

MODIFICATIONS IN THE LEGAL REGIME FOR FOREIGN DIRECT INVESTMENTS

Although still difficult to quantify, the healthcare crisis provoked by COVID-19 and its impact on the economy in Spain, and worldwide, is certain to be extremely serious. In the case of Spain, the economy which was already feeling the disruption in external demand caused by the spread of the pandemic and the difficulties affecting supply chains, it is now faced with the impact on domestic supply and demand, both severely disturbed as a result of the necessary confinement measures and mobility restrictions.

The impact of the crisis is also being felt in the widespread fall in stock markets around the world, raising the risk that a number of listed and also unlisted companies may suffer a significant reduction in their value and, as a consequence, become the target of foreign investors. This scenario is a 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.

The European Commission has flagged this risk and urged all member states that currently do not have a screening mechanism in place, or whose screening mechanisms do not cover all pertinent transactions¹, to establish a comprehensive system that allows for the screening of those investments in which the acquisition or control of a certain company, infrastructure or technology may pose a risk to security or public order in the EU as a whole or in each of the member states specifically.

Against this background, Spain has decided to undertake an urgent modification of its current foreign investment screening mechanism and to bring forward the application of Regulation (EU) 2019/452 of 19 March 2019 for the screening of foreign direct investments, which in any case would become directly applicable 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 one year ago 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 the adequate screening instruments to deal with any risks to security or public order that may arise from the acquisition by foreign investors 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.

¹ 14 member states have screening mechanisms: Denmark, France, Italy, Germany, Latvia, Lithuania, Hungary, Holland, Austria, Poland, Portugal, Romania, Finland and Spain.

New regime for foreign direct investment in Spain

The new investment regime is governed by the provisions of Royal Decree–Law 8/2020 of 17 March on urgent and extraordinary measures in response to the economic and social impact of COVID-19, and of Royal Decree–Law 11/2020 of 31 March adopting urgent complementary measures in the social and economic sphere in response to COVID-19. Both Royal Decree–Laws introduce modifications in Law 19/2003 of 4 July on the legal regime for the movements of capital and economic transactions with the exterior, by suspending the liberalised regime in place and require prior authorization for certain foreign investments.

More specifically:

Foreign direct investments (FDI) 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.
- The corporate transaction, act or legal procedure enables the active participation in the management or control of the company in question.

To these effects, 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.

The liberalized regimen for FDI for reasons of public safety, public order and public health, is suspended in the following cases:

- Critical physical or virtual infrastructures and the physical premises that are essential for the use of these infrastructures.
- Critical technologies and dual use items.
- Supply of essential consumables, particularly energy or those concerning commodities or food security.
- Sectors with access to sensitive information, particularly personal data, or that have control over this information.

- Communications media
- The government may suspend the liberalized regime for foreign direct investment in other sectors when they affect public security, public order and public health

The liberalized regime for FDI is also suspended in the following cases:

- If the foreign investor is directly or indirectly controlled by their government.
- If the foreign investor has made investments or has participated in activities in sectors affecting security, public order and public health in another member state.
- If any administrative or legal proceedings have been brought against the foreign investor for reason of criminal or illegal activities.

The investments included in the aforementioned cases are subject to the requirement to obtain prior authorisation from the Spanish Government.

A simplified and transitory regime is established for transactions already in course when the new regime comes into force and for any transactions for amounts between 1 and 5 million euros. Transactions for less than one million euros do not require authorisation. Applications for authorization must be addressed to the General Director for International Trade and Investment, where they will be decided upon report from the Foreign Investment Board.

Finally, it should be noted that the cabinet meeting of 24 March 2020 contemplated **the urgent administrative passage of the draft Royal Decree on foreign investment**. This RD will set forth the details of the procedure for the new regime on foreign investment.