NORTON ROSE FULBRIGHT

Global Rules on Foreign Direct Investment

Spain

1 Introduction

Over the past three years, Spain has significantly strengthened its foreign investment screening mechanism. As a result, acquisitions by foreign investors (as defined below) in a Spanish entity active in a strategic sector are subject to prior authorisation by the Spanish FDI authorities, namely, the Ministry of Industry, Commerce and Tourism ("**MoICT**") or the Council of Ministers. In addition, transactions undertaken by investors linked to foreign governments or investors having seen one of their previous FDI filings conditioned or prohibited in an EU Member State are all subject to review. The new rules also allow the MoICT to impose severe sanctions in case of a breach (including the nullity of the transaction and fines of up to the value of the deal). As a result, the Spanish screening mechanism has become a relatively burdensome regime, which is in many ways similar to merger control.

However, please note that, in addition to the rules summarised in this note, there are other rules in Spain that are applicable to acquisitions in certain industries (in particular, defence, for more detail click here).

2 Spain's New FDI Screening Mechanism: The Need for Prior Authorisation

2.1 Scope of Application of the FDI Screening Regulations: Definition of FDI in Spain

Under Article 7 bis of Law 19/2003, of 4 July, regarding the rules applicable to capital movements and economic transactions with foreign countries,[1] prior authorisation is required for investments made by certain investors or made in companies operating in certain strategic sectors, when the following cumulative conditions are met:

(a) *Regarding the investment: as a result of such investment*:

(i) The investor acquires for the first time a stake equal to or greater than 10 per cent of the share capital of a Spanish company, OR

(ii) The investor acquires "control" over the company (as defined by the EU Merger Regulation ("**EUMR**")[2] and the European

[1] As amended by the following:
(a) Royal Decree-law 8/2020, of 17 March 2020, regulating urgent extraordinary measures to deal with the economic and social impact of COVID-19;
(b) Royal Decree-law 11/2020, of 31 March 2020, regarding the adoption of additional urgent measures in the social and economic field to deal with COVID-19 (the "RDL 11/2020"); and
(c) Royal Decree-law 34/2020, of 17 November 2020, regulating urgent measures to support business solvency and the energy sector, and on tax matters.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Commission's Consolidated Jurisdictional Notice[3]).[4] *AND*

(b) *Regarding the investor*: The investor is a not a European Union ("**EU**") or European Free Trade Association ("**EFTA**") resident[5], meaning:

(i) The investor resides in any country other than EU or EFTA Member States; OR

(ii) The investor resides in an EU or EFTA Member State but is ultimately owned by residents outside the EU or the EFTA, which is deemed to occur in the case of any EU or EFTA resident company in which non-residents (a) directly or indirectly hold 25% or more of the shares or the voting rights, or (b) otherwise (i.e., by any other means) exercise direct or indirect control[6].

EXCEPT

Until a different minimum amount is established by an implementing regulation, investment transactions of **less than EUR 1 million** will be exempt from the obligation of prior authorisation (cf. second transitional provision of RDL 11/2020, of 31 March).

NOTE: Temporarily (under the Sole Transitory Provision of Royal Decree-law 34/2020 of 17 November), on urgent measures to support business solvency and the energy sector, and on tax matters, certain investments from EU or EFTA residents may also be subject to the Spanish FDI screening mechanism if they refer to strategic sectors as identified in section 2.2.2 below. This regime was initially established to run until 31 June 2021 and has been extended until 31 December 2024.

2.2 **FDI in Spain Subject to Review**

Provided that the investment at stake falls within the definition of FDI set out in the previous section, it will be subject to the Spanish screening mechanism if the target or the investor fall within any of the situations described in the following sections.

2.2.2 **Investments Subject to Review Based on the Activities of the Target: Investments in Strategic Sectors**

Any FDI in a Spanish company will be subject to prior authorisation if the target is active in any of the following sectors, which have been declared to be strategic:

(a) *Critical infrastructures*, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, and land and real estate crucial for the use of such infrastructures.

(b) *Critical technologies, and dual-use items*, key technologies for industrial leadership and capacity building, and technologies developed under programmes and projects of particular interest to Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies, biotechnologies, advanced materials and advanced manufacturing systems.

(c) *Supply of critical inputs*, in particular, energy, strategic connectivity services or raw materials, as well as food security. In practice, MoICT attaches a

[3] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

[4] More precisely, the Spanish FDI regulations cross-refer to Article 7(2) of the Spanish Competition Act which is interpreted, in turn, in accordance with the Consolidated Jurisdictional Notice.

[5] Spanish FDI rules, as they stand today, look at residence, not nationality.

[6] There is no express indication in the law as to (i) whether the above 25% should be computed individually or in aggregate, or (ii) what should be considered to be a Non-EU/EFTA resident when the investor is a fund acting through its general partner or managing or advisory entity.

lot of importance, in order to determine whether a certain input is critical, to market shares.

(d) *Sectors with access to or control of sensitive information, in particular personal data*, or with the capacity to control such information. In practice, MoICT attaches a lot of importance, for these purposes, to whether the target is subject to an Article 35 GDPR Impact Assessment obligation.

(e) *Media*.

The Spanish Government reserves the right to add to this list other sectors that may affect public order, public security and public health.

In practice, the Spanish FDI authorities interpret these concepts both (i) teleologically (i.e., is there a genuine effect on public order, public security and public health?) and (ii) broadly (i.e., the Spanish authority does not rule out that an investment may affect public order, public security or public health until it has satisfied for sure it does not, which often requires submitting relatively detailed information on the activities of the target).

Given that precedents are not public and that the authority is responsive and replies to questions over the phone or by email, we advise double checking with the officials in case there are doubts.

2.2.3 **Investments Subject to Review Irrespective of the Activities of the Target**

The following investments are subject to review irrespective of the activities of the target:

(a) Investments by foreign entities, which are directly or indirectly controlled[7] by the government (including public bodies or the army) of a third country.

(b) Investments by entities who have made investments or participated in activities in sectors affecting security, public order and public health in another Member State. In practice the authority is interpreting this point as requiring a filing only when the investor has seen one of their previous EU FDI filings conditioned or prohibited.

(c) All investors, when there is a serious risk that the foreign investor carries out criminal or illegal activities affecting public security, public order or public health in Spain

2.3 **Enforcement and Consequences in the Event of a Breach (Gun Jumping)**

In the event that an investment is implemented without prior authorisation or breaches conditions imposed for such authorisation, the transaction is likely to be null and would lack legal force and effect. In addition, it would constitute a very serious administrative infringement, and the MoICT could impose fines of between EUR 30,000 (which would be a sort of “entry fee”- like minimum fine) and the value of the investment.

Although the MoICT is keen to exercise is reviewing powers, having formally analysed around 70 investments since the entering into force of the Spanish FDI screening mechanism, as of 17 November 2021, no such fines have been imposed and only a handful of the notified investments have been subject to remedies.

2.4 **Spain’s FDI Screening Mechanism in Practice**

We are spotting a number of emerging trends in the practice of the Spanish FDI authorities:

- Legal certainty does not appear to feature particularly high in the priorities of MICT. Shocking as this may sound to FDI practitioners, this is probably a

[7] In order to determine the existence of such control, the criteria set out in the EUMR / the European Commission’s ‘*Consolidated Jurisdictional Notice*’ apply.

consequence of the authority having national security as its objective.

- Many regulators (not only FDI regulators) tend to conflagrate jurisdiction with substance. It is probably human to bend jurisdictional rules in the direction of notifiability when a transaction raises substantive concerns and in the direction of non-notifiability when it is banal. The Spanish FDI authority is no exception.
- The authority appears to believe it operates in a void in relation to substantive analysis. Russian, Chinese, and Iranian buyers appear to be considered the most problematic, but this is nowhere to be found in writing. It is probably safe to assume that North Korean and Belarusian buyers will be in the same category.
- For transactions caught by the threshold that do not raise substantive national security concerns, the MICT expects parties to submit the so-called "consultations". These are data-intensive filings, which usually lead to authorizations in two months (eight weeks).
- A bit like with competition law in-depth (Phase II) reviews worldwide, it is becoming increasingly problematic to predict the duration of a Spanish FDI Phase II investigation. The official deadline is six months. In practice, they tend to last around three months, but potentially problematic transactions can last (significantly) longer.

2.5 Potential Weaknesses of the System

After two years, we can safely confirm that Spain has an FDI system in place that is broadly effective and remarkably pragmatic (certainly compared with its competition law counterpart). However, the past two years have also shed light on some potential issues and areas where pending market guidance from the MoICT will be very welcome. These include the following:

- The broad scope of Act 19/2003 has arguably resulted in too many notifications. The expansive scope of the regime, coupled with the breadth and ambiguity of certain mandatory sectors, has resulted in a myriad of clearly benign deals being notified. The MoICT appears to be comfortable with this state of affairs, noting that (i) the overarching objective is preventing a single potentially problematic transaction going unreviewed, (ii) case handlers are always available to discuss (which is, in our experience, both correct and commendable) and (iii) the reviews are swift (which tends to be the case, at least for unproblematic transactions). However, Spain is yet to prohibit a single transaction in the application of its FDI Act, and, according to the figures of the MoICT, 82% of the transactions reported to the authority in 2021 were authorized in a cursory Phase I-like "consultation". Such remarkably low levels of intervention probably constitute an indication that the thresholds are set too low.
- The priority attached to the residence of the acquirer is bound to lead to problems. If, say, Vladimir Putin started living in Budapest, any acquisition he would make in Spain would benefit from the de minimis regime for EEA residents.
- The authority is adopting a number of potentially contra legem stands, including the following:
  - Asset deals: whereas Act 19/2003 only subjects investments leading to (antitrust/EUMR-like) control to an obligation to file, the MICT appears to be of the view that asset deals are potentially in scope.
  - Jurisdiction: whereas Act 19/2003 appears to establish mandatory merger control like thresholds, in practice, transactions meeting those thresholds "only" trigger a consultation.

Further detailed guidance is urgently needed. As of 19 December 2022, the

horizontally applicable system still relies on the few articles, which the revamped Act 19/2003 devotes to FDI. Precedent is mostly not public. The Spanish government appears not to be in a rush to approve Spain's Implementing Regulation (the "*Decreto de Inversiones*"). As a result, counsel is heavily relying on a Draft Implementing Regulation ("Proyecto de Decreto de Inversiones") which is not yet in force but which appears to consolidate the practice of the authority (for more information on this, click here)

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