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# Spain

## International Estate Planning Guide

Individual Tax and Private Client Committee

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## I. Wills and disability planning documents

The Spanish legal system is largely decentralised, with the autonomous regions (*comunidades autónomas*) regulating a range of matters, including the law of succession. Succession is governed by different sets of rules in Aragon, the Balearic Islands, the Basque Country, Catalonia, Galicia, Navarre and Valencia, whereas the Spanish Civil Code (CC) governs succession in the rest of Spain.

People's residence usually changes throughout their lifetime, and so do the rules applicable to their succession. Choice of law rules establish that succession is governed by the law of the place where decedents had their effective residence for: (1) at least ten years (without registration with the civil registry); or (2) two years (if registered with the civil registry) prior to their death (*vecindad civil*; section 14 of the CC). However, a last will and testament granted under a regulation other than the one ruling succession at the time of death will be valid, provided it complies with the limits on the freedom of testation under the rules governing the testator's succession at the time of death.

Under Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (the 'European Regulation'), which has replaced the Spanish regulation on this matter (Article 9.8 of the CC), the law applicable to succession is the law of the state where the deceased had his or her habitual residence at the time of death. However, if it is clear from the circumstances that at the time of death the deceased was manifestly more closely connected with another state, the law applicable to the succession will be the law of that other state. A person can also choose the succession law of the state of nationality by expressly stating it in a declaration.

These rules apply regardless of the type of assets or the country where they are located, following the principles of unity and universality of the European Regulation, which implies that the law specified by this regulation will apply whether or not it is the law of a Member State. Ireland and Denmark are the exception, as they have not adopted this regulation.

### A. Will formalities and enforceability of foreign wills

Spain only recognises succession by law or by will and testament (Article 658 of the CC) and prohibits joint wills (Article 669 of the CC) and succession agreements (Articles 816 and 1271.2 of the CC). However, these are allowed under the laws of some regions.

#### 1. ORDINARY WILLS

##### a. Holographic wills (Article 678 of the CC)

These are handwritten wills, drafted and signed by the testator, stating the day, month and year. Any words crossed out, amended or between brackets should be initialled by the testator. A holographic will may only be signed by a person of legal age (18 years old). For a holographic will to be fully effective and valid, it must be legally attested within five years from the death and certified by a notary public (Article 689 of the CC).

##### b. Open wills (Article 694 of the CC)

This is the most common type of will in Spain, as they provide greater security and are the only kind that is fully valid without requiring any subsequent procedure to authenticate them. Open wills are signed before a notary public, who is responsible for the last will and testament expressed verbally or in writing by the testator. An open will must state: (1) the

place, year, month, day and time the testator grants the will; (2) that the notary public has read it aloud to the testator; and (3) that the testator understands its content and consents to it. Except for very special circumstances (eg, the testator cannot read or is deaf), the presence of witnesses is not required.

The original will is kept in the notary public's files, and while the testator is living, only the testator may request a copy of the will. The notary public must file the will with the Registry of Last Wills and Testaments, a service of the Ministry of Justice whose duty is to ensure awareness that there is a will once the testator has died (or is still living).

c. Closed wills (Article 706 of the CC et seq)

Closed wills are drafted (handwritten or typed) by the testator or a third person, stating the place, day, month and year and signed on each page by the testator. The testator, without revealing its contents, delivers it to the notary public in a sealed envelope (or seals the envelope before the notary public), stating that it contains the testator's last will and testament, and the notary public records the granting of the will. The will may be returned to the testator, leaving a copy of the registration in the testator's records, although it is usually left with the notary public. At the testator or notary public request, the sealing of the will may be attended by two witnesses. The notary public must file the will with the Registry of Last Wills and Testaments.

d. Foreign wills

If the will is in a language in which the notary public is not proficient, an interpreter chosen by the testator must be present to translate its provisions. The will must be written in both languages, stating the language used by the testator (Article 684 of the CC).

The law applicable to foreign wills in Spain is The Hague Convention of 1961, on the Conflicts of Laws relating to the Form of Testamentary Dispositions. It provides that: (1) its rule is *erga omnes*, that is, enforceable on anybody; (2) Spain is a contracting state; and (3) Spain is governed by the principle of the *favor testamenti*, meaning in case of doubt, the will is valid and recognised if it meets the formal requirements of any of the national laws established under the convention.

## II. Estate administration

### A. Overview of administrative procedures

In case of intestate death, an *ab intestato* ('by intestacy') declaration procedure must be initiated. This procedure will be notarial, if the heirs are descendants, ascendants or the spouse of the deceased, or judicial for other kinship (eg, siblings, or aunts or uncles).

A notarial statement *ab intestato* is obtained through an affidavit certified by a notary public qualified to act in the last place of residence of the deceased in Spain. It requires:

- filing an application attaching the death certificate;
- a certificate from the Registry of Last Wills and Testaments stating that the deceased did not leave a will;
- the family record (*libro de familia*) of the deceased or certificates from the Registry Office providing proof of any marriage or offspring; and
- statements by two witnesses with no direct interest in the will that the facts in the heirs' statement are true.

The affidavit by the *ab intestato* heirs is processed under Articles 980 et seq of the Civil Procedure Act 1881 (LEC) before the court of the last place of residence of the deceased.

Under Spanish succession law, the heir has the legal position of the deceased and is responsible for administering and settling the inheritance and rendering the testamentary provisions, unless the testator provided otherwise. The testator may grant powers to execute the inheritance to one or more people. Spanish law recognises:

- the court-appointed accountant (*contador-partidor*), who is entitled to carry out the distribution;
- the inheritance administrator, who is entrusted with preserving and managing the hereditary succession; and
- individual or universal executors, entrusted with complying with some or all of the testamentary provisions.

The universal executor position is voluntary and cannot be delegated, waived (except under specific circumstances) or remunerated, unless the testator provides otherwise (although this may be different in some regional (*foral*) legal systems). The testator can appoint one or more executors to act jointly and authorises the universal executor to fully comply with the last will and testament until it is completely fulfilled (Article 894 of the CC). Its powers depend on the wishes of the testator and may be broad enough to border on arbitrariness. They include:

- taking possession and administering the inheritance (eg, paying debts and inheritance charges, leasing and fulfilling ordinary obligations);
- disposing of assets (when expressly conferred by the testator); and
- taking care of anything else required to fulfil the will (eg, inventory and evaluation of the estate, paying parts of the estate and giving bequests, and distributing the inheritance to the co-heirs).

Unless the testator indicated otherwise, the will must be executed within one year from the testator's death.

If the testator has not appointed a universal executor, and if the heirs cannot come to an agreement, any of the heirs can start special legal action to divide the inheritance under Articles 782 et seq of the Civil Procedure Act 1/2000 (the 'LEC 2000'). Its purpose is for the heirs to get an inventory, get an expert valuation of the assets and get a court-appointed accountant to divide the assets.

The spouse, any co-heir or legatee of a share requesting the division of the inheritance, as well as certain creditors whose debts have been inventoried or recognised in the will or a public document, can request judicial action.

#### B. *Intestate succession and forced heirship*

Except for Navarre, all other regions governed by regional civil law on succession or by the CC include forced heirship rules. Limitations to testamentary freedom apply to movable and immovable property located in Spain or abroad. Under these limitations, those closely related to the testator must receive a part of the estate called the *legítima*. As to the extent of forced heirship, for the sake of simplicity, this article will focus on the regulation under the CC and examine the three most common scenarios:

- *The testator is survived by a spouse and children:* One-third of the estate must be equally distributed among the children (*tercio de legítima estricta*); another third must go to the children and grandchildren of the deceased. The testator can decide whether to distribute this third in equal or non-equal parts, give it to some heirs or to just one of them (*tercio de mejora*). The testator's widow or widower is entitled to at least the usufruct of this one-third portion of the estate. The testator can freely dispose of the final third (*tercio de libre disposición*).
- *The testator is survived by a spouse, one or both parents or grandparents, and has no children:* One-third of the estate must be distributed in equal parts among the testator's parents (*tercio de legítima*); the widow or widower is entitled to at least the usufruct of half of the estate; and the testator can freely dispose of the rest of the estate.
- *The testator is survived by a spouse, has no children and no surviving parents and grandparents:* The widow or widower is entitled to at least the usufruct of two-thirds of the estate, and the testator can freely dispose of the rest of the estate.

If there are no testamentary heirs, under the CC, any intestate succession follows this order:

1. matrimonial or extra-matrimonial descendants or those through adoption in totally equal terms;
2. relatives in ascending line;
3. surviving spouse;
4. siblings, nieces and nephews;
5. collateral relatives to the fourth degree of kinship; and
6. the state.

The preference within each call of heirs is determined by the principle of the nearest relative excluding the most distant, except for the right to representation when applicable.

### C. *Marital property*

Different regional laws on marital property, in addition to the CC, coexist in Spain offering a wide range of solutions, all recognising the principle of freedom of choice. Under Article 1325 of the CC, spouses have the right to grant a public deed before a notary public with any clauses, amendments or replacements to the financial arrangement governing a marriage.

If there is no marital agreement, nationality must be considered to determine the supplementary marital law between spouses, and for Spanish citizens, their place of residence. Also, if the marriage date is prior to 29 December 1978 (the date the Spanish Constitution came into force), any property relations will be governed by the law applicable to the husband – based on his residence – at the time the marriage took place. If the marriage took place after this date, it will be regulated by Article 9.2 of the CC, under the wording of Law 11/1990, of 15 October (through reference to Article 16.3 of the CC), for example:

1. the common law governing both spouses;
2. if the spouses are not governed by a common law, the law governing one or the law governing the habitual residence of either of them, chosen by both in a certified document granted prior to the marriage;
3. if there is no such certificate, the law of the common habitual residence immediately after the marriage; or

4. if there is no common habitual residence, the law of the place where the marriage took place.

The CC establishes a supplementary legal system of joint ownership of property (*Sociedad de Gananciales*, Article 1315 of the CC), regulated by Articles 1344 of the CC et seq. This is the most common system applicable to married couples in Spain. The CC also regulates the separation of assets (*separación de bienes*) and gainsharing (*participación en las ganancias*) as conventional systems.

Under the system of joint ownership of property, there are three types of assets: (1) separate assets that the spouses hold individually; (2) separate assets held under ordinary co-ownership; and (3) community property. Most authors consider the system of joint ownership of property a Germanic type of community property, that is, separate, common autonomous property, of which both spouses hold an abstract share of the assets, only ordering the disposal of specific assets and rights upon dissolution of the community property

Under this system, the following is considered community property (Article 1.347 of the CC):

- the spouses' income;
- rent or interest arising from any property held separately or jointly by the spouses;
- any property purchased using the spouses' common funds;
- any property acquired through a right of first refusal over a jointly held property, even if it acquired with separate funds; and
- companies incorporated during the marriage by either of the spouses, paid for by common assets.

Any assets that are not proven to belong to a spouse individually (Article 1361 of the CC) are presumed to be community property.

The following is considered separate property (Article 1.346 of the CC):

- any assets or rights belonging to each spouse at the time they got married;
- any assets or rights acquired by each spouse after they got married through inheritance, bequest or donation;
- any asset or right acquired by each spouse by selling or replacing separate property;
- any asset or right acquired through only one spouse's right of first refusal;
- patrimonial assets and rights inherited; and
- any property or assets required to exercise the spouse's profession, except when these are an essential part or belong to a common business or establishment from which both spouses benefit.

The system of administration and disposal of joint ownership of property is co-administration or co-disposal of the community property requiring the consent of both spouses. Each spouse can dispose of half of the community property through a will, but such testamentary disposal will only render all effects if assigned to the inheritance of the testator. Otherwise, the value of the asset will be deemed to have been bequeathed. An important exception to the co-administration and co-disposal rule applies to any cash and securities. Any administration of assets or disposal of cash and securities carried out by the spouse in whose name or possession they are will be considered valid (Article 1384 of the CC).

Community charges and debts, which always burden the common estate, are separate from financial liability on community property with third-party creditors collecting an individual credit in certain circumstances (ie, in the exercise of a profession or trade).



Under other regional civil laws, the financial-matrimonial regime is community estate (*comunidad de bienes*). In Galicia, there is a general reference to the common law system of the joint ownership of property; in Navarre, the supplementary legal system is the 'conjugal conquest society' (*sociedad conyugal de conquistas*), and in Aragon, the system of legal community (*comunidad legal*), both similar to the system of joint ownership of property under common law. In the Basque Country, the provinces of Álava and Guipúzcoa also use a supplementary joint ownership of property system, while the province of Vizcaya uses the supplementary legal system of the joint ownership of property (in force in some municipalities *no aforadas*, including Bilbao) and the supplementary legal system of the regional communication of assets (*comunicación foral de bienes*) (in force in the rest of the province or *tierra llana*), which is a type of universal estate in which all the assets are considered community property of the spouses, whether acquired before or after the marriage, under any title. In the Balearic Islands, Catalonia and Valencia, the separation of assets is in place as a supplementary financial-matrimonial system.

In Spain, there is no national regulation for de facto couples, although there is different regional legislation on the matter<sup>1</sup> operating virtually identical to legislation on married couples, although no financial arrangement is established because the separation of assets is upheld, unless otherwise agreed.

### **III. Trusts, foundations and other planning structures**

#### *A. Trusts*

Trusts are not regulated by the Spanish legal system. The only guidelines on the treatment of foreign trusts under Spanish law are found in academic writings and in a few rulings from the Spanish courts and the Spanish tax authorities. Spain has not signed the International Hague Convention of 1 July 1985, on the Law Applicable to Trusts and on their Recognition.

The tax authorities have issued several rulings on what they understand the tax treatment of trusts should be,<sup>2</sup> but their interpretation is, in most cases, quite simplistic and should not be considered comprehensive. Hence, there is room for interpretation both for the taxpayer and for the tax authorities.

Under the current interpretation of the Spanish General Directorate for Taxes (GDT), trusts are disregarded for Spanish personal income tax (PIT), wealth tax (WT), and inheritance and gift tax (IGT) purposes. To put it simply, trusts are non-existent for tax purposes, meaning all transactions under the trust arrangement should be considered carried out directly by the settlor and the beneficiaries among themselves.

In their tax rulings, the Spanish tax authorities do not make a distinction between revocable and irrevocable trusts or whether trusts are discretionary or non-discretionary.

The traditional interpretation has been that the assets held in a trust do not cease to be the settlor's property for Spanish tax purposes when the trust is settled, and the property is contributed to the trust. Generally speaking, for Spanish tax purposes, income from the assets held in a trust will be deemed income obtained by the grantor.

If distributions from the trust are made to beneficiaries while the settlor is alive, the distributions will be deemed a gift from the grantor to the beneficiary.

At the death of the settlor, there is a *mortis causa* acquisition (inheritance) from the settlor to the beneficiaries of the trust. From that time, the trust assets and income are considered

owned or obtained by the beneficiaries, while distributions to the beneficiaries are not subject to taxation because the assets will already be deemed owned by them.

These are general principles based on the Spanish tax authorities' rulings. However, the specifics of each trust arrangement must be analysed carefully. In recent tax rulings, they mention that it is necessary to carry out a case-by-case analysis to determine which party to the arrangement should be considered the owner of the assets, which depends, inter alia, on the terms of the trust deed and on the powers of disposal over the assets granted to each of the trust's subjective elements (settlor, trustee and beneficiary). Therefore, to determine the owner of the assets, particular attention must be paid to the clauses of the trust deed and the actual actions of the settlors, trustees and beneficiaries.

## B. Foundations

### 1. OVERVIEW

The Spanish Foundations Act 49/2002 of 23 December establishes a special tax regime applicable only to registered Spanish non-profit entities.<sup>3</sup> To apply for this regime, a notification must be filed with the Spanish tax authorities, and the requirements discussed below must be fulfilled.

A foreign foundation will be entitled to the same tax benefits as a Spanish foundation, if it formally establishes a branch in Spain registered with the relevant public authorities and meets the legal requirements. However, if the foundation pursues private objectives, it is not eligible to apply for the special tax regime.

### 2. REQUIREMENTS TO APPLY THE SPECIAL TAX REGIME

To apply the special tax regime, foundations must pursue general interest objectives, such as social services, education, culture, science or health; therefore, their main purpose cannot be to devote their services to their founders, to the founders' relatives or to the members of the board of trustees. In particular, at least 70 per cent of their net income must be used for carrying out activities related to their main non-profit objective within five years of obtaining such income, including the year the income is used.

The foundation's purpose may include carrying out commercial activities that do not qualify for the tax exemption, but the income obtained through commercial activities cannot exceed 40 per cent of the foundation's total income, provided that these commercial activities do not breach the market competition regulations. In any case, the foundation's assets must not revert to being the founder's property.

The foundation's governing body cannot be remunerated. However, its members can be paid for any other professional services they provide to the foundation, unless the founder has expressly forbidden it, and provided the Protectorate (a public body that monitors foundations) authorises it. The foundation submits its annual accounts to the Protectorate, which reviews, approves and deposits with the Register of Foundations after verifying that the annual action plans have been fulfilled. In addition, a financial report to comply with information requirements regarding the foundation's activity must be submitted annually to the tax authorities.

If the foundation is dissolved, all the foundation's assets must be committed to another non-profit entity that also qualifies to apply the special tax regime under Law 49/2002.

a. Special tax regime

Income obtained by Spanish foundations (or branches of foreign foundations) that meet the requirements under Law 49/2002 (ie, capital gains, interest, rental income from immovable property and income from qualifying business activities) are exempt from corporate income tax. However, expenses related to exempt income and depreciation of assets linked to exempt activities are not deductible. Qualifying Spanish foundations are also exempt from other taxes, including business tax, immovable property tax, capital duty and urban land appreciation tax, provided that they are related to the foundation's non-profit objectives and activities.

The corporate income tax rate applicable to a foundation's business activity that does not qualify for the tax exemption is reduced to ten per cent. Spanish foundations not eligible for the special regime will be subject to a 25 per cent tax rate.

b. Donor's taxation

Individuals are entitled to a tax credit determined by the monetary value of the gift:

<i>Deduction basis</i>	<i>Deduction rate (%)</i>
Up to €150	80
Remaining deduction base	35

The deduction rate increases to 40 per cent when donations, gifts and contributions to the same entity in the two immediately preceding tax periods are higher than those of the previous year.

Tax credits cannot be carried forward. In addition, the donor will be exempt from taxation on the capital gains arising from the donated asset (other than cash).

Contributions made by legal entities and non-residents with permanent establishments (PEs) benefit from a 35 per cent tax credit on all gifts, up to ten per cent of their taxable base. Amounts exceeding this limit can be used in the tax periods ending in the next ten years.

## IV. Taxation

### A. Personal income tax

PIT is regulated under the Spanish Personal Income Tax Act 35/2006, of 28 November (the 'PITA'). PIT is one of the pillars of the Spanish tax system, embodying the principles of economic capacity and the correlated principles of equality and progressive taxation. Income includes all of the taxpayer's earnings, returns, capital gains and losses, and attributed income under law, regardless of where it was obtained or the taxpayer's place of residence. The tax period coincides with the calendar year, and the tax accrues on 31 December.

PIT is levied throughout Spanish territory, although the Basque Country and the Navarre region have their own tax regimes, albeit similar to the rest of the Spanish territory. Under the PITA, only individuals whose habitual residence is in Spain pay PIT. They are considered to have their habitual residence in Spain when:

- they spend more than 183 days in a calendar year in Spain; or
- the main centre or base of their business activities or interest is directly or indirectly located in Spanish territory.

Unless proved otherwise, taxpayers are considered to have their habitual residence in Spain when, under the above criteria, their spouse (provided they are not legally separated) and underage dependent children habitually reside there.

When countries or territories legally classified as tax havens are involved, the tax authorities may require individuals to prove their presence in those jurisdictions for 183 days in the calendar year. Spanish tax residents that change their residence to tax havens are still considered Spanish tax residents the year they move and the following four years.

Spanish tax residents are taxed on their worldwide income. Taxable income is divided in two categories:

- *general income*: ordinary income, mainly including employment income, income from immovable property, business income and income from capital gains; and
- *savings income*: speculative earnings, mainly including investment income and capital gains.

These categories are taxed at different rates.

## B. *General income*

### 1. EMPLOYMENT INCOME

Under the PITA, this income includes all earnings and utilities, regardless of their name or nature, arising directly or indirectly from personal work or employment and not considered business earnings. Employment income includes salaries, unemployment benefits and salaries of management and members of boards of directors.

### 2. INCOME FROM IMMOVABLE PROPERTY

Income from immovable property includes all income from real estate, mainly rental income. Rental income that property owners receive (excluding VAT) must be included in their taxable income. They can deduct expenses directly related to obtaining such income, plus property amortisation provided these deductions do not create a negative taxable base. Tax on income earned from renting residential property is generally reduced by 60 per cent, and this reduction increases to 100 per cent when the property is rented to people between the ages of 18 and 30 living on a minimum annual income.

Under the PITA, taxpayers must include in their tax returns income from urban real estate that is not used for business activities or is not rented, excluding permanent dwellings and land with no buildings. This imputed income results from applying a percentage between one and two per cent to the cadastral value, although this amount is lower than the market rental income.

### 3. BUSINESS INCOME

Business income includes income from entrepreneurial and professional activities and is generally calculated according to corporate tax rules (see section G below on corporate income tax). Rental income is considered business income if a taxpayer has premises used exclusively to manage the rental properties and at least one employee.

#### 4. CAPITAL GAINS

Capital gains that do not arise from the transfer of assets, for example, prizes and indemnities, are considered general income.

#### 5. ROYALTIES, IMAGE RIGHTS AND RENTAL OF MOVABLE PROPERTY

Certain investment income is considered general income (ie, royalties, income from image rights and rental of movable property).

### C. Savings income

#### 1. INVESTMENT INCOME

Investment income includes: (1) income from participating in a company's capital, such as dividends; (2) income from assigning one's own capital to third parties, such as interest; and (3) income from fixed income assets.

#### 2. CAPITAL GAINS

Under the PITA, capital gains and losses are the variations of the taxpayer's wealth that arise when this value changes, unless the PITA classifies them differently. Gains and losses from transferring assets are considered savings income. Capital gains are the difference between the transfer price and the acquisition cost. For transfers of real estate, the acquisition cost is adjusted to inflation. This rule also applies to gifts, in which case taxpayers should consider the market value of the gifted asset.

Since the general income base and the savings income base are taxed differently, after calculating each one, taxpayers can apply some deductions, including a minimum tax-exempt amount based on personal and family circumstances, a deduction for buying the main home, and certain deductions for contributions to pension schemes.

The 2021 Budget Law increased PIT rates effective from 1 January 2021 (2022 filing period). It introduced a new bracket in the general income tax scale for taxpayers with incomes above €300,000 and increased the current marginal tax rate by two percentage points for the taxable income bracket above €60,000. Below is the tax rate applicable to the general income base:

<i>General tax base</i>	<i>Gross tax base</i>	<i>Rest of general tax base</i>	<i>Tax rate (%)</i>
0.00	0.00	12,450	9.50
12,450	1,182.75	7,750	12
20,200	2,112.75	15,000	15
35,200	4,362.75	24,800	18.5
60,000	8,950.75	240,000	22.5
300,000	62,950.75	Above	24.5

The scale for determining taxation will require adding the tax rate for the autonomous community where the taxpayer resides. For example, the consolidated rate resulting from

adding the rate established by the 2021 Budget Law and the rate in force in Catalonia would be as follows:

On other	<i>General tax base</i>	<i>Gross tax base</i>	<i>Rest of general tax base</i>	<i>Tax rate (%)</i>	the
	0.00	0.00	12,450	21.50	
	12,450	2,676.75	5,257.20	24	
	17,707.20	3,938.48	2,492.80	26	
	20,200	4,586.61	12,807.20	29	
	33,007.20	8,300.69	2,192.80	33.50	
	35,200	9,035.28	18,207.20	37	
	53,407.20	15,771.95	6,592.80	40	
	60,000	18,409.07	30,000	44	
	90,000	31,609.07	30,000	46	
	120,000	45,409.07	55,000	47	
	175,000	71,259.07	125,000	48	
	300,000	131,259.07	Above	50	

hand, applying the current regulations of the autonomous community of Madrid would result in the following consolidated rates:

<i>General tax base</i>	<i>Gross tax base</i>	<i>Rest of general tax base</i>	<i>Tax rate (%)</i>
0.00	0.00	12,450	18.50
12,450	2,303.25	5,257.20	23.20
17,707.20	3,522.92	2,492.80	25.30
20,200	4,153.60	12,807.20	28.30
33,007.20	7,778.04	2,192.80	32.90
35,200	8,499.47	18,207.20	36.40
53,407.20	15,126.89	6,592.80	39.50
60,000	17,731.04	240,000	43.50
300,000	122,131.04	Above	45.50

As for the savings income base, the 2021 Budget Law, by amending sections 66 and 76 of the PITA, introduces a new bracket in the tax scale for taxable income over €200,000 with a tax rate of 26 per cent.

The tax rate applicable to the savings income base is the following:

<i>Savings tax base</i>	<i>Gross tax base</i>	<i>Rest of savings tax base</i>	<i>Tax rate (%)</i>
0.00	0.00	6,000	19
6,000	1,140	44,000	21
50,000	10,380	150,000	23
200,000	44,880	Above	26

PITA establishes a tax credit method to mitigate double taxation of foreign-sourced income and capital gains by which a resident taxpayer with foreign-sourced income can credit against Spanish tax liability on worldwide income the lower of: (1) the tax paid abroad on the foreign-sourced income or capital gains; or (2) the Spanish income tax attributable to the foreign-sourced income or capital gains.

#### D. *Controlled foreign corporation (international tax transparency)*

The controlled foreign corporation (CFC) regime aims to tax the worldwide income of Spanish taxpayers and discourage the use of conduit companies in countries with low taxation. It applies to Spanish individuals and to Spanish companies taxed under the Corporate Income Tax Act. Under this regime, taxpayers must report income obtained by companies that are not resident in Spain and located in a low tax jurisdiction, when:

- the taxpayer alone or together with a related party holds at least a 50 per cent interest in the capital, equity, profits or voting rights of the foreign company; and
- the effective tax rate of the foreign company is less than 75 per cent of the Spanish corporate income tax rate of 25 per cent, that is, 18.75 per cent.

Income is attributed to the resident company at the prorated rate, provided the income is classified as 'passive' income. The following items are considered passive income:

- income from immovable property, unless used in a business activity or by non-resident companies in the same group;
- income from equity (dividends and profit distributions) and interest from finance activities unless obtained in the course of a business activity;
- income from credit, financial, insurance and service activities, except those directly related to export activities, performed directly or indirectly with individuals or companies resident in Spain; this rule does not apply if more than 50 per cent of the income is obtained from non-related parties; and
- capital gains or losses arising from transferring real estate or rights to it or from disposing of financial assets (ie, securities).

The 2021 Budget Law expanded the list of passive income to include: (1) income from financial activities not generated in the exercise of economic activities; (2) transactions in which the non-resident entity or PE adds little or no economic value; and (3) raising the threshold from 50 per cent to 75 per cent of transactions carried out with non-related parties.

Excluding dividends and capital gains from qualifying shareholdings, which become passive income for all purposes under the CFC regime, no longer applies.

The 2021 Budget Law eliminates the special treatment of dividends and capital gains from qualifying holdings, which become passive income for all purposes under the CFC regime.

Since dividends and capital gains are now generally 95 per cent tax exempt (a full exemption does not apply), dividends and capital gains obtained by a CFC that benefits from a full exemption will have to be reported by the Spanish shareholder in its income or corporate tax return.

The CFC regime does not apply to resident companies in the European Union, unless they are resident in a tax-haven jurisdiction (exceptions apply to tax havens in the EU).

#### *E. Inbound expatriates*

The PITA establishes a special tax regime for individuals who become tax residents in Spain. They may choose to be taxed under the non-resident income tax rules during the tax period in which they acquire Spanish tax residence and for the following five years, if they meet the following conditions:

- they must not have been residents in Spain in the ten years prior to moving to Spain;
- they are moving to Spain as a result of an employment contract or the appointment as director of a company to which the taxpayer is not related; under Spanish law, directors are related to a company if they, directly or indirectly through related parties, hold shares representing 25 per cent or more of the authorised share capital; and
- they do not obtain income that could be classified as obtained through a PE in Spain.

Generally, non-tax residents (and taxpayers that choose to be taxed as non-residents) are subject to tax in Spain on their Spanish-sourced income at the following general flat rates:

<i>General tax base</i>	<i>Tax rate (%)</i>
Up to 600,000	24
Above 600,000.01	47

For savings income (interest, dividends and capital gains), a scale identical to that for other taxpayers will be applied, but only on Spanish-sourced savings income:

<i>Savings tax base</i>	<i>Gross Tax base</i>	<i>Rest of savings tax base</i>	<i>Tax rate (%)</i>
0.00	0.00	6,000	19
6,000	1,140	44,000	21
50,000	10,380	150,000	23
200,000	44,880	Above	26



## F. *Non-resident income tax*

Spanish non-resident income tax is levied on Spanish-sourced income and capital gains that non-resident taxpayers obtain in Spain.

### 1. TAXPAYERS

Individuals are considered Spanish tax residents when they meet either of the following requirements:

- spending more than 183 days during a calendar year in Spain, including sporadic absences, unless a tax residence certificate is issued by another country; the Spanish tax authorities can require taxpayers residing in tax havens to prove that they spend 183 days in a calendar year in that jurisdiction; or
- having their main base or centre of activities or economic interest, directly or indirectly, in Spain.

Unless proved otherwise, married individuals are resident in Spain if their spouses and dependent underage children have their habitual residence in Spain.

Non-resident companies are companies that are not incorporated under Spanish law or do not have their legal seat or place of effective management in Spanish territory. The Spanish tax authorities may consider a company located in a tax haven or a low tax territory to be resident in Spain if its main assets are immovable property in Spain or rights to it, unless there are valid economic reasons for it other than mere management of securities.

PEs in Spain of non-resident companies are subject to the same tax rules as resident companies. This means, *inter alia*, that: (1) PEs are taxed on their worldwide income; (2) their income and expenses must be calculated at arm's length; and (3) their tax liability is calculated under the Spanish corporate income tax rules. Non-resident companies that do not have PEs in Spain are subject to non-resident income tax on their Spanish-sourced income and capital gains.

### 2. WITHHOLDING TAXES

Spanish-sourced income obtained by non-residents without a PE in Spain is subject to final withholding tax on the gross amount. If the non-resident taxpayer is a resident in the EU, the taxation will be on net income. The current general non-resident tax rate is 24 per cent. For interest, capital gains and dividends, the applicable general tax rate is 19 per cent, although several exemptions are available based on the residency of the recipient. In addition, the transfer by a non-resident of real estate in Spain is subject to three per cent tax on the sale price. If the tax is not withheld by the buyer, the tax authorities can place a lien on the property to collect the tax due. Certain exceptions apply to this rule.

### 3. Tax treaties

Spain has entered into over 90 tax treaties with other countries based on the Organisation for Economic Co-operation and Development (OECD) Income and Capital Model, and it is constantly expanding its treaty network. These tax treaties provide reduced withholding tax rates or exemptions for certain types of income, for example, dividends, interest and royalties.

## G. Spanish corporate income tax

Spanish corporate income tax is mostly regulated by Law 27/2014, of 27 November, or Corporate Income Tax Act (the 'CITA'). Under section 1 of the CITA, corporate income tax is a personal and direct tax levied on Spanish legal entities and other assimilated entities (eg, investment funds). Companies subject to corporate income tax are taxed on their worldwide income,<sup>4</sup> whether or not from Spanish sources.

In general, the tax period coincides with the company's financial year but, in practice, it usually coincides with the calendar year, with the tax accruing on 31 December. The CITA follows the Spanish Accounting Plan, enacted through Spanish Royal Decree 1514/2007, of 16 November, which entered into force on 1 January 2008.<sup>5</sup> Unless stated otherwise in the CITA, the company's income is calculated according to these accounting rules. When there is a difference, this income must be adjusted for tax purposes. These tax adjustments to the accounting profit refer, among others, to the following items:

- amortisation and depreciation of assets (sections 12 and 13 of the CITA);
- provisions or write-offs (section 14 of the CITA);
- non-deductible expenses (section 15 of the CITA);
- thin-capitalisation rules (section 16 of the CITA);
- general and specific valuation rules for certain transactions without consideration and corporate restructurings (section 17 of the CITA);
- transfer pricing rules between related parties at arm's length (section 18 of the CITA);
- special valuation rules for change of residence, closing PEs and transactions carried out with residents in a tax haven jurisdiction (section 19 of the CITA);
- accounting valuation different from tax valuation (section 20 of the CITA);
- participation exemption regime (sections 21 and 22 of the CITA); and
- income from intangible assets (patent box regime) (section 23 of the CITA).

Once the income has been calculated according to the accounting rules and, if necessary, adjusted for tax purposes according to the above sections, the resulting tax base may be set off against tax credits generated during the year or in previous years.

Under section 26 of the CITA, tax credits may be carried forward with no time limit. The resulting tax base is multiplied by the general 25 per cent tax rate (15 per cent for newly created entities that carry out economic activities for their first year of profits and the following one). The resulting amount is the gross tax payable, which may be reduced by applying any of the deductions in sections 31–39 of the CITA. After applying these deductions and calculating the gross tax payable, the final tax payable will be the difference between the gross tax payable and the tax prepayments made in the tax period.

Tax may be set off against positive income in subsequent tax years up to 70 per cent of the taxable income prior to applying the capitalisation reserve established in section 25 of the CITA and its offset.

In any case, tax losses for up to €1m can be offset in the tax period. Losses can be carried forward with no time limit.

### 1. TAX CREDIT TO AVOID DOUBLE TAXATION

Dividends and capital gains are included in taxable income, but 95 per cent will be considered exempt provided certain requirements are met. Otherwise, the Spanish corporate taxpayer will be able to apply a tax credit for:

- the tax amount paid abroad for an identical or analogous tax: tax exemptions, rebates or any other tax benefit cannot be deducted; if a double taxation agreement applies, the deduction cannot exceed the tax payable under that agreement; and
- the amount of gross tax payable in Spain on the above income, if obtained in Spanish territory.

## 2. SPANISH HOLDING COMPANIES (ETVE)

Sections 107 and 108 of the CITA govern the ETVE regime. Spanish companies can opt for it by notifying the Spanish tax authorities (applicable the tax year when the notification is made), provided:

- their corporate purpose, as stated in their bylaws, includes (not exclusively) managing shareholding in foreign entities;
- they organise their material and human resources appropriately to carry out this activity; and
- their shares are nominative.

Under this regime, dividends and capital gains obtained by the ETVE will be 95 per cent exempt of taxation, if they meet certain requirements and will benefit from a full exemption when distributed out of the ETVE, unless the shareholder is a resident in a tax haven jurisdiction. Transferring the ETVE will also be exempt, provided certain requirements are met.

## 3. PRIVATE EQUITY REGIME

Under section 50 of the CITA, private equity companies regulated under Law 22/2014, of 12 November, on Private Equity Companies and their Managing Companies, are eligible to apply this regime. In addition, Circular 11/2008, of 30 December, of the National Stock Exchange Commission (*Comisión Nacional del Mercado de Valores* or CNMV), provides specific accounting rules.

Private equity companies are taxed under the general corporate income tax rules. However, section 50 of the CITA provides a 99 per cent exemption on their income from transferring non-listed securities, if the transfer takes place between the second and 15th year (exceptionally, until the 20th) from the acquisition of the shares. If the target company has immovable property that represents more than 50 per cent of its assets, the exemption only applies if at least 85 per cent of it is used in business activities.

Dividends benefit from a 100 per cent tax credit, irrespective of the percentage or the holding period.

## 4. COLLECTIVE INVESTMENT REGIME

Sections 29 and 52 et seq of the CITA provide a special regime for collective investment schemes incorporated under Law 35/2003, of 4 November, on collective investment schemes, and subject to the supervision of the CNMV. These collective investment schemes can be divided into financial schemes (investment funds and investment companies with variable capital–SICAVS) and non-financial schemes (real estate investment funds and companies). The applicable accounting rules are set out in the CNMV's Circular 3/2008, of 11 September.

The tax rate applicable to financial collective investment schemes is one per cent, provided they have at least 100 shareholders.

The Draft Bill on Measures to Prevent and Combat Tax Fraud provides that, to continue applying the current one per cent corporate income tax rate to a SICAV, the required 100 shareholders will need to hold shares for an amount equal to, or greater than, €2,500, determined on the net asset value at the date of acquisition of the shares.

Non-financial schemes (real estate) must exclusively invest in urban real estate to lease and their bylaws must not stipulate a shareholder's right to a dividend. Collective investment funds or companies cannot claim any tax credit, although they can recover domestic withholding taxes.

#### 5. CONTROLLED FOREIGN CORPORATION (INTERNATIONAL TAX TRANSPARENCY REGIME)

The CFC regime applies to resident individuals and companies and has been described in detail in the PIT section. In the case of corporations, the CFC regime potentially applies to all non-resident companies, including EU resident companies, except those that were not created for valid economic reasons and do not carry out business activities.

#### H. Tax on individuals' wealth

In Spain, two main taxes are levied on individuals' wealth: (1) net WT (*impuesto sobre el patrimonio*); and (2) IGT (*impuesto sobre sucesiones y donaciones*), levied on lucrative wealth transfers and on the acquisition of property and rights.

Although each of these taxes is regulated by state legislation described below, their regulation has been partially transferred to the autonomous regions, allowing them to set their own tax rates and benefits, within certain limits. Therefore, individuals' tax burdens may vary depending on where they reside, although the tax benefits and rates applicable to nonresidents are established in the general regime.

However, the European Court of Justice (ECJ), in its judgment of 3 September 2014, ruled on IGT against Spain, stating that if the deceased was a resident in a Member State of the EU or the European Economic Area (EEA), taxpayers are entitled to apply the regulations approved by the autonomous region in Spain where the highest valued assets and rights of the estate are located. As a result, Spain was forced to modify its IGT regulation to allow non-resident taxpayers to apply the regional IGT regulations.

The Spanish Supreme Court (in its judgments of 19 February, 21 March and 22 March 2018) ruled on the interpretation of the ECJ decision, concluding that it also applied to non-EU non-residents.

Below is an overview of the state regime, which is generally applicable to non-residents.

#### 1. WEALTH TAX

WT is levied on individuals' net wealth, and the taxable event is ownership of the net wealth on the date of tax accrual, which is 31 December. It applies to the worldwide assets and rights of residents in Spain. For non-residents, it only applies to their wealth located in Spain. The residence criterion is the same as for PIT.

The Wealth Tax Act provides several exemptions, although the autonomous regions can add others, including exceptions for: (1) family businesses, if certain requirements are met; (2) habitual abode (up to €300,000); (3) some works of art and antiques; and (4) pension plans.

In addition, there is a general €700,000 exemption, which can be increased or reduced by the autonomous regions.

For non-residents in Spain, WT is levied on the net value of assets and rights located or exercised in Spain. Debt taken on to finance the acquisition of assets and rights located in Spain is deductible when calculating the tax base, provided the debt was taken to acquire the Spanish asset or right. Certain exemptions apply on Spanish financial assets.

Immovable property is valued according to the higher of: (1) the cadastral value; (2) the value determined by the tax authorities for the purposes of other taxes; or (3) the price, consideration or acquisition value.

The method used to calculate the value of shares will depend on whether these are traded in an organised market and based on the average traded value in the last quarter of the year. For shares not traded in a stock market, if accounts are audited, their value will be calculated based on net book value. If there is no audited balance sheet, the value will be the higher of: (1) the face value; (2) the net book value of the last approved balance sheet; and (3) the value resulting from capitalising, at a rate of 20 per cent, the average profit of the last three financial years.

The top marginal tax rate, applicable to the net taxable base over €10,695,996.06 is 3.5 per cent. The tax scale is the following:

<i>Tax base</i>	<i>Gross base tax</i>	<i>Rest of tax base</i>	<i>Tax rate (%)</i>
0.00	0.00	167,129.45	0.2
167,129.45	334.26	167,123.43	0.3
334,252.88	835.63	334,246.87	0.5
668,499.75	2,506.86	668,499.76	0.9
1,336,999.51	8,523.36	1,336,999.50	1.3
2,673,999.01	25,904.35	2,673,999.02	1.7
5,347,998.03	71,362.33	5,347,998.03	2.1
10,695,996.06	183,670.29	Above	3.5

WT applies to Spanish tax residents and non-resident taxpayers holding assets or rights located, exercised or performed in Spanish territory. Non-resident taxpayers must file an annual tax return on their Spanish *situs* assets.

Individuals who get their tax residence in Spain as a result of moving to Spanish territory and who opt to pay non-resident income tax, that is, the inbound expatriates regime (see section E above) are only subject to WT on their Spanish *situs* assets.

Autonomous communities have regulatory powers over WT, including tax rates, reductions and allowances, so the above rates may be different in other regions.

The autonomous community of Madrid provides a 100 per cent tax rebate (ie, full exemption for taxpayers resident in Madrid).

From 1 January 2015, non-resident taxpayers residing in a Member State of the EU or the EEA will be entitled to apply the approved regulations of the autonomous community where the greater value of the assets and rights they own are, and for which tax is required because they are located, can be exercised or must be fulfilled, in Spanish territory.<sup>6</sup>

According to recent rulings from the tax authorities, non-resident taxpayers not residing in a Member State or the EEA should apply the state regulations.

The following autonomous communities have approved their own tax scale:

<i>Autonomous community</i>	<i>Marginal tax rate (%)</i>
Andalusia	2.5
Asturias	3
Balearic Islands	3.45
Cantabria	3.03
Catalonia	2.75
Extremadura	3.75
Galicia	2.50
Murcia	3%
Valencia	3.5

The sum of PIT and WT due is limited to 60 per cent of the total taxable income (not including long-term gains). If it exceeds that amount, the net WT liability may be reduced by the excess amount. However, a minimum tax of 20 per cent of the net WT liability must be paid. A number of exemptions may also apply (on business assets, pension plans and qualifying art works).

A number of Spanish tax treaties include provisions on WT.

a. Inheritance and gift tax

The taxable event is the acquisition of property and rights through: (1) inheritance, bequest or other title; (2) gift or *intervivos* transfer; or (3) proceeds from a life insurance policy where the beneficiary and the policyholder are not the same individual.

The taxable persons are those receiving the property and rights, that is: (1) heirs; (2) donees; and (3) beneficiaries. The tax liability arises on the date of death or, in case of an *inter vivos* gift, on the date the assets or rights are given, or when the donee accepts the donation.

Under the IGT Act, several deductions and tax rebates are applicable, which may be significantly different in the autonomous regions, for example: (1) for family businesses, if certain requirements are met; and (2) for the habitual abode transferred through inheritance. As with WT, the tax residence of the deceased in a *mortis causa* transfer or of the

beneficiaries in an *inter vivos* transfer also plays an important role when determining the applicable law.

Individuals who are tax residents in Spain will be taxed on the worldwide assets and rights acquired either through inheritance or donation. Non-residents will only be taxed on property located in Spain or on rights that may be exercised in Spain, as well as on life insurance policies with a Spanish entity or with a non-Spanish entity operating in Spain.

When determining the taxable base for inheritance and gifts, the market value is generally used (defined by law as the 'real' value), from which the following are deducted: (1) burdens and encumbrances on the asset; (2) certain debts; and (3) other expenses, such as medical costs and funeral-related expenses. When calculating the taxable base of heirs, legatees and beneficiaries of life insurance policies, certain deductible allowances apply. The amount depends on the relationship with the deceased. However, these allowances do not apply to *inter vivos* transfers.

Once the taxable base is calculated, the tax due is calculated at progressive rates in accordance with the table below.

<i>Tax base</i>	<i>Gross base tax</i>	<i>Rest of base tax</i>	<i>Tax rate (%)</i>
0.00	0.00	7,993.46	7.65
7,993.46	611.5	7,987.45	8.5
15,980.91	1,290.43	7,987.45	9.35
23,968.36	2,037.26	7,987.45	10.2
31,955.81	2,851.98	7,987.45	11.05
39,943.26	3,734.59	7,987.46	11.9
47,930.72	4,685.10	7,987.45	12.75
55,918.17	5,703.50	7,987.45	13.6
63,905.62	6,789.79	7,987.45	14.45
71,893.07	7,943.98	7,987.45	15.3
79,880.52	9,166.06	39,877.15	16.15
119,757.67	15,606.22	39,877.16	18.7
159,634.83	23,063.25	79,754.30	21.25
239,389.13	40,011.04	159,388.41	25.5
398,777.54	80,655.08	398,777.54	29.75
797,555.08	199,291.40	Above	34

The final tax liability is the amount resulting from applying fixed surcharges to the basic tax due. Those surcharges depend on both the recipient's previous net wealth and relationship with the deceased or donor as indicated in the table below.<sup>7</sup>

The	Recipient's net wealth	Degree of kinship		
		I and II	III	IV
	Up to €402,678.11	1	1.5882	2
	€402,678.11 to €2,007,380.43	1.05	1.6676	2.1
	€2,007,380.43 to €4,020,770.98	1.1	1.7471	2.2
	Above €4,020,770.98	1.2	1.9059	2.4

autonomous regions have legislative powers to approve their own tax rates and establish reductions.

A tax credit to avoid double taxation applies against the Spanish tax due, either the lower of: (1) the IGT paid abroad; or (2) the Spanish tax on the property. Spain has entered into only two treaties, with France and Sweden, for the avoidance of double taxation on inheritance.

#### I. Indirect taxes

Indirect taxes (*Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados* (ITPAJD)) are levied on different taxable events through:

- transfer tax on the transfer of assets and rights between individuals or companies that are not business activities;
- capital duty on corporate transactions; and
- stamp duty payable when formalising transactions in notarial deeds, corporate documents and administrative documents.

These three taxes cannot be charged at the same time. Stamp duty at a fixed rate is always charged on officially documented acts, regardless of whether transfer tax, capital duty or VAT applies, while capital duty and stamp duty can be charged simultaneously with VAT.

Each autonomous region is responsible for ITPAJD and can establish different rules and tax rates.

#### 1. TRANSFER TAX

Transfer tax is only charged on the transfer of assets located in Spain and of rights that can be exercised or have effect in Spain or abroad, but only when the individual exercising those rights is a tax resident in Spain. There is no transfer tax on the transfer of immovable assets or rights abroad.

Transfer tax is levied on onerous and *inter vivos* transfers of any kind of assets and rights that belong to individuals and companies but are not part of the transferor's professional or business activity. It is not charged if the transaction is subject to VAT, regardless of whether it is exempt. However, it can also be charged on the transfer or rental of immovable property,



as well as on the creation or transfer of real estate rights when these are subject to, but exempt from, VAT. The taxpayers are the individuals or companies acquiring the assets.

The transfer tax rate depends on the type of asset transferred:

a. Transfer of immovable property

Transfers of immovable property and rights over any property<sup>8</sup> are taxed at the general six per cent rate (ten per cent or 11 per cent in most autonomous regions), except when VAT applies.

b. Transfer of movable property

The transfer tax rate is four per cent when rights over movable property are created or transferred, as well as when administrative concessions are granted. However, the rate is one per cent when *in rem* rights, pensions, deposits and loans are created.

c. Transfer of securities

The transfer of shares and other securities is exempt from transfer tax. However, under section 314 of Royal Legislative Decree 4/2015, of 23 October, on the securities market, a six per cent transfer tax (ten per cent or 11 per cent in most autonomous regions) applies to the transfer of securities of a company whose real estate assets in Spain are more than 50 per cent of its total assets, or whose assets include securities in another company whose real estate assets in Spain are at least 50 per cent of its total assets, if the buyer gets control of the real estate company or increases its controlling stake as a result of the transfer.

## 2. CAPITAL DUTY

Capital duty is only charged on corporate transactions when the company: (1) has its place of effective management in Spain; (2) has its legal seat in Spain; or (3) carries out business in Spain but does not have a place of effective management in an EU Member State that applies a similar tax.

Capital duty applies to capital redemptions and liquidations at a one per cent rate on the value of the net assets distributed to the shareholder, who is the taxpayer. Since December 2010, one per cent capital duty no longer applies to the incorporation of Spanish companies, the transfer of the legal seat of a foreign company to Spain, capital increases or contributions made by shareholders.

## 3. STAMP DUTY

Stamp duty is charged on officially documented acts (ie, notarial, corporate and administrative acts) that are formalised in Spain or have legal or economic effects in Spain.

Stamp duty's fixed rate is €0.30 per sheet of paper and €0.15 per document page. A variable rate is also charged when the officially documented transaction for an amount or object that can be registered in an official register is not subject to transfer tax or capital duty. This variable rate ranges from 0.5 per cent to 1.8 per cent, depending on the autonomous region.

### J. Form 720: Declaration of assets and rights abroad

Tax resident individuals must report their assets and rights located or exercised outside Spain by submitting Form 720 every year.

Form 720 must include information on the following assets and rights held abroad:

- accounts of which the tax resident:
  1. is the titleholder;
  2. is a representative;
  3. is an authorised party or beneficiary; or
  4. has power of disposal over accounts in financial institutions located abroad;
- securities, rights, bonds, loans and similar financial instruments;
- insurance policies and life-long or fixed-period or temporal annuities; and
- real estate located abroad or rights to it.

This obligation to submit information does not apply to assets or rights whose total value is below €50,000. This form must be filed by 31 March on the previous year's assets and rights and in subsequent years only if the value of any of the three categories of assets and rights increases by more than €20,000 over the last filing.

Although Form 720 is merely informative, there are significant penalties for not submitting it or for incorrect, incomplete or late filing, that is, €5,000 for each item or set of data that should have been included, for a minimum of €10,000. However, the fine will be reduced to €100 for each item or set of data, for a minimum of €1,500, when Form 720 has been filed late without any prior request from the tax authorities.

In 2015, the European Commission initiated an infringement procedure against Spain and confirmed that Form 720 breaches EU law in terms of its disproportional fines and the imputation of unjustified capital gains from assets not declared on time.<sup>9</sup>

#### K. *Obligation to declare potentially aggressive tax planning schemes (DAC 6)*

Law 10/2020 implemented Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU on the mandatory automatic exchange of information on reportable cross-border arrangements, known as the 'Intermediaries Directive' or 'DAC 6', transposing it into national law.

Law 10/2020 introduces an additional provision, Law 58/2003, of 17 December, which establishes three new obligations to provide tax information:

1. the obligation to report cross-border tax planning mechanisms in which certain distinctive signs provided by the directive concur;
2. the obligation to update information on cross-border marketable arrangements, that is, those that do not require substantial adaptation for their execution by the taxpayer; and
3. the obligation to report the use in Spain of the above cross-border tax planning mechanisms.

These information obligations fall on the intermediaries and subsidiarily on the interested taxpayers.

Under the provisions of the Directive, there are two types of intermediaries:

- *primary intermediaries*: persons or entities that design, market, organise, make available or manage a cross-border mechanism subject to information communication; and
- *secondary intermediaries*: persons or entities that know or may reasonably be presumed to know that they have undertaken to provide, directly or through other persons, aid, assistance or advice on the design, marketing, organisation, making

available or management of a cross-border mechanism subject to disclosure of information.

As an exception, intermediaries who are subject to the duty of professional secrecy are not obliged to report. This exception applies when the intermediary's participation consists of providing 'neutral' advice on the design, marketing, organisation, provision or management of a reportable cross-border arrangement, that is, when this advice is solely to assess whether such arrangement complies with the applicable regulations, without seeking or facilitating its implementation.

## Notes

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<sup>1</sup> The regions that have regulated de facto couples are Andalusia, Asturias, Aragon, Balearic Islands, Basque County, Canary Islands, Cantabria, Castilla-La Mancha, Catalonia, Extremadura, Galicia, Navarre and Valencia.

<sup>2</sup> The administrative doctrines of the Spanish tax authorities are summarised in their binding tax rulings V1991-08, V0010-10, V1016-10, V2244-10, V2703-13, V1003-14, V0989-14, V0484-14, V1224-14, V1225-14, V1226-14, V0250-15, V1495-16, V0695-17, V1879-17, V2812-17, V0817-18, V0312-19, V0718-19, V3394-19, V0970-20, V2033-20 and V3316-20.

<sup>3</sup> Spanish regulations do not contemplate non non-profit foundations (ie, private foundations).

<sup>4</sup> Capital gains are included in the term 'income'.

<sup>5</sup> The Spanish Accounting Plan is based on the global accounting amendment introduced by Spanish Act 16/2007, of 14 July, which incorporated the provisions of EU Regulations 1606/2002/CE and 1126/2008 (that rewrites EU Regulations 1725/2003, 2086/2004 and 2237/2004), which in turn incorporated the International Financial Reporting Standards by the International Accounting Standards Board. In addition, Spanish Royal Decree 1515/2007, of 16 November 2007, enacted the Spanish Accounting Plan for small and medium-sized enterprises.

<sup>6</sup> Binding ruling V3054-16.

<sup>7</sup> Group I: descendants and adopted children under 21. Group II: descendants and adopted children aged 21 or older, spouses, ascendants and adoptees. Group III: second and third-degree relatives, ascendants and descendants by affinity. Group IV: others.

<sup>8</sup> Except guarantees.

<sup>9</sup> On 15 February 2017, the European Commission sent a reasoned opinion to Spain, requesting that it amend its rules on assets held in other EU or EEA Member States. The reason is that the European Commission considers that Spain is entitled to require information on its taxpayers' foreign assets but not to apply penalties higher than those applied in its domestic framework. By being higher, these penalties were considered to discourage companies and individuals from investing and moving within the single market, which was discriminatory and contrary to the fundamental freedoms of the EU. Spain also infringed the principle of non-discrimination contained in the treaties establishing the union (Treaty on EU (TEU) and Treaty on the Functioning of the EU (TFEU)) by providing higher penalties if assets are located somewhere other than in its own territory.

In 2018, a Spanish court considered the Form 720 penalty regime disproportionate and discriminatory in judgment 01073/2018. Also, in 2019 The Central Economic Administrative Court annulled a Form 720 penalty for the first time.