limited liability company, for which the rules are described in [section 4.2 above](#).

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	S.A.	S.L.	BRANCH
Monetary and non-monetary contributions	Monetary contributions must be made in the national currency, while non-monetary contributions, in the case of corporations, will require a report by an independent expert appointed by the Commercial Registrar.		
Registration	The company must be formed under a public deed to be filed with the Commercial Registry, acquiring legal personality upon registration.		Together with the public deed creating the branch, the documents evidencing the existence of the head office, the current bylaws, its directors and the decision to open the branch, duly legalized, must be registered with the Commercial Registry.
Shareholders' meeting calls	See section 4.6.1 above.		A branch does not have decision-making body in the form of a board or meeting, since its legal personality is that of the parent company.
Directors	The bylaws may establish various types of managing bodies, granting the shareholders' meeting authority to choose between them, without any need to amend the bylaws. The position of director will be not remunerated, unless the bylaws otherwise provide and establish the method of remuneration. See section 4.3 above.		The managing body of the head office will appoint a branch director to act as an attorney-in-fact of the head office at the branch. The director (as a general rule and subject to the limitations provided for in the powers of attorney) may pursue all the activities entrusted to the branch and registered at the Commercial Registry.
Share transfers	Depends on how they are represented (book entries, detachable certificate books, etc.) and on their nature (registered or bearer). In principle, they are free transferable, unless the bylaws establish otherwise.	Transfers must be recorded in a public document executed before a Spanish notary. Any bylaw provisions enabling practically unrestricted share transfers are prohibited.	A branch cannot be transferred since it does not have any legal personality.
Financial statements	The directors of the company must, within not more than three months of the fiscal year-end, prepare the financial statements, the management report and the proposal for the distribution of profit, to be approved by the shareholders' meeting within six months of the fiscal year-end.		As permanent establishments in Spain for tax purposes, branches must keep their own accounts with respect to the transactions they perform and their assets. Moreover, branches must deposit their parent company's financial statements at the Commercial Registry or, in certain cases, the statements prepared in relation to the branch's activity.
Dividend distribution	Should the profit be distributed as dividends, such distribution shall be made to the shareholders in proportion to the capital they have contributed. Payment of interim dividends is also possible.		Dividends do not exist, since profits pertain strictly to the parent company.

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In addition to commercial entities and branches, foreign investors may operate in Spain via a representative office. Noteworthy key features include:

Legal personality	It does not have its own legal personality independent from the parent company.
Formalities for opening	No commercial formalities are required to open a representative office, although for tax, a labor and social security reasons it might be necessary to execute a public deed (or document executed before a foreign public notary, duly certified by apostille or any other applicable legalization system), which must indicate the opening of the representative office, the funds allocated to the office, the identity of its tax representative, which must be a legal entity or individual resident in Spain, and its powers. The opening of a representative office need not be registered at the Commercial Registry.
Managing body	There are no formal managing bodies, but rather the representative of the office acts under the powers granted to him/her.
Activities	In principle, the activities of a representative office are limited, essentially comprising coordination, collaboration, etc.

The non-resident company is liable for all debts incurred by the representative office.