# Spain: The New Foreign Direct Investment Regulation: A Welcome Improvement—Though Gaps Remain

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## 1. Context

This article refers to the foreign direct investment (FDI) screening system put in place by Royal Decree-Law 8/2020, of 17 March (FDI Screening Act) as amended, as a form of control or *ex ante* authorisation of foreign investments into Spanish businesses active in 'sensitive' industries.[1]

This FDI regime is of some importance in the international landscape due to the fact that Spain is the fourth largest economy of the European Union (EU) and it is (though now to a somewhat lesser degree) a very open economy and important destination of international investment in the last four decades since accession to the EU in 1986. It is a jurisdiction that comes up often in international transactions, either because the primary target of an investment is in Spain, or because this is one of the countries where the target of a corporate transaction has a subsidiary so an investment operation in Spain takes place. In that regard, the market share threshold which exists under Spanish merger control law, and which is triggered often in foreign-to-foreign transactions is now compounded by the FDI screening regime, where also foreign-to-foreign (indirect) investments are caught, provided there is a link in terms of subsidiaries or assets in Spain.

This article does not touch upon, nor does it make reference to the special authorisation regimes or administrative restrictions in place in various sectors; administrative restrictions which generally apply regardless of the nationality of the investor as they seek to protect goals in principle unrelated to nationality of ownership. This is the case, for instance, regarding the ownership and cross-ownership restrictions in the media sector (which seek to protect media plurality); or in the energy sector (which typically seek to avoid excessive vertical integration, market concentration and market transparency); or the telecommunications sector (which typically seek to avoid excessive market concentration or transparency). In some instances foreign ownership restrictions have been in place to protect an *ad hoc* industry interest (for instance to avoid circumvention of air traffic rights by foreign entities in the airline business),[2] distinct from the specific protection of the national security.

Regarding the concern of foreign investors acquiring ownership of national interest businesses or infrastructures, Spain, like other countries, put in place a new FDI screening system applicable to non-EU/non-European Free Trade Association (EFTA) companies, covering also some specific EU investments. This was done as a matter of urgency during the first weeks of the Covid-19 pandemic. The FDI screening device put in place in Spain amounted to a departure from a highly open state in terms of inward investment, where restrictions to foreign investment were broadly limited to defence related businesses.

Since its inception, the Spanish regulatory regime has led to considerable doubts regarding its interpretation and application. During the first three years of application (April 2020 until August 2023), the excessive vagueness of the statutory provisions and lack of regulatory clarity was exacerbated by the absence of an implementing Regulation (which the original statute putting in place the FDI screening regime made reference to). The implementing Regulation (Royal Decree 571/2023, of 4 July, on Foreign Investment or Implementing Regulation) which finally entered into force in September 2023,[3] has provided some clarity in various areas, but also new areas of doubt have arisen and loopholes remain, as discussed below. Other than the Implementing Regulation there are no detailed administrative guidelines, which would be useful—and there is some implied desire expressed informally by the competent authorities for such future guidelines when enough experience has been acquired. In the meantime, there is a reference under the FDI Screening Act to the notion of acquisition of control under competition law, which is useful and enables the application of the rich body of law and case law in that area to many situations under the FDI Screening Act (concept of control and acquisition of control; gun-jumping, etc.).

[1] The applicable rules are laid down in Law 18/1992, of 1 July, on rules for foreign investments into Spain; Law 19/2003, of 4 July, on the regime of movement of capital, foreign economic transactions and money laundering, as recently amended by Royal Decree-Law 8/2020, of 17 March, of urgent exceptional measures to face the social and economic impact of Covid-19 (which inserts the regulatory framework of FDI screening in art.7bis of Law 19/2003, cited), as recently clarified by Royal Decree-Law 11/2020, of 31 March, adopting complementary urgent measures to face the social and economic impact of Covid-19; and as amended, again, by Royal Decree-Law of 34/2020 of 17 November 2021; and Implementing Regulation approved by Royal Decree 571/2023, of 4 July, on Foreign Investment.

[2] Article 4(f) of Regulation 1008/2008 on common rules for the operation of air services in the Community [2008] OJ L293/3.

[3] It took more than three years to approve an implementing Regulation, a time lag which might seem excessive by most standards. It is hard to ascertain the reasons for such a delay, but it may be speculated that the sensitive and highly political nature of the subject-matter (which required that several government departments wanted to express their views) is at least partly to blame.

In this article we attempt to highlight the main aspects of the FDI law in force as it results from the various reforms and amendments since March 2020 until the Implementing Regulation. Below we deal with:

(i) The concept of foreign investor and qualified investor.
(ii) The definition of 'sensitive industries'.
(iii) Transactions covered and transactions excluded by reason of the nature of the transaction or amount of the investment.
(iv) Substantive test and judicial review; competent authorities; administrative procedure and guidance; timing of approvals, types of decisions and conditions attached to decisions; and penalties for non-compliance.

## 2. The general notion of 'foreign investor' and 'qualified investor'

2.1 The FDI screening regime affects direct *foreign investments* in Spain. 'Foreign' in this context refers to an investor who is resident in countries outside of the EU/EFTA space, or even if the investor is EU/EFTA based, it is controlled (*real ownership* as the relevant provision states) by foreign (non-EU/EFTA) residents. As depicted below, even EU/EFTA investors are deemed foreign in some instances.

Foreign ownership shall be deemed to exist when foreign residents ultimately *own or control*, directly or indirectly, individually or concertedly a percentage exceeding 25% of the investor's share capital or voting rights, or when by other means they exercise control, directly or indirectly, of the investor. In this area the same criteria as those applied under merger control can be resorted to. For instance, syndicated or joint voting would generally be considered as a unitary block when applying the 25% share. Conversely, in a situation where various foreign residents ultimately own more than 25% of the shares but none individually reaches that threshold, and there is no vote syndication, arguably such circumstance alone would not determine foreign ownership.

In the area of investment entities (private equity, pension funds, etc.), the residence of general partners (GPs) or individuals ultimately controlling the fund of investment entities is looked at for the purposes of ascertaining whether or not the investor is foreign. Place of residence of the limited partners (LPs) or mere investors is not relevant (provided those LPs do not intervene in the management of the investment entity and are genuinely passive). This is the administrative practice generally followed. The Implementing Regulation, however, adds some complexity by contemplating that, for the place of residence of the limited partner not to be relevant, the limited partner must not have access to "privileged information". A possible interpretation in line with merger control law could be that, to the extent this access to information is deemed solely to protect the value of the investment, then this would not trigger applicability of the FDI regime if the limited partner is foreign (for instance, rationale *ex* art.3.5(c) of Regulation 139/2004 of 20 January, on the control of concentrations between undertakings[4] (EUMR)).

Investments in the defence sector have their own specialties referred to below.

2.2 If the investor (or entity ultimately controlling it) is an EU/EFTA resident, the FDI Screening Act is also applicable nonetheless (until 31 December 2024, though this regime has been extended various times already) if *(i)* the investment concerns listed companies; or *(ii)* in case of non-listed companies the investment is in excess of €500 million.

The Implementing Regulation does not contain any guidance on how to calculate the value of the investment in Spain. As a matter of practice the value of the investment in Spain has in past instances been calculated by taking the percentage that Spanish asset value (book value) represents over the entire international target's asset value; and extrapolating the resulting percentage to the transaction value (e.g., in a simple example if worldwide asset value is €5 billion and Spain business asset value is €500 million, i.e., 10%; and the price or consideration in the transaction amounts to €10 billion, then the value of the investment in Spain would be 10% of €10 billion, i.e., €1 billion).

Various investments by EU/EFTA investors have been subject to FDI screening. Perhaps the most notable of them is the (failed) acquisition of Prisa (media company owning the daily Newspaper *El Pais*) by Vivendi, a transaction with a high political component. It is remarkable that the one transaction in the public record which the government has apparently derailed is one where the foreign investor is an EU (French) investor.[5] When the foreign investor is EU/EFTA, FDI screening must be compliant with EU law, so EU investors have an extra layer of protection vis-à-vis Member State FDI screening action. Under the case law, this extra layer of protection extends to EU subsidiaries, even if foreign-owned. This matter is discussed further below.

Any non-Spanish investor (i.e., ultimately not Spanish-controlled) is deemed "foreign" for FDI screening purposes in the field of weapons and defense businesses.[6]

2.3 *Qualified investors* are those foreign investors regarding which FDI authorisation is required regardless of the sector of the economy where the investment takes place. Qualified investors are *(i)* foreign state-controlled

[4] Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[5] The Objective, "Indignación en Vivendi por el decreto antiopas que le impide controlar Prisa con Sánchez" (7 July 2023), available at: *https://theobjective.com/economia/2023-07-07/vivendi-decreto-antiopas-prisa/*; El Confidencial, "Pedro Sánchez y Santander bloquean el intento de Vivendi de tomar 'El País' y la SER" (8 April 2022), available at: *https://www.elconfidencial.com/empresas/2022-04-08/pedro-sanchez-banco-santander-bloquean-intento-vivendi-tomar-elpais-ser_3405495/*.
[6] Law 18/1992, of 1 July, cited.

investors; *(ii)* investors having invested in sensitive sectors in other EU countries; and *(iii)* investors posing risks of illegal activities affecting public security.

This provision is far too broad and has led to considerable doubts as to its interpretation. Indeed, taking the interpretation literally would mean that *any* investment by one of the mentioned entities in *any* area may potentially be subject to FDI screening. The Implementing Regulation attempts to clarify the scope of this provision as explained below:

(a) *'Sovereign funds' investments may be excluded from FDI screening.* To ascertain if a given investor is related to a foreign government for these purposes, the following criteria are to be borne in mind: *(i)* the existence of 'control' under the Competition Act; *(ii)* control by means of significative financing or subsidies from a third country;[7] *(iii)* in the case of investment vehicles channelling state investments, they are deemed not to be controlled by a foreign state if it flows from their governance and nature of the management that the investment policy is independent and focuses solely in the profitability of the investments without foreign state interference.

(b) *Investors having invested in sensitive sectors in other EU countries having potentially affected public order in another EU Member State.* To determine these, reference is made to the information received in the framework of the cooperation mechanisms in Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union.[8]

(c) *Risk of foreign investor carrying out criminal activities affecting public security.* Final decisions (i.e., against which no further appeal is possible) in the prior three years against the investor for criminal or administrative breaches in areas such as money laundering, environment, tax or protection of sensitive information, are to be taken into account to ascertain the risk indicated.

Again, still many open concepts which enable a margin of discretion in their application, which hopefully will be reduced if one day administrative guidelines are published.

## 3. Definition of 'sensitive industries'

### *3.1 General categories contemplated in the FDI Screening Act*

Whenever the investment has as a target one of the areas set out below, the investment will be subject to FDI screening unless it benefits from one of the exemptions discussed in this article:

- critical infrastructures;
- critical technologies;
- 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.[9]

### *3.2 The attempted clarifications added by the Implementing Regulation.*

The above categories are far too broad, and the Implementing Regulation attempts to narrow down the scope, though considerable uncertainty can still remain in some instances:

(a) *Critical infrastructures*, either physical or virtual, including those in the energy, transport, water, healthcare, communications, media, data storage and processing, aerospace, defence, electoral, finance or sensitive installations, as well as real estate required for the use of such infrastructures. 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, only the owner of the infrastructure is aware of such inclusion. Investors would not have knowledge of this circumstance or (perhaps) would only know as a matter of fact when carrying out their due diligence of the target subject to observance of legal requirements.

(b) *Industries* (other than 'critical infrastructures', above) subject to prior FDI screening:
   - critical technologies: telecommunications, AI, robotics, semiconductors, IT security, aerospace, defence, energy

[7] In this area, some common ground or connection can be identified between the FDI screening regime and Regulation 2022/2560 on foreign subsidies distorting the internal market [2022] OJ L330/1. The Implementing Regulation provides that the government may investigate the foreign state financing.
[8] Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union OJ L791 of 21 March 2019.
[9] Which includes rules on ownership restrictions to safeguard media plurality.

storage, quantum, nuclear energy, biotechnology and nanotechnologies.
- dual-use technologies: those defined in art.2.1 of Regulation 2021/821, of 20 May, setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast);[10]
- key technologies for leadership and industrial capacitation: those referred to by 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 (AI), digital security and connectivity;[11]
- technologies developed under the auspice of programmes and projects of special interest to Spain, implying a substantial amount or percentage of financing from the national or EU budget.[12]

(c) *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.

(d) *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 supplies or services in the critical sectors listed under section 3.1 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 art.35.3 of Regulation 2016/679, on personal data protection.[13]

Based on practice and the nature of FDI screening, the above list should not be taken as a strict *numerus clausus*, but rather as guidance of the types of industries or activities caught, it being advisable to liaise with the authorities in case of doubt.

Finally, the FDI Screening Act and Implementing Regulation contemplate the possibility of the government requiring authorisation for foreign investments in industries not listed as sensitive (and therefore as a general rule not subject to FDI screening). In these cases, FDI approval would be required if the government considers, by means of an express decision, that security, public health or public order may be affected, regardless of the industry.

[10] Regulation 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items [2021] OJ L206/1.
[11] Decision 2021/764 establishing the Specific Program implementing Horizon Europe—the Framework Programme for Research and Innovation, and repealing Decision 2013/743 [2021] OJ L167I/1.
[12] 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 art.8.3 of Regulation 2019/452 on direct foreign investment into the European Union.
[13] OJ L 119, 4.5.2016, p. 1–88.

## 4. Transactions caught and transactions excluded from the FDI screening requirements by reason of the nature of the target business, type of transaction or amount of the investment

### *4.1 Transactions or investments caught by the FDI Screening Act*

Transactions caught are *(i)* acquisitions of 10% or more of the share capital of a Spanish company *or (ii)* those corporate transactions as a result of which control is acquired within the meaning of merger control law as regulated by the Spanish Competition Act (Law 15/2007 of 3 July). The exception to this rule is in the defence sector, where *any degree or amount of investment* is subject to authorisation by *any non-Spanish investor* (also EU/EFTA) is subject to the special exemption indicated below.

(a) The reference to merger control law is a welcome attempt to ensure consistency with a body of law and case law that has been well developed in prior decades. Although the legal clarity provided by the reference to the concept of control under competition law is still clouded by the fact that some transactions which do not necessarily amount to a change of control can still be caught, notably, acquisitions of 10% or more of share capital of Spanish companies not amounting to a change of control.

(b) Indirect acquisitions of control of a 10% or more of the shareholding of a Spanish company (i.e., acquisition of a foreign mother company of the Spanish subsidiary) are caught.

(c) There has been some doubt, which remains under the Implementing Regulation, regarding the possibility that acquisitions of stock in intermediate mother companies in the EU with a subsidiary in Spain (mother companies meaning in this context companies not set up to circumvent the FDI screening rules) would not be caught by the FDI Screening Act if that acquisition is of a shareholding equal to or above 10%, but below 25% (see section 2.1, above). For instance, if an intermediate mother company in the EU (which has a 100% owned subsidiary in Spain) is ultimately 91% EU owned and 9% Chinese owned; and the Chinese shareholder subsequently acquires from the EU shareholders an additional 10%, such mother company (and the Spanish subsidiary indirectly) would be 19% Chinese owned (i.e., below 25%) so arguably the FDI Screening Act would not apply to that investment (as the EU mother company would be less than 25% foreign-owned) even if 10% or more of the Spanish subsidiary is indirectly being acquired.

There is some ground to argue this interpretation based on the literal wording of the relevant provision defining the concept of foreign investor for FDI screening purposes under art.7bis.1(b) of Law 19/2003, cited, which states that *ownership by non-EU/EFTA residents is deemed to arise when those residents possess or ultimately control, directly or indirectly, a percentage above 25% of the share capital or voting rights of the investor, or when through other means exercise direct or indirect control of the investor*. Hence, if there is a change of ownership in the share capital of the intermediate EU investor, so that post-transaction the foreign-owned share capital remains below 25%, arguably the investment falls short of qualifying as foreign for FDI screening purposes.[14]

The above interpretation could of course not be valid if the acquisition of shares in the intermediate EU investor results in the EU intermediate investor either passing from being EU/EFTA owned to being foreign owned (i.e., from below 25%, or 25%, foreign owned to above 25% foreign owned), or if the intermediate EU investor already qualified as foreign pre- (and post-) transaction (and the increase in foreign share capital ownership leads to a change of control, see point (d) below). In any event, the strict character of the FDI Screening Act and wide margin of discretion of authorities advise erring on the side of caution and seeking guidance in case of doubt in this particular area, unless until either a regulatory reform or administrative guidelines are in place.

(d) Regarding acquisitions of stake holdings above the initial 10%, an area of doubt has been whether or not additional acquisitions in excess of 10% were reportable transactions. This has now been clarified by the Implementing Regulation which states that increases in corporate shareholdings by a shareholder who already owns more than 10% of the share capital and which are not accompanied by changes in control are not subject to FDI screening.

[14] However, the very specific circumstances of the case should be carefully weighed.

(e) Another welcome clarification added by the Implementing Regulation is that internal restructurings within a group of companies are not included within the scope of the law and do not therefore require FDI screening. This is consistent with the concept of concentration under merger control law. The bad news regarding this point is that this exception does not apply to restructurings where direct or indirect changes of shareholdings in defence related companies takes place. This is because the restructuring exception is included in the chapter of the Implementing Regulation related to general sensitive industries investments which does not apply to the special defence related authorisation section of the Implementing Regulation. Hence, in the absence of clarification, the legal position is that restructuring transactions where no change in the ultimate control take place are not subject to FDI screening, with the exception of restructurings affecting defence companies.

(f) The law still remains somewhat unclear regarding asset acquisitions (which have been arguably, but not clearly, included by a reform of the FDI Screening Act which referred to acquisitions of 'parts of companies' as being caught). However, the analogies with merger control law as well as the goals of the FDI screening regime and the practice of the authorities currently leave little doubt that asset acquisitions are caught by the FDI Screening Act.

## *4.2 Exemptions: De minimis, energy, defence, transitory investments*

The FDI Screening Act as initially drafted signified that a potentially unlimited or very high number of transactions required FDI authorisation. The initial reforms of the FDI Screening Act introduced a blanket €1 million investment value *de minimis* rule, below which no FDI authorisation was required. This rule is no longer in force and has been replaced by a more comprehensive system of exemptions. These can be summarised as follows:

(a) *Investments in the energy sector* are exempted where *(i)* the target does not carry out energy regulated activities (in general, power generation plants or projects, as well as commercialisation 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 in Spain does not exceed 5%; (iv) when the target is an energy commercialisation company, that the number of customers does not exceed 20,000.

(b) *Investments in sensitive industries which are not regarded as critical infrastructures or defence related* (see section 3, above) are exempted from FDI approval 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 programmes or projects of particular interest to Spain.

The *de minimis* exemption would not be available to investments in electronic communications companies *(i)* holding licences for radioelectric spectrum use or using orbit-spectre resources within Spanish sovereignty; *(ii)* with significant market power in any electronic communications market; or *(iii)* when the target relates to research activities and exploitation of mineral deposits of strategic raw materials or minerals. Strategic minerals in this regard are hydrocarbons or those set out in the Communication of the Commission on Critical Raw Materials Resilience.[15]

This *de minimis* €5 million exemption is potentially the furthest reaching, but as currently drafted it can lead to considerable doubt. Indeed, the wording of the provision containing the exemption is not entirely unambiguous as to whether the *de minimis* turnover amount refers to *(i)* turnover of the entire target group internationally, or *(ii)* solely to turnover of the Spanish business of the target (in this case either worldwide or in Spain alone), or *(iii)* to turnover of the entire target, i.e., sales of the entire international target group into Spain. The following is the literal wording of the applicable part of the relevant regulatory provision (key part in italic letters):

> "In all other cases of letters b), c), d) and e) of Article 7 bis.2 of Law 19/2003, of July 4, 2003, *foreign investments in which the turnover of the acquired companies does not exceed 5,000,000 euros in the last*

[15] Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and Regions Committee, of 3 September 2020 (COM/2020/474 Final).

*accounting period closed*, provided that their technologies have not been developed under programs and projects of particular interest for Spain, will be exempt from prior authorization."

On the one hand, it can be argued that the exemption rule, because it is an exception to a general rule, should be construed restrictively (i.e., *de minimis* rule would refer to the entire turnover of the entire target internationally). However, if construed in such a manner, the *de minimis* rule would arguably defeat its own purpose, given that any significant international investment is generally worth more than €5 million worldwide, so as a matter of practice the FDI Screening Act would be rendered inoperative.

The FDI screening regime in Spain typically looks at the business in Spain and how it can impact security and national interest in Spain; also typically, values of the investment in Spain have been considered taking into account Spanish asset value (as opposed to entire target's value) correlated to transaction price (as explained under point 2.2 above, regarding value of investment calculation). The latter interpretation would imply that worldwide turnover of the Spanish subsidiary of the international target plus, perhaps, the turnover of the entire international Target group in Spain (minus the turnover of the Spanish subsidiary in Spain to avoid double counting) would be a conservative measure for the purposes of the *de minimis* rule. A slightly less conservative but still plausible interpretation would be to consider the entire (worldwide) turnover of the Spanish business of the target.

This is an area where, however, administrative guidance would be welcome, perhaps under the form of the guidelines referred to above.

(c) *Transitory investments or holdings*, i.e., investments of a short duration (hours or days) in which the investor does not have capacity to influence the management of the acquired company because they are underwriters of share issues and public offerings for sale or subscription of shares. It is the end-investors who, if necessary, require authorisation. This resembles the prevailing logic under merger control rules, where temporary holdings by financial entities etc., are not deemed concentrations under the EUMR.[16]

(d) *Acquisitions of real estate not necessary or related for the operation of any critical infrastructure* or required for an essential service.

(e) *Exceptions to FDI approval in connection with national defence*. The Implementing Regulation exempts investments from prior authorisation in the following cases: *(i)* investments in Spanish companies when they do not reach 5% of the share capital, provided that they do not allow the investor to form part, directly or indirectly, of its governing body; and *(ii)* acquisitions leading to holdings of 5–10% of the capital stock, provided that the investor notifies the transaction and certifies in public deed not to form part of the board of directors or governance body, nor to use, exercise or transfer to third parties its voting rights in listed companies (a suggestion that this latter requirement does not apply to privately held companies).

This exemption has been the object of much attention under the recent acquisition by Saudi Telecom (controlled by the Saudi State) of a 5% stake in the incumbent telecommunications operator Telefonica plus acquisition of option rights over an additional 4.9% stake.[17] Reportedly, Telefonica provides the national Military with satellite capacity, so it is apparently being treated as a defence company for these purposes.

The acquisition of the second 5% stake in Telefonica through put option rights pending FDI approval has raised some politicians' eyebrows.[18] However, such conception of option rights not being relevant for merger control purposes would be consistent with merger control law and precedent (in the absence of either of those under FDI screening law but based on the analogy with merger control law). An option right does as such not amount to an acquisition, but to a (potential) right to acquire in the future if certain conditions are met. Only when the option right is actually exercised will there be a transfer of ownership (potentially) leading to a change of control (or a relevant investment

[16] Article 3.5 EUMR.

[17] *Reuters*, "STC sticks to plan for 9.9% Telefonica stake, sources say" (31 October 2023), available at: *https://www.reuters.com/business/media-telecom/stc-renounces-upping-stake-spains-telefonica-99-report-2023-10-30/*.

[18] EFE, "Yolanda Díaz pide vetar a los inversores extranjeros en el Consejo de Telefónica" (13 September 2023), available at: *https://efe.com/economia/2023-09-13/yolanda-diaz-vetar-inversores-extranjeros-telefonica/*.

for FDI screening purposes) with relevance for merger control or FDI screening purposes.[19] Consequently, the mere granting of option rights is as a general rule not deemed a concentration under merger control law and should not be deemed as leading to a relevant investment under the FDI Screening Act. Only if the option right is accompanied by legally binding agreements which makes the exercise of the option a foregone conclusion would such call option be relevant for these purposes.

## 5. Competent authorities, administrative guidance, procedure, remedies and penalties for non-compliance

### *5.1 Competent authorities*

The competent authorities to receive, process and approve FDI screening applications are *(i)* the Directorate General of International Commerce and Investment of the Ministry of Industry, Commerce and Tourism (which refers the file to the Foreign Investment Board); and *(ii)* the Directorate General for Armaments at the Ministry of Defence regarding investments in defence related companies. These two Directorates also decide on the requests for formal guidance submitted.

The Directorate General in charge has been quite cooperative in the process of application of the new FDI regime since the spring of 2020, in circumstances that have not always been easy (first pandemic, huge number of transactions potentially subject to the regime and coping with varying legal issues of interpretation as set out above). Some former members of the Competition Authority later joined the Directorate General of International Commerce, which has helped in some instances construe the law in coherence with merger control. Files are typically shared amongst government departments (ministries). The file is dealt with by the Foreign Investment Board (JINVEX), which is led by the Director General of International Commerce, representatives of the National Intelligence Centre and representative of all ministries. Once reviewed by JINVEX the file is referred for final administrative decision.

The government (Cabinet) is responsible for deciding on the authorisation, with the exception of investments equal to or below €5 million, which are decided by the Directorate General of International Commerce and Investment.

### *5.2 Administrative guidance*

The Implementing Regulation contemplates the possibility of filing for guidance regarding whether or not a transaction must be filed for FDI screening. A response must be provided within 30 working days from filing of the consultation. The definition of 'working day' under administrative law excludes weekends and official holidays. In case no response is provided with 30 working days, an application for FDI approval can be submitted. Strictly speaking the drafting of the Implementing Regulation states this possibility, i.e., it fails to clarify if a failure to provide a response to a consultation in the stated time frame equates an admission of jurisdiction or not; therefore we see the possibility in case of no response in 30 days that a decision is adopted to file for FDI approval, yet an administrative response indicating that no filing is required is delivered even after the formal FDI filing has been submitted.

Hence, what would normally be a welcome clarification by the Implementing Regulation (given that hitherto the consultations, though generally solved in a few weeks, could in more than exceptional occasions take more than that) is only a partial clarification opening the door to additional doubt.

### *5.3 Implicit three-month rejection deadline*

FDI screening applications are subject to a three-month deadline, a welcome development as the prior legal regime provided for a six-month deadline. In the absence of a decision after three months, the request for authorisation is deemed rejected. Waiting periods can be stopped for instance in case of information requests.

### *5.4 Anti-circumvention provision*

Which has the purpose of linking two acquisitions in less than two years as a single transaction. This seems to follow the spirit, again, of similar provisions in the area of merger control.[20]

### *5.5 Timing to execute the investment*

Authorised investments must be executed within six months from approval, unless an extension is obtained. Substantial variations of the investment structure must be subject to a new FDI application.

### *5.6 Finalisation of proceedings and monitoring of FDI Decisions*

Transactions submitted for FDI review are thus far very rarely forbidden and if so not with publicly available decisions or procedures, in line with the whole process (see comments above, regarding the recent *Vivendi/Prisa* case); most often investments are approved

[19] "An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements. However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is de facto sole control". Case IV/M.397—*Ford/Hertz* of 7 March 1994. This principle is generally accepted by the national Competition Authority (e.g., merger Decision in file N-248, *Correos y Telégrafos/Chronoexprés*).
[20] Notably, art.5.2 EUMR.

unconditionally; and sometimes they are subject to remedies. According to the latest Activity Report published by the Authority referring to 2022, in that year there were 98 authorisations; 174 consultations; and one prohibition (*Vivendi/Prisa*). Of those authorisations, 10 were conditional.

Conditions attached to FDI Decisions are known to the parties alone as a general rule. Unlike what happens in the area of merger control, as pointed out, it is therefore hard to make any general statements about remedies in connection with FDI screening. Remedies known to us generally include or revolve around the following:

- Keeping domicile, staff and company listing in Spain;
- Keeping key assets in Spain (networks) or in the EU (IT/technology);
- IT/technology: additional safeguards re data protection (international data transfer) and software security;
- Keeping functional/management autonomy of target;
- Use company votes to promote general interest goals, e.g., energy transition;
- Avoid divestitures leading to losing control of subsidiaries which may put at risk the viability/stability of public interest activities;
- Ensuring financial solvency; and
- Monitoring (periodic reporting).

Monitoring of FDI Decisions (particularly remedies) is regulated in terms comparable to those under the Competition Act. The experience provided by CNMC activity and European Commission (in the area of merger control generally) can also provide useful insight in connection with FDI screening.

### *5.7 Infringements*

The most characteristic infringement is gun-jumping, in terms similar to those of merger control, including early implementation. Also providing false or incomplete information is an infringement as under merger control law. This is an area where a body of case law and administrative practice is still to be built, the commonality in the area of gun-jumping appears very extensive with merger control, to which reference is made for case law and practical solutions.

### *5.8 Penalties*

Include *(i)* administrative fines ranging between €30,000 to up to the economic value of the investment; *(ii)* invalidity of the corporate or transactional agreements (e.g., suspension of voting rights of shares); *(iii)* public admonition.

Non-compliance with authorisation conditions also amounts to a very serious infringement as does the submission of false or incorrect information regarding relevant aspects.

## 6. Final word related to substantive test, judicial review and the promotion of transparency.

By its very nature at the core of executive branch foreign policy and government prerogatives generally, it appears clear that this area is presided by a wide margin of discretion. The value deemed worthy of protection by the FDI screening laws (i.e., public order, public security and public health) appears itself subject to interpretation depending on the particular circumstances, timing, governmental circumstance and policy of each Administration and facts of each case (as the need for security may vary depending on context, such as economic context affecting one or more types of supply; turbulent geopolitical times versus peaceful times, etc.). It seems therefore, we are in a typical ‘political’ area.

The above implies that judicial review of government decisions in this area is going to be limited in its scope:

(a) First, judicial review seems likely to be quite limited to issues of procedure, manifestly arbitrary use of power or corruption.
The above is compounded by the additional factor that, unlike in the area of merger control, where merger decisions are published (subject to redaction of business secrets) and administrative reasoning is largely transparent, the world of FDI screening is not characterised by its transparency, but rather on the contrary, is quite opaque. The reasons for each authorisation are not known to the parties, much less to the public. This necessarily will also impair the possibilities of judicial review.
There is some recent judicial review activity in countries such as Germany, with two recent judgments of November by the Administrative Court of Berlin seemingly confirming that judicial review in this area is likely to stay constrained to the issue of administrative procedure, which is consistent with the nature of the FDI screening activity, very close or identified with government discretionary power.[21]
This may still be an important area for companies as states should at least strictly comply with hearing and other rights companies may have under the applicable

[21] See press releases here: “Investitionsprüfung: Erwerb eines Anteils an der PCK Raffinerie in Schwedt gilt als freigegeben (Nr. 44/2023)” (8 November 2023), available at: *https://www.berlin.de/gerichte/verwaltungsgericht/presse/pressemitteilungen/2023/pressemitteilung.1383442.php* and here: “Investitionsprüfung: Erwerb eines Medizinprodukteherstellers durch chinesisches Unternehmen durfte nicht untersagt werden (Nr. 46/2023)” (16 November 2023), available at: *https://www.berlin.de/gerichte/verwaltungsgericht/presse/pressemitteilungen/2023/pressemitteilung.1386057.php*.

administrative law. Also in the United Kingdom there is reported activity of pending matters in the area of judicial review of FDI screening.[22]

(b) One area of incipient activism which arguably provides judges with additional possibilities refers to the control of legality of national FDI screening measures and their compatibility with two Community law provisions:

(1) The first one refers to the interaction between art.21 EUMR and national FDI screening rules, in connection with concentrations with EU dimension. The European Commission is competent to make sure that Member State action, including FDI screening measures, are compliant with the procedure and principles under art.21 EUMR,[23] including proportionality.[24]

(2) The second refers to the compatibility of FDI screening with the fundamental principle of freedom of establishment under art.54 TFEU: whereas Member States are free to determine their own requirements of public security based on their national standard, such standard must comply with the principle of proportionality, meaning that only genuine and serious threats to public security are legitimate grounds to restrict investment or establishment on national security grounds. In other words, the European Commission and European courts are competent to ensure that national FDI screening measures are not sham measures which in fact disguise unwarranted political intervention or protectionism. These principles are also applicable to EU registered companies even if ultimate ownership is non-EU/EFTA, as the anchor for the application of the fundamental EU freedoms to companies is the place of registration of the company.[25]

The judiciary has a key constitutional role to play in keeping the excesses of the Executive at bay, and yet it may have limited tools to exert its role with some possible (yet potentially wide) areas of action provided by EU law and by the safeguards of the applicable administrative procedure. In that regard, even acknowledging that FDI screening is an area of added sensitivity and realm of government discretion, it would be helpful in liberal democracies to attempt to maximise transparency to the extent this is possible. FDI screening authorities internationally would do well to promote such transparency by publishing reports explaining standard practice and publishing precedents (in a merger control fashion), even if resorting to confidentiality or censorship tools when required. Lawyers will undoubtedly play a role in this regard, promoting such transparency with the required cautions to ensure secrecy and full compliance with any legal and ethical standards.

[22] Concerning the judicial review of two FDI screening decisions, i.e., *Nexperia BV/Nexperia Newport* and *L1T FM Holdings UK/Upp Corp Ltd* ("Notice of Final Orders under the National Security and Investment Act 2021" (15 July 2022), available at: *https://www.gov.uk/government/collections/notice-of-final-orders-made-under-the-national-security-and-investment-act-2021*), challenged, we understand, always on procedural grounds and safeguard of fundamental rights, such as the reach of administrative powers to review deals retroactively.

[23] Commission Decision of 21 February 2022, *VIG/Aegon CEE*, Case M.10494.

[24] See comments in my prior article "Merger control beyond merger thresholds and the multiplication of ex ante merger notification obligations" [2023] E.C.L.R. 117, 117–118.

[25] Judgment of CJEU of 13 July 2023, *Xella Magyarország Építöanyagipari Kft v Innovációs és Technológiai Miniszter* (C-106/22) EU:C:2023:568.