In a Nutshell: the (Triple) Reform of the Foreign Direct Investment Screening Regime in Spain

In the framework of a larger urgent legislative package to ease the effects of the Covid-19 crisis in the economy in the spring of 2020, the Spanish Government put in place a new foreign direct investment (**FDI**) screening system applicable to non-EU/non-EFTA companies.[1] This screening system has been amended twice in the course of 2020 with the aim of clarifying or expanding it to include EU investments.[2] We have in the course of the last year reported on each of the amendments separately,[3] which we now condensate in a single page. In summary:

(1) The FDI regime catches transactions leading to *(i)* acquisitions of control within the meaning of the Competition Act (which in practice aligns the concept of control in the framework of FDI screening to that of merger control law, therefore including joint ventures) and *(ii)* acquisitions of 10% or more of the share capital. Investments below €1,000,000 are exempted.

(2) 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) and real estate required for the use of such infrastructures;
- critical technologies including those key to business leadership and capability as well as those technologies developed under programs and projects of particular interest to Spain including telecommunications, advanced materials, robotics, nuclear energy or biotech;
- essential supplies (energy, hydrocarbons, electricity, raw materials and food), strategic connectivity services;
- sectors with access to sensitive information such as personal data or with capacity to control such information;
- the media, without prejudice of the application of the Media Act.[4]

Foreign investment *in any industry* (not just the sensitive or public interest industries set out above) shall also be subject to an *ex ante* authorization regime in any of the following cases: *(i)* when the foreign investor is government controlled; *(ii)* when the foreign investor has invested or participated in sectors affecting the security, public order or public health in another EU Member State; *(iii)* when the investor poses a risk of criminal or illegal activities affecting public security, public order or public health in Spain.

(3) Foreign investors for FDI screening purposes are those residing in countries outside of the EU/EFTA.[5] However, the November 2020 amendment introduces the need to seek authorization until 30 June 2021 regarding sensitive investments, stemming from EU/EEA countries, whenever the investment targets *(i)* Spanish companies wholly or partially listed in the Spanish stock exchange; and *(ii)* non-listed companies, if the investment is above € 500 million.

Non-compliance with the prior authorization obligation makes the transaction void and without legal effects, and 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.[6]

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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. Said amendment 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).

2 Royal-Decree-Law 11/2020, of 31 March, adopting complementary urgent measures to face the social and economic impact of COVID-19 and Royal Decree-Law 34/2020, of 17 November, on urgent measures supporting business solvency and others. An implementing regulation has been announced, which is not yet available not even in draft form at this moment.

3 See here, here and here.

4 Which includes rules on ownership restrictions to safeguard media plurality.

5 This definition includes EU/EFTA resident investors actually controlled by foreign (non-EU/EFTA) residents. An EU/EFTA investor is deemed to be controlled by a foreign investor if *(i)* the foreign investor ultimately owns, directly or indirectly, a stake of 25% or more of the share capital/voting rights in the EU/EFTA investor; or *(ii)* the foreign investor exercises, by any other means, either direct or indirect control over the EU/EFTA investor.

6 On the other hand, it puts in place a 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 implementing regulation enters into force. The simplified authorization procedure enables 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 (in principle) up to six months. The authorization must be deemed rejected if the Council does not decide within that term.