

# CALLOL | COCA

## Overview of the Foreign Direct Investment Screening Regime (Spain)

Pedro Callol

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## General Context / Broader Trends

# 01

- First trend towards **protectionism / economic nationalism**:
  - US v. China / Trump
  - Brexit, Covid-19
  - *Alstom / Siemens*: “South Korea and China have encouraged the emergence of global champions [...] and Europe needs to have the courage to create global champions” [joint statement Macron/Merkel May 2020]
- Second trend related to the **power of ‘Big Tech’, IA**:
  - Concerns about exacerbated market power/concentration
  - Vertical integration – increased enforcement law on verticals
  - Killer acquisitions
- Legal responses:
  - EU Regulation 2022/1925, 14 September 2022, **DMA**
  - EU Regulation 2022/2560, 14 December 2022, **FSR**
  - EU Regulation 2019/452, 19 March 2019, **EU FDI Framework**
  - Re-interpretation of Article 22 (*Illumina*) and 102 TFEU (*Towercast*)
  - Proliferation of national **FDI screening** (interaction between FDI and EU freedoms / Article 21 EUMR – *Xella Magyar* and *VIG* cases)

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## Immediate Context - Spain

1. Pre- covid pandemic: liberalized regime save for weapons related investments
2. Stockmarket rout – market cap. April 2020 / May 2024

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# 01

- Iberdrola €58 / €76.10 billion
- Santander €28.8 / €81.4 billion
- BBVA €16.39 / €62.9 billion
- Telefónica €16.37 / €26.2 billion
- Repsol €8.9 / €18.4 billion
- ACS €6.5 / €10.1 billion
- Indra €1 / €3.65 billion

3. Regulatory response: FDI Screening Act 19/2003, 4 July, as amended and Implementing Regulation 571/2023, 4 July.
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FDI regime in  
Spain –  
Transactions  
caught

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02

- Caution: still **vague drafting** in some key instances (emphasizes margin of discretion)
  - What transactions are caught?
    - Acquisitions of **10% or more of Spanish companies**
      - Asset acquisitions?
      - Additions to existing 10% shareholding?
    - **Acquisition of control** of Spanish *companies* (Competition Act)
      - Internal restructurings excluded
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## FDI regime in Spain – “Foreign Investor”

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# 03

- resident in countries **outside of the EU/EFTA space**; or
  - the investment is carried out by an EU/EFTA resident, who is actually *(i)* **controlled by foreign (non-EU/EFTA)** residents; *(ii)* **25% foreign ownership** by an investor or various investors syndicated
  - need to seek authorization 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
  - Pension, PE funds: residency of GP is taken into account (provided LPs do not have political rights in fund nor have access to confidential information of the fund)
  - Exception: defence sector – any non-Spanish investor qualifies as foreign
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Affected sectors are:

## Sensitive Industries

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# 04

- critical infrastructures, both physical and virtual (energy, transport, water, healthcare, communications, media, data storage and processing, aerospace, defence, finance or sensitive installations) and real estate required for the use of such infrastructures – **National Catalogue of Critical Infrastructures;**
  - critical technologies: telecommunications, AI, robotics, semiconductors, cybersecurity, aerospace, defense, dual-use, energy storage, quantum, nuclear energy, biotechnology, advanced materials and advanced manufacturing systems;
  - sectors with access to sensitive information such as functioning of critical infrastructures;
  - the media, without prejudice of the application of the Media Act.
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## Sensitive Industries (ii)

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# 04

Essential inputs: those indispensable and non-replaceable for the rendering of essential services in energy, hydrocarbons, electricity, raw materials, pharmaceuticals and food, strategic connectivity services, which loss or destruction would have a significant impact:

- software used by critical infrastructures in:
    - power generation, hydrocarbons and energy transmission networks and plants generally;
    - water treatment;
    - telecommunications installations and systems for voice transmission and data storage and processing;
    - financing and insurance sector for operation of installations or systems used in the supply of cash, card payment systems, payment settlement and insurance provision;
    - health sector for hospital management, distribution of prescription pharmaceuticals and laboratories information systems;
    - transportation installations and systems by air, sea or road;
    - management of installations or systems for food supply.
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**Sensitive  
Industries  
(iii)**

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**04**

Companies with access to sensitive information are

- 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;
  - companies with access to data bases related to the operation of essential services in the critical sectors listed;
  - those with access to official databases not accessible to the public;
  - those carrying out activities subject to compulsory evaluation of impact on personal data pursuant to Article 35.3 GDPR
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## Sensitive investors

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# 05

HOWEVER, foreign investments 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** – based on information received under the coordination mechanisms of EU Regulation 2019/452;
  - foreign investor having been condemned by a **final decision (against which no further appeal is possible)** for illegal or criminal **activities *in particular*** the prior three years in areas such money laundering, environment, tax.
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## Exemptions

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# 06

- **General de minimis rule** (not applicable to defence or critical infrastructures) whenever target realizes less than **€ 5 million**, provided target technology has not been developed within framework of programmes of key interest / radioelectric spectrum or mining of strategic minerals.
  - **De minimis rule in national defence related acquisitions:** (i) investments not reaching 5% of the share capital, provided that they do not allow the investor to form part, directly or indirectly, of its governing body [NOTE: freedom of investment in defence sector is suspended by government]; and (ii) acquisitions leading to holdings of 5-10% of the capital stock, subject to notification to the MoD and certification 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.
  - **De minimis rules in the energy sector:** (i) the 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) 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.
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## Process

- No pre-notification. Cabinet rules on report from JINVEX. Exception: investment value below €5 million.
- **Formal guidance** within 30 working days. Silence = notification required.

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## 07

- Max. duration of FDI screening: **three months**. Silence = prohibition.
  - 2023:
    - 480 transactions reviewed under the Article 6 Reg 2019
    - Spain shared 107 operations. **Consultations not shared**
    - 97 transactions notified for FDI screening:
      - 80 unconditional, 8 conditional, 9 filed (did not qualify) (suggests that “ad cautelam” filings may be taking place much as under national merger control law)
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**Process (ii)**

07

	2023	2022	2021
Applications	97	83	55
Unconditional Clearances	80 (82%)	63 (76%)	42 (76%)
Conditional Clearance	8 (8%)	9 (11%)	6 (11%)
Unauthorised	0	1	0
Shelved	9 (9%)	10 (12%)	7 (13%)
Consultations	87	174	231

**Origin of investment:**

- 43% US
- 15% UK
- 11% UAE
- 6% Canada
- 5% China

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**Process (iii)**

- Conditional decisions: designed case by case
- No limitation to potential remedies or conditions

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**07**

- Issue: conditions of authorisation often not published
  - Conditions generally revolve around:
    - Keeping domicile, staff and company listing in Spain
    - Keeping key assets in Spain (networks) or in the EU (IT/technology)
    - Guarantee supply of essential goods or services
    - IT/technology: additional safeguards re. data protection (international data transfer); software security ; access to sensitive information
    - 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
    - Monitoring (periodic reporting)
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**Process**  
**(iv)**

- Limited access to file
- Transparency rules
- **Third party rights?** Limited but not inexistent
- Likely evolution of pre-merger coordination and gun-jumping principles in line with merger control.
- FDI Authority **is investigating** gun-jumping cases already

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## Substantive Test

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# 08

- Intervention of the State refers to acts or transactions that “affect activities related, even occasionally, to the exercise of public power, national defence, public order, public security or public health
  - In practice: Government seems to use its power of discretion, the Vivendi/Prisa transaction may be an example
  - Trend generally to look more closely at politically sensitive or mediatic deals stemming from countries perceived as geopolitical rivals, e.g., China, Saudi Arabia (STB/Telefonica) even with EU investments (Talgo) and *Vivendi/Prisa*
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## Judicial Review

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# 09

- Discretionary power, e.g., Government can declare new sectors subject to FDI
- Control mostly limited to procedure/detournement de pouvoir
- EU law as limit for Government action:
  - Mergers with EU dimension and subject to merger review in Brussels: Article 21 EUMR when applicable (VIG/AEGON merger)
  - Judgment of CJEU of 13 July 2023, *Xella Magyarország Építőanyagipari Kft v Innovációs és Technológiai Miniszter* (C-106/22) EU:C:2023:568.

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## Penalties

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# 10

- 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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## Contact



[Pedro.Callol@CallolCoca.com](mailto:Pedro.Callol@CallolCoca.com)

**Callol, Coca & Asociados, SLP**

Don Ramón de la Cruz, 17

E-28001 Madrid

Office +34 917 376 768

Fax +34 911 412 139