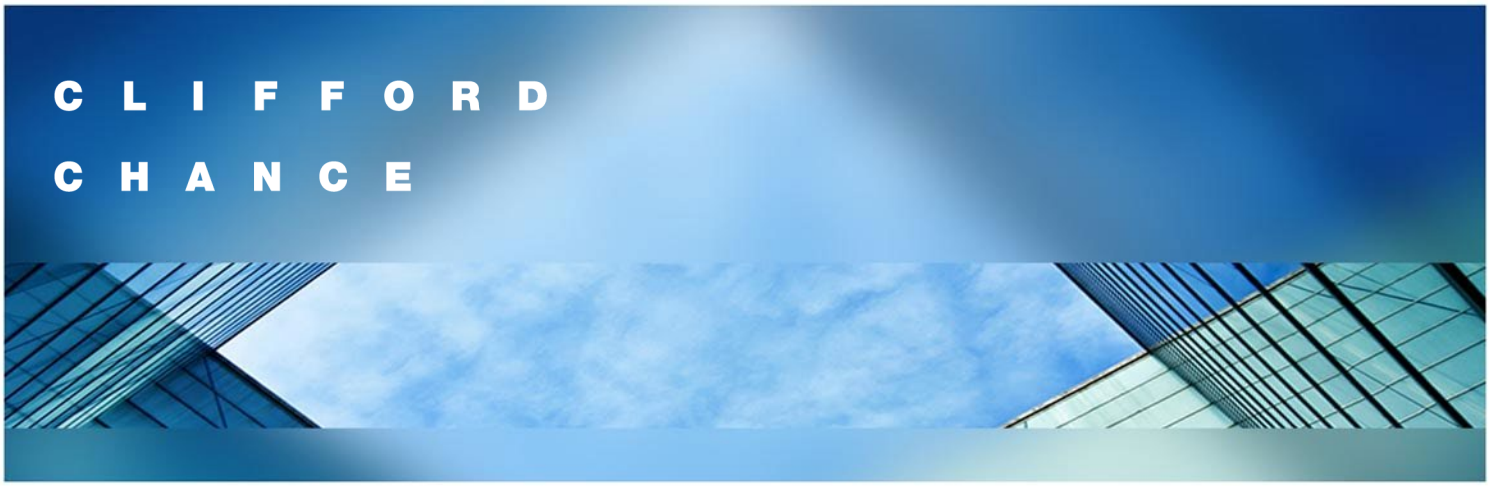

SPAIN: FINAL CONSOLIDATION OF THE SCREENING REGIME ON FOREIGN DIRECT INVESTMENT IN SPAIN

Among many of the measures that the Spanish government put in place as a result of the declaration of a state of public health emergency by means of Royal Decree 436/2020, of 14 March, having a significant impact on investments in Spain, was the suspension of the deregulation of foreign direct investment in this country, through the introduction of a new article 7 bis in Spanish Act 19/2003, of 4 July, on the legal regime governing the movement of capital and foreign financial transactions ("Act 19/2003"), implemented by Spanish Royal Decree-Law 8/2020, of 17 March, on urgent extraordinary measures to address the economic and social impact of COVID-19, which to date has been amended three times.

As a result of this new article 7 bis of Act 19/2003, it became necessary for all sectors to obtain authorisation prior to making foreign investments, whereas in the past authorisation had been required only for very specific sectors, in the case of investments made by residents of non-member states of the European Union ("EU") and countries not party to the European Free Trade Association ("EFTA").

However, the generic wording of this article, which has been the source of many practical problems of interpretation and application in the various types of cases, has from the outset revealed the need to implement regulations that, despite being expected since March 2020 have only just been approved, more than three years later, by means of Spanish Royal Decree 571/2023, of 4 July, on foreign investments ("RD 571/2023"), which furthermore replaces the previous Royal Decree 664/1999 on this subject.

Key aspects of RD 571/2023

- It makes the screening regime on foreign investment, initially established as a temporary and extraordinary measure during the pandemic, permanent.
- It aligns with legislation passed by other EU Member States.
- It refines the definition of strategic sectors.
- It specifies the exceptions to when prior authorisation is required.
- It regulates the time limits for making the authorised investment.
- RD 571/2023 enters into force on 1 September 2023.

The approval of RD 571/2023 now makes the screening regime on foreign investment, initially established by Spain's government as a temporary and extraordinary measure during the COVID-19 pandemic, permanent, in line with legislation passed by other EU Member States with the same aim.

We set out below the main developments and/or changes introduced by RD 571/2023 with regard to the general regime governing foreign direct investment in Spain.

DOES IT INTRODUCE ANY EXEMPTION TO THE NEED TO OBTAIN PRIOR AUTHORISATION?

Yes. RD 571/2023 exempts certain transactions from needing prior authorisation and sets the criteria for determining who will be considered the holder of the investment in the case of investments made by investment undertakings or pension funds and similar which are resident in the EU or party to EFTA, or analogous undertakings that are resident in third countries.

- RD 571/2023 establishes that the following will not be considered direct investments subject to screening for the purposes of article 7 bis of Act 19/2003:
    - Internal restructurings within a group of companies.
    - Increases in the stake held by a shareholder who already holds more than 10% that are not accompanied by a change of control.
- It also establishes the presumption of unity of action for two years, stating that when two or more foreign investment transactions take place within a two-year period between the same buyers and sellers, they will be considered one transaction executed on the date of the last such transaction.
- In the case of collective investment undertakings or closed-ended collective investment undertakings resident in the EU or in countries party to EFTA, as well as occupational pension funds or other retirement investment undertakings that are authorised and domiciled in the EU or EFTA countries, or, in both cases, analogous undertakings that are resident in third countries, the general partnerships will be considered the holders of the foreign investment, and therefore the subjects of the foreign investment, provided that the partners or beneficiaries do not legally exercise voting rights or have privileged access to the company's information. The actual role played by the limited partners in each case will have to be taken into account for this purpose.

  The government has crystallised the approach that has been applied in practice to date by the Ministry of Industry, Trade and Tourism (the "Ministry") itself, although with the warning that it should be checked, in any case, who takes the investment decisions to be carried out by the direct investor.

WHAT SPECIFIC CHANGES ARE INCLUDED IN RD 571/2023 IN RELATION TO THE DEFINITION OF STRATEGIC SECTORS?

Aware that this is one of the aspects that has generated the most uncertainty, the government has refined the definition of strategic sectors contained in article 7 bis.2 of Act 19/2003, specifying the following:

- It defines what should be understood by critical and dual-use technology, key technology for industrial leadership and training, and technology developed under programmes and projects of special interest to Spain.
- It develops the concept of "critical inputs" for foreign direct investment purposes.
- It specifies which companies will be considered to have access to sensitive information.

DOES RD 571/2023 CREATE ANY EXEMPTION NOT YET ESTABLISHED IN RELATION TO THE STRATEGIC SECTORS DEFINED IN ARTICLE 7 BIS OF ACT 19/2003?

Yes; in particular, the following foreign investments will not require prior authorisation:

- In the energy sector, regardless of the amount concerned, the following transactions will not be considered critical inputs, provided that the investor does not meet any of the objective circumstances required for the investment to be subject to authorisation, regardless of the sector, according to article 7 bis.3 of Act 19/2003, and provided that the following conditions apply:
    - That the companies or assets acquired do not engage in regulated activities.
    - That, as a result of the transaction, the company does not acquire the status of dominant operator in the following sectors: electricity generation and supply; fuel and biofuel production, storage, transport and distribution; production and supply of liquefied petroleum gases; or production and supply of natural gas, according to Royal Decree-Law 6/2000, of 23 June, on urgent measures to intensify competition in the goods and services markets.
    - Where the foreign investment involves the acquisition of generation assets, provided that the share of installed capacity per resulting technology is less than 5%, in accordance with the criteria established in RD 571/2023 itself for the purposes of calculating this share.
    - Where the foreign investment involves the acquisition of companies that engage in selling electricity, provided that the acquiree has fewer than 20,000 customers.
- Foreign direct investments in which the turnover of the acquirees does not exceed 5,000,000 euros in the last accounting year ended, in the following sectors, and provided that their technologies were not developed under programmes and projects of special interest to Spain:

- Critical and dual-use technology, key technology for industrial leadership and training, and technology developed under programmes and projects of special interest to Spain.
- Critical inputs.
- Sectors with access to sensitive information.

Social media (without prejudice to the specific legislation on audiovisual communication services). This notwithstanding, the following foreign direct investments, made in the sectors listed above, will always be subject to authorisation:

- Investments in electronic communications operators that meet any of the following criteria:
  - They hold concessions for the use of the radio public domain;
  - They hold licences for the use of orbit-spectrum resources under Spanish sovereignty; or
  - They have been classified as significant market power operators in a relevant market of the electronic communications sector.
- Investments related to research and exploitation of mineral deposits of strategic raw materials.

- Investments through which buildings are acquired that are not part of any critical infrastructure or are not indispensable and unreplaceable for the provision of essential services.
- The so-called "transitory investments", i.e. for short terms (hours or days), in which the investor never gains the capacity to influence the management of the acquiree, as they are placers and insurers of share issues and of public share sale or subscription offers (it being the final investors who will need authorisation, if required).

  The introduction of these exemptions through implementing regulations eliminates the *de minimis* exemption for investments under 1,000,000 euros, which had been in force until now.

HAVE THERE BEEN ANY CHANGES TO THE OBJECTIVE CIRCUMSTANCES OF THE INVESTOR ESTABLISHED IN ARTICLE 7 BIS 3 OF ACT 19/2003, WHICH ALSO DETERMINE THE NEED TO OBTAIN AUTHORISATION FOR FOREIGN INVESTMENT?

No. However, an additional criterion is included for sovereign investors to determine their dependence on the government of a third state: significant funding, including subsidies.

In addition, what was a consolidated practice on the part of the Ministry is now enshrined in legislation. Vehicles used to invest public funds, or public employee pension funds, will not be deemed to be controlled by a third government if the nature of the funds' manager, the laws or by-laws on the appointment of its directors, or other by-laws relating to its management or nature demonstrate that its investment policy is independent and focused

exclusively on the profitability of its portfolios, without the political influence of a third state.

WHAT CHANGES ARE THERE IN THE PROCEDURE FOR OBTAINING AUTHORISATION FROM THE COUNCIL OF MINISTERS?

The most significant change is the unification of the resolution period, which has been reduced from six to three months, regardless of the investment and sector.

ARE THERE ANY CHANGES TO THE EFFECTS OF ACT 19/2003 FOR INVESTMENT TRANSACTIONS CARRIED OUT WITHOUT THE NECESSARY PRIOR AUTHORISATION?

No. However, it is specified that until the investment is legalised, the economic and voting rights of the foreign investor cannot be exercised in the Spanish investee.

IS THERE A TIME LIMIT FOR THE EXECUTION OF THE AUTHORISED INVESTMENTS?

Yes, the time limit specifically established in the authorisation and, failing that, six months, with the possibility of obtaining a single six-month extension. If the investment is not made within the prescribed time limit or the extension thereof, the authorisation will be rendered void and the transaction thus unauthorised.

DOES A NEW AUTHORISATION HAVE TO BE OBTAINED IF THE TERMS OF AN AUTHORISED INVESTMENT ARE CHANGED?

Only when the conditions of the authorised investment are substantially altered. Otherwise, the amendment is subject to notification.

DOES RD 571/2023 REGULATE THE THUS-FAR INFORMAL PRIOR CONSULTATION PROCEDURE?

Yes, if there are doubts as to whether a specific investment (or its modification) is subject to prior authorisation, a consultation can be made, and the response given by the administration will be binding. The consultation must be answered within 30 business days, during which time no request for authorisation may be submitted (the applicant must wait for the end of the 30-day term to apply for authorisation).

All necessary information must be submitted with the consultation so that the necessity (or otherwise) of prior authorisation can be decided.

WHEN DOES RD 571/2023 COME INTO FORCE AND WHAT WILL HAPPEN TO PROCEDURES THAT ARE UNDERWAY?

RD 571/2023 is set to enter into force on 1 September 2023.

According to its transitional provisions, procedures in progress at that date will be governed by the previous rules, including those benefiting from the abridged procedure currently in force for investments under 5,000,000 euros.

DOES RD 571/2023 AFFECT THE EXTRAORDINARY TRANSITIONAL REGIME ON THE SCREENING OF INVESTMENTS FROM THE EU?

The approval of RD 571/2023 does not replace or repeal the single transitional provision of Spanish Royal Decree-Law 34/2020, of 17 November, on urgent measures to support business solvency and the energy sector and on tax matters ("RDL 34/2020"), establishing a special extraordinary regime on the screening of investments made by EU residents (whose beneficial ownership is also intra-Community) until 31 December 2024.

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