Foreign Direct Investment Regimes in Europe

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Scope of FDI Regime: Transactions subject to review

In Spain, the General Directorate of International Trade and Investment (Dirección General de Comercio Internacional e Inversiones) of the Ministry for Economy and Business of Spain (Ministerio de Economía y Empresa) is responsible for the foreign investment screening regime. According to the second transitional provision of the Royal Decree-law 11/2020, until a new legislative framework is approved, the Council of Ministers is not the competent authority. During this transitional period, article 10 of Royal Decree 644/1999, on foreign investments in Spain remains in force. In all cases, a report must be issued by the Foreign Investment Board. The Spanish government has been very proactive in their response to the Covid-19 pandemic, enacting emergency legislation to adapt the “liberal” foreign investment regime.

Without prior authorisation by the Spanish Government the following acquisitions are prohibited under the Spanish regime:

1) Acquisitions by a Foreign Investor*;
2) of 10% of the shareholding in a company, or less than 10% of the shareholding in a company if it results in the effective participation in the control or management of the company;
3) in a company active in sectors relating to public order, public security or public health.

* Foreign Investor means (a) non-EU or non-EFTA resident companies or (b) EU or EFTA-resident companies where 25% of the shares or voting rights are ultimately owned, directly or indirectly, or are otherwise controlled, directly or indirectly, by non-EU or non-EFTA companies.
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Scope of FDI Regime: Transactions subject to review

Does the law relate to acquisitions in only certain sectors or specific activities?

The regime particularly focuses on these specific sectors:

a) critical infrastructures, both physical and virtual (energy, transport, water, healthcare, communications, media, data storage and processing, aerospace, defence, finance or sensitive installations);
b) critical technology and dual-use products;
c) essential supplies (energy, hydrocarbons, electricity, raw materials and food);
d) sectors with sensitive information such as personal data or with capacity to control such information; and
e) media.

However the regime also targets specific investors, and when the investment is equal to or higher than 10% of the share capital, or results in a participation in the effective control and management of the relevant company, any transaction shall be subject to a regime of prior authorization if the relevant investor falls into any of the following categories:

a) It is controlled directly or indirectly by the government of a third country, including public bodies or armed forces;
b) Administrative or judicial proceedings have been initiated against it for exercising illegal or criminal activities; or
c) The relevant investor has invested or participated in sectors affecting the security, public order or public health in another EU Member State, particularly in relation to the above sectors.
The Spanish regime applies where the transaction involves a Foreign Investor acquiring more than 10% of the shareholding (or the effective control or management) in a Spanish company, where the company is active in specific sectors relating to public order, public security and public health.

Can minority stakes be caught?
- Acquisitions of minority stakes of over 10% are caught by the regime.
- Acquisitions of minority stakes of up to 10% are caught by the regime if they also result in the shareholding having effective participation in the control or management of the company.

A further regulatory development is set to establish a de minimis amount below which any foreign direct investment shall be exempt from the prior authorisation regime.
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Procedure

Is the regime mandatory (i.e. are parties obliged to notify of the transaction)?
- Yes, the regime is mandatory: Article 8, paragraph 2, letter b), Law 19/2003 (on foreign investments in Spain), establishes that any acts, businesses, transactions or operations carried out without requesting authorisation (i) when such authorisation is mandatory pursuant to article 7 bis (which contains the new regime after the outbreak of Covid-19), or (ii) prior to authorisation being granted or (iii) in breach of the conditions of authorisation, shall be considered a very serious offence.
- The sanction will be a fine, which may amount to the value of the transaction.

Is the regime suspensory (i.e. must parties wait for an approval decision before completing a transaction)?
- Yes, the regime is suspensory: parties should wait until the transaction has been approved prior to implementing or closing the transaction, or they may be sanctioned with a fine, which may amount to the value of the transaction.
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Procedure

What is the timing between an approval decision being issued and the commencement of a review by the authority?

- Article 10 of Royal Decree 644/1999 establishes a normal procedure for obtaining the authorisation, stating that a notification to obtain authorisation to carry out the transaction must be decided within 6 months. Should the authority fail to respond within 6 months, authorisation is deemed to have been granted.
- In response to the Covid-19 pandemic, the second transitional provision of Royal Decree-law 11/2020 establishes a simplified procedure for those cases in which it can be demonstrated, that a binding offer existed before March 14, 2020. In such cases, the relevant period for examination will be 1 month.

How long does the authority have to commence a review before it loses jurisdiction to do so?

- The authority has 6 months to review the transaction. Should the authority fail to respond within 6 months, authorisation is deemed to have been granted.

Are there penalties for failing to notify or failing to abide by the authority’s ruling?

- If a transaction is carried out without obtaining authorisation where required, then this amounts to a “very serious infringement”, and fines of up to the amount of the transaction, with a minimum fine of EUR 30,000, may be imposed.
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Impact on M&A

In cases where an acquisition or transaction is subject to the prior authorisation procedure because the aforementioned conditions are met, the parties should take into account the process of obtaining a approval, which can take up to 6 months, when planning the deal and timelines.

In addition, where the proposed acquisition or transaction falls within within the Spanish FDI regime, parties should understand that completion is by no means certain, as the authority has the power to block the deal or to require conditions that would make the transaction unattractive to the parties.
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