

## MODIFICATIONS IN THE LEGAL REGIME FOR FOREIGN INVESTMENTS

---

### 1. Introduction and justification

The COVID-19 health crisis had a very significant impact on the economy of Spain and the world. The fallout from the crisis was very severe in the business sector as a whole, and particularly in certain sectors, and led to the widespread volatility registered by global stock markets, with the consequent risk that a large number of listed and unlisted companies saw their value plummet, and were at risk of takeover bids by foreign investors. This scenario was cause for particular concern in the case of companies operating in strategic sectors and whose activity either directly or indirectly affects security and/or public order.

Aware of this risk, the European Commission urged all member states that did not have a screening mechanism in place, or whose screening mechanisms did not cover all potential risky transactions<sup>1</sup>, to establish a comprehensive system to screen cases in which the acquisition of a certain company, infrastructure or technology could pose a risk to security or public order in the EU as a whole or in each of the member states specifically.

For this reason, Spain decided to undertake an urgent modification of its current foreign investment screening model and to bring forward the application of Regulation (EU) 2019/452 of 19 March 2019 for the screening of foreign direct investments, which came into effect on 11 October 2020.

This regulation, which enables member states to examine the investments within their scope of application for reasons of security or public order, and to adopt measures in response to specific risks, was adopted by the member states in order to combine, on the one hand, the openness to foreign investment in which the EU believes and defends, and, on the other, the importance of having adequate screening instruments to deal with any risks to security or public order that may arise from the acquisition by foreign powers of European companies operating in strategic sectors. These screening mechanisms are intended to bring the European Union in line with other major world powers that already have mechanisms for screening foreign direct investment, such as the US, Japan or Australia.

---

<sup>1</sup> 18 member states have screening mechanisms: Czech Republic, Denmark, France, Italy, Germany, Latvia, Lithuania, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Spain, Slovakia and Slovenia.

## **2. General Regime for Foreign Investments in Spain**

Royal Decree 664/1999 of April 23, 1999 on foreign investment establishes a general principle of liberalization of foreign direct investment in Spain. As a general rule, such investment is only subject to a regime of a posteriori declaration for purely administrative, statistical or economic purposes before the Directorate-General for International Trade and Investment, once the investment has actually been made. Investments made from tax havens are also subject to a prior administrative declaration, although there are certain exceptions.

Despite the general principle of liberalization, a series of transactions will be subject to prior authorization.

### **2.1. Transactions subject to authorization irrespective of the country of origin of the investment**

- Foreign investments, regardless of their country of origin, in activities directly related to national defense, such as those intended for the production or trade of arms, munitions, explosives and war material (except in the case of listed companies engaged in such activities, where the only acquisitions that will require authorization are those by non-residents of more than 5 percent of the Spanish company's share capital, or those that, without reaching this percentage, allow the investor to form part, directly or indirectly, of its administrative body) are subject to prior authorization by the Council of Ministers, at the behest of the Minister of Defense and following a report from the Board of Foreign Investments.
- Foreign investment in the manufacture, marketing or distribution of arms and explosives for civilian use is subject to prior authorization by the Council of Ministers, on the basis of a joint proposal by the Ministry of the Interior and the Ministry of Industry, Trade and Tourism, following a report by the Foreign Investment Board
- Investments in real estate by non-member states of the European Union for their diplomatic headquarters are subject to authorization by the Council of Ministers.
- The Council of Ministers may also decide, with reasons, to suspend the liberalization regime and, therefore, subject certain foreign investments to the authorization regime, provided that the investments affect or may affect activities related to the exercise of public power, or activities that affect or may affect public order, safety and health.

## 2.2. Transactions subject to authorization by the new foreign investments regime

The new foreign investments regime is subject to:

- **Royal Decree-Law 8/2020**, of March 17, on urgent extraordinary measures to address the economic and social impact of COVID-19.
- **Royal Decree-Law 11/2020**, of March 31, adopting additional urgent social and economic measures to tackle COVID-19
- **Royal Decree-Law 34/2020**, of November 17, on urgent measures to support business solvency and the energy sector, and on taxation.
- **Royal Decree-Law 20/2022**, of December 17, on measures to respond to the economic and social consequences of the war in Ukraine and to support the reconstruction of the island of La Palma and other situations of vulnerability

These four Royal Decree-Laws introduce changes in **Law 19/2003, of July 4**, on the legal regime of capital movements and economic transactions abroad, suspending the liberalization regime and making certain foreign investments subject to prior authorization.

Although this new regime was approved against the background of the extraordinary measures and regulations put in place to tackle the Covid-19 pandemic, it lasts indefinitely.

### 2.2.1. Concept of Foreign Investment

#### 2.2.1.1. Investments made by residents of countries outside the European Union and the European Free Trade Association

Foreign direct investments (FDI) in Spain are considered to be all investments made by residents of countries outside the European Union and the European Free Trade Association when any of the following two circumstances are met:

- The investor acquires a stake equal to or over 10% of the share capital of the Spanish company.
- Where, as a result of the corporate transaction, act or legal business, control of the whole company or part of it is acquired in accordance with the criteria set out in Article 7.2 of Law 15/2007 of July 3, on the Defense of Competition.

To these effects it is very important to take into account that all transactions that are made materially by residents in countries in the European Union or the European Free Trade Association, but whose real ownership corresponds to residents in countries outside the European Union and the European Free Trade Association, shall also be considered to be made by residents in countries outside the European Union and the European Free Trade Association. This real ownership will be understood to exist when these latter subjects ultimately hold or control, either directly or indirectly, over 25% of the capital or of the shareholder voting rights, or when they exercise direct or indirect control over the investor through other channels.

#### **2.2.1.2. Investments made by residents in countries outside the European Union and the European Free Trade Association**

As a transitional measure, until December 31, 2024, the new regime suspending the liberalization of certain foreign direct investments also applies to investments made by residents of other countries of the European Union and the European Free Trade Association in the following cases:

- Foreign direct investment in companies listed in Spain, regardless of their value (as long as they are worth more than one million euros). Companies listed in Spain are those whose shares are, in whole or in part, admitted to trading on an official Spanish secondary market and have their registered office in Spain.
- Investments in unlisted companies if the value of the investment is over 500 million euros.

Foreign direct investments will also be understood to be those investments through which the investor owns a shareholding equal to or greater than 10 per cent of the share capital of the Spanish company, or when as a result of the corporate transaction, act or legal business, control of said company or part of it is acquired in accordance with the criteria established in Article 7.2 of Law 15/2007, of July 3, on the Defense of Competition.

#### **2.2.2. Transactions subject to authorization due to the sector in which they take place**

Foreign direct investments are subject to authorization if the investment is made in certain sectors insofar as they affect public order, security and public health:

- Critical physical or virtual infrastructure and the physical premises that are essential for the use of such infrastructure.
- Critical technologies, dual-use products, leading technologies and technologies developed in programs of interest to Spain.

- Supply of essential consumables, particularly energy or those concerning commodities and connectivity, or food security.
- Sectors with access to sensitive information, particularly personal data, or that have control over this information.
- Media.

### **2.2.3. Transactions subject to authorization due to the subject carrying them out**

Direct foreign investments are subject to authorization if the foreign investor that carries them out:

- Is directly or indirectly controlled by its government, including public bodies or the armed forces, of a third country.
- Has made investments or participated in activities in sectors affecting security, public order and public health in another member state.
- If there is a serious risk that the foreign investor will carry out criminal or illegal activities that affect public safety, public order or public health in Spain.
- When there is a serious risk that the foreign investor may engage in criminal or illegal activities that affect public security, public order or public health in Spain.

### **2.2.4. Authorization procedure**

- As a general rule, these investments are subject to the requirement to obtain prior authorization from the Council of Ministers.
- On a transitional basis, until the approval of the regulations implementing Article 7 bis of Law 19/2003, of July 4, on the legal regime of capital movements and economic transactions abroad and on certain measures for the prevention of money laundering, a faster and simpler regime is established for transactions of between 1 and 5 million euros that will be authorized by the Directorate General for International Trade and Investment. Applications must be addressed to the General Division of International Trade and Investment, where they will be decided after a report from the Foreign Investment Board.
- Furthermore, on a transitional basis, transactions for less than one million euros do not require authorization.