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by

**Jesús García Aparicio, CELIS Country Reporter for Spain,
and Paula Arroyo Montes, CELIS Assistant Country
Reporter for Spain**

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Abstract

Foreign investments in Spain have been liberalized since 2003, except for certain sectors. However, the current legal framework requires pre-closing authorization by the Spanish regulator for screening and control of foreign investments in Spanish companies and/or assets under certain circumstances. The screening mechanism applies when a foreign investor invests in Spanish companies (*share deals*) or/and assets (*asset deals*) that operate in or relate to specific strategic sectors that affect public security, public order, and/or public health. Specifically, these sectors include (i) critical infrastructures, (ii) critical technologies, (iii) supply of key inputs, (iii) sectors with access to sensitive information, and (v) media. The mechanism also applies when the foreign investor meets certain subjective features, irrespective of the target sector in which the investment is made. In this case, the major concern is investments conducted by foreign investors directly or indirectly controlled by foreign governments, their public agencies, or armed forces. The legal framework covers not only the direct acquisitions of Spanish companies and/or assets in critical sectors, but also indirect acquisitions.

The general screening mechanism co-exists with other specific sectorial regulations in some key industries such as national defense, telecommunications, or the air sector. In such cases, investments must comply not only with the general screening and control regime, but also with the additional requirements set forth in the applicable sectorial regulation.

If the foreign investment falls within the scope of the screening and control mechanism, the foreign investor must submit an authorization request to the Directorate General of International Trade and Investments of the Ministry of Economy, Trade, and Enterprise. The authorization application consists of a formal administrative request for the authorization granted by the relevant Spanish FDI authority and an official standardized questionnaire, which must be duly completed. The procedure must be resolved within three months regardless the amount of the investment. If the investment is conducted without prior clearance, it will be ineffective (null and void) until duly obtained and the investor will not be until then entitled to exercise its political and economic right in the Spanish company. Penalties in case of infringement may result in monetary fines and public or private reprimands. A voluntary consultation procedure is also available if there are doubts about whether the investment is subject to prior clearance or not.

An interim legal framework applies to certain investments coming from residents in countries of the European Union (“**EU**”) or the European Free Trade Association (“**EFTA**”), other than Spain, or from residents in Spain with an ultimate beneficial owner in an EU or EFTA country until 31 December 2024.

Authors

Jesús García Aparicio

Jesús García Aparicio is a senior associate at CUATRECASAS, a leading Spanish law firm where he advises on corporate, M&A, and corporate governance/ESG matters, as well as on foreign investment regulation in strategic sectors such as infrastructure, critical technologies, energy, sensitive data, defense, and other critical activities. He is a dual-qualified lawyer in Spain (2010) and in New York (2017). He has extensive international experience, having completed a one-year secondment at Cravath, Swaine & Moore LLP in New York in 2021/2022 and being a member of the German Desk of Cuatrecasas, dedicated to assisting German companies with their operations in Spain. He is recognized by Best Lawyers for Spain in the areas of Corporate M&A and Private Equity.

He is actively involved in the legal community and academia. He teaches “International Contracting & Foreign Investments” and “Introduction to German Law” at the Instituto Superior de Derecho y Economía (ISDE) and “The Remuneration of Board’s Directors” at the Instituto de Gobernanza Empresarial. He has authored several articles on corporate law topics and was a Graduate Editor of the Journal of Law and Business of New York University in 2014/2015. He is the secretary and founding member of Fulbright Network Spain, an association of Fulbright alumni, and the president of the NYU Alumni Club in Spain. He serves on the board of directors of the NYU Law Alumni Association in the U.S. and the committee of the Spanish Forum for the Culture of Security and Defense (*Club Financiero Génova*).

He holds a degree in Law and another in Business Administration from the University of Córdoba (2010) (*with distinction*). He obtained a Fulbright scholarship to pursue an LL.M. in Corporate Law at New York University School of Law (2015), where he received the Charles D. Klein '63 Graduation Award for the demonstrated excellence in law and business. He also holds a Master of Law and Business from Bucerius Law School and WHU Beisheim School of Management (2014), leading institutions in law and business in Germany.

In addition, he has extensive international education in law and business thanks to the completion of multiple exchange programs and courses at various other leading academic institutions in the United States (Harvard University, Cornell University, University of Montana, Virginia Commonwealth University), Germany (Regensburg Universität, Bayreuth Universität, *DAAD Scholar*), European Business School), the United Kingdom (King’s College London), Finland (University of Helsinki), Japan (Tokyo Meiji University), and Spain (Universidad de Navarra, Universitat Jaume I, and Universidad de Nebrija).

Paula Arroyo

Paula Arroyo Montes is a PhD candidate at Panthéon-Assas University. She holds an LL.M. in International Advocacy from Carlos III University, an LL.M in Legal Practice from Francisco de Vitoria University, a Maîtrise in European and International Law from the University of Nantes, a Double Degree in Law and Business Administration from Rey Juan Carlos University, a Trilingual University diploma in Comparative Law from Rey Juan Carlos University, and a Liberal Arts diploma from Francisco de Vitoria University. Currently, she is studying Anthropology at the National Distance Learning University (UNED).

She practices law at an international law firm in Madrid, where her practice focuses on commercial and investment treaty arbitrations. Previously, she worked in the Research and Documentation Directorate of the Court of Justice of the European Union and as an Assistant Legal Counsel at the Permanent Court of Arbitration.

She also worked as a Research Assistant at the Grotius Centre for International Legal Studies at Leiden University and interned with two international arbitrators.

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Jesús García Aparicio and Paula Arroyo Montes

Part I – Political Background

1. Foreign Investment Policy

Spain's political stance towards foreign investment reflects an open and welcoming approach, striving to attract international capital. The recovery of Spanish inbound foreign direct investments in recent years is attributed to increased competitiveness and enhanced investor confidence.

Foreign investment has played a crucial role in Spain's economy by facilitating access to advanced knowledge, improving productivity and employment, and driving economic modernization for decades, thereby making it one of the most effective mechanisms for promoting international economic integration.¹ The Spanish government actively promotes the country's strengths, including a restructured financial sector, a thriving tourism industry, efficient transport networks, renewable energy development, and cultural ties to Latin America. Recent reports indicate that global foreign investment flows increased in 2021 and continued their upward trend in the first quarter of 2022. However, a subsequent slowdown occurred due to economic and geopolitical uncertainties, including rising inflation and interest rates, increased energy prices, persistent effects of the pandemic, and the conflict in Ukraine.

For Spain, the data reflects a 13.9% increase in foreign investment in 2022 compared to 2021, surpassing EUR 34.178 billion.² Despite various challenges, Spain's investment recovery is evident, although recent quarters in 2023 showed a notable deceleration, aligning with global trends. In fact, foreign investment fell by 18.17% in 2023 compared to 2022 to a total of EUR 28.214 billion.³

Regarding foreign investment policies in western economies, the past year saw the implementation of exceptional mechanisms related to the Ukraine conflict. These measures

¹ See Memorandum of the Royal Decree 571/2023, of July 4, on foreign investments.

² See Ministerio de Economía, Comercio y Empresa, Informe anual control de inversiones en España en 2022: https://comercio.gob.es/InversionesExteriores/Documents/2022_EN_CIFRAS.pdf. As of the date of this Country Note on Spain, the Report on Screening and Control of Foreign Investments for the year 2023 has not been released yet.

³ https://comercio.gob.es/es-es/NotasPrensa/2024/Paginas/240320_InversionesExteriores.aspx.

aimed to impact the inflow and outflow of investments in the territories of Russia and Belarus.⁴ Spain aspires to be a key player in global research, emphasizing its attractiveness to foreign investors. Spain's commitment to attracting foreign investment is evident in the various incentives provided by the government. These incentives range from grants and tax benefits to professional training and preferential credit access. Being an EU member state, Spain leverages European aid programs to make investments even more appealing. However, the recent move to require government authorization for certain foreign investments underscores a careful approach, especially in critical sectors.

A notable shift is observed in the suspension of the foreign investment liberalization regime, requiring government authorization for certain direct investments in specific sectors deemed strategic for Spain in the field of public security, health, and order. This signals a nuanced strategy, indicating a balance between openness, competitiveness, and control in sensitive industries. The need for governmental authorization for certain foreign investments in strategic sectors like critical infrastructure, critical technologies, key inputs, sensitive data, and media highlights a deliberate effort to safeguard strategic interests.

2. Other Relevant Policies

Spain's Screening and Clearance Mechanism (*as defined hereafter*) reflects the consideration of multiple factors, including national interest, public order, security, and economic security. The liberalized approach to foreign investment aligns with the principles of free establishment and non-discrimination. Foreign investment also plays a crucial role in achieving the Sustainable Development Goals and realizing the 2030 Agenda by not only promoting economic growth but also by considering its social, environmental, human rights, and governance impact⁵ Nonetheless, the specific restrictions in critical sectors emphasize a commitment to protecting key national interests in Spain as well.

3. Key Features of the Screening and Clearance Mechanism

Spain's Screening and Clearance Mechanism (*as defined thereafter*) is characterized by a general legal framework that upholds the principles of free establishment and liberalized flow of capital for foreign investors. On the one hand, Article 63 of the Treaty on the Functioning of the European Union (“TFEU”) prohibits restrictions on capital movements between Member States and between Member States and third countries. On the other hand, Article 65.1.b) of

⁴ https://comercio.gob.es/es-es/NotasPrensa/2024/Paginas/240320_InversionesExteriores.aspx, at 2.

⁵ https://comercio.gob.es/es-es/NotasPrensa/2024/Paginas/240320_InversionesExteriores.aspx, at 1.

the Treaty allows Member States to adopt mechanisms motivated by reasons of national security and public order. Consequently, the introduction of specific evaluation and authorization requirements for certain sectors affecting public order, security, and health, adds a layer of regulatory scrutiny, while providing openness of the Spanish economy.

The Screening and Clearance Mechanism does not allow direct political interference or arbitrary decisions. Instead, Spain's regulatory approach is transparent and aligned with legal procedures based on the principles of good regulation, in accordance with the Act 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations ([Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas](#)), in particular the principles of necessity and effectiveness, proportionality, legal certainty, transparency, and efficiency.⁶ The current regulation provides legal certainty to investors at the same time that enable administrative authorities to suspend the liberalization regime for foreign investment more effectively in specific cases, establish a clear framework of action, and reduce administrative burdens⁷. However, the decision to suspend the foreign investment liberalization regime and introduce sector-specific authorization requirements reflects a level of government intervention to shape the investment landscape, showcasing a proactive role in safeguarding national interests.

Spain's regulatory approach stands out through its combination of openness and intervention in critical sectors. The emphasis on collaboration with international organizations, rankings in global business environments, and participation in international arbitration cases adds depth to Spain's unique approach. The decision to require government authorization for certain investments signals a proactive stance, setting it apart from more uniformly liberal regulatory models.

In summary, Spain's foreign investment policy appears to be a dynamic blend of openness and regulatory control. While actively encouraging foreign investment, recent policy changes indicate a strategic approach to safeguarding national interests in critical sectors. The Screening and Clearance Mechanism aligns with EU principles and regulation, demonstrating a commitment to legal procedures and international standards. The nuanced strategy and recent regulatory developments set Spain's approach apart from more uniformly liberal models.

⁶ https://comercio.gob.es/es-es/NotasPrensa/2024/Paginas/240320_InversionesExteriores.aspx, at 1.

⁷ https://comercio.gob.es/es-es/NotasPrensa/2024/Paginas/240320_InversionesExteriores.aspx, at 1.

Part II – Spanish Legal Framework

1. Overview of the Relevant Framework

The legal framework governing foreign investments in Spain is primarily outlined in Ley 19/2003, on July 4, on the legal regime of capital movements and economic transactions with foreign countries, and on certain measures for the prevention of money laundering ([Ley 19/2003](#)) (as amended from time to time, the “**FDI Act**”). The FDI Act, enacted two decades ago, establishes the principle of the free movement of capital, in line with the Articles 63 to 66 of the TFEU.

In 2017, recognizing the need to balance the openness of the EU to foreign direct investment with the protection of essential interests, the European Commission (“**EC**”) proposed a EU community framework. This led to the approval of [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 EU (the “**Regulation (EU) 2019/452**”) which entered into force in October 2020. The Regulation (EU) 2019/452 aimed to allow EU Member States to control foreign direct investments on grounds of security or public order, aligning with similar mechanisms in many countries of the Organization for Economic Cooperation and Development (“**OECD**”).

Spain incorporated these measures through article 7 bis of the FDI Act, introduced in 2020 by means of the Royal Decree-Act 8/2020, on extraordinary urgent measures to deal with the economic and social impact of COVID-19 ([Real Decreto-ley 8/2020](#)) (amended by the Royal Decree-Act 11/2020 ([Real Decreto-ley 11/2020](#)) and the Single Transitory Provision of the Royal Decree-Act 34/2020 ([Real Decreto-ley 34/2020](#))). Finally, the Spanish Government enacted the developing and implementing regulation of the FDI Act by means of the Royal Decree 571/2023 on foreign investments ([Real Decreto 571/2023](#)), which entered into force 1 September 2023 (the “**Implementing Regulation**”). Said legal framework constitutes the main set of rules governing the screening and control mechanism over foreign investments in Spain, whereby an authorization from the relevant FDI authorities is required if a foreign investment may imply an actual or potential risk to public order, public security, and/or public health (collectively, the “**Screening and Clearance Mechanism**”).

As it will be explained hereafter, the Screening and Clearance Mechanism covers investments made by residents of non-EU and non-EFTA countries, resulting not only in acquisitions of shares (10% or more stake in the share capital of a Spanish target company) (share deals), but also transactions that, as a result thereof, such foreign investor takes control over all or part of the assets or a business unit of the Spanish target company (asset deals) in specific sectors, such as critical infrastructures, critical technologies, key inputs, sensitive data, and media fall under scrutiny. Additionally, certain characteristics of the foreign investor, like control by a foreign government or engagement in illegal activities, are considered.

The Application Authorization (*as defined hereafter*) procedure involves completing a formal questionnaire ("[*Formulario para el procedimiento de escrutinio de inversiones extranjeras*](#)") used for the screening of FDI-Subject Transactions (*as defined hereafter*) in Spain (the "**Questionnaire**") and submitting it through the available electronic platform. Engaging in FDI-Subject Transactions (*as defined hereafter*) without proper authorization is considered a very serious administrative infringement, subject to severe sanctions under the regulations outlined in the FDI Act. Furthermore, the Implementing Regulation encompasses foreign investments in manufacturing, trade, and distribution of weapons, pyrotechnic articles, ammunition, and explosives for civilian use. Authorization procedures for such investments are presented through the same form and electronic platform.

Furthermore, the Screening and Clearance Mechanism has a set of interim regulations to allow the Spanish authorities to assess investments from EU and EFTA countries exceeding 500 million euros or targeting publicly traded Spanish companies in critical sectors.

The legal framework also touches upon the broader context, highlighting the importance of foreign direct investment for international economic integration and the modernization of the Spanish economy. It acknowledges the impact of foreign investment on social, environmental, human rights, and governance aspects, aligning with the Sustainable Development Goals and the 2030 Agenda.⁸

Directorate General of International Trade and Investments (*Dirección General de Comercio Internacional e Inversiones*) (the "**DG-FDI**") is the authority to which Authorization Applications for FDI-Subject Transactions must be filed. The Board of Foreign Investments (*Junta de Inversiones Exteriores*) ("**JINVEX**") is the interministerial body providing reports on foreign investments.

⁸ https://comercio.gob.es/es-es/NotasPrensa/2024/Paginas/240320_InversionesExteriores.aspx, at 1.

The supervisory framework ensures ongoing oversight, with the requirement for an Annual Report on the application of Regulation (EU) 2019/452 by the EC.

2. Overview of the Screening and Clearance Mechanism

Spain has maintained a liberal and open economy since 2003, attracting significant foreign investment inflows from both EU and non-EU countries, with certain exceptions in specific sectors such as national defense or activities subject to sector-specific legislation. However, since the adoption of the Regulation (EU) 2019/452 in 2019 and the outbreak of the COVID-19 pandemic in 2020, Spain has introduced new measures subjecting certain foreign investments to prior authorization by Spanish authorities. Therefore, it is necessary to analyze the characteristics of each transaction to determine the authorizations and requirements that must be fulfilled before completing the investment.

2.1. When is a corporate transaction deemed a FDI under the Screening and Clearance Mechanism?

For the purposes of the Screening and Clearance Mechanism in Spain, a foreign direct investment is an investment that must meet two criteria: (i) first, it must be carried out by a non-resident of the Member States of the EU or countries of the EFTA area (Iceland, Liechtenstein, Norway, and Switzerland) or by a resident of any of such countries whose ultimate beneficial owner is a non-resident in any of them; and (ii) second, the investment results either in the acquisition of (a) an ownership stake in the share capital of a Spanish company equal to or greater than 10% or (b) the “*control*” of all or part thereof, which encompasses the acquisition of assets and business units (an “**FDI**”). Therefore, the definition of FDI expressly includes both share deals and asset deals.⁹

Two key concepts must be considered when assessing the existence of an FDI under the Screening and Clearance Mechanism. The notion of “*control*” and the determination of the “*ultimate beneficial owner*” (“**UBO**”).

First, the concept of “*control*” is interpreted according to the Act 15/2007 on the Defense of the Competition ([*Ley 15/2007, de 3 de julio, de Defensa de la Competencia*](#)), which covers both legal and *de facto* control. Consequently, *control* can be established by contracts, rights, or any other means which, having regard to the legal and factual considerations, confer the

⁹ See Art. 7 bis 1 of Act 19/2003.

possibility of exercising a “*decisive influence*” on the Spanish target company, and in particular through: (i) ownership or the right to use all or part of the assets of the company, or (ii) contracts, rights, or any other means which confer *decisive influence* on the composition, voting, or decisions of the governing bodies thereof.¹⁰

Second, the concept of UBO is defined as the non-EU/EFTA resident who ultimately owns or *controls*, directly or indirectly, more than 25% of the share capital or voting rights of the direct EU/EFTA resident investor or where, by any other means, exercises *control*, directly or indirectly, over such investor of the Spanish target company. As a result, the upstream chain of *control* of the direct EU/EFTA-resident investor that acquires either shares or assets of a Spanish company must be assessed to find out who the actual UBO of the FDI is.¹¹ In the case of investment funds or entities alike (e.g., private equity funds) it is particularly important due to the complexity of some of their corporate holding structures.¹² In these cases, the Screening and Clearance Mechanism expressly sets the managing entity of the fund, which normally is the general partner, as the UBO of the fund, unless the partners or beneficiaries do not legally exercise political rights or have privileged access to company information.¹³

However, some corporate transactions are not considered FDI-Subject Transactions. First, procedures of internal restructurings within a group of companies that do not imply a change of *control* of the Spanish target company.¹⁴ Second, those increases of shareholding by an investor who already holds a stake of more than 10% in the target company and which, cumulatively, do not trigger any change of *control*.¹⁵

2.2. When does an FDI-Subject Transaction exist?

As explained, inbound investments in Spain are still generally liberalized. Therefore, not all the FDIs coming to Spanish companies are subject to the Screening and Clearance Mechanism. The liberalization regime is only suspended if the FDI affects certain strategic sectors, or if the foreign investor meets certain subjective criteria (as explained in Subsections 2.2.1 and 2.2.2 below, jointly the “**FDI-Subject Transactions**”).

2.2.1 FDIs in Strategic Sectors

¹⁰ See Art. 7.2 of Act 15/2007.

¹¹ See Art. 7 bis 1 b) of Act 19/2003.

¹² See Art. 8.3 b) and 10.2 of Royal Decree 571/2023.

¹³ See Art. 10.2 of Royal Decree 571/2023.

¹⁴ See Art. 14.3 a) of Royal Decree 571/2023.

¹⁵ See Art. 14.3 b) of Royal Decree 571/2023.

The Screening and Clearance Mechanism is triggered when an FDI affects one of the main critical sectors in Spain. These sectors are considered to have an impact on public order, public security, or public health if, for any endogenous or exogenous reason, their correct functioning is negatively affected.¹⁶ This framework is in line with article 4 of Regulation (EU) 2019/452 which also establishes that in order to assess whether a FDI affects security or public order, Member States may consider its potential effects in certain industries. Consequently, the FDI Act specifically lists the following sectors:

- (i) **Critical infrastructures**, whether physical or virtual (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and sensitive facilities), as well as land and real estate that are key to the use of such infrastructures.
- (ii) **Critical and double-use technologies, key technologies for leadership and industrial qualification, and technologies developed under programs and projects of particular interest to Spain**, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technology, defense technology, quantum and nuclear technologies, energy storage, nanotechnologies, biotechnologies, advanced materials, and advanced manufacturing systems.
- (iii) **Supply of key inputs**, such as energy, strategic connectivity services, raw materials, or food safety.
- (iv) **Sectors with access to sensitive information**, in particular personal data, or with the capacity to control such information.
- (v) **Media**.

(Collectively, (i) to (v) will be referred as to the “**Strategic Sectors**”).¹⁷

Notwithstanding the foregoing, the Spanish Government is entitled to suspend the liberalization regime for FDIs in Spain in those other sectors not expressly referred to as Strategic Sectors in the FDI Act when it considers that they may affect public security, order, and/or health.¹⁸

In practice, the complexity lies in identifying which activities fall within this “*numerus clausus*”

¹⁶ See Art. 7 and 7 bis 2 of Act 19/2003.

¹⁷ See Art. 7 bis 2 of Act 19/2003 and art. 15 of Royal Decree 571/2023.

¹⁸ See Art. 7 bis 4 of Act 19/2003.

list of Strategic Sectors because of, certain instances, their vague definition and ambiguous scope. The Implementing Regulation provides a clearer picture of the activities deemed as Strategic Sectors providing, in a number of cases, with express criteria to determine whether an activity is FDI-subject or not. However, the lines of some of the defined concepts are still too blurry to have a clear-cut answer of when an FDI falls into any of them.

2.2.2 FDI^s conducted by certain foreign investors

Similarly, the liberalization regime for foreign direct investments in Spain is suspended, regardless of the sector (strategic or not) where the FDI, is made by investors that meet one of more of the following features:¹⁹

- (i) **Possible control by foreign governments:** If a foreign investor is directly or indirectly *controlled* by a government of a third country, including public bodies or the armed forces. This provision specifically targets FDI^s conducted by sovereign funds and public companies from third countries.
- (ii) **Investment that affects or may affect national security or public order in another Member State:** If a foreign investor has made investments or participated in activities in sectors affecting Strategic Sectors in another EU Member State.
- (iii) **The potential engagement of criminal or illegal activities:** If there is a serious risk that the foreign investor will engage in criminal or illegal activities affecting public security, public order, and/or public health in Spain.

2.2.3 FDI^s conducted in national defense

FDI^s in activities directly related to national defense, such as those that affect the industrial capabilities and areas of knowledge necessary to provide the equipment, systems, and services for the Spanish Armed Forces, as well as those intended for the production (*design and manufacturing*), maintenance or trade of material for the national defense) are subject to the Screening and Clearance Mechanism with certain particularities. First, FDI^s below 5 percent of the share capital of the Spanish target company are exempted, provided that they do not concede the investor the right to become a direct or indirect part of its board of directors or management body. Between 5 and 10 percent of the share capital, the FDI is also exempted; but the foreign investor must file a post-closing notice to the Directorate General of Armament

¹⁹ See Art. 18 of Royal Decree 571/202 and art. 16 of Royal Decree 571/2023.

and Material of the Ministry of Defense and the DG-FDI reporting the FDI-Subject Transaction. A notarized statement of the foreign investor declaring his commitment to not use, exercise, or transfer its voting rights to third parties, nor to be part of any management bodies of the [listed]²⁰ company.²¹

2.3. Are there any FDI-Subject Transactions exempted?

The Implementing Regulation has established an exemption scheme primarily based on the activities conducted by the Spanish target company and not on the value of the investment; that is, there is not a “*de minimis*” threshold below which an FDI is exempted from being subject to the prior authorization.²² As a general rule, exemptions to the Screening and Clearance Mechanism exist for FDI-Subject Transactions in Strategic Sectors (except for Critical Infrastructures) in Spanish target companies with a turnover below EUR 5,000,000, provided that the foreign investor does not meet any of the features provided for in Subsection 2.2.2 above. However, there are some exceptions to the general exemption scheme when the transactions affect technologies developed within the scope of programs of particular interest of Spain or the EU, substantially financed with public funding; certain operation of electronic communications and strategic raw-material minerals.²³

Besides the general exemption rule, there are specific exemptions in the fields of energy²⁴ and real estate²⁵ whose applicability, in turn, is subject to the fulfillment of specific conditions and requirements.

Additionally, transitory investments of short duration (hours or days) in which the foreign investor does not have the *decisive influence* to manage the Spanish target company are exempted as they are underwriters and insurers of share issuances and public offers of sale or subscription of shares.²⁶

2.4. Are the foreign direct investments coming from EU/EFTA countries subject to the Screening and Clearance Mechanism?

²⁰ The Implementing Regulation expressly states “*listed company*”. There is doctrinal debate on whether this range is applicable to all companies.

²¹ See Art. 18 of Royal Decree 571/2023.

²² See Art. 17 of Royal Decree 571/2023.

²³ See Art. 17.2 of Royal Decree 571/2023.

²⁴ See Art. 17.1 of Royal Decree 571/2023.

²⁵ See Art. 17.3 of Royal Decree 571/2023.

²⁶ See Art. 17.4 of Royal Decree 571/2023.

On a transitional basis until 31 December 2024, the Spanish Government established a specific screening scheme for foreign direct investments made by residents of EU/EFTA countries (other than Spain) or by residents in Spain with an UBO in an EU/EFTA country.²⁷ This transitional scheme began on 19 November 2020 and has been successively extended several times due to the ongoing global situation, specifically the impact of the pandemic and geopolitical tensions on different business sectors, international value chains, and the instability of financial markets.

To be subject to prior authorization under this transitional scheme, such transactions must result in the foreign investor holding a participation equal to or greater than 10% of the capital of a Spanish target company or acquiring *control* interpreted according to the notion of “*decisive influence*” under the Spanish Act on the Defense of Competition. Additionally, (i) the target of the investment must be a listed company in Spain (i.e., those whose shares are wholly or partially admitted to trading on an official Spanish secondary market and have their registered office in Spain) or an unlisted company where the value of the investment exceeds EUR 500 million and (ii) operates in any of the Strategic Sectors.

For these purposes, the UBO is an EU/EFTA resident who ultimately owns or *controls*, directly or indirectly, more than 25% of the share capital or voting rights of the investor or where, by any other means, exercises *control*, directly or indirectly, over such investor.

The authorizing entity is the Council of Ministers following the procedure explained in Subsection 2.5.3 (I) of this Country Note.

2.5. Is the Screening and Clearance Mechanism applicable to indirect FDI-Subject Transactions?

According to the interpretation of the FDI authorities, the Screening and Clearance Mechanism applies not only to FDI-Subject Transactions consisting of direct acquisitions of Spanish companies or assets by foreign investors but also to indirect acquisitions of Spanish subsidiaries and their assets. If a Spanish or EU/EFTA resident owns all or part of a Spanish company, and its UBO outside the EU/EFTA changes as a result of an FDI-Subject Transaction, it may be subject to the Screening and Clearance Mechanism. Therefore, an analysis of the upstream chain of *control* of the resident investor acquiring shares or all or part

²⁷ See Single Transitional Provision of the Royal-Decree Act 34/2020, successively amended and extended until 31 December 2024.

of the Spanish company must be carefully assessed.²⁸

2.6. How is the procedure under the Screening and Clearance Mechanism?

2.6.1. The Authorization Application

Foreign investors who are interested in conducting an FDI-Subject Transaction in Spain must file an Authorization Application (*as defined hereafter*) to obtain express clearance granted by the relevant Spanish authority before closing of the investment deal.²⁹ Therefore, the foreign investor, as the acquiring entity, is responsible for filing it. If the FDI-Subject Transaction is carried out by two or more foreign investors to jointly *control* the Spanish target company or all or part of its assets, a single Authorization Application will be submitted by all relevant investors.³⁰ An FDI-Subject Transaction cannot proceed and close under the Screening and Clearance Regime until it is formally authorized and, if applicable, under the conditions established in the authorization.³¹

The application for prior authorization must include: (i) a formal administrative request for an FDI authorization addressed to the DG FDI; and (ii) a duly completed official Questionnaire, which is attached to the request (collectively, the “**Authorization Application**”). The Questionnaire, which is available on the website of the Ministry of Economy, Trade, and Enterprise (the “**Ministry of Economy**”), currently has 37 questions that cover four main sets of information: (i) features regarding the foreign investor/ultimate investor (e.g., identity, ownership/control structure, existence of public control, financing, state aid or business activity); (ii) the Spanish target company (e.g., shareholding structure, business activity, assets, or access to sensitive or critical data); (iii) the transaction itself (i.e., purpose, structure, geographical scope, other applicable *control*/screening proceedings); and (iv) the investor's future plans for the next three years (e.g., business plan, investment plan, employment prospects, composition of the board of directors and management team of the target).³²

If the DG-FDI considers the provided information in the Questionnaire insufficient, it may request additional data, documents, information, or clarifications along the procedure to assess

²⁸ See at 9.

²⁹ See at 9.

³⁰ See Art. 11 b) of Royal Decree 571/2023.

³¹ See Art. 11 of Royal Decree 571/2023.

³² See <https://comercio.gob.es/InversionesExteriores/Paginas/control-inversiones.aspx>.

the Authorization Application. If the investor fails to do so, the Authorization Application will be deemed withdrawn.³³

The Act 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations and the Implementing Regulation set forth the common rules for the procedure on Authorization Applications, which is strictly confidential and complies with the principles of good regulation, in particular, the principles of necessity and effectiveness, proportionality, legal certainty, transparency, and efficiency.³⁴

2.6.2. The Cooperation Mechanism

The screening and authorization procedure is also shaped by the Regulation (EU) 2019/452, which establishes the cooperation mechanism among Member States and the EC to facilitate the exchange of information, coordination and monitoring of the investments assessed by the FDI authorities within the EU.

2.6.3. The Authorizing Authority

(I) FDI-Subject Transactions exceeding EUR 5,000,000:

The Council of Ministers of Spain (Consejo de Ministros de España) is the responsible administrative entity to resolve on those FDI-Subject Transactions with an investment value higher than EUR 5,000,000.³⁵ The procedure is as follows: First, the Authorization Application is submitted to the DG-FDI; then, the JINVEX prepares an assessment report for the Ministry of Economy. Based on such a report, the Ministry of Economy makes a proposal of resolution to the Council of Ministers. Finally, the Council of Ministers issues its resolution on the Authorization Application.³⁶

(II) FDI-Subject Transactions equal to or lower than EUR 5,000,000:

FDI-Subject Transactions up to a value of EUR 5,000,000 are screened and resolved by the DG-FDI once the JINVEX issues and delivers its assessment report.³⁷

2.6.4. Filing deadline and timings

There is no deadline for filing a notifiable FDI-Subject Transaction, so it can be submitted before or after signing the transactional documents. However, the clearance must be expressly granted before its completion. For that reason, the transactional agreements should include a

³³ See Art. 11. 7 of Royal Decree 571/2023.

³⁴ See at 1.

³⁵ See Art. 14.8 b) of Royal Decree 571/2023.

³⁶ See Art. 11 b) and 13 of Royal Decree 571/2023.

³⁷ See Art. 14.8 a) of Royal Decree 571/2023.

condition precedent regarding obtaining such prior regulatory authorization.

For all types of FDI-Subject Transactions, regardless of their amount, the maximum term to resolve an Authorization Application is three months from the date the FDI Authority decides to initiate the FDI Procedure.³⁸

The timing also depends on the complexity of the FDI-Subject Transaction, the critical sectors involved in the FDI-Subject Transaction, and the participation of other governmental bodies in the procedure, such as the EC or other Member States, Spanish Central or Regional Public Administrations, economic agents, civil society organizations, or social partners. Furthermore, a request for additional information by the FDI Authority suspends the three-month term to resolve and notify the resolution regarding the Authorization Application submitted.³⁹

If the three-month term elapses without an express resolution by the relevant FDI authority, the Authorization Application shall be deemed rejected (*silencio administrativo negativo*).⁴⁰ If the FDI-Subject Transaction is authorized, it must be completed within the period specified in the authorization or, if none, within six months from the date of notification of the resolution, unless an extension is requested and successfully granted.⁴¹

2.2.1 Which are the possible outcomes resulting from a screening procedure?

After assessing the Authorization Application, the FDI Authority can (i) unconditionally authorize the proposed FDI-Subject Transaction; (ii) authorize it, but subject to the fulfillment of certain conditions, commitments, and/or undertakings to mitigate detected risks (e.g., carving-out certain activities or lines of business that affect the critical sector at issue, obligation for the investor to reserve a certain percentage of the share capital to Spanish industrial or public investors or to maintain Spanish citizens in roles with access to certain information, etc.); (iii) deny it; or (iv) consider that it does not actually fall within the Screening and Clearance Mechanism in force. In addition to these possible scenarios, the foreign investor is entitled to withdraw its Authorization Application.⁴²

The essential element that the Spanish FDI authority considers in its screening analysis is how

³⁸ See Art. 14.9 of Royal Decree 571/2023.

³⁹ See Art. 11.3 e) of Royal Decree 571/2023.

⁴⁰ See Art. 13.3 a) of Royal Decree 571/2023.

⁴¹ See Art. 11.1 e) of Royal Decree 571/2023.

⁴² See Art. 11 of Royal Decree 571/2023.

the FDI-Subject Transaction at stake affects or may potentially affect public order, security, and/or health. The resolution must provide reasoned grounds justifying the suspension of the general liberalization regime in a particular case.⁴³

If the foreign investor disagrees with the outcome of the resolution, it is entitled to submit an appeal on the denial of its Authorization Application or, if authorized, on the conditions, commitments, and/or undertakings to which such authorization was subject.⁴⁴

2.6.5. Is there a voluntary pre-filing or consultation alternative to check whether a transaction is subject to the FDI scheme?

If a foreign investor is uncertain about whether its FDI is subject to the Screening and Clearance Mechanism in Spain, it can submit a voluntary pre-filing consultation, with the duly completed Questionnaire attached, to the DG-FDI.⁴⁵ If the transaction relates to national defense, the filing goes to the Directorate General of Armament and Material of the Ministry of Defense.

The procedure is strictly confidential, subject to the general rules governing Spanish administrative procedures and the Implementing Regulation and must be resolved within thirty working days from the day following the submission of the consultation request, after the issuance of a favorable report by the JINVEX.⁴⁶

The DG-FDI may conclude that (i) the FDI falls within the Screening and Clearance Mechanism and, consequently, the foreign investor must file an Authorization Application thereafter; or (ii) the FDI benefits from the liberalization regime and can be freely accomplished in Spain. In any case, the resolution is binding *vis-à-vis* public entities, unless the specific circumstances of the case at hand substantially change, in which case it may be subject to the Screening and Clearance Mechanism.⁴⁷

2.6.6. What are the consequences resulting from an infringement of the Screening and Clearance Mechanism?

Carrying out an FDI-Subject Transaction without the prior authorization (when it is deemed

⁴³ See at 42.

⁴⁴ See Art. 11.6 of Royal Decree 571/2023.

⁴⁵ See Art. 9 of Act 19/2003.

⁴⁶ See at 42.

⁴⁷ See at 42.

mandatory) or violating the conditions of the authorization imposed on the FDI-Subject Transaction is a very serious infringement. Providing false or misleading information or documentation in the Authorization Application is also a very serious infringement.⁴⁸

For very serious infringements, the following sanctions may be jointly imposed: (i) a fine of up to the amount of the value of the FDI-Subject Transaction (but not less than EUR 30,000); and (ii) a public or private admonition by the Spanish FDI authorities.⁴⁹

Moreover, the most severe legal consequence of carrying out an FDI-Subject Transaction without the required authorization while the liberalization regime is still suspended is that it is invalid and without any legal effect until (and if) the required authorization is obtained.⁵⁰

3. Developments to Follow

Despite the entering into force of the Implementing Regulation, experts consider that the Screening and Clearance Mechanism is still inadequate and insufficient and has margin to improve. They suggest that it should be complemented by strengthening industrial capabilities through a new Act on Industry, aiming for greater sophistication. The experts emphasize the need for a more sophisticated approach to regulate foreign investments in Spanish strategic enterprises.⁵¹

The comprehensive trade, investment, and research package approved by the EC on 24 January 2024, as part of the European Economic Security Strategy rollout on 20 June 2023 will have an impact on the Screening and Clearance Mechanism of Spain in the future. The package is focused on enhancing EU security and public order by improving screening of foreign investment into the EU. Additionally, the strategy aims to encourage European coordination in the area of export controls while respecting existing multilateral regimes and Member States' prerogatives. Consultations with Member States and stakeholders will be conducted to identify potential risks associated with outbound investments in a specific set of technologies. Furthermore, the strategy aims to promote discussions on how to better support research and development involving technologies with dual-use potential. Lastly, the Council is proposed to recommend measures to enhance research security at both national and sector

⁴⁸ See art. 8.2 of Act 19/2003.

⁴⁹ See Art. 9 of Act 19/2003.

⁵⁰ See Art. 5 of Act 19/2003 and art. 1 a) of Royal Decree 571/2023.

⁵¹ See El Derecho, Expertos coinciden en que la actual regulación sobre el control de las inversiones extranjeras en nuestras empresas es insuficiente, November 2023: <https://elderecho.com/expertos-coinciden-que-actual-regulacion-sobre-control-de-inversiones-extranjeras-en-nuestras-empresas-es-insuficiente>

levels.⁵²

⁵² See https://ec.europa.eu/commission/presscorner/detail/en/IP_24_363.

Annex 1: Relevant laws, ordinances, regulatory guidelines

- Act 19/2003, of July 4, on the legal framework for capital movements and economic transactions with foreign countries and certain measures for preventing money laundering (as amended by the Royal Decree-Act 11/2020, of 31 March 2020, adopting urgent complementary measures in the social and economic field to deal with COVID-19 and the Royal Decree-Act 34/2020, of November 17, on urgent measures to support business solvency and the energy sector, and in tax matters.)
- Royal Decree 571/2023, of 4 July, on foreign investments.
- Royal Decree 410/2024, of 23 April, which develops the basic organizational structure of the Ministry of Economy, Trade and Business.
- Article 7.2 of Act 15/2007, of 3 July, on the Defense of Competition.
- Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 on the screening of foreign direct investment in the Union, applicable from 11 October 2020.
- Act 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations.
- Consolidated Communication from the Commission on jurisdictional questions in competition matters pursuant to Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings – OJEU 2008 C 95/01 of 16 April 2008.
- 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.

Annex 2: Relevant administrative and court cases

There have been no relevant administrative and court cases in Spain under the current Screening and Clearance Mechanism.

Prior relevant court cases related to FDI clearance and control mechanism:

- AP Almería Sentencia, 3 July 1993, AC\1993\1595
- AP de Islas Baleares (Sección 3ª) Sentencia num. 186/2010, 12 May 2010, ECLI:ECLI:ES:APIB:2010:1139
- STS RJ\1991\105, Tribunal Supremo, Sala de lo Civil, 3 January 1991.
- STS 592/1998, Tribunal Supremo, Sala de lo Civil, 20 June 1998.
- STS 750/2013, Tribunal Supremo. Sala de lo Contencioso, 4 March 2013, ECLI:ES:TS:2013:750.
- STS JUR\2012\452, Tribunal Supremo. Sala de lo Contencioso, 21 December 2013, ECLI:ECLI:ES:TS:2011:12414.
- STSJ CV 5933/2023, Tribunal Superior de Justicia de la Comunidad Valenciana, 23 November 2023, ES:TSJCV:2023:5933.

Annex 3: Relevant literature

- Areitio, Julene, *Impacto del régimen de inversiones extranjeras en las operaciones de fusiones y adquisiciones (M&A)*, Diario LA LEY, 2022.
- Barredo, Miguel & Canseco, Octavio, *El nuevo régimen de inversiones extranjeras como consecuencia de la crisis sanitaria del Covid-19: exégesis contextual y aspectos prácticos*, Diario La Ley, No. 9615, Tribuna Sección, 2020, Wolters Kluwer.
- Barredo, Miguel & Canseco, Octavio, *El régimen de inversiones extranjeras: su definitiva consolidación mediante desarrollo reglamentario*, Diario LA LEY, 2023.
- Codina García-Andrade, Xavier & Carro de Miguel, Carlota, *Liberalización y protección en el régimen de las inversiones extranjeras directas: desarrollos normativos recientes en Europa y en España*, Revista General de Derecho Administrativo 58, 2021.
- Esplugues Mota, Carlos, *El control de las inversiones extranjeras en la Unión Europea*, Editorial Tirant lo Blanch, 2023.
- Esplugues Mota, Carlos, *El fin de la edad de la inocencia de la UE: el Primer informe anual sobre el control de las inversiones extranjeras directas en la Unión Europea como ejemplo*, Rev. Bitácora Millennium nº 15, 2022.
- Gutiérrez Cantos, Roberto, *El mecanismo de control de las inversiones exteriores: de la suspensión del régimen de liberalización a la Sentencia del TJUE en el asunto Xella Magyarország y el nuevo Real Decreto 571/2023, de 4 de julio, sobre inversiones exteriores*, LA LEY, 2023.
- López Velázquez, David, *Manual de fusiones y adquisiciones de empresas*, Diario LA LEY, 2021.
- Ortega Burgos, Enrique & Pastor Ruiz, Federico, *Derecho Administrativo 2021*, Editorial Tirant lo Blanch, 2021.
- Peña Peña, Javier, *Inversiones extranjeras en España*, BOE, 2016.
- Roberts, Veronica (Ed.) et al. *GCR. Foreign Direct Investment Regulation Guide (3ª Ed)*, GCR. Foreign Direct Investment Regulation Guide, 2023.

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