Changes in foreign investment screening rules in Spain

April 2020

1. Introduction

On 17 March, the Spanish government introduced a new provision in legislation on the movement of capital and transactions with foreign investors. As a result of Royal Decree-Law 8/2020 containing emergency measures to tackle the economic and social impact of COVID-19 (“RD-law 8/2020”), more foreign investments became subject to prior authorisation.

On 31 March, the new Article 7a (7 bis) of Spanish Law 19/2003 of 4 July 2003 was then amended (by RD-law 11/2020) to clarify that the same rules apply to indirect investments. A simplified procedure was also introduced for those transactions where there was already agreement or a binding offer before 18 March 2020 or those with a value of €1 million to €5 million, authorisation not being required for transactions for less than €1 million.

The declared aim of this new measure, as explained in the Preamble of RD-law 8/2020, is to protect “Spanish listed companies, and also unlisted companies” (which “are witnessing the devaluation of their assets” as a result of “the global crisis caused by COVID-19”) from foreign investors that “launch acquisition operations” and might take advantage of the situation. However, in our opinion, the new rules are here to stay (even if certain adjustments are made).

The new legal provision of Law 19/2003 raises certain questions of interpretation which we hope will be resolved in the regulations that, as the Council of Ministers agreed on 24 March, are to be implemented urgently.

In our view, the rule introduced should also be interpreted having regard to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, of direct application from 11 October 2020, which the article of Law 19/2003 was “inspired” by and certain parts of which are copied word for word. The European Commission has also issued Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (Communication 2020/C 99/I/01, Official Journal of the European Union, 26 March 2020).

2. Foreign investments under the new rules: foreign investor and transactions subject to authorisation

For the purposes of this new control system, direct foreign investments (“DFIs”) are those carried out in Spain by investors resident in countries outside the European Union and the European Free Trade Association (“EFTA”: Switzerland, Liechtenstein, Iceland and Norway). We understand that the UK should
be considered as a Member State for these purposes for the duration of the Brexit transition period (currently to the end of this year, though it may be extended).

Investments made through vehicles resident in EU or EFTA countries whose beneficial owner is a foreign investor also fall under the new rules. This is where the foreign investor possesses or ultimately controls, directly or indirectly, more than 25% of the capital or voting rights in the investor, or where by other means exercises direct or indirect control of the investor. In cases of investment funds it cannot be ruled out, therefore, that Spanish authorities will look at the fund manager’s country of residence. This will have to be analysed case by case.

Relevant investments are those where the foreign investor either (i) reaches ownership of 10% or more of the Spanish company, or (ii) if the transaction enables effective participation in the management or control of that company.

The value below which DFIs will be exempt from prior authorisation will be laid down in regulations (until this happens, this threshold has been set at €1 million).

These DFIs will be subject to the new screening regime under Article 7a of Law 19/2003 when they meet either of the two following alternative criteria (it will suffice for them to meet one of them):

> **Due to the sector in which the investment target operates**

DFIs that affect *public order, public security and public health* and, in any case, those that refer to the following sectors are subject to control:

- Critical infrastructure, specifically designated as such under Spanish Law 8/2011, physical and virtual, and the key land and property used. This list of critical infrastructure is secret (it includes energy, transport, medical, financial system infrastructure etc.). Note that these are named pieces of infrastructure, not just any in a ‘critical’ sector, that have been specifically designated as such.
- Critical technologies and dual-use products: artificial intelligence, robotics, semiconductors, cyber security, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.
- Supply of critical inputs, in particular energy, raw materials and food security. Under the current wording, all transactions in these sectors and within any activity (production – even renewables, distribution, transportation, supply, refining, pipelines etc.) would be subject to the new screening rules, in principle.
- Sectors with access to confidential information, in particular personal data, or those with the capacity to control such information; this is a very broad category: health centres, insurance companies, banks, call-centres, etc. all have access to personal data; and
- The media.

The Government may extend this regime to other sectors if it considers that they may affect public security, public order or public health.

Since the sectors affected are broadly and not accurately defined (the wording is probably deliberate, to avoid the current situation being exploited by foreign investors attempting to take control of all kinds of Spanish companies), in the case of doubt, at least until determined in the implementing regulations, before making a DFI it is advisable to check with the Directorate General for International Trade and Investment, as to whether or not it considers the transaction to be subject to authorisation.
Due to the nature of the investor (irrespective of the target company’s sector or activities)

- Foreign investors controlled directly or indirectly by a ‘third country’ government (including public bodies, sovereign wealth funds or the armed forces).

- Foreign investors who have invested or participated in activities in sectors affecting security, public order and public health in another Member State and especially the sectors listed above. Interpreting this clause literally, if a foreign investor is present in any of the sectors indicated above in a Member State, authorisation must be requested in Spain for any type of acquisition (regardless of the sector).

The content of this clause is slightly different to that of the EU Regulation, which refers to those cases when “the foreign investor has already been involved in activities affecting security or public order in a Member State” (which appears to limit it to cases in which there has already been a security or public order incident).

- Foreign investors involved in administrative or judicial proceedings in another Member State, its State of origin or a foreign State for criminal or illegal activities.

In this case, the term “illegal activities” is too broad and we believe that, reasonably, it will be limited to cases in which the investor has been convicted or punished for particularly serious infringements (anti-competitive practices, infringements relating to the security of supply of essential products, public order, etc.).

3. Spanish government authorisation: procedural aspects

When a DFI meets any of the requirements described above, it will require prior authorisation by the Spanish Council of Ministers (except where the simplified procedure applies, described in the following section).

The authorisation request shall be filed by the relevant foreign investor at the General Directorate for International Trade and Investment (Dirección General de Comercio Internacional e Inversiones, belonging to the Spanish Ministry of Industry, Trade and Tourism), which is the administrative body responsible for analysing and processing the authorisation request.

Although, in theory, the maximum term to grant the authorisation is six months (after which the authorisation request will be considered as rejected on the basis of administrative silence), in certain cases the process might take longer (e.g. the term might be suspended if the Spanish authorities request additional information from either party –until this information is provided- or when technical/internal reports from other public bodies are needed, –until these reports are issued-, etc.). Note also that time limits for authorities to complete procedures have been suspended for the duration of the state of emergency.

The performing of a DFI without the authorisation of the Spanish Council of Ministers will mean that it is invalid and therefore null and void and is an administrative law infringement.

Failure to obtain authorisation may be validated after the event (i.e. the authorisation may be granted after completion of the relevant DFI), notwithstanding the fact that it could result in an administrative fine (performing a DFI without the required authorisation is deemed to be a serious administrative infringement under the applicable regulations, punishable with fines ranging from EUR 30,000 to the amount of the DFI).
4. Simplified procedure

On a transitional basis, a simplified procedure will apply to the following transactions:

- Those for which there was already agreement between the parties or a binding offer in which the price was set, determined or able to be determined, before 18 March 2020.

  In other words, the procedure will apply to transactions that are between signing and closing, or where binding offers have already been made. This will need to be proven by “valid legal means”. Normally, the signing of transaction documents or a binding offer is not done before a notary, so not only the documents signed by the parties but also any previous correspondence (emails relating to negotiations etc.) may be used to demonstrate that agreement pre-dates 18 March 2020.

- Those with a value of €1 million or more but less than €5 million (until the implementing regulations come into effect).

These transactions will be subject to a simplified procedure under article 96 of the Spanish Common Administrative Procedure for Public Authorities Law 39/2015. Decisions on authorisation must therefore be made within 30 days (after which applications will be considered automatically refused).

These applications will be dealt with by the General Directorate for International Trade and Investment, part of the Spanish Industry, Trade and Tourism industry (instead of the Council of Ministers), subject to a report from the Foreign Investment Board.