Draft Regulation implementing the Foreign Direct Investment Act

Less than two years ago, Spain put in place a new foreign direct investment (**FDI**) screening system applicable to non-EU/non-EFTA companies, twice amended in the meantime.[1] The main issue encountered when advising on the new FDI screening regime was that of the excessive amplitude and ambiguity of the law. A much announced (and necessary) implementing regulation has been delayed until publication of a (still) draft Regulation in December 2021.

Regarding the draft Regulation, *(i)* we are seeing that formal approval is taking its time; and *(ii)* yet the draft reflects, at least to an extent, existing experience and practice by the competent authorities, so it is relevant to be aware of its contents from now. Therefore, to the extent the draft Regulation provides much required (even if informal) guidance, we have deemed it relevant to report on the matter. In summary:

1. Clarification of the scope and meaning of the industries listed as sensitive for FDI screening purposes.

1.1. *Critical infrastructures* are those included in the National Catalogue of Strategic Infrastructures and the real estate required for their operation. The Catalogue is secret, which means that, in practice, investors will know about this circumstance only when carrying out their due diligence of an investment target.

1.2 *Industries listed in the applicable law as sensitive – scope:*

- critical technologies: telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum, nuclear energy, biotechnology, advanced materials and advanced manufacturing systems. This list may be enhanced or narrowed down by Royal Decree;
- dual-use technologies: those defined in Article 2.1 of EU Regulation 2021/821;
- key technologies for leadership and industrial capacitation: those referred to by EU Decision 2021/764 establishing the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation, including advanced materials, nanotechnology, photonics, microelectronics and nanoelectronics, life sciences technologies, advanced manufacturing and transformation systems, artificial intelligence, digital security and connectivity;
- technologies developed under the auspice of programs and projects of special interest to Spain, implying a substantial amount or percentage of financing from the national or EU budget.[2]

1.3 *Essential inputs* are those indispensable and non-replaceable for the rendering of essential services to society and the State, which loss or destruction would have a significant impact. In particular:

- software provided for use by critical infrastructures in: *(i)* power generation, hydrocarbons and energy transmission networks and plants generally; *(ii)* water treatment; *(iii)* telecommunications installations and systems for voice transmission and data storage and processing; *(iv)* financing and insurance sector for operation of installations or systems used in the supply of cash, card payment systems, payment settlement and insurance provision; *(v)* health sector for hospital management, distribution of prescription pharmaceuticals and laboratories information systems; *(vi)* transportation installations and systems by air, sea or road; *(vii)* management of installations or systems for food supply.
- Other indispensable and non-replaceable inputs to guarantee the integrity, security or continuity of critical infrastructures.

1.4 *Companies with access to sensitive information* are *(i)* those with access to specific data on strategic infrastructures which, if revealed, could be used to carry out actions to destroy or perturbate their normal performance; *(ii)* companies with access to data bases related with the operation of essential services in the critical sectors listed under 4.3 above; *(iii)* those with access to official databases not accessible to the public; *(iv)* those carrying out activities subject to compulsory evaluation of impact on personal data pursuant to Article 35.3 of EU Regulation 2016/679, on personal data protection.

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[1] Royal Decree-Law 8/2020, of 17 March, of urgent exceptional measures to face the social and economic impact of COVID-19. The legal reform does not repeal Royal Decree 644/1999, of 23 April, on Foreign Investments, which remains in force to the extent it is consistent with RDL 8/2020 (particularly, with regard to the authorization regime for transactions related to national defence companies active in the production or trade of weapons, ammunition, explosives and war material). See our prior alerts reporting on this legislative development and its amendments here, here and here.

[2] Amongst others, those benefitting from financing by instruments contemplated in the Annex "list of projects or programs of interest to the Union" referred to by Article 8.3 of EU Regulation 2019/452 on direct foreign investment into the European Union.

2. FDI screening in connection with sensitive industries but having no impact on public security. The draft Regulation states that investments in the above mentioned sensitive industries are not subject to FDI approval when they bear no relation, or they bear only scarce relation, to public security, health or public order.

3. FDI screening in connection with industries not expressly listed as sensitive. The draft Regulation contemplates the possibility of the Government requiring authorization for foreign investments in industries not listed as sensitive (and therefore as a general rule not subject to FDI screening). In these cases, FDI screening would be required if the Government considers that security, public health or public order may be affected, regardless of the industry.

4. Clarification of the concepts of 'foreign investor' and 'sensitive investment in another EU country'.

4.1 *'Sovereign funds' investments may be excluded from FDI screening.* To ascertain if a given investor or investment vehicle must be attributed to a foreign government the following criteria are to be borne in mind: *(i)* the existence of 'control' pursuant to competition law (Competition Act) criteria; *(ii)* control by means of significative financing or subsidies from a third country; *(iii)* in the case of investment vehicles or funds channeling State investments, they are deemed not to be controlled by a foreign State, and therefore excluded from FDI investments, if it flows from their governance and nature of the management that the investment policy is independent and it focuses solely in the profitability of the investments without foreign State political interference.

4.2 *Risk of foreign investor carrying out criminal activities affecting public security.* Final decisions (*i.e.*, against which no further appeal is possible) against the investor for criminal or administrative breaches in the prior three years in areas such as money laundering, environment, tax or protection of sensitive information, are to be taken into account. This provision certainly clarifies the existing law, where there was no limitation as to time or material scope or infringements.

5. Exemptions.

5.1 *Investments in the energy sector* are exempted where the investor is not a foreign State, has not carried out investments in sensitive sectors in the EU, or does not pose a risk of illegal activities affecting public security, provided that *(i)* the investment target does not carry out energy regulated activities (in general, power generation plants or projects, as well as commercialization activities are not regulated within this context); *(ii)* that as a result of the investment, the investor does not become a dominant operator within the meaning of the sector regulation; *(iii)* when the investment targets power generation plants, that the resulting power share of the relevant generation technology controlled by the investor does not exceed 5%; *(iv)* when the target is an energy commercialization company, that the number of customers does not exceed 20,000.

5.2 *Investments in other sensitive industries* are exempted from FDI screening if the turnover of the target company does not exceed €5 million in the prior year, provided its technology has not been developed within the framework of programs or projects of particular interest to Spain, with the exception of investments in electronic communications companies holding licenses for spectrum use or with significant market power any electronic communications market.

6. *Administrative guidance, timing of approvals and others.*

6.1 *Administrative guidance.* The draft Regulation contemplates the possibility of filing for guidance regarding whether or not a transaction must be filed for FDI screening. This possibility has already been used informally since the FDI regime entered into force in April 2020. The innovation would now be that the competent Authority must in principle provide a response within 30 working days from filing of the consultation. In case no response is provided with 30 working days, this is deemed as a decision that an FDI filing (and prior approval) is required prior to closing of the transaction.

6.2 FDI screening applications will be (once the draft Regulation enters into force) subject to a *three-month deadline*. In the absence of a decision after three months, the request for authorization is deemed rejected.

6.3 There is an *anti-circumvention provision*, linking two acquisitions in less than two years as a single transaction.