

The Spanish Government approves a package of economic measures to alleviate the social and economic impact caused by COVID-19. The package includes a reform of the foreign investment screening regime.

The rapid spread of Covid-19 has led to its consideration as a global pandemic. Spain, currently at the epicenter of the crisis, has declared the state of alarm last Sunday.¹

To ease the effects of the Covid-19 crisis in the economy, the Spanish Government approved yesterday Royal Decree-Law 8/2020, of 17 March, of urgent exceptional measures to face the social and economic impact of COVID-19 (**RDL 8/2020**), which according to the Government will mobilize € 200 billion. RDL sets up a new foreign investment regime applicable to non-EU/non-EFTA companies. The most significant aspects of RDL 8/2020 are the following:

- *Measures to support workers, families and vulnerable groups:* (i) moratorium on the payment of mortgages; (ii) the prohibition of water, power and gas cuts to vulnerable users during the crisis; (iii) unemployment benefits to workers affected by temporary collective dismissals; (iv) all workers will have access to unemployment benefits regardless of the length of their contribution period; and (v) € 300 million will be destined to urgent reinforcing of social care services.
- *Measures to support businesses and self-employed workers:* (i) the creation of a line of public financial guarantees of € 100,000 million to back credit from banking institutions; (ii) exemption of the payment of 75% of company's contribution to social security (100% when the company has less than 50 workers) with regard to workers affected by temporary work reductions; (iii) self-employed workers with reduced profits will be subject to receiving support for inactivity.
- *Softening of the rules of expenditure applicable to local authorities:* € 300 million will be destined for that purpose so that city councils can use budget surpluses for social expenditure.
- *Support for scientific research:* urgent resources will be allocated to research for a vaccine for the Covid-19 virus.
- *New foreign investment regime,* dealt with in more detail below.

Urgent screening mechanism for foreign investments.

Foreign investors for these purposes are those residing in countries outside of the EU/EFTA.² RDL 8/2020 amends Law 19/2003, of 4 July, on the legal regime of capital movements and foreign economic transactions, by adding Article 7 bis.³ Said amendment does not repeal Royal Decree 644/1999, of 23 April, on Foreign Investments (**RD 644/1999**) 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).

The Government prohibits the acquisition by foreign investors of 10% or more of the share capital of companies active in sectors related to public order, public security or public health. Acquisitions of less than 10% of the share capital are also subject to authorization if resulting in an effective participation in the control or management of the target company. 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 with sensitive information such as personal data or with capacity to control such information;
- the media.

Foreign investment in any industry shall also be subject to an *ex ante* authorization regime in one of the following cases: (i) when the foreign investor is controlled directly or indirectly by the government of a third country, including

¹ Royal Decree 463/2020, of 14 March, declaring the state of alarm. It includes measures such as population confinement, assumption of direct control by the central government of vital tools such as armed forces including regional police forces; limitation of commercial activities, etc. This measure has exceptional nature and for a limited period of fifteen days, after which parliamentary approval is required. For a quick-look summary of the measure click [here](#).

² This authorization regime is in line with the EU regime approved last year. See our alert on this topic [here](#).

³ It is foreseen that the aforesaid legal regime shall be temporary, remaining into force until the Council of Ministers decides to revoke it which is expected when Spain's economic situation as a result of the sanitary crisis (and, particularly, the valuation levels of the Spanish stock exchange which have plummeted to historically low levels) returns to normal.

public bodies or armed forces; (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) if administrative or judicial proceedings have been initiated against a foreign investor for exercising illegal or criminal activities.

The wording of RDL 8/2020 refers literally to direct investment in Spain by foreign investors. Does that wording imply that an acquisition of control triggered by an indirect acquisition outside of Spain is not subject to authorization? Does it imply that an EU company owned by a non-EU entity could escape the administrative control? In response to this, the following is noteworthy:

- (a) Reference to the past interpretation of RD 644/1999 is relevant, as administrative practice made it clear that indirect acquisitions (*i.e.* changes of control by means of acquisition of a Spanish company ultimately owning a Spanish subsidiary or assets engaged in war material production and trading) were also subject to the mandatory authorization. For instance, last year, the Government approved under RD 664/1999 the acquisition of Abertis Infraestructuras S.A. by Atlantia S.P.A. and Hochtief AKT,⁴ due to the fact that Abertis indirectly controlled Hisdesat Servicios Estratégicos, S.A., a company engaged in satellite communication services for military and governmental use. The above interpretation has been confirmed by the courts.⁵ Therefore, it is quite possible that the Government takes the view that indirect acquisitions of control are caught, even if seemingly against the literal wording of RDL 8/2020.
- (b) A variation of (a) happens where the indirect acquisition of control takes place through an acquisition of a foreign company. However, also the indirect acquisition of control of a Spanish defence company through the acquisition of a non-Spanish company is caught by the authorization regime under RD 644/1999.⁶ Therefore, there is a risk that the Government considers that an acquisition of a Spanish company performing public interest activities, by means of an intermediate acquisition of an EU company controlling it, requires authorization under RDL 8/2020.

Consequently, we see risk for a broad interpretation of the foreign investment authorization under RDL 8/2020, in line with the interpretation of RD 644/1999 in connection with defence companies, so that the Government may want to monitor and approve all acquisitions direct or indirect of the businesses or by the acquirers contemplated.

Transactions subject to the authorization regime must be subject to a condition precedent of prior approval. Moreover, 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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⁴ Decision of the Council of Ministers of 28 December 2018.

⁵ The Supreme Court, in its Judgment of 4 March 2013, appeal number 753/2011, analysed whether the authorization regime included in Article 11 of RD 644/1999 is limited only to direct acquisitions of companies active in defence-related activities or, on the contrary, if it includes transactions leading to an indirect change of control. In that case, Tvikap AB, a Swedish investment fund, received a €1 million fine and a public admonition due to its implementation of the acquisition of more than 5% of the shares of a listed company, Amper S.A., which carried out activities directly related to the national defence. The fined company argued that Amper S.A. was not directly active in defence activities, since these activities were carried out by fully owned subsidiaries of the listed company and, therefore, said transaction was not subject to the authorization regime contained in RD 644/1999. In other words, the investment fund argued that no infringement had been committed. However, the Supreme Court rejected the company's arguments and decided that Amper S.A. exercised a decisive influence over its subsidiaries and, consequently, the listed company carried out activities, even if through its subsidiaries, directly related to the national defence. For this reason, Article 11 of RD 644/1999 was applicable and the transaction had to be notified and authorized before being implemented. The Supreme Court decided to reduce the fine to €250,000 in view of factors such as lack of intentionality (the acquisition had been notified to other public offices, amongst other factors).

⁶ Acquisition of BABCOCK MISSION CRITICAL SERVICES ESPAÑA, S.A.U. (BMCS ESPAÑA), indirectly through the acquisition of its parent company AVINCIS MISSION CRITICAL SERVICES TOPCO LTD (UK). In that case the indirect control took place through acquisition of a UK company, as RD 644/1999 covered any acquisition by a non-Spanish company; but the rationale is applicable *mutatis mutandis* to the new regime under RDL 8/2020, merely changing "non-Spanish" by "non-European" (non-EEA).