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Overview of the new Foreign Direct Investment Screening Regime in Spain

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Context

General context

- Trend towards protectionism/protection of the national interest
- Push for European “industrial policy” in detriment of strict competition law standards (*Alstom/Siemens*)
- Concern for sensitive, strategic industries. EU Regulation 2019/452
- Commission recommends adoption by Member States of FDI Screening regimes

01

Immediate Context Spain: Covid-19

1. Pre-Covid: *liberalized regime safe for weapons related investments*

2. April 2020 *Stockmarket rout*

- Inditex €74.7 billion
- Iberdrola €65 billion
- Santander €28.8 billion
- BBVA €16.39 billion
- Telefónica €16.37 billion
- Repsol €8.9 billion
- ACS €6.5 billion
- IAG €5.9 billion
- Acerinox €2 billion

(valuations as of 26/Oct.)

FDI regime in Spain –
Transactions caught

02

- Cautions:
 - **Vague drafting** in some key instances (emphasizes margin of discretion)
 - **Implementing regulation** pending approval
- What transactions are caught?
 - Acquisitions of **10% or more of Spanish companies**
 - **Acquisition of control** of Spanish companies

Hence:

- Acquisitions of **assets only** in Spain are not caught (according to a literal interpretation to be taken with caution – **unlikely to hold if assets are meaningful**)
-

FDI regime in Spain – “Foreign Investor”

03

What is “foreign investor”?

- resident in countries **outside of the EU/EFTA space**; or
- the investment is carried out by an EU/EFTA resident, who is actually **controlled (*real ownership as the relevant provision states*) by foreign (non-EU/EFTA) residents.**

An EU/EFTA investor is deemed to be controlled (real ownership) by foreign investors if

- the foreign investors **ultimately own**, directly or indirectly, a stake of **25% or more of the share capital/voting rights** in the EU/EFTA investor
 - *Law is silent on vote syndication/shareholders agreements. Arguably ownership not deemed foreign if foreign owners in excess of 25% of share capital are not syndicated.*
- the foreign investor exercises, by any other means, either **direct or indirect control** over the EU/EFTA investor.

Case of Investment / PE Funds, LPs / GP. Key appears to be **residence of the GP** (where role of the LP is purely passive)

Sensitive Industries

04

Affected sectors are:

- **critical infrastructures, both physical and virtual** (energy, transport, water, healthcare, communications, media, data storage and processing, aerospace, defense, finance or sensitive installations);
- **critical technology** and **dual-use** products;
- **essential supplies** (energy, hydrocarbons, electricity, raw materials and food);
- sectors involving **sensitive information** such as personal data;
- the media.

Sensitive investors

05

HOWEVER, foreign investment in *any industry* shall also be subject to an *ex ante* authorization if:

- The foreign investor is **controlled directly or indirectly by the government** of a third country;
- the foreign investor **has invested or participated in sectors affecting the security, public order or public health in another EU Member State**;
- **administrative or judicial proceedings have been initiated** against the foreign investor for exercising illegal or criminal activities in another Member State, at the State of origin of the foreign investor or in a third State.

*This provision leads to **arguably absurd results**, a **logical construction** of the rule must be sought*

Exceptions. Procedure

06

Legal reform two weeks after initial urgent legislation:

- A *de minimis* rule according to which any **investments below € 1,000,000 are exempted** (this amount might be amended by the future implementing regulation).
- **Simplified authorization procedure** for (i) transactions signed but not yet closed, *i.e.*, which price or price determination mechanism was agreed in a binding offer before the entry into force of RDL 8/2020; and (ii) investments ranging between € 1,000,000 and € 5,000,000, until the future regulations developing Article 7 bis of Law 19/2003 come into force.

authorization within **one month** by the Directorate General for International Trade and Foreign Investments. The standard procedure requires authorization by the Council of Ministers by procedure lasting for up to **six months** ("*negative silence*").

Penalties

07

- Transactions subject to the authorization regime must be subject to a **condition precedent** of prior approval (no civil effects of transaction in Spain prior to approval).
 - Non-compliance with the obligation amounts to a **very serious infringement which may result in fines ranging between €30,000 and the transaction value**, and a public or private admonition.
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