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Spain

Project Finance

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This country-specific Q&A provides an overview of project finance laws and regulations applicable in Spain.

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Spain: Project Finance

1. What are the typical ownership structures for project companies in your jurisdiction? Does this vary based on the industry sector?

The usual ownership structure for the conduct of project finance in Spain is articulated through a newly created special purpose vehicle (SPV). The reason for the constitution of a new SPV for each project is to limit the liability of the project sponsors, so it is common that the SPV takes the form of a private limited company (*sociedad limitada*) or a public limited company (*sociedad anónima*). When financing a portfolio of assets, a separate SPV will typically own each of the assets, giving rise to either multi-borrower structures, or to a single borrower structure, with separate SPVs set up as subsidiaries of the borrower, each owning one of the projects (with gross guarantees amongst them in all cases).

2. Are there any corporate governance laws or accounting practices that foreign investors in a project company should be aware of?

It should be pointed out that Spanish financial assistance rules are amongst the most restrictive in Europe, with no whitewash procedure. This will be relevant in brownfield transactions, as it will not be possible to encumber the target company's assets to secure the acquisition debt. Also, the Companies Act requires shareholder approval to encumber or sell essential assets of a company.

3. If applicable, what forms of credit support from sponsors or host governments are typically provided?

Full completion guarantees are becoming less common, with lenders relying on the assignment of rights vis-à-vis contractors under the construction contracts. When provided, sponsor guarantees will typically be in the form of first demand guarantees.

4. What types of security interests are available (and suitable) for a project financing in your jurisdiction?

The most common security interests are:

- possessory pledges over shares, credit rights or bank accounts;
- chattel mortgages;
- non-possessory pledges; and
- mortgages over real estate (however because mortgages attract stamp duties, they are seldom granted in project finance).

5. How are the above security interests perfected?

Each type of security is subject to a specific body of law:

- the Mortgage Act for real estate mortgages;
- the Chattel Mortgage and Non-Possessory Pledge Act for these types of security; and
- the Civil Code for other pledges (pledges over bank accounts, receivables or shares).

As a general rule, agreements of creation of security interests shall be executed before a public notary (even in the case of agreements which could qualify as financial collateral, notarization is the norm).

Additionally, mortgages over real estate must be registered with the property registry, and chattel mortgages and non-possessory pledges must be registered with the movable assets registry.

When referring to a pledge over receivables, a notice to the relevant debtor is not mandatory for the perfection of the security, although such notice will be required before enforcement of the same.

Additionally, pledges over shares are annotated in the shareholders' registry book of the issuing company and if share certificates have been issued, these must be endorsed and delivered to the pledgee.

In the case of shares represented by book entries, the pledge must be recorded in the special registry kept by the relevant entity in charge of bookkeeping entries.

6. Please identify how security is enforced (notably the enforcement options available for secured parties) both pre and post insolvency/bankruptcy of the project company?

The general rule is that security is enforced by selling the collateral in a public auction, conducted by a court or a notary public. It is not permitted (except if the security is considered to be financial collateral) to appropriate the collateral in case of default (*pacto comisorio*), but a provision which gives the creditor the right to appropriate the collateral at a fair market value and return the excess to the security provider (*pacto marciano*), is permitted.

Security over bank accounts or receivables is typically enforced by set-off.

Within an insolvency proceeding, security over assets necessary for the continuation of the business can only be enforced once a creditors' agreement is approved (provided that its content does not affect the exercise of these enforcement rights), or after the first anniversary of the declaration of the insolvency (provided that the insolvent is not in the process of being liquidated), or once the liquidation process has been opened and after its first anniversary has passed without the collateral having been enforced.

This general regime does not affect financial collateral.

7. What are other important considerations in relation to the security regime in the jurisdiction that secured parties should be aware of?

The concept of a security trustee is not admissible in Spain. Security must be individually accepted by each individual creditor and enforced by each individual creditor (by itself or through an agent).

Powers of attorney may be granted to an agent to facilitate enforcement. These would be granted before a notary public and if granted outside of Spain, legalised (with the Apostille of the Hague Convention, when applicable).

If the participation in the secured documents is transferred, the security will be automatically transferred to the new creditor.

8. What key project risks should lenders be aware of in project financings in your jurisdiction? This may include, but may not be limited to, the following risks: force majeure, political risk, currency convertibility risk, regulating or permitting risk, construction/completion risk, supply or feed stock risk or legal and regulatory

risk).

Political risk has been notoriously relevant in the renewables energy sector, with several governments implementing retroactive cuts in regulated income/premiums. The sector is stable now, though.

Because of the division of power between the Spanish State and the 17 *Comunidades Autónomas* (Autonomous Regions), permitting can be challenging.

Renewable energy projects with a regulated income must comply with specific construction/permitting milestones to preserve their rights.

9. Are any governmental / regulatory consents required and are any financing or project documents requirement to be filed with any authority in order to be admissible in evidence in a court of law, valid or enforceable?

The consents required for the project will depend on the type of project to be carried out, such as licences of use, operating licences or concessions.

As regards the requirements for the enforcement of the financing documents, no licences are required. Finance contracts are typically notarized, as this gives lenders access to swifter enforcement proceedings.

10. Are there any specific foreign exchange, royalties, export restrictions, subsidies, foreign investment, that are relevant for project financings (particularly in the natural resources sectors)?

The regulation of foreign-direct-investments ("FDI") in Spain is set out in the Law 19/2003 of 4 July on the legal regime on capital movements and foreign economic transactions ("**Law 19/2003**"), developed by the Royal Decree 571/2023 of 4 July on foreign investments ("**Royal Decree on Foreign Investments**"), and the transitional disposition of the Royal Decree Law 34/2020 of 17 November on urgent measures for the support of corporate solvency and of the energy sector and also in tax matters (jointly with the Law 19/2003 and the Royal Decree on Foreign Investments, the "**Spanish FDI Regulations**").

The general rule is that acquisitions by foreign entities are not restricted. In some cases, acquisitions may be subject to administrative authorisation (for instance,

where the target holds an administrative concession, or is subject to a special regulatory regime, as would be the case with banks and financial services companies), but these would apply to both Spanish and international acquirers.

Without prejudice to the above, pursuant to the Spanish FDI Regulations, there are certain investments subject to Spanish FDI monitoring mechanisms ("**Monitoring Mechanisms**"), under which the closing of specific FDI (i.e., the acquisition of at least 10% of the share capital of a Spanish company, or any corporate or legal transaction or business action by means of which a foreign investor acquires the control over a Spanish company) carried out by certain foreign investors requires the prior authorisation from the Council of Ministers.

Pursuant to article 7 bis of Law 19/2003, 2 criteria shall be taken into account in order to determine whether a FDI carried out by a foreign investor is subject to the Monitoring Mechanism: (i) objective criteria relating to FDI sectors such as, among others, critical infrastructure, critical technologies and dual use items, supply of critical inputs, access to sensitive information or media; and/or (ii) subjective criteria relating to FDI investors, regardless of the sector in which they invest, such as, among others, non-resident EU or EFTA investors.

In addition, until 31 December 2024, (I) EU/EFTA residents in countries other than Spain or (II) Spanish residents ultimately owned by an EU or EFTA resident in countries other than Spain, i.e. those in which a non-Spanish EU/EFTA resident ultimately owns or controls more than 25% of the share capital or voting rights of, or otherwise exercises control over, the EU/EFTA resident, will be also subject to Monitoring Mechanisms in the case that they invest in listed companies or more than EUR 500 million in private companies.

11. Please set out any specific environmental, social and governance issues that are relevant. For example, are project companies subject to certain ESG laws, reporting requirements or regulations?

In Spain, following the regulatory development by the European Union (EU) in ESG matters, various rules have been dictated for compliance with the ESG criteria that companies must comply with depending on their activities, size and the person with whom they are related. Rules to be complied with depending on the type of project finance being developed.

Noteworthy in this respect is Directive (EU) 2022/2464 of

the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, which extends the reporting and reporting obligations for compliance with ESG criteria.

12. Has any public-private partnership models or laws been enacted in the jurisdiction, and if so, are they specific to certain industry sectors?

Infrastructure projects have traditionally been developed under concession agreements, with many features of public-private partnerships. PERTEs mentioned in section 16 below will be another example of public-private collaboration.

13. Will foreign judgments, arbitration awards and contractual agreements to arbitrate be upheld?

Judgments given by a foreign court are enforceable in Spain in accordance with Regulation (EC) No. 1215/2012 (when referring to judgments issued by an EU member state court), or according to Spanish civil procedure regulation (when referring to final judgments issued by a non-EU member state), which establishes that any final judgment rendered outside of Spain may be enforced in Spain under the following conditions:

- it is in accordance with an applicable international treaty; and
- in the absence of any such treaty, provided that certain requirements are met (such as that the court that issued the judgment has jurisdiction, the judgment is final and does not contradict Spanish public policy nor previous Spanish resolutions).

In the case of judgments given by a non-EU member state, Law No. 29/2015 on international judicial cooperation includes a 'general principle favourable for cooperation' in respect of the recognition and enforcement of foreign judgments.

In principle, foreign arbitral awards are also enforceable in Spain according to the 1958 New York Convention on recognition and enforcement of arbitral awards.

14. Is submission to a foreign jurisdiction and waiver of immunity effective and enforceable?

According to Regulation (EC) No. 593/2008 (Rome I) on the law applicable to contractual obligations, Spanish courts will recognise any foreign law governing financing agreements, owing to Rome I having erga omnes effects. This means that any foreign law is enforceable, irrespective of whether or not it corresponds to an EU member state and provided that validity of that foreign law is proved within the relevant judicial proceeding; nevertheless, any Spanish public policy mandatory provisions will apply.

The submission to a foreign jurisdiction is valid in Spain provided that the exclusive jurisdiction rules established either in the recast Brussels Regulation ((EC) No. 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Spanish law (as applicable) are complied with.

In the case of security agreements over assets located in Spain or shares of Spanish companies must be subject to Spanish law.

15. Please identify what you consider to be (a) the key current issues for project financing in your jurisdiction; and (b) any emerging trends or topics which should be considered or focused on by project financing stakeholders.

The development of hybridisation projects continues to be a hot topic. This allows the operation of various renewable energy sources, such as wind, photovoltaic or hydroelectric, or the storage in batteries of the energy produced but not fed into the electricity grid due to a lack of demand at the time of its generation.

Because of delays in obtaining construction permits, many renewable energy projects have fallen behind schedule and have had to request extensions of the regulatory deadlines to complete their development milestones.

Data centers are expected to see significant growth, although in some cases grid reinforcements may be required.

16. Please identify in your jurisdiction what key legislation or regulations have been implemented (or will / plan to be) for projects in connection with the energy transition?

Law 7/2021, of 20 May, on climate change and energy transition, aims to promote the decarbonisation of the Spanish economy (achievement of a zero-greenhouse

gas), achieving this goal in two phases by 2030 and 2050.

In turn, as a result of financial aid allocated to Spain to boost recovery by means of the Next Generation EU plan, Royal Decree-Law 36/2020 of 30 December foresees a new type of Strategic Projects for Economic Recovery and Transformation (PERTE) entailing a public-private scheme formula that intends to have an impact in upcoming project financings, provided that the projects are strategic with a high capacity to drive economic growth, employment and competitiveness in the Spanish economy. The creation of a register of entities interested in PERTEs is envisaged to articulate these strategic projects. Royal Decree-Law 36/2020 of 30 December is subject to further regulatory development.

17. Please identify if there are any material tax considerations which need to be taken into account for a project financing in your jurisdiction, and if so, how such tax issues can be mitigated.

Debt funds (both domestic and foreign) which are not regulated financial institutions may be subject to withholding tax on interest and fees received from Spanish borrowers.

When project SPVs are part of a consolidation group for corporate income tax on VAT, contractual provisions involving other entities in the group must be put in place to prevent cash leakage.

As mentioned before, the creation of mortgages is subject to an *ad valorem* stamp duty, as high as 1.5% in some regions, which explain why mortgages are seldom seen in project finance deals (promissory mortgages, which do not create an actual security interest but do not trigger stamp duties, are common).

18. What types of funding structures (e.g. debt, equity or alternative financing) are typical for project financing in your jurisdiction. For example, are project bond issuances, Islamic finance and – in the context of mining deals – streams or royalties, seen as attractive (and common) options for stakeholders?

The most typical type of financing of project finance transactions in Spain is through senior debt and, in some cases, through junior debt in the form of bilateral or syndicated loans. If several lending groups exist, a common terms agreement will typically be put in place,

as well as an intercreditor agreement. Project bonds have been used (senior and junior) but are not common.

19. Please explain if there are any regional development banks or export credit agencies, and if so, what is their role in project financing in your jurisdiction and beyond.

The European Investment Bank is a major player in the Spanish project finance market.

ECAs such as Euler Hermes are also active in the market.

20. Please explain if there are any important insurance law principles or considerations in connection with any project financing in your jurisdiction.

Spanish insurance law is comparable with other European jurisdictions. Insurance coverage will be a key part of the project due diligence and a specific requirement for the commissioning of the project and the release of any completion guarantees.

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