Feasibility of a 100 % Tax on Property Purchases by Foreigners in Spain

Introduction: The Government of Spain has floated a drastic measure within its new housing policy package: the creation of a tax that would levy up to **100 % of the property's price** on non-resident foreign buyers. The proposal—echoing constraints recently adopted in countries such as Denmark or Canada—would in effect **double** the price paid by a **non-EU foreigner** purchasing real estate in Spain. The declared objective is to curb speculative demand and alleviate the housing crisis by deterring foreign demand in certain tourist hotspots. Yet the **legal, political, and economic viability** of such a measure is highly questionable, owing to numerous legal barriers (domestic and international), constitutional limits, and potentially negative side-effects.

Below is an in-depth analysis of the proposal's viability, structured around seven key dimensions: Spanish constitutional law, domestic tax law, European Union law, public international law, private international law, legislative-political feasibility, and economic-legal consequences.

1. Spanish Constitutional Law

Principle of equality and non-discrimination

The Spanish Constitution guarantees equality before the law (Article 14), forbidding discrimination on personal or social grounds. Although **nationality** is not expressly listed, it is considered a personal criterion falling under the general prohibition. While Article 13.1 CE allows legislation to modulate foreigners' rights, a tax that falls **solely on foreign buyers** would raise a serious equality issue. Moreover, Article 31.1 CE requires the tax system to rest on the principles of **generality and equality**, so a levy aimed only at non-resident foreigners would arguably breach fiscal equality and the principle of **generality**.

Reservation of law in tax matters

Article 31.3 CE establishes that only a statute may impose public levies, so the creation of a tax meets the formal requirement if enacted by **Act of Parliament** (or by **Royal Decree-Law**, subsequently ratified by Parliament). However, competence conflicts may arise because **property transfer taxation (ITP-AJD)** is largely devolved to the Autonomous Communities. A state tax equal to 100 % of the same taxable event could trespass on regional powers unless it is carefully designed. The current plan foresees a **"state complementary tax"** on real-estate transfers whose amount would be **reduced by the ITP-AJD already paid** to the region, thereby avoiding full double taxation and seeking to square the measure with the constitutional distribution of fiscal powers.

Limits of the Royal Decree-Law

Should the Government attempt to enact the measure via **Royal Decree-Law (RDL)**, additional hurdles appear. Article 86 CE allows RDLs only in cases of **extraordinary and urgent necessity** and forbids them from affecting fundamental rights, the basic institutional order, or the autonomous communities' regime. A 100 % tax discriminating by nationality might be seen as affecting the fundamental right to equality and the fiscal equality principle, while altering the regional fiscal regime. Hence, **the RDL route carries a high risk of unconstitutionality**. A standard Act of Parliament is politically safer, albeit slower.

Non-confiscatory principle and ability to pay

Article 31.1 CE also provides that the tax system must **"in no case be confiscatory."** A single tax whose rate equals 100 % of the taxable base approaches a confiscatory threshold. The Constitutional Court has hinted that while confiscatoriness is assessed across the system, an individual tax that **mathematically consumes the entire base** is *prima facie* confiscatory. Experts already warn that such a tax would likely be struck down as unconstitutional for confiscation.

Constitutional jurisprudence

Although no precedent exists on a 100 % rate, the Constitutional Court and Supreme Court have repeatedly annulled discriminatory treatment of non-residents in succession, gift, wealth, and income taxes following EU law. They have also strictly reviewed Decree-laws that impinge on constitutional principles. Accordingly, **the proposal's constitutionality is highly doubtful**.

2. Spanish Tax Law

Design of the proposed tax

The measure would be a new **indirect tax** on the **onerous transfer of real estate** where the purchaser is a non-resident foreigner outside the EU. It would operate as a **100 % surcharge** on the **Impuesto sobre Transmisiones Patrimoniales (ITP)** for second-hand property, with the state levy reduced by the regional ITP already paid. Thus, **ITP + state surcharge = 100 % of the property value**.

Existing housing taxes

At present, every buyer pays either ITP (6–11 % depending on the region) for second-hand property, or **VAT at 10 %** for new builds. No distinction is drawn by nationality. The 100 % tax would apply **only to second-hand purchases** subject to ITP. Purchases of newly-built dwellings, governed by harmonised VAT, would be outside its scope, allowing foreigners to avoid the surcharge by buying new property.

Fiscal principles at stake

- **Ability to pay & non-confiscation:** A 100 % levy likely oversteps ability to pay and becomes confiscatory.
- **Generality & equity:** A tax borne solely by foreigners breaches horizontal equity.
- **Internal double taxation:** Superimposing a state tax on a regional tax over the same event is unusual and arguably duplicative.
- **Systemic limits:** An extreme tax questions the overall fairness and proportionality of the fiscal system.

Conclusion on domestic tax viability

Technically feasible only with complex coordination with the regions, the tax would probably be invalidated by courts for infringing basic tax principles.

3. European Union Law

Free movement of capital

Article 63 TFEU prohibits restrictions on capital movements **between Member States and between Member States and third countries**. Purchase of real estate is a protected capital movement. A 100 % tax that effectively prohibits non-EU foreigners from purchasing Spanish property is a blatant restriction, unlikely to pass the proportionality test.

Discrimination and jurisprudence

While the measure targets non-EU nationals to avoid Article 18 TFEU, the Court of Justice has ruled that discriminatory or restrictive treatment of third-country investors can equally breach Article 63 freedom of capital. Spain's prior regimes on succession tax and Model 720 were condemned on this ground. The Commission would almost certainly launch infringement proceedings; affected individuals could litigate, prompting preliminary references to the Court of Justice.

Harmonised taxes

VAT cannot be altered for non-residents, hence the exclusion of new builds. But that limited scope underscores its inefficacy and the EU-law problem remains.

EU conclusion

Practically nil viability: the measure flagrantly violates EU freedoms and would be struck down.

4. Public International Law

Bilateral investment treaties (BITs)

Spain has numerous BITs ensuring fair and equitable treatment and protection against expropriation. An impost confiscating value equivalent to the investment could be characterised as an indirect expropriation, triggering arbitration under ICSID or similar fora.

Double taxation conventions

Although most DTAs cover income and gains rather than indirect purchase taxes, many contain non-discrimination clauses that the measure could violate.

Diplomatic and reputational impact

Spain risks diplomatic protests and claims, especially from countries with significant investor bases (e.g., the UK post-Brexit, China, Gulf states).

5. Private International Law

- **Applicable law:** Lex rei sitae (Spanish law) applies; parties cannot contract out of the tax.
- **Jurisdiction:** Spanish administrative and contentious courts are exclusively competent over the tax.
- **Enforcement:** Non-payment blocks registration of title; Spain can seize the property in situ.
- **Possible avoidance strategies:** Foreigners could buy through EU-resident companies; tackling such structures would complicate the legislation.

6. Legislative and Political Viability in Spain

- **Parliamentary arithmetic:** The minority government needs disparate allies; centre-right and right-wing parties oppose the measure as xenophobic and anti-investment. Some left-wing and regional parties favour limits on foreign buying but may demand exceptions.
- **Legislative vehicle:** The measure has been filed as a **parliamentary Bill**, not a Decree-law, indicating awareness of constitutional risks and the need for negotiation.
- **Prospects:** Support is fragile; the Bill may be watered down (rate reduced, exemptions added) or dropped entirely.

7. Economic and Legal Consequences

- **Investment collapse:** Nearly all non-EU demand (≈ 3 % of the market nationwide but up to 30 % in some coastal areas) would vanish, harming construction and local economies reliant on residential tourism.

- **Minimal revenue, maximal damage:** With demand gone, little or no tax would be collected, while ancillary spending and VAT revenues would fall.
- **Market effects:** Luxury and second-home segments could suffer price drops; knock-on effects on employment and GDP in affected regions.
- **Litigation tsunami:** Constitutional challenges, EU infringement actions, ICSID arbitrations—all probable and costly.
- **Questionable efficacy:** The measure would not meaningfully solve housing affordability in major cities, where foreign extracommunity buyers are marginal.

Overall Conclusion

The proposed 100 % tax on foreign property buyers is **legally fraught and economically counter-productive**. It conflicts with constitutional equality and non-confiscation, contravenes EU free-movement principles, violates Spain's international investment commitments, and is politically precarious. Even if enacted, it would almost certainly be struck down by domestic or European courts, leaving Spain exposed to damages and reputational harm. In short, the measure is **not viable** beyond its symbolic value in the housing debate.

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