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The Legal 500 Country Comparative Guides

Spain

REAL ESTATE

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

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SPAIN
REAL ESTATE

1. Overview

Spain is a parliamentary monarchy, based on a social representative, democratic and constitutional regime. The head of the state is the Monarch, while the Prime Minister is the head of the Government which is composed of the Ministers who collectively form the Council of Ministers.

Spain has a highly decentralised system of administration with 17 Autonomous Communities or Regions and two autonomous cities, each based on a parliamentary system, where executive power is vested in a regional Government, headed by a president, elected by and responsible to a unicameral legislative assembly.

Most of the Autonomous Communities have their own legislation affecting real estate matters to a different extent (contractual rules, planning laws, environmental regulations, etc.).

Our answers to the questions in this Guide are limited to the regulations passed by the Spanish Parliament.

Our answers to the questions in this Guide refer to commercial real estate.

2. What is the main legislation relating to real estate ownership?

The Civil Code, dated 1889 (as amended and updated over the years), which governs the nature of real estate ownership and interests, third-party interests and rights and different types of contracts over land and real estate assets.

The Mortgage Act, dated 8 February 1946, and Mortgage Regulations, dated 14 February 1947, which establish the main rules for the registration of real estate interests and mortgages in Spain.

The Urban Lease Act, dated 24 November 1994, which governs commercial and residential leases in Spain.

The Horizontal Division Act, dated 21 July 1960, governing the horizontal division regime.

3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

The Right to Housing Act entered into force in May 2023. The Right to Housing Act contains a series of new matters of relevance for various real estate market agents such as major owners, investment funds or developers.

Several of the measures provided for in the Right to Housing Act apply to those who are defined as Major Owners: individuals or companies holding (a) more than 10 urban residential properties, or (b) a built surface area of more than 1,500 sq. m. for residential use, always excluding garages and storage rooms.

The Right to Housing Act contains the following main measures:

- Rent containment measures: these measures apply to housing leases, although a working group is expected to advance a proposal for regulation of commercial leases. These measures include: (i) caps on rent reviews in 2023 and 2024 and the creation of a new benchmark index to replace the CPI by the end of 2024; (ii) extraordinary extension for vulnerable lessees; (iii) costs of real estate management and agreement formalisation shall be borne by the lessor; and (iv) declaration of stressed residential market zones by the Autonomous Communities, extraordinary extension of contracts in stressed zones and caps on the rent of new agreements in stressed zones (these measures in item (iv) will apply only in those

Regions where the relevant Autonomous Community implement them).
- Property Tax ("*Impuesto sobre Bienes Inmuebles*") (see Q. 17) surcharges for houses that remain unoccupied for a term of more than two years and belong to owners of four or more residential properties, if applied by the relevant City Council.
- Social housing measures: the Right to Housing Act introduces also certain amendments with respect to social housing.
- Measures relating to the judicial repossession of housing: (i) new vulnerability parameters are included to identify households requiring special protection in eviction scenarios, (ii) the Right to Housing Act adds new steps in summary repossession processes, possibly pausing the proceedings for two months for individual claimants or four months for corporate claimants, to allow for the implementation of protective measures by the Public Administration, and (iv) procedurally, the Right to Housing Act modifies documentary evidence requirements for property repossession and mortgage foreclosure claims (these new requirements may extend the timeline for preparing and processing such claims, impacting the duration of legal proceedings).
- Amendments of personal income tax (IRPF) regulations: the Act provides for a 50% reduction of rental net income from residential leases, which can be increased up to 90% depending on several criteria (i.e. specific circumstances of lessor, lessee, refurbishment of the dwelling and location of the dwelling).

4. How is ownership of real estate proved?

Spanish law establishes a title registration system for the purposes of providing certainty and publicity as to the ownership of real estate assets. Transfers of real estate assets must be executed in a notarial deed (called "*escritura pública*") before a Notary Public and registered at the relevant Land Registry in order for transfers to be enforceable with respect to third parties. Land Registries provide legal notice of ownership, encumbrances and other matters relating to immovable property. Generally, any acquisition or conveyance of, or encumbrance over, real estate assets not registered at the relevant Land Registry has no effect against *bona fide* third parties. The principle behind this system is to establish an *a priori* control of the legality of actions by private parties in order to ensure certainty of good title in real estate transactions and reduce the possibility of fraud.

As a general rule, the person who registers title first has a better right to the property than anyone registering title thereafter.

It is not compulsory to record ownership of real estate in the Land Registry but it is common to do so due to the reasons explained above.

5. Are there any restrictions on who can own real estate?

No, except in the case of minors and incapacitated persons and certain restrictions or conditions that may apply in certain strategic sectors such as defence or energy.

In addition, the general foreign direct investment ("**FDI**") legal regime was amended as a consequence of the declaration of state of emergency in Spain following the SARS-CoV-2 health crisis with the approval of several laws amending Law 19/2003, of 4 July, on the legal regime applicable to the movement of capitals and foreign economic transactions and on certain measures to prevent money laundering ("**Law 19/2003**"). This new regime subjects certain FDI investments to prior authorization by the Spanish authorities. This new authorisation regime is additional to the already existing obligation to notify foreign investments for statistical purposes and to other sector specific limitations (for instance, those related to the defence or energy sectors). On 1 September 2023, the new FDI Regulation approved by Royal Decree 571/2023, of 4 July, entered into force ("**FDI Regulation**").

The need for prior authorization depends on (a) the definition of FDI, (b) the investment sector, or (c) the objective circumstances of the investor.

For the purposes of FDI screening, the applicable legislation defines investment as follows:

- investment by residents of countries outside the EU and the EFTA, when the investor comes to hold a stake equal to or greater than 10 per cent of the share capital of the Spanish company, or when as a result of the corporate operation, act or legal transaction the investor acquires control of the company, in the terms of the Spanish Defence Competition Act;
- if the investment is carried out by an investor of EU or EFTA nationality but the ultimate controlling parent entity of the investor possessing or controlling, directly or

indirectly, a percentage in excess of 25% of the capital or voting rights of the investor, or otherwise exercising direct or indirect control over the investor is of non-EU or non-EFTA nationality, the investment is also considered investment subject to FDI screening (if the investor will come to hold a stake equal or greater than 10 per cent of the share capital of the Spanish company).

Only investments as defined above in certain sectors or in light of the objective circumstances of the investor, as described below, are subject to prior FDI authorization.

With respect to the sector, the legislation identifies the following five strategic sectors:

- Critical infrastructures, whether physical or virtual (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures and sensitive facilities), as well as land and properties that are key for the use of such infrastructures, understood as those contemplated in Act 8/2011, of 28 April, which establishes measures for the protection of critical infrastructures.
- Critical technology and dual use products, key technologies for leadership and industrial skills, and technologies developed via programs and projects of particular interest to Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace and defence technologies, energy storage, nuclear technology, nanotechnologies and biotechnologies, advanced materials and advanced manufacture systems.
- Supply of essential inputs, energy in particular, understood as that which is regulated in the Act 24/2013, of 26 December on Electricity Sector, and Act 34/1998, of 7 October, on the Hydrocarbons Sector, or those referring to strategic services or connectivity or raw materials, as well as food safety.
- Sectors with access to sensitive information, personal data in particular, or with the ability to control such information, in accordance with Organic Act 3/2018, of 5 December, on Personal Data Protection.
- Communications media.

The investor's objective circumstances refer to whether:

- the foreign investor is directly or indirectly controlled, in the terms of the Spanish Defence Competition Act, by a government, including public bodies or the armed forces, or a third country;
- it has made investments or participated in activities in sectors that affect security, public order and public health in another Member State (the above strategic sectors in particular); or
- if there is a serious risk of the foreign investor exercising criminal or illegal activities, that affect public safety, public order or public health in Spain.

In case any of the foregoing objective circumstances concurs, prior authorization would be required irrespective of the sector.

The FDI Regulation provides for certain exceptions to the need to obtain prior authorisation for certain FDI, including, amongst others, the acquisition of real estate not affected to any critical infrastructure or not considered indispensable or not replaceable for the provision of essential services.

Additionally, since November 2020, EU/EFTA investments are subject to a transitional regime suspending the liberalisation of these investments in Spain. Under this regime, all investments made by residents of EU and EFTA countries that meet the definition of FDI (see above) are subject to prior authorisation of the Council of Ministers if both:

- The investment is in a strategic sector (see above).
- The amount of the investment exceeds EUR500 million (no threshold applies when the target is a listed company in Spain).

The regime also covers indirect investments that allow the investor to acquire control of 10% or more of the share capital or control of the company, acting through a Spanish company in which an EU/EFTA investor holds or ultimately controls, directly or indirectly, more than 25% of the share capital or voting rights, or over which an EU/EFTA investor otherwise exercises direct or indirect control. This transitional regime will last until 31 December 2024, although further extensions cannot be ruled out.

6. What types of proprietary interests in real estate can be created?

There are the following types of proprietary interests:

- *Ordinary ownership*: this entails full ownership over a real estate asset with the owner having

the right to fully and exclusively enjoy and dispose of the asset.
- *Co-ownership*: co-ownership exists when various persons or entities are joint owners of a real estate asset. Co-owners have equal rights to use the entire asset and they have to contribute to the necessary expenses in proportion to their respective interests in the property.

There is a right of partition ("*acción de división*") of the common property, as long as such a partition does not render the property useless. In this latter case, the property would have to be sold and the proceeds distributed among the co-owners in proportion to their shares. The law permits the coowners to enter into an agreement stipulating that they will not divide the property for a term not exceeding ten years, extendable by agreement of the parties.

In addition to the above, co-owners have a legal right of repurchase ("*retracto de comuneros*") over the shares of the other co-owners, in the event that the latter wish to dispose of such shares. This right must be exercised within nine days of learning of the sale or of the registration of the sale by any third party at the Land Registry, whichever happens first.

In general terms, any act of mere administration may be carried out pursuant to a majority decision of the co-owners, but all acts involving an "alteration" to the property (e.g. sale, encumbrance) will need unanimous consent.

The co-ownership may be established by a voluntary act (e.g. by purchasing a property jointly) or, more commonly, by a testamentary provision.

- *Horizontal property*: the so-called "horizontal property" ("*propiedad horizontal*") regime is a very common form of co-ownership of property in Spain, which combines full ownership and common ownership. By means of the horizontal property regime a building is divided into several different units, fully owned by different persons or entities, each of them representing a separate piece of the building, title to which may be registered individually and separately at the Land Registry. The common areas and elements serving the separate units (e.g. corridors, stairways, lobby, elevators, gardens, installations, rooftop, services, etc.) are owned jointly by all owners of the units under a condominium of owners' ("*comunidad de propietarios*") regime.

The "*comunidad de propietarios/propiedad horizontal*" regime must be established in a document (normally executed before a Notary) which will divide the real estate asset into separate units and will describe both the entire asset and each of the individual units. For the document to be enforceable *vis-à-vis* third parties it must be registered at the Land Registry.

In contrast to the co-ownership ("*comunidad de bienes*") regime described in the previous section of this Question, the members of the "*comunidad de propietarios*" do not have a right to request the partition of the property, since it has, in effect, already been divided up. On the other hand, they may sell separately or otherwise encumber their units and the new owner will be subject to the same rights and obligations as the previous owner in relation to the enjoyment of the unit and the common areas.

In order for the owners to manage the entire real estate asset, they may (and normally do) approve the by-laws ("*Estatutos*") establishing the general rules which govern the condominium. The by-laws must be registered at the Land Registry if they are to be enforceable *vis-à-vis* third parties.

According to the law, the condominium of owners is managed by the owners' assembly which will have to approve most actions (repairs, improvements, services, etc.) and service charges. The owners must elect a Chairman from amongst the owners and may appoint a professional manager, with no requirement for the manager to be an owner of any of the units in the building (usually an independent professional is appointed), and whose main obligations are to supervise the upkeep of the common areas and to prepare and submit for the assembly's approval the budget for annual expenses.

Condominiums of owners are not only frequent in the case of residential buildings but also in the case of commercial properties, such as shopping centres or retail parks.

There are other types of tenure (other than ownership) such as ground leases (please see Q. 7), usufructs (please see Q. 14) and leases (please see Q. 18).

7. Is ownership of real estate and the buildings on it separate?

Not unless expressly agreed. Anything existing on the land forms part of it and is transferred with it, unless otherwise agreed.

It is possible to separate ownership of the land and the

buildings by creating a ground lease ("*derecho de superficie*").

The ground lease gives a person the right to build on someone else's land and to have separate ownership of the building for a certain period of time while the owner of the land retains ownership over the plot. In order for the ground lease to be valid and enforceable, it has to be granted in a notarial deed before a Notary Public and registered at the Land Registry (except in Catalonia where it is enough with the notarial deed). The different Administrations (Local, Regional and State) routinely use this system to promote building, especially in business or industrial parks, by granting a ground lease to private developers to build on land owned by the Public Administration.

The maximum term of a ground lease is 99 years.

Upon expiry of its term, the owner of the land will retain ownership of everything that may have been built upon the land without having to compensate the grantee.

8. What are common ownership structures for ownership of commercial real estate?

Commercial real estate can be held directly by individuals or through entities, although it is more common for high value commercial assets to be held through specifically created structures.

Common ownership structures include:

- Limited liability companies; and
- SOCIMIs (Spanish REITs).

Limited liability companies: Sociedades Anónimas ("S.A.") and Sociedades Limitadas ("S.L.")

The S.A. and the S.L. are the most frequently used corporate vehicles in Spain. Both companies operate in a similar way, although the S.L. requires fewer formalities.

Limited liability

In both companies, the liability of the shareholders or members is limited to the stake held in the share capital of the company.

Share capital

The minimum share capital for an S.A. is 60,000 euros, and at least 25% of this amount must be paid up upon incorporation. In the case of an S.L., the minimum share capital is 1 euro, which must be fully paid up upon incorporation. Contributions of assets can be made both to an S.A. and an S.L. If the contribution in kind is made to an S.A., an independent expert valuation is mandatory, whereas in an S.L. the independent expert valuation is optional.

It is common for companies incorporated as investment vehicles to have a relatively low share capital and to capitalise through shareholder loans, so as to minimise as far as possible the Company's Corporate Income Tax ("**CIT**"). Although there is no thin capitalisation rule under Spanish tax legislation (i.e. no specific debt to equity ratio is required), earning stripping rules and transfer pricing rules apply as regards tax deductibility of net financial expenses.

As a general rule, net financial expenses incurred by Spanish entities would be deductible for tax purposes up to an amount of 30% of their operating profit (EBITDA) for the financial year. In any event, an expense amount of 1 million euros would always be deductible (if incurred).

In the case of entities belonging to a tax consolidated group, the 30% limit and the 1 million euros threshold would refer to such tax group.

Please note that additional limitations exist in the case of LBO transactions (i.e. acquisition of an entity and subsequent merger or subsequent application of the CIT consolidation regime).

Furthermore the difference between the 30% limit and the net financial expenses for the tax period could be accumulated (i.e. added to the 30% limit) in the tax periods ending in the following five years.

Lastly, it should be noted that any net financial expenses not deducted for tax purposes may be deducted in the following tax periods, provided that the 30% limit is complied with in such years.

In addition to the above, fair market conditions and strict documentation obligations should be observed as regards any indebtedness incurred with related parties. In particular, the taxpayer would be obliged to carry out a comparability analysis in order to determine a fair market value of the remuneration agreed under the relevant transaction.

Please also note that interest derived from Profit Participating Loans granted as from 20 June 2014 by companies which belong to the same corporate group (regardless of their tax residence) are not deductible for CIT purposes.

Formalities

Companies are incorporated through deeds granted

before a Notary Public, including the company by-laws. In general, such incorporation requires: (i) evidence via a bank certificate that the share capital has been paid up (when it is paid up in cash), (ii) an attorney with sufficient powers to appear before a Notary Public to incorporate the company, (iii) a certificate showing that the corporate name of the company is available and has been reserved, and (iv) obtaining a tax identification number (known as "NIF").

The procedure to incorporate an S.L. can be made online as long as the initial contributions of the shareholders are not made in kind (i.e., they are fully paid up in cash).

Period before the company may operate

The company can operate as soon as its public deed of incorporation has been granted. However, it does not acquire its full corporate form until it is registered with the corresponding Commercial Registry. The period for such registration varies from province to province, but tends to be approximately three weeks as from its filing at such Registry.

The acquisition of a property by a company which has been incorporated but which is pending registration with the Commercial Registry is valid. However, the individuals acting on behalf of the company (and the shareholders of the company) will be considered jointly and severally liable with the company for such action until the company is registered with the Commercial Registry. In addition, the sale and purchase of the property will not be registered with the Land Registry until the company is registered with the Commercial Registry.

Directors and company representation

A company can be managed and represented by a sole director, joint directors, joint and several directors or a Board of Directors. The directors may be entities or individuals of any nationality and do not need to reside in Spain. Please note that if the director is a foreign person, he/she will have to obtain a Spanish tax identification number (known as "NIE"). Certain formalities have to be fulfilled in order to obtain a NIE. Should the director be an entity, it will need to hold a Spanish tax identification number ("NIF") and appoint an individual as representative (who will be liable on the same terms as a director and who will need to hold a NIE if he/she is a foreign person).

The post of director may be remunerated or not, depending on the provisions of the company's by-laws. The law establishes certain cases of incompatibility with respect to the exercise of the post as director of a company, usually referring to persons in public office.

Directors are subject to liabilities as established by law, which may be covered by D&O insurance policies.

When the company is managed by a sole director or by joint and several directors, each director can bind the company acting individually without distinction, as opposed to joint directors, who must act together. When the company is represented by a Board of Directors, the post of member of the Board of Directors does not imply *per se* any capacity to represent the company, although a Managing Director may be appointed to perform the same duties as those of the Board, save for those which may not be delegated by law.

Tax

The incorporation of a company, as well as any increase of its equity (i.e. share capital, share premium, other shareholder contributions to equity) are subject to but exempt from Capital Duty Tax ("*Impuesto sobre Operaciones Societarias*").

On the other hand, any decrease of share capital where previous contributions are reimbursed to the shareholders are subject to Capital Duty Tax (to be paid by the shareholders) at a 1% rate on the market value of the assets/rights reimbursed.

Under certain circumstances, some investors consider it appropriate to issue shares with a share premium, so as to reduce such Capital Duty on the return of funds to shareholders, since the return of share premium is not subject to such Capital Duty Tax.

SOCIMIs:

Spanish Real Estate Investment Trusts (or the Spanish acronym SOCIMIs) are special legal and tax investment vehicles specifically devoted to real estate assets that generate rental income.

Spanish SOCIMIs will be subject to a 0% Corporate Income Tax (CIT) rate subject to a mandatory annual dividend distribution of profits. Accordingly, rental income and capital gains generated by SOCIMIs will be taxed at a 0% CIT rate, provided that the real estate assets are owned for a minimum of three years as from the date of application to adhere to the SOCIMI regime.

The legal requirements of SOCIMIs are as follows:

Requirements	SOCIMIs
Legal form	Sociedad Anónima (S.A.)
Shares	Shares must be nominative (not in bearer form) and must belong to the same class
Minimum share capital	5 M euros
Mandatory listing	Yes, also permitted in multilateral trading facilities within the EU (BME Growth, Portfolio Stock Exchange, Euronext Access, etc.)
Corporate object / Qualifying assets	a) The acquisition and development (including refurbishment) of urban real estate for rental purposes. b) The holding of registered shares in the capital stock of Sub-SOCIMIs: non-listed companies – regardless of whether or not they are tax resident in Spain – whose primary corporate object is the acquisition of urban real estate for rental, and which are subject to equivalent investing, income distribution and leverage requirements.
Investment requirements (asset & income test)	**Asset test** At least 80% of the SOCIMI's assets must consist of "Qualifying Assets": a) Urban real estate for rental purposes. b) Shares in similar entities (i.e. other SOCIMIs, SUB-SOCIMIs, international REITs or real estate collective investment schemes). **Activity test** At least 80% of the SOCIMI's annual revenues must derive from the lease of Qualifying Assets, or from dividends distributed by qualifying subsidiaries (Sub-SOCIMIs, foreign REITs and real estate collective investment schemes). Lease agreements between related entities would not be deemed a qualifying activity and therefore, the rent deriving from such agreements cannot exceed 20% of the SOCIMI's total revenue. Capital gains derived from the sale of Qualifying Assets are in principle excluded from the 80/20 revenue test. However, if such Qualifying Asset is sold prior to the minimum three-year holding period, then (i) the capital gain would compute as non-qualifying revenue; and (ii) it would be taxed at the standard corporate income tax rate (25%). Furthermore, the entire rental income derived from this asset would also be subject to the standard CIT rate (25%).
Holding period of the assets	Qualifying Assets must be owned by the SOCIMI for a three-year period since (i) the acquisition of the asset by the SOCIMI, or (ii) the first day of the financial year that the company became a SOCIMI if the asset was owned by the company before becoming a SOCIMI. In the case of urban real estate, the holding period means that these assets should be rented; the period of time during which the asset is on the market for rent (even if vacant) will be taken into account, subject to a maximum of one year. If the holding period is not maintained, the SOCIMI will be taxed at a 25% CIT rate for any kind of income related to such asset, during its entire holding period, together with the accrued default interest.
Mandatory distribution of dividends	a. 80% as a general rule (rental income) b. 50% of the profits derived from the sale of Qualifying Assets. Any excess amount must be reinvested within the following three years. If no reinvestment is made, 100% of the profits should be distributed. c. 100% of dividends distributed by the SOCIMI's subsidiaries

9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

The normal procedure for acquiring a property, especially when dealing with complex transactions, tends to commence with the execution of certain preliminary documents known as letters of intent ("*carta de intenciones*") or heads of terms. Through such documents, the parties, without binding themselves, state their will to enter into negotiations and outline the timeframe and the terms of the due diligence process and the transaction. Despite the fact that letters of intent and heads of terms are usually prepared as non-binding documents (except for certain specific clauses such as, for example, those on exclusivity, confidentiality and non-competition), the breach of such preliminary agreements may give rise to pre-contractual liability for the party which unjustifiably breaches the agreement and causes damage to the other party which was relying on a future agreement (provided the breaching party has induced the non-breaching party to believe it was committed to completing the transaction).

Subsequent to the letter of intent or heads of terms, it is common practice for the purchaser to carry out an audit on the property, to review legal, technical, environmental, commercial (such as rental streams) aspects, etc., depending on the type of real estate asset in question.

The legal audit of a property is based both on the documentation provided by the vendor, usually through a virtual data room, as well as the verifications made by the purchaser's lawyers in public registers (Land Registry, Cadastre, etc.) and information from city councils. Two typical documents that are obtained from public registries and city councils in a legal due diligence process are as follows: (i) Land Registry extracts (the cost is not significant and it takes around 2-3 business days), and (ii) planning certificates (the cost is not significant and the time to obtain them depends on each municipality but it can be a lengthy process (e.g. three months)).

The legal due diligence generally covers the following aspects:

- title and charges;
- lease agreements;
- third-party rights;
- condominium of owners, if applicable;
- urban planning aspects: planning status and licences;
- contracts related to the property (construction, supplies, maintenance, insurance, management, other services, etc.);
- judicial or administrative proceedings related to the property;
- municipal taxes;
- payment of service charges and other costs; and
- intellectual property matters, if applicable.

Where a property is sold by way of a transfer of the entity or structure through which it is held, the process is typically the same but with additional due diligence regarding the relevant entity or business (including corporate, tax, employment and financial matters, contracts with third parties, etc.).

The legal due diligence is normally carried out by the purchaser's legal counsel (i.e. the Notary does not carry out the due diligence). However, in certain cases (such as when the vendor is selling complex or numerous properties via a competitive bid process), the vendor may decide to instruct its lawyers to prepare a due diligence report in order to speed up the sale process or to avoid numerous bidders having to carry out the same due diligence. In this case, the vendor's lawyers may issue a reliance letter on the due diligence in favour of the purchaser.

Notwithstanding the due diligence which may be carried out by the purchaser, it is standard practice for the vendor's legal liability (which only covers title and hidden defects) to be replaced or complemented by a series of contractual representations and warranties provided by the vendor in favour of the purchaser. Such representations and warranties are often qualified by the information disclosed during the due diligence process and the vendor's liability arising from said representations and warranties is often limited in time and up to certain amounts.

10. What legal issues (if any) cannot be covered by usual legal due diligence?

The purchaser's legal due diligence does not usually cover building control, health and safety or environmental issues, requiring specialists and experts to be employed.

In addition, there are some land interests that bind a purchaser even though the interest is not registered at the Land Registry, known as "apparent easements" and also there could be certain occupancy contingencies (e.g. squatters) which, as lawyers do not generally inspect properties, would have to be verified by the purchaser itself.

11. What is the usual process for transfer of commercial real estate?

Transaction Steps	Vendor	Purchaser	Comments
Heads of terms or letter of intent ("HoT")	• Prepare and negotiate the HoT • Produce information pack comprising title documents and property information (e.g. if property let, leases and ancillary documentation, planning, licences, municipal taxes)	• Negotiate HoT • Appoint advisers	• No prescribed form of agreement but market standard terms • HoT not binding save for agreed exclusivity and confidentiality provisions (for potential pre-contractual liability matters please see Q9 above) • Most information packs are hosted on virtual data sites
Preparation of sale and purchase agreement	• Prepare draft of private sale and purchase agreement (in case there is signing and closing) • Prepare any ancillary documents (e.g. notifications to third parties, condominium of owners, etc.) • Negotiate agreement	• Carry out legal due diligence (see Q9) • Negotiate agreement and ancillary documents	• No prescribed form of agreement but market standard terms • In some cases the agreement and/or ancillary documents are drafted by the purchaser's lawyers • In some cases the transfer of the property is completed in a single stage (only closing, without signing a private sale and purchase agreement)
Signing	• Execute the private sale and purchase agreement	• Execute the private sale and purchase agreement • Pay part of the purchase price to the vendor (or escrow part of the purchase price)	• Part of the purchase price is typically paid on signing (or escrowed), which will be forfeited if the purchaser fails to complete the acquisition (unless failure was due to the vendor)
Signing to closing	• Prepare draft notarial transfer deed • Fulfilment of any vendor's conditions prior to closing • Agree arrangements with current lender for discharge of mortgage upon closing (if applicable)	• Arrange funding including third-party debt (if applicable) • Fulfilment of any purchaser's conditions prior to closing	• In some cases the acquisition documentation is drafted by the purchaser's lawyers and it is agreed before signing so that the agreed drafts are attached to the private sale and purchase agreement.
Closing	• Execute the notarial transfer deed • Use price (or relevant part of it) to pay off existing debt (if applicable) • Execute the cancellation of mortgages deed (if applicable) • Delivery of the asset to the purchaser (which usually occurs symbolically)	• Execute the notarial transfer deed • Pay the purchase price • Execute any third-party financing documents (including mortgages)	• Documentation to be formalised before Notary Public and to be filed at the Land Registry for registration • All parties to attend the closing at the Notary's office appropriately represented by means of duly executed powers of attorney (i.e. notarised and apostilled if any party is a non-Spanish entity)
Post-closing	• Pay fees related to the cancellation of mortgages. • Pay Tax on the Increase in the Value of Land of an Urban Nature • Transfer tenants' rent deposits and any other tenant's guarantees to purchaser	• Apply to Land Registry to register the property transfer and the new mortgage (as the case may be) • Serve all notices of transfer (to tenants, guarantors under the leases, to any condominium of owners, City Councils, etc.) • Pay relevant taxes (Stamp Duty / RETT) • Pay the Land Registry fees	• It is standard practice for the purchaser to pay the notarial fees (which can be negotiated with the Notary) but this is subject to agreement between the parties • Registration takes between 15 days and two months.

12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Both asset transfers and share transfers are common, depending on many circumstances.

There is often a tax advantage in transferring the interests in a company (share deal) rather than the underlying real estate (asset deal). For instance, the following reasons may be an incentive for vendors to divest through a share deal:

i. Latent gains linked to the underlying asset (calculated as the difference between the market value of the asset at the time of the transfer minus its acquisition cost) do not materialise since there is no direct transfer of the asset.

ii. Local Tax on the Increase in Value of Land of an Urban Nature ("*Impuesto sobre el Incremento del Valor de los Terrenos de Naturaleza Urbana*") does not materialise since there is no direct transfer of the asset.

iii. Under certain circumstances, the capital gains arising from the transfer of the shares may not entail effective taxation or may entail a reduced taxation in the case of the vendor provided that (a) the vendor is entitled to apply the provisions of the Spanish participation exemption regime (this regime allows a 95% exemption as of 1 January 2021 -previously, there was a 100% exemption-) or (b) the vendor is entitled to apply the provisions of a specific Double Tax Treaty which prevents Spain from taxing capital gains arising from share transfers (even in the case of real estate underlying assets).

In our experience, it is common practice that, under a share deal scenario, seller and purchaser agree to share the above-mentioned latent gains of the underlying real estate asset for both Corporate Income Tax and Local Tax on the Increase in Value of Land of an Urban Nature purposes. Although it obviously depends on the bargaining strength of seller and purchaser on a case by case basis, in our experience it is common that such latent gains are shared 50% by seller and 50% by purchaser through a reduction of the purchase price of the shares.

13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

In general terms, occupational leases (and related income) are transferred with the sale of the commercial real estate, unless it is agreed otherwise in the lease agreement or if the purchaser can demonstrate that it had no knowledge of the existence of the lease at the time of acquisition and intends to terminate the lease based on such lack of knowledge (and provided the lease agreement is not registered in the Land Registry).

14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

A wide variety of rights, interests and burdens can be created or attached to real estate. Some of the key interests are:

Easements: An easement is a charge over a real estate asset, which limits in a certain way such asset for the benefit of another asset or person. Easements are rights that run with the land.

Easements can be created by law or contractually. Examples of easements imposed by law are: (i) the limitation pursuant to which the owner of a building is prohibited from installing windows, balconies or similar constructions that would face directly onto an adjacent plot of land unless there is a minimum distance between them, and (ii) the restriction which only permits the installation of windows or openings in a wall adjacent to another building at roof-level height in order to receive light. It should be noted that the majority of legal easements do not need to be created by any particular act and therefore may not be revealed through a title search at the Land Registry. Contractual easements can be of many types and content (of access, of well, sewage, etc.); they should be formalised by means of a notarial deed executed before a Notary and registered at the Land Registry in order to be enforceable *vis-à-vis* third parties (unless they are apparent).

Mortgages: This is the most common type of guarantee, used as assurance of payment of all types of loans or credit lines normally connected to the purchase and/or development of real estate. Please see Q. 23 for a more in-depth explanation about mortgages in Spain.

Usufructs: Usufructs give a person the right to use and profit from someone else's property. This right may be granted by an *inter-vivos* or *mortis causa* act or by law. It may also be obtained by adverse possession. Usufructs are temporary rights granted for a specific period of time. They may be transferred but the grantee of the usufruct can only transfer his/her own limited title for the remaining unexpired period of the usufruct.

The beneficiary of a right of usufruct is generally entitled to appropriate the land's profits (e.g. the crops or the rent in leased premises). He/she may not make alterations to the property, unless specifically authorised. As to repairs, generally, ordinary repairs are the grantee's responsibility and exceptional ones must be carried out by the grantor of the usufruct.

Option to purchase right: An option to purchase right gives a person or entity the right to acquire a property within certain period of time, being the vendor obliged to transfer the relevant property. For the option right to be enforceable *vis-à-vis* third parties, it should be registered at the Land Registry, which would require the parties to execute a notarial deed specifying both the purchase price as well as the period in which the option has to be exercised, which cannot be longer than four years. Should the purchase option be registered, and the grantor sells the property to a third party other than the opting party, the latter may exercise its right *vis-à-vis* the new owner, whereas if it were not registered, the opting party may claim liability from the grantor of the option.

Lease agreements: Please see Q. 18.

Ground lease: Please see Q. 7.

15. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

No, this kind of structures is not recognised under Spanish law.

16. Is public disclosure of the ultimate beneficial owners of real estate required?

Public Notaries in Spain, amongst others, are obliged to identify the ultimate beneficial owner of any entity granting a public deed for the purposes of executing a transaction. This applies to any public deed to be executed for the transfer of properties or entities holding properties.

The ultimate beneficial owner is defined as:

(i) the individual on whose behalf a transaction is being executed;

(ii) an individual who owns or controls directly or indirectly more than 25% of the relevant company's shares or its voting rights or that has the direct or indirect control of the management of such company by any other means. If there is no such direct or indirect ownership or control by an individual, the Spanish legislation states that it will then be considered that the members of the management body of the relevant company are the ultimate beneficial owners (unless proven otherwise); or

(iii) an individual holding or controlling 25% or more of the assets of a legal instrument or legal person managing or distributing funds or, when its beneficiaries

are to be designated, the category of persons in whose benefit such legal instrument or legal person acts or has been created. If no such individual exists, the ultimate beneficial owners will be deemed to be those individuals that are ultimately responsible for the direction and management of such legal instrument or legal person, even through a control or ownership chain.

Stock listed companies subject to transparent information rules are exempted of the obligation to declare the ultimate beneficial owner.

The identification of the ultimate beneficial owner may be carried out by a responsible statement of the representative of the relevant company through the execution of an independent public deed. However, under certain circumstances the Notary may have to obtain evidencing documentation of the ultimate beneficial owner.

In addition, Spanish companies must state who their ultimate beneficial owner is when filing their annual accounts with the Commercial Registry. This information is filed at the Spanish Registry of Ultimate Beneficial Ownership ("*Registro Central de Titularidades Reales*" or RCTIR).

17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Real estate activities in Spain are subject to direct taxation on profits obtained, and to indirect taxation on the possession of real estate assets and transactions related thereto.

Direct Taxes

Corporate Income Tax ("CIT")

Spanish Corporate Income Tax ("CIT") is a tax on profits earned by:

- Companies resident in Spain on all income earned from their operations whether arising inside or outside Spain, at a rate of 25%;
- Non-Spanish tax residents acting through a Spanish permanent establishment, at a rate of 25%; and
- Non-Spanish tax residents acting without a Spanish permanent establishment: Non-Residents Income Tax rate of 24% or 19% (depending on the specific nature of the income) which can be reduced by virtue of Double Tax Treaties / EU Directives.

There are "participation exemption" provisions for Spanish tax-resident companies on dividends received and gains on sales of subsidiaries (Spanish or non-Spanish), but subject to certain conditions. Please note that this is a 95% exemption as of 1 January 2021 (previously, there was a 100% exemption).

There is a Corporate Income Tax consolidation regime (a minimum participation of 75% is required).

Please see Q. 8 for further details on Tax deductibility of financial expenses.

Individuals' Income Tax

Generally tax-resident individuals are taxed on worldwide income and gains.

Non-Spanish tax residents are taxed on activities of Spanish permanent establishments or Spanish-source income.

Spanish tax-resident individual investors: Dividends and capital gains tax rates range between 19% (up to 6,000 euros), 21% (6,000 euros to 50,000 euros), 23% (50,000 euros to 200,000 euros), 27% (200,000 euros to 300,000 euros) and 28% (above 300,000 euros).

Indirect Taxes

Value Added Tax ("VAT")

Transfer of Properties

Any transfer of real estate assets is always subject to either Value Added Tax ("VAT") or Real Estate Transfer Tax ("RETT"), the application of one excluding the other. The basic difference lies in the fact that, whereas the VAT borne by a company in a transaction may be deducted from the VAT incurred or to be incurred by such company in its other business activities, the RETT is not directly tax-deductible, although in accordance with the increase in price of the asset acquired, it may be considered an expense via the amortisation of the aforementioned asset.

The following real estate transactions are subject to VAT:

(a) sale of new constructions;

(b) sale of plots suitable for construction; and

(c) sale of properties to be refurbished or demolished. In the former case, the purchaser must invest in the refurbishment an amount exceeding 25% of the purchase price of the building.

In the remaining cases, the purchase is always subject to

RETT instead of VAT; in this way, the second and subsequent handovers of any property are in principle exempt from VAT and, therefore, subject to RETT. However, this exemption may be waived, the transaction thus being subject to VAT (hence excluding the RETT) when the purchaser is a taxpayer performing a business or professional activity and is entitled to the total deduction of the VAT borne in the transaction.

The general VAT rate is 21%.

It is worth pointing out that when a transaction is subject to VAT, it will also be subject to Stamp Duty ("SD"), provided the transaction is formalised through a public deed and may be registered at the Land Registry, as is usually the case. The general SD rate is between 0.5% and 2%, depending on the Autonomous Community where the asset is located. Finally, it should be mentioned that if the VAT exemption mentioned above is waived, a higher rate of SD is applicable which, depending on the corresponding Autonomous Community, may vary between 0.5% and 3%.

Lease of Properties

In general, the lease of properties is subject to Value Added Tax at the rate of 21%.

However, leases whose object consists of buildings or parts thereof exclusively used for housing, including accessory garages and annexes and furnishings leased jointly with such buildings, are exempt from Value Added Tax.

In both cases, such exemption is not applicable to leases with a purchase option, provided that the transfer of the asset would have been subject to VAT.

Real Estate Transfer Tax ("RETT")

General Rules

RETT is applied to real estate transactions other than those mentioned in the foregoing section, and in particular to (i) second and subsequent transfers of properties once their construction has concluded (unless there is a waiver of the VAT exemption, as mentioned above), (ii) the sale of land not classified as plots for construction pursuant to urban development regulations and (iii) the transfer of real estate assets within the framework of the transfer of a going concern ("*unidad económica autónoma*") for VAT purposes.

The RETT general rate is 7% but it may range between 6% and 11% depending on the Autonomous Community where the real estate asset is located.

Transfer of Shares

On a general basis, the sale of shares will be exempt from RETT / VAT if the asset is used for an economic activity.

Local Taxes

Property Tax ("PT")

PT ("*Impuesto sobre Bienes Inmuebles*") encumbers the ownership of properties of a rustic or urban nature, the ownership of an *in rem* usufruct or ground lease over such properties or the ownership of an administrative concession over such assets or over the public services to which they are subject. The taxpayer is the owner of the property or the holder of such rights or administrative concessions. The taxable basis of the PT, which is due on an annual basis, is determined by the cadastral value, which includes the land value plus that of the constructions thereon. Applied to such a basis are the taxation rates of 0.4% for urban land and 0.3% for rustic land, although these rates may be increased by each City Council depending on the population and other specific circumstances of the municipality.

Tax on the Increase in the Value of Land of an Urban Nature

This tax is collected as the result of the transfer of the ownership of urban land by any title and the granting or transfer of any *in rem* right of enjoyment, restricting ownership, over such land. The party obliged to pay such tax is the transferor of the land or the person granting and transferring the *in rem* right of enjoyment, when the transfer is for value.

In fact, this tax does not encumber the capital gains earned by the vendor, but rather is calculated on the increase of the cadastral value, adding thereto, at the time the tax falls due, a certain percentage established by the City Council depending on the number of years elapsed since the previous transfer (which cannot be more than 20 or less than 1).

This local tax has been recently subject to significant dispute within the Spanish tax system, as the Spanish Constitutional Court (*Tribunal Constitucional)* recently declared unconstitutional part of the regulation of this local tax referring to the determination of the tax base (based on the land's cadastral value during the year of sale and the holding period), irrespective of the fact that there is no real gain (or even a loss) on the assets.

As a result, the Spanish tax legislator has stated that this tax shall only be triggered in cases where an actual gain related to the land has arisen.

Other local taxes

City Councils may also subject acts regarding the use and exploitation of the property to taxation, amongst which it is worth mentioning the Tax on Constructions, Installations and Works ("*Impuesto sobre Construcciones, Instalaciones y Obras*"), which encumbers the performance of any construction, installation or works for which urban development or works licences are required. Moreover, the granting of other licences might constitute a further taxable item, such as, for instance, the obtaining of the so-called opening licence.

Business Activity Tax ("*Impuesto sobre Actividades Económicas*") is another local tax on the mere performance of economic activities. As a general rule, the company may be obliged to register for the purposes of this Business Activity Tax and pay the relevant tax due, which would be determined according to the item corresponding to the relevant activity (i.e. item 833 if the company performs development works on the real estate assets and item 861 in the case of leasing activities). The local regulations of the City Council corresponding to the real estate assets' location will always have to be observed.

18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The Spanish Law on Urban Leases ("*Ley de Arrendamientos Urbanos*") (LAU) clearly differentiates between leases for housing, whose regulations are protective towards the tenant, and those for any other non-residential use (such as the leasing of business or retail premises, offices or industrial warehouses), whose regulations are based on the free will of the parties.

In non-residential lease agreements, the parties may freely agree the majority of the aspects of the lease relationship. In the absence of any express agreement, the regulations of the LAU and, supplementary, the Civil Code, are applied. The common terms of commercial occupational leases are set out below.

Term: there is no legal maximum or minimum duration. The term will be agreed by the parties, with an initial period being possible subject to extensions. There are no statutory rights regarding renewal except for tacit renewal if the tenant continues in the leased premises for 15 days after the lease term expires with the landlord's acquiescence (tacit renewal is normally excluded by the agreement of the parties).

Rent: currently, there are no regulatory controls as to the amount of the rent. Rent is usually payable in advance and on a monthly basis. A variable rent may be agreed (established, for instance, on the basis of the tenant's turnover) in addition to a minimum guaranteed rent.

Rent review: currently, there are no regulatory controls as to when or how the rent may be increased, and the parties are free to determine the type and frequency of the review. There are several possible types of review. The most common review mechanism is annual rent review according to Consumer Price Index (CPI) variations. It is also common to agree other mechanisms such as market rent review and step rent.

Service charges: there are no regulatory controls in a commercial context and the parties are free to agree what items will be passed down to the tenant. It can be agreed that the tenant pays all costs related to the property, such as condominium or general service charges, taxes and insurance corresponding to the property, and all repair, replacement and decoration costs. It is also possible to agree that the tenant will be responsible for the maintenance costs of the structure of the leased property, although such agreement is not common.

Uses: leases usually restrict the tenant's ability to change the use of the premises.

Repairs: the parties are free to agree who is responsible for each type of repair; the landlord being legally obliged to carry out any repairs which may be necessary for continuance of the corresponding use of the leased property.

Preferential acquisition right: the tenant has a preferential acquisition right over a leased property in the event of the sale of such property. However, it is common for the tenant to waive such right upon executing the lease agreement. On acquiring leased premises, it is particularly important to verify whether or not the relevant tenants have waived such preferential acquisition right.

Assignment and sub-leasing: unless otherwise agreed, when a business or professional activity is carried out in the leased property, the tenant may sub-lease the premises or assign the lease agreement without the landlord's consent, although the latter will be entitled to increase the rent by 10% in the case of a partial sub-lease, and by 20% in the case of the assignment of the agreement or total sub-lease. In the event of the merger, spin-off or transformation of the tenant, the landlord will also be entitled to increase the rent by 20%.

It is common practice in commercial leases to exclude

the application of these provisions and to establish other rules such as: the prohibition to assign and/or sublease, the prohibition to assign and sub-lease except in favour of companies within the tenant's group, etc.

Clientele compensation for the tenant: if the tenant has been carrying out business activities in the leased property over the last five years, involving sales to the public and, upon expiry of the term of the lease agreement, the landlord decides not to extend it, despite the express request of the tenant to do so (for five additional years) and his/her acceptance to pay market rent, the landlord may be obliged to pay the tenant a compensation. The amount of any such compensation depends on various circumstances, but it could amount to 18 months of rent. The right to such compensation may be waived by the tenant.

Registration of the lease in the Land Registry: it is possible to register the lease agreement of a property in the Land Registry, although this is not common practice as it would trigger Notarial and registration fees together with Stamp Duty.

Tenant's guarantees: it is mandatory by law for the tenant to provide an amount equal to two months' rent as security for the fulfilment of all its obligations. In most of the Spanish Regions, such amount should be deposited by the landlord with a public entity during the term of the lease. Other types of guarantees (i.e. bank guarantee, corporate guarantee, etc.) may be agreed by the parties to the lease.

19. How are use, planning and zoning restrictions on real estate regulated?

Urban development

Anyone thinking of investing in real estate in Spain must bear in mind the existence of a complex system of laws and regulations adopted by the State, the Autonomous Communities and the Municipalities relating to urban development, i.e. the transformation, construction and use of land.

According to the Spanish Constitution, the Autonomous Communities hold exclusive powers with respect to planning, meaning that they are entitled to approve laws and regulations on this matter that will have to be complied with by the Municipalities when approving their respective urban development regulations. Regional laws and regulations on planning, amongst others, govern types of zoning plans, land classification, uses of the land, rights and obligations of owners of the land subject to zoning procedures, assignment of land in favour of the Municipality, and construction licences.

However, although the Spanish State does not hold any powers with regard to planning matters, due to the fact that they affect ownership rights, it has passed legislation on ownership and valuation of land. In light of the provisions established in both the laws and regulations approved by the Autonomous Communities and the Spanish State, both the Autonomous Communities and Municipalities approve plans governing zoning and planning matters within the boundaries of their territories.

Municipalities are entitled to define the classification and qualification of their land in the terms established in the regional laws and regulations. The General Municipal Plan is the regulation which establishes the classes of land and the possible uses. The General Municipal Plan is initially and provisionally approved by the City Council, but it is finally approved by the Administration of the relevant Autonomous Community where the Municipality is located. The inclusion by such General Plan of a certain plot within a category of land is of tremendous importance from the perspective of the rights held by its owner as regards its urban development use, especially in respect of the construction of buildings on such plot. In general terms, legislation of Autonomous Communities classify the land in three categories:

- *Urban land* (*suelo urbano*): this is land which has already been built upon and is integrated into the urban area, with all the basic zoning services (mainly roads, water and energy supply and sewage systems) or may be built upon or transformed as it has the urbanisation infrastructures and equipment necessary for its corresponding urban development use (i.e. access, water supply, drainage and electricity supply). For land to be granted this category it has to be urbanised beforehand, so that basic services can be provided thereto and it can be classified according to the General Plan. Usually, the General Municipal Plan will establish the uses and constructing parameters applicable to urban land. Otherwise, the Municipality will have to approve regulations further implementing it and, where necessary in this class of land, adopt decisions to redistribute ownership rights and assign responsibilities, as well as authorising the urbanisation measures required for the implementation of basic zoning services.
- *Land suitable for urban development (suelo urbanizable):* land considered necessary by the Municipality to guarantee the growth of the population and economic activities. This land does not bear any zoning services and is

not considered "*solar*", that is, land suitable for urban development. In order to transform this type of land into urban land, the Municipality will have to approve regulations implementing the General Municipal Plan, approve decisions to redistribute ownership rights and assign responsibilities, as well as authorising the urbanisation measures required for the implementation of basic zoning services.
- *Non-buildable or rustic land (suelo no urbanizable)*: this is land which in general cannot be built upon due to it being subject to special protection rendering urban development impossible or unadvisable, or due to its agricultural, forestry or livestock value.

The classification of land, apart from conditioning the urban development capacities of the owners, also determines the valuation which must be given by the Authorities to the land for the purposes of establishing a fair price should it be subject to expropriation, with such valuation increasing in line with the increase in its urban use.

Urban development regulations are implemented by the City Councils via the granting of licences, and also by imposing the corresponding fines when a party infringes any urban development regulation or applicable State and regional laws and regulations and adopting measures to restore legality, when applicable.

In addition, it is worth remembering that, despite the aforementioned urban development capacities conferred on City Councils, the Autonomous Governments in certain cases usually retain supervisory powers over municipal urban development activities, as can be seen in the definitive approval of certain urban development instruments, or even in the imposing of substantial fines.

Construction-related local licences and responsible declarations

Construction activities are subject to supervision by the relevant Municipality. In the event of significant construction works, these would be subject to the granting of works and first occupancy licences. Where construction works are considered minor, instead of being subject to the granting of construction licences, a responsible declaration or notification to the Municipality would suffice. Both laws and regulations adopted by the Autonomous Communities and local regulations govern construction licences and responsible declarations or notifications.

Where construction licences are required, prior to commencing the relevant works, the interested party must obtain the works licence. This is the licence that will establish the construction parameters applicable to the relevant project and will verify the project's compliance with the provisions established in the applicable zoning laws and regulations. In order to obtain this licence, amongst others, it is necessary to present a construction project signed by an architect and approved by the corresponding professional association, to pay the corresponding taxes, as well as, where applicable, to provide sufficient guarantees (bank guarantee, etc.) ensuring the execution of the works. If the applicant complies with the requirements established in the applicable laws and regulations for the granting of a works licence, the Municipality is not authorised to deny the granting of such licence.

Once the construction works finalise, a first occupancy licence must be obtained. The purpose of the first occupancy licence is to verify that the works have been carried out in the terms of the previously granted works licence. Generally, the granting of such licence is preceded by an inspection of the building by the Municipality's technical services. .

In the event of minor works, the interested party must file a responsible declaration or notification related to the works to be carried out, stating that they comply with applicable laws and regulations. In certain cases, a technical project will have to be submitted. Depending on the scope of the works and the relevant Municipality, the works can be commenced after filing the document or after a certain period of time if the Municipality does not oppose them. There are Autonomous Communities where once the works are finalised, the interested party must send a communication to the relevant Municipality providing information on the first occupancy of the premises, as the case may be. In any event, the Municipality is entitled to inspect the works and adopt any measure to restore legality, as the case may be.

It should be pointed out that such licences and responsible declarations are required from the owner of the property and, depending on the case, also from the property's occupants, such as, for instance, tenants of office buildings or retail units if they undertake construction works. Should any person or entity carry out any works or activities without previously having obtained the corresponding licence, the Municipality is entitled to impose a fine, as well as take other urban development-related measures (such as, for example, ordering the suspension of the activities or works carried out without a licence, declaring the closure of the building or premises, etc.). Additionally, if any damages have been caused to the Municipality, it is entitled to oblige the infringer to pay an indemnity to the

Municipality.

Finally, note that any amendment to the relevant authorised or notified works would require an additional works licence or notification, depending on whether the works were considered major or minor.

General activity-related authorisations, licences and responsible declarations

The uses of a building are subject to the granting of an environmental authorisation, an environmental or activity licence (the name changes depending on the Autonomous Community) or other type of permit (if the activity does not cause pollution but the Municipality exceptionally considers that it should be subject to a licence) or to a notification or responsible declaration, depending on the level of pollution to be caused by the activity in question. Environmental authorisations are granted by the relevant Autonomous Communities in those cases where the activity causes high pollution and must be obtained prior to any construction licences. Environmental licences and other types of permits are granted by Municipalities and must be obtained prior to, or at the same time as, the relevant construction licences. If a responsible declaration or notification is required, it must also be filed with the Municipalities.

Generally, environmental/activity licences establish the parameters which the activity must comply with from an environmental legislation perspective, and concerning the fire protection and health and safety conditions of the building according to the use for which the building was constructed. Prior to commencing the relevant activity, the initial control or operating licence must be obtained, evidencing that the activity is fully compliant with the conditions and obligations established in the previously granted environmental licence. Afterwards, periodic controls and renewal of the licence must be carried out. Any amendment of the activity is subject to the granting of a new environmental licence and subsequent initial control. In those cases where the activity does not cause pollution but exceptionally the Municipality subjects the activity to the granting of a permit, prior to commencing the activity, an operating licence will have to be obtained.

The entity carrying out the activity is the entity obliged to obtain the above-mentioned authorisations, licences and permits or to file the relevant responsible declaration or notification. Failure to obtain them is considered an infringement of the applicable legislation subject to sanctions that include, amongst others, substantial fines and total or partial, final or temporary, suspension of the activity or total or partial seizure of the premises. Additionally, if any damages have been caused to the Municipality, it is entitled to oblige the infringer to pay an indemnity to the Municipality.

Specific activity licences and authorisations

In addition to the above-mentioned general activity/environmental licences, depending on the sector, the activity may also be subject to additional licences and authorisations to be granted by the State Administration or the Autonomous Communities. For instance, some Spanish Regions require the granting of a commercial licence for the opening of large retail premises such as malls.

20. Who can be liable for environmental contamination on real estate?

Liability for environmental matters can be established by statute, criminal and civil law. Under each law, the basic principle is that the polluter pays. This section refers to the statutory liability only.

When committing an infringement defined in the relevant environmental laws and regulations, the infringing party will be considered liable for such infringement. Please note that generally such laws define who will be considered the infringing party. Additionally, the following two Acts are worth mentioning:

a) Act 26/2007

The Environmental Liability Act 26/2007 establishes a framework of environmental liability based on the “polluter-pays” principle, to prevent and remedy environmental damage. This Act applies to environmental damage, as defined therein, caused by any occupational activity carried out by operators, and to any imminent threat of such damage occurring by way of any activity. According to Act 26/2007, operators therein defined are obliged to take the necessary preventive measures, repair environmental damage caused and cover its costs. If there is a plurality of operators and their involvement in the damage is demonstrated, they would be considered jointly liable, unless otherwise established by a specific piece of legislation. In certain cases, liability may escalate to the parent company. Liability established in Act 26/2007 is compatible with liability resulting from other acts governing environmental matters, in the terms established therein. This Act 26/2007 establishes the obligation on operators subject to it to deposit performance bonds in significant amounts to comply with the obligations to prevent and remedy environmental damage.

b) Act 7/2022

In addition, the Spanish legal regime for polluted land is primarily regulated at a State level in Act 7/2022, of 8 April, on Waste and Soil Pollution for a Circular Economy, and Royal Decree 9/2005, of 14 January, establishing the list of potentially contaminating activities and the criteria and standards for declaring such land polluted (note that legislation approved by the Spanish Autonomous Communities will also have to be taken into account). According to Act 7/2022, operators of potentially contaminating activities are under a general obligation to provide information to the authorities periodically in order to enable them to determine whether the land is contaminated. In addition, the owners of lands where potentially contaminating activities have been carried out are obliged to declare this fact in the sale and purchase public deed executed for their transfer. This fact must also be registered at the Land Registry for information purposes.

The competent authority must issue a declaration of contaminated land, when it becomes aware that land has been contaminated due to human activities, that meets the criteria and standards contained in Royal Decree 9/2005 (for instance, where there is significant presence of the contaminating substances listed in the different Annexes of the Royal Decree). The declaration of contaminated land by the relevant authority triggers an obligation to undertake the necessary actions in order to clean up and restore the land within the timeframe and in the terms that may be established by such authority.

The declaration will be registered at the Land Registry and will only be cancelled by the Registry once a new declaration from the relevant authority has been made, and after the necessary actions have been undertaken to remedy the contamination and the land is no longer considered polluted.

Lastly, any polluted land subject to a declaration will be included in the catalogue of polluted land managed by the relevant regional authority. Once the relevant regional authority has verified that the land has been duly cleaned up, it will issue a further declaration stating this fact, and this will also be reflected in the above-mentioned catalogue.

Liability for remedying polluted land primarily lies with those operators that have carried out the activities causing the contamination. If there were multiple polluters, all of them would be obliged to remedy the damage caused, on a joint and several basis. Remedies may be carried out through agreements with the relevant Autonomous Community. The cost will be born by the entity obliged to implement the relevant remedies, although the relevant agreement with the Autonomous Community may establish economic incentives to finance the cost of their implementation as long as a sharing benefit scheme from the future use of the cleaned land is established in favour of the Autonomous Community granting the incentive in the amount of the incentive.

The owners and occupiers of polluted land, in that order (except in the event of land considered public domain subject to the granting of concessions for its private use), can be held secondarily liable for the clean-up and restoration of polluted land, regardless of whether they were negligent or at fault. Furthermore, subsequent operators of contaminating activities, among others, may also be found liable on a secondary basis, for any financial liability arising from the application of remedy actions. Any party found secondarily liable will be entitled to recover from the polluters the costs incurred in remedying the polluted land. Act 7/2022 refers to the liability regime of Act 26/2007 as also applicable on soil pollution. In this regard, amongst others, directors and managers of legal entities liable for soil pollution will be considered subsidiarily liable if their behaviour is considered relevant in order to assess the liability of such legal entity.

It is worth mentioning that actions to clean up and restore the land may also be undertaken voluntarily by any party, without the need for a prior declaration of polluted land by the relevant authority. In this case, the project for restoring the land must be previously approved by the relevant authority.

Upon the transfer of any right in rem over the land, owners must declare if any pollutant or potentially pollutant activity has been carried out in the land transferred. The same declaration has to be made by the owner in the new works statements (*declaración de obra nueva*) and in any assignment of land resulting from the implementation of planning provisions.

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

Yes, since 2013. At present, this obligation is governed by Royal Decree 390/2021, of 1 June, approving the basic procedure to certify the energy performance of the buildings entered into force on 3 June. This regulation implements Directive (EU) 2018/844 of the European Parliament and of the council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency. The following assets, amongst others, need to obtain an

energy performance certificate (*certificado de eficiencia energética*): (i) generally, existing buildings or parts of existing buildings to be sold or leased to a new tenant; and (ii) buildings or part of buildings of more than 500 m^2 in the aggregate devoted to certain uses, such as, amongst others, sanitary, commercial, hotels, entertainment and leisure, touristic apartments or restaurant use. The sponsor or owner of a building is responsible for obtaining this certificate, which generally would be valid for a ten-year period, unless an amendment is necessary. The certificate needs to be registered at the relevant registry created by the relevant Spanish Region. Once registered, an energy performance vignette or label (*etiqueta de eficiencia energética*) will be issued.

In the event of new buildings and refurbishments or enlargement of existing buildings, if they are to be sold or leased before the end of the relevant works, the seller or lessor will have to provide the energy performance vignette or label of the project. Once the works are finished, the seller or lessor will have to provide the corresponding energy performance certificate. In the event of sale or lease of the building or parts of the same, a copy of the energy performance certificate and/or of the corresponding vignette will be attached to the contract.

With respect to mandatory minimum energy performance levels, the Spanish legislation does not establish a minimum threshold. It establishes different levels of energy efficiency, from level A to level G, being G the worst level in terms of energy efficiency.

Failure to comply with the obligations related to the energy performance certificate is considered an infringement of the Spanish legislation, with fines up to EUR 6,000 or to the benefit obtained with the commission of the infringement.

22. Is expropriation of real estate possible?

The right to property is enshrined in Article 33 of the Spanish Constitution which nevertheless expressly states that the exercise of this right will be limited by public interest. Therefore, it should be borne in mind that in Spain, public administrations holding expropriation powers may expropriate under constitutional authority in the cases set out in, and with the safeguards contained in, the appropriate implementing legislation.

Different from expropriation, it is worth pointing out that in recent years, several Autonomous Communities have passed laws establishing a preferential purchase right in favour of the Public Administration over dwellings foreclosed by the banks, their real estate subsidiaries and real estate asset management companies.

In addition, certain Public Administrations benefit from pre-emption rights in relation to properties of historical, architectural or environmental importance.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

The right to property is enshrined in Article 33 of the Spanish Constitution which nevertheless expressly states that the exercise of this right will be limited by public interest. Therefore, it should be borne in mind that in Spain, public administrations holding expropriation powers may expropriate under constitutional authority in the cases set out in, and with the safeguards contained in, the appropriate implementing legislation.

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24. Are there material registration costs associated with the creation of mortgages over real estate?

The formalisation and registration of mortgages with the Land Registry entails the payment of Notary and Land Registry fees and, more significantly, Stamp Duty.

Stamp Duty rates may vary from 0.5% to 2.5% depending on the location of the real estate asset, the tax base being the total amount secured by the mortgage agreed on a case-by-case basis, the market standard being from 115% to 130% of the facility amount.

Traditionally, Stamp Duty derived from the granting of a mortgage under a mortgage loan was payable by the debtor. However, the Spanish Supreme Court and the Spanish legislator recently established that such Stamp Duty must be payable by the financial institution granting the mortgage loan. In any case, please note that it is becoming market practice for lenders to charge this Stamp Duty cost to debtors.

25. Is it possible to create a trust structure for mortgage security over real estate?

No, this is not possible. Mortgages should be created and registered in favour of the lender(s) as only the lender registered as mortgagee may enforce the mortgage.

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