



INVEST IN **GRAN CANARIA**,
CONNECT YOUR BUSINESS TO THE WORLD

COMPLEMENTARY INFORMATION

1. MAIN ASPECTS TO CONSIDER WHEN ESTABLISHING A BUSINESS



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1. MAIN ASPECTS TO CONSIDER WHEN ESTABLISHING A BUSINESS IN GRAN CANARIA

1.1 Introduction

This chapter deals with the main alternatives for a foreign investor to establish a business in Gran Canaria, as well as the main steps, costs and legal requirements in connection with them.

As regards the ways of establishing a business, several alternatives are analyzed, either in the form of sole ownership of a business through the incorporation of a Spanish entity or the formation of a Spanish branch, or through joint ventures to carry on a business jointly with one or more businesses already established in Spain.

There are other ways of conducting a business without requiring a physical presence; through the arrangement of distribution, agency, commission and franchising agreements.

The steps that have to be taken to make the different types of investments are the following:

- Incorporation of a Spanish Corporation or opening of a Spanish Branch
- Equity investment on an existing Spanish corporation
- Acquisition of real estate located in Gran Canaria

Finally, this Chapter contains a last section on dispute resolution in Spain, either through court proceedings or through arbitration, which is seen to be a very plausible alternative system suitable for the settlement of commercial dispute.

1.2 Different ways of conducting a business in Gran Canaria

As has been mentioned, the following alternatives exist to operate and invest in Gran Canaria:

- Incorporation of any form of company regulated by Spanish law and opening of a branch or a permanent establishment. The various forms of company available to the investor include the Limited Liability Company, which is the most common form of company right now, hence its importance and practical impact.
- Association with other entrepreneurs already established in Gran Canaria.

Foreign investors may find a joint venture with a Spanish company to be the most appropriate form of presence in Spain, since it allows the parties to share risks and combine resources and experience. There are different legal vehicles which can be used to set up a joint venture under the Spanish law as is explained below:

- An Economic Interest Grouping or a European Economic Interest Grouping
- A Temporary Business Association
- A Silent Partnership Arrangement
- The possibility of becoming established in Gran Canaria without having physically to set up a centre of operations in Spain must also be taken into account. This may be done:
 - Operating through an agent
 - Making a distribution agreement
 - Operating through commission agents
 - Franchising

1.3 Tax Identification Number and Identity Number for Foreigners

According to Spanish law, all foreign people and professionals who have economic interests in Spain will be provided with a Tax Identification Number (NIF), for legal persons, and an Identification Number for foreign individuals (NIE).

These documents are obtained free of charge and are mandatory both for the incorporation of a company and for the performance of economic activities before the Spanish public authorities.

The managers of Spanish companies which are not resident in Spain will need to obtain the Identification Number for Foreigners. In the same way, a legal person involved in an economic activity must obtain the corresponding Tax Identification Number.

The same rules have to be followed in the case of foreign shareholders of a company.

1.4 How to Incorporate a Corporation

This chapter examines the procedures required for the formation of a company and the costs involved in it.

For this purpose, the requirements for the incorporation of a Spanish business corporation will be used as an example.

1.4.1 Legal Steps

First of all, it is required that the incorporation of any company must be executed in a Public deed, and that the agreement of the parties recorded in a private document will not be enough.

To incorporate a company is necessary to have an initial capital, the necessary amount will depend on the type of the company chosen. The Limited Stock Company requires a minimum capital of 60,102 Euros that must be fully subscribed, but only requires that the initial outlay should be 25%, the remainder of such capital to be called within the statutory time period which must not exceed 5 years.

However, in a Limited Liability Company the requirement in terms of minimum capital is 3,005.06 Euros, with the difference that the full amount has to be paid up at the time of its formation.

The requirements for the valid incorporation of a company are set out below:

- The execution of a Public Deed of incorporation:
 - Identity of the founding shareholder. In the event that the shareholder is represented by a third party, a power of attorney must be conferred upon such third party.

If the power has been granted abroad, it must be legalized. It may be legalized through two procedures:

1. *Empowerment in the Spanish consulate in the country of the investor.* The foreign investor will have to appear before a Spanish consul in his country, prove his identity and confer the necessary powers of attorney upon the individual he wishes to act as an attorney. If the founding shareholder is not an individual, it must also confirm its identity, its capacity to act for and on behalf of its representative and thus confer the power of attorney upon the designated person.
 2. *Empowerment before a notary in the country of origin.* The document must be approved for the purposes of Spanish law either through the Apostille of The Hague (if the country is a signatory to the Vienna Convention of 1968) or through the Spanish consulate in the country of origin. The language will be that of the Notary Public and will require a sworn Spanish translation.
- Submission of the reservation of the name before the Notary Public, evidenced by the certificate of the Central Commercial Registry.

- Drafting of the Articles of Association that will govern the company.
- Evidence of disbursement of the capital contribution through the required bank documents.
- Obtaining of the provisional Tax Identification Number of the company.
- Settlement of the Stamp Duty Tax within one month of the incorporation.
- Registration of the company at the Commercial Registry of Las Palmas.
- Declaration of the foreign investment undertaken before the Directorate-General for Trade and Investments (Dirección General de Comercio e Inversiones, hereinafter DGCI) of the Ministry of Industry, Tourism and Trade. Citizens or companies of the European Union will not require such a statement.
- Obtaining of the definitive Tax Identification Number after the registration of the company at the Commercial Registry.
- Registration for Tax on Commercial and Professional Activities.
- Application for the Opening License where the activity is going to be developed.
- In regard to labour laws, legislation in relation to non-EU workers, who must first obtain a residence permit and work permit with the appropriate visa, must be taken into account. There are various types of permits to work in Spanish territory according to the circumstances of each case.

In contrast, European Union citizens do not have to obtain such permit since, under the Community rules governing the free movement of workers, they will be entitled to conduct any activity.

- Registration with Social Security and for insurance for occupational accidents.

Additional information may be obtained at the Chamber of Commerce of Las Palmas and through the web page www.vue.es.

1.4.2 Costs

The incorporation of any company involves the following costs:

- Transfer Tax and Stamp Duty for company operations, 1% on the amount of capital
- Fees of the Notary Public for the incorporation of the company
- Fees for registration of the company at the Commercial Registry of Las Palmas
- Opening License
- Other expenses

1.5 The branch and the representative office

These paragraphs analyze the branch and the representative office as alternatives to operate in Gran Canaria without having to incorporate a company.

At the organization of the branch, the Notary Public will request the necessary documentation that evidences the existence of the parent company, its Articles of Association, the personal data of its Directors and the resolution to create the branch adopted by its responsible body.

The branch must obtain the corresponding Tax Identification Number and elect a person who may be either a natural or a legal person resident in Spain, able to represent the parent company before the Spanish Tax Authority. The branch does not have legal personality.

As well as companies, branches will have to be registered at the Commercial Registry, after settling the Stamp Duty Tax, with certain exceptions.

It is also necessary to declare the foreign investment made before the Directorate-General for Trade and Investments (DGCI), in the case of a non-EU company.

Finally, the branch must be registered for Tax on Commercial and Professional activities, the fees for the Opening License of the branch must be paid, and registered with Social Security and the other legally formalities required must be complied with.

On the other hand, as the second alternative, the foreign investor may also operate in Gran Canaria through a Representative Office.

The most remarkable features of the representative office are:

- The office has the legal personality of its parent, so that it is not an independent entity
- There are no corporate formalities for its opening, although a Public Deed must be executed to record the opening of the office for tax, labour and social security, purposes
- It is not necessary to register the opening of the office at the Commercial Registry of Las Palmas
- It does not have formal governing bodies and the representative of the office carries out these actions
- The office activities are limited and are related only to coordination and collaboration
- The non-resident company is liable for debts incurred by the office

As regards the tax area, it is important for investors to know that in terms of profit-sharing or dividends, as appropriate, it must be borne in mind that, if the company does not belong to the EU and the country is not the signatory to a double taxation agreement with Spain, the company will have to pay 18% for taxes in Spain. However, in the case of a double taxation agreement, dividends will be taxed at the reduced rate established by the agreement, and the repatriation of profits of the branch will not be taxed in Spain.

1.6 Other alternatives to operate in Gran Canaria

1.6.1 Forms of Business Cooperation

The different forms of business cooperation will be analyzed in the followings paragraphs.

- Temporary Joint Ventures (UTEs)

The Temporary Joint Venture (Unión Temporal de Empresas, hereinafter UTE) is a system of collaboration between companies for a certain time and for the development or execution of work, service or supply. From this union, a new independent company is born that operates under the same management. It has no legal personality, and the name is formed by the names of the companies that make up the union, adding the words “Unión Temporal de Empresas” (Temporary Joint Venture).

There is no limit with regard to subjects who may participate, who may be natural or legal persons, Spanish or foreign, from the EU or otherwise.

As mentioned above, UTES are independent entities without legal personality that have a contractual origin. In fact, this is a partnership contract with the aim of developing a temporary business that has been previously determined. The UTE has no legal personality and therefore its members are jointly and severally liable to third parties without limitation.

It is governed by Law 18/1982 of 26 May on the Tax Regime for Groupings and Joint Ventures and Regional Industrial Development Corporations, which distinguishes between the main purpose, namely the implementation or development of a work, service or supply, and that which could be described as an ancillary or secondary purpose, that is limited to the execution of works and services that are supplementary or ancillary to the main purpose.

Its formation need not be executed in a Public Deed, but to access to the tax advantages provided by the tax laws, the formation of the Joint Venture must be executed in a public document. This will formalize the joint venture agreement.

With the granting of a Public Deed, the joint venture is formed, but there is another administrative and voluntary procedure, its registration on the Special Register of the Ministry of Economy and Finance. This requirement is necessary if the joint venture intends to enjoy the tax benefits specific to this class of entities.

It is also necessary to provide the joint venture with its corresponding NIF.

• *Economic Interest Groupings (EIGs)*

Economic Interest Groupings may be defined as legal entities having the purpose of facilitating the development and improving the results of the activities of their partners, without making a profit for themselves.

The purpose of EIGs must be limited to economic activities ancillary to the activities carried on by their members. EIGs are used by their partners jointly to conduct a supplementary activity.

Economic Interest Groupings are governed by Law 12/1991 of 29th April, on Economic Interest Groupings, and in the EU context, by Council Regulation (EEC) 2.137/1985 which created the European Economic Interest Grouping (EEIG).

The EIG is intended as an instrument that serves to channel supranational business cooperation within the European Union.

The procedure for the formation of an EIG is very similar to that of any capitalist company, since it requires a public deed and registration at the Commercial Registry.

The Law defines the governing bodies of the EIG in a manner similar to that applicable to any company. Thus, it contemplates two governing bodies: the Assembly of Members (the sovereign body that adopts the resolutions of the EIG) and the directors, who are appointed by the members.

The EIG is liable for its own debts but in the case of insolvency its members will be jointly and unlimitedly liable.

Optionally, another series of corporate covenants may be established among which we point out considering their importance, the rules for determining the participation of members in the profits/losses.

This freedom of allocation of the profit/loss of the EIG is one of the key elements in shaping that institution.

• *Silent Partnership Arrangement*

In practice, this is a common venture since it offers a very flexible formula to provide capital for a company that requires resources.

A silent partnership arrangement is not a company agreement and is instead a voluntary funding contract. One entrepreneur makes capital available to another entrepreneur, which may be a natural person or a legal entity.

The managing partner uses that capital as the company's overall funding or the funding of a specific business, and in return agrees to deliver to the silent partner some of the profits generated and to repay the capital at the agreed times and in the agreed manner.

If instead of profits, losses are sustained, the silent partner will not receive any remuneration, the losses will be charged to the capital contribution and only the remaining funds will be restored.

The legal regime is extraordinarily permissive, as great freedom is allowed when establishing covenants and there is a total absence of formal requirements, without imposing any of the typical formal requirements of the corporate law (Public Deed, Commercial Registry, etc...).

Other features of the silent partnership arrangements are:

- It is an Arrangement of Association, it does not have independent legal personality, it does not have to be registered at the Commercial Registry, and it does not have effects on third parties

- It is a contract between merchants, not between an individual and a merchant
- The managing partner is obliged to justify the results every time he needs to pay a dividend and when proceeding to settle the joint arrangement
- The silent partner does not have any voting rights in the arrangement
- The silent partner is not a creditor of the managing partner and is instead his partner so that his claims will be subordinate

1.6.2 Distribution, Agency, Commission and Franchising Agreements

• **Distribution Agreement**

The distribution agreement is an atypical contract, a contract which is not regulated by law so that its contents must be analyzed based on the interpretation of its clauses.

There is a great degree of freedom in this type of agreement and there are multiple types of distribution.

The dealers are a commercial network of the company but without belonging to it, whose main mission is to increase its sales.

Under Spanish law there are three types of distribution networks:

- Exclusive franchise or distribution. Through this method, the supplier undertakes to deliver its products to a single distributor and in a particular territory.
- Single distribution agreement. In this case the supplier has reserved the right to supply products to users in the territory concerned.
- Contract for authorized distribution. The distributors are selected based on their ability to market products.

• **Agency Agreements**

Through the agency agreement, a natural person or legal entity, namely, the agent, undertakes with another on an ongoing basis or under a stable relationship, in exchange for consideration, to promote acts of trade or operations for hire or to reward or to promote and complete them for and on behalf of others. All this as an independent broker, without assuming, unless otherwise agreed, the risk and responsibility for such operations.

The legal regulation of such contracts is found in Law 12/1992 of 27 May, on the Agency Contract, which transposed the Directive 86/653/EEC into Spanish law.

The main characteristics of agency contracts are set out below:

- The agent is an independent broker
- The agent's work is to promote or conclude contracts on behalf of the person on whose behalf it acts
- The agent may act on behalf of one or more principals
- The agency agreement will be for a fixed time or indefinite
- It is necessarily a paid contract

• **Commission Agreement**

The regulation of such contracts is contained in Articles 244 and following of the Commercial Code. Under this contract the commission agent undertakes to carry out a mandate from the principal in one or more commercial transactions.

The commission agent necessarily acts on behalf of the principal but may perform the commission, depending on how the relationship with the principal is defined, engaging in its own name or that of the principal.

Thus another relationship of empowerment which attributes different legal effects to the action of the commission agent is superimposed over the commission agency relationship, according to whether the commission agents acts on his behalf or on behalf of the principal.

In the first case, since there is no direct representation and the commission agent contracts on his own behalf, the commission agent will not have to declare the identity of the principal, and will be bound directly to with the individuals with whom he contracts, who will not have direct action against the principal, as the principal will not have on them either.

In the second case, the commission agent must state that he acts on behalf of the principal and, if the contract was made in writing, state this in the agreement or before the signature, stating the name, surname and address of the principal, which will cause that the contract and actions derived from it to have effect between the principal and the person or persons that contract with the agent.

This agreement has the following features:

- The principal and the agent do not have a long-lasting relationship, which is extinguished after the service has been provided.
- The principal often delivers the commission agent a provision of funds sufficient to meet the expenses of the commission agent.
- The commission agent is obligated to render accounts to the principal, evidencing the amounts received for the performance of the commission. Also, the commission agent must send information to the principal on the contracts made and the buyers involved in them.
- The commission agent must carry out the commission himself, with no right to substitution unless this has been expressly and unequivocally agreed. After the substitution has been authorized, the commission agent will in any case be liable for the management of the substitute unless he was chosen by the principal.
- The commission agent is unable to agree payment by instalments without obtaining authorization from the principal.
- Failure by the principal of his obligation to pay for the commission entitles the commission agent to make a withholding on the assets subject matter of the commission.

• **Franchising**

The franchise allows the distribution and marketing of products and services of the franchiser through new distribution channels represented by the franchised company.

The applicable law is Spanish Royal Decree 378/2003 of 28th March, which in turn refers to Regulation (EC) No 2790/1999 of 22nd December.

The importance of franchising lies in the facility of expansion of business ideas that have received some recognition and market success.

The franchise agreement has advantages for the parties:

- The franchisor may enhance its own capacity for penetration and business expansion into other markets, it monitors compliance with its guidelines by the franchisee through contractual content and does not assume the business cost of its expansion and its possible outcomes and which is borne entirely by the franchisee.
- The franchisee becomes the owner of the company that is created, is able to access a range of commercial or technical industrial knowledge (namely, Know-how) and has the right to use intangible property transferred and integrating the elements of identification of the business of the franchisor.

By paying a fee, the franchisee is able to take advantage of a recognized business success already established in the market.

The contract is completed with the agreement between the franchisor and the franchisee that is predominantly made in writing, by standard models in which specific conditions with the general conditions are imposed by the franchisor.

In Spain there are a number of formalities to be observed, such as the entry on the Register of Franchisors when the activity is going to be conducted in the territory of more than one Autonomous Community.

1.7 Other alternatives to invest in Gran Canaria

1.7.1 Acquisition of shares of an existing corporation

• Legal Steps

For the acquisition of shares of a Spanish corporation it will be necessary to follow the steps set out below:

- Endorsement of a Notary Public to transfer the shares of a Limited Liability Company, however in the case of Business Corporations the presence of a Notary Public is only required when so established by law or agreed by the parties. The actions must be identified, and the seller must show the title and, where appropriate, the subsequent declaration forms for foreign investment to the DGCI, if this was necessary.
- Settlement of the Stamp Duty Tax. In the case of companies whose assets are mostly real estate, there are certain cases in which the transfer of shares will be taxed by the ITP and AJD at 7%; in the Canary Islands the rate for this tax is 6.5%.
- The foreign investment made will also have to be declared to the Directorate-General for Trade and Investment (DGCI), in the case of a non-EU company.

1.7.2 Acquisition of real estate located in Gran Canaria

• Legal Steps

The following steps must be taken to acquire real property located in Gran Canaria:

- Execution of the Public Deed of the respective sale. It must be executed before a Spanish Notary or a Spanish consul abroad, identifying the parties, the seller to submit including the title deed to the property, the form of a declaration of investment to the DGCI, where and when appropriate, and the payment and procedure used for the purpose.
- If the seller is a developer, we have to distinguish the following cases:
 - 1) In the case of buildable land and first delivery of buildings, General Indirect Tax of the Canary Islands at 5% plus Stamp Duty Tax at 0.75% will apply.
 - 2) In the case of rural land and second or subsequent deliveries of buildings Transfer Tax at 6.5% or, in the case of waiver, IGIC at 5% will apply.
- If the seller is not a real estate developer, it will be taxed by the Transfer Tax regardless of the kind of property.
- Entry at the Property Registry, and the declaration to the DGCI will be required in the case of amounts exceeding EUR 3,005,060.
- Change of ownership of the property in the Property Registry.

• Costs

The expenditure involved in the acquisition of a property located in Gran Canaria is:

- Notary Fees
- Settlement of the Stamp Duty Tax
- Fees of the Property Registry. The scale ranges from 0.4% and 0.02%

- Municipal tax clearance on the Increase in Value of Urban Land. This tax applies to the seller. The amount will vary depending on the location of the land, in accordance with the cadastral value of the property
- Municipal Real Property Tax (IBI)

1.8 Dispute Resolution

1.8.1 Court Proceedings

Law 6/1985 of 1st July regulates the operation and governance of Judges and Courts in Spain.

The territorial organization of the State for judicial purposes is differentiated into municipalities, Districts, Provinces and Autonomous Regions, where the Justice Courts, the Courts of First Instance and Examination, the Commercial Courts, Criminal Courts, the Administrative Courts, the Labour Courts, the Provincial Appellate Courts and the High Courts of Justice have jurisdiction.

The Supreme Court and the National Appellate Court have jurisdiction throughout Spanish territory. The Constitutional Court has jurisdiction to safeguard constitutional rights.

The most relevant legislation to be pointed out regulating the various court proceedings is:

- Law 1/2000 of 8th January, Civil Procedure Law
- Law 16/1882 of 14th September, Criminal Procedure Law
- Law 2/1995 of 7th December, Labour Procedure Law
- Law 29/1998 of 13th July, Judicial Review Procedure Law

1.8.2 Arbitration

In recent years, arbitration has been found to be very effective and fast compared to traditional judicial proceedings and dispute resolution, including commercial disputes. The increased flexibility has made arbitration gain strength not only in the Spanish judicial landscape but also internationally.

In Spain, it is regulated by Law 60/2003 of 23rd December, Arbitration Law, which allows both individuals and corporations use such a procedure for settling disputes that have arisen or may arise, provided that such dispute is related to matters of free disposition.

As in judicial proceedings, arbitrators also have the power to impose interim measures, so that parties in a judicial proceeding may request before the Spanish courts that such measures be adopted to ensure the outcome of the arbitration proceedings.

With respect to the arbitration award and its strength as resolution of litigation, it is noteworthy that an arbitration award may be enforced even when the action for annulment has been taken. For the court to suspend the enforcement of an award, a bond will have to be posted in the amount of conviction plus any damages for delay o execution. In this respect our rules follows the UNCITRAL Model Law, UNCITRAL, in turn based on the New York Convention 1958.

The fact that Spain continues to UNCITRAL model has made the international arbitration in Spain much more accessible.