



The Legal 500 Country Comparative Guides

Spain

VENTURE CAPITAL

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

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SPAIN

VENTURE CAPITAL



1. Are there specific legal requirements or preferences regarding the choice of entity and/or equity structure for early-stage businesses that are seeking venture capital funding in the jurisdiction?

Innovative companies form the basis of the new digital era, attracting skilled talent and specialised investment. However, their specific characteristics, namely, the need for financing without the need to generate revenue immediately, business uncertainties and strong competition at the international level, make it difficult for start-ups to fit into the current conventional regulatory framework, especially when it comes to corporate, tax and employment matters.

In terms of choice of legal entity, in Spain there are no specific legal requirements or preferred equity structure for an early-stage businesses seeking venture capital (VC) funding. Spanish companies are typically set up either as a public limited company (*sociedad anónima*, S.A.) or a private limited company (*sociedad de responsabilidad limitada*, S.L.), although the latter would be the most common corporate form chosen for this type of investments, as it requires a lower minimum figure as paid-in share capital.

2. What are the principal legal documents for a venture capital equity investment in the jurisdiction and are any of them publicly filed or otherwise available to the public?

The main legal documents for a VC equity investment in Spain are similar to those in other jurisdictions and typically include:

- i. Subscription Agreement: this document details the specific terms of the investment, such as the number and class of shares being subscribed or purchased -in which case the investor will be dealing with a share purchase

agreement, depending on whether the VC investor carries a primary or secondary investment-, the purchase price, the company's and founders' liability regime, conditions to closing, etc.

- ii. Shareholders' Agreement ("SHA"): this document sets out the terms and conditions which shall govern the relationship between the shareholders and between them and the company, as well as the operation, management and organisational structure of the company, including provisions related to governance, management, voting rights, transfer restrictions, pre-emptive rights, drag-along and tag-along rights, among others. The Articles of Association (or By-laws) are typically amended as a consequence of the investment and are negotiated as part of the SHA, as both documents are required to be perfectly aligned.

Both agreements are usually required to be formalised before a Spanish Notary Public -although this will ultimately depend on their content-. Furthermore, share capital increases and corporate resolutions that imply amendments to the Articles of Association must also be notarised.

3. Is there a venture capital industry body in the jurisdiction and, if so, does it provide template investment documents? If so, how common is it to deviate from such templates and does this evolve as companies move from seed to larger rounds?

In Spain, VC industry bodies like ASCRI (*Asociación Española de Capital, Crecimiento e Inversión*) exist, representing the interests of the VC and private equity (PEQ) community. While these bodies provide guidance and networking opportunities, they typically do not supply template investment documents.

Instead, professional VC investors rely on legal experienced professionals to draft and negotiate investment documents suited to each investment.

4. Are there any regulatory frameworks in respect of companies offering shares for sale that need to be considered, for example any restrictions on selling and/or promoting the sale of shares to the general public?

In Spain, as in many other jurisdictions, companies seeking to publicly offer their shares need to comply and take into consideration certain regulations that aim to protect investors and financial markets, including, among others, (i) the Spanish Securities Markets Law (*Ley 6/2023, de 17 de marzo, de los Mercados de Valores y de los Servicios de Inversión*), together with specific regulations issued by the National Securities Market Commission (*Comisión Nacional del Mercado de Valores - CNMV*), (ii) the applicable Anti-Money Laundering regulations (*Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo*), and (iii) the latest Crowdfunding Regulations (*Ley 5/2015, de 27 de abril, de fomento de la financiación empresarial*).

Notwithstanding the foregoing, there are no particular limitations applicable to bilateral investment processes, other than the applicable regulations which govern the contracting process, such as the Spanish Civil Code (*Código Civil*), and those governing the companies and the shareholders' specific rights and obligations, including the Spanish Companies' Act (*Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital*).

5. Are there any general merger control, anti-trust/competition and/or foreign direct investment regimes applicable to venture capital investments in the jurisdiction?

Yes, although some of these regulations, such as the antitrust/competition laws, are not usually applicable to the specific companies in which VCs would normally invest (nor to most of the VC funds which operate in Spain).

- Merger Control and Anti-trust/Competition Law is governed by the Competition Act (*Ley de Defensa de la Competencia*) and is enforced by the Spanish National Commission on Markets and Competition (*Comisión Nacional de los Mercados y la Competencia* -

CNMC). Certain mergers and acquisitions may be subject to mandatory notification and review by the CNMC if they meet specified thresholds, such as turnover or market share. Failure to notify a qualifying transaction may result in fines or other penalties.

- Foreign Direct Investment Regulations apply when dealing with Spanish companies operating in strategic sectors that may affect public order, safety or health, and will require prior consultation and, if applicable, authorization from the General Directorate of International Trade and Investment, pursuant to the Royal Decree 20/2022, of 27 December. Although each transaction must be reviewed on a case-by-case basis, such FDI authorization must be necessarily obtained when (i) investments are carried out by a foreign investor controlled directly or indirectly by the government of a third country, (ii) investments are made by persons which have previously invested in sectors affecting security, public order and public health of another country, and (iii) there is a risk that the foreign investor may engage in activities which affect public security, public order or public health.

6. What are the prevailing tax incentives or structures offered to venture capital investors in the jurisdiction, if any?

Recently approved tax incentives under the Startup Law (*Ley 28/2022, de 21 de diciembre, de fomento del ecosistema de las empresas emergentes*), applicable to (a) the management companies and funds, (b) startups, their investors and entrepreneurs, and (c) inpatriates, include:

- Carried interest now qualifies as income from work and 50% of that income will be subject to personal income tax -upon meeting certain requirements -.
- Greater flexibility is added to the treasury stock system of startups, also allowing companies not to incur in legal grounds for dissolution due to losses until three years have elapsed from the date of their incorporation.
- Improvements in the taxation of stock options have been approved (increasing the previous EUR 12,000 exemption up to a maximum EUR 50,000 per employee).
- A tax credit of 100% has been established under the Special Regime for Self-Employed

Workers for corporate self-employed workers that continue to work as employees.

- Startups that operate in regulated sectors can now request temporary trial licenses for one year.
- Parent companies of specific Spanish groups or branches of companies not subject to the laws of an EU Member State now have a reporting obligation for corporate income tax or equivalent or similar taxes.
- Changes have been introduced to the in-patriate tax regime to enable more taxpayers to benefit from it, as well as changes regarding migration to promote international remote working.
- The process for obtaining residency in Spain is made easier in various circumstances on economic interest grounds.

7. What is the process, and internal approvals needed, for a company issuing shares to investors in the jurisdiction and are there any related taxes or notary (or other fees) payable?

The issuance of shares implies a share capital increase of the relevant company, which shall be approved by the general shareholders' meeting. When the share capital increase is made in cash, the shareholders have a pre-emptive subscription right that may be exercised *pro rata* to their shareholding in the company.

The share capital increase entails an amendment of the company's Articles of Association and therefore it must be formalised before a Notary Public by means of a public deed and further registered with the Commercial Registry.

Finally, the issuance of shares of Spanish companies is generally exempt from any taxation but is subject to Notary and Commercial Registry fees.

8. How prevalent is participation from investors that are not venture capital funds, including angel investors, family offices, high net worth individuals, and corporate venture capital?

Participation of non-VC investors is quite significant in Spain's startup ecosystem, specially for early-stage businesses seeking professional funding and guidance.

9. What is the typical investment period for a venture capital fund in the jurisdiction?

Most VC funds have an investment period of 4 to 5 years depending obviously on the type of target company, ticket size and class of shares.

10. What are the key investment terms which a venture investor looks for in the jurisdiction including representations and warranties, class of share, board representation (and observers), voting and other control rights, redemption rights, anti-dilution protection and information rights?

VC investors seek to protect their interests under both the Subscription Agreement and the SHA. Investors' standard protective measures include:

- Representations and Warranties: statements made by the Company and the Founders regarding its legal, financial, and operational status. In order to ensure a reasonably covered liability regime, investors require comprehensive representations and warranties to ensure the accuracy and completeness of information.
- Creation of Classes of Shares: in most-cases, investors require preferred shares with senior rights such as liquidation preference, dividend preference, conversion rights and anti-dilution protection.
- Voting rights, control and board representation (and observers): investors require to participate in the strategic decision-making and have access to full financial and operational information on a regular basis. Depending on the number of investors, observer rights may also be sought to attend board meetings -in which case, observers shall not have voting rights-.
- Anti-dilution rights: in most-cases, investors require protection against dilution in subsequent equity financings at lower valuations -pursuant to full ratchet or weighted average mechanisms-.
- Founders and management restrictive covenants: please see question 12 below.

11. How common are arrangement/monitoring fees for investors in the

jurisdiction?

In VC transactions, it is common that investors and legal teams advising in the transaction agree on fixed fees which, as a general rule and due to the nature and characteristics of the target companies (and their capital needs), are required to be cost-efficient.

12. Are founders and senior management typically subject to restrictive covenants following ceasing to be an employee and/or shareholder and, if so, what is their general scope and duration?

VCs normally require protection under the SHA -and the applicable management services and senior employment agreements- in the form of restrictive covenants against certain exit events. Said restrictive covenants include permanency periods, exclusivity and non-compete undertakings and good leaver / bad leaver provisions, linked to reverse vesting mechanisms and employee stock options plans.

For further information on the later item, see question 14 below.

13. How are employees typically incentivised in venture capital backed companies (e.g. share options or other equity-based incentives)?

Retention of management and certain employees is usually key to the success of the business; therefore, as part of such employees' variable remuneration package, incentives plans in the form of stock options and phantom share plans are commonly offered.

14. What are the most commonly used vesting/good and bad leaver provisions that apply to founders/ senior management in venture capital backed companies?

As a mechanism to incentivise/retain founders and management and to protect the equity structure, incentive plans designed by VC investors always include leaver provisions -both in the SHAs and into the employment or senior management services' contracts-.

Thus, there will be an impact in valuation of the founders' / management shares depending on whether these may leave in "good terms" (e.g. mutual agreement, death, physical or mental incapacity, serious illness or retirement, commonly referred to as "good

leavers") and those who leave deliberately or due to reprehensible conduct (e.g. serious breach of duty, fair dismissal or voluntary resignation, commonly referred to as "bad leavers").

15. What have been the main areas of negotiation between investors, founders, and the company in the investment documentation, over the last 24 months?

During the past 24 months, the main areas of negotiation between the parties to a VC transaction were the following:

- Company's and Founders' liability regime vis-à-vis the Investors, which is usually regulated in the Subscription Agreement, together with remedy provisions and indemnity caps, in case of damages.
- Investors' preferred rights over the Founders' and existing shareholders of the company.
- Company's governance and management after closing of the investment. The Company's board of directors is usually introduced as a standard management body in VC-backed companies, as the investors choose to appoint a certain number of board members, which provides them with reasonable control over the strategic decision-making and access to full financial and operational information on a regular basis.
- Voting rights and qualified majorities: negotiation of the SHA usually requires thorough discussions over qualified majorities for the adoption of certain resolutions, both at the shareholders' general meeting and the board of directors' level.
- VC's anti-dilution rights, as the standard protection against potential dilution in subsequent equity financings, should these be at a lower valuation.
- Lock-up, exclusivity, non-compete undertakings and reverse-vesting provisions applicable to Founders, as main restrictive covenants designed to ensure their permanence within the VC-backed company.

16. How prevalent is the use of convertible debt (e.g. convertible loan notes) and advance subscription agreement/ SAFEs in the jurisdiction?

Convertible debt is the prevalent mechanism for VC funding in Spain. It is usually simpler, more flexible and

more efficient -in terms of timings and direct costs to the company- than other available options.

The abovementioned efficiency is clear, for instance, when comparing a convertible loan vs. a share capital increase, which requires certain legal formalities (*i.e.*, passing certain corporate resolutions, granting of a public deed in front of a Spanish Notary, registration of the share capital increase in the Commercial Registry, etc.), that may delay -in terms of time- the funding. Needless to say, the relevant corporate legislation and the required formalities described above shall be taken into account when converting the debt into shares.

17. What are the customary terms of convertible debt (e.g. convertible loan notes) and advance subscription agreement/ SAFEs in the jurisdiction and are there standard from documents?

With regards to convertible debt documents, there are certain provisions which are especially important and that are typically included in the relevant documentation:

- i. Strike price: it is important to carefully calculate the strike price of the shares, which shall apply at the moment of conversion. Such price shall foresee the increase in value of the shares within the period between the granting of the debt and the expected date of conversion, and further eventualities, including:
 - o a discount rate -where parties agree on a discount to the valuation attributed to the company's shares at the moment of conversion, pursuant to which the investor is compensated for the additional assumed when financing the project at an earliest stage-; and
 - o a maximum valuation (*CAP*) of the company's shares at the moment of conversion.
- ii. Information rights: it should be noted that, until the event of conversion is reached -and therefore the investor becomes a shareholder-, the investor will not have any shareholder rights under the Spanish Companies' Act (*e.*, right to vote, right to request or receive information, attendance right to the shareholders' meetings, etc). Therefore, it is important to regulate within the corporate debt documentation the lenders' information

rights -together with the rest of applicable customary undertakings-.

- iii. Events of conversion, early termination provisions and undertaking to adhere to the existing SHA, among others.

As formalities go, convertible debt instruments are quite flexible and the parties may agree on different terms and conditions without many restrictions -other than the limitations established under the existing SHA, the Spanish Companies' Act and the applicable regulations related to the contracting of loans and credits-.

18. How prevalent is the use of venture or growth debt as an alternative or supplement to equity fundraisings or other debt financing in the last 24 months?

The venture debt mechanism as an alternative or supplement to equity fundraisings or other ordinary debt financing has increased over the last few years. Regardless of this growth, it should be taken into account that the number of venture debt transactions - compared to the whole VC spectrum within the Spanish market- is still low (for instance, the European Investment Bank estimated in 2022 that only about 3% of the annual VC transactions were venture debt transactions).

Without prejudice to the above, in 2023 we saw how the major banks in Spain (such as BBVA and Banco Santander) issued venture debt programs, joining similar initiatives launched in the past by smaller institutions, which shows the increasing interest in this debt mechanism.

19. What are the customary terms of venture or growth debt in the jurisdiction and are there standard from documents?

Venture debt is generally structured via convertible debt instruments. Please see question 17 above.

20. What are the current market trends for venture capital in the jurisdiction (including the exits of venture backed companies) and do you see this changing in the next year?

In previous years, the rising interest rates have impacted negatively in VC ecosystem and its key investments in Spain, however even though the current market is still challenging, we are observing evidence of a slow

turnaround and stabilization, together with a reasonable correction in valuations.

This positive trend will also be boosted thanks to the initiatives implemented by the Spanish Government in recent (such as the aforementioned *Startup Law*) that include, among others, tax incentives that seek to attract investors' interest.

We believe that investments in technology-driven startups will continue to be a trend. In particular, artificial intelligence (AI) will have a transversal scope, thus fostering numerous sectors such as health-tech, fintech and cyber security. Over the next few years, there will be a preference for early-stage investments (*i.e.* seed and pre-seed) in such sectors.

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