
New Legal regime for Foreign direct Investments

1. INTRODUCTION AND RATIONALE.

Spanish foreign investment regulations are among the most open in the world. In fact, according to the OECD's FDI Regulatory Restrictiveness Index, Spain ranks ninth from a regulatory point of view in terms of countries in the world that are most open to international investment, ahead of powers like Germany, France, the United Kingdom, Italy, Japan and the United States.

Spanish regulations on foreign investment are based on the fundamental principle of total liberalisation of foreign direct investment, which is generally only subject to the obligation of the promoters to declare FDI, so it can be recorded in the Investment Register kept by the Ministry of Economy, Commerce and Business for purely administrative, statistical or economic purposes once the investment has been made.

This openness to international investment that is characteristic of Spanish regulations has always been compatible with the fact that Spanish rules allow for the possible adoption of restrictive measures on an exceptional basis with respect to certain investments that could affect security, health or public order.

2. REGULATIONS ON FOREIGN INVESTMENT IN SPAIN.

The system of foreign investment in Spain is set out essentially in the following legislation:

- Law 19/2003, of 4 July, on the legal regime governing the movement of capital and economic transactions abroad and on certain measures for preventing money laundering.
- The recent Royal Decree 571/2023 of 4 July on foreign investment, which repeals the previous Royal Decree 664/1999 of 23 April.
- Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019. This establishes common criteria for screening foreign direct investments into the Union on the grounds of security or public order, and creates certain mechanisms allowing Member States to cooperate with each other and with the European Commission in order to ensure that they share at least a minimum amount of information.

The Foreign Investment Code provides detailed information on all Spanish regulations relating to foreign direct investments. https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=147&modo=2¬a=0&tab=2

3. GENERAL RULE: The principle of liberalisation Principio de liberalización.

As a general rule, foreign investments in Spain are made freely, with no need for authorisation, except in exceptional cases. However, foreign investors must complete a series of declarations via the Ministry of Economy, Commerce and Business Investment Register. These declarations are mandatory, but are not constitutive, i.e. they do not affect the validity of the foreign investment, but are for purely administrative and statistical purposes.

The following link can be used to submit these declarations:

https://comercio.gob.es/InversionesExteriores/Declaraciones_Inversion/procedimientos/Paginas/presentacion-declaraciones.aspx

3.1.1.- Post-investment declaration.

As a general rule, foreign investors are free to make an investment in Spain, and are only required to declare these investments via the Ministry of Economy, Commerce and Business Investment Register a maximum of one month after the investment has been made, using form D-1A. Investments in real estate must be declared using form D-2A.

3.1.2.- Declaration prior to investment.

In addition to being declared within a maximum period of one month after the investment has been made, direct investments whose immediate or ultimate sources are in non-cooperative¹ jurisdictions must also be declared by the investor prior to the investment:

1. If the foreign shareholding exceeds 50% of the Spanish company receiving the investment (form DP-1).
2. In the case of investments in real estate (form DP-2).

The prior declaration of foreign investment will be valid for six months from the submission date.

4. SUSPENSION OF THE GENERAL LIBERALISATION REGIME. FOREIGN INVESTMENTS SUBJECT TO PRIOR AUTHORISATION.

Authorisation will be required for all investments:

- That are made by residents of countries outside the European Union and that do not form part of the European Free Trade Association.
- Where the investors are to acquire control, or a significant degree of influence, over the management of a Spanish company as a result of the transaction.
- That affect certain strategic sectors closely related to public order, public safety or public health, or are made by certain investors whose operations are considered to be subject to authorisation due to specific circumstances.

4.1.- Transactions through which the investors are to acquire control, or a significant degree of influence, over the management of a Spanish company.

This will be deemed to be the case when:

- a) **The investor is to acquire a significant degree of influence over the management of a Spanish company.** Thus, all investments in which the investor acquires a holding equal to or greater than 10% of the share capital of a Spanish company are considered to be foreign direct investments in Spain.
- b) **The investor is to acquire control over a Spanish company.** Investments in which, regardless of the percentage shareholding acquired, control of the Spanish company is to be acquired as a result of the corporate transaction, act or legal business carried out, will also be considered foreign direct investments.
- c) **The investor is to acquire assets belonging to a Spanish company.** When decisive influence on how a Spanish company is managed is to be acquired through the acquisition of ownership rights or use of all or part of the assets of the company resident in Spain.

¹ These are regulated by Order HFP/115/2023 of 9 February, which determines the countries and regions, as well as the detrimental tax regimes, that are considered non-cooperative jurisdictions. In addition to replacing the term “tax havens” with the more precise concept of “non-cooperative jurisdictions”, this Ministerial Decree sets out a list that replaces the previous list of tax havens. The countries on the current list of non-cooperative jurisdictions are Anguilla, Bahrain, Barbados, Bermuda, the Dominican Republic, Fiji, Gibraltar, Guam, Guernsey, the Isle of Man, the Cayman Islands, the Falkland Islands, the Mariana Islands, the Solomon Islands, the Turks and Caicos Islands, the British Virgin Islands, the US Virgin Islands, Jersey, Palau, Samoa and, in terms of offshore business tax regimes, American Samoa, the Seychelles, Trinidad and Tobago and Vanuatu.

4.2.- Transactions that require authorisation given the sector in which the company operates.

Authorisation is required for FDI if the investment is to be made in certain sectors, insofar as it would affect public order, public safety or public health:

- a) **Critical infrastructure.** Critical infrastructure is understood as defined under Law 8/2011, of 28 April, which establishes measures for protecting critical infrastructure, which are therefore included as such in the National Catalogue of Strategic Infrastructure as set out in Article 4 of the aforementioned law.
- b) **Strategic technologies**, which include:
 - o **Critical and dual-use technologies:** including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.
 - o **Key technologies for industrial leadership and capacity building:** including advanced materials and nanotechnology, photonics, microelectronics and nanoelectronics, life science technologies, advanced manufacturing and processing systems, artificial intelligence, digital security and connectivity.
 - o **Technologies developed as part of programmes and projects of particular interest to Spain**, including those involving a substantial sum or significant percentage of funding from European Union or Spanish budgets.
- c) **Supply of key inputs:** Key inputs are defined as those that are indispensable and non-substitutable in the provision of essential services relating to the maintenance of basic social functions, health, security, the general social and economic well-being of the population, or the effective functioning of Spanish State institutions and public administration. The following in particular will be considered key:
 - o Inputs supplied by companies that develop and modify software used in the operation of critical infrastructure in
 1. the energy sector
 2. the water sector
 3. the telecommunications sector
 4. the finance and insurance sector
 5. the health sector
 6. the transport sector
 7. the field of food safety
 - o Other indispensable and non-substitutable inputs necessary to guarantee the integrity, security or continuity of activities affecting critical infrastructure, the supply of water, energy (hydrocarbons, renewable gases, biofuels or electricity), strategic raw materials, telecommunications or transport services, health services, food safety, research facilities, or the financial and taxation system.
- d) **Companies with access to sensitive information.**
 - o Those with access to data on strategic infrastructure that, if disclosed, could be used to plan and carry out actions aimed at disrupting or destroying such infrastructure.
 - o Those that have access to databases related to the supply of essential water, energy (hydrocarbons, gas or electricity) telecommunications or transport services, health services, food safety, research facilities, financial services or the taxation system.
 - o Those that have access to official databases that are not publicly accessible.
 - o Those engaged in activities that are subject to a mandatory data protection impact assessment.
- e) **Media**, without prejudice to the fact that audiovisual communication services, in the terms defined in Law 7/2010 of 31 March, General Law on Audiovisual Communication, will be governed by the provisions of this Law.

4.3.- Transactions that require authorisation to be given by the party that concludes them.

Authorisation is required for FDI in the event that the foreign investor in question:

- a) **Is directly or indirectly controlled by the government**, including public bodies or the armed forces, of a **third country**.
- b) **Has made investments or has participated in activities in sectors affecting security, public order and public health in another Member State**.
- c) **When there is a serious risk that the foreign investor may engage in criminal or illegal activities that affect public safety, order or health in Spain**.

4.4.- Cases of non-applicability or exemption.

Cases where authorisation will not be required, even though the transactions may fall within the category of those where authorisation could potentially have been required due to the sector in which they operate, or the characteristics of the investor involved:

- a) **When the investment transaction has no or little impact on the protected legal assets**, and would not therefore affect public order, safety or public health.
- b) **Internal restructuring within a group of companies**.
- c) **Increases in company shareholdings by a shareholder who already has a shareholding of more than 10%** that are not accompanied by changes in control.
- d) **Temporary investments**, i.e. those of short duration (hours or days), where the investor is not able to influence the management of the company acquired.
- e) **Investments whereby real estate is acquired that is not related to any critical infrastructure** and is not indispensable or non-substitutable for providing essential services.
- f) **Exemptions in the energy sector**. These include those direct investment transactions which, despite affecting the supply of essential inputs in the field of energy, are covered by the following:
 - o They are not being carried out by any of the parties that would render them subject to authorisation.
 - o The companies or assets acquired do not engage in regulated activities.
 - o The company would not acquire the status of a dominant operator with respect to electricity generation and supply, the production, storage, transport or distribution of fuels or biofuels, the production or supply of liquefied petroleum gas or the production and supply of natural gas as a result of the transaction.
 - o The foreign investment involves the acquisition of electricity production assets, provided that the share of installed power for the resulting technology is less than 5%.
- g) **Exemption for greenfield and brownfield projects**.

In the case of investments that might have needed to obtain prior authorisation, because they impact on strategic technologies, the supply of key inputs, companies in sectors with access to sensitive information or media, foreign investments in which the turnover of the companies acquired did not exceed 5m euros in the last financial year for which accounts have been closed will be exempt, provided that their technologies have not been developed under programmes and projects of particular interest to Spain.

However, FDI will always be subject to authorisation:

- o When certain electronic communications operators are involved.

- o When the transaction relates to research activities or the exploitation of mineral deposits of strategic raw materials.

5. DIRECT INVESTMENTS MADE BY RESIDENTS OF EUROPEAN UNION AND EUROPEAN FREE TRADE ASSOCIATION COUNTRIES REQUIRING AUTHORISATION.

The current environment and, in particular, the impact of the pandemic and geopolitical tensions on different sectors and on global value chains, has, together with instability in financial markets, made it necessary to use the new regime to temporarily suspend the liberalisation of certain foreign direct investments (provided, of course, that they affect the above-mentioned strategic sectors, or are made by investors whose participation in an investment means that authorisation is required) made by residents of other European Union or European Free Trade Association countries until 31 December 2024, and in the following cases:

- FDI in companies listed in Spain, regardless of their value. Companies listed in Spain are considered to be those whose shares are wholly or partly admitted to trading in an official Spanish secondary market, and whose registered office is in Spain.
- Investments in unlisted companies if the value of the investment exceeds 500 million euros.

6.- ADMINISTRATIVE PROCEDURE FOR OBTAINING FDI AUTHORISATION.

6.1.- Binding voluntary consultations.

Prior to making the investment, non-resident investors may request a consultation on whether the suspension of the investment liberalisation regime would apply to their specific investment project. The request should be submitted to the Ministry of Economy, Commerce and Business Directorate-General for International Trade and Investment.

The decision regarding these consultations with Government bodies and entities will be binding, although only in relation to the party carrying out the consultation.

6.2.- Application for authorisation.

Applications for authorisation must be addressed to the head of the Secretary of State for Trade's Directorate-General for International Trade and Investment.

The following link is to the form that needs to be completed by the investor in order to request authorisation.

https://comercio.gob.es/InversionesExteriores/Documents/Formulario_28_03_2023.docx

6.3.- Authorisation application process.

It is mandatory for the process to be completed electronically. Applications, communications and other required documentation must be submitted via the Ministry of Economy, Commerce and Business Tourism's electronic registry.

6.4.- Decisions on applications.

Following a report from the Foreign Investment Board, the decisions regarding applications will be the responsibility of the person in charge of the Directorate-General for International Trade and Investment when the investment amount is less than or equal to five million euros, the decision being made by the Council of Ministers in all other cases. The maximum period for resolving the application and issuing the decision to the interested party will be three months.

The agreements, resolutions or decisions may consist of:

1. Authorisation with no conditions attached.
2. Refusal of authorisation.
3. Authorisations subject to conditions imposed by the resolution body or to pledges made by the investor and accepted by the decision-making body.
4. Cancellation due to withdrawal by the investor or because the transaction is not considered to be subject to any regime for suspending the liberalisation of foreign investment.

An appeal for reconsideration may be lodged in the event that authorisation is refused, or in the case of an authorisation being granted subject to conditions or pledges, or a direct administrative appeal may be lodged.

Investment transactions carried out without the required prior authorisation will be invalid and have no legal effect until the necessary authorisation has indeed been obtained.

7.- PRIOR AUTHORISATION FOR FOREIGN INVESTMENTS IN SPAIN IN ACTIVITIES RELATING TO NATIONAL DEFENCE.

Prior authorisation will be required for all investments in activities directly relating to national defence, except for:

- a) Investment in Spanish companies that represents less than 5% of that Spanish company's share capital, provided that the investor will not be permitted to form part of its board of directors, either directly or indirectly.
- b) When the investment represents between 5% and 10% of share capital, provided that the investor notifies both the Directorate-General for Armament and Material and the Directorate-General for International Trade and Investment of the transaction, and accompanies this notification with a document in which they reliably undertake, by means of a public deed, not to use, exercise or transfer their voting rights to third parties, or to form part of any of the listed company's administrative bodies.

Applications for authorisation must be addressed to the head of the Ministry of Defence's Directorate-General for Armament and Material, and these will be resolved by the Council of Ministers on the basis of the proposal from the head of the Ministry of Defence and a report from the Foreign Investment Board.

In those cases where, due to the nature, characteristics or size of the transaction, the foreign investment does not affect core defence interests, it may be authorised by the head of the Directorate-General for Armament and Material, following a report from the Foreign Investment Board.

Foreign investment in Spain in activities directly relating to arms, ammunition, pyrotechnic or explosive items for civilian use, or other materials for use by Spanish State security forces, will also be subject to prior authorisation.

Applications for authorisation must be addressed to the head of the Directorate-General for International Trade and Investment, and the decision will be made by the Council of Ministers on the basis of a joint proposal from the head of the Ministry of Home Affairs and the head of the Ministry of Economy, Commerce and Business, following a report by the Foreign Investment Board.